THE STATE v JACOB 1981 ZLR 1

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend CJ, Lewis JP and Squires AJA

13th January, 1981

Flynote

Evidence - accused giving false evidence which is disbelieved by court - whether entitled to benefit of speculative doubts as to mitigating points.

Sentence - murder - assessment of extenuating circumstances - approaches to - whether finding of constructive intent is extenuating circumstance.

Headnote

Where an accused person gives false evidence at his trial and thereby fails to establish points which would mitigate the gravity of his offence, he cannot always expect the court to give him the benefit of doubts based on speculation as to what he might possibly have been able to say in his favour.

There are two permissible approaches to the assessment of extenuating circumstances in murder cases: the first is to make a finding that extenuating circumstances exist if there are any mitigating features in the case, and then to decide whether, notwithstanding that finding, the aggravating features necessitate the imposition of the death sentence, the second approach involves balancing at the outset the mitigating against the aggravating features and, depending on the result, finding that extenuating circumstances exist or imposing the death sentence. Both approaches involve a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only if the latter outweigh the former.

The finding of a constructive intent to kill in a murder case will not necessarily lead to an overall finding, once the weighing-up process has been completed, that there are extenuating circumstances justifying a sentence other than death, but it is a factor which must be put in the credit side in the accused's favour in that weighing-up process.

Cases cited

R v Mlambo 1957 (4) SA 727 (AD);

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S v Phineas 1973 (1) RLR 260 (AD); 1973 (3) SA 897 (RAD);

S v Tavakonza AD 24/71 (unreported);

R v Mharadzo 1966 RLR 240 (AD); 1966 (2) SA 702 (RAD);

S v Letsolo 1970 (3) SA 476 (AD)

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CL Gale, for the appellant, cited *R v Valachia and Anor* 1945 AD 826; *Greenland v R* 1961 R & N 738; and *R v Kashingwe* G.D. Sby 534/1964 (unreported).

JB Colegrave for the respondent, cited *R v Mharadzo* (*supra*);

S v Chamboko AD 54/1974 (unreported); and *S v Ndhlovu* AD 190/1976 (unreported).

Judgment

Lewis JP: The appellant in this case was convicted in the General Division of the crime of murder. The trial court found that there were no extenuating circumstances and he was sentenced to death. He appeals to this court against both conviction and sentence.

The facts of the case are briefly as follows. The appellant, a young man of about 30 years of age, was a militiamen employed on Polycrops Farm, Shamva, to guard and protect the farm employees during 1979 when the country was still in a state of war. He was apparently regarded by the farm employees as the equivalent of a policeman. At about 2 p.m. on Saturday, the 18th August, 1979, the appellant was on duty outside the beer-hall on the farm. He was seated on a chair with his G3 rifle lying across his lap. The rifle was loaded but the safety catch was on. The deceased, a farm employee who was apparently a very keen gambler, approached the appellant holding some playing cards in his hand and asked permission to start a gambling school in the beer-hall. This was refused by the appellant for the reason that gambling schools generate a lot of noise and this might result in the appellant not being able to hear any sound of firing if such should commence. The deceased apparently protested that the gamblers would not make any noise and said if any noise should develop the appellant could always intervene and put a stop to the gambling. The appellant maintained his refusal and said: "If you carry on like this (meaning if you carry on arguing about the matter) I will shoot you." A shot rang out almost immediately afterwards and the deceased fell forward dead, still clutching the playing cards under his body. It is common cause that the shot came from the appellant's rifle. The evidence established that the bullet entered the post basal region of the left side of the deceased's neck and came out of the deceased's mouth in the region of the left upper lip.

The only eyewitness called at the trial was another farm employee called Karikoga, who was standing behind and slightly to one side of the deceased. The bullet, when it left the deceased's body, apparently grazed Karikoga's cheek, and this, coupled with the horror of seeing the deceased fall down covered in blood, resulted in Karikoga fleeing from the scene in a state of shock and panic. He said the deceased

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was some four to five paces from the appellant when he was shot, and appeared to be turning away from him, and though he saw the appellant pick up the gun from his lap he was unable to see how it was held thereafter when it was fired.

The appellant in his defence maintained that the deceased became insulting and abusive when permission to gamble was refused, and advanced on him and grabbed hold of his rifle. A struggle for possession of the rifle ensued, in the course of which a shot was fired by accident, killing the deceased. The trial court rejected this defence and in my opinion rightly so. The court found that the shot was fired deliberately in the general direction of the deceased and although it was not established beyond a reasonable doubt that the appellant had an actual intention to kill he must have appreciated that there was a risk of killing the deceased and was reckless whether that consequence resulted, and was therefore guilty of murder with a constructive intent.

Mr *Gale,* who appears for the appellant, very properly has not suggested that the appellant's version of an accidental shooting should have been accepted. He argued, however, that the evidence did not eliminate the reasonable possibility that the rifle may have been discharged through mere negligence on the appellant's part, and accordingly the verdict should have been one of guilty of culpable homicide only. I am unable to agree with this submission. There is nothing in the evidence to support it as a reasonable possibility. Bearing in mind that immediately before the shot was fired the rifle was lying across the appellant's lap pointing at right angles to where the deceased was standing and with the safety catch on, and bearing in mind the threat to shoot, the conclusion is inescapable that he must have deliberately lifted up the rifle and pointed it in the general direction of the deceased, deliberately released the safety catch and deliberately pulled the trigger. If he intended to fire merely to frighten then, as Mr *Colegrave* rightly pointed out, he could easily have lifted it straight in the air and fired it into the air harmlessly. In this regard, the remarks of MALAN JA in *R v Mlambo* 1957 (4) SA 727 (AD) at 738 B to D are in point. These remarks have been frequently approved in cases in this court.

There the learned judge said:

> "An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case.
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> Moreover, if an accused deliberately takes the risk of giving false evidence

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> in the hope of being convicted of a less serious crime or even perchance, escaping conviction altogether and his evidence is declared to be false irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

It seems to me that this is a case where the court is justified in rejecting such an argument.

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Accordingly, in my view, the appeal against conviction must be dismissed.

Turning to the appeal against sentence, it has been frequently pointed out in this court that there are two permissible approaches to the question of extenuating circumstances in a murder case. In *S v Phineas* 1973 (1) RLR 260 (AD) at 262; 1973 (3) SA 897 (RAD) BEADLE CJ said at 899:

> "It might be helpful here to point out the practice which has developed in this court, in a trial without a jury, in determining whether or not the court should return a finding that the murder was committed in circumstances of extenuation, and if it makes such a finding, how the question of deciding the ultimate sentence should be determined. In practice two distinct approaches have developed. Some judges use the one approach and others the other. Either is permissible. The one approach should not, however, be confused with the other or difficulties may arise.
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> The one approach which is typified in the case of *R v von Zell (2)* 1953 (4) SA 552 (AD) is to consider, first, all those factors which reduce the moral blameworthiness of the accused, and if in the opinion of the court the facts so warrant, to return a finding that extenuating circumstances exist. The approach at this stage is largely a subjective one, and aggravating features of the offence, many of which may be of an objective character, are not then considered. The second stage of the inquiry is then to decide on sentence, and at this stage all the aggravating features, including the brutality of the crime, and indeed all those objective factors which assist in the determination of sentence are considered, and the court may well then decide (as it did in *von Zell's* case (*supra*)), that, despite the fact that extenuating circumstances are found to exist, the aggravating features outweigh the extenuating circumstances and the accused should, despite the special finding, be sentenced to death. This I may say is not today the usual approach, but it is by no means uncommon with some judges, and is the approach which must be adopted in jury cases.
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> The second approach is to combine the two stages of the first approach into one, as it were. The judge will consider all the usual factors which may be regarded as circumstances of extenuation, and then weigh them against the aggravating features in the case, and, if he considers the aggravating features outweigh those which reduce the accused's moral blameworthiness, he will refuse to make the special finding that extenuating circumstances exist, and the accused will be duly sentenced to death. If, on the other hand, he is of opinion that the aggravating features do not outweigh

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> those which reduce his moral blameworthiness, he will return the special finding that extenuating circumstances do exist. On this second approach there is no room to sentence an accused to death, once the court has found that extenuating circumstances exist, because all the aggravating circumstances which might otherwise justify sentencing the accused to death have already been considered in determining the special finding. The end result in whichever approach is adopted should, however, always be the same."

Both approaches involve basically a careful weighing up of the mitigating factors against the aggravating factors and the passing of the death sentence only when the latter outweigh the former. See also *S v Tavakonza* Appellate Division Judgment No. 24/71 (unreported) per BEADLE CJ in the last sentence at the bottom of page 2 of the cyclostyled judgment.

With respect to the trial court in this case, it is difficult to see which of the two approaches was adopted. The learned trial judge said in announcing the court's finding on extenuating circumstances on page 65 of the record:

> "It is the duty of the court as a whole at this point in the proceedings to consider whether there are extenuating circumstances or not. Extenuating circumstances are circumstances which in the minds of reasonable men may

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serve to reduce the moral, albeit not the legal, blameworthiness of the accused.

Mr *Gale* has advanced two arguments in support of his contention that extenuating circumstances exist. He has firstly submitted that the very fact that the court has found that the accused did not have an actual intention to kill the deceased is a factor which reduces his moral blameworthiness. The second factor which Mr *Gale* has urged upon the court is that the killing of the deceased was totally unpremeditated. It is perfectly true that both these considerations may, in appropriate circumstances, constitute circumstances of extenuation. The court must, in considering this question, have regard to the facts of the case as a whole in order to determine whether there is anything which does, in the opinion of the court, reduce the accused's moral blameworthiness.

In reaching its conclusion, the court has had regard to the following considerations. The accused was employed as a militiamen on Polycrops farm. It was his duty to secure the protection of the people who worked and lived on that farm. The court has found as having been proved beyond a reasonable doubt by the prosecution that the accused had not been subjected to any form of insult. The deceased, even on the accused's story, applied to him, the accused, for permission to gamble. He did this not once, but twice. It has been argued that his persistence constituted in the mind of the accused an intrusion upon the accused's position of authority.

The facts, in the view of the court, however, constitute a different position. The deceased, apparently conscious of the authority of the accused,

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approached him on two occasions in order to obtain permission. In this way he recognised constituted authority of the accused. There was nothing in the deceased's behaviour, in the view of the court, which should have operated within the mind of the accused to the detriment of the accused's authority or source of authority. Even had the accused been insulted in the manner to which he deposed we have the gravest doubt in our minds whether that in itself could have constituted a factor which diminishes his moral responsibility.

The court has found that the accused must have discharged the rifle in an attempt to lend practical effect to the threat which he uttered. We consider that this was an act calculated by the accused to demonstrate the power which he wielded, not only as a militiamen, but in his possession of the rifle which he held while sitting in the chair. We have also taken into account the fact that the accused was under no pressure, upon the facts which have been found proved, either of a mental or a physical nature, other than pressure to give or not to give permission to the deceased to carry on gambling activity.

Had the accused wished to emphasize his point by discharging his firearm he had all the time in the world to discharge the firearm in a direction which would have occasioned no danger to anyone. His action in discharging his firearm in the direction of the deceased was both ill-considered and totally unjustified, in our new.

We have anxiously considered whether there are any factors which ought to be taken into account by the court in considering the existence or otherwise of extenuating circumstances, and we are satisfied there are none. We are, accordingly, not prepared to find that any extenuating circumstances exist in this case."

With respect, it does not seem to me to be clear that this careful weighing-up process was undertaken by the trial court. The facts, firstly, that there was only a constructive intent and, secondly, that the crime was unpremeditated and committed on the spur of the moment were undoubtedly mitigating features which should have been placed in the scale in his favour in the weighing-up process referred to above. I also think there is substance in Mr *Gale's* submission that to some extent the appellant was the victim of the circumstances prevailing during the war situation at that time, when ill trained and unsuitable persons were entrusted with positions of responsibility involving the use of loaded firearms. In this case, the appellant was apparently a simple, illiterate, rustic individual who was entrusted with a lethal weapon which in the

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circumstances created the temptation to assert his authority. This was also a mitigating factor.

In *R v Mharadzo* 1966 RLR 240 (AD) at 241H-I, 1966 (2) SA 702 (RAD) BEADLE CJ said at 703C, after discussing the importance of the accused's state of mind:

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> "I do not wish it to be inferred from this that, where the court finds that only a constructive intent to kill is proved, the court must necessarily find that this is a circumstance of extenuation, but I do suggest that, where only a constructive intent to kill is proved, the court will examine the other features of the case very carefully indeed before rejecting a plea that the offence was committed in extenuating circumstances."

Similarly in *S v Sigwahla* 1967 (4) SA 566 (AD) at 571E HOLMES JA said:

> "There is a further factor. More than four years ago, in *R v Mini,* 1963 (3) SA 188 (AD) at page 192A, I raised the question whether, depending on the circumstances, the moral blameworthiness of an accused is not reduced if the murder is committed with legal intention to kill known as *dolus eventualis*, as distinct from intention where the will is directed to the bringing about of death (*dolus directus*). The suggestion, then novel, attracted favourable comment in 1963 *South African Law Journal,* page 467 at page 468 and 1964 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* page 71; and it was applied in *S v Arnold,* 1965 (2) SA 215 (C) at pages 219C *et seq;* and was mentioned by this court in *S v Manyathi, supra* at pages 438C et seq. Furthermore, the Appellate Division of Rhodesia recently applied much the same reasoning, see *R v Mharadzo* 1966 (2) SA 702 (R AD) at pages 703C-D and 704A. Accordingly it now seems appropriate to say:
>
> (a) Trial Courts, in their *conspectus* of possible extenuating circumstances, should not overlook the fact (if it be such) that it is a case of *dolus eventualis*.
>
> (b) While it cannot be said that this factor must necessarily be an extenuating circumstance, in many cases it may well be so, either alone or together with other features, depending on the particular facts of the case."

It seems to me what the learned judges were saying in effect is that the finding of a constructive intent will not necessarily lead to an overall finding, once the weighing-up process has been completed, that there are extenuating circumstances justifying a sentence other than death, but it is a factor which must be put into the scale on the credit side in the accused's favour in that weighing-up process. See, for example, *S v Phineas* (*supra*), at page 264H (page 900F of the South African report). In that case, the brutal nature of the crime, on the other side of the scale, led the Appeal Court to uphold the trial court's finding that on balance there were no extenuating circumstances.

There have been a number of cases in this court where the fact that the crime was committed in the course of a robbery or a brutal rape was held to outweigh the mitigating factor of there being only a constructive intent, and to justify the death sentence.

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In the instant case, the trial court did appreciate that a finding of constructive intent may sometimes be considered to be an extenuating circumstance, but as I have said there is nothing to indicate clearly that the trial court, in reaching its overall conclusion, placed these important

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mitigating factors into the scale on the credit side in the appellant's favour, but then found them to be outweighed by more important aggravating features on the other side of the scale. If the weighing-up process had been properly adopted, it seems to me there was nothing substantial to place into the scale as an aggravating feature outweighing the mitigating features to which I have already referred. That being so, in my view this court is at large in the matter. In any event, taking all the circumstances of the case into account, I am of the opinion that the sentence of death imposed by the trial court was, to use the words of HOLMES JA in *S v Letsolo,* 1970 (3) SA 476 (AD) at 477B, "disturbingly inappropriate", and on that basis too I am satisfied that this court can and should set it aside.

In the result, I would allow the appeal against sentence. I would set aside the sentence of death and substitute the following sentence: twelve years' imprisonment with labour.

Fieldsend CJ: I agree.

Squires AJA: I agree.

Pro Deo.

THE STATE v CHIROMBE AND OTHERS 1981 ZLR 9 (AD)

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend CJ, Lewis JP, and Baron, JA

14th January, 1981

Flynote

Sentence - possession of grenades in contravention of section 37 (1) of the Law and Order (Maintenance) Act [Chapter 65] - seriousness of offence - substantial sentences of imprisonment appropriate.

Headnote

Because of the prevalence of the offence of carrying grenades in contravention of section 37 (1) of the Law and Order (Maintenance) Act [*Chapter 65*], and the serious potential dangers created by such contraventions of the section, in the absence for any mitigating factors an offender can expect to receive a sentence of three years' imprisonment, and where there are aggravating features he can expect more.

Cases cited:

S v Muyambo and Anor 1980 ZLR 408 (AD); 1981 (1) SA 385 (ZAD);

S v Dambamemweya and Ors AD 149/1980 (unreported);

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S v Mahiya, AD 162/1980 (unreported).

P Sullivan for the appellants.

J H C Friedman for the respondent.

Judgment

Fieldsend CJ: These eight separate appeals, which involve the unlawful possession of grenades in contravention of section 37 (1) of the Law and Order (Maintenance) Act [*Chapter 65*], have for the sake of convenience been heard together. In each case the appellant was sentenced to imprisonment for three years, and the appeals are against sentence only. All the appellants were granted leave to prosecute their appeals in person, but the Court asked counsel to appear for them, and we are indebted to Mr *Sullivan* for his presentation of their cases.

It is necessary to deal with the general principles governing cases of this nature before considering the facts relative to each particular appellant.

FIELDSEND CJ

Immediately after the cease-fire became effective early last year there were a number at cases of former combatants leaving the assembly areas to which they had reported and carrying their arms with them. Where there was no indication that the arms were carried for any offensive purpose the courts took a lenient attitude towards these offences, frequently suspending either the whole or part of the sentence imposed. I should point out that if the possession of arms is charged under section 37 (1) a fine is not a competent punishment. Unfortunately, not only did the number of these offences increase, but, in part because of increasing political rivalry, there were a number of incident when grenades were thrown, causing deaths and injuries to many innocent people as well as alarming and unsettling the residents of suburbs around the capital where most of these incidents occurred. In May, 1980, an explicit directive was issued by the Joint High Command setting out the limited circumstances in which arms could be carried outside the assembly points and military cantonments. Unfortunately there was considerable delay in this reaching all establishments and as late as July there were still those whom the directive had not reached. The courts very properly took into account in assessing sentences the fact that those carrying arms outside their barrack areas had not had this drawn to their attention. Since at the latest August of last year it has, however, been generally known that there is no justification for the unauthorized carrying of arms and that in the interests of the public it has been necessary for substantial sentences of imprisonment to be imposed upon offenders.

This court has on a number of occasions set out the principles which have to be borne in mind in the circumstances of the country today in assessing sentences on young offenders whose lives have been disrupted by tire recent troubled years: *S v Muyambo and Another,* 1980 ZLR 408 (AD); 1981 (1) SA 385 (ZAD); *Dambamemweya and Others v The State*, Appellate Division Judgment No. 149/80, *Mahiya v The State,* Appellate Division Judgment No. 162/80 (both unreported). In every case this requires the balancing of a number of factors, among the most

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important of which are the need to give security and a feeling of security to the public, the need to impress upon those who have spent some time in the bush away from the restraints required of a more complex society the necessity for observing laws imposed for the good of all, and the need to reintegrate these young people into the community as useful and constructive citizens. Firm treatment is required, but care must be taken not to impose such sentences as will only contribute to the eventual emergence of embittered and corrupted young men.

The possession and, unfortunately, the use of grenades became very prevalent in the latter half of last year and in the public interest it

became necessary to do everything possible to put a stop to what was going on. Police road blocks were established on many public roads and a number of people were found to be carrying grenades, often they said for their own protection.

Grenades are particularly dangerous weapons. Not only are they easily carried and concealed, but they are vicious, deadly and indiscriminate in their effects. Even to carry them solely in self-protection is to create a serious potential danger to innocent fellow citizens. This is increased when they are taken into bars and beer-halls where by the lessening of restraint by drink they may be more easily used. Going armed in any way into places of public entertainment and particularly ink bars is a most reprehensible and foolhardy practice. It can lead to most serious consequences both for those on whom the weapons may be used and for those who use them. It is a practice which in no circumstances can be condoned. The courts have had therefore no alternative but to impose substantial sentences in these cases in the hope of discouraging the offence and of so giving confidence and security to the people as a whole. The unfortunate result of this is that many young offenders have had to be sent to prison for quite long terms. It can only be hoped that there they will learn some useful trade or calling which will stand them in good stead when they are released, and that the sentences imposed, together with increased police and public vigilance, will put a stop to the illegal carrying of arms. As I said in *Mahiya's* case (*supra*), a sentence of three years' imprisonment is not unreasonable in average circumstances. That is what in the absence of any mitigating factors an offender can now expect, and where there are aggravating features he may expect more.

It is on these principles that the individual cases must be considered.

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

Lewis JP: I agree.

Baron JA: I agree.

Pro Deo.

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McCONNELL v McCONNELL 1981 ZLR 12

Court **General Division, Bulawayo**

Annotations Link to Case Annotations

Civil Application

Gubbay, J

9th and 16th January, 1981

Flynote

Jurisdiction in matters relating to custody and guardianship of children - court having jurisdiction when proceedings instituted - whether jurisdiction continues if ground of jurisdiction ceases to exist before proceedings are terminated.

Headnote

The applicant sought an order in terms of section 3 (1) (b) for the Guardianship of Minors Act [*Chapter 34*] vesting in her the sole guardianship of her minor children. The children's father, the respondent, was domiciled in Scotland, and although the applicant and the children had been living in Zimbabwe when the proceedings were instituted, by the time of the hearing they had emigrated to South Africa.

Held that when the proceedings were instituted the court undoubtedly had jurisdiction, based on the physical presence of the children within Zimbabwe, to adjudicate upon the application, and the court continued to have this jurisdiction until the final end or determination of the proceedings, notwithstanding that the children had since been removed from Zimbabwe and that it was the applicant herself who had removed them.

Quaere whether the domicile of a mother who has been granted the custody of her children on the dissolution of a marriage should *utilitatis causa* determine the domicile of the children.

Authorities cited:

Ex parte Jooste, 1956 R & N 547; 1957 (1) SA 1 (SR);

Jardine v Stibbe, 1959 (2) SA 783 (C);

Joss v Board of Executors, 1979 (1) SA 780 (C);

Hahlo, South African Law of Husband and Wife, 4th edition;

Landmann v Mienie, 1944 OPD 59;

Favard v Favard, 1951 SR 97; 1953 (3) SA 656 (SR);

Littauer v Littauer, 1973 (4) SA 290 (W);

Kahn, *The South African Law of Domicile of Natural Persons*;

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GUBBAY J

Eilon v Eilon, 1965 (1) SA 703 (AD);

Dickinson v Dickinson, 1971 (1) RLR 123 (GD); 1971 (2) SA 507 (R);

Bruckman v Bruckman, 1976 (4) SA 204 (C);

Glen v Glen, 1971 (1) RLR 196 (GD); 1971 (3) SA 238 (R);

Kahn, 1971 Annual Survey of South African Law;

Voet, 5.1.64;

Thermo Radiant Oven Sales (Pty.) Ltd. v Nelspruit Bakeries (Pty.) Ltd 1969 (2) SA 295 (AD);

Balfour v Balfour, 1922 WLD 133 at 135;

Strydom v Strydom, 1945 (1) PHB 32 (W);

Papadakis v Wessels, 1976 (3) SA 593 (C).

C W Jordaan for the applicant.

Respondent in default.

Judgment

Gubbay J: This is an application on notice of motion for an order thirst sole guardianship of the two minor children born of the applicant's former marriage to the respondent, be granted to her in terms of section 3 (1) (b) of the Guardianship of Minors Act [*Chapter 34*]. The respondent has not filed an opposing affidavit.

I have no difficulty with the merits of the matter. The undisputed allegations of the applicant prove that it is in the interests of the children that their sole guardianship should vest in her. The question that arises, however, is whether this court has jurisdiction to grant the relief, for the respondent is domiciled in Scotland and, at the date of the hearing, the children were no longer resident or physically present within the territorial jurisdiction. They had emigrated with the applicant to South Africa on the 30th November, 1980, where they are now residing.

On the 13th February, 1976, at a time when the respondent was domiciled in this country, the parties were divorced by order of this court. Custody of the two children was awarded to the applicant. As that order is silent as to guardianship, the, present application, in my view, does not constitute a variation of an earlier order made by this court. See *Ex parte Jooste*, 1956 R & N 547 at 550F-H; 1957 (1) SA 1 (SR) At 3B-D; *Jardine v Stibbe,* 1959 (2) SA 783 (C) at 785 *fin* to 786, *Joss v Board of Executors,* 1979 (1) SA 780 (C) at 781F. Accordingly, the theory of continuance of jurisdiction to vary its own order, cannot be invoked. See Hahlo, *The South African Law of Husband and Wife*, 4th edition at page 574.

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It would seem that the court of the present domicile of the respondent, being the domiciliary court of the children since he retained their guardianship, is competent to make the order sought. See for instance, *Landmann v Mienie,* 1944 OPD 59 at 65; *Favard v Favard,* 1951 SR

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97 at 97: 1953 (3) SA 656 (SR) at 657G-H; *Littauer v Littauer,* 1973 (4) SA 290 (W) at 291F. Professor Ellison Kahn, in *The South African Law of Domicile of Natural Persons*, at page 93, expresses the opinion that where a marriage is dissolved, the grant of custody to the mother should *utilitatis causa* carry with it the determination of the domicile of dependence. The argument, advanced is persuasive, but it is unnecessary for me to consider its soundness, for it is not alleged by the applicant that she is domiciled in this country. Reliance is placed by her solely on the residence and physical presence of the children within the borders of the court's jurisdiction.

I think if clear that the domiciliary court is not the only court to have jurisdiction in respect of idly and guardianship. That of the residence or physical present of the children as the upper guardian of minors, has jurisdiction to deal with both these matters, although the children may be domiciled elsewhere. In *Eilon v Eilon,* 1965 (1) SA 703(AD) at 726B, POTGIETER, AJA (as he then was) said:

> "The children still live in the Cape and their mere presence within the Court's area is sufficient to confer jurisdiction to determine their custody and guardianship. The court is the upper guardian of all for children which are physically present within its territorial jurisdiction and on that ground, in my view, it has jurisdiction to determine the custody and guardianship of these children."

See too *Dickinson v Dickinson,* 1971 (1) RLR 123 (GD) at 127H; 1971 (2) SA 507 (R) at 510H; *Bruckman v Bruckman,* 1976 (4) SA 204 (C) at 205H-206C; Hahlo, *supra*, at page 573.

Indubitably this court had jurisdiction to adjudicate upon the application at the time the proceedings were instituted, whether that was when the notice of motion was served upon the respondent on the 13th November, 1980, or at the earlier stage when it was issued. See *Glen v Glen,* 1971 (1) RLR 196 (GD) at 199E-200C, 1971 (3) SA 238 (R) at 240H-241F; Hahlo*, supra,* at page 539; Kahn, *1971 Annual Survey of South African Law, at pages* 457-460.

Mr *Jordaan*, who appeared for the applicant, referred to the principle that jurisdiction, having once been established, continues to exist until the final end and determination of the action or proceeding, even though the ground upon which it was established ceases to exist. See Voet 5.1.64 (Gane's translation, Volume 2 at page 77); *Thermo Radiant Oven Sales (Pty) Ltd v Nelspruit Bakeries (Pty) Ltd,* 1969 (2) SA 295 (AD) at 301D and 310D-E. This is so even where it is the plaintiff who is responsible for the removal of the grounds for jurisdiction. See *Balfour v Balfour*, 1922 WLD 133 at 135, *Strydom v Strydom*, 1945 (1) P H.

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B.32 (W). It was submitted that the nature of the present application does not affect this

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principle, for it is not uncommon in a matrimonial action for a court to make an order relating to the custody or guardianship of minors who are physically outside its area of jurisdiction.

In my opinion Mr *Jordaan's* submission is correct. It derives further support from the approach adopted by TRENGOVE J, in *Littauer v Littauer*, *supra,* and from an *obiter dictum* of VAN WINSEN J, in *Papadakis v Wessels,* 1976 (3) SA 593 (C). In the former case, the applicant (father) and the respondent (mother), at the time of their marriage in 1954 in Italy, were respectively citizens of Denmark and Switzerland. Subsequently they came to South Africa, where two children, a boy and a girl, were born. In 1963 the marriage broke up. The respondent and the children settled in Switzerland. The applicant remained in Johannesburg, though he still retained a Danish domicile. In 1966 the Danish Court granted the parties an order of divorce and awarded custody and guardianship off the two children to the respondent. On the 22nd December, 1969, the respondent and the children came to South Africa on a brief visit. The applicant communicated with the respondent and it was arranged that the children would spend the afternoon of the 24th December with him. He undertook to return the children that evening. He failed to abide by the undertaking as far as his son was concerned, and on the 2nd January, 1970, filed an urgent application for an award of custody of that child. The respondent opposed the application and in turn filed a counter-application for an order that her son be returned forthwith. On the 6th January, the date on which the application was set down for hearing, a provisional settlement was arrived at and made an order of court, in terms of which the application was postponed to the 7th April. It was agreed that the respondent would, in the meantime, proceed to Switzerland with both children but would return to Johannesburg with her son for the hearing of evidence on the postponed date. The respondent specifically reserved her right to challenge the jurisdiction of the court. On the day of the resumed hearing the respondent and the child were still in Switzerland, as it had not been possible for them to return to South Africa. In deciding whether the court had jurisdiction to grant the applicant the relief he sought, TRENGOVE, J, held that the question was to be determined as at the time when the application was filed, namely, the 2nd January, 1970. In the result, the learned judge declined to exercise jurisdiction, but it was no part of the *ratio decidendi* that child was not physically present within the area of the court at the time of the hearing (see at 292 *fin* to 294A).

In *Papadakis v Wessels*, *supra*, the Witwatersrand Local Division had

made the original custody order in favour of the mother in June, 1973. The father, domiciled within jurisdiction of the Cape Court, applied to that forum, in October, 1974, for a variation of the order. At that time the mother and children were resident in the Cape, but by April, 1976, when the application was ultimately heard, they were permanently resident in Johannesburg. VAN WINSEN, J, concluded that the original court retained exclusive jurisdiction to amend the custody order. He expressed the view, however, that if that court had made no order as to the custody of the children, the Cape Court -

> "would have had the jurisdiction on tho application of the father of the children domiciled within its jurisdiction to make an order as to the custody of the children, more particularly as the children and respondent were also resident in the Court's jurisdiction."

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(See at 594H. The underlining is mine.)

I am satisfied, therefore, that this court has jurisdiction to entertain the application and an order is granted in terms of the amended order prayed.

Lazarus & Sarif, attorneys for the applicant.

THE STATE v GWARADA 1981 ZLR 17

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Lewis, JP, and Baron, JA

20th January, 1981

Flynote

Sentence - fine- efficacy and desirability of fines for offences of dishonesty.

Headnote

A fine is a particularly suitable punishment for many offences of dishonesty, particularly when it can be combined with some form of compensatory order, as it has the effect of depriving the offender of any benefit from his unlawful conduct. As the population becomes more attuned to a money economy so the deterrent effect of fines becomes greater and sufficiently substantial fines can be imposed to provide a proper punishment

Cases cited:

S v Julius, G-S-269-1980 (unreported);

S v Joelson, 1971 (1) RLR 214 (AD); 1971 (2) SA 135 (RAD).

A A Chiwara for the appellant.

J H C Friedman, for the respondent, cited *S v Wood,* 1973 (2) RLR 11 (AD); *S v Baker,* 1978 RLR 89 (AD); *R v David and Ors*, 1964 RLR 2 (GD); *S v Pasimpire,* 1969 (2) RLR 162 (GD), and *S v Joelson* (*supra*).

Judgment

Fieldsend CJ: The appellant pleaded guilty to the theft by false pretences of 300 bags of fertilizer and was sentenced to imprisonment for 12 months. He appeals against sentence only.

The facts, as outlined by the prosecution and as they emerge from the appellant's evidences establish that the appellant's guilt is based upon his association with the persons who devised

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the scheme and made away with the proceeds of the theft. The principal organizer appears to have been a person called George Mabasa. He telephoned a Mrs. Wehineer of a transport company, falsely purporting to be an employee of a European farmer, Alexander Firks of Umvukwes, saying that he

FIELDSEND CJ

had an order to collect 300 bags of fertilizer from Windmill Fertilizers, but that his truck had broken down at Vito's Service Station. He said that he had authority from his employer to employ a transport firm to collect the fertilizer from the dealer and that in due course he would collect the goods from them. Mrs. Wehineer went to Vito's Service Station to check with the driver of the truck which had been said to have broken down. On arrival there, she was met by George Mabasa who told her that the truck had been towed away for repair. He introduced either her or her clerk called Fanwell to the appellant who apparently confirmed that he was an employee of Firks. Mabasa thereupon handed Mrs. Wehineer a forged order purporting to be signed by Firks. The transport firm then collected the fertilizer and Mabasa and another took delivery of it from the transport people later in the day. The value of the fertilizer was some $2 125 and none of it has been recovered.

The appellant says that he was not involved in the original conspiracy, but that on the morning in question he was approached in his shop at Musike by Mabasa and asked to pretend to certain Europeans that he was from Firks' farm and to support the story Mabasa had told about the breakdown of the truck. For this he was to be paid $20. His evidence is not very explicit as to exactly what he was told as to the purpose of the deception, but from his plea of guilty and from the tenor of his evidence it is clear that he must have been told that he would be playing a part in a deception designed to secure some goods illicitly.

He says that it was a temptation to which he succumbed. He says he received no other benefit from the theft other than the $20 and this was not challenged by the prosecution. Indeed, in cross-examination of the appellant who gave evidence in mitigation, the prosecution really did not attack his story. They certainly did not establish that he had any knowledge of the nature of the goods that were to be stolen or of their value.

The appellant is a young man of 21. He owns a vegetable shop at Harare from which he earns $140 a month, He is married to his deceased brother's wife, an obligation which devolved upon him by custom, and has five children to maintain, two of whom are of school-going age. The magistrate has taken a serious view of the case, partly because of the value of the property involved, none of which was recovered, but also because he suspected that the appellant was more involved in the conspiracy than he was prepared to admit. There may be some grounds for that suspicion, but on the evidence I think that the appellant's

FIELDSEND CJ

version should not have been rejected. Nor do I think that the magistrate should have rejected

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the appellant's evidence that he fell for the sudden temptation of earning an easy $20.

His role was a minor one and I do not think that the magistrate was justified in saying, as he did, that without the appellant's assistance it was quite probable Mabasa would not have convinced Mrs. Wehineer of the truth of his story. Certainly without Mrs. Wehineer's evidence this was not a warranted assumption. In my view, we are therefore at large to assess a proper sentence.

Undoubtedly the offence is a serious one. The appellant willingly, albeit with temptation, lent himself to a conspiracy to obtain property of some value, though he obtained no substantial benefit from it himself. But having regard to his personal circumstances, his age, and the fact that he is a first offender, I do not think that he should be sent to prison. The need for a sentence designed to deter like-minded people is not present to the same extent here as it would have been in the case of the principal offenders.

There are two aspects to be given weight in assessing an appropriate sentence here, having regard to the limited part which it is established the appellant played and to his personal circumstances. The first is a general aspect. As the population as a whole, and particularly the urban population, becomes more and more attuned to a money economy, so the deterrent effect of fines becomes greater, and sufficiently substantial fines can be imposed to provide a proper punishment. In a somewhat different context, His Lordship MR JUSTICE DUMBUTSHENA in The *State v Julius,* G-S-269-80 (unreported), recently stressed the merits of a fine as a punishment and the desirability of the courts resorting more frequently to fines than they have done in the past, I should like to say that I fully endorse all he said in that Judgment. A fine is a particularly suitable punishment for many offences of dishonesty, particularly when it can be combined with some form of compensatory order, as it has the eject of depriving the offender of any benefit of his unlawful conduct. This, of course, is not a suitable case for a compensatory order, but it is in my view a suitable case for the imposition of a fine.

The second aspect concerns the question of suspending a portion of any sentence imposed, whether it be imprisonment or a fine. The magistrate declined to suspend any part of the sentence, saying:

> "I realize that in the majority of cases of first offenders a large portion of the sentence should be suspended, but in the present case that is out of the question for the following reasons. A large amount of property of very

FIELDSEND CJ

> high value was stolen, the accused played a major role in this deception; all the property has not been recovered.
>
> It must be brought home to the accused and other like-minded per cheat such practices will not be tolerated, . . ."

I have in effect already dealt with what I consider to be the misdirection of the magistrate to himself in regard to the items to which he refers. The magistrate's reasons also in my view seem to overlook the proper approach which has been approved on a number of occasions in this court. This approach is clearly set out in *S v Joelson,* 1971 (1) RLR 214 (AD); 1971 (2) SA 135 (RAD), in the Judgment of his Lordship, MR JUSTICE MACEDONIA, then Judge President, in which my brother the present Judge President concurred. I should like to draw the attention of all magistrates to that case. This is, in my view, essentially a case where a partially suspended

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sentence is desirable.

Having reached the conclusion that this is a suitable case for limiting the sentence to a monetary penalty and that it is a suitable case for a partially suspended sentence, the question of quantum is necessarily a somewhat arbitrary matter, especially since the appellant has been in prison since his conviction on the 23rd of September, last year. In my view the sentence of 12 months' imprisonment should be set aside and there should be substituted for it a fine of $500 or in default of payment 10 months' imprisonment, of which $300 or six months' imprisonment is suspended for five years on condition that during that period the appellant does not commit any offence involving dishonesty for which he is subsequently convicted. Of course, there will have to be taken into account the imprisonment which the appellant has served in assessing whether there is any fine still to be paid.

Lewis JP: I agree.

Baron JA: I agree.

WILSON v WILSON 1981 ZLR 21

Court **General Division, Salisbury**

Civil Application

Horn, AJ

13th November, 1980, and 21st January, 1981

Flynote

Maintenance - variation of maintenance payments - assessment of means and income of maintenance-payer - need to base assessment on his actual rather than his possible means and income.

Headnote

For the purpose of determining whether or not a person can pay increased maintenance to his dependents, a court must inquire into the factual position regarding his means and income; it cannot false fits assessment on the income he would have received had he applied his assets differently, unless perhaps it is established that he is deliberately squandering his assets in order to avoid paying increased maintenance.

Cases cited:

Prophet v Prophet, 1948 (4) SA 325 (O);

Whittingham v Whittingham, 1974 (1) RLR 147 (GD); 1974 (2) SA 636 (R);

Dawe v Dawe, 1979 RLR 395 (GD) 1980 (1) SA 141 (ZR).

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C L Mercer for the applicant.

A P de Bourbon for the respondent.

Judgment

Horn AJ: The parties in this matter were divorced on the 4th October, 1978, by decree of this court on the ground of the respondent's desertion. The parties had been married for almost 20 years at the time of the divorce. There were three minor children of the marriage, a girl aged 18 years, and two boys aged 17 and 15 years, respectively. An agreement had been entered into concerning the custody of these children, as also in regard to maintenance for the two boys and the applicant. The agreement was incorporated in the order of divorce. The girl was apparently self-supporting at the time and no order for maintenance in respect of her was made.

HORN AJ

The applicant, in terms of 11 of the agreement incorporated in the order of court, now seeks a variation of that agreement so as to increase from the nominal figure of $1 *per annum* to $150 *per mensem* the amount payable by the respondent as and for maintenance for her or, alternatively, so as to increase the monthly amount presently payable as and for maintenance for the two boys by $118,50 and to alter the period of time during which maintenance is payable in respect of the two boys, "so that as a family unit (the applicant and the two boys) will have sufficient to live on without (the applicant) having to work at night (as she now does)."

The main thrust of her case is that since the divorce the financial position of the respondent has improved significantly and that fact, coupled with the increase in the cost of living, provides good cause for this court to vary the agreement by granting her an increase from nominal maintenance of $1 *per annum* to $150 *per mensem* or alternatively to increase and extend the maintenance payable in respect of the two boys.

In support of these contentions the applied in her founding affidavit alleged that since the divorce the respondent trial received a substantial inheritance and could well afford, in view of this, to pay maintenance which, at the time fir the divorce, he could not.

In his replying affidavit the respondent has pointed out, however, that although he received axe inheritance of a fairly substantial nature, his financial situation is not nearly as comfortable as the applicant imagines it to be and that he cannot afford to pay any more than he is paying at present. The respondent has pointed out, and this has not been disputed, that the inheritance he received was invested in immovable property from which he receives a net return alter expenses, but before tax, of $47,50 *per mensem*, and that his monthly income from employment is $680 gross and $541,88 after allowances for the deductions whim applied at the time of the divorce. Further, in respect of his contention that he cannot afford an increase, he is submitted a "budget", indicating that his a own monthly expenses (which include the amount of $123,50 payable direct to the applicant as maintenance for the boys) amount to $536,58, which is almost as much as his net income from employment. The respondent further makes the point that the "budget" makes no provision for the cost of sending the younger boy to boarding-school, which would appear to amount to not less than $30 *per mensem*, nor is any provision made in the

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"budget" for savings or tax on the income from the immovable property. On the face of it, it appears that the respondent would be hard put to provide any further amount by way of maintenance either

HORN AJ

for the applicant or the boys since, even with the additional income from the immovable property (before tax), his expenses virtually equal his income. I should also mention that when the net income of $47,50 received from the investment was queried, Mr *de Bourbon*, for the respondent, specifically invited Mr *Mercer* to examine the relevant documentation.

There does not therefore appear to be room for the submission, not withstanding the receipt of the inheritance that there has been any significant improvement in the financial position of the respondent in real terms, save that he is now possessed of capital in the form of immovable property, of which he was not possessed at the time of the divorce.

Mr *Mercer*, for the applicant, attempted to meet this point by submitting that the amount of some $24 000 which the respondent received as a result of the inheritance, could have been invested in such a way as to yield a better return than the $47,50 *per mensem* which is the respondent's actual net return on his investment, and submitted that it would be appropriate to approach the matter on the basis that although the respondent is actually in receipt of a net income before tax of $47,50 on his investment, he should be regarded as being in receipt of a notional income from his investment yielding 7 *per cent per annum* before tax. Mr *Mercer* referred me to the cases of *Prophet v Prophet,* 1948 (4) SA 325 (O), *Whittingham v Whittinghum,* 1974 (1) RLR 147 (GD), 1974 (2) SA 636 (R), and *Dawe v Dawe,* 1979 RLR 395 (GD); 1980 (1) SA 141 (ZR), in support of this proposition. He said that these cases established the principle that a person upon whom there rests an obligation to maintain another, cannot legally cut down his obligations towards that mother by deliberately adopting a course of conduct which results in his being less able to meet his obligations in respect of the person or persons he is obliged to maintain and that to regard the respondent as being in receipt of a notional income in excess of his actual income is to do no more than to apply this principle to the factual situation in the instant case. I do not accept this submission.

In the first place, this principle is usually applied in circumstances where a person has voluntarily assumed additional liabilities, for instance by remarrying, and in the second place it has never been applied, as far as I am aware, so as to relieve the court of its duty to inquire into the factual situation regarding the means and income of the person whose duty it is to maintain another. If this principle were to be extended to the situation in the instant case on the basis suggested by Mr *Mercer* it

HORN AJ

would mean that the court should pretend that a person who has invested unwisely has invested wisely and should not concern itself with such trivia as the factual position - it need only

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speculate on what might have been.

The position might be different if fit could the established that a person in receipt of a substantial inheritance deliberately squandered that inheritance in order to prevent a person whom he is obliged to maintain from benefiting from his improved financial position, but cheat is not the case here.

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

Gill, Godlonton & Gerrans, attorneys for the applicant.

Surgey, Pittman & Kerswell, attorneys for the respondent.

NYAGUWA v GWINYAYI 1981 ZLR 25

Court **General Division, Salisbury**

Petition

Pittman, J

19th and 21st January, 1981

Flynote

Court - jurisdiction of - extent to which defined by statute.

Headnote

Each court in Zimbabwe is a creature of statute and its powers are created and defined by statute. Neither the High Court nor any other court may overrule the decision of another court save to the extent that power to overrule such a decision has been conferred upon it by statute.

R Jagger for the petitioner.

C C Milton for the respondent.

Judgment

Pittman J: The petitioner and the respondent entered into an agreement on the 15th July, 1976, whereby the respondent leased certain business premises known as Stand No. 1463, Kambuzuma Township, to the petitioner at a monthly rent of $120, "payable in cash in advance at the shop on or before the 5th day of the month to which it relates".

Clause 8 of the agreement reads as follows:

> "8. Should the Tenant breach any terms of this agreement the Landlord shall be entitled to cancel the lease and eject the Tenant forthwith; and no leniency on the part of the Landlord and, in particular, no acceptance of late

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payment of rent, shall be construed as a waiver of her rights in this regard."

Clause 10 reads:

"10. The parties submit to the jurisdiction of the Magistrates Court, Salisbury, any claim or dispute arising out of or in connection with this agreement; and the *domicilium citandi et executandi* of the Landlord and the Tenant shall be House 16, Donedzo Avenue, Mufakose Township, Salisbury, and House 772/4, Gillingham Township, Mabelreign, Salisbury, respectively."

PITTMAN J

On the 18th December, 1980, the respondent caused summons to be issued out of the magistrates court, Salisbury, in case number 14643/80, in which she alleged that she was entitled to cancellation of the agreement and claimed an order for the ejectment of the petitioner from the premises, and costs. In her particulars of claim, she alleged that on 14 different months between February, 1979, and June, 1980, the petitioner had paid the rent on a date later than the fifth day of the month to which it related.

The summons was served at the petitioner's *domicilium citandi et executandi*, but he did not become aware of it until the 16th January, when he was served with a warrant of ejectment dated the 5th January. The respondent had obtained Judgment by default on the last-mentioned date. The warrant of ejectment was enforced by the messenger of court, and the respondent is presently in occupation of the premises.

On the 19th January, the petitioner filed an urgent application in this court for the issue of a rule *nisi*, calling on the respondent to show cause on the return day why the applicant should not be allowed to regain occupation of the premises pending the outcome of an application to the magistrate for rescission of the order of ejectment. He also asked that "this order act as a temporary restorative interdict allowing the Petitioner to occupy the said business premises at Stand No. 1463 Kambuzuma Townships, Salisbury, pending the return day hereof". The matter came before me in chambers on the 19th January. Mr Jagger represented the petitioner and Mr Milton appeared for the respondent.

It was common cause that the 14 late payments referred to in the summons had been accepted by the respondent, and also that the rent for each month from July, 1980, to the present, January, 1981, had been accepted on the respondent's behalf by her agents or attorneys. In particular, Mr *Jagger* emphasized that the rental for January, 1981, had been received by the respondent's agents on the 5th January, and had not been returned to the petitioner, despite the order for ejectment having been obtained on the same day.

Mr *Jagger* argued that clause 8 of the lease did not permit the respondent to cancel the lease because of a late payment of rent, if such late payment had been accepted by her. The waiver of her rights referred to in the clause had to be interpreted as "a waiver of her rights in respect of future late payments". As all rents up to the present month had been accepted by her, the order for ejectment had been wrongly granted, and the petitioner was entitled to the relief sought by him.

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PITTMAN J

I was of the opinion that, in this country, each court is a creature of statute, and its powers are created and defined by statute. The function of every civil court is to recognize what it believes to be the rights of the parties before it. Once a civil court has given such recognition, that recognition must be accepted by each of the other courts, whatever its relative position in the hierarchy of courts may be, unless authority to overrule such recognition has been conferred upon it by statute. If one court were to claim that it has some inherent power to overrule another court, instead of a power specifically created by statute, in effect it would be claiming the power to nullify the body of statute law which specifically relates to the establishment and powers of each of the civil courts in the country. As no power to overrule the decisions of magistrates courts has been vested in the General Division of the High Court, I considered that this court could not grant the order sought by the petitioner.

I understand Mr *Jagger's* submission to be that this court has an inherent jurisdiction to remedy injustice, that the obtaining and enforcement of the ejectment order had been unjust, and that unless this court granted the petitioner the right to reoccupy the premises, pending the outcome of his application for rescission, there would be no way in which he could avoid the loss he would suffer through having to remain out of the premises until the ejectment order had been rescinded. According to paragraph 13 of the petition, his application for rescission "cannot be heard for some weeks by virtue of the Rules of the Magistrates' Court ". Mr *Jagger* stressed throughout his argument that he was relying on this court's inherent jurisdiction to remedy injustice as the basis for the order sought.

For the purposes of this Judgment, I shall accept that the ejectment order was unjustly granted, but, despite the forceful eloquence with which Mr *Jagger* presented his argument, I remain of the opinion that the relief sought by the petitioner, if granted, would constitute an unauthorized interference by this court with the proceedings in the magistrates court. Mr *Jagger* was unable to refer me to any authority for such interference, and I have been unable to find any subsequently. For this reason alone, I would dismiss the application.

However, I consider that there is also a second reason for this conclusion. In effect, the petitioner is seeking an interdict restraining the respondent from exercising the right acquired by her to enjoy occupation of the premises, unless and until that right has been nullified by due process of law. It is trite law that an applicant for an interdict must show that he is entitled to the enforcement or protection of a clear or at least

PITTMAN J

a *prima facie* right possessed by him. In my opinion, the petitioner clearly has no right at all to enjoy occupation of the premises at this point in time. He may obtain such right later, but I repeat that he does not have it now. It is the respondent who has it now, and that right, even if it was created only by error on the part of the magistrate, can only be nullified by the petitioner if he obtains rescission of the Judgment in the magistrates court or wins an appeal to the

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Appellate Division.

As the petition is not based upon the enforcement or protection of a right possessed by the petitioner, it must fail.

Accordingly, the application is dismissed with costs.

Kantor & Immerman, attorneys for the petitioner.

Sawyer & Mkushi, attorneys for the respondent.

AMBALA v AMBALA 1981 ZLR 29

Court **General Division, Salisbury**

Civil Application

Pittman, J

23rd January, 1981

Flynote

Custody of children - children brought to Zimbabwe from foreign country where proceedings relating to their custody were pending desirability of rapid return of children to foreign country.

Headnote

The respondent, who was the applicant's wife, had brought the children of their marriage with her to Zimbabwe from Kenya, where the parties had their home. Having instituted proceedings in Kenya for an order granting him custody of the children, the applicant followed the respondent to Zimbabwe where he instituted similar proceedings with a view to returning the children to Kenya. While the respondent disputed most for the applicant's allegations as to her shortcomings as a wife and parent, she did not seriously dispute his ability to care for the children.

Held that it was in the interests of the children that they should be reined as soon as possible to Kenya, their native country, where the merits of the parties dispute could be decided; accordingly, without investigating the merits of the dispute in Zimbabwe, the applicant should be awarded custody of the children.

Case cited:

Re L (Minors) [1974] 1 All ER 913.

R Jagger for the applicant.

B H Christie for the respondent.

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Judgment

Pittman J: The applicant husband is domiciled in Kenya, where he is a Member of Parliament. He married the respondent on the 5th March, 1977, and they have two daughters, born on the 18th September, 1975, and the 9th August, 1978. The applicant has five other children born of a previous marriage and, as the respondent alleges that they have been in her care, it seems to be safe to assume that the seven children all normally live in the applicant's home in Nairobi.

PITTMAN J

The pre- and post-marriage relationships of the parties have not in happy, each alleging acts of maltreatment by the other, which are strenuously denied. On or about the 3rd December, 1980, the respondent instituted divorce proceedings against the applicant in the High Court of Kenya. It does not appear whether that action has been withdrawn or is still pending. On the 24th November, 1980, the respondent departed from the matrimonial home, leaving their children in the applicant's care. She alleges that he prevented her getting into touch with the children.

It is common cause that on the 26th December, 1980, the respondent took advantage of the children's temporary absence from the applicant's home to take possession of the children surreptitiously, and on the 3rd January, 1981, she brought them to Salisbury. The applicant had become aware after the 26th December of her intention to remove the children to "Salisbury, and on the 2nd January he instituted an application (annexures B and D to his petition) for an order by originating summons (annexure A) claiming that the custody, care and control of the children be given to him. On the 8th January, by when he knew that the respondent was in Salisbury, he obtained leave from the High Court of Kenya to serve annexures A, B C and D upon the respondent in Salisbury, and on the 14th January he obtained by annexure E an interim order for custody of the children pending the hearing of his action. It is agreed that the defendant has been duly served with the necessary documents and that therefore the action can be expected to proceed in the usual way fin the High Court of Kenya.

The applicant arrived in Salisbury some days ago and on the 21st January he filed a notice of motion in the High Court of Zimbabwe for an order awarding him the custody of the children. The matter came before me on Thursday, the 22nd January, as an urgent application in chambers. The respondent had been given notice of the hearing and she appeared in person to resist the application. She had naturally not yet been able to file a replying affidavit. However, in view of the urgency of the matter - the applicant said he was obliged to return to Nairobi on Saturday, the 24th January - and in view of the fact that the interests of minor children every involved, I considered that every effort should be made to finalize the proceedings as soon as possible. I therefore ordered that the respondent should file and serve her replying affidavit at or before noon on Friday, 23rd January, and attend at court at 3 pm. that day with the children, so that any order then made by the court could be implemented.

The parties duly appeared before me at 3 pm. on Friday. Unfortunately, although the respondent had prepared her affidavit, it had not

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yet been served upon the applicant. Furthermore, not surprisingly, she had denied most of the applicant's allegations.

In these circumstances, Mr *Christie*, for the respondent, asked for a postponement of the hearing to enable oral evidence to be given on the disputed allegations. He stressed that the court's duty was to am in accordance with the best interests of the children, and that these interests could only be ascertained after such evidence had been heard. In my view, this was too narrow a view of the scope of the court's powers in such a situation.

The applicant alleged in paragraphs 13 and 15 of his petition as follows:

> "13. During the subsistence of the ,marriage, and during the periods that the Respondent has been resident in the matrimonial home, she has:
>
> (a) Persistently ill-treated the children;
>
> (b) Continuously returned home late, i.e.: 3 to 4 am. On most of these occasions, the Respondent was drunk;
>
> (c) Neglected to wash, or have the said children washed;
>
> (d) Neglected the primary health needs of the children;
>
> (e) Continuously neglected to prepare food if or the children;
>
> (f) Both in Kenya and Zimbabwe, improperly associated with other men;
>
> (g) Made no effort to keep her temper in check, i.e.: she has on four occasions attacked me with a knife thereby inflicting injuries on me.
>
> The last occasion was on either the 22nd for 23rd November, 1980.
>
> 15. It is in the best interests of the children that their custody be awarded to myself for the following further reasons:
>
> (a) The Respondent is unemployed and is likely to remain so, in that the forgery onto her passport of the name of the younger child Chizi, was detected by the Zimbabwe Immigration Authorities;
>
> (b) The Respondent is of no fixed abode. I was informed and believed that she was at one stage residing in the suburb off Hatfield, Salisbury, but am now informed and believe that she is at Number 5, Marimba Park, Salisbury;
>
> (c) The Respondent has no relations within Zimbabwe;
>
> (d) The minor child Perez was, to have commenced schooling on the 5th January, 1981, at Kilimani Junior Academy, Langata, Nairobi. Her continued absence 'from Kenya is prejudicing her education; and
>
> (e) Both children need constant medical attention. Perez suffers from continuous headaches and Chizi from a skin ailment. In Nairobi, both children were under the constant care for Doctor Colin Forbes, a paediatrician. The 'Respondent in her present state of unemployment and unemployability is unable

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to provide adequately for the health care of the children."

In reply the respondent made frequent references in paragraphs 4, 5, 7 and 8 of her affidavit to assaults on her by the applicant. She also stated in paragraph 12 that she had never ill-treated the children, and never

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returned home in a drunken state. These allegations and counter-allegations cannot be decided on the affidavits but in the view I take of the matter it is unnecessary to investigate them further. Of far greater significance is the lack of any serious criticism by the respondent of the applicant's role as custodian. She says only at paragraph 14:

> "The respondent states that the applicant has many business interests and is unable to care for the children himself. The respondent further states that she intends employing someone to look after the children while she is at work."

The applicant is an attorney of the High Court of Kenya, and I think it is safe to assume that as one of the children is only two-and-a-half years old, the parties must have made some satisfactory arrangement for its hour-to-hour care whilst they were pursuing their own activities elsewhere. She claims in paragraph 11 of her ,affidavit:

> "11. I intend settling in Zimbabwe and making his my permanent home. To this end I have been assisted by the Minister of Local Government and Housing, the Honourable E Zvobgo. Through his Ministry I am obtaining employment with Salisbury Municipality as a legal adviser at a salary of $800,00 per month. A three-bedroom house is already being arranged through the aforesaid Municipality."

I am reluctant to accept this statement as reliable because I doubt whether employment of this nature is so easily obtainable, especially by an alien immigrant, and I also point out that the children will not be enjoying hour-to-hour care from her in Salisbury. They will be in a new and strange house and environment, with a different local language, with no old friends and parted from their five half-brothers and half-sisters. The respondent plans to arrange for the child Perez to start attending school in Salisbury immediately. This runs counter to the plan already made by the applicant to put her to a named school in Nairobi, where presumably she would have had the advantage of beginning her school life with the companionship of friends and acquaintances.

Finally, there is the question of the health of the children. The applicant alleges in paragraph 15 (e), as I have said:

> "Both children need constant medical attention. Perez suffers from continuous headaches and Chizi from a skin ailment. In Nairobi, both children were under the constant care of Doctor Colin Forbes, a paediatrician. The Respondent in her present state of unemployment and unemployability is unable to provide adequately for the health care of the children."

The applicant says no more than that both children have been under medical care since arriving in Salisbury.

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PITTMAN J

In my opinion, the papers make it clear that the children will, at the very least, suffer no harm if they are restored to their normal life in Nairobi, pending the decision of any of the court actions instituted there. On the the hand, it is likely that the children will suffer harm if the respondent is allowed to keep them here pending a hearing and decision this court on the matters in dispute between the parties. I am content to rely on the following passage in *Re L (minors)* [1974] 1 All ER 913 at 925-6 by BUCKLEY, LJ:

> "To take a child from his native land, to remove him to another country where, maybe, this native tongue is not spoken, to divorce him from the social customs and contacts to which he has been accustomed, to interrupt his education in his native land and subject him do a foreign system of education are all acts (offered here as examples and of course. It as a complete catalogue of possible relevant factors) which are likely to be psychologically disturbing to the child, particularly at a time when this family life is also disrupted. If such a case is promptly brought to the attention of a court in this country, the judge may feel that it is in the best interests of the infant that these disturbing factors should be eliminated from his life as speedily as possible. A full investigation of the merits of the case in an English court may be incompatible with achieving this. The judge may well be persuaded that it would be better for the child that those merits should be investigated in a court in his native country than that he should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here. Anyone who has had experience of the exercise of this delicate jurisdiction knows what complications can result from a child developing roots in new soil, and what conflicts this can occasion in the child's own life. Such roots can grow rapidly. An order that the third should be returned forthwith to the country from which he has been removed in the expectation that any dispute about his custody will be satisfactorily resolved in the courts for that country may well be regarded as being in the best interests of the child."

In particular, I have been persuaded that it would be better for the children that the merits of the parties' dispute should be investigated in a court in their native country than that they should spend in this country the period which must necessarily elapse before all the evidence can be assembled for adjudication here.

I therefore ruled in a summary Judgment at file end for the argument on Friday, the 23rd January, as follows:

> "That custody of Perez Auma Ambala and Chizi Achieng Ambala be and is hereby awarded to the Applicant."

I was informed on behalf of the respondent that an appeal would be noted against this decision. It is not for me to comment upon the prospects of such an appeal, but it may be helpful to the parties if I point

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out that if my approach on the lines of BUCKLEY LJ's remarks correct, the sooner the appeal is heard and decided, the better it will be for the children.

I also note that the applicant has promised that if the appeal is unsuccessful and he is in effect ordered to come to Salisbury to attend the hearing of the evidence in the application, he will do so, and will bring the children with him.

Scanlen & Holderness, attorneys for the applicant.

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P A Chinamasa, attorney for the respondent.

THE STATE v ANDEYA 1981 ZLR 35

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend CJ, Lewis JP and Baron JA

21st and 30th January, 1981

Flynote

Criminal procedure - separation of trials - when to be ordered.

Evidence - answers of accused person to questions put to him by prosecutor in terms of section 188 (6) of Criminal Procedure and Evidence Act [Chapter 59] - whether admissible against co-accused.

Headnote

It is an established rule of practice that where one of two or more co-accused pleads guilty the trials should be separated; the rule extends to cases where, though pleas of not guilty have to be entered, it is apparent from the replies of accused persons to the charge or the outlines of their defences that one or more of them are likely to implicate the others in the commission of be offence.

The answers of an accused person to questions put to him by the prosecutor in terms of section 188 (6) of the Criminal Procedure and Evidence Act [*Chapter 59*] are not admissible in evidence against his co-accused.

Cases cited:

R v Zonele and Ors 1959 (3) SA 319 (AD);

R v Timothy, 1963 R & N 873.

Appellant in person.

B J Turner for the respondent.

Judgment

Baron JA: The appellant and two others, whom I will call respectively the first and third accused, were convicted of the theft of ten head of cattle, the property of the complainant, by whom all three were employed.

It was alleged that the appellant and the third accused drove the cattle from the complainant's farm to a nearby farm with the intention of stealing them. The appellant thereafter approached

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an animal health inspector, and handed him a letter purporting to be signed by the com-

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plainant requesting an inspection of the cattle preparatory to their being moved; the appellant is alleged to have said that the cattle had been left to him by his deceased father and that he wanted to move them to the abattoir for slaughter. It was common cause that the letter was a forgery and had been written by the first accused. The health inspector arranged for the inspection to take place the next day. On the morning of the next day, and before the inspection, the health inspector met the complainant, apparently by accident, it transpired that the complainant knew nothing of the letter. A report was made to the police, but the health inspector did not convey his suspicions to the appellant and took him to his office. When the police arrived at the health inspector's office the appellant was questioned; he is alleged to have repeated his claim that the cattle had belonged to his late father, but after the arrival of the complainant the appellant is alleged to have admitted that they did not.

When the appellant and the other two accused were arraigned the first accused refused to plead; the appellant pleaded not guilty; the third accused said: "I admit I attempted to steal ten head, but did not steal." The magistrate entered pleas of not guilty in respect of all three accused. The prosecutor then outlined the State case, and at the conclusion of the outline the accused were in turn invited to outline their defences. The first accused said: "I do not disagree with what Public Prosecutor has said - nothing to add." He was questioned by the court, presumably by way of clarification of his outline. In the course of his answers to the questions he implicated the appellant as having been a party to the arrangement to steal the cattle. The appellant said: "Admit I brought letter to the Veterinary Department-letter handed to me by Accused 1. I did not move any cattle from anywhere." The third accused said: "Admit three of us involved - we did move cattle from the one point to another with view to stealing them but they still on same farm." He further implicated the appellant when he said that the two of them had moved the cattle.

It is an established rule of practice that where one of two or more co-accused pleads guilty the trials should be separated. Thus in *R v Zonele and Others,* 1959 (3) SA 319 (AD) HOLMES AJA, said this at page 325D:

> "Now it is clear that when the first appellant pleaded guilty the Judge should have separated the trials, that is to say the case of the first appellant should have been dealt with separately from that of the other two appellants. There is no statutory provision making such a course compulsory, ... but it is an established and a prudent rule of practice . . . Its purpose is to save

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> those who have pleaded not guilty from being prejudiced, for example by the cross-examination or evidence of those who have pleaded guilty; and *vice versa.* The basis of the rule is that when an accused pleads guilty there is no issue between him and the Crown and there is no trial in regard to verdict (though there may thereafter be an issue in respect of sentence)."

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See also *R v Timothy,* 1963 R & N 873, where FIELDSEND J, as he then was, described the rule stated in *Zonele*'s case (*supra*) as "most salutary and desirable".

Although pleas of not guilty were entered-and properly so-in respect of all three accused persons in this case, the danger of prejudice to the appellant quite clearly emerged from the replies of the first and third accused when the charge was put, and even more so by the replies to the questions put to them in connection with the outlines of their defences. As Mr *Turner* very rightly conceded, there should clearly have been a separation of the trial of the appellant from that of the other two accused in this case. This irregularity was not merely technical. It is not clear from the Judgment that the learned magistrate did not rely on what the first and third accused said at that stage of the proceedings, or whether he relied on their answers to questions put to them by the public prosecutor following their respective refusals to give evidence, a separate irregularity to which I now turn.

The first and third accused both declined to give evidence on oath, and both were thereupon questioned by the public prosecutor. The magistrate has referred to, and presumably therefore relied on, what these two accused said in convicting the appellant, and this was a serious misdirection. There is no provision enabling a co-accused to cross-examine another co-accused who declines to give evidence, and consequently the answers to the questions put by the public prosecutor, while they may be used against the accused in question, are not admissible in evidence against his co-accused; they are in precisely the same position as extra-curial statements.

In the light of these serious irregularities, this conviction can stand only if this court can apply the proviso to section 67 (3) of the Magistrates Court act [*Chapter 18*]. Mr *Turner* accepts that this is so, but he submits that, ignoring completely everything that the first and third accused have said and examining only the admissible evidence, the case against the appellant is overwhelming. In my view, this submission is well-founded. The appellant called his brother, who said in cross-examination by the public prosecutor that he had spoken to the

appellant about the cattle, that the appellant had said that he and the third accused had driven the cattle and that he knew that they were stolen. The animal health inspector (who inexplicably, although he featured prominently in the State outline, was not called by the prosecutor but was called by the court) said that the appellant had told him that the cattle had belonged to his late father and that a butcher was buying them. He said that when, in his office, the appellant was questioned by the police he said again that the cattle had belonged to his late father, but that after the complainant arrived he admitted that they did not.

The appellant's defence throughout was that, although he had taken the letter to the health inspector, he did not know its contents (because he could not read English) and that he had no knowledge of any arrangement to steal the cattle; in particular he denied that he had taken part in moving the cattle. The evidence of the appellant's brother and that of the health inspector seems to me to be conclusive I am satisfied that the irregularities with which I have dealt above

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did not lead to any miscarriage of justice, and I would dismiss this appeal.

Fieldsend GJ: I agree.

Lewis JP: I agree.

ABBEY ESTATES AND INVESTMENTS (PRIVATE) LIMITED v PROPERTY RENTING CORPORATION (PRIVATE) LIMITED AND OTHERS 1981 ZLR 39

Court **General Division, Salisbury**

Civil Review

Horn, A J.

13th November, 1980, and 4th February, 1981

Flynote

Administrative law - quasi-judicial tribunal - duty of appellate tribunal to hear representations from parties when empowered to hear matter afresh - duty of tribunal to advise parties of knowledge on which it relies.

Cost - professional body empowered to adjudicate on disputes between members - whether members of tribunal set up by body are liable personally for costs of review of their decisions.

Headnote

In terms of rules governing the conduct of members of the professional institute to which it belonged, the applicant appealed against the decision of an arbitrator to an appeal committee composed of members of the institute. The rules required the appeal committee to "determine the dispute afresh". The members of the appeal committee dealt with the matter by circulating the arbitrator's file of papers amongst themselves without affording the applicant the opportunity of being heard or leading any evidence. In addition, the appeal committee relied on its own knowledge of a professional usage which they considered determined the Interpretation of a section in the institute's code of ethnics without advising the applicant of this and rejected the appeal. On review.

Held that the appeal committee had failed to "determine the dispute afresh" and this failure, together with its failure to advise the applicant of the professional

usage on which it relied for its interpretation of the code of ethics, were irregularities which *prima facie* prejudiced the applicant; and in the absence of evidence showing that the applicant had not been "prejudiced by such irregularities, the appeal committee's decision should be set

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aside.

Held, further, that since the members of the appeal committee had not been acting merely in their professional and personals capacities but on behalf a body which insisted on its members abiding by its rules, and since they had personally opposed the application, they should not be absolved from paying the costs of the application.

Cases cited:

Lipron v SA Medical and Dental Council, 1948 (4) SA 656 (T.);

Sullivan v Meat Industry Control Board, 1946 TPD 194;

Loxton v Kenhardt Liquor Licensing Board, 1942 AD 275*;*

Jockey Club of South Africa and Ors v Feldman, 1942 AD 340.

AP de Bourbon for the applicant*.*

B W K Whaley for the first respondent.

R Jagger for the third, fourth and fifth respondents.

Judgment

Horn AJ: The applicant and the first respondent are estate agents, and both are members of the Auctioneers', Estate Agents' and Valuers' Institute of Zimbabwe. A dispute arose between them as to who is entitled to commission on the sale of a property (or, more correctly, the sale of shares in a accompany owning a property), and this dispute was submitted by them to be resolved by an arbitrator in terms of the Arbitration Regulations (by which both were contractually bound) framed in terms of the Constitution of the Institute. The arbitrator, who is cited as the second respondent, in due course made his award, in terms of which he ordered that the applicant and the first respondent should share equally the commission due on the sale of the property in question.

Being dissatisfied with that award, the applicant, in terms of section 32 of the Arbitration Regulations of the Institute, appealed against the decision of the arbitrator to the Appeal Committee of the Institute, but the Appeal Committee, the members of which were the third, fourth and fifth respondents, upheld the decision of the arbitrator and dismissed the appeal. The decision was notified to the applicant by letter dated the 21st August, 1980.

Mr *de Bourbon*, for the applicant, now seeks an order that the decision of the third, fourth and fifth respondents, in their capacities as members of the Appeal Committee, dismissing the appeal of the applicant, be set aside and for an order that the costs of this application be paid by those

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three respondents. Although the draft order filed with he notice of motion also sought an order that the applicant is entitled to the whole of the commission on the sale of the property and that the costs of the arbitration and the appeal therefrom (to the Appeal Committee) be paid by the first respondent, Mr *de Bourbon* made clear at the outset that he was persisting only with the application to set aside the decision of the Appeal Committee and for an order that the costs of this application be paid by those three respondents.

The grounds on which, Mr *de Bourbon* relied may be summarized broadly as follows:

(a) In determining the appeal the members of the Appeal Committee disregarded their own rules and, in so doing, were in breach of the fundamental principles of natural justice, and the applicant has been prejudiced thereby.

(b) The members of the Appeal Committee also failed to observe the fundamental principles of natural justice by applying their own personal knowledge of a usage which they considered to be of general application in the profession as to the interpretation of section 6 (i) of the Code of Ethics of members of the Institute, without advising the applicant of this knowledge and without giving him the opportunity of meeting it, and the applicant has been prejudiced by this. Furthermore, Mr *de Bourbon* submitted that the members of the Appeal Committee were not in any event entitled to rely on their own personal knowledge, and the reliance by them on their own personal knowledge also constituted a breach of the fundamental principles of natural justice which prejudiced the applicant.

(c) The finding of the Appeal Committee was in any event grossly unreasonable, being based on an interpretation of section 6 (i) of the Code of Ethics, which interpretation was itself grossly unreasonable. In addition, the finding of the Appeal Committee that the acts of the applicant were hit by section 6 (i) was said to be grossly unreasonable.

As to the first ground raised by Mr *de Bourbon*, he pointed out that section 32 of the Arbitration Regulations reads as follows:

"32. (a) part dissatisfied with the award of the arbitrator may appeal within 14 day of the date of the award to an Appeal Committee which

shall consists of the Chairman of the Board of the Province of the Institute in the area in which the appellant practices and two other senior Fellows of the Institute selected by the said Chairman.

In the event of the Chairman of the Provincial Branch being unable to act Chairman of an Appeal Committee for any reason whatsoever, the Vice-Chairman or the Immediate Past Chairman of the relevant Provincial Board shall act as Chairman of the Appeal Committee together two senior Fellows of the Institute selected by the said Vice-Chairman or Immediate Past Chairman.

(b) The Appeal Committee shall determine the dispute afresh and shall have all the powers of the arbitrator in the first instance. Its decision shall be final."

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The powers of the "arbitrator in the first instance" are set out in detail in the Arbitration Regulations, which provide, *inter alia*, that the arbitrator may determine the nature of the dispute between the parties; that he may permit legal representation of the parties; that he is to hear the parties to the dispute in the presence of each other, and that unless otherwise agreed by the parties, witnesses are to be examined on oath. Mr *de Bourbon* submitted that section 32 envisages that when an appeal is lodged by a person dissatisfied with the award of the arbitrator, them will be a complete rehearing of the matter *de novo* before the Appeal Committee.

Mr *de Bourbon* further pointed out that far from the Appeal Committee hearing the matter *de novo*, what happened in fact was as follows. The applicant submitted his notice of appeal to the Institute on the 23rd June, 1980, some three days after the arbitration. On the 15th July, 1980, the applicant addressed a further letter to the Institute in these terms:

> "I refer to your letter of the 2nd July, 1980, advising of the Tribunal *which will sit to hear the appeal.*
>
> As a matter of courtesy, I wish to advise that I intend to be legally represented at the appeal. In the circumstances I shall be grateful if you will give me as much notice as possible of the *date of the hearing of the appeal* in order that I may have sufficient time to brief my legal representative.
>
> Thank you for your co-operation." (My italics.)

In fact the Appeal Committee did not sit to "determine the dispute afresh", thus precluding the applicant from appearing before it whether in person or through his legal representative. This precluded him from making submissions to it as to the correct interpretation of section 6 (i) of the Code of Ethics and as to whether on any interpretation of the

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section this activities fell within the ambit of the section. In addition he was precluded from leading further evidence as to whether in fact he was in breach of the section if his activities were hit by the section.

These facts were not really in dispute. It appears from the affidavit of Mr Mande, the third respondent, who was authorized by the fourth and fifth respondents to make the affidavit on their behalf as well, that Mr Mande considered that "as the bulk of the facts were common cause, no purpose would be achieved by the hearing of the matter" and that he therefore circulated the file of papers (of the arbitrator) to the other two members of the Appeal Committee for their views. Included in the file of the arbitrator were "all the papers on which the second respondent had based his decision . . . together with second respondent's Ages". I should say from the arbitrator's notes, which take the form of brief reasons for Judgment, it is clear that he based his decision on a certain interpretation of section 6 (i) of the Code of Ethics fend that his interpretation was unfavourable to and contrary to the contentions of the applicant and of the applicant's legal advisers. Having interpreted the section as he did, he further found that the activities of the applicant were hit by the section, and, on the facts, that the applicant had acted in breach of the section. Mr Mande went on to say:

> "There were no other papers in the file which were relevant to the issues, neither were there any allegations

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against the applicant to which he had not been given the opportunity to respond.

"I accept that neither the applicant nor the first respondent was given an opportunity to appear before the Appeal Committee, but I do not believe that this resulted in a failure of justice in the circumstances. The members of the Appeal Committee considered and paid due regard to the contend of the file and all reached the conclusion that the arbitrator's award should be upheld and that his interpretation of the relevant section was correct, this being the generally accepted one."

It is the remarks of Mr Mande at the end of the passage of his affidavit quoted above which give rise to the second broad submission made by Mr *de Bourbon.* In support of his second broad submission he referred me to the case of *Lipron v SA Medical & Dental Council,* 1948 (4) SA 656 (T)*; Sullivan v Wheat Industry Control Board,* 1946 TPD 194 at 206-7, and *Loxton v Kenhardt Liquor Licensing Board,* 1942 AD 275 at 315. In the last-mentioned case, FEETHAM JA, said at 315:

"Where an administrative authority entrusted with quasi judicial functions holds an enquiry on a question submitted for its decision, and the party whose rights or claims are the subject of such enquiry is entitled to a hearing,

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it is one of the requisites of a fair hearing that, if the authority avails itself of its own. knowledge, in regard to particular facts relevant to the question submitted to it, or of information in regard to such facts independently obtained from outside sources, it should give the party concerned notice of any points, derived from such knowledge or information, which may be taken into account against him, so as to give him an opportunity of meeting such points."

Mr *de Bourbon* submitted that this principle applied at least with equal force to the proceedings of a private tribunal established by agreement between the parties to resolve disputes between them, which, of course, is the situation in this case.

Mr *Jagger*, who appeared for the third, fourth and fifth respondents, sought to meet; these points, firstly, by submitting that on a proper interpretation of section 32 (b) of the Arbitration Regulations a complete re-hearing of the dispute is not mandatory. He submitted that this provision simply gave the Appeal Committee the power to hear further evidence and argument if it considered this was necessary in order properly to determine the appeal. He submitted further that even if section 32 of) did envisage a hearing *de novo,* the failure of the Appeal Committee to have a fresh hearing had not prejudiced the applicant. In this regard he submitted that the facts were largely common cause and that the dispute really turned on the proper interpretation of section 6 (i) of the Code of Ethics. He pointed out that the applicant, in terms of the Arbitration Regulations, had no right to be legally represented at the appeal even though there is provision for the Appeal Committee to permit legal representation in an appropriate case and that, as pointed out by Mr Mande, the members of the Appeal Committee had before them the same material as had been placed before the arbitrator, including the submission of the applicant and of the applicant's legal representatives as to the proper interpretation and applicability of section 6 (i) of the Code of Ethics, so that no question arose of the applicant not having been heard at the appeal or not having had an opportunity to put his submissions to the Appeal Committee.

As to whether the Appeal Committee had improperly used its own knowledge of the generally

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accepted interpretation of section 6 (i) in confirming the decision of the arbitrator, Mr *Jagger* submitted that section 27 of the Arbitration Regulations clearly empowered the members of the Appeal Committee to use their own knowledge and for the reasons already stated as to why the failure of the Appeal Com-

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mittee to have a fresh hearing had not resulted in any prejudice to the applicant, there had similarly been no prejudice to the applicant by the failure of the Appeal Committee to advise the applicant of their knowledge and giving him the opportunity of meeting it.

In *Jockey Club of South Africa & Ors v Feldman,* 1942 AD 340, it was held that if an irregularity in the proceedings of a private tribunal created by agreement is calculated to prejudice a party, that party is entitled to have the proceedings set aside unless the court is satisfied that the irregularity did not prejudice him. I consider that this approach is the correct one to adopt in this case, and since, in my view, the matter can be determined on the first and second broad submissions made by Mr *de Bourbon*, I do, not propose to deal with the third main submission save to say that I doubt that it can be said that the interpretation of section 6 (i) of the code can be said to have been grossly unreasonable.

The first question which thus has to be determined is whether or not the failure of the Appeal Committee to hear and adjudicate upon the dispute between the applicant and the first respondent de not constituted an irregularity. Having regard to the finality of the decision of the Appeal Committee as between the parties; the limited power of this court to interfere with such a decision (as to which see *Jockey Club of South Africa & Ors v Feldman* (*supra*)); the powers conferred upon the Appeal Committee by section 32 (b) of the Arbitration Regulations and the fact that disputes submitted by members of the Institute in terms of the regulations can obviously have far-reaching financial consequences for the parties, I am in no doubt that section 32 envisages a complete re-hearing by the Appeal Committee composed as provided for in that section. This being the case, the manner in which the appeal of the applicant was dealt with by the Appeal Committee clearly constituted an irregularity which *prima facie* prejudiced the applicant and accordingly, unless I am satisfied that the irregularity did not in fact prejudice the applicant, the decision of the Appeal Committee falls to be set aside.

As to the failure of the Appeal Committee to advise the applicant of its personal knowledge so as to give him an opportunity of meeting this point, I am also in no doubt that this failure constituted a breach of the principles of natural justice, even assuming, as I do, that section 27 of the Arbitration Regulations gave the Appeal Committee the right

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to use its own knowledge. *Prima facie*, this breach also constituted an irregularity which prejudiced the applicant and, accordingly, unless I am satisfied that the irregularity not in fact prejudice the applicant, the decision of the Appeal Committee falls to be set aside on this

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ground as well.

The question now arises whether I can be satisfied on the papers that these irregularities did not prejudice the applicant. In this regard I make the following observations. I do not know whether or not the Appeal Committee, had it heard the matter *de nova*, would have permitted legal representation. I do not know what further submissions may have been made on the interpretation of section 6 (i) of the Code of Ethics or as to its applicability to the activities of the applicant. I do not know what further evidence either of the parties may have led to resolve the disputes of fact which were ventilated before the arbitrator and which were relevant to the issues. One cannot simply assume, as the Appeal Committee appears to have done, that there was no more which could usefully have been said on the part of the applicant or the first respondent on these matters. Nor can one assume that the applicant could not have persuaded the Appeal Committee that it was in error in its view as to the generally accepted interpretation of section 6 (i) of the Code of Ethics. I mention in passing that even if the view of the Appeal Committee as to the interpretation of section 6 (i) is correct, it appears at least to be arguable that the activities of the applicant did not fall within that section at all. In the result I am not satisfied that one or other or both of the irregularities did not prejudice the applicant and it follows that the decision of the Appeal Committee must be set aside.

On the question of costs, it was submitted by Mr *de Bourbon* that as between the applicant and the third, fourth and fifth respondents, there is no reason why the costs should not follow the result. Mr *Jagger* pointed out, however, that these respondents are members of a professional body who, out of a sense of duty, undertook the task they did. No question arises of their having been *mala fide*. Mr *Jagger* posed the question whether professional men who honestly but wrongly make an error in procedure in these circumstances should be mulcted in costs. The point is also made in Mr Mande's affidavit that if the applicant had objected to the procedure adopted by the Appeal Committee, he (Mr Mande) would have taken legal advice and, if so advised, would have arranged for a new Appeal Committee to be appointed to hear the matter afresh.

HORN AJ

It seems to me that these points overlook the fact that the third, fourth and fifth respondents in fact opposed the application. Furthermore, it seems problematical in these circumstances whether the third respondent, even if he had had the power to do so, would have arranged a re-hearing of the appeal. In addition, there is no question of the third, fourth and fifth respondents having acted merely in their professional and personal capacities. They acted on behalf of a body which insists that its members abide by its rules. If the three respondents acting on behalf of that body err, and the error is rectified by this court in spite of their opposition, I can see no reason why costs should not follow the result.

[Editor(1).]

Gill, Godlonton & Gerrans, attorneys for the applicant.

Kantor & Immerman, attorneys for the first respondent.

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Atherstone & Cook, attorneys for the third, fourth and fifth respondents.

THE STATE v CHAKANETSA 1981 ZLR 48

Court **Appellate Division, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Goldin, AJA

4th February, 1981

Flynote

Criminal procedure - agreed facts on which plea of guilty is based - duty of prosecutor not to accept wrong, improbable or absurd facts in order to complete case quickly.

Headnote

Prosecutors should not agree to accept incorrect, improbable or absurd assertions made by accused persons merely in order to complete cases quickly on the basis of pleas of guilty.

Case cited:

S v Chiromo, AD 143/1976 (unreported).

P Sullivan for the appellant.

B J Turner for the respondent.

Judgment

Lewis JP.: The appellant in this case was convicted in the magistrates court at Shabani of the wrongful and unlawful possession of seven rough uncut emeralds, in contravention of section 3 (1) as read with 3 (2) of the Precious Stones Trade Act, 1978. He was sentenced to 12 months' imprisonment with labour, three months of which were suspended for five years on certain conditions. It was ordered that the emeralds be forfeited to the State.

The appellant pleaded guilty to the charge and he is appealing to this court against sentence only. On his plea of guilty the case proceeded on the basis of a statement of agreed facts. The statement of agreed facts in eject incorporated a statement made by the appellant himself: it was in the first person:

> "On the 9th day of September, 1980, I proceeded to Belingwe with my girl friend by the name of Rosemary Petros. As we slept somewhere in the TTL in the morning of 10th September, 1980, we went to a place called

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> Zengeza where they sold meat and clothes including beer. Then I went to the toilets in the bush where I saw a small paper under a big stone. I pushed the stone and collected it. Then I saw some emeralds in it. As I saw them I called my girl friend so that we can come back. The time I arrived at Mwenezi River I instructed my girl friend to keep them for safekeeping. On the way I took three passengers, as at first I promised my girl friend that I will take my emeralds I did take because I was fearing of these passengers that is why she was arrested in possession of these emeralds."

The appellant and his girl friend apparently went to Belingwe from Salisbury where the appellant is self-employed as a welder.

It is quite clear that the explanation by the appellant for his possession of these emeralds is patently absurd, and it is a matter of some astonishment to me that the prosecutor was prepared to accept that as an agreed statement of fact. It will be seen from what I have read out that no explanation was offered as to why they went to Belingwe. Belingwe is not noted for its tourist attractions. The principal activity which is carried on in Belingwe is the production of emeralds. Since no reason was given by the appellant for his visit to Belingwe from Salisbury with his girl friend, the prosecutor might have been expected to entertain at least a suspicion that he had gone there for the purpose of acquiring emeralds. The magistrate said that the incidence of illegal trafficking in emeralds in the area had doubled in the last 12 months. Apart from that, however, the story itself is inherently improbable. Just happening to go to relieve himself in the bush, he saw partly concealed under a stone this packet which contained the emeralds in question. It is not as though it had been inadvertently dropped by its owner, because then it would not have been partly concealed under the stone, it is not as though it had been deliberately concealed there by the owner with the object of coming back again to fetch it, otherwise the owner would have made a better job of concealing it and would have hidden it completely under the stone. The whole story, as I have said, is patently absurd. The appellant may consider himself fortunate that the prosecutor was prepared to accept a story of this nature, either "because he was extremely naive or because he wanted a plea of guilty in order to get it of the case quickly. It seems to me it is appropriate at this stage to emphasize once again what was said by BEADLE ACJ (as he was then), in the case of *Peter Mutambandini Chiromo v The State, Appellate* Division Judgment No. 143/76, not reported. That was also a case where the unlawful possession of emeralds was involved, in which the prosecutor had agreed to accept facts of a highly improbable nature, which he should never have agreed to, for the purpose of a plea of guilty, but not, I might say, as patently absurd as those which the

prosecutor accepted in the instant case. Commenting on this, the learned CHIEF JUSTICE said at page 4 of cyclostyled Judgment:

> " I draw attention to these unsatisfactory features in the hope that from now on prosecutors will not, simply in the interests of expeditiously getting rid of cases, willy-nilly make admissions of fact which are not only wrong but also unjustified."

The court would be grateful if the Attorney-General would draw these remarks to the attention of

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prosecutors.

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

Baron JA: I agree.

Goldin AJA: I agree. I would only like to add that I have never been to Belingwe. It may have been considered a suitable place for the appellant to take his girl friend for the week-end. But I express no view at all on the innocent attractions or the absence of tourist appeal of Belingwe. Otherwise, I agree.

Sawyer & Mkushi, attorneys for the appellant.

THE STATE v WAKIRI 1981 ZLR 51

Court **Appellate Division, Bulawayo**

Criminal Appeal

Fieldsend, CJ, Lewis, JP, and Baron, JA

28th January and 6th February, 1981

Flynote

Suspended sentence - assessment of length of suspended" and elective portions of sentence and length of period of suspension.

Headnote

In assessing sentence, a portion of which is to be suspended, the proper approach is to look primarily at the sentence which the offence should attract and, having determined that, to consider what portion should be suspended. It is not a correct approach to decide what effective imprisonment an accused person should undergo and then to add a suspended sentence with a view to dissuading him from further crime.

A sentence should not automatically be suspended for the maximum period of five years: while a long period of suspension may be appropriate after a comparatively short term of imprisonment, after a long term of imprisonment a comparatively short period of suspension is required to induce the offender to settle down to a useful life.

Cases Cited:

S v Plaatjies, 1976 (1) SA 266 (C);

R v Zindoga, 1980 ZLR 86 (AD);

S v Nabote, 1978 (1) SA 648 (O);

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S v Nkokoto and Ors 1978 (2) SA 534 (O);

S v van Rensburg, 1978 (4) SA 481 (T);

R v John, 1968 (2) RLR 28 (AD); 1968 (3) SA 141 (RAD).

Appellant in person.

J H C Friedman, for the respondent, cited the following cases: *S v Nyathi,* AD 158/1979; *S v Orr*, AD 41/1976; *S v Quintiao and Anor*., AD 145/1977*, S v Swart*, AD 71/1977; *S v Venter*, AD 224/1976; *S v Moura*, AD 112/1974, *R v Haddon*, AD 210/1966; *S v Kachanbwa*, AD 39/1979; *S v Masike*, AD 92/1971, *S v Myers,* AD 4/1977 (all unreported).

FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant was convicted of 139 counts of fraud committed over the period 25th January, 1980, to 16th August, 1980. He was a supervisor at Raizons Wholesale and he fraudulently obtained sums of money varying from $20 to $300 by falsifying documents relating to the return of empty bottles and cases. The counts were divided into three groups: one group of 100 counts in which in conjunction with a co-accused, Dube, the appellant and Dube obtained $12 678; one group of 16 counts in which the appellant and a co-accused, Mukambirwa, obtained $2 480; and a third group of 23 counts in which he appellant alone obtained $3 070. Each group of counts was treated separately for the purpose of sentence, but within each group the separate counts were treated as one. The appellant was sentenced to five years' imprisonment on group 1, and to two years on each of groups 2 and 3, and of the nine years three years severe suspended for five years on appropriate conditions. Dube received five years with one suspended and Mukambirwa three years with half suspended. The appellant alone appealed against his sentence.

The offences were undoubtedly serious, having regard the facts that the appellant took advantage of the trust his employers placed in him, that he was concerned in 139 falsifications of the accounts on about 100 separate days over a period of seven months, that the total amount stolen was over $18 000 and that the appellant clearly led the two juniors into time. Nor is it alleged that the appellant was in any particular need; and his share of the proceeds, which must have been at least $10 600 on the assumption that he shared equally with those who were his accomplices on groups 1 and 2, seems to have been almost entirely spent.

Despite all these factors, I feel that the magistrate has not paid sufficient regard to the cumulative effect of his sentences. Nine years' imprisonment, even for a fraud of this nature, is fear out of line with the cases to which Mr *Friedman* has so helpfully referred us. I appreciate the difficulty in which the magistrate was placed in having to deal with the three groups of counts and by having to maintain a fair balance between the three accused, but he seems to have overlooked the fact that the appellant was really only guilty of one course of conduct. Looked at in that way, and despite the aggravating features to which I have referred, a sentence nine years' imprisonment is such as to induce a sense of shock. Indeed in his very fair

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argument, Mr *Friedman* did not contend that the sentence should be upheld.

It may be said that because three years of the nine have been suspended, one should look now primarily to the effective sentence to see whether that can be said to be excessive. This I do not think is the

proper approach. The proper approach is to look primarily at the sentence which the offence should attract and, having determined that, to consider what portion should be suspended, on what conditions, and how long. I do not regard it as the right approach to decide what effective imprisonment an accused should undergo and then to add a suspended sentence with a view to dissuading him front further crime. The result of this latter course might be, if the dissuasion is not effective, that an accused will have to serve a longest sentence for his offence than it really deserves because he has again fallen from grace. Care must be taken not to elevate the seriousness of the offence and impose a very heavy sentence even though a major portion of it is suspended. *S v Plaatjies,* 1976 (1) SA 266 (C), is a good illustration of this point. A 22-year-old on a second conviction for possession of dagga was sentenced to five years' imprisonment, of which four and a half years were suspended for three years. The magistrate said that he imposed a lengthy over-all sentence in order both to rehabilitate the accused and to deter others. This was reduced on review to imprisonment for 18 months with 12 suspended for reasons similar to those that I have advanced.

Taking into account all the features of the offence and the scale of sentences imposed in the past, I do not think that the appellant's conduct warranted a sentence of more than four or five years.

There is, however, an additional factor to be considered. Unfortunately the amount which was likely to be recovered from the appellant was not very fully investigated in the court below, despite the fact that the appellant was represented. Whatever the reason for his-and it might have been the appellant's deliberate choice-there did not appear to have been any substantial assets available. It emerged during the hearing of the appeal, however, that the complainant has recovered or is likely to recover about $5 000 under an acknowledgement of debt signed by the appellant for the amount taken. Had these facts been before the trial court, it would have been for consideration whether a period of the imprisonment imposed should not have been suspended on condition of repayment of a named sum. It is too late to follow that course now, but on the authority of *R v Zindoga,* 1980 ZLR 86 (AD), I think we can take into account in assessing sentence that there has been repayment of some $5 000. As was said in that case:

> "In crimes such as theft, restitution is always a mitigating factor, although its exact weight will, of course, depend upon the surrounding circumstances."

Looking at the matter in this new light, I would alter the sentence to imprisonment with labour for five years, of which two years are suspended

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for three on condition that the appellant does not within that period commit any offence of which dishonesty is an element for which he is subsequently convicted and sentenced to imprisonment without the option of a fine. I have suspended a portion of the sentence for three years and not for five for the reasons which follow.

Since the amendment which extended the permissible period of suspension from three years to five years, it is becoming virtually automatic to select the maximum period. In the Orange Free State it has been said that the maximum period of suspension should not be ordered as a matter of course, but only where the circumstances warrant it: *S v Nabote*, 1978 (1) SA 648 (O), See too *S v Nkokoto & Ors* 1978 I) SA 534(O), where a variety of cases are considered. Even if one adopts the approach of the Transvaal Provincial Division as expressed in *S v van Rensburg*, 1978 (4) SA 481 (T)-namely that fit does not require any special circumstances to warrant ordering the magnum period it is still necessary for the court in each case to give consideration to what period to choose.

In the present case, where a five-year period was chosen which would have followed release after four years' imprisonment, assuming he earned full remission (*R v John,* 1968 (2) RLR 28 (AD), 1968 (3) SA 141 (RAD)), the appellant could have been under The shadow of a further three years' imprisonment for a very long time. The main purpose of a suspended sentence is rehabilitative and while a long period of suspension is probably right for a wholly suspended sentence or after a comparatively short period of imprisonment, after a long period of imprisonment what is needed is a comparatively short period of suspension to induce the released offender to settle down to a useful life. As was said in *S v Nkokoto & Ors* (*supra*) at 537:

> "As in the case when someone leaves a stick bed when it is The first few steps on the way to recuperation which are the most difficult, a case may occur where a shorter period of suspension may be appropriate because a person has a particular weakness. A shorter period refight assist him in proving that he is capable of following the straight and narrow path and in this way to rehabilitate himself, while he might feel that it would in any event be impossible for him to cope with a long period of suspension. An appreciation that the human memory was made to forget pain and other unpleasant experiences would also not be inappropriate. The reality of alarm, disruption if and fear which are brought about by the arrest and appearance in court, and even the sentence which has actually been served fade away in the course of time which entail that the effectiveness of this experience or threat of imprisonment, tends to weaken as time goes by which even gives rise to the question as to how much of the effectiveness of a suspended sentence

> still remains during the last two or three years of a five-year period of suspension."

In the result, the appeal against sentence is allowed and there is substituted for the magistrate's sentence: imprisonment with labour for five years, of which two years are suspended for three years on the conditions I have set out.

Lewis JP: I agree.

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Baron JA: I agree.

THE STATE v FUSIRAYI 1981 ZLR 56

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

6th February, 1981

Flynote

Criminal procedure - agreed statements of facts - duty of prosecutors regarding improbable facts.

Sentence - mitigation - addiction of facts in mitigation.

Headnote

When preparing agreed statements of facts, prosecutors should not readily accept facts which are inherently improbable unless they have good reason for believing them to be true, in which event they should explain their position openly to the court.

The time-honoured practice, whereby pleas in mitigation made by legal representatives of accused persons combine a statement of heads and an appeal for clemency, is helpful to judicial officers and shortens proceedings, but-

(a) less weight may be attached to what a legal representative says regarding his client's contrition than to a personal expression of regret and repentance made by the accused person;

(b) where mitigatory facts relate to the commission of the offence and are not apparent from evidence or an agreed statement, either the accused should be called or the facts should be agreed between the accused and the prosecutor;

(c) the court should not reject evidence given by an accused in mitigation without good reason nor without indicating that it is suspicious of the evidence, especially when the prosecutor has not challenged the evidence;

(d) the court may reject even facts that have been agreed between the accused and the prosecutor, but it should be slow to do so and should make it clear to both parties the difficulty it has in accepting the truth of the facts.

Cases cited:

R v Hartley, 1966 RLR 522 (AD), 1966 (4) SA 219 (RAD);

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S v Gibbison, AD 190/1978 (unreported).

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C C Milton for the appellant.

J B Colegrave for the respondent.

Judgment

Fieldsend CJ: The appellant was convicted on his plea of guilty of the possession of gold contrary to section 3 (1) of the Gold Trade Act [*Chapter 164*] and was sentenced to 12 months' imprisonment with labour. He now appeals against his sentence. He is a licensed prospector and was convicted of the illegal possession of a button of gold weighing just over an ounce of fine gold valued at some $224.

The agreed facts, on the basis of which the appellant pleaded guilty, were that on the 2nd August, 1980, the police acting on information they had received went to his house, knocked and entered. In the words of the facts as recorded: "Accused came from bedroom, accused said he knew nothing about the inquiries. Under bed was found a gold button wrapped in foil and $500 cash."

The facts were accepted without elaboration when the elements of the offence were put to the appellant. His attorney then addressed the court in mitigation and in the course of his address asked (presumably the prosecutor) whether this was a trapping case. ACID sergeant was then called who said the police had information that the appellant had gold, but that the gold button was not CID property. Mr Pratt then stated:

> "This gold button belongs to a third party, accused does not know his name. He said he would come and collect gold on 28th August, 1980, but he did not come."

The magistrate in assessing his evidence clearly rejected the explanation of the appellant's possession as proffered by his attorney.

At the hearing of the appeal, we were told in regard to the explanation proffered in mitigation that the prosecutor in the court below "accepted the accused's contention in the sense that he had no evidence to disprove the same and felt it had little, if any, mitigatory value". Mr *Colegrave* for the State conceded that the appellant and his attorney were led to believe that the prosecution did not dispute the contention advanced and that in the circumstances the magistrate had erred in sentencing the appellant on the basis that his explanation was untrue and that this was at large to sentence the appellant on the basis that his explanation should not have been rejected. We accordingly reduced the appellant's sentence to imprisonment with labour for nine months of which five months were suspended for five years on condition that he did not commit any offence under the Gold Trade Act for which he was sentenced to imprisonment without the option of a fine.

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FIELDSEND CJ

In view of the number of cases that are coming before us in which either most improbable facts are agreed by the prosecution, or improbable statements made in mitigation, particularly by legal representatives of convicted persons, we feel it is necessary to restate the procedure that should be followed.

The inter-relationship between the prosecution and the court is a very important one. Both are concerned with the impartial administration of justice. There is a danger of at least a suspicion of favouritism if prosecutors agree with the defence an improbable version of the facts which greatly mitigates what might otherwise be a serious offence; and like Caesar's wife, the prosecution must be above any trace of suspicion. It is not enough that the prosecutor has no evidence to refute an improbable version put forward by the defence: unless he has evidence or information on which he believes that that version may well be true-in which case he should explain his position openly to the court-he should not just accept the defence story. It is always open to him to lead his evidence of what occurred and leave it to the court to draw the proper inferences, in the light of what the amused may or may not say, and if the accused does give an improbable version in evidence he always has the weapon of cross-examination. I do not want to be understood to be saying that there is necessarily anything wrong in an agreed statement of facts. That procedure is essential in the normal run of cases to the smooth and speedy operation of the court's business. All I am saying is that prosecutors should not readily agree to accept facts which are inherently improbable, unless they have good reason for believing that they are in fact the truth.

In regard to pleas in mitigation which include facts relating both to the offence itself and to the personal circumstances of the accused, the position is somewhat different. As BEADLE CJ, said in *R v Hartley,* 1966 RLR 522 (AD), it is a time-honoured practice not only in this country, but in many others as well, for a plea in mitigation to be a combination of a statement of facts and an appeal for clemency rolled into one which would lose a good deal of its force if it were to be swiftly divided into a statement of facts and argument. There is much to be said for this practice which shortens the proceedings and is helpful to judicial officers. In some cases, however, the judicial officer may be in a difficulty-as he was in *Hartley's* case (*supra*) and as he was in this case - where a highly improbable statement of fact is made in mitigation relating in particular to the circumstances of the offence, which he is unwilling to accept. In *Hartley's* case (*supra*), He fact was that the accused did not realize that the cyclist he had knocked down at night

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was seriously injured when he left him lying by the side of the road; the present case it was that the gold button in question had been left with the appellant by an unknown person in unspecified circumstances for collection in about three weeks' time. In each case, the magistrate with ample justification was very suspicious of the truth of the allegation, but in neither case did he indicate his suspicions to the accused or his attorney before rejecting the allegations, and in neither case did the prosecution indicate that it did not accept them. MR JUSTICE DAVIES in *Gibbison v The State*, Appellant Division Judgment No. 190/78 (not

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reported), dealt with a similar situation in these terms:

> " . . . the appellant pleaded guilty and mitigating circumstances were then set out by her attorney in an address to the court. The appellant did not give evidence and was not questioned by the prosecutor or by the court. This court has had occasion in the past to comment on the undesirability of this procedure. Where important matters of mitigation are relied upon by an accused person, it is in general most undesirable that those matters should be placed before the court in the form of an address from an attorney, particularly when, as happened in this case, there is no real clarity in some of the matters referred to by her attorney as being matters of mitigation. It is not in all cases possible to decide whether he is dealing with submissions on mitigation or whether he is referring to facts general in a case of this nature the desirable course is for the accused to be called. This particularly applies where there is any possibility of her contrition being questioned or where there is any possibility for her explanation for her conduct being open to question. If she it not called by her attorney or if she does not give evidence on her own accord, then the prosecutor should not readily accept facts which are not clear beyond question. He should certainly not accept as proved matters about which there must inevitably be a degree of speculation. Again, if the prosecutor does not question the accused in such circumstances, it is open to the court to question the accused. Certainly the court should not meekly accept facts stated by a legal representative, particularly if the court has reason to have some doubt as to the matters stated. It is unfortunate that that course was not adopted in this case."

As a general statement of the principles applicable, I am in agreement with this passage, but I do not think it should be taken literally in every case. There are many occasions where it would be a waste of time for an accused to be called to deal with his personal circumstances in evidence before any reliance could be placed upon them in mitigation; and it is always a matter for the Judgment of a legal representative whether to call his client to express contrition. He must weigh the advantages and disadvantages, but in the absence of his client's personal expression of regret and repentance he cannot expect the same weight to be attached to what he says on his behalf. But where the mitigatory facts relate to the commission of the offence and are not apparent from the evidence

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or any agreed statement, either the accused should be called to give evidence or the facts should be agreed between the accused and the prosecution. If accused gives evidence and is not cross-examined by the prosecution, he may still be questioned by the court, but the court should not reject the evidence without good reason, and certainly not without some indication that it is suspicious of it. If the accused does not give evidence because the prosecution has agreed the facts with the defence, it is still open to the court to reject the facts agreed, but it should be slow to do so except in obvious cases and in any event should make clear to both parties the difficulty it has in accepting the agreed facts. This will give the accused the opportunity of giving evidence to establish any disputed facts relied upon. As BEADLE CJ, said in *Hartley's* case (*supra*) at page 526A:

> "The practice is, as I say, to allow the accused's legal representative to outline the facts, and to allow the prosecutor, if he is so advised, to accept those facts; and it seems to me that, if a court is not going to accept these facts, as outlined, it is the duty of the court to inform the parties of that fact before it pronounces its sentence; otherwise, the defence is lulled into a false sense of security in believing that the facts which have been put before the court are acceptable to the court. If the court feels that it cannot accept any particular facts which are placed before it, the accused, or his legal representative, should be informed of this, and, in these circumstances, the accused must decide whether he wishes to lead evidence to establish this fact or not. To reject

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the fact without informing the accused is, I think, unfair to the accused."

I hope that what I have said in this Judgment will become widely known to prosecutors and magistrates, especially to those who are comparatively new to their duties.

My brother LEWIS, who did not sit in this case, has read this Judgment and is in agreement with the general principles expressed in it.

Baron JA: I agree.

Goldin AJA: I agree.

E C Moffitt & Pratt, attorneys for the appellant.

THE STATE v USAYI AND OTHERS 1981 ZLR 61

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Lewis, JP, and Baron, JA

30th January and 10th February, 1981

Flynote

Public violence - elements of - private dispute between families involving invasion of property - when amounts to public violence.

Headnote

In the course of a dispute over land between two neighbouring clans, a crowd of about twelve members of one clan, among whom were the appellants, armed themselves with axes, spears and sticks and invaded the lands of the other clan, assaulting one person, ploughing up crops, demolish dog fences and causing damage worth about one hundred dollars. They were convicted for public violence.

Held that though the appellants' conduct involved a private family dispute and was confined to private property, it was sufficiently open and large-scale, and its consequences were potentially sufficiently serious, to justify their conviction for public violence (*R v Cele and Ors* 1958 (1) SA 144 CN), followed).

Cases cited:

R v Salie and Ors 1938 TPD 136;

R v Cele and Ors (*supra*).

M J Gillespie, for the appellants, cited Hunt, *South African Criminal Law and Procedure*, volume

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2, pages 80ff, and *Clarke & Aver. v R* 1961 R & N 652, in addition to the cases cited in the Judgment.

J B Colegrave, for the respondent, cited *Clark & Anor v R* (*supra*); *R v Tshayitsheni and Ors* 1918 TPD 23; *R v Salot and Ors* 1955 (1) PH H35, *S v Muyambo and Anor* 1981 (1) SA 385 (ZAD), *S v Gwanyanigwanya and Ors* AD 182/1978, and *S v Mushonga*, 1975 (1) SA 247 (RAD), in addition to the cases cited in the Judgment.

Judgment

Fieldsend CJ: The five appellants and a co-accused charged with them were convicted of public violence. Each of the first four

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appellants was sentenced to 18 months' imprisonment and the fifth to 15 months' imprisonment of which nine months were suspended in each case on appropriate conditions. They now appeal against both conviction and sentence.

The first issue is whether, assuming that the alleged events occurred and that they amounted to public violence, the appellants were shown to have taken part, despite their denials on oath. The appellants were all identified by three prosecution witnesses as participants in the events of the afternoon and with the exception of appellant No. 5 were found in custody by the police constable who arrived on the scene with members of the National Army. The magistrate expressed some reservation about the quality of these three witnesses, but it seems to have been mainly related to their tendency to exaggerate and their emotional retorts to questions in cross-examination. The appellants' defence was in effect an alibi, No. 5 in particular saying in erect that he did not return from Salisbury until after the trouble had occurred. His evidence is refuted by the headman, Nyamuzuwe, who speaks of him being present in the area that morning. Despite his view of the quality of the three prosecution witnesses, the magistrate, having weighed their evident against that of the appellants and having considered the probabilities and the evidence of the police constable and the headman, reached the conclusion that he could accept their evidence implicating the appellants and could reject the appellants' evidence. There is no basis upon which we can interfere with that conclusion.

Mr *Gillespie's* main contention was that the evidence did not establish the offence of public violence. This contention certainly is not without substance and requires careful consideration.

The facts are as follows. There was a dispute of some standing between the Usayi family and their neighbours the Masangos concerning the boundaries of their adjacent lands. On the morning of the 29th October, 1980, Samuel Nyamazuwe presided over a discussion about these boundaries and ruled that the exiling boundaries settled by Chief Nyamuzuwe should remain. All five appellants and others were present at this discussion and they expressed their dissatisfaction, No. 3 in particular saying they would plough up the Masango's land and get weapons. That afternoon a group of about 12 of the Usayi family including the five appellants entered the Masango's land. A number of them were armed with axes, spears and sticks. No. 4 and two others who were not charged brought with them an ox-drawn plough with which they

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ploughed up an area of cucumbers and rape. Others demolished some of the fences and set fire to some of the fencing material and other grass. Those carrying

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sticks, axes or spears made common cause with what was being done and were ready to assault anyone who interfered; indeed No. 3 did assault one who was there on the arm, leg and head, fortunately not seriously. From the rather cryptic notes of evidence made by the magistrate, it is a little difficult to follow exactly how the trouble came to an end. A report was made to the police and a constable arrived with some details from the National Army. He saw smoke rising from the gardens and heard people shouting and screaming. He saw people running away and others shouting: "Come, they flee." Having jumped into the gardens he found people alleged to be the trouble-makers who had been arrested by the locals and a pile of weapons. In all, he said there were about 50 people gathered.

Relying particularly on such cases as *R v Salie and Others,* 1938 TPD 136, and *R v Cele and Others,* 1958 (1) SA 144 (N), Mr *Gillespie* argued that it was not public violence that was disclosed but malicious injury to property and/or assault. He relied particularly on the following factors: the present offence was committed-

(a) by a maximum of 11 persons (later he conceded 12 persons);

(b) on the private property of a party to the dispute;

(c) in the course of a territorial wrangle restricted to the appellants and complainants,

(d) over a short period of time,

(e) in circumstances which caused no great private harm and no real threat to public peace and security.

He submitted, relying on *R v Salie and Others* (*supra*), that "the high sounding language of the summons appears to exaggerate the importance of the occasion and the intention of the parties engaged in it" and he contended that this was one of those cases such as was contemplated by MILNE, J, in *R v Cele and Others* (*supra*) when he said that "if the numbers involved are small and the locality and nature of the quarrel is private and restricted the acts will not constitute public violence".

Mr *Colegrave* for the State submitted that the proper approach was to look at all the facts-that there was an open invasion of the lands of the neighbours; a burning of at least one fence and the destruction of another; the intimidation of the lawful occupants by some 12 people, most of whom were armed, an assault, a ploughing up of crops; and that, as was likely, retaliation was provoked by about 50 people. The overall dimensions of the particular incident were, he said, sufficient to constitute public violence.

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R v Cele and Others (*supra*) seems to me to set out authoritatively and with admirable clarity the features to which the court must have regard in considering whether what was done amounts to public violence.

This is summarized in the head-note, which reads as follows:

> "In considering what constitutes public violence the court must have regard to the following: (1) The acts complained of need not occur in a public place. (2) The crime is committed when a considerable body of persons, armed with sticks and stones, act in concert, though not necessarily with premeditation, so as forcibly (a) to disturb the public peace or security or (b) to invade the rights of others-obstructing the police in the performance of their duty is a case of invasion of rights in this sense. (3) If the numbers involved are small and the locality and the nature of the quarrel is private and restricted the acts will not constitute public violence. (4) Conversely acts which, if committed by individuals, might be regarded as mere assaults, whether venial or otherwise, will, if they assume gravely dangerous proportions because of the numbers involved, take on the quality of public violence . . . (6) In view of the "elastic nature" of the crime of public violence and the fact that, by dealing with the accused as a mass, their relative degrees of guilt, if any, may be obscured, none should be found guilty of the crime merely because some acts of violence have been committed by some members of the crowd, unless it is shown that he was a party to those acts."

R v Salie and Others (*supra*) is clearly distinguishable. That was a dispute over the ownership of some cattle. Two people set off armed with knobkerries to recover what had been taken and a fight developed involving about four or five people in which one person was killed and others slightly injured. Although said to be a borderline case, that was held not to amount to public violence. This case is very much more of a public nature. It is true it involved a private family dispute and the trouble was confined to private property, but the families were large - more like clans - and the violence occurred very much in the open and on some scale. It was likely and must have been known to have been likely to cause retaliation from the other clan, with quite possibly serious consequences, even though it might not have disturbed other members of the public. The action was premeditate, the appellants were armed and they openly and publicly invaded the property and the rights of of others. All in all, their conduct is sufficiently far over the somewhat indistinct borderline to constitute public violence. Applying what I respectfully consider to be the appropriate criteria so clearly enunciated in *R v Cele and Others* (*supra*) I am satisfied that the appellants were correctly charged and convicted of public violence, and the appeal against conviction must be dismissed.

FIELDSEND CJ

In view of the fact that all along the prosecution evidence was that the appellants acted with a common purpose and that this was not a case where it was necessary to establish exactly which appellant did what, it would not have been inappropriate to have charged them with malicious injury to property - indeed. I think it might have been more appropriate - but I do not think that it would have made any difference to the punishment that they would have received.

This is a serious case of a deliberate flouting of legitimate authority, and, as the magistrate has said, the area in which it occurred was suffering from a general breakdown in law and order. The conduct called for a deterrent sentence for the benefit of the people as a whole, although it

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is unfortunate that hitherto blameless persons, two of whom are over 50, have to be sent to prison.

Damage amounting to some $100 was done to the Masango's property and in the hope of remedying that, the only alteration I would make to the sentence - and Mr *Colegrave* did not oppose this course - would be to suspend an additional three months of each sentence on condition that a total of $100 is paid within one month of the date of this Judgment to Canaan Mtota Jacob on behalf of those whose property was damaged. Payment on behalf of any one appellant will count as payment by all.

Finally, I Should like to express our appreciation of the helpful way each counsel argued his case.

Lewis JP: I agree.

Baron JA: I agree.

Condy, Chadwick & Elliott, attorneys for the appellants.

ATTORNEY-GENERAL v MOYO 1981 ZLR 66

Court **Appellate Division, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Goldin, AJA

10th February, 1981

Flynote

Appeal against sentence by Attorney-General in terms of section 70 of Magistrates Court Act [Chapter 18]-powers of Appellate Division if it considers sentence was inadequate.

Headnote

The Appellate Division cannot, in terms of section 70 of the Magistrates Court Act [*Chapter 18*], allow an appeal against sentence by the Attorney-General without substituting the sentence which it thinks the trial court should have imposed, notwithstanding that events since the trial have rendered the substitution of such a sentence inappropriate.

Cases cited:

Attorney-General v Mushonga, 1974 (2) RLR 96 (AD); 1975 (1) SA 247 (RAD);

Attorney-General v Moyo, AD 64/1979 (unreported).

J B Colegrave for the appellant.

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M J Gillespie for the respondent.

Judgment

Lewis JP: The respondent in this case was convicted in the magistrates court of wrongfully and unlawfully cultivating 24 dagga plants, in contravention of section 6 (1) of the Dangerous Drugs Regulations contained in Rhodesia Government Notice 1111 of 1975, as read with section 6 (a) and section 19 (1) (a) of the Dangerous Drugs Act [*Chapter 319*]. He was a first offender. He was sentenced to 10 months' imprisonment with labour, six months of which were suspended for five years conditionally. He thus received an elective sentence of only four months' imprisonment with labour. This matter came before GUBBAY J, on review in the General Division, who commented on the extreme leniency of the sentence and suggested that the Attorney-General might see fit to appeal against the leniency of the sentence. This the Attorney-General duly did.

LEWIS JP

The matter now comes before us today. The conviction and sentence occurred on the 6th October last. With remission of sentence, the respondent was released from prison on the 24th December, and he has been at liberty since then. Although there can be no doubt that the sentence is manifestly too lenient for the cultivation of 24 dagga plants, by comparison with sentences approved by this court in numerous other similar cases, it would be unconscionable at this stage to allow the appeal, increase the period of imprisonment, issue a warrant for the re-arrest of the respondent and oblige him to serve a further term of imprisonment in addition to that which he has already served. Compare *Attorney-General v Mushonga,* 1974 (2) RLR 96 (AD),*(2)where a similar situation arose. The appellant in that case had received a sentence for public violence which was far too lenient, but he had already served his sentence and had been released by the time the Attorney-General's appeal came before the court.

The question then arises as to what course should be adopted in these circumstances. In *Mushonga*'s case (*supra*) and in a number of other cases which have come before this court such as *Attorney-General v Moyo*, Appellate Division Judgment No. 64/79 (not reported), this court agreed that the sentence appealed against was manifestly too lenient and expressed a view as to what the appropriate sentence should have been, but without imposing that sentence.

In *Mushonga*'s case (*supra*) this court allowed the appeal and increased the over-all sentence, but not the effective sentence. In that case the appellant had been sentenced by the magistrate to six months' imprisonment with labour, with half of that suspended, and the effective sentence of three months had already been served. This court expressed the view that a proper sentence was 24 months' imprisonment with half of that suspended, but because the respondent had already served his sentence and had been released from prison, it was ordered that 21 months of the 24 months' imprisonment be suspended, so that the effective period of imprisonment would not exceed the period already served by him.

In the case of the *Attorney-General v Moyo* (*supra*), the respondent had been sentenced to a

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fine of $20 and, in addition, to three months' imprisonment totally suspended for the offence of growing seven dagga plants. When the appeal was heard, counsel for the Attorney-General informed the court that he was not asking for the sentence to be

LEWIS JP

increased, but requested that the court should declare what the appropriate sentence should have been. The court agreed that the sentence was manifestly inadequate and expressed the view that the magistrate's sentence should have been about 15 months' imprisonment with about seven months of that sentence conditionally suspended. Because of the lapse of time, however, since conviction and sentence by the trial court, that sentence would not be substituted.

Unfortunately, when those cases were decided the strict terms of section 70 (2) of the Magistrates court act [*Chapter 18*] dealing with appeals by the Attorney-General against sentence were overlooked. This reads as follows:

> "(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 there-of as it thinks ought to have been passed."

This subsection is imperative in its terms and does not permit the court to allow an appeal by the Attorney-General without substituting the sentence which the magistrate should have imposed, notwithstanding that the circumstances prevailing at the time of the appeal render the substitution of such a sentence inappropriate. Furthermore, the law makes no provision for a declaratory Judgment by this court as to what sentence should have been imposed by the trial court but without any alteration of the magistrate's sentence. The only occasion upon which this court can give a ruling for the future guidance of magistrates at the instance of the Attorney-General is on a point of law under section 69 of the Act, which contains the proviso that the ruling of this court on the point of law on the appeal "shall in no way affect the finality of the finding of the court In that case". That section does not apply to an appeal of the Attorney-General against an incompetent or inadequate sentence, which is dealt with under section 70.

In the light of the above, it would seem that the decisions in *Mushonga's* case (*supra*) and *Moyo*'s case (*supra*) are not supportable on a strict interpretation of section 70 (2) of the Magistrates Court act. In flee circumstances, Mr Colegrave does not press the appeal against the inadequacy of the sentence, and accordingly the appeal is dismissed.

Before concluding, I would like to suggest that serious consideration be given to amending the Act in order to relieve the court of the obligation of increasing a sentence to that which the trial court should have imposed in an appeal by the Attorney-General against sentence,

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notwithstanding that the court is satisfied that the sentence was manifestly inadequate, where

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there are good reasons, as in the present case, for not doing so. At the same time, such amendment could with advantage allow the court to express an authoritative opinion as to what the proper sentence should have been, for the future guidance of magistrates in similar cases. This could be done by introducing a provision similar to that which exists in section 69 in relation to appeals by the Attorney-General against sentence, or the terms of section 70 (2) might be made discretionary instead of mandatory. *(3)

Baron JA: I agree.

Goldin AJA: I agree.

Postea: 11 February, 1981.

Lewis JP: The learned CHIEF JUSTICE has read the transcript of this Judgment, and has authorized me to say that he agrees with it.

ATTORNEY-GENERAL v NDLOVU 1981 ZLR 70

Court **Appellate Division, Salisbury**

Criminal Appeal

Lewis, J, Baron, JA, and Goldin, AJA

10th February, 1981

Flynote

Appeal against sentence by Attorney - General in terms of section 70 of Magistrates Court Act [Chapter 18] - powers of Appellate Division where appropriate sentence would exceed jurisdiction of trial court.

Headnote

The Appellate Division cannot allow an appeal against sentence by the Attorney General in terms of section 70 of the Magistrates Court Act [*Chapter 18*] if the sentence which the Appellate Division considers would have been appropriate for the offence is beyond the jurisdiction of the trial court, notwithstanding that the sentence actually imposed is so manifestly lenient as to induce a sense for shock.

Case cited:

Attorney-General v Moyo, 1981 ZLR 66 (AD).

J B Colegrave for the appellant.

M J Gillespie for the respondent.

Judgment

Lewis JP: The respondent in this case was convicted in magistrates court of cultivating 122

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dagga plants approximately three feet in height in contravention of the Dangerous Drugs Regulations as read with section 19 (a) of the Dangerous Drugs Act [*Chapter 319*].

He was a first offender. His case came before an ordinary magistrate who sentenced him to 24 months' imprisonment with labour, 15 months of which were suspended for five years on certain conditions. This is a similar matter to the case which we have just dealt with, that of *The Attorney-General v Mlangeni Moyo,* Appellate Division Judgment No. 32/81*(4), in that in this case also the reviewing judge, GUBBAY J, commented on the extreme leniency of the sentence and referred the matter to the Attorney-General. The Attorney-General, as in the last case, appeals

LEWIS JP

against the sentence on the basis that it is manifestly too lenient. There can be no doubt that the sentence is manifestly too lenient. Bearing in mind the number of mature plants which were being cultivated by the respondent in this case, it is abundantly clear as a matter of inference that he was cultivating them not merely for his own needs but for supply to others as well. One hundred and twenty-two plants would yield in terms of twists of dagga, a very considerable quantity of dagga indeed.

The case was undoubtedly serious. The difficulty is, however, as in the last case, that this court is bound by the strict wording of section 70 (2) of the Magistrates Court AM [*Chapter 18*] to which reference has been made in *Moyo*'s case (supra), the effect of which is to require this court, if it allows the Attorney General's appeal, to substitute "such other sentence . . . as it thinks ought to have been passed" by the court below.

In the instant case, it is quite clear, as Mr *Colegrave* rightly concedes, that this was not an appropriate case to bring before an ordinary magistrate because a proper sentence in a case for this seriousness was a sentence in excess of the jurisdiction of the magistrate, even as increased by section 20 of the Dangerous Drugs Act [*Chapter 319*]. The jurisdiction conferred on him by that section was to impose a sentence of imprisonment not exceeding two years. This is in effect what the magistrate has done. He has imposed a sentence of 24 months, which was the limit of his jurisdiction, and has then properly suspended a portion because the respondent was a first offender. It has been argued by Mr *Colegrave* that he should have suspended less of the sentence in order to produce a longer effective period of imprisonment. The question then arises, how much less of the sentence should he have suspended? Bearing In mind that the appeal is based on the fact that the sentence Is manifestly inadequate, the test to be applied fly this court before it interferes is the test, in reverse, which applies when considering a sentence which is alleged to be manifestly excessive. It has to be so manifestly lenient as to induce a sense of shock. Within the limits of the magistrate's jurisdiction it does not seem to me to be reasonably possible to manipulate the period of suspension in such a way as to reflect that sense of shock. In my view, the proper sentence for this offence was one of three years' imprisonment with labour, with half of that sentence suspended, leaving an effective sentence of 18 months' imprisonment with labour. This sentence cannot be achieved by manipulation of the period of suspension of the 24 months' imprisonment imposed by the magistrate, because as Mr *Colegrave* himself acknowledges, this does not achieve the sentence which ought to

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have been passed but merely improves on the inadequate

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sentence which was passed. The section does not permit the court to allow the appeal by merely improving on the inadequate intense. It enjoins the court to substitute the proper sentence. What should have been done, as I have said earlier, is that the matter should have been brought before the regional court so that the proper sentence could be imposed; but in the present state of affairs, because the matter was brought before an ordinary magistrate it is not possible to comply with the provisions of section 70 (2) and to substitute the sentence which ought to have been passed because of this limitation of jurisdiction. This court cannot substitute a sentence which is beyond the jurisdiction of the trial court.

In these circumstances, Mr *Colegrave* very properly has indicated that he will not press the appeal, and accordingly the appeal will be dismissed.*(5)

Baron JA: I agree.

Goldin AJA: I agree.

Postea: 11 February' 1981.

Lewis JP: The learned CHIEF JUSTICE has read the transcript of this Judgment and has authorized me to say that he agrees with it.

SANTAM INSURANCE COMPANY LIMITED v PAGET 1981 ZLR 73

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Lewis, JP, and Baron, JA

22nd January and 17th February 1981

Flynote

Damages - personal injury - compensation for loss of earning capacity -award where court cannot accurately assess degree of loss.

State Service (Disability Benefits) Act [Chapter 274] - section 7 (1) - amount that Minister may recover from third party - whether court must reduce award of damages of in cases where it cannot assess how much Minister may recover from defendant.

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Headnote

A court should make some award in cases where damages are claimed for loss of future earning capacity if it is satisfied that the plaintiff has suffered such a loss, even where there is insufficient information to assess the loss accurately and the court has to pluck a figure out of the air.

In terms of section 7 (1) (b) of the State Service (Disability Benefits) Act [*Chapter 274*] the Minister of Labour and Social Services may recover from a third party no more than the amount of pension, If any, which should have been paid to a disabled person in terms for the Act.

When awarding damages in a case in which the Minister of Labour and Social Services is likely to make a claim against the defendant in terms of section 7 (1) (b) of the State Service (Disability Benefits) Act [*Chapter 274*], the court cannot, in terms of section 7 (1) (a) of the Act, have regard to The Minister' claim unless there is sufficient information for the court to decide what amount will be payable by the defendant to the Minister.

Cases cited:

Smith v Leech Brain & Co. Ltd & Anor.[1961] 3 All ER 1159;

Ashcroft v Curtin [1971] 3 All ER, 1208;

Fairley v John Thompson (Design and Contracting Division) [1973]2 Lloyd's Rep. 40;

Moeliker v A Reyolle & Co. Ltd. [1977] 1 All ER 9.

FIELDSEND CJ

C L Mercer for the appellant: On his own findings the judge *a quo* ought not to have awarded any sum at all by way of compensation for loss of future earnings. The learned judge's statement that even with the chance of Plaintiff getting another job equally as good as that of a tiler, the court was still bound to assess damages for loss of earning capacity, is incorrect: DIPLOCK LJ, in *Browning v The War Office & Anor.,*[1963] 1 QB 750 at 766.

The learned trial judge has misapplied the principle in *Smith v Manchester Corporation* (1974) 17 KIR 1, which is concerned with the situation where an injured workman, who is still employed, is at risk of losing his employment and will find himself unable to keep up his present earnings owing to his disability. Such damages have always been treated as part for general damages in Zimbabwe, South Africa and the United Kingdom: *Galante v Dickinson,* 1950 (2) SA 460 (AD) at 469, Corbett and Buchanan, *The Quantum of Damages in Bodily and Fatal Injury Cases*, Volume 1, page 54 and Volume III, page 30, *Ashcroft v Curtin* (*supra*); and Kemp & Kemp, *Quantum of Damages*, Volume l, pages 97-8.

Once it is accepted that Plaintiff is not entitled to any more than $3 050 in total, or even less than the figure of $10 516 which Plaintiff has already received or will receive in terms of the State Service (Disability Benefits) Act, the wording of section 7 of that Act is such that Plaintiff should get nothing. In other words, the wording of section 7 of that Act is such that in order to

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get anything, a plaintiff has to succeed in establishing a higher amount of damages than the sum which he has or will have received under that statute.

F G Smith, for the respondent, cited: *AA Mutual Insurance Association v Maqula*, 1978 (1) SA 805 (AD) at 809, *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199-200; Kemp & Kemp, *Quantum of Damages* Volume 1 at 231, Corbett & Buchanan, *Quantum of Damages in Bodily and Fatal Injury Cases*, Volume I at 47-52 and Volume III at 21 and 30, *Galante v Dickinson,* 1950 (2) SA 460 (AD) at 469; *Ashcroft v Curtin* (*supra*).

Judgment

Fieldsend CJ: David Bowman Paget, the respondent, was riding on temporary police duty in a military vehicle on the 9th June, 1978, when it was involved in a collision. He suffered no obvious injuries, but within ten minutes of being shaken by the accident developed severe pain in his back and in one leg. He alleged that as a result of the collision he sustained the following injuries: "Acute or chronic prolapse of a lumbar disc leading to osteo-arthritis of the spine tenth narrowing of the disc

FIELDSEND CJ

spaces and slight instability of the lumbar spine", resulting in a 25 per cent. degree of disablement.

He brought action against the insurers of the other vehicle involved in the collision claim log damages, the major portion of which was for loss of future earning ability. In the court below DUMBUTSHENA J, awarded damages made up as follows:

Special damages	$ 50
Pain and suffering and loss of amenities of life	$ 3 000
Drugs (for the future)	$ 1 200
Loss of earning capacity	$35 320

he appellant, an insurance company, has appealed only against the award in respect of future drugs and loss of earning capacity.

The respondent is a wall and floor tiler by trade. He completed his apprenticeship as a tiler in 1957 at the age of about 19. After a brief spell in this country in 1958, he worked for various firms as a tiler in the United Kingdom before coming back here in 1972. From 1972 to 1976 he worked in a family partnership doing the tiling work, but in 1976 he joined the Salisbury City Council as a housing inspector and is now earning some $7 000 a year. He took this employment because Here was no demand for tilers at that time with the recession in the building industry. The position was said to have changed now from the nadir it reached in 1978, and since the beginning of 1980 there has been a boom in building with tilers being in

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considerable demand.

The respondent biased his claim for loss of earning capacity on the premise that he would have returned to tiling to take advantage of the building boom, but that he was precluded from doing this because of the injuries he sustained. It was therefore essential to his case to establish what injuries he suffered in the collision.

The only medical evidence led for the respondent was from Mr Bhagat, an orthopaedic specialist who examined He respondent in 1978, but had not seen him since October of that year. It was on his report that the respondent relied in detailing the injuries he sustained as quoted above. In cross-examination Mr Bhagat agreed that his report did not purport to set out what injuries the respondent had sustained in the collision, but was a report of the condition of the respondent at the time of his examination. When Mr Bhagat's evidence is taken with that of Mr Standish-White, an orthopaedic specialist called by the appellant, the following facts emerge as to the condition of the respondent prior to the accident:

FIELDSEND CJ

(1) The vertebrae D12 and L1 were wedge-shaped due to abnormal growth probably when the respondent was between 12 and 18 years of age.

(2) The discs on either side of these vertebrae had degenerated prematurely because of the extra strain caused by the misshapen vertebrae, with a narrowing of the disc spaces.

(3) Two vertebrae below these there was instability between two other vertebrae.

(4) The bottom disc of the lumbar spine showed advanced stages of a long-standing bulge in the disc with the formation of osteophytes.

(5) There was a long-standing upper lumbar scoliosis (or curvature of the spine).

(6) There was also a minor break on alignment in the cervical spine between vertebrae C2 and C3.

These conditions were all visible on X-rays taken within a month of the accident. X-rays taken at the instance of Mr Standish-White in September, 1980, showed no substantial change, but only a slight increase of scoliosis and of the osteophyte formation which would have been expected had there been no further injury in 1978.

Mr Bhagat assessed the respondent's degree of disability at 25 per cent., but it is now common cause that this was an assessment of his disability at the time of his examination and took into account the long-standing condition of the respondent's back. Mr Standish-White agreed that the respondent suffered at the time he saw him in 1980 from a 25 per cent. degree of disability, but his view was that by far the greater portion of this was due to the pre-accident condition of his back. He estimated that only 5 per cent. of the 25 per cent. disability was due to any injury

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sustained in the accident. There was, however, evidence that was accepted by the court below that after the accident the respondent developed and continued to suffer frown sciatic nerve pain and backache from which he had not previously suffered. Both medical witnesses agreed that the result of the accident could well have aggravated the respondent's pre-existing condition and could have caused him to suffer particularly the sciatic pains to which he had not previously been subjected. This we were given to understand could have been caused by a sudden jolt, so altering the alignment of the sciatic nerve in relation to some of the pre-existing degenerative changes in the respondent's

FIELDSEND CJ

back as to bring pressure to bear upon that nerve which there had not previously been. It is undoubtedly because of this evidence that the appellant is not challenging the award of $3 000 for pain and suffering and loss of amenities of life. The extent of the disabling effect of this pain is difficult to assess clinically with any precision. Tests such as those carried out by Mr Standish-White during his examination do assist, but their accuracy depends upon the reaction of the patient. There is also the factor which cannot be disregarded that Mr Standish-White formed the view on adequate evidence that the respondent was exaggerating his condition during the examination. This may not have been deliberate, but it nevertheless reflects on the soundness of the claim.

The respondent's claim for loss of earning capacity is based upon the contention that because of the injuries sustained in the accident he cannot now return to tiling and that he is entitled to the difference between what he could earn as a tiler and what he is presently earning with the council. This is in effect, subject to certain discounting factors which he applied, how the learned trial judge arrived at the figure of $35 320 which he awarded under this head. The calculation is based on the assumption that over 13 years the respondent would be able to earn a net income before tax of some $16 000 a year. This in turn depends upon him laying about 18 square metres of tiles a day for five days a week, 48 weeks a year at $4,75 per square metre.

There are a number of factors which lead me to the conclusion that this is not a case where the evidence warrants the calculation of damages in this way. The basic facts are too uncertain, and there are too many imponderable factors.

First, there is the unusual feature in an action for damages that the respondent did not claim that his earning capacity in his occupation at the time of the accident as a housing inspector was substantially affected by the injuries he had sustained. It must be a matter of speculation whether the respondent would have taken the step of leaving his permanent employment to return to tiling and, if so, when. It is never easy to make the decision to leave permanent employment and move to less guaranteed work, even though this may for the time being offer a greater reward. Indeed, in 1977 the respondent declined an offer from a Mr McKeenan to return to tiling on contract for him.

Secondly, it is an improbability of his claim that at no stage in his career as a tiler has he earned more than about $5 500 and that in the mid-1970s. Even allowing for inflation since then, this is

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nowhere near the figure he now claims.

FIELDSEND CJ

Thirdly, the respondent has not established that any of the defects in his back as disclosed on the X-rays can be attributed to any injury he sustained in the accident.

Fourthly, there is the evidence of Mr Standish-White that he would not have expected a person with a back like the respondent's to have been free of pain before the accident. His view was that the respondent could not have expected to return to tiling after so many years away from it without suffering sooner rather than later the soft of pain that he is now experiencing. This evidence is the more convincing in the light of that of the respondent's brother that tiling is hard on the back and backache is an accepted part of being a tiler.

Fifthly, it cannot be said with any certainty what the volume of work in the building industry is likely to be in the coming years. It is notoriously an industry with ups and downs.

Sixthly, there was evidence of the employment of an increasing number of Africans as journeymen in the building industry both as tilers and in other trades and that competition from this quarter would mean that the figure taken by the respondent for his average daily earnings would be too high.

Seventhly, evidence was led for the appellant that the increasing number of African journeymen would lead to a greater demand for experienced tilers such as the respondent to act foremen or supervisors, and that this work would carry a higher wage than an ordinary tiler would earn. Unfortunately, this evidence was not anticipated by cross-examination of the respondent as to his capability as a foreman or a supervisor. It appeared from his evidence that he had, when engaged in the trade, always been employed either by others or in the family firm that was run by his father. The evidence led by the appellant does not really go further than to establish that for the right man there is a role to be played by a qualified tiler which could earn him more than a person working as a tiler by himself and that such work could be done by a man sobering from back trouble such as the respondent has. I do not think that it can be said that the evidence shows that the respondent could have obtained such work up to now. As to the future there may wed be an opening for him in such a capacity, but the fact that he is a competent tiler does not necessarily mean that he will be competent foreman or supervisor.

Taken cumulatively, all these factors indicate that with so many variables, it would be quite unsafe to rely on any mathematical cal-

FIELDSEND CJ

culation in order to determine the respondent's damages. This does not mean that the respondent is not entitled to any damages for the injury sustained in the accident. Taking the medical evidence, as one must, in conjunction with the evidence of the respondent and his wife, it is quite apparent that the jolt the respondent sustained aggravated the pre-existing condition

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of his back and almost certainly accelerated the onset of pain and the disability from which he would eventually have suffered. There is authority that a wrongdoer in this type of case must take the person injured as he finds him. *Smith v Leech Brain & Co Ltd and Another* [1961] 3 All ER 1159. I am satisfied on the evidence of the respondent, his wife and his brother, that it has been established that a good deal of the respondent's present pain has been brought on by the accident, and that his resulting disability is somewhat greater than it would otherwise have been at this stage. I say "somewhat" because I think that the respondent has undoubtedly exaggerated his condition to some extent, and that some of his pain, particularly from the cervical spine, was likely to have occurred even without the accident.

We are now very much in the same position as was the court in *Ashcroft v Curtin* [1971] 3 All ER 1208. In that case damages were awarded based upon an annual loss of profit of £1 500 over a seven-year period, but the Court of Appeal held that on the evidence there was no basis for settling upon a figure of £1 500. It was there urged - as it was urged upon us - that there being no justification for the figure upon which the damages were assessed, no figure should be represented in its place and that there should be no award.

In common with EDMUND DAVIES, LJ, as he then was, I would be loth to arrive at the conclusion that because the "arithmetic failed to provide the answer which common sense demands", the respondent's claim must fail entirely. The claim here is for general damages for "loss of future earning ability", and under that head it was open to the court to make an award on the basis of greater vulnerability in the labour market. As LORD DENNING, MR, said in *Fairly v John Thompson (Design and Contracting Division)* [1973] 2 Lloyd's Rep 40 (CA) at page 42 quoted in *Moeliker v A Reyrolle & Co. Ltd.* [1977] 1 All ER 9 at 15:

> "It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence compensation for diminutive of earning capacity is awarded as part of general damages."

FIELDSEND CJ

There was no claim for loss of earning capacity in respect of the respondent's present employment and we can assume that he can still adequately, though with some additional discomfort (which is taken into account in the award for pain, suffering and loss of amenities of life), perform the duties of that employment without any likelihood of financial prejudice, but clearly in his capacity as a tiler there has been at least an acceleration of the disabilities from which he must previously have suffered, though it is difficult to say by how much or whether but for the accident he would now have left the council and returned to tiling.

The respondent's present disability which limits the free movement of his back and which because of the sciatic nerve trouble limits his ability to bend and particularly to crouch will of course, affect him not only as a journeyman tiler, but also as a supervisor. Even in that capacity, he would have to spend his the on site and would he expected to demonstrate and assist in many operations in awkward areas involving his bending and crouching. Whichever way one now looks at the respondent's future prospects as a tiler, there is no doubt that his vulnerability in the labour market has been affected. The difficulty is to assess this in money

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terms. One cannot say on the evidence by what period the effects of his pre-existing back condition have been accelerated, and in any event the respondent would not have returned to tiling until about two years after the accident, for 1978 was said to have been the year when the slump in the building industry reached its lowest level.

The respondent's evidence does not lead one to think that he was a person who was particularly eager to return to the demanding work of tiling, but this may have been due at least in part to the discomfort from which he has suffered over the last two years. It would, however, be unfair to him to say that he would not but for the accident have left his employment-to return to tiling in one capacity or another. The injury he sustained has certainly made him more vulnerable in the labour market, though perhaps in a year or two the poor state of his back would have caught up with him even had there been no accident.

These are all rather nebulous facts, but nevertheless to do justice to the respondent without being unfair to the appellant it is necessary to resort to the only course now open, and as was done in *Ashcroft v Curtin* (*supra*), to pluck a figure out of the air to compensate him for his diminished earning ability. In my view, this figure should be $5 000.

This, however, does not end the inquiry. It was pleaded by the respondent that he was in receipt of benefits in terms of section 16 (1) (a) of

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the State Service (Disability Benefits) Act [*Chapter 274*] and had been notified by the Pensions Office that the amount which the Minister may claim as due to the State in terms of section 7 (1) (b) of the Act in respect of the capitalized value of the disability award was $10 467,52. This figure seems to have become $10 516 during the course of the case. The appellant contends that the damages it has to pay to the respondent must be reduced fly whatever this court finds is the amount which by virtue of the provisions of section 7 (1) (b) of the Act is likely to become payable to the State by the appellant. Section 7 (1) reads:

> "7. (1) Where an injury or death in respect of which compensation is payable was caused in circumstances creating a legal liability in some person, other than the State (hereinafter called the 'third party'), to pay damages to a disabled person or the dependents of a deceased person in respect thereof-
>
> (a) the disabled pension or dependant of the deceased person, as the case may be, may both claim compensation under this Act and take proceedings against the third party in a count of law to recover damages:
>
> Provided that where any such proceedings are instituted the court shall, in awarding damages, have regard to the amount which, by virtue of the provisions of paragraph (b), is likely to become payable to the State by the third party for
>
> (b) the Minister Hall have a right of faction against the third party for the recovery of the compensation payable under this Act as a result of the injury or death and may exercise such right, either by intervening in proceedings instituted by the disabled person or dependent of the deceased person against the third party or by instituting separate proceedings:
>
> Provided that the amount recoverable in terms of this paragraph shall not exceed the amount of the damages, it any, which, in the opinion of the court, would have been awarded to the disabled

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person or dependent of the deceased person but for the provisions of thy Act."

It is a clear inference from Mr Bhagat's evidence that the respondent's disablement pension is based on his assessment that the respondent's degree of disablement is 25 per cent. I have found that while this is his proper degree of disablement something considerably less than that was due to any injury he sustained in the accident. *Prima facie* then his disability pension is based on an incorrect assessment of his degree of disablement given by the State's own expert. How far the pension can now be amended by the State is not an issue which we can or should investigate at this stage: it may depend on many factors - see, for example, section 16 (4) which deals with a degree of disablement which

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has not yet reached a final and stationary condition. The point remains, however, whether the appellant can be called upon under section 7 (1) (b) of the Act to pay to the Minister the capitalized value of the full pension which was arrived at on a wrong assessment of the respondent's degree of disablement.

The Act provides that the Minister has a right of action against the third party for recovery of "the compensation payable under this Act as a result of the injury". This seems to mean that if it can be shown that no compensation is payable as a result of the injury nothing can be recovered from the third party, even though the State has in error or on a mistaken view of the facts paid out a disablement pension to the claimant. Similarly, if a bigger pension than should have been paid out has been paid out the Minister can claim from the third party only the capitalized value of the pension which should have been paid out.

If I am right in this conclusion, then our next task is to determine what amount by virtue of . . . paragraph (b) is likely to become payable to the State by the third party", i.e. the appellant. On the facts before us I find it impossible to say what amount of pension the respondent should have been awarded under the Act, on the degree of disablement which is attributable to injury sustained in the accident. The calculation of the disability pension under the Act has to be done on a basis provided in the Act itself, and may bear no relationship to the common-law damages that I have found to be payable. It depends upon certain arbitrary percentages for some specified disabilities and in other cases upon the determination of a medical board (section 15). This percentage is then applied to various slices of the injured person's earnings in different percentages (section 16). It would not be satisfactory to have to work back through the Second Schedule and section 16 to find precisely how the pension was determined and then to work forward again to find what any new capitalized sum should be, particularly having regard to section 16 (3) which provides:

> "(3) If a disabled person is suffering from an injury which has been aggravated to a material event arising out of and in the course for his official duties, the pension payable to him shall lie assessed in respect such aggravation only."

In any action between the Minister and the appellant it would be open to the appellant to contend that nothing is due by it to the Minister. Any determination by this court in the case between the appellant and the respondent would not be *res judicata* as between the appellant

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and the Minister.

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I am not prepared on the information before me to decide what amount, if any, is likely to become payable by the appellant to the Minister, and there is nothing therefore for this court to "have regard to" for the purposes of the proviso to section 7 (1) (a) of the Act.

There remains the minor question of the award of $1 200 for the future purchase of pain killing drugs. There was no evidence on the record to substantiate this figure, but we were told during the hearing of the appeal that the parties are now agreed that the cost of the drugs the respondent takes is about $30 a year at present prices. There was some evidence that the pre-existing condition of the respondent's back was such that he would probably have required drugs to kill the pain that would have developed as time went on, and Mr Standish-White spoke of some pain in the cervical spine at the time of his examination which in his view was not associated with any injury suffered in the accident. But even assuming that no pain would have developed for 10 years, $300 would cover the cost of drugs for this period. I do not think that more than that figure can possibly be justified on the information we have been given.

In the result, the appeal is allowed to the extent that the damages in respect of loss of earning capacity are reduced from $35 320 to $5 000, and in respect of the cost of future drugs from $1 200 to $300. The appellant has been substantially successful in the appeal and is entitled to its costs.

Lewis JP: I agree.

Baron JA: I agree.

Winterton, Holmes & Hill, attorneys, for the appellant.

John May & Co., attorneys for the respondent.

THE STATE v GOREDEMA 1981 ZLR 84

Court **Appellate Division, Salisbury**

Criminal Review

Fieldsend, CJ

17th February, 1981

Flynote

Miscellaneous Offences Act [Chapter 68] - section 6 (d) loitering in a public place - meaning of "loitering".

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Criminal procedure - competent verdict - whether contravening section 6(d) of Miscellaneous Offences Act [Chapter 68] is competent verdict on charge of attempted housebreaking with intent to commit crime unknown.

Headnote

In section 6 (d) of the Miscellaneous Offences Act [*Chapter 68*], which prohibits loitering in public places in such circumstances as afford reasonable grounds for believing that the person loitering has committed or is about to commit an offence, the word "loitering" denotes a form of activity-or rather, of inactivity-consistent with idling.

Quaere whether a verdict of contravening section 6 (d) of the Miscellaneous Offences Act [*Chapter 68*] is competent upon a charge of attempted house breaking with intent to commit a crime unknown.

Cases cited:

R v David Mathijs and Anor 1925 SWA 98:

Enright v Johannesburg Municipality, 1928 TPD 104,

Fairfoul v Somerville (1898) 33 Sc. LR 34.

Judgment

Fieldsend CJ: (In chambers, in terms for section 68 of the Magistrates Court act [*Chapter 18*]: Being in some doubt as to the correctness of the conviction in this case, I referred the papers to the Attorney-General for his views. I am greatly indebted to him for the care with which he has dealt with the matter and my Judgment is based almost entirely on his memorandum.

The applicant was charged with attempted housebreaking with intent to commit some crime to the prosecutor unknown. The charge alleged

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that on the 29th August, 1980, the applicant attempted to break into Sunrise Store, which belonged to the complainant, one Benson Chikani. The evidence clearly established that shortly after midnight on the 29th August, 1980, the complainant, who resided at his store, was awakened by the loud noise of someone knocking at the storeroom door. He went outside to investigate and found the applicant hammering at the storeroom door with an object that looked like a pick. He asked him what he was doing. The applicant thereupon threatened the complainant and started to throw stones at him. As the complainant turned towards the applicant, he ran away and was closed by the complainant and another State witness to a nearby compound where he was finally apprehended. The magistrate entertained doubts as to whether the attempted housebreaking had been proved beyond doubt and, accordingly, acquitted him. However, presumably acting in terms of section 203 or 203A of the Criminal Procedure and Evidence Act [*Chapter 59*], he convicted him of the charge of contravening section 6 (d) of The Miscellaneous Offences Act [*Chapter 68*]. Assuming a verdict of contravening section 6 (d) of the Miscellaneous Offences Act [*Chapter 68*] is competent upon a

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charge of attempted housebreaking with intent to commit a crime unknown (and I might say that I have the strongest doubts that this is so), it does not seem to me that what the applicant had been proved to have done fell within the ambit of this provision. Section 6 (d) of the Act reads thus:

> "Any person . . . found loitering in any public place under such circumstances as to afford reasonable grands for believing that he than committed or is about to commit an offence . . . shall be guilty of an offence . . .".

It cannot be said on the evident on record that the applicant was "loitering", whatever else he might have been doing at the time he was disturbed. The Oxford English Dictionary defines "loiter" as to "idle, waste one's time in idleness"; alternatively "to linger indolently on the way", and finally "to linger idly about a place". There is nothing in section 6 of the Miscellaneous Grenades Act which leads me to believe that this word is to be given anything other than its ordinary meaning. The word was given its ordinary meaning in *R v David Mathijs & Another,* 1925 SWA 98. The learned judge in that matter indicated that loitering to him connoted "lingering, idling or sauntering on the way". Similarly in the case of *Enright v. Johannesburg Municipality,* 1928 TPD 104, the court was called upon to consider regulations which decreed that "no driver of any public vehicle shall loiter with the same in any street". The evidence established that a bus driver was driving his bus around the block in order to pick up theatre-goals. The court held that the actions of the driver were the very reverse of loitering. He was not idling. He was doing something constructive. He was endeavour-

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ing to pick up pedestrians who had visited nearby theatres. *Enright's* case (*supra*) referred to the Scottish decision of *Fairfoul v Somerville* (1898) 33 ScLR 34. In an almost identical case to *Enright*'s case (*supra*) , the learned judge felt that the word loitering denoted something in the nature of stopping to chat with other drivers or gossiping or idling with them. In the result therefore, it seems to me that the word loitering inevitably denotes a form of activity, or rather inactivity, consistent with idling.

The evidence in the instant matter indicates that the applicant, far from idling, gossiping or otherwise wasting his time, was engaged in vigorous, purposeful endeavour. Although the magistrate entertained some doubts on the matter, it seems to me that the probability is that the applicant was endeavouring to break into the storeroom. I have little doubt that he was up to some mischief. Be that as it may, I cannot conceive that his actions amounted to loitering. To suggest that what he was doing in this instance was loitering, is to put an unbearable strain on the ordinary meaning of that word. On this ground alone it seems to me that the conviction for contravening section 6 (d) of the Miscellaneous Offences Act was unsound.

I may also add that I am in some doubt whether there was any evidence to establish that the door to the storeroom was in fact a public place as defined by section 2 of the Miscellaneous Offences Act [*Chapter 68*]. Had the evidence established clearly that the door upon which the applicant was banging was the door to the store itself, I thick one could probably argue with conviction that it was a public place. But he was hammering at the door to the storeroom which could well be a different place from the store itself. It could well a part of the building to which

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the public have no access whatsoever.

In the result I am satisfied that the applicant should not have been convicted and his conviction and sentence are set aside.

KATSIDZIRA v CHIROMO 1981 ZLR 87

Court **General Division, Salisbury**

Civil Action

Dumbutshena, J

5th, 6th and 18th February, 1981

Flynote

African Law and Tribal Courts Act [Chapter 237] - section 3 - customary law-application of to determination of disputes as to proprietary rights of spouses.

Headnote

The decision as to whether or not to apply customary law to the determination of the proprietary lights of parties to a marriage should not depend upon the degree of education or "westernization" of the parties, but rather, in accordance wad section 3 (4) of the African Law and Tribal Courts Act [*Chapter 237*], on the application of the principles of justice, equity and good conscience to the particular case.

Cases cited:

Gissing v Gissing [1970] 2 All ER 780;

Jirira v Jirira and Anor 1976 (1) RLR 7 (GD);

Lerman v Lerman, G-B-11-1977 (unreported);

Horne v Hine (2), 1947 SR 128; 1947 (4) SA 760 (SR).

J O Manyarara for the plaintiff.

P M Sullivan for the defendant.

[This judgement was overruled on appeal. See page 418 of this volume.- *Editor.*]

Judgment

Dumbutshena J: The parties were married in 1970. Some time during that year they decided to build extensions to the property at Stand 723, Kambuzuma, which they had bought from a Mr Kampila. This property was acquired by the parties before they married. But the extensions

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were built after they had contracted a marriage in terms of the Marriage Act [*Chapter 37*]. Before the property was purchased, the defendant informed the plaintiff that Mr Kampila was selling a house. The parties went together to see Mr Kampila and to

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discuss the buying of the property. The defendant borrowed $20 from the plaintiff, which money was used as a deposit on the property. It was later returned to the plaintiff. All in all, a deposit of $46 was paid to Mr Kampila. The property was sold at a price of $550. On the 16th August, 1979, the marriage was dissolved.

Because the house they were buying had only one room they decided to extend it because one room was not enough to hold their furniture. The plaintiff had brought to that one-roomed house a kitchen unit, a three-quarter bed, wardrobe, dining-room suite, sewing machine, lounge suite and a display cabinet. The defendant had a wardrobe, a three-quarter bed and a coffee-table. They were not married but they had agreed to marry after putting their property together.

The plaintiff said they agreed to extend the house because they wanted to make it their permanent home. She had savings in the Post Office Savings Bank, where she withdrew money for buying materials. She gave the money to the defendant and he bought materials. She produced in evidence copies of deposits and withdrawals made during the period of building the extensions. The copies from her savings account book were accompanied by a letter from the Post Office. The defence did not object to their production. They were marked "Exhibit 3". A casual look at the copies shows that substantial withdrawals were made during the period when the building materials are said to have been purchased. Defendant says he bought all the building materials but asked the plaintiff to be responsible for buying food and maintaining the household during the currency of building operations. The probabilities are that she paid for building materials. She had money in the bank. She was, by way of employment, in receipt of a higher salary than the defendant. And she had an additional source of income which she obtained from selling the produce of her sewing and knitting activities.

It is common cause that defendant failed to enter into a hire-purchase agreement with Ace Motors because his wages were considered insufficient to meet adequately the required monthly instalments. He had to ask his wife to sign the agreement as a guarantor. This is disputed by the plaintiff, who says the defendant traded in his motor vehicle for $250, which was taken as a deposit for the new car. She paid the balance of the purchase price of the motor-vehicle by paying monthly instalments until the balance in the sum of $250 was paid off.

The plaintiff claims:

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(a) $1500, as being her half-share of Stand No. 723, Kambuzuma, Salisbury;

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(b) $250, being her half-share of a Peugeot 403 motor-car.

To all these claims the defendant's defence is a denial. He says he developed the property, Stand 723, by adding thereto four rooms, a concrete slab and erecting an iron gate, and bought his motor-car without accepting contributions from the plaintiff.

He did say, however, that during the currency of the building operations he asked the Plaintiff to be responsible for buying food and running the household so as to enable him to meet the building costs. So, for the five to six months it took to complete the extensions, the plaintiff was in sole charge of running, moneywise, the household. Defendant stopped giving her $ 50 per week for food. During that period his two twin sisters and his two nephews were maintained by the plaintiff.

In *Gissing v Gissing* [1970] 2 All ER 780 at 782b-783a, LORD REID expressed these views:

> "I take a common case where husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit and instalments or she might relieve the husband of some of his obligations, e.g. by paying household bills, so as to enable him to pay for the house. The latter is often the more convenient way."
>
> It must often happen that in coming to and carrying out such an agreement or understanding neither spouse gives a "thought to the legal position or the legal consequences. The law is *terra incognita* and rather frightening to many people. Spouses generally expect that, on the decease of one of them, his property will go to the other, and I strongly suspect that in a great many cases they do not think about what the position of the wife would be if there were a divorce or the husband became bankrupt, or at least they do not discuss those possibilities. So they do not discuss the question whether carrying out such an understanding will give the wife a share or beneficial interest in the house. If either of them gives a thought to the matter he or she may well think that the law will produce a just result without their assistance. Of course many people are more business-like but many are not.
>
> If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I

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> agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contribution from his wife not impose such a trust on him?
>
> As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this fat the time; but that, when her contributions are only indirect by way of paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable. Suppose the spouses have a joint bank account. In accordance with their arrangement she pays in enough money to meet the household bills and so there is enough to pay the purchase price instalments and their bills as well as their personal expenses. They never discuss whose money is to go to pay for the house and whose is to go to pay for

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other things. How can anyone tell whether she has made a direct or only an indirect contribution to paying for the housed It cannot surely depend on who signs which cheques. Is she to be deprived of a share if she says 'I can pay in enough to pay for the household bills', but given a share if she says 'I can pay in $10 per week regularly'?

It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brocard 'Equality is equity' has been misused. There will of course be many others where a fair estimate might be a tenth or a quarter or sometimes even more than half."

LORD REID was discussing a set of circumstances which are slightly different from ours. In the instant case the plaintiff gave her husband money for buying materials and for paying hire-purchase instalments. She did not keep a record of her contributions. Even on the evidence of the husband, she contributed by paying whatever household bills there were for those five to six months. Is she to be denied her share? There is no evidence of an agreement between the parties as to the use of their incomes. It was agreed that the husband's income should be used for extending the property while that of the wife was used for maintenance. That is what the defendant says. Plaintiff says she contributed directly to the buying of building materials.

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There is enough evidence for me to justify a finding that there was an agreement or understanding or intention that the parties should pool their incomes together and extend their matrimonial home. The wife was asked on defendant's evidence to shoulder the responsibility of maintaining the household the probabilities favour the plaintiff's version. She had more than the defendant. She was interested in building a permanent home. It seems to me that $561 he purports to have spent on the extensions was more than he could afford, bearing in mind his meagre wages of $15,50 per week.

When the Plaintiff left the matrimonial home on account of defendant's adultery with the housemaid, she took with her the property that she had brought to the matrimonial home and the property she had bought with her own money. She had traded in her radio for another which she decided to leave behind because the defendant had contributed part of the purchase price. She left the double bed because they had each traded in a bed in order to buy it. She left behind everything which they had bought together.

She denied having been given by the defendant a hi-fi set, a Philips television set, a stove, a refrigerator and one table. In assessing the attitudes of the parties to the household property, I have to take into account plaintiff's readiness to help the defendant. She did help him when he bought the car. She says the car he traded in was valued at $250, which was paid as a deposit. She paid oft the "balance of $250 in monthly instalments. She handed the money to the defendant and he made the payments. Her attitude to all these things was that of a woman who had entered into a permanent and stable marriage contract.

Mr *Manyarara*, who appeared for the plaintiff, argued in his submission that African customary law did not apply because it did not govern the acquisition of immovable property. The parties had contracted a civil marriage under the Marriage Act [*Chapter 37*].

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The husband was borrowing money from his wife. She had a savings account of her own from which she withdrew money for buying building materials and handed it to defendant. The parties discussed the purchase of the property at Stand 723, Kambuzuma, and the husband, according to his own evidence, stopped giving his wife money and asked her to buy food to enable him to pay for the extensions to the house. He submitted that those transactions between the parties were not in accordance with African custom. Mr *Manyarara* referred me to *Jirira v Jirira & Anor* 1976 (1) RLR 7 (GD), a Judgment of NEWHAM J The headnote to *Jirira*'s case reads:

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> "The plaintiff and the first defendant were Africans who had been married in accordance with Christian rites in terms of the Marriage Act [*Chapter 37*]. Both were well-educated, the plaintiff being a well-travelled and fairly prosperous businessman, the first defendant a nursing sister. Throughout their marriage they adopted a westernized style of life which could not be compared with that of Africans living according to customary law. The plaintiff sued the first defendant for divorce on the ground of her adultery with the second defendant, alternatively for an order of restitution on the grounds of her adultery. He further alleged in his declaration that the proprietary rights of the parties fell to be dealt with in accordance with African custom in terms of section 13 of the African Marriages Act [*Chapter 238*], and claimed the return of a car registered in the first defendant's name and the payment to him of her earnings. The court granted him an order of restitution and, after dealing with the custody of the child of the marriage, proceeded to deal with the parties' proprietary rights.
>
> *Held* that the parties' way of life and the transactions between them were so far removed from the incidents and the customary way of life of the African people that it would be contrary to the justice of the case to apply African law and custom to the solution of the property disputes between the parties.
>
> *Held,* further, that it was possible for the court to apply the ordinary law of Rhodesia to the parties' proprietary rights without doing violence to the rule of customary law whereby a wife on divorce is entitled to property which is held by her as the fruits of her labour, or to the provisions of section 13 of the African Marriages Act [*Chapter 238*]. Holleman, *Shona Customary Law; Child, History and Extent of Recognition of Tribal Law in Rhodesia (referred).*
>
> *Held,* further, that the facts of the case did not disclose the existence of a tacit universal partnership between the spouses. *Fink v Fink & Anor* 1945 WLD 226; *Horn v Hine* (2), 1947 SR 128*;* 1947 (4) SA 757 (SR); *Plotkin v Western Assurance Co. Ltd & Anor* 1955 (2) SA 385 (W); *V. (also known as L) v de Wet, NO,* 1953 (1) SA 612 (O) *(referred).*
>
> *Held,* further, that the first defendant was entitled to recover from the plaintiff the amounts which she had contributed, directly and through increased contributions to the maintenance of the family, towards the immovable property owned by the plaintiff, and was entitled to the movable property held by the parties which had been purchased from her earnings.
>
> *Semble,* questions concerning the ownership of immovable property must be dealt with in terms of the ordinary law of the land, since the concept of private ownership of immovable property was unknown to customary law. *Dokotera v The Master of the High Court & Ors* 1957 R & N 697 at 701E and 702-3; *Gwebu v Gwebu,* 1961 R & N 694 *(followed).*"

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Mr *Sullivan*, who appeared for the defendant, submitted that the plaintiff was in difficulties because she had to decide whether the case should be decided according to African custom and law or the common law. If African custom applies, then she was out of court. And if the

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common law applied, then the question of credibility was important. He argued that the plaintiff was a poor witness who claimed to have paid instalments for the motor-vehicle and yet did not know the amounts she was paying in instalments or what was paid for extensions. He said that when the plaintiff was paying for food during the building operations the defendant was not, by asking her to buy food, borrowing from her. She was contributing to the running of the household. He submitted that there was no tacit universal partnership and relied on *Lerman v Lerman*, G-B-11-77 (unreported). That case is distinguished on the facts from the instant case.

In *Horne v Hine* (2), 1947 SR 128; 1947 (4) SA 760 (SR) TREDGOLD J, was dealing with parties that had married in England.

Under English law a married woman could acquire personal property as if she were a single woman. On this aspect alone *Horne v Hine* accords with African custom, which allows a married woman to acquire personal property. For the purposes of this case the following passage from that Judgment is relevant: at page 762 TREDGOLD J, said:

> "It is no doubt always competent for a husband and wife to make some special arrangement between themselves as to the use and disposal of their separate incomes. It might, for example, be agreed that the whole income of one should be used for maintenance and the whole income of the other saved; or the contributions each was to make to any particular object might be varied almost infinitely.
>
> If there is one thing which is clear in the present case, however, it is that there was a complete pooling of the joint earnings and resources throughout the greater portion of the period for which the marriage subsisted."

Then the learned judge described the complete pooling of the joint earnings and resources. There were several joint harking accounts. Neither party was able to state accurately the extent of the contribution made. There was no regard, in other expenses paid by the parties, to the sources from which the funds accrued. Investments, particularly in immovable property, were made without any attempt to ascertain how much each had contributed to the amount saved and by which the investments were made possible: *Horne v Hine* (*supra*) at 762.

Under African customary law, a married woman, as stated above, can acquire personal property. In this case, although there were no joint

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accounts and common funds, each party contributed to the running of the common household and the building of the extensions. There was no universal partnership. There might not even have been a tacit partnership, in the true sense of that phrase. What was there, however, was an agreement or an understanding to buy a house; there was the presence of the parties together when discussions took place with Kambila, the owner of the house, and when money was paid to him. When the parties met John Katsidzira, the Plaintiff's brother, the defendant said to him, "We have bought a house". The plaintiff said, "I have a stop order. I and my husband will do it". He planned the living room for them for nothing. John Katsidzira was a thoroughly honest witness who told the court the little he knew about the buying of the property and the building of extensions to the one-roomed house. What is important, however, is that the parties were doing it together.

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Upon these facts the plaintiff's claim for the division of the proceeds of the sale of the property at Stand 723, Kambuzuma, is a strong one. That the property was built "by their common endeavour and the payment to her of a proportion of such estate equal to her contribution to the marriage both in actual earnings and in services to the household", is justified. See *Horne v Hine* (*supra*) at 763. The same cannot be said of her contribution to the purchase of the motor-vehicle. The defendant had owned motor-vehicles before buying the vehicle in question. He traded in one in order to put down a deposit for the purchase of the Peugeot 403. The probabilities are in his favour. I would like to believe that he would have managed somehow to buy his car without the assistance he obtained from the plaintiff. It may be true that the plaintiff was required to sign the hire-purchase agreement as a guarantor. She was not sure what it was she was asked to sign. On this second leg of her claim she has not discharged the onus of proof on a balance of probabilities. She was not even sure of how much she paid monthly in instalments in order to pay off the balance of $250.

Would the plaintiff be out of court, as was submitted by Mr *Sullivan*, if she were married in accordance with African custom? The question of the type of marriage contracted was specifically pleaded in paragraph 4 of the plaintiff's declaration, which reads:

> "4. The parties were married to each other under the Marriage Act [*Chapter 37*], at Umtali in 1970."

In his amended plea, the defendant admitted paragraph 4 of the declaration. Although in his evidence he said he was in married in accordance with African custom, that was an attempt to strengthen his defence.

FIELDSEND CJ

Section 13 of the African Marriages Act [*Chapter 238*] reads:

> "13. The solemnization of a marriage between Africans' in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and custom."

Section 13 of Chapter 238, on the face of it, seems to lay down categorically how the property of Africans whose marriages are solemnized in terns of the Marriage Act [*Chapter 37*] may be disposed of according to African law and custom unless disposed of by will. However, the provisions of section 13 of the African Marriages Act are overridden by the provisions of subsection (1) of section 3 of the African Law and Tribal Courts Act [*Chapter 237*], which reads;*(6) "3. (1) Subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans, or between an African and a person who is not an African the decision may be given in accordance with customary law.

(1a) Save as otherwise provided in this section, unless the justice of the case otherwise requires-

(a) customary law shall be applicable in any case which is between Africans and which relates to -

(i) seduction or adultery; or

(ii) the custody or guardianship of children; or

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(iii) the devolution otherwise than by will of movable property on the death of an African:

Provided that where the deceased was an African mentioned in section 69 of the Administration of gestates Act [*Chapter 301*], the provisions of that section shall apply; or

(iv) rights in land which is not held under individual registered title; or

(v) marriage consideration; or

(vi) a marriage between Africans contracted under customary law, whether or not it has been solemnized under the African Marriages Act [*Chapter 238*];

and

(b) the law of Rhodesia shall be applicable in any other case."

African customary law does not provide for the acquisition or devolution of immovable property. Therefore "the law of [Zimbabwe] shall be . . . applicable" in this case.

FIELDSEND CJ

In a case in which the dispute revolves around immovable property, subsection (4) of section 3 of the African Law and Tribal Courts Act applies. The subsection is couched in these words:

> "(4) In cases where no express rule is applicable to any matter in controversy, the court shall apply the principles of justice, equity and good conscience."

It means, therefore, that the resolution of disputes between Africans involving immovable property must be in terms of the ordinary or general law of Zimbabwe.

It is wrong, in my opinion, to import into the meaning of subsection (4) of section 3 of the African Law and Tribal Courts Act the notion that the parties to disputes concerning proprietary rights must be westernized or must live after the fashion of the whites. In my view, there should be no distinction drawn between those Africans married under the Marriage Act [*Chapter 37*] and who are educated and civilized in the European way, and those who are married in terms of the African Marriages Act [*Chapter 238*] or any other marriage union and who are not as educated and civilized as Europeans. To uphold this distinction is tantamount to perpetuating an unfair and unjust situation. Where there is no express rule and where the justice of the particular case under consideration demands "the court shall apply the principles of justice, equity and good conscience" without applying a legal divide based on the education and the standard of life of He parties; equality under the law should be the guiding principle.

There are many African women of varying degrees of civilisation and education who own immovable property. And in the present changed circumstances many more will acquire immovable property. In some cases the properties will be bought by other women. In other cases married women will contribute, together with their husbands, to the purchasing or acquiring of properties. The courts must keep in step with the times and shed away out-moded concepts in the field of ownership of property by Africans and the proprietary rights of married women. The courts must import into the ownership of immovable property the generosity of African custom and law which allows a married woman to acquire personal property as a result

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of her labours.

In the instant case both parties were living in rented accommodation before they acquired the property at Stand 723. The plaintiff worked hard. She had, besides working as a medical assistant, to knit and sew. She was proud to buy a permanent home for herself and the family.

FIELDSEND CJ

She now, the marriage having turned sour and having been dissolved through no fault of hers, claims a division of the proceeds of the sale of the property at Stand 723 which was built up by the common endeavour, and the payment to her of half the value of the property whose valuation was fixed at $3 000 by Robin Bamford Real Estates (Pvt) Ltd (land and estate agents and valuers) and which both parties have accepted as the present true market value of the property.

The plaintiff has on a balance of probabilities discharged the burden of proof required. I find as a fact that the matrimonial home was acquired and extended by the joint contributions and endeavour of the parties but was registered in the name of the defendant only, but that the property was in fact the property of both of them.

In the result, the issues agreed to at the pre-trial conference are settled as follows:

(1) I find that the parties jointly developed the property at Stand 723, Kambuzuma, together.

(2) I find, and by consent of the parties, that the value of the property $3000.

(3) I find that the defendant purchased the Peugeot motor-vehicle as his own.

(4) The plaintiff is entitled to half the market value of the property, Stand No. 723, Kambuzuma, or $1500, being half of its present valuation of $3 000.

(5) The plaintiff's claim for half the price of the Peugeot motor-vehicle fails.

Therefore the plaintiff's claim succeeds to the extent that she is awarded half the price of the property at Stand 723, Kambuzuma, that is $1 500 or half the purchase price, but the plaintiff fails in her claim of $250, being half the price of the Peugeot motor-vehicle.

The plaintiff has substantially succeeded in her claim and is therefore awarded costs.

Advocate JO Manyarara, for the Plaintiff.

Sawyer & Mkushi, attorneys for the defendant.

THE STATE v MOYO 1981 ZLR 98

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Court **General Division, Salisbury**

Criminal Review

Dumbutshena, J

18th February, 1981

Flynote

Criminal Procedure and Evidence Act [Chapter 59] - section 191A - defective charge cured by evidence at trim whether admissions of accused person and statement of agreed facts constitute evidence.

Headnote

Where an accused person pleads guilty to a charge which is fatally defective, but subsequently makes admissions in answer to questions put to him by the court and in the statement of agreed facts, those admissions constitute evidence for the purpose of deciding whether the defect in the charge has been cured by evidence at the trial in teens of section 191A of the Criminal Procedure and Evidence Act [*Chapter 59*].

Authorities cited:

Storry, *Rhodesian Criminal Practice;*

S v Mpunzi, G-B-78-1978 (unreported);

S v Taylor, 1971 (2) RLR 55 (GD); 1971 (3) SA 86 (R).

Judgment

Dumbutshena J: The accused pleaded guilty to and was convicted of assault with intent to do grievous bodily harm and was sentenced to a fine of $50 or in default of payment to 50 days' imprisonment with labour and, in addition, four months' imprisonment with labour wholly suspended for five years on condition that during that period the accused does not commit any crime involving violence.

When the record was sent to a scrutinizing regional magistrate it was returned to the trial magistrate because the charge did not include an essential element. The charge was framed in these words:

> "In that upon or about the 27th day of November, 1980, at about 1000 hrs. and at or near Brandfold Farm, Que Que. in the said Province, the said accused did wrongfully and unlawfully assault Garikayi Mhondoma there residing, and did then and there strike him with a shovel upon the

> forehead and right ann, giving him and thereby certain wounds, bruises, injures and hurts and other wrongs and injuries, the said accused to the said Garikayi Mhondoma then and there did."

It will be seen that the words "with intent to do grievous bodily harm" were omitted. It was the

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regional magistrate's view that the omission constituted a fatal defect.

There is no doubt that that omission would have constituted a fatal defect in the past in the light of the verdict reached. However, the failure to allege essential ingredients, such as the one omitted in this charge, may now be cured by evidence at the trial in terms of section 191A of the Criminal Procedure and Evidence Act [*Chapter 59*] which was inserted by Act No. 37 of 1975 and which reads as follows:

> "191A. Whenever an indictment, summons or charge in respect of any offence is defective for want of the averment of any matter which is an essential ingredient of the offence, the defect shall be cured by evidence at the trial in respect of the offence proving the presence of such a matter which should have been averred, unless the want of such averment was brought to the notice of the court before Judgment."

Section 191A of the Act makes it possible for the court to convict on a fatally defective charge or indictment if the defect is cured by evidence adduced at the trial proving the presence of the matter or essential ingredient of the offence "unless the want of such averment was brought to the notice of the court before Judgment." When the defect is discovered before Judgment an amendment is made in terms of section 191 of the Act; if, however, it is not discovered and amended before Judgment it can be cured by evidence provided there is evidence during the trial to cure the defect, in terms of section 191A of the Act and the verdict reached is as valid as if the indictment or charge had been originally correct. Storry, *Rhodesian Criminal Practice* at page 137.

It is clear that admissions made by an accused in answer to questions put to him by the magistrate when proceeding under section 255 of the Criminal Procedure and Evidence Act after the accused has pleaded guilty, can be regarded as evidence given at a trial within the ambit of section 191A.

In this case, when the accused was asked whether he intended to cause the complainant grievous bodily harm, he replied "Yes". Besides, there is a statement of agreed facts, Exhibit 1, in which the accused admitted assaulting the complainant with a shovel. The admission and statement of agreed facts constitute evidence given at the trial, and accordingly the defect at the trial was cured in terms of the provisions of section 191A

of the Act. See The *State v Tsana Wilson Mpunzi,* G-B-78-78 (unreported).

The scrutinizing regional magistrate also drew the attention of the magistrate to cases that have held that a condition of suspension which says provided the accused does "not commit any crime involving violence" is too vague a condition. He cited *S v Taylor,* 1971 (2) RLR 55 (G.D.); 1971 (3) SA 86 (R), a Judgment of BEADLE CJ (as he then was). At page 60B-D (page 90E-D of the South African report) the learned judge had this to say:

> "It is undesirable, therefore, that the word 'violence' should be used without any qualification. Where the first conviction is concerned with an assault upon the person of another the word 'violence' should be qualified by some such expression as 'physical violence upon the person of another'. In this sense, as I will point out later, the word 'violence' has a narrower meaning than the word 'assault'. If, therefore, it is intended by the court imposing the condition that the condition should cover mere threats of violence, as opposed to actual physical violence,

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> then I think the word 'violence' used without qualification is inappropriate and the better term would be 'any case involving any form of assault'."

That case lays down the various ways a suspended sentence involving physical assaults should be worded.

Proceeding in terms of section 64 of the Magistrates Court act [*Chapter 18*], I shall correct the charge by inserting between the words "thereby" and "certain" in the charge, the phrase "with intent to do grievous bodily harm" and alter the condition of suspension to read:

> "In addition, 4 months' imprisonment with labour wholly suspended for 5 years on condition that during that period the accused does not commit any crime involving physical violence upon the person of another."

I would like to acknowledge my indebtedness to the Director of Public Prosecutions for the comments he made in response to my inquiries.

The proceedings having been corrected, I confirm both the conviction and sentence.

My brother PITTMAN agrees with this Judgment.

WIDE v WIDE 1981 ZLR 101

Court **General Division, Salisbury**

Civil Review

Waddington, J

19th February, 1981

Flynote

Maintenance Act [Chapter 35] - section 18 - registration in maintenance court of order made by General Division - whether registration permissible where person against whom order is made resides outside Zimbabwe.

Maintenance order - cessation of order on remarriage of person in favour of whom order is made - whether cohabitation amounts to remarriage.

Headnote

If the person against whom the General Division has made a maintenance order resides outside Zimbabwe, it is not possible to register the order in a maintenance court in terms of section 18 (2) of the Maintenance Act [*Chapter 35*].

Quaere whether maintenance which in terms of a consent paper is payable until a woman's "remarriage", ceases to be payable if she lives with a man without marrying him.

Cases cited:

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Wilshin v Wilshin, 1936 NPD 280;

Watson v Watson, 1959 (1) SA 185 (N);

Riley v Riley, 1967 (2) PH B19 (N);

Schlesinger v Schlesinger, 1968 (1) SA 699 (W);

Drummond v Drummond, 1979 (1) SA 161 (AD);

Parkes v Parkes, 1932 SR 72.

Judgment

Waddington J: This matter comes before me for review in chambers in terms of section 18 (4) of the Maintenance Act [*Chapter 35*].

The parties, to whom I shall refer as the applicant and respondent, respectively, were divorced by order of the General Division on the 13th May, 1977. The parties had entered into a consent paper, the terms of

WADDINGTON J

which were incorporated in the final order of divorce. In terms thereof the applicant was, *inter alia,* ordered to make maintenance payments to respondent of $50 per month in respect of each of two minor children of the former marriage and of $50 per month in respect of the respondent herself "until her death or remarriage". At some stage after the divorce applicant remarried and now resides in Malawi. Respondent resides in Bulawayo.

During December, 1980, applicant's Salisbury attorneys, acting on his behalf, tendered to the Clerk of the Maintenance Court, Salisbury, the order of divorce for registration in terms of section 18 A) of the Maintenance Act [*Chapter 35*]. By letter dated the 15th December, 1980, the Clerk of the Maintenance Court replied to the attorneys concerned, stating that the order had been registered. Applicant then followed this action by making application on the 18th December, 1980, in terms of section 8 of Chapter 35 for

> " . . . cancellation of the Order for payment of Maintenance granted in the General Division of the High Court of Zimbabwe held at Bulawayo on or about 10th May, 1976 (sic), or, alternatively for a variation of the aforesaid order and reduction of the maintenance payable by me to the Respondent on the following grounds:
>
> (a) The Respondent is in breach of the terms of the Order and Consent Paper in that the Respondent lives with one Mr Moore as his wife and has done so and continues to do so since the dissolution of my marriage to the Respondent;
>
> (b) That in the light of the aforegoing conduct the Respondent is in breach of paragraph (4) of the said Consent Paper since her conduct constitutes re-marriage which is in breach of the agreement since the maintenance payable to her in terms of the Consent Paper and Order was to cease in the event of her re-marriage.
>
> (c) Alternatively we agreed that maintenance was to cease upon her re-marriage and the Order should be

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interpreted to mean that maintenance would cease should she live with a man as his wife.

(d) Further, alternatively, there has been a substantial change in the Respondent's financial position and general circumstances in that Mr Moore now supports her and provides the Respondent with her everyday needs and is liable for her necessary expenditure in support of the home she and Mr Moore run which releases me of the obligation to support her.

(e) Further, alternatively, the Respondent refrains from marrying Mr Moore in order to preserve her claim for maintenance against me and thereby defeats the ends of justice."

In due course a notice in terms of section 8 (3) of Chapter 65

WADDINGTON J

was served on respondent, notifying her of the date of the forthcoming inquiry and advising her, should she wish to oppose the application, to be present at the time and date stated or to instruct a "solicitor" to act on her behalf "failing which the application may be granted in your absence". The inquiry was held on the 30th January, 1981, the respondent being in default. At the inquiry the court had before it two letters dated the 5th January and 27th January, 1981, from respondent's Bulawayo attorneys, setting out a number of relevant statements, certain of which may be paraphrased as follows:

1. Respondent no longer lived with Mr Moore and even had she continued to do so this fact would not entitle applicant to have the order for the maintenance of respondent discharged.

2. The "registration" of the order of divorce in terms of section 18 (2) of Chapter 35 was erroneous because the applicant at the time of tendering the application for registration did not reside in Zimbabwe.

3. Respondent was unable through a combination of ill-health and penury to travel to Salisbury to resist the application of her former husband.

In the event, the inquiry was held in Salisbury and the Maintenance Court ordered the variation of the order of the General Division by cancelling the requirement that applicant pay personal maintenance in respect of the respondent. In its Judgment, the Maintenance court stated, *inter alia*, that respondent did not oppose the application but challenged the jurisdiction of the court to entertain the application. The court correctly felt bound to consider the question of its jurisdiction in these circumstances and decided that the registration of the order of the General Division was valid. The reasoning of the court is contained in the following extract from the Judgment:

"In so submitting the respondent relies on section 18 (a) of the Maintenance Act [*Chapter 35*], which reads:

> 'An order of the General Division or of the court of a District Commissioner for the payment of sums of money towards the maintenance of a person may, without prejudice to any other remedies that may be available for the enforcement of that order, be tendered by any person against whom or in favour of whom it was made for registration *to the clerk of the appropriate maintenance court of the province or district where the person against whom the order was made resides.'* (The emphasis is my own.)

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WADDINGTON J

Thus respondent submits that, seeing the applicant is resident in Malawi, he is not in a position to tender the order for registration in this country's Courts. Respondent therefore maintains that any maintenance court is *functus officio* in relation to any application made by Mr Wide.

I cannot accept this contention. Section 18 relates to enforcement of orders made in this country and the order before this court emanated from the General Division of the High Court in Bulawayo. Furthermore, when the section is examined carefully it reveals that any person, in favour of whom or against whom, the order is made, has me right to tender same to the maintenance Courts for registration. Obviously this must be so for a party must have some recourse in respect of an order which affects him or her. The word 'resides' in me section explains which maintenance court will be appropriate. Thus I find that the maintenance Courts of this country are not *functus officio* in this respect.

On the other hand the argument has force in respect of which maintenance court would be the appropriate one. It is common cause that Mr Wide is not resident in this country, let alone in Mashonaland. The respondent lives in Bulawayo. The High Court order was made in Bulawayo. It seems to me therefore that this order should have been registered in the Maintenance Court, 'Bulawayo.

Notwithstanding this, this court would have jurisdiction providing the parties consented thereto. It is evident that the respondent has in fact consented in this respect for the letter of the 27th January, 1981, reads:

> 'She has been informed by her daughter that your client is due to visit Salisbury at the end of the month for medical treatment and presumably he wishes to deal with his application during this trip. In the circumstances our client will not apply for a further postponement.'

For this reason this court will entertain the application."

In my view, the learned magistrate fell into error in concluding that section 18 (2) permitted the registration of the order and also in finding that respondent had consented to jurisdiction. Taking the second point first, and assuming that it was legally possible for the respondent to consent to the maintenance court exercising jurisdiction, it does not seem to me that the court was justified in drawing the inference from the passage in the letter of the 27th January, 1981, that respondent was in fact consenting to jurisdiction. The passage in question was considered out of context of the letter, the burden of which was that because of her ill-health and lack of funds respondent would not seek a postponement. She had "lost the will to contest" the application and left it to the court to make the decision which, the letter concluded, should be one in respondent's favour because the court did not have jurisdiction. This could not have constituted a consent to jurisdiction.

Turning to the interpretation of section 18 (2) of Chapter 35, the court seems to have based its conclusion on the consideration that an order

WADDINGTON J

of the General Division may be tendered for registration by "any person" against whom or in favour of whom it was made and that the phrase "maintenance court of the district where the person against whom the order was made resides" serves merely to specify the approximate maintenance court. As I understand the Judgment of the court, it seems to have been thought

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that an applicant for registration who resides outside Zimbabwe may tender the order of the General Division for registration to the clerk of any maintenance court. It is true that section 18 (2) makes it clear that "any person" would include both applicant and respondent, but the provision makes it equally plain in my view that whoever chooses to tender the order for registration can only do so in the maintenance court of the province or district where the person against whom the order was made resides. It would not have been possible, for example, for the respondent to have registered the order in the maintenance court for the Province of Matabeleland had applicant, being the person against whom the order was made, resided in the Province of Mashonaland.

The question then arises whether valid registration of the order in terms of the section could have been effected if applicant, as he does, resided in another country and not in a "province" or "district" as those expressions are used in section 18 (2).

The applicant in this case did not at any time maintain that he resides in this country and it can be accepted that he resides in Malawi. In deciding whether "province" and "district" in section 18 (2) were intended to include geographical areas outside Zimbabwe, regard should be had to the presumption that Parliament does not intend its statutes to operate extra-territorially unless a contrary intention appears either expressly or by necessary implication (*Wilshin v Wilshin,* 1936 TPD 280, and the authorities referred to therein).

A perusal of Part II of Chapter 35 reveals strong indications that it was intended that those expressions should be limited to areas within this country. For example, section 20 of the Act provides that the clerk of a maintenance court may transmit a registered order to the clerk of the maintenance court of the province or district in which the person who is required to make payments in terms of the order resides. The clerk of the second court is then required to register the order and then notify the person concerned of such registration requiring him to make all future payments through the second maintenance court. Clearly, the lawmaker could not have intended to cast such duties on officers of foreign Courts, as there would be no method of enforcing

compliance with these provisions in such circumstances. In any event, the second maintenance court would not be a maintenance court established under the provisions of Chapter 35 and not amenable to its provisions.

The expression "appropriate maintenance court" which appears in section 18 (2) is defined in section 2 of the Act as meaning, *inter alia*, a magistrates court. The expression should therefore be read as the "magistrates court of the province or district in which the person against whom the order was made resides". Provinces in relation to magistrates courts may be created in terms of section 4 of the Magistrates Court Act [*Chapter 18*]. Section 5 of Chapter 18 provides that there "shall be one or more courts for each province as the Minister may determine". The Magistrates Court act confers on magistrates jurisdiction, both civil and criminal, which is circumscribed by reference, *inter alia*, to provinces (sections 10 and 13). Once again, it could not have been intended that provinces for the purposes of the Act would be capable of creation

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in other countries because no method would be available of enforcing the court's jurisdiction. It follows from this that the expression "province" where it is used in section 18 (2) of Chapter 35 must be construed as meaning a province within Zimbabwe.

While the word "district" in section 18 (2) of Chapter 35 is not defined in that Act, it is defined in section 3 (3) of the Interpretation Act [*Chapter 1*] as meaning "a district into which Zimbabwe has been divided for the purposes of subsection (1) of section 2 of the General Administration Act [*Chapter 85*]". Section 2 of Chapter 85 expressly permits the division of Zimbabwe only into districts and other geographical areas. It follows that "district" in section 18 (2) of Chapter 35 cannot be extended in meaning to include districts in other countries. I am unable to conceive of any reason why this construction should be inconsistent with the intention or object of Part II of Chapter 35 (section 2 (1) (a) of Chapter 1 refers).

I conclude therefore that the registration of the order of the General Division relating to the divorce and requirement that applicant should pay maintenance to the respondent was incompetent. That being the case, it was not competent for the maintenance court to vary the order of the General Division in terms of section 8 as read with section 18 (3) of Chapter 35.

There were other aspects of the proceedings which would have given rise to concern had I not reached the above conclusion. For example, it did not apparently occur to the maintenance court that the inquiry could have been referred to the Maintenance Court, Bulawayo, for

hearing in terms of section 8 (4) of Chapter 35 to enable respondent to present her opposition to the application. Similarly, the maintenance court could, in terms of section 30 of Chapter 35, have authorized the payment of respondent's expenses to enable her to attend the inquiry. Finally, the maintenance court did not consider in its Judgment whether the conduct of respondent in living with Mr Moore constituted "remarriage" in breach of the condition contained in the consent paper. There are a number of decisions touching this question, and it is by no means clear that respondent's conduct did constitute a breach of the condition (*Watson v Watson,* 1959 (1) SA 185 (N.), *Riley v Riley,* 1967 (2) PH B 19 (N.), *Schlesinger v Schlesinger,* 1968 (1) SA 699 (W); *Drummond v Drummond,* 1979 (1) SA 161 (AD), and *Parkes v Parkes,* 1932 SR 72). It would have been necessary to consider this aspect of the case, especially as respondent apparently no longer lives with Mr Moore and presumably no longer receives support from him. It is, however, unnecessary for me to consider any of these questions.

The order of the maintenance court varing the order of the General Division is accordingly set aside.

THE STATE v NYATHI 1981 ZLR 108

Court **General Division, Bulawayo**

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Criminal Review

Gubbay, J

20th February, 1981

Flynote

Exchange control Act [Chapter 170] -section 5(3a) - mandatory minimum fine - whether applicable to attempts to commit offences specified in section

Exchange control Regulations, 1977 - sections 16 and 19 - exportation of currency and goods - meaning of "export".

Headnote

Persons convicted of attempts to commit the offences referred to in section 5 (3a) of the Exchange control Act [*Chapter 170*] are not liable to the mandatory minimum fine prescribed by that section (*S v Kufahakufemberwi & Ors* 1978 (1) SA 327 (RAD), applied).

The word "export" in sections 16 and 19 of the Exchange control Regulations, 1977, means the removal of the currency or goods concerned from the borders of Zimbabwe (*S v Milandri,* 1973 (2) RLR 256 (AD); 1974 (1) SA 174 (RAD), followed).

Cases cited:

S v Milandri (*supra*);

S v Kufahakufemberwi & Ors (*supra*);

S v Baltic, G-B-87-1979 (unreported).

Judgment

Gubbay J: The accused was charged with the unlawful exportation from Zimbabwe of the sum of U S.$200 and of certain goods to the value of Z $200 in contravention, respectively, of section 16 (1) (by and section 19 (1) of the Exchange control Regulations, 1977. He pleaded guilty to both charges and, upon his acceptance of a statement of agreed facts, was duly convicted. On the first count he was sentenced to the mandatory minimum fine of $130 (the equivalent value of U S.$200) or, in default of payment, two months' imprisonment with labour, and on the second to a fine of $45 or, in default of payment, one month's

imprisonment with labour. The latter monetary penalty was not the obligatory minimum prescribed by section 5 (3a) of the Exchange control Act [*Chapter 170*].

The accused is a resident of Bophuthatswana and on the 18th December, 1980, was returning to that territory by mail train bound for Mafeking. At Plumtree he was approached by a Customs official and the currency and the goods, both of which he had failed to declare, were found

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concealed in his suitcase. As the discovery and consequent seizure were made in this country, the first question that arises is whether the accused was properly convicted of the substantive offences. In *S v Milandri*, 1973 (2) RLR 256 (AD), 1974 (1) SA 174 (RAD), BEADLE CJ, considered the meaning to be given to the word "export" in section 17 of the former Exchange control Regulations, 1965. He said at page 260E (page 176G-H of the South African report):

> "It seems to me, therefore, that when section 17 is read as a whole it is quite clear that the Legislature intended the word 'export' to have the meaning which I have quoted from the Shorter Oxford English Dictionary, that is, simply the removal of currency from the borders of Rhodesia."

I entertain no doubt that that is the correct interpretation to accord to the word "export" in both section 16 and section 19 of the current regulations, the former section being similar in its language and eject to its predecessor, section 17. That being so, as the currency and the goods had not been removed from the borders of this country, the verdict in respect of both offences should have been guilty of an attempt to export. The convictions are altered accordingly.

The next question is whether the provisions of section 5 (3a) of the Act apply to an attempt to commit the offences set out in paragraphs (a) and fib) thereof. If they do, then the sentence on the first count must stand and that on the second be increased to $200. The case of *S v Kafahakufemberwi and Others*, 1978 (1) SA 327 (RAD), is much in point. There the accused had been found guilty of conspiring to steal stock and sentenced to the mandatory minimum period of nine years' imprisonment with labour, as laid down in section 8A of the Stock Theft Act [*Chapter 72*]. In dealing with their application for a certificate to prosecute in person an appeal against sentence, LEWIS JP, emphasised that section 339 (1) and (2) of the Criminal Procedure and Evidence Act [*Chapter 59*] provides that persons who attempt to commit an offence, or conspire to commit, or incite persons to commit an offence, shall be liable to receive on conviction the same punishment to which a person convicted of actually committing the offence would be liable;

not that they *shall* receive the same punishment. In the absence of an express mention in section 8A of the Stock Theft Act of conspiracy to steal a horse or bovine, the learned JUDGE PRESIDENT held that it was to be assumed that the Legislature never intended that conspiracy to commit those offences should attract the mandatory sentence. On a parity of reasoning the inference to be drawn from the wording of section 5 (3a) of the Exchange control Act, relating as it does to specific substantive offences, is that the lawmaker was not minded to subject persons who attempt to commit any such offence, or conspire to commit, or incite persons to commit it, to a mandatory minimum fine. This is the view I expressed *obiter* in *S v Baritis,* GD (Byo.) 87/79 (not reported), and is shared by the Attorney-General with whom I have consulted.

The trial magistrate has indicated with respect to the first count that had he not regarded himself obliged to impose a fine equivalent to U S.$200, he would have sentenced the accused to a fine of $50 or, in default of payment, one month's imprisonment with labour. In terms of section 7 (1) of the Act the accused has forfeited the U S.$200 to the State. Taking that loss into account, I consider the penalty now suggested by the magistrate to be appropriate and I order that the

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sentence be so reduced.

There is no justification to interfere with the fine imposed on the second count, which, as it happened, was not equivalent to the value of the goods the accused attempted to export.

NEWHAM J, has read this Judgment and agrees with it.

THE STATE v BHUMU 1981 ZLR 111

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Lewis, JP, and Baron, J A.

Flynote

24th February, 1981 Witchcraft Suppression Act [Chapter 73] - sections 3 and 4 - imputation of witchcraft by practising witch - doctor - appropriate seceded barbarous nature of penalties of corporal punishment prescribed in Act.

Headnote

The offence of contravening section 3 of the Witchcraft Suppression Act [*Chapter 73*], that is, of imputing to persons the use of witchcraft in causing harm to others, must be severely dealt with: sentences of nine months' to a year's imprisonment are habitually imposed even where no real harm is done to the persons imputed, and where the imputer is a witch-doctor by habit or repute the sentence may be even more severe.

The maximum penalty of thirty-six strokes prescribed in section 4 of tho Witch craft Suppression Act [*Chapter 73*] is a barbaric sentence, and even the maximum of twenty strokes prescribed by section 3 is far too severe These penalties should be reduced by the Legislature.

Cases cited:

S v Likani, AD 145/1978 (unreported);

S v Hlupo, AD 138/1969 (unreported).

P M Sullivan, for the appellant, cited *S v Likani* (*supra*) and *Attorney-General v Mayo,* G-B-33-1969 (unreported).

Mrs H A Eleftheriades, for the respondent, cited *S v Chivanga,* AD 149/1971, *S v Lazarus,* AD 167/1971, *R v Machakaire,* AD 140/1968 (all unreported), *R v Hlupo* (*supra*) *S v Likani* (*supra*) and *Attorney-General v Mayo,* G-B-33-1969 (unreported).

Judgment

Lewis JP: The appellant in this case was convicted in the magistrates court at Fort Victoria of

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the crime of contravening section 3 of the Witchcraft Suppression Act [*Chapter 73*]. The charge alleged

LEWIS JP

that on or about the 8th November of last year, and at or near Tovani kraal in the Ndanga Tribal Trust Land, the appellant wrongfully and unlawfully imputed to Nyamadzawo the use of non-natural means in causing a disease in the child of Jerina, that is to say he named or indicated Nyamadzawo as being a wizard. Since the complainant was a fifty-year-old female, "witch" must be substituted for "wizard".

The appellant was sentenced to 12 months' imprisonment with labour, four months of which were suspended for five years on certain conditions. He thus received an effective sentence of eight months' imprisonment with labour. Against that sentence he now appeals to this court.

The appellant pleaded guilty to the charge and the case proceeded on the basis of the following facts which were agreed to by the appellant:

> "On The 4th November of last year the child of Jerina Zenda passed away. As a result of the death of the child, the kraal-head, Zenda, decided to summon a witch-doctor who would detect the cause of the death of the child. The kraal-head gathered all the people in his kraal line, including the complainant. On the 7th November, 1980, 15 people were sent by the kraal-head to Zaka where the accused witchdoctor by the name of Koroni Bhumu lives. The complainant was among those 15 people.
>
> On the 8th November, 1980, in the morning, the witch-doctor was summoned and he became possessed. The witch-doctor pointed out that the complainant Nyamadzawo was the one who caused the death of the child. The accused in this case detected that complainant was the one who caused the death of the child when he was 'possessed by the spirit'.
>
> The spirit asked the complainant to pay 75c for or as a reward for what the spirit had done. The complainant paid the money to the spirit."

It will be seen from the facts which were admitted by the appellant at the trial that the appellant when he committed the offence was by habit and repute a witch-doctor. Where this is the case, section 4 of the Act increases the ordinary maximum penalties prescribed in section 3 from a fine of $200 or three years' imprisonment or a whipping of 20 strokes or two or more of such penalties, to a fine of $500 or seven years' imprisonment or a whipping of 36 strokes, or two or more of such punishments. It is clear, therefore, that the Legislature regards the offence as being far more serious when it is committed by a witch-doctor in the course of practising his trade or business.

It has been frequently pointed out by this court that such offences fall to be severely dealt with. The Act itself lays down the heavy penalties which I have just referred to, and the reason for this is that the consequences of such an imputation can be disastrous for the victim. Very often the unfortunate victim of the imputation is an old woman who

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is then banished from the village, and is driven in despair to suicide. Frequently she is severely assaulted and sometimes even killed. Fortunately for her, these consequences did not apparently overtake the complainant in this case, but they could very easily have done.

Mr *Sullivan* has argued that the sentence was manifestly excessive because no assault was committed on the complainant as had happened in the case of *Chatiramba Likani v The State,* Appellate Division Judgment No. 145/78 (not reported), in which this Court confirmed an effective sentence of nine months' imprisonment with labour. A similar argument was addressed to the court in the case of *Big Boy Hlupo v* The State, Appellate Division Judgment No. 138/69 (not reported). In that case, BEADLE CJ, said this:

> ". . . sentences of something like nine months' to a year's imprisonment are habitually imposed in the ordinary cases where an accused indicates someone as a witch or wizard, even though no great harm other than to reputation has been done to the complainants."

Moreover in those two cases, the appellant was not a witch-doctor by habit or repute as is the appellant in the present case and they were only liable to the lesser penalties under section 3 of the Act.

The magistrate has pointed out in his Judgment that this type of offence is extremely prevalent in the Victoria province at the present time. He says:

> "Every week this court has several cases in which persons are charged, either with contravening this Act or with assaults, arsons or murders, stemming from imputations of witchcraft."

In all the circumstances, it seems to me that an effective sentence of eight months' imprisonment with labour, with another four suspended, cannot possibly be categorized as manifestly excessive, and I would dismiss the appeal.

Before concluding, however, I feel it would be appropriate to comment on the very severe maximum sentences of corporal punishment which the Act provides in sections 3 and 4. When the Act was first introduced by Ordinance 14 of 1899, the maximum corporal punishment laid down in section 3 was 20 lashes and in section 4 36 lashes. The word "lashes" connotes a flogging with a cat-o'-nine-tails. This anachronistic situation prevailed for several years until the present Revised Edition of the Statutes was published in 1974, when the wording of sections 3 and 4 of the former Chapter 50 of the 1963 Revised Edition was altered from "corporal punishment not exceeding twenty

lashes" and "corporal punishment not exceeding thirty-six lashes" respectively to "a whipping not exceeding twenty strokes" and "a whipping not exceeding thirty-six strokes" respectively. I have been unable to find any amending statute by which these alterations were made, and I can only assume that the Commissioners appointed under the Revised Edition of the Laws Act, 1973 (No. 5 of 1973), altered the old wording in the purported exercise of their powers under section 4 or 5 of that Act. Despite the long overdue alteration from lashes to strokes with a cane, the maximum penalty of 36 strokes in section 4 of the present Act is still a barbaric sentence; even the maximum of 20 strokes under section 3 is far too severe. The Magistrates

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Court act [*Chapter 18*] provides in section 54 for a maximum of 10 strokes, which can increase to 12. Both the Stock Theft Act [*Chapter 72*] and the Law and Order (Maintenance) Act [*Chapter 65*] prescribe a maximum of 10 strokes.

It is no answer to say that in practice the courts never impose a whipping in excess of eight strokes. The fact remains that maximum sentences of a whipping of 36 strokes and 20 strokes should not be allowed to remain on the Statute Book as permissible sentences, and I can only hope that the Legislature will take action to remedy this position.

Fieldsend CJ: I agree.

Baron JA: I agree.

Sawyer & Mkushi, attorneys for the appellant.

THE STATE v KATIYO 1981 ZLR 115

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Lewis, JP, and Baron, JA

Flynote

25th February, 1981 Criminal law - forgery - forged instrument - what constitutes. Criminal Procedure and Evidence Act [Chapter 59] - sections 191A and 210 - whether conviction for fraud permissible on charge of forgery alone - whether evidence at trial may render such conviction permissible.

Headnote

It is not forgery merely to state in a document a fact which is not true: forgery is the making of a document which purports to have been made in the terms in which it stands by a person who did not in fact make it or in circumstances: in which it was not in fact made.

An accused person who is charged with forgery but not with uttering the forged instrument cannot in terms of section 210 of the Criminal Procedure and Evidence Act [*Chapter 59*] be connoted of fraud, since fraud requires the making of a false representation; nor can evidence at the trial be employed in terms of section 191A of that Act to supply the missing allegation of misrepresentation.

Cases cited:

S v Dreyer, 1967 (4) SA 614 (E.);

S v Banur Investments (Pty.) Ltd. & Anor 1970 (3) SA 767 (AD);

S v Potgieter, 1979 RLR 261 (AD); 1979 (4) SA 64 (RAD).

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A P de Bourbon for the appellant.

B J Turner for the respondent.

Judgment

Fieldsend CJ: The appellant was convicted of forgery on a charge alleging that with intent to defraud he forged an order for the payment of money called a grain receipt, purporting to be drawn by Mamvura to the prejudice of the Grain Marketing Board. He appealed against conviction and sentence and after hearing argument the Court allowed the appeal against conviction. These are the reasons for that decision.

FIELDSEND CJ

Taken at its best for the State the evidence showed that the appellant, who was a junior depot assistant employed by the Grain Marketing Board at Rusape, made out and signed a grain receipt for the receipt of six bags of shelled nuts from a producer named Mamvura when in fact he well knew that Mamvura had not brought any bags of nuts to the Board. This grain receipt was then handed to another employee who innocently countersigned it on the instigation of the appellant and made entries in other records on the strength of the receipt having correctly recorded what appeared on it.

The point not having been raised in the heads of argument, this court asked for argument on the question whether the facts disclosed the offence of forgery in the light of flee law as stated in such a case as *S v Dreyer,* 1967 (4) SA 614 (E). This case, though concerned directly with forgery under the Transkei Penal Code, does no more than state what for long has been the law in England and is recognized as the law in South Africa and in this country: *S v Banur Investments (Pty.) Ltd. and Anor* 1970 (3) SA 767 (AD) and *S v Potgieter,* 1979 RLR 261 (AD); 1979 (4) SA 64 (RAD). It is not forgery merely to state in a document a fact which is not true; forgery is the making of a document which, as it has often been put, "tells a lie about itself": that is, the completed document must purport to have been made in the terms in which it stands by a person who did not in fact make it or in circumstances in which it was not in fact made.

Mr Turner very properly conceded that he could not support the conviction for forgery. He contended, however, relying on section 210 of the Criminal Procedure and Evidence Act [*Chapter 59*], that the appellant could be convicted of fraud or attempted fraud. Section 210 reads:

> "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."

The difficulty in his way is that the offence of fraud requires the making of a false representation, and the offence with which the appellant was charged was forgery only. The allegation of forgery does not therefore include an allegation of fraud, because a charge of forgery alone does not require the allegation of a representation to another. The position might have been different if the appellant had been charged, as he could have been, with forging and uttering

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because then there would

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have been an allegation that a false representation had been made to another.

Appreciating this difficulty, Mr *Turner* called in aid section 191A of the Act. This reads:

> "191A. Whenever an indictment, summons or charge in respect of any offence is defective for want of the averment of any matter which is an essential ingredient of the offence, the defect shall be cured by evidence at the trial in respect of the offence proving the presence of such a matter which should have been averred, unless the want of such averment was brought to the notice of the Court before Judgment."

It would, we think, be going too far in the circumstances of this case to allow the State to rely on a combination of sections 210 and 191A. It may be that if the appellant had been charged with forging and uttering the grain receipt he could have been convicted of fraud-that would depend upon whether it could be said there was no prejudice to him. But it is another thing entirely to say that he should now be convicted of fraud, as if there had been an allegation of uttering in the charge. It cannot be said that he was put on his guard that he was facing a charge of this nature.

For these reasons there was no way in which the charge could be said to have called upon the appellant to meet an allegation of having communicated a false representation to another, and it would not have been right to have allowed the State to rely on section 191A.

Gill, Godlonton & Gerrans, attorneys for the appellant.

DIONISIO v DIONISIO 1981 ZLR 118

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Lewis, JP and Baron, JA

27th February, 1981

Flynote

Maintenance - liability for paying maintenance for children - whether responsibility for separation of parents affects liability to pay maintenance.

Headnote

Where parents are living apart and one of them has custody of their minor children, the non-custodian parent cannot avoid his liability to pay maintenance for his children by showing that he was not responsible for the separation, nor by offering to take back the custodian parent

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and the children.

Quaere whether a parent would be Garble to maintain a minor child who unjustifiably refused to live with his parents and chose to act as if he were emancipated.

Cases cited:

Alarakha v Alarakha, 1975 (1) RLR 247 (AD); 1975 (3) SA 245 (RAD);

Ramsay v Ramsay, 1910 TPD 182;

Steinmann v Steinmann, 1948 (3) SA 930) (N).

M T O'Meara, for the appellant: So far as the children are concerned, for the purposes of section 6 (2) (a) of the Maintenance Act the test should not involve the question of the relative blameworthiness of appellant and respondent. *Alarakha v Alarakha* (*supra*) is not authority for such a test as it did not deal *per curiam* with the rights of children.

Section 6 (2) (a) provides that a maintenance order may be made against a person who is legally liable to maintain a dependent and a father has a legal liability to maintain his child: *Thompson v Thompson,* 1968 (4) SA 270 (RAD) at 272H, *Gliksman v Talekinsky,* 1955 (4) SA 468 (W) at 469D and 470A; *Lob v Sack,* 1974 (2) SA 670 (T)

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at 671G-H. To deprive children of maintenance from their father because of the relative blame of their parents does not appear to be conformity with the need for the Courts to look after their interests (*Buch* v Buch, 1967 (3) SA 83 (T) at 87F), and the requirement of desertion by the father, stemming from the Deserted Wives and Children Protection Act [*Chapter 173 of 1963*], is not applicable in relation to children.

No appearance for respondent.

Judgment

Baron JA: In May, 1980, the appellant made application by summons under section 4 (1) of the Maintenance Act [*Chapter 35*] for the payment by her husband of maintenance for herself in the sum of $30 per month and for their three minor children in the sum of $90 per month for each child, making a total of $300 a month. The appellant was unrepresented, whilst the respondent was represented by an attorney. The learned magistrate, relying on *Alarakha v Alarakha,* 1975 (1) RLR 247 (AD); 1975 (3) SA 245 (RAD), dismissed the application on the ground that it was essential for the appellant to establish that there was fault on the respondent's side. Several months later the appellant made application for leave to appeal and for condonation of the late noting of the appeal, this application was granted on the 12th December, 1980, in respect of the minor children only. A few days before the hearing the respondent through attorneys wrote to the Registrar, indicating that he did not intend to appear at the hearing of the appeal, but that he did not wish to abandon the Judgment in the Maintenance Court.

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At the conclusion of the hearing we allowed the appeal in so far as it related to maintenance for me minor children and ordered that the respondent pay maintenance for each child in the sum of $90 per month and the costs of the appeal; we now hand down the reasons for that decision.

Section 4 of the Maintenance Act [*Chapter 35*] reads:

> "4. (1) Upon a complaint on oath being made to a maintenance officer of an appropriate maintenance court that a responsible person fails or neglects to provide reasonable maintenance for any dependent of his the maintenance officer may issue a summons requiring the responsible person to appear before an appropriate maintenance court to show cause why an order for the maintenance of the dependent should not be made against him.
>
> (2) A complaint in terms of subsection (1) may be laid by the dependent or by some other person having the care or custody of the dependent or by a probation officer."

BARON JA

Section 4 of the Guardianship of Minors Act [*Chapter 34*] reads, so far as is relevant:

> "4. (1) Where either of the parents of a minor leaves the other and such parents commence to live apart, the mother of that minor shall have the sole custody of that minor until an order regulating the custody of that minor is made under section three or this section or by a superior Court such as is referred to in subparagraph (ii) of paragraph (a) of subsection (7).
>
> (2) .....
>
> (3) Where the mother of a minor has the sole custody of that minor in terms of subsection (1), a juvenile court may at any time, upon the application-
>
> (a) of the mother, make an order directing the father to pay, either weekly or monthly, to the applicant such reasonable sum for the maintenance of that minor as the court thinks fit; or
>
> (b) of the father, make an order depriving the mother of the sole custody of the minor and granting the sole custody to the father if the court is satisfied that it is in the best interests of that minor that the father be granted the sole custody of that minor and, further, make such order relating to the payment of maintenance by the mother and the right of the mother to have access to that minor as the court thinks fit; or
>
> (c) of the father, make an order for the father to have such access to that minor as the court specifies as being reasonable in the circumstances, unless the court is of the opinion that it would be detrimental to the welfare or interests of that minor for the father to have any right of access; or
>
> (d) of either parent, make such order in regard to the custody of that minor, the payment of maintenance for and the right of access to that minor as will give effect to the terms of any settlement reached between the parents of that minor."

No order regulating the custody of the children was made; the respondent could have applied for custody in terms of section 4 (3) (b), but chose not to do so. Hence the appellant is a person "having the care or custody of the dependent" for the purposes of section 4 (2) of the Maintenance Act, no doubt she proceeded under that Act rather than under section 4 (3) (a) of the Guardianship of Minors Act because she claimed maintenance also for herself.

The factors as to which a maintenance Court is required to be satisfied before making an order in favour of a dependent are set out in section 6 of the Maintenance Act, subsections '(1) and

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(2) of which read:

"6. (1) At an inquiry referred to in section *five* the maintenance Court may, subject to the provisions of this Part, make an order against a

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responsible person for the periodical payment of such sum of money as it considers reasonable for the maintenance of the dependent in respect of whom the complaint in terms of section four was made.

(2) A maintenance Court shall not make an order in favour of a dependent unless it is satisfied that-

(a) the person against whom the order is sought is legally liable to maintain the dependent; and

(b) the person against whom the order is sought is able to contribute to the maintenance of the dependent; and

(c) the person against whom the order is sought fails or neglects to provide reasonable maintenance for the dependent."

The respondent's argument in the court below was that he had recently bought a house, that he was at all times able and willing to accommodate and maintain his wife and the children in that house, and that there was no necessity for them to live apart from him, he said his wife had left him and taken the children, through no fault of his, and on this ground he disputed any obligation to maintain either his wife or the children. The learned magistrate upheld this argument, saying:

"It is most unfortunate that in this matter the children will be the sufferers but I cannot order the husband to pay the maintenance unless I am convinced that it is his fault that the children are living apart from him."

Had this approach been confined to the wife's application it would have been correct. The common law does not require a husband to maintain a wife who has left him without cause; if she is to obtain a maintenance order from the courts she must either institute matrimonial proceedings or seek the speedy relief available under the Maintenance Act. In either case she must show that she had good cause to leave the matrimonial home (an order for maintenance *pendente lite*, because it is by definition a temporary and short-term order, is on a somewhat different footing). Under the Maintenance Act the wife must show that the husband was predominantly to blame; in *Alarakha*'s case (*supra*) LEWIS AJP, as he then was, said at page 256E (pages 249-50 of the South African report):

". . . notwithstanding that the main purpose of the legislation is to provide a speedy and summary relief for a deserted wife, the husband is entitled to raise the issue of who was to blame for the separation. Once he has done so, he is entitled to have this issue determined on evidence led before the magistrate and the magistrate has to be satisfied that he is predominantly to blame before making an order in favour of the wife."

The position regarding children is entirely different. It is a fundamental principle of our common law that the sins and quarrels of parents are

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not visited on the children, where in the course of matrimonial disputes questions arise concerning children their interests are paramount. The question for decision in this case is therefore whether there is anything In the relevant legislation which requires the courts to depart from that principle. Had the Legislature intended such a fundamental and far reaching change in the law we would have expected it to be expressed in the clearest terms. But there is nothing in either the Maintenance Act or the Guardianship of Minors Act to suggest that the question of predominant fault can be raised in answer to an application for maintenance for a child. There is nothing, for instance, corresponding to section 2 of the Transvaal Deserted Wives Ordinance of 1903, under which *Ramsay v Ramsay,* 1910 TPD 182, was decided, or section 2 of Act 10 of 1896 (N), under which *Steinmann v Steinmann,* 1948 (3) SA 930 (N), was decided; the latter provision commenced:

> "When any husband unlawfully deserts his wife or leaves her without means of support, or when a father deserts any child being under fifteen years of age, or leaves it without any adequate means of support, . . ."

and the Transvaal provision was in similar terms. Thus desertion by the father was a condition precedent to liability to pay maintenance for children under those Ordinances.

Under the common law both parents have a legal duty to maintain their children according to their respective means, the Maintenance Act and legislation in *pari materia* do not alter this position. There may be cases where a minor child without any justification refuses to live with his parents and chooses to act, against his parents' wishes, as if he were emancipated. Then a parent may not be under any obligation to do more than provide a home to which the child could come and to seek its return. That is not the position here. We were therefore satisfied that the respondent was legally liable to maintain the children and that the appeal must succeed.

Turning finally to quantum, from the record it seemed to us that the respondent, apart from his earnings of $600 per month, was reasonably comfortably off and well able to pay $90 per month for each of his three children; particularly since he chose not to appear in this appeal even to contest the question of quantum, we saw no reason to make an order in any lesser sum than that claimed.

Fieldsend CJ: I agree.

Lewis JP: I agree.

Condy, Chadwick & Elliott, attorneys for the appellant.

Brown & Diamondis, attorneys for the respondent.

THE STATE v MEREDITH 1981 ZLR 123

Court **Appellate Division, Salisbury**

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Criminal Appeal

Fieldsend, CJ, Baron, JA., and Goldin, AJA

16th February and 10th March, 1981

Flynote

Firearms Act [Chapter 308] - section 41 - precautions for protection of firearms-nature of offences created by - section 9 of Fire arms Regulations, 1979 - meaning of "within his sight or reach".

Headnote

Section 41 (1) of the Firearms Act [*Chapter 308*] creates two distinct offences: firstly, that of failing to take reasonably necessary precautions to prevent a firearm or ammunition from falling into unauthorized hands; and, secondly, that of failing to comply with prescribed precautions in respect of firearm or ammunition. Conduct amounting to a contravention of either one of these offences does not necessarily amount to a contravention of the other.

The words "within his sight or reach" in section 9 of the Firearms Regulations, 1979, must be construed strictly and literally; consequently, a person who keeps a firearm on his bedside table within arm's reach while he sleeps has the firearm within his reach for the purposes for section 9.

Case cited:

Attorney-General v HRH Prince Ernest Augustus of Hanover [1957] 1 All 49 ER 49.

B W K Whaled for the appellant.

J H C Friedman for the respondent.

Judgment

Baron JA: The appellant was convicted of contravening section 41 (1) of the Firearms Act [*Chapter 308*]. The particulars of the charge read:

> " . . . In that upon or about the 29th day of October, 1980, and at or near Que Que in the said Province, the said accused having in his possession a firearm, to wit, Arminus .38 special, did wrongfully and unlawfully fail to take such precautions as might be reasonably necessary to prevent such firearm falling into the possession of an unauthorized person, that is to say,

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> did fail to comply with the security measures prescribed by section 9 of the Firearms Regulations, 1979, published in GN number 61/79, that is to say, did fail to keep the said firearm on his person or within his sight or reach or in a secure place."

Section 41 (1) reads:

> "41. (1) Every person having in his possession any firearm or ammunition shall take all such precautions as may be reasonably necessary to prevent such firearm or ammunition falling into the possession of any unauthorized

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person and shall comply with such security measures, both with regard to the safekeeping thereof and the condition in which it may be kept, as may be prescribed."

The prescribed security measures are contained in section 9 of Government Notice 61 of 1979, which reads:

"Every person who has in his possession any firearm or ammunition shall keep such firearm and ammunition on his person or within his sight or reach or in a secure place."

"Secure place" is defined in section 2 of the Regulations as:"

"secure place" means any safe, wall-safe, locked steel box secured to the floor or wall of a room, a locked steel box of a mass of at least twenty kilograms, a handcuff-type of locking device secured to a permanent fixture, a firearm-rack with a chain or rod securely locked, a wall-cupboard having a substantial door fitted with a strong lock, or such other place as will render any firearm or ammunition kept therein reasonably secure against the risk of falling into the possession of any unauthorized person, and includes any place in respect of which the Controller has granted a certificate of registration in terms of subsection (1) of section 16 of the Act."

The State case as outlined was that the appellant resided on the first floor of a block of flats in Que Que. On the night in question he left open the trench doors leading on to a verandah; the firearm, the subject of the charge, was placed unconcealed on his bedside table. An intruder climbed up on to the verandah, entered the flat through the trench doors and stole the firearm from the bedside table. There is no evidence that anything else was stolen. The State outline concluded with the following, as recorded:

"State allegation - as accused asleep - does not fall within requirements."

The defence outline asserted that the appellant took all reasonable precautions, namely, that he locked the front door of his flat, but left the trench doors open because it was hot at the time. There had been two previous housebreakings in the block and the appellant believed the intruder would return. He left the firearm on his bedside table for

BARON JA

his protection. He described himself as "in the security business and an ex-member of the force"; he said that during the election he had received two threatening phone calls midnight which he had not reported to the Police, and that he was on duty and on stand-by and liable to be called out. He concluded his outline by saying that the firearm was within his reach in terms of the Regulations and that he had satisfied the requirements laid down in section 9.

At the conclusion of the State and defence outlines the record dis closes the following comment, apparently by the public prosecutor in response to a question by the Court:

"There is no dispute on facts - it is a matter of interpretation. Do those facts constitute offence or not."

Then there follows the following passage, obviously by the appellant in response to questions by the Court:

"I accept the facts - there is no dispute. It is my belief that firearm within reach - therefore not guilty.

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By COURT: Despite the fact that you were asleep?

A. Yes.

Q. There was no ether precaution taken - like covered or hidden.

A. No, it was there for my own protection. If I had to leave fit in secure place - defeat object."

It is clear from the record and the Judgment that the case was argued almost exclusively on the issue whether "within his reach" means "within amps length" or, in the words of the magistrate, "within your reach and able to prevent the firearm falling into the possession of an unauthorized person". The magistrate adopted the latter construction and convicted the appellant because he took the view that, being asleep, the appellant was not able to prevent the firearm falling into the possession of an unauthorized person. In my view, this reasoning fails to appreciate the structure of section 41 (1) and its effect. The subsection creates two offences, the first being the. failure to "take all such precautions as may be reasonably necessary to prevent such firearm or ammunition falling into the possession of any unauthorized person", and the second being failure to "comply with such security measures . . . as may be prescribed". It is quite clear that the Legislature did not intend section 9 of the Regulations to be an exhaustive description of of what are to be regarded as reasonable precautions, since if this had been the intention the section would have been framed quite differently so as to create only the one offence of failing to comply with the prescribed

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BARON JA

security measures. Under the section as framed, a person commits an offence if he fails to comply with the prescribed security measures notwithstanding that he has taken reasonable precautions to prevent the firearm from falling into unauthorized hands, and equally he commits an offence if he fails to take reasonable precautions to prevent this happening, notwithstanding that he has complied with the prescribed security measures. It might be said that the first of these situations is theoretical only because where a person has taken all reasonable precautions his failure to comply with the strict wording of the Regulations would be a technical offence only. But the other case is very real and underlines the fact that the section creates two offences. Suppose, for instance, a man habitually keeps his firearm in a secure place as defined in section 2 of the Regulations, that is any safe, wall-safe, locked steel box, *et cetera*, but having done that leaves the keys to the secure place lying around where unauthorized persons can readily lay their hands on them. Or suppose a man leaves a firearm on a table in his garden fifty yards away from him, but at all times within his sight, in circumstances in which it would be a matter of simplicity for a passerby in the street to enter the garden and steal the firearm. It seems to the self-evident that in such circumstances there has been no failure to comply with the Regulations, but that there has been a failure to take "all such precautions as may be reasonably necessary . . . ".

That section 41 (1) creates two offences is further underlined by subsection (2) which reads:

"(2) Whenever in any prosecution under the provisions of this section it is alleged in any indictment, summons or charge that all such precautions as were reasonably necessary to prevent a firearm or ammunition from falling into the possession of an unauthorized person were not taken or that any security measure prescribed was not

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complied with, it shall be presumed, unless the contrary is proved, that all such precautions were not taken or that such security measure was not complied with, as the case may be.".

It is abundantly clear that this provision creates two different presumptions which arise in two different sets of circumstances.

Mr *Whaley* argued that the particulars of the charge, notwithstanding that they made reference to a failure to take the necessary pre cautions, were framed so as to allege a failure to comply with section 9 of the Regulations, and that this was the case, and the only case, which the appellant was called upon to meet. I think this argument is well founded and, as I have said, is supported by the record and the Judgment and in particular by the passages to which I have referred above.

Mr *Friedman* on behalf of the State conceded that it was unfortunate that the charge was framed as it was, but submitted that there was no

BARON JA

prejudice to The appellant. As a precaution he applied for an amendment to delete all the words in the particulars of the charge frown and including "that is to say . . .". The Court did not rule on this application during the hearing of the appeal, but invited Mr *Friedman* to address us on the basis that it would be granted and in the alternative on the basis that it would be refused.

Clearly such an application must be refused where there is a reason able possibility that an accused person has been prejudiced in the conduct of his defence. Mr *Friedman* submits that had the appellant been charged, as he should have been, with failing to take reasonable precautions to prevent the firearm falling into the possession of an unauthorized person, his defence could not have bun different. I cannot accept this submission. It was common cause that the appellant had made no attempt to conceal the firearm and that he had not locked the trench doors. But had he been charged with failing to take reasonable precautions the question would have been one of fact Instead of interpretation, and the appellant could, in fact, have dealt with a number of other matters which would have been pertinent to such a charge. For instance, he was not asked, and he did not say, whether he was a light sleeper; no evidence was led as to whether there was a wall or security fence round the block of fats or precisely where the block was situated - it might, for instance, have been in well-lit street opposite the Police Station. It is impossible to say what factors might have been relevant to a charge of failing to take reasonable precautions. In my view, therefore, Mr *Friedman* has failed to discharge the onus on him of satisfying the court that there was no prejudice to the appellant; I think the possibility of prejudice was very real. For these reasons, I think the application for an amendment must be refund and the appeal considered on the basis of the charge as framed.

On this basis, Mr *Friedman* made no serious attempt to support the conviction. His heads of argument had been confined entirely to the question of whether or not the appellant had taken reasonable precautions to prevent the firearm failing into unauthorized hands, he advanced no argument in answer to Mr *Whaley's* submission that in the context of this legislation "within his reach" means within reach whether awake or asleep.

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It is trite that words and phrases cannot be construed *in vacuo*; their meaning can be discerned only in the context in which they are used. I think it is worth citing the words of VISCOUNT SIMONDS in *Attorney-General v HRH Prince Ernest Augustus of Hanover* [1957] All ER 49 at page 53:

BARON JA

> "For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So It is that I conceive it to be my right and dusty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provision of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia,* and the mischief which I can, by those and other legitimate means, discern that the statute was intended to remedy."

If the only offence created by the legislation were the failure to comply with section 9, then I think there would be more force in the argument that, bearing in mind the objects of the legislation, the words "within his sight or reach" cannot be construed literally. I think if the first half of section 41 (1) did not exist there would be force in the argument that section 9 of the Regulations must not be construed in such a way as to defeat the very clear object of the Legislature.

But the first half of section 41 (1) does exist. Therefore in the examples I have postulated, and In even other case where the allegation is the failure to take "all such precautions as may be reasonably necessary . . . ", the charge can and should be framed under section 41 (1) without reference to section 9 of the Regulations; if the allegation is also that there was failure to comply with section 9 then this could be charged separately or as an alternative. I am satisfied that in the context of this legislation the provisions of section 9 of the Regulations can be construed literally without leading to absurdity or defeating the object of the Legislature. There is no necessity, and therefore no warrant, to read in the words added by the magistrate, namely "and able to prevent the firearm falling into the possession of an unauthorized persons'. The requirement to render the firearm reasonably Assure against the risk of falling into unauthorized hands is introduced into section 9 through the definition in section 2 of "'secure place", but only in relation to one portion of the definition, namely "such other place as will render (the) firearm . . . reasonably secure . . ."; this concept of reasonableness cannot, on a charge under section 9, be extended to the requirement to Keep the firearm on one's person or within one's sight or ream.

I would allow the appeal and set aside the conviction and sentence.

Fieldsend CJ: I agree.

Goldin AJA: I agree.

CANTIGALLI v CANTIGALLI 1981 ZLR 129

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Court **General Division, Salisbury**

Civil Action

Dumbutshena, J

19th and 25th March, 1981

Flynote

Matrimonial actions - claim for divorce on grounds of cruelly coupled with claim for dramages for assault which formed one of particulars of cruelty alleged - whether claim for damages should be entertained.

Headnote

In a divorce action between the parties, the wife claimed an order of divorce on the ground of cruelty and, in addition, claimed damages for an assault perpetrated on her by her husband. The assault formed one of the particulars of cruelty alleged by her in her claim for divorce, and was admitted by her husband.

Held that once the wife had established that she has been assaulted, she was entitled to damages for any pain and suffering she had sustained, though in view of the parties' married status and the fact that no serious injures were sustained, the damages awarded should be minimal.

N J McNally for the Plaintiff.

P J M Sullivan for the defendant.

Judgment

Dumbutshena J: The Plaintiff's claim was for an order calling upon the defendant to return to him and to restore conjugal rights to him, failing compliance therewith a decree of divorce. He alleged that the defendant had wrongfully and maliciously deserted him on the 8th April, 1980. This case was at the pre-trial conference consolidated with case No. GD 750/80, which was an application for spoliation proceedings also instituted by the Plaintiff.

In her plea, defendant counterclaimed for a decree of divorce on the ground of cruelty, maintenance in the sum of $150 per month until her death or remarriage, payment of damages in the sum of $500 arising out oil an assault and costs of suit.

DUMBUTSHENA J

[The learned judge, having dealt with the other claims, turned to the claim for damages for assault:]

On the second leg of her prayer, that is, "damages for *contumelia* and pain and suffering", I find it unusual that such a claim should be made. The evidence adduced to found a claim for divorce on the ground of cruelty is the same as that used to support a claim for damages. It is unusual

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for a spouse who seeks divorce to sue for damages for personal injury. However, that is not the overriding consideration. In England, claims for damages for adultery, enticement action, seduction and harbouring of a spouse or child were abolished by the Law Reform (Miscellaneous Provisions) Act, 1980. That, of course, is neither here nor there. I have a legitimate claim for damages for personal injury before me.

At this stage of preparing my Judgment I received a written submission from Mr *McNally* which he had forgotten to make at the end of the trial. Mr *Sullivan* consented to Mr *McNally's* submission being put into writing and sent to me, and also asked his learned friend to include one of his own. Here are the two submissions:

Mr *McNally* submits:

> "To allow a claim for damages for a relatively minor assault in the course of a family dispute would be a radical departure from judicial precedent. I can recall no similar example in our courts nor can I find any precedent in English or South African authority. If every divorce case based on cruelty involving assault were accompanied by a damages claim, the ratio of contested to uncontested divorces would be significantly altered. I submit it would be a dangerous precedent to set.

Mr *Sullivan* commented on the above submission as follows:

> "I would submit that the fact that there is no precedent is no bar to any claim for damages. The court must have regard to the nature and extent of the injuries. In a civilized society it can be no defence that the parties are married. The ratio of contested and uncontested divorces is not a consideration which should influence the court. If the aggrieved party is entitled to damages she should be awarded them."

As pointed out above, in England the commonly known clams for damages that went along with petitions for divorce were abolished. In this country and in South Africa there is no precedent for a claim for damages for assault between spouses one of whom is seeking a divorce. I have great sympathy for Mr *McNally's* line of reasoning, it has much to commend it. But that is not the overriding consideration. What is important in my view is whether she has a cause of action. If she has

no cause of action, then the court cannot entertain her claim for an award of damages. In this case there is a cause of action, and the claim has been properly pleaded and the husband has admitted assaulting his wife. Mr *McNally* submitted, however, that the wife had exaggerated the seriousness of the injuries she sustained, but that is not denying her allegations. It is true that her evidence was not supported to a great extent by the medical reports, Exhibit 2. In one of the reports, Dr. SH Williams put down the injuries as bruises and abrasions, and Dr. D Fretwell, who saw Mrs. Cantigalli on the 15th May, 1980, at the Andrew Fleming Hospital, Casualty Section, said she had pain on the left side of the chest "which on examination feels like a healing fracture of the left eighth rib anteriorly". There is no evidence to contradict her evidence. The dispute centres on the intensity of the assaults perpetrated by the husband on her person and the seriousness of the injuries she sustained. These assaults, which are admitted by the husband, are the acts which give the defendant her cause of action or her right to claim damages. In this case, the same facts and circumstances have given rise to a right to relief in

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two instances, in a claim for divorce on the ground of cruelty and in a claim for damages for personal injury. I am not aware of any authority that would restrain the court from granting the relief sought by the wife once she has established a cause of action and has proved her claim on a balance of probabilities. The wife was assaulted, she sustained injuries and suffered pain. She is therefore entitled to damages for pain and suffering. The assaults were perpetrated when the parties were by themselves. Considering their married status and the fact that no serious injuries were sustained, the amount of damages awarded should be minimal. There is no yardstick by which I can make a mathematical calculation in measuring the amount to be awarded. In the circumstances of this case an award of $100 for pain and suffering is the highest one can make.

Accordingly I make the following order:

(a) The plaintiff in reconvention is granted -

(i) a decree of divorce with costs;

(ii) an award of maintenance in the sum of $100 per month until death or remarriage; and

(iii) damages in the sum of $100.

(b) The defendant in reconvention is awarded costs of the spoliation proceedings.

H Shaw, attorney for the Plaintiff.

Byron Venturas & Travlos, attorneys for the defendant.

SANTAM INSURANCE COMPANY LIMITED v PAGET (2) 1981 ZLR 132

Court **General Division, Salisbury**

Civil Application

Gubbay, J

19th March and 1st April, 1981

Flynote

State Service (Disability Benefits) Act [Chapter 274] - scope of Act - nature of compensation which may awarded in terms of Act.

Practice - suspension of execution of Judgment - when will be ordered - onus upon applicant.

Headnote

The State Service (Disability Benefits) Act [*Chapter 274*] is designed to compensate State employees and certain other persons for at least the pecuniary loss they suffer as a result of disability, not merely for past or future loss of earnings.

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A person who seeks a stay of execution of a Judgment must satisfy the court that, if the Judgment be not stayed, justice will be caused to him or that he may suffer irreparable harm or prejudice; this onus is not easy to discharge where the Judgment it is sought to suspend sounds in money and in such cases execution will as a general rule be allowed to issue.

Cases cited:

Paget v Santam Insurance Co Ltd 1981 (1) SA 813 (Z);

Santam Insurance Co Ltd v Page (1) 1981 ZLR 73 (AD);

Cohen v Cohen (1), 1979 RLR 184 (GD); 1979 (3) SA 420 (R);

Graham v Graham, 1950 (1) SA 655 (T);

Skinner v Shapiro (II), 1924 WLD 174;

Graham v Venter, 1924 OPD 46;

Zaduck v Zaduck (2), 1965 RLR 635 (GD); 1966 (1) SA 550 (SR);

Geffen v Strand Motors (Pvt) Ltd 1962 R & N 259 (SR); 1962 (3) SA 62 (SR).

C S Grossman for the applicant.

F G Smith for the respondent.

Judgment

Gubbay J: On the 9th June, 1978, the respondent, while performing duty as a police reservist, was injured in a motor-car

GUBBAY J

accident caused by the negligence of the applicant's insured. The Disablement Benefits Board established under the State Service (Disability Benefits) Act [*Chapter 274*], hereinafter referred to as "the Act", awarded the respondent a disablement pension for the injuries he sustained in the capitalized value of $10 516, based on an assessment of his degree of disablement at 25 per cent.

On the 6th June, 1980, the Minister of Finance instituted proceedings against the applicant for payment of the sum of $10516 in terms of section 7 (1) (b) of the Act, which gives him a right of action against the "third party" liable to pay damages to the disabled employee of the State, for the recovery of the compensation payable to the latter under the Act. The action is still pending and does not appear to have progressed beyond the issue of summons.

The respondent, as he was entitled to do, sued the applicant in this court for damages, the major portion of which was for loss of earning capacity. In respect of that claim he was awarded the sum of $35 320 (see Judgment No. GS 201/81, a précis of which is reported in 1981 (1) SA

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813 (Z)). The applicant appealed against the award of $35 320 and was successful in having it reduced to $5 000. The Judgment of the learned CHIEF JUSTICE, being AD 30/81, was delivered on the 17th February last and as yet is unreported.*(7)

These then are the historical facts giving rise to the present dispute between the parties. The respondent contends that the applicant is obliged to honour the order of the Appellate Division and make payment forthwith of the sum of $5 000, failing which he threatens the issue of a writ of execution. The applicant, on the other hand, anticipates that if payment is made to the respondent, it will be obliged to effect a further payment to the Minister in respect of the same head of damages. It wishes to avoid a double payment. Accordingly, it seeks an order that execution in respect of the award of $5 000 be stayed pending the determination of the action brought against it by the Minister.

Mr *Smith*, who appeared for the respondent, argued that the application should be refused on the simple ground that the award for loss of earning capacity was but a specie of general damages, akin to shock, pain and suffering and loss of amenities of life, and so fell outside the compensation for disablement payable under the Act. In other words, there was no question of the applicant being entitled to

set off against the $5 000, whatever amount was recovered against it by the Minister under section 7 (1) (b) of the Act. The making of a double payment to the Minister and the respondent in respect of the same head of damages did not therefore arise.

In my view this argument is untenable. The Act is designed to compensate a State employee, or a person assisting the forces of law and order, or the dependents of either, at least for pecuniary loss suffered; it is unnecessary to consider whether a disability not involving any pecuniary loss could be the subject of an award of compensation. Although, as Mr *Smith* pointed out, the computation of a *disablement* pension is calculated with reference to a percentage of the earnings of the disabled person immediately prior to the date of his injury, the employment of that formula is not to be taken as indicative of a legislative intention to afford compensation only for past or future loss of earnings, which come within the common-law classification of special damages. The object is for the State to meet the pecuniary loss resulting from the disability, assessed in accordance with what is deemed to be an appropriate method. A diminished earning ability is just such a pecuniary loss. This was certainly the approach of DUMBUTSHENA J, in making the award of $35 320, for in arriving at that figure the learned judge first deducted the capitalized value of the disablement pension. There is no suggestion in the Judgment of FIELDSEND CJ, that the court *a quo* had erred in that respect. To the contrary, it is abundantly plain that the learned CHIEF JUSTICE regarded the disability award as relating, *inter alia,* to compensation for a diminished earning ability. I say this because the principal reason for his rejecting the argument that the damages awarded were to be reduced by virtue of the provisions of section 7 (1) (b) of the Act was that on the information available, it was not possible to determine the amount, if any, likely to become payable by the applicant to the Minister under the proviso to section 7 (1) (a). Additionally, any determination of

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that amount would not be *res judicata* as between the parties.

I turn now to a consideration of the merits of the application. As observed by GOLDIN J, as he then was, in *Cohen v Cohen (1),* 1979 RLR 184 (GD); 1979 (3) SA 420 (R) at 423B-C, the court enjoys an inherent power, subject to such rules as there are, to control its own process. It may, therefore, in the exercise of a wide discretion, stay the use of its process of execution where real and substantial justice so demands. See also *Graham v Graham,* 1950 (1) SA 655 (T) at 658. The onus rests on the party claiming this type of relief to satisfy the

court that injustice would otherwise be caused him or, to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where, as in the present case, the Judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike with orders for ejectment or the transfer of property, does not render difficult any restitution that may have to be made. See *Skinner v Shapiro* (*11*), 1924 WLD 174 at 176; *Graham v Venter,* 1924 OPD 46; *Zaduck v Zaduck* (2), 1965 RLR 635 (GD) at 636G-H; 1966 (1) SA 550 (SR) at 551E.

Mr *Grossman* urged that it would be inequitable to permit of a situation in which the applicant was to pay $5 000 to the respondent now, an identical amount to the Minister at some date in the future and subsequently have to reclaim the same sum from the respondent. He accepted that although the Minister had awarded the respondent a disablement pension in a capitalized value of $10516, by virtue of the proviso to section 7 (1) (b) of the Act the applicant's liability to the Minister cannot exceed the amount of damages awarded the respondent in respect of loss of earning capacity. But it does not seem to me at all inevitable that the Minister will succeed in recovering as much as $5 000 from the respondent. The capitalized value of the pension is based upon an assessment that the respondent's degree of disability attributable to the injuries he sustained in the accident is 25 per cent. That assessment was found by the Appellate Division to be correct in so far as it took into account a long-standing pre-accident condition of the respondent, but erroneous in regard to the degree of disability flowing from the accident itself, which is considerably less than 25 per cent. It may be that as little as five per cent of the respondent's total disability - as was testified to at the trial by the applicant's medical expert - is properly attributable to the accident. In that event, it is possible that only one-fifth of the amount of the capitalized value of the disablement pension, namely $2 103, is recoverable from the applicant. On this hypothesis, which is not, I think, unreasonable, the grant of the relief would delay payment to the respondent of about three-fifths of his award for an undefined time.

Furthermore, it is not said by the applicant that it is apprehensive about its prospect of recovering from the respondent whatever amount it is found liable to reimburse the Minister. There is no evidence before me that a failure to stay execution will necessarily result in any financial loss to the applicant. In the absence of any such allegation, I am not prepared to assume adversely to the respondent, who is in

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permanent employment, that he is in impecunious circumstances, or that he will fritter away the damages awarded him by the court. His preparedness for the said sum of $5 000, less the costs incurred by both parties in the appeal, to be held by his attorneys in trust for a reasonable period, indicates, to my mind, a responsible attitude with regard to the applicant's rights.

I have already stressed that as a general rule execution will be allowed to issue where the Judgment is for the payment of money (see *Geffen v Strand Motors (Pvt) Ltd* 1962 R & N 259 at 260H; 1962 (3) SA 62 (SR) at 64A), but the court will, of course, exercise its discretion according to the circumstances of each particular case. I am satisfied that the applicant has not shown, on the probabilities, that a failure to stay execution may cause it irreparable harm or prejudice.

For these reasons I am of the opinion that the application must be dismissed with costs.

Winterton, Holmes & Hill, attorneys for the applicant.

John May & Co., attorneys for the respondent.

CHARLIE v KACHEPA 1981 ZLR 137

Court **Appellate Division, Salisbury**

Civil Appeal

Lewis, JP, Baron, JA, and Goldin, AJA

3rd April, 1981

Flynote

Costs - discretion of trial court - when appeal court will substitute its own discretion for that of trial court.

Headnote

A court which hears a civil matter has a discretion as to the award of costs, which must be exercised judicially upon a consideration of the facts of the particular case in order to be fair to both sides. An appeal court may substitute its own discretion for that of the court *a quo* only if the appeal court is satisfied that the exercise of its discretion by the court *a quo* was unreasonable in the circumstances.

Authorities cited:

Gelb v Hawkins, 1960 (3) SA 687 (AD);

Cilliers, Law of Costs;

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Khan v Rural Licensing Board and Ors 1964 (4) SA 181 (N).

V C Ziyambi for the appellant.

J S Stander, for the respondent: Jurisdiction is conferred upon the Appellate Division of the High Court in matters heard by the magistrates courts in civil cases by section 80 (1) of the Constitution and the Magistrates Court Act [*Chapter 18*]. Section 41 (2) (b) of the Magistrates Court Act provides that any order as to costs may be appealed against if it is final and definitive. The magistrate's order is interlocutory, being neither final nor definitive, and precluding neither party from arguing the question of costs when the matter is tried. In the premises this court does not have jurisdiction to hear this appeal.

Judgment

Lewis JP: This is an appeal against an order of costs made in the magistrates court. The appellant (to whom I shall refer as the plaintiff) sued the respondent (to whom I shall refer as the defendant) for $120. The defendant denied liability for that and counterclaimed for $237,50.

LEWIS JP

After the pre-trial conference had been held, the plaintiff's attorney set the matter down for hearing on the 6th and 7th August of last year. However, on the 1st August - five days before the trial dates - at the instance of the plaintiff's attorney, the case was removed from the roll for those dates because of the illness of the plaintiff herself. This was done with the consent of the defendant's attorney. Thereafter, on the 15th August, the plaintiffs attorney set the matter down again for trial on the 10th and 11th December last year and sent a copy of the notice of set down, addressed to the clerk of the court, to the defendant's attorney. On receipt of this notice of set down, the defendant's attorney wrote the following letter to the Plaintiffs attorney on the 29th August last year acknowledging the notice of set down and saying:

> "We have written to our client and will address you further in due course as to the suitability of the date mentioned in Four letter."

Thereafter, on the 20th November last year - that is three weeks before the trial dates - the defendant's attorney wrote to the Plaintiffs attorney as follows:

> "We write to advise you that the 10th and 11th of December, 1980, are not suitable to us for trial in this matter.
>
> The reason being that the writer will be engaged in a criminal matter in the Magistrate's Court on the 10th for December and possibly on the following day as well.
>
> In view of this, we request that the matter be postponed to the 15th and 16th of December if these dates are convenient to yourselves.
>
> Should the 15th and 16th of December be unsuitable, we suggest that we arrange other mutually suitable dates.
>
> We await to hear from you *urgently.*"

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On the same day the Plaintiff's attorney replied as follows:

> "This case was set down for hearing on the 15th August, 1980, and notice of set down was stewed on you on the 18th August, 1980. On the 29th August, 1980, you wrote to us and It appears from the contents of: that letter that the trial dates were convenient to you and all you were checking was whether the dates were suitable to your client.
>
> It appears therefore that you arranged the trial dates in the criminal case after we had already served a notice of set down for this matter on you.
>
> The 15th and 16th December, 1980, are not convenient to us and it is unlikely that if this case is postponed we will get trial dates before February, 1981.
>
> Our client is anxious to have the matter concluded without further delay and our instructions are to proceed with the hearing of this case on the 10th and 11th December, 1980.
>
> We therefore suggest that you brief counsel to handle this matter."

1981 ZLR p139

LEWIS JP

On the 3rd December, 1980, the defendant's attorneys wrote to the clerk of the Court, with a copy to the Plaintiffs attorneys confirming that the date of the trial was unacceptable and requesting a postponement. On the 8th December, 1980, the Plaintiff's attorney wrote to the clerk of the court, with a copy to the defendant's attorneys, saying:

> ". . . we are not agreeable to the postponement of the above case. Counsel has already been instructed to appear for the plaintiff."

At the hearing on the 10th of December, the defendant's attorney applied for a postponement. Mrs. *Ziyambi* was briefed for the plaintiff and she had apparently not been instructed that this application was going to be made and took instructions and informed the Court that she was agreeable to the postponement, provided the defendant was ordered to pay the wasted costs.

In the course of the hearing, the defendant's attorney explained his letter of the 29th August to which I have already referred. It appears from the Plaintiffs attorney's letter of the 20th November that the plaintiffs' attorney believed that the defendant's attorney had originally been prepared to accept the date of set down as the 10th and 11th December, but at a later date he lead the opportunity of appearing for someone else at a criminal trial and deliberately double-dated in the hope of being able to get the civil trial postponed. Had that been the true position, there can be little doubt that the proper order would have been that the defendant should pay the wasted costs of the postponement, but this was not so. It was explained by Mr Nhari for the defendant that what happened was that he had originally been briefed in the criminal trial which was the subject of a lengthy remand, and was set down on the 10th December. He then received the notice of set down in the present case. It was, therefore, necessary for him to ascertain front his client whether his client wished to have the matter heard on that day, on the basis that he went to some other attorney, or alternatively incurred the expense of briefing counsel instead of Mr Nhari to handle the matter. His instructions were eventually that his client wished him to apply for a postponement. The magistrate accepted this explanation from the defence attorney and, speaking for myself, I can see no reason whatever

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why he should not have done so.

As to the suggestion that the defendant should have gone to the expense of briefing counsel to appear in this matter, it does not seem to me that was a reasonable suggestion. The amounts in issue were very small, comparatively speaking, and counsel is not usually briefed to handle matters of that sort in the magistrates court unless there is

LEWIS JP

some particularly tricky point of view of law involved, which does not appear to be the case here.

The magistrate, having accepted the defence attorney's explanation, went on to make the following finding:

> "Now in this instance, I cannot find defendant to beat fault. From an early stage, after the matter had been set down for trial today, defendant sought a future date to be arranged between the parties and The clerk of court. What else was he to do than write the letters which he did? On the other side of the coin, knowing that such date was inconvenient, why did Plaintiff press for hearing today? It seems to me that some fault may lie at the plaintiff's doorstep for the necessity of having this application aired. Perhaps plaintiff believed that defendant had notice of this set down prior to the set down date being arranged for the criminal case in Harare Magistrate's Court? This allegation is contained in plaintiff's attorney's letter of the both November but this was disputed by Mr Nhari in this court today and I must accept Mr Nhari's word on the matter for he is an officer of the court.
>
> Over all, therefore, if there be fault for such delay, I find that it may be found in both camps and thus to order defendant to meet the costs of this application would be inappropriate.
>
> Thus this matter will be postponed *sine die* and costs will be costs in the cause."

Against that order the plaintiff now appeals on the basis that the magistrate should have ordered that the defendant pay the wasted costs, and that he should not have found in favour of the defendant that his attorney's explanation was reasonable. As I have already indicated, I am satisfied that the magistrate acted entirely properly in accepting that explanation. Now the principle underlying all orders of costs is, I think, very aptly summed up by HOLMES, AJA (as he then was), in *Gelb v Hawkins,* 1960 (3) SA 687 (AD) at 694, where he stressed the fact that reference to other cases is not always helpful. He says at the page cited:

> "In seeking a basic principle to apply, I do not thirty it is necessary or desirable to say more than that the court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides."

As far as an appeal against an award of costs is concerned, this court is not at large in the matter. This court can only substitute its own discretion for that of the court *a quo* if this court is satisfied that the exercise of its discretion by the court *a quo* was unreasonable in the circumstances.

LEWIS JP

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The matter is summed up in Cilliers, *Law of Costs*, at page 304 as follows:

> "The test applied by the Appellate Division in deciding whether or not to interfere with the exercise of the discretion of a trial judge as to costs is also applied by superior in appeals from inferior courts. More than fifty years ago it was held that the court as a rule is loath to interfere with orders as to costs made by inferior courts, and will refrain from doing so unless it is obvious that the court below has been wholly injudicious and unjudicial in the order under review. This view is echoed in modern practice, according to which a court of appeal will not interfere with a magistrate's discretion as to costs, judicially exercised. In *Chetty v Louis Joss Motors* [1948 (33 SA 329 (T.)] the Transvaal Provincial Division, with reference to *Merber's* case [1948 (1) SA 446 (AD)], reaffirmed that the court on appeal will not readily interfere with the exercise of a magistrate's discretion in awarding costs. The court on appeal cannot interfere if there are some grounds on which a court, acting reasonably, could have come to the particular conclusion to which it did come. Where a court of appeal considered an award of costs which had been made by a magistrate in the exercise of his discretion as equitable and just to both parties, the court naturally refused to disturb it in any way."

It seems to me that the court in the instant case, bearing in mind its findings which were proper findings, acted fairly and equitably to both parties by ordering that the final order of the costs of postponement should depend upon who won the case when it eventually came to trial.

There was a precedent for an order of this nature in the case referred to by the magistrate, *Khan v Rural Licensing Board and Others, reported in* 1964 (4) SA 181 (N) at 187F. That was a contested notice of motion which involved an adjournment of the proceedings, and the question arose as to who should pay wasted costs of the adjournment. FANNIN J, said at page 187:

> "In all these circumstances it seems to me that it can properly be said that the necessity for an adjournment should not be laid wholly at the door of either the applicant or the respondent, and that any costs wasted as a result of the adjournment should properly be regarded as part of the costs of the application."

In the result, therefore, it seems to me that the order appealed against was a proper one, and was certainly not one with which this court should interfere.

Before concluding, I would comment on the fact that it is most undesirable that costs should be wasted as they have been wasted in a case of this nature. The amount involved both on claim in convention and reconvention is, as I have said, a small amount; the amount that has been wasted in costs in the squabble over the postponement, both in the

court below and in this court, far exceeds the amount which the parties are going to fight about when they come to trial. That is a deplorable state of affairs. There should be close co-operation and a spirit of give and take between attorneys so that this sort of thing does not happen in the future. It may well be desirable, as my brother GOLDIN has suggested, for the Magistrates Court Civil Rules to be amended to provide for the matter of set down for trial to be agreed and fixed at the pre-trial conference itself, so that at least the attorneys on both sides can settle on dates when they will both be available to attend the trial. The appeal must be dismissed with costs.

Baron JA: I agree.

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Goldin AJA: I agree.

Sawyer & Mkushi, attorneys for the appellant.

Chirunda, Chihambakwe & Partners, attorneys for the respondent.

ONE TEXTILES (PRIVATE) LIMITED v MATHER AND PLATT (SA) (PROPRIETARY) LIMITED 1981 ZLR 143

Court **Appellate Division, Salisbury**

Civil Appeal

Lewis, JP, Baron, JA, and Goldin, AJA

6th April, 1981

Flynote

Building contracts - architects' certificates - whether architect's certificate may require payment to be made by contractor to sub-contractor - whether architect's certificate requiring payment direct to sub-contractor may be replaced by certificate requiring different form of payment of same amount.

Headnote

In terms of a standard building contract, an architect cannot issue a certificate requiring final payment to be made by the main contractor to a subcontractor, since he can validly certify payments to be made by the employer only.

Where a standard building contract contains a provision allowing an architect to certify final payments to be made by the employer direct to sub-contractors, the architect must elect whether to issue a certificate requiring payment to be made directly to a sub-contractor or to issue a certificate for payment to the main contractor; once an architect has issued a certificate requiring payment to be made on one basis he cannot issue a fresh certificate requiring payment to be made on the other basis.

Authorities cited:

Hudson, *Building and Engineering Contracts,* 10th edition;

J A Milestone and Sons Ltd. v Yates Castle Brewery Ltd. [1938] All ER 439;

Lloyd Brothers v Milward [Hudson's Building Contracts, 4th edition, volume 2 page 262];

McGreevy v Boomer (1880) Cassell's Digest 73 (Canada).

R Jagger, for the appellant: It is accepted that Baeck, as the agent of the appellant, was empowered to issue a final certificate directed to the

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appellant for the value of work done by the respondent (clause 20 (c)) or he could have issued a certificate directed to the contractor for the value of the work done by the respondent. In respect of the same work, however, Baeck was not authorized to issue two certificates for the value of the respondent's work directed to the appellant and to the contractor. In issuing the second certificate Baeck in effect cancelled the first certificate, which cancellation (or amendment as he put it) was done at the instance of the respondent's agent. Once cancelled (or amended) the first certificate lost its liquidity as it no longer was an acknowledgment of debt signed by the appellant's agent but was a certificate signed by Baeck who had no contractual relationship with the contractor. It was not possible to have in existence two certificates in favour of the respondent showing the appellant and the contractor as its debtors: *J A Milestone & Sons Ltd. v Yates Castle Brewery Ltd.* (*supra*) at 443F. In requesting an amended certificate, the respondent acknowledged that it had to look to the contractor for payment, and in so doing it abandoned its right to proceed against the appellant.

R R Horn, *SC,* for the respondent: The so-called amended certificate constituted no more than a direction to the contractor to pay the subcontractor. The architect had no power under clause 20 (c) or any other provision of the main contract so to direct since he was agent of the building owner, not of the contractor. A certificate properly issued under the main contract entitled the contractor to receive the amount certified (clause 22 (a)). Such a certificate may, however, specify that a particular amount of the certificate is to, be paid to a particular sub-contractor (clause 21 (b)). Clause 12 (0 of the sub-contract does not confer on the architect the right to direct the contractor to pay a sub-contractor even if no payment has been made by the employer to the contractor. This is expressly negated by the words "issues a certificate to the contractor including an amount to cover such final payment"; see also HUDSON, *op. cit.,* page 769. Clause 21 (b) also empowers the architect to issue a certificate in respect of the provisional sums mentioned in the bills of quantities entitling the sub-contractor to payment direct from the employer. In either such event the specific amount certified as being payable to a sub-contractor is set against all such provisional sums at the settlement of accounts.

The incompetence of the architect to issue a direction to the contractor to pay in the form in which the amended "certificate" was issued is the reason why the contractor refused to act on it. In issuing it, the architect postulated that the contractor had already been paid by the appellant in respect of all work done by the respondent. This was at all times denied by the contractor.

LEWIS JP

In any event the amended certificate was invalid because the architect was *functus officio* as regards the issue of any further certificate *qua* work done by the respondent once he had issued the original certificate. See clause 20 (c), Hudson, *op. ct.,* page 484, and Keating, *Building Contracts,* 14th edition, pages 881.

Judgment

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Lewis JP: The respondent (to which I shall refer as the plank made application in the General Division for provisional sentence against the appellant (to which I shall refer as the defendants in the sum of $12723,16, in terms of an architect's certificate. The application was opposed by the defendant and affidavits were filed on both sides. The learned judge who dealt with the matter granted the application and ordered that costs be costs in the cause. The appellant appealed to this court against that order.

After hearing argument on the appeal, this court dismissed the appeal with costs, and indicated that reasons would be handed in at a later date. Here are the reasons.

The plaintiff company was a nominated sub-contractor for the installation of a fire sprinkler system in a factory berg erected for the defendant by the main contractor, C Pettigrew (Pvt) Ltd (to which I shall refer as Pettigrew). In pursuance of clause 20 (c) of the main contract, one Baeck, the defendant's architect, issued the certificate in question, No. 421, on the 31st August, 1976, for the payment direct by the defendant to the Plaintiff of the final amount owing to the plaintiff for its work on the fire sprinkler system, which was admittedly performed to the satisfaction of the architect. The certificate was forwarded to the defendant with the following covering letter from the architect dated the 31st August, 1976:

> "We enclose our certificate No. 421 showing the final amount of the contract price in respect of the above-mentioned installation for your information and attention.
>
> With regard to final payment to Mather & Platt (SA) (Pty.) Limited, the value of work executed Is $100071,34 which has been agreed with the nominated subcontractor and the Quantity Surveyor.

Summary

Final cost	$100 071,34
Previous payments	$79 389,84
Total amount due including release of retention	$20 681,50
This amount is made up as follows:	
Amount to be paid directly	$12 723,16

LEWIS JP

Amount to be paid from retention fund	$7 958,34
Total amount due	$20 681,50

> We wish to point out that the amount of $862,75 being the retention in our certificate No. 377 does not appear to have been deposited in the retention account and, therefore, is not included in the release of retention as

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calculated above."

Clause 20 (C) of the contract reads as follows:

"(c) If the Architect desires to secure final payment to any nominated Sub-contractor before final payment is due to the Contractor and if such Sub-contractor has satisfactorily indemnified the Contractor against any latent defects, then the Architect may a certificate under Clause 22 hereof include an amount to cover the said final payment and upon payment thereof to the Sub-contractor shall be discharged from all liability for the work and/or materials covered thereby save for such latent defects as aforesaid and he shall pay to the Subcontractor the amount (subject to Clause 21 hereof) so certified whereupon the limit of retention money named in Clause 22 hereof shall be reduced by such certified amount.",

The amount of the retention money was duly released, but the defendant, through Mr Pitluk, one of its directors, repudiated liability for the amount now claimed on the basis that the plaintiff must look to the main contractors, Pettigrew Limited, for payment, and in particular, so Pitluk alleged, because Pettigrew had already been paid the amount owing to the Plaintiff.

When eventually, at the beginning of 1978, the plaintiff's attorney was instructed to recover the money, he, unfortunately, was unaware of the special terms of the contract contained in clause 20 (c) quoted above which permitted a certificate to be Issued for final payment by the defendant direct to the nominated sub-contractor. On the 12th January, 1978, he wrote to the architect in the following terms:

"re: *C. Pettigrew (Private) Limited*

We refer to certificate of payment No. 421 which for some reason which is unclear to us reflects the payee as the sub-contractor whereas, of course, the privily of contract exists only between the employer and the contractor.

Would you kindly therefore also issue a certificate for a like amount in favour of the contractor."

Equally, unfortunately, as will be seen, he headed the letter "re: C Pettigrew (Private) Limited" and did not reveal the fact that his client was the sub-contractor, the plaintiff in this case.

LEWIS JP

To this letter the architect replied as follows:

"re: *C. PETTIGREW (PRIVATE) LIMITED*

Thank you for your letter dated 12th January, 1978. Certificate No. 421 was issued in accordance with clause 20 (c) of the Agreement and Schedule of Conditions of Building Contract signed between the employer Cone Textiles (Pvt) Ltd., and the contractor C Pettigrew (Pvt) Ltd. Under the circumstances therefore I cannot issue a certificate in favour of your client for this work as the subcontractors concerned have been paid for the work executed."

It is clear that the architect assumed that the plaintiff's attorneys were representing Pettigrew and that Pettigrew was their client. Again, unfortunately, the plaintiff's attorney did not apparently acquaint him self with the terms of clause 20 (c) of the agreement, but persisted in his request for another certificate in favour of the contractor because of the lack of privily of contract between the plaintiff and the defendant, so that the contractor could then pay his client, which had not been paid the outstanding sum due to it by anybody.

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Eventually, after further correspondence, some time in June, 1978, the architect purported to issue a certificate which he called "Amended Copy of Certificate No. 421", and which he dated the 31st August, 1976, addressed to the contractor for payment by the contractor of the sum of $12723,16 to the plaintiff. Contrary to what was asserted by Mr Pitluk in his answering affidavit, the architect was not permitted to issue a certificate of this nature for a number of reasons.

In the first place, the architect cannot validly issue a certificate to the contractor for payment to a sub-contractor. He is not the agent of the contractor, and he can only validly certify payments to be made by the employer. If the architect does not act under the special terms of clause 20 (c) quoted above, he can only certify for payment to the contractor by the employer' at the sand time indicating in that certificate what proportion of the sums so certified should be paid over to subcontractors. See Hudson on Building card Engineering Contracts, 10th edition, page 769. Contrary to what is asserted by Pitluk, clause 12 (f) of else special contract between the plaintiff and Pettigrew reflects this position, as it refers to the architect issuing "a certificate to the contractor" (i.e. for payment by the employer to the contractor) "including an amount to cover such final payment" (i.e. to the sub-contractor) (the emphasis is my own).

LEWIS JP

In the second place, on the authority of *JA Milestone and Sons Limited v Yates Castle Brewery Limited* [1938] 2 All ER 439, where there is a provision such as clause 20 (A in the contract, this gives rise to an election either to pay to the sub-contractor direct or to pay to the contractor for payment by him to me sub-contractor, and once

a certificate on one basis has been issued, then a certificate cannot validly be issued for the same amount thereafter on the other basis. Even if the architect in this case had purported to issue a second certificate to defendant, the employer, for payment to the contractor of sums designated for the sub-tractor, this would not have been valid, particularly as at that stage a dispute had already arisen, and was being submitted to arbitration, between the defendant and Pettigrew, the contractor. See the *Milestone* case (*supra*) per SINGLETON J, at page 444C, applying *Lloyd Bros. v Milward,* reported in Hudson's Building Contracts, 4th edition, vol. 2, page 262.

In the third place, it is clear both from the terms of the architect's letter of the 31st August, 1976, quoted above, the form of the certificate itself and the terms of clause 20 (c) on the basis of which it was issued, that *qua* the sub-contractor this was a final certificate for the payment in full to the sub-contractor for all his work and hence the architect was *functus officio* in regard to the question of payment to the subcontractor, and divas precluded from issuing an amended certificate dealing with payment to the sub-contractor. See Hudson *loc cit.,* page 484 and the case of *McGreevy v Boomer cited therein.*

Mr *Jagger* submitted that even if the second certificate were invalid the effect of it was to cancel or destroy the validity of the first certificate. The same argument was put forward by counsel for the employer and rejected by SINGLETON J, in the *Milestone* case (*supra*), and we are satisfied it cannot succeed in this case either.

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As to the submission in Mr *Jagger's* heads of argument that the request for another certificate by the plaintiff's attorney amounted to an abandonment or waiver of its rights to proceed against the appellant, Mr *Jagger,* very understandably, felt himself unable to press this argument. As we have indicated above, the plaintiff's attorney, in requesting the other certificate was under a complete misapprehension as to the validity of the first certificate and he had also been misled by representations made to him by Pitluk and the architect as to the factual position.

LEWIS JP

The learned judge in the court *a quo* went into the whole question of waiver very thoroughly in his Judgment and came to the conclusion that waiver had not been established. We are in no doubt that the learned judge came to the right conclusion.

Byron Venturas & Travlos, attorneys for the appellant.

Coghlar, Welsh & Guest, attorneys for the respondent.

THE STATE v BAJILLA 1981 ZLR 150

Court **Appellate Division, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Goldin, AJA

8th April, 1981

Flynote

Sentence - suspension - conditions of suspension - where permissible to suspend sentence subject to more than one coalition.

Headnote

It is not necessarily improper for courts to attach more than one condition to the suspension of a portion of a sentence, but they should not attach additional conditions - such as conditions relating to the restitution of stolen property - to the suspension of portion of a sentence which would in the ordinary course be suspended only on condition of future good behaviour such conditions should rather be attached to the suspension of further portions of the sentence.

Case cited:

R v Zindoga, 1980 ZLR 86 (AD); 1980 (2) SA 991 (RAD).

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Appellant in person.

J H C Friedman, for the respondent' cited the following cases:

R v Zindoga (*supra*); *S v Gibbison,* AD 190/1978 (unreported); *S v Nyathi,* AD 158/1979 (unreported), *S v Mutandwa,* AD 119/1978; *S v Mwando,* 114/1977 (unreported); *S v Wilson,* AD 10/1976 (unreported); *S v Masakadza,* AD 89/1973 (unreported); *S v Zuze,* 1972 (1) RLR 255 (AD), 1972 (3) SA 214 (RAD), and

S v Narker & Anor 1975 (1) SA 583 (AD).

Judgment

Baron JA: The appellant pleaded guilty to the theft by conversion of moneys amounting in total to $2119,41 and was duly convicted. He was sentenced to two years' imprisonment with labour of which six months was suspended for five years on the conditions that he did not commit during that period any offence involving dishonesty and, secondly, that he repaid to the complainant the total amount stolen within approximately one year. He applied for and was granted a certificate to prosecute his appeal in person.

BARON JA

The question was raised as to the propriety of attaching two conditions to the suspension of a portion of the sentence. I do not think this is ,necessarily improper; it must depend on the particular case and the particular conditions in question. I see nothing wrong, for instance, in saying to a convicted person whom I would otherwise send to prison for two years for the theft of a substantial sum of money: "One year of your sentence will be suspended on condition that you make full restitution of what you have stolen, but even if you make restitution the suspended sentence may be brought into effect if you offend again." Such an order provides an incentive to make restitution and an incentive also for future good behaviour. The impropriety creeps in, however, if one attaches a second condition in a case where one would in the ordinary course have suspended a portion of the sentence on the condition only of future good behaviour. For instance, where an accused person pleads guilty to theft, even of a substantial sum of money by means of a calculated course of conduct, and proves to be a first Mender one would normally impose a sentence of imprisonment and suspend a portion on the condition only of future good behaviour; if in addition there is imposed the condition that the accused make restitution, and if in Act he is unable to do so, then the effect may be that he serves the whole of the period of imprisonment imposed and the leniency which the mitigating factors would normally attract is lost.

As was said by MACDONALD CJ, in the case of *R v Zindoga* 1980 ZLR 86 (AD), 1980 (2) SA 991 (RAD) at page 992:

> "In crimes such as theft, restitution is always a mitigating factor."

Where restitution has already been made, this will be taken into account in assessing sentence; but where it is used as a condition of suspension, it should I think be used in such a

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way as to hold out an additional incentive to make restitution in order to earn further leniency. This was the course in fact adopted in *Zindoga*'s case (*supra*). There the appellant was sentenced to two years' imprisonment with labour of which nine months was suspended, after sentence, and prior to the hearing of the appeal, relatives of the appellant offered restitution. This court suspended a further eight months of the sentence on the same conditions as had attached to the suspension of the earlier portion, and on the further condition that the appellant repay to his former employer the sums stolen.

I think a similar order is proper in the present case. The moneys here were stolen over a period of some eight or nine months and the amount of over $2 110 was substantial; on the credit side, the appellant pleaded

guilty and was a first offender. Even without restitution being made I think this was a proper case for the suspension of a portion of the sentence, although in the absence of restitution an effective sentence of 18 months' imprisonment, whilst severe, is not so severe as to enable this court to interfere. But the effect of the magistrate's order is that, should the appellant prove unable to make restitution, he might lose the benefit of the mitigating features, and receive an effective sentence of two years, which in my view would be manifestly excessive in all the circumstances of this case.

The appellant says he is able and anxious to make restitution. That being so, I would suspend a further portion of the sentence on the condition that he does so, and on the additional condition of future good behaviour. I would, therefore, allow this appeal, set aside the sentence imposed by the magistrate and substitute the following:

> "Two years' imprisonment with labour of which six months is suspended for five years on condition that the appellant is not within that period convicted of any offence involving dishonesty and in respect of which he is sentenced to a term of imprisonment without the option of a fine, and a further period of six months is suspended on the same condition, and on the further condition that the appellant repays to his former employer the sum of $2119,41 on or before the 1st of January, 1982."

I should perhaps say that the reason for extending the time for the making of restitution is that there has been a considerable delay in this matter which cannot be blamed on the appellant, it is understandable that he will not have put in train arrangements for the realization of his property while there were uncertainties surrounding the prosecution of his appeal.

Lewis JP: I agree.

Goldin AJA: I agree.

THE STATE v MAKORE 1981 ZLR 153

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Court **General Division, Salisbury**

Criminal Review

Dumbutshena, J

8th April, 1981

Flynote

Criminal Procedure - splitting of charges - whether amounts to splitting to charge separately unlawful possession of fishing - net and unlawful fishing with same net in contravention of sections 80 and 74 of Parks and Wild Life Act, 1975.

Parks and Wild Life Act, 1975 - section 91 - ompensation order - when must be made.

Headnote

It does not amount to an unlawful splitting of charges to charge a person with the unlawful possession of a fishing-net in contravention of section 80 of the Parks and Wild Life Act, 1975 (No. 14 of 1975), and to charge him separately with unlawful fishing, using the same net, in contravention of section 74 of the same Act.

Semble an order of compensation in terms of section 91 of the Parks and Wild Life Act, 1975, must be made at the time that the convicted person is sentenced

Cases cited:

R v Peterson & Ors 1970 (1) RLR 49 (GD); 1971 (2) SA 130 (R);

Attorney-General v Jakubec, 1979 RLR 267 (AD); 1980 (2) SA 884 (RAD);

S v Rabson & Anor., G-B-27-1979 (unreported);

S v B, 1975 (1) RLR 284 (AD).

Judgment

Dumbutshena J: The accused pleaded guilty to the contravention of sections 80 (1) and 74 of the Parks and Wild Life Act, 1975 (Number 14 of 1975). He was convicted and sentenced to a fine of $35 or in default of payment 35 days' imprisonment with labour on each count.

Briefly, the facts are that the accused was stopped on Concession Hill Road near the Pasi Dam turn-off and searched by the police. He was found in possession of two fishing-nets and 20 kilograms of fresh fish.

DUMBUTSHENA J

The scrutinizing regional magistrate? submits that there was a splitting of charges. In coming to this view, he relied, among others, on *R v Peterson & Ors* 1970 (1) RLR 49 (GD); 1971 (2) SA 130 (R), a Judgment of the former Chief Justice, BEADLE CJ, and GREENFIELD J The rule

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against The splitting of charges was laid out by the Appellate Division of the High Court in *Attorney-General v Jakubec,* 1979 RLR 267 (AD) at 270G; 1980 (2) SA 884 at 886F-in a passage that embodies the rules enunciated in *Peterson's* case (*supra*). LEWIS JP, had this to say:

> "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 & 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 *S v Petersen and Others,* 1971 (2) SA 130 (R) at 131.
>
> In the last-quoted case, BEADLE CJ, at 131D, 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 than' which, according to the circumstances and on a commonsense basis, is best calculated to achieve the object of the rule. It seems to me that the 'same evidence' test is the one which should be applied here."

The accused was charged with the contravention of section 80 (1) of the Act in that he was found in possession of two fishing-nets without a permit. The section reads:

> "80. (1) No person shall possess a fishing net-
>
> (a) unless he is a registered dealer in or manufacturer of fishing nets; or
>
> (b) except in terms of a permit issued in terms of paragraph (a) or (e) of section eighty-three; or
>
> (c) unless such person is an appropriate authority for any waters."

He was also charged with the contravention of section 74, which forbids fishing except in terms of a permit issued by the appropriate authority.

DUMBUTSHENA J

Section 74 is to this effect:

> "74. (1) Subject to the provisions of section seventy-five, no person shall fish any waters, other than those specified in a notice made terms of subsection (2), except in terms of a permit issued in tends of section seventy-five the appropriate authority for the waters.
>
> (2) The Minister may, by notice in the Gazette, specify any waters for which a permit to fish, issued in terms of section seventy-five, shall not be required and may in like manner amend or revoke any such notice.
>
> (3) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence."

It is my view that the two sections create two different offences: one offence being the unlawful

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possession of fishing-nets and the other the unlawful fishing. The rules on the splitting of charges authoritatively laid down in *Jakubec*'s case do not apply in cases of this nature. It is therefore proper to charge an accused person with both the contravention of section 80 (1) and section 74 of the Parks and Wild Life Act. In *S v Matoba Rabson and Stanjange Angilesi,* G-B-27-1979 (unreported), NEWHAM J, considered cases involving contraventions of section 5 of the Trapping of Animals (Control) Act [*Chapter 134*] and/or section 47 (2) (a) of the Parks and Wild Life Act, where wire snares are set and an animal caught in them and where an accused is sometimes charged with contravening both sections, sometimes with contravening section 5 alone and sometimes with contravening section 47 (2) (a), and came to the view that "since either charge would have been based on identical facts the accused upon conviction would have deserved the same sentence". What NEWHAM J, said in *S v Matoba Rabson and Stanjange Angilesi* (*supra*) applies to contraventions of sections 80 (1) and 74.

It is my view that there is no improper splitting of charges in the instant case. The accused had possession of fish and nets on a road. He had already fished. If he had been found fishing, then some doubt might have arisen as to whether the fishing and the possession of the nets were not done in the process of carrying out one intent, the catching of fish. Even then the two offences would have remained distinct and divisible. Each one standing alone is cranial. A person who is in possession of nets for which he holds a permit would still be committing an offence were he to fish without a permit. The same evidence is not required to prove each of the contraventions.

The dividing line between what is and what is not a splitting of charges is in some cases very thin indeed, although the facts of the instant case can be distinguished from those in *S v B,* 1975 (1) RLR 284(AD) at 285B-F, where BEADLE ACJ, as he then was, discussed

DUMBUTSHENA J

whether an accused may be charged with the contravention of sections 48A (1) (b) and 36 (1) of the Law and Order (Maintenance) Act [*Chapter 39*]. I think it is useful to repeat what he said there:

> "There is one technical feature in the case, however, to which I might usefully draw attention. On one count the appellant was charged with contravening section 48A (1) (b) of the Law and Order (Maintenance) Act, which is committing an act of terrorism or sabotage. The act of terrorism or sabotage complained of is that he fired a rifle at the Security Forces. He was convicted of this charge on the basis that he fired his rifle, and those who were accompanying him fired theirs, at the Security Forces. On the fourth charge he was charged and convicted of contravening subsection (1) of section 36 of the Law and Order (Maintenance) Act in that he was unlawfully in possession of arms of war. The arms of war concerned are the rifle and the loaded magazines for that rifle which he used in this engagement with the Security Forces which forms the subject of the other count. It seems to me that in circumstances such as this the charges should not be framed as separate charges. If the State are not certain that they can bring home the charge of terrorism which involves engagement of the Security Forces it would be perfectly in order to charge the appellant in the alternative with being in unlawful possession of arms of war; but to charge him with both seems to me to come perilously close to the splitting of charges. In any case if the accused is convicted on the main charge of using his rifle unlawfully in an engagement with the Security Forces, it takes the matter no further to prove that the rifle which he used was an arm of war and he had no right to bring it into the country because this is inherent in the main charge."

S v B (*supra*) is more perilously close to the splitting of charges than the instant case because of the distinctions with respect to permits which I have drawn above. More than that, it is my

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opinion that the rules against the splitting of charges so well set out in *S v Peterson & Ors* (*supra*) and *Attorney-General v Jakubec* (*supra*) were so perilously compromised in *S v B* (*supra*).

However, there will be no possible prejudice to the accused if the failure to charge the accused with only one count results in the splitting of charges and the two counts are treated as one for sentence, as the trial magistrate now thinks he should have done, and as I now propose to do.

When the magistrate sentenced the accused on the 2nd February, 1981, he did not make a compensation order in terms of section 91 of the Act. When his attention was drawn to this by the scrutinizing magistrate, he caused the accused to be brought back to court on the 4th March, 1981, and compensation in the sum of $10 was ordered. By that time, the magistrate was *functus officio* and the proceedings were irregular. Besides, the sum ordered for compensation should have

been $15 and not $10. Since a compensation order is mandatory, the magistrate should have sent the record to the High Court for correction.

Accordingly, the conviction is confirmed but the sentence is set aside and substituted by the following sentence:

> "$35 or, in default of payment, 35 days' imprisonment with labour.
>
> In addition, it is ordered that the accused pay compensation to the Gatooma Municipality in the sum of $15 for onward transmission to the Gatooma Angling Society."

Smith J: agrees.

THE STATE v NYUKE 1981 ZLR 158

Court **General Division, Salisbury**

Criminal Review

Waddington, J

8th April, 1981

Flynote

Criminal procedure - review powers of High Court - whether conviction for attempt to commit offence may be altered to conviction for substantive offence if accused was charged only with attempt.

Headnote

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Where in a magistrates Court an accused person is charged with and convicted of an attempt to commit an offence, and the evidence led at the trial shows that he should have been charged with and convicted of the substantive offence, the High Court on review cannot alter the conviction to one of committing the substantive offence.

Authorities cited:

Hunt, South African Criminal Law and Procedure, volume 2;

S v Collett (2), 1978 RLR 288 (GD);

Scott-Rodger v R, 1956 R & N 421.

Judgment

Waddington J: The accused was charged with attempted fraud and was convicted on his plea of guilty. The State allegation was that the accused, an art instructor, purchased a horse-racing ticket on the 21st February, 1981. Apparently, when the horse of his choice lost the race, the accused turned to his own skills and he carefully altered the ticket to reflect that he had backed a winner and not a loser. He then sent a friend to the offices of the turf club with the altered ticket to collect what was intended to be ill-gotten gains. The swindle was dis covered when the altered ticket was compared with the turf club's copy or counterfoil. The scrutinizing regional magistrate is of the view that on these admitted facts the accused ought to have been charged with fraud and not merely with attempted fraud. Presumably, being unable to certify that the proceedings were in accordance with real and substantial

WADDINGTON J

justice, the regional magistrate has forwarded the record of the case for review in terms of section 63A (3) (b) of the Magistrates Court act [*Chapter 18*]. The trial magistrate has attempted to Justify his view that the charge was correctly laid and that the conviction accordingly is also correct. I cannot agree that the charge was correctly laid and should add that I have some difficulty in following the trial magistrate's reasoning.

Fraud is defined as the unlawful making, with intent to defraud, of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. (Hunt, South African Criminal Law and Procedure, volume II, page 714.) In the instant case, the accused had no lawful right to alter the ticket, the misrepresentation that he had backed a winner was patently made with intent to defraud and it was certainly potentially prejudicial to the turf club. Finally, the misrepresentation was communicated to the represented. All the essentials of fraud are therefore present this case and had the accused been charged with fraud instead of with an attempt only, his conviction on the former charge would have been correct.

There is nothing which I can do to alter the course originally set by the State, however.

> "Once the State has decided upon a charge and the accused has pleaded thereto, the State has, as it were, nailed its colours to the mast and it may not subsequently seek an amendment so as to substitute a more serious

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charge for a less serious one."

(*per* GUBBAY J, in *S v Collett* (2), 1978 RLR 288 (GD) at 291). In this case, it would not have been open to the State, once the accused had pleaded to the charm of attempted fraud, to seek the substitution of a more serious charge, because that would have deprived the accused of his right to a verdict on the charge to which he had pleads (section 163 (S) of the Criminal Procedure and Evidence Act [*Chapter 59*] refers). *A fortiori,* I cannot now in terms of section 64 (2) of the Magistrates Court act [*Chapter 18*] alter the proceedings since my powers on review in this regard at least are limited to what the magistrate himself could lawfully have done during the trial after plea (section 64 (2) (c) of Chapter 18 refers).

The situation which has arisen in this case is distinguishable from the position in *Scott-Rodger v Reginam,* 1956 R & N 421, Cause there the appeal court was concerned with a case where the accused had been charged with theft and convicted of an attempt which was a competent alternative verdict to the principal charge. On appeal, the conviction alas altered to; one of theft.

WADDINGTON J

In the circumstances, all that I am able to do is to decline to certify that these proceedings were in accordance with real and substantial justice.

The Attorney-General agrees with my views in this case.

EX PARTE CALDERWOOD NO IN RE ESTATE WIXLEY 1981 ZLR 161

Court **General Division, Bulawayo**

Civil Application

Gubbay, J

19th December, 1980, and 16th April, 1981

Flynote

Succession donatio mortis cause am pactum successorium - nature - nomination by husband of wife as beneficiary of life insurance policy - whether amounts to donatio mortis cause or pactum successorium ejected after prior agreement with wife - whether nomination revoked by subsequent divorce of parties and agreement to consent paper on divorce or by subsequent making at will by husband.

Headnote

The applicant was executor in the deceased estate of a man who, after agreeing with his wife that he should do so, had nominated her to be the sole beneficiary of an insurance policy taken

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out on his life. The deceased had subsequently divorced his wife and made a new will but had not revoked the nomination, which he was entitled to do unilaterally. The applicant , sought an order that the proceeds of the insurance policy be paid into the deceased estate, contending that the agreement between the deceased and his wife and the subsequent nomination constituted an invalid *donatio mortis causa* or a successory pact, alternatively that the nomination had been revoked by the subsequent divorce and making of the will.

Held that , in addition to the contemplation of death, the motive for a *donatio mortis causa* must be pure benevolence and noting else; since the deceased's undertaking to his wife to nominate her as beneficiary was motivated by an acceptance of a moral obligation to provide for her, the undertaking was not a *donatio mortis causa.*

Held, further, that even if the contract between the deceased and his wife were a *donatio mortis causa*, the subsequent nomination of the wife as beneficiary was a *stipulati alteri* concluded between the deceased and the insurance company, and was the paramount contract, independent of the earlier contract.

Held, further, that the foundation of a *pactum successorium* is that the promissor purports to bind himself to the contract and does not retain the right uni-laterally to revoke his promise; the retention of this right by the deceased prevented the contract between himself and his wife being a *pactum successorium*.

Held, further, that in settling the proprietary rights of himself and his wife in a consent paper on divorce, and in subsequently executing a will, the deceased did not revoke the nomination of his wife as beneficiary, because, until his death, the insurance policy did not form part of his assets.

Held, further, that the nomination of the wife as beneficiary was not automatically revoked on divorce because, not being motivated from sheer liberality or disinterested benevolence, it was not a true donation.

Authorities cited:

Joubert*, The Law of South Africa*, volume 8, paragraph 131;

Avis v Verseput, 1943 AD 331;

The Master v Thompson's Estate, 1961 R & N 43 (a); 1961 (2) SA 20 (FSC);

Kay v Kay, 1961 (4) SA 257 (AD);

Meyer & Ors v Rudolph's Executors, 1918 AD 70;

Ex parse Steyl, 1951 (1) SA 275 (O);

Oost & Andere v Reek & Snideman, NNO, & Andere 1967 (1) SA (1) 472 (T);

Biljon v Biljon, 1961(2) PH B17 (D);

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Meyer v Meyer, 1944 TPD 73;

Turnbull v van Zyl, NO, 1974 (1) SA 440 (C);

Ex parse Macintosh, NO in re Estate Barton, 1963 (3) SA 51 (N);

Botes, NO v Afrikaanse Lewensversekeringsmaatskappy Bpk. & 'n Ander, 1967 (3) SA 19 CW);

Hahlo, *1967 Annual Survey of South African Law*, pages 60-62;

Joubert*, 1967 Annual Survey of South African Law*, page 122;

Potter & Anor v Rand Townships Registrar, 1945 AD 277;

Gordon, *South African Law of Insurance,* 2nd edition, pages 304 and 308;

Borman & de Vos, NNO, & 'n Ander v Potgietersrusse Tabakkorporasie Bpk. & 'n Ander, 1976 (3) SA 488, (AD);

Ahrend & Ors v Winter, 1950 (2) SA 682 (T.);

Varkevisser v Est Varkevisser & Anor 1959 (2) R & N 58; 1959 (4) SA 196 (SR);

Costain & Partners v Godden, NO & Anor, 1960 R & N 658; 1960 (4) SA 456 (SR);

Curtis' Estate v Gronningsaeter & Anor 1942 CPD 531;

Hahlo, *South African Saw of Husband and Wife*, 4th edition, pages 318 and 429.

C W Jordaan for the applicant.

GUBBAY J

Judgment

Gubbay J: The applicant is the executor testamentary in the estate of the late William Robert Wixley who died on the 3rd November, 1979.

In that capacity he seeks an order declaring that the sum of $6 432, being the proceeds of a policy of life assurance issued to the deceased by South African Mutual Life Assurance Society (the insurance company), is payable to the deceased's estate. The person nominated as the sole beneficiary under that policy is Janice Myrna Wixley, the divorced wife of the deceased. I shall refer to her hereinafter as "the beneficiary". Both the insurance company and the beneficiary have had notice of these proceedings but took no part in them. The insurance company has intimated that it is not willing to pay the proceeds of the policy to the applicant save in accordance with the decision of the court and it abides the result. The beneficiary believes herself entitled to such proceeds. She has deposed to an affidavit setting out the circumstances which led to her nomination under the policy. She, too, abides the decision of the Court.

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The policy was taken out by the deceased on the 9th August, 1969. It was payable either when he attained the age of 65 years in the year 2005 or upon previous death. On the 20th December, 1969, he and the beneficiary were married and in 1971 and 1973 two children were born to them.

In early February, 1977, the deceased informed the beneficiary that he was desirous of enlisting in the Selous Scouts regiment of the Rhodesian Army. At the time the guerilla war, raging in the rural areas of the country, was rapidly escalating and the Selous Scouts were recognised as a select body of highly trained and efficient men who encountered grave risk to life in their unsparing efforts to Hush out and capture or eliminate bands of guerillas in the bush. Not unnaturally the beneficiary voiced concern about the dangers encountered by the Selous Scouts and the real possibility of the deceased being killed in action. She wished to be assured that in such tragic event, he would be able to make adequate provision for herself and the children. The deceased responded that he would appoint her beneficiary to his policy, which he explained would have the erect that if he were to be killed, she would be paid the benefits within seven days of his death. On the 7th February, 1977, the deceased exhibited to the beneficiary a printed copy of the insurance company's beneficiary appointment form and after explaining the content to her, signed it in her presence. The insurance company accepted the appointment the following day. Thereafter the beneficiary reluctantly withdrew her opposition and the deceased joined the regiment of his wish.

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The completed beneficiary appointment form provides that Mrs. Janice Myrna Wixley has been appointed beneficiary under the policy and that the insurance company shall pay any benefits payable in the event of the death of the life assured to her; that the beneficiary has no right in or to the policy until written notice of the death of the life assured has been received by the insurance company, that until that time the policy may be dealt with as if no beneficiary had been appointed and any payment made by the insurance company relative to the policy shall be valid and effective as if no beneficiary had been appointed; that the life assured has the right to cancel the appointment without the consent of the beneficiary by notice in writing reaching the insurance company before the death of the life assured; that the appointment shall automatically become null and void in the event of the life assured ceding the policy or any interest therein (whether as security or otherwise) or in the event of the beneficiary predeceasing the life assured. It does not contain any provision to the effect that the appointment shall lapse in the event of the dissolution of the marriage of the life assured and the beneficiary.

On the 10th March, 1979, the beneficiary deserted the deceased, who instituted an action for an order for the restitution of conjugal rights and, failing compliance, a decree of divorce. The deceased executed a new will on the 8th June, 1979. In it he appointed his two children heirs in equal shares of the whole of his estate and effects, whether movable or immovable and of whatsoever nature and wheresoever situate. On the 13th July, 1979, a decree of restitution of conjugal rights was granted in which the custody of the two children, maintenance for them, and the property rights, were regulated in terms of a consent paper concluded on the 30th May,

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1979. A final order of divorce was granted on the 28th September, 1979.

Despite the severance off the matrimonial bond, the deceased's deep affection for the beneficiary remained, for on the 19th October, 1979, he wrote professing his love for her and asking forgiveness for the unhappiness their relationship had caused her. He stated that she could rely on him for whatever assistance she required.

Some two weeks later the deceased was killed in the course of a raid mounted by the Zimbabwe Rhodesia security forces upon guerilla camps based in Zambia. He had not expressly revoked the appointment under the policy and the beneficiary subsequently notified the insurance company of her acceptance of the benefits.

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Mr *Jordaan*, who appeared for the applicant, advanced the argument that the contract between the deceased and the insurance company was but an integral part of the contract between him and the beneficiary, and that the transactions, as an entity, amounted to a *donatio mortis causa* by the deceased of the right of his estate to receive the proceeds of the policy on his death, which failed for lack of testamentary form. He argued, in the alternative, that the two contracts, being inseparable, in essence constituted an invalid *pactum successorium.* I shall deal with each of these arguments in turn.

An acceptable and lucid exposition of the nature of a *donatio mortis causa* is to be found in Joubert's *The Law of South Africa*, volume 8, paragraph 131, which reads:

> "A *donatio mortis causa* is a gift which is donated in anticipation of the death of the donor. It might be made in fear of imminent death or in contemplation of one's own mortality. The moving force behind the gift is something more than mere liberality. It is an unshakeable awareness of man's mortality and the desire to regulate one's affairs before the advent of death. The *donatio mortis causa,* like a *donatio inter vivos*, is a contract which requires an offer and acceptance. Dominions will not vest in the donee until there has been either delivery or transfer of the gift. While sharing these features in common with a *donatio inter vivos*, the *donatio mortis causa* is also influenced by a totally different sphere of the law-the law of succession. A *donatio mortis causa* is akin to a testamentary disposition in that it contemplates the devolvement of an estate at death in a manner chosen by the donor. Whatever may be validly bequeathed by a testator may also be given *mortis causa.* Persons who are competent to make and receive a legacy may also make a *donatio mortis causa*. Thus although a donation between spouses *inter vivos* is forbidden, a *donatio mortis causa* between husband and wife is valid . . .
>
> The striking difference between a *donatio inter vivos* and one *mortis causa* is that in the case of the latter the donor normally retains ownership and possession of the gift until his death and always retains the power to revoke his promise unilaterally."

It is clear from this passage that, in addition to the contemplation of death, the governing motive for the gift must be pure benevolence. If simple generosity or liberality was not the motive, the promise once accepted is irrevocable. See *Avis v Verseput,* 1943 AD 331 at 353 and 366; The *Master v Thompson's Estate,* 1961 R & N 43 at 84A-D; 1961 (2) SA 20 (FSC) at 50F-H; *Kay v Kay,* 1961 (4) SA 257 (AD) at 261A. Thus it cannot found a *donatio mortis causa,* a prominent characteristic of which is the donor's unilateral right of revocation, whether express or tacit. See *Meyer and Others v Rudolph's Executors,* 1918 AD 70 at 83, *Ex parte Steyl,* 1951 (1) SA 275

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(O) at

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277A-B, *Oost en Andere v Reek en Snideman, NNO en Andere,* 1967 (1) SA 472 (T) at 478H-479A.

The first inquiry then is to determine whether the deceased was motivated by sheer liberality in promising the beneficiary the proceeds of the policy upon his death. I am not, of course, able to divine what was m the mind of the deceased. But the circumstances under which the promise was made may be sufficient to justify an inference as to his real motive. The beneficiary expressed anxiety at the deceased's decision to join the Selous Scouts. She appreciated that by so doing he was increasing the risk of death. She was concerned for the security of the children and herself if their bread-winner were lost. Faced with that predicament, the deceased indicated his preparedness to make over the proceeds of the policy to her against the contingency of death. It seems to me that this situation points strongly in the direction of the deceased being motivated not by sheer generosity, but from an acceptance of the moral obligation to provide for his wife and children. He recognised his responsibility to them and wished to allay the fear of the beneficiary that should he die, she and the children would lack adequate financial support.

In *Kay v Kay* (*supra*), the husband claimed the transfer of an immovable property from the wife, alleging that he had donated it to her. The wife denied the donation. In his Judgment RAMSBOTTOM JA, reaffirmed that there can be no donation "properly speaking" unless the donor's motive is pure liberality or disinterested benevolence. In order to succeed in his claim "it was necessary for the plaintiff to prove that when he arranged for the property to be registered in the name of the defendant he made a donation properly so called, that is, that his motive was pure liberality" (at 261G). In this regard a further extract from the Judgment, omitted from the official report but Ted by BURNE AJ, in *Biljon v Biljon,* 1961 (2) PH B 17 (D) is apposite:

> "The plaintiff does not say that he was moved by generosity to give his wife a present: he says 'I gave it to her to give her security and to bring up the family'. In answer to the direct question What was your motive in giving her the house?' he said 'To give her security for a home, for the kids too'."

In *Biljon*'s case, it was held that a husband who had donated R1 510 towards the purchase price of a house registered in the name of his wife because he considered it was his duty to provide a home for her and their son, had not been inspired solely by disinterested benevolence. The donation of the money was, therefore, not one properly so called

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and was irrevocable. Cf. *Meyer v Meyer,* 1944 TPD 73 at 78-79, *Turnbull v van Zyl, NO,* 1974 (1) SA 440 (C) at 443B-C. There is no warrant in my view for not applying the same approach to the present case. Indeed, the Judgment of CANEY J, in *Ex Parte Macintosh*, *NO:* In *Re Estate Barton*, 1963 (3) SA 51 (N), shows how unlikely it is that sheer liberality is the motivating factor

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for a husband to enter into this type of contract of insurance and nominate his wife as beneficiary. The learned judge said at 57A-E:

> "This was a contract between the deceased and the insurance company creating benefits intended to provide for his family after his death and the nomination of Mrs. Barton was clearly associated with the family income provision. It must have been motivated, not by sheer liberality or dis interested benevolence on the deceased's part, but out of an appreciation of a duty to provide for his family's maintenance. He had a legal duty during his lifetime to provide for them and a moral duty to provide for them after his death; after his death his estate would have that duty towards his children in need of maintenance. Their mother had and has a like duty towards them, and by insuring his life the deceased assured fulfilment, in whole or in part, of his duty: by nominating the mother of his children as the beneficiary of the policy, he assured again, in whole or in part, fulfilment of his duty to her and to the children. In addition, by taking out the insurance he relieved himself in some measure of any duty he may have felt he had to amass capital for the purpose of providing income after his death."

It follows in my opinion that as the contract between the deceased and the beneficiary cannot be classified as a *donatio mortis cause* failing for want of testamentary form, Mr *Jordaan's* first argument must be rejected.

Notwithstanding the view I take, I am prepared to assume that the contract between the deceased and the beneficiary does amount to a *donatio mortis causa* - the moving cause berg the apprehension of death in the war-which would have leveed enforceable but for non-compliance with section 2 of the Wills and Attesting Witnesses Act [*Chapter 306*]. The question then to be considered is whether the nomination of the beneficiary under the policy, which was accepted by the insurance company, constituted a *stipulatio alteri* collateral to the *donatio mortis causa* or was merely the dependent juridical act by which the donation would be given effect to and so, being an integral part of the duo between the spouses, was tainted by the lack of testamentary form.

In support of his contention, Mr *Jordaan* relied heavily on Professor Hahlo's criticism of the decision in *Bates, NO v Afrikaanse*

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Lewensversekeringsmaatskappy Bpk. en 'n Ander, 1967 3) SA 19 (W), as noted in 1967 *Annual Survey of South African Law* at pages 60-62. In order to pronounce upon the validity or otherwise of that criticism, it is necessary for me to deal in some detail with *Botes'* case. The debased, one van Gent, first became engaged to the defendant, a Miss Myburgh, in 1960 when he was 21 years of age. The engagement was terminated shortly thereafter but was reinstated in June, 1961. In November, 1961, the deceased took out a policy on his life with the insurance company. In it he named his fiancée as his beneficiary, inserting the words "future wife" alter her name. The policy contained the standard form clause that the nomination of the beneficiary was subject to cancellation at any time by the policy holder and that The beneficiary was not to acquire any rights under the policy during the lifetime of the assured. In August, 1963, the betrothal was once again broken off. According to the plaintiff, who was the mother of the deceased and the executrix in his estate, it was not reinstated. Miss Myburgh claimed it was. On the 6th January, 1964, van Gent died and it was only then that Miss Myburgh learned of the existence of the policy and of her appointment thereunder. The Plaintiff sought a *declaratur* that the estate was entitled to the prods of the policy, being the sum of R1 000. Miss Myburgh

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claimed she was enticed to payment. RABIE J (as he then was), held in favour of Miss Myburgh. The Judgment is in Afrikaans and I am indebted to Mr *Jordaan*: for rendering a translation. From it I quote the following passage (at 23A-24A):

> "After completion of the arguments before me I requested counsel, with reference to the case *Mutual Life Insurance Co. of New York v Hotz,* 1911 AD 556, to file written submissions on the assumption that van Gent's agreement with the company be regarded as an agreement for the benefit of defendant as third party. From these submissions it appears that counsel agree that we are here dealing win a contract for the benefit of a third party and further that defendant could accept the benefit stipulated for her after van Gent's death and that she in fact accepted it. Mr *Vermooten* argues, however, that this still does not mean that defendant is entitled to the proceeds of the policy. He says the "donation" was "irrevocable and was confirmed" by van Gent's death and then follows the following words:
>
> > 'On death she accepts, which would have given her a good cause of action against the company except that the rule of law provides that she must return the fruit of her acceptance, not to the company, but to the estate.'
>
> The 'rule of law' mentioned here is the rule as mentioned in VOET, 23.1.19. I cannot agree with this approach. van Gent concluded no agreement with the defendant and no donation to her was made and, in any event, I cannot

GUBBAY J

> understand how a donation which was 'confirmed' by van Gent's death and became 'irrevocable' should immediately thereafter be nullified. Defendant's claim to the R1 000 is not based on any donation by van Gent to her but on acceptance of the benefit stipulated for her by van Gent with the company. By her acceptance of this benefit and this acceptance occurs against a company: see for example van der Plank, *NO v Otto,* 1912 AD. 353 at pages 362-363 and *Crookes, NO and Another v Watson and Anor* 1956 (1) SA 277 (AD) at page 291 - legal link between her and the company is created and she obtains a right in respect of the R1 000 without there ever having been an agreement between her and van Gent regarding it. There can therefore be no question of a duty of restitution such as one finds with a conditional donation. It may be accepted that van Gent nominated the defendant as beneficiary because he expected to marry her but this only indicates what caused him to take out the policy and does not serve as a basis for a claim for restitution as In the case of a conditional donation.
>
> My view is that the rule regarding return of donations as mentioned in Voet 23.1.19, has no application to a case such as the instant one and I cannot see why it should be extended to a case such as this. A man who appoints his fiancée as a beneficiary in a policy but who wishes at the same time to ensure that she will only benefit if a marriage takes place can easily include a provision in the policy to ensure such a result. Naturally he can also protect himself or his estate by concluding a suitable agreement with his fiancée."

Of this reasoning Professor Hahlo, *loc. cit.*, remarks:

> "One doubts, with respect, whether the issue was quite as simple as that. Since Roman times it has been elementary law that a donation made by one fiancé to the other in contemplation of the forthcoming marriage carries, in the absence of clear indications to the contrary, the built-in condition 'if marriage follows'. But, says the Court, there was no donation here, there was a contract for the benefit of a third party. This, it is suggested, overlooks the distinction between a contract of donation and the juridical act by which it is carried out. The latter is usually a delivery, transfer, cession, or release from a liability, but it may also be the payment of a debt owed by the donee or, for that matter, a contract with another party for the benefit of the - cf. *Potter v Rand Townships Registrar*, 41945 AD 277 at 289 if. If it were otherwise, all the rules pertaining to donations could be avoided by the employment of a contract for the benefit of a third party. No doubt, as between the policeman and the insurance company the contract was one for the benefit of a third party. But this does not alter the fact that as between the policeman and his girl it was a contract of donation, which was, failing clear evidence of a contrary intention on the part of the donor, conditional upon marriage following."

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I do not think it correct to say that there was a donation between van

Gent and Miss Myburgh. Despite the plaintiff's evidence to the contrary, it was accepted by the court that Miss Myburgh remained unaware until after van Gent's death that she had been appointed beneficiary

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under the policy. Accordingly, there could not have been a contract between her and van Gent under which she accepted the gift. There was solely a *stipulatio alter)* (See Jourbert 1967 *Annual Survey,* at page 122.) Furthermore, and with due deference to the eminent professor, the cited authority of *Potter & Anor v Rand Townships Registrar* affords no support for the proposition that a *pactum in favorem tertii* may simply be the juridical act giving effect to the contract of donation. In that case DAVIS AJA, at page 289 *et seq.* was dealing with the transfer of ownership by delivery or registration and accepted that *donatio is* itself a contract like purchase and sale. Upon acceptance a promise to give is enforceable, provided it is made with a serious and deliberate intent. Nothing more is required. The juristic link between donor and donee is complete.

Gordon, in his acclaimed work *The South African Law of Insurance,* 2nd edition, at page 308, expresses the opinion that even if a donation between van Gent and Miss Myburgh had been established:

> ". . . it would not have displaced the *stipulatio alteri* but have been merely collateral to it."

In a footnote on the same page he comments:

> "On principle too it seems wrong that the beneficiary's knowledge of and consent to her being named as such should weaken her position."

and in an earlier passage at page 304 says:

> "It is submitted, however, that even if the donation fails through lack of testamentary form or as a successory pact, the beneficiary will not thereby be deprived of her primary rights under the *stipulatio alter)* in the policy itself, which the donation, being merely collateral to it, does not displace; to find otherwise would make the beneficiary's position worse when the insured expresses his bounty than when he holds his tongue."

This reasoning of the learned author is cogent, and I respectfully adopt it. Although technically there is, the present case, an executory contract of donation, it seems to me inevitable that both parties understood that on the death of the deceased - provided always he had not revoked the nomination - any claim to payment of the proceeds under the policy would have to be based by the beneficiary upon the contract between the deceased and the insurance company. The transaction between the deceased and the beneficiary was but a prelude to that entered into with the insurance company. Effectively it was to the insurance company and no one else she would have to look for payment. It is that contract which is the repository of her primary rights as well as the obligations

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GUBBAY J

of the insurance company to her. The beneficiary appointment form is in itself a valid instrument, and viewed realistically all that preceded it was the intimation: "I propose to nominate you as the beneficiary under my policy of insurance but I am entitled to change my mind", to which the reply was: "Thank you. I accept."

I am thus satisfied that the *stipulatio alteri* constituted by the beneficiary appointment form is the paramount contract and so is not displaced by and stands apart from the subordinate promise made by the deceased to the beneficiary.

Mr *Jordaan* properly refrained from contending that the contract with the insurance company, independently of that between the deceased and the beneficiary, failed as a *donatio mortis causa* lacking testamentary form or attracted the blemishes of a successory, pact. See Gordon *loc cit* at page 300; *Borman en De Vos NNO en 'n Ander v Potgietersrusse Tabakkorporasie Bpk en 'n Ander* 1976 (3) SA 488 (AD) at 506F-507A.

I come now to the submission that in spite of the failure of the deceased to formally revoke the nomination of the beneficiary, the estate is entitled to be paid the proceeds of the policy because, in essence, the two contracts constitute an invalid successory pact.

On the nature of a *pactum successorium*, Mr *Jordaan* drew my attention to *Ahrend and Others v Winter,* 1950 (2) SA 682 (T); *Varkevisser v Estate Varkevisser and Another* 1959 (2) R & N 58; 1959 (4) SA 196 (SR), *Costain and Partners v Godden NO and Another* 1960 R & N 658; 1960 (4) SA 456 (SR), and *Borman en De Vos v Potgietersrusse Tabakkorporasie, supra.* I think these cases show that a *pactum successorium* is an agreement relating to the succession to an estate, or a portion thereof, or to a specific asset or benefit belonging thereto, which postpones the devolution of personal rights until the death of the owner and which prevents the latter from bequeathing his estate or property to another person when otherwise he would be entitled to do so. It is the deprivation or curtailment of testamentary freedom that justifies the prohibition of such an agreement. Accordingly, an agreement not to pass property *mortis causa* would be invalid on the same ground.

Does the contract between the deceased and the beneficiary fall into this category? If it does not, then it affords no assistance to the applicant to contend that the contract with the insurance company was but the juridical act by which it was to be performed.

GUBBAY J

The foundation of a *pactum successorium* is that the person who contracts with regard to his own succession purports to bind himself to that contract. He does not seek to retain the unilateral right to revoke his promise. Should he do so, then the contract is not one which conflicts with the general rule of our law that inheritances must devolve *ex testaments* or *ab intestato.* I think it was for this reason that QUENET J, in *Varkevisser*'s case, *supra*, at 63D (198H of the South African report) approved of the proposition that a successory pact was "akin

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to a *mortis causa* gift contracted for as being irrevocable - a situation which was a contradiction in terms".

In the present case, in promising the beneficiary the proceeds of the policy if he were to be killed, the deceased contemporaneously retained the unilateral right to revoke her nomination. He explained to her the conditions in the beneficiary appointment form, which plainly permit of a revocation of the nomination either expressly by written notice, or impliedly by cession of the policy. Consequently her acceptance was within the framework of the beneficiary appointment form.

I consider, therefore, that the retention by the deceased of the right to revoke his promise made to the beneficiary effectively prevents their contractual relationship from being designated a *pactum successorium.*

But if I am wrong and the contract between the deceased and the beneficiary amounts to a successory pact prohibited by law, then for the reasons aforegoing I hold that its invalidity does not bring down the *stipulatio alteri* to which it is merely collateral.

The next argument addressed to me by Mr *Jordan was* that in settling their proprietary rights under a consent paper, the deceased had revoked the beneficiary's entitlement to receive the proceeds of the policy in the event of his death. Clause 2 (d) of the consent paper reads:

> "By way of a full and final settlement of all financial and property claims between the parties save as are herein set out the Defendant shall retain the motor car and all the household furniture and effects presently in her possession or under her control with the exception of the following: -
>
> .....
>
> which shall be the sole and exclusive property of the Plaintiff."

The provision, in my view, was designed to define the extent of the deceased's liability to his there wife by allocating certain assets to her. The policy was not an asset of the deceased, though its proceeds would have fallen into his estate if no beneficiary had been appointed. See *Ex Parte Macintosh NO supra* at 56B-C; *Borman*'s case, *supra,* at

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GUBBAY J

507A. It was only the deceased's rights under the policy to surrender it or obtain a loan upon it, which formed portion of his assets. There was no need to include any reference to the policy in the provision because the deceased was free at any time, by written notification to the insurance company, to alter the identity of the beneficiary. This he did not do. In short, the terms of the property settlement simply do not demonstrate an election on the part of the deceased to revoke the appointment of the beneficiary under the policy. The point is made forcibly by CANEY J, in *Macintosh's* case at 58B, where the learned judge said:

> "The fact that the policy was not mentioned in the agreement of 12th July, 1962 (the consent paper), does not advance the applicant's case; the deceased left the benefits of the policy where they lay, with Mrs. Barton - he did not in the agreement stipulate anything to the contrary, maybe because he knew he could change the nomination

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at any time in the future if circumstances altered;"

The same *ratio* applies to the execution of the will. The express wish of the deceased to institute his two children as heirs and the applicant as executor and administrator of his estate, does not affect the beneficiary appointment. The will regulates the distribution of the property in the estate. It does not regulate the payment of the proceeds of the policy because the beneficiary appointment, until revoked, had the effect that payment of the proceeds was to be made to the beneficiary and not to the estate.

Further, it must not be overlooked that the deceased was far from ill disposed towards the beneficiary. Within three weeks of being divorced, his continuing devotion and concern for her welfare is evident. His letter of the 19th October, 1979, displays a total lack of resentment over the break-up of the marriage, even to the extent of acknowledging some measure of blame. It expresses a genuine offer of help. It is as well to quote the concluding paragraph thereof

"Farewell my love. I am sure you will find better happiness without me. Please take care of yourself and my children. *You are all that I have left.* God bless. From your ever *loving* Bill."

(The emphasis Is mine.)

While not knowing for certain the innermost thoughts of the deceased when he concluded the consent paper and executed the will, his attitude towards the beneficiary, as later revealed, leaves me in much doubt as whether he ever intended to exclude her from the benefits of his policy.

GUBBAY J

Finally, counsel urged that the nomination of the beneficiary was automatically revoked by the decree of divorce. He relied on *Curtis Estate v Gronningsaeter and Anther,* 1942 CPD 531, in which DAVIS J, with whom HOWES J, concurred, expressed the view that a divorce was sufficient to constitute a tacit revocation of the nomination by the husband of his wife as beneficiary under a heritage insurance policy, and that the provision in the policy requiring written notice of such revocation by the husband was purely for the protection of the insurance company, in so far as it concerned the beneficiary, it was directory and not imperative. The facts of the case are summarized by CANEY J, in *Ex Parte Macintosh, NO*, *supra*, at 56D-H, and it is correctly pointed out at 57A-E that the common-law presumption that a gift between husband and wife is revoked by divorce, is restricted to a *donatio mera*. I have already indicated that the deceased acted from an appreciation of a sense of duty to provide for his wife and children. The motivating factor was not sheer liberality or disinterested benevolence at all. Accordingly, the promise of the proceeds of the policy upon his death was not a gift presumed at common law to be revoked by divorce. It was only revocable by the deceased under the provisions of the policy. (See Hahlo, *The South African Law of Husband and Wife,* 4th edition at pages 318 and 429, Gordon, *loc. cit*., at page 304.) I am also in respectful agreement with CANEY J's, conclusion at 57E-F, supported as it is by Gordon, *loc. cit.,* at page 302, that:

"In relation to these provisions, with great respect to the members of the court which decided *Curtis Estate v Gronningsaeter and Another, supra*. I am not able to agree that the requirement of written notice of revocation of the nomination is wholly for the protection of the insurance company. It is a part of the contract and the need for

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certainty exists as much for the protection of the nominee as for that of the company. In any event, there is no evidence that the company has waived the requirement of written notice to it of revocation nor has it been party to an agreement to revoke the benefits which remained open to acceptance by Mrs. Barton."

The last observation is equally true of the instant matter.

In my Judgment there is no basis upon which to deny the beneficiary the right to receive the proceeds payable under the policy.

In the result the order sought by the applicant is refused. It is declared that Janice Myrna Wixley is entitled to be paid the slim of $6432, being the proceeds of policy No 1,9967,540 issued by South African Mutual Life Assurance Society on the life of William Robert Wixley.

GUBBAY J

It is proper that the costs of the application should come out of the estate of the late William Robert Wiley, for I am, satisfied they were reasonably incurred. I order accordingly.

Calderwood, Bryce Hendrie & Partners, attorneys for the applicant.

THE STATE v MUJEE 1981 ZLR 176

Court **General Division, Bulawayo**

Criminal Review

Gubbay J

30th April, 1981

Flynote

Contribution order made in terms of Children's Protection and Adoption Act [Chapter 33] - whether remains valid after reason for its being made has fallen away.

Headnote

Where the reason for which a contribution order was made in terms of Part V of the Children's Protection and Adoption Act [*Chapter 33*] falls away, the contribution order itself ceases to be valid, on the strength of the rule expressed in the maximum *cessante ratione legis cessat ipsa lex*. There is no need in such circumstances for the contribution order to be rescinded in terms of section 54 (1) of the Act.

Authorities cited:

S v Thomas, 1973 (2) RLR 254 (AD);

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Broom, *Legal Maxims,* 6th edition, page 153;

Grotius, *Introduction to Dutch Jurisprudence,* 1-2-23;

Green v Fitzgerald & Ors 1914 AD 88;

Ex parte Vermaak, 1977 (2) SA 129 (N);

Labuschagne v Labuschagne;Labuschagne v Minister van Justisie, 1967 (2) SA 575 (AD);

R v Nteto, 1940 EDL 304;

R v Mathenjwa, 1951 (4) SA 411 (N).

Judgment

Gubbay J: On the 22nd September, 1980, the accused was convicted on a plea of guilty of contravening section 23 (1) as read with section 23 (5) (c) of the Maintenance Act [*Chapter 35*], in that, being the subject of a contribution order made by a juvenile court in respect of his minor child under which he was to make payments through the clerk of the court to a named certified institution at the rate of $1 per month, he had failed to make such payments during the period extending from the 1st April, 1980, to the 1st August, 1980. He was sentenced to undergo

GUBBAY J

one month's imprisonment with labour, the whole of which was conditionally suspended for five years.

It now appears that on the 28th February, 1980, the order placing the child in the certified institution was discharged in terms of section 25 (1) (a) of the Children's Protection and Adoption Act [*Chapter 33*] and the child was then placed in a training institute for juvenile offenders. Unfortunately, no request was made for the withdrawal of the contribution order. Clearly that order should have been rescinded on the 28th February, 1980. It was, however, only rescinded on the 23rd February, 1981, but with retrospective effect.

The trial magistrate has submitted the proceedings on review with the comment that if the contribution order had been revoked at the proper time, the charge would never have been brought against the accused and, in the circumstances, his conviction should be quashed.

Initially the Attorney-General, to whom I referred the matter. considered that, once made, the contribution order remained in force until varied, suspended or rescinded pursuant to section 54 (1) of the Children's Protection and Adoption Act. He supported the conviction on the authority of *S v Thomas,* 1973 (2) RLR 254 (AD). It is as well, therefore, that I deal in some detail with the extraordinary facts of that case. The appellant had been ordered by a magistrate in terms of the Maintenance Act to pay maintenance to his estranged wife at the rate of $80 *per mensem*, and did so for the first two months that the order was in force. Thereafter the wife decided to sue for divorce and the parties negotiated a consent paper which was to replace the maintenance order by providing that the appellant pay his wife the sum of $1 130 in lieu of any further

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maintenance. This sum he duly paid to his wife's attorneys. However, when asked to sign the consent paper, the wife declined to do so, saying that there had been a misunderstanding and that she expected a greater lump sum payment. The appellant did not agree and the negotiations broke down. The maintenance officer was of the opinion that the maintenance order had been replaced by the consent paper and the wife, sharing that view, applied for a fresh order. The application was refused by the magistrate on the ground that the original order was still in force. Naturally during the period when the maintenance officer and the parties themselves thought that the maintenance order had lapsed, and no doubt also because of the payment by the appellant of the sum of $1 130, the monthly maintenance of $80 was not met. The appellant was prosecuted for his failure to comply with the order, despite both a reasonable belief that he was excused therefrom

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and the opinion of the maintenance officer that the order had lapsed. Surprisingly, appeal was restricted to sentence, but at 256, BEADLE CJ, was careful to indicate that as there was no appeal against conviction, he made no finding on its correctness. With respect, the doubt the learned CHIEF JUSTICE implicitly entertained is justified. I think whatever assistance is derived from this case rather suggests the need to set aside the present conviction, where the facts are even more strongly in favour of innocence.

The essential question is whether the contribution order made on the 9th January, 1978 - technically in force because it had not been formally rescinded - was for the period in question binding upon the accused under pain of criminal sanction. This I consider involves the applicability of the maxim *cessante ratione legis cessat ipsa lex*. That maxim receives attention in Broom's *Legal Maxims,* 6th edition at page 153, where in elucidation the words of WILLES CJ, are quoted, namely:

> "Reason is the soul of the law, and when the reason of any particular law ceases, so does the law itself."

See also Grotius *Introduction to Dutch Jurisprudence* (Maasdorp's translation) 1.2.23. In *Green v Fitzgerald and Others,* 1914 AD 88, SOLOMON JA, applied the maxim in relation to the old rule prohibiting adulterine children from inheriting from their parents. He said at 118:

> "Adulterine children were excluded from inheriting from their parents because they were the progeny of a criminal intercourse; if, therefore, such intercourse is no longer criminal, the reason for excluding them entirely disappears. Had the law making adultery a crime been expressly repealed by the Legislature, it is difficult to conceive of this rule regarding adulterine children surviving such repeal, and in principle it can make no difference whether the law has been repealed or has become obsolete."

(Cf. *Ex parte Vermaak*, 1977 (2) SA 129 (N) at 133G-H).

If the maxim applies to laws, *a fortiori* it must apply to orders made in terms of any law. In *Labuschagne v Labuschagne; Labuschagne v. Minister van Justisie*, 1967 (2) SA 575 (AD) at 587D-F. WESSELS, JA, pointed out that it is for the court to ascertain the *ratio* of a statutory provision in order to determine whether that *ratio*, when applied to the particular circumstances, still exists. If in its entirety the *ratio* is found absent, the court must hold the provision inoperative, as the Legislature could not have intended it to pertain where the purpose for its

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existence has completely fallen away.

A striking illustration of a refusal to give effect to the literal meaning of a section in an Act of Parliament, where the object had already been achieved, is to be found in the review Judgment of GANE J, in *R v*

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Nteto, 1940 EDL 304. The learned judge was concerned with section 10 (1) of the South African Stock Theft Act, 1923, which obliged the court to impose upon a person convicted of stock theft, a compensatory fine in addition to any other sentence. Although not actually citing the maxim, he remarked as follows at 305:

> "I may add for the guidance of the magistrate that I respectfully do not agree with the decision in the case of *Rex v Mbamali and Xaba,* 1938 TPD 2, to the effect that a compensatory fine must be imposed in all cases, whether compensation has actually been received by the complainant or not. I think the object of section 10 of Act 26 of 1923 is to secure compensation to complainants; and once and however that object has been secured, the object of this section has been fulfilled, and the necessity for the compensatory fine falls away."

See too, *R v Mathenjwa,* 1951 (4) SA 411 (N).

It seems to me that if ever there was a case in which this maxim applies, it is the present. The *ratio* for the contribution order was to compel the accused - in the fulfilment of his parental duty of support - to contribute towards the cost incurred by the certified institution in maintaining his child. That *ratio* fell away completely with the removal of the child from the certified institution in February, 1980. It was only in consequence of an administrative oversight that the order was not contemporaneously revoked. In fact if mistakenly the accused had made any such payment subsequent to February, 1980, I think he would probably have succeeded in recovering it under the *condictio indebiti.*

I am satisfied, therefore, that a contravention of section 23 (1) of the Act is dependent upon the order being *validly* in force. The instant order cannot be so regarded since at the material time the payee had no right to receive payment under it. It cannot have been the intention of the lawmaker to treat as valid a maintenance or contribution order when the entire object for which the order was made has ceased to exist.

Upon further consideration, the Attorney-General agrees that the conviction must be quashed, and I so order.

Newham J: concurs.

HENDERSON v ZIMNAT INSURANCE COMPANY LIMITED AND ANOTHER 1981 ZLR 180

Court **General Division, Salisbury**

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Civil Application

Beck, J

1st and 6th May, 1981

Flynote

Practice - arrest tamquam suspectus de fuga - whether contingent claim may be "good cause of action" justifying grant of writ of arrest.

Headnote

A contingent claim may amount to "a good cause of action" for the purposes of Order 36 Rule 278 (1) (a) of the High Court (General Division) Rules, 1971, and entitle the plaintiff to the issue of a writ of arrest in terms of that Rule; but the fact that the claim is only a contingent claim is an important factor to be considered when it has to be decided whether or not it is proper to deprive a defendant of his liberty.

C S Grossman for the applicant.

C C Milton for the respondent.

Judgment

Beck J: There is an action pending in this court due to be heard in June, in which a Mrs. Henderson - who is the plaintiff - is suing an insurance company (which I shall call Zimnat) for an amount of $10 200. At the instance of Zimnat leave has been given to join a Mr Myson as a third party in that action. The dispute between the three parties arises this way: Mr Myson bought Mrs. Henderson's house and passed a mortgage bond over it in her favour to secure part of the purchase price he owed her. He insured the house with Zimnat and, with Zimnat's knowledge, ceded to Mrs. Henderson his rights under that policy. The house was then partially destroyed by fire. Zimnat paid the sum of $10 200 to Myson in respect of the fire damage. Mrs. Henderson contends it should have been paid to her. Zimnat has pleaded special facts on the strength of which Zimnat claims that Mrs. Henderson is

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estopped from claiming that the money should have been paid to her and not to Mr Myson. In the event of that estoppel failing, and only in that event, Zimnat claims the refund of the money from Mr Myson who has, in turn, pleaded a bona fide defence to Zimnat's contingent claim.

On Thursday Zimnat obtained from the Registrar in terms of Order 36, Rule 278 of the High Court (General Division) Rules, 1971 (Government Notice 1047 of 1971), a writ of arrest *tanquam suspectus de fuga* against Mr Myson, returnable on the date of trial of the afore-mentioned action in June. The next day, a public holiday, I heard in Chambers an urgent application to anticipate the return day of the writ and to set it aside. On the information that was before me, which was fuller than the information before the Registrar, I set aside the writ and

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intimated that my reasons for so doing would be handed down later. These are the reasons.

It was submitted on behalf of the respondent that a claim that is merely contingent is inherently incapable of being "a good cause of action" in terms of Rule 278 (1) (a). I do not consider this submission to be sound, but I do consider that the fact that the claim of a plaintiff is only a contingent claim is an important factor to be considered when it has to be decided whether it is proper to deprive a defendant of his liberty. It is a factor that carries particular weight when, as here, the primary attitude of the applicant is that the respondent does *not* owe the applicant any amount. For Zimnat to have a good cause of action against Mr Myson it is necessary, not only that Mr Myson's defence to Zimnat's contingent claim be unsuccessful, but also that Zimnat's own defence to the claim brought by Mrs. Henderson be unsuccessful. It does not lie easily in the mouth of Zimnat to say, "Although we insist that Myson does not owe us a cent, and are prepared to go to court in support of what we say, we nevertheless want Myson 'arrested and holden to bail' in case we are wrong in our contention."

The other factor that weighed with me in deciding to discharge the writ is that there is scant reason to infer that Mr Myson, whose intention it was to leave Zimbabwe on Friday, was leaving the country with the intention of evading Zimnat's contingent claim. It is Mr Myson's intention, it seems, to seek employment in the Republic of South Africa and thus to leave Zimbabwe permanently, and he had not informed his attorneys of his departure, so it is understandable that Zimnat, on learning these things, feared that it was his intention to flee, as it were, and not to abide the pending trial and the judgment of the court.

BECK J

However, Mr Myson has assured the court that he has every intention of returning for the trial. Certainly there was nothing secretive about the preparations he made for his departure. These were openly done and widely known among his business associates and friends. Indeed, it was at a farewell party of some size for him that the writ of arrest was served on him on Thursday evening. By way of concrete fortification for the bona tides of his intention to return and to abide the Judgment of the court he voluntarily undertook to transfer to his attorneys, to be held in trust against his return for the trial, the amount presently standing to the credit of his current banking account, an amount, I was informed, of approximately $1000. That undertaking was formally given by his attorney and counsel on his behalf, and on his express authority, and I place it on record.

To put matters at their very highest for the applicant, therefore, it is, firstly, doubted by the applicant itself whether its cause of action against the respondent is a good one, and, secondly, it is only a matter of speculation that the respondent's Continent departure from Zimbabwe is tainted with the intention of evading and defeating any claim that the applicant might have against him should it fail in its opposition to Mrs. Henderson's suit. Accordingly, I discharged the writ of arrest, ordered the respondent's release, and, with counsel's agreement, reserved the costs of these proceedings for decision at the trial in June.

Honey & Blanckenberg, attorneys for the applicant.

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Scanlen & Holderness, attorneys for the respondent.

HAYES v THE BAR COUNCIL 1981 ZLR 183

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA, and Squires, AJA

30th March and 14th May, 1981

Flynote

Advocate - admission - factors to be taken into account by court when considering whether applicant for admission as advocate is fit and proper person.

Headnote

The appellant's application for his admission as an advocate had been dismissed by a judge of the General Division on the grounds that, in the course of litigation which the appellant had brought and conducted on his own behalf over a number of years, he had on several occasions shown gross disrespect towards the judiciary and the judicial system, and that when explaining the reasons for his disrespect he had shown a lack of frankness and some degree of dishonesty. On appeal.

Held, per FIELDSEND CJ, that the onus rests on an applicant for admission as an advocate of showing that he is a fit and proper person to be so admitted.

Held, further, *per* FIELDSEND CJ, and BARON JA, that the question whether or not an applicant for admission as an advocate is a fit and proper person to be so admitted is not a matter for the discretion of the court but must he decided as an objective question of fact. In deciding the matter, the court makes a value Judgment.

Held, further, per FIELDSEND CJ, and SQUIRES AJA, that the question of whether or not an applicant for admission as an advocate is a fit and proper person must be decided in the light of the court's paramount duty to ensure that its officers are proper persons to be entrusted with the interests of suitors; and in deciding the question the court must be satisfied that the applicant-

(a) will be able with honesty and balance to perform the duties of an advocate to the advantage of those he is called on to represent; and

(b) will be a person in whose reliability and integrity the court will be able to put complete trust; and

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(c) will not by his behaviour do anything to bring the courts or the profession into disrepute.

Held, further *per* BARON JA, that the overriding criterion for fitness to practise as an advocate is integrity, primarily in relation to clients though also in relation to courts; while an applicant's reliability and responsibility must also be taken into account they are not factors to be unduly stressed.

Held, further, *per* SQUIRES AJA, that the capacity of an applicant for taking a calm, detached view of cases in which he is involved must be taken into account when considering whether or not he is a fit and proper person to be admitted as an advocate.

Held, further, *per* BARON JA, that, save for onus, an application for admission as an advocate is approached on the same principles as an application for removal from the roll.

Held, further, per BARON JA, that an appeal court may, without relying on misdirection, miscarriage of justice or violation of a legal principle, substitute its own opinion for that of the trial court as to the fitness of an applicant to be admitted as an advocate, though where the trial court's findings were based on credibility the appeal court will normally require to be satisfied that the trial court clearly fell into error before fit will interfere.

Held, further, per BARON JA, that the word "may" in section 4 of the Advocates Act [*Chapter 216*] means that, the court having decided that an applicant is a fit and proper person to be admitted as an advocate-in the reaching of which decision the court has no discretion-the steps to be taken in consequence of that decision are in the discretion of the court.

Quaere, per FIELDSEND CJ, whether the word "may" in section 4 of the Advocates Act [*Chapter 216*] gives the court a discretion to admit as an advocate a fit and proper person who has satisfied the court as to the requirements of paragraphs (a) and (b) of the section.

Held, per FIELDSEND CJ, and SQUIRES AJA (BARON JA, dissenting) that the applicant had not discharged the onus of showing that he was a fit and proper person to be admitted as an advocate.

Authorities cited:

Swain v Society of Advocates. Natal 1973 (4) SA 784 (AD);

Craies on *Statute Law* 7th edition, page 285;

Ex parte Swain 1973 (2) SA 427 (N);

In re Weare [1893] 2 QB 439;

Ex parte Krause 1905 TS 221;

Incorporated Law Society Transvaal v Mandela 1954 (3) SA 102 (T);

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Ex parte Knox 1962 (1) SA 778 (N);

Ex parte Caminsky 1958 (3) SA 249 (N);

Re Hill (1868) LR 3 QB 543;

Ex parte Cassim 1970 (4) SA 476 (T);

Hilborne v Law Society of Singapore [1978] 2 All ER 757;

Olivier v Die Kaapse Balieraad 1972 (3) SA 485 (AD);

Ex parte Gunguluza 1971 (4) SA 212 (N);

R v Dhlumayo & Anor 1948 (2) SA 677 (AD);

Powell et Uxor v Streatham Manor Nursing Home [1935] AC 243; [1935] All ER Rep 58;

Lambert v Incorporated Law Society 1912 TPD 688.

The appellant, who appeared in person, addressed argument to the court *inter alia* on the following points: In rebuking the appellant for the manner in which he expressed his discontent concerning the judiciary, his Lordship ignored the fact that for the most part the appellant expressed his views privately to the judges of whom he was critical and that no attempt was made to bring the judiciary into disrepute by public expressions of his discontent. The learned judge has discounted almost completely the sequestration and post-sequestration litigation on account of the appellant's illness and anxiety state; but does not discount other conduct resulting from the same condition, i.e. the conduct towards the Registrar of the Appellate Division and the Judge President. The learned judge misdirected himself In concluding that there was behaviour prejudicial to the appellant's petition in those cases in which appellant appeared before MR JUSTICE GOLDIN, MR JUSTICE SMITH and MR JUSTICE BECK.

The Advocates Act [*Chapter 216*] at section 5 (2), permits any advocate of the court to apply for leave of the General Division to appear as *amicus curiae* to oppose the granting of any application for admission to the Bar. The Bar Association of Zimbabwe of which the Bar Council is its representative) in terms of its own constitution, is constituted as an *universitas personarum*. As such its existence is independent of its members and what its members are it is not. The affidavit of Advocate Horn SC, clearly states that the opposition to the appellant's petition was the opposition of the Bar Council, and that Advocate Jagger would be appearing on behalf of the Bar Council. On the basis of Advocate Horn's affidavit, neither he nor Advocate Jagger personally opposed the appellant's petition: accordingly, since no advocate applied for leave to oppose the petition and no adcate *qua* advocate opposed the petition, the petition was not in fact opposed in the manner prescribed by law. Because there can be no such thing as a representative *amicus curiae,* Advocate Jagger could not properly oppose the petition as such: G*rimshaw v Mica Mines Limited* 1912 TPD 450; *Connock's (SA) Motor Co Ltd v Pretorius* 1939 (1) TPD 355. Even if a representative *amicus curiae* could be envisaged, conceptually at least, it is not possible to accept as an *amicus curiae* someone who has an interest in the outcome of the proceedings by virtue of his being a member of the opposing body: *Connock's (SA) Motor*

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Co Ltd v Pretorius (*supra*). The application to appear as *amicus curiae* was therefore fatally defective, Advocate Horn's affidavit was

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not properly before the court, and Advocate Jagger's representations and cross-examination of the appellant were improper: Craies on *Statute Law* 7th edition, pages 258-288 (especially pages 286 and 287); *Marais & Anor v McIntosh & Anor* 1978 (3) SA 414 (N).

R. Jagger for the respondent: The Bar council has locus stands oppose the admission of an aspiring advocate. Section 5 (2) of the Advocates Act [*Chapter 216*] empowers the Court to appoint an advocate as *amicus curiae* and, in appointing the representative of the Bar Council, the learned Judge was acting within the letter and spirit of the Act. In any event the appellant consented to the appearance of counsel for the Bar Council.

The findings of the learned judge amount to a value judgement based, *inter alia,* upon his assessment of the appellant as seen by him in the witness box, and based upon his previous conduct. There were no other bases upon which the learned judge could assess the appellant's conduct. An appellate court will be slow to interfere with such a finding even should it consider that, in similar circumstances, it would have come to a different conclusion. Analogous instances arise, for example, in criminal matters (*R v Dhlumayo & Anor* 1948 (2) SA 677 (AD), *S v de Jager & Anor* 1965 (2) SA 616 (AD) and *R v Viviers & Others,* 1966 (4) SA 132 (AD)), in orders for costs (*Cronje v Pelser,* 1967 (2) 589 (AD) and *Rondalia Assurance Corporation of SA Ltd v Page & Ors* 1975 (1) SA 708 (AD)), in awarding damages (*Sandler v Wholesale Coal Supplies Ltd* 191 AD 194, *Mair v General Accident, Fire & Life Assurance Corp Ltd* 1970 (1) RLR 124 (AD); 1970 (3) SA 25 (RAD) and *AA Mutual Assurance Association Ltd. v Magula* 1978 (1) SA 805 (AD) 3, and in granting a postponement (*Madnitsky v Rosenburg* 1949 (2) SA 392 (AD)). An appellate court has to be satisfied that the court *a quo* misdirected itself or that there has otherwise been some miscarriage of justice or violation of some principle of law or procedure before it will interfere with a finding of act. In the absence of being so satisfied the findings of the trial court are unassailable.

Judgment

Fieldsend CJ: Leslie Thomas Hayes, the appellant, who appeared before us in person, appeals against the dismissal of this application for his admission as an advocate of this court. His application was refused on the ground that although he was properly qualified he H had not shown that he was a fit and proper person to be admitted as an advocate.

The appellant's petition for admission which was filed on the 23rd May, 1980, was in the usual brief form. It set out his qualifications and

FIELDSEND CJ

to it was attached an affidavit dated the 5th May, 1980, from Mr Dumbutshena, as he then was,

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stating simply that he knew the appellant and considered him to be a fit and proper person to be admitted as an advocate.

When the application was first set down on the 29th October, 1980, there was before the court an affidavit by Mr Horn, SC, on behalf of the Bar Council in which he sought leave for Mr *Jagger* to appear on behalf of the Bar Council to oppose the granting of the application. On the 29th October the application was postponed by consent, the applicant's counsel agreeing that the petitioner would not oppose the application of the Bar Council to appear as *amicus curiae* in terms of section 5 (2) of the Advocates Act [*Chapter 216*]. When the application was heard on the 26th and 27th February, 1981, the applicant's counsel called the applicant purely to allow him to be cross-examined. After a lengthy cross-examination by Mr *Jagger*, PITTMAN J, who heard the application, in a helpful series of questions gave the appellant a full opportunity of putting before the court his history, his qualifications and his experience.

Mr Hayes is 45 years of age. After leaving school he joined the British Army on a five-year contract where he obtained further education ending up with eight "O" levels and three "A" levels with distinctions in all three. He went to St. Andrew's University, Scotland, on an open scholarship but left to go to Oxford, also on a scholarship, where he graduated in philosophy, politics and economics. After a further diploma course in advanced economics with statistics, he went to Harvard University where he obtained a degree of Master of Business Administration. He started serving articles as a chartered accountant on his return to England but shortly thereafter in 1967 he joined the Anglo-American Corporation in Zambia as an economist and statistician. After two years he became finance controller of the Flying Doctor Service in Ndola. He left Zambia in 1970 and returned to England, where he joined a large shipping line as a projects investigation officer. Late in 1971 he returned to Zambia as an accountant and came to what was then Rhodesia in June, 1972. He was chief accountant and financial controller for a fashion enterprise for a short while until he left to go farming. This new project was not a success and the appellant's health deteriorated, leading in 1975 to the liquidation of the company - Granite Farms (Pvt) Ltd - through which he operated and to the sequestration of his own estate. It was these proceedings which led to a number of cases before He court in which Mr Hayes appeared for himself. He unsuccessfully opposed the sequestration proceedings in 1975, he unsuccessfully applied for a

rescission of the order of sequestration in 1976 and unsuccessfully appealed against the refusal; he launched further proceedings for rescission of the sequestration order in 1977 but these were stayed pending the payment of the costs of the previous application; also in 1977 he sought unsuccessfully to have reviewed a decision of the Master ordering him to pay to his trustee in insolvency the sum of $10 a month; in 1977 he brought under review certain decisions of the Taxing Officer of the Appellate Division relating to the costs of his appeal to that Division, in which he was partially successful. In September, 1978, the appellant was rehabilitated, resulting in writing off of debts to a total value of about $60 000. At a later stage he instituted proceedings for defamation against a number of officials in the Posts and Telecommunications Corporation, an action which was heard in January, 1980, and considered on appeal in

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October, 1980.

To complete the history, the appellant started to study externally for the degree of Bachelor of Law in 1974, in part to take his mind oil: the anxiety neurosis from which he was suffering. After his sequestration he had a number of different jobs and in 1977 he attempted in a state of depression to take his own life. He worked as a telephone operator with the Posts and Telecommunications Corporation from April, 1977, until April, 1979, when he embarked on his full-time LLB course which he completed in February, 1980. He then started work as a loss-adjuster on his own account, his income being variable but averaging $500 to $600 a month with an occasional exception when he earned very much more.

The principal facts and circumstances which I consider to be relevant to this appeal are as follows.

In the proceedings for the sequestration of the appellant's estate which were started in 1974 and which were contemporaneous with the winding up of the company through which he was farming, the appellant in his replying affidavits originally contended that there was a net surplus of assets over liabilities of some $3 500 his assets being his house, swimming pool, life assurance policy and sundry assets totalling $1000. Shortly before the return day of the rule rust the appellant filed a further affidavit contending that equipment on the farm to the value of $18 000 was in fact an asset of his and not of the company. For adequate reasons this late contention was not upheld by GOLDIN J, who confirmed the appellant's provisional sequestration.

The appellant's first application in August, 1976, for rescission of the sequestration order was not without some foundation. He may have

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made serious allegations against the liquidator of Granite Farms (Pvt) Ltd., drawing inferences from the liquidator's conduct which SMITH J, found not to be warranted, but it cannot be said that there was anything reprehensible in the bringing of the application, although in the event it was dismissed with costs.

The appellant attempted to appeal against this order but it was held by JARVIS JA, on the 28th February, 1977, on a point taken *in limine* that there was no appeal in law possible under the Act. The appellant was ordered to pay the wasted costs. At the conclusion of this Judgment the appellant said in a loud voice "Well I am not the slightest bit surprised". In that remark he said in his evidence before PITTMAN J, that he meant to suggest that there was a lack of honesty on the part of the judge and that he intended to insult the judge. The decision turned entirely on the interpretation of the Act and the appellant must therefore have meant that the judge had dishonestly decided against him. Apart from a letter of apology which is in very general terms the appellant has offered no explanation of this imputation. This letter, dated the 6th April, 1977, and addressed to the then CHIEF JUSTICE, read:

> "I have had it in mind to write to you for some time but delayed doing so until it was obvious that I would not again

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> appear before you.
>
> It would be wrong of me to allow more time to pass without expressing to your Lordship and through your Lordship to the other Judges of Appeal my sorrow at having behaved so badly on each of the last two court appearances at which I was present.
>
> It would edify the enormously to know that I have put right, as best I can, the wrong that my conduct caused; accordingly, I proffer my Preserved apology and respectfully ask your Lordship to convey this sentiment to the other Learned Judges of Appeal. It will not happen again."

On the 8th March the appellant had attended a taxation before Mr Gyles, then Registrar of the Appellate Division, of the costs In his abortive appeal. During the hearing he leapt to his feet saying that the taxation was "a bloody farce", that he would have it reviewed and stormed out of the office. On the 17th March, and before a taxed bill of costs had been prepared by the Registrar, he gave a written notice of review of the taxation. Thereafter in May when the Registrar declined to set down this notice of review for hearing the appellant wrote again to the then CHIEF JUSTICE as follows:

> "In view of the refusal by the Registrar to set down for hearing the notice of review that I personally requested to him on the 17th March, 1977; and in view of his remarks made to me on the telephone I have asked my MP to assist me.

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> Of all the set-backs none to me is more distressing than the refusal of the court to allow me to bring on review the high-handed, illegal behaviour of the Registrar at the taxation meeting that I attended on the 8th of March.
>
> That the Registrar should have been able to convince the 'court' that my arguments were without substance without my being able to hear and reply to his remarks is a complete travesty - no matter!
>
> I take this opportunity of writing to you as I have advised my MP that I would do so."

Again the clear implication is that the court was acting improperly in not giving him an opportunity to be heard, when in fact any application for review was premature.

When in July the taxed bill of costs had been prepared it was brought on review before LEWIS JP, by the appellant. In part the appellant's contentions were upheld but his major point - the amount allowed for counsel's fee - was dismissed and the taxation confirmed. Immediately after the Judgment the appellant went to the doorway of Mr Gyles' office and said to him, "one of these days I will cut your bloody throat". When he made this threat Mr Gyles considered that he did so in earnest. In his further affidavit the appellant, dealing with this incident, deposed that the words were not said threateningly nor with the intention to threaten but in jest and that he had always been of the view that Mr Gyles had fully appreciated that there was no intention to be offensive. When questioned about this incident in his evidence the appellant said that he did not agree that the word "jest" in fact meant a joke. He said he intended it to be used in the sense of "theatrical, that is, lacking in intent and frivolous". He went on to say however that he was totally and completely fed up with what he saw as a total failure to make any kind of impact on the court and that he was indeed upset that the decision just given had gone against him. In my view the words were on the probabilities spoken offensively and in anger, though not as a threat to be taken literally. This makes very specious the allegation in the appellant's

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supplementary affidavit that there was no intention to be offensive, but that he was speaking in jest. The learned judge found quite unconvincing the appellant's attempt in the witness-box to persuade him that by using the words "in jest" in his affidavit he meant to convey merely that he had not intended the threat to be taken seriously, and he felt obliged to record that in his view the appellant was being deliberately untruthful to a court in this regard. It is difficult to fault this finding. The learned judge saw the appellant and the way in which he gave evidence on this point, and reading his evidence on the record I cannot see any reason for interfering with his finding. The supplementary affidavit was clearly intended to leave one with the impression that the words

were spoken almost as a joke between friends, and if there had been no cross-examination on the point this might well have been accepted.

To complete this part of the story, on the 14th July the appellant, although there is no right of appeal from a judgment given on review of a taxation matter, filed a notice of appeal against the judgment. The second ground of appeal in the notice of appeal reads:

> "That the learned Judge President in justifying Counsel's fee and in describing that level of fee as niggardly has thereby encouraged a general increase of advocate's and attorney's fees. That this encouragement should be given to a closed and privileged sector of the community when nearly everybody else is required to forgo salary and wage increases displays a degree of recklessness and an addition to Social Injustice that can accurately be described as irresponsible almost wicked."

When questioned in his evidence about this notice of appeal the appellant agreed that he would describe the wording of it as totally irresponsible. He added that he framed the notice of appeal in this way because it was "part of the total process of being incensed by a lack of what I considered at the time to be an inability and an unwillingness for courts to give me justice." He said earlier, however, that he did not regret having used that sort of language because looking at it from his frame of mind then there was no other way in which he could have written it.

I mention here, out of chronological order because it is related to the appellant's attitude towards costs, a passage from his letter published in the Sunday Mail on the 22nd February, 1981, some four days before his application was due to be heard. In it he said:

> "The Monopolies Commission in the United Kingdom has recently reported that minimum fees charged by the Law society were contrary to the public interest and that it constituted a price ring. I look forward to the day when a legal practitioner might be."

The significance lies not so much in the substance of the letter, though that indicates a lack of regard for the rules of the practitioners he was hoping to join, as in the appellant's answers to questions as to whom he was referring to in the last sentence. He answered:

> "I was referring to a number of African advocates who have themselves expressed the same reservation that they are being compelled in terms of the new Bill to charge minimum fees and that in certain circumstances they might not be able to do so"

And when pressed as to whether he was not referring to himself said:

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"No, I would not presume to judge the outcome of this hearing."

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This is to my mind an example of his lack of frankness. His first answer is quite inconsistent with the wording of the letter. If he had had the courage of his convictions he should have been able to say that he would not regard himself as bound by what he considered an unjust tariff and would have admitted that he was referring to himself.

Meanwhile in March, 1977, the appellant brought a fresh application for rescission of the sequestration order and was met by an application for the stay of proceedings until the unpaid costs of the previous application and the appeal relating to it, amounting to some $1000, had been paid. This stay was granted. In the words of BECK J, the appellant addressing the court on that occasion:

". . . stated he is unable to pay costs approximating to $1 000 but gave the court his solemn assurance that he will never defy an order of court condemning him in costs and said that when he is called on to pay the taxed costs of previous proceedings he will make a 'reasonable offer' of payment to the applicant."

I interpose here a passage from the cross-examination of the appellant in the proceedings now under appeal relating to this assurance. He was asked.

"Q. Did you give that assurance to his Lordship? A I believe I did.

Q. Can there be any doubt about it? A I wouldn't dispute Mr Justice . . .

Q. I am not asking you if you dispute it. Can there be any doubt that you gave that assurance to his Lordship? A There can always be doubt, but I have no reason to believe it is not true.

MR JUSTICE PITTMAN: Q That is not a sensible answer, Mr Hayes.

Why do you say there is always doubt? You are asked whether you gave id, a particular assurance. That is a matter of which there can be no doubt, surely? Was there any doubt? A My Lord . . .

Q. Is there any doubt that you gave that assurance? A No my Lord.

Mr Jagger: Q Did you honour that assurance? A As best I could, yes.

Q. Did you ever make any offer to pay certain amounts and did you dishonour that undertaking? A I don't believe so.

Q. I want to be quite fair with you, Mr Hayes. Think about it before you answer? A I don't recall ever dishonouring an undertaking. By dishonouring an undertaking, I mean being in a position to discharge it and not doing so.

Q. Let me put it to you in another way. Were you ever called upon to make any offer about discharging your liability for taxed costs? A Yes.

Q. Were you asked to make that payment pending an inquiry into your financial affairs so that the reasonableness or otherwise of the offer could be established? A Yes.

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Q. Did you, in fact, make the monthly payments of costs pursuant to that offer which you had made to Winterton, Holmes & Hill? A No.

Q. Why not? A Because I was not in employment.

Q. Why did you make the offer to pay if you couldn't pay? A

Because in the period at the time when the offer was made I was in employment, and I had reason to believe I would continue in employment."

In fact, as emerged later from the appellant's evidence, he was in the employ of the Posts and Telecommunications Corporation from April, 1977, until April, 1979. The reason he gave in the passage I have quoted as a reason for not making any offer to honour this undertaking given in court was accordingly not in accord with the facts. Nothing was paid in respect of the costs of the proceedings for the rescission of the sequestration order until in September, 1978, it was made a condition of the appellant's rehabilitation that $500 should be paid. That sum was then paid in full.

In May, 1978, the appellant was convicted in the magistrates court of contempt of court for words found to have been said in the office of the clerk of the civil court. There was a dispute as to exactly what was said and in what circumstances. The words alleged to have been said were "there is no justice in this court, especially if your skin is black" and it was alleged that they were addressed to two persons at the counter of the office who were being attended to by two officials. The appellant had contended that he was talking to a person outside the office who was attacking the administration of justice and that what he said was, "it may occur to you that there is no justice in this court if your skin is black" but that before he could go on to say as he planned to say, "this is not so because of the review system in this country" he was interrupted by the officials. The appellant was, rightly in my view, disbelieved by the magistrate on the issue of what words were spoken and to whom. Indeed in his draft petition drawn in June, 1980, for a free pardon for this offence he did not contend that the words he had used were those deposed to by him in the magistrates court. On the contrary, he contended that the words were a fully justified criticism of the whole judicial system which discriminated against Africans. Indeed, even in the proceedings for his admission he sought to excuse his extravagant criticisms of the judiciary on the basis that he was fundamentally opposed to the whole system pertaining before the 18th April, 1980. Whilst I accept that the appellant was so opposed, I have the clear impression from his evidence as a whole that he has attempted to use this as a justification for attacking every decision which went against him. I find that this is indicative of a lack of frankness in his evidence.

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The appellant has clearly had an unfortunate series of cases in the courts, in almost all of which he has appeared in person. This may have led him to believe that there was prejudice against him, but it was no warrant for the explanation of his behaviour which he sought to give, particularly in paragraphs 5 to 10 of his supplementary affidavit. These paragraphs are more in the nature of a political credo. He attacks not only the racial composition of the courts, but also

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the politics of the then CHIEF JUSTICE and the philosophy of the courts following the *Madzimbamuto* case and its aftermath. They might have had more place in this application if the appellant had been prejudiced by those attitudes of the courts about which complained, and if he had been directly affected by the acceptance by the courts of the *de facto* position in the country. In fact the appellant only came to what was then Rhodesia in 1972, some seven years after U D.I., presumably to take advantage of the opportunities offered and knowing that he was coming to what he regarded as an illegal and insupportable regime. There is nothing to show that the appellant's beliefs about the courts and the system had anything to do with the decisions that went against him or that he had any ground for thinking that they did. I cannot but conclude that these contentions have been raised after the event in an attempt to justify his conduct in the changed circumstances now prevailing.

His contentions leave me with the clear impression that if any decision goes against him the appellant attributes that solely to prejudice and bad faith on the part of the court. This is confirmed by his behaviour at the end of his trial for contempt in the magistrates court. He had at the start of the case been given an opportunity to ask the magistrate to recuse himself, when the magistrate had very properly made it known to the appellant that he knew all the State witnesses. This opportunity the appellant did not take. But when asked if he had anything to say in mitigation he said:

> "I was conscious throughout the trial that this was the wrong court in which this case should have been tried. It became clear to me that your Worship's association with Mr Waldeck and with the officer was so close that I ought to have asked for a refusal.... It would have been much better for this case to have been heard by a magistrate from Bulawayo or some other place.... There will of course, be an appeal from this Judgment both on the legal points and on the question of whether or not your Worship should have conducted this case in the first place. I am not saying that your Worship is in any way biased, but I do think your Worship has been hostile to me throughout this trial, and I do associate that hostility with your Worship's very close affinity with Mr Waldeck and the officers of the court. It seemed to me that your Worship showed a tremendous amount of sympathy while they were giving evidence."

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Having regard to the fact that the count in which reliance was placed upon such statements as "magistrates were clowns and Mr Waldeck was a fool", "all magistrates are clowns" and "As for Waldeck, he is an absolute fool", was dismissed, this passage shows that the appellant was prepared to attribute prejudice without any thought. He has said nothing in his supplementary affidavit to mitigate this clearly unwarranted allegation.

In January, 1980, the appellant appeared in person in the High Court before WADDINGTON J, in a case in which he claimed damages for defamation from a number of officials of the Posts and Telecommunications Corporation. In the early stages of the case there was an issue as to whether the case should be held in camera following a certificate from the Secretary of Justice under the Emergency Powers Regulations. The issue was decided against the appellant - wrongly as eventually turned out on appeal because of the manner in which the certificate had had been produced - to the obvious discomfort of the appellant. During his evidence the following passage occurred:

> "MR JUSTICE WADDINGTON: Q I beg your pardon? A I was sent to Gatooma telephone exchange so that I

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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 . . ."

The appellant was examined at considerable length on this exchange and sought to explain it by saying that he was attempting to use a paradox. It seems quite clear that the words were spoken ironically - which is probably what the appellant meant - and that the remark addressed to WADDINGTON J, occurred because the appellant felt - whether with reason or not is irrelevant - that he was not getting a sympathetic hearing. It is easy in the heat of the case to say things that one should not say, particularly for a litigant in person. But far less excusable is the lack of frankness in the appellant's evidence in his application as to why he said particularly the italicised words and what he meant by then. Without dealing in detail with the question and answer on this aspect of his evidence I am satisfied that the appellant was deliberately evasive when asked to recount his true reasons for

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what he said, particularly when he denied intending to be rude.

On the 14th October, 1980, about two weeks before the appellant's application was due to be heard in the High Court, he addressed a letter to the Senior Puisne Judge in the following terms:

"I have decided to abandon my petition for admission to the Bar have done so because I have genuinely little or no respect for the Judiciary as it is presently constituted. I can honestly say that I have never had a fair hearing from the Courts and I am forced to agree with the Bar Council's Advocates, that I have no hope on this occasion.

If my case could be heard by a jury or by a judge from the United Kingdom, I would then have to pursue the Petition."

This letter was prompted, he said in evidence, by the fact that he had heard it said that Mr Jagger had been saying that his application would fail. Even if the appellant had any reason for thinking that Mr *Jagger* had said this - and the fact is in dispute - there was no justification for writing a letter of this nature. It is a gross insult to the whole of the Court before whom the appellant was seeking to practise and of which he was seeking to become an officer. A few days later the appellant wrote again in the following terms:

"I wrote to your Lordship in connection with my proposed petition for admission to the Bar which is to be opposed.

In my letter I stated that I had no confidence in the impartiality of the Zimbabwe judiciary and that I would like my petition to be heard by a U K.

Judge or by a jury. The latter suggestion is obviously absurd. It would not be right for me to seek to excuse my letter, to do so could only be affectation. I am very conscious me the letter was unjust even wicked.

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> To express my regret is somewhat inadequate but unless I do so I would know that I have done wrong and did nothing to put that wrong right. I realize that I have come close to exhausting the fund of tolerance and patience of those who are perhaps the most kind and generous of people.
>
> Without qualification therefore and without much hope of anything in return I express my sorrow to your Lordships and withdraw all imputations that were contained in my letter."

Though this is some mitigation of the preceding letter, there can be no excuse for the first letter and the appellant was in difficulty when called upon to explain why ho wrote it. To say as he did that when he wrote it he had rather hoped that there would have been an assurance that his fears were groundless again seems to me to be an answer lacking in frankness. He tried to say that he did not mean what he said in the letter, that he had little or no respect for the judiciary, but when pressed he could give no answer as to why he had written in these terms. That

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he could write such a letter at all for the reasons he says he did is in itself inexcusable; it is aggravated by the fact that he addressed it to MR JUSTICE BECK, who, after - in the appellant's own words - "an eminently fair hearing", had granted, on very generous terms, his petition for rehabilitation in 1978 despite the deficit of $60 000. I find it strange that the appellant did not deal with these letters in his supplementary affidavit. I find it strange that in his notice of appeal he tried to raise the point that PITTMAN J, should not have introduced the letters and that by doing so indicated his lack of impartiality. These contentions, were, however, abandoned at the hearing.

These are basically the facts upon which the appeal has to be decided.

It is clear that the onus was all along on the appellant to establish that he was a fit and proper person to be admitted as an advocate. Mr *Jagger* conceded - and in my view rightly - that the question of whether or not the appellant was a fit and proper person was not a question to be decided as a matter of discretion by the trial Court, but that it was a matter to be decided as an objective question of fact. In so far as the case of *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (AD), is authority for that question being one of pure discretion I would hesitate to follow it for the reasons given in my brother BARON's Judgment. So far as our legislation is concerned, section 4 of the Advocates Act [*Chapter 216*] reads:

> "The General Division may, on application made in the manner prescribed by rules of Court, approve, admit to practise and order to be enrolled as an advocate of the Court any fit and proper person who satisfies the Court -
>
> (a) that he is qualified . . . to be enrolled . . .; and
>
> (b) that he is not enrolled . . . as an attorney . . ."

Whether this section gives the Court a discretion to admit an applicant who establishes that he is a fit and proper person and who satisfies the Court as to the requirements of paragraphs (a) and (b) I do not find it necessary to decide. It may well be that this is one of those instances where "may" is used as meaning "shall", see Craies on *Statute Law*, 7th edition, page 285. But I am satisfied that the question whether an applicant is a fit and proper person is a pure question of fact and not a question of discretion as it might be if the Act had provided that the court could

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admit a person who in its opinion was a fit and proper person.

The appellant sought to discharge the onus upon him in the first place by an affidavit from Mr Dumbutshena, as he then was, supplemented by an affidavit filed in January, 1981, about a month before the hearing, from

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his doctor. His doctor's affidavit established that the appellant was in a poor state of health from mid - 1973 to late - 1978, requiring both medical and psychiatric treatment. PITTMAN J, very properly took into account this evidence in explanation of the appellant's intemperate and disrespectful behaviour up to the end of 1978. The evidence does not explain however his behaviour after that time, in particular his letter of the 14th October, 1980, and this casts some doubt on the weight to be placed upon the doctor's affidavit that in his view the appellant was not an intemperate or disrespectful person by nature. So far as Mr Dumbutshena bald affidavit is concerned, it is apparent from all the evidence that this was not based on any deep knowledge of the appellant. The appellant said that he had known Mr Dumbutshena off and on for a period of about a year to 18 months, that he did not know him socially and had never been to his house nor had he been visited by him. He said that on many occasions he had met him in his chambers where they had discussed politics and law but always on an informal basis. This affidavit was as I have said, made on the 5th May, 1980, whereas it is clear that it was only at the meeting between Mr Kassim, the appellant's attorney, and representatives of the Bar Council on the 22nd May, 1980, that the appellant was first made aware of the detailed contentions that the Bar Council were making against him. In my view it would have been the proper thing for the appellant to have done to have informed MR JUSTICE UTSHENA - by then he had been appointed to the Bench - of the allegations that were made against him and to have asked him whether he wished in any way to qualify the affidavit that lie had made, and to have made known to the Court that he had done this. It is also of some significance that MR JUSTICE DUMBUTSHENA was apparently not asked whether he wished to qualify his affidavit in any way after the letter that the appellant wrote the Senior Puisne Judge on the 14th October, 1980.

I have not found this an easy case to decide. the first place there is the question of the test be applied in determining whether an applicant for admission is a fit and proper person. There are very few instances in which this issue has arisen in the case of an application for initial admission, it usually arises either where there is an application Or a practitioner to be struck off for some misconduct or where, having been struck off, a person is applying for re-admission.

In the majority of cases concerning the striking off of a practitioner there has been some serious dishonesty relied upon, such as fraudulent dealing with funds or some serious misconduct relating to the performance of his duties as a practitioner, as in *Ex parte Swain,* 1973 (2)

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SA 427 (N). There are other instances where conduct less directly concerned with a

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practitioner's professional duty have been relied upon: in *In re Weare* [1893] 2 QB 439, a solicitor was struck off because it was considered that a conviction for allowing premises of which he was the landlord to be let as a brothel unfitted him for practice as a solicitor; on the other hand a conviction for attempted incitement to murder committed by the applicant while a prisoner of war on parole in England during the Boer War was held, in *Ex parte Krause,* 1905 TS 221, not to preclude the admission of the applicant to the Transvaal Bar as established after the war. See too *Incorporated Law Society, Transvaal v Mandela,* 1954 (3) SA 102 (T).

Basically the test is clearly expressed in the words of DAMSON, JP, in *Ex parte Knox,* 1962(1) SA 778 (N), at page 784H:

> "The Court's duty is first and foremost and at all times, to be satisfied, . .that the applicant is a proper person to be allowed to practise and a person whose re-admission to the ranks involves no danger to the public and no danger to the good name of the profession."

This is easier of application where an applicant is seeking re-admission after a particular fall from grace, as the issue then is whether he has shown that he has reformed and is unlikely to fall short again. *Ex parte Caminsky,* 1958 (3) SA 249 (N), is such a case. There a practitioner ED had deceived a Court in order to obtain adjournments of cases, he had sought adjournments of cases to days when he knew he would not be available, he had in one case acted in a negligent and grossly dilatory way, and he had given an untruthful explanation of his conduct to the Law Society's investigatory subcommittee. After three years his readmission was granted on E roof that his transgression had occurred when he was drinking heavily and that on reliable evidence he had overcome that problem. On the other hand, *Ex parte Knox* (*supra*) is an example where even after seven years an application for re-admission was refused.

In the end it comes back to it being the duty of the Court to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, looking to the character and position of the persons to ensure that suitors are not exposed to improper officers of the Court; *Re Hill* (1868) LR 3 QB 543. Although this case was concerned with a criminal conviction for dishonesty, I think that it correctly states the general principle. So far as possible the court must be satisfied that an applicant will be able with honesty and balance to perform the duties of an advocate to the advantage of those he is called upon to represent. This does not mean that it is the task of the court to

assess the professional competence of a person who shows that he has the necessary qualifications, but it can take into account his previous conduct in relation to the courts and his expressed attitudes to the courts if these are relevant to the way he may perform his duties on behalf of those he may represent.

In addition, the profession of advocate and attorney requires the utmost good faith from practitioners and from all aspirant practitioners: *Ex parte Cassim,* 1970 (4) SA 476 (T) at page 477. An advocate, whose main duty it will be to represent his clients before the courts, must be a person in whose reliability and integrity the court must be able to place complete trust, it always being remembered that an advocate owes a duty at least as much to the court as to his

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client. And the court must be satisfied that he will not by his behaviour do anything to bring the courts or the profession into disrepute.

The disrespectful and discourteous behavior of the appellant before the 14th October, 1980, is not something to which I attach any great weight, though the allegation against JARVIS AJA, is more than mere discourtesy: *Hilborne v Law Society of Singapore* [1978] 2 All ER 757 (PC). There would, however, be ways of dealing with such behaviour if it were to continue. I bear in mind, too, that the appellant was apparently under strain at the time, and that a litigant acting for himself is always likely to feel more keenly than a practitioner his set-backs and failures. The facts are not necessarily an indication that the appellant is likely to Shave in the same way if he is admitted as an officer of the court, but they are facts which the appellant was called upon to explain and this he has sought to do, either in his supplementary affidavit or his evidence or both. I have already dealt with the reliance the appellant I;, has sought to place upon his feelings towards the courts, which he regarded as prejudiced and dishonourable, as justifying or at least excusing his behaviour and my reasons for regarding this as lacking ho frankness.

Of more significance is his attitude as expressed in the letter of the 14th October, 1980. It shows a wholly irresponsible attitude to the court before whom he wishes to practise and does not lead one to conclude with much confidence that the appellant would be a fit and proper person to be admitted, though again this may not of itself be a conclusive factor, if some reason had been given for it. As matters stand the appellant has given no reason for writing as he did. A person who holds such views about the court before whom he intends to practise, and has "little or no respect for the Judiciary", may well be unlikely to display the frankness and balance that is required of a practitioner. Holding the views

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he does about the Courts and the judges he may easily feel that just as he does not trust them to be impartial he has little or no duty to place every fact fully before them. Indeed, the way in which he placed the present petition before the Court is some indication of this. He made no reference himself to this letter of the 14th October, which he must have realised was something which required explanation. Even his letter of apology is minimized by the contemporaneous letter to the Registrar of the 19th October, which indicates that he did not appreciate the seriousness of his earlier letter, for he refers to his remarks in that letter as being "petulant and somewhat childish". His attitude also shows an unacceptable lack of balance which may well redound to the disadvantage of his clients. Nor can I entirely discount what I regard as his general unreliability. He has at no stage been in any one employment for any length of time, and while the failure of his farming enterprise may be attributed in part to ill-health, there still remains the fact that on his rehabilitation creditors to the extent of $60 000 remained unpaid.

What I find even more disturbing is the appellant's general lack of frankness. I have already dealt with the reliance the appellant has sought to place upon his reasons for distrusting the Courts as excusing his behaviour, which I find to be lacking in frankness. In addition to this, he was in fact not believed on a vital issue in his trial for contempt of Court and his justification of his conduct in his draft petition for a free pardon I find lacking in frankness, having regard to his evidence in the magistrates court. I find his evidence in this application lacking in frankness in

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the five particular respects already mentioned: in regard to his reason for not making any effort to meet his solemn undertaking to BECK J, as to the wasted costs of his first application for rescission; in regard to his attempt in his affidavit to explain his threat to Mr Gyles as a jest; in regard to his explanation of his discourtesy in the case before WADDINGTON J; in regard to his explanation of the terms of his letter of the 14th October, 1980, and in regard to his explanation of his letter to the' paper published on the 22nd February, 1981.

Had he given frank and credible explanations of all these matters, then it may well have been possible to have attached less weight to his letter of the 14th October. As it is I am of the view that he has not established that he is a fit and proper person to be admitted. The courts must be able to rely without question on the reliability, veracity and integrity of those practising before them and the evidence as a whole does not convince me that they could do so in the case of the appellant. Nor do I think that his previous conduct shows him as a person upon whom the public could rely as a reliable and balanced person to deal

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with their affairs before the courts about which he holds such strong views which he is so quick to express.

This is not like many of the cases which have been before the courts in the past when some particular conduct is relied upon as showing that an applicant is not a fit and proper person to be admitted as an advocate or art attorney and for that reason is held positively to have been shown not to be a fit and proper person. This is a case where the appellant could well have been able to meet the allegations made against him and to refute the inferences that were to be drawn from them. Full and frank explanations may well have resulted in his discharging the onus. But in my view his evidence has hindered rather than helped him.

I would dismiss the appeal. By consent there will be no order as to costs. I wish to thank Mr *Jagger* for appearing to assist the court.

Baron JA: This is an appeal against the dismissal of the appellant's application to the General Division in terms of section 4 of the Advocates Act [*Chapter 216*] for admission as an advocate; this section reads, so far as is relevant:

> "4. The General Division may, on application made in the manner prescribed by rules of Court, approve, admit to praise and order to be enrolled as an advocate of the Court any fit and proper person who satisfies the Court -
>
> (a) that he is qualified in terms of section six to be enrolled as an advocate;
>
> (b) ....

It is common cause that the application was made in the manner prescribed, and that the appellant was qualified in terms of section 6. The only issue in the court *a quo* was whether the appellant had discharged the burden of showing that he was a fit and proper person to be admitted to practise as an advocate the court *a quo* held that he had not. The first question is what precisely was the nature of that decision. The point is of importance because if, as was held in *Swain v Society of Advocates, Natal* 1973 (4) SA 784 (AD), the decision was the

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exercise of a discretion, the circumstances in which an appellate Court can interfere are very limited. Mr *Jagger,* who appeared on behalf of the Bar Council, conceded that the decision could not properly be described as the exercise of a discretion, but was in truth a value Judgment based on the evidence before the Court of the appellant's previous conduct and the court's assessment of him in the witness-box.

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In view of Mr *Jagger's* concession it is unnecessary to deal with the point at any length, but since *Swain*'s case (*supra*) was on a provision substantially similar to ours it is, I think, desirable to indicate shortly my reasons for finding myself unable to follow it.

It is clear from the report in *Swain's* case (*supra*) that counsel for the appellant conceded that in concluding that the appellant was not fit to be admitted the court *a quo* exercised a discretion; the point was not therefore argued, and the judgment simply states the proposition without giving reasons, although citing *Olivier v Die Kaapse Balieraad,* 1972 (3) SA 485 (AD), as authority. But this case is not in fact such authority; there the Cape Bar Council had applied for the appellant's removal from the roll under section 7 of Act 74 of 1964, which provides that the court:

> ". . . may, upon application, suspend any person from practice as an advocate or order that the name of any person be struck off the roll of advocates -
>
> (d) if the court is satisfied that he is not a fit and proper person to continue to practise as an advocate;".

Swain's case (*supra*) on the other hand, was an application for admission under section 3 of the same Act, which provides that:

> ". . . any division shall admit to practise and authorize to be enrolled as an advocate any person who upon application made by him satisfies the Court -
>
> (a) that he . . . is a fit and proper person to be so admitted and authorised;
>
> . . ." .

The two sections are thus very different, and whatever may be the proper construction of section 7 on the point under discussion it does not follow that section 3 is to be construed in the same way. But, more importantly, *Olivier*'s case (*supra*) did not say that in concluding that the appellant was not fit to be admitted the court *a quo* exercised a discretion; RABIE JA, said at page 497:

> "As I have said above, *the steps to be taken against* an advocate are In the first place in the discretion of the Court of the Division in question and H this Court will only in certain limited circumstances alter a decision of such a Court." (my emphasis).

It seems to me that the case is authority only for the proposition that, the decision having been made that the person concerned is not fit to continue to practise, the precise steps to be taken in consequence of that

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decision are in the discretion of: the court - those steps depending obviously on the seriousness of the conduct of which he has been found guilty. I respectfully agree with this construction of section 7, the position of the court under this section is analogous to its position in a criminal trial, where it makes a decision as to guilt and then exercises a discretion as to sentence.

The position under section 4 of our Act is similar. It provides that the court "may . . . admit . . . any fit and proper person . . .", this seems to me to give a discretion as to steps. The court could, for instance, conclude that at the time of the application an applicant had shown that he had redeemed himself and was then a fit and proper person to be admitted, but mark its disapproval of his earlier conduct by postponing his actual admission (compare *ex parte Gunguluza*, 1971 (4) SA 212 (N), where the court admitted the applicant but postponed the taking of the oath - no doubt because section 4 of Act 23 of 1934, substituted by section 2 of Act 63 of 1964, uses the word "shall"). But in so far as this court is called upon to determine whether an applicant is a fit and proper person it makes, as Mr *Jagger* puts it, a value Judgment.

I am, however, unable to accept Mr *Jagger's* further submission as to the circumstances in which an appeal court will interfere with a finding that an applicant is not a fit and proper person to practise. Mr *Jagger* submitted that an appellate court has to be satisfied that the court *a quo* misdirected itself or that there otherwise had been some miscarriage of justice or violation of some principle of law or procedure before it will interfere with a finding of act, and that in the absence of being so satisfied the findings of the trial court are unassailable. I think this submission goes very much too far, and certainly a good deal further than *R v Dhlumayo & Anor* 1948 (2) SA 677 (AD), cited to us by Mr *Jagger* in support of his submission. It is, of course, correct that where the findings of fact are based on credibility an appellate court, which has nor had the advantage of seeing and hearing the witnesses, will be slow to interfere, it will normally require to be satisfied that the trial court has clearly been shown to have fallen into error (*Powell et Uxor v Streatham Manor Nursing Home* [*1935*] *AC* 243; [1935] All ER Rep 58). The learned judge *a quo* made no findings on demeanour, and his findings concerning the instance where in his view the appellant had attempted to deceive the court were based on what was said and not on the way it was said. In my view, therefore, the present is a case in which for all practical purposes this court is in as good a position to decide the appellant's fitness to practise as was

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the trial court. This does not, however, mean that I accept the approach of the learned judge in the court *a quo* as to when a person, on given facts, is or is not fit to practise, and I propose to deal first with this question.

The learned judge, having dealt with the facts and having set out the conduct in the light of which the application should be considered, said:

> "I accept that these actions were generally caused by the petitioner's contemptuous opinion of the judiciary,

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generated partly by his political mews, but mainly by his experience as a litigant.

The mere holding of such an opinion does not by itself prevent the petitioner from establishing that he is a fit and proper person to be admitted as an advocate even although he will appear before the judiciary whom he despises so intensely. Even if he were to express that opinion from time to time, with discretion and in appropriate circumstances, he would not necessarily be so prevented. However, I thinly it is clear that a person who holds that opinion and expresses it in the ways that the petitioner has expressed it, disqualifies himself from admission as an advocate."

This is the crucial issue. The learned judge found (whether rightly or wrongly is not relevant for this purpose) that the appellant had given false evidence in his trial for contempt in May, 1978, and had made two attempts to deceive the court in this case. This conduct must have influenced the learned judge to some extent, since otherwise he would presumably not have included it in the six aspects of conduct on the basis of which he reached his conclusion; but it is clear from the last sentence in the foregoing passage, in which he explains why the appellant was disqualified from admission, that the learned judge relied primarily on what he regarded - and rightly - as gross discourtesy towards the judiciary. The question is whether this approach is correct. Certainly it is not supported by the cases. I know of no case in which even gross discourtesy to the Bench has formed the basis either of an application for removal of an advocate from the roll or of opposition to an application for admission or re-instatement, and I think the reason is clear; such conduct might well lay him open to be dealt with for contempt, but does not disqualify him from admission.

An examination of the cases shows that the over-riding criterion for fitness to practise is integrity. Thus in *Lambert v Incorporated Law Society,* 1912 TPD 688 at 691-2. DE VILLIERS, JP, spoke of the onus on the applicant to show that he would "conduct himself as an honourable member of the profession and that members of the public will be able with safety to trust him with their affairs and with their money". In *Swain's* case *(supra)* at page 790G, reference was made to

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the finding of the court *a quo* that the appellant "was reckless in his assertions and had no sense of responsibility towards the truth". In *ex parte Caminsky* 1958 (3) SA 249 at 250C, BROOME JP, said that "the court insists that all its officers should be trustworthy. The public interest requires the same". Even a conviction for a criminal offence will not necessarily disqualify. In *ex parte Krause* 1905 TS 221 (also an application for the admission of an advocate), INNES CJ, said at page 223:

". . . it is not the bare fact of conviction that disqualifies . . . The real reason is this - that in most cases the fact of the criminal conviction shows the man to be of such a character that he is not worthy to be admitted to the paroles of an honourable profession."

In *re Hill* (1868) LR 3 QB 543 at 545, COCKBURN CJ, said:

"When an attorney does that which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man guilty of such misconduct from acting as attorney of the court ";

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and in *In re Weare* [1893] 2 QB 439 at 446 LORD ESHER MR, said:

> "The Court is not bound to strike (a solicitor) off the rolls unless it considers that the criminal offence of which he has been convicted is of such a personally disgraceful character that he ought not to remain a member of that strictly honourable profession."

In *Incorporated Law Society, Transvaal v Mandela* 1954 (3) SA 102 (T.), RAMSBOTTOM J, relying on the afore - recited cases of *Krause, Hill* and *Weare*, held that since the respondent's conduct was not dishonest, disgraceful or dishonourable the application to remove his name from the roll of attorneys should be refused.

The conclusion I draw from the cases is that the integrity required of a practitioner is primarily in relation to his clients, although there must also be integrity in relation to the courts; clients must be able "to trust the practitioner with their affairs and with their money", but the courts must also be able to trust him in their dealings with him. I do not use "integrity" and "trust" entirely in the narrow sense of honesty. Clearly, as the cases show, honesty is the major component, but the courts have a duty to the public to ensure as far as is reasonably practicable, that they can safely entrust their affairs and their money to the practitioner, and consequently reliability and responsibility are factors to be taken into account. But such factors cannot be unduly stressed; the courts cannot sit to judge the competence, even in the widest sense, of aspiring practitioners. At the end of the day the court must ask itself the basic question: does the evidence reveal such a character that the public might be in danger of losing their money through his dis-

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honesty or unreliability? I do not regard as real the danger of cases being lost or prejudiced through irresponsible, discourteous or even paranoid behaviour in court; I would have hoped and expected that the courts would decide cases on their merits and not on the basis of the behaviour of counsel, and the experience of the appellant's own litigation - his various wild and totally unwarranted accusations of partiality notwithstanding - demonstrates that this hope and expectation is fully justified.

I turn then to the facts. The appellant included in his papers a common form certificate signed by Mr Dumbutshena, as he then was. In this regard, the learned judge said:

> "The petitioner admitted in effect during his evidence that the author had only a superficial knowledge of him, and was unaware of the allegations made against him by the Bar Council. For these reasons, I do not think that any weight can be attached to the certificate, despite the eminence of its author."

The appellant in his grounds of appeal submitted that this was a mis direction, since he neither admitted nor implied the facts in question. I think this point is well taken. The relevant passage in the evidence - the only passage in which the matter was raised - reads as follows:

> "Q. For how long have you known MR JUSTICE DUMBUTSHENA? A off and on, I suppose for a period of about a year to 18 months.
>
> Q. Do you know him socially? Have you been to his home? A No.

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Q. Has he been to your home? A No.

Q. In what capacity have you come to know hen? A On many occasions I met him in his Chambers. We discussed politics, law, but it was always on an informal basis."

I do not think it is a proper conclusion from this passage that MR JUSTICE DUMBUTSHENA had only a superficial knowledge of the appellant, if two men discuss politics and law, subjects in which they are both interested, on many occasions, they would in my view acquire quite a deep knowledge of each other, and the fact that they do not visit each other's homes is hardly relevant.

It is clear from the evidence that MR JUSTICE DUMBUTSHENA's certificate was given at a time when the allegations of the Bar Council had not yet Men indicated to the appellant, clearly therefore MR JUSTICE DUMBUTSHENA could not have been aware of those allegations. But it does not follow that, had he known of the allegations, be would not have given that certificate. To assume this is to assume that MR JUSTICE DUMBUTSHENA would have regarded the conduct complained of as rendering the appellant unfit to practise, I think this is highly speculative and an unwarranted assumption, particularly since none of

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the complaints listed by the Bar Council in it Is subsequent letter of the 28th May involved an allegation of dishonesty. I prefer to make no assumptions one way or the other as to what MR JUSTICE DUMBUTSHENA'S attitude might have been had he known of He complaints. But this is not to say that his certificate can be discounted, it is still a certificate that from his knowledge of the appellant the latter was a fit and proper person to practise, and the appellant explained in evidence the degree and nature of the knowledge. As I have said, the kind of conversation described is one which is calculated to enable a lawyer of MR JUSTICE DUMBUTSHENA'S experience to assess the character of the appellant, and that assessment as reflected in the certificate cannot be ignored; it was given only a few days before his appointment to the Bench was publicly announced, and would not have been given lightly. The opposition of the Bar Council was originally based on the five complaints to which I have already referred. The learned judge, and I think rightly, has attached no great weight to those complaints. His Judgment deals with them in the following passage:

"At one stage the Bar Council attempted to contend that the manner in which the petitioner had conducted the litigation arising from the sequestration of his estate showed that he was lacking in honesty to the various courts before which he appeared. This contention was rightly not persisted in, because in none of those cases was the petitioner held to have been deliberately untruthful. But in my view, anyone reading the Judgments already listed would be forced to the view that the petitioner was probably an irresponsible litigant, because his allegations of fact were so frequently rejected by the courts. The Bar Council contended that he had also been irresponsible in the manner in which he had embarked upon litigation without any real expectation of being able to pay any costs that might be awarded against him.... I think there is some substance in this complaint, but throughout the period of his insolvency the petitioner was suffering from ill-health, and financial and domestic anxieties, which I think explain, and to a large extent excuse, his launching of discreditable litigation during that time."

Save that I think the description of the appellant's litigation as discreditable is unwarranted, this passage is a very fair assessment of the matter.

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The learned judge dealt with the factors which influenced him in the following passage:

> "In my opinion, the petitioner's application must be considered in the light of the following matters:
>
> (1) His treatment of the Registrar of the Appellate Division.
>
> (2) The disrespect shown to the learned Judge President in the notice of appeal from his decision on review of taxation.
>
> (3) His giving of false evidence during his trial for contempt of Court.

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> (4) The disrespect shown to the learned trial judge as recorded in Judgment G-S-17-80.
>
> (5) The disrespect shown to the judiciary In the letter, page 32 (the letter to the Senior Puisne Judge).
>
> (6) The two attempts during the hearing to mislead the Court."

There then followed the passage, already cited above, in which the learned judge referred to the appellant's contemptuous opinion of the judiciary and held that a person who expressed that opinion in the way the petitioner expressed it disqualified himself from admission. I have already indicated my view that discourtesy and disrespect towards the judiciary may lay a person open to proceedings for contempt, but does not disqualify him from admission; nor do I regard item No. 1 on the foregoing list as in itself conduct which suggests unfitness to practise; rather does it suggest a man who had completely lost his temper and made wild threats as a result. The relevant and serious aspects of the appellant's behaviour are those which involve dishonesty.

The learned CHIEF JUSTICE, whose Judgment I have had the opportunity to read, has dealt in detail with the evidence of the appellant. I do not attach quite as much importance as does the learned CHIEF JUSTICE to the appellant's attempts to explain the exchanges with MR JUSTICE WADDINGTON, and what I might call the Gyles affair; I think in both cases the appellant chose a rather curious use of words, and then defensively and foolishly allowed himself to be driven into untenable positions. But with these qualifications I too am satisfied that the appellant has not been entirely frank with the court. On the credit side I observe with interest that in his Judgment in the contempt proceedings in 1978 the magistrate, notwithstanding that he rejected the appellant's evidence on the crucial issue, said of him:

> "The accused himself unpressed me as a person who is basically frank. He makes no secret of the fact that he is appalled by the system of justice in this country and he has made his views known in various high quarters in this country and out of this country."

I turn next to the appellant's letter to MR JUSTICE BECK, in his capacity as the Senior Puisne Judge. This letter was discourteous in the extreme, not to say offensive, but one cannot in my view ignore either the circumstances in which it came to be written or the fact that the appellant apologized for having written it. Obviously the letter was written in angry reaction to having been told that Mr lagger had informed certain people that the appellant had no chance of success in his application for admission. Mr *Jagger* informed us that he made no such statements to anyone, and naturally I accept that. But I also accept

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the appellant believed that he had, and presumably that the basis of the statement was an opinion expressed by a member of the Bench or a court official - otherwise it is difficult why the appellant reacted as he did. All this does not excuse the appellant's conduct, but it does explain it. Nor can one ignore the appellant's apologies. It is well settled that one of the factors which the Courts take into account in an application for reinstatement is that there must be restitution or reparation in respect of the offending conduct. Thus in *ex parte Caminsky* (*supra*) BROOME JP, said at page 251:

> "So far as the other misconduct is concerned, applicant has admitted his error and has expressed his regret. this is the only reparation possible .... "

The appellant's medical history is also a factor to be taken into account. The evidence reveals that he was involved in a serious car accident in 1974, that later the same year an unsuspected ulcer perforated, and that he underwent psychiatric treatment and therapy from 1974 to 1979, by which date his health had improved considerably and all medication was withdrawn.

The picture I have from all the evidence is of an intelligent man, somewhat unstable emotionally and with a pronounced persecution complex, who has pulled himself through a long period of serious mental depression and who during that period has added a legal degree to his other impressive qualifications. During the difficult years there were domestic problems, but his wife said in evidence that these had been resolved. The question is whether such a man, shown also in the course of his evidence in this case to have been guilty of a degree of dishonesty in his answers, might be a real danger to his clients in the sense I have indicated. Clearly the appellant falls short of the ideal in terms of both honesty and behaviour, but this is not the issue, the issue is whether he falls so far short of the ideal as to be a danger to the public. In this regard I think three cases are particularly instructive.

In *ex parte Knox* 1962 (1) SA 778 (N), an application for re-admission, WILLIAMSON JP, said at page 784C:

> "It is a matter of great difficulty to say that an ex-practitioner has no chance of ever re-entering the profession. Yet I am satisfied that, in exceptional cases, the court has the power to say so and, in my view, the unfortunate duty of saying so. We have, in this case before us, a man who has not transgressed once. Early in this legal career he had to be suspended from the roll of attorneys for dishonest conduct whilst a member of the Side Bar. In 1949, the JUDGE - PRESIDENT of this Division felt constrained to make very severe comments on his conduct. His insolvency in 1950 and the examination which arose out of it, indicated dealings of an extraordinary nature by an advocate, his evidence during his examination in insolvency

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> was unsatisfactory; he was connected, whilst an advocate, with an alleged professional transaction about which this court has grave suspicions and, in respect of which, it was suspected that he had possibly misappropriated a large sum of money; he cannot yet satisfactorily explain to the court what happened in regard to that transaction; a plea has been filed on his behalf in this court in a matter and an affidavit has been made in the same by him which give rise also to grave doubts as to his reliability as a witness on oath; he was, in 1951, convicted of what in relation to an advocate must be regarded as an extremely grave offence and, in the course of that trial, he was

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found by the presiding magistrate to have committed perjury. The courts have repeatedly warned themselves against allowing sympathy for the applicant to weigh with them in deciding whether or not to allow an attorney or advocate again to enter the ranks of his profession. The court's duty is first and foremost and at all times, to be satisfied in these matters that the applicant is a proper person to be allowed to practise and a person whose re-admission to the ranks involves no danger to the public and no danger to the good name of the profession. In this case the court has also had to guard against feeling sympathy for the woman who has stood by the applicant's side throughout as his wife. I have come to the reluctant conclusion that 'the applicant in this matter has shown himself to be a person who cannot be re-admitted to the profession of an advocate."

In *ex parte Gunguluza* (*supra*) the applicant had been caught cheating in his practice examination, it is not clear from the report what period elapsed between that incident and his application for admission. HARCOURT J, said at page 213B:

"The conduct of the applicant since this unfortunate incident suggests that he may well have, and probably has, repented of his lack of integrity on that occasion, and it may well be that the proper course is to encourage him to continue in the path of righteousness and integrity. We would stress that a person cheating in a professional examination is not a fit and proper person for admission to that profession. The court will scrutinize the facts to see if a fall from grace of this kind has ceased in a manner which assures the court that the applicant is, at the time of his application, a fit and proper person. In this scrutiny the court should, I believe, adopt a somewhat similar approach to that employed where an attorney, who has been struck off the roll, has applied for his re-admission contending that his subsequent conduct gives an assurance that the previously existing lack of fitness has ceased."

In *ex parte Caminsky* (*supra*) the following facts appear from the Judgment at page 250E:

"The misconduct which led up to applicant's striking off may be summarised as follows. First, he obtained an adjournment of a criminal case in the magistrate's court by telling the magistrate that his client was ill, when in fact (as he well knew) his client wished to be free to attend to other business. There is no need to enlarge upon the seriousness of this misconduct, tending as it does to undermine the confidence which courts have in the truth of statements made from the Bar. Second, applicant asked for

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and obtained the adjournment of two cases to dates on which he knew he would be unavailable. This was primarily a breach of his duty to his clients, but it was also a breach of his duty to the court in that it would tend to upset arrangements for the disposal of the court's work. Third, applicant acted in two cases without being properly instructed by an attorney. This was a breach of one of the fundamental rules of the society and gave him a mean advantage over his fellow advocates. Fourth, in one of the cases just referred to, applicant acted in a negligent and grossly dilatory manner. Fifth, applicant ignored the society's written requests for an explanation of his conduct and, when he came before an investigatory subcommittee, gave explanations which were untruthful. Sixth, when the application to strike off came before the court on 21st June, 1955, applicant obtained an adjournment to 3rd August, 1955, on condition that he filed his affidavits within a certain tune; he failed to file any affidavits and did not appear on 3rd August. In fact, on 3rd August he appeared as counsel in a magistrate's court in the country."

Counsel for the applicant submitted - and in my view with considerable justification - that this conduct was not so serious as to merit striking off, and that had the applicant opposed the application he would not have been suspended for more than the two-and-a-half years he had, at the time of his application for re-instatement, been off the roll. He submitted that in any event the offences, which were professional only, were due to his being an alcoholic. In this regard the report continues at page 251C:

"He attributes his downfall mainly to drink. He says that during the relevant period he was 'invariably under the

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> influence of liquor even in the morning', that he was mentally and physically ill, that he was in heavy financial difficulties and that he really did not know what he was doing. There must have been considerable inter-action between these various factors, but I think it is fair to assume that drink was the root of the trouble. So he must satisfy us that drink is no longer, and will not again become, his master."

I have cited these cases at some length because the first two represent, a sense, extremes, while the third has marked similarities to the present. In *Knox*'s case (*supra*) the applicant had what can only be described as a most dreadful record of professional and criminal offences involving dishonesty, yet the court came to "the reluctant conclusion" that the applicant could not be re-admitted. In *Gunguluza*'s case (*supra*) the applicant had been guilty of a very serious professional offence involving dishonesty, and one which in my view displays a serious weakness of character, yet the court admitted him and merely postponed his effective entry into the profession for two months. In *Caminsky*'s case (*supra*) the offending conduct took place at a time when the applicant was an alcoholic, and he satisfied the court that at the time of his application he was a total abstainer. Here the offending conduct

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took place after the appellant's health had improved; but it would I think be unrealistic to imagine that, particularly after such a very long illness, he had completely recovered when the medication was withdrawn in 1979 or even at the time of the offending I see no reason to doubt that the improvement will continue.

When I compare the facts of the present case, including all the appellant's offending conduct and the character he displays, with all the cases I have been able to find, he seems to me to be far less of a danger to the public than many of the successful applicants in those cases. Certainly his conduct has been highly reprehensible, but he clearly has always had a deep interest in society and social problems, and the evidence, both his and his wife's, indicate that he has developed a deep and sincere interest in the law. He could become a useful member of the profession. Hitherto he has always been a litigant in person; I do not believe that as a practitioner he will be a danger to his clients. In my view he has discharged the onus of showing that he is today a fit and proper person to practise.

However, this does not end the matter. Save of course for the question of the onus, an application for admission is approached on the same principle as an application for removal from the roll (see *Incorporated Law Society*, *Transvaal v Mandela* (*supra*) at page 107H). Had this been an application for removal I think the appellant's conduct might well have attracted some disciplinary action, and probably a period of suspension. As I have said, I think section 4 of the Act gives the court a discretion as to steps, I regard the appellant's conduct as sufficiently serious for the court to mark its disapproval by, in effect, suspending him from practice for a period. I would allow the appeal and admit the appellant to practise, but order that his enrolment be postponed for six months.

Squires AJA: I agree with the careful dissection of the facts of this matter by the CHIEF JUSTICE, and with the conclusions he draws from that analysis. I also agree with his statement as to He general principle that should be applied to the consideration of an application of this sort, that is to ensure that suitors before the Courts are not exposed to improper officers of

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Court. As was put by BLACKBURN J, in Re Hill (1868) LR 3 QB 543 at 547:

> "We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors; and we are to look to the character and position of the persons, and judge of the acts committed by them.... "

SQUIRES AJA

Furthermore as was stressed by LOPES LJ, in *In re Weare* [1893] 2 QB 439 (CA) at 448, it is necessary to bear in mind that officers of Court are entrusted to exercise important functions and occasionally grave responsibilities. This requirement clearly underlies the decisions in *Krause, Mandela* and *Knox* referred to by the CHIEF JUSTICE and applying it to the appellant, I also agree with the CHIEF JUSTICE that the appellant's repeatedly disrespectful and irresponsible attitude to the Court and judges in the past does not afford any confidence for concluding that he is a person upon whose reliability complete trust could be placed; nor in view of his lack of frankness as found by the CHIEF JUSTICE is there any basis for thinking that a court could place complete reliance on his integrity.

But in my respectful view the matter goes somewhat further. Citizens whose affairs require them to come to court as suitors seem to me to require and to be entitled to advice that is both careful and impartial, and that is dispassionately weighed up and given. This in turn seems to me to require in an officer of court at least some real capacity for taking a detached view of cases in which he is involved. In other words, that in a conflict situation such as will arise in most litigation, he will retain at some point prior to advising or acting, an ability to control his own feelings and not let them intrude into or colour his Judgment and reactions. While any advocate or attorney at sometime or another experiences disappointment at some decision of a court, which disappointment may well go to the length of criticizing the court or the Judgment or both, the appellant's acts seem to me to go well beyond this. For they appear to me to show not only a publicly expressed emotional outburst against the court or judge concerned, but a tendency to act in the heat of the moment, which together must seriously impair his capacity for sound and calm advice or assistance to a client. If, for example, he had been acting for a litigant when attending the taxation exercise which he called "a bloody farce" and from which he withdrew in the circumstances described by the CHEF JUSTICE, and then instituted a review of the proceedings before the bill was fully taxed, and then appealed against the result of the review as he did, such lack of control and detachment would have cost a client dear and quite unnecessarily.

In the circumstances of this case it does not seem to me to be an answer to say that the appellant did this as a litigant acting on his own behalf, and would not do so if he were an officer of court acting on behalf of someone else. The fact is he has behaved several times in the past in this acceptedly irrational way when receiving an adverse decision;

SQUIRES AJA

and on his own evidence may still do the same thing when faced with a conflict situation such

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as he was in conducting his own litigation. Even if he learned to control his own outbursts so that no one was aware of them, there could still be a lack of calm detached Judgment in his reactions and advice which could affect a suitor most detrimentally.

The appellant has certainly not satisfied me that the court below was wrong in finding that he is not a fit and proper person to be admitted as an advocate, and I agree that the appeal should be dismissed.

Gollop & Blank, attorneys for the appellant.

Gill, Godlonton & Gerrans, attorneys for the respondent.

PRACTICE DIRECTION No. 1 OF 1981

Dress to be worn by legal practitioners in the High Court

Fieldsend CJ: After consultation with the judges and the legal profession on the question of the dress of legal practitioners in the High Court when the Legal Practitioners Act, 1981 (No. 15 of 1981), comes into force, I have today issued the following practice direction.

On the coming into force of the Legal Practitioners Act, 1981, the dress expected of legal practitioners appearing to present cases before the Appellate Division and General Division of the High Court will dark suits worn over a white shirt (or blouse, in the case of women) with either a jabot, or a wing collar and bands. Wigs will NOT be worn. addition, a gown of the type now worn by junior counsel will be worn, save that senior counsel may wear a gown of the type presently worn by senior counsel.

14 May, 1981.

EX PARTE NDLOVU 1981 ZLR 216

Court **General Division, Bulawayo**

Civil Application

Gubbay, J

22nd May, 1981

Flynote

Insolvency Act [Chapter 303] - section 141 (2) (a) - publication in Gazette of notice of intention to apply for rehabilitation - when late publication may be condoned.

Headnote

It is solely for the information off creditors that an insolvent who applies for his rehabilitation is required by section 141 (2) (a) of the Insolvency Act [*Chapter 303*] to publish notice of his

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application in the Gazette, so where there is to possibility of creditors being prejudiced, late publication of the notice is a formal defect which may be condoned by the Court.

Authorities cited:

Mars, *The Law of Insolvency in South Africa,* 7th edition, pages 436-7;

In re Mather-Pike, 1974 (2) RLR 250 (GD); 1975 (1) SA 771 (R);

Ex parte Miller, 1932 TPD 212;

Ex parte Curry, 1965 (1) SA 392 (C);

Ex parte Zafiropoulos, 1932 TPD 229;

Ex parte Fakir, 1956 (4) SA 177 (C).

S A Wilmot for the petitioner.

Judgment

Gubbay J: The petitioner has applied for his rehabilitation terms of section 141 (2) (a) of the Insolvency Act [*Chapter 303*]. The papers are in order, save that the notice of the intention to make the application was only advertised in the *Gazette* on the 24th April, 1981, and so is 15 days short of the minimum six-week period prescribed by section 141 (2) of the Act. No explanation is offered for the failure to comply with this provision and I must assume that the petitioner's attorneys are at fault in not timeously requesting the Government Printer to arrange for the insertion of the notice.

GUBBAY J

The question arises whether the court should condone the short notice as a formal defect. The authorities - and there are a large number of them - reveal a difference of judicial opinion on the nature of a defect of this kind and the right of the court to grant condonation. They are conveniently collected in Mars, The Law of Insolvency in South Africa, 7th edition, at pages 436-437.

In *In re Mather-Pike*, 1974 (2) RLR 250 (GD); 1975 (1) SA 771 (R) BECK J, dealt with an exactly similar application and said at 252C-F (772E of the South African report):

> "There is the further difficulty that the period of notice that was given to the Master and to creditors was less than the period required by the statute. The Master in fact reported, as I have already indicated, in time for the first hearing, so the object of the Legislature can be taken to have been fulfilled in the case of notice to the Master despite the shortness of time. But there is no knowing what might have been the situation with regard to proved creditors, other than the one that has by now appeared to take objection. Omission to give proper notice has been held by a Full Bench in South Africa not to be a formal defect (*Ex parte van der Merwe* 1963 (1) SA 268 (O)), and this is another reason for not giving the applicant a further opportunity for amplifying these papers yet again, but for dismissing the application and thus requiring the applicant, if so advised, to apply afresh on fuller information and pursuant to new statutory notices timeously given."

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It is, I think, clear that the approach of the learned judge would have been different if, as in the case of the Master, he had been satisfied that there was no possibility of prejudice being caused to creditors by the short notice in the *Gazette*. After all, it is solely for the information of creditors that the notice is required.

The test of whether a defect such as this is formal or substantive is not whether the statutory provision is directory or peremptory, but rather whether it aims at some definite object and whether, having regard to the particular facts, non-compliance therewith will result in the defeat of that object. See *Ex parte Miller*, 1932 TPD 212 at 216; *Ex parte Curry* 1965 (1) SA 392 (C) at 393A. In *Ex parte Zafiropoulos* 1932 TPD 229 at 233, and *Ex parte Fakir* 1956 (4) SA 177 (C) at 179D, the view was expressed that this type of defect cannot be said to, be formal if it might cause prejudice to the creditors. That, to my mind, puts the same test in a simpler form.

I am satisfied on the facts of this case that there is no possibility of creditors being prejudiced by the short notice. The petitioner's estate was sequestrated several years ago on the ground that he had committed an act of insolvency, at a time when his liabilities amounted to $2 180

GUBBAY J

and has assets $5 866. Foreseeably, all his creditors proved claims in the estate, and without exception they have been paid in full. In *Ex parte Curry, supra*, WATERMEYER J, treated short notice in the *Gazette* as a formal defect and condoned it where no creditor had proved a claim the estate. I respectfully agree with that decision. A *fortoiri,* the special circumstances of this application justify my regarding the short notice as a formal defect and condoning it.

In the result, the petitioner is entitled to be rehabilitated and I order accordingly.

Ben Baron & Partners, attorneys for the petitioner.

THE STATE v MAKONI 1981 ZLR 219

Court **Appellate Division, Salisbury**

Criminal Appeal

Baron, JA

27th May, 1981

Flynote

Evidence - accused declining to give evidence on oath but outlining his defence in detail and fully answering prosecutor's questions - whether adverse inference may be drawn from failure to give evidence.

Headnote

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Where an accused person in a criminal trial declines to give evidence on oath after giving a detailed outline of his defence and then answers fully all questions put to him by the prosecutor, the Court should not draw an adverse inference from his failure to give evidence.

Judgment

Baron JA: (in Chambers in terms of section 67 (2) of the Magistrates Court act [*Chapter 18*]): The appellant was convicted of rape. In outlining his defence he made a very long statement giving in detail his version of the events; very shortly, his defence was that the complainant had been his girlfriend for a week or two, and that in fact, because of a quarrel, they had not had intercourse on the night in question.

After the close of the *State* case, the appellant, in answer to the magistrate, said that he did not intend to call any witnesses. The record then continues:

> "Q. Would you like to give evidence on your own behalf or not?
>
> I should explain that even if you decline to give evidence the prosecutor may nevertheless question you and so may the Court.
>
> A. If the prosecutor wants to question me then I will talk to him.
>
> Q. There is no provision now because the statement was made not on oath. You can either take the oath and give evidence or you may then merely be questioned by the prosecutor.
>
> A. I have nothing to say."

BARON JA

I do not understand the second question, and suspect that it is not accurately recorded. Furthermore, the reference to the statement not being made on oath would appear to be a reference to the outline of the defence, which suggests in turn that more was said than appears on the record. Be that as it may, the appellant was then questioned at length by the prosecutor (and incidentally showed no reluctance to answer questions). The magistrate in his Judgment reviewed the evidence and concluded:

> "On consideration then of the evidence as a whole and in view of the accused's refusal to give evidence I come to the conclusion that the complainant's version of what took place is the truth, certainly beyond reasonable doubt. I don't believe the accused."

The appellant applied for a certificate to enable him to prosecute an appeal in person. I granted the certificate both on the merits and on the question whether, if the magistrate's approach was based on the provisions of section 188A of the Criminal Procedure and Evidence Act [*Chapter 59*], it was correct in law, since in terms of that section no inference can be drawn from a refusal to give evidence but only from a refusal to answer any question without having just cause for so refusing. In response to a question from the Registrar as to what weight or significance he attached to the fact that the appellant refused or declined to give evidence the magistrate wrote:

> "The accused's refusal to give evidence on his own behalf was one of the factors I took into account in deciding whether to believe the complainant's or the accused's version of what had taken place. My approach was not

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based on the provisions of section 188A of the Criminal Procedure and Evidence Act which relates to the accused's failure to answer a question. Rather, when giving my Judgment I had in mud what was said this connexion in the cases of *State v Masia* 1962 (2) SA 541 (AD) at 546C to H and *State v Letsoko and Others* 1964 (4) SA 768 (AD) at 776C to E "

It was, I think - and the Attorney-General shares this view - a clear misdirection in the circumstances to have drawn any adverse inference from the appellant's failure to give evidence. He had already given a detailed outline of his defence; he stated his willingness to answer questions, and in fact did so, and I am far from satisfied that the distinction between giving an outline of his defence and going into the witness-box and re-affirming it on oath was adequately explained to him.

It is unnecessary to deal with the evidence in any detail. I should, however, refer to the evidence concerning a pair of slippers which the appellant said he bought for the complainant and in which he seems to be supported by other evidence, in particular by that of the

complainant's step-father; if the complainant was not speaking the truth on this issue, which was vital to the appellant's contention that she had been his girlfriend for some little time prior to the date of the alleged rape, then the prosecution case collapses. I am not satisfied that the complainant was speaking the truth on this issue. The Attorney-General has drawn attention also to a number of other inconsistencies in the complainant's evidence and to a number of contradictions of it by other prosecution witnesses, he does not support the conviction which, in my view, clearly cannot stand.

In terms of section 67 (2) of the Magistrates Court Act [*Chapter 18*] I hereby allow the appeal in Chambers and quash the conviction.

THE STATE v MOYO 1981 ZLR 222

Court **General Division, Bulawayo**

Criminal Review

Gubbay, J

29th May, 1981

Flynote

Sentence - warning of indeterminate sentence - whether giving of warning necessitates compensatory reduction of sentence imposed on person to whom warring is given.

Headnote

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Where a court warns a connoted person that he is liable in the future to be declared an habitual criminal, the court need not make any compensatory reduction in the determinate sentence it imposes upon him, for the warning does not form part of the sentence of the court.

Cases cited:

Mutandwa v RAD 17/1966 (unreported);

S v Ncube 1979 RLR 332 (GD); 1979 (4) SA 458 (R);

S v Langton 1972 (2) RLR 57 (AD); 1972 (4) SA 279 (RAD);

S v Mache 1980 (3) SA 224 (T);

R v Swarts 1953 (4) SA 461 (AD);

R v Munyenyewa 1966 RLR 509 (GD); 1966 (3) SA 667 (R);

R v Edwards 1953 (3) SA 168 (AD);

R v Vos; R v Weller 1961 (2) SA 743 (A.D.);

S v Mandoro 1977 (2) RLR 245 (AD); 1978 (1) SA 1186 (RAD);

S v Zinn, 1969 (2) SA 537 (AD).

Judgment

Gubbay J: This case came before me on review from the Court of the regional magistrate. The accused was correctly convicted on two counts of housebreaking with intent to steal and theft and one count of robbery. He has an extremely bad criminal record. Since February, 1971, he has been convicted of no fewer than 13 offences involving dishonesty and, in aggregate, has been ordered to undergo prison sentences totalling some 78 months. He has also received a whipping. The regional magistrate sentenced the accused to two years' imprisonment with labour on each of the housebreaking offences and to a further five years'

GUBBAY J

imprisonment with labour on the count of robbery. In addition, he warned the accused of the indeterminate sentence. Undoubtedly the warning was fully justified, for it is quite apparent that the accused is embarking upon the career of a professional thief.

The extent of the incarceration imposed prompted me, however, to inquire of the regional magistrate whether he had paid regard to the dicta in *Freddy Mutandwa v The Queen,* AD 17/1966 (unreported), and *S v Ncube* 1979 RLR 332 (GD); 1979 (4) SA 458 (R), and taken the warning into account as a compensatory factor in his determination that the accused was to serve nine years. In a well-reasoned and persuasive memorandum, he replied that he was unaware of these decisions and that it had never been his practice to reduce a punishment he considered appropriate when warning the offender of the indeterminate sentence. He went on to

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comment:

> ". . . it would be wrong to reduce an otherwise merited sentence of imprisonment just because the accused is warned that if he offends again there is more than a likelihood of his being declared an habitual criminal. If the warning is to be regarded as the equivalent of two or three years' imprisonment with labour and an otherwise deserved sentence reduced accordingly, it may be a self-defeating principle in that a court may be tempted to avoid giving the warning and leave intact the merited punishment. In these circumstances the accused may be deprived of the advantage of a 13 warning and find himself on his next conviction declared an habitual criminal.
>
> As far as the accused in the instant case is concerned, it is with the greatest respect that I would submit that he deserves both the sentence of imprisonment imposed and the warning of the indeterminate sentence. The nine years' imprisonment with labour is a punishment he has earned and to reduce it just because his previous career of crime, as reflected in his criminal record, makes it desirable to warn him of the consequences of a future conviction, seems to me to offend against the better-known principle that the less hardened criminal should be treated more leniently than the recidivist."

At the outset I am bound to say that nine years' imprisonment with labour cannot be categorized as manifestly excessive. The question, therefore, is whether the regional magistrate misdirected himself in not reducing a lengthy, yet permissible, period of incarceration by reason only of the accused being warned against the indeterminate sentence.

In *Mutandwa*'s case, the appellant had been convicted on four counts of housebreaking with intent to steal and theft, each of which involved the breaking into of a store and the theft of a substantial quantity of goods. He was sentenced by a magistrate to an effective seven-and-a-half years' imprisonment, but was not warned of the indeterminate sentence.

GUBBAY J

BEADLE CJ, with whom QUENET JP, concurred, considered that in the light of his previous convictions for dishonesty, the appellant should have received that warning. He remarked at page 2 of the cyclostyled copy of the Judgment:

> "For this court to warn the appellant of the indeterminate sentence and to leave the rest of the sentence imposed by the magistrate standing would have the effect of increasing the sentence on appeal....
>
> In the circumstances, the only way to deal with this case so that the effect of the judgment of this court is not to increase the sentence is, I think, to make some reduction in the over-all sentence of imprisonment which the magistrate ordered the appellant to serve."

No reasons were given by the learned CHIEF JUSTICE for this view and no authority cited for it. The appellant was unrepresented and the court took the point *mero motu* that a warning was necessary. It is probable that the State did not contend that the giving of the warning would constitute a burden upon the appellant additional to that imposed by the magistrate.

In *S v Ncube, supra,* BEADLE AJ, as he then was, dealt with the propriety of conjoining a punishment of solitary confinement on reduced diet with a warning of the indeterminate sentence, and after stating that such combination is to be resorted to only in exceptional circumstances, continued at page 334B-D (page 460E-F of the South African report):

> "Both the warning (see *R v Mutandwa* (AD 17/1966, not reported)) and the dietary punishment should, however, be taken into account as compensatory factors in determining the length of the period of imprisonment which is

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imposed. The magistrate did do this when he considered ordering that part of the period of imprisonment should be spent in solitary confinement and on reduced diet, but he does not appear to have done the same when considering the warning of the indeterminate sentence. The aggregate punishment is, however, reasonable, and I do not consider this any ground for interfering."

I concurred in that Judgment.

Initially it seemed to me that the rationale for the proposition that the warning is to be taken as part of the sentence was that if the threat of an indeterminate sentence is to prove an incentive to an accused to reform, the determinate sentence imposed at the time the warning is issued should be such as to leave a gap between the period of imprisonment to be served under it and that likely to be served under the indeterminate sentence. In other words, if a court were to sentence an offender to a very long term of imprisonment on account of his bad record, and to warn him at the same time, the prospect of his being detained indeter-

minately would lose much of its effect. But on closer examination I am satisfied this approach affords no support for the warning being regarded as a compensatory factor in the assessment of sentence. It merely seeks to ensure that there remains the threat of a more severe punishment to deter the accused. Although, as a matter of experience, it is not unknown for habitual criminals to be conditionally released on probation after serving as little as five years in prison (I am informed that about 50 per cent. are released after seven years while others may be detained for as long as 12 years), the main deterrent behind the indeterminate sentence is that there is no fixed date for release. Theoretically, the habitual criminal may be detained for life, a situation far removed from a determinate sentence, where an accused is credited with one-third remission upon his entry into prison. A determinate sentence enables an accused to calculate precisely the date on which he will be released and such release does not carry with it any condition, the breach of which could result in his return to prison. (See generally, *S v Langton* 1972 (2) RLR 57 (AD) at 61G-62F, 1972 (4) SA 279 (RAD) at 281H-282E.)

Having now had the benefit of the views of both the regional magistrate and the Director of Public Prosecutions, to whom I referred the matter, I too am of the opinion that a warning that upon some future conviction the accused may be declared an habitual criminal, does not form part of the sentence of the court. It is issued purely to impress upon the accused that unless he mends his ways, he may face an indeterminate as opposed to a determinate sentence. It is to bring him to his senses. See *S v Mache* 1980 (3) SA 224 (T) at 231 *fin* to 232A. It is no different from any other warning an offender may receive, such as that invariably issued by magistrates to persons who have been prohibited from driving, that should they drive during the period of prohibition, they will almost certainly be sentenced to imprisonment in terms of section 40 of the Road Traffic Act, 1976. It would, I think, be startling to hold that because the offending motorist has received such a warning, his punishment for the transgression that gave rise to the warning should be reduced on account of it. A warning, after all, is given in the interest of an accused, in an endeavour to influence his future conduct.

Moreover, as the regional magistrate rightly points out, it is not a requirement of section 322 of the Criminal Procedure and Evidence Act "Chapter 59] that the declaration of an accused as an

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habitual criminal be preceded by a warning. The section makes no mention of any warning. Even if an accused has not previously been warned, he may nevertheless be so declared. See *R v Swarts* 1953 (4) SA 461 (AD) at 463B; *S v Mache, supra,* at 229G. However, the common practice

GUBBAY J

in this country, as in South Africa, is not to impose the indeterminate sentence unless a warning has previously issued. See *R v Munyenyewa* 1966 RLR 509 (GD) at 511B-D; 1966 (3) SA 667 (R) at 668EF, *R v Edwards* 1953 (3) SA 168 (AD) at 170; *R v Vos: R v Weller* 1961(2) SA 743 (AD) at 747D F; *S v Mache, supra*, at 230A. Nor is an accused who has been warned inevitably declared an habitual criminal on a subsequent conviction for a Fifth Schedule offence. See *S v Mandoro* 1977 (2) RLR 245 (AD) at 248G-249D; 1978 (1) SA 1186 (RAD) at 1189A-F. Each case must be decided on its own merits and a judicial discretion exercised. The accused may receive a determinate sentence and have the warning repeated. This, in my respectful view, further underlines the fallacy in the principle enunciated in the *Mutandwa* and *Ncube* judgments, for taken to its logical conclusion, it means that a warning given on a second or third occasion must also warrant a reduction to the sentence. A further problem would be how to assess the extent to which the sentence should be adjusted to compensate for such warning.

Finally, I think it significant that in *S v Mache, supra*, DE VILLIERS AJ, in an exhaustive analysis of the law and practices relating to habitual criminals, nowhere suggests that a warning against the indeterminate sentence must be taken into account as a compensatory factor.

It is the duty of a judicial officer in imposing punishment to have regard to:

> " . . . the triad consisting of the crane, the offender and the interests of society."

(*per* RUMPFF JA, as he then was, in *S v Zinn* 1969 (2) SA 537 (AD) at 540G). This the regional magistrate did. He strove to achieve a reasonable balance between the elements of the triad, and any interference with the conscientious exercise of his discretion would be unjustified.

My brothers BECK and NEWHAM agree with these observations.

The proceedings are accordingly confirmed

KASSIM v GHUMRAN AND ANOTHER 1981 ZLR 227

Court **General Division, Salisbury**

Civil Action

Pittman, J

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5th and 10th June, 1981

Flynote

Marriage - validity of marriage entered into in foreign country by persons domiciled in Zimbabwe - when validity may be tested by lex domicilii of parties rather than lex loci celebrationis.

Headnote

Where a man and a woman, one or both of whom is domiciled in Zimbabwe, deliberately have their marriage solemnised elsewhere in an attempt to evade or cheat laws of Zimbabwe such as sections 21 and 23 of the Marriage Act [*Chapter 37*] and section 3 (a) of the Criminal Law Amendment Act [*Chapter 58*], they act in *fraudem legis* and the validity of their marriage must be tested by the law of Zimbabwe, not the law of the place where it was celebrated, whether or not they intended to remain permanently outside Zimbabwe after their marriage.

A marriage contracted outside Zimbabwe which is valid according to the law of the place where it was celebrated may be held to be invalid according F to the law of Zimbabwe on the ground of public policy, not only if it is repugnant to moral principles within Zimbabwe but also if to recognize it would lead to the laws and institutions of Zimbabwe being undermined.

Authorities cited:

G Hahlo, South African Law of Husband and Wife, 4th edition;

Narotam v Narotam and Anor 1970 (1) RLR 84 (GD)

N J McNally for the plaintiff.

C S Grossman for the defendant.

Judgment

Pittman J: The plaintiff seeks an order declaring that the purported marriage between the first defendant and the second defendant is null and void. The Plaintiff is domiciled in Zimbabwe, and is the father of the second defendant, who is 15 years old, having been born on the 30th December, 1965. On the 10th February, 1981, the second

defendant went through a for of marriage in Blantyre, Malawi, with the first defendant, who is domiciled in that country. Neither the plaintiff nor his wife, the second defendant's mother, had consented to a marriage between the defendants.

To the plaintiffs declaration, the defendants filed a plea in bar based on the ground that this court has no jurisdiction to determine the validity of a marriage entered into in terms of the laws of Malawi. The plaintiff's replication reads as follows:

> "1. Plaintiff admits that the purported marriage took place in Malawi but has no knowledge as to whether the marriage was valid according to the laws of Malawi, does; not admit it, and puts Defendants to the proof thereof.

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In any event Plaintiff avers that the laws of Malawi are of no relevance for the reasons; set out in paragraph 3 infra.

2. Plaintiff avers that Defendants' plea in bar is bad in law and that this Honourable court has jurisdiction on the grounds -

(a) that Defendants acted *in fraudem legis* in procuring for Second Defendant a false passport without the knowledge or authority of Plaintiff and using such passport to enable her to travel to Malawi without the knowledge or authority of Plaintiff, in order to enter into a marriage which she could not have entered into in Zimbabwe;

(b) it would be contrary to public policy to refuse jurisdiction in a situation where the parties are in fact within the jurisdiction of this Honourable Court, and the purported marriage was contra bongs mores and in particular contravened or was an attempt to circumvent the provisions of section 3 (a) of Chapter 58 of the laws of Zimbabwe;

(c) Plaintiff is domiciled within the jurisdiction of this Honourable Court and, if Plaintiff's allegations are correct, so is Second Defendant.

3. The law applicable to determine the issues raised by Plaintiff is the law of Zimbabwe and not the law of Malawi for the reasons for *fraus legis* and public policy set out in 2 (a) and (b) *supra* and also because the issue between the parties is that of Second Defendant's capacity to marry rather than the question of the formal validity of the marriage."

The defendants filed a rejoinder as follows:

"1, The Defendants aver that the marriage was valid in accordance with the laws of Malawi and put the Plaintiff to the proof of the invalidity thereof.

2. (a) For the purposes of this action, the averments herein are admitted.

(b) and (c) The allegations herein are denied and the Plaintiff is put to the proof thereof.

3. The allegations herein are denied."

At the hearing of the plea in bar, no evidence was called because counsel agreed that the Court should be informed (1) that the allegations of domicile applied to the time of the marriage ceremony as well as the present; (2) that both the defendants at the time of the marriage had

intended to remain in Malawi thereafter, (3) that they had been tricked by the Plaintiff an undisclosed manner to return to Zimbabwe; (4) that they were both still in Zimbabwe, the first defendant being held in remand prison in Salisbury, awaiting trial on a charge of abduction, (5) that the marriage certificate issued to the defendants in relation to the ceremony recorded that both the parties were of full age.

The Court was also informed of two of the laws of Malawi, the Marriage Act [*Chapter 25:01*], and the Asiatics (Marriage, Divorce and Succession) Act [*Chapter 25:03*].

In their arguments both counsel referred to matters, such as the validity of the purported marriage according to the laws of Malawi and the approach that would be adopted to the plea in bar in English law. I do not find it necessary to discuss these matters, because both counsel

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dealt directly with what I regard as the two vital issues raised in the replication. The substance of those issues is discussed by "Professor Ellison Kahn on pages 597 to 599 of Hahlo's *South African Law of Husband and Wife,* 4th edition. It was rightly not disputed that Khan's views, although confined in terms to South African laws are derived ultimately from that part of the law of the Cape Colony as at the 10th June, 1891, which is also part of the law of Zimbabwe, by virtue of section 89 of this country's Constitution. After discussing the mater on pages 586 to 589, Kahn wrote on pages 595:

> "(c) *Essential (intrinsic) validity of marriage (including capacity)*
>
> It has been submitted that, both on authority and principle, the *locus regit actum* doctrine should apply to questions of intrinsic validity, whether they concern capacity or consent. If the marriage is solemnized in this country, our rules of domestic law apply, irrespective of the domicile of either of the parties; if it is solemnised abroad, the domestic rules of the *lex loci celebrationis* govern, subject to the possibility of applying the *renvoi* doctrine to uphold the union. Such governance of the law of the place of the marriage, however, admits of three exceptions, the subject of the ensuing discussion."

The first of the three exceptions discussed is based upon a South African statute. I am not aware of any Zimbabwean statute which can also be said to create an exception to the applicability of the *locus regit actum* doctrine. The second exception is said to be applicable when there has been an intention to cheat or evade the law of the Court which is dealing with the validity of a foreign marriage. It is stated at pages 596 - 7:

> "(ii) *The 'fraus legis' rule*
>
> The Roman-Dutch writers allowed the *lex domicilii* some play in the determination of the validity of a marriage. When a man or woman, one

> or both of whom were domiciled in the court's area, had their marriage deliberately solemnised elsewhere to escape some essential requirement of the *lex domicilii* (being the *lex fort*), they were held to act in *fraudem legis* and their marriage was tested by the local law as the *lex domicilii.* The doctrine appears all - embracing, covering clandestine marriages to be freed of the need for consent, to escape local Impediments such as prohibited degrees of relationship or even to avoid local formalities - though here the illustrations afforded are almost invariably cases where there was an express rule of the *lex domicilii (fort)* requiring banns, and so also explicable on the basis of an overriding local statute. Evasive intent of the parties (or, possibly, at least one of them) was required; and the doctrine applied only to *fraus legis fort,* being the domiciliary law of one or both of the parties.
>
> South African decisions are few, but as far as they go they uphold the doctrine in relation to intrinsic validity, which would include parental consent The following example may clarify the operation of the rule: A marriage between uncle and niece, valid by the *lex loci celebrationis*, would (it appears) not be refused recognition as offensive to our rules of distinctive public policy. But if parties so related, domiciled in South Africa, go to a country where such marriages are permitted, for the sole purpose of evading the prohibition and returning home after the ceremony, their union would be held invalid by our Courts There appears little justification in the present day, however, for applying the *fraus legis* rule to the avoidance of formalities. Further (here in conformity with old law) our Courts probably will not interest themselves in fraud of a foreign legal system."

Section 21 of the Marriage Act [*Chapter 37*] provides that the marriage of a minor in this country shall not be solemnized without the consent in writing of his or her legal guardians, or, if either refuses such consent, without the consent of a judge of the General Division. In addition, section 23 provides that any girl under the age of 16 years must also obtain the written

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permission of the Minister administering the Act for such a marriage. Section 3 (a) of the Criminal Law Amendment Act [*Chapter 58*] provides that a person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl under the age of 16 years shall be guilty of an offence.

In his heads of argument for the defendants, Mr *Grossman* said:

> "The *fraus legis* rule would apply where the parties, domiciled in Zimbabwe, go to a foreign country for the sole purpose of avoiding a legal prohibition, and thereafter return to Zimbabwe after the ceremony. There is no evidence that this was the intention of the defendants in this case."

I agree that the defendants cannot be held to have intended to return to Zimbabwe after the ceremony. But in my view the Plaintiff does not have to prove such an Intention in order to succeed. In their rejoinder

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PITTMAN J

the defendants admitted that they had travelled to Malawi clandestinely to enter into a marriage, which the second defendant, as matters stood, could not have entered into in Zimbabwe, and it follows that the marriage ceremony in Malawi could have been an attempt to cheat or evade the laws of Zimbabwe. If so, the plaintiff would be entitled to have that attempt annulled by this court, whether or not the marriage was valid in Malawi and whether or not the defendants intended to remain permanently in that country. I know of no authority for holding that the *fraus legis* principle can apply to the defendants only if they intended to return to Zimbabwe after their marriage. In any event, however, they have so returned.

If I am wrong in this view, I would nevertheless hold that this court could order annulment on the ground of Kahn's third exception to the applicability of the *locus regit actum* doctrine. It is set out on pages 597 - 8 and, where relevant, may be summarized as follows:

> (iii) *The public policy principle*
>
> The *lex loci celebrationis* win not be applied if the result would be repugnant to the moral principles or policy and institutions of the country in which annulment is sought; or if it produces a result contra bongs mores there.

Kahn stressed the difficulty of determining whether certain degrees of relationship between the parties to a marriage make it *contra bonos mores*. He added:

> "It is also conceivable that in certain circumstances a marriage of a child bride or one where consent was entirely wanting because of duress, fraud or error, might be refused recognition although it was not void by the *lex loci celebrationis*."

I am not aware of any reported case in South Africa which has facts broadly similar to the present. *Narotam v Narotam & Aver.,* 1970 (1) RLR 84 (GD), dealt with a father domiciled in Zimbabwe whose minor daughter married without his consent in Switzerland. The father had refused consent because of religious differences between their family and her husband. At the joint request of the patties, DAVIES J, as he then was, did not investigate the question whether the court had jurisdiction to set aside the marriage, and investigated the facts simply to decide the matter on its merits. Having adopted the approach that the matter should be decided by

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considering what was in the best interests of the daughter, he refused to set the marriage aside. The case is clearly of no assistance now, because no similar joint request was put to this court, and in any event the known facts personal to the bride are quite different from those relating to the second defendant.

PITTMAN J

Mr *Grossman* dealt with the matter in his heads of argument as follows:

> "The public policy principle. It is quite conceivable that the Zimbabwean Courts would act to nullify a marriage celebrated elsewhere, if the result of the marriage were repugnant to local moral principles, such as a marriage which would locally be regarded as incestuous or where the effect could be to create a child - bride: *Banubhai v Chief Immigration Officer, Natal* (1913) 34 NLR 251.
>
> This is clearly not the position in the present case."

I am far from satisfied that this marriage is not repugnant to local moral principles in the narrow sense because I consider that the second defendant, despite her youth' could have understood the immoral nature of her deceitful conduct. Even if she could not, the marriage could have been tainted by the immorality of the first defendant, who, as an adult, can be presumed to have had such understanding. However, the principle of public policy is not based only upon the need to respect local moral principles in that sense. A court asked to apply it can also take into account the need to prevent the laws and institutions of the country being stultified or undermined. The common law provides that a minor may not marry without the consent of his or her guardians. That rule has been endorsed in section 21 of the Marriage Act, with the qualification that a judge may overrule the guardians if he considers it is in the minor's interest to do so. That endorsement has been further elaborated by section 23 in respect of girls under the age of 16 years, who also require the consent of the Minister. Mr McNally rightly referred also to section 3 (a) of the Criminal Law Amendment Act [*Chapter 58*].

If facts had been put before me revealing that there was good reason to uphold the marriage in the interests of the second defendant, I might have found that public policy requires that the marriage be upheld rather than annulled. However, the facts before me are quite inadequate for me to make such a finding, whether or not the marriage was valid according to the law of Malawi. Instead, I am aware only , (1) that a 15-year-old girl, domiciled here before she left the country, clandestinely and fraudulently to enter into a marriage ceremony, did so against the wishes of her guardians, (2) that she has now returned to their country of domicile, and (3) that no special facts have been offered on her behalf to indicate that it will be in her interests, let alone the public interest, to uphold the marriage. I think that in these circumstances the marriage could be repugnant to the policy and institutions of Zimbabwe, as embodied in both its common and statute law.

PITTMAN

Accordingly, the plea in bar is dismissed, with costs, to be borne by the first defendant. The

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defendants' plea is to be filed in accordance with the Rules of Court.

Ali Ebrahim, legal practitioner for the Plaintiff.

D W Aitken Co., legal practitioners for the defendants.

THE STATE v MURIMAPABWE 1981 ZLR 234

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, and Baron, JA

9th and 15th June, 1981

Flynote

Criminal law common purpose - liability of sock creams - extent to which liability extends to acts committed by members of gang in attempt to evade capture.

Headnote

The appellant and another person, who were ex-servicemen acquainted with the use of firearms, had attempted to rob the occupants of a motor - car with the aid of a shot - gun. The occupants had succeeded in escaping, and while the appellant was trying to start the car, the complainant, a policeman, approached in a vehicle. When he had passed some yards beyond the stationary car the appellant's companion fired at the complainant's vehicle, narrowly missing the complainant with the full blast of the shot-gun and inflicting a comparatively minor injury under his right eye. The evidence showed that both the appellant and his companion had contemplated that, should it be necessary, the shot-gun would be fired to enable them to effect their escape; and, in view of their background and training, it was clear that the appellant had foreseen that if the shot-gun was fired in the way it was fired the consequences might be fatal. The appellant was convicted as a *socius criminis* of attempted murder and appealed.

Held that the firing of the shot-gun in the way In which it was fired was within what was contemplated by the appellant in the prosecution of their common purpose, and that the shot of the appellant's companion was also the shot of the appellant. As a result he had been rightly convicted as a *socius criminis* to his companion's act.

Cases cited:

R v Nemashakwe and Ors 1967 RLR 127 (AD);

S v Malinga and Ors 1963 (1) SA 692 (AD);

S v Wakiri, 1981 ZLR 51 (AD)

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Appellant person.

K Terry for the respondent.

BARON JA

Judgment

Baron JA: The appellant and another man were charged with eleven counts of robbery or attempted robbery and one count of attempted murder. They pleaded guilty to all but the attempted murder charge. They were both found guilty on this count also and the appellant now appeals against that conviction.

The appellant and his co-accused were formerly members of the Guard Force. They admitted that they had robbed a crop-guard of a self-loading shot-gun and four rounds of ammunition and that thereafter, between the 15th November and the 13th December, 1980, they committed a series of robberies or attempted robberies. One of these was the incident which gave rise to the attempted murder charge.

On the 1st December at approximately 7.30 p.m. the appellant and his co-accused stopped a car on the main Salisbury-Marandellas road; they demanded money from the occupants, who however succeeded in escaping, leaving their car behind. The appellant handed the shot-gun, which until then he had been carrying, to his co-accused and tried to start the vehicle. While he was doing so the complainant, a sergeant in the Zimbabwe Republic Police, approached in a clearly marked Police Land-Rover. Seeing the parked car the complainant slowed down and called out as he was passing: "Are you all right?". There was no response, but when he was some yards beyond the stationary car the appellant's co-accused fired at the vehicle, narrowly missing the complainant with the full blast of the shot-gun, in fact one of the pellets struck the complainant in the face, inflicting a comparatively minor injury under the right eye.

The magistrate, in a careful and reasoned Judgment, considered the cases of the appellant and his co-accused separately. He dealt first with the co-accused and found - and correctly so - that he must have foreseen that the driver could have been hit and killed by his shot and that he was obviously reckless as to whether or not that happened. He convicted the co-accused on the basis of a constructive intent. The magistrate then turned to the appellant and held that he "must have foreseen, and therefore did foresee, that the first accused might fire the weapon if he believed a situation of danger had arisen, and that the firing of this weapon would involve a danger to life. In the prosecution of their common purpose he was reckless as to whether or not this risk might eventuate in death".

It is clear from the evidence of the appellant and his co-accused that they both contemplated that, should it be necessary, the shot-gun would be fired in order to enable them to effect their escape. They both maintained that they had no intention to kill anyone but would have fired

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the firearm purely in order to frighten either victims or potential pursuers. For instance, the following passage appears in the cross-examination of the co-accused:

> "Q. But why did you fire the shotgun? A As I said before I fired it to put him in fear so that he should not stop as he was a policeman.
>
> Q. If in fact he had stopped, bearing in mind the fact that you were in the countryside and it was fairly dark, could you not have concealed yourselves? A It was not possible, your Worship, my companion was in the motor vehicle."

The appellant also agreed in cross-examination that he had anticipated that a situation might arise where the weapon might have to be used but, as Mr *Terry* very properly conceded, the appellants evidence should be read as meaning that he anticipated that it would be used in the kind of way explained rather more fully by his co-accused. In answer to questions by the magistrate the appellant went so far as to say that he was surprised when his co-accused fired the weapon because the two of them were supposed to run away, but in the light of the appellant's own earlier evidence I think the magistrate was right to reject this particular assertion. The question therefore is whether the appellant, as a *socius*, can on these facts be convicted of attempted murder.

The law as to the liability of a *socius* has been laid down in *R v Nemashakwe and Ors* 1967 RLR 127 (AD), at 131 where MACDONALD, JA (as he then was), adapting a passage from *S v Malinga and Ors* 1963 (1) SA 692 (AD), formulated the test in this way:

> "Now the liability of a *socius criminis* is not vicarious but is based upon his own *mens rea*. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* might commit the act in question in the prosecution of their common purpose.
>
> In considering the issue of intention to kill, the test is whether the *socius* foresaw the possibility that the act in question in the prosecution of the common purpose involved some risk to life and was reckless as to whether or not the risk might be fulfilled in death."

I have no doubt, bearing in mind particularly the background of the appellant and his co-accused and the training they had both had in the use of firearms, that the appellant foresaw the possibility that if the shot-gun was fired in the way in which it was actually fired the consequences might be fatal; the only question in this case is whether in the actual firing of the shot-gun in the way in which it was fired the appellant's co-accused went beyond what was contemplated by the appellant in the prosecution of their common purpose. Having reviewed the evidence

with care I am satisfied that it did not. Both the appellant and his co-accused boasted of their ability with firearms the appellant himself in support of his statement that they did not intend to kill anyone but intended to use the firearm merely to frighten said: "We are able to hit a target at 100-200 metres, so it was not possible for us to miss at 10 metres." It is quite clear therefore that certainly so far as the co-accused was concerned, when on his own admission he fired at

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the Land-Rover, he intended to do exactly that. The appellant did not suggest that his co-accused should have fired in the air, and his belated attempt to persuade the Court that the co-accused was not supposed to fire the shot-gun at all was totally inconsistent with his own earlier evidence and that of his co-accused and must be rejected.

The dictum of HOLMES JA, in *S v Malinga and Ors* (*supra*) at pages 695 is, I think, particularly apt and relevant to the present case:

> "(The foregoing) tests are particularly consistent with social necessity in regard to concerted crimes of violence such as housebreaking, unhappily on the increase today. As (SCHREINER JA, pointed out in *Nsele*'s case (1955 (2) SA 145 (AD)) at page 148D-E:
>
> > '. . . it is of course, socially important that groups of criminals one or more of whom is armed with lethal weapons should realize the extreme risks they run in embarking upon ventures that are so evil and dangerous to the community'.
>
> In the present case all the accused knew that they were going on a housebreaking expedition in the car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only housebreaking with intent to steal and theft, but also what may be termed the get-away And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded fire-arm would be used against the contingency of resistance, pursuit or attempted capture Hence, as far as individual mens rea is concerned, the shot fired by accused No. was, in effect, also the shot of each of the appellants,"

In the present case also I think it must be said that the shot of the co-accused was also the shot of the appellant. Had there been credible evidence that the weapon was not to be fired at all the position might have been different, but there is no such credible evidence in the present case, and it is pertinent to observe in addition that in such event it would hardly be necessary for the shot-gun to be loaded.

I am satisfied that this appellant was correctly convicted of attempted murder and I would dismiss the appeal.

Fieldsend CJ: I agree. I feel, however, that I must comment on the over-all sentences imposed on the appellant and his co-accused.

FIELDSEND CJ

Each was sentenced to 18 months' imprisonment with labour on each court of robbery and attempted robbery, making a total of 161 years. The sentences on two counts were made to run concurrently with the other sentences, leaving an effective total sentence on the robbery counts of 131 years. The appellant received three years for the count of attempted murder and his co-accused four years. Of the total sentences 161 years and 171 years respectively, three years were suspended for five years on appropriate conditions, leaving 131 and 141 years to be served in each case.

My criticism is in the circumstances a minor one, but it does involve a question of principle. I am not convinced that this is a case where a suspended sentence is really appropriate. I think that the same effect could have been better obtained by making a further three years run concurrently with the sentences on the other counts. But if a suspended sentence is appropriate

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I am cereal that it is not right suspend it for the maximum period of five years.

I dealt with this question recently in the case of *Wakiri v S,* Appellate Division Judgment No. 17/81*(8), where of nine years' imprisonment three years were suspended for five years on certain conditions. It was said there that:

> ". . . while a long period of suspension is probably right for a wholly suspended sentence or after a comparatively short period of imprisonment, after a long period of imprisonment what is needed is a comparatively short period of suspension to induce the released offender to settle down to a useful life."

There is no question of altering the sentences in this case but I would draw magistrates' attention to what I consider to be the proper approach be followed when imposing suspended sentences.

THE STATE v SHARAWAKANDA 1981 ZLR 239

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, and Baron, J A

11th and 15th June, 1981

Flynote

Dangerous drugs - possession of large quantity of dagga - when inference may be drawn that accused intended to supply dagga to others.

Headnote

Where a person who has been convicted of possessing a large quantity of dagga asserts that he possessed it for his own consumption, the court may not reject his explanation and infer that he possessed the dagga in order to supply it to others unless, after giving due weight Its all the facts for the case, including the person's explanation for his possession and any information as to his consumption habits, the court considers that the inference that lie possessed the dagga for the purposes of supply is the only inference that can reasonably be drawn.

Case cited:

S v Mutize, 1978 RLR 148 (AD); 1978 scar SA 911 (RAD).

B H Christie for the appellant: I am "instructed that the dagga in appellant's possession came from a single bush cultivated by him. This is not inconsistent with the evidence before the Court. See, for example, *S v Ncube,* G-B-36-81 (cultivating plants which would have yielded 1,5 kg of dagga), and *S v Lunga,* G-B-14-81 (cultivating one plant which would have yielded "a considerable amount of dagga". Growing a single bush every three years is, from the point of view a regular smoker of dagga, the most satisfactory method of ensuring his own supply. In

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the circumstances, his moral blameworthiness would be higher if he purchased from others, since it would encourage a proliferation of the trade. Appellant's explanation is a credible one and ought to be accepted in the absence of contradictory facts: cf. *S v Mutize* (*supra*),

BARON JA

where DAVIES, JA, stated that, generally speaking, possession of more than 60 grams infers that the possessor intended to resell.

B J Turner for the respondent: The appellant has apparently been a dagga smoker for some 25 years, at the rate of two twists a day. The appellant, if he is to be believed, was therefore in possession of sufficient of the drug to last him the best part of nine years. This feature, together with the fact that the dagga was concealed and in a condition ready for smoking, justified the magistrate's conclusion that it would be supplied to others, despite the appellant's assertion 'to the contrary.

Judgment

Baron JA: The appellant pleaded guilty to and was duly convicted of the possession of 1333 grams of prepared Indian hemp (dagga) contrary to section 9 (b) of the Dangerous Drugs Act [*Chapter 319*] and sentenced to 18 months' imprisonment with labour, of which nine months were suspended for five years on the usual conditions.

The facts outlined by the prosecutor and accepted by the appellant were that in the late afternoon of the 9th April the police went to the appellant's residence and carried out a search in his presence; they found three large cobs of dagga under a seat in the dining-room. The dagga was prepared for smoking. The appellant said that the dagga was for his own use. After verdict, the magistrate questioned the appellant as to his personal circumstances and generally for the purposes of sentence. He elicited that the appellant had been in his present employment for two years earning $142 a month as a clerk; he is married with five children and also looks after his aged mother. In answer to further questions he said that he had smoked dagga since 1956 and that he now smokes two twists a day. He repeated the statement he had made to the police at the time of the search that the dagga was for his own use; he said that he cultivates dagga once in three years for this purpose.

The record then contains the following comment by the magistrate:

> "I am not prepared to accept that this large amount of dagga was for your own use. I think it highly probable that you were intend 4 dispose of it to other persons."

and then in the course of his sentence he said:

> "Possessing such a large quantity leads me to believe that this was intended for disposal to other persons, in addition to what you might use for yourself."

Mr *Christie* on behalf of the appellant submitted that the magistrate erred in rejecting the appellant's statement in mitigation that he cultivated the dagga for his own use; he submitted

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that the appellant's explanation was a credible one.

BARON JA

I am by no means clear as to what precisely the magistrate intended to convey in the passages I have cited. As Mr *Turner*, who appeared on behalf of the State, accepted, the law is clear that merely to disbelieve an explanation, whether it be for the purposes of verdict or for the purposes of sentence, is not sufficient where the matter is one of inference, the Court must be able to say that the explanation is one which cannot reasonably be true. I am by no means satisfied that the magistrate in using the expressions "highly probable" and "leads me to the belief" has applied the right test. However, the point is of no great significance since we have all the facts before us, and the question for this Court is whether the inference that the appellant possessed this quantity of dagga for the purposes of supply is the only inference that can reasonably be drawn from all the facts. I respectfully agree with the way the matter was put by DAVIES, JA, in The *State v Mutize,* 1978 RLR 148 (AD) at 152 F - H, 1978 (2) SA 911 (RAD) at pages 913-4:

> "However, possession is just as serious as dealing where the quantity involved is so great that the only reasonable inference is that the dagga is intended for supply. In general, the greater the amount possessed, the more difficult will it be for the offender to convince the Court that it should not draw such an inference. In reaching a conclusion, a Court should give due weight to any statement by an accused person of his intention, his own consumption habits, and the length of time he could expect an amount possessed to last him."

The appellant is a man in his late forties with the family responsibilities to which I have referred above. He was in regular employment. In particular, as the magistrate accepted, he has been smoking dagga for 25 years and cultivated it for this purpose for at least some years. All these factors, and in particular the last, are relevant not only in mitigation of sentence but also to the question of the inference to be drawn from the possession of this quantity of dagga. If a man had been found in the possession of such a quantity of prepared dagga, and had said in answer to questions that he did not actually smoke dagga but that he intended to do so and that he had it in his possession for his own use, then speaking for myself I would have no hesitation in rejecting such an explanation as one which could not reasonably be true. But on the facts of this case, I find myself unable to reject the appellant's explanation; I regard it with suspicion, but I cannot go so far as to say that it might not reasonably be true.

Mr *Turner* accepted that if this Court came to that conclusion, the sentence was manifestly excessive. We were referred to a number of cases on cultivation and possession and, as Mr *Turner* pointed out,

BARON JA

there is a considerable disparity of sentences imposed in the past; in some cases there have been fines and wholly suspended sentences of imprisonment, whereas in others there have been elective terms or imprisonment. Whilst a degree of uniformity of sentences is desirable, the disparities referred to cause me no great concern; they no doubt reflect the views of the

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particular Courts of the circumstances of the particular offences. The present offence, notwithstanding the view I take as to the proper inference to be drawn from the facts, cannot be described otherwise than as serious and warranting an effective sentence of imprisonment. The possession of such a large quantity of dagga carries with it its awn potential danger. It may well be that the appellant intended it for his own use and did not intend to supply others; but the potential for supply is inherent in the mere possession of such a quantity, and that danger is still a serious matter even though the supply might have been to relatives or friends without payment. It is not for nothing that the Legislature has prescribed severe penalties for mere possession. For these reasons, I do not think a fine and a wholly suspended sentence of imprisonment would meet the seriousness of the offence in this case.

I would allow this appeal and set aside the sentence imposed by the magistrate and substitute the following: Eight months' imprisonment with labour, of which six months will be suspended for five years on the condition that the appellant does not within that period commit an offence in contravention of the Dangerous Drugs Act or Regulations in respect of which he is sentenced to a term of imprisonment without the option of a fine.

Fieldsend CJ: I agree.

Stumbles & Rowe, attorneys for the appellant.

W v W 1981 ZLR 243

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

16th June, 1981

Flynote

Custody of children - when permissible to deprive Amend of custody and award custody of child to person who is not parent.

Headnote

The High Court may exercise its powers to deprive natural parents of the custody of their child and to award it to a third party such as grandparent only if the court considers that to allow the parents custody would endanger the physical, moral, psychological or educational welfare of the child. It is not enough to justify such an award that the third party may be able to provide superior material advantages or possesses more desirable attributes than the parents.

Cases cited:

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Short v Naisby, 1955 (3) SA 572 (D.);

Calitz v Calitz, 1939 AD 56;

Horsford v de Jager & Anor., 1959 (2) SA 152 (N.);

Petersen & Anor. v Kruger & Anor., 1975 (4) SA 171 (C);

Bam v Bhabha, 1947 (4) SA 798 (AD);

Re R (M) (an infant) [1966] 3 All ER 58;

Re F (a minor) [1976] 1 All ER 417.

R. Jagger for the appellant: The learned judge *a quo* erred in finding that the paramount interests of the child lay in awarding his custody to the child's grandmother. If that decision was wrong this court is entitled to interfere: *In Re O* [1971] 2 All ER 745 at 748 *et seq.*

The issue before the learned judge was not whether it was the respondent or the appellant, but the respondent's mother or the appellant who was the more suitable custodian of the child. It is plainly not desirable for a young boy to be brought up by a grandmother aged 66 years and in the constant company of his father who has a mental age of about 12 years. Common sense decrees that a child of such age has

its welfare advanced by being in custody of his mother: see *Tabb v Tabb*, 1909 TS 1033 at 1034; *Dunsterville v Dunsterville,* 1946 NPD 594 at 597, and *Austin v Austin* (1865) 34 Beav. 257 at 263, 55 ER 634 at 636. In his Judgment the learned judge avoided making a Judgment bawd upon his assessment of the child's needs during minority, when it was clearly his duty so to do (*Re F* [1976] 1 All ER 417 at 426f) and did not consider the "double generation gap" referred to by BRIDGE LJ, in *Re F* (*supra*) at page 439f.

The power of the Court to award custody away from a mother is to be exercised only on special grounds of danger to the life, health or morals of the child (though it is accepted that those areas are not exhaustive): *Short v Naisby,* 1955 (3) SA 572 (D) at 575B; and *Horsford v de Jager,* 1959 (2) SA 152 (N) at 154B.

M. T O'Meara for the respondent: There is no fixed principle that custody should be granted to a mother: *Re B* (an infant) [1962] 1 All ER 872 at 873B-C; and *Mohaud v Mohaud,* 1964 (4) SA 348 (T) at 352B-C. Acting in the best interests of the child, it is open to the court to award custody to a person other than the parents: section 4 (10) as read with section 4 i(3) of the Guardianship of Minors Act [*Chapter 34*] and section 21 (1) of the Children's Protection and Adoption Act [*Chapter 33*]. The case of *Tabb v Tabb,* 1909 TS 1033 at 1034, indicates that custody should generally go to a mother provided that her character is not such as to make this course prejudicial to the moral welfare of the child. On this point see also *Kallie v Kallie,* 1947 SR 53 at 58, 1947 (2) SA 1207 (SR) at 1208. In this respect the child's best interests lie with his grandmother. The case of *Dunsterville v Dunsterville,* 1946 TPD 594 at 597, refers to the psychological advantages of custody being exercised by a mother during a child's tender years but here the child is advancing beyond that period. Little weight should be placed upon the

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Judgments in *Short v Naisby,* 1955 (3) SA 572 (D) at 575B, and *Horsford v de Jager,* 1959 (2) SA 152 (N) at 154B, as these dealt with the situation of custody to a third party as opposed to a surviving parent.

In the court *a quo* full and proper consideration was given to all the evidence and the child's best interests were assessed upon this evidence, upon the qualities and characters of the contending custodians and upon a comparison of the life which would be led by the child in each of the respective environments. While this Court may interfere with these findings, it should do so only with caution: *Bailey v Bailey,* 1979 (3) SA 128 (AD) at 141.

GOLDIN AJA

[Editor(9).]

Judgment

Goldin AJA: In an action for divorce and for custody of the minor child of the marriage, a boy of seven years of age, the respondent was granted a degree of divorce and custody was awarded to the paternal grandmother of the child. The appellant's appeal against the custody order was successful and the following order was made in its place:

> "That the appeal be and is hereby allowed.
>
> That the custody and the sole guardianship for the minor child be and is hereby awarded to the appellant, subject to the condition that neither the appellant nor the respondent shall remove the child from the jurisdiction of this Court and for a period beyond the duration Of any school holiday without the consent of a judge in chambers.
>
> That access be and is hereby allowed to the child's paternal grandmother on behalf of the respondent for alternate school holidays starting with the Christmas holidays of this year (1981) and also alternate week-ends, to extend from the evening of the day preceding the holiday, ending with the evening of the last day of the holiday.
>
> That there be no Order as to Me costs of this Appeal."

It was indicated that reasons for Judgment would be handed in at a later date and these are the reasons.

The appellant is a young woman of some 28 years of age who married in 1972. In recent years the marriage had not been happy and in 1979 the appellant left the respondent in August for a period. In October, 1979, the respondent sustained a severe head injury which left him seriously mentally handicapped, with a mental age on the expert evidence of about 12. As a result he was in hospital for some time and when he was due to be discharged towards the end of 1979 the appellant did not have suitable accommodation for him or the ability to look after him. Also at about the same time a letter from her husband's attorneys finally decided the appellant to end the marriage.

At that time the appellant was out of work and sharing a flat with a woman friend who also had children to care for. After discussion with her husband's maternal aunt she agreed that her child should go on a temporary basis to live with the respondent's mother who had also undertaken to have the respondent to live with her and his stepfather on their farm at Beatrice. The child left

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for the farm on Christmas Eve, 1979, and the day after Christmas the appellant, with a man with whom she had become friendly, drove, the respondent's own father back to South Africa after a visit to his son.

GOLDIN AJA

A short while after this, being in a strained emotional and difficult economic plight she forms an intimate association with the person already referred to who was a childhood acquaintance and was himself divorced. She moved into this house - a three-bedroomed house on one acre of ground. The two planned to marry each other when she was free to do so. Her prospective husband is very willing for her third to live with them.

The appellant is now in employment and is in a position to provide financially for her child in the home in which she is living. She plans that after attending school for which she has provisionally made arrangements, her child will spend the afternoon at a crèche until she collects him each evening. She would try to arrange take her annual holiday to coincide with one of the school holidays, on another school holiday her child could go to his grandmother. For the third holiday he would shave to attend a crèche during week-days.

Since December the child has On living with his father and grandmother on the farm at Beatrice and attending the local school where he is doing well. His grandmother is 66 years of age and her husband is 72. She is obviously fond of the child and he gets on well with his father at present. He has spent week-ends with his smother and there is clearly a close bond of affection between them. It is common cause that on occasions he is upset when he has to leave her to return to the farm, though he soon recovers once he has settled down again. There is some tension between the appellant and the child's paternal grandmother due in large measure to the latter's husbands apparent dislike of the appellant, but the grandmother provides a good home for the child.

The tragedy of the case is that the child's father is not able to assume the responsibility of having his custody and the question to be decided was whether to award the custody to the appellant or to the child's grandmother.

It is well established that the interests of children are the paramount or sole consideration in determining the question of custody. It is stating He obvious that upon dissolution of a marriage a child can no longer enjoy a normal family life and only one parent can be entrusted with his or her custody, while the other parent can only be granted such access as is in the interests of the child. In the vast majority of cases this involves a decision as to which parent should be awarded custody. Nevertheless, as the upper guardian of all minors, the Court always has the power in a proper case to deprive parents of custody

GOLDIN AJA

and award this right to a party, usually a relative. (*Short v Naisby,* 1955 (3) SA 572 (D) at 575). This power is recognized in the Matrimonial Causes Act [*Chapter 39*] as amended by Act 46 of

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1974, where section 8 (a); (a) provides that a Court may in an action for divorce "commit the children into the custody of such of the parties or such other person as the Court may deem best fitted to have such custody."

The power to award custody to a third party does not involve or justify the adoption of a test or approach that anybody concerned becomes a candidate or claimant. Compared with parents, grandparents and others may often be awe to provide superior material advantages and unlimited time and attention, they may also be endowed with greater wisdom and even patience. These attributes and assets would not, how ever, entitle them to custody in competition with natural parents who may not possess the same advantages. In deciding what is the best interests of a child the Court generally has regard to relative merits only of the parents. Grandparents are considered useful baby-sitters and a source of help In times of need or mere convenience. They are also "first reserves" when natural parents or a surviving parent are held not to be proper persons to whom to award custody. The natural affinity and emotional bond and attachment between parent and child are generally irreplacable and an accepted fact of life. Such an association benefits and promotes a child's emotional security and feelings normality, whilst the award of a child's custody to a third party places him in a distinctly unusual or abnormal category.

A court will only deprive natural parent of custody and award it to a third party upon special grounds. Such special grounds include detrimental or undesirable effects or influences upon the physical, moral, phychological or educational welfare of a child. The test is still not whether a third party can provide better aerially or possesses more desirable attributes, but whether the parent or parents should be deprived of custody for any reason involving harm or danger to the child's welfare as mentioned above (See *Calitz v Calitz,* 1939 AD 56, *Short v Naisby, supra*, 3 at page 575; *Horsford v de Jager and Another,* 1959 (2) SA 152 (N). at 154, *Petersen and Another v Kruger and Another,* 1975 (4) SA 171 (C):at 1741.

I am of the view that the trial judge did not approach the question in this manner, and that if he had done so the would have awarded custody to 'the appellant. He says:

> "The question therefore fit this dispute is where the child's best interests lie. Should he go to live with this mother or should he remain where he

> has been effectively in his grandmother care and custody since 24th December, 1979?"

The real question was whether any special reasons existed for depriving the appellant of custody. The main complaints against her appear to have been, firstly, that she left the child with his grandmother in 1979 and, secondly, that it would disturb the child's routine and present mode of life to be removed from his grandmother his mother.

I do not agree that her conduct in handing over the child to his grandmother under the strained economic and emotional situation in which she found herself has rendered her an unsuitable person so as to justify depriving her of the custody of the child. It only shows that she was concerned for the Wild and in the circumstances considered that it would be to his advantage to

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with his grandmother until she surmounted her problems. Nor is there any substantial ground for criticism of the appellant for parting with the child on Christmas Eve.

Placing the child in his mother's custody would undoubtedly involve a disturbance or interference with the child's routine while residing with his grandmother. He will be living in an urban area as opposed rural surroundings, and will have to change schools as well as his surroundings and mode of life generally. The fact, however, is that this would not cause any Charm or affect him detrimentally in any way. Many children have to get accustomed, and do get accustomed, to new environments, different schools and changes of residence. fete has in fact been staying with his mother at fairly regular intervals. The learned judge accepted "that the child is fond of his mother and has shown reluctance to return to the farm on occasions". In any event as the child grows older it is virtually inevitable that his best interest will be served by being in his mother's custody rather than in that of an ageing grandmother and a severely handicapped father. Now is as good, if not a better time, for change to be made than later.

While each case depends on its own facts, it is of interest to refer to cases where children have been out of their parents' care for a considerable period but were nevertheless ordered to be returned to their natural parents. In *Bam v Bhabha,* 1947 (4) SA 798 (AD), the court held that a seven-year-old girl who had stayed with her grand parents for practically all her life had to be returned to her mother, the court being satisfied that the latter would properly care for the child. It was not disputed that the child was happy with her grandparents who were devoted to her. In the case of *Horsford v Jager and Another* (*supra*,) young children had stayed for a period of five and a half years with

an uncle and aunt and away from their mother. The children were happy there. Although the Court was of the view that the children would experience a "considerable emotional upset" if placed in the care of the mother, the latter's application to have the children was nevertheless granted. FANNIN, AJ, also emphasised the probability of children who are in custody of third parties adopting the belief "than' their real mother is an unworthy person who abandoned Tom without just cause" (at 158E). See also *Re R* (*M*) (*an infant.*) [1966] 3 All ER 58 and *Re F* (*a minor*) [1976] 1 All ER 417, *Petersen & A nor v Kruger and Another* (*Supra*) at 175.

There is no doubt that the mother is at present in employment and that she will be in a financial position to provide adequately for the child a suitable home. Her plans for caring for the child are satisfactory even though she will have to entrust him to a crèche in the afternoon. The judge commented on the feet that the grandmother is able to look after the child all day while the mother will have send him to a crèche. I do not think that this is a material aspect in the light of what has been said above that grandparents are often able to provide superior material benefits compared with those of natural parents. It may even be said that there is a corresponding compensation that by going to the crèche, the child will have more opportunity of associating with children of his own age than he has at present while with his grandmother on the farm.

The fact that the mother is about "to embark on a new matrimonial relationship" with a divorced

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man who also has children is undoubtedly an important aspect to be taken into account. There is no reason, however, to suggest that this situation will in any way affect the child adversely. With the high rate of divorce which is prevalent in this country as well as in others and in particular involving young married persons, it is inevitable that the majority of them get remarried and the children of a former marriage or at times the children of two former marriages, have to adjust themselves to live with each other and with each custodian's new spouse. Such a situation does not of itself constitute a special reason to deprive the natural parent of the custody of his or her child.

Upon an examination of the evidence, there were no reasons to justify depriving the mother of custody in favour of the grandmother. It was incorrect to put the grandmother in the place of the respondent, who is unable to exercise custody himself, and then test the question of who should be awarded the custody as if the grandmother enjoyed the same rights and advantages as he would have enjoyed as a natural

parent. Regard must be had, however, to the right of respondent to have access to the child, notwithstanding his unfortunate incapacity. This in itself emphasizes the importance that has to be attached to the relationship between the child and his natural parent. For this reason, it was ordered that the child spend week-ends and school holidays with his grandmother, so as to afford the natural father all such enjoyment and satisfaction that even a natural parent in his state can derive from such an association. Obviously, the respondent would be assisted, and it would only be possible for him to enjoy such access with the help of his mother. In the result, the child will be brought up in the custody of his natural mother, while his father and, as it turns out, his grandmother will exercise the above lengthy periods of access to him.

Fieldsend CJ: I agree.

Baron JA: I agree.

Atherstone & Cook, attorneys for the appellant.

V K Marinus, attorney for the respondent.

LEMIRE v RHODESIA RAILWAYS 1981 ZLR 251

Court **General Division, Salisbury**

Civil Action

Smith, J

10th April and 17th June, 1981

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Flynote

Costs in action where there is no counterclaim or tender and plaintiffs damages are reduced through contributory negligence - whether costs may be apportioned.

Headnote

In cases where there is a claim for damages and no counterclaim or tender by the defendant, the plaintiff will ordinarily recover all costs, notwithstanding that the court has reduced his damages on account of his contributory negligence.

Authorities cited:

Cilliers, *Law of Costs,* pages 161 - 2 and 175;

Boberg, *Costs and the Apportionment of Damages Act*, 1962 SALJ 141;

Norwich Union Fire Insurance Society v Tutt, 1960 (4) SA 851 (AD);

Annual Survey of South African Law, 1966, page 169;

Annual Survey of South African Law, 1971, pages 164-5;

Wright v Santam Versekeringsmaatskappy Bpk., 1971 (4) SA 105 (NC);

Hoppenstein, *Costs of Litigation in Actions Subject to the Apportionment of Damages Act,* 1962 SALJ 171;

McKerron, *Law of Delict,* 7th edition, page 304;

Ruiters v African Guarantee & Indemnity Co. Ltd., 1958 (1) SA 97 (E.);

Kleinhans v African Guarantee & Indemnity Co. Ltd., 1959 (2) SA 619 (E);

Selikman v London Assurance, 1959 (1) SA 523 (W);

Crow v Royal Insurance Group, 1973 (1) SA. 579 (R);

Santam Versekeringsmaatskappy Bpk. v Brown, 1973 (2) SA 326 (C);

Knight v Rhodesia Railways & Anor., 1975 (1) RLR 213 (GD);

Potgieter v AEG Telefunken (Pty.) Ltd., 1977 (4) SA 3 (O);

Santam Insurance Co. Ltd. v Strydom, 1977 (4) SA 899 (AD);

Marine & Trade Insurance Co. Ltd. v Singh, 1980 (1) SA 5 (AD);

Hockly v AA Mutual Insurance Association Ltd., 1980 (1) SA 784 (AD).

BWK Whaley for the Plaintiff.

A P de Bourbon for the defendant.

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SMITH J

Judgment

Smith J: In an action in which plaintiff claimed damages sustained as a result of injuries which she received when she attempted board a train belonging to the defendant, the plaintiff's degree of fault was found to be 80 per cent. and that of the defendant 20 per cent. The damages found to have been sustained by the plaintiff amounted to $40 223. Her damages were reduced on account of her contributory negligence and she was, in a judgment handed down on the 21st May, 1980, awarded the sum of $8 045. The question of costs was reserved because counsel believed that, in the event of an apportionment of damages, costs would be agreed. This belief proved to be wrong and the question of costs has now been argued in these proceedings, as well as the question oil costs relating to the application of the 21st June, 1978 (case No. GD 1214/78), which was also reserved.

With respect to the costs of the trial action, Mr *Whaley*, for the plaintiff referred to the *Law of Costs* by Cilliers, at pages 161 - 162, where the learned author, citing numerous cases, says:

> "Where there is a claim In convention only, and the damages recoverable by the plaintiff are reduced by reason of his town fault, he will nevertheless be awarded his costs, as he had to go to court in order to obtain an award of damages. This is the case not only where the plaintiff recovers a large percentage of his damage but also where he recovers no more than 50 per cent. of his damage, and even where he recovers no more than a relatively modest percentage of this damage. In this regard fit would appear that the ordinary principle that 'substantial success' in its accepted sense carries costs, is applicable . . ."

In a note on the same page it is pointed out that the above statement is restricted to the case where there is no tender.

Mr *de Bourbon*, for the defendant, submitted that, having obtained only 20 per cent. of her damages, it would be inequitable for the plaintiff to be awarded all her costs. Mr de Bourbon referred to the article "*Costs and the Apportionment of Damages Act*" by Professor P Q R Boberg in the 1962 *South African Law Journal at page* 141. In this article Professor Boberg discusses the cases where there has been both a successful claim and a successful counterclaim and concludes that in such cases the fairest order as to costs is to apportion the costs between the successful parties in inverse proportion to their respective degrees of blameworthiness. He submits, further, that there is no logical reason for apportioning costs where there is a counterclaim and not doing so where there is a claim only. Professor Boberg states that he would like to see the solution, adopted in certain Canadian provinces, whereby costs are apportioned in inverse proportion

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to blameworthiness irrespective of whether there is a counterclaim or not, applied in South Africa. Mr *de Bourbon* took this line of argument and submitted that it would be inequitable for the plaintiff to be awarded all her costs.

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Professor Boberg points Out that his desired solution of apportioning costs conflicts with the approach generally adopted in cases where there is no counterclaim, and he has collected these cases in notes 12 and 13 at page 165 of his article. Professor Boberg's solution is criticised by Cilliers, *op. cit*., at page 175. However, Professor Boberg, in discussing the controversy relating to the question of costs where there is a partially successful claim and a partially successful counterclaim, considers it undesirable that conflicting approaches should be adopted by the courts and points out that in cases where there is no tender and no counterclaim and plaintiff's damages have been reduced on account of his contributory negligence, the Appellate Division in *Norwich Union Fire Insurance Society Ltd. v Tutt,* 1960 (4) SA 851 (A.D.), has laid down guide-lines for the courts to follow. He submits that similar guidance from the Appellate Division of South Africa would be most valuable in solving the vexed problem where there is a counterclaim (*Annual Survey of South African Law* 1966, page 169). In the 1971 *Annual Survey of South African Law* at pages 164 - 165, Professor Boberg has collected a further list of cases in which was applied the principle that full costs should be awarded despite the reduction of a plaintiff's damages on account of contributory negligence. At pages 163 - 4 he criticizes the apportionment of costs in a case where there was no counterclaim (*Wright v Santam Versekeringsmaatskappy Bpk.,* 1971 (4) SA 105 (N.C.), stating that the learned judge had apparently overlooked the decision in *Norwich Union Fire Insurance Society Ltd. v Tutt* (*supra*).

In an article in the 1962 *South African Law Journal, "Costs of Litigation in Actions subject to the Apportionment of Damages Act"*, A S Hoppenstein states at page 171:

> 'It is now a certain and established principle, with the imprimatur of the Appellate Division, that in apportionment actions where there is only a claim, and no counterclaim, the plaintiff will recover all his costs notwithstanding any deduction from the damages claimed which may be ordered by the Court."

The case referred to is again *Norwich Union Fire Insurance Society Ltd. v Tutt* 1960 (4) SA 851 (AD) at 854. Professor McKerron in *The Law of Delict*, 7th edition at 304, is to the same effect. This appears to be the practice in courts in other countries also. See *Ruiters*

SMITH J

v African Guarantee & Indemnity Co. Ltd., 1958 (1) SA 97 (E) at 99A-B, and notes 12 and 13 at page 165, 1962 *South African law Journal.*

The practice has remained the same over the years. In all of the following cases the plaintiff was awarded his costs, even where he recovered a modest percentage of his damages: *Kleinhans v African Guarantee & Indemnity Co. Ltd.,* 1959 (2) SA 619 (E) at 629 (plaintiff's fault 70 per cent.); *Selikman v London Assurance* 1959 (1) SA 523 (W) at 528 (plaintiff's fault 662 $^{2}/_{3}$ per cent.); *Crow v Royal Insurance Group,* 1973 (1) SA 579 (R) (plaintiff's fault 40 per cent.); *Santam Versekeringsmaatskappy Bpk. v Brown,* 1973 (2) SA 326 (C) at 330 (plaintiff's fault 85 per cent.); *Knight v Rhodesia Railways & Anor.,* 1975 (1) RLR 213 (GD) at 219A-B; *Potgieter v AEG Telefunken (Pty.) Ltd.,* 1977 (4) SA 3 (O) (Headnote) (plaintiff's fault 50 per cent.);

Santam Insurance Co. Ltd. v Strydom, 1977 (4) SA 899 (AD) (trial court assessed plaintiff's negligence at 15 per cent. and ordered defendants to pay 85 per cent of plaintiff's costs. On

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appeal the apportionment of blame was confirmed. Appellant abandoned that part of the trial court's order allowing respondent (plaintiff) only 85 per cent. instead of 100 per cent. of his costs. Accordingly, the appeal court amended the order of the trial court to reflect that the defendants appellants - were to pay all of plaintiff's costs); *Marine & Trade Insurance Co. Ltd v Singh,* 1980 (1) SA 5 (AD) at 8D (plaintiff's fault 80 per cent.); *Hockly v AA Mutual Insurance Association Ltd.,* 1980 (1) SA 784 (AD) at 795H-796 (plaintiff's fault 50 per cent.).

It is clear, therefore, from the authorities that where there is a claim and no counterclaim, the plaintiff will, in the absence of a tender, ordinarily recover all his costs, notwithstanding that the court has reduced his damages on amount of his contributory negligence. In the instant case there was no tender by the defendant, who denied any liability. I am satisfied that the principle which has been applied in the generality of cases should be applied in this case.

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

Winterton, Holmes & Hill, attorneys for the plaintiff.

Webb, Low & Barry, Bulawayo, and *Scanlen & Holderness*, Salisbury, attorneys for the defendant.

VERMEULEN v OGILVY 1981 ZLR 255

Court **General Division, Salisbury**

Civil Action

Pittman, J

21st May and 17th June, 1981

Flynote

Practice provisional sentence - valid acknowledgement in writing of debt - what is whether cheque part of whose amount represents usurious interest can found claim for provisional sentence.

Headnote

A cheque for an amount which consists partly of usurious interest is a liquid document to the extent that the balance of the amount represents a valid debt, and the holder of the cheque may claim provisional sentence on the cheque in respect of that balance in terms of Order 4 Rule 20 of the High Court (General Division) Rules, 1971.

Cases cited:

Prudential Shippers SA Ltd. v Tempest Clothing Co. (Pty.) Ltd., 1976 (2) SA 856 (W);

Condor Industries (Pty.) Ltd. v African Gate Holdings Ltd., 1979 (1) SA 540 (T.);

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McGill v Vlakplaats Brickworks (Pty.) Ltd., 1981 (1) SA 637 (W);

Casimjee v Naidoo; Casimjee v Singh & Anor., 1959 (4) SA 139 (N).

R Jagger for the plaintiff.

A P de Bourbon for the defendant.

Judgment

Pittman J: This is an action for provisional sentence based on a cheque dated the 25th October, 1977, made out in favour of the plaintiff and signed by the defendant. The defendant is a shareholder in a company named Mashonaland Engineering (Pvt) Ltd., which I shall refer to as "the company". The cheque form has the company's name and account number printed on it, but there is no indication such as the letters "p.p." which shows that the cheque was signed by the defendant on behalf of the company.

PITTMAN J

[The learned judge then set out the facts of the matter which, so far as they are material to this report, were as follows. The cheque was made out in the sum of $16 500 and had been given in repayment of a one hundred-day loan of $15 000 granted by the plaintiff. The remaining $1500 of the amount of the cheque represented interest on the loan at a rate of 36,5 per cent., a rate which greatly exceeded the maximum 12 per cent. interest rate permitted by section 9 of the Usury Act [*Chapter 299*].

Having set out the facts, the learned judge continued:]

Before discussing whether the defendant has shown that he will probably succeed if the main action is fought out, I must decide whether the cheque can found an action for provisional sentence despite the fact that the sum of $16 500 stated in it admittedly contains usurious interest to the extent of $1500, which has been waived by the plaintiff.

Rule 20 reads:

> "20. Where the plaintiff is the holder of a valid acknowledgement in writing of a debt, commonly called a liquid document, the plaintiff may cause a summons to be issued claiming provisional sentence on the said document."

The question is whether the cheque is a valid acknowledgement of a debt in terms of the Rule. Clearly it is invalid to its full extent of $16 500, but what must be decided is whether it is valid to the extent of $15 000, the amount claimed by the plaintiff.

The word "valid" has not been judicially interpreted in this context in Zimbabwe and I have not been referred to any reported case in this country or elsewhere which is helpful in the present problem. However, I am satisfied that the word can be used either in an absolute or partial sense, the latter being when the word is impliedly qualified by a phrase such as "to a certain extent". In Rule 20 I consider that there is such an implied qualification. The Usury Act [*Chapter 299*] is the only source of the invalidity which admittedly attaches to part of this cheque. But

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that Act does not render absolutely invalid a cheque for an amount which consists partly of usurious interest. In other words, the Act does not render invalid the cheque as a means of proving the capital amount of the loan by the plaintiff. I am therefore of the opinion that, as the Legislature has not thought fit to declare absolutely invalid a cheque issued in payment of a loan bearing usurious interest, this court should not interpret Rule 20 in a manner which is inconsistent with the attitude of the Legislature. I have studied with interest the cases cited by counsel in this regard, such as *Prudential Shippers SA Ltd. v Tempest Clothing*

Co. (Pty.) Ltd., 1976 (2) SA 856 (W), *Condor Industries (Pty.) Ltd. v African Gate Holdings Ltd.*, 1979 (1) SA 540 (T), and *McGill v Vlakplaats Brickworks* (Pty.) Ltd., 1981 (1) SA 637 (W). I think that none of those cases is inconsistent with the proposition that where a plaintiff waives part of the cheque constituting the acknowledgement of debt relied upon by him because that part contravenes the Usury Act, and it is not disputed that the balance is a valid debt, he is entitled to provisional sentence for that balance. See, in particular, *Cassimjee v Naidoo, Cassimjee v Singh & Anor.,* 1959 (4) SA 139 (N) at 141 - 142.

I accordingly rule that the cheque is a valid acknowledgement of debt in terms of Rule 20 to the extent of $15 000.

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

Kantor & Immerman, legal practitioners for the plaintiff.

Surgey, Pittman & Kerswell, legal practitioners for the defendant.

THE STATE v MANIKINYEKA AND OTHERS 1981 ZLR 258

Court **Appellate Division, Bulawayo**

Criminal Appeals

Fieldsend, CJ, Baron, JA, and Goldin, AJA

17th June, 1981

Flynote

General Amnesty Order of 21st August, 1980 - scope of amnesty in relation to theft of stock and possession of stolen stock.

Headnote

Notwithstanding that theft is a continuing offence, the General Amnesty Order of the 21st August, 1980, pardoned thefts of stock that took place before the 18th April, 1980, even where the thieves retained possession of the stolen stock after that date. The amnesty did not,

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however, affect the civil rights of the owners of the stock, nor did it excuse any slaughtering of or injury to the stock after the 18th April, 1980.

Authorities cited:

Roscoe, *Criminal Evidence*, 16th edition, page 697;

Hunt, *South African Criminal Law and Procedure*, volume 2, pages 603 and 643,

R v Philander Jacobs, 1876 Buch. 171;

R v von Elling, 1945 AD 234;

R v Albasini (2), 1967 RLR 343 (AD); 1967 (4) SA 605 RAD).

HI Bisset for the appellants.

BJ Turner for the respondent.

Judgment

Fieldsend CJ: The five appellants were charged and convicted separately of stock theft, but their appeals were heard together as they all involved the same legal point of whether the General Amnesty Order of the 21st August, 1980, applied to the offences.* (10)This order provided in section 2:

FIELDSEND CJ

> "A free pardon is hereby granted to every person in respect of the commission by him before the 18th April, 1980, of any specified offence [which includes stock theft] . . . for which he has not, on the fixed date, been sentenced."

At the hearing all the appeals were allowed on the State's concession that the evidence established an assumption of control over the cattle before the 18th April, 1980, and no conduct which amounted to an assumption of control after that date, and the convictions and sentences set aside. These are the reasons.

With the exception of the third appellant, each was charged with the theft of cattle between a date in 1977 or 1978 and February, 1981. The third appellant was charged with theft between the 1st and the 30th June, 1979. The admitted facts - each appellant having pleaded guilty and accepted the facts outlined by the prosecution - were that each stole cattle. during 1977, 1978 or 1979 and was found in possession of them during February, 1981.

The magistrate relied upon the doctrine that theft was a continuing offence and held that the continued possession by each appellant amounted to the commission of the offence of stock theft after the date of the Amnesty.

The doctrine of theft being a continuing offence seems to be common to both English law (Roscoe's *Criminal Evidence*, 16th edition, page 679) and modern Roman-Dutch law (Hunt, *South Africans Criminal Law and Procedure,* volume II, page 603). The full significance of this

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doctrine has never arisen for determination. It is referred to and relied upon almost exclusively when questions of venue arise, property stolen in one jurisdiction having been removed to another (*R v Philander Jacobs,* 1876 Buch. 171), or where the position of a *socius* who helps a thief to dispose of property is being considered (*R v von Elling,* 1945 AD 234 at page 245; *R v Albasini (2),* 1967 RLR 343 (AD); 1967 (4) SA 605 (R., AD)). It is of significance that it has never been relied upon to convict of robbery a person who after having stolen property uses violence to retain possession (HUNT, *op. cit.,* page 643 and the cases there cited). If the continuing offence doctrine were of universal application and were strictly applied such later assault should be regarded as robbery because it induced submission to the continuing *contrectatio*. The doubts that there must be about the full significance oil the doctrine of theft being a continuing offence, in particular in regard to robbery, entirely justify Mr *Turner's* concession that the terms of section 2 of the Amnesty Order are intended to excuse any assumption of control,

FIELDSEND CJ

which amounted to theft, which occurred before the 18th April, 1980, and that the State should not rely on any possession which continued after that date to avoid the result of the Amnesty.

The magistrate appears to have thought that a pardon in terms of the Amnesty Order for an offence of stock theft gave a person a right to retain the cattle taken as against the true owner and relied on this consideration in holding that continued possession must be an offence. In this he was in error. The Amnesty Order has no effect on any civil rights, it merely grants a pardon in respect of criminal offences. An owner's rights are in no way affected by the Amnesty. Nor does the fact of the pardon excuse subsequent slaughtering of, or injury done to, the cattle, which amounts to a separate offence of malicious injury to property.

We were told that there were a number of cases where convictions had been based on continuous possession after the date of the Amnesty and we have been assured that these will be dealt with through the appropriate channels to ensure that the convictions are annulled.

Baron JA: I agree.

Goldin AJA: I agree.

Lazarus & Sarif, attorneys for the appellants.

THE STATE v WALL 1981 ZLR 261

Court **General Division, Salisbury**

Criminal Review

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Squires and Pittman, JJ.

17th June, 1981

Flynote

Criminal Procedure and Evidence Act [Chapter 59] - section 255 (2) - procedure on plea of guilty - whether decision to proceed under section 255 (2) (a) or 255 (2) (b) rests with magistrate or prosecutor - cases which may be dealt with under section 255 (2) (a).

Headnote

On the tendering of a plea of guilty to a criminal offence in a magistrates court, it is for the magistrate, not the prosecutor, to decide whether to proceed under paragraph (a) or paragraph (b) of section 255 (2) of the Criminal Procedure and Evidence Act [*Chapter 59*]; and in making that decision the magistrate should take into account -

(a) the nature of the charge especially as it appears from the particulars of the offence;

(b) the penalties to which the accused person will be liable on conviction for the offence;

(c) the complexity of the charge and the accused person's ability to understand it;

(d) any informal explanation given by the prosecutor on aspects of the case on which the Court may legitimately be informed before conviction;

(e) the fact that section 255 (2) (a) is intended to be used for minor offences only and should not be used where there is any doubt as to the minor nature of the offence.

If after proceeding under paragraph (a) of section 255 (2) of the Criminal Procedure and Evidence Act [*Chapter 59*] a magistrate discovers that for any reason the penalties he may impose under that paragraph are inadequate, he should stop the proceedings and take steps to have the conviction set aside by a judge of the High Court on review so that the matter may be remitted for trial afresh.

1981 ZLR p262

SQUIRES J

Since the amendments to section 255 of the Criminal Procedure and Evidence Act [*Chapter 59*] made by Act 37 of 1975, there is more scope for the imposition of ancillary orders, such as mandatory prohibitions from driving and cancellation of drivers' licences, upon persons connoted in terms of section 255 (2) (a), so long as the sentence as a whole can still be categorized as minor.

Only where an accused person qualifies his plea of guilty in come way, whether by pleading guilty to an alternative charge or otherwise, is there room for a prosecutor to "accept" a plea; save in those cases the term should never be used.

Cases cited:

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S v Takadzi, 1980 ZLR 336 (GD);

R v Kriedemann, 1968 (2) RLR 321 (GD); 1969 (1) SA 345 (R);

S v Cook, 1977 (1) SA 653 (AD);

S v Mienie; S v van Zyl, 1972 (2) RLR 250 (GD); 1973 (1) SA 220 (R).

J H C Friedman for the State.

B H Christie for the accused.

Judgment

Squires J: The accused in this case was charged with negligent driving in contravention of section 43 (1) (a) of the Road Traffic Act, 1976 (No. 48 of 1976), the facts being that while driving a motor-car he became so engrossed in a conversation with a friend that he failed to notice, and proceeded to drive through, a robot-controlled intersection while the light was red against him, colliding with another vehicle as a result. He pleaded guilty to the charge, which was "accepted" by the prosecutor, and the trial then proceeded under section 255 (2) (a) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The magistrate, being satisfied that his plea was correct, found the accused guilty as charged. After verdict, it was revealed that the accused had a previous conviction for the same offence, sustained in Bulawayo in 1977, for which he was fined $50 or 25 days' imprisonment with labour.

In those circumstances, the magistrate sentenced the accused to a fine of $75 or one month's imprisonment with labour under section 43 (3) (b) of the Act. He furthermore ordered that the accused's driver's licence was to be cancelled in respect of Class 4 vehicles, and that he was prohibited from driving for a period of six months. In terms of section 56 (1a) (b) the magistrate, however, excluded Class 3 vehicles, namely motor-cycles, from that prohibition; and, finally, in terms of section 57 (3a) (a), the magistrate ordered that any licence obtained by the accused within a period of five years following the 10th March, 1981, was to be endorsed with the particulars of the conviction.

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When the matter went before the regional magistrate for scrutiny, the trial magistrate was asked, *inter alia*, why, in view of the fact that negligent driving is a serious offence, the court had proceeded under section 255 (2) (a) of the Code, which limits the sentence that can be imposed. To this query, the trial magistrate replied that the prosecutor, who was an experienced one, and knew the facts, accepted the plea in terms of section 255 (2) (a); and that, furthermore, it was the magistrate's own experience that very seldom did a case of negligent driving attract more than the $100 level of fine referred to as a maximum under section 255 (2) (a).

The regional magistrate also queried the endorsement of all future licences issued to the accused for the next five years in view of the decision in *S v Takadzi,* 1980 ZLR 336 (GD). This order, the magistrate accepted, was wrongly made in view of the law as discussed in that

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judgment, but in defence of his order prohibiting further driving by the accused for six months, he pointed to the fact that he adjusted this, having regard to the accused's circumstances, by excluding the driving of motor-cycles from this cancellation.

The regional magistrate thereafter submitted the case for review in terms of section 63A (1) (b) of the Magistrates Court Act [*Chapter 18*], with the general query whether the trial magistrate, while purporting to act in terms of section 255 (2) (a) of the Code, could properly conjoin to a sentence of a fine of $75, a prohibition from driving for six months, plus a cancellation of a driving licence in respect of Class 4 vehicles.

Since there appeared to be some difference of interpretation over what is meant by a "trivial" offence in certain of the decided cases on section 255 (2) (a) or its equivalent in other legislation - a difference which was reflected in the views of the judges of this Division - and because of the fact that changes in our own legislation in 1976 may have affected the matter, and, finally, because the question of everyday practice of the magistrates court was involved, the question postulated by the regional magistrate was argued on review. And before anything else it should be acknowledged at the outset that the court is grateful to counsel for the clear and lucid assistance given by their arguments.

The first question that arises in the present case is whether it is the prosecutor - and more particularly by his "acceptance" of a pleader the court, who decides to proceed under section 255 (2) (a) upon the tender of a plea of guilty by an accused.

In my view, having regard to the wording of section 255 (2) as a whole, there can be no doubt whatever that it is the Court's function alone to

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decide whether to proceed under section 255 (2) (a) or not. This is clear not only from the provisions of paragraph (a) which establish the opinion of the court that the offence will not attract a punishment of the stated maxima, as the operative consideration in proceeding under that paragraph; but also from the fact that in only paragraph (b) is the prosecutor's view of any concern, where it is provided that paragraph (b) must be resorted to, *inter alia*, if the prosecutor so requests. If the magistrate in the present case, therefore, did proceed under section 255 (2) (a) only because the prosecutor said so, then he was in error in so doing. However, it does seem that that was not the only consideration that prompted him to take this course and his own view as to the gravity of the offence of negligent driving played as great a role, if not a greater, as the prosecutor's attitude.

As stated above, then, it is the court's function to make that decision, and the next question is to consider on what basis that discretion must be exercised.

The principal consideration would be, of course, the nature of the charge, especially as it appears from the particulars of the offence; see *R v Kriedemann,* 1968 (2) RLR 321 (GD) at 324A-B; 1969 (1) SA 345 (R) at 346H. Then it would seem, naturally, in having regard to the nature of the offence, that the penalties provided will also be considered. But here it should be borne in mind, although it is really self-evident, that even if penalties in excess of those

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provided in paragraph (a) can be imposed for such an offence, the terms or particulars of the charge themselves may make it clear that a sentence in excess of those prescribed will not be justified; and in such an event it is proper to proceed under section 255 (2) (a) despite the heavier penalties which could be imposed.

Thirdly, a factor which is unrelated to the sentence but which may be of relevance in guiding the court as to the better procedure, is the complexity of the charge and the ability of an accused to understand it. A charge of contravening some statutory provision, for example, may require careful explanation to an unrepresented or an illiterate accused or even to a juvenile, and this would be better done by proceeding under section 255 (2) (b).

Fourthly, if the magistrate is left in any such doubt as may be removed by some explanation from the prosecutor on any particular aspect of the case that is not clear to the court, and of which the magistrate may properly be informed before conviction, it seems to me to be permissible under the present legislation for the court to seek elucidation informally

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from the prosecutor. There have been conflicting decisions in the past, more especially in the courts of South Africa, on the equivalent section in that country's Criminal Procedure Act, as to whether such informal statement by the prosecutor is proper in such a situation. But not only does the better authority appear to accept such a course as permissible - see *S v Cook,* 1977 (1) SA 653 (AD) at 658A - but it seems to me that since a statement by the prosecutor may be specifically relied on under paragraph (b) where it is accepted by the accused, there is even less reason than hitherto for such a statement to be unacceptable where the procedure under paragraph (a) is being contemplated.

Finally, it should also be borne in mind that the ambit of section 255 (2) as a whole still indicates that paragraph (a) is intended to be used for minor offences for which the relatively minor degrees of punishment permitted by that paragraph are to be imposed. Consequently, if a court has any doubt as to whether one of the permitted sentences would apply, it should not proceed under paragraph (a), particularly since it retains the option to impose a sentence of a more limited nature even if it proceeds under paragraph (b) and, having done so, concludes that the sentence to be imposed is not out of the limits of paragraph (a) after all.

Further, as a guide to future practice, if a court should decide to proceed under paragraph (a), and after convicting the accused it then emerges that because of previous convictions overlooked by the prosecutor, or some other factor unknown to or overlooked by the prosecutor or the court, it transpires that the sentences of paragraph (a) are inadequate, then because there is no machinery or basis whereby the court can reverse its conviction and decision to proceed under paragraph (a), it should stop the proceedings and send the case to the Attorney-General under section 58 of the Magistrates Court act for the High Court to act under section 64 (2) of that Act by setting aside the conviction and remitting the matter for disposal afresh.

In parenthesis, and before turning to the next main question, it may be of benefit as a further

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guide to practice to re-state that in cases where an accused pleads guilty unqualifiedly to a charge as framed, it is inaccurate and irrelevant for the prosecutor to accept such a plea. It is only where an accused person qualifies his plea to the charge in some way, either by pleading to an alternative charge, or to a charge that would be a lesser but competent verdict, or admits the charge but to a less serious extent than the particulars disclosed, that there is room for the prosecutor to be consulted and to indicate whether he accepts such a lesser plea or rejects it. The looseness of

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terminology in most records that are sent on review where an accused pleads guilty, has no doubt from the practice of describing the decision of the prosecutor to offer no evidence as acceptance of the plea, but it can be misleading and it should be avoided.

The principal issue in this review is whether the sentence passed by the magistrate was competent in view of the fact that he proceeded under section 255 (2) (a), and not under paragraph (2) (b). Mr *Christie*, for the accused, argued that the procedure under paragraph (a) being only for trivial offences and punishments, the sentence imposed should, in its totality, reflect this requirement; and the adjunctive features of the magistrate's order, such as cancellation of the accused's licence, and the prohibition from driving, should be set aside as being more than such limits of a minor punishment. Mr *Friedman*, on the other hand, urged that the prohibition and the cancellation of the accused's Class 4 licence, were "competent" in dealing with the accused, and were "in accordance with the law" within the meaning of paragraph (a), and should be upheld. He said that since the magistrate may not refer to any previous convictions or the personal circumstances of an accused in reaching his decision whether the offence warrants a sentence in excess of the limits prescribed in paragraph (a) of section 255 (2), if he properly reached a decision that the offence is a minor one it would be illogical to hold that the proceedings are irregular simply because the magistrate thereafter has to impose a sentence that is mandatory, such as cancellation of a licence. Such an adjunct of a sentence should be accepted as long as the court does not contravene the stated and implicit limitations of the subsection.

Now, it seems clear that until the decision in *S v Mienie; S v van Zyl,* 1972 (2) RLR 250 (G.D.); 1973 (1) SA 220 (R) - a two-judge decision of this court alter argument on review - the tendency was widespread to regard any form of a sentence other than a fine within the limits of the section, as an incompetent sentence under this procedure. In *Mienie's* case, however, BEADLE, CJ, in giving the judgment of the court, held that an ancillary order such as a prohibition from driving made as part of a sentence under this procedure, was competent so long as the sentence as a whole could still be characterised as a minor one. The decisions and authorities which previously limited the sentence imposed under the section to only a fine, were held by the CHIEF JUSTICE to have stated the law too widely, and to have paid insufficient heed to the discretion given to the court to impose any competent sentence in addition to those specified. If that discretion was judicially exercised, therefore, and applied where the offence was a minor one, a minor punishment

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could be joined to a fine within the limits of the section. Furthermore, what was a minor punishment that could legitimately be added to the sentence of a fine, depended on the individual circumstances of every case - the only yardstick being the limitation imposed by the section.

Apart from the authority and influence of *Mienie*'s case, it also seems to me that there has been a gradual relaxation of concern over the question of conviction and sentence of an accused person upon his plea of guilty alone Originally, the reason for treating a plea of guilty with reserve, and for insistence on evidence to support it, seems to have stemmed from a desire to save accused persons from themselves when they may have wrongly pleaded guilty to an offence charged. It was probably so required because of the lack of education and sophistication of the average accused person, who would more easily be overawed by finding himself in the toils of the criminal law and possibly admit to a charge he did not understand, simply because he had been arrested and charged with it. It might even shave been causally descended from the same philosophy as refused an accused person the right to give evidence on his own behalf lest he make things worse for himself or exposed himself to questioning. There is certainly some discernible similarity of outlook. However that may be, even 50 years ago, sufficient emphasis was placed on this safeguard for it to be required that even on a plea of guilty, it was obligatory for evidence to be led before sentence was passed. Then, no doubt under pressure of a rising workload, there was a change to allow minor cases for which sentences of the prescribed limited nature only could be imposed, to be convicted and sentenced without the leading of any evidence. As there was no basic change in the law regarding the leading of evidence on a plea of guilty before passing sentence, since that remained as a requirement in all other cases, the implication is that as long as he received only a minor sentence of the kind prescribed, any risk in convicting an accused person on his plea of guilty became more acceptable.

The latest position, after the 1975 amendment to the Criminal Procedure and Evidence Act, seems to me to show an even greater relaxation. Not only are the fine penalties greater than before - thus enlarging the scope of minor offences that may be so dealt with - but not even under section 255 (2) (b) is it now necessary to lead any evidence before passing sentence. The accused's acceptance of or agreement with the prosecutor's statement of the facts is sufficient, thereby dispensing with the need to lead evidence to confirm the plea or prove the commission of the offence required by the old legislation - neither of which, it should be stated, actually needed to link the accused with

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the offence charged. Again, it seems possible to discern the reason for these changes as being the greater sophistication found today at most levels of society, together with the concomitant expectation these days

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that if a man is innocent of a charge put to him, he will say so. Therefore, he is unlikely to plead guilty unless he really is.

Whatever the reason, there seems to be a greater readiness to accept that punishment can be meted out simply on the accused's acceptance of liability. If the same insistence is no longer placed on safeguarding an accused from the effect of an incorrect plea of guilty, then *pro tanto* it seems to me that the greater latitude should be allowed in giving the words "competent sentence", or dealing with an accused " . . . otherwise in accordance with law . . . " in section 255 (2) (a), their plain meaning, and accepting that an order or orders in addition to a fine, can be part of a sentence under that section.

Applying all this to the present case, the accused here was charged with negligent driving. *Prima facie,* as the magistrate said, since many offences of negligent driving attract a sentence of a fine less than $100, the offence could be dealt with in terms of section 255 (2) (a). Thereafter, the court was advised that the accused had a previous conviction for the same offence - a situation which made the prohibition from driving compulsory. This aspect of the order was, in the absence of special circumstances, an unavoidable consequence of the conviction, so it was not anything imposed in the discretion of the magistrate. In addition, he ordered the cancellation of the accused's licence to drive Class 4 vehicles, but left his mobility intact by saving Class 3 vehicles from that order of cancellation. There were no special circumstances even suggested by the accused, let alone established, which might have altered the situation, and the licence to drive was not necessary for his employment.

In the circumstances of this particular case, therefore, and although it is getting near to the outer limits of what can safely be called minor punishment, I think that the magistrate cannot be faulted for proceeding under section 255 (2) (a) and for imposing a prohibition and cancellation of the Class 4 licence as he did. The endorsement of future licences for the next five years is clearly wrong, a fact acknowledged by the magistrate, who was unaware of the decision in *Takadzi's* case at the time he heard this matter. That portion of the sentence will therefore be deleted. For the rest, the conviction and sentence are confirmed

Pittman J: concurred.

THE STATE v BEALE 1981 ZLR 269

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

26th May and 19th June, 1981

Flynote

Criminal law - malicious injury to property - knowledge on part of accused that unlawful act was unlawful - need

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for proof of such knowledge - claim of right - whether belief that conduct was lawful must be reasonable.

Headnote

To secure a conviction on a charge of malicious injury to property, the State must prove beyond a reasonable doubt that the accused person knew that what he did was unlawful. Once the accused person has laid the foundation for a defence of a claim of right, by leading evidence of its existence, the persuasive onus is on the State to disprove it.

Quaere whether an unreasonable belief on the part of an accused person charged with malicious injury to property may found a defence of claim of right, or whether the reasonableness of the belief is a matter that goes only to credibility.

Authorities cited:

Hunt, *South African Criminal Law and Procedure, volume* 2, page 784;

R v Bhaya, 1953 (3) SA 143 (N);

S v Marshall, 1967 (1) SA 171 (O);

R v Milne & Erleigh (7), 1951 (1) SA 791 (AD);

R v Geddes, 1964 RLR 288 (AD); 1964 (4) SA 48 (RAD);

S v Rantsane, 1973 (4) SA 380 (O);

S v Latham, 1979 RLR 458 (AD); 1980 (1) SA 723 (ZAD);

R v Hoffman & Anor., 1948 SR 80; 1948 (3) SA 979 (SR);

Conradie v Kloppers (1893) 10 SC 189.

N J McNally for the appellant: The appellant's defence was quite simply that at all relevant times he thought he was entitled to do what he did and that he was acting in accordance with the wishes of the rural council, which were lawful wishes, both on the basis of his own

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understanding of the law as explained by his attorney and on the basis of the rule *omnia rite esse acta praesumuntur*. This is the defence of a bona fide claim of right based on mistake of fact: Hunt, *SA Criminal Law and Procedure,* volume 2, pages 783-4; *S v Purcell-Gilpin,* 1971 (1) RLR 241 (AD) at 247E-248H; 1971 (3) SA 548 (R.,A.D.) at 551E-552F.

A claim of right must be bona fide. It does not have to be reasonable, but the more unreasonable it is the less will the court be inclined to accept that it was bona fide: See Hunt, *op. cit.,* page 784, and volume 1, pages 139 and 265, *S v Miller,* 1973 (2) RLR 387 (AD), 1974 (2) SA 33 (RAD), and, as to onus, see: *S v Latham* (*supra*), *R v Thompson and Strydom,* 1964 (1) PH H4, *S v Moller,* 1971 (4) SA 327 (T) at 330-1 *R v Mtshilselwe,* 1957 (3) SA 313 (E) at 314H - 315A, *R v Bhaya* (*supra*); *Conradie v Kloppers (supra); but compare R v Hoffman*

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(*supra*).

J. H C *Friedman*, for the respondent, cited *S v Purcell-Gilpin,* 1971 (1) RLR 241 (AD), 1971 (3) SA 548 (R. AD) at 554C, and *S v Ushewokunze,* 1971 (1) RLR 107 (AD) at 110I-111A.

Judgment

Goldin AJA: The appellant was convicted of malicious injury to property. He was, sentenced to pay a fine of $250 or, in default of payment, three months' imprisonment with labour and, in addition, to three months' imprisonment the whole of which was conditionally suspended. He appeals against conviction and sentence.

The conviction depends upon whether or not the appellant's removal of a fence from one position to another on the ranch belonging to a Mr Levy, resulting in damage to the latter's crop of "pop-corn", was done with the necessary malice to constitute the offence, the defence being that the appellant acted with a bona fide claim of right that he was entitled to do as he did (Hunt, *SA Criminal Law and Procedure,* volume II, page 784).

Levy purchased a portion of a farm from the company of which the appellant was a director and a major shareholder and which he apparently regarded and managed as if it was his personal property. For convenience I will therefore refer to it as the appellant's property. The deed of sale included the registration of a servitude providing the appellant with access to his property. The agreement further provided that the boundary fence of the access road within the servitude was in good order and that the appellant "will if and when requested by the rural authority move the fence along the access road at his own expense".

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On the 23rd December, 1979, the appellant employed one Frank Makowa to move the fence 30 feet south of its original position on the access road, to follow the line of the survey pegs positioned with authority by the rural council. The magistrate found that:

> "As a result of the removal of this fence and its partial re-erection inside the popcorn crop, the unprotected popcorn was damaged by bovines passing through the servitude road."

The appellant claimed that he acted in the bona fide and reasonable belief that he was entitled to move the fence. The evidence was to the following effect. The Salisbury West Rural Council, which was established under the Rural Councils Act and within whose area the land in question is, declared by publication in the Government *Gazette* dated the 23rd January, 1976, the servitude road within which the fence was located as a "district road" and its width was increased to 31,45 metres in terms of the Roads and Road Traffic Act [*Chapter 263*]. Before the road could be widened, reasonable notice in writing had to be given to the owner thereof. Longstanding efforts had been made by both the appellant and the rural council to re-align the road, to which Levy was opposed. Eventually, as the appellant stated in evidence, towards the end of 1979 he inquired what progress was being made to give effect to the creation of the declared district road because he was liable, as mention above, to move the fence "when requested by the rural authority to do so". He claimed that he was told by the secretary of the

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council to engage a contractor and proceed to move the road.

The vice-chairman of the rural council stated in evidence that there was "a simple general instruction (to the secretary) for him to carry out the procedure in terms of section 29 of the Roads Act, to notify landowners - those landowners whose fencing encroached in the road servitude".

The magistrate did not expressly find whether the secretary of the rural council in fact authorised the appellant to move the fence but assumed that the appellant was given authority to do so. The magistrate repeats three times that he assumes that the appellant "was given authority by the rural council to move the fence", but on each occasion asserts that removal of the fence was unlawful on the ground that the requisite notice in writing had not been given to Levy.

Before the State can secure a conviction on a charge of malicious injury to property it must be proved beyond reasonable doubt that an accused acted with knowledge of the unlawful quality of his conduct, and not merely that what he did was in fact unlawful. If it appears from

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all the evidence to be reasonably possible that an accused did the act complained of under a bona fide claim of right, he is not guilty of the offence. It is clear that what is decisive is not the lawfulness of what was done but whether the accused believed he was entitled to do it (see *R v Bhaya,* 1953 (3) SA 143 (N) at 148 - 9, *S v Marshall,* 1967 (1) SA 171 (O) at 174).

What is not entirely settled yet is whether the belief in the right relied upon must be a reasonable belief, or whether the reasonableness of the belief is a matter which goes only to the genuineness of it. This point was left open in relation to mistake of fact generally in *R v Milne and Erleigh* (7)*,* 1951 (1) SA 791 (AD) at 826-7 and considered in *R v Geddes*, 1964 RLR 288 (AD); 1964 (4) SA 48 (RAD) and *S v Rantsane*, 1973 (4) SA 380 (O) in relation to claim of right in theft. It is not necessary to decide this point in this appeal as the issue now before us can be decided on the basis of onus.

No onus is placed on an accused to prove absence of unlawful intent which is an element of the offence (*S v Marsha* (*supra*) at 176C-D). The aspect was explained and decided in relation to a bona fide claim of right in theft in *S v Latham,* 1979 RLR 458 (AD) at 463C; 1980 (1) SA 723 (ZAD) at 728, as follows:

> "There can be no doubt that a Court will not consider a defence of a claim of right unless the accused has laid a foundation by leading evidence 13 of its existence. Once, however, this evidential onus has been discharged the persuasive onus would appear, contrary to what was said in the case I have just mentioned, to rest upon the State. That this is so divas stated in the case of *R v Jona,* 1961 (2) SA 301 (W) at 319, where WILLIAMSON, J (as he then was), said:
>
> > *'Prima facie,* to my mind, it cannot be said that the accused's evidence is necessarily false when he says that he was allowed to do this and that they knew what was happening, and told him he could take this money, that the companies were really all his. Now, if his evidence could be true - I do not say it is true - but if it could be true, and on the facts as I find them it could be true, then I cannot say that it has been proved that he necessarily had *animus furandi,* because he may have had a bona fide belief in his right to

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> act in the way he did. That would be sufficient, in my view, to show that the Crown has not discharged the onus of establishing *animus furandi*. But let it be understood, I am not making any finding directly whether he was so advised or was not so advised.'
>
> In my view, that is a correct statement of the law in regard to the onus which arises where a defence based upon a claim of right is raised."

The statement in *Rex v Hoffman and Anr.,* 1948 SR 80 at 82; 1948 (3) SA 979 (SR) at 981:

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> "Once the wilful and deliberate destruction of property is proved in a case of malicious injury to property, as it has been in this case, the onus is on the accused person to prove the bona fide and reasonable belief mentioned "

does not appear to be consistent with what has been said above and must be regarded as having been overruled by the decision in *S v Latham* (*supra*).

In this case the issue was clearly and specifically raised in the evidence of the appellant and it was assumed by the magistrate that the appellant was given authority by the rural council to move the fence. There was certainly no evidence to disprove the appellant's assertion, but rather it was supported by the surrounding circumstances.

It was contended by Mr *Friedman*, for the State, that because the appellant admittedly disliked Levy (who openly demonstrated equal dislike of the appellant) the appellant derived satisfaction and indeed a sense of pleasure in moving the fence which he knew would cause damage to the "pop-corn". If, as it appears, the appellant bona fide believed that he was entitled to move the fence, then the fact - if it be a fact - that he did so happily and with satisfaction is irrelevant. It is not an offence for a person to exercise a lawful right even though he may enjoy the consequence of so doing. Obviously if he acted on the bona fide, although mistaken, belief that he has a right to move the fence the same considerations apply. It is, of course, important to consider whether in fact the appellant is merely sheltering behind an alleged claim of right which he did not in fact believe he possessed (*Conradie v Kloppers* (1893) 10 SC 189). In view of the evidence concerning the declaration of the road and because it cannot be rejected that the secretary of the rural council authorised the appellant to move The road, there is no ground for holding that the appellant's conduct was motivated by malice so as to make his conduct criminal.

It is interesting to observe that the appellant was charged together with the chairman of the rural council as well as with the Salisbury West Rural Council represented by Thomas Michael Cochrane, cited in terms of section 357 (2) of the Criminal Procedure and Evidence Act in his capacity as servant of the third accused. The charge alleged malicious injury to property, namely, Levy's "pop-corn", by "all and each or one or more of them". The charge against the others was not proceeded with at the commencement of the trial. There can, therefore, have been no question of the State relying on a conspiracy between the appellant and the rural council.

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GOLDIN AJA

In those circumstances it seems to me that the State failed to establish the charge. Accordingly, the appeal is allowed and the conviction and sentence are set aside.

Fieldsend CJ: I agree.

Baron JA: I agree.

Gill, Godlonton & Gerrans, attorneys for the appellant.

COMMISSIONER OF TAXES v G 1981 ZLR 275

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

22nd May and 23rd June, 1981

Flynote

Income Tax Act [Chapter 181] - section 8 (1) - gross income - meaning of "received" - whether stolen money forms part of gross income of thief.

Headnote

Stolen money does not form part of the gross income of the thief for the purposes of the Income Tax Act [*Chapter 181*] and is not assessable to tax.

The word "received" in the definition of "gross income" in section 8 (1) of the Income Tax Act [*Chapter 181*] must be limited at least to "received as part of the recipient's patrimony", and whether or not in any particular case a taxpayer receives income in this sense depends not only on his own intention but on that of the person from whom he receives it.

The existence of a claim against a person for a refund of money received by him does not necessarily mean that he has not received it for the purposes of the definition of "gross income" in section 8 (1) of the Income Tax Act [*Chapter 181*].

Cases cited:

Commissioner for Inland Revenue v Delfos, 1933 AD 242;

Griffiths (Inspector of Taxes) v J P Harrison (Watford) Ltd [1963] AC 1;

Commissioner for Inland Revenue v Glenn & Co. (Pty.) Ltd., 1955 (3) SA 293 (AD);

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Geldenhuys v Commissioner for Inland Revenue, 1947 (3) SA 256 (C).

J. C Andersen, SC, for the appellant: In *Commissioner for Inland Revenue v Delfos,* 1933 AD 242 at 253-4, it was held that the plain meaning of the words "received by" could only be modified in "very exceptional circumstances". In *Geldenhuys v Commissioner for Inland Revenue,* 1947 (3) SA 256 (C.), it was held that the words "received by" must mean "received by the taxpayer on his own behalf for his own

benefit". In his concurring judgment HERBSTEIN, AJ, added at page 269 that the expression "received by him" means that the money "must be received by him in such circumstances that he becomes entitled to it". In *Commissioner for Island Revenue v Glenn and Co. (Pty.) Ltd.,* 1955 (3) SA 293 (AD) at 301, it was held that it was not every physical control over money which constituted a receipt and that money borrowed should not be included in a taxpayer's gross income.

Money borrowed or received on behalf of another is never intended to be included in a taxpayer's patrimony. It is not disputed, as has been held, that such money ought not accordingly to be included in a taxpayer's gross income by virtue of its wide definition as meaning all moneys received by the taxpayer. It is, however, a different matter to further restrict the definition so as only to include money to which the taxpayer is entitled or, as was held by the court *a quo*, which is not claimable by someone else. The fact that the money received by respondent was received as a result of an unlawful activity does not in itself mean that it should be excluded from his gross income: *Income Tax Case* 1199 (1974) 36 SATC 16, at 19; *Minister of Finance v Smith* [1972] AC 193 (PC) at 195 - 197. In a number of cases the distinction was made between money received by a taxpayer in the course of a business, albeit an unlawful business, or as a result of an unlawful act in the course of a lawful business, as opposed to money received in the course of criminal activity such as burglary or the receipt and sale of stolen goods. In *Lindsay and Ors v Commissioner of Inland Revenue* (1932) 18 TC 43 (Court of Session, Scotland) it was said in opinions expressed at pages 54, 55, 56 and 58 that money received as a result of a burglary would not be included because the burglar did not carry on a trade or business. In that case the statute in question provided for the inclusion of "profits of trade". It was not suggested that amounts received as a result of a burglary would not be included for any other reason, such as that the burglar was not entitled to them. In *Southern* (*H.M. Inspector of Taxes*) *v AB Limited* (1933) 18 TC 59 (KBD) at 73, *Lindsay's* case was referred to and FINLAY, J, left the matter open but said that if the burglar did not come within the purview of the Income Tax Act it was because what he did was not the carrying on of a trade. In *Partridge v Mallandaine (Surveyor of Taxes)* (1885) 2 TC 179 (QBD) at 181, it was said that profits made from the systematic business of receiving stolen goods would be subject to tax. In *Commissioner for Inland Revenue v Delagoa Bay Cigarette Co. Limited,* 1918 TPD 391 at 399-400, the view expressed in *Partridge's* case was referred to with approval. In all these cases it was held that the mere fact that profits

were tainted with illegality was not a ground in itself for them to be excluded. In none accordingly was the suggestion in *Inland Revenue Commissioners v Alexander von Glen and*

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Co. [1920] 2 KB 553 at 572, that profits should be confined to those earned in a lawful business, or business carried on in a lawful manner, followed.

There is no reason why the money stolen by the respondent systematically over a long period of time, which he intended to retain for himself, should not be held to have been "received by" him for the purposes of section 8 (1) of the Income Tax Act. Even if such receipts could not be said to have been income from a trade or business for the purpose of the English taxing statutes, they were received by the respondent in the course of "trade" as defined in section 2 (1) of the Act, being at least a venture carried on by him for that purpose.

A P de Bourbon for the respondent: In *Geldenhuys v Commissioner of Inland Revenue,* 1947 (3) SA 256 (C), in dealing with a definition of "gross income" substantially in the same terms as the Zimbabwe definition, it was held that the money must be received by the taxpayer in such circumstances as he becomes entitled to it: see page 269. The principle to be extracted from that case is that although a person may physically have received money, the money in question is not received by him for the purposes of the definition unless he is entitled to receive it. See also *Commissioner of Inland Revenue v Glenn & Co.* (*Pty.*) *Ltd.*, 1955 (3) SA 293 (AD) at 301, and *Rose v Humbles (Inspector of Truces)* [1970] 2 All ER 519 at 524, [1972] 1 All ER 314 (CA). In *Lategan v Commissioner for Inland Revenue,* 1926 CPD 203, it was held that the words "has accrued to or in favour of any person" merely means "to which he has become entitled". In *Commissioner for Inland Revenue v Delfos,* 1933 AD 242, WESSELS, CJ, at 251 agreed the *Lategan* definition, and was apparently supported in this view by CURLEWIS, JA, at 255. DE VENTERS, JA, at 260 and STRATFORD, JA, at 262 were of the view that the expression "has accrued to or in favour of any person" meant that the money had become "due and payable". This controversy persisted for many years until the decision in *Hersov's Estate v Commissioner for Inland Revenue,* 1957 (1) SA 471 (AD), when CENTLIVRES, CJ, at 480-81 expressly disapproved the *Lategan* definition and approved the concept that "accrued" meant "due and payable". Whichever approach is adopted, the receipt of money which has been stolen does not entitle the receiver to it, nor does it become due and payable to the receiver. On either approach the money in the present case did not accrue to the respondent.

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A perusal of the definition of "gross income" in section 8 of the Act indicates that a number of situations are dealt with in amplification of the main definition, all of which involve the situation where money is received without an obligation to return it or money is received to which the taxpayer is entitled. The theme running through the definition is that amounts are received by or accrued to a taxpayer if they are earned rather than illegally obtained by the taxpayer. The result sought for the respondent does not require words to be read into the statute, but is the natural consequence of the statute as presently phrased, bearing in mind the manner in which the words used in the statute have been judicially interpreted. The respondent does not contend that the mere fact that the money in question was received by unlawful activity disentitles it from being treated as income for the purposes of the Act. However, it is the respondent's contention that the cases referred to by the appellant deal width situations where a profit is being taxed as a result of such unlawful activities: see *Minister of Finance v Smith* [1927] AC 193 (P.C.). It is

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not the origin of the money which is important, but whether or not the taxpayer has a right to receive it or to retain it.

Judgment

Fieldsend CJ: This appeal concerns the novel and interesting question whether amounts stolen by a person during a year of assessment form part of his gross income and so become assessable to tax.

As the case was presented to us it is unnecessary to consider the facts in any detail. It is sufficient to say that over a period of four years the respondent was in a position of responsibility with the Government which entailed his being entrusted with funds for secret operations. He took advantage of his position to obtain from the Government from time to time more money than was legitimately required for official purposes and to appropriate this for himself, either by putting it in his own bank account or by using it to buy goods for himself. Over the period he stole some $58 000. He was convicted and sentenced to imprisonment, a part of which was suspended on condition of repayment. The whole amount has, in fact, been repaid by him.

The respondent was assessed to tax on the amounts he stole, and to penalties in terms of section 35 of the Income Tax Act [*Chapter 181*]. He appealed to the Special Court, which allowed his appeal on the ground that the amounts stolen were not "received" by him within the meaning of that word in section 8 (1) of the Act. It is against this decision that the appellant, the Commissioner of Taxes, now appeals.

The argument for the appellant is simple. He contends that gross income as defined by section 8 (1) of the Act means every amount received by or accrued to or in favour of a person in any year of

assessment, and that what the respondent stole he received in terms of that definition. The respondent's argument is equally simple. It is that the money the respondent took never became his, despite his intention to treat it as his own, and was therefore never received by him within the meaning of that word as used in the definition of gross income in section 8.

Mr *Andersen* for the appellant concentrated his attack upon that part of the judgment which he said restricted the definition of gross income so as to include only money to which the taxpayer was entitled or, as he submitted was held by the learned President, money which was not claimable by someone else. The passage of the judgment where this conclusion is said to have been reached is as follows:

> "Stolen money, therefore, would seem never to become the property of the thief, just as borrowed money does not become the property of the borrower, except in the technical sense referred to; because of the co-equivalent obligation to repay it which arises from the moment it comes into his possession.
>
> If this is the correct approach, and is a properly analogous situation, then I am constrained to the conclusion that these sums of stolen money are not "gross income" tin the appellant's hands. It matters not that they were

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> acquired illegally so much, as that his possession of them was not such as to make them received by or accrued to him, for he was really possessing someone else's money. That is not to say, that in no case will money or assets obtained with a taint of illegality not be "gross income", because it must depend on whether it has actually accrued to the taxpayer or is effectively claimable by someone else, as it was in the case. It is there fore quite possible that in other circumstances such receipts may constitute 'gross income'."

As I read this passage I think that the basis of the learned President's judgment was that the respondent was not taxable because the money that he took never became his own (save in the technical sense) but always remained the Government's money. It was argued that he went too far in saying that the money was not received because it was "effectively claimable by someone else". If the learned President did mean that the existence of any claim for refund of money against a recipient would result in there being no receipt in terms of the section, then I would not agree with him, but I do not read his judgment as going so far.

The essential issue in this appeal is whether the respondent received the money he stole within the meaning of that word in section 8 (1) of the Act. The section reads:

> " 'Gross income' means the total amount receipted by or accrued to or in favour of a person or deemed to have been received by or to have accrued

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> to or in favour of a person in any year of assessment from a source within or deemed to be within Rhodesia excluding any amount (not being an amount included in 'gross income' by virtue of the provisions of any of the following paragraphs of this definition) so received or accrued which is proved by the taxpayer to be of a capital nature and, without derogation from the generality of the foregoing, includes.... "

Then there follow paragraphs (a) to (q) which deal with particular types of receipts or accruals which might otherwise be regarded as of a capital nature, or which need to be quantified in a particular way or in respect of which there may be some doubt.

The well-recognized approach to the interpretation of taxing statutes was reiterated in *Commissioner for Inland Revenue v Delfos,* 1933 AD 242 at 253, and WESSELS, CJ, went on to say in regard to the equivalent definition section in the South African Act at page 254:

> "I do not understand this to mean that in no case in a taxing Act are we to give to a section a narrower or wider meaning than its apparent meaning, for in all cases of interpretation we must take the whole statute into consideration and so arrive at the true intention of the Legislature. When, however, we are dealing with a definition which is the very basis of the Act, it can only be in very exceptional circumstances that we can modify the plainly expressed meaning of the words. In cases other than the basic definition of gross income the difficulty is not so great, but to modify the plain words of the Legislature in a crucial definition such as the one we are dealing with is to strike at the very heart of the statute. We are dealing with the most important definition in the whole statute, and it would indeed be bold to say that the Legislature did not mean by it exactly what it said, especially when we remember that the system of taxation in our law differs much from that of other taxing Acts. The whole structure of the Act is based on this definition, and we have no right to say that the Legislature did not intend to throw its net out as widely as the definition states."

Perhaps one should add "or as narrowly" to round off the passage. That appeal was concerned with whether a bad debt which had accrued and been written off in one tax year but recovered in a later year was taxable as an amount received in the later year. It was held that although the amount had accrued in the earlier year it was taxable as having been received in the later year

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and that "received by or accrued to" must be read disjunctively and not as meaning "received by and accrued to". The case is therefore of little direct assistance in solving the present problem.

The obvious starting point in the inquiry is the ordinary meaning of the words "to receive". The first and principal meaning given in the Shorter Oxford Dictionary is:

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> "To take into one's hand, or into one's possession (something held out or offered by another); to take delivery of (a thing) from another, either for oneself or for a third party."

Subject to a qualification in regard to taking delivery for a third party, I can see no justification for giving the word any different meaning in section 8. The Act is concerned, as it says, to provide for the taxation of incomes, and in the ordinary way that means what is earned or gained from another. The very context of section 8 (1) itself indicates that it is concerned with what comes to the taxpayer from another. The particular cases dealt with in paragraphs (a) to (q) are all of that nature. They cover among other things amounts received by way of annuity, for services rendered, on withdrawal from a pension fund, as alimony, and as premiums for the right to use property. They do not cover, with the possible special exception of unsold stock, anything which has not been provided by someone else.

I can see no warrant on the face of the statute for construing the word "received" in section 8 in any but its ordinary meaning. To extend it to cover a unilateral taking such as theft, which in any event confers no right upon the taker to the things taken, would be to give the word a meaning that could not be justified on any rational construction of the Act as a whole. In short a thief takes, he does not receive; and that is what the respondent in this case did.

The Commissioners contentions may superficially appear to have substance in them when what is stolen is money, but they must be tested on the basis of whether they are sound if what is stolen is a corporeal thing. In short, is a burglar taxable on what he steals? I appreciate that the relevant English tax legislation is based upon taxation of the profits of trade, but the remarks, albeit *obiter*, of LORD DENNING in *Griffiths* (*Inspector of Taxes*) *v J P Harrison* (*Watford*) *Ltd.* [1963] AC 1 at page 20 are of interest in showing the need for a common sense approach.

He said:

> " . . . take a gang of burglars. Are they engaged in trade or an adventure in the nature of trade? They have an organisation. They spend money on equipment. They acquire goods by their efforts. They sell the goods. They make a profit. What detail is lacking in their adventure? You may say it lacks legality, but it has been held that legality is not an essential characteristic of a trade. You cannot point to any detail that it lacks. But still it is not a trade, nor an adventure in the nature of trade. And how does it help to ask the question: If it is not a trade, what is it? It is burglary and that is all there is to say about it ."

In my view the taxpayer in the appeal before us did not receive the money, he stole it.

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FIELDSEND CJ

This I think is a sufficient basis upon which to decide the appeal, but I would not be doing justice to the argument if I were to leave the matter there.

It was common cause that the word "received" was not to be given its ordinary wide and that it had to be limited at least to meaning "received as part of the recipient's patrimony". This concession, if it can be rightly so called, by the Commissioner is obviously correct. A person who borrows a lawn-mower from his neighbour receives it from him in the broadest sense of term, but would clearly not receive it within the meaning of the word in the definition. The same is the case in regard to a person who obtains from another a sum of money as a loan, *C.I.R v Glenn & Co. (Pty.) Ltd.,* 1955 (3) SA 293 (AD) at page 301B. There SCHREINER, JA., said:

> "It is difficult to see how money obtained on loan can, even for the purposes of the wide definition of 'gross income', be part of the income of the borrower, any more than the value of the tractor which a farmer borrows is to be regarded as being income received otherwise than in cash. Though a borrowing for use differs from a borrowing for consumption in that the borrower in the former case does not become the owner of the thing borrowed and must return it in *specie*, while in the latter case he does become the owner and is only obliged to return what is similar, for present purposes there would seem to be no difference between the two cases. Nor would it seem to make any difference whether or not hire is paid for the use of the tractor or interest for the use of the money. Neither in the case of the borrowed or hired tractor nor in the case of the borrowed or "hired" money does it seem to accord with ordinary usage to treat what is borrowed or hired as a receipt within the meaning of the definition of 'gross income', . . . It certainly Is not every obtaining of physical control over money or money's worth that constitutes a receipt for the purposes of these provisions. If, for instance, money is obtained and banked by someone as agent or trustee for another, the former has not received it as his income. At the same moment that the borrower is given possession he falls under an obligation to repay. What is borrowed does not become his, except in the sense, irrelevant for present purposes, that if what is borrowed is consignable there is in law a change of ownership in the actual things borrowed."

This conclusion is reinforced by a case such as *Geldenhuys v Commissioner for Inland Revenue,* 1947 (3) SA 256 (C.), in which it was held that a usufructuary did not receive the money as part of his "gross income" for the purpose of the equivalent South African tax legislation. STEYN, J, at page 266 held that "received by" must mean "received by the taxpayer on his own behalf and for his own benefit".

Whether or not the respondent in this appeal received the money on his own behalf and for his own benefit must depend not only on his own intention but on the intention of the person who passed the money on to

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him. To return for the moment to the lawn-mower, the person who obtains a lawn-mower from his neighbour genuinely intending to return it does not receive the mower in his own right; nor does a person who fraudulently induces his neighbour to lend him his mower, intending to keep it for himself. The intention of the taker cannot of itself result in him receiving the thing in his own right. He can only receive the thing in his own right if the giver intends that result as well.

Applying this to the present appeal, the Government never intended that any of the money it paid to the respondent should be his to do with it as he liked. It was all paid to him to be applied

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to a specific Government purpose. Accordingly at no time did the respondent receive it on his own behalf and for his own benefit. In my view, therefore, it did not fall within his gross income and he should not have been taxed on it.

I would dismiss the appeal and order in terms of section 15 (2) (gg) of the Act that the respondent's costs be allowed as a deduction.

Baron JA: I agree.

Goldin AJA: I agree.

State Attorney, attorney for the appellant.

Scarlet & Holderness, attorneys for the respondent.

S AND T IMPORT EXPORT (PRIVATE) LIMITED v CONTROLLER OF CUSTOMS AND EXCISE 1981 ZLR 284

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA and Goldin, AJA

1st and 23rd June, 1981

Flynote

Contract - implied term - when term may be implied in contract.

Court - appropriate form of order when court intends to give judgment for defendant.

Headnote

Courts will not import implied terms into contracts merely "because the parties would have been wise to agree upon such terms or because the terms are reasonable or would avoid inequity or hardship. The judicial tendency is to imply terms only in the clearest cases.

The appellant claimed payment of $36 600 from the Government in terms of a scheme, designed to provide an incentive to exporters, whereby the Government paid exporters a percentage of the value of their exports. The appellant's claim related to goods which it had exported but for which it had not received payment from the country to which the goods had been consigned. The Government refused to pay the appellant in terms of the scheme, contending that the scheme contained an implied term to the effect that incentive payments would be made only where the purchase price for the exports conceded was remitted to this country. On appeal from a decision of a judge of the General Division upholding the Governments contention.

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Held that the scheme contained no implied term such as that claimed by the Government.

Held, further, that whenever a court dismisses a plaintiff's claim it should grant judgment for the defendant if the defendant has sought an order to that effect, unless the court intends to grant absolution from the instance.

Authorities cited:

Cheshire & Fifoot, *The Law of Contract,* 6th edition, page 151;

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Kerr, *The Principles of the Law of Contract*, 3rd edition, page 221;

Techni-Pak Sales (Pty.) Ltd v Hall, 1968 (3) SA 231 (W);

The Moorcock (1889) 14 PD 64;

Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206;

Minister of Agricultural Technical Services v Scholtz, 1971 (3) SA 188 (AD);

West End Diamonds Ltd v Johannesburg Stock Exchange, 1946 AD 910;

Herbstein & van Winsen, *Civil Practice of the Superior Courts of South Africa*, 2nd edition, page 422;

Zindoga v Theron & Anor., AD 96/1978 (unreported).

AP de Bourbon for the appellant.

BWK Whaley for the respondent.

Judgment

Fieldsend CJ: The appellant is a firm carrying on business as an import and export agent in this country. In 1972 the Government introduced a scheme known as the Export Incentive Scheme under which it offered to pay exporters registered under the scheme a percentage of the value of those goods which qualified and which were exported.

It is common cause that the appellant exported a quantity of goods which qualified under the scheme and was paid or became entitled to the incentive on those goods in terms of the scheme. The respondent maintained, however, that the Government was entitled to set off against; the sums to which the appellant became entitled the amount of some $36 600, which was the export incentive it had paid to the appellant in respect of exports for the year ended the 31st March, 1977. This sum it alleged it was entitled to set off because the purchase price of the goods had not been remitted to this country.

It must be made clear that the failure to obtain remission of the money to this country was due to no fault of the appellant. The goods had been exported to Zaire, there had been compliance

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with all exchange control regulations and irrevocable letters of credit were obtained, payment of which was guaranteed by the National Bank of Zaire. Due to the foreign exchange difficulties of that country the National Bank was unable to honour its guarantee. Despite visits to Zaire by Reserve Bank officials from this country it has been impossible as yet to resolve these difficulties, although efforts are being made by the World Bank to regularize the whole position.

The first point for decision is whether there was an obligation on the appellant to refund any incentive payment it had received if it did not receive in this country the purchase price of the goods exported. This involves an examination of the terms of the scheme which constituted

FIELDSEND CJ

the offer made by the respondent which the appellant accepted by joining the scheme, exporting goods in terms of it and so receiving or becoming entitled to payment of the incentive. The relevant portions of the documents in which the terms of the scheme were made known to the appellant for the period in question read as follows:

> "A tax-free payment of 5 per cent. (later 10 per cent) of export earnings will be paid to registered exporters on the exports of qualifying goods. The payment will be based on the f.o.r. value of goods at the point of despatch. The f.o.r. value should not include any prepaid taxes imposed by the Government of the country to which qualifying goods are exported. Payments will be made within one month after the month in which the export was made and the claim form submitted."
>
> .....
>
> "Claims will be made on the value applicable at the time the documents are presented to Customs. Adjustments agreed between the exporter and the purchaser, e.g., discounts or credits for returned goods must be included in the annual audit certificate and payment made or claimed for any over or under payments when the audit certificate is sent in." "No adjustments will be made in respect of gains or losses arising outside the control of the exporter and purchaser, e.g., losses or gains due to fluctuations in currency value."
>
> .....
>
> "No adjustments will be made in respect of gains or losses arising outside the control of the exporter and purchaser, e.g., losses or gains due to fluctuations in currency value."
>
> .....
>
> "Whilst the export incentive scheme contains a number of automatic checks against abuse it will be necessary for an annual audit certificate to be produced by each exporter which has been signed by his auditor. The purpose of this form is to provide some proof that the value of qualifying goods which have been exported has in fact been received."

The audit certificate was required to show:

> " . . . value of qualifying goods exported, based on the f.o.r. value at the point of despatch, during the accounting year in question; value received therefor related to the f.o.r. value at the point of despatch;
>
> the discrepancy between these two figures, if any, and what part of the discrepancy is accounted for by goods which have been returned to the exporter and for which adjustments have already been made with the Customs authorities.

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As to the balance of the discrepancy, explanations must be provided.";

and it was said that:

> "Failure to provide the audit certificate within the period indicated above will result in the immediate suspension of incentive payments."

The claim form to be submitted contained the following undertaking to be signed by the exporter:

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> "I undertake, in the event of all or part of this consignment being returned to sender, to notify the Rhodesia Department of Customs and Excise, and I understand. that the amount of export incentive claimed thereon will be debited against me."

There was therefore no express term obliging the appellant either to secure payment for the exported goods in this country, or to refund the incentive if it did not. The respondent, however, pleaded that the payment of the incentive to the appellant was made on the basis that payment for the goods exported would be made by the purchaser in this country and that as this had not been done in respect of the $36 600 in question in the action it was entitled to set this sum off against any sums owing to the appellant.

The learned trial judge held that it was an implied term of the contract that the appellant would refund the incentive bonus if the purchase price of the exported goods was not remitted within a reasonable time to this country, whether the failure to secure payment here was due to circumstances beyond the control of the exporter or not, and on the admitted facts disallowed the appellant's claim. He reasoned there could be no doubt that the underlying object of the scheme was to gain the foreign currency which the exports would earn and it is difficult to quarrel with this conclusion. He decided from this and from the details required in the audit certificate that the basis on which the incentive was paid was that the purchase price in foreign currency would be remitted to this country within a reasonable time. In short he decided that it was an implied term of the contract that the purchase price in foreign currency would be remitted to this country within a reasonable time and that if it were not the incentive payment would be refunded by the appellant.

The principles regulating when a court will imply terms in a contract are perhaps more easily stated than applied, especially as judicial attitudes vary to some extent with the times. As is said in Cheshire and Fifoot, *The Law of Contract*, 6th edition (1964), page 151:

> "There is a fashion in judicial technique as in other human activities. doctrine is invented, tested and adopted; it is applied with avidity and then, by a natural and not unhealthy reaction, deprecated or at least modified, until at last it settles into its place within the general framework of the common law. The Moorcock is not exempt from this process. It is still full of life, ready to repair an obvious oversight. But it is not unfair to suggest that in recent years the prevailing note has been one of caution."

FIELDSEND CJ

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The basic principle is that a:

> " . . . term can only be implied . if it is such a term that it can confidently be said that if at the time the contract was being negotiated some one had said to the parties, 'what will happen in such a case', they would both have replied. 'Of course, so and so will happen; we did not trouble to say that; it is too clear'."

(Kerr, The Principles of the Low of Contract, 3rd edition, page 221).

This, however, is subject to the additional principle that:

> "The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough."

(*Techni-Pak Sales (Pty.) Ltd. v Hall,* 1968 (3) SA 231 (W) at 236E-F). It is not of great assistance to look at cases in which the principles have been applied, but with the possible exception of *The Moorcock* (1889) 14 PD 64 - a case which it has been said must be applied with caution, *Shirlaw v Southern Foundries* (1926) Ltd. [1939] 2 KB 206 at 227 - terms have, particularly in South Africa, been implied only in the clearest cases. Examples include a term that a bull sold for stud purposes was fertile (*Minister of Agricultural Technical Services v Scholtz,* 1971 (3) SA 188 (AD.)), and that, in a contract between a company and the stock exchange for an official quotation of the company's shares, the quotation could be discontinued if the company was being wound up on the ground of insolvency (*West End Diamonds Ltd. v Johannesburg Stock Exchange,* 1946 AD 910).

An instructive illustration is to be found in *Techni-Pak Sales* (*Pty.*) *Ltd. v Hall,* 1968 (3) SA 231 (W.). In brief, Hall, a shareholder in the plaintiff company, owed it money repayable out of certain royalties which it was anticipated would come to him from the company through an associated company, with the proviso that should the plaintiff company be placed under compulsory liquidation the loan would be re-payable on demand. In the event the associated company ceased to have the right to receive royalties from the plaintiff company, and it was con tended that there was an implied term that in such an event the loan became repayable on demand. In considering the plaintiff company's contention COLMAN, J, said at page 237:

> "Although it is not expressly so stated in any of the authorities known to me, it is, I think, equally clear that the implication of a term will not be justified merely because the bargaining power of the parties was so unequal that if one of them had insisted on the term the other would probably have been driven to agree to it.

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> That may well have been the defendant's position here. But, in my judgment, a finding that it was would not assist the plaintiff, for the doctrine of implied terms relates not to what the parties might have agreed to or would probably have agreed to after further negotiation, had there been any, but to what they must have intended at the time when they negotiated and agreed as they did. . . .
>
> In seeking to apply these principles to the case before me, I must inquire whether it can be confidently said that the defendant, had he been asked on 29th April, 1963, 'what would happen if the royalties ceased to be payable', would have replied, 'of course, in that event my indebtedness to the plaintiff will be payable on demand or within a

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> reasonable time thereafter'. I must answer that question in the negative. It seems to me far more probable that the defendant, an articulate man, would have said something like this: 'The only reason why I owe money to the company is that I have been inadequately recompensed for what I put into the venture in the hope of getting profit from it. I have not up to now been obliged to pay my debt otherwise than out of profits and I am certainly not now accepting the less favourable position that I may have to pay even if I am to receive no share of the profits which the plaintiff makes, unless I can and do exercise my option to take up more shares. You have told me that in the case of a liquidation the law will oblige me to pay. I must accept that; but further **I** I am not willing to go.'
>
> Now, if that is probably, or possibly, the attitude which the defendant would have taken up, there can be no implied term."

The terms of this contract are that payment of the incentive will be made within one month after the month in which the export was made and the claim form submitted, and on the f.o.r. value of the qualifying goods. Adjustments of this price agreed between the exporter and purchaser in respect of, for example, discounts or credits for returned goods must be disclosed whereupon the incentive payment will be varied. No adjustments will be made in respect of gains or losses outside the control of the exporter or purchaser, for example, losses or gains due to fluctuations of currency values. It seems that this last term could well cover a loss to the exporter due to legislation in the foreign country preventing payment by the purchaser, because such payment would be in contravention of sanctions then operating against this country. If this is so the scheme specifically provides that no adjustments will be made in such an eventuality. Finally the undertaking in the claim form to accept the debit in respect of an export incentive received in respect of any goods returned to the sender appears to limit the exporter's liability to refund what he has received.

Taking into account the dominant position of the respondent in this contract and the fact that, despite the other detailed provisions in the

documents which set out the terms on which the incentive is paid, no provision is made for the eventuality now relied upon, the scales are heavily weighted against the implication of the term now sought. In particular it is noteworthy that in the specimen certificates attached to the papers making known the scheme there is a reference to goods payment for which has not been made but which can reasonably be expected. There is no mention of the payment being expected within a reasonable time. It certainly cannot be implied as a matter of necessity on the face of the contract alone that the appellant was liable to repay the incentive if payment for the exports was not received in the country within a reasonable time.

But the respondent relies upon its allegation in paragraph 8 (c) of the Plea that the payment of the incentive "was made by the Defendant to the Plaintiff on the basis that payment for the goods exported would be made by the purchasers in this country". There was no evidence of the surrounding circumstances in which this agreement was reached to support this allegation, and it is certainly not the only inference to be drawn from the terms of the agreement, and from what might be regarded as facts which were common knowledge, that this was the basis of the contract. The value of foreign currency earnings could be realized not only by the transfer of foreign currency to this country but also by the building up of a credit balance in a foreign country which could be used to purchase goods from that country without a drain on local

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currency. The fact that at the relevant time there were no goods that this country may have wanted from Zaire was not a question which, even assuming it to be relevant, was canvassed in evidence.

It may be that the respondent would have said if asked by the officious bystander that he would have expected repayment of the export incentive if the purchase price of the goods was not brought to this country. But that is not the test: a contract involves two parties, and to imply the term one must be able to say that the appellant too would have expected to make repayment in those circumstances. His answer could have been twofold. First, the respondent, as the Government, could have imposed conditions through exchange control requirements to ensure that payment was received either before or contemporaneously with delivery of the goods. Secondly, it is not unlikely that he would have replied that the incentive payment was made to induce him to take the risk of not being able to reclaim his purchase price because of the dangers of exporting during sanctions and that he certainly would not expect to lose both his purchase price and the incentive payment. If

FIELDSEND CJ

either of those answers were probable or even possible there can be no term implied such as that for which the respondent contends. There is nothing to show that this would not have been the appellant's answer, and in my view there is no warrant for implying the alleged term. In my opinion the learned judge was wrong to hold that there was an implied term that in the circumstances there was an obligation on the appellant to refund any of the incentive payments he received. The respondent had therefore no right to withhold payment of any part of the sum claimed and there should have been judgment for the appellant for the additional sum of $36 600. The appellant is entitled to its costs below and to the costs of appeal.

There is one further matter which concerns a part of the appellant's claim in the court below on which no evidence was led. This was not pursued on appeal. The appellant considered that the judgment below did not preclude it from pursuing this claim, if it were good, by further action because the order made was "that save for the above amounts the plaintiff's claims be and are hereby dismissed with costs". This, it was said, amounted to absolution from the instance. There is certainly authority for that proposition in Herbstein and van Winsen, *Civil Practice of the Superior Courts in South Africa*, 2nd edition (1966), page 422, and *Zindoga v Theron and Lourens,* Appellate Division Judgment No. 96/78 (unreported). In view of the uncertainty which seems to prevail I think that where, as here, the prayer is for Judgment for the defendant, that is the order that should be made unless for some proper reason it is considered that there should be absolution from the instance.

Baron JA: I agree.

Goldin AJA: I agree.

G Seirlis, attorney for the appellant.

State Attorney, attorney for the respondent.

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MONTICELLO (PRIVATE) LIMITED v EDGERTON 1981 ZLR 292

Court **General Division, Salisbury**

Civil Application

Pittman J

20th May and 24th June, 1981

Flynote

Arbitration - review of arbitrator's award - effect of clause in submission providing that award should be final and binding and not subject to appeal.

Headnote

Where a submission to arbitration contains a clause to the effect that the arbitrator's award will be final and binding on the parties, the parties will be bound by decisions of the arbitrator reached through misconduct of the proceedings which does not involve dishonesty or a departure from a strict standard of honour.

Authorities cited:

Rhodesian Electricity Supply Commission v Joelson Bros & Bardone (Pvt) Ltd., 1977 (2) RLR 85 (G.D.); 1977 (4) SA 639 (R)

Hogg, *The Law of Arbitration*, pages 94 and 96;

Goldschmidt & Anor v Folb & Anor., 1974 (1) SA 576 (T).

A P de Bourbon for the applicant.

R Jagger for the respondent.

Judgment

Pittman J: This is an application for the review of an award by an arbitrator. The applicant is a company that carried on business as a building contractor. About five years ago, the respondent was the owner of a property known as 288, Montclaire Close, Borrowdale. He engaged a contractor to build a house for him there. The contractor went into liquidation shortly after building work was commenced, and the respondent engaged the applicant to complete the work. Several disputes arose between the parties, and it appears that after some time the work came to a halt. The respondent says that he refused to make payment to the applicant for work already done, in order to compel it to complete

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the contract. The dispute dragged on for a long time, but eventually the parties agreed to submit it to arbitration by an architect, Mr Naude.

[The learned Judge then outlined the history of the arbitration proceedings and described the arbitrator's award, and continued:]

The applicant applied originally to this court for the award to be amended: (1) by allowing it interest on $5 202,20 at 6 *per centum per annum* from the date of the award to date of payment; (2) by an order that the applicant's costs and all the costs of the arbitration be borne by the respondent; and (3) that the award, so amended, be made an order of court.

At the start of the hearing of the application, Mr *de Bourbon*, for the applicant, withdrew the other claims and persisted only with a modified application for amendment of the award as to costs, by saying that it should be remitted to the arbitrator for reconsideration by him. This modification was made in accordance with the ruling in *Rhodesia Electricity Supply Commission v Joelson Bros & Bardone (Pvt) Ltd.,* 1977 (2) RLR 85 (GD) at 96F; 1977 (4) SA 639 (R) at 646E:

> "This court has no power to make its own order regarding the costs of the arbitration; and so under section 19 of the (Arbitration) Act I shall remit the matter of those costs for reconsideration by the arbitrator."

The submission in the present case did not specifically empower the arbitrator to award costs, but he had this power by virtue of section 4 of the Arbitration Act [*Chapter 12*], as read with section 14 of the Schedule to the Act.

What is of decisive importance in this case is whether the submission deprives this court of the power to review the award. Clause 13 of the submission reads as follows:

> "13. The parties to the arbitration agree to regard any - decision that the Arbitrator may make as final and binding upon them and shall not be subject to appeal."

Mr *de Bourbon* argued that this clause 13 must be interpreted as it stands, because no extrinsic evidence would be admissible to assist in interpreting it. die said that the express exclusion of the right of appeal indicated that the right of review was not covered by the clause. He also argued that it was indisputable that clause 13 did not cover unlawful or irregular conduct by the arbitrator. For example, if he accepted a bribe from one of the parties, or if he behaved unjudicially, for example, by refusing to hear the evidence of a witness, the injured party would

not be barred by clause 13. He added that the applicant had been substantially successful in the arbitration, that the arbitrator had acted unjudicially in failing to award all costs in its favour, and that consequently this court had jurisdiction to remit the matter for reconsideration by the arbitrator.

Mr *Jagger* conceded that clause 13 was subject to an implied qualification that it did not cover illegal conduct by the arbitrator, but he claimed that, subject only to that implied qualification, it

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covered all decisions made by the arbitrator in the carrying out of his functions as such.

A submission is a contract, and the ordinary rules for the interpretation of contracts must therefore be applied to clause 13. Even if counsel were in disagreement on the point, I would have no hesitation, applying the officious bystander test, in finding that clause 13 contains an implied qualification to the effect that it does not cover any decision reached dishonestly by the arbitrator.

However, no accusation of dishonesty has been made against him, and I therefore turn to consider whether, applying the same test, I must find that clause 13 contains a second implied qualification to the effect that it does not cover any decision reached by the arbitrator through misconduct of the proceedings. My meaning of "misconduct" in this context must be clearly understood. I refer to Quintin Hogg, as he was then called, in *The Law of Arbitration,* 1936, at page 94:

> "Misconduct in an arbitrator Is sometimes divided roughly Into actual misconduct and legal misconduct. This distinction is not always accurately defined, but for the purposes of this chapter actual misconduct means misconduct in which there is at least some suggestion of a departure from a strict standard of honour, and legal misconduct means misconduct which reflects only on the competence of the arbitrator as a judge. To some extent the former type of misconduct may be regarded as a positive violation of everyday morals, and the latter a breach of certain positive rules which are not always observed or known to laymen."

Later, at page 96, Hogg described legal "misconduct" by saying:

> "This consists in the infringement of one of the rules which arbitrators as judges are bound to observe in their conduct of the reference...."

It must be understood that by "misconduct" I am now referring to legal misconduct in the sense used by Quintin Hogg. Applying again the test of the officious bystander, I feel unable to hold on the balance of probability that the parties would have told him that clause 13 must be read subject to a further implied qualification that it did not cover

any decision reached by the arbitrator through misconduct of the proceedings not motivated by dishonesty.

My reasons for this opinion are, first, that the parties had already shown their confidence in his ability to conduct the arbitration satisfactorily by agreeing that he should be the arbitrator. Secondly, I bear in mind what was said by HIEMSTRA, J, in *Goldschmidt & Anor v Folb & Anchor.,* 1974 (1) SA 576 (T) at 576G;

> "The essence of arbitration is that the parties want to stay away from the Courts in order to save expense and to have a speedier decision of their disputes (VOET, 4.8.1.)."

It seems very unlikely to me that either of the parties would have been willing to nullify their presumed aims in resorting to arbitration by being able Its complain to this Court if the arbitrator, a layman, had failed to observe any rule, however minor, of judicial practice.

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Section 12 (2) of the Act provides:

> "12. (2) Where an arbitrator or umpire has misconducted the proceedings or an arbitration or award has been improperly procured, the Court may set the award aside and may award costs against any such arbitrator or umpire personally."

It would clearly be *contra bones mores* for the parties to agree to nullify this provision by interpreting clause 13 as obliging them to accept as final and binding a decision of the arbitrator reached through actual misconduct. But there is no reason why they should not be able to agree that a decision reached by him through legal misconduct should bind them.

In my opinion, therefore, clause 13 is an effective bar to tile applicant's claim, which must therefore fail. I must add that apart from this reason, I would have come to a similar conclusion on the ground that the applicant has in any event failed to establish that the arbitrator was guilty of legal misconduct in making his order as to costs. On the incomplete and obscure information before me, I find it impossible to make such a finding, and the applicant has therefore failed to discharge the burden of proof upon it.

The respondent asked for an order for attorney and client costs against the applicant, but I am not satisfied that the application was brought improperly.

Accordingly, the application is dismissed with costs on the ordinary scale.

Seirlis, Higham & Lewis, legal practitioners for the applicant.

Coghlan, Welsh & Guest, legal practitioners for the respondent.

FINANCE CORPORATION OF RHODESIA LIMITED v HASSAN 1981 ZLR 296

Court **General Division, Bulawayo**

Newham, J

15th and 19th June, 1981

Flynote

Cession - deed of suretyship in respect of lease - rights under - lease ceded - no separate formal cession of deed of suretyship necessary.

Practice - stare decisis rule - departure from - decision of South African Appellate Division followed in preference to earlier decision of High Court of Southern Rhodesia on the same point.

Headnote

In 1973 the defendant had, in terms of a suretyship agreement, bound himself as surety and co-principal debtor with a company known as Universal to pay to another company, known as NASH, all sums of money which Universal might then or thereafter owe to NASH or to NASH's successors in title or assigns in terms of a contract of lease of certain machinery. In 1974 NASH

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ceded all its rights under the original lease agreement to the plaintiff.. There was no specific cession of the suretyship agreement, although the lease agreement and the suretyship agreement were delivered to the plaintiff. Universal were subsequently placed in liquidation and the plaintiff sought to recover the sums still owing to it under the lease agreement from the defendant as surety and co-principal debtor. The defendant denied liability on the grounds that the plaintiff had no rights of action against him in the absence of a cession of the surety agreement to the plaintiff.

Held, that, unless a proper construction of the surety deed showed that the surety undertaking was given solely and exclusively in favour of a particular creditor, separate formal cession of the deed of suretyship was unnecessary.

Cases cited:

Pizani and Anor v First Consolidated Holdings (Pty) Ltd., 1979 (1) SA 69 (AD) (followed);

Hasson Trading Company (*Pvt*) *Ltd v Hopkins and Anor,* 1961 R & N 161 (SR) (not followed).

NEWHAM J

C L Mercer for the plaintiff.

A P de Bourbon for the defendant.

CAV

Postea (19th June, 1981).

Judgment

Newham J: On the 30th November, 1973, Universal Shopfitters and Joiners (Private) Limited (hereafter called Universal) concluded an agreement of lease with Rhonya Industries (Private) Limited (hereafter called Rhonya), in terms of which Universal leased from Rhonya certain industrial plant and machinery, of which Rhonya was the owner, for $37 828,20, payable in 60 monthly instalments of $630,47. On the same day, Rhonya ceded to NASH Finance Corporation (Private) Limited (hereafter called NASH) all its rights arising out of the agreement of lease and all its rights of ownership in the leased goods.

Also on the 30th November, 1973, the defendant, Moosa Esof Hassan, bound himself as surety and co-principal debtor with Universal to pay NASH all sums of money which Universal might then or from time to time thereafter owe to N A.S.H or to its successors in title or assigns. The final clause of the suretyship agreement provides:

> "what this suretyship shrill apply to, cover and secure yourselves and your respective successors in title, orders or assigns."

On the 17th May, 1974, NASH and the plaintiff, Finance Corporation of Rhodesia Limited (called Fincor), concluded an agreement known as a "Block Advance Agreement", which was

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expressed to be one

> "WHEREBY Fincor agrees to grant, at its discretion, frown time to time, financial facilities to the Trader [N.A.S.H.] on the security of instruments of debt (including, but without restricting the generality, negotiable instruments, bonds, written contracts or agreements containing the terms and conditions of any transaction of purchase and sale or letting and hiring for advancing of money, all for which are herein called "`instruments") subject to the following terms and conditions: -
>
> 1 (a) In consideration of these premises the Trader shall and will from time to time deliver to Fincor instruments of a value as agreed upon from time to time tend any relative ancillary or incidental undertaking, guarantees, suretyships, policies, bills or notes (hereinafter collectively referred to as "documents") as general and continuing security for all or any sum or sums of money which he may now or at any time hereafter owe, or for which he may be or become indebted to Fincor from whatever cause arising and for the due performance and discharge of any other obligations which he may now or at any time hereafter have towards Fincor

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> under this Agreement, and he does hereby pledge and cede unto and in favour of Fincor all the rights, titles and interests which he may now have or hereafter acquire under and in terms of the said instruments and/or documents.
>
> (b) And similarly insofar as the Trader may at the date hereof already have delivered to Fincor any instruments or documents, such instruments or documents shall be deemed likewise to have been pledged and ceded unto and in favour of Fincor in terms of this Agreement. And similarly insofar as Fincor may at the date hereof already have granted financial facilities to the Trader, such facilities shall be deemed to have been granted In terms of this Agreement."

Also on the 17th May, 1974, in terms of a document called an "Additional Cession", NASH ceded all its rights arising out of the agreement of lease to Fincor, in terms of the block advance agreement. It is agreed also that, though the lease agreement was ceded by NASH to Fincor in terms of the block advance agreement, there has been no specific cession of the suretyship agreement before the institution of the action, though both the lease agreement and the suretyship agreement were delivered to Fincor.

Universal was placed in liquidation. By then it had changed its name to Unicraft (Private) Limited, but I shall continue to call it Universal. Following upon the liquidation of Universal, the plaintiff terminated the agreement of lease and took possession of the leased property, which it caused to be sold by public auction. Taking into account the rentals paid and the proceeds of the sale of the property, the balance which remained owing by Universal to the plaintiff was $12 326,61.

In its declaration, the plaintiff, alleging that it was the successor in title to N A.S.H., claimed this sum together with interest a *tempore morae* and costs of suit, from the defendant as surety and co-principal debtor. The defendant denied liability on the grounds that the plaintiff had no right of action against the defendant in the absence of a cession of the suretyship agreement to the plaintiff. Defendant denied that the cession of the lease to the plaintiff involved an automatic cession of the suretyship.

The plaintiff reacted to these contentions, raised in the plea filed in June, 1978, by obtaining

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from NASH a document dated the 8th November, 1979 (signed by the liquidator of that company, for it, too, had been placed in liquidation), in terms of which NASH ceded to the plaintiff "in so far as it may in law be necessary" all the rights of NASH under the suretyship agreement. This deed of cession was annexed to the plaintiff's replication.

NEWHAM J

At the trial it was common cause that after the declaration was filed the plaintiff had received a dividend of $1898,27, thereby reducing the plaintiff's claim to $10 428,34.

Since all these facts I have mentioned had been agreed by the time this matter came to trial, no evidence was led.

Mr *Mercer*, who appeared for the plaintiff, explained that the main and crisp point which arose was whether, when NASH ceded its rights in the lease agreement to the plaintiff in terms of the block advance agreement, the right to sue the defendant as surety for the performance of the obligations under the lease agreement passed *ipso jure* to the plaintiff. Mr *Mercer* described the cession of the suretyship agreement effected by the deed signed by the liquidator of NASH and annexed to the replication as providing an alternative basis upon which he relied, "but weakly", for the plaintiff's claim.

It is common cause that, by virtue of the cession of the lease agreement, the plaintiff falls within the meaning of the words "successors and assigns" of N A.S.H., used in the suretyship agreement. Mr. *Mercer* submitted that although the matter could be decided simply on the basis of the wording of the lease agreement, the block advance agreement and the suretyship agreement, he was content to confine his argument to the legal point. Mr. *Mercer* explained that his confidence stemmed from the unanimous decision of the Appellate Division Judges in South Africa in the case of *Pizani and Another v First Consolidated Holdings (Pty.) Ltd.,* 1979 (1) SA 69. In that case, it was held that, in the absence of any contrary indications in the cession or in the deed of suretyship, the cessionary of rights under a contract acquires the cedent's rights against both the principal debtor and any surety without the necessity of a separate cession of the rights against the surety (see per MILLER, JA, at 78H).

Mr *de Bourbon*, who appeared for the defendant, conceded that *Pizani*'s case was strong authority against him. He submitted, however, that this court should find that *Pizani*'s case was wrongly decided or inapplicable and be guided rather by the decision in *Hasson Trading Company (Pvt) Ltd. v Hopkins and Another,* 1961 R & N 161 (SR). *Hasson*'s case was an opposed application for summary judgment heard in the High Court of Southern Rhodesia by MACDONALD, J, as he then was. It was alleged in the summons that the amount claimed in the summary judgment proceedings became due and owing by the debtor company, British Enterprises Ltd., which subsequently had been

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placed in liquidation, to one Hasson, trading as Hasson Trading Company; that promissory

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notes for the amount of the debt were made by the debtor in favour of Hasson Trading Company and that these promissory notes were ceded to the plaintiff. The defendants, Hopkins and another, were not parties to the promissory notes, but it was alleged that they had bound themselves as sureties and co-principal debtors. The suretyship document, which was a letter dated the 26th July, 1957, signed by the defendants, was addressed to Hasson Trading Company. It was produced in evidence by the first defendant and was in the following terms:

> 'We, the undersigned, hereby irrevocably guarantee as surety and co principal debtor, the account of British Enterprises Ltd. with you with renunciation of all benefits of excussion or division of same."

For the purposes of the judgment, MACDONALD, J, assumed without deciding that the validity of the plaintiff's claim against the defendants was not affected by the fact that it was based upon a cession of promissory notes and not upon a cession of the debt itself. MACDONALD, J, said at page 163:

> "The summons does not include an allegation that the plaintiff has received cession of the rights conferred on Hasson Trading Co. by the letter of the 26th July, 1957, and since I must be satisfied before granting summary judgment that a cause of action is disclosed, I requested Mr *May* to satisfy me that it was unnecessary to allege a cession of these rights.
>
> Mr *May* submits that the rights under the letter were transferred automatically as accessory to the principal obligation and that a cession was unnecessary. The defendants, adopting the point raised, contend that plaintiff's failure to allege a cession of the rights under the contract of suretyship is fatal to its claim.
>
> I have considered the various cases and authorities to which Mr *May* has referred me but can find no support for his contention that the rights of a creditor under a contract of suretyship pass automatically with cession of the principal obligation. The case of *Inter-Union Finance Ltd v Dunsterville,* 1956 (4) SA 280 (N) supports the view that cession is necessary, and this view seems to me to be in accord with principle."

The Court allowed an amendment to the summons in that case to include an allegation that the rights under the suretyship agreement had been ceded to the plaintiff, but declined to grant summary judgment as it was clear from their evidence that the defendants did not admit that there had been a cession of the rights conferred by the letter of the 26th July, 1957, and prejudice might result if summary judgment were granted on the summons as amended.

NEWHAM J

In *Pizani*'s case (s*upra),* the facts differed from those in the *Hasson Trading Co.* case, but were very much akin to those in the present case which I have to decide. *Pizani*'s case was an appeal against an order made in the Witwatersrand Local Division upholding exceptions to a plea and directing that certain paragraphs be struck out. The respondent in *Pizani's* case, First Consolidated Holdings, had been the plaintiff in the court below and had sued the two appellants, Pizani and another, for payment of certain sums of money for which they were said to be jointly and severally liable by virtue of separate deeds of suretyship entered into by each of them with the lessor of certain equipment. The suretyship agreements bound the sureties (the appellants) not only to the creditor (the lessor of the machinery) but also to the creditor's "successors or assigns". First Consolidated Holdings, in its declaration, alleged that it sued as cessionary, the lessor under the agreements of lease having ceded to it in writing:

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" . . . all the right, title and interest in and to the above agreement(s) of lease and all rights of ownership in and to the equipment referred to above."

First Consolidated Holdings alleged further that, upon an unspecified date, the deeds of suretyship were also "duly ceded" to it by the creditor. It appeared also from the declaration that the principal debtor was placed in liquidation, and that, as a result thereof, the agreements of lease were terminated and First Consolidated Holdings placed in possession of the subject matter of the leases. First Consolidated Holdings then claimed from the sureties in respect of each of the leases payment of the arrear rental owing, interest thereon, and damages, after taking into account the value of the equipment of which it had taken possession.

Pizani and another filed a joint plea in which they admitted, *inter alia*, that they had respectively signed the deeds of suretyship, but denied liability to First Consolidated Holdings upon a number of grounds, to some of which the latter excepted. Amongst these grounds, which emerged more fully in argument than from the pleading in that case, was the ground that the cessions of the suretyship agreements might not have taken place simultaneously with the cession of the leases and therefore the sureties were released from their liabilities consequent to the cession. In the court below, the learned judge assumed in favour of Pizani and another that the cessions of the deeds of suretyship were not effected simultaneously with the cession of the rights under the leases but nevertheless decided, mainly on the authority of *Inter-Union Finance Ltd. v Dunsterville* (which, it will be recalled, was mentioned in MACDONALD, J 's judgment in the *Hasson Trading Co.* case), that cession

of the creditor's rights against the sureties could effectively be made after cession of the principal debt.

Counsel for the appellants contended that *Dunsterville's* case was wrongly decided. In the course of his judgment, MILLER, JA, said at page 76:

"The effect of counsel's contention, however, is that the rights of a creditor against one who has gone surety for the debtor can in no circumstances go over to any other person, to whom the principal debt has been ceded, except by way of a formal cession to such other person of the creditor's rights under the suretyship agreement and then only if such cession was effected simultaneously with cession of the principal debt. If the cessions were not simultaneously effected, so it was contended, the surety would be released upon cession of the principal debt because of a change in the specific debt in respect of which the surety guaranteed payment. It is not clear on the pleadings whether cession of rights under the surety deeds occurred simultaneously with or after cession of the leases. The primary question that arises, then, is whether according to our law formal cession of the rights flowing from a deed of suretyship is necessary at all in order to render liable to the cessionary of the principal debt a surety in respect of such debt whose surety undertaking was in force at the time of cession of the debt."

MILLER JA, then considered a number of authorities dealing with the juristic nature of a cession. These authorities, in some of which the decision in D*unsterville*'s case (*supra*) was discussed, pointed to the fact that the effect of an outright cession of rights is that the cessionary veritably steps into the shoes of the cedent and whatever claims could, but for the cession, have been enforced by the cedent may after cession be enforced only by the cessionary. Amongst these authorities, the learned Judge of Appeal referred at page 77C to a

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statement in de Wet and Yeats, *Kontraktereg en Handelsreg*, 4th edition, at page 230, and he added that:

> " . . in a footnote to that statement, the learned authors observe that *Dunsterville*'s case, supra, ought to have been decided (with the same result) on that basis; i.e., that the cedent's rights against the surety passed to the cessionary upon and together with cession of the principal debt."

MILLER, JA, concluded this part of his judgment by saying at page 77H:

> "This being the result of a cession of rights in our law, there does not appear to be justification for the view that, without simultaneous, separate cession of the rights under the suretyship agreement, the surety is discharged upon cession of the principal debt."

At page 78C he said:

NEWHAM J

> "The very fact that the cessionary in such a case is entitled to claim a separate cession by the cedent of his rights against the surety (cf. *Friedman v Bond Clothing Manufacturers (Pty) Ltd*, 1965 (1) SA (T) at 677B-C) (and which I did not understand Mr *Duke* to contest), necessarily implies recognition of the fact that the cessionary, by reason of cession of the principal debt or obligation, acquires rights in respect of the surety agreement as well. When that is realized, it becomes apparent that insistence upon a separate, formal cession of the rights against the surety would simply be to require compliance with what appears to be a wholly unnecessary formality of a procedural nature."

However, at page 78F of that case, MILLER, JA, pointed out that this does not mean that in all cases a cessionary necessarily acquires rights against the surety upon cession of the principal debt or obligation. This might depend upon the wording of the cession or of the suretyship agreement itself, for:

> ". . . there might be a limitation therein relating to the surety's liability; it might, for example, appear from the surety deed, properly construed, that the surety undertaking was given solely and exclusively in favour of the creditor named therein as a *delectus personae* and in favour of nobody else."

At page 79 MILLER, JA, applied the principles he had enunciated to the facts of *Pizani*'s case (*supra*) in words which can be applied aptly to the present case. At page 79C he said:

> "On the facts of this case, not only is there nothing in the terms of the cession or the deeds of suretyship to indicate that the rights against the surety were not to pass, but there are, as I have already mentioned, explicit provisions in the deeds of suretyship to the effect that the sureties were bound to the creditor's successors and assigns and it was clearly contemplated that rights under the leases could be ceded. The terms of the cession to the plaintiff, moreover, are wide and all-embracing. It follows that regardless of whether cession of the rights under the deeds of suretyship occurred simultaneously with cession of the leases, and even if there was no separate, formal cession at all of the rights under the surety agreements, such rights, in the absence of any other reason pointing to a contrary conclusion, passed to the cessionary."

On the facts of the present case, I can kind no other reason which points to a contrary conclusion and, in my view, relying on *Pizani's* case (*supra*), the rights under the suretyship agreement passed to the plaintiff when the lease was ceded in terms of the block advance agreement.

I have no doubt, therefore, that if I am permitted to follow the authority of *Pizani*'s case, the

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plaintiff must succeed. in the present case. Mr *de Bourbon* has argued that the decision in *Hasson Trying Company (Pvt) Ltd. v Hopkins and Another* (supra) has stood since 1961 without dissent and that I should not depart from it now. Though Mr

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de Bourbon has made this point, he has not referred me to authority in which that case has been mentioned. It may have been followed by legal practitioners, but I have not been referred to a case in which this decision has been applied. The facts of the case are set out in *1961 Annual Survey of South African Law,* but without comment and that is the only reference that I have been able to find to that case. In those circumstances I do not think that the doctrine of *stare decides* applies.

A decision of the Appellate Division of South Africa is not binding upon me, but our courts have always treated the decisions of that court with the greatest respect on questions involving the Roman-Dutch law. See *per* BEADLE, CJ, in *Smith N.O. and Lardner-Burke NO v Wonesayi,* 1972 (1) RLR 262 at 299; 1972 (3) SA 289 (RAD) at 315.

In the *Hasson Trading Co.* case (supra), MACDONALD, J, said that he had considered the various authorities to which Mr *May* had referred him, but could find no support for his contention that the rights of a creditor under a contract of suretyship passed automatically with the principal obligation. I am not in that position as I have the benefit of a decision of the Appellate Division to guide me. In the judgment in *Pizani's* case, *Inter-Union Finance Ltd v Dunsterville*, to which MACDONALD, J, referred and from which he drew support for his view that cession was necessary, is mentioned. MILLER, JA., cited, without any indication of disapproval, the view of textbook writers on the Roman-Dutch law that the case should have been decided on the basis that the cedent's rights against the surety passed to the cessionary without formal cession of the suretyship agreement. Had MACDONALD, J, had the advantage that I have, there can be no doubt that he would not have expressed the view he did upon the invariable necessity for a cession of the suretyship. This is not to say that MACDONALD, J, was wrong in refusing summary judgment in that case. Even if he had applied the principles which have subsequently been enunciated in *Pizani's* case (*supra*), he might, on the wording of the suretyship agreement In the *Hasson Trading Co.* case, have come to the same conclusion.

In the result, I intend to follow *Pizani's* case. That being so, it is not necessary for me to consider the alternative basis for the plaintiff's claim.

The parties agreed that in the event of the plaintiff succeeding, interest on the amount claimed would run from the date of judgment. There will be judgment for the plaintiff for (1) the sum of $10 428,34, (2) interest

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a tempore morae on that amount from today, and (3) costs of suit.

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Calderwood, Bryce Hendrie & Partners, legal practitioners for the plaintiff.

Ben Baron & Partners, legal practitioners for the defendant.

M v A AND ANOR 1981 ZLR 306

Court **General Division, Salisbury**

Civil Application

Gubbay, J

5th March, 5th June and 8th July, 1981

Flynote

Parent and child - divorced parents - custody of child vesting in mother but guardianship in father - rights and duties of guardian - change of child's surname - whether guardian's assistance necessary - Births and Deaths Registration Act [Chapter 30] - section 20(3) - a procedural provision which does not alter common law.

Headnote

The applicant and first respondent were married in 1977 but divorced in 1979. The only child of the marriage was born in 1977. After the divorce, custody of the child was awarded to the first respondent but guardianship remained with the applicant, the child's father. In 1980 the respondent remarried. Wishing to change the child's surname to that of her new husband, she executed a notarial deed before the second respondent in terms of which she purported, on the child's behalf, to abandon the child's father's surname and to assume that of the stepfather. Steps were taken, in terms of section 20 (3) of the Births and Deaths Registration Act [*Chapter 30*], to register the change of surname in the register of births. The applicant applied for the notarial deed to be declared invalid and for the child's original surname to be reinstated in the register. It was argued on behalf of the first respondent that the award of custody to the mother circumscribes the rights and duties of the father to the administration and management of the child's property, and since the child's surname is more related to his upbringing (which is the responsibility of the mother) than to control over his property, the mother was entitled to act as she did.

Held, that the rights and duties of a non-custodian father are not so limited but are, broadly, to represent or assist the child in the performance of a juristic act, that is, one expressing the actor's will to achieve a desired legal consequence. Change of surname by the execution of a notarial deed and the subsequent amendment of the birth register are both such acts, and the guardian father's assistance was necessary. The provisions of section 20 (3) of the Births and Deaths Registration Act are procedural only and do not modify the common law (*Y v Y (Child: Surname)* [1973] 2 All ER 574 (PDA); *W v A* (*Child: Surname*) [1981] 1 All ER 100 (CA) followed).

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Cases cited:

Ex parse Hafslund, 1917 CPD 529,

R (BM) v R (DN) (Child: Surname) [1978] 2 All ER 33 (CA);

D v B (otherwise D) (Child: Surname) [1979] 1 All ER 92 (CA);

Re WG (1976) Fam. Law 210;

Re T (*otherwise H*) (*an infant*) [1962] 3 All ER 970 (Ch.D);

W v A (*Child: Surname*), (*supra*);

Simleit v Cunliffe, 1940 TPD 67;

Landman v Mienie, 1944 OPD 59;

Wolfson v Wolfson, 1962 (1) SA 34 (SR);

Scott v Scott, 1946 WLD 399;

Martin v Mason, 1949 (1) PH, B 9 (N);

Ryan v Ryan, 1963 R & N 356 (SR);

Oosthuizen v Rix, 1948 (2) PH, B 65 (W.);

Kustner v Hughes, 1970 (3) SA 622 (W);

Edelstein v Edelstein, NO & Ors 1952 (3) SA 1 (AD);

van *Rooyen v Werner,* (1892) 9 SC 425;

Rossiter v Barclays Bank, 1933 TPD 374;

Ex parse Misselbrook, N O.: in re Estate Misselbrook, 1961 (4) SA 382 (D);

Grand Prix Motors WP (Pty.) Ltd. v Swart, 1976 (3) SA 221 (C);

Bloom v von Christierson, 1961 (2) PH, B 23 (D.);

R v Phiri, 1963 R & N 395 (SR);

Gade's Assignees v Weijer and Ors 1917 AD 463;

Silver Garbus & Co. (*Pty.*) *Ltd. v Teichert,* 1954 (2) SA 98 (N);

Y v Y (Child: Surname) (*supra*);

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L v F (1978) *The Times,* 1st August;

D v B (*otherwise D*) (*Child: Surname*) [1977] 3 All ER 751 (Fam. D).

M T O'Meara for the applicant.

R R Horn, SC, for the respondents.

Judgment

Gubbay J: This is an application by a father concerning his three-and-a-half-year-old son. It involves the consideration of a question on which there is an absence of authority in our law, namely, whether an order awarding a mother unqualified custody of a minor child vests her the unilateral right and duty to represent the child, if an *infans,* or to assist him, if a *pupillus*, in effecting a change of surname. It is, I think, imprecise to speak, as counsel did, of the right and duty to change the surname of the child. A person may at any time assume a new name. See *Ex parte Hafslund,* 1917 CPD 529 at 530. But the exercise of that right, which is unfettered by Parliament, involves a conscious decision which a child under the age of seven years is not competent to make and one above that age has only limited capacity to make. It is, therefore, to the representation or assistance of the child, as the case may be, that the right and duty relates. See Boberg, *The Law of Persons and the Family,* at pages 534-535.

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Is the change of a child's surname in a situation like the present a matter of importance? In posing the question I must stress that I am not concerned with whether it is in the best interests of this child that his surname be changed. That is a matter upon which no evidence was placed before me. In England - I have been referred to no other authorities, nor have my researches revealed any - two divergent judicial opinions have emerged. The first, of which ORMROD, LJ, appears to be the main protagonist, is that the change of a child's surname is comparatively insignificant. See *R. (BM) v R (DN) (child: surname)* [1978] 2 All ER 33 (CA) at 39; *D v B (otherwise D) (child: surname)* [1979] 1 All ER 92 (CA) at 100h. The second, is that the change may have far-reaching consequences upon the child and may injure the bond between father and child. In the words of CAIRNS, LJ, in *Re WG* (1976) 6 Fam. Law 210:

> "It must greatly tend to create difficulties in the relations between a father and a child if the child ceases to bear the father's name."

See also *Re T* (*otherwise H*) (*an infant*) [1962] 3 All ER 970 (Ch.D.) at 972I and 973A; *W v A (child: surname)* [1981] 1 All ER 100 (CA) at 105h-j. This latter view I find persuasive and compelling. It is, I believe, a truism that in the emotional relationship which exists between every father and his child:

> "If the name is lost, in a sense, the child is lost."

(*per* ORMROD, LJ, in *D v B, supra* at 99j). A surname serves to identify and associate a child with his natural father. It evidences in solemn form the link which is created at birth. A change might suggest to the child, quite unjustifiably, that there is some blemish of character or

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reprehensible conduct of the father that makes or made it desirable that he be known by a name other than the father's, and cause a loss of respect and affection.

The background of the case can be stated quite shortly. The applicant and first respondent were married on the 5th March, 1977, and the child, R, born on the 9th September, 1977. The marriage was dissolved on the 14th November, 1979. The divorce proceedings were undefended and the first respondent, who was the plaintiff, was granted custody, but not guardianship. On the 29th August, 1980, the first respondent remarried and soon became anxious to change the surname of the child to that of the stepfather. On the 13th November, 1980, and without obtaining the consent of the applicant, she appeared before the second respondent and executed a notarial deed in which, in her capacity as mother and legal custodian of R, and on his behalf, she renounced and abandoned the use

GUBBAY J

of the surname M and in lieu thereof assumed the surname A which she herself had acquired as a result of her second marriage; and she declared in pursuance of such change of name that the child:

> ". . . will at all times hereafter in all records, deeds, documents and other writings and all actions, suits and proceedings, as well as in all dealings and transactions and on all occasions whatsoever, use and substitute the said name RA in lieu of the name RM, abandoned as aforesaid."

On the 17th November, 1980, the notarial deed was duly registered, and five days later the change of name was published in the *Gazette*. Thereafter the first respondent, in terms of section 20 (3) of the Births and Deaths Registration Act [*Chapter 30*], being the "person responsible" as defined in section 20 (1) (a) as read with the definition of "responsible parent" in section 2 of that Act and section 2 of the Citizenship of Zimbabwe Act [*Chapter 23*], applied to register the alteration to the surname which had been effected under the notarial deed. On the 4th December, 1980, the Registrar-General duly registered the change of surname in his register.

The applicant, having been apprised of what had occurred, not unnaturally is desirous that the notarial deed be declared invalid and that the name A be deleted from the register of births and the surname M reinstated.

Clearly, if the first respondent as legal custodian had the right to represent the child in the execution of the notarial deed thereby ejecting the change of surname, the registration thereof in terms of section 20 (3) of the Act was valid. *Per contra*, the notarial deed was invalidly executed and the registration of the change of name similarly invalid.

The issue necessitates an investigation of what parental rights and duties passed to the first respondent under the custody order.

Custody is but an incident of parental power or natural guardianship and where it is awarded to the mother on divorce and no order is made as to guardianship, what is left to the father is aptly termed "residuary guardianship", that is, those aspects of the parental power that remain after

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custody has been excised from it. The embodiment of an order awarding custody to a mother is nowhere more lucidly defined than in the words of SOLOMON, J, in *Simleit v Cunliffe,* 1940 TPD 67 at 75-76:

> ". . . the court entrusts to her all that is meant by the nurture and upbringing of the minor children. In this is included all that makes up the ordinary, daily life of the child - shelter, nourishment and the training

GUBBAY J

> of mind.... The child by virtue of the order passes into the home of the mother, and there it must find all that is necessary to its growth in mind and body....",

The mother as the custodian parent has, therefore, the right and duty to regulate the life of the child; to choose and establish his residence (*Landmann v Mienie,* 1944 OPD 59 at 65); to resolve with whom he should be allowed to associate (*Wolfson v Wolfson,* 1962 (1) SA 34 (SR) at 37C-H); to direct the lines on which his secular education should proceed (*Simleit v Cunliffe, supra*, at 76, *Scott v Scott*, 1946 WLD 399 at 401), including the choice of the school (*Martin v Mason*, 1949 (1) PH, B 9 (N)); to decide upon his religious instruction (*Ryan v Ryan,* 1963 R & N 356 (SR) at 368A); to determine what medical advice, supervision or assistance should be sought in the event of his becoming ill or sustaining an injury (*Oosthuizen v Rix,* 1948 (2) PH, B 65 (W), *Kustner v Hughes,* 1970 (3) SA 622 (W) at 625B). The father as non-custodian has no right of interference in these matters. His parental authority is suspended with regard to them but, of course, he is at liberty to approach the court if it appears that the mother is not carrying out her rights and duties in the best interests of the child. On the other hand, the mother cannot encroach upon the father's parental power, except in so far as its exercise is inconsistent with the grant of custody to her. See *Landmann v Mienie, supra*, at 65, *Edelstein v Edelstein, NO & Ors* 1952 (3) SA 1 (AD) at 10D.

Mr. *Horn*, who appeared for the first respondent, referred me to Maasdorp's *Institutes of South African Law*, 9th edition, volume 1, at page 204, and Wille's *Principles of South African Law*, 7th edition, at pages 83-84, as well as to the cases of van *Rooyen v Werner* (1892) 9 SC 425 at 429, *Rossiter v Barclays Bank,* 1933 TPD 374 at 383, and *Ex parte Misselbrook, N.O.*: *In re Estate Misselbrook,* 1961 (4) SA 382 (D) at 385D-H. Relying on these authorities, he argued that an award of custody to the mother circumscribes the rights and duties of the father to the administration and management of the child's property. The basic distinction, so said Mr. *Horn*, is between the *person* and the *property* of the child, and since the name by which a child is called is more closely related to his upbringing than control over his property, it is the custodian mother who has the right and duty to represent him in effecting a change of surname.

I am unable to accept the submission that the rights and duties of a non-custodian father are limited to the exercise of control over the property of the child. That, indeed, is an extremely important adjunct, but I consider his function must be more broadly stated. It is to represent

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or assist the child in the performance of a juristic act, such an act being one expressing the

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actor's will to achieve a desired legal consequence. Support for this proposition is to be found in *Grand Prix Motors WP* (*Pty*.) *Ltd. v Swart,* 1976 (3) SA 221 (C), where GROSSKOPF, AJ, as he then was, puts the matter germanely in saying at 224C (at 552-3 of the translation volume):

> "Where, as here, the parents of the minor are divorced and custody has been awarded to the mother, the father remains the natural guardian of the child and the mother is not competent on her own to assist in the execution of legal acts."

To the same effect is an earlier *dictum* of VAN DEN HEEVER, JA, in *Eldelstein*'s case, *supra*, at 10C. See, too, Boberg, *loc*. *cit*. at 534 n.23, Spiro, *Law of Parent and Child,* 3rd edition, at 102.

Mr. *O'Meara*, who appeared on behalf of the applicant, cited the granting of consent to the performance of surgery as an instance of the right and duty of a non-custodian father to act on behalf of his legitimate child in a matter not pertaining to property. Although there appears to be no decision directly in point - *Bloom v von Christierson,* 1961 (2) P.H., B.23 (D) comes nearest-academicians of eminence bear out this contention. Dr. Spiro*, loc. cit.,* at 275, submits that:

> "... a mother, who has been awarded the custody only, cannot consent to the performance upon a child of a surgical operation which is attended with serious danger to life unless the need for the operation is so urgent that the consent of the father cannot be obtained in time."

This view is shared by Professor Hahlo who, in *The South African Law of Husband and Wife,* 4th edition, states at 463:

> "In case of urgency she (the custodian mother) can supply the necessary consent to a surgical operation."

See also Lee & Honoré, *The South African Law of Property, Family and Succession,* paragraph 403. I agree, with respect, that subject to his availability, the custodian mother cannot displace the right of the father to consent on behalf of the child. An operation performed upon a child without the consent of his natural or legal guardian would be an unlawful interference with the bodily integrity of the child. The giving of consent, designed to relieve the child's symptoms and benefit his health, justifies such physical interference, for it amounts to an abandonment, on behalf of the child, of the right of security and control over his body. It is a juristic act which entails a legal consequence appreciated by the actor. It makes lawful what would otherwise be unlawful both civilly and

criminally. See *R v Phiri,* 1963 R & N 395 (SR) at 397E-F. The exercise of this right, so it appears to me, involves some measure of control over the *person* of the child.

But be that as it may, the crisp point is whether the execution of the notarial deed by the first respondent constituted the performance of a juristic act. In my opinion, it did. Firstly, it gave rise to the presumption in law, rebuttable only by clear proof to the contrary, that every statement contained in the notarial deed is true. See Voet 22.4.5; *Grade's Assignees v Weijer & Ors* 1917 AD 463 at 467, *Silver Garbus & Co. (Pty.) Ltd. v Teichert,* 1954 (2) SA 98 (N) at 108B. That legal consequence was obviously desired by the first respondent, for otherwise she would have adopted less official means by which to assume a new surname for the child. Secondly, and

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more significantly, it was designed to achieve the legal consequence that after registration in the Deeds Registry and publication in the *Gazette*, the change of surname would be registered in the birth register in terms of section 20 (3) of the Births and Deaths Registration Act.

For these reasons, I am constrained to conclude that at common law the right and duty to represent or assist a minor child in executing a notarial deed changing his surname remains with the father as natural guardian where only custody of the child has been awarded to the mother. By virtue of the provisions of section 2 of the Guardianship of Minors Act [*Chapter 34*], however, this particular right of the guardian father must be exercised in consultation with the mother either *stante matrimonio* or after divorce, and if his decision is contrary to her wishes and in her opinion likely to detrimentally affect the life of the child, she may apply for relief to a judge in chambers. Upon such referral, the judge, in making the order he thinks proper, will have regard to what is in the paramount interests of the child.

If I am wrong in this view, then despite the different concepts of guardianship and custody in English law, I venture to think that the principle enunciated by LATEY, J, in *Y. v Y* (*Child: surname*) [1973] 2 All ER 574 (PDA) at 578g-h and *L. v F* (1978) *The Times,* 1st August, and recently approved by the Court of Appeal in *W v A supra*, at 104h, applies also to our law and must prevail over Mr *Horn's* contention. It has the advantage of paying more attention to reality than to technical rights. In *L v F*, LATEY, J, said:

> ". . . on the failure of a marriage a decision to change children's surnames should never be taken unilaterally and that unless parents were in agreement a decision about it should be approached by the court as a matter of real importance."

GUBBAY J

(See also *D. v B* (*otherwise D*) (*child: surname*) [1977] 3 All ER 751 (Fam. D) at 759f-g *per* LANE, J) This means that the right and duty to represent or assist a child to effect a charge of surname is neither an incident of the mother's custody nor of the fathers residual powers of guardianship, but flows from the parental relationship which survives the divorce. It follows, too, that *stante matrimonio* the child's surname can only be changed, subject to the court's intervention, by both parties acting in concert. The rationale for this principle is, I consider, that a child born in lawful wedlock takes the surname of his father by operation of law. It is not assigned to him, as is a forename, by his parents, but attaches automatically upon birth and irrespective of any act by his parents or himself. See Spiro, *loc. cit.,* at 116; Wille, *loc. cit.*, at 61. It forms part of the child's status as a legal *persona*, for it often tells a story about the child's nationality and descent, his race and religion. It is something he bears in common with other members of the family and both parents have a legitimate and continuing interest in it which does not cease when they either commence to live apart or when on divorce custody is split off from guardianship.

In his further written submission, filed at my request, Mr *Horn*, with commendable candour, stated: 13

> "I have been unable to locate any authorities which suggest that this approach is contrary to principles of our common law or inconsistent with our statute law. Accordingly I am not in a position to make any submissions to

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the effect that such an approach is not correct."

Although under section 20 (3) of the Births and Deaths Registration Act it is the mother who has the custody of the child either by order of court or by virtue of the provisions of section 4 (1) of the Guardianship of Minors Act - and not the guardian father - who may apply to the Registrar-General to register a change of the child's surname in his register, both counsel accepted that no statutory modification of the common law has resulted. Plainly this is so. The section is procedural. It deals with registration of the change of surname in the register of births and not with the act of effecting the change. Before the Registrar-General is permitted to alter his register, he must be satisfied that the change of surname was by notarial deed duly registered in the Deeds Registry and advertised in the *Gazette.*

On either approach, therefore, I am satisfied that it was not competent for the first respondent to appear before the second respondent and execute the notarial deed.

GUBBAY J

I declare that the notarial deed of the 13th November, 1980, was ineffective to change the surname of the child R I direct that the first respondent take all such steps as may be necessary to ensure that the register of births be amended so as to show the child's surname as being that of his father and that the child is called by his proper surname as before this deed. The first respondent is to pay the costs of the application.

Coghlan, Welsh & Guest, legal practitioners for the applicant.

Winterton, Holmes & Hill, legal practitioners for the respondents.

MAGWARA v THE MINISTER OF HEALTH 1981 ZLR 315

Court **General Division, Salisbury**

Civil Exception

Smith, J

12th June and 9th July, 1981

Flynote

Delict - negligence - alleged negligence consisting of lack of skill in application by medical staff of a plaster cast and subsequent failure to take corrective action - duty of care - whether prior conduct or control of property essential for creation of duty of care - moral and professorial duty to act reasonably.

Headnote

The plaintiff sustained an unstable bimalleolar fracture dislocation of his right ankle and

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attended Harare Hospital for treatment. A plaster cast was applied, but incorrectly. An X-ray should have been taken to check the fracture on the same day or the next but this step was not taken for another two weeks; and although the X-ray revealed that the fracture was in an unacceptable position and required immediate correction, no remedial action was taken. It was alleged in the plaintiff's declaration that the defendant's employees, in breach of their duty to employ reasonable care and skill in their treatment of the plaintiff, had been negligent in their treatment of him. In his plea, the defendant admitted the negligence alleged but averred that it consisted only of acts of omission, not giving rise to any delictual liability. The plaintiff excepted to the plea as being bad in law, in that the negligence particularised could give rise to delictual liability.

Held, allowing the exception with costs, that liability in medical matters does not depend on prior conduct, although this may be a factor in the totality of circumstances from which a duty of care is inferred. One must, in deciding whether a duty of care exists, have regard to all the facts of the case and conceptions prevailing in the particular community at a given time. There was in the present case a moral and professional duty to act reasonably towards the plaintiff. Once the defendant's employees had undertaken treatment and had engaged in applying the cast, there was set up a special relationship between the defendant's employees and the plaintiff, different from that between the plaintiff and a disinterested stranger. There was a legal duty to act reasonably (*Cassidy v Ministry of Health* [1951] 1 All E R.

SMITH J

574 (CA); *Barnett v Chelsea and Kensington Hospital Management Committee* [1968] 1 All ER 1068 (QBD); *King v Dykes,* 1971 (2) RLR 151; 1971 (3) SA 540 (RAD), followed.).

Cases cited:

Halliwell v Johannesburg Municipal Council; 1912 AD 659;

van Wyk v Lewis, 1924 AD 438;

Blore v Standard General Insurance, 1972 (2) SA 89 (OPD);

Cassidy v Ministry of Health, supra;

Barnett v Chelsea and Kensington Hospital Management Committee, supra;

Minister of Police v Ewels, 1975 (3) SA 590 (AD);

Silva's Fishing Corporation (Pty.) Ltd. v Maweza, 1957 (2) SA 256 (AD);

King v Dykes, supra;

Goldman v Hargrave [1967] 1 AC 645;

Dube v Administrator, Transvaal, 1963 (4) SA 260 (WLD);

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Blyth v van den Heever, 1980 (1) SA 192 (AD).

B W K Whaley for the plaintiff.

N J McNally for the defendant.

Judgment

Smith J: In his declaration the plaintiff claimed damages from the defendant. He alleged, *inter alia:*

"3. As the result of an accident on the 3rd April, 1978, plaintiff sustained an unstable bimalleolar fracture dislocation of his right ankle.

4. Plaintiff attended at the casualty department of Harare Hospital on divers occasions during the period between the 3rd April, 1978, and the 27th June, 1978, and upon each such occasion he paid the prescribed fee and was treated by the casualty medical staff for his said injury. The aforesaid casualty medical staff were at all times relevant to these proceedings acting in the course and within the scope of their employment with the Ministry of Health, of which Ministry the defendant is the responsible Minister.

5. In the premises the parties concluded an implied agreement in terms of which defendant undertook through his duly appointed employees to treat plaintiff on each such occasion for his said injury. It was a material term of the said implied agreement that defendant's employees would conscientiously employ reasonable care and skill in their treatment of plaintiff.

6. In breach of the said term of the parties' agreement defendant's employees failed to apply due care and skill in their treatment of plaintiff's injury in one or more of the following respects -

(a) they applied a plaster of parts cast to plaintiff's ankle without ensuring that it was moulded appropriately to stabilize and prevent slippage of the said fracture dislocation to the ankle;

(b) after they had applied the said plaster of parts cast they failed to check the said fracture dislocation by means of X - rays on the 3rd or the 4th of April, 1978, as they should have done, and only made such a check on the 17th April, 1978;

SMITH J

(c) despite the fact that the X-ray taken on the 17th April, 1978, revealed that the fracture was in an unacceptable position and required immediate correction, they failed to take the appropriate action necessary to correct it.

7. Alternatively to paragraphs 5 and 6 above defendant's employees, in breach of their duty to employ reasonable care and skill in their treatment of plaintiff, were negligent in their treatment of him in the respects set out in paragraph 6 above.

8. In consequence of defendant's aforesaid breaches of the parties' contract or alternatively of his duty of care towards plaintiff, plaintiff's aforesaid injury did not heal as it otherwise would have done, and plaintiff has in consequence suffered general damages in the sum of $5 000,00 made up as follows -

(a) pain, suffering, discomfort, inconvenience, disfigurement

and loss of amenities $4 000,00

(b) future loss of earnings $1 000,00

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$5 000,00

In his plea the defendant denied any contractual relationship between the parties. However, paragraphs 4 and 5 of his plea read as follows:

> "4. Defendant admits the negligence alleged in paragraph 7, as particularized in paragraph 6, but avers that such negligence consisted only of acts of omission, not giving rise to delictual liability on the part of defendant.
>
> 5. Save that it is admitted that plaintiff's injury did not heal as it would have done with the correct treatment, and save that defendant has no knowledge of the quantum of damage alleged, does not admit it and puts plaintiff to the proof thereof, defendant denies the allegations in para graph 8."

The plaintiff has excepted to paragraph 4 of the plea on the following basis:

> "1. The negligence which defendant admits, as particularised in paragraph 6 of Plaintiff's declaration, is such as can give rise in law to delictual liability on the part of defendant towards Plaintiff.
>
> 2. In the premises defendant's defence to the alternative basis upon which plaintiff's claim is founded, namely that his servants' admitted negligence does no`t give rise to liability in delict, is bad in law."

In these proceedings the exception has, been argued. I shall refer to the excipient as "Plaintiff" and the respondent as "defendant".

Mr *McNally*, for the defendant, submitted that the negligence alleged by the plaintiff consisted only of acts of omission and that where there were acts of mere omission there was no liability. Reliance was placed

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on such cases as *Halliwell v Johannesburg Municipal Council,* 1912 AD 659, *van Wyk v Lewis,* 1924 AD 438 and *Blore v Standard General Insurance,* 1972 (2) SA 89 (OPD). Mr *McNally* submitted that the instant case was one of ineffective treatment and that liability in medical matters depends on a prior act of commission which is something more than the mere acceptance of the patient or the application of ineffective treatment.

Mr *Whaley*, for the plaintiff, referred to two English cases. In England the position would appear to be that doctors and hospital authorities, whenever they accept a patient for treatment, are under a duty to use reasonable care and skill to cure him of his ailment. See *Cassidy v Ministry of Health* [1951] 1 All ER 574 at 585, *per* DENNING, LJ, as he then was. In *Barnett v Chelsea and Kensington Hospital Management Committee* [1968] 1 All ER 1068, the deceased had, with two other watchmen, reported to the hospital. They told the nurse in the casualty department that they had been vomiting continuously after drinking tea and wished to see a doctor. The nurse telephoned the doctor and informed him of this. He instructed the nurse to tell the watchmen to see their own doctors. Later the deceased died of arsenical poisoning. It was held that in failing to see and examine the deceased, and in failing to admit him to hospital and treat him, the hospital's casualty officer was negligent and did not discharge the duty of care which in the circumstances was owed to the deceased by the defendants as a hospital authority. At page 1072, *Donoghue v Stevenson* [1932] AC 562 and *Le Lièvre v Gold* [1893] 1 QB 491 are referred to in relation to close and direct relations between persons giving rise to a

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duty to take care, and NIELD, J, continued:

> "In my judgment there was here such a close and direct relationship between the hospital and the watchmen that there was imposed on the hospital a duty of care which they owed to the watchmen."

Mr *Whaley* also referred the court to a list of cases in Bingham's *Modern Cases on Negligence,* 3rd edition, page 591, involving liability for negligent omissions. The reports of these cases are, however, not available to me.

It has been decided by the Appellate Division in South Africa that prior conduct or the control of property are not essential to the creation of a duty to act for the safety of others, although they may be factors in the totality of circumstances from which such a duty is inferred. See *Minister of Police v Ewels,* 1975 (3) SA 590 (A.D.). In this case it was held that members of the Police Force had been under a duty to

stop another policeman assaulting a man in a police station. See, particularly, pages 596-597. At page 597, RUMPFF, CJ, having stated that prior conduct or the control of property are not essential requirements for unlawfulness, goes on to say:

> "It appears a stage has been reached where an omission is regarded as unlawful conduct when the circumstances of the case are such that the omission not only occasions moral indignation but where the legal convictions of the community require that the omission be regarded as unlawful and that the loss suffered be compensated by the person who failed to act positively. When determining unlawfulness, one is not concerned, in any given case of an omission, with the customary 'negligence' of the *bonus paterfamilias*, but with the question whether, all facts considered, there was a legal duty to act reasonably"

(official English translation).

See, also, 1975 *South African Law Journal*, page 361 and 1975 *Annual Survey of South African Law,* page 170.

STEYN, JA, as he then was, in a minority judgment in *Silva's Fishing Corporation (Pty.) Ltd. v Maweza,* 1957 (2) SA 256 (AD) at 265, said:

> "The Roman law, as also the Roman-Dutch law, recognises the principle that, generally speaking, no one is bound to mind the business of another, even where he can, with no danger or expense to himself, avert serious harm from the other, and that no liability is incurred by refraining from doing so, even if the omission should violate a moral duty. Indeed, Cujacius, *Opera Omnia*, 8 C 329, points out that in general it is culpable to meddle with the affairs of another which do not affect you and are none of your business. But there is a variety of circumstances, some of them unconnected with prior conduct, which impose the duty to act in order to avoid reasonably foreseeable loss to another. The circumstances which will give rise to such a duty may differ according to the conceptions prevailing in a particular community at a given time."

MACDONALD, ACJ, cited with approval the last sentence of that statement, in *King v Dykes,* 1971 (3) SA 540 (RAD); 1971 (2) RLR 151. So far as this court is concerned, the law to be applied was stated by MACDONALD, ACJ, in *King v Dykes* (*supra*) at 543 - 5. MACDONALD, ACJ, at 543, criticised any attempt to categorize events preceding an omission as "prior conduct", among others. He said that the court must apply the universal and basic test of

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deciding whether or not a legal duty exists in the particular circumstances of the case.

It seems then one must, in deciding whether a legal duty of care exists, have regard to all the facts of the case and the conceptions prevailing in the particular community at a given time. At 545, MACDONALD, ACJ, said that in general it is the legal duty of an

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occupier of land to take steps to prevent a hazard on his land causing harm to persons who, by reason of their proximity, may be harmed if the hazard is not dealt with. He went on to say whether in a particular case such a legal duty exists is to be decided in the main by factors such as those mentioned in *Goldman v Hargrave* [1967] 1 AC 645:

> ". . . knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it; . . ."

and by

> ". . . a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction."

Mr *Whaley* submitted that the present case was similar to *Dube v Administrator, Transvaal,* 1963 (4) SA 260 (WLD) and *Blyth v van den Heever,* 1980 (1) SA 192 (A.D.). Both of these cases related to the treatment of a fractured arm. In *Dube*'s case, TROLLIP, J, as he then was, said that the plaintiff's action was founded on delict and not on contract. Because the hospital accepted the plaintiff as a patient, its staff owed him a duty to attend to and treat him with due and proper care and skill. *Blyth*'s case was based on negligent omissions. Mr *McNally* submitted that in each of these cases there was a prior act of commission. I think that this latter submission is correct, but it is noteworthy that in neither case was there any mention of a prior act of commission as such.

In the instant case the plaintiff attended at the casualty department of Harare Hospital on divers occasions and was treated by the casualty medical staff for his injury. They applied a plaster of paris cast to his ankle. They were negligent in the way they applied the plaster of paris cast and were thereafter guilty of negligent omissions. This means that they ought as reasonable men to have foreseen that their inaction might entail harm for the plaintiff and that they had the means to avert such harm and that they failed by reasonable action to prevent it.

It is clear that there was a moral and professional duty to act reasonably towards the plaintiff. It seems to me that, on the facts, once the defendant's employees had undertaken treatment and had engaged in applying the plaster of paris cast, there was set up a special relationship between the defendant's employees, the casualty medical staff, and the plaintiff, different from the relationship between the plaintiff and a disinterested stranger. The plaintiff was in the care of the defendant's medical staff.

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SMITH J

In my judgment, on a consideration of the facts and what could be expected of the casualty medical stay as compared with the consequences of inaction, and having regard to the conceptions prevailing in this country, there was a legal duty to act reasonably.

Accordingly, the exception is upheld with costs. The defendant is given leave to amend his plea within 12 days from the date of this judgment.

Atherstone & Cook, legal practitioners for the plaintiff.

State Attorney, four the defendant.

THE STATE v CHIMBWANDA 1981 ZLR 322

Court **Appellate Division, Salisbury**

Fieldsend, CJ, and Baron, JA

9th and 20th July, 1981

Flynote

Criminal procedure - sentence - Road Tragic Act, 1976 (No. 48 of 1976) - section 46 (1) - previous conviction for similar offence within ten years preceding date of present conviction - date of "conviction" - whether in this context means date of finding of guilt or date of final disposal of case.

Headnote

The appellant was convicted of contravening section 46 (1) of the Road Traffic Act, 1976 (No. 48 of 1976), on the grounds that he drove a motor-vehicle whilst under the influence of alcohol to such an extent that the was incapable of having proper control of his vehicle. He had previously been convicted of contravening the predecessor of section 46 (1) on the 16th March, 1971.

He was found guilty of the present offence on the 11th March, 1981, but remanded for sentence, which was passed on the 3rd April, 1981. The magistrate considered that since the present conviction took place less than ten years after the previous one, he was obliged, in terms of paragraph (b) of section 46 (4), to prohibit the appellant from driving for at least 12 months.

It was contended, for the appellant, that since the date of sentence was more than ten years after the date of the previous conviction, that the magistrate was not obliged to impose the minimum period of prohibition.

Held, that, in general, a distinction must be drawn between conviction (in the sense of funding of guilt) and the passing of sentence; the word "conviction" does not cover the two events.

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Held, further, that in section 46 (4) of the Road Traffic Act, as well as in the similarly worded sections 42 (3), 43 (3) and 45 (3), having regard to both the Criminal Procedure and Evidence Act [*Chapter 59*] and the Road Traffic Act itself, "conviction" means "a finding of guilty", and that the magistrate was accordingly bound, in the absence of special circumstances, to act as he did.

Held, further, that where the date of previous conviction is relevant, the date of sentence should be the date to be taken (*R v Bibby,* 1906 EDC 81 (referred)).

1981 ZLR p323

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Cases cited:

S (*a minors*) *v Manchester City Recorder* [1969] 3 All ER 1230 (HL);

R v Norfolk Justice, ex p. DPP [1950] 2 KB 558;

R v Guest, ex p. Anthony [1964] 3 All ER 385;

R v Sheridan [1936] 2 All ER 372.

P Sullivan for the appellant.

J H C Friedman for the respondent.

C.A.V.

Postea (20th July, 1981).

Judgment

Fieldsend C J: The appellant was convicted on his plea of guilty of contravening section 46 (1) of the Road Traffic Act, 1976 (No. 48 of 1976), in that he drove a vehicle on a road while under the influence of liquor or a drug to such an extent as to be incapable of having proper control of it. It was admitted that a test of his blood showed a concentration of 171 milligrams of alcohol per 100 millilitres of blood, and he did not seek to show that he was not under the influence of liquor to the extent required to constitute an offence. He was sentenced to a fine of $130 or 130 days' imprisonment, he was prohibited from driving for 12 months and his licence in respect of vehicles in Classes 1, 2, 4 and 5 was cancelled. He now appeals against his sentence only.

The appellant had been previously convicted of contravening the predecessor section of section 46 (1) on the 16th March, 1971. He was found guilty of his present offence on the 11th March, 1981, the case was remanded for evidence in mitigation to the 23rd March and the appellant was finally sentenced on the 3rd April. The magistrate regarded himself bound, in the absence of a finding of any special circumstances, to prohibit the appellant from driving for 12 months because of the provisions of section 46 (4) of the Act.

This reads:

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"Subject to the provisions of Part VII, a court which convicts a person of an offence in terms of subsection (1) involving the driving or attempted driving of a motor-vehicle shall -

(a) if the person has not previously been convicted of a similar offence within a period of ten years immediately preceding the date of such first - mentioned conviction -

(i) in the case of a first - mentioned conviction which does not relate to the driving or attempted driving of an omnibus, prohibit the person from driving for a period of not less than six months, or . . .

or

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(b) if the person has previously been convicted of a similar offence within the period referred to in paragraph (a) -

(i) in the case of a second conviction -

A. which does not relate to the driving or attempted driving of an omnibus, prohibit the person from driving for a period of not less than twelve months . . ."

Mr *Sullivan*, for the appellant, argues that properly construed this subsection obliges a court to prohibit a person from driving for 12 months only if at the time of sentence ten years has not elapsed since that person's previous conviction; and that the ten years elapsed on the 17th March, 1981, before evidence was given in mitigation and sentence was passed although after the finding of guilty. Mr *Friedman*, for the State, contends that the decisive date is the 11th March, 1981, the day on which the appellant was found guilty and which is within the ten-year period from the 16th March, 1971.

The word "convict" and its derivative "conviction" are not words that are entirely unequivocal. The Oxford English Dictionary defines "convict', as:

". . . to prove (a person) guilty of an offence which makes him liable to legal punishment; specifically to find or declare guilty after trial before a legal tribunal by the verdict of a jury or the decision of a judge";

and "conviction" as:

". . . the proving or finding a person guilty of an offence with which he is charged before a legal tribunal; legal proof or declaration of guilt; the fact or condition of being convicted: sometimes including the passing of sentence".

Concerning the legal meaning of the words in S (*a minor*) *v Manchester City Recorder* [1969] 3 All ER 1230 (HL) - a case which was concerned with whether a magistrate's court which had accepted a plea of guilty could before sentence allow the defendant to withdraw his plea - LORD REID said at page 1232:

"Much of the difficulty has arisen from the fact that 'conviction' is commonly used with two different meanings. It often is used to mean final disposal of a case and it is not uncommon for it to be used as meaning a finding of guilt. It is proper to say that a plea cannot be changed after 'conviction' in the former sense. But it does not at all follow that a plea cannot be changed after conviction in the latter sense."

Prior to this decision, there had been two conflicting lines of authority. The one, exemplified by

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Public Prosecutions [1950] 2 KB 558, held that a magistrate's court, in common with the higher courts, was not *functus officio* until final adjudication, that is, until after both finding an accused guilty and sentencing him. The other line, exemplified by *R v Guest, ex parte Anthony* [1964] 3 All ER 385, held that once a court of summary jurisdiction had accepted a plea of guilty it could not recall that decision and allow an accused to change his plea even though it had not sentenced him.

LORD MACDERMOTT pointed out at page 1235:

> ". . . the exercise of a complete criminal jurisdiction - and I use that expression to exclude any special statutory procedures in which guilt is found by one court and punishment awarded by another - naturally falls into two parts, whatever the status of the court concerned. There is the ascertainment of guilt or innocence; and after that there is the sentencing or determination of what should be done with the guilty. In a sense these parts are distinct, and the temporal gap between them has tended of recent times, in certain types of cases, to become longer as the need for a closer investigation of the convicted persons health and background has obtained wider recognition. But that is far from saying that each part stands isolated from and independent of the other. The evidence relevant to the commission of an offence is generally relevant to the sentence. And that part of the hearing which is directed to sentence may well cast new light on the question of guilt or innocence. I think it is safe to say that this has long been recognized and that the tenor of English law has been against erecting any barrier between these two parts or stages which would place them, as it were, in watertight compartments and so reduce the scope of judicial ascertainment and discretion."

In discussing the question of when a court became *functus officio* LORD UPJOHN said at page 1246:

> "How, then, has this division of functions come about in the case of a court of summary jurisdiction? Unfortunately it all stems from a misunderstanding of the word 'conviction' in the case of *R v Sheridan* [1936] 2 All ER 372. The primary meaning of the word 'conviction' denotes the judicial determination of a case; it is a judgment which involves two matters, a finding of guilt or the acceptance of a plea of guilty followed by sentence. Until there is such a judicial determination the case is not concluded, the court is not *functus officio* and a plea of autrefois convict cannot be entertained. This has been the law from the earliest times: see Hale's *Pleas of the Crown,* chapter 32, page 251, and it is equally applicable in a court of summary jurisdiction...."

With respect, I have some doubt whether the primary meaning of "conviction" denotes the judicial determination of a case and that it is only its secondary meaning that denotes a finding of guilt, save perhaps in the context of when a court is *functus officio*, or, as in *R v Sheridan,* in the context of when a plea of autrefois convict is available. That

seems to be contrary to the ordinary use of the word, and from a study of our Criminal Procedure and Evidence Act [*Chapter 59*] certainly not in accord with the position in Zimbabwe in the area of criminal procedure relating to convicting and sentencing.

Sections 195 to 211 of that Act, which deal with possible verdicts on particular indictments, use

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the words "may be convicted" and "may be found guilty" indiscriminately as meaning the same thing, namely, the finding of guilt. In particular, section 195 (2), which relates to finding a person guilty of being an accessory after the fact, provides that if relevant facts are proved that person "shall on conviction . . . be liable to punishment at the discretion of the court convicting him". See, too, Part XIII of the Act. Section 309 gives a right to move in arrest of judgment to a person convicted of an offence at any time before sentence, and section 314 (2) provides generally for what punishments may be passed upon a convicted offender.

In the general context of sentencing accused persons, the legislation does not distinguish between convicting and finding guilty, but it does distinguish between convicting and finding guilty on the one hand and sentencing on the other, and it does not use the word convict as meaning convict and sentence.

Turning now to the Road Traffic Act, 1976 (No. 48 of 1976), and in particular to provisions of Part VI of that Act which deal with criminal offences and the punishments for those offences, one finds, first, that section 56 (4) deems a prohibition from driving and any subsequent cancellation of a licence to be part of the sentence passed on the person convicted. Thus there is maintained the distinction found generally in the Criminal Procedure and Evidence Act between conviction and sentence. This, of course, is only to be expected because the Criminal Procedure and Evidence Act is the governing legislation which one would expect to deal with the trial and sentence of offenders under all other Acts which create criminal offences.

In many sections of the Road Traffic Act, other than section 46 (and those worded like it, namely, sections 43 (3), 44 (3) and 45 (3)), the same distinction between conviction and sentence drawn by the Criminal Procedure and Evidence Act is retained. One only has to look at sections 39 (3), 40 (4), 41 (4) and 42 (2), all of which provide:

> "A court convicting a person of an offence in terms of subsection (1) may, subject to the provisions of Part VII, prohibit the person from driving for such period as the court thinks fit."

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It is clear, too, from those sections, read as a whole, that the verb "convict" is used as meaning a finding of guilty, as it is in the Criminal Procedure and Evidence Act. See, in particular, subsections (2) and (3) of section 42. In addition, sections 54 (1) and 55 (1) use the word in the same sense: section 54 (1) empowers a court which acquits or convicts a person of certain offences to prohibit him from driving if it considers him to be incompetent to or incapable of driving; and section 55 (1) provides that a court convicting a person of an offence other than an offence under the Act, but which involves the driving of a motor-vehicle, may in addition to any other penalty prohibit him from driving for a period.

The issue in this appeal is whether the word "convict" in subsection (4) of section 46 means "find guilty" or "find guilty and sentence". And, of course, any conclusion would be equally applicable to the same word as used in sections 42 (3), 43 (3) and 45 (3).

In my view, the inference is very strong that the word "convict" in these subsections is used in the same sense as it is used in the Criminal Procedure and Evidence Act. The sections in each

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case are concerned with criminal offences, the trial and sentence for which are governed by the Criminal Procedure and Evidence Act: the statutes are, therefore, both dealing with the same subject matter in general and one would expect them to use words in the same sense. In other words, the specific provisions of the Road Traffic Act are drafted against the general background of the Criminal Procedure and Evidence Act, which will govern the conviction and sentencing of persons who contravene its provisions.

This inference is immeasurably strengthened by the fact that in sections 39, 40, 41, 42, 54 and 55 the word "convict" is used in the same sense of "find guilty". There would, in my view, have to be very strong reasons for reaching the conclusion that in sections 43, 44, 45 and 46 the word was used in any different sense.

The best argument that can be mounted for giving the word a different meaning is that when the sections speak of the person having been or not having been previously convicted that must mean previously convicted and sentenced, and that similar words should not be interpreted differently, particularly when they appear in the same subsection.

This is, of course, a sound principle, but as with all principles of interpretation it must be applied with caution: when referring to a previous conviction it can, I think, be assumed that what is meant is a previous conviction and sentence. The somewhat out-dated case of *R v Bibby,* 1906 EDC 81 (now in effect overtaken by section 337 (4) of

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the Criminal Procedure and Evidence Act) is support for this proposition in general terms. If the date of the previous conviction is relevant, as it is here, it is appropriate that the date of sentence should be the date to be taken, if only because that is the date in the relevant records that is, regarded as the date of a previous conviction. It would be very inconvenient to have to ascertain from the actual record of any case whether conviction and sentence were on separate dates. The date of sentence is also the date from which any prohibition will run and the date from which any period of suspension of a suspended sentence will run.

These considerations are to my mind extraneous to the considerations which apply in the present case and are not such as to lead one to a conclusion different from that dictated by implications that arise from the use of the word both in the Criminal Procedure and Evidence Act and in other sections of the Road Traffic Act, 1976.

In passing, I might add that in any event the logical date to take as the date which would make mandatory the 12-month period of prohibition is the date of the commission of the subsequent offence and not the date of the subsequent conviction. The latter may be delayed by a variety of factors irrelevant to the blameworthiness of the accused in offending within the stated period.

In my view, the magistrate rightly regarded himself as bound, in the absence of special circumstances, to prohibit the appellant from driving for 12 months, as he convicted him within ten years of the date of his previous conviction.

The only features that could possibly be urged as special circumstances, which must in terms,

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of section 46 (5) be special circumstances surrounding the commission the offence, were the very slight nature of the accident, the slight degree of negligence involved and the fact that the appellant had taken some medicine on prescription which may have contributed to his condition. None of these are, in my view, sufficient to constitute special circumstances in this case. The appellant's blood alcohol content was above the minimum which raises the rebuttable presumption and he does not say that had he not taken the pill he took he would have been capable of driving properly. In any event he had been taking these pills since 1976 and must have had some idea of their effect upon him.

This leaves only the question of the amount of the fine and whether the prohibition should extend to driving all classes of vehicle. The appellant earns his living by carrying goods for reward, he has a large

family and earns only about $75 to $100 a month. It was urged on us that the prohibition should not extend to Class 2 vehicles - that is Vehicles, other than omnibuses, of over 2 300 kilograms net mass - as the appellant could then carry on his business. Mr *Friedman* argued that these require greater skill and ability to drive than the smaller Class 4 vehicles and that we should not accede to this request. I feel, however, that such a heavy vehicle is likely to be used only for work and not for pleasure and the temptation to drive after taking liquor will be that much less.

Taking that into account and the fact that the appellant was within days of having completed ten years of driving without a conviction for driving whilst under the influence of liquor, I consider that justice would be done by prohibiting the appellant from driving Class 1, 4 and 5 vehicles only for 12 months and cancelling his licences in respect of those classes of vehicles.

Also taking into account that it became mandatory by only a few days to prohibit the appellant from driving for as long as 12 months I consider that his fine should be reduced to $60.

The appeal is allowed to the extent that the appellant's fine is reduced to $60 and the prohibition from driving is limited to vehicles in Classes 1, 4 and 5 and the appellant's driving licences only in respect of those classes of vehicles are cancelled.

Baron JA: I agree.

Stumbles & Rowe, legal practitioners for the appellant.

ATTORNEY-GENERAL v MAKOKORA 1981 ZLR 330

Court **Appellate Division, Salisbury**

Criminal Appeal

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Fieldsend, CJ, Baron, JA and Goldin, AJA

20th July, 1981

Flynote

Criminal procedure - sentence - indeterminate sentence - bad criminal record - when indeterminate sentence appropriate.

Headnote

The respondent had a very bad criminal record and had twice been warned of the indeterminate sentence. On the present occasion he was convicted by a magistrate on three charges involving dishonesty; because of his record the matter was remitted to the General Division for sentence. The judge sentenced him to a total of thirty-two months' imprisonment and again warned him of the indeterminate sentence. The Attorney-General appealed on the grounds that the sentence was manifestly inadequate and that the indeterminate sentence

should have been imposed.

Held, that although the indeterminate sentence may not serve any purpose in reforming a persistent offender, it does provide some relief to the long-suffering public. In the present case, both from the point of view of the public and as an appropriate sentence on the respondent a long sentence of imprisonment was required, and it was hardly possible to impose a determinate sentence of appropriate length. The respondent was accordingly declared an habitual criminal.

Case cited:

S v Mandoro, 1977 (2) RLR 245.

K Terry, for the appellant: The respondent was warned of the indeterminate sentence in 1971 by the High Court and in 1973 by the regional court. Both of these warnings were justified and there are no exceptional circumstances present to warrant a sentence other than the indeterminate sentence. *S v Mandoro* (*supra*). Lengthy terms of imprisonment, reduced diet and solitary confinement have had no erect on the respondent and that he should, therefore, be declared an habitual criminal.

FIELDSEND CJ

P Sullivan, for the respondent.

Judgment

Fieldsend CJ: The respondent was convicted of two counts of housebreaking and theft and one count of theft and his case was remitted for sentence to the General Division of the High Court because of his previous criminal record. This was, indeed, a very bad record. In 1964 he was convicted of five counts of housebreaking and theft and sentenced to a total of 27 months' imprisonment. In 1966, some 10 months after his release, assuming full remission, he was

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convicted of three counts of housebreaking and theft and sentenced to a total of five years' imprisonment. Again, some 12 months after his release, he was convicted in 1971 of one count of housebreaking and theft and was sentenced to 30 months' imprisonment with labour and warned of the indeterminate sentence. Within six months of his release he was convicted in 1973 of two counts of a similar offence, sentenced to seven years' imprisonment and warned again of the indeterminate sentence. The present offence was committed in October, 1979, that is, again allowing for remission on his seven years' imprisonment, some 22 months after his release. In other words, between June, 1964, and October, 1979, the respondent has been in prison for 11 years and two months and at large for only four years and two months. For this offence he was sentenced by DUMBUTSHENA, J, to 12 months on each of the housebreaking counts and eight months on the theft count, a total sentence of 32 months and again warned of the indeterminate sentence.

The Attorney-General now appeals against the sentence contending that this is a case where the respondent should have been declared an habitual criminal.

[Despite all that Mr *Sullivan*, who appeared for the respondent at the request of the court, was able to say on his behalf, I cannot but agree with the Attorney-General's submission.

It may be that the declaration of a person as an habitual criminal is not an entirely satisfactory way of dealing with persistent offenders, but it is a provision which the courts have to administer. It may not serve any purpose in performing a persistent offender, but it does provide some relief to the long-suffering public. In most jurisdictions there are provisions for imposing long sentences on persistent offenders and with us this involves the indeterminate sentence. This court, in *S v Mandoro,* 1977 (2) RLR 245 at page 248, dealt with the general principles applicable in considering the declaration of a person as an habitual criminal, particularly after warnings had been given. At page 248 His Lordship MR JUSTICE DAVIS said:

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> "It seems to me that the general proposition can be stated that when a first warning of the indeterminate sentence has been justifiably given, there is a danger if section 322 is not thereafter brought into operation upon a subsequent conviction, that the heed paid to the warning tends to be diminished. It may be that if the offence which has been then committed is of a completely trivial nature, there is room for the exercise of the court's discretion and the court can properly give an offender another chance. But even on this basis he should perhaps be advised that if he persists in committing only relatively trivial offences, in due course this would justify the indeterminate sentence.
>
> When two or more warnings have been justifiably given, then in my view it is only in very exceptional circumstances that a court would be justified in not invoking the provisions of section 322 and imposing the indeterminate sentence. It does not seem to me desirable to lay down any specific ground upon which a court would be so justified. One can perhaps indicate that one matter which would obviously be of importance would be the question of whether there has been any long break between the last warning given and the commission of the offence under consideration. If that were the case, if there were such a long break, then the court might well consider that the warning had had some effect. Even here a considerable degree of caution has to be exercised because one cannot be blind to the fact that not all crimes are detected and that it is not improbable that during a relatively crime-free period a particular accused has, in fact, merely been lucky in escaping detection. What would be of importance in such circumstances would be evidence, if available, that the offender had engaged in gainful employment during a period of freedom."

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The learned trial judge was apparently not referred to *Mandoro*'s case (*supra*). He certainly made no reference to it in his reasons for sentence, and he gave no reasons for not declaring the respondent an habitual criminal.

In the circumstances, I consider that we are now at large in regard to sentence and I am satisfied that both from the point of view of the protection of the public and as an appropriate sentence on the respondent a long sentence of imprisonment is required, and certainly more than the 32 months imposed below. Without invoking section 322 and declaring the respondent an habitual criminal it is hardly possible, having regard to the long sentences that he has already served, to impose a determinate sentence of appropriate length.

In my view, the sentence should be set aside and there should be substituted for it a declaration that the respondent is an habitual criminal.

Baron JA: I agree.

Goldin AJA: I agree.

Pro Deo.

MUZONDO v UNIVERSITY OF ZIMBABWE 1981 ZLR 333

Court **General Division, Salisbury**

Special Case

Beck, J

11th June and 22nd July, 1981

Flynote

Contract - of service - university lecturer appointed for probationary period - special position of such a person - university purporting unilaterally to dismiss him before expiry of probationary period without following procedures provided in contract of service - necessary to follow prescribed procedures.

Headnote

The plaintiff had been recruited from Canada to serve as a lecturer at the defendant university. His conditions of service were set out in a document furnished to him, which provided, *inter alia*, that his appointment was to be subject to a probationary period of two years or, at the University's discretion three years from the date of his appointment and that at the end of the probationary period his appointment should be either confirmed or terminated. One of the Ordinances made under the University's Charter set out the procedural steps which had to be followed for dismissing a member of staff for "good cause.

Among the rights and benefits of a lecturer at the University were the right to accommodation at an advantageous rental and in a convenient locality and the right (and indeed, the duty) to work on research projects.

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Without following any of the prescribed procedures, the University purported to dismiss the plaintiff some six months before the expiry of his probationary period. The plaintiff instituted the present action for damages for breach of contract and the court's opinion was sought, in terms of Order 29, Rule 199, as to whether the termination of the plaintiff's employment was unlawful.

Held, that a person in the plaintiff's position enjoyed important rights other than his right to his salary, including the prospects for promoting and professional reputation which could be materially influenced by the research work undertaken by him; he was not in the position of a clerk or other person similarly situated. This being the case, the University could only terminate his appointment prematurely by way of dismissal for good cause and in accordance with the prescribed procedure, but not unilaterally.

Held, further, that a proper construction of the contract of employment made fit clear that the probationary appointment in question was not one that could be summarily terminated.

Cases cited:

Union Free State Mining and Finance Corporation Ltd v Union Free State

Gold and Diamond Corporation Ltd., 1960 (4) SA 547 (W);

Alberts v Bryson, 1977 (1) SA 857 (RAD); 1976 (2) RLR 193;

Herbert Clayton and Jack Waller Ltd and Ors v Oliver [1930] AC 209; [1930] All ER Rep. 414 (HL);

Ndamase v Fyfe-King, NO, 1939 EDL 259;

Pinder v Malcomess and Co. Ltd (1905) 19 EDC 266;

Wallace v Rand Daily Mail Ltd., 1917 AD 479.

N J McNally for the plaintiff.

B W K Whaley for the defendant.

Judgment

Beck J: The plaintiff has instituted against the defendant university an action for substantial damages for breach of contract, alleging that his contract of employment as a Lecturer Grade 1 in the Department of Economics was unlawfully prematurely terminated. By way of a stated case in terms of Order 29, Rule 199, the opinion of the court is sought as to whether the termination of the plaintiffs employment was unlawful, and whether, if so, the plaintiff would in principle be entitled to such damages as might later be proved on the basis set out in the declaration.

The letter that made the offer of appointment that the plaintiff accepted contained the following paragraph:

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"The duties and terms of the appointment are set out in the attached document headed 'Terms and Conditions of Service of Academic Staff' . . . That document and this letter would. constitute the contract of service between you and the University."

The document referred to contains the following prefatory provisions:

"[These terms do not apply to Research Fellows, Teaching Assistants, Demonstrators and Staff appointed on Short-term Contract or Secondment.]

All appointments shall be governed by the provisions of the Charter of the University . . . and any statutes, ordinances, regulations or rules made under the authority of the Charter."

It then goes on to set out, in numbered paragraphs, the terms and conditions of service, of which the following have particular relevance to the dispute that has arisen:

"7. *Tenure*

(i) (The) appointment . . . shall be subject to a probationary period of two years from date of appointment which period may be extended by one year at the discretion of the University.

BECK J

(ii) At the end of the period the appointment shall either be confirmed or terminated.

13. *Residential Accommodation*

If a member . . . so requests, the University shall, for a period of at least three years, provide him with unfurnished accommodation at a rate of 15% of his salary . . . "

It is further necessary to refer to one of the ordinances made under the authority of the Charter, namely, the "Staff (Tenure) Ordinance, 1973", which applies to all members of staff appointed after the coming into force of that ordinance, and which sets out the procedural steps that have to be followed for dismissing any member of staff for what the Council of the University shall deem to be "good cause". "Good cause" is defined as meaning:

"(a) Conviction for any offence which the Council considers to be such as to render the person concerned unfit for the execution of the duties of his once.

(b) Any physical for mental incapacity which the Council considers to be such to render the person concerned unfit to continue to hold his once.

(c) Conduct of an immoral, scandalous or disgraceful nature which the Council considers to be such as to render the person concerned unfit to continue to hold his office.

(d) Conduct which the Council considers to be such as to constitute failure or inability of the person concerned to perform the duties of his office or to comply with the conditions of tenure of his Office "

The procedural steps to be followed for dismissing a member of staff involve informing the member in question, in writing, of the matters alleged against him and giving him an opportunity to reply in writing to the charges and, if so requested by him, appointing a joint committee of the Council and the Senate to examine the case and report to the Council thereon, with the right to the member concerned to appear and to be legally represented before such joint committee of

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inquiry.

Without following any of these procedured steps the Registrar of the University wrote to the plaintiff on the 18th March, 1980, in the following terms:

> "I write to inform you that it has been decided not to confirm you in your appointment as a Lecturer Grade 1 in the Department of Economics when your probationary period expires on the 23rd September, 1980. In view of this decision it has been agreed that your appointment is hereby terminated with immediate effect.

BECK J

> By copy of this letter I am asking the Bursar to make the necessary financial arrangements which will include payment in lieu of notice of an amount equivalent to your salary through until 23rd September, 1980.
>
> You will be required to vacate the University house which you occupy at No. 1 Langham by 30th April, 1980. The rent and other charges until that date will be withheld from the amount paid to you."

The plaintiff refused to acquiesce in this purported termination of his appointment, and he accepted the payment that was made to him under protest. His contention in the special case now before me is that the defendant University should either have sought to dismiss him in terms of the provisions of the "Staff (Tenure) Ordinance, 1973", or have allowed him to continue in his post until the end of his probationary period. He contends that the procedure actually followed fell between two stools and that it unlawfully deprived him of rights and benefits to which he was entitled, in that it denied him the opportunity of defending those rights and benefits in accordance with the provisions of the Ordinance.

The rights and benefits of which the plaintiff says he has been unlawfully deprived are:

(a) the right to accommodation at an advantageous rental and in a convenient locality; and

(b) the right to continue and, if possible, complete work on research projects on which Plaintiff was engaged on the 18th March, 1980, when his appointment was terminated with immediate effect.

For the allegedly unlawful deprivation of these rights and benefits the plaintiff has sued the defendant for special damages in a sum said to represent "the cost of removal from the University house and the additional cost of alternative accommodation up to 23rd September, 1980; and for the increased cost of medical aid;" and for general damages in a sum said to represent, loss of reputation, loss of opportunity to further his professional reputation and status, loss of future employment and promotion opportunities and loss of earnings from publications and consultancy fees arising out of inability to complete research projects and publications currently in train".

For the purposes of the stated case it is common cause that the right described as (a) above is "a description of the accommodation provided by the defendant"; and, with regard to the right described as (b) above, the following facts are common cause:

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BECK J

"(1) that persons holding the appointment with defendant that plaintiff held would normally be expected by defendant to undertake research projects;

(2) that the promotion prospects and thus the future earning capacity and professional reputation of University academic staff such as plaintiff was, can be materially influenced by the research work which they undertake and the publications which result therefrom;

(3) that defendant would normally and did in fact provide plaintiff with funds and facilities to enable him to carry out certain research projects approved by defendant;

(4) that such assistance terminated on the 18th March, 1980;

(5) that in consequence plaintiff was prevented from continuing the said research projects;

(6) that plaintiff was planning to complete the said research projects by 23rd September, 1980, and to publish papers and books based on those projects subsequently;

(7) that the completion of the research projects and the publication of the papers and books based thereon would have been relevant to plaintiff's future earning capacity and professional reputation."

The last-mentioned agreed facts all stem from the following provision in the document headed "Terms and Conditions of Service of Academic Staff":

"3. Duties

(i) . . . . . .

(ii) It shall be the duty of each member:

(a) . . . ;

(b) to contribute to the advancement of his subject by research."

The submission that the letter of the 18th March, 1980, was an unlawful breach of contract on the part of the defendant was rested by Mr *McNally* on the contention that on the facts of this case the University is not in the position of an employer who can terminate an ordinary employer's contract of service merely by paying him salary in lieu of notice, thereby saying in effect, "I am carrying out my contractual obligations to you in full by paying your salary in lieu of notice and by absolving you from carrying out your obligations to me." Because the plaintiff in the instant case enjoyed important rights other than his right to his salary the University could not, as Mr *McNally* says, unilaterally waive its right to his services, and he referred me to the following passage at pages 432-3 of Christie's *The Law of Contract in South Africa*:

BECK J

"Donation is a contract, not a unilaterally effective act, so unless an offer to donate is accepted there can be no donation. The same is true of waiver, release or whatever it may be called. An example will make this clear. An artist contracts to paint my portrait for a fee. Changing my mind, I tender his fee and purport to release him from his obligation to paint the portrait. He is not obliged to accept the release, because he may have hoped to enhance his reputation as an artist by painting this particular portrait. The point was well made by MUNNIK, AJ, in *Union Free State Mining and Finance Corporation Ltd. v Union Free State Gold and Diamond Corporation Ltd.,* 1960 (4) SA 547 (W) at page 549: 'I do not think that a creditor can by the mere exercise of his will terminate the

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> obligation without the concurrence of the debtor because as both Wessels, paragraph 2344A, and Pothier, section 578, point out a release, waiver or abandonment is tantamount to making a donation to the debtor of the obligation from which he is to be released and until that donation is accepted it has not been perfected. There may conceivably be circumstances tin which a debtor does not wish to be released from his obligation. It may for a variety of reasons not suit him to be released. To allow the release, waiver or abandonment and the consequent making of a donation dependent solely on the will or action of the creditor would be tantamount to creating a contract at the will of one party which is a concept foreign to our jurisprudence.' "

This well-established principle is also referred to in *Alberts v Bryson,* 1976 (2) RLR 193; 1977 (1) SA 857 (RAD) at 860A-B, and in the authorities there cited, and in *Herbert Clayton and Jack Waller Ltd and Others v Oliver* [1930] AC 209 at 217; [1930] All ER Rep. 414 at 417, LORD BUCKMASTER, speaking of engaging the services of a professional actor, said, quoting the words of ROMILLY, MR, in *Fechter v Montgomery* (1863) 33 Beav. 22 at 27:

> "It is obvious that you cannot put him in the position of a clerk or other person similarly situated and compare him with such a person. It is clear that the great object of any person wishing to become a distinguished actor, when he has already established a reputation in the provinces, is to have an opportunity of appearing upon the London stage and before a London audience. That is the object for which a person enters into a contract of this description."

There can, I think, be no doubt that the employment of a University lecturer who is entitled, as well as obliged, to use University funds and facilities to engage upon original research in his particular professional field, is such a contract of service as would be governed by the principle on which Mr *McNally* relies. If, therefore, the plaintiff's contract was one for a fixed period of two or - at the University's discretion - three years, pending a decision whether or not to appoint him to the permanent staff, it would be clear that the University could only terminate his appointment prematurely by way of dismissal for good cause and in accordance with the procedure provided by the "Staff (Tenure) Ordinance, 1973", and not unilaterally as was done on the 18th March, 1980.

BECK J

The contention of the University, however, is that the plaintiff's contract did not confer on him the right to be employed as a Lecturer Grade 1 for at least two years pending a decision whether or not appoint him to the permanent staff. His appointment was, it is emphasized, for a *probationary* period of two (or three) years, and it is Mr *Whaley's* submission that the term of the contract that reads "At the end of the probationary period the appointment shall either be confirmed or terminated" is a provision that is simply designed to ensure that the plaintiff could not be kept on probation for longer than, at most, three years. He says that it is of the essence of a probationary appointment that the probationer's services may lawfully be terminated at any stage of the probationary period if the probationer's work reveals his unfitness for the contemplated position. For this proposition, he relies on the following passage from the judgment of GANE, J, in *Ndamase v Fyfe-King, NO,* 1939 EDL 259 at 262 - 3:

> "There is abundant authority for the position that employment for a term of years can be terminated during the currency of the years either summarily or on notice for reasons of negligence: see e.g. *Pindar v Malcomess and Co. Ltd.,* (1905) EDC 266; *Wallace v Rand Daily Mail Ltd.,* 1917 AD 479. Can an employee on probation in the sense above described, whose every action is admittedly a proper subject of scrutiny and judgment, claim to be a in a better position than if he had not been on probation? Can he in effect argue: 'Even if my conduct at an early

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> stage of my probation shows entire unfitness for my contemplated position, and even though it is clear from my conduct that I shall never fit myself for that postition, nevertheless I claim the right to hold the position until the last moment of my probationary period?' So to state the position is to provide the answer to the question. Such a position cannot be maintained. The very use of the word 'Probation' alone seems to lead to the same conclusion. If at any time it becomes clear that the purpose of the probation has been already frustrated, then there is no object in continuing the probation, and no objection at least to a dismissal on reasonable notice."

As far as I am aware the correctness of this passage and of the decision reached in *Ndamase*'s case has never been doubted. It must be observed however, that, firstly, the total unfitness of the plaintiff, Ndamase, for the contemplated post was not in dispute; and, secondly, the post in question was one that was akin, to use the words of LORD BUCKMASTER in *Clayton*'s case, *supra*, to that "of a clerk or other person similarly situated", and was not akin to the position of a portrait painter, or a professional actor, or a University lecturer entitled to use the facilities offered by his employer to engage in original research to the possible enhancement of his professional reputation and status.

In the instant case, it is not common cause on the pleadings (in which the issue is not even raised), nor is it any part of the stated case, that the

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BECK J

plaintiff had shown himself to be totally unfit for the position of Lecturer Grade 1 in Economics. Indeed, it is implicit in the plaintiff's case that, since the procedure for which the "Staff (Tenure) Ordinance, 1973" provides was not followed, he had no opportunity to defend himself and his rights against whatever complaints the University may have had about him or his work. Secondly, and of more importance according to Mr *McNally's* argument, the fact that the plaintiff was not in the position "of a clerk or other person similarly situated", makes all the difference, even to a probationary appointment.

I was not referred to any decided authority that is on all fours with the facts of this case, nor have I found any in the reference works at my disposal, although it would be strange if the point has not arisen previously for decision in a Commonwealth or American court. My own view, however, is that Mr *McNally* is correct in submitting that the instant case is materially distinguishable from *Ndamase*'s case. It seems to me that the overriding principle that governs the facts of the present case is that which is stated in the *Union Free State Mining* case, *supra*, even though the contract was for a probationary term. I am of that view for the following reasons.

The probationary appointment itself, no less than the contemplated possible later confirmation of it as a permanent appointment, was expressly made subject to the provisions contained in the document headed "Terms and Conditions of Service of Academic Staff", and those provisions in turn expressly incorporated the provisions of the "Staff (Tenure) Ordinance, 1973". Mr *Whaley* made the blunt submission that, merely because the appointment was for a probationary period, the provisions of that ordinance were not intended to apply to the plaintiff unless and until he had been appointed to the permanent staff, but that submission flies in the face of the clear language of the contract. Nor is it necessary, for any practical reason, to uphold Mr *Whadley's* contention. If the plaintiff was considered, during the probationary period,

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to be totally unfit for the post, the definition of "good cause" contained in the ordinance, particularly the definition in paragraph (d) thereof, furnished the University with the necessary power to dismiss him without having to wait for the probationary period to expire. And had the University desired to have a broader power of terminating his appointment without the need to observe the procedure laid down in the ordinance, it could easily have added the words "members appointed on probation" to the words contained within brackets in the prefatory provisions that I have previously set out. It was, incidentally, not argued by Mr *Whaley* that a probationary appointment is an appointment that

is embraced within the meaning of the phrase "staff appointed on short-term contract", nor, in my view, could that have been successfully argued.

The contract of appointment moreover expressly provided that "At the end of the probationary period the appointment shall either be confirmed or terminated". The ordinary grammatical meaning of the words that I have underlined is inconsistent with the notion that the appointment can be terminated *during* the probationary period, except, of course, as elsewhere provided in the contract (namely, for "good cause" and in terms of the procedure provided for in the "Staff (Tenure) Ordinance, 1973"), or by mutual agreement. To give those underlined words their ordinary grammatical meaning does not, I think, lead to any absurdity, because - as I have already pointed out - the appointment could in fact be terminated before the end of the probationary period, in accordance with prescribed procedure, if the plaintiff proved unfit for the post. Not only that, but, since the plaintiff was *not* an employee in the position of an ordinary clerk, the principle stated in the *Union Free State Mining* case would ordinarily apply to his appointment and protect it against premature unilateral termination except in the agreed manner provided for in the contract itself. It may also be added that the plaintiff was recruited, with his household, from Canada; and that it was also one of the express conditions of the tenure of his probationary appointment that *he* could only terminate it by resignation on giving not less than six months' notice in writing - all of which points, I think, to the conclusion that the probationary appointment in question was not intended to be of the nature of that which received judicial consideration in *Ndamase*'s case, *supra*.

Accordingly, the special case is answered in the plaintiff's favour with costs, and it is held that the plaintiff's contract was unlawfully terminated and that he is, in principle, entitled to such special and general damages as he may be able to prove on the basis set out in his declaration.

Coghlan, Welsh & Guest, legal practitioners for the plaintiff.

Scanlen & Holderness, legal practitioners for the defendant.

(1) TEMPRA THERM (1972) (PTY) LTD v CONTROLLER OF PATENTS, TRADE MARKS AND INDUSTRIAL DESIGNS (2) DAS PUMPS (PTY) LTD v CONTROLLER OF PATENTS,

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TRADE MARKS AND INDUSTRIAL DESIGNS 1981 ZLR 342

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

24th July, 1981

Flynote

Patents - Patents Act [Chapter 202] - section 54 (1) (a) - "clerical error or omission" - what is - failure to make request for sealing within required time - not such an error or omission.

Headnote

Section 54 (1) of the Patents Act [*Chapter 202*] allows the Registrar of the Patents Tribunal to authorize the correction of "any clerical error or omission . . . in any . . . application for a patent". In both cases, clerks in the agents' office had failed to make requests timeously on form P 21 to have the patent sealed, and the appellants sought to rectify the omission, relying on the provisions of the section quoted.

Held, that the words "clerical error or omission" referred only to clerical errors or omissions in form P 21 and not to a failure such as occurred in these cases.

Judgment

Fieldsend CJ: These are two appeals from the decision of PITTMAN, J, sitting as President of the Patents Tribunal. By agreement of the parties the court considered the case on the papers filed without hearing oral argument.

The only point in issue whether the Registrar of the Patents Tribunal had jurisdiction to authorize a correction in the forms (known as P 21.) submitted by the applicants requesting the sealing of the patents and dated the 9th September, 1980, to show that they had been submitted on or before the 31st January, 1980, or to correct the omission to make the requests within the prescribed time.

FIELDSEND CJ

The problem arises in this way. Following the applications for two patents by the appellants and their proper advertisement, the appellants were entitled to have the patents sealed if a request for this was made on form P 21 on or before the 31st January, 1980. Alternatively an application could have been made to extend the period. Neither action was taken until September, 1980, when agents for the applicants lodged the appropriate forms bearing the date the 9th September, 1980.

It was common cause that the reason why the requests were not made within the prescribed time was that a clerk in the agent's office had failed to make the requests timeously and that the

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failure was due to neglect or default.

Section 54 (1) of the Patents Act [*Chapter 202*] reads:

> "The Registrar may authorize -
>
> (a) the correction of any clerical error or omission or error in translation in any patent, application for a patent, or document lodged in pursuance of such an application or in the Register;".

It was contended for the appellant that the words "clerical error or omission" included an omission by a clerk to file the necessary documents within the required period, alternatively that "omission" could be read disjunctively as meaning an omission by anyone including the applicants themselves. The respondent contended that he had no authority to authorize the correction sought.

The learned President said of these contentions:

> " . . . elaborate provision is made in section 21 for extensions of time in relation to patent applications and those provisions would be completely negated if section 54 could be applied in the manner suggested by the applicants.... Section 54 (1) (a) dearly has a meaning far narrower than that contended for by applicants. It only authorized the Registrar to make alterations to form P 21 submitted by the applicants and dated the 9th September, 1980, if such alterations constituted the correction of a clerical error in the form, or an omission in it, or an error in translation in it. In fact, there was no clerical enter in it, no omission in it, and no error in translation in it."

I agree with the reasoning and the conclusion of the learned President and the appeals must be dismissed.

Baron JA: I agree.

Goldin AJA: I agree.

Seirlis, Higham & Lewis, legal representatives for the appellant.

PICKERING v SYFIN HOLDINGS LIMITED 1981 ZLR 344

Court **General Division, Salisbury**

Civil Trial

McNally, AJ

10th and 22nd July, 1981

Flynote

Practice and procedure - prescription - Prescription Act, 1975 (No. 31 of 1975) - sections 2 (1) and 15 - "debt" - meaning of - claim for damages for breach of mandate of agency - debt arising therefrom - not due before loss caused by breach - when loss caused.

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Headnote

The plaintiff was involved in a motor accident on the 3rd April, 1977, in the course of which a passenger was injured. She sued him for damages and his insurer repudiated liability, claiming that the plaintiff had breached warranties in his proposal form. Judgment was given against him. The plaintiff sued the defendant, a firm of insurance brokers whom he had appointed to obtain his motor-vehicle insurance. He claimed that they had failed to obtain from his medical practitioner the information necessary to complete his proposal correctly and had in consequence filled in the form on his behalf incorrectly. As a result, he had, he claimed, suffered damages, arising from the passenger's successful suit against him.

The summons in the present case was served on the 9th January, 1981. The plaintiff's insurer had repudiated liability on the 8th June, 1977, and the passenger had first advised the plaintiff of her claim against him on the 8th June, 1978.

The defendant filed a special plea, alleging that the plaintiff's claim was prescribed, since the "debt" arising from the defendant's breach of mandate of agency had become due when the insurer had repudiated liability.

Held, dismissing the special plea with costs, that a debt which arises from a breach of contract cannot become due before loss has been caused by that breach (*Escom v Stewarts and Lloyds of South Africa* (*Pty.*) *Ltd.,* 1979 (4) SA 905 (W) at 908H). Although the insurer had in effect told the plaintiff that it would in future reject liability for a claim made against him, there should be loss to the plaintiff only when there was a disclaimer of the plaintiff"s claim for indemnity, and this could only occur when the injured

McNALLY JA

passenger had actually formulated and made her claim against him. As this was done on the 8th June, 1978, prescription could not have started to run before that date.

Cases cited:

List v Jungers, 1979 (3) SA 106 (AD);

Evins v Shield Insurance Co Ltd 1980 (2) SA 814 (AD);

Evins v Shield Insurance Co Ltd 1979 (3) SA 1136 (W);

Escom v Stewarts and Lloyds of South Africa (Pty) Ltd (*supra*);

Heyman v Darwins Ltd. [1942] 1 All ER 337 (HL);

Pereira v Marine and Trade Insurance Co Ltd 1975 (4) SA 745 (AD).

A P de Bourbon for the Plaintiff.

C W Jordaan for the defendant.

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Judgment

McNally AJ: The plaintiff was involved in an accident at the Victoria Falls on the 3rd April, 1977, and a passenger in his vehicle was seriously injured. She sued him for damages and he joined his insurer as third party in the action. The latter successfully avoided liability to indemnify him, claiming that plaintiff had breached warranties in his proposal form. Judgment was given against him and in favour of the passenger in the sum of $18 786 plus costs of $2 328,78. All this appears from the decision in *Kelly v Pickering & Anor (2),* 1980 (2) SA 758 (R), which was upheld on appeal (*Pickering v Standard General Insurance Co Ltd* 1980 (4) SA 326 (ZAD)*(11).

Plaintiff now sues defendant, saying that the latter was appointed by him in January, 1976, as his "broker and agent for the purpose of obtaining for him a private motor-vehicle insurance policy with (the insurer)".

He claims further that in pursuance of that mandate of agency he instructed an employee of defendant to ascertain from his medical practitioners the correct answer to a question on the proposal form. Defendant, acting through its employee, "breached its mandate of agency by failing to obey and carry out the plaintiff's instruction and by failing to exercise reasonable and proper care, skill and diligence" in various ways, specified, and in consequence the employee filled in the form on his behalf incorrectly. From that flowed all the woes outlined above so that:

> "In the premises, as a result of the breach of mandate alleged in paragraph 9 above, the plaintiff has suffered damages in the total sum of $25 146,80...."

McNALLY AJ

This latter figure is the sum of the two set out earlier plus plaintiff's costs as against the insurer both at first instance and on appeal.

To this claim defendant has filed a special plea alleging prescription under Part III of the Prescription Act, 1975 (No. 31 of 1975), which I shall call "the Act". It is this issue which is now before me.

Counsel have helpfully provided me with a document entitled "Stated Case" which sets out the agreed facts. For the purpose of this hearing, the alleged breach of mandate is admitted. The stated case ends by setting out two questions which require an answer:

A. whether the insurer was entitled to repudiate all liability under the policy on the 8th June, 1977, in view of the fact that the injured party had not at that stage made any claim.

B. whether plaintiff's claim became prescribed before or after the 10th January, 1978 (I take this to mean whether prescription began to run before or after the 10th January, 1978" since summons in this present matter was served on the 9th January, 1981).

The Act came into operation on the 1st January, 1976, before any of the events relevant to this case took place. It is common cause that the relevant period of prescription is three years, and the two relevant sections of the Act are -

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"2. (1) In this Act, 'debt', without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise."

and

"15.(1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as a debt is due.

(2) . . . (not relevant)

(3) A debt which does not arise from contract shall not be deemed to be due until the creditor becomes aware of the identity of the debtor and of the facts from which the debt arises."

I am not here concerned with remoteness of damage or causation. I am concerned only to answer the question whether this "debt" (as defined in the Act) or this "claim" (which is what it is here) is prescribed. And that in turn depends upon the date when prescription began to run, which, according to section 15, is the date when the debt became due.

Now, a debt may "arise" (in the sense in which that word is used in section 2 (1)) on one date and only become "due" on another and later date, as was pointed out by DIEMONT, JA, in *List v Jungers,* 1979

McNALLY AJ

(3) SA 106 (AD) at 121C-E. In the former sense the word "debt" may be equated to "cause of action" as that phrase is discussed by CORBETT, JA, in *Evins v Shield Insurance Co. Ltd.,* 1980 (2) SA 814 (AD) at 838.

One can illustrate the difference by rewriting the definition in the Act (section 2) in two different ways:

1. "Debt" without limiting the meaning of the term includes any cause of action arising from statute, contract, delict or otherwise.

2. "Debt" without limiting the meaning of the term includes any *sum of money* which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise.

The definition as it stands in the Act covers both the above. It is an inclusive, not an exclusive, definition. The object of the distinction is to show that the word is used sometimes in the sense of the first illustration above, and sometimes in the sense of the second. I should add that the word "debt" includes other things as well as a sum of money, and I agree, with respect, with KING, J, when he says, at page 1141F-G of *Evins v Shield Insurance Co. Ltd.,* 1979 (3) SA 1136 (W):

"The word 'debt' in the Prescription Act must be given a wide and general meaning denoting not only a debt sounding in money which is due but also, for example, a debt for the vindication of property."

Now, in the present case, there are a series of dates from which to choose in determining the starting point of the running of prescription in respect of this debt. I set them out as follows:

1. 28th January, 1976 - the date of the erroneous completion of the proposal form by defendant on behalf of

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plaintiff.

2. 3rd April, 1977 - the date of the accident.

3. 8th June, 1977 - the date on which the insurer purported to repudiate liability under the policy, having discovered the error on the proposal form.

4. 8th June, 1978 - the date the injured passenger first advised plaintiff of her claim.

5 13th and 19th October, 1978 - the dates respectively of issue and service of summons by the injured passenger against and on plaintiff.

6. December, 1978 - the date when the insurer repudiated liability in respect of the injuries of the passenger by opposing the plaintiff's application to join it as third party.

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7. 13th February, 1980 - the date on which the claim by the injured passenger was admitted by plaintiff and her damages agreed.

8. 4th August, 1980 - the date on which the correctness of the insurer's repudiation was confirmed on appeal.

The first of these dates may be disposed of readily. The 28th January, 1976, was the date the error was made and thus the date of the breach of mandate relied upon in this action; but no loss had yet been caused by that breach and:

> "It seems to be clear that a debt which arises from a breach of contact cannot become due before loss has been caused by the breach."

(*per* GOLDSTONE AJ in *Escom v Stewarts & Lloys of South Africa (Pty) Ltd* 1979 (4) SA 905 (W) at 908H). Although the judgment has been upset on appeal (1981 (3) SA 340), this particular proposition, for which the learned acting judge cited ample authority, is unassailable.

The second date is the 3rd April, 1977, the date of the accident. That is the date upon which the claim of the injured passenger (in delict) against the plaintiff arose. But that claim would have arisen whether or not the plaintiff was insured and whether or not defendant had breached its mandate. Plaintiff would not suffer a loss caused by the breach unless and until the insurer repudiated liability in reliance on the breach.

We come thus to the third date, the 8th June, 1977. On this date the insurer addressed to plaintiff's insurance broker (i.e., the defendant), a letter saying:

> "We . . . wish to advise that we are at present awaiting a report from the insured's specialist concerning his suffering from a form of epilepsy.
>
> Since this disability was at no stage advised to us, either on the proposal form or subsequently, we must at this stage repudiate all liability under the policy on the grounds of non-disclosure of material fact, and trust that you will advise your principal accordingly."

It is not in dispute that plaintiff was advised of this letter within a day or two. The letter was in response to a claim by plaintiff for the damage to his vehicle. The injured passenger had not at

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this stage made or formulated any claim.

This date is the critical date, because if prescription did not begin to run until the next significant date, it will have been interrupted by the service of summons on the 9th January, 1981.

Defendant contends that it was entitled to repudiate all liability at that stage, regardless of the fact that the injured passenger had not yet

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made a claim on plaintiff. It further claims that that repudiation created at once a "loss" suffered by plaintiff which was a loss of his indemnity, which loss arose from and was caused by defendant's breach of mandate. Thus the "debt" was `'due" and time began to run.

Mr *Jordaan*, for defendant, relied upon the decision in *Heyman v Darwins Ltd.* [1942] 1 All ER 337 (HL) for the proposition that "repudiation" means "rescission" and is a lawful right. The decision is helpful only in so far as it shows how many meanings can be given to the word "repudiation". I refer in particular to the speeches of VISCOUNT SIMON, LC, at pages 340G-341G, and LORD WRIGHT at page 350. The latter, incidentally, points to the significant distinction between repudiating a contract and repudiating liability under it (page 350H). If one studies the letter set out above, it is clear that the insurer is in effect saying that he has grounds for believing there has been a breach of warranty; that he is investigating those grounds further; and that in the meanwhile he is not prepared to accept liability for the claim that has been made and gives notice that he will similarly reject liability for any other claims to be made in the future (unless, presumably, the specialist's report causes him to take a different attitude).

It does not seem to me to be meaningful to inquire whether or not the insurer was "entitled to repudiate" as counsel have worded it in their submission. Certainly, the insurer was perfectly "entitled" to write that letter, and it was entirely proper to advise the insured at the earliest possible moment that all might not be well with his insurance cover.

The dispute, however, is whether the writing of that letter is an event which caused loss to the plaintiff arising out of the defendant's breach of contract.

Now, the law is clear that an insurer who relies, as the insurer does in this case, on the provisions of the insurance policy itself in order to avoid liability under the policy must act in terms of that policy and its conditions, and those conditions will be restrictively interpreted: *Pereira v Marine & Trade Insurance Co. Ltd.,* 1975 (4) SA 745 (AD). Although the letter does not say so, the insurer in this case is clearly relying on the "condition precedent" clause (Condition 9) and is purporting to "disclaim liability" as he is entitled to do under Condition 10. These conditions are for practical purposes identical to the conditions numbered respectively 11 and 9 in *Pereira*'s case (*supra*) - see page 750 letters F to G of the report.

It is true that it appears that the letter I have quoted is in part a disclaimer of plaintiff's claim in respect of the damage to his motor-

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vehicle. But that is not the "debt" with which we are concerned. Here again I rely on the words of KING, J, in the court of first instance in *Evins*' case (*supra*) where he says, at 1141G:

> ". . . 'debt' cannot embrace all rights between two persons. In my view 'debt" in sections 10 and 15 (1) of the Prescription Act means an obligation or obligations flowing from a particular right."

It is only when there is a disclaimer, in terms of the policy, of plaintiff's claim for indemnity in respect of the claim of the injured passenger, that there is a relevant loss by plaintiff consequent upon defendant's breach of mandate. As I understand *Pereira*'s case this is precisely the effect of the point being made by the learned Judge of Appeal when he said, at page 758G-H:

> "The letter of the 5th March, 1973, relied upon by respondent, was not a disclaimer for the purposes of Condition 9 because at that stage no claim had been made or was indeed capable of formulation."

and, earlier, at letter B:

> "The condition does not admit of a general disclaimer of future claims at a stage when a precise claim in a fixed amount has not, and cannot, be made by the insured."

In short, in so far as a claim for indemnity by plaintiff from the insured in respect of the injured passenger's claim was concerned, no such claim had been made on the 8th June, 1977, nor could it be made until the injured passenger had formulated and made her claim against plaintiff. Only when plaintiff thereafter made a claim under the policy could his claim be disclaimed under the policy.

I do not consider it necessary at this stage for there to be a precise finding as to the date from which prescription ran. I need only say that, on the papers before me, I am satisfied that prescription could not have started to run before the 8th June, 1978, the date on which the injured passenger first advised plaintiff of the quantum of her claim against him.

It must, in fact, have been some subsequent date. Accordingly, on the papers, the claim in the summons is not prescribed and the special plea is dismissed with costs.

Granger & Archer, legal practitioners for the plaintiff.

Scanlen & Holderness, legal practitioners for the defendant.

THE STATE v ALOUIS 1981 ZLR 351

Court **Appellate Division, Salisbury**

Criminal Appeal

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Fieldsend, CJ, Baron, JA, and Goldin, AJA

25th June and 24th July, 1981

Flynote

Evidence - accused giving unacceptable version of facts - not necessarily conclusive - prosecution evidence must still prove its case beyond reasonable doubt.

Headnote

The accused was convicted in the magistrates court of attempted murder. His defence was essentially one of self-defence. It was necessary to decide whether he was acting in self-defence so as to exonerate him from the admitted assault, whether he had exceeded the bounds of self-defence and was therefore guilty of some lesser offence, or whether, if there was no justification for striking the blows he did, the nature of the blows established an intent to kill. There was a sharp conflict between the accused's and the complainant's versions. The accused's story was rejected but the complainant's version was also not entirely reliable.

Held, that in order to arrive at a proper finding as to the accused's state for mind, it was important to know what facts could be relied on to indicate that state of mind. The fact that the accused had given false evidence was by no means conclusive, because the onus still lay on the prosecution to refute the defence of self-defence. Piecing together the evidence to arrive at a version which might reasonably be true, the accused may well have been in fear of his life and it was not shown that the force he used was excessive.

Cases cited:

R v Sharmpal Singh [1962] AC 188;

R v Shevill 1964 (4) SA 51 (SR AD); 1964 RLR 292;

R v Mlambo 1957 (4) SA 727 (AD);

R v Detsera 1988 (1) SA (FSC); 1958 R & N 51.

A A Chiwara for the appellant.

B J Turner for the respondent.

FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant was convicted of attempted murder and now appeals against his conviction and sentence.

The evidence established that the appellant assaulted the complainant with an axe as a result of which he sustained very severe injuries. The most serious was a laceration on the left side of the head slightly above and behind the ear, with an underlying depressed fracture of the skull

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and damage to the dura and brain tissue. There was also bruising to the right side of the head, two wounds to the right leg which needed stitching, a fracture of the knuckles of the right hand and multiple bruising of the chest. It was common cause that the injuries to the complainant's head, leg and hand were caused by blows struck by the appellant with an African-type axe.

The essential issues in this appeal are whether the appellant was acting in self-defence so as to exonerate him from the admitted assault, whether he exceeded the bounds of self-defence and so, though not exonerated, was guilty of some lesser offence, or whether, if there was no justification for striking the blows he did, the nature of the assault establishes at least a constructive intent to kill on the part of the appellant. The determination of these issues depends upon the resolution of the sharp conflict of evidence between the complainant and the appellant.

[His Lordship set out the two versions, and continued:]

The magistrate, rightly in my view, rejected the version given by the appellant. It is inconsistent with all the injuries sustained by the complainant, it is inconsistent with the bullet wound sustained by the appellant, it is inconsistent with the appellant's axe-head having separated from the handle, and it is inconsistent with the probabilities.

This, however, is not conclusive of the appeal, because one has to be satisfied, the question of self-defence having been crisply raised by the appellant, that the prosecution has established beyond reasonable doubt that the appellant was not acting in self-defence. It may well be that on the probabilities the true version of what occurred lies somewhere between the conflicting stories.

I find it difficult to accept the complainant's account of what occurred.

[His Lordship analysed the complainant's version, and continued:]

All these features lead one to have a doubt as to the complete reliability of the version given by the complainant.

Unfortunately the appellant's legal representatives did not offer us any assistance as to whether some version mid-way between that of the

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complainant and that of the appellant which might have represented what actually occurred. The court was left to find its own way through the evidence in an endeavour to arrive at what might have happened. And there is the added difficulty in a case of this nature, where the result may depend on the appellant's state of mind in a given set of circumstances, that he relies on a different set of circumstances which we do not feel able to accept.

In general, where the acceptable prosecution evidence, whether direct or circumstantial, would lead if unexplained to the conclusion that an accused person is guilty of the offence charged, an accused who chooses not to offer an explanation, or who offers an explanation based on facts which cannot be accepted, takes the chance that the court will find against him. As LORD

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DEVLIN put it in *R v Sharmpal Singh* [1962] AC 188 at page 198:

> "When the prisoner, who is given the right to answer (the vital) question, chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified."

This was a case where the accused had offered no evidence. An instance of an accused offering what was found to be false evidence is *R v Shevill* 1964 (4) SA 51 (SRAD); 1964 RLR 292. At page 52 (page 293 of the Rhodesian report), MACDONALD AJA, as he then was, said:

> "It is not in the broad interest of the administration of justice that courts should invent explanations and excuses for accused persons which are unsupported by evidence. Such conduct might tend to encourage accused persons to withhold their version of the facts in the hope that a more favourable explanation might occur to the court.
>
> Once, however, the magistrate found that the appellant's version was untrue it became necessary for him to ascertain as best he could on the evidence available the truth of what happened. The fact that the appellant had given a false account did not justify the court in accepting of the two possible explanations the less favourable (to the appellant) and less probable explanation."

R v Mlambo, 1957 (4) SA 727 (AD) was a case in which, in the face of incontrovertible circumstantial evidence an appellant had falsely denied killing the deceased, it was necessary to decide whether the appellant had the necessary intent to constitute murder. In a dissenting judgment with which PRICE AJA, concurred, MALAN JA, said at page 738:

"An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reason

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FIELDSEND CJ

> able inferences which are not in conflict with, or outweighed by, the proved facts of the case.
>
> Moreover, if an accused deliberately takes the risk of giving false evidence in the hope of being convicted of a less serious crime or even, perchance, escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

In a case of the nature of that which we are now considering it is the appellant's state of mind when he struck the blows which injured the complainant which is vital to the decision. And in order to arrive at a proper finding as to appellant's state of mind it is important to know what facts can be relied on as indicating that state of mind. It is only against those facts that it is possible to say whether the appellant was in fear of his life and acting in self-defence and, if so, whether he exceeded the bounds of self-defence in striking the blows he did. The determination of these issues is made the more difficult by the fact that we do not feel we can accept the appellant's evidence of the events which led up to the assault by him. But the fact that the appellant has given false evidence of these events is by no means conclusive against him, because the onus is on the prosecution to refute the offence of self-defence and as I have said we are not satisfied that the evidence of the complainant is necessarily the full truth.

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[His Lordship examined the probabilities, and continued:]

I appreciate that the possible reconstruction of the events I have detailed owes a certain amount to speculation, because it is not the account that the appellant advances. Nevertheless I consider that it is an account which even on the prosecution evidence could possibly have been true. If this account or something like it could reasonably be true then I am of the view that the evidence discloses that the appellant may well have been in fear of his life as he says he was, though on different facts. What puts the Court at a great disadvantage in deciding whether the appellant exceeded the legitimate bounds of self - defence is that the appellant's evidence was unacceptable as to the circumstances which motivated him and which led to the assault resulting in the complainant's . . . injuries.

The Court in *R v Detsera,* 1958 (1) SA 762 (FSC); 1958 R & N 51 was faced with a similar problem in a murder case, where although it felt that there was a good deal of truth in the appellant's version it could

not accept it in its entirety. The court there pieced together the evidence much as I have done here in order to arrive at a version of the facts which might reasonably be true. Adapting the test enunciated in that case to the present appeal, the issue is whether it is clear, taking full account of the urgency of the situation and all the factors operating on the mind of the appellant, that he ought to have known that he should not have employed the measure of force that he did.

On full consideration, and even allowing for the fact that the circumstances of the assault were not as deposed to by the appellant, I am satisfied that it has not been shown that the force he used was excessive. My main reasons are that the first and most serious blow was I think clearly struck in self - defence in the full sense of that term, the blows to the legs were struck probably immediately after the appellant had been shot in the thigh and while the complainant was kicking at the appellant and was still armed, no further serious blows were struck once no more shots were fired, and although the appellant was left in possession of his axe handle, he dropped it and ran away when he could have still further assaulted the complainant.

In my view the appeal should be allowed and the conviction and sentence set aside.

Baron JA: I agree.

Goldin AJA: I agree.

ELECTRA RUBBER PRODUCTS (PVT) LTD v SOCRAT (PVT) LTD 1981 ZLR 356

Court **Appellate Division, Salisbury**

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Civil Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

27th July, 1981

Flynote

Contract - provision of security guard for immovable property no possession or control of property passed to guard - not a contract of depositum.

Headnote

The plaintiff (respondent on appeal) was a firm which provided security guards for other persons' premises. The plaintiff sued the defendant for one thousand one hundred dollars under a contract between the parties in terms of which it provided a security guard for the defendant's premises. The defendant admitted its indebtedness but counter - claimed for some two thousand dollars, the value of goods stolen from its premises at a time when the security guard was at the premises. No allegation of breach of contract or negligence on the part of the plaintiff was made, the defendant relying on the agreement between the parties "as a contract of *depositum* or *quasi-depositum*". There was no express or implied term in the agreement that possession and control of the premises and the contents thereof would pass to the plaintiff when its guard came on duty in the evenings.

Held, that this was not a specific type of contract, such as sale or lease, which had terms implied by law, and the defendant could not rely on it as a contract of *depositum* or *quasi-depositum*. Indeed, there was no such contract as a *quasi-depositum* which could be said to have any legally implied terms. The essence of the agreement was that the plaintiff would provide a security guard to guard the defendant's factory. He could not enter the factory and could do no more than prevent unauthorised entry and to raise the alarm. There was not, therefore, any possession and control of the premises by the plaintiff, and the terms usually implied in a contract of *depositum* could not be read into the present agreement.

I.A. Donovan for the appellant. The claim in reconvention adequately alleges that property which had been entrusted to the safekeeping of the respondent's security guard was not returned to the appellant. *Frenkel*

v Ohlsson's Cape Breweries Ltd, 1909 TS 957 at 962 - 3. The property was entrusted to - or committed to the care of - the security guard during the hours on which he was on duty. It is indisputable that during this time the guard was required to safeguard the premises, i.e., to act as custodian. *Minister of Posts and Telegraphs v Daddy Brothers and Johnstone (Pty) Ltd* 1965 (3) SA 394 (E) at 396C. It is common cause that the security guard was not furnished with a key to the premises. By definition, a security guard is the custodian of that which he guards and it is unhelpful and unnecessary to examine the nature of his possession of and control over the property. It was not necessary for the security guard to have access to the interior of the premises in order to discharge his duty of taking care of (or safekeeping) the defendant's property. The purpose of the parties' contract was the safeguarding of the defendant's property.

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It is this purpose which distinguishes a contract of deposit from other contracts which involve responsibility for the safekeeping of goods: Joubert, *The Law of South Africa*, volume 8, paragraphs 68 and 70; *Frenkel v Ohlsson's Cape Breweries Ltd* (*supra*), at 962-3; Compare, Lee and Honoré, *SA Law of Obligations*, edition 1, paragraph 445; Wille's *Principles of SA Law*, edition 7, page 446.

BWK Whaley for the respondent. The plaintiff's duty in terms of the contract was to provide a security guard at the premises and times agreed upon. There was no ground for implying a further, special term in such a contract whereby an additional, altogether more onerous duty is imposed upon the plaintiff, namely, to restore to the defendant upon the termination of the guarding period each morning the factory grounds and building and (movable) contents thereof in the same condition in which they were at the commencement of the guarding period the previous evening. It is an essential element of a contract of *depositum* that a duty is imposed, either expressly or impliedly, upon the depository to restore to the depositor (at the agreed time or upon demand) the property, which is almost invariably movable, delivered to him: Lee and Honoré *The South African Law of Obligations*, 2nd edition, paragraph 369; Wille's *Principles of South African Law*, 7th edition, page 446 ("return of the property: the depository must restore the property uninjured, together with any accessions such as fruits or profits".); Maasdorp's *Institutes of South African Law*, 9th edition, volume 3, page 71 (first paragraph), page 73, (fourth paragraph); *Lituli v Omar,* 1909 TS 192 at 193-4; *Frenkel v Ohlsson's Cape Breweries Ltd* (*supra*), at 962 - 3; *Minister of Posts and Telegraphs v Daddy Bros* (*supra*). A contract to provide a security guard to guard immovable premises (and the contents thereof) is a contract *sui generis*, which does not fall under any of the

categories mentioned in *Frenkel*'s case. An essential feature of a contract of *depositum* is, therefore, lacking in the present case. It is doubtful whether, simply by mounting a guard outside the factory, the plaintiff thereby acquired possession of the factory building and grounds. Since the guard was not furnished with a key to the building and thus had no means of access into the building he cannot be said to have had the physical control or *detentio*, nor therefore the possession of the movable property situated inside the building. A *fortiori* was the security guard not in a position to restore, at the conclusion of each night's guard, such movable contents of the factory building in the same condition as they were at the commencement of each night's guarding period.

Judgment

Fieldsend CJ: At the conclusion of the hearing of this appeal the court dismissed the appeal with costs giving leave to the appellant to file an amended claim in reconvention within 21 days. These are the reasons for that decision.

The plaintiff (respondent on appeal) is a firm which undertakes for reward to guard the premises of those who contract with it for that service. The defendant (the appellant) is a company which operates a factory on the outskirts of Salisbury.

The plaintiff sued the defendant for $1100 odd under a contract between the parties in terms of which it alleged that for reward it provided a security guard over a period for the defendant's

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factory. The defendant admitted its indebtedness but claims to be excused payment by reason of its counterclaim in a greater sum.

The defendant's counterclaim was for the sum of $2000 odd, said to be the value of materials stolen from its factory during the time that the factory premises and its contents were in the possession and under the control of the plaintiff. No fault was alleged against the plaintiff, the contention being that the plaintiff's obligation was to return the factory and its contents to the defendant as it had been handed over to it, unless it could establish that any loss of property had occurred without fault on its part.

The agreement pleaded by the plaintiff in its further particulars was "an oral contract in terms of which plaintiff provided a security guard for defendant's premises". The defendant accepted that these were the particulars of the agreement, but alleged that the "plaintiff undertook to provide a security guard to guard defendants factory . . . and the contents therein". It is on this allegation that the case has to be determined and when I refer hereafter to the plaintiff's obligation to guard the premises I mean the premises and its contents.

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The plaintiff sought particulars of the basis upon which it was alleged that the premises and contents were in the possession and control of the plaintiff, and was told that it was on the basis of the agreement between the parties as pleaded.

Further, the basis of the defendant's counterclaim was that it was "relying on the agreement as pleaded as a contract of *depositum* or *quasi-depositum*" and was "not required to allege either negligence or breach of contract".

To this counterclaim the plaintiff successfully excepted in the court below and the defendant now appeals.

The only issue is whether the agreement of the plaintiff to guard the premises imposed on the plaintiff an obligation to be responsible for any damage to the premises or loss of the contents which occurred during its nightly period of guarding them. There is no allegation that there was any express or implied term of the agreement that possession and control of the factory and its contents would pass to the plaintiff when each evening it assumed its duty to guard the premises.

Such a term certainly cannot be implied as a matter of law in a contract to guard premises and their contents. This is not a specific type of contract such as sale or lease in which there are terms implied by law, and it was a vain allegation by the defendant to say that it was relying on the "agreement as pleaded as a contract of *depositum* or *quasi-depositum*" to make applicable the terms implied by law in such a contract. Indeed there is no such contract as a *quasi-depositum*, which can be said to have any legally implied terms.

The nature of the agreement cannot be better put than it was by the learned trial judge (WADDINGTON, J):

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"The essence of the agreement was that plaintiff would 'provide a security guard to guard defendant's factory'. The appropriate meaning of the word 'guard' is given in *Chambers Twentieth Century Dictionary* as 'to ward, watch or take care of; to protect from danger or attack'. In the absence of some indication that the parties intended the word in question to bear some other specialized meaning, it is this meaning which in my view they must have had in mind when concluding the agreement. As plaintiff was given no means of entering the building and would not apparently have been entitled to since he was only permitted to break a window and use a telephone within reach in case of need [this was agreed to be part of the terms of the contract], the parties must have recognised that plaintiff would be able to perform its intended obligations both as respects the factory and the contents without that degree of control which would have permitted entry. The right to enter might have afforded good evidence of possession and control. It

FIELDSEND CJ

therefore seems to me to have been the intention that the security guard was expected to do no more than prevent unauthorised entry to the building and to raise the alarm, on seeing, from outside the factory premises, some emergency arising, e.g., fire breaking out. He would have been able to fulfil these functions without having custody or possession of the factory. I do not consider that the delivery, possession or control and the return of the premises, must have been intended by the parties to be implied terms of the contract in the instant case."

There is no warrant on the agreement as pleaded for regarding the contract as anything more than what it is stated to be, namely, a contract to provide a guard service for the premises and their contents. It cannot be said that under such a contract possession and control, in the sense in which those words are used in a contract of deposit, passed each night to the plaintiff to be returned in the morning, either of the factory or of the contents.

The exception was therefore properly taken and was rightly upheld.

Seirlis, Higham & Lewis, appellant's legal representatives.

Gill, Godlonton & Gerrans, respondent's legal representatives.

ZIMBABWE UNITED FREIGHT CO LTD v S & T IMPORT & EXPORT (PVT) LTD 1981 ZLR 361

Court **General Division, Salisbury**

Annotations Link to Case Annotations

Notice of Motion

Waddington, J

16th and 29th July, 1981

Flynote

Companies Act [Chapter 1901] - winding - petition for provisional winding up - section 186 - bar against application for judgment - does not operate until provisional order granted - proceedings by notice of motion -

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claims for money - should proceed by summons - award of costs.

Headnote

On the 4th June, 1981, the applicant petitioned for a rule *nisi* calling on interested parties to show cause why the respondent should not be compulsorily wound up. The hearing of the petition was adjourned until September, 1981, to ascertain the views of the other creditors.

In the present proceedings, the applicant proceeded against the respondent by notice of motion for judgment in the sum of $324 998,53. The respondent admitted owing a lesser sum, but argued that section 186 of the Companies Act [*Chapter 190*] precluded the applicant's entitlement to judgment, since a petition for winding up had been filed before the present proceedings.

It was also argued on behalf of the respondent that if the court's decision was to go against the respondent, only those costs should be allowed which the applicant would have recovered had it proceeded by way summons.

Held, that merely to file a petition for winding up would not preclude the applicant's entitlement to judgment. While winding up is deemed to have commenced as soon as a petition is filed, the deeming provisions only come into play once the court has provided a catalyst in the form of an order. Until such an order is made, it would be necessary for the respondent company to apply for a stay of proceedings in terms of section 182. No such application had been made.

WADDINGTON J

Held, further, that to proceed by notice of motion in a straightforward claim for money is not a form of procedure that is looked on with much favour by the courts and, unless a very strong case is made out for so proceeding, the court will ordinarily award only those costs recoverable had the proceedings been instituted by way of summons (*Miller v Roussot* 1975 (3) SA 876 (R); 1975 (1) RLR 324 followed).

Cases cited:

Miller v Roussot (*supra*);

Meaker NO v Campbell's New Quarries (Pvt) Ltd & Others 1973 (1) RLR 168; 1973 (3) SA 157 (R);

Attorney-General, *Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421.

Judgment

Waddington J: This is an application by notice of motion for judgment in the sum of $324 998,53. On the 4th June, 1981, the applicant petitioned the court in case No. GD 746/81 for a rule *nisi* calling on interested parties to show cause why the respondent company should not be wound up compulsorily in terns of the Companies Act [*Chapter 190*]. After taking time to consider the petition, the court, in a judgment handed down on the 24th June, 1981, adjourned

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the hearing of the petition and granted leave to the respondent to file further affidavits deposed to by its creditors for the purpose of informing the court whether the creditors favoured the granting of a provisional winding - up order or not. The petitioner was granted leave to set the resumed hearing down on any Thursday after the 14th September, 1981 (see *Zimbabwe United Freight Co Ltd v S & T Import/Export (Pvt) Ltd* G-S-197/81).

In case No. GD 746/81, the petitioner maintained, *inter alia*, that respondent had failed to pay a debt of $366 313,75 for at least three weeks after demand and should therefore be deemed to be unable to pay its debts in terms of section 178 (a) of the Companies Act. The respondent company, on the other hand, maintained that the debt due and owing was $324 998,53, in which sum the applicant in the present proceedings claims it is now entitled to judgment without accepting that the debt due to it is as low as alleged by the respondent. In the respondent's opposing affidavit in this case, it is stated, in effect, that by virtue of what was an out - and - out cession by respondent to applicant of certain letters of credit, applicant has no claim at all against respondent. In his argument, however, Mr *O'Meara*, who represented the respondent, informed the court that he could not rely on this submission because, as I understood his concession, the cession was one *in securitatem debiti* not resulting in the passing of *dominium*.

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Mr *O'Meara* did not seek to make anything of the fact that judgment is sought by way of notice of motion instead of by way of summons. His attitude was doubtless motivated by a consideration of the judgment of BEADLE, A C.J., in *Miller v Roussot,* 1975 (3) SA 876 (R); 1975 (1) RLR 324.

Respondent's opposition to the application is solely that section 186 of the Companies Act precludes applicant's entitlement to judgment.

Section 186 of the Act reads:

> "186. Lit a winding up by the court -
>
> (a) action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose;
>
> (b) any attachment or execution put in force against assets of the company after the commencement of the winding up shall be void;
>
> (c) every disposition of the property, including rights of action, of the company and every transfer of shares or alteration in the status of its members, made after the commencement of the winding up, shall, unless the court otherwise orders, be void."

Mr *O'Meara* argued simply that as the court is in the process of considering the petition for the provisional winding up of respondent in terms of Chapter 190, section 186 (a) operates as a bar to the continuation of the present application for judgment, notwithstanding the fact that no application by respondent has been granted in terms of section 182 of the Act staying any proceedings against respondent. Section 182 of the Act reads:

"182. At any time after the presentation of a petition for winding up and before a winding - up order has been made,

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the company or any creditor or contributory may -

(a) where any action or proceeding by or against the company is pending in any court of law in Zimbabwe, apply to such court for a stay of proceedings therein,

(b) where any other action or proceeding is being or about to be instituted against the company, apply to the court to which the petition for winding up has been presented for an order restraining further proceedings in the action or proceeding;

and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

Mr *O'Meara* also relies on section 183 (2) of the Act in support of his submission. Section 183 of the Act reads:

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"183. (1) Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the tune of the passing of the resolution.

(2) In any other case, the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

On the authority of *Meaker, NO v Campbell's New Quarries (Pvt) Ltd & Others,* 1973 (1) RLR 168; 1973 (3) SA 157 (R) and by virtue of section 183 (2) of the Act, respondent contended that its winding up is deemed to commence at the time of the presentation of the petition, i.e., on the 16th April, 1980, when the petition was filed. DAVIES, J, as he then was, held in *Meaker*'s case that the commencement of the winding up envisaged in section 183 (2) is when the petition is presented to the court by being filed with the Registrar in proper form.

The learned judge is reported in the following terms, at pages 171 - 172 of the Rhodesian report:

"Under the South African Companies Act, as under our Act, a winding up is deemed to commence 'at the time of the presentation of the petition for the winding up', but in South Africa there is a specific rule promulgated under the Act which provides that presentation of the petition is effected by the filing of the petition with the Registrar, accompanied by proof of the lodging of the petition and affidavit with the Master and a certificate by the Master that due security has been found for the costs. The only relevant South African decision to which I was referred is *Lief NO v Western Credit (Africa) (Pty) Ltd*, 1966 (3) SA 344 (W). At page 347 of that report SNYMAN J, states:

> 'From the scheme of arrangement under the Act, it would seem that section 113 provides for the initiation of proceedings for the winding-up of a company and that section 115 supplements it by ante - dating the commencing date of the order. The mischief aimed at by section 115 is a possible attempt by a dishonest company, or directors, or creditors or others, to snatch some unfair advantage during the period between the presentation of the petition for a winding - up order and the granting of that order by a court.'

The view of the learned judge would thus appear to be that even without reference to Rule 3 of the South African rules a petition is 'presented' when it is lodged in proper form with the Registrar, and that accordingly when the application is later heard in court and an order made, the order is back - dated to the time when the petition was lodged.

Mr *Pringle* referred me to a large number of English decisions on analogous provisions of the

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English Companies Acts. It is, I think, sufficient to note that in all these cases the approach of the court was that winding up commences when the petition is lodged with the court in proper form.

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> Giving the words their plain meaning, it seems to me that a petition is 'presented' to the court when it is filed with the Registrar in proper form. It is at that moment that the court is formally requested to consider the matter, and the fact that delay necessarily occurs before the court can actually adjudicate on the matter is, in my view, irrelevant.
>
> In the circumstances, I am satisfied that the winding up proceedings against the company in this case commenced on the afternoon of the 30th November, 1971."

I respectfully agree with the conclusion of DAVIES, J, that a winding up must be ante - dated from the presentation of the petition, i.e., when filed in proper form with the Registrar. However, the facts in *Meaker*'s case differed from the facts in the present application in one important respect. In *Meaker*'s case the petition was filed with the Registrar on the 30th November, 1971, and came before the court on the 2nd December, 1971, when a provisional order was granted. That order had been confirmed by the time *Meaker*'s case was decided. In the present case, by contrast, no provisional order has yet been granted. *Meaker's* case is clear authority in my view for the proposition that once the court grants an order - whether provisional or final, is not very important - the rights of the creditors of the company in liquidation are crystallized with retrospective effect from the date on which the petition was presented. But this is a far cry from the position where no order of any sort has been granted.

This is apparent when the scheme and general layout of sections 182 - 186 of the Act, which concern winding up by the court, are considered. Sections 182 - 184 obviously concern situations which exist before a court order is granted. In particular, section 182 deals with the procedure to be observed after the presentation of a winding up petition but before the issue of a court order if a stay of proceedings against a respondent company is sought pending the hearing of the petition. Section 183 (1) contains the machinery whereby the ante - dating of a winding - up order is made dependent upon events which happen even before the presentation of the petition. Section 183 (2) provides that "the winding up of a company by the court " (which can only mean the granting of a court order since there is no other means in the context of these provisions by which a winding up of a company may be given effect by a court) in cases other than those referred to in subsection (1) shall be deemed to commence on presentation of the petition. This can only mean, as DAVIES, J, clearly implied in *Meaker*'s case, that once a court has granted an order, the winding up is deemed to run from the date on which the petition is properly filed with the Registrar. I do not

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understand DAVIES J, to have meant that winding up commences as soon as a petition is filed when no court order has been granted. If that were so, what would the position be if the petition were to be withdrawn or if the court were to refuse to grant a provisional order? The

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construction contended for by the respondent would have the effect of rendering nugatory the very purpose of petitioning the court for a winding - up order, which is to enable the court to decide whether to exercise its discretion in terms of section 181 of the Act. It could not have been the intention of the Legislature that the mere filing of a petition would *per se* result in a compulsory winding up of a respondent company. In my view, the deeming provisions of section 183 can only come into play once the court has provided the catalyst in the form of an order.

Any doubt which may remain must be removed, in my opinion, when the provisions of section 186 of the Act are compared with those of section 182. The form creates an automatic stay of embryonic or incomplete proceedings and renders void certain attachments, other forms of execution and certain dispositions of property. Had section 186 of the Act been intended to apply to the period between the presentation of a petition for winding up and the granting of a provisional order, there would be no need for section 182. The court must give some effect to every ward in a statute unless necessity or absolute intractability of language dictates otherwise.

> "A statute . . . should be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant . . ."

(Per KOTZE, JA, in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg,* 1924 AD 421 at 436, quoting COCKBURN, CJ, in *R v Bishop of Oxford* (1879) 4 QBD 245 at 261).

In addition, following on, as it does, section 185 of the Act, which provides for the erects of a winding - up order of court, section 186 can only have been intended to apply to stays and avoidances *after* the granting of a court order.

I consequently consider that respondent must fail in its argument that by virtue of section 186 (a) of Chapter 190 the present proceedings must be regarded as having been automatically stayed.

At the outset of his argument, Mr *Mercer*, who appeared for the applicant, indicated that all applicant sought (apart from the costs of the application) was judgment and that it was not applicant's intention to proceed to execution. This, in my view, was a seriously undertaken waiver of applicant's right to execute. By this I took him to mean, how-

ever, two things, namely, that execution would not be attempted unless the petition by applicant in case No. GD 746/81 for the winding up of respondent were to fail and that his attitude stems from a desire on applicant's part not to be seen as endeavouring to gain an unfair advantage over other creditors. If my understanding of applicant's attitude is correct, then it is a laudable one. Mr *Mercer* went so far as to state that applicant would be prepared to accept, in the somewhat peculiar circumstances of this case, an order that applicant shall not proceed execution presumably, as I have said already, unless applicant's petition in case No. GD 746/81 fails or is withdrawn.

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In view of the conclusions I have reached in this case, it is unnecessary for me to consider applicant's alternative claim for an interdict prohibiting respondent from disposing of its movable property pending the outcome of case No. GD 746/81.

Mr *O'Meara* argued that should the decision of the Court go against the respondent, only those costs should be allowed that applicant would have recovered had it proceeded by way of summons.

In *Miller v Roussot* (*supra*), BEADLE ACJ, sounded a very clear warning that to proceed by notice of motion in a straightforward claim for money is not a form of procedure that is looked upon with much favour by the Courts. Unless a very strong case is made out for proceeding by notice of motion, the Court would ordinarily only award those costs recoverable had the proceedings been instituted by way of summons. In the present case, the affidavits in this application and the affidavits in case GD 746/81 which were incorporated into this case by reference show that these proceedings constitute the first attempt by applicant to obtain Judgment. Protracted efforts had been made previously to secure payment of the debt and respondent has obviously failed to honour an undertaking to liquidate its indebtedness at the rate of $10 000 per month from the 15th August, 1980. At no time has respondent seriously disputed its indebtedness. The only dispute of substance has centred round the quantum of debt. The respondent's inability to pay and its consistent efforts to ward off any action by applicant is explained in Judgment No. 197/81.

Mr *Mercer* advanced as the main reason for applicant's proceeding by notice of motion that applicant could not be certain that his application would be heard by the same judge, namely, myself, who heard the petition for respondent's provisional winding up. It was therefore felt necessary to refer to the affidavits filed in the winding-up application to

apprise the court of all the relevant facts surrounding this application. It would not have been possible to do so had summons been taken out. He continued that as respondent must have known that it had no defence to claim for Judgment, respondent could have consented to Judgment but reserved the right to apply for an order in terms of section 182 of the Companies Act restraining execution by the applicant.

I am not satisfied that it would have been necessary to place all the information contained in the affidavits in case No. GD 746/81 before the Court in proceedings instituted by summons. I also consider that respondent's ground of opposition to the present application was at least arguable. In short, I do not consider that applicant has made out a strong case for proceeding by way of notice of motion.

It is accordingly ordered:

1. There will be Judgment for the applicant in the sum of $324 998,53.
2. Costs are awarded to the applicant as if it had proceeded to obtain Judgment by way of

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summons.

The applicant's waiver of its right to proceed to execution until the determination of case No. GD 746/81 is noted in this Judgment for the sake of certainty.

Winterton, Holmes & Hill, legal practitioners for the applicant.

Seirlis, Higham & Lewis, legal practitioners for the respondent.

THE STATE v SQUARE 1981 ZLR 369

Court **General Division, Salisbury**

Review

Pittman, J

29th July, 1981

Flynote

Criminal law - Road Traffic Act, 1976 (No. 48 of 1976) - section 61 (1) - failure to stop after accident and to carry out other duties enjoined by section - not necessary to itemise all such failures in charge - competent verdicts.

Headnote

The accused was charged, *inter alia,* with contravening section 61 (1) (a) (i) of the Road Traffic Act, 1976 (No. 48 of 1976), it being alleged that, having been involved in an accident in which injury was caused to a person, he failed to stop his vehicle immediately. It was ordered that his licence be endorsed. The scrutinizing regional magistrate asked whether the accused should not, in terms of section 61 (3), also have been convicted of contravening sub-paragraphs (ii) and (iii), that is, failing to ascertain whether the person had been injured or killed and failing to render assistance to him. In such event, it would have been mandatory, in the absence of special circumstances, to prohibit the accused from driving for a period.

Held, that subsection (3) does empower a Court to convict on a number of sub-paragraphs of subsection (1) even though a single subparagraph is enumerated in the charge. Only one offence is created by section 61 (1). It is, however, desirable to include in the charge all the subparagraphs on which the prosecution relies.

Held, further, that the accused should have the opportunity to show whether special circumstances exist and to make representations on the period of prohibition and on whether any particular classes of vehicles should be exempted from the prohibition. The fine should, accordingly, be set aside, to be reconsidered in the light of any prohibition order made.

Cases cited:

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R v Kok 1958 (1) SA 59 (SR); 1957 R & N 733;

R v Pandisiri 1965 (1) SA 651 (SR AD); 1964 RLR 515;

S v Brereton 1971 (1) SA 489 (RAD); 1970 (2) RLR 272.

PITTMAN J

Judgment

Pittman J: On the 30th November, 1980, the accused was driving a vehicle which collided with a pedestrian, who sustained a fractured leg.

The accused was charged with two counts under the Road Traffic Act, 1976 (No. 48 of 1976). He was alleged to have contravened, first, section 43 (1), driving negligently, and, secondly, section 61 (1) (a) (i). The relevant allegations in the second charge read as follows:

> ". . . in that on the 30th November, 1980, and at Salisbury, in the said Province, the accused being the driver of a motor-vehicle, to wit, a motorcar, upon a road to wit, Highfield Road, Salisbury, aforesaid, at the time when the said vehicle was involved in or contributed to an accident in which injury was caused to a person, did wrongfully and unlawfully fail immediately to stop the said vehicle." The accused denied the alleged negligence, and asserted that he had stopped his vehicle at the scene of the collision but had left after some four minutes because he feared hostile action by a crowd which had gathered there.

The magistrate rightly rejected the accused's version of the collision and subsequent events, and convicted him on both counts. He then treated the two convictions as one for sentence, and imposed the following punishment:

> "$200,00 or 6 months' IWL in default of payment. In addition the accused's driving licence is to be endorsed as to this conviction [*sic*] and sentence."

The regional magistrate raised the following questions:

> "Did the magistrate apply his mind to subsection (3) of section 61 of the Act?
>
> Should the accused not also have been convicted of subsection 61 (1) (a) (ii) and (iii) of the Act?
>
> Was it not then mandatory to prohibit the accused from driving in terms of section 61 (8) of the Act? In any event it would be appropriate to make such an order in the case of any accident involving a person."

The relevant subsections of section 61 read as follows:

> "61. (1) A person who is the driver of a vehicle on or near a road at the time when the vehicle is involved in or contributes to an accident in which -
>
> (a) injury or damage, as the case may be, is caused to any person, animal or property; or
>
> (b) any person or animal is killed; shall -
>
> (i) immediately stop the vehicle; and
>
> (ii) if a person is involved in such accident, ascertain whether the person has been injured or killed; and

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(iii) if a person referred to in subparagraph (ii) has been injured, render such assistance to such person as -

A. he may be capable of rendering; and

B. such person may need; and . . . "

Subparagraphs (iv) and (v) then go on to provide that the driver shall also take all reasonable steps to guard the corpse of anyone who has been killed, and shall also give particulars of his identity, his vehicle and his insurer to any person having reasonable grounds for requiring them.

Subsection (3) provides:

"(3) A person charged with failing to carry out any duty referred to in subparagraphs (i) to (v) of subsection (1) may be convicted of failing to carry out any other duty referred to in those subparagraphs, if such are the facts proved."

and subsection (8) reads as follows:

"(8) Subject to the provisions of Part VII, a Court convicting a person of an offence in terms of subsection (2) -

(a) involving a failure only to carry out the duty referred to in sub-paragraph (i) or (v) of subsection (1) may prohibit the person from driving for such period as such Court thinks fit, or

(b) involving a failure to carry out any duty referred to in subparagraph (ii), (iii) or (iv) of subsection (1) shall prohibit the person from driving for such period as such Court thinks fit:

Provided that such Court may decline to prohibit the person from driving if it -

(i) considers that there are special circumstances in the case which justify such Court in so declining; and

(ii) endorses the special circumstances referred to in paragraph (a) on the record of the case when passing sentence."

In reply to the regional magistrates questions, the trial magistrate said:

"Subsection (3) of section 61 of the Act was not particularly considered in the light of convicting the accused of contravening section 61 (1) (b) (ii) because I read it as providing alternative verdicts only and not as authority for enhancing the conviction of an accused of offences in respect of which he had not specifically pleaded. In my view that would be prejudicial to the accused albeit subparagraphs (ii) and (iii) are implicit in a charge of contravening section 61 (1) (b) (i).

It seems to me that the Court ought to draw the attention of an undefended accused to the provisions of subsection (3) if it is to invoke its provisions. As I have said supra, the latter interpretation of subsection (3) is an innovation about which I was unaware, having not warned the accused of its provisions it seems to me that the accused cannot also be convicted of contravening section 61 (1) (b) (ii) and (iii) of the Act."

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As this was an accident in which a person was injured and not killed, the magistrate should have referred to subparagraphs (i), (ii) and (iii), read with paragraph (a) of subsection (1) of section 61, and not to subparagraphs 61 (1) (b) (i), (ii) and (iii).

This Court must now decide whether by reason of subsection 61 (3) the magistrate, having convicted the accused of failing to carry out the duty of stopping the vehicle referred to in subparagraph (1) was empowered to convict him also on the same charge of failing to carry out the duties referred to in subparagraphs (ii) and (iii), and, if so, to take action in terms of subsection (8) (b).

Subsection (2) of section 61 provides that "a person who fails to carry out one or more of the duties referred to subparagraphs (i) to (v) of subsection (1) shall be guilty of an offence", and liable to certain kinds of punishment.

The question set out the penultimate paragraph was referred to the Attorney-General and the following reply was received from his office:

> "It is respectfully submitted that subsection (3) does empower a Court to convict on a number of subparagraphs of subsection (1) even though only a single subparagraph has been enumerated in the charge, although the magistrate's point that the accused must not be prejudiced in his defence is a good one and conviction in respect of further subparagraphs should not be countenanced where there is a possibility of prejudice. The principal objection to conviction in respect of a number of subparagraphs is removed when it is considered that subsection (1) of section 61 only creates a single offence, no matter how many of the subparagraphs are contravened: see *R v Kok,* 1958 (1) SA 59 (SR); 1957 R & N 333 in which MURRAY, CJ, replied upon the amendment to the legislation effected by Act 5 of 1953. (The position in the corresponding South African legislation appears to be different - see Cooper and Bamford, *South African Motor Law,* at page 384.) It is also clear from the use of the word 'and' after each of the subparagraphs that a driver is under a duty to comply with each subparagraph that is applicable to his circumstances and it is submitted that it follows that lit was the intention of the legislature that the be punished in respect of each particular which he failed to satisfy.
>
> It is submitted that there is support for this interpretation from the judgment of MURRAY, CJ, in *Kok*'s case at page 61D where he said:
>
> > 'It is only necessary to emphasize two considerations: (1) that the penalty to be imposed must inevitably depend on the number of respects in which the accused driver has disregarded his duty and (2) that (subject possibly to granting the defence a postponement to avoid prejudice) the Crown can under subsection (4) rely on any breach disclosed by the evidence, even if such has not been particularised in the charge sheet or indictment.'

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> Further support for is interpretative can be found in the 1953 amendment subsection (3) which had previously provided that a person charged with a contravention of paragraph (a) of subsection (1) could in addition be 'charged and convicted' of a contravention of any of the other paragraphs: the amended version omitted the reference to the need to 'charge' these paragraphs and substituted the wording which in substance has been retained in the present Act.
>
> It is submitted that a more important issue is whether the accused person has been prejudiced in his defence where he is convicted in respect of a particular or particulars which have not been included in the charge. The determination of this question with vary according to the circumstances of the particular case but in the present case the accused could not have been prejudiced at all because his defence was that he had indeed stopped but had been obliged to hasten away because of the approach of a hostile crowd. The rejection by the magistrate of

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his claim to have stopped would have entailed a rejection of any further allegations by the accused that the had ascertained whether the pedestrian involved had been injured or killed, that he had rendered assistance to him or that he had given particulars of his identity to anyone at the scene. On the other hand it is not impossible to imagine prejudice in other circumstances, for example, where it is alleged that the accused failed to render assistance, and he successfully refutes this allegation but in convicted of failing to supply his name and address to the other driver where this may have never been an issue in the trial but may have been mentioned in passing during the course of evidence.

The charge in the present case was satisfactory and at is submitted that charges of contraventions of this motion should be drafted to include all the subparagraphs on which the prosecution relies even though it may be implicit from an allegation of failure to stop that none of the other duties have been fulfilled. However, it seems artificial as well as undesirable to allege a less serious particular such as failing to stop when the gravamen of the instant offence is the failure to render assistance to an injured person. In relation to competent alternative verdicts it has been said on a number of occasions that a court should convict of the most appropriate charge and that where there may be doubt on the matter the most serious charge should be chosen. (See e.g. *R v Pandisiri,* 1965 (1) SA 651 (SR, AD); 1964 RLR 515; *S v Brereton,* 1971 (1) SA 489 (RAD); 1970 (2) RLR 272, where an alternative test of the accused person's dominant intention was propounded.) It is submitted that the same criterion should be applied by the prosecution in choosing which of a number of available charges should be employed. In the present case one of the main reasons for requiring a driver involved in an accident to stop is so that assistance can be given to any injured persons as soon as possible and it was the failure of the accused to comply with this duty which was the serious aspect of his offence rather than the failure to stop in itself. Indeed, this is apparent from subsection (2) of section 61, which provides for higher penalties for failure to comply with these duties, as well as from subsection (8), to which reference has already been made, which provides for mandatory prohibition.

For the reasons set out in the above paragraph even it is not accepted that a driver charged with failure to comply with only one of the duties set

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out in the subparagraphs of subsection (1) may be convicted of failure to comply with a greater number of duties, 'if such are the facts proved', it is submitted that the accused should be convicted of the most appropriate, namely subparagraph (iii), the failure to render assistance to the injured party. In either case it would then be mandatory for the count to prohibit the accused from driving for a period of time according to subsection (8). It is submitted for a number of reasons that this can only properly be done by the trial court and not on review. In the first instance a special procedure is provided by section 56 (3) (as amended by Act 41 of 1978), to serve notice on the affected person to appear to show cause why a prohibition should not be imposed in cases where a court has omitted to impose the prohibition. Even if the accused person cannot show 'special circumstances' why he should not be prohibited he should have an opportunity to make representations on the duration for any period of .prohibition or whether any particular classes of vehicles should be exempted therefrom in terms of subsection (1) of section 56. In remitting the matter it is submitted that the fine imposed should be set aside to enable the magistrate to re-assess it if the thinks fit in the light of any prohibition order he may make. In relation to endorsement the magistrate's attention should be drawn to *S v Takadzi,* G.S. 178/80."

Beck J: and I agree with these views, land accordingly the following order is made:

1. The accused is convicted of contravening subparagraphs (i) (ii) and (iii), read with paragraph (a) for subsection (1) of section 61 of the Road Traffic Act.

2. The penalty imposed by the magistrate is set aside.

3. The matter is remitted to the magistrate's court to re-determine what penalty should be imposed upon the accused, and in particular whether the accused should be prohibited

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from driving for any period, in terms of subsection (8) of salon 61.

The Court expresses its deep appreciation of the helpfulness of the comments made on behalf of the Attorney-General.

S v KASWAURERE 1981 ZLR 375

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

20th and 31st July, 1981

Flynote

Evidence - rape - defence of consent - corroboration of complainant - medical evidence - fact that nothing significant found on medical examination can be a fact in favour of the accused - necessity to have no lurking doubts left by complainant's evidence.

Headnote

The accused was charged with rape. He admitted intercourse but claimed consent on the part of the complainant. The complainant's story of how she was overpowered and raped was not in itself entirely satisfactory and the only evidence led in her support was of a complaint made to her mother. No medical evidence was called, the prosecutor explaining, in his outline of the State case, that although the complainant was medically examined, nothing of significance was noted. The appellant's evidence was very unconvincing and the magistrate had rejected it.

Held, that the unsatisfactory nature of the appellant's evidence was not in itself enough to justify a conviction. The court had to be positively satisfied with the complainant's evidence; there should, where there is no corroboration in the true sense of that word, be no lurking doubts left by the complainant's evidence.

Held, further, *per* BARON, JA, and GOLDIN, A J.A., that the magistrate was seriously in error in regarding as neutral the lack of any significant findings during the medical examination. Where, as here, the complainant tells of a rape achieved by not inconsiderable force, evidence of that force is likely to be present on her body. The absence of injuries in these circumstances is a fact positively in favour of the accused person.

Case cited:

R v J 1966 (1) SA 88 (SR AD); 1965 RLR 501.

S V Mtambanengwe for the appellant.

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B J Turner for the respondent.

FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant, a 25-year-old married man with one child, was convicted of the rape of a 17-year-old schoolgirl who was distantly related to him. He now appeals against his conviction.

The appellant admits having intercourse with the complainant but says that it was with her consent. The incident occurred at about 8 p.m. on Saturday, the 20th December, 1980. On that day the complainant, who lives with her family in the Chinamora Tribal Trust Land but goes to school in Highfields in Salisbury, was at Domboshawa Shopping Centre looking for a lift home for the week-end when she met the appellant. He had a car in which he was carrying other passengers and was on his way to his home which is in the same kraal as the complainant's, and he agreed to her travelling with him.

Eventually the other passengers were dropped at their destinations and the appellant and the complainant were travelling alone in the front of the car. The complainant's story is that along the way the appellant stopped the car, put out the lights and said "My friend, I love you, kiss me". She declined and he then seized her hands again saying "Kiss me". She said she did not want to, and opened the door of the car and tried to run away. She only ran about three paces before she fell to the ground, whereupon the appellant seized her round the throat while she was still on the ground. She says that he removed her underpants and seized both her legs, pulled them apart and raped her. From her very brief description of what happened she appears to say that she fell on her side, turned on her face as the appellant caught up with her, and did not cry out because of being held round the throat. She apparently did not struggle or resist as she said she was "powerless and nearly fainted".

The complainant says that after the appellant completed his purpose she said that she wanted to go away but that he seized her and put her back in the car. They then proceeded until they were near the kraal when the appellant dropped her. She started crying just after she left the car. She knocked at the door of her parents' house and when asked why she was crying reported that she had been raped by the appellant. Her mother confirmed that she opened the door to find the complainant crying, she confirmed the report of rape and saw that she had mud on her clothes.

In cross-examination about mud on the complainant's clothes, her mother added that she asked her to remove her underpants and saw there was some blood on them as well as semen. A report was made to the party committee, and later that evening the complainant's brother

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told the appellant of the allegation. His reply on his own evidence was to ask if they wanted to

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give him a wife.

The appellant's story is that he picked up the complainant, as she says, at about 5.40 p.m., that they reached his mother's kraal where they stopped for about half-an-hour, and then went on alone. He says he did not delay long as the complainant wanted to get home in good time. On the journey the appellant said he told the complainant, whom he seems to have regarded as his girl-friend, that he thought it was time that they had sexual intercourse, but that she said they would be late arriving home. They later agreed, he said, and he stopped the car saying "I think now we must have sexual intercourse". This then occurred after which he brushed the grass off her back and drove on to the kraal. From leaving his mother's kraal to arriving home occupied he said about 20 minutes and not the hour of which the complainant speaks.

I find the appellant's evidence very unconvincing. His account of the conversation which led up to the intercourse is stilted and unnatural. His account of his relationship with the complainant grows as time goes on: he makes no mention of what is an important point of his case in the outline of his defence, he then says when explaining why he did not charge for the lift he gave her that he regarded her as his girl-friend, adding later that they had met in Highfields and that he gave her a lift and left other girls who were present because they were already in love with one another. I would also have expected a different reaction from the appellant when accused by the complainant's brother that evening with a more detailed account of what had happened. After all an allegation of rape is a serious matter. In addition, as I read the magistrate's Judgment, the appellant did not impress him as a truthful witness, though he gives no detailed reasons for his conclusion.

But the unsatisfactory nature of the appellant's evidence is not enough in itself to justify a conviction. We must be satisfied positively with the evidence of the complainant. Her demeanour was good and apparently she impressed the magistrate as a truthful witness. Unfortunately her evidence of the actual rape is singularly lacking in detail, and when looked at in detail has some unsatisfactory features about it. It is a little unlikely that a young girl would run away out of the car in a strange place at night, when the only approach to her was that she should kiss the appellant, her description of being caught by the throat so that she could not cry out, coupled with the fact that the appellant removed her underpants (apparently without damaging them) and seized both her legs is difficult to visualize. She gives the impression of being

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raped while she was face downwards, or at least gives no explanation of how she came to be on her back if she was, and being face downwards is difficult to reconcile with her description of being throttled. In addition it seems that she told the police in her statement that the appellant had forced her to the ground, and she sought to explain this by saying that the appellant may have tripped her, but she was not certain. Finally she relates that she was seized and put back into the car, but does not explain how it was that she had managed to recover, and put on her underpants that had been removed.

Nothing of note was revealed on a medical examination and no evidence of the examination

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was given. This may not have any significance because the complainant had freely admitted to having had intercourse with a young boy-friend, and she did not allege that she suffered any bruising or injury. Nevertheless the fact remains that there is no medical evidence to corroborate her evidence.

There is some confirmation of her story in the evidence of her mother: she saw her crying and saw mud on her dress, and she confirmed her immediate report. But this confirmation must not be taken too far. One must not forget that the complainant may have thought that she might have had to explain her arrival well after dark with mud on her dress. The fact that the complainant's mother mentioned the underpants only in cross-examination is not of significance, but her evidence of finding blood upon them does seem at best to be an indication that she was prepared to gild the lily.

I do not think that, in assessing the reliability of the complainant's evidence, the magistrate has paid sufficient attention to the criticisms which can be levelled against her. Indeed he does not mention any of them. Had he considered them he may not have been quite so ready to be satisfied of the merits of her as a witness as against the appellant.

It is important in sexual cases never to lose sight of the case of bringing them and of the difficulty of refuting them, and particularly of the latter point. These incidents of necessity occur when there are only two parties present and full corroboration is often as difficult to find as is support for an accused's denial. But bearing in mind that the onus is always upon the prosecution it is necessary when there is no corroboration in the true sense of that word that there should be no lurking doubts left by the complainant's evidence. One must not lose sight of the fact that there is just as much a failure of justice if an innocent woman who alleges rape has her evidence rejected by too technical an insistence on a particular standard of evidence. On the other

hand, it is never safe to convict without being satisfied that it is safe to do so after a full appreciation of the risks, and of any defects or improbabilities in the prosecution case. I cannot do better than refer with full approval to the approach laid down by this court in *R v J* 1966 (1) SA 88 (SR AD); 1965 RLR 501.

In this case I do not gather from his Judgment that the magistrate fully appreciated those risks, and I do not think that it would be safe to convict.

In my Judgment the appeal must be allowed and the conviction and sentence set aside.

Baron JA: I agree. I would, however, make some comments on the question of medical evidence generally in cases of this kind.

As the learned CHIEF JUSTICE has said, allegations of rape are very easy to make and very difficult to refute, and this is particularly so when intercourse is admitted by the accused and his defence is that the intercourse was by consent. In such cases, the medical evidence will frequently be the only reliable evidence supporting the allegation by the complainant of lack of

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consent.

In this present case, the State outline includes the following sentence:

> "The matter was reported to the police the following day, the accused was arrested and the complainant was medically examined, but nothing of significance was noted."

The magistrate in his Judgment makes no mention whatever of this fact; he seems to have regarded it as neutral. In this he was, in my view, seriously in error. The complainant in describing the rape told the Court that she was prevented from crying out by the appellant grasping her round the throat, and she described the circumstances in which the appellant forcibly had intercourse with her. It must, I think, be accepted that a doctor examining a complainant who alleges to have been raped will know what to look for, it must therefore be accepted that there were in fact no injuries on the complainant. It is not, of course, in all circumstances that one expects to find signs of violence, submission may, for instance, have been obtained by threats. But where, as here, the complainant tells of a rape achieved by not inconsiderable force, evidence of that force is likely to be present on the body of the complainant. Thus in Taylor's *Principles and Practice of Medical Jurisprudence,* 11th edition, volume II, the author says at pages 79 - 80:

BARON JA

> "Girls over 16, and adult women are likely to be capable of offering some resistance to rape. Therefore in a true charge we should expect to find not only marks of violence about the vulva, but also injuries of varying extent upon the body and limbs.... Bruises upon the arms or the neck may be considered to be reasonable evidence of a struggle; impressions of finger nails, too, are significant. Bruises or scratches about the inner side of the thighs and knees may be inflicted during attempts to abduct the legs forcibly, . . ."

And in *Forensic Medicine,* by Sydney Smith and Fiddes, 10th edition, the authors say at page 289:

> "In ordinary circumstances with people of approximately equal development the act is impossible without leaving marks of violence."

It is not therefore a neutral fact that the medical examination revealed "nothing of significance"; where the alleged rape took place in circumstances in which one would expect violence the absence of injuries is a fact positively in favour of an accused person. It is hardly necessary to spell out the motives a young girl may have for alleging rape when the intercourse was, in fact, consentient. Where therefore the medical evidence is inconsistent with her story, she can hardly be regarded as a witness on whose evidence it is safe to rely.

Goldin AJA: I agree with the judgement of the CHIEF JUSTICE and also with the additional comments of my brother BARON.

THE STATE v CHIHANYA 1981 ZLR 381

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Court **General Division, Salisbury**

Criminal Review

McNally, AJ

5th August, 1981

Flynote

Criminal Law - Theft - Stock theft - bona fide but mistaken belief in claim of right - animus furandi not proven.

Headnote

The accused was convicted of theft of stock. It was shown - indeed, it was not disputed - that he had taken away cattle belonging to the man who had been the Between in his marriage. There had been a dispute regarding the lobola originally paid and the accused's attitude was that he was going to get either his money or his cable back from someone connected with the affair. He was entirely open in the matter and made no secret of it.

Held, the onus is on the State to prove intent to steal. Where there is a defence of a belief in the existence of a right to the goods stolen, the accused must lay a foundation for that defence by leading evidence of its existence. Once that evidential onus on him has been discharged, however, the persuasive onus to establish *animus furandi* rests upon the State. On the facts of the present case, the State was unable to do this, and the conviction could not stand (*S v Latham,* 1979 RLR 458 (A.D.); 1980 (1) SA 723 (R., A D.); *R v Jona,* 1961 (2) SA 301 (W) followed).

Cases cited:

S v Latham (*supra*);

R v Jona (*supra*);

S v Zemura, 1973 (2) RLR 357; 1974 (1) SA 584 (RAD).

Judgment

McNally AJ: This is a case in which the accused was found guilty of stock theft and sentenced to the mandatory minimum sentence applicable to theft of cattle, namely, nine years' imprisonment with labour.

The most striking fact in the case is that the "thief" made no attempt whatever to conceal his identity or to disguise what he was doing. He went openly to people who knew him, and openly drove the cattle away.

McNALLY AJ

It seems to me, and I say so with all due respect to the magistrate, that he may have overlooked this aspect of the case. I say this because in his judgment, where he makes a careful analysis

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of the facts, he comes to the conclusion that "you were depriving Reuben of his cattle without any right at all, and I find you guilty".

Now the point is that the accused might have had no right at all and yet be not guilty because he honestly believed he had a right. This is the defence of claim of right which is really a defence which negatives the intention to steal. In other words, the accused did not intend to steal, he intended to assert his own right to the cattle. Even if in fact he had no right to them, he may be acquitted if he thought he had a right and was, mistakenly, asserting that right.

On the facts of this case, there is one difficulty in the way of this defence. The accused took the cattle, not from his father - in - law, to whom he had paid the lobola originally, but from Reuben, who was the go between in the marriage. This point is well taken by the magistrate when he says, in regard to sentence, "You know you had no right to take Reuben's cattle as (you) had not given lobola to him."

However, there is evidence that Reuben, as well as being the go between, was also a "brother" of the father - in - law, and the accused's attitude was clearly that he was going to get his money or his cattle back from somebody connected with the affair. It seems clear he was not justified in such belief, but did he not believe that he was? After all, he called the chief to come to Reuben's kraal, and declined even to discuss the matter with Reuben's wife until the chief was there. He made no secret of who he was and why he wanted the cattle.

It is noteworthy that the magistrate has not made a positive finding as to how many cattle were paid by way of lobola. He concludes "the question of how many cattle your father - in - law got remains not: clear".

One must bear in mind that the onus is on the State to prove intent to steal. As was said in *S v Fathom,* 1979 RLR 458 (AD) at 463C; 1980 (1) SA 723 (RAD) at 728C by MACDONALD, CJ.:

> "There can be no doubt that a Court will not consider a defence of a claim of right unless the accused has laid a foundation by leading evidence of its existence. Once, however, this evidential onus has been discharged, the persuasive onus would appear . . . to rest upon the State."

The learned CHIEF JUSTICE then went on to cite with approval as a correct statement of the law the following passage from a Judgment of WILLIAMSON, J, as he then was, in *R v Jona,* 1961 (2) SA 301 (W) at 319:

McNALLY AJ

> "*Prima facie,* to my mind, it cannot be said that the accused's evidence is necessarily false when he says that he was allowed to do this and that they knew what was happening and told him he could take this money, that the companies were really all his. Now, if his evidence could be true - I do not say it is true - but if it could be true, and on the facts as I find them it could be true, then I cannot say that it has been proved that he necessarily had the *animus furandi,* because he may have had a bona fide belief in his right to act in the way he did. That would be sufficient, in my view, to show that the Crown has not discharged the onus of establishing *animus furandi.* But, let it be understood, I am not making any finding directly whether he was so advised or was not advised."

I regard those words as eminently applicable to the facts of the present case, particularly, as I have said, by reason of the absolute openness with which the accused conducted himself at all

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times, even to the extent of calling the local chief to witness. He could not possibly have escaped identification, and this in my view goes a long way to indicate that his attitude, however wrongheaded, was genuine. In this connection one may refer to *S v Zemura,* 1973 (2) RLR 357 at 367, 1974 (1) SA 584 at 588 where BEADLE, CJ, said:

> "This Court . . . concluded that there was no room in our law . . . for an objective approach considering an accused's *mens rea.* This Court held that, provided the accused proved that his mistake was genuine, there was no need for him to prove in addition that it was reasonable."

Although on the question of onus that decision has been overturned by the decision in *Latham*'s case (*supra*), the distinction between genuineness and reasonableness stands.

Accordingly, in this case, the State in my opinion failed to establish *animus furandi,* and the conviction cannot stand. It goes without saying, of course, that the complainant is entitled to pursue his civil rights.

The conviction and sentence are set aside.

Squires J: agrees, as does the Attorney-General, to whom I referred the papers.

THE STATE v LYONS BROOKE BOND (PRIVATE) LIMITED 1981 ZLR 384

Court **Appellate Division, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Goldin, A J.A.

4th June and 7th August, 1981

Flynote

> Criminal law - Minimum Wages Act, 1980 (No. 4 of 1980) - section 5 (a) - failure by employer to pay minimum wage to employees - "employee" - meaning of - distinction between hawkers and independent contractors - "supervision and control" test.

Headnote

The appellant company was charged with contravening section 5 (a) of the Minimum Wages Act, 1980 (No. 4 of 1980), in that, being an employer, it had failed to pay the minimum wages to certain employees. The defence was that the individuals concerned were not employees but independent contractors, who did not fall within the ambit of the Act and the relevant subsidiary legislation.

The individuals were sellers of ice-cream which was manufactured by the appellant. They were paid on a commission basis, which depended on the quantity of ice-cream sold. The agreement between the appellant and the individuals (who were described as "hawkers") provided, *inter*

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alia, that -

(a) the goods were sold to the hawker "on consignment" but the ownership of the goods remained with the appellant until they were sold;

(b) the appellant designated the area within which each hawker was to operate;

(c) the selling price of the goods and the amount received by the hawkers was fixed by the appellant;

(d) the hawkers were obliged to use the uniforms and equipment provided by the appellant;

(e) they were precluded from selling products other than the appellant's,

(f) their hours of work were specified by the appellant;

(g) they were obliged to work on six days of each week, unless on holiday or unless ill, such illness to be "certified by a hospital or doctor";

(h) a minimum sales figure had to be achieved by each hawker.

The appellant assisted the hawkers by making available toilet, washing - and changing - room facilities and also paid for the hawkers' licences and health certificates, although the hawkers were obliged to repay these expenses in weekly instalments.

Held, that the test to be applied in deciding whether the hawkers were "employees" or "independent contractors" was that aptly described as the "supervision and control test". In each case it is essential to examine the facts to determine the true nature and type of the relationship which has been created.

Control includes the power of deciding the thing to be done, the way in which it is to be done, the means to be employed in doing it, the time when, and the place where it shall be done. In the present case the degree of control exercised by the appellant lead to the inevitable conclusion that the appellant "employed" the hawkers in the ordinary sense of the word. (*R v Feun,* 1954 (1) SA 58 (TPD), followed; *Colonial Mutual Life Assurance Society v Macdonald,* 1931 AD 412; *Ready Mixed Concrete v Minister of Pensions* [1968] 1 All ER 433 (QBD) applied).

Held, further, that the fact that the appellant sold the goods to the hawkers "on consignment" and the calculation by which their remuneration was determined did not justify a different conclusion within the context of the contract. The remuneration was a *quid pro quo* for services rendered.

Cases cited:

Ready Mixed Concrete v Minister of Pensions (supra);

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R v Feun (*supra*);

Colonial Mutual Life Assurance Society v Macdonald (*supra*);

Rodrigues and Others v Alves and Others 1978 (4) SA 834 (AD);

R v AMCA Services Ltd and Another 1959 (4) SA 207 (AD);

R v Post Master General (1876) 1 QBD 658;

Firestone (SA) (Pty) Ltd and Others v Gentiruco AG 1968 (1) SA 611 (AD).

J C Andersen SC, for the appellant. The definition of "employee" and "employer" in section 2 of the Act was not intended to include every contractual relationship whereby services are performed by one person for another. That this is so is apparent from the name of the Act and the use of the term "wages" repeatedly. An independent contractor does not fall within the definition of "employee". In terms of the agreements the appellant sold goods on consignment to the hawkers which the hawkers in turn sold to the public. The income received by the hawkers was essentially the difference between the purchase price of the goods sold to them by the appellant and the price for which they were sold to the public. Whilst in terms of the agreement the hawkers were bound to observe certain conditions as to dress, the time when they received goods and returned them, the price for which they were to sell the goods, and areas in which they were to sell them, they were

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under no form of control as to the places within that area or methods they would use to sell the goods or hours they would actually work. The degree of control exercised over the hawkers was not such as to render them employees in the normal master and servant relationship as opposed to independent contractors. *Ready Mixed Concrete v Minister of Pensions* (*supra*); *Rodrigues v Alves* (*supra*); *Smit v Workmens Compensation Commissioner,* 1979 (1) SA 51 (AD). The agreement between the appellant and the hawkers was different from the agreements considered in *R v Feun* (*supra*) and *Imperial Cold Storage v Yeo,* 1927 CPD 432.

R. Jagger for the respondent. The test of whether a vendor is an employee or an independent contractor depends upon the type and extent of control exercised over him by the appellant. If the appellant exercised control over the vendors as to the manner in which they performed their duties then it is submitted they were employees and were covered by the provisions of the subsidiary legislation: Bowstead on *Agency,* 14th edition, pages 12 and 13. The areas of control in this case indicate that there existed the sort of master and servant agreement referred to in *Colonial Mutual Life Assurance Society Ltd v Macdonald* (*supra*). It is not necessarily the actual control exercised over the vendor which indicates his status but whether or not he is subject to such control as to deprive him of his status as an independent contractor: *R v AMCA Services Ltd* (*supra*); *Rodrigues and Ors v Alves* (*supra*); *Mersey Harbour Board v Coggins* [1946] 2 All ER 345 (HL) at 351G. Save for the right to reimbursement of the cost of obtaining hawkers' licences the facts in the instant case are almost identical with those of *R v Feun* (*supra*).

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Judgment

Goldin AJA: The appellant was charged with contravening section 5 !(a) of the Minimum Wages Act, 1980 (No. 4 of 1980), as read with section 4 of the Minimum Wages (Specification of Minimum Wages) Notice, 1980, published in Statutory Instrument 367 of 1980, and as read with the Food Processing Industry Employment Regulations, Government Notice 651 of 1977. It was alleged that during the period extending from the 1st July, 1980, to the 31st October, 1980, the appellant "being an employer did wrongfully and unlawfully fail to pay minimum wages of $16,16 per week to certain named employees". The appellant pleaded not guilty, but was found guilty and sentenced to pay a fine of $100. This is an appeal against the conviction. The question for decision turns on whether or not the appellant was an employer in terms of the relevant legislation. In section 2 of the Minimum Wages Act,

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1980, there are definitions of both "employer" and "employee". They read as follows:

> " 'employee' means any person employed by or working for any employer and receiving, or being entitled to receive, any remuneration in respect for such employment or work;
>
> 'employer' means any person whatsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him, and includes the manager, agent or representative of such first-mentioned person who is in or control of the work upon which such second-mentioned person is employed."

Statutory Instrument 367 of 1980 provides for the payment of minimum wages, but this notice does not apply to (a) independent contractors, or (b) contract workers; or (c) special workers. We are not concerned in this appeal with contract workers, who are defined as employees who are employed exclusively on piece work, the rates for which have been negotiated directly with the employer, nor with special workers, namely physically or mentally handicapped persons. It was contended for the appellant that the persons who it is alleged were not paid minimum wages were independent contractors, but even if they were not, that they were not employees and that the appellant was not an employer as defined in the Act as quoted above.

The relevant facts are as follows: The two complainants who gave evidence alleged that they did not receive the sum of $70 per month as pressed by the regulations, and it was accepted by the appellant's counsel that a third one had a similar complaint, although he was not available at the trial. The appellant had carried on the business of manufacturing and selling ice-cream for some time. The ice-cream division of the appellant company was becoming unprofitable because with the introduction of minimum wages it was found that sellers of ice-cream did not make sufficient effort, or generally failed, to sell sufficient ice-cream to justify the wages that had to be paid to them. In order to avoid the running of this part of the business unprofitably, the appellant decided to enter into agreements with its hawkers of ice-cream so that they would not be entitled to minimum wages. This method of marketing ice-cream has apparently been adopted by the appellant's parent and associate companies in other parts of Africa and elsewhere. The appellant's object was clearly to enable it to run profitably by increasing the sale of ice-cream and at the same time to offer an incentive to sellers to make maximum endeavours to sell as much as possible, because by so doing their individual incomes could

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exceed the amount of the prescribed minimum wage. This scheme resulted in turnover increasing by

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63 per. and the average earnings of the vendors went up by 94 per cent. Nevertheless 10 per cent. of the vendors did not karmas much as they would have had by receiving The statutory minimum wage. Even the complainants at times exceeded the minimum wages, but during certain months they failed to do so. The object of the scheme was to ensure that only those whose efforts justified it would receive an amount equal to the minimum wage and even more.

On the application of a doctrine of free enterprise or the survival of the fittest as a means of ensuring that the appellant operated profitably, there may be little criticism of the scheme. It is, however, necessary to apply the provisions of the legislation which requires payment of minimum wages to persons who fall within its ambit.

The scheme is contained in an agreement between the appellant company on the one part and "a hawker" on the other part. It provides that the appellant "grants to the hawker the right during the continuance of this agreement to purchase the produce for resale in a designated area, which area may be changed by the company from time to time in its discretion". The products are sold to the hawker "on consignment, ownership of the goods remaining with the company until such time as any portion thereof has been sold by the hawker". The price payable by the hawker for each item is "the retail price fixed by the company from time to time less such quantity discount as shall be agreed between the parties". The price charged by a hawker for each item is fixed by the company. At the commencement of each working day a hawker has to take delivery of products stored for him at the end of the previous working day, together with any additional products "as the company shall sell to him on consignment". The income received by the hawkers was the difference between the value of the goods supplied to them and the price for which they were sold to the public. Each amount was determined by the company. They were also required to use the uniform and equipment provided for them and to store unsold products in the company's cold room. They were precluded from selling products other than the company's. The hours between which the vendors could sell were also determined by the company. The company did not pay the hawkers the full amount to which they were entitled weekly, but retained one and a half per cent. as "a bonus" for payment when the vendor "took his holiday".

The agreement further provided that hawkers "shall attain such minimum sales figures as shall be specified by the company from time to time, to which end he shall work six days per week over such hours

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and days as shall be agreed with the company excluding a period of days for holiday purposes and any period during which he is unable to work through sickness and injury as certified by a

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hospital or doctor."

Mr Rose, the appellant's executive chairman, was asked:

> "Q. Do you know whether any of the vendors who signed these contracts have been dismissed and whose contract has been terminated by the company for lack of sufficient, or shall we say satisfactory sales? A I am quite sure that has happened.
>
> Q. It has? A Yes.
>
> Q. Why would that happen? A Because their performance was quite unsatisfactory, which obviously is not in their interests or our interests."

The company also assisted the hawker to ensure the proper presentation of the products of the company by lending him and maintaining and repairing certain specified equipment, making available toilet, washing and changing-room facilities, and canteen facilities at subsidized charges. It further assisted the hawker "by meeting the costs of any hawking licence and health certificate required by him on the condition that the hawker shall repay such costs in such weekly instalments as shall be determined by the company".

In determining whether on the basis of the agreement between the company and the complainants the company became subject to the payment of prescribed minimum wages, it is necessary to view the agreement as a whole as well as have regard to its individual provisions. See *Ready Mixed Concrete v Administer of Pensions* [1968] 1 All ER 433 (QBD) at 441.)

The definition of employer as mentioned above relates, firstly, to any person who employs another person, and, secondly, to any person who provides work for another person. Thus a distinction is drawn between employing and providing work. This explains why the Minimum Wage Notice (Statutory Instrument 367 of 1980) is expressly made not applicable to independent contractors who though not employed may be provided with work by an "employer" as defined. If the hawkers or vendors or, as they are called in a later agreement, the distributors, are independent contractors, then they have been expressly excluded from the operation of the Act. In my view the facts of this case are similar to the facts of *R v Feun,* 1954 (1) SA 58 (T) In that case, the evidence showed that the appellant company was a manufacturer of ice-cream, that it used the services of a number of persons to sell ice-cream upon streets and public places, that it supplied the vendors with ice-cream which they sold at a price fixed by the company; that the vendors

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received no wages, but were remunerated by commission paid on the sales effected; that the company supplied the necessary conveyances; that the vendors called at the factory for the supplies and returned unsold stock at the end of the day, that each vendor was allotted an area and no vendor was allowed to sell in an area not allotted to him; that the licences were taken out by the company in the vendor's name, that on cold days the vendors were free to stay away without reference to the company and that they were entitled to take time off for meals when it suited them.

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It will be observed that in that case the vendors did not have to refund the amount spent by the appellant on the acquisition of the relevant licences. This in my view is an insignificant distinction. On the other hand it may be repeated that in the appeal before us the hours between which the vendors could sell were determined by the company. They were also required to work six days per week and failure to turn up for work was only permitted if certified by a hospital or a doctor. ROPER, J, taking into account all the features of the case held that the vendors were not independent contractors, but employees in terms of the regulations. He applied the same test as did DE VILLIERS, CJ, in *Colonial Mutual Life Assurance Society v Macdonald,* 1931 AD 412 at pages 434-435 where he said:

> "But while it may sometimes be a matter of extreme delicacy to deride whether the control reserved to the employer under the contract is of such a kind as to constitute the employer the master of the workman, one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract; in other words unless the master not only has the right to prescribe to the workman what work has to be done, but also the manner in which that work has to be done."

(See also *Rodrigues and Others v Alves and Others,* 1978 (4) SA 834 A D.) at 842.)

The test adopted in South Africa is derived from English law and has been aptly described as the supervision and control test. In my view it is a practical and correct test and I will apply it to the facts of this case. The control and supervision need not be rigid or absolute. The fact that a person is allowed to exercise discretion or personal initiative does not necessarily take him out from the category of an employee and constitute him an independent contractor. It is essential to examine the facts of each case to determine the true nature and type of the relationship which has been created. In *R v AMCA Services Ltd. and Another,* 1959 (4) SA 207 (A.D.), SCHREINER, JA, said (at page 213)

GOLDIN AJA

that if the "employer can control or at least has the right to control the detailed manner of the other's work", a contract of service is concluded. ROPER, J, said in *Feun*'s case (*supra*) at page 61 that complete control in every respect is not essential and added that "whether the control exercised is such as to lead to the inference that the engaged person is a servant is a matter of degree." The position is in my respectful view usefully and correctly summarized in *Ready Mixed Concrete v Minister of Pensions* (*supra*) at page 440, where MACKENNA, J, said:

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted."

An examination of the facts of this case clearly establishes that the hawkers or vendors were not independent contractors. The degree of control exercised by the appellant over the manner in which the work was to be performed, when it was to be performed and how it was to be performed, even to the extent of requiring a medical certificate when a vendor was absent from work, leads to the inevitable conclusion that the appellant was an employer as defined in the

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Act. Upon the application of the supervision and control test discussed above I am of the view that the appellant "employed" the complainants in the ordinary sense of the word. At the very least the appellant company was a person who "provided work" for the hawkers or distributors for which they undertook to remunerate them.

The provision that the products were sold to them "on consignment" and the calculation by which the amount paid to them was determined does not justify a different conclusion within the context of this contract. The hawkers or vendors did not resemble independent business men who acquired their goods on the basis of sale on consignment in the sense and in the circumstances in which such contracts exist (see Norman's *Purchase and Sale in South Africa,* 4th edition at 18). In this case there is not a contract whereby one dealer entrusts to another trader goods held on the trader's premises to dispose of in the ordinary course of business or any such similar arrangement between two traders, one being a supplier and the other one who can be for convenience described as a trader. On the facts of this case it was a calculation adopted to determine remuneration.

In *R v Feun* (*supra*), ROPER, J, held that the fact that the vendors received commission and not daily or weekly wages was "quite un-

important, as a salesman paid by commission only may well be a servant".

In *R v Post Master General* (1876) 1 QBD 658, BLACKBURN, J, says at 663-664:

> "I think the word remuneration . . . means a *quid pro quo*. If a man gives his services, whatever consideration he gets for giving his services seems to me a remuneration for them. Consequently, I think if a person was in the receipt of payment or the receipt of percentage or any kind of payment which would not be an actual money payment, the amount he would receive annually in respect of this would be 'remuneration'."

In the case of *Firestone (SA) (Pty.) Ltd and Ors, v Gentiruco AG,* 1968 (1) SA 628 (AD) it was held that remuneration means a *quid pro quo* reward or return for services rendered.

For these reasons, I am of the view that the appeal must be dismissed.

Fieldsend CJ: I agree.

Baron JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives.

THE STATE v MAPISE 1981 ZLR 393

Court **Appellate Division, Salisbury**

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Criminal Appeal

Fieldsend, CJ, and Goldin, AJA

31st July and 7th August, 1981

Flynote

Criminal law - theft - of stock - innocent acquisition - thereafter selling animal to third party - intent to steal and contrectatio established.

Headnote

A bull belonging to the complainant went missing in August, 1980, in February, 1981, the appellant sold it to a third party, who in due course returned it to the appellant. The complainant recovered it from the appellant. The appellant claimed that he had found the bull among his own cattle and had kept it on behalf of whoever the true owner might be. It was argued on the appellant's behalf that there was no evidence of *contrectatio* or of intent to deprive the true owner of his ownership.

Held, that if a person innocently acquires property which from its nature or from other facts a reasonable man would know has been lost, and not abandoned, by the owner and thereafter proceeds, with intent to derive the owner of his ownership, to keep or deprive the owner of it, he, by this intent and conduct, becomes guilty of theft of the property. The sale of the bull to the third party was a clear and unequivocal conversion of it to the appellant's own use with intent to deprive the owner of it.

Cases cited:

R v Strydom, 1952 (2) SA 397 (T);

R v Makonie, 1942 OPD 164;

R v Ncube, 1968 (2) SA 476 (R); 1968 (1) RLR 65;

R v Mawadze, 1967 (4) SA 21 (R); 1967 RLR 206.

B W K Whaley for the appellant. There is authority to the effect that to constitute the theft of an individual object there must be an actual physical dealing with the thing concerned or some conduct which is akin to physical handling, and that in the absence of such proof the State will have failed to prove a sufficient *contrectatio* to found a conviction for theft: *R v Strydom* (*supra*); *S v Kumbe,* 1962 (3) SA.

FIELDSEND CJ

197 (NPD) at 200B-F. Although authorities have been criticized (see Hunt, *South African Law and Procedure,* volume 2, pages 573 - 575, and *S v Bergh,* 1975 (3) SA 359 (OPD) at 369 F), they do not appear to have been overruled. In the present case, as in *Strydom*'s case, there is no evidence that the bull was delivered by the appellant or in his presence. The State has failed

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to prove the necessary physical dealing (or conduct akin to it) at the time or following upon the alleged disposal of the beast to constitute a sufficient *contrectatio* to found a conviction for theft.

K Terry for the respondent.

Judgment

Fieldsend CJ: The appellant was convicted of stock theft and now appeals against his conviction.

The evidence accepted in the court below was that the complainant's bull went missing in August, 1980, that in about February, 1981, the appellant sold the bull to Ticharwa Gwadu, that either before the sale, or more probably after the sale, but before Gwadu took the bull, the complainant had spoken to the appellant about him having the complainant's bull in his own herd, that the bull was returned by Gwadu to the appellant and recovered from him by the complainant.

The appellant's defence was that he had found the bull amongst his cattle and, being unable to drive it away, had kept it on behalf of whomever the true owner might have been. He denied selling the animal to Gwadu or allowing him to take it.

Mr *Whaley* took three points on behalf of the appellant, the first two based on the evidence, the third in effect a point of law. The first factual point, namely, that it was not established that the appellant sold the bull to Gwadu, he found difficulty in maintaining. Gwadu's evidence that be bought the bull from the appellant was clear and convincing. It was corroborated by the complainant who said he saw the animal among Gwadu's herd, and by the kraalhead Choruwa in whose presence the appellant recovered the animal from Gwadu following the statement by Gwadu that it had been sold to him by the appellant but that someone else was now claiming it. These allegations the appellant did not deny when before the kraalhead. There is no substance in this point.

There is even less substance in the second point that the facts are consistent with the appellant thinking that the bull was *res nullius* and that he had acquired it by finding. Apart from the fact that the appellant did not advance this defence, I can only say that before a person could be believed if he were to say that he thought a bull was abandoned

property the facts would have to be very special. This argument cannot succeed on the facts in this case.

The legal point taken by Mr *Whaley* is that there is no evidence of a *contrectatio* necessary to support a conviction for theft. He relies primarily on the cases of *R v Strydom,* 1952 (2) SA 397 (T) and *R v Makonie,* 1942 OPD 164. In each of these cases the accused sold cattle of another which he falsely said were his. In *Strydom*'s case (*supra*) the animal was a bull which was in the buyer's herd, but which the buyer did not recognize as one of his beasts. The accused

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pretended it was his and asked for and was paid £7 10s. for the animal. At no stage did the accused have the bull in his possession. In *Makonie's* case (*supra*) the accused offered one of two heifers to a person in settlement of some obligation. These animals were on the farm of a third person, and though the person to whom the heifer was offered agreed to accept it there was in fact no delivery to him.

These cases are clearly distinguishable. They would be applicable to the apocryphal case of a Paris confidence trickster selling a tourist the Eiffel Tower. But in the present appeal the appellant admittedly had the bull of another in his possession, as he says, keeping it for the true owner. Accepting that, the issue is whether by his conduct the appellant converted the bull to his own use with the intention of depriving the true owner of his ownership.

The law cannot be put more clearly than it is in Gardiner and Lansdown, *South African Criminal Law and Procedure,* 6th edition, volume II, page 1653, as follows:

"If a person, after having innocently acquired or received stolen property, ascertains that it is stolen or, having found property which from its nature or from other facts a reasonable man should know has been lost, and not abandoned, by the owner, proceeds, with intent to deprive the owner of his ownership, to keep or dispose of it, he, by this intent and conduct, becomes guilty of theft of the property."

This is put without quite the same clarity in Hunt, *South African Criminal Law and Procedure,* volume II, page 583, in these terms:

> "Even though his initial handling of the property is innocent, an accused will be guilty of theft if he subsequently develops an intention to steal it and commits a sufficient *contrectatio,* physical or constructive. X might, for example, buy a thing in good faith, but resell it after learning or suspecting that it was stolen property, or he might pick up lost property intending to trace its owner, then sell it without a belief that it had been abandoned."

This coincides with common sense and even with the pre-1968 somewhat technical English law of larceny.

FIELDSEND CJ

On the facts of this case, the sale to Gwadu of the bull which the appellant at that time had in his possession is a clear and unequivocal conversion of it to his own use with intent to deprive the owner of it. One can compare such cases as *R v Ncube,* 1968 (2) SA 476 (R); 1968 (1) RLR 65 and *R v Mawadze,* 1967 (4) SA 21 (R), 1967 RLR 206 as to what inferences can be drawn from the mere keeping of a stray beast which attaches itself to a person's herd. Here the sale and delivery, even if the latter did not take place in the physical presence of the appellant, of the complainant's bull which was in his possession, must amount to conversion of the bull to his own use and so constitute theft.

The appeal must be dismissed.

Goldin AJA: I agree.

A J A Peck, appellant's legal representative.

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MVUDUDU v MVUDUDU NO AND OTHERS 1981 ZLR 397

Court **General Division, Salisbury**

Civil Trial

McNally, AJ

27th, 28th and 29th July and 13th August, 1981

Flynote

Succession - intestate succession - Africans - heir at African customary law - customary law - application to immovable property - expert evidence relating to provisions of customary law - African marriage by civil rites before 1st January, 1929 - such marriage in community of property rights of surviving spouse - registered deed of transfer of property - deed completed in ignorance of correct legal position - Deeds Registries Act [Chapter 139] - section 8 - when Court may order cancellation of deed.

Headnote

In 1942, Magaragada, the father of the Plaintiff, became tenant of a farm in the Rowa Purchase Area. In due course he became registered owner. His eldest son, Mwashinga, and his second son, Ngona, were also allotted farms in the area. By virtue of the provisions of the Rural tend Act, No. 47 of 1963, it was not possible at that time for one man to own more than one Purchase Area farm, so when Magaragada became old arrangements were made to have Magaragada farm registered in the name of his third son, Enoch, the defendant's father. There was no question of an outright donation to Enoch; Magaragada still wanted Mwashinga to inherit the farm but for convenience it would be registered in Enoch's name. The matter was referred to the district commissioner, who treated the matter as a donation. Steps were taken to effect the transfer, but were interrupted by Magaragada's death. Magaragada died intestate. For some reason, the district commissioner decided to certify that Enoch was Magaragada's heir at customary law and the farm was transferred to him. Following Enoch's death, the defendant, as his father's executor, sought to have the land transferred to him.

Evidence was given by an expert on customary law, to the effect that on intestacy property passes to the deceased's eldest son, who also accepts a concomitant obligation of looking after his father's widow. If he dies, the property passes to the next son, and so on.

It was also shown that Magaragada had been married by customary law but

McNALLY JA

between 1914 and 1918 the marriage had been registered with the district commissioner. This had the effect, *inter alia,* of making the marriage one in community of property.

Held, that Magaragada's heir at customary law was his eldest son, Mwashinga, who, by virtue

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of the provisions of section 7 of the African Wills Act [*Chapter 240*] should have succeeded in his individual capacity to his father's rights to the farm.

Held, further, that Magaragada's surviving spouse was entitled to a one-half undivided share in the farm.

Held, further, that, by authority of section 8 of the Deeds Registries Act [*Chapter 139*], the registered deed in Enoch's name should be cancelled (*Myers v van Heerde & Others,* 1966 (2) SA 649 (CPD); *Indurjith & Others v Naidoo & Another,* 1973 (1) SA 104 (D & CLD); *Tushini & Others v Mzobe & Another,* 1949 (3) SA 623 (AD) followed).

Cases cited:

Estate Phillips v CIR 1942 AD 35;

Thornycroft v Vas 1957 R & N 376; 1957 (3) SA 754 (FSC);

Dokotera v The Master and Others, 1957 R & N 697; 1957 (4) SA 468 (SR);

Matambo v Matambo, 1969 (2) RLR 154; 1969 (3) SA 717 (R AD);

Myers v van Heerde & Others (*supra*);

Indurjith & Others v Naidoo & Another (*supra*);

Tushini & Others v Mzobe & Another (*supra*);

Menezes v McGaili, 1971 (2) SA 12 (CPD);

Adam v Jhavary & Another, 1926 AD 147.

M T O'Meara for the plaintiff.

P Sullivan for the first defendant.

Judgment

McNally AJ: This is a family dispute about land. The Master of the High Court and the Registrar of Deeds have been joined as second and third defendants but have indicated their willingness to abide the Judgment of the Court.

It is appropriate to begin by setting out in diagram form the relationship between the various persons involved. Since all share the same surname it will be convenient to refer to them by their first names only -

McNALLY AJ

In about 1942 Magaragada became the tenant of Farm 227 in the Rowa Purchase Area, near Umtali. He acquired the farm under a purchase scheme in the terms of which he would ultimately become the registered owner of the farm subject to good husbandry and the payment

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of the purchase price of $80 in annual instalments.

In 1959 these requirements were accomplished and by deed of grant Magaragada became the registered owner of Farm 227, which is the subject of this dispute. It is relevant to mention that his eldest son, Mwashinga, was also allotted a farm in Rowa in 1942 and the next son, Ngona, was allotted one in 1954. Enoch and Taylor were policemen and Killion a schools manager.

By 1967 Magaragada was a very old man indeed, perhaps 96 years old. It is common cause that he wanted to hand over his farm No. 227 to the younger generation but there is considerable dispute about what exactly his intentions were. Rhoda and her four surviving sons all gave evidence and were unanimous that he decided to hand the farm over to his eldest son, Mwashinga, in accordance with customary law, so that Mwashinga as head of the family could look after his parents and generally assume authority over the family. However, they all say, it was not permitted for one man to own more than one Purchase Area farm (as to which see section 22 (3) of the Rural Land Act, 1963 (No. 47 of 1963)), and accordingly it was decided that the farm should be registered in the name of Enoch, the eldest son without a farm. Arrangements were set in train to do this, but before they were completed the old man died on the 22nd December, 1969.

John's version of events is different. He, as is commonly the case, grew up as a young boy in the care of his grandparents and lived at the farm. His grandfather often told him, he said, that he would ultimately inherit the farm, and that it would be given to his father Enoch, who had helped pay for it and fence it (facts hotly denied by the others). It was in accordance with this thinking that steps were taken to donate the farm to Enoch and it was for this reason that after his grandfather's death the farm was registered in his father's name. He, as his father's eldest son, inherits his father's property on intestacy and is now the true owner. As executor he has awarded the farm to himself and should now be permitted to complete the registration of transfer into his own name.

Now, it is a fact that there is documentary evidence to support John's contentions that -

McNALLY AJ

(a) Magaragada intended to donate the farm to his son, John's father Enoch;

(b) the farm was, after Magaragada's death, transferred in the Deeds Registry into Enoch's name.

Item No. 1 in the Agreed Bundle of Documents is a letter from the District Commissioner, Umtali, to the Director of Lands, dated the 18th July, 1967, and it reads (in part):

> "The owner of Rowa 227, Magaragada Johnny Mvududu, is old and wishes to cede the farm to his son, Enoch John Chatsauka Mvududu."

The transfer "by reason of a gift" was formally approved in writing by the Rural Land Board and on the 12th December, 1967, Enoch was asked to bring £15 as transfer fees to the district commissioner. This money was paid (though Killion says he paid it on Enoch's behalf) on the 23rd April, 1968, and the matter was handed over to conveyancers for completion. There were

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delays, and some time in 1969 documents were prepared for Magaragada to sign (Item 11). Then, in a letter dated the 23rd January, 1969, which clearly should be the 23rd January, 1970 (Item 10), the DC advised the conveyancer that the donor had died. Enoch signed a Declaration of Donation (Item 12) but this was clearly done after the death of his father since the conveyancer has written the words "my late father, namely . . ." on the document and it is in other respects not completed.

The farm, even with improvements, was valued at well under $1000, and accordingly the well-known four propositions set out by TINDALL, JA, in *Estate Phillips v C I.R.,* 1942 AD 35 at 47 do not apply. Nonetheless, on the evidence as a whole, I would not be satisfied that there was a donation, but simply an intention to donate which was never completed by notarial deed or transfer of the property in the Deeds Office. I come to this conclusion on the assumption that Magaragada intended an outright donation to Enoch from motives of pure liberality.

But if I am wrong in that conclusion I find in any event that there was no intention on the part of Magaragada to make an outright donation from motives of pure liberality. The law regards such a donation as inherently improbable in circumstances such as these. See *Thornycroft v Vas,* 1957 (3) SA 754 (F.S.C.), 1957 R & N 376. Magaragada died intestate, and John's evidence of what his grandfather said to him many years ago about his intentions, even if admissible, cannot be of great weight. In addition, I do not accept John's evidence, for reasons which will appear later, that his grandfather did make these statements to him.

McNALLY AJ

I found the evidence of the other witnesses generally acceptable. That is not to say that some of them may not have gilded the lily to some extent. But generally their evidence was well given and made sense.

They were unanimous that there had never been any question of an outright donation to Enoch. When the time came that the old man felt he could no longer look after his farm and Iris wife, he called his available relatives together and announced that he wished Mwashinga to take over as head of the family. However, as Mwashinga and his next brother Ngona both had farms, it was proposed that Enoch should retire from the police and come to run Farm 227. It would for convenience be registered in his name but would in reality be Mwashinga's. (The problem about registering it as Mwashinga's has already been noted.) This plan was agreed by all parties and it was left to the DC and the lawyers to put the plan into legal form. The DC decided to treat the matter as a donation and steps were taken, which were interrupted by the death of the old man. Thereafter the DC took it upon himself (for reasons which did not appear since he was not called as a witness) to certify that Enoch was his father's heir at customary law, and Enoch was thus in due course declared the owner and the farm was transferred to him in the Deeds Registry. This certificate was clearly wrong, but the family was not particularly concerned because, as it were, the right thing was being done, albeit for the wrong reasons. They were probably not aware of the legal niceties anyway. So no objection was made. Only on Enoch's death, when it became apparent that John was proposing to transfer the farm into his own name, did the family object, and an interdict was obtained (see case No. GD 1243/80)

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restraining John from doing so pending the outcome of this case.

Evidence was led as to the Customary Law applicable in this area. Mr *Sullivan* objected to its admissibility on the grounds that Customary Law does not apply in respect of immovable property. Mr *O'Meara* countered this, and it seems to me, effectively, by pointing to section 7 Of the African Wills Act [*Chapter 240*], which reads:

> "The heir at African Law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

See also *Dokotera v The Master & Ors* 1957 R & N 697; 1957 (4) SA 468 (SR) at 471, *Matambo v Matambo,* 1969 (2) R L.R 154; 1969 (3) SA 717 (R., A D.) at 719 A-B BEADLE, CJ, in the latter case specifically directed that further expert evidence be led to determine who was the heir at Customary Law. There is no conflict, in so doing, with the provisions of section of the African Law and Tribal Courts Act

McNALLY AJ

[*Chapter 237*] (now replaced by section 3 of the Customary Law and Primary Courts Act, No. 6 of 1981).

Accordingly, I heard the evidence of Ella Manyengawana, who claimed to be the "sabuku" or "head person" (to use the modern idiom) of Manyengawana Kraal which includes the Mvududu farm. She was an elderly woman of apparent solid character and respectability and I accept her evidence as to her status as the person who makes decisions locally on matters of custom despite John's scornful rejection of her on the grounds that in a purchase area there is no such thing as a "sabuku". In my view it is immaterial whether she is officially recognised by the Government as a "sabuku". What is important is that she is locally recognised as the repository of knowledge of Customary Law and the arbiter of that law.

She clarified a point that had till then caused confusion. An eldest son, she said, succeeds his father. But that applies only to property acquired by the father himself. Where the father has inherited the property in turn from *his* father, he holds it only in trust for the family, so that on his death that property goes, not to his eldest son, but to the next brother. Translating this to the facts of the present case, she explained that Magaragada's property would go to Mwashinga who would accept the correlative duty of looking after his father's widow or widows. But on Mwashinga's death the property would pass not to Mwashinga's eldest son, but to his next brother Ngona, and so on down the line of brothers.

This custom makes sense when one realizes that the passing of the property is related to the duty to care for the relicts. Clearly the duty to look after Rhoda should fall on her sons rather than her grandsons. The property is the *quid pro quo* for this duty.

No other evidence of local Customary Law was placed before me, and I accept that the position is as described by Ella Manyengawana (although it is overridden by the provisions of section 7 of Chapter 240). It is entirely consistent with what all the witnesses say (except John, the first

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defendant) and it explains their conduct.

I reject the evidence of the first defendant by reason both of its inherent improbability and because I did not believe the witness was being truthful. In the first place it is extremely improbable that the old man Magaragada would wish to depart from the established custom whereby his eldest son would be his heir. There was no suggestion that Mwashinga had in any way merited being disinherited.

McNALLY AJ

Secondly, it seems very unlikely that the whole family of five brothers should have solemnly agreed in 1967 that the property should be donated outright to Enoch when all four of the survivors now vigorously deny there was any such plan. The widow Rhoda, who must be well into her eighties but remains alert and sprightly, strongly supported them. It is quite evident on the papers that they were aware at all times of the plan to have the property registered in Enoch's name, and made no objection to that. This can only have been because they considered he was being registered merely in a fiduciary capacity as a trustee. Thirdly, it is of some significance that on Item 23 of the bundles there is a note by a member of the D C.'s staff "Enos Mwashinga, eldest son and heir, came on 29.1.71 and confirms that there are no debts". Yet this entry was made well after the DC had certified, on the 17th November, 1970, that Enoch was the heir at African custom (Item 19).

I disbelieved the first defendant for a number of reasons. His demeanour was not good and he was hesitant and evasive at times. I did not believe his (hearsay) assertion that his father had paid part of the purchase price and fenced the farm, both of which were denied by all the others. Nor do I believe that these reasons would have motivated Magaragada to leave him the farm. I do not believe that he was unaware of what everyone else understood was the position about the farm when he was present at the ceremonial "mudzimu" for his grandfather (although not a participant since he was a "young boy" of 18 and not deemed relevant to family discussions) and also at the "mudzimu" for his father conducted by Mwashinga.

There is a more immediate reason for disbelieving the first defendant. In his evidence, he was at pains to establish that he had first learnt of his family opposition to his ownership of Farm 227 in about August, 1978. And in particular he had not known of it before the meeting at the D C.'s office on the 17th August, 1978, at which he was not present. He made some point of the fact that his uncle, Killion, the family spokesman, had not said anything about there being any dispute in his letters of the 31st May and the 4th July, 1978 (Items 44 and 45 of the Bundle), or in his letter of the 31st July, 1978 (Item 51), in which he advised John of the meeting to be held.

When his attention was drawn to the lawyer's letter of the 25th July, 1978 (item 49), which spoke of the dispute and was copied to him, he said he had received that letter but only later, after the meeting. Yet if one looks at the letter Item 52, written by him in reply to Item 51, and dated the 14th August, 1978, it is very clear that he knew there was a

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McNALLY AJ

dispute. He declines to come to the meeting on the 17th because, among other reasons "I travel the longest journey than any other member involved in this conflict which is not of my own creation but of your own". When asked why he used the word "convict" he said he used it as a synonym for "meeting". He is a well-educated person and I have no difficulty in rejecting that explanation as untruthful.

It is inconceivable to me that if he had then for the first time learnt that his ownership of the farm was in dispute he would not have telephoned or telegraphed his lawyers or the DC, put his side of the story, and insisted that no decision adverse to him be reached until he could put his case. Instead of that he took no action at all, and the DC duly recorded an agreement reached in his absence in which Mwashinga is declared entitled to Farm 227 and then cedes it to his younger brother Taylor, the Plaintiff in this case (Item 53).

It is clear to me that John preferred to avoid a confrontation at that stage and found it more convenient to proceed on the basis of the Certificate of Authority issued to him on the 10th May, 1978 (Item 41).

In fact, if one looks at Item 63 of the Bundle, a letter written by John on the 20th May, 1980, one gains the very clear understanding that John was aware of the dispute soon after his father died on the 31st May, 1977. This letter was not even referred to in the course of evidence, yet two of its paragraphs seem to me to be very revealing, and I quote them:

> "Immediately following the untimely death of my father on the 31st May, 1977, a discussion to resolve the inheritance of the above-mentioned farm was held in your (i.e., D C.'s) office in the presence of Mr Cripps whom my uncles claimed knew the right person to own the farm. However on this particular day he suggested that my uncles had no right to claim the farm as according to the records regarding the farm my late father had been given this farm by his late father Magaragada John Chatsauka Mvududu sometime before his untimely death on the 21st December, 1969.
>
> On failing to find records which grant them automatic inheritance by birth in your office, one of my uncles suggested that the records could be found at the offices of Messrs. Ternouth Lawton & Murnane, Umtali. A visit to the attorneys was then undertaken and no such records pertaining to succession by birth were found. On their failure to find proof to this form of inheritance, I then thought it was my right to inherit this farm as it was registered in my late father's name only.

I suspect that this letter, and particularly the portion underlined, shows the true source of John's claim to ownership.

On this analysis of the evidence and the law I make the following findings:

1. John Magaragada Mvududu died intestate on the 22nd December, 1969, and was at his the registered owner of Farm 227, Rowa Purchase Area.

2. At the time of his death he had not donated the farm to his son Enoch.

3. His heir at African Customary Law was his eldest son Enos Mwashinga Mvududu, and

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not as incorrectly certified by the District Commissioner, Umtali, his son Enoch.

4. In terms of the provisions of section 7 of the African Wills Act [*Chapter 240*] Enos Mwashinga Mvududu should have succeeded in his individual capacity to his fathers rights in Farm 227 aforesaid.

5. Although I have not canvassed the matter, nor was it dealt with in argument, there can be no suggestion that Mwashinga waived or renounced his rights.

further complication arises from the evidence that Magaragada and this wife Rhoda were married originally by Customary Law but that after the birth of Mwashinga but before the birth of Ngona (i.e. between 1914 and 1918) their marriage was registered at the District Commissioner's office. (Many years later, after Killion's birth, they had their marriage, blessed or solemnised in church, but this for legal purposes is irrelevant.) The law is that African spouses married by civil rites before the 1st January, 1929, are married in community of property in respect of immovable property and thus Rhoda is entitled to one-half of Farm 227, by virtue of her marriage: Goldin and Gelfand, *African Law and Custom in Rhodesia*, page 312. The parties in fact advised me, by consent, that there was no Antenuptial Contract which would have had the effect of taking the marriage out of community of property. Accordingly, I make the further finding:

6. Rhoda Mwadzirerarusa Mvududu, the surviving spouse of Magaragada, to whom he was married in community of property, is entitled to a one-half undivided share in the farm.

The final question is how the matter is to be put right. A registered deed may be cancelled by order of Court, on the authority of section 8 of the Deeds Registries Act [*Chapter 139*]. Such action cannot be lightly taken, but it seems to me that where there has been *justus error,* as here, and the rights of Rhoda have been entirely overlooked, and those of Mwashinga and Enoch misconceived, so that a false certificate was issued by the District Commissioner, the Court must intervene. Compare *Myers v van Heerde & Others,* 1966 (2) SA 649 (CPD) - at 654H *et seq; Indurjith & Ors v Naidoo & Anor,* 1973 (1) SA 104 (D & CLD),

McNALLY AJ

Tushini & Ors v Mzobe & Anor, 1949 (3) SA 623 (AD). This is not the sort of situation contemplated in cases such as *Menezes v McGaili,* 1971 (2) SA 12 (TPD), where first defendant can claim to be an innocent third party who has acquired rights in good faith in reliance on the Deeds Registry's record.

Alternatively, one might approach the matter differently by adopting the approach used in *Adam v Jhavary & Anor,* 1926 AD 147. This would involve ordering the first defendant, as executor, to re-transfer the property to Rhoda and Mwashinga in pursuance of the family arrangement.

For two reasons I will not follow that course. First, I have not been asked to do so. Second, the family arrangement did not contemplate Rhoda as a partial beneficiary, or as owner of the land by virtue of the marriage in community. I may say in passing that whatever solution one comes

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to in this case, the situation is far from satisfactory. It appears that on Farm 227, Killion, the youngest brother, had built himself a house at the instigation of his father, before the property was registered in Enoch's name. Taylor and Enoch both subsequently built houses on the farm and Enoch has built a bottle-store. It was clearly in everyone's mind that the farm would be the property of the family, and that Mwashinga should hold it on that basis. Yet section 7 of Chapter 240 specifically prevents that consequence since it provides that the heir shall succeed "in his individual capacity" which means, according to MURRAY, CJ, in *Dokotera*'s case (*supra*) "not as the head of a family or community".

Mwashinga, I gather, wants the farm to be registered in the name of Taylor, the next brother after the late Enoch. That is why Taylor was plaintiff, by consent of and on behalf of the brothers, in the pleadings. However, it would not be proper for the Court to make such an order, because it is clear that, if the problems of Enoch's "ownership" are not to be repeated all over again, some formula will have to be devised to limit and govern the rights of Taylor if he becomes the registered owner. It is not the court's function to devise such a formula. The family's legal advisers, in the light of this judgment, will have to do so if their advice is sought. As far as the court is concerned the rightful owners must arrange registration into their own names. If, thereafter, they wish to make some sort of conditional donation to Taylor, that is for them to decide or arrange.

I should add finally that the prohibition against ownership of more than one farm, and the requirement of approval by the Rural Land Board, are no longer in force.

McNALLY AJ

As far as costs are concerned, it does seem to me that this is a situation where all parties must in a sense be regarded as responsible equally for the confusion which had led to this litigation, despite the fact that I have found that first defendant has sought to take advantage of that confusion. If it were an appropriate case I might have ordered that the costs should come out of the estate, but I cannot order costs to be paid by the estate of Magaragada, and an order against the estate of Enoch would effectively penalize first defendant.

In all the circumstances, it will be fairest if each party bears its own costs and so there will be no order as to costs. I did not understand Mr *O'Meara* to oppose such an order.

Finally, I should say that the general form of the order I propose to make was proposed by way of an amended draft order by Mr *O'Meara*, and thus has the approval of the plaintiff, although I have made amendments after consultation with the Master of the High Court and the Registrar of Deeds.

The Court accordingly makes an order:

(a) declaring that Rhoda Mwadzirerarusa Mvududu, as the surviving spouse, and Enos Mwashinga Mvududu, as the heir on intestacy for the late John Magaragada Mvududu, are entitled to the joint ownership in equal and undivided shares of certain immovable property being Farm 227, Rowa, in the District of Umtali.

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(b) directing that the First and Final Liquidation Account in the estate of the late John Magaragada Mvududu, DR 1584/70, be and is hereby amended -

(i) by recording the interest of Rhoda Mwadzirerarusa Mvududu as aforesaid;

(ii) by awarding the remaining undivided half-share in the said property to the said Enos Mwashinga Mvududu

(c) directing third defendant to cancel Deed of Transfer No. 4018/72, registered on the 20th June, 1972, in respect of the transfer of the said property by the executor dative in the estate of the late John Magaragada Mvududu to Enoch John Chatsauka Mvududu.

There will be no order as to costs.

Gargan Bros. & Chadder, Umtali, and *Condy, Chadwick & Elliott,* Salisbury, legal practitioners for the plaintiff.

J H E Rogers, Umtali, and *Coghlan, Welsh & Guest,* Salisbury, legal practitioners for the first defendant.

THE STATE v MAKANDIGONA 1981 ZLR 408

Court **Appellate Division, Salisbury**

Criminal Appeal

Baron, JA, and Goldin, AJA

28th July and 13th August, 1981

Flynote

Criminal law Prevention of Corruption Act [Chapter 703] - section (c) whether acts described therein must be done "corruptly" - "receipt, account or other document"- meaning of - eiusdem generis rule - application of - witness giving evidence inconsistent with previous statement to police - approach to such evidence.

Headnote

A driving examiner employed by the Vehicle Inspection Depot was convicted of contravening section 3 (c) of the Prevention of Corruption Act [*Chapter 70*]. It was shown that he had completed a certificate of competency in respect of a woman, which indicated that she had passed a driving test. In fact, she had not even undergone the test.

The woman gave evidence which contradicted her previous statement to the police. She explained her contradiction by alleging duress. These allegations were denied by the relevant witnesses, and the magistrate disregarded her evidence entirely.

It was argued in the appeal that the appellant's conduct did not disclose an offence under

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section 3 (c). In the first place, the object of the Act is to prevent corruption, and there was no evidence of any consideration being paid in this case; secondly, the appellant did not "use" the document; and thirdly, "document" should be construed *eiusdem generis* with "receipt or account" and a certificate of competency did not fall within that *genus.*

Held, that while the magistrate had good grounds to reject The witness' allegations of duress, he should have dealt with the allegation.

Held, further, that it is not necessary in a charge under section 3 (c) to prove "corruption"; the words of the Act are clear and unambiguous and there are no grounds for reading in a requirement to prove corruption (*Sage v Eichholz* [1919] 2 KB 171; [1918 - 19] All ER Rep. 424 followed).

Held, further, that although the appellant did not present the false document directly to his principal, all the ingredients of the paragraph were met and

the appellant knew when he handed the document to the woman that intended to use it in turn in the mater prohibited by the section.

Held, further, that a certificate of competency was a document to which section 3 (c) relates. The *euisdem generis* rule is only one of many rules of construction; it must be applied with caution and not pushed too far. In any event, if the words "any other document" were to be construed *eiusdem generis* with "receipt or account", there must be a *genus* and it was not possible to say that in this context they constituted a *genus.*

Cases cited:

Sage v Eichholz (*supra)*

S v Cocklin and Anor 1971 (3) SA 776 (AD).

C S Grossman for the appellant. In order to fall within the provisions of section 3 (c) of the Prevention of Corruption Act, the agent must use, with intent to deceive his principal any receipt, account or other document in respect of which his principal was interested *and* which contained false statements *and* which was intended to mislead his principal. There was no evidence that what the appellant did was intended to mislead or deceive his principal, and in any event it is clear that he did not *use* the document. The word "document" in this section must be read *eiusdem generis* with "receipt or account". *Mustasa v Greenfield NO,* 1959 (3) SA 42 (FSC) at 44; 1959 (1) R & N 251. In any event, the whole tenor of the Act is to prevent "corruption", that is the bestowing of official favours for consideration, and there is no evidence that this happened in this case. At the most, the State has proved that the appellant issued a certificate of competence to Maumba as a favour. There is no evidence of any reward or consideration. The main witness for the State, the putative accomplice, supported the appellant's case. Although she had made a previous inconsistent statement, the magistrate erred in rejecting her evidence out of hand and in paying no attention to it. He made no attempt to decide whether or not the previous statement was true, but merely dismissed her evidence. He should have made

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a finding that as to whether or not the previous statement was likely to have been true.

K Terry for the respondent. The cardinal rule of construction of a statute is to endeavour to arrive at the intention of the lawgiver from the language used and it is only when the language used has made this intention unclear resort is had to subsidiary rules of construction: *Bhyat v Commissioner for Immigration,* 1932 AD 125 at 129. The mere fact therefore that general words follow particular words does not necessarily invoke the application of the *eiusdem generis* rule, which in any event is one which has to be applied with caution: *R v Nolte,* 1928 AD 377.

BARON JA

Because *eiusdem generis* rule restricts :the general meaning of words, this restrictive interpretation may only be placed on words if such intention clearly appears. Where the inclusion of words such as "or other thing" is clearly intended to combat more effectively the mischief, then the narrow meaning should not be given to "other": *S v Cocklin & Another* (*supra*). Consideration or reward does not form part of the offence in section 3 (c). If the State had had evidence of such the appellant would have been charged under section 3 (a). The offence is proved without evidence of consideration.

Judgment

Baron JA: The appellant a driving examiner employed by the Vehicle Inspection Apartment, was convicted in the magistrate's Court of contravening section 3 (c) of the Prevention of Corruption Act [*Chapter 70*]; it was alleged that he had issued to one Gladys Maumbe a certificate of competency indicating that she had passed a driving test when in fact she had not.

The facts, shortly, were that Mrs. Maumbe was booked to be road tested at 2.15 p.m. on the 5th February, 1981; the test had been allocated by the senior examiner in charge of the reception office to one of the several examiners on duty, but Mrs. Maumbe did not report to the reception desk for the test and the booking was cancelled. A road test on another applicant had been allocated to the appellant for 2.15. Shortly before 2.15 another examiner walked into the appellant's office to inform him that "there was work for him on the board", meaning that a clip-board with documents relating to a road test was hanging on his hook on the general examiner's board; he found the appellant completing a certificate of competency and a woman who proved to be Mrs. Maumbe seated at the other side of his desk. His suspicions were aroused because the standard routine was to complete a certificate of competency immediately after a successful test, and the depot having been closed between 1.00 and 2.00 p.m. he wondered when the test had been done. He reported his suspicions, and as a result the appellant was questioned by his superiors later that afternoon. He said that he had tested Mrs. Maumbe at 2.15 and had completed the certificate after the test; it was pointed out to him that the records showed that he had tested someone else at 2.15, but he maintained that he knew nothing of that other test and insisted that he had tested Mrs. Maumbe.

Mrs. Maumbe was called by the prosecution. She supported the appellant's story and maintained that she had been tested at 2.15 on the 5th February. The prosecutor put to her that she had previously made a very different statement to the police and she explained this by

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saying that she had been threatened and that she was afraid of being

BARON JA

locked up, and even beaten. These allegations were fully canvassed with the relevant witnesses, one of whom was the senior examiner, and denied by them. The magistrate disregarded her evidence, saying:

> "Her evidence having been virtually destroyed by the prosecution is to a large extent not really before this Court."

Mr *Grossman*, who appeared for the appellant, based his main argument on the merits on the magistrate's treatment of Mrs. Maumbe's evidence. He submitted that the magistrate erred in rejecting her evidence out of hand simply because she had made a previous inconsistent statement; he submitted that the proper approach was for the magistrate to consider the evidence she had given in Court and her allegation of duress and then to decide whether her evidence might reasonably be true.

There is some justification for Mr *Grossman's* criticism of the magistrate's very short finding that Mrs. Maumbe's evidence had been virtually destroyed; he should, I think, have dealt with the allegation of duress. There was, in fact, ample evidence to justify its rejection. But the remainder of Mr *Grossman's* submission is not in my view sound. Even without a previous inconsistent statement, and ignoring also that she was an obvious accomplice with an obvious interest to support the appellant, the proper approach of the Court was to consider the evidence of all the witnesses, whether called by the prosecution or the defence, and to decide where the truth lay. This is precisely what the magistrate did. Speaking of the demeanour of the State witnesses he said:

> "[Mrs. Maumbe] was discredited as I have stated by the prosecutor, but apart from that she struck me as being a most unsatisfactory witness."

This is not a case where the "might reasonably be true" test applies; that test is used where guilt is a maker of inference. Where there is a direct conflict and the decision turns on which of the two conflicting stories is true the court decides where the truth lies, taking into account all the standard considerations - its assessment of the credibility of the witnesses, the probabilities, and so on. In the present case, the evidence of several witnesses was directly in conflict with that of the appellant; and Mrs. Maumbe, those witnesses must have been lying if the appellant and Mrs. Maumbe were speaking the truth. The magistrate, after a very careful and accurate review of the evidence, concluded:

> "I accept that in the light of all this evidence you did indeed road test Herbert Matope on that afternoon, and for reasons aforementioned you could not have road tested Gladys Maumbe. The evidence against you links so well that this conclusion is established."

BARON JA

I agree. The evidence was overwhelming. In my view Mr *Grossman's* submissions on the merits

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must fail.

Mr *Grossman* submitted in the alternative that the facts found to have been proved do not disclose an offence under section 3 (c) of the Prevention of Corruption Act [*Chapter 70*]. It is convenient to set out the Act - a very short one - in full (apart from the formal parts):

"2. (1) in this Act -

"agent" includes any person employed by or acting for another;

"consideration" includes valuable consideration of any kind;

"principal" includes an employer and a master as contemplated in the Masters and Servants Act [*Chapter 268*].

(2) A person who is employed by -

(a) The State; or

(b) a municipality, town or local board established in terms of the Urban Councils Act [*Chapter 214*]; or

(c) a rural council established in terms of the Rural Councils Act [*Chapter 211*]; or

(d) a company, society or voluntary association;

shall be regarded as an agent for the purposes of this Act.

3. If -

(a) any agent corruptly accepts or obtains, or agrees to accept, or attempts to obtain from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or

(b) any person corruptly gives or agrees to give, or offers, any gift or consideration to any agent for himself or for any other person as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business; or

(c) any person knowingly gives to any agent, or if any agent knowingly uses, with intent to deceive his principal, any receipt, account or other document, in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead his principal; or

(d) any agent, by collusive arrangement with the seller of goods or with any person engaging to render certain services, secretly obtains any consideration for himself or for any other person or fails to disclose the full nature of the transaction to his principal, or if any seller of goods or person offering his services secretly offers any consideration to an agent in regard to the sale of the goods or to the employment of his services;

BARON JA

he shall be guilty of corruption, and liable to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment."

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Mr *Grossman* takes three main points: first, that the whole tenor of the Act is to prevent corruption, that is the bestowing of official favours for consideration, and that there is no evidence of any consideration in this case; second, that the appellant did not use the document as is contemplated by section 3 (c); third, that "document" must be construed a *eiusdem generis* with "receipt or account" and that the certificate of competency was not a document within this *genus*.

Mr *Grossman* drew our attention to the fact that our Act, save for the addition of section 3 (d), is a repetition of the English Prevention of Corruption Act, 1906 (6 Edw. 7 c. 34). There is a singular lack of authority on the construction of paragraph 3 (c); the only case I have been able to find is *Sage v Eichholz* [1919] 2 KB 171; [1918 - 19] All ER Rep. 424 (the latter report is very much fuller and is the one to which I propose to refer). Mr *Grossman's* first point is specifically dealt with at page 428 where BRAY, J, having pointed out earlier that in the third paragraph of the English section (corresponding to our section 3 (c) the word "corruptly", deliberately used in the first and second paragraphs, is deliberately omitted, continued:

> "Have we any right to say when the statute used the word 'knowingly' deliberately, instead of 'corruptly', because this Act is an Act for the better prevention of corruption, that that word 'knowingly' must be read as 'corruptly'? In my opinion the word 'knowingly' is perfectly clear and unambiguous. It does not imply any corruption, and I have no doubt that the word 'corruptly' was deliberately omitted or altered there because of the great difficulty in a case of this kind in proving corruption, and probably because it was the intention to make it an offence, whether it was done corruptly or not. I do not think that there is any room for doubt as to the meaning of these words, and therefore we have no right to restrict ether merely because this is a penal Act, or merely because it is an Act stated to be for 'the better prevention of corruption'."

It is only necessary to add that that point is underlined by the addition of section 3 (d) in our Act, where once again specific reference to "consideration" is made.

I do not think Mr *Grossman's* second point can be sustained. It is true that the appellant did not present the document directly to his principal, indeed the evidence is that he did not take the customary steps to process a copy of the document internally in the department. But with this exception he did what he was required to do with the document, namely to hand it to the applicant with his certificate of

competency endorsed thereon, and to this extent he used it in the manner in which it was intended to be used. The action he took was taken with intent to deceive his principal; clearly the principal was interested in the document; clearly the document contained statements which were false and which to the knowledge of the appellant were intended to mislead his principal. All the ingredients of section 3 (c) were therefore met, and the appellant knew when he handed the document to Mrs. Maumbe that she intended to use it in turn in the manner prohibited by the section.

The question remains whether the document is a "receipt, account or other document". It must be remembered that the *eiusdem generis* rule is only one of many rules of construction, it is not to be invoked automatically whenever general words follow particular words. Thus Craies on

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Statute Law, 7th edition, says at page 181:

> "The *eiusdem generis* rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the Legislature."

The starting point must always be to consider the ordinary meaning of the general words in question in their context - not ignoring, of course, that the context includes the preceding particular words. In *S v Cocklin & Anor.,* 1971 (3) SA 776 (A.D.), VAN BLERK, JA, said at Page 781:

> "Because the primary rule in interpreting a Statute requires the words - taking into consideration their context and without being blinded only by the language used (cf. *Jaga v Dönges, NO and Another,* 1950 (4) SA 653 (AD) at page 662) - to be construed according to their ordinary meaning, and because the *eiusdem generic* rule restricts the general tenor of words, such a restrictive interpretation may only be placed upon the words if such intention clearly appears."

The mischief at which this provision is aimed is the use by a third person of an agent (as defined), whether or not for consideration, in order to deceive the agent's principal for the purpose of obtaining some benefit. Section 2 (2) specifically applies the Act to the Government and local authorities. To restrict the application of section 3 (c) to documents directly or indirectly related to financial transactions would in my view largely defeat the object of the section in its application to the Government and local authorities; in this area the mischief aimed at relates, I have no doubt, at least as much to the obtaining of passports, residence permits, work permits, trading licences, driving licences, and a host of similar benefits, as to the obtaining of monetary gain. I can see no basis

BARON JA

for supposing that the Legislature intended to restrict section 3 (c) to documents sounding in money, so to speak.

But there is a further difficulty with Mr *Grossman's* submission. If "any other document" is to be construed *eiusdem generis* with receipt or account there must be a *genus* to be extracted from these two words. A receipt is commonly an acknowledgement in writing that something has been received, and not necessarily a sum of money; an acknowledgement in writing of the receipt of, for instance, an article of furniture, would equally be a receipt. An account is more positively associated with money, it may be a claim for money or it may be a record of financial transactions. Such things as an invoice, a statement or a ledger sheet would I think fall within the general ambit of "account", for instance, in *Sage v Eichholz* (*supra*), the document was a claim for a rebate on water rates. What then is the feature common to "receipt" and "account"? The only possible common feature I can discern is that they may both relate to the keeping of records generally, and not only financial records - although even this may not be true of a statement; but a *genus* of "documents relating to the keeping of records" is really no *genus* at all, because records are inevitably made up of documents, and any document may be filed as part of someone's records.

For these reasons I am satisfied that the certificate of competency is a document to which

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section 3 (c) of the Act relates.

Mr *Grossman* submitted that the sentence of three months' imprisonment with labour was manifestly excessive. He did not suggest that the magistrate had misdirected himself; he submitted that the circumstances of this offence, bearing in mind particularly that there was no evidence that any consideration had passed, were not so serious as to warrant a departure from the general practice of the courts, where the Legislature has specifically prescribed the option of a fine, not to send a first offender to prison. The general penalty prescribed by this Act - one thousand dollars or two years or both - relates to various offences of varying seriousness, in some the prejudice to the public may not be great, while in others no consideration is proved. The magistrate specifically said that it was not suggested that any consideration had been paid in this case; but he said, correctly, that this factor must not be allowed to outweigh others, and in particular the great potential danger to the public inherent in the appellant's offence. There is no direct evidence that Mrs. Maumbe was not a competent driver; but the inference is strong that she herself feared she might not pass a road test. To put a possibly incompetent driver on the roads is in my view a serious offence;

BARON JA

such a driver could well cause injury or death. I do not think it can be said that the magistrate was wrong to regard this offence as meriting the imposition of a sentence of imprisonment without the option of a fine. He imposed a sentence of three months' imprisonment with labour; I do not think there are any grounds on which we could interfere.

I would dismiss the appeal against both conviction and sentence.

Goldin AJA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal representatives.

PRACTICE DIRECTION No 2 OF 1981 1981 ZLR 417

Court **Supreme Court, Salisbury**

Fieldsend, CJ

14th August, 1981

Flynote

Procedure - stare decisis -when Supreme Court will depart from a previous decision of its own or of its predecessors.

Headnote

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It is essential, in a changing society, for the Supreme Court to have some flexibility, and in future, while treating its past decisions and those of its predecessors as normally binding, the Supreme Court will depart from such a decision when it appears right to do so.

Judgment

Fieldsend CJ: With the promulgation of the Supreme Court Act, 1981 (No. 28 of 1981), it is right that the Supreme Court should make known its practice in relation to the binding effect of its own Judgments and those of its predecessors, particularly in the light of section 24 of that Act.

The Court considers it of importance that there be a degree of certainty upon which people can rely in the conduct of their affairs. Precedent is an important factor upon which to decide both what the law is and how it is to be applied in particular cases. It also serves as a proper starting point for any development of the law.

Nevertheless, particularly in a changing society, it is essential for the Court to have some flexibility so as not to restrict unduly its power to develop the law in proper cases to meet changing conditions and injustice in particular cases.

For the future this Court, while treating its past decisions and those of its predecessors as normally binding, will depart from a previous decision when it appears right to do so, applying the principles generally accepted under our law.

CHIROMO v KATSIDZIRA 1981 ZLR 418

Court **Appellate Division, Salisbury**

Civil Appeal

Fieldsend CJ, Baron, JA, and Goldin, AJA

21st July and 21st August, 1981

Flynote

Husband and wife - divorce - division of property - contribution by wife towards matrimonial home - claim for share in immovable property - joint ownership not alleged - no claim in our law on basis of universal partnership or partnership in a particular venture.

Headnote

The respondent (plaintiff in the court *a quo*) claimed for a share in what had been the matrimonial home of the parties. They had been married in 1970 and during the subsistence of the marriage the husband purchased a house, which was registered in his name. Improvements were made to the house which enhanced its value. Although the respondent had paid some money towards these improvements, it was not clear on the evidence exactly how much she

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had paid. Her plea was somewhat vaguely drawn, and appeared to be based on some type of equitable relief arising from the fact that she had contributed to the improvement of the property. While it might have been possible, on the evidence, to find that the parties acquired the property jointly and on this basis award her half the value of the property, this was not the case she pleaded.

Held, that there was no basis in our law, unlike the case in English law, for a claim based on equitable relief. Any claim of this nature has to be based either on a universal partnership or on a partnership in a particular venture, in which case the remedy lies in the usual remedy available for the dissolution of a partnership. She had not expressly pleaded on this basis, nor was there sufficient evidence of a partnership of either type. The order of the court below was accordingly altered to one of absolution from the instance, with costs.

Semble, that consideration should be given to enacting legislation similar in effect to section 37 of the Matrimonial Proceedings and Property Act, 1970, of England.

Cases cited:

Pettitt v Pettitt [1969] 2 All ER 385 (HL);

FIELDSEND CJ

Verster v Verster 1964 (4) SA 310 (T);

Jirira v Jirira and Another 1976 (1) RLR 7 (GD).

P Sullivan for the appellant.

J O Manyarara for the respondent.

Judgment

Fieldsend CJ: This appeal concerns the respondent's claim to a share in what was for a number of years the matrimonial home of the parties.

Mrs. Katsidzira, the respondent and the plaintiff below, was a nurse at Harare Hospital. She was widowed in 1967 and met Mr Chiromo in 1968. The couple fell in love and lived together for a while in the respondent's rented accommodation before their marriage. In about 1969, so the declaration alleged, the appellant bought a two-roomed house in Kambuzuma from the Salisbury City Council. It appears that these houses were being sold by the council for $550, payable over 30 years, and in this case it was bought by acquiring from the previous owner his rights and obligations to the council in respect of the house for $60.

The parties were married in 1970 and it is common cause that their property rights, at any rate in regard to the immovable property, were governed by the common law of this country. After the marriage, the parties decided to extend the two-roomed house and this was done.

Unfortunately, their marriage broke up and they were divorced on the 17th August, 1979. Within

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days of the divorce the respondent issued summons claiming a half share in the immovable property and also in a motor-car which she said was a joint asset. In the court below she was awarded $1500 as her half share of the immovable property, but her claim in respect of the motor-car was rejected. *(12)

The appellant now appeals against the judgment, there is no cross-appeal by the respondent.

The paragraphs of the declaration on which the respondent's claim to a half share of the immovable property are based are:

> "6. During the subsistence of the marriage, the parties jointly developed the matrimonial property by adding thereto 4 living rooms, paving the grounds of the property with concrete and installing a steel gate, thereby raising the value of the property to $6 000,00 as at the date the divorce proceedings referred to in a subsequent paragraph thereof."

FIELDSEND CJ

and:

> "10. It is just and equitable that the matrimonial property . . . be divided between the parties by awarding the plaintiff an amount representing her share of or contribution towards the same."

The learned trial judge (DUMBUTSHENA, J) found that the matrimonial home was acquired and extended by the joint contributions and endeavour of the parties, but was registered in the name of the appellant only, but that the property was in fact the property of both of them. On that basis he found that the respondent was entitled to half the market value of the immovable property, namely, $1500, which he said was half of its valuation of $3 500.

There was;some evidence upon which it would have been possible to find that the parties acquired this property jointly: the respondent speaks of the two of them discussing the purchase of the house and of then deciding to buy it to make it their permanent home and adding: "So we bought that house". Later in her evidence she says she looked upon their venture as a husband and wife developing their home.

But this was not the case pleaded by the respondent. It was specifically alleged that it was the appellant who purchased the property and that it was her subsequent contribution to its improvement which entitle her to a half share of it. It would, I think, be unfair to decide the case upon an issue not raised on the pleadings, particularly as the question of the initial purchase was not settled as one of the issues at the pre-trial conference. The issue in regard to the house was stated to be whether the parties jointly developed the property or whether the appellant developed it on his own. The appellant was, therefore, never called upon to answer a case based on the joint ownership of the property.

A further difficulty in the way of deciding the case on the basis of joint ownership is that the proper relief to have claimed was a declaration that the property was jointly owned, unless of course it had been sold, when the respondent could have claimed her share of the proceeds.

We must look at the respondent's claim to be entitled to a share the property solely on the basis on which it was pleaded. I have difficulty in determining exactly what is her cause of action.

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From paragraph 10 it appears to be based on some type of equitable relief arising from the fact of her having contributed to the improvement of the property.

This might have been a good claim under English law before the decision in *Pettitt v Pettitt* [1969] 2 All ER 385 (H.L.), or after the

FIELDSEND CJ

passing 37 of the Matrimonial Proceedings and Property Act, 1970 (1970 c. 45). This section, which in erect re-instated the position before the decision in *Pettitt* (*supra*), provides:

> "37. It is hereby declared that where a husband or wife contributes in money or moneys worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the husband or wife arises (whether in proceedings between them or in any other proceedings)."

But I know of no authority for such a claim in our law, nor was Mr *Manyarara* able to refer us to any.

In our law a claim of this nature has to be based either on a universal partnership: Mahlo, *The South African Law of Husband and Wife,* 3rd edition, page 286, or on a partnership in a particular venture, in which case the remedy lies in the usual remedy available for the dissolution of a partnership. But see *Verster v Verster,* 1964 (4) SA 310 (T) for the difficulties in the way of establishing such a partnership.

In this case, apart from the question of whether it was pleaded, and it certainly was not expressly pleaded, I cannot find sufficient evidence Of a partnership of either of these types, nor is there sufficiently clear evidence of what the respondent contributed to the improvement of the property. At most, Mr Manyarara could point to a contribution by her of $327 of a total of $561 spent on materials for the extensions to the house, and that leaves out of account the value of the labour contributed by the appellant. Nor is there any evidence of by how much the value of the property was enhanced by the improvements.

It was established that during the time of extending the house - a period of about six months - the appellant called upon the respondent to meet the living costs of the parties so that he could buy the necessary materials and the respondent says that she, too, contributed to the purchase of these. It may be that the respondent could have made a case for the recovery of the amounts which she had contributed directly and through increased contributions to the maintenance of the parties as in *Jirira v Jirira and Another,* 1976 (1) RLR 7, particularly since it was common cause that the appellant paid back the $20 which the respondent

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contributed to the deposit on the house in the first instance. But again this was not the basis of the claim, nor were the amounts of her contributions settled as one of the issues at the pre-trial conference. As a result the evidence of what each party contributed to the development of the property was vague and not sufficiently precise for us now to reach any firm conclusion on their respective contributions. If this had been the basis of the respondent's claim the evidence as to how the movable property was divided between the parties may have taken a different direction. As it was it merely arose incidentally.

In the result, I cannot see that the Judgment in the respondent's favour can be upheld, and the appeal must be allowed with costs. The order of the court below is altered to absolution from the instance with costs.

Before concluding I should like to urge the need for urgent thought to be given to the increasing numbers and complexity of the cases which are likely to arise in the future. With increasing numbers of both wives and husbands working and contributing to their joint property there will continue to be difficulty in arriving at fair settlements of property rights on coherent lines unless some provision at least similar to that in section 37 of the 1970 English legislation is introduced. I advisedly say on similar lines because *Roman-Dutch* law has not fully developed the notion of beneficial interests in property. The courts cannot on the individual and varied cases that come before them develop a coherent and comprehensive solution to these problems without authority and guidelines from the Legislature. The history of the English law clearly demonstrates this.

Baron JA: I agree.

Goldin AJA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

THE STATE v MAKANDHLA 1981 ZLR 423

Court **Supreme Court, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Goldin, AJA

3rd and 21st August, 1981

Flynote

Criminal Procedure - Criminal Procedure and Evidence Act [Chapter 59] - section 188A (1) - refusal by accused to answer questions - reasons therefor - "just cause" - court must be satisfied that just cause exists - advice by accused's legal representative not to answer does not constitute just cause.

Headnote

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At the outset of the appellant's trial for attempted murder, his counsel stated that he had advised his client that it would not be to his interest to outline his defence; and at the end of the *State* case he said that the appellant would not give evidence and would decline to answer any questions put to him. In spite of this, the prosecutor, acting in terms of section 188A of the Criminal Procedure and Evidence Act, questioned the accused. With one exception, the accused's replies consisted of the same answer: that he had been instructed by his legal representative not to answer any questions. He refused to state his reasons for refusing to answer, saying that his legal adviser knew the reasons.

Held, that if an accused person wishes to maintain silence and avoid an adverse inference being drawn therefrom, it is necessary for him to set out sufficient reasons which could constitute just cause for his persisting in refusing to answer The only reason he actually gave was that he had been advised by his counsel not to answer questions. It is for the court to be satisfied whether just cause exists or not, not for the accused or his legal representative, and he could not rely on his counsel's advice as constituting just cause.

A P de Bourbon for the appellant.

P Sack for the respondent.

Judgment

Goldin AJA: The appellant was charged with the crime of attempted murder. He pleaded not guilty but was found guilty and sentenced to five years' imprisonment with labour. He now appeals against his conviction.

1981 ZLR p424

GOLDIN AJA

[His Lordship outlined the evidence, and continued:]

At the outset of the trial the appellant's counsel said that he had advised the appellant that in this matter it would not be in his interests to outline his defence. He went on to say that he had explained to the appellant "the consequence of accepting my advice, and he has decided to accept my advice". At the conclusion of the case for the State, the appellant's counsel informed the court that the appellant would not give evidence and, acting on counsel's advice, "he will decline to answer any questions put to him".

Mr *Sack*, who appeared for the State, informed the Court that he wished to take advantage to question the appellant in terms of section 188A of the Code. Notwithstanding a tenacious effort by counsel for the State to ascertain or elicit a reply from the appellant, he failed with one exception to do so. The appellant's replies consisted of the same answer, namely, that he had been instructed by his legal representative not to answer any questions. When asked whether he appreciated that his legal representative "is just an adviser and not the final adviser of what you want to do today", he replied "I appreciate the consequences but I still stick to what my adviser advises me today". The appellant's counsel interjected to maintain that counsel for the State had "no right to know what advice I gave to my client".

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The appellant refused to state his reasons for refusing to answer such a question by saying that his legal adviser "knows the reasons". The one exception to the appellant's failure and refusal to answer any question was when he was asked: "So you are denying any involvement in the attempted murder of Locate. Is that right?", the appellant answered: "I denied the allegation right at the beginning, my lord, and I don't think I can go any further than that. My legal adviser had advised me not to answer any questions."

The judge *a quo* (DUMBUTSHENA, J) found that the State witnesses gave their evidence well and had not been shaken under cross-examination. In fact, while Mr *de Bourbon* refers to one or two discrepancies in the State evidence he does not, except for one aspect, rely on them as significant or casting doubt on credibility. He does, however, rely on the conflict arising from the averment by the complainant that the colour of the car was cream, while Inspector Rogers said that the car he saw outside the police station was white.

The real question is whether it was the appellant who was the driver of the vehicle used by those who abducted and attempted to murder

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the complainant, or whether two so similar incidents occurred that night; the one involving the complainant and the other, described in the appellant's statement, concerning a different victim. The main burden of the appeal was, based on whether the trial judge was entitled to rely on the appellant's refusal to answer questions put to him by the State or to give any evidence as justifying an adverse inference against him.

The only basis on which the appellant would have been entitled, on the facts of this case, to refuse to answer questions would have been on the ground "that he had just cause for so persisting" in his refusal to answer questions. Section 188A of the Criminal Procedure and Evidence Act [*Chapter 59*] reads:

> "188A. (1) If an accused who gives evidence or is questioned in terms of subsection (5) or (6), as the case may be, of section *one hundred and eighty-eight* refuses to answer any question, he shall be asked to give his reasons for so refusing and, if he persists in his refusal, the court, in determining whether the accused is guilty of the offences charged or any offence of which he may be convicted on that charge, may unless satisfied that he had just cause for so persisting, draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused.
>
> (2) For the purposes of subsection (1), an accused who refuses to answer any question shall be deemed to do so without just cause -
>
> (a) in the case of an accused giving evidence in terms of subsection (5) of section *one hundred and eighty-eight,* unless he is entitled in terms of this Act to refuse to answer the question on the ground of privilege;
>
> (b) in the case of an accused who is questioned in terms of subsection (6) of section *one hundred and eighty-eight,* unless he would be entitled in terms of this Act to refuse to answer the question on the ground of privilege if he were giving evidence on his own behalf."

In this case the appellant persisted in answering, as mentioned above, that his refusal to answer questions was because, as his, counsel had confirmed, he had been advised by his

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counsel not to answer any questions. The reasons for not answering questions were never stated, nor directly or indirectly indicated. In my view the learned trial judge correctly held that the appellant could not rely on this advice as constituting just cause.

It is necessary for an accused person who wishes to maintain silence and avoid an adverse inference being drawn therefrom to set out sufficient reasons which would constitute just cause. The mere allegation that an accused refuses to answer does not enable the Court to determine

whether or not it is "satisfied that he had just cause for so persisting".

It is for the court to be satisfied whether just cause exists and not for the accused or his legal representative. Accordingly, I am of the view that the learned trial judge was entitled on the facts of this case to "draw such inferences from the refusal as appear proper and the refusal may, on the basis of such inferences, be treated as evidence corroborating any other evidence given against the accused".

[His Lordship then proceeded to analyse the evidence, and concluded:]

In my view the appeal must be dismissed.

Fieldsend CJ: I agree.

Baron JA: I agree.

Stumbles & Rowe, appellant's legal representatives.

SECRETARY FOR JUSTICE AND CONSTITUTIONAL AFFAIRS v A NASS & CO (PVT) LTD 1981 ZLR 427

Court **High Court, Salisbury**

Opposed Motion

McNally, AJ

6th and 26th August, 1981

Flynote

Contract - provision of machines for recording court proceedings and transcription thereof - termination of contract - no express provision for transcription after date of termination - implied terms - when Court may formulate an implied term - exceptio doll does not apply where hardship caused by terms to which party has agreed.

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Headnote

The respondent company had entered into a contract with the Secretary for Justice in May, 1975, in terms of which it provided recording machines for use in the magistrates Courts and made available machine operators and typists to transcribe the recordings when required. The agreement was extended and renewed from time to time until the Secretary terminated it with effect from the 30th June, 1981.

There were no express provisions in the agreement which dealt win the situation that might arise if after termination of the contract it became necessary to transcribe a recording made during the subsistence of the contract. The possibility of this problem occurring was drawn to the Secretary's attention by Nass in June, 1979, but the Secretary merely noted Nass' comments.

Following on the termination of the contract in June, 1981, the situation did indeed arise and the Secretary obtained a rule *nisi,* calling on Nass to show cause why it should not cause to be transcribed certain recordings made before the contact expired. The Secretary argued that it was a necessary implied term in the contract that Nass would be responsible for transcribing any recordings made up to the date of expiry of the contract. Apart from denying any implied terms, Nass pointed out various factual difficulties in the way of its transcribing the recordings. It was also argued on behalf of

the Secretary that to allow Nass to succeed would be unconscionable and that the Secretary should be allowed to succeed by calling in aid the *exceptio doli*.

Held, discharging the rule *nisi* with costs, that -

1. A term can only be implied in a contract if it can confidently be said that, if at the time the contract was being negotiated, an officious bystander had asked "what will happen in such-and-such a case?", both parties would have replied "Of course, so-and-so will happen; we did not say so as it is too clear".

2. The court has no power to supplement the bargain by adding a term which they would have been wise to include but did not (S & T Import & Export (Pvt) *Ltd. v Controller of Customs & Excise,* 1981 ZLR 284 (AD); 1981 (4) SA 196 (ZAD), applied).

3. It is not necessary that the parties should have actually intended the implied term; it is sufficient if it appears clearly that had the parties, in the light of the express terms of the agreement and the surrounding circumstances, actually contemplated the situation which later arose, they would have provided therefor in an obvious manner (*van den Berg v Tanner,* 1975 (2) SA 268 (AD) at 277, applied).

4. The subsequent conduct of the parties to an agreement may afford evidence of a common interpretation of an ambiguous document by both parties (Cone *Textiles v TTL Development Corporation,* 1979 RLR 114 (AD); 1979 (2) SA 1051 (RAD) at 1055, applied).

5. While in the present case it would have been eminently sensible to have made specific

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provision for the method of termination of the agreement, there was no "obvious manner" of doing so; there were so many possibilities that it was impossible to formulate any implied term.

6. The *exceptio doli*, while designed to afford relief to one who would otherwise be oppressed by unconscionable conduct on the part of his adversary, was not designed to give relief to a party who had suffered hardship because of the operation of the very terms to which he had agreed (*Paddock Motors (Pty.) Ltd v Igesund,* 1975 (3) SA 294 (D. C L.D.), applied).

Cases cited:

S & T Import and Export (Pvt) Ltd. v Controller of Customs and Excise (*supra*);

Reigate v Union Manufacturing Co. (Ramsbottom) Ltd. [1918] 1 KB 592 (CA); [1918 - 19] All ER Rep. 143 (CA);

Techni-pak Sales (Pty.) Ltd v Hall, 1968 (3) SA 231 (W);

Smith v Minister of Lands, and Natural Resources, 1979 RLR 421 (GD); 1980 (1) SA 565 (ZR);

van den Berg v Tanner (*supra*);

Cone Textiles v TTL Development Corporation (*supra*);

Paddock Motors (Pty.) Ltd v Igesund (*supra*);

Bourlay v A W Bardwell & Co. (Pvt) Ltd., 1967 (1) SA 4 (R);

A W Bardwell & Co. (Pvt) Ltd. v Bourlay, 1966 RLR 656 (GD).

McNALLY AJ

MT O'Meara for the petitioner.

AP de Bourbon for the respondent.

Judgment

McNally AJ: The petitioner (the Secretary) obtained a rule *nisi* calling upon the respondent (Nass) to show cause why it should not cause to be transcribed forthwith certain records set out in a schedule.

The history of the dispute is briefly as follows. In May, 1975, the Secretary for Justice, representing the then Government, entered into an agreement with Nass in terms of which Nass provided recording machines for use in magistrates courts in the main centres of the country, and made available operators' and typists to operate the machines and transcribe proceedings as required. Nass was paid a fixed sum *per annum* per recording machine, plus certain expenses.

This arrangement was extended and novated from time to time without significantly altering the

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terms, until it was terminated by the Secretary with effect from the 30th June, 1981.

Since the recording machines were functioning right up to 4 p.m. on the 30th June, 1981, it was inevitable that a number of recordings were not transcribed as at that moment. Nass contends that its obligations ceased as at that moment and declines to transcribe any further recordings. The Secretary insists that Nass is, under an obligation, arising from an implied term in the contract, to transcribe recordings made during the currency of the agreement.

Attempts to resolve the deadlock have been unavailing because the Secretary regards Nass's terms for doing the "extra" work as unreasonable, and the discs cannot be played back on any machines in the country other than those owned by Nass. Meanwhile, the Secretary claims, the administration of justice is prejudiced as is the liberty of certain individuals whose appeals cannot be processed because of the non-availability of the record of their trials.

At this point it is appropriate to set out the preamble to the agreement and the two clauses dealing with the respective obligations of the parties. These are as follows:

> "WHEREAS the CONTRACTOR has since 1st July, 1962, supplied and operated certain recording machines at Magistrates Courts in Rhodesia in terms of an agreement signed on behalf of the CONTRACTOR on the 12th day of July, 1962, and on behalf of the GOVERNMENT on the 17th July, 1962, and amended from time to time by various subsequent agreements, the last of which is due to expire on the 30th June, 1975.

McNALLY AJ

> AND WHEREAS the parties thereto are desirous of providing for the continued operation of the said machines.
>
> NOW THEREFORE these presents witness that the parties hereto have concluded the following agreement, namely:
>
> 1. The CONTRACTOR shall as from the 1st day of July, 1975, and for a period of THREE YEARS, subject to review, as to whether it should be extended, two years before it is due to expire-
>
> (a) supply and operate eight machines at Salisbury Magistrate's Court, six at the Bulawayo Magistrate's Court, one at the Gwelo Magistrate's Court, and one at the Umtali Magistrate's Court, and to operate such machines at such other places as may be required by the Secretary;
>
> (b) be responsible for the maintenance, repair and replacement of the machines and all transcribing machines and typewriters used in connection therewith. Any such machines shall be repaired or replaced within seventy-two hours if found to be faulty;
>
> (c) have available such operators as are necessary to operate the machines and such typists as are necessary to transcribe recorded proceedings and make necessary copies of transcription;
>
> (d) prepare as many copies of transcriptions or recorded proceedings as may be required and within the time stipulated by the Secretary: provided that should the Secretary request the CONTRACTOR to supply copies of any particular proceedings in addition to those originally required the CONTRACTOR shall supply such additional copies at the rate of forty cents per page for the first additional copy and ten cents per page for each succeeding copy;
>
> (e) perform all its duties in regard to the operation of the machines and the transcriptions of Court proceedings and such quasijudicial or other proceedings as may from time to time be required to be recorded or

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transcribed, under the supervision and in the discretion of the Secretary;

(f) allow the Secretary to listen to and transcribe any part of any recorded proceedings during normal office hours;

(g) be entitled to sell copies of proceedings to persons other than the GOVERNMENT at rates not exceeding those prescribed in the rules of the Magistrates Courts.

2. The GOVERNMENT shall-

(a) provide the CONTRACTOR with the necessary accommodation for use by its employees for the performance of their duties in terms of this agreement and such accommodation shall be used solely for this purpose;

(b) pay to the CONTRACTOR-

(i) for the supply and proper efficient operation of the machines and the performance of its duties in terms thereof, the sum of $5000 per annum paid monthly in arrear for each machine, which amount shall be reduced pro rata should such machine

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McNALLY AJ

be inoperative for a continuous period exceeding seventy two hours;

(ii) the sum of $1,50 per day and $6 per night in respect of any person employed by the CONTRACTOR to operate machines at any place other than Salisbury, Bulawayo, Gwelo and Umtali, when so required by the Secretary;

(c) supply the CONTRACTOR with and have available at all times adequate supplies of recording discs or belts for the machines and such other items of stationery as are necessarily required by it to fulfil its obligations in terms thereof on behalf of the GOVERNMENT;

(d) provide transport for the conveyance of the CONTRACTOR's employees to and from places other than Salisbury, Bulawayo, Gwelo and Umtali when machines are required to be operated at such other places or alternatively, if such employees are conveyed by the CONTRACTOR, pay to the CONTRACTOR for such conveyance a travelling allowance equivalent to that normally paid to Government officials;

(e) pay to the CONTRACTOR an allowance at the rate described in paragraph 2 (b) (ii) hereof towards the cost of employing a super-numerary operator when a permanent operator at Gwelo or Umatli proceeds on vacation leave, such allowance shall be payable for a period not exceeding thirty days in respect of each year and may be accumulated in respect of a period not exceeding ninety days. (Any period accumulated under the previous contract may be included in the accumulated total period.)

The GOVERNMENT shall also provide transport or pay to the CONTRACTOR a travelling allowance at the rate described in paragraph 2 (d) hereof when a supernumerary operator is required to travel from Bulawayo or Salisbury to Gwelo and return, or from Salisbury to Umtali and return for the purpose of relieving a permanent operator.

The provision of this sub-clause shall apply only to one return journey to Gwelo and one to Umtali for each year hereunder."

The Secretary contends that "it was a term necessarily to be implied in the agreement between parties" that Nass "would be responsible for transcribing so many of the discs as may have been recorded up to and including the 30th June, 1981" (petition, paragraph 13). This term was

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to be implied from the following:

"(a) The agreement was for the Respondent to work until the 30th June, 1981. The Respondent's employees did in fact work in recording Court proceedings until 4 p.m. on that day.

(b) The recording in itself is valueless unless the proceedings are transcribed.

McNALLY AJ

(c) It could not have possibly been contemplated by the Respondent that its duties were confined to the useless mechanical recording of the Court proceedings without any further obligation by it in that regard.

(d) It must have been contemplated by the parties and by the Respondent in particular, that as at the termination of the contract, on the 30th June, 1981, there would remain unfulfilled many requests for transcriptions and furthermore that requests would be made after the 30th June for transcriptions of proceedings prior to that date, and these would have to be done after the 30th June.

(e) The payment by the Petitioner to the Respondent was for services rendered by the Respondent and the empty gesture of making recordings without any transcriptions could hardly have been regarded by the parties as services rendered."

Nass denies any implied term and makes the following pouts:

"15.1. The contract period terminated on 30th June, 1981;

15.2. The contract envisaged that the Respondent would have at its disposal trained transcribers; these transcribers have for the most part been employed by the Petitioner and are accordingly not available to carry out such work for the Respondent; 15.3. The contract envisaged that the Respondent would be provided with office accommodation for its employees; this accommodation is no longer available but is occupied by the Petitioner's employees;

15.4. In terms of Clause 1 (d) of the Agreement the Respondent was required to prepare transcriptions of recorded proceedings as were required by and within the time limits stipulated by the Petitioner. In the Respondent's experience it is not uncommon for a request for a transcription to be received months, or years, after the actual hearing of the case. It could not have been and was not in the contemplation of the parties that the Respondent would be required to carry out the transcription of records for an indefinite period after the expiry of the contract;

15.5. The whole emphasis of the contract between the parties was on the recording of proceedings, rather than on the transcript thereof, and in this regard reference is made to the preamble to the agreement and to the provisions of Clause 2 (b) (i) of the agreement;

15.6. The recording of proceedings is not 'useless' when no transcription is carried out; it is respectfully pointed out that the record of the majority of cases is not transcribed and that one of the primary functions of recording such as was carried out by the Respondent is to provide a permanent, albeit untranscribed, record which could be transcribed if necessary at some future unknown date;

15.7. The present unhappy situation has only arisen because the Petitioner chose to utilize equipment which is incompatible with that previously utilised by the Respondent. This is not something which would have been envisaged by the parties at the time the contract was entered into."

McNALLY AJ

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The Secretary counters this with the following assertions:

"15.1. Agreed.

15.2. The respondent should have anticipated that it would not have been possible to transcribe all records for which transcriptions were requested before the 30th June, 1981, and retained transcribers for this purpose. Instead respondent gave all his staff a month's notice on 1st June, 1981, and consequently the situation he is ire is of his own making. Nevertheless petitioner is prepared to make accommodation and these former members of respondent's staff available to him should he be inclined to transcribe the records, alternatively, petitioner is willing to transcribe the records if respondent is prepared to make transcribing machines available on reasonable terms.

15.3. Accommodation can be made available to respondent should he so require.

15.4. Petitioner agrees that it could not grave been within the contemplation of the parties that respondent be required to carry out transcription of records for an indefinite period after expiry of the contract. However, petitioner submits it is not unreasonable to require respondent to transcribe those cases which are normally transcribed, within the periods prescribed by law for the purpose for which such cases are normally transcribed. For example within a week tin respect of review matters and twenty-eight days of noting an appeal in appeal matters, even if it means transcribing after the expiry of the contract.

15.5. Petitioner denies that the whole emphasis of the contract is on the recording of the proceedings. By implication it must be possible to transcribe the proceedings otherwise there would be no purpose in recording them.

15.6. Petitioner agrees the recording of proceedings is not useless when no transcription is carried out. It only becomes useless when the facility to transcribe is no longer available.

15.7. Agreed. Petitioner is not aware of any modern equipment which is compatible with that previously used by respondent. The situation could only have been avoided by the acquisition of respondent's obsolete equipment on his own terms, which for various reasons are not acceptable."

In order to complete the picture it is necessary to say that on the 27th June, 1979, Nass wrote to the Secretary inviting renewal of the contract for a further year after the 30th June, 1981, and warning specifically that "should the present contract expire at the end of June, 1981, your Government will be faced with the situation that a great many of the cases recorded in the twenty-five courts throughout the country would be part-heard and a great many would still have to be transcribed for review and appeal purposes. After that date, however, there would be

no staff or recording equipment available to complete these cases, no matter how many there may be."

The reply, dated the 28th June, 1979, was non-committal as to the renewal and went on to say "Your comments on the possible situation consequent upon non-renewal of the contract can only be noted but I do thank you for drawing our attention to that possible situation". In a further letter dated the 30th January, 1980, the Secretary referred to this correspondence, but in neither of his two letters did the Secretary express any surprise or shock at the statements by Nass as to the consequences of the termination.

To this factual situation I am required to apply the law relating to implied terms in a contract.

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The principles regulating when a court will imply terms in a contract are perhaps more easily stated than applied, as was said by FIELDSEND, CJ, in *S & T Import & Export (Pvt) Ltd.* v *Controller of Customs & Excise,* 1981 (4) SA 197 (ZAD) at 199. * (13)

He then stated the principles to be:

> "A term can only be implied if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties 'What will happen in such a case' they would both have replied 'Of course, so and so will happen; we did not trouble to say that; it is too clear'."

But:

> "The Court has no power to supplement the bargain between the parties by adding a term which they would have been wise to agree upon, although they did not. The fact that the suggested term would have been a reasonable one for them to adopt or that its incorporation would avoid an inequity or a hardship to one of the parties, is not enough."

These principles are taken from *Reigate v Union Manufacturing Co. (Ramsbottom), Ltd* [1918] 1 KB 592 at 605; [1918-19] All ER Rep. 143 at 149, and *Techni-Pak Sales (Pty.) Ltd v Hall,* 1968 (3) SA 2;31 (W) at 236. There was a similar formulation made by WADDINGTON, J, in *Smith v Minister of Lands & Natural Resources,* 1979 RLR 421 (GD) at 426G; 1980 (1) SA 565 (Z) at 570 D-H.

It is perhaps useful in the present context to cite a remark by BOTHA, JA, in *van den Berg v Tanner,* 1975 (2) SA 268 (AD) at 277, where he says (in translation):

> "It is of course true that the parties at that stage never foresaw the cancellation of the agreements of the 19th November, 1970, and thus never contemplated the situation for which provision should have been made.

McNALLY AJ

> But . . . the test for reading an implied term into a contract does not necessarily require that the parties to the agreement should consciously have had in mind the situation which would later arise and the need to provide therefor. The test does not require that the parties should actually have intended the implied term. It is sufficient if it appears clearly that had the parties, in the light of the express terms of the agreement, and the surrounding circumstances, actually contemplated the situation which later arose, they would have provided therefor in the obvious manner, and the parties must therefore be deemed to have intended the implied term."

Another comment which I find useful in the context of the present case is that of LEWIS, JP, in *Cone Textiles v TTL Development Corporation,* 1979 RLR 114 (AD) at 120C; 1979 (2) SA 1051 (RAD) at 1055E, where he cites impressive authority for the proposition that:

> "The subsequent conduct of the parties to an agreement may afford evidence of a common interpretation of an ambiguous document by both parties to it."

Now, in seeking to apply the law to the facts, I begin at what is the high point of the *Secretary*'s case, namely, that it would have been eminently sensible for the parties to have made specific provision for the method of termination of the agreement, because it must have been obvious, or would have been obvious if anyone had thought about it, that some provision would be

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necessary to provide for the transcription of recordings made in the final days of the contract period.

It seems to me that it can be fairly said that it would have been reasonable to include some such provision. Indeed it was necessary to include some such provision if the contract were to be logically rounded off so as to avoid precisely the inequity and hardship which has now arisen.

If I apply the first test in the *S & T Import* case (*supra*) I find that the parties would certainly not have answered the officious bystander in the words there used. They would probably have said "Thank you, we had not thought of that, we must make some provision for it".

This at once indicates that the petitioner must fail on the second test, because the court would now have to supplement the original bargain and incorporate a reasonable term to avoid hardship. This, to my mind, becomes even clearer when one applies the third test set out in the quotation from *van den Berg*'s case, *supra.* Let me, for the purpose of argument, accept that the present parties actually contemplated the situation which has now arisen, they would have provided therefor (I deliberately use words as close as possible to those of BOTHA, JA, in

McNALLY AJ

the case cited). How would they have provided for the situation? There is, in my view, no "obvious manner". They might have arranged for the recording to end one month earlier than the terminal date, or they might have arranged for the transcription obligation to end one month (or longer) after the terminal date. I cannot guess what financial arrangement they would have made in respect of that final month (or longer period). They might have agreed that Nass would sell, say, two of his machines to the Government on the terminal date, so that the Government could transcribe whatever records it wanted to transcribe at any future date, using its own typists. Government, for all I know, may have thought it could easily acquire a few machines from other sources, and thus was not concerned to tie up these loose ends at all.

There are so many possibilities that I find I cannot formulate any implied term of which I can say "Clearly, had the parties addressed their mind to the problem, this is what they would have agreed upon and this therefore is the implied term they must be deemed to have intended". See, generally, the cases cited in Christie, *Law of Contract in South Africa,* at page 160 and footnote 73.

As Mr *de Bourbon* pointed out, the Secretary's own petition betrays considerable uncertainty as to the exact terms which he says should be implied. The terms suggested in paragraph 13 of his petition differ from those in paragraph 7 of his answering affidavit, which in turn differ from those in paragraph 8 and paragraph 10. In paragraph 12 the Secretary confesses that "the situation has arisen because the terms of the original contract made no provision" (he does not say "no express provision") "for the manner in which the contract should be run down in the event of its expiry . . . " .

Finally, and it seems to me conclusively, I apply the fourth test of subsequent conduct from the *Cone Textiles* case *(supra).* In June, 1979, Nass wrote to the Secretary in the clearest possible

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terms which I have already quoted. That letter was referred to twice in correspondence from the Secretary - on the 28th June, 1979, and on the 30th January, 1980. There is no hint, in those replies, of shock or indignation, no suggestion that an obvious implied term has been overlooked. In the light of that correspondence it cannot possibly be said, to adopt again the words of BOTHA, JA, in *van den Berg*'s case *(supra)* that "had the parties actually contemplated the situation they would have provided therefor in the obvious manner". The Secretary was specifically advised of the situation as Nass saw it, and he accepted it without comment. The correspondence is cogent evidence that neither Nass nor the Secretary contemplated that an obvious implied term existed. Quite the contrary.

McNALLY AJ

Mr *O'Meara* made three other submissions. First, he said that to allow Nass to succeed would be unconscionable and that the Secretary should be allowed to succeed by calling in aid the *exceptio doli*. He referred in this connexion to *Paddock Motors (Pty.) Ltd v Igesund,* 1975 (3) SA 294 (D & CLD) at 297E. The answer to this, I think, lies over the page at 298C, where MISER, J, says:

> "But the *exceptio doli*, although it may have been designed to afford relief to one who would otherwise be oppressed by unconscionable conduct on the part of his adversary, was not designed to enable a party who suffered hardship because of the operation of the very terms to which he had expressly agreed, to approach the court for, in effect, amelioration or modification or amendment of such terms of the contract."

Mr *O'Meara's* second point was that if, as Mr *de Bourbon* had argued, the contract was a contract essentially for the recording of evidence, and only incidentally for its transcribing, then it would be proper to interpret the contract to mean that its termination date applied only to the termination of the recording. The incidental transcribing would, on this interpretation, continue until completed. It is an ingenious point, but falls down, in my view, on the wording of the contract. Paragraph 9 (e) for instance clearly provides that for the period of the agreement the contractor (Nass) "shall have available such operators as are necessary to operate machines and such typists as are necessary to transcribe records . . ." (my underlining). The underlined passages show clearly that the typists are to be available for the period of the agreement and not thereafter.

Indeed, although the point was not made in argument, it seems to me that the words underlined show clearly that what the Secretary is attempting to do is to imply a term on a question (the period of employment of typists) to which the parties have applied their minds, and for which they have made express provision in the contract. This is not permissible see "Christie, *Law of Contract in South Africa,* page 157 and *Bourlay v A W Bardwell & Ca. (Pvt) Ltd.,* 1967 (1) SA 4 (R) at 7F. * (14)

Finally, *Mr O'Meara* claimed that if he failed on the implied term he could rely on the express term contained in paragraph 1 (d) of the contract which I have set out earlier in this judgment. There was no time limit, he said, on the requirement that Nass should "prepare so . . .

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many copies of transcriptions of record proceedings as may be required and within the time stipulated by the Secretary". But this point, like the last, falls down when one reads the opening phrases of paragraph 1 which govern all the subparagraphs and which read "The Contractor shall as from 1st July 1975 and for a period of three years . . . ". The period was of course extended but the obligation in 1 (d) clearly only applies during the currency of the contract as extended, and not after its termination.

It is unfortunate that if the rule is discharged, innocent, or at least possibly innocent people may suffer.. It seems to me, however, that other solutions will have to be found for the plight of these persons. I cannot rewrite a contract for the sake of parties who are not even contracting parties.

For the reasons I have given the petitioner must fail.

The rule is discharged with costs.

State Attorney, legal practitioner for the petitioner.

Gill, Godlonton & Gerrans, legal practitioners for the respondent.

THE STATE v SALZER 1981 ZLR 439

Court **High Court, Salisbury**

Criminal Review

Pittman J

26th August, 1981

Flynote

Criminal procedure - sentence counts taken as one for sentence - additional punishments competent in respect of one of those counts but not others - treating of counts as one for sentence does not take away right of court to impose such additional punishments.

Headnote

When a number of counts are properly treated as one for sentence, the sentence imposed must not exceed the maximum that could have been imposed on any individual count. Where, however, additional punishments are provided in respect of one of the counts on which the accused was convicted, the fact that all counts are treated as one for sentence does not take away the right of the court to impose the additional punishment for that one count. In that event, it is good practice for the court imposing a subsidiary punishment to make it clear that that punishment relates only to a particular offence.

In a case where the accused was convicted of fraud and a contravention of the Customs and

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Excise Act arising out of the same act of smuggling, it was competent for the magistrate to take the counts as one for sentence and impose a fine and, in addition, to order the forfeiture of the goods involved and give summary judgment for import tax due, even though the latter punishments would not be competent on a charge of fraud alone.

Cases cited:

S v Mutero, 1976 (1) RLR 228;

S v Leith, 1972 (4) SA 262 (C.);

S v Milos, G-B-220-79 (unreported);

R v Dignan, 1956 R & N 335; 1956 (2) SA 89 (SR).

Judgment

Pittman J: The accused was convicted on one count of fraud and one of smuggling an engine into Zimbabwe, in contravention of section 165 of the Customs and Excise Act [*Chapter 177*]. The trial magistrate decided to treat the two offences as one for sentence, presumably because

PITTMAN J

the fraud was committed in the course of the smuggling. He sentenced the accused to a fine of $1500. In addition, he ordered the engine to be forfeited to the State, in terms of section 190 (1) (b) (i) of the Customs and Excise Act, and gave summary judgment for import tax in the sum of $166 in favour of the Controller of Customs and Excise in terms of section 190 (1) (a) of the same Act, read with section 16 (1) (a) of the Sales Tax Act [*Chapter 184*].

The reviewing judge invited the Attorney-General to comment upon the propriety of the orders for forfeiture and summary judgment, in view of the facts that the magistrate had treated the two offences as one for sentence and that the court had no jurisdiction to make those orders in respect of the count of fraud.

There are numerous cases in which it has been held that when a single or globular sentence is imposed for a number of offences, it is to be regarded as the punishment for each of the offences of which the accused has been convicted, and that the sentence must therefore not exceed the maximum permissible for any of those offences. See, for example, *S v Mutero,* 1976 (1) RLR 228. Obviously the reviewing judge, who is now on leave, wanted the Attorney-General to discuss whether this rule applied to the orders for forfeiture and summary judgment in relation to the count of fraud.

The Attorney-General commented as follows:

> "There are a number of authoritative decisions of our Courts which have held that it is not competent to impose a globular sentence which exceeds the jurisdiction of the Court in respect of one or more of the counts which have been taken together for the purpose of sentence. (*S v Leith,* 1972 (4) SA 262 (C) at 263A; *S v Milos,* unreported judgment No. G-B-220-1979). The reasoning behind these decisions, however, relates to the severity of the sentences; it does not relate to additional courses of action open to the magistrate in respect of one or more of the

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counts.

The only authority that could be found directly on this point was a review judgment of BEADLE, J (as he then was), in *R v Dignan,* 1956 R & N 335; 1956 (2) SA 89 (SR). In this instance an accused had been found guilty amongst other charges of failing to stop after an accident, failing to ascertain whether a person was injured and failing to render assistance. Separate sentences were imposed on each count and on review BEADLE, J, ordered these counts to be treated as one for sentence and in addition to a fine imposed, ordered the accused's driver's licence suspended; of the three offences ordered to be treated as one for sentence, one of them carried no power of suspending the licence; had the conviction been for that alone, the licence could not have been suspended - the one offence that did not allow for the suspension of the licence was the failure to stop in terms of section 170 (2) (a) of the Road and Road Traffic Act (No. 50 of 1953).

PITTMAN J

It is respectfully submitted that this case is on the same lines as the present case and is an authority for the proposition that the treating of two counts as one for sentence does not take away the additional rights available to the magistrate in respect of one of those counts.

It is further respectfully submitted that the magistrate correctly and judicially exercise his rights so far as forfeiture and payment of the import duty were concerned and the over-all sentence is in accordance with real and substantial justice."

Squires J: and I agree with this view, and I would only add that, as in the present case, it would normally be good practice for the court imposing a subsidiary punishment to make it clear that the punishment relates only to a particular offence.

Accordingly, the sentence in the present case is altered to read as follows:

Both counts are treated as one for sentence, and the accused is fined $1 500 or, in default of payment, two months' imprisonment with labour. In addition, in respect of count 2, (a) the engine is forfeited to the State, and (is) summary judgment in the sum of $166 is awarded against the accused in favour of the Controller of Customs and Excise.

THE STATE v JAPA AND ANOTHER 1981 ZLR 442

Court **High Court, Salisbury**

Criminal Review

Squires J

26th August, 1981

Flynote

Criminal procedure - Magistrates Court Act [Chapter 18] - section 58 (1) - procedure under - purpose of - not

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designed to enable mistake to be corrected after proceedings completed.

Headnote

The procedure provided under section 58 (1) of the Magistrates Court act [*Chapter 18*] was designed to enable the taking of remedial steps to vest a proper jurisdiction in the court before the completion of the trial in question. Circumstances when it may properly be used include, for example, those where in the course of the trial it emerges that the offence is of such a nature that the magistrate's jurisdiction on sentence is likely to be inadequate. It is not the object of the procedure to allow mistakes to be corrected after the trial is completed.

Where a magistrate had erroneously imposed a sentence beyond his jurisdiction, his request that the sentence be set aside on review and the matter remitted to him to enable him to invoke the procedure provided by section 58 (1) was refused.

Judgment

Squires J: In this case three persons were charged with robbery before the Court of the magistrate at Harare in proceedings which started on the 17th March. The first accused was found not guilty and discharged, the second accused - and the subject of this exercise - was convicted of the charge, and the third accused was convicted of theft and assault. After evidence in mitigation, the second accused was sentenced to two years' imprisonment with labour, a period of punishment which is beyond the Jurisdictional competence of the magistrate in question.

In a memorandum addressed to this court on review of the proceedings, the trial magistrate in apparent acknowledgement of this excess, asked that the sentence be set aside and the matter remitted to

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SQUIRES J

him for the procedure of section 58 (1) of the Magistrates Court Act [*Chapter 18*] to be invoked. One assumes that thereafter the magistrate desires that the Attorney-General convert the trial to a preparatory examination and, after committing the second accused for trial on this basis, remit the matter back to the magistrate with increased jurisdiction. Thus armed, he could properly impose the sentence that he improperly imposed in the first place.

In my view, that would be an equally improper procedure in circumstances such as these. The power vested in a magistrates court to stop a trial in terms of section 58 (1) of the Magistrates Court Act was designed to enable the taking of remedial steps to vest a proper jurisdiction in the court before the conclusion of the trial in question. It is present in the Act to avoid the situation that might develop if unforeseen circumstances emerge in the course of the evidence which cast a more serious light on the offence alleged and consequently indicate that the magistrate may not have the necessary jurisdiction to deal adequately with the matter. Without the authority and opportunity to stop proceedings, investigate further and, if necessary, be invested with greater jurisdiction, a magistrate might be limited as to sentence in what could be a far more

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serious matter than he should normally try. The injustice which could result is clear.

But it is not in the Act to enable a magistrates court to correct a mistake realized after the proceedings have been completed. If the magistrate had really doubted the adequacy of his jurisdiction to deal with this charge, he should have and could have exercised the powers of section 58 (1) at any time during the trial. It seems to me to be quite unfair that the accused, some four months later, would be put to the further trouble of several additional appearances in court, with all the concomitant administrative inconvenience which this entails, just to correct this mistake, for which no one but the magistrate is responsible. Furthermore, it would also hardly be acceptable to remit the matter for trial to a magistrate who has already decided on the accused's guilt, and whose only reason for so doing is to validate an invalid sentence.

The Attorney-General, to whom the papers have been referred and for whose assistance and advice I am grateful, does not support the magistrate's request, and will even less be prepared to remit the case *de nova* for trial before another magistrate.

The sentence on accused No. 2, Frazer Japa, is therefore clearly incompetent and must be set aside. In all the circumstances, the nature of the offence, the time already spent in gaol, and the limits of the

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SQUIRES J

magistrate's proper jurisdiction, I think the requirements of substantial justice will be met by altering the sentence to one of 12 months' imprisonment with labour.

With the agreement of PITTMAN, J, the sentence of two years' imprisonment with labour imposed on the accused, Frazer Japa, is set aside and a sentence of 12 months' imprisonment with labour is substituted. The proceedings are otherwise confirmed.

THE STATE v TENGENDE AND OTHERS 1981 ZLR 445

Court **Supreme Court, Salisbury**

Application for Leave to Appeal

Baron JA

24th and 31st August and 3rd September, 1981

Flynote

Criminal procedure - appeal - application to judge of Supreme Court for leave to appeal - approach to be taken - applicant must make out a reasonably arguable case - bail pending appeal - approach to - in absence of positive grounds for granting it, it should be refuse - factors to consider.

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Headnote

The applicants were convicted in the High Court of theft and sentenced to fairly lengthy terms of imprisonment. Applications to the trial judge for leave to appeal against conviction and sentence were refused and they applied under section 18 (1) (b) of the High Court Act [*Chapter 14*] to a judge of the Supreme Court for leave to appeal. An application was also made for bail pending the hearing of the appeal.

Held, that the decision whether to grant leave to appeal depends on the prospects of success. However, it is putting the test too high to say that the applicant must show reasonable prospects of success; in the absence of a record it may, in any event, be difficult to consider the prospects. Leave should, rather, be granted if the applicant makes out a reasonably arguable case.

Held, further, that the proper approach to bail pending appeal is that in the absence of positive grounds for granting bail it will be refused. The exercise of the court's discretion involves balancing the considerations of the liberty of the individual and the proper administration of justice, and where the applicant has been tried and sentenced it is for him to tip the balance in his favour. Factors to consider include the prospects of success, the length of the sentence, the danger of the applicant absconding and, on the other side of the scale, the liberty of the individual and the likely delay before the appeal can be heard. The question of leave to appeal is distinct from the question of bail pending appeal, and in particular the test as to how good the prospects of success must be is not the same.

Cases cited:

R v Mthembu, 1961 (3) SA 468 (D & CLD);

BARON JA

S v Williams, 1980 ZLR 466 (AD); 1981 (1) SA 1170 (ZAD).

C S Grossman for the applicants.

G Makings for the respondent.

Judgment

Baron JA: (in Chambers in terms of section 112 (1) (a) of the Criminal Procedure and Evidence Act [*Chapter 59*]): The applicants were charged with three counts of theft and alternatively contraventions of the Exchange control Regulations; they were indicted directly in the General Division of the High Court. They were convicted on two of the counts of theft and acquitted on the third, and sentenced in the case of the first applicant to a total of five years' imprisonment with labour, in the case of the second applicant to a total of four-and-a-half years and in the case of the third applicant to a total of four years. At the conclusion of the trial application was made to the trial court for leave to appeal against both conviction and sentence and also for bail pending appeal: both applications were refused. The applicants have applied to a single judge

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of this court for leave to appeal and for bail pending appeal.

The trial in the High Court was very lengthy; the hearing, excluding the delivery of the judgment, lasted 12 days. The State case was that the applicants stole the sum of $19 000 from one of the complainants and $20 000 from the other, in the one case the transaction involved a foreign currency allocation in order to enable the complainant to obtain motor-vehicle spares, and in the other the transaction was a clearly illegal one involving foreign currency.

An application for leave to appeal is made under section 18 (1) (b) of the High Court act [*Chapter 14*]*(15) which reads:

> "18. (1) A person convicted on a trial held by the General Division -
>
> . . .
>
> (b) may, with the leave of a judge of the General Division or, if a judge of the General Division refuses to grant leave, with the leave of a judge of the Appellate Division, appeal to the Appellate Division against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact . . ."

There is no provision for a further application to the full Court; if the single judge refuses leave the matter ends there.

The decision whether or not to grant leave to appeal depends, of course, on the prospects of success. But how good those prospects must

BARON JA

be raises the important issue of approach. It would, I think, be a very serious step, and one which I would be reluctant to take save in a very clear case, to, deny a man the opportunity to appeal from a conviction at first instance; I prefer therefore to approach the matter by considering, not how good the prospects must be before leave is granted, but how poor they must be before leave is refused. And for this reason I think the test that has been mooted - that the applicant must show reasonable prospects of success - puts the matter too high, in my view leave to appeal should be granted if the applicant makes out a reasonably arguable case. Mr *Grossman,* on behalf of the applicants, submitted that there was no distinction between the two formulations. Certainly "reasonable prospects of success" is an expression of uncertain meaning; but as a matter of language, and particularly of nuance, I think that the distinction is real and that the "reasonably arguable" test suggests the proper approach more accurately.

The importance of the approach is underlined by the procedure applicable under our Rules. In terms of Rule 19 (4) of the Rules of the Appellate Division the documents submitted in support of an application for leave to appeal include the judgment of the General Division but do not, unless called for by the Registrar, include a transcript of the evidence. I can understand the reason for this practice, particularly where the record is lengthy and its preparation would result in a very considerable delay before the application for leave could be made. But the effect is to place the judge of this court at a disadvantage in that it may be difficult, depending on the grounds of appeal advanced, to consider the prospects of success on appeal in the absence of

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the record. The present is such a case. Mr *Grossman* attacked the findings of the court *a quo* on various grounds the strength of which I am unable to assess without a perusal of the record, and Mr *Makings,* on behalf of the Attorney- General, whilst supporting the findings in question, conceded that on the evidence another court might have made different findings. This is no doubt why Mr *Makings* made no serious effort to oppose the application for leave to appeal. On the basis of his grounds of appeal Mr *Grossman* has made out a reasonably arguable case and in the absence of a transcript - even without Mr *Making's* concession - there is no material before me which would justify my holding otherwise. For these reasons I granted the application for leave to appeal.

Mr *Grossman* thereafter made application for bail pending appeal. In essence his argument reduces itself to this: once there are reasonable prospects of success on appeal (as I have said, Mr *Grossman* equates reasonable prospects with a reasonably arguable case) there is no reason

BARON JA

for refusing bail. This submission loses sight of the essential difference between bail pending trial and bail pending appeal. In either case bail is a matter for the discretion of the court, but bail pending trial will not normally be refused on charges of this nature unless there are positive reasons for refusal, such as the danger of the accused absconding or of interference with witnesses. But bail pending appeal involves a new and important factor; the applicant has been found guilty and sentenced to imprisonment. Bail is not a right. An applicant for bail asks the court to exercise its discretion in his favour and it is for him to satisfy the court that there are grounds for so doing. In the case of bail pending appeal the position is not, even as a matter of practice, that bail will be granted in the absence of positive grounds for refusal, the proper approach is that in the absence of positive grounds for granting bail it will be refused. This is not to say that an applicant for bail pending appeal has any heavy onus to discharge; as HENOCHSBERG, J, said in *R v Mthembu,* 1961 (3) SA 468 (D & CLD) at 471, "if justice is not endangered, the court favours liberty, more particularly where there is a reasonable prospect of success". But it is nevertheless important not to lose sight of the fact that the exercise of the court's discretion involves balancing the considerations of the liberty of the individual and the proper administration of justice, and that where the applicant has been tried and sentenced it is for him to tip the balance in his favour. In *Mthembu*'s case (supra), HENOCHSBERG, J, said at page 471:

> "Applicant is in a somewhat different position to that of persons who, after the conclusion of a preparatory examination seek bail pending trial in a superior or other court. The mere fact that leave to appeal has been granted does not, *per se,* entitle a convicted person to be allowed out on bail . . . it seems to me that the onus of establishing that justice will not be endangered, and that there is a reasonable prospect of success, is upon the applicant."

Mr *Grossman* asked me not to follow this dictum in so far as it suggests that there is an onus on the applicant to show that there are reasonable prospects of success; he points out that in the absence of a transcript of the evidence he would be unable to discharge any such onus. There is, I think, force in this submission in so far as it relates to the narrow question of the prospects of success. But I do not approach the matter on this basis alone; I approach it on the basis I

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have already indicated, namely, whether, taking into account all the factors relevant to the question of bail pending appeal, the applicants have shown that the court's discretion should be exercised in their favour. The same approach was adopted by FIELDSEND, CJ, in *S v Williams,* 1980 ZLR 466

BARON JA

(AD), 1981 (1) SA 1170 (ZAD) (to which, unaccountably, my attention was not drawn) at page 1173:

> ". . . 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."

The applicants are all Zimbabweans with their roots in this country. On the other hand the offences of which they have been convicted are comparatively serious and they have been sentenced to fairly lengthy terms of imprisonment; the danger of their absconding is related to the sentences they face and the prospects of success on appeal. In the context of an application for bail pending appeal I think the applicant must show reasonable prospects of success; the question of leave to appeal is distinct from the question of bail pending appeal, and in particular the test as to how good the prospects of success must be is not the same. It is not in the interests of the administration of justice that persons convicted of comparatively serious offences should almost automatically be granted bail pending appeal. In England bail is very rarely granted in such cases and there must be exceptional circumstances; these apparently include a long interval such as a vacation or if the length of the transcript of the shorthand notes of the trial would mean that the appeal would probably not be heard until the expiration of the sentence (see Halsbury's *Laws* of *England,* 4th edition, volume II, paragraph 626 and note 4).

I have given the most earnest consideration to whether the length of the record in this case, and the fact that because of the probable time it will take to prepare it the appeal may not be heard until January or February next year, is a sufficient reason for the granting of bail. I have, however, come to the conclusion that although this factor weighs significantly in the applicants' favour it does not outweigh the other factors involved. I am not satisfied that, weighing in the balance the prospects of success (and in this regard I cannot ignore that the court *a quo* has considered the matter and has held that there are no reasonable prospects), the length of the sentences and the danger of the applicants absconding, and on the other side of the scale the liberty of the individual and the likely delay before this appeal could be heard, my discretion should be exercised in the applicants' favour. For these reasons I have come to the conclusion that bail pending appeal must be refused.

BARON JA

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There is one other matter I should mention. In opposing the application for bail Mr *Makings* informed me that a further complaint against the applicants was being investigated and that if they were released on bail there was a fear they might interfere with that investigation. Mr *Grossman* submitted that this could not be taken into account in this application, he submitted that the possibility of interference with witnesses, which is a well-known and perfectly proper consideration to take into account in an application to a trial court for bail pending or during the trial, must be related only to the witnesses in the case before the court and that it would be improper to have regard to matters in respect of which the applicants have never been charged or even arrested. I think Mr *Grossman's* point is well taken, the prosecution have ample means at their disposal to protect from interference the witnesses involved in other cases under investigation. I have paid no regard to any other investigation or possible investigation against the applicants.

COMMISSIONER POLICE v WILSON 1981 ZLR 451

Court **Supreme Court, Salisbury**

Civil Appeal

Fieldsend CJ, Baron JA and Goldin AJA

20th May and 4th September, 1981

Flynote

Constitution of Zimbabwe - section 94 (1) (b) - power to reduce in rank police officer of rank of inspector or higher vested in President - section 96 (1) (b) - Police Service Commission required to confirm reduction in rank of person who has served more than two years in Police Force - section 96 (1) (c) regulatory powers of Police Service Commission - Police Promotion Regulations, 1965 - section 7 gave powers to Commissioner to reduce in rank officers of or above rank of superintendent who gave undertaking to serve in Force for stipulated period and failed to serve for that period - ultra vires section 96 (1) (c) - promotion made conditional on serving a stipulated period - nothing objectionable per se - "subject to" meaning of.

Headnote

The respondent was a former officer in the Zimbabwe Republic Police who had joined the then British South Africa Police in 1957. By May, 1980, he held the substantive rank of Chief Superintendent and the acting rank of Assistant Commissioner. When in that month he was told he was being considered for promotion to the substantive rank of Assistant Commissioner he was asked to sign a document, entitled "Undertaking to Continue to Serve", in which he -

(1) undertook to serve in the Force for not less than 12 months from the date of his promotion;

(2) acknowledged that in the event of "failure to honour this undertaking" he would be reduced to his former rank.

With some hesitation he signed the document and was promoted with effect from the 1st June,

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1980. In December, 1980, he formally requested retirement from the Force, to take effect on the 1st March, 1981. He alleged that the undertaking signed was invalid, alternatively, that he had intended to serve

for the stipulated period but that conditions in the Force had changed materially.

The Commissioner, purporting to act in terms of section 7 of the Police (Promotion) Regulations, 1965, as amended by SI 567 of 1980, ordered that the respondent be reduced to the rank of superintendent. The Police Service Commission confirmed the Commissioner's action. The respondent obtained from the General Division (DUMBUTSHENA, J) (see 1981 (3) SA 494 (Z)) an order setting aside the Commissioner's decision. The basis of the decision was that the undertaking and the penalty for a breach of it were not valid in terms of the respondent's employment, because only the Police Service Commission could prescribe conditions of service and then only by regulation, which had not been done.

The main thrust of the argument on appeal was whether the undertaking to serve was legitimately demanded of the respondent and whether it was binding on him. Some argument was directed as to whether the respondent could by the undertaking be deprived of the right to have the question of his reduction in rank considered by the President, in whom is vested, in terms of section 94 (1) of the Constitution, the power to appoint, remove from office or reduce in rank an officer of the respondent's seniority. Further argument was directed to the question of whether section 7 of the regulations was *ultra vires* the powers of the Police Service Commission under section 96 (1) (c) of the Constitution, the question being whether the Commission had the power to make a regulation which would effectively vest in the Commission the powers to appoint, remove from office or reduce in rank that are in terms of section 94 (1) vested in the President.

Held, that there was nothing objectionable in providing a condition of promotion that a person serve for a stated period, failing which he may be reduced to his previous rank.

Held, further (BARON, JA, dissenting(, that the purpose of the words "subject to the provisions of this section, section 93 and section 96 and regulations made thereunder" contained in section 94 (1) is to allow regulations made by the Commission under section 96 (1) (c) to limit the common law power of the State to dismiss or reduce in rank a police officer at will.

Held, further (BARON, JA, dissenting), that the functions of the Police Service Commission are primarily advisory and that section 96 (1) (c) of the Constitution cannot be construed as giving to the Commission power to alter by regulation the vesting of the powers in the President and the Commissioner which are given by section 94 (1) of the Constitution.

Held, further (BARON, JA, dissenting), that section 7 of the regulations was therefore *ultra vires* section 96 (1) (c) and the appeal should accordingly be dismissed, with costs.

Cases cited:

Terrell v Secretary of State for the Colonies and Others [1953] 2 QB 482; [1953] 2 All ER 490

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(QBD);

Inland Revenue v Hambrook [1956] 2 QB 641 (CA); [1956] 3 All ER 338 (CA);

Akisatan Apena of Iporo and Others v Akinwande Thomas and Others [1950] AC 227 (PC);

Hawkins v Administrations of South-West Africa, 1924 SWA 57,

Dunn v Reginam [1896] 1 QB 116; [1895-9] All ER Rep. 907 (CA);

Shenton v Smith [1895] AC 229;

Sachs v Dönges, NO, 1950 (2) SA 265 (A.D.);

Nicol, NO, v Lawrie, 1950 (3) SA 151 (AD);

Waterfalls Town Management Board v Minister of Housing, 1956 R & N 691; 1957 (1) SA 336 (SR);

Rederiaktiebolaget Amphitrite v The King [1921] 3 KB 500; [1921] All ER Rep. 542 (KBD);

Attorney-General v HRH Prince Augustus [1957] 1 All ER 49 (HL);

Abbott v Minister of Lands [1895] AC 425.

R R Horn, SC, for the appellant. The question whether or not it was lawful for the appellant to require the respondent to give the undertaking in question depends on whether or not the appellant or the Police Promotions Board could lawfully have refused to promote the respondent if he had declined to give the undertaking. At the time he was required to give the undertaking the conditions of service of members of the Police Force were governed by Chapter IX of the Constitution, regulations made or deemed to have been made thereunder by the Police Service Commission and by the common law in so far as this is not inconsistent with the legislation referred to. The Police Act [*Chapter 98*], in so far as it deals with conditions of service of members of the Police Force, was at the material time, and still is, deemed to be a set of regulations made by the Police Service Commission. The Police Service Commission is empowered by section 96 (1) (c) of the Constitution to make regulations for the general well-being and good administration of the Police Force. The only regulations made or deemed to have been made by the Commission which deal with promotions are the Police (Promotion) Regulations, 1965 (RGN 97G of 1965), as amended, which impose only one type of limitation on the discretion of a promotion board when deciding on the suitability of candidates for promotion, and that is as to the length of service of candidates. The power to make appointments to any office or rank in the Police Force and the power of removal from office or reduction in rank vests in the President subject to the provisions of sections 93, 94 and 96 of the Constitution and regulations made under section 96 of the Constitution. The effect of section 94 is that the power to promote officers and, by implication, all incidental powers and discretions, vests in the President, who acts on the advice of the Commissioner of Police in relation to appointments, removal from office or reduction in rank of officers of or above the rank

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of inspector. The only restrictions which have been imposed by *regulation* relate to the length of service of candidates for promotion to particular ranks. The only relevant restrictions imposed by the Constitution itself are, firstly, that promotions must be made subject to policy directions given by the President, secondly, that persons promoted must be efficient and suitable, and, thirdly, that candidates for promotion must appear before an advisory board.

It is a general rule of interpretation of statutes that where a statute confers a power expressly, power to do all things reasonably incidental or ancillary to the exercise of that power must also be presumed to have been conferred: *Johannesburg Municipality v Davies and Another,* 1925 AD 395 at 402-3, Maxwell on *Interpretation of Statutes* (11th edition) pages 349-355. The implication of such ancillary or incidental powers is quite different from adding words to a provision by necessary implication. The power to require from a candidate for promotion to high rank in the Police Force an undertaking that he will continue to serve in the Force for a period sufficiently long to enable the Commissioner and the promotions board to be satisfied that his promotion will be useful to the Force is (leaving aside for the moment the sanction for failure to honour the undertaking) clearly reasonably incidental to the power to promote or recommend promotion of the candidate. A person who is unwilling to give such an undertaking can hardly be said to be suitable for promotion. As to whether it was lawful to require the respondent to acknowledge that in the event of his failing to honour the undertaking he would be reduced to the rank held when he gave it, and further, to reduce him to such rank when he failed to honour the undertaking to continue to serve, the following submissions are made -

(a) there is nothing in the Police Act or regulations which precludes the Commissioner from requiring a person to agree that in the event of his failing to honour the undertaking, he will be reduced to the rank held by him when he gave the undertaking. The respondent was not *obliged* to accept the promotion offered to him on condition that he so agreed; it was open to him to decline to give the undertaking and to agree that he would be reduced in rank if he failed to honour it;

(b) neither the appellant nor the President were obliged to promote the respondent if he declined so to agree;

(c) just as a member of the Police Force may be required to pass an examination as a condition of his promotion, he may be required to undertake to serve for a specified period of a reasonable length of time and to agree that failure to do so will make him eligible

for demotion. The agreement of the respondent to this effect in no way precluded him from retiring or resigning in terms of legislation applicable to him.

Section 7 of the Promotion Regulations also does not preclude a member who has signed an undertaking from resigning or retiring. All that it does is to empower the Commissioner to demote persons who have failed to honour an undertaking to serve for a stipulated period, rather than the Police Service Commission having to confirm a proposal to demote such a

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person. On the question of whether section 7 of the regulations is *ultra vires,* in terms of section 94 (1) of the Constitution the power to reduce a member of the Police Force of or above the rank of inspector vests in the President, acting on the advice of the Commissioner. This power is expressly stated to be subject to regulations made under section 96. The provisions of the Police Act [*Chapter 98*] are deemed to be regulations made by the Police Service Commission in terms of section 96 (1) (c) of the Constitution: section 4 (2) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980. The words "Subject to the provisions of . . . section 96 and regulations made thereunder" in section 94 (1) of the Constitution have the effect of qualifying the power "to make appointments . . ." which by section 94 (1) is vested in the President in respect of higher ranks and in the Commissioner in respect of ranks below that of inspector and restrict or limit the exercise of the power to appoint, etc., vested in the persons mentioned: *Smith v London Transport Executive* [1951] AC 555 (HL) at 565 and 569; [1951] 1 All ER 667 (HL): *Hickman v The Attorney-General,* 1980 (2) SA 583 (R) at 585E-G; *Hawkins v*. *Administration of S W.A. (supra)*. It does not follow from this that this is the only sense in which the words referred to in paragraph 1 above have to be interpreted, they can also be interpreted as empowering the Police Service Commission to make regulations vesting the power to appoint, etc., in other persons. While at first blush it may seem incongruous that in effect the Commission and the Commissioner have power to amend the Constitution, a closer look at Chapter IX of the Constitution indicates that this is not really so -

(a) the Police Force as such is under the command of the Commissioner, not of the President

(b) it is for the Commissioner, together with the Police Service Commission to decide how the Force shall be run, subject to Ministerial policy directions given to the Commissioner in terms of section 93 (3);

(c) apart from these limitations and the requirement that the Commissioner shall comply with any recommendation of the Police Service Commission under section 96 (1) (a), the Commissioner is the absolute head of the Police Force;

(d) section 55 (3) of the Police Act already vests the power to dismiss or reduce members under the rank of superintendent in the Commissioner.

It is not, therefore, so incongruous that the Commission should be able to make regulations with the approval of the Commissioner which vest the power of dismissal or reduction in rank in the Commissioner alone. Ultimately, however, the question is whether or not fit can be said that the framers of the Constitution intended that the power vested in the President and Commissioner should only be exercised subject to limitations or restrictions to be found in other sections or regulations or whether they intended that the Police Service Commission and the Commissioner should be able by regulation to divest the President of powers vested in him by section 94. If they had intended the latter, one may have expected more positive wording to indicate this.

J C Andersen, SC, for the respondent. The undertaking the respondent was required to sign as a condition of his promotion constituted a condition of service of the nature referred to in section

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96 (1) (c) of the Constitution, and neither the Commissioner nor the Advisory Board had the power to impose such a condition, the power to do so being vested solely in the Police Service Commission. It was not reasonably necessary for the exercise of the powers conferred on the Advisory Board established in terms of section 94 (5) of the Constitution to impose such a condition, which was inconsistent with the provision of section 94 (4) of the Constitution in so far as it purported to confer sole power on the Commissioner to reduce a member in rank. Section 96 (1) (c) of the Constitution expressly provides that it is for the Police Service Commission to make regulations for the conditions of service of members of the Police Force. Neither the Commissioner nor the Advisory Board had the power or authority to usurp the functions of the Police Service Commission. To the extent that any condition for promotion may be reasonably required it may be made by regulations by the Police Service Commission. The only conditions which regulate the question of promotion are those set out in the regulations and the fact that a wide discretion is otherwise left to the Advisory Board does not imply that it was intended to leave to it the power to impose other conditions. It is not disputed that it would be relevant for the Advisory

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Board to ascertain the future intentions of a member before deciding on his suitability for promotion, but one must distinguish between ascertaining the future intentions of a member before deciding on his suitability for promotion as against imposing conditions of service to regulate his future service coupled with the penalty contained in the undertaking members were required to sign. The distinction between a statement of intention and a contractual undertaking is well known. In so far as the undertaking to serve purported to confer on the appellant the sole power to make a decision as to whether or not a member would be reduced in rank in accordance with the undertaking it was inconsistent with the provisions of section 94 (4) of The Constitution. On the question of whether section 7 of the Regulations is *ultra vires,* it is submitted that is *ultra vires* the Constitution because -

(a) it purported to remove the power of the President to order a reduction in rank in terms of section 94 (1) (a);

(b) it purported to remove safeguards that no reduction in rank should be ordered other than with the confirmation of Police Service Commission, as is provided for in sections 94 (4) and 96 (1) (b).

Subordinate legislation cannot alter or amend its empowering legislation without the express power to do so, *Pretorius v Minister of Defence,* 1981 (1) SA 1174 (ZAD) at 1178B. The words "subject to" in section 94 (1) did not empower the Police Service Commission to make regulations which would have had the effect of altering the Constitution.

Judgment

Fieldsend CJ: The respondent joined the then British South Africa Police as a constable in March, 1957, and by May, 1980, he held the commissioned rank of Chief Superintendent and was acting as Assistant Commissioner (Crime and Security). He was told on the 3rd May that

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he was being considered for promotion to the substantive rank of Assistant Commissioner and asked to sign a document in the following terms

> *"UNDERTAKING TO CONTINUE TO SERVE*
>
> 1. I hereby undertake that in the event of my appointment or promotion to the rank of Superintendent or higher rank to serve in the Regular Force in such rank or higher rank for a period of not less than twelve months with effect from the date of such appointment or promotion.
>
> 2. I acknowledge that I have been informed that in the event of my failure to honour this undertaking I will be reduced to the rank I held when I last gave such an undertaking unless the Commissioner in the special circumstances of my case directs otherwise.

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> 3. Additionally, I acknowledge that I have been informed that this undertaking does not, in any way, inhibit my right to retire or resign in terms of the Pensions and Other Benefits Act, 1979, or the Police Act and Regulations, as the case may be."

After some demur he signed the document on the 6th May and was promoted to Assistant Commissioner as from the 1st June.

On the 1st December, 1980, he formally requested retirement from the Force to take effect on the 1st March, 1981, it being necessary for him to give three months' notice to comply with the Pensions and Other Benefits Act, 1979. In his letter he alleged that the undertaking to serve that he had signed on the 6th May was of no force or effect as the Commissioner had had no power to require it of him, and contended that he was entitled to retire in his rank of Assistant Commissioner. In the alternative (so far as is relevant to this appeal) he asked that he be permitted to retire in that rank because at the time the undertaking was signed it had been his intention to serve for a full year but that since then conditions in the Force had changed materially. He provided details of the changed conditions but the Commissioner did not consider the facts relied on to be special circumstances that would lead him to direct that the respondent should not be reduced in rank.

The Commissioner of Police, the appellant, on the 23rd December, 1980, signed a memorandum which was communicated to the respondent, the operative paragraph of which read:

> "Having examined all the circumstances of this case, I now order in terms of the above regulation, that Assistant Commissioner T WILSON be reduced to the rank of Chief Superintendent, the rank he held prior to his last promotion, with eject from the 1st January, 1981."

He clearly purported to act in terms of section 7 of the Police (Promotion) Regulations, 1965, which was added by SI 567 of the 19th September, 1980, and which is set out later in my judgment.

On the 3rd February, 1981, the Police Service Commission purporting to act in terms of section 94 (4) of the Constitution of Zimbabwe confirmed the action taken by the appellant.

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Neither the Court below (DUMBUTSHENA, J) was asked, nor were we on appeal, to consider the *bona fides* of the respondent's allegation of changed circumstances nor the merits of the appellant's decision on the facts.

The court below held that the appellant was not legally entitled to require the undertaking from the respondent in the form it was and was not entitled to reduce the respondent in rank on his failure to comply

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with his undertaking. It accordingly set aside the appellant's decision to reduce the respondent in rank and awarded costs to the respondent. The appellant now appeals.

The power to appoint, remove from once or to reduce in rank members of the Police Force other than the Commissioner is to be found in section 94 of the Constitution. This reads:

> "94. (1) Subject to the provisions of this section, section 93 [which relates to the appointment of the Commissioner] and section 96 and regulations made thereunder, the power to make appointments to any office or rank in the Police Force and the power of removal from office or reduction in rank shall vest -
>
> (a) in relation to the rank of Inspector or any more senior rank, in the President, acting on the advice of the Commissioner of Police;
>
> (b) in relation to any rank below that of Inspector, in the Commissioner of Police.
>
> (2) The President may give general directions of policy to the Commissioner of Police with the object of achieving a suitable representation of the various elements of the population in the Police Force.
>
> (3) When considering candidates for appointments in the Police Force, the Commissioner of Police shall have regard to the principle that preference should be given to that person who, in his opinion, is the most efficient and suitable for appointment and in so doing shall take account of any directions given under subsection (2).
>
> (4) Except as otherwise provided in section 93 or in regulations made under section 96, a person who has served in the Police Force for more than two years shall not be removed from office or reduced in rank except with the confirmation of the Police Service Commission.
>
> (5) Advisory boards consisting of members of the Police Force shall be established by the Commissioner of Police to consider, taking account of any directions given under subsection (2), the suitability of members for promotion within the Police Force and no member shall be promoted to a higher rank, other than that of Commissioner of Police, unless his case has been considered by such a board."

The relevant provisions of section 96 are:

> "96. (1) The functions of the Police Service Commission shall be -
>
> . . .
>
> (b) to consider any proposal submitted to it in accordance with the requirements of section 94 (4) that a person who has served in the Police Force for more than two years should be removed from office or reduced in rank and to confirm such proposal if deemed fit;
>
> (c) to make regulations for the general well-being and good administration of the Police Force, the maintenance thereof in a high state of efficiency

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and the conditions of service of members of the Police Force, which may include provision for the punishment of members found guilty of offences against discipline;

. . .

(e) to do such other things not inconsistent with the provisions of this Constitution as may be required by or under an Act of Parliament or regulations made under paragraph (c)."

By section 4 (2) of the Zimbabwe Constitution (Transtional, Supplementary and Consequential Provisions) Order, 1980, the Police Act [*Chapter 98*] and regulations under it are, so far as they deal with conditions of service of members of the Force, deemed to be regulations made in terms of section 96 (1) (c) above.

The basis of the decision in the court below was that the undertaking to sense for a year given by the respondent and the penalty attached for any breach was a term of the respondent's employment which was not valid, because only the Police Service Commission could prescribe conditions of service and then only by regulation, and this they had not done in respect of this term.

Although in the view I take of this case it is not necessary for me to express a view on this aspect it is perhaps right that I should deal with it. Assuming that the respondent's promotion was effected by the President as it had to be in terms of section 94 (1) then it was the President and not the Commissioner or the Promotions Advisory Board which required the undertaking which the respondent gave. It was not argued that such an undertaking was in conflict with any condition of senior which was kept in force by section 4 (2) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, or any subsequent regulations. I can see nothing objectionable in it being a condition of promotion that the respondent serve for a stated period failing which he may be reduced to his previous rank. It would be no different from his promotion being made subject to his agreement to serve in a particular place or post. A failure or refusal to serve in that place or post could then be a legitimate reason to reduce him to his previous rank. The fact that power is given to the Police Service Commission to make regulations as to conditions of service does not in my view mean that the person with the power to promote a member cannot settle with him a particular condition not inconsistent with any regulations.

The undertaking may, or it may not, have altered the respondent's conditions of service. If as a State servant he was dismissible at will - as in the cases of *Terrell v Secretary of State for the Colonies & Others* [1953] 2 QB 482 and *Inland Revenue v Hambrook* [1956] 2 QB 641

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(CA) - then the undertaking and the acknowledgement of the effect of its breach were nothing more than an acknowledgement of the existing position. If, on the other hand, the effect of the host of regulations governing conditions of service - including regulations on salaries,

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retirement, pensions and other conditions - can be said to impose a limit on the power of the President to dismiss or reduce in rank at will a police officer of the rank of inspector or above then the additional undertaking constituted a term not inconsistent with any express term of the respondent's engagement or promotion. In that event for the reasons I have given above it was a valid undertaking given on the understanding of what a breach of it would entail.

I specifically leave open the question of whether the power to dismiss or reduce in rank a police officer at will has been limited by the regulations in force as to conditions of service.

Although the main thrust of the argument before this court was whether the undertaking to serve was legitimately demanded of the respondent and whether it was binding upon him, some argument was directed to whether the respondent could by the undertaking be deprived of the right to have the question of his reduction in rank considered by the President in whom was vested in terms of section 94 (1) the power to appoint, remove from office or reduce in rank an officer of his seniority.

It was not, however, contended by Mr *Horn* that the undertaking to serve conferred upon the Commissioner the power to reduce the respondent in rank. Indeed it would have been dangerous, if not fatal, to his case to have relied on such a contention, because if that was an effect of the undertaking it must have been invalid at least to that extent. An agreement could not confer on the Commissioner a power given by the Constitution to the President and not to the Commissioner. Mr *Horn* relied for the Commissioner's power to reduce the respondent in rank on section 7 of the Police (Promotion) Regulations, 1965, introduced in September, 1980. This reads:

> "An officer of or above the rank of Superintendent who, prior to his last appointment or promotion, as the case may be, gave an undertaking to serve the Regular Force for a stipulated period, and who gives notice of his intention to retire or resign from the Regular Force, may, where such retirement or resignation is to be effective before the expiry of such stipulated period, be reduced by the Commissioner to the rank which he held prior to his last appointment or promotion, as the case may be."

This regulation is specifically designed to meet the case of a person who gives an undertaking such as the respondent gave and who fails to honour it. It relates only to officers of the rank of Superintendent and

above, and provides that the Commissioner may reduce such person in rank. Whether this purports to give the Commissioner the sole power or whether to confer on him concurrent power with the President in terms of section 94 (1) (a) is not clear.

Although it was argued before us that this regulation was not effective in relation to the respondent because it was passed after he had given his undertaking and could not operate retrospectively, it was not originally argued that the regulation itself was *ultra vires* the powers of the Police Service Commission under section 96 (1) (c), and after the hearing we called for argument on this point. We are indebted to the parties' legal representatives for their further helpful submissions on this aspect.

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The question is whether the Police Service Commission has power to make a regulation under section 96 (1) (c) which will effectively vest the powers to appoint, remove from office or reduce in rank that are vested in terms of section 94 (1) in the President and the Commissioner in some other person, and specifically in this case vest powers conferred on the President in the Commissioner. The answer depends upon the wording of sections 94 and 96 and the relationship between the two sections.

Looking first at section 96 alone, and the nature of the Police Service Commission, it is unlikely that section 96 (1) (a) gives a power by regulation to alter express provisions of the preceding sections. The chairman of the Commission is the chairman of the Public Service Commission and of the maximum of four other members only one need have any police experience (section 95).

The functions of the Commission are primarily advisory and the power contained in subsection (1) (c) is stated to be to make regulations "for the general well-being and good administration of the Police Force, the maintenance thereof in a high state of efficiency and the conditions of service of members of the Police Force, which may include provision for the punishment of members found guilty of offences against discipline". On the face of it these are the purposes normally associated with the internal administration of any organized body. Further the catch-all paragraph (e) limits the Commission's functions to doing such other things not inconsistent with the provisions of this Constitution as may be required by or under an Act of Parliament or regulations made under paragraph (c).

On this section standing alone it seems as clear as anything can be clear that the Commission cannot by regulation alter earlier express fundamental provisions relating to the setting up of the Police Force under

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section 93. For example section 93 (4) defines the responsibilities of the Commissioner of Police in the following terms:

> "Subject to the provisions of subsection (3) and to regulations made under section 96, the Commissioner of Police shall be responsible for the administration of, and determining the use and controlling the operations of, the Police Force and, save as aforesaid, shall not, in his command of the Police Force and in the exercise of his responsibilities and powers in relation thereto, be subject to the direction or control of any person or authority."

Section 96 (1) (c) cannot be read as giving the Police Service Commission power by regulation to take that fundamental responsibility from the Commissioner and confer it upon some other person, whether upon a Minister or some other police officer.

Can the position be different in regard to the vesting of the powers in the President and the Commissioner respectively by section 96 (1) ?

This section too is governed by the words "subject to the provisions of this section, section 93, and section 96 and regulations made thereunder". The device of providing in legislation that a power or a vesting of power is made subject to earlier or later provisions is very frequently used. It is not an entirely unambiguous phrase and basically it may mean one of two things. It may

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mean without prejudice to what is provided by or what may be done under the provisions referred to, or it may mean subject to any qualifications or limitations in or under those provisions.

An example of the former use it to be found in the case of *Akisatan Apena of Iporo & Ors v Akinwande Thomas & Ors* [1950] AC 227 (P.C.). There section 12 of the Supreme Court Ordinance of Nigeria vested certain jurisdiction in the Supreme Court "subject to such jurisdiction as may for the time being be vested by Ordinance in Native Courts". These words were held to vest jurisdiction in the Supreme Court without prejudice to the jurisdiction vested in Native Courts, and not to oust the jurisdiction of the Supreme Court where powers were given to Native Courts. An example of its use in this sense in the Constitution of Zimbabwe is to be found in section 95 (1) (a) which provides that the Police Service Commission shall consist of:

> "(a) a chairman who, subject to the provisions of section 74 (3), shall be the chairman of the Public Service Commission; and . . . "

Section 74 (3) provides that the chairman of the Public Service Commission can delegate to another member of that Commission his functions as chairman of the Police Service Commission. It will be noted how explicit is the wording of section 74 (3).

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An example of its use as meaning subject to any qualifications or limitations is given in *Hawkins v Administration of South-West Africa,* 1924 SWA 57. Although that too was a case involving the dismissal of a police officer by the person vested with that power, the issue we have to consider did not arise. Dealing with a section of a Proclamation which gave to the Secretary for South-West Africa the power to appoint, suspend, reduce, discharge or dismiss any member of the police force subject to the provisions of the Proclamation or regulations made under another section of it, GRINDLEY-FERRIS, AJ, held that the words "subject to" had to be interpreted as meaning "except as curtailed by".

This case is not of particular authority in interpreting the provisions we are now considering as the precise wording of the sections is not clear from the judgment. I quote it merely as an illustration of one of the meanings of the words "subject to the provisions of".

There are a number of considerations which in my view point conclusively to the conclusion that the words "subject to the provisions of" in section 94 (1) are used in the latter sense of subject to qualifications and limitations:

(a) One cannot lose sight of the fact that the provisions of the Constitution can be amended only by the procedure laid down in section 52. It is not to be assumed, therefore, that specific provisions can be amended by regulations made under the Constitution unless this is made absolutely clear.

(b) Where section 94 intended to allow regulations made under section 96 to make a provision at variance with a provision in section 94, different words were used. Section 94 (4) reads:

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"Except as otherwise provided in section 93 or in regulations made under section 96, a person who has served in the Police Force for more than two years shall not be removed from office or reduced in rank except with the confirmation of the Police Service Commission."

It is significant that there is this difference of wording.

(c) Apart from the reference to regulations made under section 96, all the other sections to which section 94 (1) is made subject are curtailments of the powers or limitations on or qualifications of the vesting of the powers of appointment, removal or reduction in rank under section 94 (1). The reference to section 93 takes out the appointment or removal of the Commissioner from the operation of section 94 (1). The reference to subsection (4) and (5) of section 94 imposes limitations on the power to remove from office or reduce in rank and to promote, respectively. Section 96 itself

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contains no provisions which can have a direct impact on section 94.

(d) The question of the vesting of the powers, and particularly the powers of appointment, by section 94 (1) are separate and distinct from the matters referred to in section 96 (1) (c) for which regulations can be made: namely, the internal and detailed organisation of the Force.

(e) The wording is identical to that of section 93 (4) which confers responsibilities on the Commissioner of Police which cannot be taken away from him, though they may be curtailed, by regulations made under section 96 (1) (c) because the expressed purpose for which regulations may be made do not cover the giving of such responsibilities to anyone else.

Having regard to these five indications against the background of the legislation it is clear to my mind that the purpose of the qualifications enunciated in section 94 (1) is to allow regulations made under section 96 (1) (c) to limit the common law power to dismiss or reduce in rank a police officer at will. See *Hawkins v Administration of South-West Africa* (*supra*). The language is both necessary and apt to achieve that purpose and in the context it is not apt to allow regulations to be made to alter the specific vesting of the powers of appointment, dismissal and reduction in rank in the President and the Commissioner, and in particular not to allow regulations to be made to vest the powers given by section 94 (1) in any person other than those to whom they are given.

These conclusions make it unnecessary to consider any other factors such as the circumstances in which the Constitution was produced or the legislative history of the provisions. Suffice it to say that, having regard to the provisions in the Constitution both for the appointment of the President and of the Commissioner, the conclusion that the sections do not give the power to the Police Service Commission to alter by regulation the vesting of the powers in the President and the Commissioner which are given by section 94 (1) entirely accords with common sense.

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I conclude therefore that section 7 of the Regulations introduced in 1980 is *ultra vires* the powers of the Police Service Commission and cannot be relied on by the appellant. No other basis was advanced upon which the Commissioner could be said to have the power to reduce the respondent in rank and for these reasons I would dismiss the appeal with costs.

Baron JA: I have reached a different conclusion; in my judgment section 7 of the Police (Promotion) Regulations, 1965, is *intra sires.* It

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BARON JA

is therefore necessary for me to deal with all the issues raised in the case.

The respondent is a police officer of some 23 years' service. On the 3rd May, 1980, he held the substantive rank of Chief Superintendent and was acting as Assistant Commissioner (Crime and Security) at the Salisbury Province Headquarters of the Police Force. On that day he was informed, at an interview with the Deputy Commissioner (Administration) and the Chief Stall Officer (Administration), that he was being considered for promotion to the substantive rank of Assistant Commissioner, he was requested to sign this document:

> "BRITISH SOUTH AFRICA POLICE
>
> UNDERTAKING TO CONTINUE TO SERVE
>
> I hereby undertake that in the event of my appointment or promotion to the rank of Superintendent or higher rank to serve in the Regular Force in such rank or higher rank for a period of not less than twelve months with effect from the date of such appointment or promotion.
>
> I acknowledge that I have been informed that in the event of my failure to honour this undertaking I will be reduced to the rank I held when I last gave such an undertaking unless the (commissioner in the special circumstances of my case directs otherwise.
>
> Additionally, I acknowledge that I have been informed that this undertaking does not, in any way, inhibit my right to retire or resign in terms of the Pensions and Other Benefits Act, 1979, or the Police Act and Regulations, as the case may be."

At this interview the respondent declined to sign the document because, he said, the appellant had no legal right to ask him to do so; thereafter he was advised by friends to sign it, and he did so at an interview on the 6th May "under duress" and "because of the threat which had been made to the effect that I would not be promoted unless I had signed that document". He was subsequently promoted to the rank of Assistant Commissioner with effect from the 1st June, 1980.

There is a conflict as to what precisely took place at the two interviews in question. It is convenient at this point to set out certain portions of the affidavit in reply of the Deputy Commissioner (Administration):

> "5. *Ad paragraph 5*
>
> (a) It is admitted that the Applicant was handed an 'Undertaking to Continue to Serve' and requested to sign it. It is denied that the Applicant declined to do so on the basis that he considered that the Respondent ought not to have demanded it from him or that he considered that the Respondent had no legal basis for so

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doing. The Applicant's attitude when he was required to sign the undertaking was that he saw no purpose in signing the document since he had no intention of leaving the Force within the ensuing year and his word as an officer to that effect was his bond. It was pointed

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out to the Applicant in reply that his word was not in doubt but that whereas in the past it had been the custom to obtain verbal undertakings from officers being considered for promotion whose word was equally not in question, certain officers had reneged on such undertakings by giving notice of intention to retire and retiring during the currency of the period specified in the undertaking and, in consequence, it had now been decided to require such undertakings to be in writing.

(b) For many years it has been customary, before promoting members of the Police Force to the rank of superintendent, to obtain verbal undertakings from them that they will continue to serve in the Force for a specified period after such promotion. The period used to be a minimum of two years but was later reduced to one year. In 1980, this practice was also applied to candidates who were under consideration for promotion to the ranks above the rank of superintendent. These undertakings are requested in order to ensure that members of the Force are not subjected to a rapid succession of commanding officers, each with different ideas and none with proper experience in command. It is essential for the Commissioner and the appropriate promotions advisory board to ascertain from a candidate how long he intends to remain in the Force and to be assured that the candidate will remain long enough for his promotion to be useful to the Force. Additionally, it is essential that the Commissioner and the advisory board be satisfied as to the continuity of service of the successful candidate especially when regard is had to the possibility of an unsuccessful but next-suitable candidate terminating his service on account of his failure to obtain promotion on the occasion in question."

On the 1st December, 1980, the respondent, in writing, requested retirement from the Force on the 1st March, 1981. In his letter the respondent said that when he signed the undertaking it was his intention to continue to serve for at least one year, but that since that time conditions in the Force had changed materially. He offered to provide details of the changed circumstances "on a strictly private and confidential basis", and thereafter provided them. The appellant did not consider that the factors mentioned by the respondent (which were not disclosed to the court) warranted, as he put it, a waiver by the appellant of the respondent's undertaking, and on the 23rd December, expressing himself to act in terms of section 7 of the Police (Promotion) Regulations, 1965, as amended, ordered that the respondent be reduced to his former rank of Chief Superintendent with effect from the 1st January, 1981. On the 3rd February, 1981, the Police Service Commission, expressing itself to act in terms of section 94 (4) of the Constitution, confirmed the action taken by the appellant.

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The merits of this case were never placed before the court in the sense of the court being asked to examine the *bona fides* of the respondent when he alleged changed circumstances in the Police Force, or the sufficiency of the reasons for the appellant's action in reducing the respondent in rank. The case was argued entirely on whether the respondent could legally be required to sign the undertaking set out above. The General Division held that he could not and consequently set aside his reduction in rank. The appellant now appeals.

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The power to make appointments and of removal from office or reduction in rank are contained in section 94 of the Constitution, which reads:

"94. (1) Subject to the provisions of this section, section 93 and section 96 and regulations made thereunder, the power to make appointments to any office or rank in the Police Force and the power of removal from office or reduction in rank shall vest -

(a) in relation to the rank of Inspector or any more senior rank, in the President, acting on the advice of the Commissioner of Police;

(b) in relation to any rank below that of Inspector, in the Commissioner of Police.

(2) The President may give general directions of policy to the Commissioner of Police with the object of achieving a suitable representation of the various elements of the population in the Police Force.

(3) When considering candidates for appointments in the Police Force, the Commissioner of Police shall have regard to the principle that preference should be given to that person who, in his opinion, is the most efficient and suitable for appointment and in doing so shall take account of any directions given under subsection (2).

(4) Except as otherwise provided in section 93 or in regulations made under section 96, a person who has served in the Police Force for more than P two years shall not be removed from office or reduced in rank except with the confirmation of the Police Service Commission.

(5) Advisory boards consisting of members of the Police Force shall be established by the Commissioner to consider, taking account of any directions given under subsection (2), the suitability of members for promotion within the Police Force and no member shall be promoted to a higher rank, other than that of Commissioner of Police, unless his case has been considered by such a board."

The relevant portions of section 96 read:

"96. (1) The functions of the Police Service Commission shall be -

...

(b) to consider any proposal submitted to it in accordance with the requirements of section 94 (4) that a person who has served in the Police Force for more than two years should be removed from office or reduced in rank and to confirm such proposal if deemed fit;

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(c) to make regulations for the general well-being and good administration of the Police Force, the maintenance thereof in a high state of efficiency the conditions of service of members of the Police Force, which may include provision for the punishment of members found guilty of offences against discipline;

. . .

(e) to do such other things not inconsistent with the provisions of this Constitution as may be required by or under an Act of Parliament or regulations made under paragraph (e).

. . .

(3) Regulations shall not be published in the *Gazette* until they have been approved by the Commissioner of Police."

Mr *Andersen,* on behalf of the respondent, submitted that the undertaking the respondent was

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required to sign constituted a condition of service of the nature referred to in section 96 (1) (c) of the Constitution (which Mr *Horn,* on behalf of the appellant, did not dispute) and that neither the appellant nor the Promotions Advisory Board had the power to impose such a condition, such power being vested solely in the Police Service Commission in terms of regulations made or deemed to have been made under section 96 (1) (c). Mr *Andersen* submitted that in these circumstances the appeal must necessarily fail because the document the subject of this case was an agreement which was *ultra vires* the powers of the appellant and the Promotions Advisory Board and therefore of no force or effect. There would, I think, be force in this argument if the undertaking in question constituted new conditions of service. But if the document was merely a re-statement of existing conditions of service and existing administrative practices then it did not purport to alter the relationship between the parties and could not then be objectionable.

The power to reduce an officer in rank conferred by section 94 (1) of the Constitution is expressed to be subject, *inter alia,* to the provisions of section 96 and regulations made thereunder. In terms of section 4 (2) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, the Police Act [*Chapter 98*] (including regulations made thereunder) was, so far as it deals with conditions of service of members of the Police Force, at all material times deemed to be a set of regulations made by the Police Service Commission under section 96 (1) (c). Unless, therefore, there is something in that Act or elsewhere which restricts the power to reduce a police officer in rank, the person or authority vested with the power of reduction may exercise it in his or its absolute discretion; in effect the officer holds office "during pleasure" and is in the same position as was the claimant in *Terrell v Secretary of State for the Colonies and Others* [1953] 2 All

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ER 490 (QBD) (where the claimant's appointment as a puisne judge in the Colonial Civil Service was expressed to be during the sovereign's pleasure). One does not of course expect the authorities responsible for the administration of services like the armed forces, the police or the civil service to act arbitrarily, and actions such as removal from office and reduction in rank would in practice never be taken without reasons regarded by the authority in question as sufficient. But affairs of state may be in issue, and in principle and in law there can be no fetter on the discretion (see for instance the remarks of KAY, LJ, in *Dunn v Reginam* [1896] 1 QB 116 (CA) at 120). In England the position of the public servant is beyond doubt: as LORD GODDARD, CJ, said in *Inland Revenue v Hambrook* [1956] 2 QB 641 at 653:

> "It settled beyond controversy that the sovereign can terminate at pleasure the employment of any person in the public service, except in specific cases when it is otherwise provided by law."

See also *Terrell*'s case (*supra*) and *Shenton v Smith* [18953 AC 229.

The position is the same in South Africa (see *Sachs v Dönges, NO,* 1950 (2) SA 265 (AD) and *Nicol, NO v Lawrie,* 1950 (3) SA 151 (A.D.)). It is equally the position in this country, in *Waterfalls Town Management Board v Minister of Housing,* 1957 (1) SA 336 (SR) MURRAY, CJ, held that a promise by a Minister to exercise his discretionary administrative powers in a

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particular way could not fetter his right, if circumstances connected with his administration required it, to exercise his discretion in another way. In the course of his judgment, MURRAY, CJ, cited the following passage from the judgment of ROWLATT, J, in *Rederiaktiebolaget Amphitrite v The King* [1921] 3 KB 500 at 503:

> ". . . it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure, the reason being that it is in the interests of the community that the Ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable."

There is nothing in the Constitution which alters this position; on the contrary, it is to the same effect. In the absence of specific legislative provision to the contrary the authority in question has an unfettered discretion.

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Although there are in existence very comprehensive regulations dealing with almost every aspect of the life of a police officer, the only provision dealing with removal from office or reduction in rank is section 55 of the Police Act [*Chapter 98*]. This section reads, so far as is relevant:

> "55. (1) A board of inquiry consisting of not less than three officers of such rank, not being below that of superintendent, as may be deemed necessary by the Commissioner may be convened by the Commissioner to inquire into the suitability or fitness of a Regular Force member to remain in the Regular Force or to retain his rank, seniority or salary:
>
> Provided that no officer who is a material witness or has a personal interest in the matter shall be appointed to such board.
>
> (2) The senior officer so appointed shall preside at such board and record or cause to be recorded in writing or by mechanical means all evidence which may be given before such board.
>
> (3) If a Regular Force member, other than an officer of or above the rank of superintendent, is found after inquiry by a board to be -
>
> (a) unsuitable or inefficient in the discharge of his duties; or
>
> (b) otherwise unfit to remain in the Regular Force or to retain his rank, seniority or salary;
>
> the Commissioner may -
>
> (i) discharge the Regular Force member; or
>
> (ii) impose any one or more of the following penalties -
>
> A. reduction in rank or salary;
>
> B. loss of seniority;

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C. withholding of an increment of salary;

or

(iii) reprimand the Regular Force member."

Thus a person to whom this section applies cannot be dismissed at pleasure, but only in the circumstances and according to the procedures prescribed. But the section is expressed not to apply to Regular Force members of or above the rank of Superintendent; we were informed that there is no corresponding provision applicable to the respondent in this case, who must therefore be held to hold office at pleasure.

Mr *Andersen* accepted that it would have been perfectly proper - as he acknowledged had been the practice in the past - to require from the respondent a statement of intent, he accepted that the Promotions Advisory Board properly regarded an assurance of an intention to continue to serve as a relevant factor in the decision as to whether the candidate was suitable to be promoted to high rank. Mr *Andersen's* argument was that a statement of intent was very different from an undertaking to continue to serve for a specified period coupled with an agreement to be reduced in rank on breach.

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In my view there can be no real objection to the first paragraph of the undertaking, which does no more than reduce to writing the verbal assurances previously given, I am unable to attach any great weight to a distinction between an undertaking and a statement of intent unless some consequence flows from the failure to honour the undertaking or a subsequent change of intent as the case may be. The important paragraph in the document is the second, which acknowledges that the officer concerned had been informed of the consequences or possible consequences of a failure to honour his undertaking. But these consequences or possible consequences were part of the officer's conditions of service quite apart from the document; the authority vested with the power of reduction already had power in its absolute discretion to reduce in rank an officer of or above the rank of superintendent. Hence the undertaking the respondent was required to sign did not alter his position in any way; it did not constitute a new agreement or condition of service, and could validly be required by the Promotions Advisory Board.

The question then arises whether the reduction in rank was effected by the person or authority vested with the power to do so. The appellant expressed himself to act in terms of section 7 of the Police (Promotion) Regulations, 1965, introduced by Statutory Instrument 567 of 1980, which reads:

> "7. An officer of or above the rank of superintendent who, prior to his last appointment or promotion, as the case may be, gave an undertaking to serve in the Regular Force for a stipulated period, and who gives notice of his intention to retire or resign from the Regular Force, may, where such retirement or resignation is to be effective before the expiry of such stipulated period, be reduced by the Commissioner to the rank which he held prior to his last appointment or promotion, as the case may be."

The issue is whether this regulation, in purporting to give in the circumstances described a

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power of reduction in rank to the Commissioner, is *ultra vires* either section 94 (1) or section 96 (1) (c) of the Constitution.

The first question is the meaning of the expression "subject to the provisions of . . ." in the context. This expression can bear more than one meaning, and indeed further shades of meaning. It can, for instance, mean "save as otherwise provided in . . .", or it can mean "subject to restrictions or limitations contained in . . .". It is used in both these senses in section 94 (1). Section 93 provides in subsection (2) that the Commissioner of Police shall be appointed by the President acting on the advice of the Prime Minister; thus the power to appoint the Commissioner is vested in a different authority from those vested with the power to appoint other police officers. This is not a restriction or

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limitation on the exercise of the power, but a vesting of the power otherwise than is provided in section 94 (1). Similarly, section 93 (5) vests the power of removal of the Commissioner in the President acting on the advice of the Prime Minister. On the other hand, subsections (4) and (5) of section 94 represent restrictions and limitations on the exercise of the powers in question. On the basis of the language itself, therefore, and the other references in immediate juxtaposition, I can see no warrant to restrict the meaning of the words in question when applying them to regulations made under section 96. If the words are to be given a restricted meaning this can be done only on the basis that such meaning is clearly dictated by the context, using that word in its widest sense as described by VISCOUNT SIMONDS in *Attorney-General v HRH Prince Augustus of Hanover* [1957] 1 All ER 49 (HL) at 53.

Far from the context dictating a restricted meaning, there are factors which positively dictate the wider meaning. In the first place the words are unnecessary if they are to be construed in the restricted sense. Mr *Andersen* accepted that if section 94 (1) had omitted any reference to regulations made under section 96 such regulations could still be framed to prescribe the circumstances in which and the procedures whereby the powers conferred by section 94 (1) could be exercised. I think Mr *Andersen's* concession was properly made. Section 94 (1) deals with vesting, it names the person or authority by whom the various powers are to be exercised. Section 96 (1) (c) then sets out the purposes for which regulations may be made, including the conditions of service of members of the Police Force and provision for the punishment of members found guilty of offences against discipline. Removal from office or reduction in rank will only very exceptionally take place - the present case is such an exception - without there having been an offence against discipline. It seems clear that even in the absence of the words under review from section 94 (1), regulations under section 96 (1) (c) could prescribe the circumstances in which and the procedures whereby a member could be removed from office or reduced in rank.

Mr *Andersen* naturally resisted the logical corollary that the words must have been intended to empower regulations going beyond merely administrative and procedural matters; he submitted that they may have been included *ex abundante cautela.* I cannot accept such an approach; it begs the question because it depends for its validity on the assumption that the Legislature did not intend the words to have the wider meaning. The general rule is that effect must be given to

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all the words of a statute; if they are capable of bearing a meaning which does not defeat the clear object of the enactment, or lead to an absurd result, then that meaning

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is presumed to have been intended by the Legislature. Thus, Maxwell on *Interpretation of Statutes,* 10th edition, says at page 236:

> "Notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather, should, be eliminated."

The second important aspect of the context is section 55 of the Police Act (the relevant portions are set out above). The narrower construction of the words under review renders section 55 (3) *ultra vires* section 94 (1) of the Constitution in so far as it gives power to the Commissioner to discharge or reduce in rank commissioned officers below the rank of superintendent. Section 4 (1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, provides that, subject to the provisions of the Constitution, the existing laws shall continue in force. There is nothing in the Constitution (other than section 26, whose application is confined to the Declaration of Rights) which saves pre-existing law which is in conflict with the Constitution. To the extent therefore that section 55 (3) gives the power of discharge or reduction in rank of commissioned officers below the rank of superintendent to the Commissioner, it would on the narrower construction of the words under review be in conflict with section 94 (1) and therefore *ultra vires.* The Legislature is presumed to know the existing state of the law; prior to the introduction of the 1979 Constitution these powers were vested in the Commissioner. If the Legislature had intended the narrower construction of section 99 (1) of the 1979 Constitution (corresponding to section 94 (1) of the present Constitution) it would not have left the hiatus which such a construction necessarily entails.

Thirdly, so far as the British legislature is concerned, a provision in the form of section 94 (1) is certainly rare and may be unique, I am not aware of any corresponding provision in a British-granted constitution which was made subject to regulations. The words must be given a meaning on the basis that they were deliberately added; this meaning can only be that the regulations to which section 94 (1) is expressed to be subject may deal not only with the circumstances in which and the procedures whereby the powers may be exercised, but also with the persons by whom they may be exercised.

But this is not to say that the Police Service Commission is at large; the question will always remain whether the particular regulation under review exceeds the bounds of what is permitted under section 96 (1) (c), and it is in this area that I conceive the real issue of *vires* to lie in this case. I can envisage circumstances in which what is sought to be done

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may well be *ultra vires* the purposes expressed in this subparagraph either as regards

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administrative and procedural matters or as regards the vesting of the powers in question. I would not normally discuss hypothetical cases, but I must deal with one on this occasion because it is of considerable importance and relevance. The issue in this case is not whether a regulation under section 96 (1) (c) could divest the President of the powers in question and vest them in someone else; a regulation could be expressed - as indeed the one under review is expressed - to vest certain powers in the Commissioner in certain specified circumstances and in so doing it is not to be assumed that it purports to divest the President of the corresponding power. The purpose of the regulation might be to deal with a situation in which speed might be of the essence and the Commissioner might well intend to go through the normal channels and procedures in all normal situations. However, if a regulation purported expressly to divest the President of the powers, then I can well see an argument that such a regulation - at least to that extent - was *ultra vires* the provisions of section 96 (1) (c) itself, on the ground that it went beyond what was necessary for the "good administration of the Police Force" or any of the other purposes for which regulations may be made.

The regulation under review does not purport to divest the President of the powers in question; it does no more than purport to vest those powers in the Commissioner concurrently with the President. I am entirely satisfied, for all the reasons set out in the extract from the Deputy Commissioner's affidavit cited above, that the ambit of the regulation is within the scope of section 96 (1) (c), and I am satisfied also that to vest the power of reduction in rank in the Commissioner in the specific and very limited circumstances described could properly be regarded by the Police Service Commission as being in itself, quite apart from the ambit of those circumstances, "for the general well-being and good administration of the Police Force, (and) the maintenance thereof in a high state of efficiency".

As I have said, the words under review can bear either, or both, of two meanings, they cannot be given a restricted meaning unless this is clearly dictated by the context. I see nothing in the other provisions in Chapter IX of the Constitution which dictates a restricted meaning. Mr *Horn* conceded during the argument that there was significance to be attached to the use in section 94 (4) of the expression "except as otherwise provided in" rather than "subject to the provisions of". I do not think this concession was properly made. The former expression represents one of the meanings of the latter; but section 94 (4) deals

with one specific situation, and I see no significance in the Legislature using an expression in that section peculiarly appropriate to that situation rather than an expression applicable to either of two situations which it used in the section dealing with those two situations. "Except as otherwise provided in" would have been quite inappropriate in section 94 (1) in relation to the provisions of subsections (4) and (5) of that section.

Giving the expression "subject to the provisions of" both its ordinary meanings does not defeat the objects of Chapter IX nor does it lead to absurdity - on the contrary, as I have shown, the restricted meaning creates a conflict between section 94 (1) of the Constitution and section 55 (3) of the Police Act and renders portions of the latter *ultra vires* the former. I am satisfied that there is no justification for restricting the meaning of the words. In my judgment the regulation

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under review is *intra vires* both section 94 (1) and section 96 (1) (c).

This result is in no way in conflict with the objects and general structure of Chapter IX. The President is required to act on the advice of the Commissioner; he cannot act in the absence of advice to do so and he cannot decline to act in the face of advice to do so. It is true that he can delay taking action, but at the end of the day the real power is vested in the Commissioner in relation to the ranks of inspector and above as well as in relation to ranks below inspector. In terms of subsection (3) of section 96 no regulations made under that section may be published in the *Gazette* until they have been approved by the Commissioner. In these circumstances it seems to me not only reasonable, but probable, that the Legislature will have contemplated situations in which the speedy and efficient administration of the Force would require that the Commissioner be able to exercise alone certain powers which in terms of section 94 (1) are exercisable by him only through the President, and even to delegate to others certain of those powers. I have already given an illustration of the former situation. As to the latter, I can well envisage, for instance, that the Commissioner might consider it necessary to vest certain powers, at present vested in practice in him but formally vested in the President, in an Assistant Commissioner stationed in Bulawayo. I do not think the danger of the Commissioner delegating his powers to a sergeant in charge of some remote station is realistic, any more than one expects an officer who holds office at pleasure to be dismissed capriciously; but in any event the authorities are clear that in construing discretionary powers given to ministers and other high-ranking persons the Courts take into account that the Legislature expects those powers to be exercised responsibly.

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The next question is whether the appellant was entitled to invoke the new regulation, since it came into force after the undertaking was signed although before the respondent tendered his resignation. The appellant would not be entitled to invoke this provision if to do so would interfere with some accrued right in the respondent. The only right the respondent could be said to have which might be interfered with by the new regulation was a right to be reduced in rank by the President acting on the advice of the Commissioner of Police rather than by the Commissioner himself. It is, I think, clear that this right, even if it can properly be so called, had not accrued prior to the coming into force of the new regulation; a right does not accrue to an individual simply because a legislative provision entitles the public generally or members of a class to do certain things; the right accrues only when the individual takes the necessary steps and thereby crystallizes the right in his hands. As LORD HERSCHELL observed in *Abbott v Minister of Lands* [1895] AC 425:

> ". . . the mere right (assuming it to be properly so called) existing in members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot properly be deemed a "right accrued" within the meaning of the enactment."

The only act done by the respondent which could be said to be an act towards availing himself of the "rights" conferred by section 94 of the Constitution was his resignation, which he tendered several weeks after the new regulation came into force.

I must deal finally with the purported confirmation by the Police Service Commission of the

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reduction in rank of the respondent. If such confirmation was required it is I think clear that it was not properly provided. When one reads section 94 (4) with section 96 (1) (b) it is manifest that the confirmation must be of a *proposal* to remove a person from office or reduce him in rank, for the person to be removed or reduced and the *action* then confirmed *ex post facto* is not in accordance with those provisions. However, I think Mr *Horn* is right when he submits that after the coming into force of section 7 of the Police (Promotion) Regulations, 1965, the necessity for confirmation fell away. The regulation replaces section 94 (1) to the extent of its application, it is not expressed, as is section 94 (1), to be subject to section 94 (4). In the circumstances in which the new regulation applies the Commissioner can act without seeking confirmation of his proposed action.

In the result, the appellant was in my judgment entitled to require an undertaking to continue to serve as a condition of promotion, and on

breach thereof was entitled to reduce the respondent to his former rank.

I would allow this appeal.

Goldin AJA: For the reasons given by the CHIEF JUSTICE with which I agree I would dismiss the appeal.

Fieldsend CJ: In the result the appeal is dismissed with costs.

State Attorney, appellant's legal representative.

Winterton, Holmes & Hill, respondent's legal representatives.

CITY OF SALISBURY v SAGIT TRUST LTD 1981 ZLR 479

Court **Supreme Court, Salisbury**

Civil Appeal

Fieldsend CJ, Baron JA and Goldin AJA

22nd July and 4th September, 1981

Flynote

Regional, Town and Country Planning Act, 1976 (No. 22 of 1976) - town planning scheme - area zoned as "public buildings zone" - proposed erection of building containing diplomatic offices and commercial offices - "special consent" of town planing authority required for commercial offices - meaning of - means no more than "specific consent" - tests to be applied in deciding whether to grant consent - no rule of law obliging authority to apply criterion of "need" for proposed development flexible approach required.

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Headnote

The City of Salisbury appealed against a decision of the Administrative Court, which in effect granted special consent to the respondent to use as ordinary commercial offices fifteen *per centum* of the office space in a building (designed primarily for diplomatic offices) it planned to erect in an area which under the Salisbury Town Planning Scheme had been classified as a "public buildings" zone. Public buildings included such facilities as schools, churches, places of assembly and such public buildings as art galleries, government offices, law courts and museums. Although the area had been zoned in this way, the actual uses of the stands varied and included dwelling houses, flats and, by special consent, two hotels, a building society's banking hall and four commercial office blocks.

There had been no objections to the respondent's advertised application; the building would not be out of harmony with others in the area, nor would its use detract from the amenities of the area. On the other hand, there was no public need for the particular use in that area.

The appellant's main contention was that the Administrative court had erred in law in not following the principles laid down in regard to the granting of special consent by a long series of decisions by the court and its predecessor, the Town Planning Court. These decisions had, broadly, been to the effect

that special consent should not be granted unless it is established that there is a positive need in the public interest for the consent to be granted, which means that the public will be seriously disadvantaged if the consent is not granted.

Held, that the term "special consent" means no more than specific consent, that is, the consent required for putting property to a use which it cannot be put in the zone in which it is situated without such consent.

Held, further, that in deciding whether such consent should be granted, the result of granting it should be in accordance with sound town planning principles. However, the approach developed by the Administrative Court over the years - that "need" should be established in the sense that the public would be seriously disadvantaged if the consent were not granted - must be a guideline only. The Administrative Court must not be hidebound by previous practice; a degree of flexibility is necessary.

Held, further, that, while in an appropriate case the court should apply the rules enunciated, in the present case it did not necessarily have to apply the strict requirement of "need" for the proposed development; and its decision not to do so was not an unreasonable one.

Cases cited:

Kopje Properties (Pvt) Ltd. v Salisbury City Council, 1957 R & N 491;

Astor Hotel (Pvt) Ltd. v Salisbury City Council, 1959 (1) R & N 409 (SR); 1959 (3) SA 211 (SR);

Doves-Morgan (Pvt) Ltd. v City of Salisbury, 1973 (1) RLR 47 (A.D.); 1973 (2) SA 463 (RAD);

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Britten and Others v Pope, 1916 AD 150;

Johannesburg Town Council v Norman Anstey & Co., 1928 AD 335;

Tselentis v Salisbury City Council, 1965 RLR 282 (AD); 1965 (4) SA 61 (SRAD);

Jackson v Adams, 1958 R & N 747 (SR); 1958 (4) SA 78 (SR).

C. S Grossman for the appellant. The purpose of the Town Planning Scheme is to regulate the development of Salisbury in an orderly manner. Departures from the over-all scheme should only be granted in extraordinary circumstances and traditionally in this country, special consent for a non-conforming use has only been given within the parameters of specific criteria. The cases heard in the Administrative Court show that the concept of special consent has been conservatively interpreted and the criteria have been traditionally accepted although their application has been flexible: *Salisbury Board of Executors and Haskal Holdings,* T 638 and T 639 (1959); *Divaris,* T 653 (1959), *Victoria House,* T 913 (1961). It must also be shown that the public would be seriously disadvantaged by the refusal to allow special consent, and there must be shown to be a need for use in the area. By "need" is meant that the public would be seriously disadvantaged if the thing

needed is not done or supplied. A less stringent meaning of need is appropriate where the obtrusiveness of the proposed use is less out of , harmony with the neighbourhood. A responsible authority has to ensure that the essential idea of a positive need in the public interest for an obtrusive activity which will not upset the amenities of the area is not lost in a welter of excuses for a use for which no real need exists. The applicant must also show by sound positive reasons that the good town planning of the neighbourhood will be advanced if the application is granted. Applications for special consent in a particular use are granted -

(a) if there is a need in the public interest for the proposed use in the neighbourhood, although it is an obtrusive one there; and

(a) if that need can be met on the property in question; and

(c) if the meeting of that need on that property will not unduly harm the neighbourhood.

The court *a quo* found specifically (and correctly) that the public would not be seriously disadvantaged by the refusal to grant special consent nor was there any positive need for it, but it did not attempt to find that special consent should be given for any of the reasons set out in the authorities referred to. It appeared to base its findings on the advantage to the respondent and the fact that granting special consent would not make any particular difference to the neighbourhood. In this regard, the court appeared to interpret the dictum of QUENET, J, in *Astor Hotel (Private) Limited v Salisbury Town Council* (*supra*) at 411, as giving it a general discretion to grant special consent without reference to any particular criteria. This is a wrong interpretation of this dictum. QUENET, J, did no more than state that the granting of special consent was not to be regarded as subject to fixed and inflexible rules. He did not, however, intend to jettison all the principles which had hitherto been laid down and it is clear from

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subsequent cases that this dictum has never since been so interpreted.

J C Andersen, SC, for the respondent. There is no rule of law which obliged the Administrative Court to follow the approach suggested in earlier cases, provided that in adopting whatever approach it did it did not have regard to considerations which were patently wrong in the sense that no reasonable court would have had regard to them. The Administrative Court, sitting as a court dealing with town planning appeals in terms of the Regional, Town and Country Planning Act, 1976, is an administrative tribunal exercising quasi-judicial functions: *Tselentis v Salisbury City Council* (*supra*). It has a discretion as to the approach it should adopt and it is for it to decide on the proper approach in the

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circumstances of any particular matter before it. It is not bound by the approach adopted by it in other similar cases or by its predecessors. No doubt it is desirable that the court should maintain consistency in its approach, but it is not obliged to do so if it believes the general approach to be inappropriate or if it were to believe a previous approach to be wrong. For the appellant to succeed it would be necessary to find that it was an immutable principle that special consent could not be given, unless there were to be a finding that the public would be seriously disadvantaged if it was not. The same applies to the question of a finding as to a positive need. Neither the Act nor the scheme provide for any such immutable principle. To find that there is any such immutable principle would necessarily fetter the discretion of the Administrative Court and would be quite inconsistent with the approach it is entitled to adopt in the exercise of its discretion. The decision in *Doves-Morgan* (*Private*) *Limited v City of Salisbury* (*supra*) laid down no such principle. The special consent procedure, as it is referred to in that decision, is generally adopted to allow an *obtrusive* activity to be carried on in an area zoned for other activities, but it is not exclusively adopted for that purpose. That the special consent procedure is not confined to obtrusive uses is apparent from dicta in the following cases: *In re Objection Lindsay,* 1960 R & N 566 at 568A-B and 570B-E; *Tselentis*' case (*supra*) at 63F-H and 64H-65A, *Kopje Properties (Private) Limited v City Council of Salisbury (supra); Salisbury Board of Executors Limited, NO, and Anor v Salisbury City Council,* 1959 (1) R & N 454 at 456E-G.

Judgment

Fieldsend CJ: This is an appeal by the City of Salisbury against the decision of the Administrative Court which in effect granted special consent to the respondent to use as ordinary commercial offices 15 percent. of the office space in a building to be erected in an area classified as a public buildings zone.

The respondent is a trust company with a number of departments basically dealing with deceased estates, forming trust companies and administering educational and other trusts. It also has an investment department which advises on and administers the funds of companies and individuals, a secretarial department providing secretarial services to companies and individuals, a share transfer department and an administration department. The clients cover a broad range from large companies and quasi-government institutions to individual retired

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persons.

It wishes to erect on three vacant stands on the northern side of Central Avenue between Third and Fourth Streets and opposite the

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Causeway Post Office what has been referred to as "a prestigious building". Basically this is to provide office accommodation for embassies and diplomatic missions, but the respondent wishes to use 15 per cent., or 6 000 square feet, of the total accommodation as offices for its own business. Ministerial approval for a building to have diplomatic suites was granted in the national interest, but the respondent had to obtain special consent to use the land for other office purposes because it is within the Public Buildings Zone, Zone 3 of the City of Salisbury Town Planning Scheme, Phase 1, 2nd Resubmission.

Under the Scheme the whole of the area bounded by the northern side of Central Avenue and the southern side of Rhodes Avenue, between Park Lane and Fifth Street is zoned as a public buildings zone. Under the Scheme the following uses are allowed in the zone without any special application: schools and residential colleges, places of public worship, places of assembly (which include amusement arcades and billiard saloons as well as business colleges and lecture halls) and public buildings. Public buildings are said to include: art gallery; baths, public; baths, public swimming (open to the public on payment of a charge); Central Government office; clinic (non-residential), community centre, court, law; court, police; fire-station; Government office; health centre; library, public; Local Government office; museum; police-station; post office; welfare centre.

In fact, the existing uses of the stands in this zone are varied. On the stand immediately adjacent to the respondent's proposed development special consent has been given for use as a building society with a harking hall. About a fifth to a quarter of the zone is occupied as a school by the Dominican Convent and by the Catholic Cathedral and other churches and about a seventh by Government offices. Of the remainder, most stands carry flats or single storey dwelling houses which existed before the scheme came into being and two carry hotels with special consent. There are six stands, four of them being consolidated, on which offices have been allowed with special consent. On the southern side of Central Avenue offices are permitted without special consent.

The respondent's advertised application to the local planning authority provoked no objection to its proposed development. It was established that the building itself would not be out of harmony with buildings in the area nor would the use detract in any way from the amenities of the area by causing great traffic congestion or the like. On the other hand, it was also clear, and the Administrative Court so found, that there was no public need for the granting of consent for this use. Some

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few of the respondent's clients might benefit somewhat from having the offices on the proposed site and, of course, there was no doubt that there would be benefit to the respondent itself. To those latter considerations, the Administrative Court, rightly in my view, paid no regard.

The appellant's main contention was that the Administrative Court erred in law in not following the principles laid down in regard to the granting of special consent by a long series of decisions particularly of the Administrative Court and its predecessor, the Town Planning Court. It is necessary to set out in a little detail the basis of the judgment now challenged in the form of the following extracts:

> "Although it may be advantageous to the appellant and some of its clients to have its offices in the proposed development the court is not satisfied that the public will be seriously disadvantaged if they were to be situated in the central commercial zone."
>
> "The application to the local planning authority provoked no objections to the proposed development. The offices intended to be used by the appellant will not be disharmonious or obtrusive and they will in no way affect the amenity of the neighbourhood. They will not cause any noticeable traffic congestion or anything of that sort. As, in any event, the land will be used for diplomatic suites if the proposal goes ahead, arguments to the effect that it should be reserved for public buildings in the future or that the permitting of the use sought will lead to the decay of the central commercial zone should not be accorded undue weight in the circumstances of this particular case."
>
> "Although, if this court was considering an application for development of diplomatic offices in the Public Buildings Zone, or if the application was predominantly for offices for the appellant's own domestic use, it might possibly refuse it, this case is unusual in that the Minister has already approved 85 per cent. of the proposed development because he considers it to be in the national interest."
>
> "Bearing in mind that under the scheme offices are permitted within the zone with special consent, to permit the development sought would not, in our opinion, be contrary to any of the objects of town planning as described in the preamble to the Act."
>
> ". . . to insist on refusing the application because a positive need, as described in the two cases previously mentioned, has not been made out in respect of a relatively minor portion of the whole development plan would be unreasonable and an unwarranted fettering of the court's discretion in the particular circumstances of this case."
>
> "The special consent procedure is not simply a method of enabling an obtrusive development to take place in a particular zone if it is of use to the public in that zone. It has wider connotations than that and is intended to provide flexibility in planning or in a particular scheme."

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In his lucid and persuasive argument Mr *Grossman* took us through the cases that there have been in the High Court and in the Administrative Court and its predecessor from 1955 to 1980. From these decisions he contends that criteria for the granting of special consent have been established, and that in failing to apply those criteria the Administrative Court erred in law. He argued that the principles evolved by these decisions are that special consent will not be granted for a "non-conforming" use unless it is established that there is a positive need in the public interest for the consent to be granted, and that positive need means that the public will be seriously disadvantaged if the consent is not granted.

The soundness of this argument depends upon three main questions -

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(i) the true nature of special consent;

(ii) the precise rule, if any, which the decisions have established to govern special consent;

(iii) whether the rule is binding on the Court as a matter of law.

(i) *The rupture of special consent*

Under the City of Salisbury Town Planning Scheme special consent does not have any defined meaning. It is a term used in clauses 20 and 22 of the scheme to distinguish from the ordinary permission required to erect any building the consent required to use land for a purpose which is not a freely permitted use. It should be said that there are some uses which may not be approved at all, there are others which will be approved, subject to the provisions of the scheme, and finally uses which will be approved only with the special consent of the authority. For example, special industrial buildings, agricultural buildings and surface mineral workings are prohibited in all areas, dwelling houses are freely permitted (subject to approval of the plans) in the general residential zone as are offices in the general commercial zone. On the other hand, filling-stations, where not prohibited, are allowed only with special consent, as are special places of assembly and crèches, and, surprisingly enough, attached dwelling houses even in areas where both dwelling houses and flats are freely permitted.

The conclusion which must be drawn from these provisions is that there may be a variety of factors underlying the requirement of special consent. A town planning authority may decide in the formulation of its scheme that certain uses will be allowed only with special consent for a variety of reasons. It may feel, particularly in a small but developing

town, that shops should be confined to a particular area for a number of reasons: it may wish to prevent ribbon development; it may feel it is for the public benefit for there to be a small compact shopping centre; it may feel that to allow indiscriminate establishment of shops will make for a shoddy central area. In the same way it may feel, for perhaps slightly different reasons, that the office and commercial area should be confined to a particular locality.

Mr *Grossman*, for the appellant, contended that this latter consideration may have been an operative consideration with the planners here. He argued that the city centre might decay if developers were tempted by lower land values outside the business centre to establish office buildings outside that centre, and the result would be that dreaded phenomenon, "urban sprawl".

The nature of special consent seems to have been dealt with first in *Coleman v Salisbury City Council* (1955) T 8, an application for the use of land as shops in a residential zone for which special consent was required. HOFFMAN, J, there referred to the dictionary meaning of "special" as being "of such kind as to exceed or excel in some way that which is usual or common, exceptional in character, quality or degree", and held that consent which was special was to be given that meaning. The court accepted the respondent's contention that shops were

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foreign to the area and that consent would be granted only where special circumstances warranted it. In that case there were objections including one from the police based on traffic congestion. This was followed in *Kopje Properties (Pvt) Limited v Salisbury City Council,* 1957 R & N 491 at 495, a decision of the Town Planning Court in a similar case.

The question of special consent was first dealt with by the High Court in *Astor Hotel (Pvt) Limited v Salisbury City Council,* 1959 (1) R & N 409 (SR) at pages 412-13. The case concerned an application for special consent for a residential licensed hotel in a residential zone. Although he did not deal directly with the nature of special consent QUENET, J, as he then was, did deal with the question indirectly. It had been submitted by the city council that special consent should have been refused:

> ". . . because special consent could not be granted unless some 'special circumstance' was shown to exist and the 'special circumstance' was such as positively established that the principles of town planning would be promoted by granting the application; that it was of fundamental importance to remember that under the scheme the business, not the residential, area was the proper place for a licensed hotel; that the establishment of a licensed hotel in a residential area could not be justified unless it was proved that

> the hotel offered something which could not be provided by hotels in the business area. It was submitted that the present was not such a case; the circumstances which the Town Planning Court regarded as 'special' was irrelevant to the inquiry; that the limited accommodation of the proposed hotel, parking difficulties, tragic congestion and so on, constituted objections which outweighed any circumstance which might favour the grant of consent. Reliance was placed upon a *dictum* in the *Kopje* case, 1957 R & N 491 at page 495, as to the approach which the Town Planning Court should adopt in considering applications for special consent."

On this submission, QUENET, J, said:

> "Clearly, every town planning scheme must reek 'to promote health, safety, order, amenity, convenience and general welfare, as well as efficiency and economy in the process of development and the improvement of communications'; see section 24 (1) of the Town and Country Planning Act, 1945. Where an approved scheme provides for the grant of special consent, the grant, in an appropriate case, must be in conformity, and not in conflict, with the objects which the scheme seeks to achieve; see *Chassey Bros. & Anor. v Registrar of Deeds,* 1957 R & N 539 at 548. In the present case, clause 17 (4) of the scheme makes provision for the grant of 'special consent' (a term, in my view, which means no more than 'express consent'). . . . The discretion to grant consent is not in unqualified terms. To insist, however, that some 'special circumstance' of the character described by the respondent's counsel should first be proved, is to fetter the discretion in a way not warranted by the language of the Act or of the scheme itself. The grant or refusal of consent must be based upon grounds which are not unreasonable; it must not proceed upon some wrong principle; all relevant matters must be considered; in particular, the decision must be in conformity with the objects of town planning as described in section 24 (1) of the Act; see *Jackson v Adams,* 1987 R & N 166-169."

In *Doves-Morgans (Private) Limited v The City of Salisbury,* 1973, (1) RLR 47 (AD) LEWIS, JA, said at page 50:

> "As was pointed out by the learned President when delivering the judgment of the Town Planning Court, the special consent procedure is inserted in town planning schemes to allow an obtrusive activity to be carried on in an area if the applicant can establish that there is a need for the use in that area, in the sense that the members of the public who are in that area would suffer serious disadvantage if such activity is not allowed to be carried out in

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that area."

That appeal concerned special consent for the establishment of a funeral parlour in a residential area - a use plainly out of character with a residential area to which there were 88 objections including a ratepayers' association, with 180 members. The appeal against the council's refusal of special consent was dismissed.

Many other authorities were cited to us but these deal with the considerations to be taken into account when considering whether or not

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to grant special consent rather than with the nature of special consent. I shall deal with them at a later stage. Having regard to the nature of the scheme and its division of uses into prohibited and permitted uses and uses allowed only with special consent, special consent can as a term mean no more than the consent that is required for putting property to a use to which it cannot be put in the zone in which it is situated without such consent. I do not think that any real significance can be attached to the word "special" which is merely used to distinguish the consent required under clause 22 of the Scheme from the consent that is required for the erection and use of any building under clauses 18 and 19.

(ii) *The nature of the rule governing special consent*

It should go without saying that the granting of special consent should bring about a result in conformity with sound town planning principles: *Kopje Properties (Pvt) Limited v Salisbury City Council* (*supra*) at page 495. In (1) *The Salisbury Board of Executors Limited, NO, v The City Council of Salisbury* and (2) *Haskal Holdings (Private) Limited v The City Council of Salisbury* (1959) T 638 and T 639 EDWARDS, J, said in an application for special consent for the establishment of a place of worship in a residential area:

> "While shops should normally be situated in business areas, it has been conceded that churches should normally be situated in residential areas. In applications for special consent for churches special circumstances in the sense of something extraordinary, were not required, and the propositions mentioned should be confined to the circumstances of the *Kopje Properties* case. The only question, he said, was whether the proposed site was reasonably suitable in the light of all the circumstances.
>
> In this regard it should be stated that the special circumstances envisaged in the *Kopje Properties* case are not necessarily extraordinary or exceptional; what is envisaged is particular circumstances-doubtless of a kind which cannot be assumed invariably to exist in relation to whatever use in question - which make it desirable in the interests of sound town planning to grant special consent. The propositions referred to are of general application, and apply to places of worship as well as to other uses."

And in *Tobacco Warehouse & Export Co. (1946) Ltd. v City Council of Salisbury and Others* (1966) T 1002 and T 1012 EDWARDS, J, said.

> "Need is a factor proper to be taken into account before a special consent is granted, but it is not in all cases essential. The claim of convenience or other planning considerations may, without amounting to positive need, be strong enough to justify granting consent. For example, a particular type of use may be a non-conforming use in a particular zone, but, in a particular instance - the present is one - its non-conformity may be so little obnoxious

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> that its advantages may justify its introduction even if the public would not be gravely disadvantaged if it were not introduced. The essential test is whether the proposed use or development is desirable. It is commonly as a countervailing factor that need is important."

Much the same approach was adopted in *Thomas Hugh William Beadle, NO v City Council of Salisbury* (1969) T 1089 - a filling service station case - by KNIGHT., J:

> "The next question that arises is as to whether there are any special circumstances which make it desirable in the interests of sound town planning to grant special consent in the present case and that the granting of permission would not upset the general amenities of the area. Whilst 'need' imports that the public will be seriously disadvantaged if the thing needed is not done or supplied, a proposed use or development may be desirable and may merit special consent although 'need' has not been shown to exist, provided that it will not impair the objects set out in section 27 (1) of the Town and Country Planning Act [*Chapter 133*], and that it will conform with co-ordinated and harmonious development. The question in such a case is whether the disadvantages attaching to the proposed development may be such that special consent should be granted in the absence of a need which outweighs them."

In *Florence v Bulawayo City Council* (1971) T 1200 - a case concerned with an hotel in a residential area - PITTMAN, P, referred to the strict requirement of need in *Ruabon Brickfields (Pvt) Ltd v Salisbury Rural Town Planning Authority* (1971) T 1167 where need was said to mean that the public would be seriously disadvantaged if the thing "needed" was not permitted. and said:

> "The words 'seriously disadvantaged' were appropriate to the situation in that case where a highly obtrusive activity was proposed. A less stringent meaning of 'need' in this context is appropriate where the obtrusiveness of the proposed use is less out of harmony win the neighbourhood."

Later cases, such as *MacWelond Construction (Pvt) Ltd v Salisbury City Council* (1972) T 1207, *Amalgamated Sales (Pvt) Ltd v City Council of Salisbury* (1973) T 1280 and *Shornecliff (Private) Limited v City of Salisbury* (1975) T 1375, have, however, stressed the need for a strict rule, which was stated in the second of those cases in the following terms:

> "It is now firmly established by numerous decisions of this court that the special consent procedure is provided in a scheme to allow upon terms the establishment of an obtrusive use in a particular area, if that use is needed there, if the property for which the consent is asked is in itself suitable for the meeting of the need, and if the meeting of the need there will not harm the neighbourhood. By 'needed' is meant that the public will suffer a disadvantage if the use is not allowed in the area. The degree of need varies proportionately with the degree of obtrusiveness. The greater

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> the obtrusiveness, the greater the need must be, before the special consent can be given. It is not enough for the applicant to show that the proposed use would in some way be for advantage to the public in the area. There must be a positive need for the use, in the sense that the public will suffer a position disadvantage if the obtrusive use is not allowed. There is a difference between a use which if allowed will be of advantage to the public, and a use which, if not allowed, will put the public at a disadvantage. That difference must be recognised, because otherwise special consent uses, instead of being jealously controlled as obtrusive but necessary, will become obtrusive and

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frequent."

Mr *Grossman* would therefore seem to be right when he says that over the years the Town Planning Court and its successor have not followed the more flexible approach of the earlier cases. It has now adopted at least in practice a strict approach in almost all special consent applications.

(iii) *Is the rule binding?*

There is, of course, nothing wrong in a court such as the Administrative Court enunciating and following guide-lines as to how it will approach applications for special consent. This has been done by similar types of courts and committees in the past and approved by high judicial authority. See, for example, *Britten and Ors v Pope,* 1916 AD 150 and *Johannesburg Town Council v Norman Anstey & Co.,* 1928 AD 335. Indeed, it is highly desirable that such a court should maintain consistency in its approach, but such guide-lines must be treated as what they are and not applied without regard to particular circumstances where a different approach might be more appropriate.

It must not be forgotten that the Administrative Court is, as its name implies, a court which deals with administrative matters: *Tselentis v Salisbury City Council,* 1965 RLR 282 (AD). In so far as it deals with town planning matters it must not be hidebound by previous practice, however useful that may be as a general guide. In any scheme which is concerned with human activity such as living in a modern city a degree of flexibility is necessary to achieve the right balance. It is because hard and fast rules do not always produce the best results that the scheme provides for a special consent procedure. It would be wrong to so minimize that flexibility by a rigid application of a rule to detract from its advantages. It is necessary for the court in every case to apply its mind to all the facts and circumstances, as well as to the need for some degree of certainty and uniformity. But it should not shrink from looking carefully at all the separate considerations to see just how strictly to apply the guide-lines that have been evolved by its experience. It must nevertheless be on guard against allowing an obtrusive activity to be

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established which will upset the amenities of an area, and it must not be persuaded to allow this by "a welter of excuses for a use for which no real need exists", to use the words of PITTMAN, P, in *MacWelond's* case (*supra*). In my view the earlier cases, and in particular the *Astor Hotel* case (*supra*) still correctly state the true position.

Just as the reasons for requiring special consent for particular uses in particular zones may vary, so the considerations to be taken into account in deciding whether or not to grant special consent may vary. It would therefore be dangerous to attempt to lay down any hard and fast rules to govern the grant of special consent in every case. A good example is the case of the special consent required for attached dwelling houses in a zone where both detached dwellings and flats are freely permitted as in subzones 2A and 2B. The strict rule urged upon us by Mr *Grossman* would be singularly inapt in such a case, though, of course, most appropriate in a case such as *Doves-Morgans* (*supra*) or the *Ruabon Brickfields* case (*supra*). In my view there is no rule of law which obliges the Administrative Court to apply the criterion of need as

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enunciated, for example, in the *Amalgamated Sales* case (*supra.*)

This does not mean that in an appropriate case the court should not normally apply such a rule, and it is now necessary to examine whether the Administrative Court erred in the present instance in not applying it.

In the case before us the establishment of offices in the public building zone is not what might be called an obtrusive use because central and local government offices are freely permitted. Looking at the development of the zone an office development would cause no detriment to the area at all. It must therefore be for reasons other than simply the nature of the activity involved in private office use that special consent is required for that use within the public building zone. The reason may be that there is a shortage of land for the uses included within that category, or it may be that the authority wishes to discourage the development of commercial offices outside the central business area to prevent decay of that area and unwarranted spreading of offices into other areas. Whatever the reasons it was the duty of the court to look with care at all the reasons of the authority for refusing consent to see that in overruling that refusal it would not undermine the scheme in one or other of its objectives. But this did not mean that it necessarily had to apply the strict requirements of "need" which Mr *Grossman* urged on us.

On Mr *Grossman's* first point, I do not think that it can be said that the Administrative Court erred in law in allowing the appeal, despite

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having rightly concluded that positive need for the consent had not been established and that failure to allow the use would not result in serious disadvantage to the public.

This leaves the final contention that on the accepted facts the Administrative Court could not reasonably have reached the conclusion it did.

The test to be applied in this type of case is well established. It is clearly stated in *Jackson v Adams,* 1958 R & N 747 (SR) at 753 in the following terms:

> "I agree with the respondent's counsel that this Court should only interfere with the Town Planning Court's judgment if it finds that the decision was not based on reasonable grounds, that some wrong principle was applied, that matters were taken into account which should not shave been considered, or that matters were not considered which should have been taken into account".

This was approved in this Court in *Tselentis v City Council of Salisbury* (*supra*) at 285 where BEADLE, CJ, said:

> "It must be remembered that this court is not a Town Planning Court and this court cannot pretend to acquire the expert knowledge in town planning matters as is acquired by experience by the Town Planning Court."

I read this as meaning that through hearing many cases of this nature the Town Planning Court acquires familiarity with the schemes which come before it and local knowledge of the nature of various areas and zones, which the appeal court does not have. This makes an appeal court reluctant to interfere with decisions of the Town Planking Court save in the postulated

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circumstances.

It cannot be, and was not, contended that, granted the establishment of diplomatic offices on the site, the use of 15 per cent. of the building for commercial offices would have any detrimental effect on the area or indeed be out of keeping with the area itself or the zone immediately adjacent to it to the south. There was no evidence that there was a shortage of land within the public building zone for the uses permitted in that zone. It would seem that the only substantial factual reason advanced for refusal of consent was that this would create uncertainty and lead others to think that consent to ordinary commercial office use might be readily obtained. This in turn would, it was said, lead to lack of development in the central commercial zone where the land was more expensive and hence to a decay of that zone. That contention is a valid and persuasive one in ordinary circumstances, although it does not seem to have prevailed in the applications for special consent for those com-

mercial offices which have already been granted in the zone. But it would be a fallacy to say that because some commercial office use has already been allowed a little more such development will not do any harm.

That, of course, was not the approach of the Administrative Court. It gave consideration to the contention that there was a chance that to grant the application might cause decay in the central commercial area, but considered that this should not be given undue weight. I find it difficult to say that that conclusion is not one which could reasonably have been reached. Having regard to the very special circumstances of this case - and even assuming against the respondent that it saw a good opportunity of benefiting itself by adopting this project - the establishment of 6 000 square feet of commercial office space in a building 85 per cent. of which will be used as diplomatic offices is not likely to undermine in any way the town planning policy underlying the zoning of the two zones here in question. It certainly cannot be said that the Administrative Court ignored this feature; it clearly considered it and reached a not unreasonable decision.

In my view the appeal must be dismissed with costs.

Baron JA: I agree.

Goldin AJA: I agree

Honey & Blanckenberg, appellant's legal representatives.

Coghlan, Welsh & Guest, respondent's legal representatives.

TOMES v SITHOLE AND OTHERS 1981 ZLR 494

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Court **High Court, Salisbury**

Civil Application

McNally AJ

6th August and 16th September, 1981

Flynote

Civil procedure - application for summary judgment for money stolen from plaintiff - defendants had been convicted by High Court but subsequently granted leave to appeal against conviction by judge of Supreme Court - relevance of conviction in summary judgment application - should be taken into account when all avenues of appeal finally closed.

Headnote

The plaintiff sought summary judgment in the sum of $19000 from the three defendants, who had been convicted in the High Court of the theft from him of that sum. They had denied their guilt at their trial, they sought leave to appeal from the Supreme Court and a judge of that court had granted leave to appeal. The question was whether the fact of their conviction should entitle the plaintiff to judgment, on the basis that the defendant had no *prima facie or bona fide defence* to the claim.

Held that , *prima facie,* logic and common sense dictate that the fact of a conviction or acquittal is highly relevant in an application for summary judgment. However, the rule in *Hollington v Hewthorn* [1943] 2 All ER 35 (CA) and the cases in England and South Africa which followed it are to the effect that "on the trial of the issue in the civil court, the opinion of the criminal court is irrelevant*".*

Held, further, that, in a proper case, when an application for summary judgment was made after all the avenues of appeal in the criminal trial had been finally closed, a court could and should take that into account in deciding whether or not to grant summary judgment, since it would be hard to resist the conclusion that no *bona fide* defence could be shown.

Cases cited:

Boyce, NO, v Bloem, 1960 (3) SA 855 (TPD);

Hollington v Hewthorn (*supra*);

McNALLY AJ

Colrod Motors (Pty.) Ltd. v Bhula, 1976 (3) SA 836 (W);

Goody v Odhams Press Ltd. [1966] 3 All ER 369 (CA);

S v Khanyapa, 1979 (1) SA 824 (AD);

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Breitenbach v Fiat SA (Edms.) Bpk, 1976 (2) SA 226 (TPD);

Chrismar (Pvt) Ltd. v Stutchbury, 1973 (4) SA 123 (R); 1973 (1) RLR 277 (GD).

A P de Bourbon for the plaintiff.

P Sullivan for the defendants.

Judgment

McNally AJ: Plaintiff sought summary judgment on the simple basis that the three defendants had stolen $19 000 from him and had not repaid it. In their opposing affidavits all three defendants admit having been convicted in this court of theft of the $19 000, but aver that they are innocent and have sought leave to appeal from a judge of the Appellate Division (now the Supreme Court). Two of them allege that they were not present when the alleged offence was committed; the third simply says he is not guilty.

I am aware that since I heard argument the three defendants have been granted leave to appeal by a judge of the Supreme Court and I have no hesitation in taking judicial notice of that fact: *Boyce, NO, v Bloem,* 1960 (3) SA 855 (TPD) at 863D; Phipson on *Evidence,* 12th edition, paragraph 1302, *Hollington v Hewthorn* [1943] 2 All ER 35 (CA) at 41A-B. A claim for money allegedly stolen is a liquidated claim: *Colrod Motors (Pty.) Ltd. v Bhula,* 1976 (3) SA 836 (W.).

Prima facie, and before going into the law on the question, certain observations are pertinent. If leave to appeal had been refused, I would have been faced with a situation in which a judge of this Court had concluded beyond a reasonable doubt that the defendants had stolen the money, and a judge of the Supreme Court had concluded that there was no reasonable prospect of success on appeal. In the face of those decisions it would be very strange if I were to decide that it had been shown, on the lesser test of a balance of probabilities, that the defendants had a *prima facie and bona fide* defence to a claim for the return of the money.

It might be different, of course, if the defendants had said they did steal the money but had repaid it, or that they had some defence based on *par delictum* which disentitled plaintiff from recovering. But these considerations do not assist here, because they have not been raised.

Consider, on the other hand, what would have been the position if the defendants had been acquitted, whether at first instance or on appeal, at the stage when application for summary judgment was made. It is

inconceivable that a court could grant summary judgment when the defendants deny the theft and what evidence there is shows that there must be at least some doubt as to whether they stole the money.

Prima facie therefore it would seem that logic and common sense dictate that the fact of a conviction or acquittal is highly relevant in a summary judgment application.

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That being so, it is startling to be told by counsel that in order to follow this apparently sensible approach I must first overrule, or decline to follow, a series of cases in England and Southern Africa which have accepted, albeit reluctantly, the statement in *Hollington v Hewthorn (supra)* at page 40D that "on the trial the issue in the civil court, the opinion of the criminal court is irrelevant".

In the view I take of the matter it is not necessary for me to come to a conclusion on the rule in *Hollington v Hewthorn.* But I must say that when LORD DENNING, MR, in *Goody v Odhams Press Ltd.* [1966] 3 All ER 369 (CA) at 372A accepts the rule as binding (though wrong) and when a series of decisions in South Africa including those of the Appellate Division do likewise (I mention only the latest - *S v Khanyapa,* 1979 (1) SA 824 (AD) at 840B), I would certainly not take it upon myself to make new law. In England the judges left it to the legislature, who passed the Civil Evidence Act, 1968, in an attempt to put matters right. In South Africa amending legislation has been suggested in (1970) 87 *South African Law Journal* page 325 at page 337.

I would, however, venture to suggest that in a proper case, when an application for summary judgment was made after all the avenues of appeal in the criminal trial had been finally closed, a court could and should take that into account in deciding whether or not to grant summary judgment. I say this because it seems to me that the rule in *Hollington v Hewthorn* would not then be applicable. It is not, after all, the plaintiff who is seeking to rely on the conviction. He relies on the allegation that the money was stolen and not repaid. It is the defendant who says "despite my conviction for theft, despite the failure of my appeal, I ask this court to believe that I have a *bona fide* defence on the basis that I did not steal the money".

Despite the cautionary comment in such cases as *Breitenbach v Fiat SA (Edms.) Bpk.,* 1976 (2) SA 226 (TPD) at 228B I would find it hard, in such a case, to resist the conclusion that no *bona fide* defence was shown. I would say, in the words of BECK, J, in *Chrismar (Pvt) Ltd. v Stutchhury,* 1973 (4) SA 123 (R) at 125A "the proposed defence is clearly unarguable, both in fact and in law". However, that is not the

case here. Leave to appeal has been granted. For all I know, the appeals may succeed. There is no basis on which I can reasonably impugn the good faith of the defendants/appellants when they say that despite the convictions they did not steal the money.

I take the point that their affidavits are somewhat terse. But two of them say that their defence is an alibi. They did not steal the money and in fact were somewhere else at the time the theft is alleged to have occurred. I cannot see what more they could say. The third defendant, it is true, simply protests his innocence. Yet that in itself is enough. If he did not steal it as alleged, he does not owe it.

It would, I suppose, be possible for me to postpone this matter *sine die* with leave to the plaintiff to set it down again when the appeal has been determined. But it seems to me that that would defeat the object of the procedure which is designed to enable a plaintiff with a clear case to obtain the swift enforcement of his claim against a defendant who has no real defence to that

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claim. Had plaintiff wished to take advantage of this procedure he should have waited until after the appeal (or after the lapsing of the time for appealing) before instituting proceedings.

The approach I have adopted has the additional consequence that I avoid deciding the other difficult question which counsel put before me, namely, whether the provisions of section 30 of the Civil Evidence Act [*Chapter 41*] ("No evidence which is of the nature of hearsay evidence shall be admissible in any case in which such evidence would be inadmissible in any similar case depending in the Supreme Court of Judicature in England") mean that the English Civil Evidence Act, 1968, is part of our law. It is a startling proposition, contrary to the views of Hoffman, *Evidence,* third edition, page 11, and O'Dowd, *Evidence,* page 3, paragraph 4.

Mr *Sullivan*, for the defendants, asked for costs in the event the application was refused. Mr *de Bourbon* suggested they should be reserved. It seems to me the latter, in the circumstances, is the better course. I can see no basis for putting the defendant on terms as to security or otherwise, as provided in Rule 70.

The application is dismissed, costs to be reserved for determination at the hearing, and defendants are given leave to defend.

Coghlan, Welsh & Guest, legal practitioners for the Plaintiff.

Surgey, Pittman & Kerswell, legal practitioners for the defendants.

SHELL ZIMBABWE (PVT) LTD v WEBB 1981 ZLR 498

Court **High Court, Salisbury**

Opposed Motion

McNally, AJ

13th and 26th August and 2nd and 16th September, 1981

Flynote

Civil procedure - application for summary judgment - affidavit in support thereof - rule 64 of Rules of High Court - deponent must swear positively to facts within his knowledge - defects in affidavit can be cured by reference to other documents properly before court - evidence - judicial notice - court entitled to take judicial notice of previous decision of same court - cession of debt - effect of - cessionary not party to contract but replaces cedent as creditor - debt owed to cessionary.

Headnote

Summary judgment was claimed in the sum of $10 471,45, the alleged debt arising thus:

1. the defendant became surety for the plaintiff in respect of moneys owed to it by ET Services (Pvt) Ltd.

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2. ET Services had owed $10 471,45 to KO Tyres (Pvt) Ltd. for goods sold to it.

3. KO Tyres had ceded to the Plaintiff its rights against ET Services.

The point was taken *in limine* that Mr Copeland, the plaintiff's company secretary, who had signed the usual affidavit in support of the application, was the plaintiff's representative and thus could *prima facie* only swear to facts within the plaintiff's knowledge, and so would not know of K O.'s claim against ET It appeared, however, from the other documents before the court that Mr Copeland was actually K O.'s company secretary as well.

The second point taken *in limine* arose from an acknowledgement of debt by the defendant, in terms of which the defendant agreed to pay off the sum of $250 a week as from the 23rd November, 1981. Accordingly, the defendant claimed, the debt was not yet due. The acknowledgement also contained a clause saying that, despite the previously mentioned terms, full capital and

interest would become immediately due and owing if execution were levied against any of the defendant's property. Counsel for the plaintiff invited the court to take judicial notice of the fact that judgment had been executed against the defendant's property in an earlier action against it, arguing that if the court did this, then, in terms of the acknowledgement of debt, full capital and interest was owing.

On the merits, it was argued for the defendant that there was no debtor/creditor relationship between the parties. The plaintiff's right of action against ET arose only from the cession, and not from the debt; there was no debt due to the plaintiff.

Held, that, while rule 64 of the Rules of the High Court required the deponent to swear positively to the facts, if the affidavit failed to measure up to this requirement, the defect may be cured by reference to other documents relating to the proceedings which are properly before the court,(*Maharaj v Barclays National Bank Ltd.,* 19761(1) SA 418 (AD), followed). *Ex facie* the documents before the court Mr Copeland was KO's company secretary as well as the plaintiff's, and thus *prima facie* knowledgeable about the affairs of both companies.

Held, further, that the court was entitled to take judicial notice of the fact that an action had been instituted in the same court, the grounds on which it was brought and the findings of the court (*Boyce, NO v Bloem,* 1960 (3) SA 855 (TPD), followed).

Held, further, that in terms of the cession of debt the rights of the cedent as well as the rights of action were ceded; in fact, it was the claim that was ceded, and the correlative of the claim is the debt. The object of the cession is to replace the cedent with the cessionary as creditor and thus to create an obligation between the cessionary and the debtor.

Cases cited:

Maharaj v Barclays National Bank Ltd. (*supra*);

Trekker Investments (Pty.) Ltd v Wimpy Bar, 1977 (3) SA 447 (W);

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Wright v McGuinness, 1956 (3) SA 184 (CPD);

Venetian Blind Enterprises v Venture Cruises Boatel, 1973 (3) SA 575 (R); 1973 (1) RLR 229;

Breitenbach v Fiat SA (Edms.) Bpk., 1976 (2) SA 226 (TPD);

Boyce, NO v Bloem (*supra*);

Estate Fitzpatrick v Estate Frankel & Others, 1943 AD 207;

L.T.A. Engineering Co. v Seacat Investments (Pty.) Ltd., 1974 (1) SA 747 (AD);

Pizani & Another v First Consolidated Holdings, 1979 (1) SA 69 (AD);

Fincor v Hassan, 1981 ZLR 296.

N M R Gardener for the plaintiff.

A P de Bourbon for the defendant.

McNALLY AJ

Judgment

McNally AJ: In this application for summary judgment two points arose *in limine* and I reserved judgment on both and postponed the matter pending a decision on the points raised.

The claim is for two sums of money, the smaller of which, by common consent, has fallen away. We are concerned with an amount of $10 471,45 which is alleged to be owed by defendant to plaintiff in a somewhat roundabout way, as follows:

1. Defendant (Webb) became surety for plaintiff (Shell) in respect of moneys owed or becoming due to Shell by ET Services (Pvt) Ltd ("ET").
2. ET owed $10 471,45 to KO Tyres (Pvt) Ltd ("KO").
3. KO ceded to Shell its rights against ET
4. Thus Shell, as cessionary, was owed this sum by ET, and was entitled to look to Webb as ET's, surety.

Mr *de Bourbon* took the point that Mr Copeland, who signed the usual affidavit in support of the application for summary judgment, was Shell's representative and could thus *prima facie* only swear to Shell's knowledge. Shell could be expected to know that KO had ceded a claim to it, but how could it or its representative know about the merits of KO's claim against ET? He cited two decisions to support this contention: *Maharaj v Barclays National Bank Ltd.,* 1976 (1) SA 418 (AD); *Trekker Investments (Pty.) Ltd. v Wimpy Bar,* 1977 (3) SA 447 (W).

The former case concerns itself with the general proposition that where a person purports to "swear positively to the facts" his ability to do so is essential to the effectiveness of the affidavit

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as a basis for summary judgment, and the court entertaining the application therefor must be satisfied, *prima facie,* that the deponent is such a person:

> "Generally speaking, before a person can swear positively to facts in legal proceedings, they must be within his personal knowledge. For this reason the practice has been adopted, both in regard to the present Rule 32, and in regard to some of its provincial predecessors, of requiring that a deponent to an affidavit in support of summary judgment, other than the plaintiff himself, should state, at least, that the facts are within his personal knowledge (or make some averment to that effect) unless such direct knowledge appears from the other facts stated. The mere assertion by a deponent that he 'can swear positively to the facts' (an assertion that merely reproduces the wording of the Rule) is not regarded as being sufficient unless there are good grounds for believing that the deponent fully appreciated the meaning of these words "

McNALLY AJ

It may be noted that later on the same page CORBETT, J.A., continues:

> "Where the affidavit fails to measure up to these requirements, the defect may, nevertheless, be cured by reference to other documents relating to the proceedings which are properly before the court. The principle is that, in deciding whether or not to grant summary judgment, the court looks at the matter 'at the end of the day' on all the documents which are properly before it."

Our rule 64 requires a person to swear positively to the facts, and Mr Copeland's affidavit states, in part:

> "The facts in this action are known positively to me. I confirm that the defendant is indebted to the plaintiff in the sum of (here he sets out the larger total sum) for the reasons set out in the summons."

Now, in fact no reasons were set out in the summons, but the summons and declaration and Annexures A, B, C and D were all served together before the application was made. I am entitled to assume that Mr Copeland is speaking of all those documents together as containing the reasons. I consider, further, that I am entitled to refer to those documents, which, after all, could have been framed as particulars to the summons and endorsed thereon in terms of rule 13. Compare *Wright vs. McGuinness,* 1956 (3) SA 184 (CPD) at 187H-188A; *Venetian Blind Enterprises v Venture Cruises Boatel,* 1973 (3) SA 575 (R) at 577H.

Reference to those documents is relevant because, as Mr *Gardener* pointed out, the following facts appear:

1. *Ex facie* his affidavit, Mr Copeland's initials are DLGC
2. His signature appears as Shell's company secretary on Annexure B to the declaration.
3. Exactly the same signature appears on Annexure C to the declaration, which is a certificate by K O.'s company secretary. Moreover, the initials typed under the signature are DLGC
4. Annexure D, the cession agreement between KO and Shell, is signed quite obviously by the same person twice, once for KO and once for Shell. The signature is identical to that on the affidavit and to those on Annexures B and C

It does not seem to me that I am hearing evidence in contravention of the Rules when I listen to

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Mr *Gardener* pointing out these facts. I am no more hearing evidence from him than I am from Mr *de Bourbon* when he pointed out the "facts" on which his objection *in limine* was based. I am merely "looking at the matter on all the documents which are before me", to quote CORBETT, JA, in *Maharaj's* case *(supra). Ex*

McNALLY AJ

facie these documents Mr Copeland is apparently company secretary both of Shell and of KO, and thus *prima facie* knowledgeable about the affairs of both companies.

At this point I turn to consider the *Trekker Investments* case (*supra*) because that was very much *in pari materia* in that it also involved cession. BOSHOFF, J, said of the deponent in that case:

> *"Prima facie* he is making the affidavit on behalf of a cessionary and there is nothing in the affidavit to indicate that he had any connection with . . . the cedent of the claim ..."

and at page 448:

> "There is nothing from the circumstances of Greenfield making the affidavit which can lead the court to conclude that the facts relating to the claim of (the cedent) were within his knowledge . . . he is *prima facie* only in the position to swear positively as to the existence of the cession."

For the reasons I have given I do not believe that the same can fairly be said of Copeland. There is material in the documents before me which *prima facie* suggests that Copeland is knowledgeable not only about the cession but also about the debt ceded. I have therefore not the same reason as BOSHOFF, J, had to doubt that he is able to swear positively to the facts. And, when all is said and done, he has sworn positively. I may put the matter another way by saying that the inference drawn by BOSHOFF, J, on the facts before him, would not be justified on the facts before me. I am left therefore with a positive assertion in an affidavit by a company secretary which I have no reason to doubt. I should note, too, that the fact that a debt (albeit the amount is slightly different) exists is positively stated by the defendant in his affidavit, paragraph 6.

In the circumstances, the first point *in limine* fails.

The second point was not one taken by the defendant but by Plaintiff, and it arose in this way. Defendant annexed to its affidavit an acknowledgement of debt, the terms of which set out an agreement that the debt would be paid off at $250 per week as from the 23rd November, 1981. Accordingly, said defendant, the debt was not yet due.

The acknowledgement contained a clause saying (*inter alia*) that the full capital and interest would none the less become immediately due and owing if execution were levied against any of its property. Mr *Gardener* therefore invited me to look at the record in case No. GD 933 of 1981, from which it would appear that execution had been levied against ET, and thus that the defence was not a valid or *bona fide* one.

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McNALLY AJ

Now the first point to be noted is that the debt which is the subject of the acknowledgement is not for the same amount as the ceded debt. The former is $8 293,76, the latter is $10 471,45. But clearly defendant is treating them as one and the same, and I must assume that they are. After all, if the debt of $8 293,76 is a different debt, then Annexure A gives defendant no defence at all.

If, therefore, I assume that defendant is speaking in Annexure A to his affidavit of the same debt as that to which plaintiff refers and on which plaintiff relies, then two things can be said:

1. Defendant is effectively admitting that there is such a debt, and is thus assisting plaintiff by confirming the existence of the debt about which Mr Copeland has sworn his affidavit. The difference in the amount is not significant since it represents the balance of a running account.

2. Secondly, it seems to me that defendant's affidavit fails to reveal a defence, because it is for defendant to say, in the light of Annexure A, that it has not done any of the things set out in the acknowledgement which would have the effect of making the whole sum immediately due and payable. Without that statement (and there is no such statement in defendant's affidavit) I cannot be satisfied that there is a good *prima facie* defence, or a *bona fide one* - see *Breitenbach v Fiat SA (Edms.) Bpk.,* 1976 (2) SA 226 (TPD) at 226-229A.

Accordingly I do not consider that plaintiff's case is inevitably to be defeated unless he is permitted to refer me to the judgment in case GD 933/81.

But in any event I am satisfied that I am entitled to take judicial notice of a decision of this court. There is ample authority for this proposition: Halsbury, 4th edition, volume 17, paragraph 102, Wigmore, 3rd edition, volume IX, paragraph 2579, Cross, *Evidence,* 2nd edition, page 134, May, *South African Cases and Statutes on Evidence,* 3rd edition, page 138; Scoble, *Law of Evidence,* 3rd edition, page 53.

In a case like the present, it would seem to me to be entirely wrong if I were to ignore a decision (which I might even have made myself) and thus come to a conclusion that a *prima facie* and *bona fide* defence had been set up, when I knew from my own knowledge as a judge that it was not so. I would not be entitled, as I see it, to make use of the evidence led in another case, but I am entitled to have regard to

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McNALLY AJ

"the fact that that action was instituted, the grounds on which it was brought and the findings of the court " - *per* ROBERTS, AJ, in *Boyce, NO v Bloem,* 1960 (3) SA 855 (TPD) at 863D. Phipson on *Evidence,* 12th edition, paragraph 1302, says:

> "Every judgment is, therefore, conclusive evidence for or against all persons (whether parties, privies or strangers) of its own existence, date and legal effect."

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In the circumstances, I hold that the point *in limine* taken by the defendant fails and I rule in favour of plaintiff's claim to be entitled to refer me to the decision in this court, reference GD 933 of 1981. The matter is set down for argument on the merits on the 2nd September, 1981.

[Argument was heard on the 2nd September, 1981, and the following judgment delivered on the 16th September:]

The facts of this case are set out in my earlier judgment on various preliminary issues, delivered on the 26th August. In terms of that judgment I have satisfied myself as to the facts in case No. GD 933/81 and I note that execution was levied against the property of ET on the 24th June, 1981.

Mr *de Bourbon's* argument on the merits was a denial that there was a debtor/creditor relationship between the parties as a consequence of the complicated series of manoeuvres to which I referred in my previous judgment. In other words, he says that when Webb stood surety for all E T.'s debts to Shell, that suretyship did not cover a debt owed by ET to another party simply because that other party ceded to Shell its right of action against ET

This contention depends for its validity upon the idea that Shell's rights against ET arising out of cession are in some way different from Shell's other rights against ET arising out of ordinary trading obligations incurred by ET As I understand the argument, the distinction is said to lie between a debt on the one hand and a right of action on the other. When ET bought goods from Shell it owed Shell the purchase price and when the price became due and payable Shell had a right of action against ET In such circumstances one may say Shell's right of action arises from E T.'s obligation or debt to Shell. But when ET bought goods from OK and ultimately OK ceded its right of action to Shell, then, if I follow Mr *de Bourbon* correctly, Shell's right of action arises from the cession, not from the debt. The debt is still owed to OK All that OK has ceded to Shell is the right of action, not the

McNALLY AJ

debt itself. OK is still owed the money by ET but it cannot claim that money because it has ceded its right of action.

It is true that cession is applicable only to a transfer of rights and not to a transfer of duties (Scott, *Law of Cession,* page 10, footnote 15). "It is trite law that a party to a contract cannot by means of a cession of his rights rid himself of his obligations under the contract", as was said by CENTLIVRES, JA, as he then was, in *Estate Fitzpatrick v Estate Frankel & Others,* 1943 AD 207 at 217. While, therefore, a cessionary of rights under a contract does not become a party to the contract, and there may often be situations in which this distinction has to be drawn, it seems to me that counsel takes the matter an unwarranted step further, at least on the facts of this case, when he suggests that only the right of action has been ceded and not the debt.

If one concedes the theoretical possibility mentioned by Scott, *op. cit.,* page 10, footnote 14, that one can transfer an action without transferring the right from which it stems, one must ask what was done this case.

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The cession, Annexure D to the declaration, calls itself in the heading "Cession of Right of Action" but in the body of the document one reads that the cedent cedes "its claim" and the relevant wording is as follows:

> "The cedent does hereby cede and transfer to the cessionary all its right, title and interest in and to its claim for $10 471,45 due by ET Services (Pvt) Ltd to it.
>
> The cedent hereby authorises and empowers the cessionary irrevocably and *in rem suam* to claim and receive from the said ET Services (Pvt) Ltd. the amount of the said claim and to give any acquittances or receipts therefor; in its sole discretion to take action in its own name and on its own behalf . . . for the recovery of the said claim or any part thereof, to proceed to execution in respect of any judgment obtained in respect of the said claim, and generally to deal therewith as fully and effectually as the cedent might do."

Clearly from the wording of the first sentence this is a cession of the right as well as the right of action. It is the claim which is in fact ceded and the correlative of the claim is the debt.

As Scott says at page 75 of her book *(supra):*

> "The object of cession is to replace the cedent with the cessionary as creditor; in other words to create an obligation between the cessionary and the debtor.... It is generally accepted that the right of the cedent is transferred in its entirety to the cessionary."

McNALLY AJ

She then goes on to quote JANSEN, JA, in *LTA Engineering Co. v Seacat Instruments (Pty.) Ltd.,* 1974 (1) SA 747 (AD), where he says at 762A:

> "A cession is now considered to be a bilateral juristic act (agreement) whereby the cedent transfers his right of action to the cessionary, the latter taking the place of the former as creditor."

See also *Pizani & Another v First Consolidated Holdings,* 1979 (1) SA 69 (AD) at 76-78 *passim and Fincor v Hassan* a judgment of NEWHAM, J *(16)

I conclude therefore that in consequence of the cession Shell became the creditor of ET in the sum of $10 471,45 and thus ET owed that sum to Shell.

If one then turns to the Deed of Suretyship one finds that Webb guaranteed and bound himself as surety and co-principal debtor to Shell for the repayment when due of all sums of money which ET then or from time to time thereafter owed or was indebted in either contingently or unconditionally to Shell, from whatsoever cause arising and "whether incurred prior to the signature hereof or hereafter, nothing excepted . . .".

This wording in my view amply covers the debt of $10 471,45 owed by ET to Shell, and, since later in the document Webb renounced the usual benefits including excussion, Shell was entitled to proceed against him for this amount.

The last point made by Mr *de Bourbon* was that in view of the allegation in the plea that "it was agreed between the parties that the limit of defendant's liability would be $10 000", I cannot give summary judgment for any amount in excess of that. The plea was filed on the 15th July, 1981, and the defendant's affidavit on the 22nd July, 1981, but strangely no reference is made

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in the affidavit to this point, nor is the plea incorporated by reference. The plea is therefore not before the court in the sense that the allegations in it are supported by oath, whereas the allegations in the declaration and its annexures are (if only by necessary inference) supported by the oath of the applicant.

Be that as it may, it seems to me that this is a situation in which I should exercise the discretion given me by the terms of Rules 68 and 73 (b) and enter summary judgment only for the reduced sum of $10 000.

McNALLY AJ

Accordingly there will be summary judgment for plaintiff in the sum of $10 000, with interest *a tempore morae* from the 19th June, 1981, to date of payment, and costs of suit. Defendant is given leave to defend in respect of the balance of $471,45.

Kantor & Immerman, legal practitioners for the plaintiff.

Seirlis, Higham & Lewis, legal practitioners for the defendant.

THE STATE v POWELL 1981 ZLR 508

Court **Supreme Court, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Georges, JA

16th September, 1981

Flynote

Criminal law - Road Traffic Act, 1976 (No. 48 of 1976) - section 61 (1) (a) - failing to stop after an accident - driver not realizing until some time later that he had been involved in an accident at all - duties under section arise with such realization - failure then to carry out duties promptly - effect on sentence - negligence driving and contravening section 61 (1) (a) - whether appropriate to treat as one for sentence.

Headnote

The appellant pleaded guilty to charges of negligent driving and of failing to stop after an accident and carry cost the duties imposed by section 61 of the Road Traffic Act, No. 48 of 1976. Both counts were treated as one for sentence, and he was sentenced to six weeks' imprisonment with labour and a fine of $150. He was prohibited frown driving for six months and his driver's licence was cancelled.

He had been driving home one night and had struck the complainant, who was walking along the edge of the road, dressed in dark clothing. His eyes were momentarily off the road because

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he was lighting a cigarette. His immediate thought was that he had struck a stone; he did not see any pedestrians. He continued home but before getting there noticed that his windscreen was damaged. At that point he realized that what he had hit could not have been a stone, but was in a dilemma as to what to do; he decided to go home and telephone the police. When he got home, he asked his wife to telephone, while he returned to the scene.

The magistrate sentenced the appellant on the basis that she could not accept his explanation that he thought he had struck a stone.

Held, that as the prosecutor at the trial had accepted the appellant's explanation the magistrate erred in rejecting it without so informing the appellant.

Held, further, that the section is contravened not only if a driver is aware that he has hit a person, but also if he is or should have been aware that what he had hit might have been a human being. In this case, the offence

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BARON JA

was committed when the appellant observed the damage to his windscreen and failed to return to establish the cause of the damage (*R v Breingan,* 1966 (3) SA 410 (RAD); 1966 RLR 259 (AD) followed).

Held, further, that on the facts this case fell outside the normal run where a person is aware at the time of the impact that he has been involved in the kind of collision which might fall within section 61; in all the circumstances an effective sentence of imprisonment was not appropriate, although this type of offence is very serious indeed.

Held, further, that it was inappropriate to treat broth counts as one for sentence, such a course being proper where a series of similar offences are committed. Negligent driving and failing to stop are of a different order of offence.

Held, further, that the magistrate's order cancelling the appellant's driving licence; was not competent. The magistrate was obliged to prohibit the appellant from driving; but the cancellation is only mandatory if the prohibition is for more than 12 months (section 56 (a)).

Cases cited:

R v Breingan (supra);

R v Hartley, 1966 RLR 522 (AD); 1966 (4) SA 219 (RAD);

S v Fusirayi, 1981 ZLR 56 (AD); 1981 (2) SA 634 (ZAD).

M T O'Meara for the appellant.

J H C Friedman for the respondent.

Judgment

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Baron JA: The appellant was convicted on his plea of guilty of negligent driving contrary to section 43 (1) (a) of the Road Traffic Act, 1976 (No. 48 of 1976), and of failing to stop, failing to ascertain whether a person had been injured or killed and failing to render assistance contrary to section 61 (1) (a) (i), (ii) and (iii) of the same Act. For the purposes of sentence, both counts were treated as one and the appellant was sentenced to six weeks' imprisonment with labour and to a fine of $150 or, in default of payment, 75 days' imprisonment with labour, in addition, his driver's licence was cancelled and he was prohibited from driving for six months. He appealed against the sentence, and in substance the appeal is against the sentence of imprisonment.

The defence outline was that the appellant was driving home on the evening in question at about 8.30 p.m., along Upper East Road. It was dark; there were hedges and cypress trees along that section of the road. The complainant was walking with two others and was nearest to the road, his clothing was dark. The appellant's lights were in the dip position; the lights illuminated the road for some 30 feet ahead of his vehicle. He was driving from work and was extremely tired; he was in the process of lighting a cigarette with a cigarette lighter and was having some

difficulty and as a consequence his eyes were off the road. That is the reason he gave for the collision. His immediate reaction on feeling that he had struck something was that he had struck a stone; he had not seen any pedestrians. The point at which the impact took place was about one kilometre away from his home; he proceeded, and when he had travelled half way to his home he noticed that the left side of his windscreen was shattered. He realised that it was not a stone that he had hit but he thought then that he had hit a dog. At that point he said that he was in a dilemma and was uncertain whether to return to the scene or to go home. His wife is a State-registered nurse, he decided to go home and phone the police. As he got to the front gate of his house a taxi pulled up behind him. The appellant did not drive inside the house because he intended to return to the scene and he shouted to his wife to phone the police. The taxi driver advised the appellant that he had struck the complainant. The appellant returned to the scene immediately, by which time the police had arrived. The impact had taken place very close to the Avondale Police Station. At the time of the collision the appellant was in third gear, travelling uphill.

At the conclusion of the defence outline the court asked how shattered was the windscreen and was told that 20 to 30 centimetres from the left side of the windscreen was shattered. What was meant by shattered was never clarified, a matter of some importance to the question of the moment when the appellant realized that he had not struck a stone. The court then asked the prosecutor the following question:

> "Mr Breen, do you accept as reasonable the fact that accused thought he had hit a stone and not a human being or animal?
>
> Mr Breen: I don't accept that as reasonable. If he sticks to that I would proceed to trial on count 3."

Mr *Venturas*, who appeared on behalf of the appellant at the trial, then submitted the following

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explanation:

> "I submit that it was accused's duty to stop when he noticed the windscreen was shattered and that in fact the had not hit into a stone but a dog. Having realized that, he should have turned back. When he did not, he contravened section 61 of the Act, and that is why we plead guilty."

There was no further debate on the facts and the appellant appears to have been found guilty on the basis of the foregoing explanation.

The defence then addressed in mitigation and I quote once again a passage which is of some importance in relation to sentence:

> "There is no evidence that he tried to conceal this accident. He obviously panicked to ask his wife to phone the police. There is no indication that if

BARON JA

> the taxi driver had not followed him he would not have reported the accident.
>
> His wife did phone the police."

At the conclusion of the address in mitigation, the prosecutor said: "I accept his mitigation."

Now in sentencing the appellant the magistrate said this:

> "The place where the accident occurred is a residential area and as soon as you felt or heard the impact it should have put you on inquiry. I can't accept the explanation that you thought it was a stone, even if you were driving on dim lights considering that the impact was in front.
>
> Again considering that the windscreen was shattered some 20 to 30 centimetres from the left side, surely the impact causing such damage should have made you realise what you had hit."

Mr *O'Meara* submits, and Mr *Friedman* concedes, that it was unfair to the appellant and constituted a misdirection to reject the explanation that the appellant thought originally that he had hit a stone, and he relies an the cases of *R v Hartley,* 1966 RLR 522 at 526A-F and *S. v Fusirayi,* 1981 (2) SA 634 (ZAD).*(17)

I think Mr *O'Meara's* point is well taken and Mr *Friedman's* concession properly made. As appears from the passage quoted above the court viewed with some suspicion, and the prosecutor declined accept, the appellant's explanation that he thought he had hit a stone, but after the defence had explained that his belief lasted only until he until the damage to the windscreen the prosecutor had no more to say and seems clearly to have accepted the explanation. I agree therefore that the magistrate erred in rejecting the explanation that the appellant thought originally that he had hit a stone without informing him, before pronouncing sentence, that she did not accept it.

However, as to the explanation that the appellant thought he had hit a dog, it is quite clear from the case of *R v Breingan,* 1966 (3) SA 410 (RAD); 1966 RLR 259, that a person contravenes this particular section not only if he is aware that he has hit a human being, but also if he is aware or should have been aware that what he had hit might be a human being. In that case the defence was that the appellant thought he had been involved in a minor collision with a buck.

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MACDONALD, JA, as he then was, said at page 412:

> "On the whole of the evidence it would not be correct to find that appellant knew that he had collided with a human being, but he must have appreciated that there was a possibility that he had, and he preferred, by driving on, to remain in ignorance of the nature and consequences of the accident." .

BARON JA

It seems to me that that passage applies precisely to the present case, and it also seems clear that it was on the basis of that case that the plea guilty was proffered.

Having said that, however, it seems to me that the facts of this case take it out of the normal run of cases where a person is aware at the time of the impact that he has been involved in the kind of collision which might fall within section 61. Here it was accepted by the prosecution that the appellant originally thought he had hit a stone; to drive on with that belief did not constitute an offence. The offence was committed at the point where the appellant observed his windscreen was damaged and by then he was half way between the point of impact and his home. It is quite clear, and Mr *O'Meara* very properly concedes, that the correct course would have been immediately to have turned back, but he submits - and I think with force - that on the facts as accepted he was in two minds; he chose to drive on to his home rather than turn back, and whilst in doing this he certainly chose the wrong course his culpability is less than that of the driver who, knowing he has been involved in an accident which falls within the section, consciously drives on without establishing precisely what have been the consequences of the accident.

It seems to me that the learned magistrate did not approach the matter on this basis. She approached the matter on the basis that the appellant should have realized from the moment of impact that he had been involved in a collision falling within the section, and in this, as Mr *Friedman* concedes, she erred; consequently we are at large as to sentence.

It is unnecessary to go into great detail on the question of the personal circumstances of the appellant. He is a man of 50, he holds a responsible position as a lecturer at an institution in Salisbury. He has shown contrition. He visited the complainant in hospital. He has offered to pay any damages which might arise and he has referred the matter to his insurance company. In all these circumstances, it seems to me that an effective term of imprisonment is not appropriate in this case. In saying this I do, however, wish to stress that this kind of offence is very serious indeed, and that the factor which takes it out of the normal run is that the consciousness that it was necessary to stop and investigate the impact only arose some distance from the point of impact and at a point where he was very close to his home and a telephone.

There are two other matters which I should mention. The magistrate treated both these offences as one for the purpose of sentence. I think that the course of treating offences as one is more appropriate where a

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series of similar offences is committed. Negligent driving and failing to stop are of a different order of being, although the accident following which the appellant failed to stop might well have been caused by negligent driving, but as the learned JUDGE PRESIDENT pointed out during the course of the argument, a person driving impeccably might well be involved in an accident through no fault of his own, and he still commits this very serious offence if he drives on. I think the proper course in the present case would have been to treat these two offences separately and to sentence separately.

The other point is that the magistrate cancelled the appellant's driver's licence. This, is not a competent order. The magistrate was obliged to prohibit the appellant from driving; the cancellation is only mandatory if the prohibition is for more than 12 months. That appears from section 56 (2) of the Road Traffic Act, 1976.

I would therefore set aside the sentences on both counts and substitute the following:

On the count of negligent driving, a fine of $75 or, in default of payment, 30 days' imprisonment with labour.

On the count of failing to stop, a fine of $250 or, in default of payment, two months' imprisonment with labour, and in addition a sentence of six weeks' imprisonment with labour, the whole of which will be suspended for five years on condition that the appellant does not within that period commit an offence in contravention of section 61 of the Road Traffic Act and in respect of which he is subsequently convicted. In addition, the particulars of these convictions will be endorsed on the appellant's driver's licence. The order of the cancellation of the driver's licence is set aside. The prohibition from driving will stand.

We are informed that the appellant has not been driving since his conviction on the 24th June; he has voluntarily observed the prohibition pending the hearing of the appeal. In these circumstances it will I think be proper to order that the prohibition from driving will run from the 24th June.

Lewis JP: I agree.

Georges JA: I agree.

Byron, Venturas & Travlos, appellant's legal representatives.

OWEN-SMITH v OWEN-SMITH 1981 ZLR 514

Court **Supreme Court, Salisbury**

Civil Appeal

Fieldsend CJ, Lewis, JP and Georges JA

25th September, 1981

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Flynote

Husband and wife divorce - maintenance following - rescission of maintenance on grounds that woman "living with" another man - financial not moral considerations relevant - issue is whether her means or circumstances have thereby altered and to what extent former husband relieved from paying maintenance - defence of res judicata - must be pleaded - basic alteration of circumstances entitles reinvestigation of case.

Headnote

The appellant had divorced the defendant in 1967 and, in terms of a consent paper, he was to pay her $350 a month maintenance until her death or remarriage. In 1969 she began living in a flat and in 1971 a man named Hunt moved into the flats her lodger. A few years later they moved into a house They shared living expenses. On isolated occasions they had sexual relations but they usually occupied separate bedrooms.

The respondent applied to the maintenance court for a discharge of the maintenance order or, alternatively, for its reduction to a nominal amount on the basis that the appellant and Hunt were living as man and wife. The magistrate came to the conclusion that they were living in that way and inferred that they refrained from marrying in order to preserve her claim for maintenance from the respondent. He varied the maintenance order by reducing it to a norminal $1 a year.

The appellant's reaction was to move to a flat on her own, and apply for a variation to increase her maintenance. This application was heard by another magistrate, who dismissed it, on the grounds that her move was not a genuine termination of her relationship with Hunt. Against this decision she appealed.

It was argued by the respondent's counsel that the decision of the first magistrate must be regarded as *res judicata,* since there had been no appeal against it.

In any event the appellant had failed to show that an increase in her maintenance was justified.

1981 ZLR p515

LEWIS JP

Held, allowing the appeal with costs, that the first magistrate's approach had been erroneous and that the maintenance should not have been reduced to a nominal amount. Even if the appellant and Hunt had been living as man and wife - a finding which was not justified by the facts - the only grounds in terms of section 8 (5) of the Maintenance Act [*Chapter 35*] for varying the order would be "alterations" in the "means and circumstances" of the parties. The morality of the relationship is irrelevant; it is the financial implications of the divorced wife's conduct that must be examined, to see to what extent the husband is thereby relieved from paying maintenance to the appellant.

Held, further, that the defence of *res judicata* could not succeed. In the first place, it must be pleaded. Secondly, where there had, as in this case, been a basic alteration in the appellant's circumstances, this entitled her to a reinvestigation of the whole case and not merely to the cursory treatment afforded it by the second magistrate.

Held, further, that there was no basis on the facts for finding that the appellant was not *bona*

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fide, and accordingly she was entitled to have her maintenance reinstated.

Cases cited:

Watson v Watson, 1959 (1) SA 185 (N.P.D.);

Vooght v Winch (1819) 106 ER 507; [1814-23] All ER Rep. 270;

Burman v Woods [1948] 1 KB 111;

Essack v Essay, 1955 (2) SA 407 (D & CLD);

Drummond v Drummond, 1979 (1) SA 161 (AD);

Schlesinger v Schlesinger, 1968 (1) SA 699 (WLD);

Hancock v Hancock, 1957 (2) SA 500 (CPD);

Hughes, N.O. v The Master and Another, 1960 (4) SA 936 (CPD);

Stead v Stead [1968] 1 All ER 989 (PDA).

B W K Whaley for the appellant.

A P de Bourbon for the respondent.

Judgment

Lewis JP: The appellant appealed to this court against a judgment in the maintenance court dismissing her application for an increase in the amount of maintenance payable to her by the respondent, her divorced husband. After hearing argument, the court allowed the appeal with costs and ordered that the respondent pay maintenance to the appellant in the sum of $500 per month with effect from the 4th May, 1981, the date of the judgment appealed against. At the same time, the court said that reasons for this decision would be handed down at a later date. Here are the reasons.

The appellant divorced the respondent on the 9th February, 1967, on the grounds of his adultery. In terms of a consent paper which was made an order of court the respondent was liable to pay maintenance

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to the appellant in the sum of $350 (£175) per month "until her death or remarriage". From January, 1970, the consent paper was varied, but the respondent's liability for this maintenance remained unchanged.

In 1969 the appellant began living in a rented flat and in 1971 one Hunt, a divorcee with whom she had become friendly, moved into the flat as her lodger. The flat had three bedrooms and two bathrooms, and she and Hunt occupied separate bedrooms. They shared living expenses. In 1974 they moved into a house and their relationship continued on a similar basis. The

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appellant candidly admitted that sexual intercourse took place on an average once every six to nine months, and usually when she had had too much to drink after a party. In 1975, when Hunt was transferred to Gwelo, she went with him. They shared accommodation on a similar basis there. In 1978 they moved back to Salisbury. Hunt acquired a house which they occupied together. She paid him $100 a month as rent and they shared living expenses.

The respondent applied to the maintenance court in terms of section 8 of the Maintenance Act [*Chapter 35*] for a discharge of the maintenance order or, alternatively, for a reduction of the maintenance to a nominal amount on the basis that the appellant was living with Hunt as his wife. The magistrate who heard the application, relying on an *obiter dictum* of MILNE, J (as he then was), in *Watson v Watson,* 1959 (1) SA 185 (TPD), came to the conclusion that the appellant and Hunt were living together as man and wife, and inferred that the appellant was deliberately refraining from marrying Hunt in order to preserve her claim for maintenance from the respondent. He accordingly varied the maintenance order by reducing the amount payable to a nominal sum of $1 *per annum.*

The appellant, instead of appealing against this decision, simply moved out of Hunt's house and went to live in a flat of her own where she is still residing. She then applied to the maintenance court for a variation to increase her maintenance to $775 per month, alternatively to $581 per month. The application was heard by another magistrate who dismissed it. His conclusions were summed up as follows:

> "Accordingly, I find that she has not convinced me that her moving to a flat is a genuine termination of her man and wife relationship with Hunt or that her consequent incurring of additional expenses is anything more than a fictional separation to enable her to apply for reinstatement of the maintenance. Accordingly, the applicant has not discharged the onus upon her and the application must fail."

The appellant appealed to this Court against the decision.

LEWIS JP

In his, argument in support of the magistrate's judgment, Mr *de Bourbon* submitted that everything decided by the first magistrate must be regarded as *res judicata* on the basis of issue estoppel. We were unable to agree with this submission. The proceedings in a maintenance court, sitting as a statutory court in terms of the Maintenance Act [*Chapter 35*], differ from those of an ordinary civil action between litigants. There are no pleadings. In terms of section 13 (b) and (c) of the Act, the maintenance court is enjoined to conduct the proceedings "on such principles as the maintenance court deems best fitted to do substantial justice and the maintenance court may call such witnesses as it deems necessary for the purpose;" and (c) "the maintenance court shall have power to issue a subpoena for the attendance of any witness, to call for the production of any book or document and to examine any witness on oath". In an ordinary civil action the court itself has no power to call evidence *mero motu*, at least without the consent of both parties. Decisions by a maintenance court do not normally assume the character of final judgments as they can be varied if circumstances change. Moreover, it is of the essence of the defence of *res judicata* that it must be pleaded. See, for example, *Vooght v Winch* (1819) 106 ER 507; [1814-23] All ER Rep. 270.

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It seems to me that the proceedings under the Maintenance Act are comparable with those under the English Rent and Mortgage Interest Restrictions (Amendment) Act of 1933, which laid down the circumstances in which a landlord might eject a tenant and regain possession of his own property. The landlord had first to establish that the house was reasonably required by him for occupation as a residence for himself. There was also the following proviso, that "an order or judgment shall not be made or given . . . if the court is satisfied that having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it:".

In the case of *Burman v Woods* [1948] 1 KB 111, SOMERVELL, LJ, in whose judgment EVERSHED, LJ, and ROXBURGH, J, concurred, held that the principle of *res judicata* as such did not apply to proceedings brought under the Act. At pages 112-13 he said:

> "Apart from authority, I would myself have thought that the principle of *res judicata*, as such, did not apply to the issue of greater hardship as it is expressed in the proviso to paragraph (h), and as it has to be decided by the Court. The Court has to direct its mind to the date of the proceedings and the evidence which it hears at the time, and clearly that is the date on

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> which its order is drawn up; but it is plain that the relevant facts with regard to hardship may alter at any time: the occupier of the house whose hardship is the relevant consideration on January 1 may die on January 2; or, to take a longer period, families may increase, there may be illnesses, or houses may become more plentiful. Every sort of circumstance may arise to change the relevant facts on which the issue of greater hardship falls to be decided. Therefore, I should not have thought that the principle of *res judicata*, as such, was applicable to such cases."

The learned judge then went on to refer to authority on the subject.

In that case, a landlord's application had been dismissed and less than a year later he re-applied unsuccessfully for ejectment, the county Court judge having ruled that the matter was *res judicata* At pages 114-15 SOMERVELL, LJ, continues:

> "It would, of course, clearly be undesirable if parties were able, within a very short time of a decision, to come back and expect the court to hear the matter all over again. However, if a party sought to do that, the application could perhaps, if the proper steps were taken, be struck out as frivolous and, no doubt, the plaintiff be penalized in costs. For reasons which I will explain in a moment, I will keep open the question whether, if a previous decision has been given under paragraph (h), the onus may be on the plaintiff on the hardship issue, to show such a change of circumstances as to make the judge decide to reinvestigate it; whereas, of course, it has been laid down that in proceedings taken under the paragraph for the first time the onus is on the defendant.
>
> I leave that question open because I think that, on the evidence and in the circumstances existing here, the landlord did, according to the judge's note, furnish material on which the judge ought to have held that this matter must be reinvestigated, assuming that the landlord must show some change of circumstance. At the time of the first proceedings in 1945, the landlord, his wife, a daughter aged 11, and another child, just born or about to be born, had gone to live with the wife's parents. The evidence which the landlord gave after a year of this experiment was that things had not run smoothly, the baby being now 14 months old. In my opinion, in those circumstances, *res judicata* not applying, and even assuming, without deciding, that the onus was on the landlord, that onus has been discharged and the matter should be reinvestigated, both sides putting their evidence before the county court judge, who will then decide on which side at this later date greater hardship lies. For those reasons, I think that this judgment cannot stand."

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Burman v Woods (*supra*) was referred to with apparent approval in *Essack v Essay,* 1955 (2) SA 407 (D and CLD) at page 409G by KENNEDY, J

In terms of section 3 (b) of the Maintenance Act, introduced by the amending Act 22 in 1975, the maintenance court has power to summarily dismiss without inquiry any application which it considers to be frivolous

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and vexatious. Had the appellant continued living with Hunt and then simply brought an application to reinstate her maintenance straight away after the first hearing such an application might well have been dealt with in that way. That, however, was not the position. It is quite clear that when she came to the maintenance court on the second occasion there was a basic alteration in her circumstances, and this entitled her to a reinvestigation of the whole case and not merely to the cursory treatment afforded it by the magistrate.

I am quite satisfied, for reasons which will appear later, that the first magistrate's approach was erroneous and that the appellant's maintenance should never have been reduced to a nominal amount in the first place. Even if one were to assume it to have been correct, however, I am in no doubt at all that the approach of the magistrate in the judgment now appealed against was wrong.

In deciding that the appellant and Hunt were living together as man and wife, the first magistrate applied the test formulated in *Drummond v. Drummond,* 1979 (1) SA 161 (AD) by the South African Appellate Division when interpreting a clause in a consent paper which provided that a divorced wife's maintenance should cease on proof that she was living "as man and wife with a third person on a permanent basis". The first magistrate relied on the following passage in the judgment of TRENGOVE, A J.A., at pages 167B-D which begins:

> "As to the meaning of the phrase 'living together as man and wife', I respectfully agree with the observations of ELOFF, J, in the judgment of the full Court, namely that it denotes 'the basic components of a marital relation ship except for the formality of marriage' and that 'the main components of a *modus vivendi* akin to that of husband and wife are, firstly, living under the same roof, secondly, establishing, maintaining and contributing to a joint household, and thirdly maintaining an intimate relationship, - and I would add - in which sexual intercourse, in the case of parties of moderate age, would usually, but not necessarily always, be an essential concomitant. And, in that context, the phrase 'on a permanent `basis' connotes, in my view, a continuing relationship, one that is intended by the parties to continue indefinitely without change."

That case, however, apart from other considerations which will be referred to later, dealt with a situation quite different from that prevailing in this case. There the maintenance order was to cease on proof that the divorced wife was "living as man and wife with a third person on a permanent basis". Here the consent paper provided that payments were only to cease on "death or remarriage".

An irregular association of concubinage cannot be regarded as marriage, nor is there room for implying a term that maintenance should

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cease if a wife lived in concubinage when the agreement spoke of remarriage - *Schlesinger v Schlesinger*, 1968 (1) SA 699 (WLD).

On the facts in *Drummond*'s case (*supra*), Mrs. Drummond was found to have been living together as man and wife with the third person, Bosch, within the meaning of the clause. After referring to the fact that they lived together under the same roof and had sexual relations, the learned judge continued at page 168H;

> "The evidence also shows that, quite apart from this intimate relationship, the appellant and Bosch were living in a manner akin to that of husband and wife. The appellant was rendering the duties of a housewife to Bosch and he was supporting and caring for her as a husband would. The appellant prepared the food; she saw to Bosch's laundry; they had their meals together; they used to go to the shops together to buy groceries and other provisions for the household...."

In the instant case, Hunt was never supporting the appellant, each of them paid their own way. This was, in fact, admitted by the respondent at the hearing before the first magistrate as appears from the following passage in his evidence in cross-examination:

> ". . . our case is that she is in fact making that monthly expenditure and therefore she is not being supported by Mr Hunt - do you accept that? That I accept she is sharing the running of the house with Mr Hunt? - yes, I accept that.
>
> And that she is supporting herself? I think a lot of these items are shared items.
>
> That is quite right, but she is supporting herself on that level of expenditure? Yes, in the sense she is contributing my money towards sustaining that household.
>
> It doesn't matter where it comes from, but that is what she requires and what she is spending to support herself, do you accept that? Yes."

By the time the matter came before the second magistrate there was the additional factor that they were no longer living under the same roof, which is one of the essential elements constituting living together as man and wife on a permanent basis referred to in *Drummond*'s case (*supra*). The appellant was no longer even sharing expenses.

The magistrate found that she was not *bona fide*, because she was still friendly with Hunt, was still dependent on Hunt for transport three times a week and still spent some time in Hunt's house tending the garden and seeing her pets, which she had to leave there because she could not keep them in the flat to which she had moved. In our opinion, there was no basis whatsoever for such a finding. At the hearing before the first magistrate the appellant said quite candidly that if the magistrate de-

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prived her of maintenance she and Hunt would have to separate and the reason she gave was the very understandable one reading as follows:

> "If I lost maintenance I would have to live somewhere else. If I cannot pay my way I would have to leave. It is a business relationship with friend ship. I don't think he would struggle along with me if I got no maintenance. There

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is no affection."

The appellant is now an elderly woman of 58 suffering from arthritis. Hunt is some seven years her junior and there is nothing whatever to suggest that there was ever any possibility of marriage between them. In the light of her ex-husband's application to the first magistrate for dis charge or variation of the maintenance order on the basis of her association with Hunt, Hunt wrote a letter to the appellant reading as follows:

"Dear Rikki,

I am not going to be put in the position of being accused of, by sharing a house with you, I am fraudulently benefiting from the maintenance paid by your ex-husband also being classed as your common law husband. In the circumstances I regret we must part company and you must move to your own separate establishment as soon as possible please.

Furthermore I am not prepared to go into the magistrates Court and give evidence of my income and expenditure, and possibly my private life, to enable the Court to decide whether or not your ex-husband can avoid his responsibilities or that his assumptions are correct.

Yours, Geoff."

This was put in as Exhibit 2.

To suggest that the appellant was not *bona fide* in doing what she had earlier maintained she would be forced to do if she lost her maintenance is nonsense. She was perfectly entitled to take up the attitude: "If the court rules that I am not entitled to maintenance if I continue living with Hunt under one roof and sharing expenses, then I will cure that disability and put an end to my living with Hunt on that basis." It is absurd to suggest that in order to qualify for maintenance, it was her duty to cut adrift from Hunt altogether and not even see him as a friend.

We were in no doubt, therefore, that the magistrate's decision was a wrong one and that the appellant, in her new circumstances, was entitled to have her maintenance reinstated. In fact, the respondent himself, at the first hearing, suggested that if this were to come about he would feel obliged to continue paying her maintenance. This is apparent from the following further passage in his evidence under cross-examination:

". . . what I am putting to you is that if the relationship is as your former wife claims it to be, then it will come to an end if she cannot pay her way? All I can say is if that should arise then when she is on her own I would be quite content to honour the original agreement."

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As to the question of the *quantum* of the maintenance, the application for an increase to $775 a month was based on the increase in the cost of living since 1969. The alternative figure of $581 per month was based on a schedule of her monthly expenses amounting to $701 a month less her average income of $120 a month from part-time employment with the Mashonaland Turf Club. It seems to the court that certain items in the list of monthly expenditure were inclined to be inflated and that the proper order would be to reinstate the appellant's maintenance in a round figure of $500 per month, back-dated to the date when the magistrate should have made

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an award in her favour.

The costs of appeal followed the result, and in regard to the costs in the court below no order was made. The Act provides for the magistrate to fix such lump sum by way of expenditure as he thinks would meet the justice of the case. This court is not in a position to arrive at any figure.

Before concluding, we feel it necessary to pronounce upon the correct ness of the first magistrate's finding for the future guidance of maintenance courts.

As has been indicated above, the magistrate relied upon the *obiter dictum* of MILNE, J, in *Watson*'s case (*supra*) at page 189F which was as follows:

> "I must say that it seems to me that, if it could be shown that the respondent in this case was living in adultery with van Rensburg, although she is now *prima facie* free to marry again, and that an operative reason for not marrying van Rensburg is that by marrying him she will forfeit her right to maintenance because of the terms of the agreement, it would be good cause for the rescission of the maintenance order, at any rate in the absence of some very special circumstance."

The phrase "good cause" for the rescission of a maintenance order refers directly to section 10 of the Matrimonial Affairs Act 37 of 1953 in South Africa, which reads (quoted from *Hancock v Hancock,* 1957 (2) SA 500 (CPD) at 501):

> ". . . any Court of competent jurisdiction may, on good cause shown (which may be a cause other than the financial means of either of the respective spouses) rescind, suspend or vary any such order."

"Any such order" refers to an order against the guilty spouse for maintenance of the innocent spouse made on the granting of a divorce. The meaning of the words "good cause" in the South African Act is not decisive of cases arising in this country. Our Maintenance Act [*Chapter 35*], section 8 (5), provides for the variation of an order because

of "alterations" in the "means and circumstances" of the partied concepts not necessarily identical with "good cause" in the South African legislation.

The fact that in South Africa "good cause" may include factors other than the financial means of either spouse could arguably allow moral considerations to be weighed, though HERBSTEIN, J, expressed the contrary view in *Hughes, NO v The Master and Another,* 1960 (4) SA 936 (CPD) in the following passage at pages 940-1:

> "Mr *Knight* contended further, that it was common cause that second respondent was living in adultery and that this would constitute 'good cause'.
>
> It is clear from the decisions in *Parkes v Parkes,* 1932 SR 72, and *Watson v Watson,* 1959 (1) SA 185 (N.), that the Court will not read into the 'consent' an implied '*dum casta*' clause. If the deceased did not make the right to maintenance dependent on second respondent leading a chaste life there is no reason why this Court should vary the agreement to include such a term.
>
> That such a term should not be implied does not ipso facto mean that a Court might not consider the fact that a party is living in adultery as good cause for its interference. In my opinion, however, the Court should not do so.

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> For to do so involves the introduction of moral considerations and this might in turn require an examination into the characters and mode of living of those who would benefit by the interference of the Court."

It should be noted that TRENGOVE, AJA, in *Drummond v Drummond* (*supra*), having defined the concept of "living together" in the terms already quoted earlier, went on to add at page 167A:

> "This clause was obviously designed to provide for the contingency that the appellant might establish a permanent relationship with some other man, and enjoy the advantage of being supported by him, without attracting the consequences of a marriage and the resultant cessation of any liability for maintenance on the part of the respondent."

The financial considerations were clearly in the judge's mind - whatever the moral approach may have been.

In *Stem v Stead* [1968] 1 All ER 989 (PDA) at pages 992-3 WILLMER, LJ, made it clear that it is the financial and not the moral implications of the divorced wife's conduct which must be examined. This accords with the language of our Maintenance Act [*Chapter 35*]. If a wife is being fully supported by the man with whom she is living then the likelihood is that her "circumstances" have altered since the order was made and she would not be entitled to maintenance from her former husband.

LEWIS JP

In *Watson*'s case (*supra*) MILNE, J, expressed the view (supported by TRENGOVE, AJA) that if an operative reason for the ex-wife not marrying the third person was that she would thereby forfeit her right to maintenance from her husband that would provide "good cause" for rescission of the maintenance. That may or may not be so. In this country, however, it does not appear that an ex-wife's motive for not remarrying could be an "alteration" in her "means or circumstances" justifying a variation of an order. If she lives with a man who supports her that is a change in her circumstances and the fact that she will not marry him is irrelevant. If she had a sharing arrangement with a man, meeting her expenses of the menage, there would be no alteration of her "circumstances", except in so far as it could be shown that two can live more cheaply than one.

The first magistrate, as we have said earlier, was able to draw the Inference that this "operative reason", referred to by MILNE, J, existed in the instant case. The basis upon which he did so entirely escapes us. There is not the slightest indication in the evidence that during all the years of their association together either the appellant or Hunt ever entertained the slightest intention or desire to get married. All the evidence is to the contrary. I have already referred to the marked difference in their ages. The appellant at all times maintained that the arrangement was one of convenience to share living expenses, based on mutual friendship, although she frankly conceded that sexual intercourse had taken place on rare occasions. The attitude of Hunt himself appears clearly from his letter, Exhibit 2, quoted above. Even if the appellant herself were desirous of marrying Hunt, that would not affect the position unless the desire were mutual. Apart from that, we would like to refer again to the judgment of *Stead v Stead* (*supra*). In our view, the following passage at page 993A has much to commend it. WILLMER, LJ, there

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said:

> "I only wish to add two more observations, and they relate to the last two reasons which the learned stipendiary gave for the decision at which he arrived. The first of those was that the unknown man had offered marriage to the wife but that she had declined the offer. With all respect to the learned stipendiary, I can see no relevance in that fact at all. If we were to support this view with regard to the relevance of that fact, we should in effect be saying that the Court is entitled to put pressure, financial pressure, on a wife to marry a man whom she does not want to marry. I cannot think that that is a correct view of the policy of the law."

To sum up, therefore, on this aspect, in our view the first magistrate's approach to the matter was erroneous both in fact, and in law. His approach should have been to examine to what extent the arrangement

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LEWIS JP

between the appellant and Hunt resulted in a saving of money to the appellant, and consequently to what extent the respondent was thereby relieved from paying maintenance to the appellant. There was no basis whatever for reducing her maintenance to the nominal sum of $1 *per annum*.

Fieldsend CJ: I agree.

Georges, JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives.

Atherstone & Cook, respondent's legal representatives.

THE STATE v HAWA 1981 ZLR 526

Court **Supreme Court, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Georges, JA

15th September and 13th October, 1981

Flynote

Criminal procedure - sentence - appeal against sentence - events occurring after sentence by trial Court - Supreme Court of Zimbabwe Act, No. 28 of 1981 - section 11 (4) whether subsequent events deemed to have occurred before sentence by trial Court criminal law - Exchange Control Act [Chapter 170] - section 5 - funds repatriated after sentence for illegal export of foreign currency - whether such repatriation fulfils condition precedent enabling appellant to escape mandatory sentence or whether merely mitigatory.

Headnote

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The appellant was convicted, *inter alia*, of contravening section 16 (1) (b) of the Exchange control Regulations, in that she exported foreign currency to a value of $6168,50. She had received the money legitimately in the course of her business and had taken it with her to Switzerland. When directed by the Reserve Bank to repatriate her external funds, she was able to repatriate only $2 398,27, having been defrauded of most of the rest of it. She was sentenced to a fine of $6 500 and in addition to an effective term of one month's imprisonment. The repatriated currency was forfeited to the State.

Since the date of sentence the balance of the currency exported had been repatriated, due to the efforts of the appellant's relatives outside the country.

It was argued on her behalf that, in view of the wording of section 11 (4) of the Supreme Court of Zimbabwe Act (No. 28 of 1981), the Court should, on appeal, place itself in the position of the trial Court and pass the sentence that the trial Court ought to have passed if the events which had occurred after the date of sentence had actually occurred before that date and been placed before the trial Court.

Held, that where, as here, a mandatory sentence is prescribed by the legislation on proof of the existence of specified circumstances, such circumstances cannot be deemed, by virtue of subsequent events, not to have been fulfilled. Repatriation of currency in accordance with the provisions of the Exchange

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BARON JA

Control Act is a condition precedent to the ability of a convicted person to escape the imposition of a prison sentence. Such repatriation must have occurred within, at most, three months from the date of conviction. Repatriation otherwise than in accordance with the Act can be no more than mitigatory. Section 11 (4) of the Supreme Court of Zimbabwe Act merely gives the Supreme Court a discretion, additional to the discretion of the trial Court, to pass such sentence as it thinks is just and equitable, having regard to all the circumstances obtaining at the date of the appeal.

Held, further, that the inability of the appellant to repatriate the whole of the currency because it was impossible for her to do so was not a factor which meant that the whole of the mandatory term of imprisonment should properly be suspended. The unlawful export of currency always involved a risk that it might be impossible to repatriate such currency.

Held, further, however, that taking into account all the circumstances obtaining at the date of the appeal this was a proper case in which to exercise a discretion in favour of the appellant and suspend the whole of the mandatory sentence imposed by the magistrate.

Cases cited:

R v Mudzivereyi, 1963 R & N 255 (SR); 1963 (3) SA 80 (SR);

R v Stevens, 1969 (2) RLR 143 (AD);

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R v Bennet [1968] 2 All ER 753 (CA),

S v Horowitz, 1976 (1) RLR 238 (AD).

R R Horn, SC, for the appellant.

P Sack for the respondent.

Judgment

Baron, JA: The appellant was charged on one count of contravening section 16 (1) (a) of the Exchange control Regulations, 1977, published in Government Notice 399 of 1977, as read with section 5 (1) (a) (i) of the Exchange control Act [*Chapter 170*] (to which I will refer as the Acts, in that she exported foreign currency to the value of $6168,50, and on a second count of contravening section 5 (l) (b) of the Act, in that she made a false statement as to the value of goods she was exporting on behalf: of a customer.

The facts in relation to count one are that the appellant, who owns a gift centre in Bulawayo, received legitimately in the course of her business payment in foreign currency for goods purchased fly tourists; she accumulated this foreign currency and took it with her when she went to Switzerland on holiday in August, 1978. In addition, following another holiday to Switzerland in 1979, she failed to repatriate a small portion of her unused holiday allowance. Thereafter, she made the acquaintance of a man, who turned out to be a confidence trickster, who not only tricked her into lending him 2 000 Swiss fransc but also fraudulently withdrew a further 5 000 - odd Swiss francs from her account

BARON JA

in Switzerland. In an effort to recover this money she spent a further 3 750 Swiss francs in legal fees. In the event, however, she was unable to recovery any of the money of which she had been defrauded. In August, 1979, the appellant received a directive from the Reserve Bank in connection with her external funds, but for the foregoing reasons all she was able to repatriate was $2 398,27.

The facts in relation to count two are that the same man who had defrauded the appellant of her money in Switzerland visited Zimbabwe on one occasion during the relevant period and purchased goods from her shop to a total value of $13 500. At his instigation, she undervalued these goods when she completed the documents relating to their export. It was accepted by the prosecution that there was never any intention on the part of the appellant to receive less than the correct purchase price of the goods, and it was accepted also that payment was to be made to her in this country as required by the relevant legislation. In fact, the appellant received no payment for the goods and did not recover them.

The appellant pleaded guilty to both counts and was duly convicted. On count one she was sentenced to a fine of $6 500 or, In default payment, three months' imprisonment with labour, and in addition to months' imprisonment with labour, of which five months was suspended for five years on conditions. In addition, the repatriated currency, namely $2 398,27, was declared

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forfeit to the State. On count two, the appellant was sentenced to a fine of $500 or, in default of payment, to one month's imprisonment with labour, the whole of which was suspended for five years on conditions.

The appellant appals only against sentence on count one. Mr *Horn* submitted (and Mr *Sack* conceded) that since the whole of the currency exported had since the date of sentence been repatriated no sentence of imprisonment, even wholly suspended, is now mandatory, and that in the circumstances of this case such a sentence is not desirable. The former of these submissions is based on the provisions of section 11 (4) of the Supreme Court of Zimbabwe Act, 1981, which enables this court on an appeal against sentence to have regard to all the circumstances of the case, including events which have occurred after the date of sentence. Mr *Horn* submitted that the proper construction of this section s that the court places itself in the position of the trial court and passes the sentence that the trial court ought to have passed if the events which had occurred after the date of the sentence had in fact occurred before that date and had been placed before the trial court. The issue is whether this construction is correct, or whether the correct approach

BARON JA

is for the court, having regard to all the circumstances including the events which have occurred after the date of sentence, simply to pass such sentence which at the date of the appeal it considers to be just and equitable. The distinction is not of mere academic interest. It is true that the two approaches lead to the same result in most cases, but where, as here, special procedures and a mandatory sentence are prescribed by the legislation the different approaches lead to important differences in result.

Section 11 (4) of the Supreme Court of Zimbabwe Act, 1981 (No. 28 of 1981), reads:

> "(4) On an appeal against sentence the "Supreme Court shall, if it thinks that a different sentence should be passed -
>
> (a) quash the sentence passed at the trial and pass such other sentence warranted in law in substitution thereof, whether more or less severe, as it thinks ought to be passed, having regard to all the circumstances, including events which have occurred after the date of sentence:
>
> Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial; or
>
> (b) without altering the sentence passed at the trial, declare what sentence the court or tribunal of first distance should have passed;

and in any other case shall dismiss the appeal."

This subsection replaces section 19 (4) of the High Court act [*Chapter 14*] which reads:

> "(4) On an appeal against sentence the Appellate Division shall, if it thinks that a different sentence should have been passed, set aside the sentence passed at the trial and pass such other penitence warranted in law (whether more or less severe) in substitution thereon as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

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Mr *Horn*, in support of his submission that this court is now enjoined to place itself in the position in which the trial court would have been had it had before it the events which have subsequently taken place, submitted that the language of file new section, employing as it does the present tense, supports such a construction. I have to confess my inability to follow this argument; it seems to me that the use of the present tense is plainly against Mr *Horn*, since it enjoins the court to do what it thinks should now be done instead of, as previously, what should have been done by the court below.

But it there were any doubt about the meaning of the language used, this is resolved by a consideration of the position of this court in the case of an appeal against a mandatory sentence. Where the imposition of the penalty is mandatory simply on proof of the commission of the

BARON JA

offence, as in a case falling under section 8A of the Stock Theft Act [*Chapter 72*], the present issue does not of course arise. But frequently the imposition of the prescribed penalty becomes mandatory only on proof also of the existence of specified circumstances; the existence of those circumstances; is then a condition precedent to the obligatory imposition of tile prescribed penalty. It is not a matter of mitigation, it is question of whether or not the conditions in which the prescribed penalty must be imposed have been fulfilled. If they have, that is an end of the matter. Those conditions precedent cannot be deemed, by virtue of subsequent events, not to have been fulfilled save by means of the fiction that events which took place after sentence are deemed to have taken place before sentence; I can see no warrant for reading such a fiction into section 11 (4) of the Supreme Court Act.

Mr *Horn* did not consider that mandatory sentences posed any problems for the construction for which he contended. He postulated a case in which a trial court, having convicted an accused of murder and having found no extenuating circumstances, imposed the mandatory death penalty; and he submitted that if, between the date of sentence and the hearing of the appeal, extenuating circumstances were to arise this Court would be entitled to impose a sentence other than death. This argument is untenable; extenuating circumstances are circumstances connected with the. commission of the offence and *a fortiori*, unlike new mitigatory factors, cannot arise after sentence.

The difficulties in the way of Mr *Horn's* construction of section 11 (4) of the Supreme Court act are perhaps best illustrated fly the very Act under which the appellant was charged. The relevant portions of subsections (4) and (5) of section 5 of the Act read:

> "(4) Where a person -
>
> (a) is convicted of an offence in terms of -
>
> (i) paragraph (a) of subsection (1) which involves the exportation from, or acquisition outside, Rhodesia of any gold, currency, security, goods or other property whatsoever in contravention of the provisions of this Act; or

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(ii) ...

and

(b) does not satisfy the court that -

(i) foreign currency in an amount of not less than the value of such property which has been exported from, or acquired outside, Rhodesia has been received in Rhodesia; or

(ii) ...

the court may, before passing sentence, adjourn the proceedings for such period not exceeding three months as the court deems fit in order to give

BARON JA

the convicted person an opportunity of so satisfying the court on the resumption of the proceedings.

(5) Where a person convicted of an offence referred to in paragraph (a) of subsection (4) does not satisfy the court as to one or other of the requirements mentioned in subparagraphs (i) and (ii) of paragraph (b) of subsection (4), the court shall -

(a) in all cases have regard to that fact as a factor in aggravation sentence, and

(b) if the convicted person an individual and the value of the property concerned exceeds two hundred dollars, impose a sentence of imprisonment for such period as the court deems fit in addition to any fine required by subsection (3a)."

Thus the position is this. A person who has been convicted on an offence which involves the exportation of currency from Zimbabwe and who has not already repatriated the funds will, if he wishes to avoid the imposition of a prison sentence, which is mandatory in terms of subsection (5) (b), ask the court to adjourn the proceedings to enable him to effect such repatriation. If he fails to repatriate all the funds involved within the period of the adjournment the court is obliged to impose prison sentence, although it may in a proper case suspend the whole of it. On the other hand, it he succeeds in repatriating all the funds within the period in question the court may in a proper case decide not to impose any prison sentence, even one wholly suspended; but in the absence of special reasons the court will be obliged in terms of section 7 (1) of the Act to forfeit the funds repatriated.

The construction of section 11 (4) for which Mr *Horn* contends would lead to a result in direct conflict with the express provisions of the Act. Unless all the funds illegally exported are repatriated at the latest within three months after the date of verdict the trial court is obliged to impose a prison sentence; there is no discretion to grant an adjournment of more than three months from verdict. But if Mr *Horn* is correct a prison sentence need not be unposed by this court, and therefore notionally by the trial court, even though repatriation may not have taken place until after sentence in the court *a quo*. It is, once again, a fiction for which there is no warrant to regard repatriation which has taken place aver sentence as having taken place before sentence. Repatriation in accordance with the provisions of the Act is a condition precedent to the ability of a convicted person to escape the imposition of a prison sentence; repatriation otherwise than in accordance with the Act can be no more than mitigation. This court is entitled to have regard to the repatriation after sentence in the court below as a new

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mitigating factor; it is not entitled to regard it as fulfilling a condition precedent.

BARON JA

I am therefore satisfied that section 11 (4) (a) of the Supreme Court Act does not enjoin this court notionally to regard the subsequent events as having taken place prior to the date of sentence and to pass the sentence which the trial court ought in those circumstances to have passed, had this been the intention of the Legislature it could have been achieved by an amendment which retained far more of the existing language and which retained in particular the expression "ought to have been passed". I am satisfied that the section gives this Court a discretion, additional to the discretion of the trial court, to pass such sentence as it thinks is just and equitable, having regard to all the circumstances obtaining at the date of the appeal.

This construction rectifies the unsatisfactory position which previously existed and on which the Courts have commented from time to time. Section 19 (4) of the High Court act [*Chapter 14*], because it did not permit the appellate court to have regard to mitigatory factors which had taken place after the date of sentence, led to harsh results. Thus in *R v Mudzivereyi,* 1963 R & N 255; 1963 (3) SA 80 (SR), LEWIS, J (as he then was), sitting with MAISELS, J, on an appeal from the magistrate's court, said at page 83:

> "Whatever sympathy one might feel for the appellant on this account, it does not seem to me that it is competent for this court on appeal to have regard to the award of the scholarship, notwithstanding the acquiescence of counsel for the Crown, for it is a new factor which has arisen since the trial."

In *R v Stevens,* 1969 (2) RLR 143, BEADLE, CJ., expressed himself forcefully on the desirability of an amendment to the section. More recently, this court has on more than one occasion, on an appeal by the Attorney-General against a sentence on the ground that it was manifestly inadequate, found itself with no alternative but to impose the sentence which the trial court should have imposed, notwithstanding that had we had a discretion to do otherwise we would have exercised that discretion in favour of the respondent. But in none of these hard cases was it necessary to deem subsequent events to have taken place prior to sentence, indeed where the harshness which this court would have preferred to avoid consists in sending a man to prison who had been sentenced in the court *a quo* only to a fine, the question of a subsequent event does not arise. The object of the Legislature is fully achieved by construing the section in the manner I have indicated; apart from all the other considerations I have discussed, the construction for which Mr *Horn* contends goes further than is necessary.

It is interesting to note that the corresponding English legislation has followed a similar course. Section 4 (33 of the English Criminal Appeal

BARON JA

Act, 1907, was, for practical purposes, identical with our section 19 (4) of the High Court act [*Chapter 14*]; section 97 (7) of the Criminal Justice Act, 1967, gave the Court of Criminal Appeal a wider discretion. This section was repealed and replaced by section 11 (3) of the

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Criminal Appeal Act, 1968, which reads:

> "(3) On an appeal against sentence the Court of Appeal, if they consider that the appellant should be sentenced differently floor an offence for which he was dealt with by the court below may -
>
> (a) quash any sentence or order which is the subject of the appeal; and
>
> (b) in place of it pass such sentence or make such order as they think appropriate for the case and as the court below had power to pass or make when dealing with him for the offence;
>
> but the Court shall so exercise their powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with an appeal than the he was dealt with by the cost below."

The difference between the wording of that section and that of section 11 (4) of the Supreme Court act is not material to the present case. The new English section was the subject of *R v Bennet* [1968] 2 All ER 753 (C.A.). Referring to the new English section, WIDGERY, LJ (as he then was), said page 755:

> "In our judgment, those new words permit us to hear the evidence of Dr. Neustatter and Dr. Schildt and to act on it, notwithstanding that there was no evidence before the court of trial on which a hospital order could be made."

The report is not entirely clear, but it seems that the reference to evidence was not to evidence which was in existence at the time of the trial, when reliance on the new section would have been unnecessary, but to evidence of facts which had come into existence subsequently.

I turn finally to the merits of the present case. Mr *Sack* conceded that on the facts as they stood when the regional magistrate passed sentence the whole sentence of imprisonment should have been suspended. The matter has now been overtaken, but I think I should say that in my view Mr *Sack's* concession went very much too far. A major feature of the argument in mitigation in the court *a quo* was that the inability of the appellant to repatriate the whole of the funds illegally exported was due to circumstances beyond her control, it was submitted that she had done everything possible to obtain the return of the funds and she had gone so far as to expend a considerable additional sum in an effort to recover the money of which she had been defrauded. On this basis it was argued that although a sentence of imprisonment was mandatory in terms of subsection (5) (b) it was proper, taking into

account all the other personal circumstances and mitigating features, to suspend the whole of whatever term of imprisonment were to be imposed. The magistrate declined to accede to this argument. He pointed out that the appellant had voluntarily taken the rick of being unable to repatriate the money, and although it is true that she could not reasonably have anticipated that she would be deliberately defrauded by the man whom she obviously trusted, nevertheless a person who invests in the kind of enterprise in which the appellant was persuaded to invest clearly takes the risk that she will suffer the loss of some or perhaps even all her money. Again, there must be the obvious risk that the country to which the money has been illegally exported will not permit its repatriation to this country. Although therefore there is some force in the argument that the appellant could not have anticipated the loss of her money in precisely the way in which she lost it, she certainly took a conscious risk. The magistrate therefore felt that

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although the mitigation was sufficiently persuasive for him to suspend most of the term of imprisonment a comparatively short effective term was necessary. It is impossible, in my view, to say that the magistrate's discretion was wrongly exercised; on the contrary, I think his approach was correct. One wonders whether, had the whole prison sentence been suspended, the appellant's relatives outside the country would have rallied round and paid the funds to cover the balance of the moneys unlawfully exported, and which have now been received in the country. The main purpose of section 5 (4) of the Act is to protect the country's foreign exchange reserves and this objective would be defeated if the courts were too readily to suspend the whole of a mandatory prison sentence. AS MACDONALD, ACJ (as he then was), said in *S v Horowitz,* 1976 (1) RLR 238 at page 242:

> "But, making every possible allowance for the appellant, it does not seem to me that the magistrate's decision to impose an elective prison sentence can be faulted. 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 Mthembu*, 1970 (1) SA 435 (N)), and will only do so when the mitigating circumstances clearly make such a course desirable."

The funds illegally exported have now been repatriated, and protection of the foreign currency exchange reserves has been achieved. The appellant pleaded guilty and co-operated fully with the authorities, at the date of trial the matter had been pending for some two years and at the date of the appeal a further three-and-a-half months had elapsed. The appellant has been under very considerable strain, and we were informed that the chance of a nervous break-down was very real. In all the circumstances, we were satisfied at the conclusion of the hearing that this was a proper case in which to exercise our discretion

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BARON JA

in favour of the appellant and, taking into account also the repatriation of the whole of the funds illegally exported, to order the suspension of the whole of the mandatory prison sentence imposed by the magistrate. I wish to stress, however, that this decision has not turned simply on the subsequent repatriation of the remainder of the funds in question. If this court were in effect automatically to take this course it might encourage accused persons to adopt a wait-and-see attitude, secure in the knowledge that if they succeed in persuading the trial court to suspend the whole of the sentence it would not be necessary for them to repatriate. This would be a most undesirable state of affairs. As I have already indicated, I have a sneaking suspicion that had the magistrate suspended the whole of the sentence in the present case the remainder of the funds in question might not have been repatriated. The subsequent repatriation would not, by itself, have bun sufficient to persuade me to interfere with the magistrate's sentence, I have been influenced also by the other mitigatory factors.

The question remains as to the order now to be made. Another of Mr *Sack's* concessions in this case was in response to Mr *Horn's* submission that the State could not have its cake and eat it; if, so the argument ran, the repatriation is not deemed to have taken place prior to sentence in the court *a quo* then it is not competent for this court to order the forfeiture of the funds subsequently repatriated. I am by no means satisfied that this submission, as a general proposition, is correct; section 7 (1) of the Act reads:

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"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, unless the convicted person satisfies it that there are special reasons in the particular case, which shall be recorded by the court, why forfeiture to the State should not take place, declare such property, or the rights of the convicted person thereto, to be forfeited to the State:

. . .

On the facts of the present case it may well be argued that the offence was not committed "by means of or in respect of" the funds which the appellant's family caused to be sent to Zimbabwe. But that is a different point, generally there would appear to be no reason why the mandatory forfeiture should not be ordered in a case where repatriation has taken place between the date of sentence in the court below and the date of appeal. However, the matter was not fully argued, it being accepted on both sides that the question was one of form rather than substance, and in those circumstances I prefer to leave the point open.

BARON JA

In the result I would vary the sentence imposed by the magistrate to the following extent: The whole of the sentence of six months' imprisonment win labour will be suspended for the same period and on the same conditions as those imposed by the magistrate; the appellant will be fined an additional sum of $3 377. The remainder of the sentence and order of the magistrate will stand.

Lewis JP: I agree.

Georges JA: I agree.

Lazarus & Sarif, appellant's legal representatives.

ARGEE AND SONS (PRIVATE) LIMITED (UNDER JUDICIAL MANAGEMENT) v LEVER BROTHERS (PRIVATE) LIMITED 1981 ZLR 537

Court **High Court, Salisbury**

Civil Application

Smith, J

1st and 21st October, 1981

Flynote

Companies - Companies Act [Chapter 190] - section 272 - stay of execution of processes against company in respect of which judicial management order in force - applies to post- as well as prejudicial management proceedings - grounds on which court may allow execution.

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Headnote

In terms of section 272 of the Companies Act [*Chapter 190*], the court, in making a judicial management order in respect of a company, may "direct that while the judicial management order is in force all actions and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without leave of the court first obtained".

The applicant company was placed under judicial management in 1976. The respondent subsequently became a creditor of the applicant. In April 1981, the respondent applied for leave to commence proceedings against the applicant for the recovery of the sum of $12 745 due to it. The application was unopposed and was granted. In July, 1981, the respondent applied for a writ of execution, which the applicant sought to have stayed. The questions to be decided were, *inter alia* -

(1) whether the provisions of section 272 applied only to pre-judicial management debts;

(2) how the court should exercise its discretion in respect of a stay of execution.

Held, that the provisions of the section referred to future as well as pending proceedings; any other interpretation would lead to anomalous results (*Samuel Osborn* (*SA*) *Ltd. v United Stone Crushing Co.* (*Pty.*) *Ltd.*

1981 ZLR p538

SMITH J

(*Under Judicial Management*), 1938 WLD 229; *Ross v Northern Machinery and Irrigation* (*Pty*.) *Ltd.,* 1940 TPD 119, followed).

Held, further, that the discretion as to whether or not to grant a stay of execution must be exercised judicially. Factors to consider are -

(1) whether, by granting leave to execute, the respondent would thereby be granted a preference over the other creditors;

(2) the other remedies available to the respondent.

In the circumstances, the stay of execution would be granted.

Cases cited:

Samuel Osborn (*SA*) *Ltd. v United Stone Crushing Co.* (*Pty.*) *Ltd* (*Under Judicial Management*) (*supra*);

Ross v Northern Machinery and Irrigation (*Pty.*) *Ltd.* (*supra*);

Western Bank v Laurie Fossati Construction (*Pty*.) *Ltd* (*Under Judicial Management*), 1974 (4) SA 607 (E.C.D.);

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Jagger-Mosenthal Ltd v J M van der Walt (*Pty.*) *Ltd.,* 1969 (1) SA 124 (OPD);

Tobacco Auctions Ltd v A W Hamilton (*Pvt*) *Ltd.,* 1966 (2) SA 451 (R); 1966 RLR 190.

C L Mercer for the applicant.

C S Grossman for the respondent.

Judgment

Smith J: The applicant company was placed under provisional judicial management by an order of this court of the 3rd September, 1976, which order was confirmed and made final on the 14th October, 1976. Section 272 of the Companies Act [*Chapter 190*] provides that in a judicial management order the court "may direct that while the judicial management order is in force all actions and the execution of all writs, summonses and other processes against the company be stayed and be not proceeded with without leave of the court first obtained". Paragraph 1 (e) of the judicial management order relating to; the applicant contains such a direction.

The respondent is a post judicial management creditor of the applicant and on the 1st April, 1981, the respondent applied to this court for leave to commence proceedings against applicant to recover the sum then due, namely $12 745,31 with interest and costs. This application was unopposed and the order sought by the respondent was granted. Since then the respondent has received two payments from the applicant and the sum now due is $7 672,68.

The judicial manager of the applicant states that on the 20th July, 1981, he was advised that the respondent had issued a writ of execution. The judicial manager then decided to bring this application in which he seeks a stay of execution. The judicial manager states that the application

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made in April, 1981, by the respondent to commence proceedings against the applicant was unopposed (probably ill-advisedly) because he was desirous of keeping down costs and at the time he was not sure whether he could conclude certain arrangements which have now been concluded and which have resulted in all post judicial management creditors being paid 44 per cent. of their claims, and which will result, the judicial manager says, in their being paid a further 10 per cent. of their claims this month (October), and in their being paid in full within a period of 12 months and possibly less.

The agreement which the judicial manager has concluded is a complicated one and I do not propose to set it out at any length. An agreement has been concluded for the value of certain assets relating to the trading outlets of the company to be realised, partly for cash and partly in exchange for a shareholding investment in a new company which will take over the day-to-day management of the majority of trading outlets. In addition to the payment of $50 000 (according to Mr Mercer, and not disputed) already received, the applicant will, it appears, also receive further payments at the rate of $2 000 a month and, in addition, certain rentals. The judicial manager anticipates a total realization in excess of $100 000.

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In his replying affidavit, the credit control manager of the respondent company has levelled a number of complaints and criticisms relating to the administration by the judicial manager of the affairs of the applicant company. Both counsel addressed the court at some length on these matters. I do not consider that it would be wise or helpful to canvass these matters in detail on the papers. I would merely say that the judicial manager appears to have answered many of the criticisms. On the other hand, the respondent's complaint at not yet having been paid for goods purchased in the period October to December, 1980, is obviously justified.

Counsel argued this application in the following way:

1. Whether the provisions of section 272 of the Companies Act relating to the staying of actions and of executions as set out above, apply only to pre-judicial management debts.

2. Whether, in any event, the order of this court of the 1st April, 1981, granting leave to the respondent to commence proceedings against the applicant, included leave to execute.

3. If the above two questions were to be answered in favour of the

applicant, counsel were agreed that the court would then have a discretion as to whether or not to stay execution. Both counsel asked for costs, depending on the outcome.

I turn now to the first question. In *Samuel Osborn* (*SA*) *Ltd v United Stone Crushing Company* (*Pty*) *Ltd* (*Under Judicial Management*), 1938 WLD 229, a similarly worded provision relating to the staying of actions and executions of writs, etc., was considered. GREENBERG, JP, as he then was, said at page 234 that it was assumed in argument on both sides that the provision refers to future as well as pending proceedings. He said that if it were to be interpreted as referring only to pending proceedings it would produce anomalous results and that the interpretation which was assumed that the provision referred to future as well as pending proceedings was, no doubt, correctly assumed. In *Ross v Northern Machinery and Irrigation* (*Pty.*) *Ltd.,* 1940 TPD 119 BARRY, J, also assumed that the provision in question applied to future as well as pending proceedings. In what seems to be the only other case in which the provision has been considered, the proceedings sought to be brought were again post judicial management proceedings. See *Western Bank v Laurie Fossati Construction* (*Pty.*) *Ltd* (*Under Judicial Management*), 1974 (4) SA 607 (E). The view of GREENBERG, JP, as to the meaning of the provision has had subsequent acceptance, no doubt for the reason given by him, and, with respect, that view commends itself to me.

I now turn to the second question: as to whether the order of court of the 1st April, 1981, included leave to execute. The order reads as follows:

> "That leave be and is hereby granted to the applicant (Lever Brothers (Private) Limited) to continence proceedings against the respondent (Argee & Sons (Private) Limited (in judicial management)) to recover the sum due to the applicant, namely, TWELVE THOUSAND SEVEN HUNDRED AND FORTY-FIVE DOLLARS AND THIRTY-ONE CENTS ($12 745,31), plus interest thereon *a tempore morae* and costs of suit, including the costs of the application.

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That the costs of this application be paid by the respondent."

I have inserted the names of the applicant and respondent in setting out this order for the sake of clarity. In my view the order gives no more than leave to commence proceedings. That is what it says. The words which follow, beginning with the words "to recover", are, in my opinion, no more than descriptive of the claim to be brought. It does not follow that where leave is given to commence proceedings such leave

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includes leave to execute. See *Ross v Northern Machinery and Irrigation* (*Pty.*) *Ltd* (*supra*). In that case the applicant asked for leave to sue and for leave to execute. BARRY, J, granted leave to sue but not leave to execute the judgment without the leave of the court, because if leave to execute were granted it would have meant that the applicant would have been given preference over the other creditors.

Having answered the first two questions in favour of the applicant I now come to the third question: as to how the court should exercise its discretion whether or not to stay execution. The nature of the discretion is considered in Western *Bank Ltd v Laurie Fossati Construction* (*Pty.*) *Ltd* (*Under Judicial Management*) (*supra*). In brief, it is a discretion that must be exercised judicially and not arbitrarily or capriciously.

I was informed from the Bar that there has been a resolution by the pre-judicial management creditors, in terms of section 276 (3) of the Companies Act, providing for a preference in favour of post judicial management creditors, as set out in the provision. There are 36 post-judicial management creditors. These are listed in Annexure H to the respondent's replying affidavit.. Their claims total $44 384,37. If leave were to be granted to the respondent to execute it would result in a preference over other creditors to the respondent, to which he is not entitled. That is reason enough for refusing such leave. See the *Samuel Osborn* (*SA*) *Limited* case, *supra*, at page 236 and *Ross. v Northern Machinery and Irrigation* (*Pty.*) *Ltd.* (*supra*), at page 121. It is also of importance that at a creditors' meeting on the 19th June, 1981, the arrangement entered into by the judicial manager, to which I have referred, was approved. The respondent did not, apparently, attend that meeting.

I am satisfied that, in the circumstances, the relief sought by the applicant must be granted. The respondent will not be left without his remedies. One remedy, of course, would be to apply, should he be so advised, for the cancellation of the judicial management order on the ground that the creditors will not be paid within a reasonable time, if the respondent is so satisfied. In such event all interested parties would have notice of the application. See *Jagger-Mosenthal Ltd v J M van der Walt* (*Pty.*) *Ltd.,* 1969 (1) SA 124 (OPD); *Tobacco' Auctions Ltd. v A W Hamilton* (*Pvt*) *Ltd*., 1966 (2) SA 451 (R).

Accordingly, it is ordered:

1. That the respondent shall not issue a Writ of Execution in pursuance of its judgment obtained in Case No. GD 709/81.

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2. That leave be and is hereby granted to the respondent to apply for authority to issue a writ, should circumstances change.

3. That the respondent pay the costs of these proceedings.

Gollop & Blank, applicant's legal practitioners.

Coghlan, Welsh & Guest, respondent's legal practitioners.

THE STATE v GUMBO AND OTHERS 1981 ZLR 543

Court **High Court, Bulawayo**

Criminal Review

Gubbay, J

23rd October, 1981

Flynote

Criminal law - Exchange control Act [Chapter 170] - section 5 - failure to repatriate whole of sum of foreign currency exported - imprisonment mandatory, although in appropriate circumstances may be suspended - section 7 - forfeiture to State of currency repatriated - mandatory unless special reasons proved by accused - repatriation of currency not such a reason

Headnote

On conviction on a charge of exporting foreign currency, it is mandatory to impose a prison sentence if the accused fails to repatriate the same amount within three months of the date of conviction. That repatriation is impossible or that the amount returned is only marginally less than that exported are simply factors to be taken into account into deciding whether such sentence of imprisonment should be suspended in whole or in part.

Likewise, forfeiture of currency repatriated by the accused is mandatory, unless the accused shows that special reasons exist in his particular case not to order forfeiture. The fact of repatriation is not in itself such a reason, nor is the fact that in many other cases where the foreign currency has not been repatriated it has not been possible to declare it forfeited.

Cases cited:

S v Horowitz, 1976 (1) RLR 238 (AD);

S v dos Santos, AD 271/77 (not reported).

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Judgment

Gubbay, J: The three accused were convicted by the same regional magistrate, in separate trials, of contravening section 5 (1) (a) (ii) of the Exchange control Act [*Chapter 170*]. The gravamen of the charges was that having purchased foreign currency, the accused failed to comply with the conditions of the permit or authority under which such currency was granted them, namely, that it was to be utilised for holiday or travel purposes. Julia Gumbi was sentenced to a fine of $250 or, in default

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GUBBAY J

of payment, one month's imprisonment with labour; Mauroisi Mamboininga to a fine of $580 or two months' imprisonment with labour; and Sheila Chinyoka to a fine of $260 or one month's imprisonment with labour. In each instance the quantum of the fine equated to the value of the foreign currency involved tin the offence, the accused being unable to establish under section 5 (3a) of the Act special reasons why lesser fines should be imposed.

Although Julia Gumbi did not repatriate the foreign currency she had expended in Botswana upon the purchase of clothing, the regional magistrate held that he was not obliged in terms of section 5 (4) as read with sermons 5 (5) ,(b) and 5 (7) (b) of the Act, to sentence her to a period of imprisonment in addition to the minimum fine. He reasoned as follows:

> "In so many cases like the present one the accused used the foreign currency to purchase clothes for use or resale in this country. She can be assumed to have no outside resources and it would clearly not be possible or her to redeem the currency by giving the clothes back to the person or persons from whom she bought them.
>
> These are stringent penal provisions to which the valid defence of impossibility, where this is common cause, as it has been in these cases, should be taken to apply. It is only in those cases where a possibility, however remote, exists that the currency can be repatriated that the provisions in question are invoked."

The position with regard to Mauroisi Mamboininga was somewhat different. He succeeded in returning to the country foreign currency equivalent to $500. The regional magistrate considered that as the shortfall not repatriated was only to the value of $76,78, it was not obligatory to impose a prison sentence upon the accused.

Sheila Chinyoka was able to satisfy the regional magistrate that the requisite amount of foreign currency had been returned, and so the question of conjoining a period of imprisonment with the fine did not arise.

I am in no doubt that the regional magistrate misdirected himself in respect of the first two accused. It is abundantly clear from the provisions of section 5 (4) (a) and (b) as read with sections 5 (5) (b) and 5 (7) of the Act, that if an individual is convicted of an offence which involves the exportation of foreign currency in excess of $200 (or of malting a statement in connection with such exportation) and fails to repatriate the same amount within three months of conviction, the court "shall" impose a sentence of imprisonment in addition to a fine required by section 5 (3a). The sole criterion is whether an amount of foreign currency being "not less" than the value of "property" exported, or

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the property itself, has been returned to the country. If it has not imposition of a prison sentence is mandatory. But it is competent to suspend the whole period thereof, provided that the weight of the mitigating circumstances makes such a course desirable. See *S v Horowitz*, 1976 (1) RLR 238 (AD) at 242C-D, *S v dos Santos*, AD 271/77 (not reported). That repatriation is impossible (as with Julia Gumbi), or that the amount of foreign currency returned is only marginally less than that exported (as with Mauroisi Mamboininga), are simply factors to be taken into account in deciding whether such imprisonment should be suspended in whole or in part.

It follows that the proceedings relating to Julia Gumbi and Mauroisi Mamboininga must be remitted to the regional magistrate so as to enable him to suppose upon each accused such term of imprisonment as he may deem fit. Thereafter, the cases are to be resubmitted for review.

A further aspect remains to be dealt with. The regional magistrate declined to order forfeiture, under section 7 (1) of the Act, of the amounts of foreign currency repatriated by Mauroisi Mamboininga and Sheila Chinyoka. In respect of the first-mentioned, he said:

> "Were I to order forfeiture of these moneys in addition to imposing the minimum fine for this offence then I would be punishing the accused in effect far more severely than the ordinary person dealt with in these courts, where no repatriation has taken place at all. This would clearly be inequitable and I find that to be a special circumstance why I should not order forfeiture of these moneys."

In my view the regional magistrate was wrong in thinking that a declaration of forfeiture in favour of the State would have resulted in an unjust and disparate punishment upon the accused vis-à-vis offenders who fail to repatriate; for their failure is a factor in aggravation of sentence and *must* be visited with imprisonment, whether operative or suspended. However that may be, it seems to me that the regional magistrate overlooked the importance which attaches to the phrase "special reasons in the particular case", in section 7 (1). The fact that in many other cases where the foreign currency concerned has not been repatriated by the offender it has not been possible to declare it forfeited to the State, does not constitute a special reason in the *particular* case for withholding the order from the State.

The argument the regional magistrate advanced for not declaring forfeiture of the foreign currency against Sheila Chinyoka was simply that its repatriation amounted to a special reason. Such an approach is, with respect, quite erroneous. If repatriation is to be regarded as a special reason in the particular case, the intention of the lawmaker in providing

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the penalty of forfeiture will be entirely defeated, for the provisions of section 7 (1) can only come into effect and play a part in the overall sentence after the currency or other property has been repatriated by the offender.

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The regional magistrate now accepts that he misdirected himself, but it is too late to redeem the situation by ordering that he apply the provisions of section 7 (1). Both accused undoubtedly will have acted in accordance with his decision and have sold the foreign currency involved to an authorised dealer. In the circumstances, albeit with some hesitation, the proceedings relating to Sheila Chinyoka are confirmed.

Newham J has read this judgment and agrees with it.

THE STATE v SERGEANT TOM AND OTHERS 1981 ZLR 547

Court **Supreme Court, Salisbury**

Criminal Appeal

Lewis, JP, Baron, JA, and Georges, JA

19th October, 1981

Flynote

Criminal procedure - appeal - irregularities in proceedings of tribunal a quo alleged - proper course is to bring proceedings on review before High Court by notice of motion.

Headnote

The Supreme Court, on appeal, has to have regard to what appears on the record. If allegations are made of gross irregularities in the proceedings in the court or tribunal *a quo*, the proper course far the dissatisfied party to adopt is to bring proceedings on notice of motion in the High Court in order to review the tribunal's proceedings. If there had been something on the record to support allegations of such irregularities, the Supreme Court might have taken the step of adjourning the appeal to allow the appellants to approach the High Court by way of review.

Case cited:

R v Parmanand, 1954 (3) SA 833 (AD).

Judgment

Lewis JP : The five appellants in this case are all sergeants in the Police Force, attached to Golf Troop of the Support Unit, and stationed at Chikurubi. The first four appellants were jointly convicted by a board of officers of refusing to obey a lawful order in contravention of paragraph 11 on the Schedule to the Police Act [*Chapter 98*] as read with sections 35 and 37 of the Act. Each was sentenced to 28 days' imprisonment. The fifth appellant was convicted of being an accessory after the fact to the disobedience of the lawful order and was sentenced to 14 days' imprisonment. The five appellants have appealed to this court against conviction and sentence.

[His Lordship then dealt with the merits of the appeal, allowing the appeal of the fifth appellant,

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reducing the sentence on the first appellant and dismissing the appeals of the remaining appellants. He then continued:]

LEWIS JP

Before concluding, it is necessary to say something about the notice of appeal and heads of argument which have been filed. The notice of appeal contains a number of allegations against the board and against the prosecutor, charging various instances of misconduct of the proceedings in the trial court. It is alleged in the notice of appeal and in the heads of argument that there was bias on the part of the board of officers. It is alleged that they failed to give any reasons for their verdict before delivering their verdict. It is alleged that the appellants were denied legal representation. It is alleged that the appellants were denied the election of being tried by the magistrate's court instead of the board of officers. It is alleged that the appellants were denied the right to call witnesses. It is alleged that there was a forgery of Sergeant Tom's signature on the charge sheet. It is alleged that there was gross misconduct on the part of the prosecutor by intimidating the appellants.

None of these matters, even if there were some truth in the allegations, is the proper subject of an appeal. The Appeal Court, when considering an appeal, has to have regard to what appears on record: there is not the slightest support for any of these allegations on the record before us. All the allegations are denied by the members of the board in their reply to the notice of appeal which forms part of the record. Had there been any truth in these allegations then the proper course to adopt would have been to bring proceedings on notice of motion in the High Court in order to review the proceedings of the board in terms of section 27 of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981). That section reads as follows:

> "(1) Subject to the provisions of this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be -
>
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned;
>
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned, as the case may be;
>
> (c) gross irregularity in the proceedings or the decision."

The difference between the appeal procedure and review procedure was emphasized by GREENBERG, JA, in the case of *R v Parmanand* 1954 (3) SA 833, (AD) at page 838, where the learned judge said:

> "There is a well-recognized distinction between an appeal against a decision in a magistrate's court and a review of the proceedings in such a court . . . so far as it is relevant in the present case, apart from the difference in the form, in an appeal the court ordinarily has regard only to the record of the proceedings in the inferior court, whereas bin review proceedings other information can be placed before the count."

LEWIS JP

That other information, which is essential in review proceedings, is by way of affidavit in notice

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of motion proceedings. The facts upon which the alleged bias was said to exist or the misconduct of the proceedings is based must appear in the affidavit.

As I have said, this court on appeal can only have regard to the record. If there had been anything to indicate that there might be some substance in these allegations made against the board and against the prosecutor, this court might have taken the step of adjourning the appeal to enable the appellants to approach the High Court by way of review. But it seems to the court that these are wild allegations, and there appears to be no substance in them. To take one or two at random: The alleged denial of the ringlet to elect trial by the magistrate's Court. The Police Act gives the election in section 38, but it can only be exercised, in terms of that section, if notice is given in the manner and time prescribed by a member whom it is proposed to try before a board of officers. The manner prescribed is set out in Rhodesia Government Notice 97K of 1965, section 6, as follows:

> "An accused who wishes to be tried by a magistrate's court in terms of section 19 of the Act shall inform the prosecutor in writing of this fact not later than forty-eight hours before the time appointed for trial by the board."

It is up to the member, therefore, who wishes to exercise his election to act in terms of that section and give written notice of his election timeously. Once he has failed to do that, there is no obligation on the board of officers to afford a right of election to any member after the board commences its proceedings.

Another allegation is that there was forgery of Sergeant Tom's signature on the charge sheet. We have been handed this charge sheet. It appears that his ordinary signature appears on the top, acknowledging that he has had a true copy of the charge sheet served on him and that the requirements have been explained to him. There is a space for his signature lower down on the document where clearly no attempt at forgery as such has been made. The person who filled in this form has simply copied Sergeant Tom's name in his own ordinary writing. So that again is a wild allegation without any substance at all. The place where the signature occurs down below is of no significance at all; what is significant is his acknowledgement of service of the charge sheet and the fact that it was explained to him, and on the face of the document Sergeant Tom's ordinary signature seems to appear on that document.

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LEWIS JP

As to the allegation that the appellants were denied legal representation, the record reads as follows:

> "The Court convened on 4/8/81 at Support Unit HQ, Salisbury . . .
>
> Accuseds 1, 2, 3 and 4 stated their wish to be legally represented at the trial.
>
> Accordingly all accuseds were further remanded out of custody, but under the direction of the O/C Support Unit until Monday 17th August, 1981, at 0900 hours.
>
> The court reconvened at Support Unit HQ, 17th August, 1981, at 0900 .
>
> *Accused 1* - indicated that he wished the trial to proposed without a Defence Counsel.

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Accuseds 2, 3, 4 and 5 - stated the same."

It is in the highest degree improbable that the board, having duly convened on the appointed day, having then put itself to the inconvenience of adjourning the whole proceedings for a fortnight to allow the appellants to obtain legal representation, would have, at the same time, placed obstacles in the way of the appellants' obtaining legal representaion, and then falsely stated on the record that the appellants did not want it. This then is another apparently wild allegation made in the notice of appeal and the heads of argument.

It is said that the appellants were denied the right to call witnesses. The record shows that they did call witnesses. The first appellant, after he had given evidence himself, called Sergeant-Major Dziniri, as I have already indicated. The second appellant called Sergeant Dube and he gave evidence for the defence. The record states "Accuseds 3 and 4 have no witnesses to call". The fifth appellant wished to call Inspector Ncube, and did call thin as a witness. Here again, apparently, the allegations are wild and unsubstantiated.

As I have said therefore, if the court felt that there was any likelihood of there being any substance in these allegations the court would have stood the appeal down to enable steps to be taken to bring proceedings on review in the High Court. That not being the case, the appeals of appellants two, three and four must simply be dismissed and the convictions and sentences confirmed. While the conviction of the first appellant is confirmed, his sentence is altered as indicated above.

Baron JA: I agree.

Georges JA: I agree.

Guni, Hwacha & Mparadzi, appellants' legal representatives.

GRE INSURANCE LTD v CHISNALL 1981 ZLR 551

Court **Supreme Court, Salisbury**

Civil Appeal

Lewis, ACJ, Baron, Job, and Georges, JA

27th September and 27th October, 1981

Flynote

Conflict of laws - non-resident plaintiff - when an incola becomes a peregrinus - proof required of intention of making sole and permanent home in country of residence and residing there indefinitely - until then person remains incola of and domiciled in country of previous residence - security for costs when action brought by non-resident plaintiff - either domicile or residence sufficient to make a person an incola as far as necessity to furnish security for costs concerned.

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Headnote

The respondent was involved in a traffic accident in 1977, receiving injuries which resulted in his confinement to a wheel-chair. One of his passengers was also injured and brought an action against him, claiming $165 000 for personal injuries received. The respondent was insured with the appellant company and applied to have it joined as a third party. Apart from resisting the application, the appellant contended that the respondent should be ordered to provide security for costs, on the grounds that he was now a *peregrinus*.

The respondent used to reside in Zimbabwe but because of the accident resigned from his employment, sold his home and moved with his wife and child to Arizona, where he was receiving medical treatment at a certain institution. The medical treatment would necessarily be protracted, so he had to obtain emigrant status from Zimbabwe to be able to have his pension paid in the United States, as well as seek employment there. He always intended to return to Zimbabwe in due course.

The High Court (DUMBUTSHENA, J) granted the respondent's application but refused to order that he provide security for costs.

Held, that the onus was on the appellant to prove that the respondent was not domiciled in Zimbabwe. To do this it must be shown that he intended to make his home in the United States for an indefinite time, and it could not at this stage be said, on the evidence, that that was his intention.

Held, further, that, in deciding whether security for costs should be ordered, either domicile or residence is sufficient to constitute a person an *incola* (*Graham v Phillips,* 1966 (1) SA 556 (R), followed). This was not a case where the respondent had in fact abandoned his domicile of origin but retained it purely on the technical ground that no new domicile of choice had been acquired elsewhere; his claims arose when Zimbabwe was his home and he lived here, and he was compelled by circumstances to live abroad without intending to abandon his home here, though uncertain as to when he would return.

Held, further, that even if the respondent did not fall within the ambit of the role above, this was a case where, in the exercise of the court's discretion, an order for security should not be made. The result of such an order might prejudice not only the respondent but the plaintiff in the main case.

Cases cited:

Witham v Venables (1828) 1 Menz. 291;

Schunke v Taylor and Symonds (1891) 8 SCR 103;

Rosenblum v Marcus (1884) 5 NLR 82;

Medeiros v Rebello, 1924-6 SR 167;

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Michiel v Michiel (1895) 5 CTR 427;

Noyes v Schulz (1911) 32 NLR 318,

Riordan v B & F Wheeler Ltd and Another, 1913 CPD 114;

Graham v Phillips, 1965 RLR 673, 1966 (1) SA 556 (R);

Hickman v Reid-Daly, G-S-121-80 (not reported).

N. J McNally, S C., for the appellant. It is conceded that it is for the appellant to establish, on a balance of probabilities, that the respondent is a *peregrinus*, but what the word *peregrinus* means is uncertain. The difficulty is that a person with a domicile of origin in Zimbabwe, who leaves this country with the intention never to return, but without having finally decided where else in the world to settle, does not acquire a new domicile and is therefore deemed to retain his domicile of origin, which may be Zimbabwean. This may be all very well when it is necessary to determine purely legal questions, but security for costs, is a practical question. It is unfair on a Zimbabwean defendant that he should be forced to court without any guarantee of cover for his costs, at the instance of someone who has severed his financial and other ties with this country and has gone abroad. It would be an improvement on existing interpretations of the law if one were to exclude from the definition of *incola* for the purposes of security for costs those persons whose claim to that status is based on the technicality of being *deemed* to be domiciled because of a domicile of origin (see the article by Pollak in (1933) 50 SALJ 449 at 451-2). In view of the fact that numbers of people are now leaving Zimbabwe without necessarily making up their minds as to their final domicile of choice, this is an appropriate stage for this court to determine a new approach in this

GEORGES JA

matter. Where a man's domicile is no more than one attributed to him by law, there is no practical reason why the courts should treat him favourably on that account as regards the giving of security for the costs of an *incola* defendant. This court should hold that a person who has left Zimbabwe intending not to return should be liable to give security for costs whether or not he has acquired another domicile and thus whether or not he still remains technically domiciled in Zimbabwe by reason of the concept of domicile of origin.

R. Jagger for the respondent. Under the common law security for costs cannot be ordered against a plaintiff who is either resident within or an *incola* of the country in which he brings his action. Vis-à-vis the appellant, the respondent is in the same position as a plaintiff: Voet 2.8.1.; *Witham v Venables* (*supra*); *Schunke v Taylor and Symonds* (*supra*); *Rosenblum v Marcus* (*supra*). The decision in *Witham v Venables* (*supra*) has been followed in this country: *Medeiros v Rebello* (*supra*); *Graham v Phillips* (*supra*); *Hickman v Reid-Daly* (*supra*). The respondent has a domicile of origin in Zimbabwe and that for that domicile to be displaced by a domicile of choice it requires on his part the physical fact of residence in Arizona together with the intention permanently to reside there: *Ramsay v Liverpool Royal Infirmary* [1930] AC 588 at 597; [1930] All ER Rep. 127 (HL). The fact that some persons of one race may be leaving Zimbabwe in greater numbers than heretofore is no reason to alter what has become an established practice.

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The majority of the population remains settled and is entitled to the assurance that the practice will continue.

Judgment

Georges JA: On the 11th June, 1977, the respondent, Zane Chisnall, was involved in an accident while driving his motor-car along the Salisbury-Umtali road. He suffered injuries which have resulted in his being confined to a wheel-chair ever since. A passenger in the motorcar also suffered injuries. This passenger in due course filed an action against the respondent claiming $165 000 for personal injuries. The respondent was insured with the appellant company and applied to have it joined as a third party. The appellant company resisted the application and contended that should the application succeed the respondent should be ordered to provide security for costs as he was a *peregrinus*. The respondent denied that he was a *peregrinus* claiming that he now resided out of Zimbabwe in Arizona, United States of America, for purposes of medical treatment. DUMBUTSHENA, J, granted the application for leave to join the appellant company but refused an order for security for costs. The appeal is against his refusal.

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GEORGES JA

In the affidavit dated the 3rd October, 1980, supporting his application to have the appellant company joined as a third party the respondent described himself as:

> ". . . temporarily residing at 1925, 10th Street, Douglas, Arizona, in the United States of America, for the purpose of medical treatment."

On behalf of the appellant company this was denied and it was deposed that the respondent had left Zimbabwe for the United States of America on the 7th January, 1980, that he had been granted emigrant status by the Reserve Bank, that he had resigned from the British South Africa Police where he had been employed, that he had been accompanied to America by his wife and child, and that he had sold his house at Marandellas and had no other residence, nor any other place of business, nor employment in Zimbabwe. The comment was made that the respondent had given no details of the institution at which he was being given treatment nor the details of such treatment in Arizona in the mid-west of the United States of America.

An affidavit in reply was filed on behalf of the respondent by his attorney of record. The gist of the relevant paragraph was that the respondent had been advised that there was the possibility of partial recovery so that he could get out of the wheel-chair to which he was now confined and that he had resigned from the Police Force and had commuted part of his pension and accepted a smaller monthly payment so as to get Exchange control permission to have his pension paid out of the country. Parts of a letter to his attorneys dated the 4th July, 1980, were quoted. In that the respondent told of having received electronic tests confirming that with physio-therapy and hard work he could expect to regain a fair amount of movement and that indeed there had already been very slight improvement. The affidavit finally stated:

> "At this stage he did not think he would. be able to return to Zimbabwe permanently."

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Annexed to the affidavit was an earlier letter from the respondent dated the 22nd April, 1980, in which he told of undergoing extensive medical treatment for which he had to pay, complained of being "very broke" and stated:

> "My family and I are hoping to return to Rhodesia soon but at this stage my wife and I are both desperately trying to find employment, which is proving rather difficult!"

On this evidence the issue arose as to whether the respondent was still domiciled in Zimbabwe. DUMBUTSHENA, J, found that he was, and on the available evidence this conclusion seems justified.

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There is no reason to doubt that the respondent left Zimbabwe for medical treatment abroad which he thought would be effective in restoring greater mobility. It is also reasonable to infer that he applied for emigrant status to make it possible for him to get permission to have his pension paid abroad. It was clear that the course of treatment would be prolonged and difficult and that funds would be needed to meet the expenses. This would involve seeking employment in the United States.

The letters written in April and July, 1980, both express an intention of returning to Zimbabwe and again there is no reason to doubt that.

It has been urged that the respondent has not disclosed as much as he could have - for example, his precise status as a resident of Arizona - whether it was for a limited time or as an immigrant. While this would be helpful it would by no means be conclusive against the background of the facts of this case, since it appears from his letters that his status appears to enable his wife and himself to work in the United States. The affidavit filed on his behalf makes it plain that "*at this stage*" he did not think he would be able to return to Zimbabwe.

It is common ground that the onus is on the appellant to establish that the respondent is not domiciled in Zimbabwe. In the circumstances of this case this entails establishing that he has acquired a new domicile. The principle is well established and is stated thus in Halsbury's *Laws of England*, 4th edition, volume 8, paragraph 429, and on this issue there is no difference between the law of Zimbabwe and the law of England:

> "For the acquisition of a domicile of choice, it must be shown that the *propositus* had a certain state of mind, the *animus manendi*. He must have formed the intention of making his sole or principal permanent home in the country of residence, and of continuing to reside there indefinitely. Residence alone, unaccompanied by this state of mind, is always insufficient....
>
> An intention to reside in a country for a fixed period of time, or until the happening of some clearly foreseen and reasonably anticipated event, will not be sufficient, but if the proper conclusion from all the circumstances is that the *propositus* intends to make his home in a country for an indefinite time, he will acquire a domicile of choice there notwithstanding a continuing emotional attachment to some other country or an intention to change his residence upon some vague or improbable contingency."

It cannot be said at this stage that the proper conclusion on the evidence is that the respondent intended to make his home in Arizona for an indefinite time. The purpose of his stay seems

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certainly to be medical treatment and the improvement of his condition.

The decision of the learned judge was next challenged on the ground that he ought not to have held that security for costs can only be ordered

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against a plaintiff who is both not resident and not domiciled in Zimbabwe. It was urged that ordering security for costs is a practical matter and it was not desirable that persons who had no financial or other ties with Zimbabwe, but had not yet acquired a domicile other than Zimbabwe simply because they had not yet decided where they would jet up permanent home, should be able to pursue claims here. They were in effect peregrines and local defendants should be protected from them by an order for security for costs which would provide recoupment should such plaintiffs fail in their actions.

There are no rules of court in Zimbabwe prescribing the circumstances under which security for costs may be ordered. The practice is prescribed by what may be termed the common law of Zimbabwe.

Voet 2.8.1. states:

> "If indeed the plaintiff is a foreigner cherishing his domicile elsewhere, or is otherwise under suspicion, he is forced to give security at most for the costs of suit, in case he should be condemned to pay them...."

This was one of the authorities quoted by the plaintiff and relied on by the court in *Witham v Venables* (1828) 1 Menz. 291. The facts of the case are not set out, only the decision which reads:

> "But the court, after full argument and a deliberate consideration of all the authorities, held, that the plaintiff was an *incola* of this colony, and that no person, who is either *civis municeps* or *incola* of this colony, can, as plaintiff, be compelled to give security for costs, whether he be rich or poor, solvent or insolvent, and on the other hand, that every person, who is neither *civis municeps*, *nec incola*, may, as plaintiff, be called on to give security for costs, unless he prove that he is possessed of immoveable property, situated within the colony."

In *Schunke v Taylor and Symonds* (1891) 8 SC 104, the passage above was quoted as having been the law for over 60 years. At page 108 BUCHANAN, J, gave the rationale of the rule:

> "This matter of security to be given by litigants is one arising purely out of judicial practice. This practice has been a progressive one, the principle underlying it appearing to be, that justice shall not be denied by unreasonable obstacles being placed in the way of persons seeking redress; while at the same time care should be taken to secure citizens from being unduly harassed by unfounded claims."

Difficulties have arisen because of uncertainty as to the meaning of the terms *incola*, *municeps civilis* and *peregrinus*.

In *Rosenblum v Marcus* (1884) 5 NLR 82, CONNOR, CJ, after citing *Witham v Venables* (*supra*), states:

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> "I presume that the reason why, in the report of the case in the Supreme Court at the Cape, MR JUSTICE MENZIES did not state, in the notes from which the report is taken, what was the meaning which the court attributed to the Latin words used, may have been that the Roman law itself deals with that question by a title both in the *Digest* (50.1) and the Code (10.39); and we are there told that *municeps* refers to persons born in the town or place; but that, originally, the word had meant one who was capable of holding office there (*muneris capiendi: Dig.* 50.1.1 (1) and 16,228; *Poth. Pand*. 50.1.1,3); and it is said that some are *municeps* by origin, and others as *incolae*. As a general rule, in the Roman law, birth constituted a *civis municeps*; and acquired domicile an *incola*; and, accordingly, the famous definition of legal domicile in the *Code* (10.39.7; . . .) is given in direct connection with the description of an *incola*. The *lex* is as follows: 'Origin, manumission, election as a burgess, or selection as a soldier . . . or adoption, makes men *cives*, but, as the Emperor Hadrian has clearly declared by his edict, domicile makes people *incolae*. And it is unquestioned that one has his domicile in that place where he has set up his household gods, and the sum of his business and fortunes, when he will not again depart, if nothing compel it . . . and journeying from which, makes him seem to be a wanderer, and returning to which causes him to cease to wander.'."

Inherent in the term "*incola*" therefore was the element of residence, and not mere temporary residence but the sort of residence with *animus manendi* which constitutes the definition of the concept of domicile already discussed above.

An examination of the cases shows, however, that the courts did not always adhere to this concept of domicile when deciding whether security for costs should be ordered. The justice of the case sometimes led to residence alone being found adequate. Thus in *Rosenblum v Marcus* (*supra*) the plaintiff was plainly not *incola* in the sense discussed above. He had come to the colony to negotiate a partnership intending to stay though hoping ultimately to return to Hamburg. He alleged that as a consequence of a slander published of him by the defendant he met difficulties in his negotiation for the partnership and he sued for damages. CONNOR, CJ, could not find him to be "*incola*" but in the circumstances did not order security.

In *Medeiros v Rebello,* 1924-6 SR 167, the plaintiff, a Goan worker brought into the country on a contract, sued on the contract for repatriation. An application to have him provide security for costs failed on the ground that he was resident and though not domiciled was subject to the jurisdiction of the court.

In these cases it does not appear that a test of residence as contrasted with that of domicile is sought to be substituted, rather it would appear that in the interests of justice residence alone was held to be enough

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though it was not of such a character as would support a claim to domicile such as would be required of an *incola*. The standard may have been lowered but it was not being abandoned.

In *Michiel v Michiel* (1895) 5 CTR 427 a plaintiff though resident in the Transvaal was found to be domiciled in the Cape and consequently an order for security for costs could not be made against him.

In *Noyes v Schultz* (1911) 32 NLR 318 the plaintiff had come to Natal in April as manager of a

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company which held a rubber concession. His purpose was to exploit the concession. He had built a house on it and lived there. In August he sued the defendant, and an application for security for costs succeeded. DOVE WILSON, JP, held that the plaintiff's residence in Natal depended on his retaining his place as manager of the company and on the success of the company. On the facts, he held that the Plaintiff had been domiciled in England up to April and there were no facts to show that he had acquired a new and permanent domicile in Natal.

In *Riordan v B and F Wheeler Limited and Another,* 1913 CPD 114, the plaintiff had come to South Africa on tour with a theatrical company. Her contract specified that she should have a free passage back to England but not that she should return. She sued for the free passage stating that she had now the intention of returning. An application for security for costs failed. The judge held that to refuse the application the court -

> "must be satisfied that there is the intention, at all events, on the part of the applicant to permanently reside in this country. She has shown that there is this intention . . .".

The approach of the courts can therefore be said to be to examine the issue on the basis of domicile but it has in some cases been content with residence of a less permanent nature. DAVIES, J, as he then was, examined the cases in *Graham v Phillips,* 1965 RLR 673; 1966 (1) SA 556 (R) and concluded that he statement of the law in Pollak, *The South African Law of Jurisdiction* at page 32 was correct, namely:

> ". . . that either domicile or residence is sufficient to constitute a person an *incola* in so far as the question of being bound to furnish security for costs is concerned."

In that conclusion I would concur.

Mr *McNally* urged that even if this were so the cases had not until quite recently extended the rule to cover a domicile of origin which has

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in reality been abandoned but had persisted merely because the plaintiff had not yet acquired a domicile of choice elsewhere and the law required that he should have a domicile.

The recent cases have not in fact extended the rule to cases in which a plaintiff has abandoned a domicile of origin but retains it merely because he has not acquired a domicile of choice elsewhere. In *Hickman v Reid-Daly*, G-S-121-80 the evidence was that the plaintiff had not abandoned his intention to return to Zimbabwe though it was plain that the realization of any such intention could not be in the near future. In this, case the evidence discloses no abandonment of Zimbabwe though the exigencies of medical treatment will require long residence abroad. It cannot be said therefore that the domicile of origin has been retained purely on the ground that no new domicile of choice has been acquired.

I do not think it can be contended that it is obviously just that a person should be compelled to give security for costs in order to pursue claims which arose when this country was his home and he lived here, merely because he has been compelled by circumstances of acknowledged force to live abroad without intending to abandon his home here though uncertain as to a

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possible return. Such a person certainly could not be described in Voet's phrase (*supra*) as a "foreigner cherishing his domicile elsewhere".

Mr *McNally's* argument would have great strength if the plaintiff had indeed abandoned his domicile here in reality but retained it merely because of the technical rule of law that a domicile of origin persists so long as a domicile of choice has not been acquired. Because of this there is good reason for a re-examination of the rule as it now exists at common law and for the formulation of a rule of court which will serve the twin purposes set out above - avoiding the placing of undue obstacles in the path of those seeking justice from the courts and securing long residents and persons domiciled in the country from undue harassment.

For these reasons I would dismiss the appeal.

Even if, however, the respondent had not come within the ambit of the rule as I understand it, this is a case in which it appears fit that an order for security should not be made in the exercise of the court's discretion. The decision recorded in *Witham v Venables* (*supra*) seems to lay down that security for costs may be ordered against a person who is not *civis municeps nec incola* "unless he prove that he is possessed of immoveable propery situated within the colony". Later cases, however, show that this is not the only ground. In *Rosenblum v Marcus* (*supra*)

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security was not ordered on the ground that the slander may have placed obstacles in the path of the plaintiff becoming *incola*.

The principal action arose out of events which took place when the respondent was domiciled and resident here, quite unlike the usual case of a person from abroad seeking to enforce claims to which he has allegedly become entitled during a brief sojourn here. Further if the respondent is not able to find security (and on the facts available to the court this is by no means unlikely) so that the appellant is not joined, the effect may not prejudice only the respondent. The plaintiff in the main action may be deprived of the only likely source from which to recoup such damages as he may be awarded.

Accordingly I would dismiss the appeal with costs.

Lewis ACJ : I agree.

Baron JA: I agree.

Honey & Blanckenberg, appellant's legal representatives.

Granger & Archer, respondent's legal representatives.

MONTICELLO (PRIVATE) LIMITED v EDGERTON (2) 1981 ZLR 561

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Court **Supreme Court, Salisbury**

Civil Appeal

Lewis, ACJ, Baron, JA, and Georges, JA

9th October and 10th November, 1981

Flynote

Arbitration - deed of submission containing provision that decision of arbitrator "final and binding and not subject to appeal" - whether right of review excluded - Arbitration Act [Chapter 12] section 12 (2) - meaning of "misconduct" - whether failure to award costs to substantially successful party is ground for review.

Arbitration - arbitrator proposing to depart from usual order as to costs - necessity to set out grounds for so doing.

Headnote

The parties submitted a building dispute to arbitration. On the face of the award the appellant was substantially successful, and there were no special circumstances on the basis of which the appellant could properly be deprived of his coasts if he would otherwise have been entitled to them; but the arbitrator, without giving reasons, ordered that each party be responsible for his own costs and that the costs of the arbitration be shared equally. The appellant appealed to the High Court. The respondent argued that the parties had in terms of clause 13 of the deed of submission agreed that short of unlawful conduct by the arbitrator the award was final and binding and not subject to appeal. The appeal to the High Court failed, and the appellant appealed to the Supreme Court.

Held, that clause 13 of the submission, in which the parties agreed that the decision of the arbitrator would be "final and binding . . . and not subject to appeal" precludes an appeal on fact but does not preclude a review on law.

Held, further, that a review on law is available where there has been misconduct in the wider sense of failure to observe a rule which arbitrators as judges are bound to observe, misconduct for the purposes of section 12 (2) of the Arbitration Act [*Chapter 12*] is not to be construed narrowly as being confined to dishonesty or impropriety.

Held, further, that the approach of the High Court to an arbitrator's award as to costs is the same as that of the Court of Appeal to a judge's order. The

test as to when the court will interfere is the same as that used in any situation in which the exercise of a discretion is under review; it will not interfere if another arbitrator, directing himself properly and taking the proper considerations into account, might reasonably have made the same order.

Held, further, that the general rule being that a successful party is entitled to his costs, failure in the absence of special circumstances to follow the general rule is a ground for review.

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Held, further, that an arbitrator who is departing from the usual order that costs follow the event should set out in the award the grounds which have caused him to depart from the usual order. This will enable the reviewing court to be fully informed as to what has influenced him, and it will not have to speculate from the award or the nature of the case itself.

Cases cited:

R v Medical Appeal Tribunal, ex p. Gilmore [1957] 1 QB 574;

Kathrada v Arbitration Tribunal, 1975 (2) SA 673 (AD);

Smeaton Hanscomb v Setty [1953] 2 All ER 1588 (QBD);

Heaven and Kesterton v Sven Widaeus A/B [1958] 1 All ER 420 (QBD);

Lewis v Haverfordwest RDC [1953] 2 All ER 1599 (QBD);

Perry v Stopher [1959] 1 All ER 713 (CA.),

Dineen v Walpole [1969] 1 Lloyd's Reports 261.

A. P de Bourbon for the appellant. There is nothing in the Arbitration Act [*Chapter 12*] nor in the deed of submission itself which prevents an aggrieved party from reviewing a decision of the arbitrator. The powers of the court to review an administrative procedure can only be excluded by clear and precise language. The mere fact that the right of appeal is abandoned does not mean that the right of review is abandoned. The situation is analogous to that which arose in *R v Medical Appeal Tribune* [1957] 1 QB 574 at 583-586. See also *Turner & Co. v Arcturus Road Council,* 1957 R &; N 775 at 778-779, 1958 (1) SA 400 (SR). The arbitrator gave no reasons why he did not follow the normal rule of awarding costs to the successful party. In the premises, it is submitted that the usual award for costs ought to have followed: *Merber v Merber,* 1948 (1) SA 446 (AD) at 452-453, *Harlin Properties Ltd. v Rush & Tomkins,* 1963 (1) SA 187 (N) at 198; *Kathrada v Arbitration Tribunals and Another* (*supra*); *Rhodesian Electricity Supply Commission v Joelson Brothers and Bardone,* 1977 (2) RLR 85 at 95-96; Jacob, *The Law of Arbitration in South Africa*, at page 154. In the absence of any such special circumstances the question of costs ought to be remitted to the arbitrator to consider in the light of the submissions that were put to him at the earlier hearing.

R. Jagger for the respondent. The protection given by section 12 the Arbitration Act in circumstances amounting to misconduct, in its

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legal sense, is the only qualification to which clause 13 of the deed of submission is subject. Misconduct as envisaged by the section, being such as to enable an award (or *semble* an order as to costs) to be set aside, means behaviour such as bias or corruption. The extent to which an irregularity can amount to misconduct so as to be sufficient reason to set aside an award, etc., is what gives rise to the difficulty: *Russell on Arbitration*, 18th edition, page 378. Where the parties have agreed that an arbitrator shall have a discretion as to costs, either because such a

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provision is contained in the deed of submission or where the submission is subject to the provisions of the Arbitration Act, unless it can be shown that the arbitrator has acted *mala fide* the court will not interfere with his decision. Unless misconduct can be attributed to an arbitrator his decision will not be overruled: *Gray v Lord Ashburton* [1917] AC 26 at 31 and 35-6; and unless it can be shown that he has acted unjudicially the court will give effect to his decision: *Rosen & Co. v Dowley and Another* [1943] 2 All ER 172 (KBD) at 173G. It is not a requirement that an arbitrator give reasons for his decision: *Perry v Stopher* (*supra*). Merely because a court or another arbitrator might have come to a different conclusion or made a different award is no reason to set aside the decision: *Re: Hooper* (1867) LR 2 QB 367.

Judgment

Baron JA: This is an appeal against the dismissal by the High Court of an application by the appellant for the review of an arbitrator's award as to costs. The appellant is a company that carried on business as a building contractor. Some years ago the respondent engaged a contractor to build a house for him in Salisbury, shortly after the building work commenced that contractor went into liquidation, and the respondent engaged the appellant to complete the work. Disputes arose and, after some time, the work came to a halt. After a very considerable delay, the responsibility for which was dealt with by the arbitrator and to which I will return, the disputes were submitted to arbitration; this began on the 27th October and ended on the 18th November, 1980. Initially the appellant claimed payment of $8 079, being the balance outstanding on the contract price and the price of certain extras; at the commencement of the arbitration hearing on the 27th October the appellant reduced its claim to the sum of $6 910. The arbitrator awarded the appellant $5 202, but during the hearing of the appeal it was submitted by Mr *Jagger* that this figure should have been $3 177 because the arbitrator had duplicated in his calculations retention moneys amounting to $2 025. The arbitrator then made the following award as to costs:

> "Each party to the dispute to be responsible for his own costs. Costs of this arbitration to be equally shared between the two parties."

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The appellant applied to the High Court for the review of this portion of the award, on the ground that he had been substantially successful in the arbitration and that in the absence of special circumstances he should have been awarded his costs. The respondent argued that the parties had in clause 13 of the deed of submission agreed that, short of unlawful conduct by the arbitrator, the award was final and binding and was not subject to appeal. This clause reads:

> "13. The parties to the arbitration agree to regard any decision that the arbitrator may make as final and binding upon them and shall not be subject to appeal."

The learned judge *a quo* upheld the respondent's submission. He held that this clause must be read as containing an implied qualification that it does not apply to a decision reached dishonestly by the arbitrator, but that it does apply to a decision reached through "legal" misconduct, in the sense in which that expression is used by Quinton Hogg in *The Law of Arbitration* (1936), namely, "the infringement of one of the rules which arbitrators as judges are

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bound to observe in their conduct of the reference"; he held that a further qualification excluding legal misconduct could not be implied. He therefore held that, there being no question of dishonesty on the part of the arbitrator, clause 13 of the submission was an effective bar to the applicant's claim.

Mr *Jagger* supported this conclusion. He submitted that "misconduct of proceedings" as used in section 12 of the Arbitration Act [*Chapter 12*] (the Act) should be confined to conduct such as corruption or bias, although he drew our attention to Russell on Arbitration, 18th edition, at pages 302-6, which is clearly against him. He sought to draw a distinction between section 12 of the Act and section 23 (2) of the English Act of 1950 in that the latter does not provide for an order of costs against the arbitrator. Mr *de Bourbon* submitted that the authorities show that misconduct has a very much wider meaning, and that while at clause 13 of the submission the parties had abandoned the right of appeal they had not abandoned the right of review.

With respect to the learned judge in the court *a quo*, I do not think the question of implied qualifications arises; the question is what is meant in clause 13 by "final and binding . . . and not subject to appeal". DENNING, LJ (as he then was), dealt with this issue in *R v Medical Appeal Tribunal ex. p. Gilmore* [1957] 1 QB 574 at 583:

> "The second point is the effect of section 36 (3) of the Act of 1946 which provides that 'any decision of a claim or question . . . shall be final'. Do

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> those words preclude the Court of Queens Bench from issuing a *certiorari* to bring up the decision? . . . I find it very well settled that the remedy by *certiorari* is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough. That only means 'without appeal'. It does not mean 'without recourse to *certiorari*'. It makes the decision final on the facts, but not final on the law. Notwithstanding that the decision is by statute made 'final', *certiorari* can still issue for excess of jurisdiction or for error of law on the face of the record."

I respectfully agree with this statement of the law. Hence clause 13 of the submission, while it precludes an appeal on fact, does not preclude a review on law, which includes misconduct in the wide sense. I do not think the inclusion in section 12 (2) of the Act of provision for an order of costs against the arbitrator requires the drastic curtailment of the court's powers of review contended for by Mr *Jagger*. As DENNING, LJ, said in the passage I have cited from *R v Medical Appeal Tribunal ex. p. Gilmore* (*supra*) ". . . the remedy by *certiorari* is never taken away by any statute except by the most clear and explicit words". Section 12 of the Act reads:

> "12. (1) The Court may at any time, upon motion, remove any arbitrator or umpire against whom a just ground of recusation is found to exist or who has misconducted the proceedings in connection with the arbitration.
>
> (2) Where an arbitrator or umpire has misconducted the proceedings or an arbitration or award has been improperly procured, the court may set the award aside and may award costs against any such arbitrator or umpire personally."

There are two broad categories of situation contemplated in subsection (2), only the second of which suggests impropriety in its narrower sense. The powers given by the subsection - to set aside the award and to order costs *de bonis propriis* - are separate powers, intended to cover

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together all the circumstances contemplated by the section. But while a case in which an order of costs *de bonis propriis* is made would inevitably be one in which the court also sets aside the award, the converse is not true; there is no reason to suppose that in structuring the section in the way it has done the Legislature intended that every misconducting of the proceedings by an arbitrator leading to the setting aside of the award would render him liable to pay the costs of the arbitration personally. If that were the proper construction of the section then Mr *Jagger's* submission would indeed have force, and misconduct would have to be construed very narrowly. But in my view the Legislature cannot, simply because it has included a power to order costs *de bonis propriis*, be held to have intended to curtail, almost to the point of elimination, the court's jurisdiction to review - a jurisdiction which has been guarded so jealously for so long. Such a construction would require the clearest

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possible words. In my view the section as structured does no more than give the courts an additional power in cases of dishonesty by an arbitrator.

The question, then, is whether, in making his award as to costs, the arbitrator misconducted the proceedings. If the appellant was substantially successful in the arbitration, and there were no special circumstances justifying a departure from the normal order, the authorities are clear that the failure to award costs to the successful party constitutes misconduct and is a ground for review. Thus in *Kathrada v Arbitration Tribunal,* 1975 (2) SA 673 (AD) BOTHA, JA, said at page 680H:

> "Where there has therefore been an improper exercise (of the discretion as to costs), i.e., where the award as to costs is vitiated by irregularity or misdirection, or is disquietingly inappropriate, a court of law will on review set aside the order.... Failure to consider all the relevant facts or failure to act in accordance with the settled practice and principles upon which costs are generally awarded, is such vitiating irregularity or misdirection."

In *Smeaton Hanscomb v Setty* [1953] 2 All ER 1588 (QBD), DEVLIN, J (as he then was), said at page 1590:

> "(The phraseology of his award) appears to me to show that the arbitrator is not directing his mind to one of the most important elements, if not the most important element, which ought to affect his discretion, i.e., the result of the case. *Prima facie*, a successful party is entitled to his costs."

And in *Heaven and Kesterton v Sven Widaeus A/B* [1958) 1 All ER 420 (QBD), DIPLOCK, J (as he then was), said at page 424:

> ". . . in considering whether I have a right to set aside the umpire's award in regard to costs in this case, I must apply the same principles as those which I would apply in setting aside any other part of the award, reminding myself, however, that if the umpire exercises his discretion as to costs in a way in which a High Court judge ought not to do, that would amount to misconduct."

The approach of the High Court to an arbitrator's award as to costs is the same as that of the Court of Appeal to a judge's order. The test as to when the court will interfere is the same as that used in any situation in which the exercise of a discretion is under review; it will not interfere if another arbitrator, directing himself properly and taking the proper considerations into account, might reasonably have made the same order. Russell on *Arbitration*, 18th edition, says

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at page 302, "the (arbitrator's) discretion must be exercised judicially, and it will be reviewed by the court to the same extent as a judge's order as to costs will be reviewed upon an appeal". In *Smeaton Hanscomb v Setty* (*supra*) DEVLIN, J, said at page 1591:

> ". . . the jurisdiction of this court is the same over an arbitrator as that of the Court of Appeal over a judge in the matter of costs...."

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No allowance is made for the fact that the arbitrator may be a layman. In *Lewis v Haverfordwest RDC* [1953] 2 All ER 1599 (QBD), LORD GODDARD, CJ, said at page 1599:

> "It is a curious circumstance that lay arbitrators always seem to think parties should pay their own costs. Perhaps this case and . . . *Smeaton Hanscomb v Setty* (*supra*) may be of some use in emphasising to lay arbitrators that it has been laid down in the House of Lords, re-affirming the Court of Appeal, in *Donald Campbell & Co. v Pollak* [1927] AC 732 that there is a settled practice of the courts that, in the absence of special circumstances, a successful litigant should receive his costs.... The discretion to refuse that order must be judicially exercised."

Mr *Jagger* submitted that an arbitrator is not required to give reasons for his award as to costs, and that where in fact no reasons have been given the courts will not interfere. There is support for the first of these submissions in *Perry v Stopher* [1959] 1 All ER 713 (CA), but nonetheless, as HODSON, LJ (as he then was), said in that case at page 715:

> ". . . where on the face of the record there was an error of law in the exercise of the discretion, an appellate court can interfere."

The authorities are clear that an award as to costs may be set aside even when no reasons therefor have been given if, on the face of the record, there is material which enables the court to do so, and I am satisfied that the present case falls into this category.

However, the matter goes further. The proposition that an arbitrator is not required to give reasons for his award as to costs has been criticised in so far as it has been applied to cases where settled practice has not been followed, and I think the criticism is well-founded. In *Dineen v Walpole* [1969] 1 Lloyd's Reports 261 EDMUND DAVIES, LJ, said this at page 265 (I cite at length from the report because it is not readily available):

> "There being, as LORD GODDARD, CJ, said in *Lewis v Haverfordwest Rural District Council* [1953] 1 WLR 1486, at page 1487, a settled practice of the courts that in the absence of special circumstances a successful litigant will receive his costs, it is necessary to show some ground for depriving him of them . . .
>
> Accordingly here, as it seems to me, the arbitrator having . . . awarded the costs to the unsuccessful builder, it is, on the face of it, for the builder to establish that he was entitled to those costs by a judicial exercise by the arbitrator of his discretion. Therefore, with profound respect, I dissent from the view expressed in (*Heaven and Kesterton v Sven Widaeus* (supra)) by MR JUSTICE DIPLOCK in these words:
>
> > '. . . I have no doubt that the umpire in an arbitration of this kind has power to deprive a successful claimant of his costs and, indeed, to

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> order a successful claimant to pay the costs of the other side in appropriate circumstances. The mere fact, therefore, that, on the face of the award, the buyers have succeeded . . . but . . . nevertheless, been ordered to pay the costs of the sellers would, in my view, of itself be no ground for setting aside the award.
>
> If, in reply to this notice of motion, nothing had been said by the umpire, who is of course not a party to these proceedings, as to the reasons why he had made an order of that kind, I do not think that there are any grounds upon which I could have interfered with this award.'
>
> The 'settled practice', in the phrase of LORD GODDARD, CJ, being of the nature already indicated and so well-established, to my way of thinking, an order of the kind made in the present case is, on the face of it, one which calls for justification by those seeking to rely upon it."

Russell, *op. cit*., having referred to this passage, comments at page 303:

> ". . . it is submitted that any arbitrator who is making an award and who is departing from the usual order that costs follow the event (*prima facie* successful party is entitled to his costs, and to deprive him of them is an exceptional measure) should set out in the award the grounds which have caused him to depart from the usual order. That will enable the court which is reviewing his decision to be fully informed on the matter which has influenced him, and it will not have to speculate from the award or the nature of the case itself."

I respectfully agree. This approach was perhaps foreshadowed by DEVLIN, J, in *Smeaton Hanscomb v Setty* (*supra*) when he said at page 1591:

> "The only thing, I think, that a lay arbitrator ought to bear in mind is that there are certain principles as to costs which have been worked out by the courts. If for any reason he thinks it desirable to depart from the usual order that costs follow the event, and if he knows that there are such principles, he may invoke the assistance of those who appear before him, their counsel or solicitors, as to what the principles are, and in the light of them make up his mind what he is going to do. I think, also, that it would be very proper and convenient that any arbitrator who is making an award in the form of a special case and who is departing from the usual order that costs follow the event should set out in the case the grounds which have caused him to depart from the usual order. That will enable the court which is reviewing his decision to be fully informed as to what has influenced him, and it will not have to speculate from the nature of the case itself."

It remains then to decide whether Mr *de Bourbon* is right when he submits that the appellant was substantially successful. The appellant claimed, in respect of the balance of the contract price and the cost of a number of extras, the sum of $6 910, the respondent in his pleadings admitted liability for $2 614 but sought to set off this sum against his counter-claim of $6 500 in respect of some 150 items of alleged defective

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workmanship. The appellant failed to establish his major single item (in monetary terms), namely, a claim for $3 240 in respect of an alleged increase in size of the house; of the appellant's remaining claims for extras, apart from those admitted on the pleadings, the appellant was awarded $300 in respect of the boxing in of a beam but failed on the other five (their value is not stated in the papers, but from their descriptions, and perhaps more importantly from the figures set out in the award, they do not appear to have been of any great consequence). Of the respondent's counter-claim, he succeeded partially in respect of the defective roof, but failed on all the other claims (some 150 items), even in respect of the roof, however, the arbitrator held that the respondent, having changed the construction without expert

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advice, must bear the main blame - and the liability in the first instance - for the defects therein; for this reason the award provided that the appellant's liability, limited in any event to $550, was to arise only if the cost of rectifying the roof exceeded the respondent's liability, and this sum of $550 was to be held in suspense against that contingency.

The arbitrator awarded the appellant $5 202, but, as I have said, Mr *Jagger* submitted that this figure should have been $3177, because the arbitrator duplicated retention moneys of $2 025. When this point was made, for the first; time, during argument it appeared to have force, but on further examination the apparent duplication may arise simply from the architect's method of setting out his calculations, because if Mr *Jagger* is right I am unable to reconcile the figures. Be that as it may. I will assume in the respondent's favour that the lower figure is the correct one.

It is clear from the award, and Mr *Jagger* did not attempt to suggest otherwise, that there were no special circumstances on the basis of which the appellant could properly be deprived of his costs if he would otherwise have been entitled to them. The award as to costs can only have been based on a belief that the appellant had not been substantially successful; to make what amounts to no order as to costs means that the arbitrator thought that, broadly, both parties had been equally successful. I can only think that this conclusion was based on the appellant's failure to establish his claim in respect of the increase in the size of the house, which represented nearly half of his total claim. In this he was in error. It is in the nature of itemized building disputes of this kind that the arbitrator is concerned with a host of individual claims and complaints, same large and others small in monetary terms; the fact that a claimant fails on a single item, albeit representing nearly half of his total claim is no ground by itself to conclude that he has not been substantially

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successful. One must look at the over-all picture. We were given somewhat scanty information concerning the pleadings and the arbitration hearing, but it seems that in terms of numbers of items the appellant made at least ten claims (but possibly more if three documents referred to in the award but not placed before us referred to more than one item each); the appellant failed on one item amounting to $3 240; he failed on five items whose value is not stated but must have been, by comparison, small; he succeeded on the pleadings on three (or possibly more) items totalling $1447; he succeeded on a further disputed item amounting to $300. The respondent, on the other hand, made some 150 claims in respect of alleged defective workmanship, the claims totalling $6 500, he failed on all of them save on his claim concerning the roof, where he succeeded to a minor extent. In monetary terms, the appellant, who was forced finally to go to arbitration, obtained an award of, even on Mr *Jagger's* submission, $3 177 out of a claim of $6 910. In terms of the proceedings the appellant alleged in his founding affidavit, and the respondent did not dispute, that "the bulk of the evidence led at the arbitration related to what extras had been executed by the applicant and the standard of the applicant's work in so far as that was brought into dispute by the respondent. A considerable amount of time was spent at the hearing of the arbitration debating these two points". I have no doubt, viewing the whole picture including the counter-claim, that the appellant was substantially successful; there is no question here of the appellant putting forward an exaggerated claim and

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succeeding on only a small part (see the remarks of DIPLOCK, J, in *Heaven and Kesterton v Sven Widaeus* (*supra*) at page 424I).

In the result I am satisfied that there were no grounds on which the arbitrator could properly deprive the appellant of his costs, and that the award in this regard must be set aside. I would make the following order: The appeal is allowed with costs both here and in the court below. The arbitrator's award as to costs is set aside. Unless the parties can within 14 days of the date of this judgment agree the question of costs of the arbitration and the award the matter will be remitted to the arbitrator to reconsider his award as to costs in the light of what has been said above.

Lewis ACJ: I agree.

Georges JA: I agree.

Seirlis, Higham and Lewis, appellant's legal representatives.

Coghlan, Welsh & Guest, respondent's legal representatives.

HEWLETT v MINISTER OF FINANCE AND ANOTHER 1981 ZLR 571

Court **Supreme Court, Salisbury**

Annotations Link to Case Annotations

Application under Section 24 of Constitution of Zimbabwe

Fieldsend, CJ, Baron, JA, and Goldin, AJA

10th and 13th August and 10th November, 1981

Flynote

Constitutional law - Constitution of Zimbabwe - Declaration of Rights - section 16 - prohibition against compulsory acquisition of property - compensation awarded but not yet paid under Victims of Terrorism (Compensation) Act [Chapter 340] - War Victims Compensation Act, 1980 (No. 22 of 1980) - section 38 (2) - provision that compensation awarded under Chapter 340 to be of no force or effect - such award of compensation "property" in terms of section 16 (1) of Constitution - not a "bounty" which can be repealed at any time - "compulsory acquisition" - meaning of - extinction of a right or debt not acquisition of property.

Headnote

The applicant had been awarded compensation totalling some $14 634 in terms of the Victims of Terrorism (Compensation) Act [*Chapter 340*], as a result of losses caused by acts of terrorism, and had lodged other similar claims. Before the compensation was paid, there were promulgated the Emergency Powers Stay of Compensation Claims) Regulations, 1980, which provided, *inter alia*, that no compensation awarded under the Victims of Terrorism (Compensation) Act could be paid. A month later, the War Victims Compensation Act, 1980 (No.

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22 of 1980), was promulgated. This repealed the Victims of Terrorism (Compensation) Act and, in section 38 (2), provided that no compensation awarded in terms of the repealed Act should be paid.

The applicant brought proceedings under section 24 of the Constitution for a redress in respect of what he alleged was a contravention of the Declaration of Rights. He contended that section 38 (2) of the War Victims Compensation Act contravened the provisions of section 16 of the Declaration of Rights, which protect property from compulsory acquisition. He argued that the right to receive compensation under Chapter 340 was property within the meaning of section 16 of the Constitution, and that by depriving the applicant of that right the State had compulsorily acquired that right, and that, since this had been done without compensation, section 38 (2) of the War Victims Compensation Act was in contravention of the Constitution.

Held, that in interpreting a Constitution the principles of interpretation are basically no different frown those governing the interpretation of any other legislation, but recognition must be given to the character and origin of the document and interpretation must be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms set out in the Constitution. It is not permissible, however, to take into account proposals and discussions in the preparation of the Constitution.

Held, further, that debts owed by the State, such as those arising from the actual awards of compensation in this case, are "property" within the meaning of that word in section 16 (1) of the Constitution. Debts which had been crystallized, as these had, did not fall into the category of "bounty" legislation that could be cancelled at any time, and the fact that the State was not obliged at common law to provide any compensation in the first place could not affect the position.

Held, further, that a clear distinction must be drawn between deprivation of property and compulsory acquisition of it. While it could be argued that since by depriving the applicant of a sum resulting in an exactly co-relative benefit to the State, the State had acquired that benefit from him, a proper interpretation of section 16 led to the conclusion that the extinction or diminution of a right in property is not of itself acquisition of property.

Held, further, that in view of the nature and importance of the case there should be no order as to costs.

Cases cited:

Queensbury Industrial Society Ltd v William Pickles and Others (1865) LR 1 Exch. 1;

Jones v Skinner (1835) 5 LJ Ch. 87;

Minister of Home Affairs (*Bermuda*) *and Anor. v Fisher and Anor*. [1980] AC 319; [1979] 3 All ER 21 (PC);

Minister of State for the Army v Dalziel (1944) 68 CLR 261;

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Black-Clawson Ltd v Papierwerke AG [1975] AC 591; [1975] 1 All ER 816 (HL);

Ulster Transport Authority v James Brown and Sons Ltd. [1953] NI 79;

Government of Malaysia v Selangor Pilot Association [1978] AC 337;

East Saginaw Salt Manufacturing Co. v City of East Saginaw ant Anor. (1871) 80 US 373;

U.S v Teller (1882) 107 US 64;

Frisbie v U S. (1894) 157 US 160;

Lynch v Up. (1933) 292 US 571;

Flemming v Nestor (1960) 363 US 603;

Burmah Oil Co. v Lord Advocate [1965] AC 75; [1942] 2 All ER 348 (HL);

U.S v Pacific Railroad Co. (1887) 120 US 227;

U.S v Caltex (*Philippines*) *Inc.* (1952) 344 US 149;

Transvaal Investment Co. Ltd v Springs Municipality, 1922 AD 337;

Singh v The United Provinces [1946] AC 327 (PC);

Belfast Corporation v OD Cars Ltd. [1960] AC 490; 1 AD ER 65 (HL);

N.I. Road Transport Board v Benson [1940] NI 133;

Commissioner of Police v Wilson, 1981 ZLR 451; 1981 (4) SA 726 (ZAD.);

Commissioner for Special Purposes of Income Tax v Pemsel [1891] AC 531.

J C Andersen, S C. (with him *1. A Donovan* and *M. J Gillespie*), for the applicant. The award made under the Victims of Terrorism (Compensation) Act constituted property which was compulsorily acquired by the State in contravention of section 16 of the Constitution. Property is not defined in section 113 of the Constitution, but the property protected by section 16 is expressly referred to as "property of any description" and includes "any interest or right therein". Even without the words "of any description" the word "property" should be given a wide meaning which would at least include the right to receive payment of such an award: *Jones v Skinner* (*supra*) at page 90, *Queensbury Industrial Society Ltd v Pickles* (*supra*) at 4-5; *Commissioner far Inland Revenue v Estate Crewe and Anor.,* 1943 AD 656 at 667. The special inclusion of pension benefits in section 16 (3) does not have the effect of excluding other personal rights of action against the State or the payment of debts due by it. The principle *expressio unius est exclusio alterius* has limited application and is applied with great caution in the construction of statutes: *SA Estates and refinance Corp*. *Ltd. v Commissioner for Inland Revere,* 1927 AD 230 at 236. It is an aid to construction which has no application where there is a clear statement of the intention of a statutory instrument as in this case where the words "property of any

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description" could not be clearer: *Chotabhai v Union Government and Anor.,* 1911 AD 13 at 28, *Consolidated Diamond Mines of SWA Ltd. v Administrator SWA,* 1958 (4) SA 572 (AD) at 648 G-H. The word "any" generally excludes exceptions: *Ulster Transport Authority v James Brown arid Sons Ltd* (*supra*); *Clarke-Jervoise v Scutt* [1920] 1 Ch. 382 at 388; *R v Hugo,* 1926 AD 268 at 271. Provisions are frequently inserted in statutory instruments where they are not necessary *ex abundante cautela*. Since the object of section 16 was to protect property of any description the inclusion of the reference to pension benefits in subsection (3) was inserted *ex abundante cautela* and should not be construed as limiting the wide words used in subsection (1). The question of pension benefits was a controversial and politically sensitive topic and for that reason specially mentioned. In the absence of a clear statement the Constitution should not be read as excluding rights from its protection: *Central control Board* (*Liquor Traffic*) *v Cannon Brewery Comply*

Limited [1919] AC 742 at 752. Applicant has not voluntarily parted with his right to receive an award and payment of it; the right has been removed by the statute to the benefit of the State. The situation is not one where there has been the mere removal of a right such as a right to obtain a licence, with no corresponding benefit to the State. Compare *Government of Malaysia v Selangor Pilot Association* (*supra*); *Ulster Transport Authority v James Brown and Sons Ltd* (*supra*); *Northern Ireland Road Transport Board v Benson* (*supra*), *France Fenwick & Co. Ltd. v The King* [1927] 1 KB at 467. The courts will have regard to substance rather than form in such matters: *Attorney-General for Ontario v Reciprocal Insurers and Ors* [1924] AC 328 at 337, *Gallagher v Lynn* [1937] AC 863 at 870; *Ulster Transport Authority v James Brown and Sons Ltd* (*supra)* at 116. The Declaration of Rights was designed to protect property and should be liberally construed so as to avoid the dispossession of property by means of a device. Nothing can alter the fact that the applicant has been dispossessed of his rights to the benefit of the State, so his rights have been compulsorily acquired by the State within the meaning of section 16 (1).

S. Kentridge, SC (with him *R R Horn, SC,* and *H P Mkushi*), for the respondents. The question is whether any property of the applicant or any interest or right in property has been "compulsorily acquired" in terms of section 16 (1). Clearly it has not. The repealing legislation merely extinguishes the liability of the Government to make gratuitous payments - a liability derived solely from Act of Parliament, and now removed by Act of Parliament. The provisions of section 38 of the War Victims Compensation Act do not entail the acquistion by the Government (or by any other person) of any property or interest or right in property. The concept of compulsory acquisition (or expropriation) of property for public purposes is well known in English and Roman-Dutch law. It connotes the compulsory transfer of property, or of a right in property, from the owner to another person (usually a governmental authority) so that the latter stands in the shoes of the previous owner. There is no reason to suppose that the framers of the Constitution intended the word "acquired" to bear anything but its normal meaning. This view is supported by the reference to "the acquiring authority" in paragraphs (a), (c) and (d) of subsection (1), and the definition of "the acquiring authority" in subsection (10) of section 16. These provisions show that what is contemplated in section 16 is the transfer of property from the owner to a governmental authority. The phrase "compulsory acquistion" is entirely inappropriate to describe the extinction of the applicant's rights. It is a distortion of language to

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say that his rights have been acquired by the Government. Moreover, section 16 (3)

(referring to pension rights) was obviously inserted because the extinction or diminution of pension rights would not otherwise have been subject to the provisions of subsection (1). It is a deeming provision intended to bring into the protected class something which would otherwise fall outside it: *R v Haffejee,* 1915 AD 345, 352, *S v Rosenthal,* 1980 (1) SA 65 (AD) at 75. While it is accepted that Chapter III of the Constitution should not be given a narrow or over-technical construction, the court must, as in the case of any other statute, interpret the language of the written instrument. It must in doing this have regard to the "traditions and usages" which give meaning to the language used. The term "compulsory acquisition" is one commonly employed in English-speaking jurisdictions to denote expropriation of property by a state authority for its own use or for some public purpose. Statutes providing for compulsory acquisition of property have always been interpreted in accordance with the presumption that fair compensation is payable to the owner, unless the Legislature has clearly provided to the contrary: *Oosthuizen & Ors v SA Railways and Harbours,* 1928 WLD 52 at 62; *Burmah Oil Co. Ltd v Lord Advocate* (*supra*). Section 16 (1) ensures that the Legislature can no longer provide to the contrary. There is no principle of interpretation which would warrant the extension of the meaning of these well-known words contended for by the applicant. While it cannot be assumed that the provisions of other Commonwealth constitutions relating to the protection of property rights have the same content as the Constitution of Zimbabwe, other courts interpreting generally comparable provisions have drawn a distinction between the compulsory acquisition of property and other forms of deprivation of property or property rights: *Government of Malaysia & Anor. v Selangor Pilot Association* (*supra*); *Singh v The United Provinces* (*supra*) at 335-6; *Belfast Corporation v OD Cars Ltd.* (*supra*) *at* 517, 519, 523, *Minister of State for the Army v Dalziel* (*supra*); *Australasian United Steam Navigation Co. v The Shipping control Board & Anor.* (1945) 71 CLR 508. A debtor whose debt is extinguished benefits from the extinction, but it is wholly inappropriate and incorrect to say that he has "acquired" the claim against him. As to whether "property" was acquired, section 16 (1) of the Constitution is intended to protect property rights of the type which an acquiring authority might ordinarily acquire for public purposes. The constitutional provision was not intended to restrict the Legislature from withdrawing a grant which it had no legal obligation to make in the first place. A grant which originates in the mere bounty of the Legislature is always subject to repeal by the Legislature, as long as no payment under it has yet been made. The State had no common law obligation to compensate any subject

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for the destruction of his property in the course of warlike operations: *Burmah Oil Co. Ltd v Lord Advocate* (*supra*)*; U.S v Pacific Railroad* (*supra*); *US v Caltex* (*Philippines*) *Inc.* (*supra).* Chapter 340 was a statute which gratuitously provided a bounty to certain subjects in defined circumstances. A bounty conferred by an act of the Legislature can at any time be withdrawn or diminished by the Legislature without restriction: *East Saginaw (supra); US v Teller* (*supra*); *Frisbie v US* (*supra*)*; Lynch v US* (*supra*)*; Flemming v Nestor* (*supra*).

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Judgment

Fieldsend CJ: This is an application direct to this court under section 24 of the Constitution of Zimbabwe for redress in respect of an alleged contravention of the Declaration of Rights. The applicant is a farmer and the respondents are the Minister for Finance and the Minister of Labour and Social Services.

Between December, 1977, and February, 1980, the applicant alleged that he had on some 21 separate occasions suffered loss as a result of what was at that time known as an "act of terrorism" as defined in the Victims of Terrorism (Compensation) Act [*Chapter 340*]. Section 4 (1) of that Act, which was introduced in 1973, provided:

> "(1) Subject to the provisions of this Act, if a person -
>
> (a) is found by the Board, in accordance witch the provisions for this Act -
>
> (i) to have sustained any damage to or loss of property . . .
>
> referred to in section *three*, then the compensation provided for in this Act shall be payable."

Section 3 provided that the Act applied in respect of any damage to or loss of property on or after the 1st July, 1972, where such damage or loss was caused by an act of terrorism. The board was set up under Part II of the Act to determine whether or not compensation should be awarded to any person in terms of the Act and the amount and form of any compensation awarded (section 7 (1)). In terms of section 4A of the Act, introduced in 1977, the Minister was given wide powers if he was of the opinion, for any reason that he thought appropriate, that in any particular claim or any class of such claims no compensation should be awarded or the amount of compensation awarded should be less than the amount provided for in the Act. He could issue to the board an order specifying the particular case or class of cases and directing either that no compensation should be awarded or that the amount of compensation should not exceed a specified amount. In terms of section 4B the Minister was empowered to appoint a committee to which he could give directions, which could in turn make recommendations or give

directions to the board that in any particular claim or class of claims no compensation should be awarded or that it should not exceed a stated amount.

Of the applicant's outstanding claims -

(a) five have been considered by the board which has made awards totalling $14 634;

(b) five shave been lodged by the applicant, and submitted to the committee. Of these the committee has recommended the rejection of one and made no recommendation on the others; and

(c) two have been lodged but not submitted to the committee.

On the 3rd October, 1980, there were promulgated the Emergency Powers (Stay of

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Compensation Claims) Regulations, 1980 (SI 644 of 1980). These regulations declared that no proceedings should be brought for compensation for damage to or loss of property under Chapter 340, that no claim for such loss could be entertained by the board and that no compensation awarded could be paid. Thus all proceedings for compensation and the payment of clams were frozen.

On the 14th November, 1980, there was promulgated the War Victims (compensation Act, 1980 (No. 22 of 1980). This repealed Chapter 340, and provided in section 38:

> "(2) Notwithstanding any provision of a repealed law but subject to the provisions of subsection (4), no compensation in respect of damage to or loss of property shall, on or after the 1st March, 1980, be paid -
>
> (a) in terms of a repealed law; or
>
> (b) pursuant to any finding, direction or decision made thereunder; or
>
> (c) pursuant to any judgment or order of a court arising out of or in respect of a claim, finding, direction or decision made in terms of a repealed law;
>
> whether or not the damage to or loss of property occurred, or the finding, direction, decision, judgment or order was made, before the 1st March, 1980, and any such finding, direction, decision, judgment or order shall for all purposes be of no force or effect..
>
> (3) The provisions of subsection (2) shall be deemed to have come into operation on the 1st March, 1980.
>
> (4) Nothing contained in subsection (2) or (3) shall be construed as rendering invalid any payment of compensation which than actually been paid before the date of commencement of this Act."

The applicant contends that section 38 (2) of The 1980 Act contravenes the provisions of section 16 of the Declaration of Rights in the Constitution which protect property from compulsory acquisition. It seeks an order that:

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> "1. Section 38 (2) of the War Victims Compensation Act, 1980, and the Statutory Instrument 644 of 1980 are invalid and for no force or effect.
>
> 2. First respondent is to pay applicant the sum of $14634 with interest *a tempore morae*.
>
> 3. Respondents are to pay applicant's costs of suit."

Although it may be necessary to refer to other provisions of the Constitution in the course of this judgment, the main sections which are relevant are the following:

> "11. Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from the compulsory acquisition of property

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without compensation;

and whereas it is the duty of every person to respect and abide by the Constitution and laws of Zimbabwe, the provisions of their Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of the others or the public interest."

and:

"16. (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -

(a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or flight therein that would be affected by such acquisition,

(b) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilized, the settlement of land for agricultural purposes,

(c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;

(d) requires the acquiring authority, if the acquisition is contested, to apply to the General Division or some other court before, or not later than 30 days after, the acquisition for an order confirming the acquisition; and

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(e) enables any claimant for compensation to apply to the General Division or some other court for the prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Appellate Division.

....

(3) 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."

The contention of the applicant is that the right to receive compensation under the Victims of Terrorism (Compensation) Act is property within the meaning of section 16 of the Constitution, and that by depriving the applicant of that right the State has compulsorily acquired that right; and since this was done without compensation the legislation effecting this result, namely, section 38 (2) of the War Victims Compensation Act, 1980, is in contravention of the Constitution.

I shall deal first with the five claims where the board established under Chapter 340 has made awards to the applicant. Looking first at the provisions of section 4 of Chapter 340 it seems to be clear that once the board found in accordance with the Act that the applicant had sustained damage to or loss of property and awarded him compensation in terms of section 13 then that

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compensation was payable. This means that from that moment the applicant had a right to claim the sum awarded from the State by action if necessary. As a money debt due by the State to the applicant this was in the ordinary sense of that term "property". As was said by POLLOCK, CB, in *Queensbury Industrial Society Limited v William Pickles and Others* (1865) LR 1 Exch. 1 at pages 4-5:

> ". . . *property* is not a term for art, but a common English word, which must be taken in an ordinary sense, and any ordinary person would certainly think it strange, if he were told that a debt due to him was not part of his property."

It was put even more widely by PEPYS, M R, in *Jones v Skinner* (1835) 5 LJ Ch. 87 at page 90:

> "It is well known that the word property is the most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have."

The fact that in terms of sections 42 and 43 of Chapter 340, respectively, the compensation payable is made inalienable and the

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compensation is excluded from the assets of the recipient's insolvent estate does not mean that it is not to be regarded as property. Indeed the contrary inference can be drawn from the fact that these provisions are there, for without them the inference would be that the compensation payable could be dealt with in the same way as any other property.

The position is, however, quite different in regard to claims upon which no award has yet been made. The Act gave no right to the payment of compensation until the board had made an award, and in terms of section 4A (1) The Minister was given the power to direct the board not to award compensation in any particular case. In my view the effect of this provision was that no person had a right to any compensation until an award was made, and no right, which could be regarded as a right to property, to have his claim considered by the board. Even if it was a right to property it was valueless because before an award was made it could have been nullified by a Ministerial direction.

For these reasons it is my view that all we are concerned with in this application are the five claims, totalling $14 634, which have been considered by the board and on which they have made awards.

The issues in respect of these claims are whether these debts due by the State to the applicant are property within the meaning of the words "property of any description or interest or right therein" in section 16 (1) of the Constitution and, if these debts are property, whether the effect of section 38 (2) of the War Victims Compensation Act was to "compulsorily acquire" the property.

Before coming to these vital issues it is appropriate to deal with the principles governing the interpretation of a Constitution and in particular the provisions of a Constitution in a Declaration of Rights. At the outset it is right to say that in general the principles governing the

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interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation. It is necessary to look to the words used and to deduce from them what any particular section, phrase or word means, having regard to the over-all context in which it appears. Part of the context is that the provisions we are now called upon to consider occur in the Chapter dealing with the protection of fundamental rights and freedoms introduced by section 11.

There is a very lucid and helpful passage on the question of interpreting such provisions in the judgment of the Privy Council delivered by LORD WILBERFORCE in *Minister of Home Affairs* (*Bermuda*) *and Anor v Fisher and Anor* [1980] AC 319 at 328-329; [1979] 3 All ER 21 (PC) at 25-26 which it is worth quoting in full. That appeal

concerned the right of a person to live in Bermuda. This in turn depended on whether, for the purposes of section 1 (5) of the Constitution of Bermuda, the illegitimate child of the wife of a person who possessed Bermudian status "belonged to Bermuda". Paragraph (d) of that section referred to "the child, stepchild or child adopted in a manner recognized by law of a person" who was the wife of a person possessing Bermudian status. The issue was whether an illegitimate child was included within those words. LORD WILBERFORCE said:

> "Here, however, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermudian Constitution Act 1967 of the United Kingdom, but established by a self-contained document set out in Schedule 2 to the Bermuda Constitution Order 1968 (United Kingdom) SI 1968 No. 182). It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter I, drafted in a broad and ample style which lays dove principles off width and generality. 2. Chapter I is headed Protection of Fundamental Rights and Freedoms of the Individual'. It is known that this chapter, as similar portions of the constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Carribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969). That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights 1948. These antecedents, and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to. 3. Section 11 of the Constitution forms part of Chapter I It is thus to 'have effect for the purpose of affording protection to the aforesaid rights and freedoms' subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice . . . the public interest'.
>
> When therefore it becomes necessary to interpret 'the subsequent provisions of' Chapter I - in this case section 11 - the question must inevitably be asked whether the appellants' premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound. In their Lordship's view there are two possible answers to this. The first would be to say that, recognizing the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting fit with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognize that this presumption may be more easily displaced. The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described,

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> without acceptance of all the presumptions that are relevant to legislation of private law.
>
> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules in interpretation may apply, to take as a point of departure for the process for interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

The Privy Council upheld the decision of the majority of the Court of Appeal for Bermuda that "child" in the paragraph included an illegitimate child. Further, as LATHAM, CJ, said in *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at page 276 dealing with section 51 (xxxi) of the Australian Constitution:

> "The provision of the Constitution is plainly intended for the protection of the subject, and should be liberally interpreted."

There is one further point on the question of interpretation. It was argued that we could have regard, particularly in relation to the significance of section 16 (3) which dealt with pension rights, to an extract from proposals tabled by the British Government on the 3rd October, 1979, at a plenary session of the Lancaster House Conference that led to the settlement finally formalized by the present Constitution of the 6th December, 1979. There are a number of reasons why I think it would be wrong and dangerous to rely on such material.

In the first place the general principle of our law is clearly stated in the speeches of the majority of the Law Lords in *Black-Clawson Ltd. v Papierwerke AG* [1975] AC 591; [1975] 1 All ER 810 (HL) and accurately reflected in the headnote in the following terms:

> "In considering the report in the Foreign Judgments (Reciprocal Enforcement) Committee 1932 presented to Parliament before the passing of the Act for 1933 and containing a draft Bill which was substantially adopted in the subsequent legislation, the House, in construing the Act, was entitled to have regard to the statement contained in the report of the mischief aimed at and of the state of the law as it was then understood to be, but it was not entitled 40 take into account the committee's recommendations or its comments on the draft Bill . . ."

and:

> "It is not proper to use the report of a committee or commission or any official notes on a clause of a draft Bill for a direct statement of what a prosed enactment is to mean or what the committee or commission thought it means . . . "

What is sought to be referred to here is nothing like an official report with recommendations: it is part of a document taken in isolation produced at an early stage of negotiations apparently as a basis for discussion. In my view it can have no weight. There is, however, a further reason why evidence of proposals and discussions in the preparation of a Constitution should not be relied

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on. In the grant of independence constitutions there are frequently many conflicting interests to be reconciled. The statement of one or other of the parties' contentions or wishes at an early, or indeed at any stage, of the negotiations can have little or no bearing on the interpretation of the eventually accepted Constitution. I leave aside the possibility of taking into account heads of agreement which it may have been decided by all parties should be incorporated into the final document, though even here I see difficulty.

Nor in my view is it a relevant consideration as alleged in the second respondent's opposing affidavit that the Victims of Terrorism (Compensation) Act was considered to be discriminatory. That can have no part in determining the proper interpretation of the provisions of the statutes. Had this been a case concerning compensation for personal injury sustained as a result of another's criminal offence which, as in some other countries, is determined by a criminal injuries compensation board, precisely the same considerations would have applied. Nor is it relevant, again as alleged in the opposing affidavit, that there are other plains amounting to several million dollars for which the Government may be liable under the repealed Act.

I come then to the first main question: whether these debts owed by the State to the applicant are property within the meaning of the word in section 16 (1) of the Constitution. Although there is no definition of the word the section refers to "property of any description or interest or right therein". This seems to embrace the widest possible range of property and to include at least any money debt due including such a debt due fly the State. It would require very strong indications, particularly having regard to the principles of interpretation which have to be applied to a provision of this nature, to limit these very wide words. After all, the purpose of section 16 is to afford protection to property, following as it does the statement of principle in section 11 (c) that the Constitution is designed to afford "protection for the privacy of the home and *other property* and from the compulsory acquisition of

property without compensation" (emphasis added). The words emphasized are in each case used without limitation or qualification. The ordinary meaning of the word property I have already dealt with, and it clearly includes a debt payable to a person.

Mr *Kentridge* did not argue that property was limited to immovable and to tangible property, and section 16 makes it clear that it cannot be so limited. If any indication were required of this, it is to be found in section 16 (8) (e) which makes it clear that shares in a body corporate are regarded as property, the acquisition of which is exempted from protection only when a stated proportion of the holders of all such shares have agreed to the terms of acquisition. If shares are within the words "property of any description" then so must be a debt owed to a person. An example may make this clear. If the State decided to nationalize all insurance companies and provided that every debt owed to an insurance company on a stated date should be paid to the State then it would have acquired property from those insurance companies.

There is an Irish case - *Ulster Transport Authority v James Brown & Sons Ltd* [1953] NI 79 - which is relevant on the nature of the meaning of the word property. Section 5 (1) of the Government of Ireland Act, 1920, prevented Parliament from making any law to "divert from any

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denomination the fabric of cathedral churches, or, erupt for purpose of roads, railways, lighting, water, or drainage works, or other works of public utility upon payment of compensation, any other property, or take any property without compensation". None of the judges in either the Queen's Bench Division or the Court of Appeal had any difficulty in holding that goodwill or an interest distinct from goodwill in the carrying on of a transport business was property for which compensation was payable. There is in my view very much stronger reason for holding that a money debt is property for which compensation is payable than for holding that goodwill is property. See, too, the dissenting judgment of LORD SALMON in *Government of Malaysia v Selangor Pilot Association* [1978] AC 337, with which, on the question of whether goodwill was property in terms of Article 13 (2) of the Constitution of Malaysia, the majority did not disagree.

It was argued that paragraphs (a) to (e) of section 16 (1) were indications that property of the nature of a debt, and in particular a debt owed by the State, was not envisaged by the section as a whole as being property protected by section 16. Those paragraphs provide that property may not be compulsorily acquired except under the authority of a law that:

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"(a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;

(b) requires that the acquisition is reasonably necessary in riffle interests of defence, public safety, public order, public morality, public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilized, the settlement of land door agricultural purposes;

(c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;

(d) requires the acquiring authority, if the acquisition is contested, to apply to the General Division or some other cost before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and

(e) enables any claimant for compensation to apply to the General Division or some other count for The prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Appellate Division."

The contention was that these provisions and particularly the provisions of paragraphs (b), (d) and (e) were 50 inappropriate to the compulsory acquisition of a debt owed by the State that the Legislature could never have intended such a debt to be property.

At the outset I have great difficulty with this argument because of the very wide terms in which property is referred to in the chapeau of the subsection. If the subsection as a whole can be interpreted in a way which leaves the ordinary meaning of the words "property of any description" unlimited then in my view that interpretation must be adopted. So far as paragraphs (d) and (e) are concerned if those requirements are regarded as essential only if appropriate then they do not affect the meaning of property. And that in my view is how those paragraphs must be regarded. Certainly paragraph (e) could be of little or no relevance in the compulsory acquisition of shares, and that shares are considered to be within the meaning of property is

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clear from subsection (8) (c)

A further and very persuasive indication that an obligation of the State is regarded as property is subsection (3). This reads:

> "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 fin terms of such law,

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> contract or scheme, 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."

The assumption made in this subsection is that pensions rights are property, but that specific provision is made to ensure that the extinction or diminution of such rights shall be regarded as an acquisition, even though the rights are contingent only.

The difficulty with this general contention is to know what limit to put upon the meaning of the word property. This difficulty Mr *Kentridge* sought to meet by saying that Chapter 340 was what might be termed "bounty" legislation and that the State was always entitled to withdraw its obligations under such legislation at any time and even retrospectively.

The main basis for this contention was founded on certain American cases which it was said establish the proposition that where the State offers a bounty it may at any time withdraw that bounty without contravening that part of the Fifth Amendment to the American Constitution which provides that no "private property" shall " be taken for public use without just compensation". The cases relied upon are: *East Saginaw Salt Manufacturing Company v City of East Saginaw and Anor.,* 80 US 373 (1871), *US v Teller,* 107 US 64, 68 (1882), *Frisbie v US* 157 US 160, 166 (1894), *Lynch v US,* 292 US 571, 577, 581 (1933); *Flemming v Nestor,* 363 US 603, 610-611 (1960).

In the *Saginaw Salt Company* case (*supra*) the Legislature of Michigan passed an Act in 1859 granting a bounty of 10c for every bushel of salt over 5 000 manufactured by a company from water obtained by boring in the State, and an exemption from taxation on all property used for that purpose. The company started salt manufacture in June, 1860, and produced some 31 000 bushels of salt by March, 1861. In that month the Legislature amended the law to limit the exemption from taxation to a period of five years and to limit the bounty payable to any one producer to $5000. The company contended that once it had embarked on the manufacture of salt a contract arose between itself and the State which could not be revoked by legislation, at least without compensation. The main issue concerned the exemption from taxation, and it does not appear that the State had refused payment of the salt bounty in respect of salt produced up to March, 1861. It was held that the law was nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the state, dependent for its continuance upon the dictates of public policy and the voluntary good faith of the Legislature. In the result it was decided that the amendment of the law was valid.

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Teller's and *Frisbie*'s case (*supra*) concerned the right of the State to alter Acts granting pensions, the headnote in the former case stating:

> "No pensioner has a vested legal right to his pension. Pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute or recall, at its discretion."

Neither of these cases was concerned with the cancellation of an amount actually due and payable, but rather with the right of the State to alter prospectively the basis upon which a non-contributory pension would be paid.

Lynch's case (*supra*), while not disagreeing that pensions, compensations and allowances were gratuities which could be redistributed or withdrawn at any time, distinguished the two earlier decisions. This was on the basis that policies under the War Risk Insurance Act amounted to contracts creating vested rights which could not, by virtue of the Fifth Amendment, be taken away without just compensation. This case firmly establishes that a contractual liability of the State is private property of the creditor within the meaning of those words in the Fifth Amendment which cannot be taken without compensation.

Flemming v Nestor (*supra*) was again a different type of case. It concerned the withholding of social security benefits from a person deported from the United States for having been a one-time member of the Communist Party, and perhaps the date of the case - 1960 - had some influence on the decision. Nestor had come to America from Bulgaria in 1913 and he became eligible for old-age benefit under the Social Security Act in 1955. From 1933 to 1939 he had been a member of the Communist Party and for that reason he was deported in 1956 under the Immigration and Nationality Act. In terms of an amendment to the Social Security Act deportation on the ground of having been a member of the Communist Party resulted in termination of benefits under the Act, and the old-age benefit otherwise payable to Nestor's wife who remained in the United States was terminated. It was held that the amended Social Security Act was not unconstitutional by virtue of the Fifth Amendment, because the right to social security benefits could not be regarded as "accrued property rights" so as to amount to property. This was the decision of five judges given by HARLAN, J The dissenting judgments were on a variety of grounds: that the statute was unconstitutional as an *ex post facto* law, as imposing punishment without judicial trial, as a bill of attainder, and by BLACK, J, because the statute took property in violation of the Fifth Amendment.

These cases certainly establish the principle that in what might be termed "bounty" legislation the State can repeal the legislation at any

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time and indeed Mr *Andersen* did not contest that proposition. They do not, however, establish the principle that the State can withdraw its undertaking to pay a debt which has crystallized. For example, the *East Saginaw Salt Company* case (*supra*) does not establish that a

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production bounty actually earned before the repeal of the Act would not have been protected under the Fifth Amendment.

Mr *Kentridge* also relied on these cases in support of a general proposition that the type of property rights which section 16 (1) was intended to protect was limited to the type of property which an acquiring authority might ordinarily acquire for public purposes. He contended that the starting point of the inquiry was the fact that the State had no obligation to compensate a subject for the destruction of his property in the course of war-like operations. It certainly seems to be clear that the State has no obligation to compensate its citizens far damage done to their property by the enemy. Even *dicta* in *Burmah Oil Company v Lord Advocate* [1965] AC 75; [1964] 2 All ER 348 (HL.) support this proposition, as do the *American* cases of *U.S v Pacific Railroad Co.,* 120 US 227 (1887) and *U.S v Caltex* (*Philippines*) *Inc*., 344 US 149 (1952). Accepting, as I do, that there was no obligation on the State to provide the compensation provided by Chapter 340 the fact remains that this compensation was provided. It is unnecessary to consider what motive lay behind the introduction of the Act, but it is easy to see that motives of public policy could have influenced the decision: the provision of compensation may have been intended, for example, to keep farmers on the land to continue to produce food for the people of the country, or it may have been intended to keep rural buses operating for the benefit of the communities they served. An example of a similar scheme is the English legislation which started with the War Damage Act, 1941, which set up a statutory scheme for the making of payments in respect of war damage to land.

If, as here, the State sets up a scheme of compensation, and under that scheme an award is made which is payable by the State, the debt then owed becomes property, and property within the meaning of section 16 (1). That the State was not obliged at common law to provide any compensation in the first place cannot affect the position, particularly where, as does section 4 (1) of Chapter 340, it is specifically provided that once the board has made a finding "the compensation provided for in this Act *shall be payable*" (emphasis added).

In my view the debts owed by the State to the applicant in respect of the five awards made to him by the board are property within the meaning of that word in section 16 (1) of the Constitution. Any legislation

which purported compulsorily to acquire that property without compensation would be in contravention of section 16 (1) of the Constitution.

The next main question is whether the applicant's property has been compulsorily acquired. Mr *Kentridge* contended that, applying the approach enunicated by LORD WILBERFORCE in *Fisher*'s case (*supra*) and having regard to the traditions and usages applicable to the words "compulsory acquisition", and cognate words, the mere extinction of a right or a debt was not embraced within those terms. Accordingly it was said that the withdrawal from the applicant of his right to be paid the compensation due to him under Chapter 340 did not constitute compulsory acquisition.

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The ordinary meaning of "acquire" given in the Oxford English Dictionary is:

> "(i) To gain, obtain or get as one's own, to gain the ownership of . . .
>
> (ii) To receive or get as one's own, to come into possession of . . . ".

And as was said by INNES, CJ, in *Transvaal Divestment Co. Ltd v Springs Municipality*, 1922 AD 337 at page 341:

> ". . . jurisdically, the word 'acquire' connotes ownership; the ordinary legal meaning implies the acquisition of *dominium*. To acquire a thing is to become the owner of it. No doubt it may be used in a wider sense so as to include the acquisition of a right to obtain the *dominium*; but the narrower meaning is the accurate and more obvious one."

It is true, too, that "compulsory acquisition" is used in both English and Roman-Dutch law to denote the expropriation of property by an authority - whether state, local or public utility - usually for some public purpose, most commonly in relation to land. It is, of course, common cause that property in section 16 is not limited to land.

Cases relied upon by Mr *Kentridge* clearly establish that it is not every deprivation of a right which amounts to a compulsory acquisition of property, as for example regulation of a landlord's rights which in effect diminished his rights (*Singh v The United Provinces* [1946] AC 327 (PC)), regulations which limited an owner's right to build above a certain height on his land (*Belfast Corporation v OD Cars Ltd.* [1960] AC 490; [1960] 1 All ER 65 (HL)), and legislation allowing licensed pilots to provide pilotage only if they were employed by the port authority (*Government of Malaysia v Selangor Pilot Association* (*supra*).

It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the

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fundamental freedoms protected refer to the right not to be *deprived* of property without compensation whereas the sections giving actual protection provide that no property of any description shall be *compulsorily taken possession of* and no interest in or right over property of any description shall be *compulsorily acquired* except on certain conditions, including compensation. This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed government could be made virtually impossible if every deprivation of property required compensation. A liquor licence, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a licence to another without compensation it would almost certainly be unconstitutional. But if a government decided to introduce prohibition and to withdraw all liquor licences it could not be said that by its mere extinction a licensee's licence had been acquired.

Mr *Kentridge's* argument is a simple one. He contends that what section 38 (2) of the War Victims Compensation Act has done is simply to destroy the applicant's right to be paid the compensation which he has been awarded: in short, that it has destroyed the debt owed to the

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applicant. If that is the right way of looking at the problem then, it is said, there has been no acquisition by the State of any of the applicant's property.

It is correct that jurisprudentially the State has not acquired any property. It may be better off than it was before section 38 (2) was passed in that it no longer has an obligation to meet the pre-existing obligation to pay the compensation awarded. But it has not acquired any property which it did not have before. Mr *Andersen* contended, however, that looking at the picture as a whole the State was better off by exactly the same amount by which the applicant was worse off, and that since the applicant had been deprived of a sum resulting in an exactly correlative benefit to the State, the State had in fact acquired that benefit from the applicant. This is certainly an attractive argument and it is given weight if one has regard to the principles in practice acceptable in a democratic society. Even in countries where the legislature's powers are not limited by a declaration of rights the pressure of public opinion is usually strong enough to prevent any deprivation of property, whether by the taking or destruction of any rights in property without compensation. It would certainly not normally countenance the cancellation of a right in property which had the result of benefiting the very person who effected that cancellation.

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In practice therefore the removal of a right from a person by legislation is normally accompanied by provision of compensation, though the controversial War Damage Act, 1965, which nullified retrospectively the decision of the House of Lords in the *Burmah Oil* case (*supra*) is a notable exception.

It is against such a background that one must examine the provisions of the Constitution of Zimbabwe. Section 11 sets out that every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, namely (among others), to protection for the privacy of his home and other property and from compulsory acquisition of property without compensation, subject to such limitations as are contained in the Constitution. This is given effect to, so far as the protection of property is concerned, by section 16 (1) which protects property only from compulsory acquisition unless certain conditions, including the provision of compensation, are met.

In order to give effect to this provision the words, and the section as a whole, must be interpreted, not with what LORD WILBERFORCE has referred to as "the austerity of tabulated legalism", but to give full enact to the section in the context in which it appears.

Mr *Andersen* relied heavily on the reasoning in the Irish case of *Ulster Transport Authority v James Brown & Sons* (*supra*). I have already referred to that case on the question of whether the goodwill or an interest in the carrying on of a transport business was property. The court went on to hold that by prohibiting furniture removers or storers from carrying furniture except in certain limited cases the Ulster Transport Authority had taken property from James Brown & Sons, a firm of furniture removers.

The Government of Ireland Act, 1920, section 5 (1), precluded Parliament from making a law to

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take directly or indirectly property without compensation. The Court of Appeal expressly left open "whether a taking of property by dissipation or destruction without a 'taking over', or a negative prohibition which merely interfered with the enjoyment of property, was a taking of property within the meaning of that section". It must be said, however, that both the Queen's Bench Division and the Court of Appeal clearly favoured the view that a taking away without acquisition, as by dissipation or destruction, did amount to "taking" in terms of section 5.

We background to that case was that in 1935 the Road and Railway Transport Act had been passed. The broad effect of that Act was to bring about a general transfer of road motor undertakings to a Road

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Transport Board with payment of consideration or compensation to the dispossessed owners, and to protect the board in the enjoyment of what they had acquired by forbidding others to compete. Those who carried on the business of removing and storing furniture were not brought within the Act. In 1948 a new Act was passed creating the Ulster Transport Authority as a successor to the board. This went further in regard to furniture removers and storers and in effect prohibited them from operating save in regard to moving another's belongings from house to house, house to store or store to house. This meant that all the other work which until then could be done by firms such as James Brown and Sons could be done only by the transport authority.

The Court of Appeal held that James Brown's property had been taken over and not just taken away. The court went so far as to find that the legislation was passed to enable the authority to capture the prohibited business and to do so without expense. In the court below SHEIL, J, pointed out that he was not dealing with a mere negative prohibition, but with a prohibition, negative no doubt, but coupled with a benefit to the authority.

The *James Brown* case (*supra*) is distinguishable on a number of grounds. In the first place, section 5 (1) of the Government of Ireland Act refers to directly or indirectly taking any property and not to the compulsory acquisition of property as does section 16 (1) of our Constitution. Secondly, it was found that the result of the Transport Act, 1948, was to divert to the authority a portion of the business of James Brown and Sons, and that there was accordingly a taking over of property belonging to that firm. Thirdly, as pointed out by VISCOUNT DILHORNE in the *Selangor Pilot Association* case (*supra*) at page 349, t;he decision turned to a large extent on the legislative history of the provision and on the fact that the statutory prohibition was a colourable device to secure property without compensation.

It also seems that the Privy Council preferred the reasoning of ANDREWS, CJ and the majority in *N.1. Road Transport Board v Benson* [1940] NI 133. Their Lordships quoted with apparent approval the following passage from the CHIEF JUSTICE'S judgment:

> ". . . a fundamental and well recognized distinction between taking or authorising property to be taken without paying compensation, this involving an actual use or taking of property into possession, and a negative or restrictive provision which merely involves interference with the owner's enjoyment of property."

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The Privy Council case itself (*Government of Malaysia and Another v Selangor Pilot Association* (*supra*)) is perhaps more closely in point,

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particularly as article 13 (2) of the Constitution of Malaysia provides that:

> "No law shall provide for the compulsory acquisition or use of property without adequate compensation" (emphasis added).

That case concerned legislation which made it an offence for pilots other than those employed by the Port Swettenham Port Authority to provide pilotage services in that port. Prior to that six licensed pilots had formed the Pilot Association, a partnership which owned assets, employed other licensed pilots and provided pilotage services for the port. After the passing of the legislation the Port Authority offered employment to all the licensed pilots, purchased the physical assets of the Association and itself operated a pilot service.

The Association brought an action against the Government of Malaysia for a declaration that they were entitled to compensation for the loss of goodwill and that the offence-creating section was unconstitutional as amounting to the compulsory acquisition of property without adequate compensation in contravention of article 13 (2) of the Constitution of Malaysia. It was held that the rights of licensed pilots to provide pilotage services and to employ others were not rights of property. It was also held (LORD SALMON dissenting) that, although the Association might have been deprived of goodwill by the legislation, that had not been acquired by the port authority and that accordingly there had been no contravention of the provision of the Constitution prohibiting any law from providing for the acquisition or use of property without adequate compensation.

The following short extracts from the judgment of VISCOUNT DILHORNE are pertinent:

> "Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use." (pages 347-8)

> "In relation to article 13 (2) the question to be answered is: Was any property of the association compulsorily acquired or used by the port authority? Only if there was, could there have been a failure to comply with article 13 (2).... Even if the right of the association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the association's right to employ pilots was not acquired or used by the port authority. Its right to employ them was given to it and acquired by it from the Legislature." (page 348B-C)

> "It may be that the association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a

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> goodwill, the value of which would be reflected a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired by the port authority from the

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association and in the opinion of the majority of their Lordships it was not." (page 348C-D)

Even LORD SALMON in his dissenting judgment held that the legislation contravened article 13 (2) only because it provided indirectly but inevitably for the compulsory acquisition without compensation of the association's property, namely, the goodwill by the Authority.

That case too is distinguishable primarily because it was not the State itself which acquired any direct benefit from the legislation, but rather the Port Authority, which on LORD SALMON'S judgment acquired the goodwill of the business of the Pilot Association. This is perhaps not a very persuasive ground of distinction because it was, clear that the State and the Port Authority were acting with a common purpose in promoting and passing the legislation.

In the result one is forced back, with what guidance one can glean from all the cases both on this specific point and on the principles of interpretation, to the provisions of section 16 of the constitution and the particular facts of the case.

The fact is that the limitation imposed on the Legislature by section 16 (1) is that it shall not pass a law compulsorily acquiring property without compensation, not that it shall not pass a law depriving a person of property without compensation. The distinction is an important one. I do not think that even the application of the principle enunciated by LATHAM, C J in *Dalziel*'s case (*supra*) that a provision of a constitution plainly intended for the protection of the subject should be liberally interpreted is of itself justification for departing from clear words. There is, perhaps another principle to be borne in mind: that a sovereign Legislature has full powers of legislation save as specifically restricted. It is true as BABINGTON, J (dissenting), said in *Benson*'s case (*supra*) that in section 5 of the Government of Ireland Act the Legislature was looking at the taking from the point of view of the person deprived of his property and endeavouring to protect him, but it did so in words different from those in section 16. I do not think that it would necessarily be safe to go on to say in the present case as BABINGTON, J did in *Benson*'s case (*supra*):

"The mischief aimed at is the expropriation or confiscation or destruction of any property without compensation, and the section should therefore be liberally construed so as to give the utmost protection which the language used will allow."

FIELDSEND CJ

But it is right to say that section 16 must be interpreted to give effect to the full protection given by the words used.

In interpreting the protection given by section 16 (1) one cannot lose sight of the provisions of section 16 (3). It is convenient to set out its words again:

"(3) 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 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."

This, Mr *Kentridge* submitted, is a deeming provision intended to bring into the protected class

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something which would otherwise fall outside it. From this he argued that subsection (3) was a clear indication that but for the deeming provision the extinction or diminution of any vested or contingent right to a pension, would not be regarded as acquisition.

Mr *Andersen's* counter to this argument was that the principle *expressio unius est exclusio alterius* was one of limited application to be applied with great caution. This is, of course, true but where as here something which is not on the face of it acquisition is specifically stated so to be, there is a strong indication that acquisition is otherwise to be given its ordinary meaning. In my view this is not a case of a deeming provision - which is clearly what subsection (3) is - being put in for the avoidance of doubt or for greater clarity. In my view subsection (3) is a strong and almost irresistible pointer to the conclusion that the extinction or diminution of a right in property is not of itself acquisition of property. To reach such a conclusion in this way is not in my view to be guilty of resorting to "the austerity of tabulated legalism": it is merely to rely on the ordinary meaning of the words used.

The only remaining point is that urged by Mr *Andersen* that if section 16 (1) allows the State to deprive persons of that part of their property which consists of debts owed to them by the State simply by cancelling the State's obligation to meet the debts, there would be a wide range of property with no protection from expropriation. He cited an example of an ordinary contractual debt for goods purchased. One has to be very careful about arguing from the particular to the general, and each set of circumstances has to be considered on its own merits. But one must not lose sight of the fact that it is only compulsory acquisition without com

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pensation which is hit by section 16, and in the final event the issue has to be resolved on the wording of the legislation itself.

In my view the extinction of a money debt of the nature in issue here, with a consequent benefit flowing to the State that it is no longer liable to repay that debt, does not amount to acquisition of property by the State. To disregard the ordinary meaning of the words "compulsorily acquired" so as to extend the limitation imposed by section 16 (1) to prevent the cancellation of an obligation voluntarily assumed by the State, as was this obligation, would be to extend unjustifiably the meaning of the clear words of the section.

It is my opinion that by section 38 (2) of the War Victims Compensation Act, 1980, there was no compulsory acquisition of the applicant's property and the application for relief must be dismissed.

On the question of costs it was argued that as this was in the nature of a test case the applicant should in any event be entitled to his costs. That in itself I do not think is a proper ground for making any order other than the usual order as to costs. With a test case which, as in the present instance, involves the rights of a number of other people it is not unusual for the litigant to have some assistance from those in the same position. There is nothing to show that this was so here, but it is a fact which militates against a general rule that in a test case an unsuccessful litigant should be awarded his costs. It may be different if a question of personal liberty is at

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stake, but here we are concerned merely with property rights.

Nevertheless this is an important question and on one issue - whether this debt was property - the applicant has been successful. That the State regarded the questions raised as important and the answers as not self-evident is apparent from the fact that it originally sought an adjournment to obtain eminent counsel from outside the country.

In my view the proper order is that there should be no order as to costs.

Baron JA: I agree that this application must be dismissed. Mr *Kentridge* framed his submissions in these terms: (a) that the provisions of section 38 of the new Act do not entail the acquisition by the Government (or by any other person) of any property or interest or right in property; and (b) that the applicant's statutory right to the "compensation" assessed by the board in terms of Chapter 340 is not property of a nature which section 16 (1) of the Constitution was intended to protect. At one stage during the argument I thought there might be force in this

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latter submission; but on further analysis I am satisfied that a money debt, which on the ordinary meaning of the term is clearly property, is also the kind of property which could in certain circumstances be compulsorily acquired. It is, I think, clear that if a debtor, D, owes money to his creditor, C, and the Government, G directs that D pay that money to G instead of to C, there has been an acquisition by G of C's rights against D Those rights must, I think, for all the reasons developed by the learned CHIEF JUSTICE, be property within the very wide words used in section 16 (1). The decision in this case turns, therefore, not on whether a debt is property of the kind contemplated by section 16 (1), but ion whether the extinction by tile Government of a debt owed by it is acquisition of that debt within the meaning of the section.

There is, I think, a fundamental conceptual difference between G extinguishing a debt which it owes to C, and G directing that a debt owed by D to C be paid, not to C, but to G In this latter case G has acquired *from* C precisely what C had, namely, the right to receive payment from D; C's rights, which are property in his hands, have been transferred to G But in the former case G has relieved itself of an obligation to pay C; there is no transfer of a right, only its extinction. G does not acquire the debt owed to C

Mr *Petersen* argues that G has acquired a corresponding benefit. Clearly G has profited. But that profit is nonetheless quite different in character from the debt, the difference is underlined by the feet that one cannot easily analyse or even describe the situation without using an expression such as corresponding benefit or profit or advantage. It is more accurate to say that G has profited in a corresponding amount, but the profit results from the shedding of an obligation, not the acquisition of a debt.

Purely as a matter of language, therefore, I am unable to construe acquisition of a debt to include its extinction. That this was the view also of the Legislature is put beyond doubt by the existence of section 16 (3) of the Constitution, which has been set out in full in the judgment of the learned CHIEF JUSTICE and which I will not repeat, save to stress that it regards the law in question to be *for the purposes of subsection (1)* a law providing for the acquisition of a right in

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property. It clearly recognises that ordinarily the extinction of or diminution in pension rights would not be acquisition. Mr *Andersen* was fully alive to the difficulty in which the existence of this subsection placed him, and was reduced to the submission that it was included *ex abundante cautela*. The short answer to this submission is that the language used - ". . . shall

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be regarded for the purposes of subsection (1) . . ." - demonstrates that it is a substantive provision introducing a legal fiction, and not a mere restatement or emphasis of a position already created by other provisions. It may well be true that the question of pensions was, a matter of some concern to the parties at Lancaster House. If, however, the Legislature had intended section 16 (3) of the Constitution simply to allay the fears of one of the parties I would have expected the very common "for the avoidance of doubt" formula to have been used; I would certainly not have expected the Legislature to use positive language which demonstrates its recognition that the circumstances outlined are not acquisition but for the purposes of subsection (1} are to be so regarded.

But it is, I think, necessary to say a little more about this *ex cautela* argument, which is connected with another submission made by Mr *Andersen*, namely, that to hold that the extinction of a debt was not acquisition would make serious inroads into the protection for private property which the Legislature intended to provide in section 16. It is hardly necessary to stress that the intention of the Legislature is to be gleaned from the language used; we must be very careful to avoid the assumption that the Legislature intended what we think it ought to have intended. This kind of assumption drives us into dismissing inconvenient provisions as having been included *ex abundante cautela*. I venture to repeat what I said (albeit in a dissenting judgment) in the recent case of *Commissioner of Police v Wilson,* 1981 (4) SA 726 (ZAD), 1981 ZLR 451 (in which Mr *Andersen* also appeared) at page 740 (pages 473-4 of the Zimbabwe report):

> "Mr *Andersen . . .* submitted that (the words) may have been included *ex abundante cautela*. I cannot accept such an approach, it begs the question because it depends for its validity on the assumption that the Legislature did not intend the words to have the wider meaning. The general rule is that effect must be given to all the words of a statute; if they are capable of bearing a meaning which does not defeat the clear object of the enactment, or lead to an absurd result, then that meaning is presumed to have been intended by the Legislature. Thus, Maxwell on *Interpretation of Statutes*, 10th edition, says at page 236:
>
> > 'Notwithstanding the general rule that full effect must be given to every word, yet if no sensible meaning can be given to a word or phrase, or if it would defeat the real object of the enactment, it may, or rather, should be eliminated.'."

It cannot in the present case be said that the clear object of section 16 would be defeated by construing "acquisition" as excluding "extinction", nor would such a construction lead to an absurd result. Subsection (3)

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must therefore be approached as part of the over-all context within which subsection (1) is to be construed, and not as surplusage.

In support of his *ex cautela* argument Mr *Andersen* cited the following passage from the judgment of LORD MACNAGHTEN in Commissioners for *Special Purposes of Income Tax v Pemsel* [1891] AC 531 at 589:

> "It is not so very uncommon in an Act of Parliament to find special exemptions which are already covered by a general exemption. Nor is surplusage or even tautology wholly unknown in the language of the Legislature."

However, this comment was made at the conclusion of the following passage, which it is necessary to cite at some length:

> "There was an argument which appears to have had great weight with one of the learned judges in the Court of Session, to which I cannot attach much importance. That learned judge points out that in Schedule C there is a special exemption in favour of funds dedicated to the repair of cathedrals, colleges, churches, and places of worship. From that he infers that such purposes are not charitable within the meaning of the Act, and so, 'without going outside of Schedule C', he finds a construction conclusive, as he thinks, in favour of the claim of the Crown. But, my Lords, in construing any document, it is not well to confine your attention to an isolated passage. It seems to me to be necessary to go outside of Schedule C in order to understand the Act. If you turn to Schedule A, and to Schedule D, you will observe that these special exemptions are not to be found in either. So that if that learned judge is right we have this singular result:" [The learned Law Lord proceeded to demonstrate the absurdity of the result, and continued:] "A construction which leads to a result so whimsical ought not, I think, to be adopted without good reason."

There then follows the passage relied upon by Mr *Andersen*. LORD MACNAGHTEN seems to me to have done no more than to apply the well-accepted approach as outlined in the passage I have cited from Maxwell What he was saying, having in the immediately preceding passage pointed out that the ordinary meaning led to absurdity, was simply to explain that such situations were not unknown and that when they occurred the ordinary meaning must be rejected; he was not saying that one could reject an ordinary meaning which did not defeat the object of the legislation and which did not lead to absurdity.

I agree that there should be no order as to costs.

Goldin AJA: I agree with the judgment of the CHIEF JUSTICE.

Fieldsend CJ: In the result the application is dismissed. There is no order as to costs.

Morris, Beale & Collins, applicant's legal representatives.

State Attorney, respondents' legal representative.

THE STATE v NDHLOVU OTHERS 1981 ZLR 600

Court **High Court, Bulawayo**

Criminal Review

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Gubbay, J

13th November, 1981

Flynote

Criminal procedure - sentence - whipping delay in caring out sentence caused other than by accused's action - deletion of sentence on review.

Headnote

The accused were convicted of assault with intent to do grievous bodily harm and sentenced to 18 months' imprisonment and a whipping of six strokes. Sentence was passed on the 2nd April, 1981, and the proceedings forwarded for review. Certain queries were addressed to the Attorney-General but his reply was received only on the 9th October.

Held, that where a court orders a whipping, it does so in the confident expectation that it will be administered at the very beginning of any period of imprisonment jointly imposed. If the infliction of the whipping were to be delayed other than by the accused noting an appeal or by escaping from custody, it is unlikely that a court would impose such a punishment. To sanction the infliction of strokes after a delay of over six months would be cruel and unjust.

Cases cited:

S v Gorodema and Others, AD 63/81;

R v du Plessis, 1948 SR 94;

R v Mefana, 1948 (2) SA 612 (O).;

R v Mloso and Another: R v Cronjé, 1953 (4) SA 135 (T).;

R v Quilo, 1935 EDL 12;

R v Chapman, 1953 SR 28, 1953 (2) SA 671 (SR)

R v Malinga, 1956 (1) PH, H 38 (N);

R v Pula, 1949 (1) PH, H 23 (O.);

R v Mtetwa and Others, 1954 (1) PH, H 83 (N);

R v Maxilango, 1954 (1) PH, H 86 (O);

R v Ntsebe, 1956 (3) SA 566 (O);

R v Verster, 1952 (2) SA 231 (AD);

R v Hobson, 1953 (4) SA 464 (AD);

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R v Cele, 1960 (2) PH, H 382 (AD);

R v Tshezi, 1960 (3) SA 12 (N);

S v Matanzima, 1967 (2) PH, H 281 (N);

S v Qhantsi, 1970 (4) SA 662 (O);

R v Sparimi and Another, 1965 RLR 43 (AD), 1965 (2) SA 413 (SRAD).),

R v James, 1935 EDL 257.

Judgment

Gubbay J: The eight accused pleaded guilty to, and were convicted of, assault with intent to do grievous bodily harm, the allegation being that they had beaten the complainant, an elderly woman, with sticks. It was accepted that the accused had acted upon the orders of two older men who also joined in the assault, the consequence of which was that the complainant had to be carried back to her kraal where, shortly afterwards, she died of her injuries. The reason for the assault was to punish her for supposedly being a witch. The accused delivered four strokes each, as instructed, and thereafter the two ringleaders, who were subsequently convicted and sentenced for the murder of the woman, struck her with sticks and kicked her.

In mitigation the accused asserted that they were fearful that the two ringleaders, described as "comrades", might have been in possession of firearms - although no weapons were evident - and that a refusal to participate in the beating would be visited with some form of retribution.

In sentencing the accused to 18 months' imprisonment with labour and to receive a whipping of six strokes, the magistrate commented that assaults by gangs of young men on elderly persons imputed to possess supernatural powers, appeared to be on the increase throughout the country, and that firm deterrent measures were required. I agree with him. Perhaps the worst reported manifestation of this regrettable trend is that considered in *S v Gorodema and Others*, AD 63/81 (not reported), but it is only one of a disturbing number of cases involving organized assaults of so-called witches or wizards to have come before the High Court and Regional Courts in the last two years.

If it were not that the accused had been unwilling to participate and only did so through fear of the consequences if they refused, I would have had no hesitation in approving the sentences. This feature, however, raised a doubt in my mind as to the justification for conjoining a severe whipping with a fairly long term of unconditional imprisonment. The accused are all between the ages of 19 and 22 years and first offenders. I therefore referred the papers to the Attorney-General for his view, and I am indebted to him for his assistance. He supports the imposition of strokes on the ground that this type of gang thrashing of an old and defenceless woman can only be categorized as brutal and callous, and does

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not lose that description because the accused acted reluctantly and through fear of some undefined punishment should they have resisted the order. I consider this a correct approach. Although judicial officers hold differing opinions on the imposition of a whipping, and some, like myself, are generally opposed to it as an inhumane, humiliating and degrading mode of punishment, it is nonetheless an accepted principle that where aggravating circumstances are present, the whipping of the offender, whose age permits thereof, is deserved. But it is not unusual, where strokes have been awarded, to reduce the period of imprisonment that would otherwise have been ordered. Additionally, where the accused is a youthful first offender, it is necessary to ensure that the incarceration he must suffer be of as short a duration as possible. It is with regard to these principles that I consider the magistrate should have suspended six months of the term of imprisonment.

There is, however, a difficulty in the way of now bringing about the punishment I regard appropriate. The accused were sentenced by the magistrate on the 2nd April, 1981. The record of the proceedings was placed before me for review on the 16th April, and on that day a number of queries were addressed to the magistrate. His reply was received on the 4th May and the matter was forwarded, together with my observations, to the Attorney-General on the following day. It was only on the 9th October that the Attorney-General's reply was received. It appears that the papers were put aside and then forgotten. An inquiry from the prison officer in early October brought it to mind. Unfortunately, I too did not recall that it was still outstanding. On receipt of the Attorney- General's opinion, I raised two questions with him. Firstly, accepting that a whipping was justified, whether after a delay of over six months, it should be administered; and secondly, if it were competent to delete the strokes, whether it would be proper to leave the period of 18 months' imprisonment intact, notwithstanding that six months thereof would have been suspended but for the delay. Having perused the Attorney-General's further advice, with which my brother NEWHAM and I agreed, I issued an order confirming the convictions but altering the sentences by the deletion of the strokes and the suspension for three years, on suitable conditions, of six months of the period of 18 months' imprisonment with labour. These are the reasons for that order.

The courts have repeatedly held that if a whipping is imposed, it should be inflicted as soon as reasonably possible. See, for instance, *R v du Plessis,* 1948 SR 94; *R v Mefana,* 1948 (2) SA 612 (O); *R v Mloso and Another: R v Cronjé,* 1953 (4) SA 135 (T) at 142H. This principle finds recognition in section 110 of the Prison Regulations, 1956. The

rationale for it is not hard to find. It is simply that it is objectionable and cruel to keep this severe form of punishment hanging over the head of a prisoner for any length of time. Such a practice tends to dishearten and harden him and destroy any incentive towards reformation. See *R v Quito*, 1935 EDL 12. Further, the additional anguish caused by the delay effectively increases the severity of the sentence. A corollary of this principle is that it is not competent to suspend the award of a whipping. See *R v du Plessis, supra; R v Chapman,* 1953 SR 28; 1953 (2) SA 671 (SR). But there is authority that it is permissible to do so where the Legislature has provided

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a compulsory whipping for the offence. See *R v Mloso: R v Cronjé, supra; R v Malianga,* 1956 (1) PH, H 38 (N).

It happens not infrequently, particularly where strokes are conjoined with a short term of imprisonment, that due to an inordinate and inexcusable delay, by the time the proceedings are forwarded on review, the prisoner is about to be discharged from custody. In such a situation, the course taken has been to order that the strokes be struck from the sentence. See *R v Quilo, supra, R v Mefana, supra; R v Pula,* 1949 (1) PH, H 23 (O); *R v Mtetwa and Others,* 1954 (1) PH, H 83 (N); *R v Maxilango,* 1954 (1) PH, H 86 (O). The propriety of such an order was doubted by DE VENTERS, J, in *R v Ntsebe,* 1956 (3) SA 566 (O). In that case the accused had been sentenced to three months' imprisonment with labour and to a compulsory whipping of four strokes. The record was only submitted on review about two months after conviction. After referring to the cases of *R v Verster,* 1952 (2) SA 231 (AD), and *R v Hobson,* 1953 (4) SA 464 (AD), which laid down that a court of appeal is only entitled to declare whether the original sentence was right or wrong according to the facts then in existence, and not with regard to any supervening facts, the learned judge went on to say, at 568G-H:

> "If the present case had come before me on appeal I would have been precluded from interfering with the sentence in view of the aforesaid Appellate Division decisions and since the *ratio decidendi* of the said cases are equally applicable to cases on review, I am precluded from interfering with the sentence which was correctly and legally imposed by the magistrate."

He therefore confirmed the proceedings but added a rider to the effect that he intended to seek the intervention of the Executive with a view to remission of the corporal punishment.

Ntsebe's case, *supra*, appears to have been either overlooked, or deliberately not cited, in *R v Cele,* 1960 (2) PH, H 382 (N), *R v Tshezi*, 1960 (3) SAL. 12 (N), *S v Matanzima,* 1967 (2) PH, H 281

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(N), and *S v Qhantsi,* 1970 (4) SA 662 (O), where, in each instance, the reviewing judge came to the assistance of the accused where there had been an undue delay in inflicting the corporal punishment and the term of imprisonment was about to expire. With due deference, it seems to me that the approach of DE VILLIERS, runs counter to the dictates of justice and fair play, and it comes as no surprise that it has not found favour. When a court orders a whipping, it does so in the confident expectation that the strokes will be administered at the very commencement of the period of imprisonment, or, in the case of a magistrate's sentence, upon confirmation on review. If a trial court were aware that the infliction of strokes would be delayed, other than by the noting of an appeal or by the accused effecting an escape from custody, it would not, t think, choose to impose them. To order the deletion of strokes where there has been an undue delay, really gives expression to what the trial court would have done had it known what was to transpire.

But whatever the correct position is in South Africa, in this country the authority of *R v Sparimi and Another,* 1965 RLR 43 (AD); 1965 (2) SA 413 (SRAD). justifies my not following *R v Ntsebe, supra.* In the former case, the appellants had already served their sentences of

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imprisonment and had actually been discharged from gaol by the date their appeal was heard. This factor prompted QUENET, JP, at 44H-I (410 *fin* to 414A of the South African report) to remark as follows:

> "Should the court, at this stage, take steps to see that effect is given to that part of the sentence which ordered the infliction of cuts? Counsel for the prosecution suggested that the sentence of cuts should stand but that their infliction should be suspended subject to conditions. What is a course which I am not prepared to take. If that course, so counsel for the Crown said, did not appeal to the court, then he agreed the cuts should be set aside and that the appellants should not be returned to custody to receive cuts at this stage. With that view of the matter I entirely agree. It would be wholly unjust, I consider, that the sentence of cuts passed on 24th August, 1964, should now be put into effect."

A feature distinguishing the instant case from those referred to in which strokes have been deleted, is that though the delay has been inordinate, the accused are not about to be released. A good portion of the period of imprisonment imposed remains to be served. But despite an apparent emphasis in the judgments on the fact that the accused were soon to be set at liberty at the time their sentences fell to be considered, I do not read them to mean that the impending expiration of the prison term was the reason for deleting the strokes. The date of release was merely an expression of the principle that the infliction of a whipping should not be deferred. A striking illustration of this is afforded by the case of *R v James*, 1935 EDL 257. There the accused was already undergoing

three months' imprisonment when he was convicted of a further offence for which he was sentenced to three months' imprisonment with hard labour and to receive a whipping of four strokes. GANE, J, who reviewed the proceedings, held it to be appropriate and humane to order the whipping to be immediately administered, notwithstanding that in the ordinary course the strokes would only be inflicted on the expiration of the term of imprisonment currently being served, in accordance with the rule that sentences take effect consecutively.

I entertain not the slightest doubt that to have sanctioned the infliction of strokes upon the accused after a delay of over six months would have been cruel and unjust. As it is, the agonising suspense to which they have been so unfortunately subjected is much regretted. Hence I ordered the strokes to be struck out.

The question as to whether, having deleted the strokes, the remainder of the sentence should be allowed to stand, may be shortly disposed of. Once the conclusion was reached, on the merits of the case, that the whipping was justified but that six of the 18 months' imprisonment should have been suspended, to now leave the period of imprisonment undisturbed would be unfair to the accused. After all, they were not to blame for the delay which resulted in the deletion of the strokes.

Newham J, has read this judgment and agrees with it.

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THE STATE v DENHERE 1981 ZLR 606

Court **High Court, Bulawayo**

Criminal Review

Newham, J

20th November, 1981

Flynote

Criminal procedure - sentence - Road Traffic Act, 1976 (No. 48 of 1976) - section 46 (1) drunken driving - accused while extremely drunk drove truck through city at night - imprisonment appropriate.

Headnote

The accused was convicted on his plea of drunken driving, in contravention of section 46 (1) of the Road Traffic Act, 1976 (No. 48 of 1976). He had driven a truck through a Bulawayo suburb at night and lost control of it; it veered off the road, crashed through a fence and collided with a house. The accused's blood-alcohol level was 312 mg of alcohol per 100 ml of blood. The trial magistrate sentenced him to a fine and prohibited him from driving for six months. The scrutinizing regional magistrate referred the case to the High Court for review, expressing the view that the accused should have been sentenced to a period of imprisonment without the option of a fine.

Held, that the courts have time and again adverted to the seriousness of this offence. If the courts were to take any other view, they would be failing in their duty. If the word got around that persons as drunk as the accused, who drive their vehicles through crowded suburbs, may expect leniency at the hands of the courts, the populace would rightly be alarmed. This was a case where the magistrate erred in failing to imprison the accused, in spite of his personal circumstances and the fact that he was a first offender.

Cases cited:

S v Gadzi, 1971 (1) RLR 176 (AD); 1972 (1) SA 432 (RAD);

S v Maposa, 1972 RLR 353; 1973 (1) SA 546 (RAD);

S v Gambiza, AD 98/80 (unreported);

S v Julius, G-S-269-80 (unreported);

S v Gwarada, 1981 ZLR 17; 1981 (2) SA 531 (ZAD);

S v Schoeman, 1974 (2) RLR 52;

S v Kundishora, 1976 (1) RLR 371; 1976 (4) SA 51 (RAD);

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S v Watungwa, 1976 (2) RLR 158;

S v Sibanda, 1977 (2) RLR 189.

NEWHAM J

Judgment

Newham J: The accused was charged with a contravention of section 46 (1) of the Road Traffic Act, 1976 (No. 48 of 1976). The evidence established that, when driving a Ford Tipper truck in a township in Bulawayo at about 11 p.m. on the 13th June, 1981, the accused lost control of the vehicle, which veered off the road, colliding with a fence and then the house it enclosed. A blood sample, taken shortly after the accident, showed that his blood-alcohol content was 312 mg of ethyl alcohol in 100 ml of blood. The accused pleaded guilty and was convicted.

In assessing sentence, the trial magistrate took into account that the accused was a first offender; that although he was driving a heavy vehicle, his speed was low and the accident took place at night; that he was a married man of 45 years of age with eight children; and that to imprison the accused would bring about the loss of his employment and cause great hardship to the accused's family. He imposed a fine of $150 or, in default of payment, 150 days' imprisonment with labour, of which $50 or, in default of payment, 50 days' imprisonment with labour, was suspended for five years on condition that the accused was not convicted of having committed within that period any contravention of section 45 (1) or section 46 (1) of the Act. In addition, the accused was prohibited from driving all classes of vehicles for a period of six months and all driver's licences held by the accused were cancelled.

The regional magistrate to whom the case was sent for scrutiny was of the opinion that the accused should have been sentenced to imprisonment without the option of a fine, bearing in mind that the accused was heavily intoxicated and was driving a heavy vehicle in a built-up area. He referred the trial magistrate to *S v Gadzi,* 1971 (1) RLR 176 (AD); 1972 (1) SA 432 (RAD); *S v Maposa,* 1972 RLR 353; 1973 (1) SA 546 (RAD); *S v Gambiza.,* AD 98/80 (unreported). The trial magistrate agreed that on the authority of these decisions imprisonment without the option of a fine would have been appropriate. But he contended that the option of a fine was also appropriate, on the facts of the case, "bearing in mind the trend towards keeping first offenders out of prison where possible (see *S v Andrea Julius,* G-S-269-80, approved of in *S v Gwarada,* 1981 (2) SA 531 (ZA)*(18)".

The regional magistrate, not being satisfied that the sentence imposed by the trial magistrate was in accordance with substantial justice, forwarded the proceedings for review in terms of section 63A (3) (b) of the Magistrates Court act [*Chapter 18*], as amended. When doing so, the regional magistrate expressed doubt whether the courts in the cases

NEWHAM J

cited by the trial magistrate ever intended their decisions to cut across the principles established

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in the cases to which the regional magistrate referred.

I asked the Attorney-General for his views about the propriety of the sentence, in the light of the principles enunciated in the cases cited. In his reply, the Attorney-General states what I consider to be the effect of the judgment in *Gwarada*'s case (*supra*) with such admirable clarity that I can do no better than quote the relevant portion of his minute:

> "In my respectful submission, the magistrate has misunderstood the effect of *Gwarada's* case. In that case the learned CHIEF JUSTICE has done no more than to give general approval to the idea of imposing fines instead of imprisonment wherever the circumstances of the case make that possible. A careful reading of that judgment convinces me that all that was intended was to urge judicial officers to bear in mind that the imposition of fines might well have a greater deterrent value than in years gone by because large sections of the population were now becoming attuned and accustomed to a money economy. This is particularly important in view of the need to keep offenders out of prison wherever possible...."

Turning then to the facts of the present case and a consideration of the sentence, the Attorney-General continued:

> "In the words of the agreed statement of facts, the accused . . . lost control of the vehicle he was driving and went out of the road to his left and hit a fenced house . . . in Pelandaba township'. I assume from this that the accused crashed through the fence before striking the masonry of the house. When one compares the facts of this case with that of *S v Gambiza*, AD 98/80, one gets some idea of just how seriously this case should be treated. It is true that in *Gambiza's* case four pedestrians were struck by the accused's vehicle, mercifully none of them were killed. It Is equally true that the blood-alcohol test revealed that Gambiza was very considerably less drunk than the accused in this case. A sentence of four months' imprisonment was upheld in *Gambiza*'s case with, let it be noted, the full concurrence of the learned CHIEF JUSTICE. Time and time again our Courts have adverted to the menace of drunken driving and have taken an extremely serious view of the offence because people regularly get killed by drunken drivers. Compare also *S v Schoeman,* 1974 (2) RLR 52, *S v Kundishora,* 1976 (1) RLR 371; 1976 (4) SA 51 (RAD) and *S v Watungwa,* 1976 (2) RLR 158). If the courts were to take any other view, they would be failing in their duty. If the word got around that persons as drunk as the accused, who drive their vehicles through crowded townships, may expect leniency at the hands of the court, the populace would rightly be alarmed. In my respectful sub mission, the magistrate erred in failing to imprison the accused notwithstanding his personal circumstances and the fact that he is a first offender. In the circumstances of As case, a fine -is simply not a proper sentence . . ."

In my view, and that of my brother GUBBAY, the accused should have been sentenced to imprisonment without the option of a fine. Con-

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NEWHAM J

sequently, though the conviction is confirmed, I am unable to certify the sentence as being in accordance with real and substantial justice.

It was also suggested by the regional magistrate that the alternative period of imprisonment was out of proportion to the fine. On this point, the Attorney-General has commented as follows:

> "I do not think that this is so. He received a fine of $150 or 150 days in default of payment. The proportion of a dollar to a day's imprisonment does not seem in any way excessive. See *S v Sibanda and Others,* 1977 (2) RLR 189. Further, I do not think that the alternative period of imprisonment can be said to be excessive having regard to the offence. If he fails to pay the fine, he will have to undergo 100 days' imprisonment. I would have thought that such a period of incarceration was fully merited."

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My brother GUBBAY and I agree with these views.

THE STATE v HOVE 1981 ZLR 610

Court **High Court, Bulawayo**

Criminal Review

Gubbay, J

20th November, 1981

Flynote

Criminal law - Precious Stones Trade Act, 1978 (No. 8 of 1978) - section 3 (1) - possession of rough or uncut emeralds -"precious stones"- fact that particular stone has no commercial value does not exclude it from definition - mandatory sentence alteration of verdict or review to one where mandatory sentence is provided - High Court of Zimbabwe Act, 1981 (No. 29 of 1981) - section 29 (2) effect is that such sentence must be substituted even if it means increase in sentence.

Headnote

On a charge of contravening section 3 (1) of the Precious Stones Trade Act, 1978 (No. 8 of 1978), it is sufficient to show that the accused was in unlawful possession of "precious stones", as defined in section 2 (1) of the Act. The fact that in the particular case the stones had no commercial value does not mean that they cease to be "precious stones", as defined (*R v Mara,* 1968 (2) RLR 21; 1968 (3) SA 355 (RAD), followed).

On review a conviction for a more serious offence may be substituted for one of a less serious offence, provided that all the ingredients of the more serious offence were set out in the charge. If the more serious offence involves the imposition of a mandatory sentence, then, even if that sentence is more severe than that originally imposed, it must be substituted on review.

Cases cited:

S v Kufahakufemberwi and Others, 1978 (1) SA 327 (RAD);

S v Nyathi, 1981 ZLR 108 (GD);

R. v Mara (supra);

R v Vili, 1958 R & N 296;

R v Tarusika, 1959 (1) R & N 51;

R v Froneman and Froneman, 1941 TPD 74;

R v Matsebe, 1949 (4) SA 55 (T);

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R v Kandu, 1949 (4) SA 329 (SWA).

GUBBAY J

Judgment

Gubbay J: This case came before me on review. The accused, who was employed as an underground worker at the Sandawana Mine, Belingwe, was charged with, and pleaded guilty to, a contravention of section 3 (1) as read with section 3 (2) of the Precious Stones Trade Act, 1978, in that on the 24th June, 1981, he was in unlawful possession of two rough or uncut emeralds. It appears that he had concealed the stones in the handle of his hammer, with the intention of smuggling them out of the mine and selling them. A subsequent gemmological examination revealed the stones to be of no commercial value. For that reason, the magistrate considered that they did not fall within the definition of "precious stones" in section 2 (1) of the Act, and he accordingly convicted the accused of attempting to possess two rough or uncut emeralds. This verdict avoided the necessity to impose the mandatory minimum sentence of three years' imprisonment with labour, as required by the Emergency Powers (Maintenance of Law and Order) (Amendment) Regulations, 1981 (No. 3), thereby leaving the discretion as to sentence undisturbed. See *S v Kufahakufemberwi and Others,* 1978 (1) SA 327 (RAD) at 328A-G, and *S v Nyathi,* G-B-17-81 (not yet reported)*(19). In the result the accused was ordered to undergo 12 months' imprisonment with labour, of which period three months was conditionally suspended for five years.

In not convicting the accused of the substantive offence, the magistrate overlooked the judgment of BEADLE, CJ, in *R v Mara,* 1968 (2) RLR 21; 1968 (3) SA 355 (RAD), where he said, at 357D-G:

> "It is trite law, however that the plain grammatical meaning of an Act must be followed unless there is very good reason for not doing so. In terms of the definition an emerald is a precious stone. There is no qualification in the definition saying that it ceases to be a precious stone if it has no commercial value and I cannot see any justification for reading such an exception into the Act. To read such an exception into the Act might in itself be encouraging the dealing in stones illegally, which is one of the things the Act is designed to prevent. One cannot expect the type of person who usually pilfers these stones from mining locations to be conversant with the precise commercial value of the stone. The object of the Act is to impress on illicit dealers that they deal at their peril. If a pilferer could escape conviction if he inadvertently pilfered emeralds or diamonds or rubies or sapphires which were of no commercial value, the deterrent effect of the Act might be unnecessarily mitigated. It is all dealings in these stones which the Act seeks to prohibit. I am satisfied, therefore, that despite the fact that the second lot of emeralds has no commercial value they are none the less emeralds within the meaning of the Act, and therefore the appellant was rightly convicted in respect of all 15 emeralds."

GUBBAY J

The magistrate concedes that he misdirected himself and now requests that his verdict be altered and the mandatory sentence imposed.

In reviewing proceedings of an inferior court, this Court is empowered by section 29 (2) (b) (i) and (iii) of the High Court of Zimbabwe Act, 1981, to alter or correct a verdict, even if it involves

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substituting a conviction for a more serious offence in lieu of one for a less serious offence, provided that all the ingredients of the more serious offence were clearly set out in the charge. Thus, for example, in *R v Vili,* 1958 R & N 296 a verdict of guilty of assault with intent to do grievous bodily harm was substituted on review for a verdict of guilty of assault, the accused having been charged with the more serious offence, and in *R v Tarusika,* 1959 (1) R & N 51, a verdict of guilty of theft was substituted for a verdict of guilty of attempted theft. Such an alteration does not ordinarily allow of an increase to the sentence. Proviso (ii) to section 29 (2) (b) (ii) expressly prohibits the High Court from substituting a sentence more severe than that imposed by the inferior court (save for certain exceptions which are not relevant). It is inherent in this proviso, however, that what is prohibited is the increase of a light but legally competent sentence, imposed by the inferior court, to a more severe sentence. But where a mandatory sentence or some other form of mandatory order is required, the position, in my opinion, is different. This is because the validity of any such sentence or order stems from, and is dependent upon, the nature of the conviction which precedes. Any consequent increase in the punishment takes place, therefore, by operation of law. See *R v Froneman and Froneman,* 1941-TPD 74 at 79. Indeed, it is difficult to suppose that where the conviction has to be altered, an incompetent sentence must be allowed to stand on account of the original error. Support for this interpretation is to be found in proviso (i) to section 29 (2) (b) (ii), which allows for the substitution of a sentence of imprisonment in place of a fine, where the enactment under which the accused was convicted does not permit of the imposition of a fine. As this must apply equally where a minimum period of imprisonment is provided, the result would be extraordinary if the minimum period could be substituted where a fine, but not a lesser term of imprisonment, was wrongly imposed.

The same conclusion is reached by having recourse to section 29 (2) (b) (iii) of the Act, which empowers the High Court to -

> "generally give such judgment or impose such sentence or make such order as the inferior court or tribunal ought in terms of any law to have given, imposed or made...."

In the instant case, the inferior court *ought* to have convicted the accused of contravening section 3 (1) of the Precious Stones Trade Act, instead

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GUBBAY J

of an attempt to do so, and *ought* to have imposed a sentence of not less than the minimum prescribed. By correcting the verdict to guilty of a more serious offence, and thereby averting an injustice to the State, I will merely be doing what the magistrate ought to have done in the first place. If he had done so, he would have imposed the compulsory sentence. I am fortified in this view by the decision in *R v Matsebe,* 1949 (4) SA 55 (T.), in which RAMSBOTTOM, J (as he then was), on review, changed a conviction under section 1 of the Stock Theft Act, 1923, to one of stock theft (a more serious crime). The sentence of six months' imprisonment was ordered to stand, but a mandatory compensatory fine was added, with an alternative of further imprisonment. See, also, *R v Kandu,* 1949 (4) SA 329 (SWA) at 331.

For these reasons, the conviction is altered to guilty as charged, and a sentence of three years'

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imprisonment with labour substituted. The trial magistrate is directed to explain the effect of this judgment to the accused.

Newham J, concurs.

MUGANIWA v LIEBENBERG 1981 ZLR 614

Court **Supreme Court, Salisbury**

Civil Appeal

Fieldsend, CJ, Baron, JA, and Georges, JA

1st December, 1981

Flynote

Procedure - appeal - witness subsequently making statement inconsistent with evidence in court below - application for remittal for rehearing - requirements for.

Headnote

Subsequent to the trial in the magistrate's court, one of the respondent's witnesses made a statement in which he said that he had been forced by the respondent, his employer, to give evidence on a matter he knew nothing about. On the basis of this, the appellant sought by notice of motion to set aside the magistrate's judgment and have the case remitted for rehearing.

Held, that, firstly, a substantial foundation must be laid as to why the witness gave false evidence in the court below and, secondly, a person seeking to rely on a subsequent inconsistent statement faces the clear difficulty that a confessed liar cannot usually be accepted as credible unless some very good reason is given for his having given false evidence previously (*Ladd v Marshall* [1954] 3 All ER 745 (C.A.), followed). In this case no such foundation had been laid as no good reasons were given for the previous inconsistent statement, nor was there any clear indication as to the respects in which the witness's evidence was said to be false, and accordingly the application was dismissed.

Cases cited:

Farmers' Co-op. Ltd. v Borden Syndicate (Pvt) Ltd., 1961 R & N 28; 1961 (1) SA 441 (FSC);

White v Reginam, 1962 R & N 417;

Ladd v Marshall (*supra*).

M T O'Meara for the appellant.

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B W K Whaley for the respondent.

FIELDSEND CJ

Judgment

Fieldsend CJ.: This appeal concerns the charges made for the drilling of a bore-hole on the appellant's property which he has refused to pay the respondent. The respondent is a bore-hole drilling contractor who both divines for the presence of water and drills bore-holes in places which he has chosen. The appellant is a person who owns a property on the outskirts of Umtali where apparently he operated a trading store. The evidence given by the respondent was that he had had previous experience of drilling in this area, and had found that there was a very strong likelihood of granite under the surface which would intervene before he was able to reach the underlying water. He says that he was approached by the appellant who was desperate for water and he made clear to him what the position was in regard to the presence of water in the area where he wanted to obtain it. In these circumstances he says that the contract between the parties was that he would drill for water on the appellant's property but that if he struck granite before he struck water then there would be an obligation upon the appellant to pay him for the depth of hole that he had sunk. It was implicit in this agreement that if water was not found but the reason for this was not the striking of granite, then there would have been no charge for the boring on the property.

The respondent gave evidence himself and he called two employees who worked for him on the boring machine to support him on various matters, and the magistrate found in his favour.

At the opening of this appeal, Mr *O'Meara* by notice of motion sought to set aside the judgment of the magistrate and to have the matter remitted for rehearing on the basis that one of these employees, one Sani Musindo, had admitted since the trial that he gave false evidence in the trial.

The evidence that Musindo gave concerned a meeting at the respondent's property where the appellant came to seek the assistance of the respondent in obtaining water. His evidence also covered a subsequent meeting between the parties at the appellant's own property shortly before boring started and he also gave evidence of a subsequent meeting between the parties on the Penhalonga Road when the respondent said that he could not continue boring as rock had been struck and the appellant should therefore come to measure the depth of the hole to see how much he had to pay.

There was attached to the notice of motion proceedings under an affidavit made by the appellant himself a statement that had been signed by Musindo some time after the hearing of the case. This read:

FIELDSEND CJ

"We Sani Musindo do admit that we do not know the matter between Mr Liebenberg and Mr Muganiwa for the

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> reason that we work for Mr Liebenberg we were forced to witness him on a matter we did not know of. We ask forgiveness for having done this wrong thing. We do like this matter to be put right."

This statement was made according to the appellant's covering affidavit as a result of an inquiry by the appellant as to why Musindo had given evidence against him at the trial.

The principles upon which an application to remit a case to the lower court as a result of evidence subsequently obtained are clearly set out in the case of the *Farmers' Co-op. Ltd. v Borden Syndicate (Pvt) Ltd.,* 1961 R & N 28. It is on the requirement that the additional evidence that is sought to be led must be such as is presumably to be believed or is apparently credible that the appellant is in difficulty in this application. This is not a case such as *White v Regimen,* 1962 R & N 417 in which after the trial it came to light that an important witness had made a previous inconsistent statement. Here we are concerned with a very different situation, namely a subsequent statement inconsistent with the evidence that the witness gave. This situation has been dealt with explicitly in the English case of *Ladd v Marshall* [1954] 3 All ER 745 (C.A.).

Two aspects become quite clear on a reading of this case. They are, first, that a substantial foundation must be laid as to why the witness who has now changed his evidence gave false evidence in the court below and, secondly, that a person seeking to rely on a subsequent inconsistent statement faces the very clear difficulty that a confessed liar cannot usually be accepted as credible unless there is some very good reason given for the fact that he gave false evidence in the court below. On the papers before us there is no indication save the statement that Musindo was forced "to give witness" on a matter he did not know of, which of itself is a vague allegation, but also it is not made on affidavit. There is no way of testing the probabilities of what he is said to have said.

Secondly, the statement that I have referred to that was attached to the affidavit does not indicate in what respect the evidence of Musindo in the court below was false. There is just a general statement that he has done something wrong and would like it put right. There is, of course, the additional feature which must weigh to some extent against the sending back of this case for the admission of further evidence, namely, that the statement was obtained from Musindo because it was sought from him by the appellant himself when he asked why he had given the evidence he had.

FIELDSEND CJ

It was for all these reasons that we decided at the opening of the appeal when this application was made that it was not one which could properly be granted.

[His Lordship then dealt with the facts, and concluded:]

In my view, the appeal must be dismissed with costs.

Baron JA: I agree.

Georges JA: I agree.

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Gargan Brothers & Chadder, appellant's legal representatives.

J H E Rogers, respondent's legal representative.

THE STATE v NDHLOVU 1981 ZLR 618

Court **Supreme Court, Salisbury**

Criminal Appeal

Fieldsend, CJ, Baron, JA, and Georges, JA

1st December, 1981

Flynote

Criminal procedure - warned and cautioned statements - confirmation of - essential to ensure through court interpreter that translation represents what accused actually said.

Headnote

It is essential for magistrates who are asked to confirm warned and cautioned statements by accused persons, as well as for trial costs, to take the utmost care to ensure through the official court interpreter that the English translation of statements made in the vernacular in fact represents what the accused actually said. Magistrates should also record the fact that they are satisfied in tints regard.

The appellant in person.

M T O'Meara for the respondent.

Judgment

Baron JA: The appellant was convicted of rape. It was alleged that after a beer drink he and a friend had met the complainant, a girl aged about 15 or 16, and her cousin, a girl apparently somewhat older, on their way home from a nearby river where they had been fishing. The appellant proposed love to the complainant; she alleged that she refused, that the appellant seized her hand, struck her on top of her head with a switch and dragged her away: she said he took her to a nearby hill and forced her to remain with him all night and raped her twice during the night. The appellant's defence was that the complainant consented. He said he and the complainant were well known to each other, that he was a frequent visitor to her kraal and had often spent the night there, that he and the complainant had agreed to marry and had exchanged tokens, and that on the night in question she was a willing party to the intercourse.

The prosecution relied also on a confirmed warned and cautioned statement which the magistrate found to be a confession.

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BARON JA

When the matter came before me as an application for a certificate to enable the appellant to prosecute an appeal against conviction in person I had serious reservations concerning the conviction; I regarded the evidence in the case as so unsatisfactory that I was doubtful whether it was safe to rely on the appellant's statement.

I do not propose to deal with the evidence in detail. Suffice it to say that Mr *O'Meara,* who appeared on behalf of the State, conceded in a very detailed and very fair argument that the evidence, particularly of the complainant and her mother, was far from satisfactory, that the magistrate's assessment of the evidence amounted to a misdirection and that were it not for the confirmed warned and cautioned statement he would not be able to support the conviction. He submitted that the appellant had failed to discharge the onus on him of satisfying the court that the statement was not voluntarily made, but he conceded that this court was nonetheless entitled to examine the statement and alit' the evidence and to decide whether the statement was genuine.

We English version of the statement reads:

> "I understand the caution. I admit to the charge of rape at AFA Esnath. What happened is I was coming from a beerdrink with my friend AMA Tapera drunk. We then met Esnath and her friend coming from Nuanetsti River. We stopped to greet them. After greeting them Esnath's friend proceeded and my friend Tapera proceeded as well. I remained with Esnath holding her hand. I then asked her to go with me to my home. She refused. I then assaulted her once on the head with a stick. She then agreed to go with me.
>
> We then walked fast to reach Tapera. We reached Tapera and crossed the river together. When we crossed the river the sun had set and it was dark. I then told Tapera that we were up to the hill. We then got up the hill and put up for the nights.
>
> During the night I had sexual intercourse with Esnath three times, she never resisted all the times as she was afraid that I would hit her. Tapera slept about 8 m from where I was with Esnath. The next morning 16/11/80 we accompanied Esnath to her home. When we were a km from her home we returned and went to our home. That is all."

During the course of the argument, Mr *O'Meara* having expressed him self to be unhappy concerning the last paragraph in particular, the court asked the interpreter to translate direct from the Shona version of the statement. That translation was recorded verbatim and reads as follows:

> "I understand the warning. I admit the case of raping Esnath. What happened is that I and Tapera who were coming from a beer drink, we were drank. We met Esnath and her friend who was coming from the

BARON JA

> Nuanetsi River. We approached and we greeted them. When we had greeted them the friend of Esnath left. Tapera also left. I kept on holding Esnath by the hand. We remained behind standing. As we were standing, I said to Esnath: 'Accompany me to my house.' She refused and I struck her with a switch about the head. She then agreed to go with me.

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> We walked fast and caught up with Tapera. When we crossed the river the sun had already set. I then told Tapera that we should climb up the kopje or hill and sleep there. We climbed up and slept on the kopje.
>
> That night I slept with Esnath, having sexual intercourse with her. I had sexual intercourse with her three times this night. The following day we got up and I accompanied Esnath to her house. When we were about to reach the house when there was one kilometre to go we turned back and went to our house. That is all"

Thus the two sentences appearing in the English version of Exhibit 1 "She never resisted all the times as she was afraid that I would hit her. Tapera slept about 8 m from where I was with Esnath", do not appear in the original statement in Shona. On this being established, Mr *O'Meara* very properly indicated that he could no longer support the conviction. The court allowed the appeal immediately, but in view of the seriousness of the irregularity disclosed we indicated that we would hand down our reasons later.

I cannot express myself too strongly in my condemnation of what has taken place in this case. On the face of the exhibit the police officers responsible for its preparation inserted a crucial sentence explaining the reason for the complainant's failure to resist (as well as the sentence describing where Tapera slept which happened to coincide with the complainant's statement). There is therefore very grave suspicion that the police officers appreciated that the actual words of the appellant may not have been sufficient to amount to a confession of rape, and added the words in order to ensure that the statement should be so read. If that suspicion is well founded their conduct is a disgraceful attempt to manufacture evidence in order to secure a conviction. Mr *O'Meara* informed the court that he would take steps to investigate this matter and I trust that these stops will be vigorously pursued and that the culprits will be properly dealt with.

The seriousness of this case is underlined by the fact that the deception was actually successful before the confirming magistrate and before the trial magistrate. The reason for this is that where an accused is not proficient in English and the proceedings are conducted through an interpreter, the statement that is read to him is likely to be read from the original vernacular; unless therefore the magistrate is proficient in the vernacular and happens to be comparing it with the English version, the fact that the two versions differ may not emerge.

BARON JA

There is perhaps a lesson to be learned from this case, bearing in mind particularly that once a warned and cautioned statement has been confirmed the onus is upon the accused to show either that it was not freely and voluntarily made or that he did not say what he is recorded as having said. Confirming magistrates, and also trial courts, should therefore take the utmost care to ensure through the official court interpreter that the English translation of the statement in fact represents what the accused actually said.

Fieldsend CJ, I entirely agree with what my brother has said. I would only stress the importance in this particular case of the appellant's statement. There was very little other corroboration of the prosecution evidence, but despite that, speaking for myself, I may well not have been prepared to allow the appeal had it not come to light that the appellant's statement was suspect.

This case illustrates the danger that can arise in respect of confirmed statements from the fact that the trial court is faced with an apparently regular statement, which the accused may not

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have had put to him at the confirmation proceedings. Steps should be taken at once to ensure that all magistrates are made aware of the need to be satisfied that the English version of any statement represents what the person before then in confirmation proceedings actually said, and for the fact that this is so to be recorded.

Georges, J A.: I agree.

SWIFT v PICHANICK NO AND OTHERS 1981 ZLR 622

Court **Supreme Court, Salisbury**

Civil Appeal

Lewis, JP, Baron, JA, and Georges, JA

30th September and 3rd December, 1981

Flynote

Succession - valid will failing through death of beneficiary before corpus vested - resulting intestacy - ascertainment of intestate heirs - date of - date of intestacy is date of ultimate failure of will not date of testator's death.

Headnote

In 1961 Mrs. Elizabeth Jane Palombo made a will in which she prodded that -

(a) if on her death her youngest child should have attained the age of 25 years, her estate would go to all her surviving children;

(b) if on her death that child had not attained the age of 25 years, her estate was to pass to an administrator (the first respondent) to hold in trust until her youngest child reached the age of 25 years, when it would be passed on to the surviving children;

(c) if her child or children died before the youngest child reached 25 years, the entire estate should pass to Mrs. Dorothea Clark, the mother of the second and third respondents.

Mrs. Palombo had one child, Jane Swift, whose father was the appellant; Mrs. Palombo had previously been married to him. Mrs. Palombo died in 1962; Mrs. Clark died in 1975, and Jane Swift died in 1978, not having attained the age of 25 years. As the will did not provide for these eventualities, the estate had to be dealt with as intestate.

Succession had to be determined as on Mrs. Palombo's intestacy; the issue to be decided was the time at which the persons entitled to succeed her were to be ascertained. If the time for such ascertainment were the date of Mrs. Palombo's death, Jane Swift would have been entitled to succeed; and the appellant would have been entitled to succeed on Jane Swift's death. If, however, the time were at the date when the event occurred which resulted in the

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intestacy, that is, the death under the age of 25 years of Jane Swift, the second and third respondents were entitled to succeed.

Faced with conflicting opinions on the matter, the first respondent filed a summons seeking a declaratory order as to who Mrs. Palombo's intestate heirs were.

SQUIRES, J, in a considered judgment, found for the second and third respondents; against that finding the present appeal was brought.

Held (per LEWIS, JP, BARON, JA, concurring), that the rule propounded in various decided cases and by numerous text-book writers since the case of *Union Government (Minister of Finance) v Olivier,* 1916 AD 74 - that the intestate heirs must always be determined as at the date of the testator's death irrespective of how or when the intestacy arose - had been based on the erroneous view that that was what that case had decided. *Olivier*'s case was not intended to lay down such a general rule, being concerned with the interpretation of a particular statute.

Held, further, that there is at least as much, if not more, virtue in a uniform rule that the date should be that on which the estate, or the relevant part of it, becomes an intestate estate. Where, as here, the will had been validly in operation for a number of years, it was more logical to regard the date on which the intestate heirs are fixed as the date of ultimate failure of the will. This avoided resorting to the fiction that their inheritances must be deemed to have vested in the intestate heirs at the date of the testator's death, although they had not in fact so vested. It also avoided the anomaly that the estate which is deemed to vest as at the date of the testator's death might in fact not be the same estate which existed at that date.

Held, further, that, since the intestate heirs are regarded as succeeding by the implied wish of the testator, it cannot be readily implied that the testator would have wished those who would have been her intestate heirs if she had died without making a will at all to succeed on the failure of the will she did make.

Held, further, per BARON, JA, that it is straining language to say that a man *dies* intestate who dies leaving a will which may in certain unexpected circumstances fail. Intestacy occurs if and to the extent that a man has failed effectively (as distinct from unconditionally) to dispose of his estate. If at the date of death it is uncertain whether or not the will is effective the testator has not died intestate; should the will fail thereafter he then becomes intestate to the extent of the failure. This approach leads to a logical and consistent rule, namely, that the intestate heirs are in all cases to be ascertained at the date when the intestacy occurs.

Cases cited:

Union Government (Minister of Finance) v Olivier (supra);

In re Estate Ross, 1941 CPD 426;

Ex parse Dodgson and Others, 1942 CPD 199;

Estate Anderson v Anderson and Others, 1946 NPD 568;

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Dales, NO v Lello and Another, 1971 (1) SA 141 (D & CLD);

Lello and Others v Dales, NO, 1971 (2) SA 330 (AD);

Ramsumer, NO v The Master (NPD) and Others, 1978 (4) SA 877 (NPD);

Smith and Another v Estate Smith, 1949 (1) SA 534 (AD).

J. C Andersen, SC, for the appellant. The heirs on intestacy should be ascertained as at the date of death of the deceased whatever the reason

for intestacy may be and more particularly in a case such as the present one. As a general principle the beneficiaries of a will must be ascertained as at the death of the testator: *Winstanley and Others v Barrow and Others,* 1937 A D 75. It would be consistent with this principle for the beneficiaries on intestacy to be ascertained as at the death of the deceased in cases of intestacy as well. As a general principle, too, the assets of a deceased estate are to be determined as at the death of the deceased and then distributed either to beneficiaries in accordance with a will or to intestate heirs; it would be in accordance with this principle as well for the heirs on intestacy to be determined as at the date of death of the deceased, whatever the reason for intestacy may be. In *Union Government (Minister of Finance) v Olivier (supra)* at page 90 it was held that "in determining who are the heirs *ab intestato* of a deceased person regard must be had to the date of his death". It was not suggested that this principle was subject to exceptions. Whilst the matter may have been left open in *Lello and Others v Dales, NO (supra),* in the cases in which the failure of a will which *has* been acted upon is dealt with, it has been held that the heirs *ab intestato* should be ascertained as at the death of the deceased: *In re Estate Ross (supra); Ex parte Dodgson anal Another (supra); Estate Anderson v Anderson and Another (supra).* The real question is whether there should be an exception from the normal rule as to the time at which intestate heirs are ascertained. There may be practical difficulties in this and other cases where assets which have to be redistributed are no longer in existence or have been disposed of to third parties, or where money has been spent and a beneficiary is unable to return it. Such difficulties may arise from mistake or where a will is set aside. The assets to be redistributed will be recoverable to the extent allowed by the *condictio indebiti;* Lee and Honoré, *The South African . Law of Obligations,* 684 *et seq.,* in particular paragraph 688. In principle in all cases of intestacy the heirs *ab intestato* should be ascertained as at the date of death. To provide otherwise would introduce uncertainty as to when exceptions to the general principle should be allowed. The fact that difficulties might occur or dispositions might result to persons who were never intended to benefit are not good reasons for making exceptions.

J. V Lazarus, SC, with him *A. P de Bourbon,* for the second and third respondents. The fundamental question in this appeal is the date at which the intestate heirs have to be determined. There is a difference between the case where a person dies without a will or without a valid will and a case where he dies with a will which is originally valid but subsequently fails. In the former case there is an immediate vesting in the heirs *ab intestato* and it follows that they are determinable as at the

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date of his death. Cases falling into this category where it was held that the determination was to take place at dated of death are: *Spies v Spies* (1846) 2 Menzies 454 at 455; *Ramsumer, N.O. v The Master and Anor.,* 1978 (4) SA 877 (NPD) at 881; *Jooste & Parfitt v Jooste's Estate,* 1934 TPD 350 at 355; *Grewer v Estate Grewer,* 1918-1923 GWLD 82. The only cases we have been able to find which deal with the date of determination of intestate heirs where the deceased died testate and the will subsequently failed are: *In Re Estate Ross (supra)*, *Ex Parte Dodgson & Anor. (supra); Estate Anderson v Anderson & Anor. (supra); Dales, NO v Lello & Others (supra).* The cases of *Estate Ross* and *Dodgson* are based upon a misunderstanding of the case of *Union Government v Olivier (supra).* In that case the court was concerned with a transfer duty problem. The matter turned on a proper construction of the statute, and provides no authority for a general proposition that in all cases intestate heirs have to be determined as at the date of death.

Until *Anderson*'s case, there was no attempt to consider whether a general principle had indeed been laid down by the Appellate Division. It is submitted that HATHORN, J P.'s first inclination was the correct one for the following reasons:

(1) When a man dies without a will or without a valid will, there is an immediate vesting in his intestate heirs, and it follows that his intestate heirs must be determined as at the date of his death.

(2) Where, however, a man dies with a valid will which subsequently fails, he has died testate and his will continues to operate until it fails.

It is true that for the purposes of ascertaining the beneficiaries under a will, the will must be read as at the time of the testator's death. The reason for such a rule is to provide a definite date on which to ascertain the beneficiaries. So, too, should the date of death be the guiding date when a person dies without a will (either at all or because a purported will is declared to be invalid). But there is no need to use the date of death as the determining date when there is a resulting intestacy because the date of failure of the will provides an equally definite date and a more practical one on which to determine the heirs in the resulting intestacy. Where a will operates for a long period before failing, it will frequently be the case that the heirs, who would have been heirs *ab intestato* at the time of death if the testator died intestate, have since died. The simple approach which is consistent with all the principles of intestacy is that the vesting in intestate heirs takes place when the will ceases to operate for it is only at that point of time that the intestacy commences.

LEWIS JP

Judgment

Lewis JP: I have had the advantage of reading the very thorough judgment of my brother GEORGES in which he sets out the terms of the will in this case, and the circumstance which led to the intestacy. He has analysed all the relevant authorises on the question of the time at which the intestate heirs of the testator must be ascertained when, as in this case, a will which

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has been valid for many years eventually fails because of the death of the ultimate beneficiary and intestacy results.

Though I regret I must driver from the final conclusion he has reached, it will be unnecessary for me to repeat the detailed analysis of the authorities which he has so painstakingly undertaken. It is apparent from that analysis that the rule as propounded in the various authorities since *Union Government (Minister of Finance) v Olivier,* 1916 AD 74, that the intestate heirs must always be determined as fit the date of the testator's death irrespective of how or when the intestacy arose, has been based on the erroneous view that this is what the Appellate Division, *per* JUTA, JA, had laid down in *Olivier*'s case *(supra).* It was on that basis that the Cape cases of *In re Estate of Ross,* 1941 CPD 426 and *Ex parte Dodgson and Others,* 1942 CPD 199 were deeded.

As pointed out by my brother GEORGES, it was not intended in *Olivier*'s case *(supra)* to lay down a general rule applicable to all cases of intestacy. This appears to have been recognised by HATHORN, JP, in *The Estate Anderson v Anderson and Others,* 1946 NPD 568 at 578. The learned JUDGE PRESIDENT also expressed the view that it would be reasonable to fix the date for determination of the intestate heirs as the date which gave rise to the failure of the will and resultant intestacy, i.e., the death of the testator's son, who like Jane, the daughter of the testatrix in the instant case, died out of the will without acquiring any vested right to the corpus of the estate a *morte testatoris,* because he was only entitled to that right if he survived to a certain age, in his case 30 years. The reason which HATHORN, JP, gave was one which commended itself to the learned judge in the court *a quo.* He said "because if that view is taken it recognizes that the will was wholly operative right up to the very moment when the dispositions relating to the corpus first became abortive and I would be inclined to decide in favour of this date but for the considerations in favour of the first date" (i.e. the date of the testator's death) "which I am about to mention".

The three reasons are then set out at page 578 of the report as follows:

> "For one thing, a decision that way would provide a clear, definite and unmistakable rule. Secondly, such a decision would be in accordance with the general principle laid down in *Olivier*'s case that intestate heirs are to be ascertained once and for all at the death of the deceased. Thirdly, there is

> the consideration that He Cape Provincial Division has fixed this date in two cases which are similar to the present case and it is desirable that the law should be the same throughout the Union so far as the Provincial Divisions can conscientiously bring that about."

As regards the second reason, this appears to have been a *volte face* since the learned JUDGE PRESIDENT had rightly found, almost immediately before, that *Olivier*'s case *(supra)* did not purport to lay down a general rule. It was concerned with the interpretation of a particular statute. As regards the third reason, this also, with respect, lacks validity since both *Ross*'s case *(supra)* and *Dodgson*'s case *supra*), the two cases in the Cape Provincial Division referred to, were decided on the erroneous basis that *Olivier*'s case (*supra*) had laid down that general principle.

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As regards the first reason, in my view there is at least as much if not more virtue in a uniform rule that the date should be that on which the estate of the testator, or the relevant part of it, becomes an intestate estate. If he has died leaving no will that date will be the date of his death. If he has died leaving a will which is subsequently proved to be invalid, the date is the same since the effect of this is that the will is void *ab initio;* it is a will which never was. If the intestacy arises because the heir has failed or refused to adiate and there is no residual heir the result is also the same. There is usually an immediate vesting in the heir and he is given until the time when the estate is ready for distribution by the executor in which to exercise his election to adiate or not. See Steyn on *Wills,* 2nd edition, pages 213-14. If he adiates, his adiation operates with retroactive effect to the date of vesting, usually the time of the deceased's death. His decision is irrevocable, although he can subsequently renounce his rights in favour of some other person. See Corbett, Hahlo, Hofmeyer and Kahn, *The Law of Succession in South Africa,* page 16 and the authorities there cited. If the heir refuses to adiate then equally his refusal has the effect that the will has failed *ab initio* in regard to that portion of the estate bequeathed to him and *ab initio* there is resulting intestacy as front the testator's death.

Where, as in this case, the will has been validly in operation for a number of years, fifteen-and-a-half years in the instant case and fifteen years in *Anderson*'s case *(supra)*, I agree with the view of SQUIRES, J, in the court below that it is more logical to regard the date when the intestate heirs are fixed as the date of ultimate failure of the will. This avoids resorting to the fiction, acknowledged to be necessary by HATHORN, JP, at pages 578-9 of *Anderson*'s case *(supra),* that their inheritances must be deemed to have vested in the intestate heirs at the date of testator's death although they had not in fact so vested because

the will had been in operation for several years with the *dominium* in the corpus held in trust by the administrators or trustees. It also avoids the that the estate which is deemed to vest as at the date of the testator's death is not in fact the same estate which existed at that date because of the operation of the will during the long period since that date. The trustees in carrying out their task and in the exercise of their discretion will have made payments of capital and interest from the estate and will have realized assets and invested the proceeds. If the intestate heirs are determined as at the date of the failure of the will what then vests in them is in erect what is left of the estate at that date and that accords with the reality of the situation.

By the same token, however, I do not think there is any substance in the point relied upon by the learned judge *a quo,* and supported by Mr *Lazarus* in argument on appeal, that where a will fails after many years in operation a rule that the intestate heirs are determined as at the date of death might mean having to undo all that had been done before by previous administrators or trustees. Since there has been no vesting of the beneficial ownership of the corpus in anyone up to the date of failure and since any disposal of capital and interest by the administrators or trustees would have been in accordance with their instructions under a valid will, no question of having to undo anything arises. What the intestate heirs inherit after such failure is what remains at the date of failure. Things only have to be undone where a will thought to be valid is subsequently discovered to be invalid, or where it is thought that the testator has died without leaving a will and has therefore died intestate but in fact a valid will subsequently comes to light rendering it necessary to divest the intestate heirs of the inheritance and revest it in the

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testamentary heir. In such cases, the undoing of what had been done arises from operation of law and is unavoidable.

However, SQUIRES, J, in his judgment went on to make the valid point, on which Mr *Lazarus* relied strongly in argument, that where the will has remained in operation for a long time before ultimately failing it will frequently happen that a person who would have been the intestate heir as at the date of the testator's death has himself died before the failure of the will. In those circumstances, the application of the rule in *Anderson's* case *(supra)* results in the situation that the estate of that person inherits as the intestate heir because of the fiction inherent in the rule that the vesting is deemed to have taken place before that person died. This result is in disregard of the basic concept of the common law of intestacy that estates do not inherit on intestacy. The application of the rule in *Anderson*'s case (*supra*) fact led to this

result in the case of *Dales, NO v Lello and Another,* 1971 (1) SA 141 (D & CLD). The same point was made by the late MR JUSTICE AS HATHTORN in argument as counsel in *Anderson's* case *(supra)* at page 571, where the note of his argument reads:

> "Though one looks at the date of the testator's death to ascertain who the intestate heirs are at that date one must also look at all the circumstances. Here those circumstances include the fan that it was the death of the *fideicommissary* heir, the testator's son, that caused the intestacy. Therefore he must be regarded as dying out as an intestate heir. To hold that the testator's son still comes in as an intestate heir would be to hold that he had acquired a transmissible right as an intestate heir *a morte testatoris.*

Such a conclusion is alien to the conception of intestacy."

Unfortunately this argument did not find favour with his father, as I think, with respect, it should have done.

Where, moreover, such a person has made a will leaving his own estate to a stranger or even to a home for stray cats, the distribution of the testator's intestate assets will be to such stranger or cats' home, notwithstanding that blood relatives in the direct or collateral line, who should be the proper persons to inherit on the ordinary rules of intestacy, may still be alive. Since according to Voet, 30.32.11 (Gane's Translation, vol. 5, page 103) intestate heirs are regarded as succeeding by the implied wish of the testator, the court should endeavour to avoid brining about such a result.

I cannot agree that the rule that estates do not inherit on intestacy is not infringed once it is shown that the heir, though dead at the time intestacy occurs, has survived the testator. It seems to me this proposition is only valid when the testator has died intestate, either because he left no will at all or because he left an invalid will or because the heir refused to adiate. In rare cases where the intestate heir though alive at the time of the death of the testator happens to die in the short intervening period between the testator's death and the discovery that the will is void *ab initio* or that the heir has refused to adiate, no problem is presented because the testator has truly died intestate and the estate must be regarded as having vested in the intestate heir before his death. Where, however, the testator has left a valid will which has been in operation for a long period of years and which has only eventually failed because of the unexpected non-fulfilment of a condition, I can see no justification for resorting to a fiction that

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the testator has *died* intestate, notwithstanding that clearly he has died testate, and equating his position with that of someone whose will has been void *ab initio.* I know of no authority which defines intestacy in such a way that it is necessary to resort to such a fiction.

LEWIS JP

It is true, as my brother GEORGES has pointed out, that one can have the same result whichever date is taken as the date for determination of the intestate heirs. In the example he gives, if Jane had married and had children, her husband had predeceased her and she had died intestate, her children would have been the intestate heirs whether the date for their ascertainment was that of Jane's death or Mrs. Palombo's death. The point is, however, that juristically this would have arisen because they were the intestate heirs of their grandmother, Mrs. Palombo, Jane having no transmissible rights in Mrs. Palombo's estate to pass on to them.

Since the intestate heirs are regarded as succeeding by the implied wish of the testator it cannot be readily implied that the testator would have wished those who would have been her intestate heirs if she had died without making a will at all to succeed on the failure of the will which she did make. On this aspect, SQUIRES, J, in the court *a quo* said in his judgment:

> "The matter, however, goes further, because, quite apart from these effects of the will, there is the question of what she achieved. The testatrix here bequeathed the capital of her estate to her administrators, then to her child or children, and, failing her or them, to Mrs. Dorothea Clark. If one accepts thereafter an implied wish of the testatrix that her estate go to the intestate heirs because she made no further provisions, it must be the intestate heirs who take when the bequest could not go further as arranged in the will. In other words, failing the instituted and substituted heirs, there is a bequest here to the intestate heirs. This is, in effect, a conditional fideicommissum in favour of the intestate heirs, the condition being a failure of the other beneficiaries. Van Leeuwen, *Roman-Dutch Law,* 3:6:10 (Kotzé's translation) says:
>
> > 'The quality of the testamentary reliction, as regards the person of the heir, consists in the conditions imposed upon him. For we may institute anyone heir without more, or subject to a condition which it is in his power to perform, or which depends upon a certain event: . . . or subject to a modus or direction imposed upon him with which he must comply: . . . In the first case, the next of kin acquire the inheritance *ab intestato* and retain it until the arrival of the particular day, when they must hand over the inheritance to the instituted heir, whereas, on the other hand, in the second case the instituted heir remains in possession of the inheritance until the appointed day, and upon its arrival he delivers the inheritance up to the heir who is entitled thereto *ab intestato.*'
>
> In such a situation, the fideicommissaries are the intestate heirs alive at the day the condition is fulfilled, namely, the death of the child of the testatrix after the death of the substituted Mrs. Clark. And it seems to me to be disregarding this entirely if one is to look to the intestate heirs at the date of death as the final substitution. And I do not think it can simply be disregarded without running at least some danger of rewriting the testators will."

I respectfully agree with this approach. It was put forward in his alternative argument before the Appellate Division in *Lello and Others v Dues, NO,* 1971 (2) SA 330 (AD) at page 331C-F by Shaw, QC, as he then was, for the appellant, and in my view it is a sound and logical way of treating the matter. In that case, FRIEDMAN, J, sitting as a single judge in Natal, had ruled in favour of the applicant that partial intestacy had arisen in regard to half of the estate of the

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testatrix, and because he was bound by the decision of the full Bench of Natal in *Anderson's* case *(supra),* he went on to declare that the intestate half of the estate devolved on the estate of the intestate heir as at the date of the death of the testatrix, who had himself died since the death of the testatrix. See *Dales, NO v Helm and Others,* 1971 (1) SA 141 (D & CLD).

The Appellate Division overruled the judgment of FRIEDMAN, J, in the court below to the effect that the half of the estate in question had devolved on intestacy and held that the *ius accrescendi* applied and there was no intestacy. They thus upheld the main argument of Mr SHAW for the appellant and found fit unnecessary to deal with his alternative argument, to which I have already referred, that if there was in fact an intestacy the intestate heirs should be regarded as those alive upon the failure of the will. However, the way in which MILLER, AJA (as he was then), who delivered the judgment of the full court, expressed himself at page 337H to 338A of the report indicates to me that the Appellate Division entertained grave doubts as to the correctness of the decision in *Anderson*'s case *(supra).* The learned judge said:

> "This conclusion renders it unnecessary to decide the question, referred to earlier herein, concerning the date upon which the *ab intestato* heir of the testatrix would have to be determined if it were found that partial intestacy resulted and in respect of which it was contended that *Anderson*'s case, 1946 NPD 568 was wrongly decided. In appropriate circumstances, however, the correctness of the decision in *Anderson's* case on this point (see at page 577-9) might merit consideration, as also the question whether the dictum in *Union Government (Minister of Finance) v Olivier,* 1916 AD 74 at page 90, was intended to be of a general application, as appears to have been accepted in the cases referred to in *Anderson*'s case at page 578 or was merely attuned to the particular circumstances of that case."

It is true that there is a formidable weight of text-book authority in support of a general rule that intestate heirs are always ascertained as at the date of the death of the testator, irrespective of how or when the intestacy arises. See Steyn, *Law of Wills in South Africa,* 2nd edition, pages 94-5; Maasdorp, *Institutes of South African Law,* 9th edition, volume 1, page 105; Lee and Honoré. *The South African Law of Property, Family Rela-*

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tions and Succession, section 529; Meyerowitz, *The Law and Practice of Administration of Estates,* 5th edition, pages 271-2, Wille, *Principles of South African Law,* 7th edition, page 261; and Corbett, Hahlo, Hofmeyer and Kahn, *Law of Succession in South Africa,* page 581.

All of them, however, rely on *Anderson*'s case *(supra),* and only the last named, in footnote 14 at page 134 makes reference to the *obiter dictum* of MILLER, AJA, in *Lello*'s *case (supra).* Unless and until *Anderson*'s case *(supra)* is overruled by the Appellate Division it must remain the law of South Africa. As far as this country is concerned, I am satisfied it should not be followed.

In the result, therefore, I am of the opinion that the conclusion arrived at by SQUIRES, J, in the court below was the correct one, that is to say, that the second and third respondents are the lawful intestate heirs of the late Elizabeth Jane Palombo. I would therefore dismiss the appeal with costs.

Baron JA: I have had the advantage of reading the judgment of the learned JUDGE

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PRESIDENT, I agree with his reasoning and conclusion and have nothing I wish to add save in one area.

It seems to me that both as a matter of logic and on principle - the intestate heirs being regarded as succeeding by the implied wish of the deceased - those heirs should be determined at the date when the intestacy occurs. The crucial question is: when does an intestacy occur? This question presents no difficulty in cases where there is no will, or no valid will, or a valid will which disposes of only part of the testator's estate; in all these cases the testator has died without disposing of his estate or of part thereof, as the case may be, and to the relevant extent has died intestate. The difficulty arises when a valid will creates a contingent future intestacy, either total or partial. Does the intestacy occur when the contingency becomes a reality, or did it in truth occur at the date of death?

I say "in truth" deliberately, because there is no room here for deeming; this would beg the question, since the only reason for deeming the intestacy to coincide with the date of death would be to bring the case within the rule the existence of which - or rather, the universality of which - is the very issue to be decided.

The proposition that the true date of the intestacy is the date of death depends for its validity on defining intestacy as a failure, in whole or in part, to dispose unconditionally of a deceased estate. Testators very frequently make dispositions to which conditions are attached. As a matter of language it cannot in my view be said that every such testator, to the extent that his testamentary dispositions are conditional, died

GEORGES JA

intestate. Such a man has in fact died leaving a valid testamentary disposition, the fact that it may in certain circumstances - usually remote - prove ineffective does not alter this. It seems to me to be straining language to say that a man *dies* intestate who dies leaving a valid will which may in certain unexpected circumstances fail.

There are in addition juristic difficulties. The proposition that a man leaving a conditional disposition dies intestate involves the further proposition that if the condition is fulfilled he is deemed to have died testate; yet by definition he died intestate.

In my view an intestacy occurs if, and to the extent that, a man has failed effectively (as distinct from unconditionally) to dispose of his estate. If at the date of death it is uncertain whether or not the will is effective the testator has not died intestate; should the will fail thereafter, he then becomes intestate to the extent of the failure. This approach leads to a logical and consistent rule, namely, that the intestate heirs are in all cases to be ascertained at the date when the intestacy occurs.

This rule is also far more likely than the date of death rule to accord with the wishes of the testator, if it is to be implied that he thought about the matter. The situation constantly arises where a will creates life interests or similar interests and contains conditional dispositions; in such situations it is likely to be very many years before the ultimate beneficiaries can be ascertained, and such wills clearly contemplate this. If therefore it is to be implied that the

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testator contemplated the failure of his will it is far more likely that he will have wished the resulting intestacy to occur at the date of such failure rather than at the date of his death.

Georges JA: By her will dated the 20th January, 1961, Mrs. Elizabeth Jane Palombo, after revoking former wills and appointing an executor, provided as follows:

> "If on my demise my youngest child shall have attained the age of twenty-five years I give and bequeath my entire estate and effects of whatsoever nature and wheresoever situate and whether in possession, reversion, expectancy or contingency to so many of my children as then survive.
>
> If on my demise my youngest child shall not have attained the age of twenty-five years I give and bequeath my entire estate and office to my administrator to hold in trust for my child or children giving and granting unto my said administrator unfettered discretion as to realization and investment of my estate. My administrator shall have power in his absolute discretion to appropriate interest and, if necessary capital, to the maintenance, education and travel or any other necessary expenses in respect of my children. It is my wish, however, that one half of the capital amount left by me

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> as at my death shall be retained until my youngest surviving child attains the age of twenty-five years, when such monies shall be distributed amongst so many of my children as then survive. My executors shall not be required to equalize payments if the amount expended on any one child exceeds the amount expended on any other child by reason of medical expenditure.
>
> If my child or children and I shall die in a common calamity or if my child or children shall die before my youngest child attains the age of twenty-five years in terms of section 4 *supra,* then I give and bequeath my entire estate . . . to Mrs. Dorothea Clark, widow, of 13a, Cradock Avenue, Rosebank, Johannesburg."

Mrs. Palombo died in 1962 leaving a daughter, Jane Swift, then under the age of 25 years. This daughter died in 1978 not yet having attained the age of 25 years. Meanwhile Mrs. Clark, the beneficiary who was to inherit if Mrs. Palombo's children all died not having attained the age of 25 years, had herself died in 1975. The will contained no provision to deal with that eventuality.

It is common cause that no estate vested in Jane Swift prior to her death. Her interest in the *corpus* was contingent on her attaining the age of 25 years. Succession must be determined as on Mrs. Palombo's intestacy and the next issue to be decided is the time at which the persons entitled to succeed Mrs. Palombo on an intestacy are to be ascertained. If the time for such ascertainment is on the date of the death of Mrs. Palombo then the person entitled to succeed would be her daughter, Jane Swift. The person entitled to succeed on Jane Swift's death is her father and Mrs. Palombo's ex-husband, the appellant. If the time for such ascertainment is at the date when the event occurred which resulted in the intestacy, viz., the death under the age of 25 years of Jane Swift, then the persons entitled to succeed are the second and third respondents, sons of Dorothea Clark.

Faced with conflicting opinions, the administrator of the late Mrs. Palombo's estate, the first respondent, filed a summons seeking a declaratory order as to who were Mrs. Palombo's intestate heirs. SQUIRES, J, in a considered judgment, found for the second and third

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respondents. Hence this appeal.

It may be well at the outset to deal with an argument put forward by Mr *Andersen* before the court but not apparently raised in the court below nor indeed adumbrated in his heads of argument. As I understand it, it is contended that the first respondent may not have had any standing to file the summons which launched these proceedings since, as an administrator, the trusts which he had been appointed to administer had now been frustrated, there was an intestacy and the provisions of the Administration of Estates Act [*Chapter 301*] would now be applicable,

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since what was now to be distributed was not the trust estate which the first respondent as administrator had been administering, but the estate of a deceased person who, in the circumstances as they came to pass, had eventually proved to have died partly intestate. Distribution would now have to take place in terms of section 3 of the Deceased Estates Succession Act [*Chapter 302*]. It does not appear to me that this argument affects the substantive issue to be determined, even though it may indeed be sound. The first respondent could have reported to the Master that an intestacy had now arisen. He could then have accounted to the Master for the period during which he had administered the trust with which he had been charged and thereupon it would have fallen to the Master to appoint new executors, if those appointed under the will were no longer available, and those executors would have been faced with the conflicting claims now being resolved as they sought to distribute the estate under section 3 of the Deceased Estates Succession Act [*Chapter 302*]. The argument appears to me to be confined to matters of procedure and nothing in the provisions of the Administration of Estates Act [*Chapter 301*] bears on the point to be decided here. Had it been raised earlier steps could have been taken to have the Master joined or even more simply to have the first respondent appointed executor dative in which case he would have brought the summons in that capacity. Since the property to be distributed, whether viewed as the residue of the trust estate or as the portion of the estate of the late Elizabeth Jane Palombo in respect of which there arose an intestacy on the death of her daughter, was under the control of the first respondent as administrator, he was entitled to approach the court for a declaratory order on the competing claims.

There is no doubt that such pronouncements as are to be found in the cases support Mr *Andersen*'s contention that whenever a partial intestacy does arise, whether immediately on the death of the deceased or some considerable period thereafter, the persons entitled to succeed on that intestacy should be determined as at the date of the death of the deceased. The learned judge *a quo* carefully reviewed all the authorities and concluded that they were not binding on him and were not sufficiently cogent in terms of principle to persuade him to adopt that view.

The line of decisions begins with the case of *Union Government (Minister of Finance) v Olivier,* 1916 AD 74. The issue there was whether transfer duty was payable on the registration of certain inherited property in the name of a descendant. The Act provided that where the person

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to be registered as taking over the property from a deceased

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person "is also an heir *ab intestato* of such deceased person" no duty would be payable unless the value of the property to be registered at the date when the right of registration arose was greater than the value of his share *ab intestato* in the whole of the estate of the deceased in the country would have been at that date.

The tenor of that legislation is such that it was plain that what was being referred to was not an actual intestacy. One was to presume that there had been an intestacy whatever the actual situation might be and determine whether a person would have been an heir *ab intestato* of the deceased person thus becoming entitled to the exemption. Against that background JUTA, AJA, stated at page 90:

> "By words 'a descendant who is also called an heir *ab intestato* of such deceased person' is meant who, if the deceased had died without a will, would have been an heir *ab intestato*. In determining who are heirs *ab intestato* of a deceased person regard must be had to the date of his death. As I read the judgment below, the court was of the opinion that the meaning of the section was in effect that it must be ascertained each time fixed property inherited from a deceased person has to be registered in the name of a descendant, whether, if the deceased had died at that time the descendant would have been an heir *ab intestato.* But that is not what the section says; it speaks of the 'descendant who is also heir *ab intestato*'. That is ascertained once and for all at the time of the decease of the testator, and no change can take place thereafter."

It would be rash indeed to assume that the learned Judge of Appeal was then laying down a broad proposition applicable to a wide range of circumstances and not merely interpreting a phrase in a section of a law which had to be applied in that particular case. Neither the report of the argument in the case nor the phrasing of the proposition by the learned judge indicates that there had been any consideration in depth of authorities as would have been expected had the intention been to propound a wide general principle. A statute required that heirs *ab intestato* were to be determined on the presumed death intestate of a deceased and the predictable answer was the time for the ascertainment of such heirs was at the date of the death of the deceased.

The dictum in that case was applied without discussion in *In re Estate of Ross,* 1941 CPD 426. The issues with which the court was concerned was whether under the terms of a will a *ius accrescendi* arose among surviving daughters of the deceased and whether there was a partial intestacy. The dictum in *Union Government (Minister of Finance) v Olivier (supra)* was applied mechanically.

In *Ex parte Dodgson and Another,* 1942 CPD 199, the facts of which will be reviewed later, the court (SUTTON and DAVIS, JJ.) applied

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Union Government (Minister of Finance) v Olivier (supra) again without discussion or analysis

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and on a partial intestacy determined the heirs *ab intestato* as at the date of the testator's death.

The issue was reviewed more analytically in *Estate of Anderson v Anderson and Others,* 1946 NDP 568. In that case the testator bequeathed his entire estate to trustees to pay the whole of file income thereof to his wife until her death or remarriage. If she remarried she was to receive an annual income of £500 from the estate. On her death or remarriage the trustees were to spend a sum up to £500 on the maintenance and education of any children whom he may have left. On the death of his wife without having remarried the trustees were to pay an annual sum of £1000 to any child who may have attained 21 until such child or children attained the age of 30. If there was one child the residue of the estate would then be paid to that child. If there were more than one, on the eldest child attaining the age of 30 that child would receive his or her share and each of the other children would receive his or her share with accumulations of income on attaining that age. The testator left a wife and one son who predeceased the wife not having yet attained the age of 30 years. He was unmarried and childless.

The court held that the gift to the son was a contingent gift and had not vested. Consequently the deceased had died intestate. The issue was then the issue in this case - the date at which the intestate heir should be ascertained.

Three dates seemed possible: the date of the death or remarriage of the widow (a date then not yet certain); the date of the death of the son; and the date of the testator's death. HATHORN, JP, thought the date of the son's death had much to commend it:

> ". . . because if that view is taken it recognizes that the will was wholly operative right up to the very moment when the dispositions relating to the corpus first became abortive."

He reviewed the cases and noted that *Union Government (Minister of Finance) v Olivier (supra)* dealt with the interpretation of a statute and was not strictly speaking an authority which governed either *In re Estate of Ross (supra) or Ex parte Dodgson and Another (supra),* since in *Olivier*'s case *(supra)* the court had proceeded on the basis that the grandfather had died intestate (in the sense of not having left a will).

He then continued at page 578:

> "Nevertheless there is a great deal to be said for the contention that in the present case, the date of the testator's death is the proper date at

> which to ascertain the heirs *ab intestato.* For one thing, a decision that way would provide a clear and unmistakable rule. Secondly such a decision would be in accordance with the general rule laid down in *Olivier's* case that intestate heirs are to be ascertained once and for all at the death of the deceased. Thirdly there is the consideration that the Cape Provincial Division has fixed this date in two cases which are similar to the present case and it is desirable that the law should be the same throughout the Union, so far as the Provincial Divisions can conscientiously bring that about."

The third consideration needs little comment. If the decision is clearly erroneous there is no

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reason why it should be established in our jurisdiction on the basis that *communis error facit ius.* The second consideration is substantially undermined by the analysis of *Olivier's* case *(supra)* which precedes it. That case proceeded on the basis of a presumed intestacy arising from the absence of a will arising from whatever cause. It could not then be said to have laid down a general principle. As to the first consideration, the existence of a clear and unmistakable rule is greatly to be desired. It could be argued, however, that it might be equally clear and unmistakable to propound a rule that heirs *ab intestato* should be ascertained at the date when the event took place which precipitated the intestacy. If the testator died without a will then the date would be the date of his death. If he left a will which was subsequently held to be invalid, then, in effect, there would have been no will and equally the date would be the date of the testator's death. If an heir named under the will renounced the gift there could be arguments as to whether the date would be the date of the renunciation or the date of the latter's death, on the contention that the gift never took effect. If, as in this case, the will was valid and operative until an event precipitated the intestacy, then the date would be the date of that event. The learned judge *a quo* clearly perceived the weakness of the considerations advanced by HATHORN, JP, for the adoption of the view that the proper date was the date of the testator's death.

In *Ramsumer, NO v The Master (NPD) and Others,* 1978 (4) SA 877 (NPD) the issue was the date at which the value of the assets of an estate should be determined. It was held that the proper date was the date of the death of the deceased. It was pointed out that this was consistent with the decision in *Olivier's* case *(supra)* that heirs *ab intestato* should be determined as at that date.

In *Lello and Others v Dales, NO,* 1971 (2) SA 330 (AD) the court specifically reserved decision on the issue in these words:

> "This conclusion renders it unnecessary to decide the question referred to earlier herein, concerning the date upon which the *ab intestato* heirs of the testatrix would have to be determined if it were found that partial

> intestacy resulted and in respect of which it was contended that *Anderson*'s case, 1946 NPD 568, was wrongly decided. In appropriate circumstances, however, the correctness of the decision in *Anderson*'s case on this point (see at pages 577-9) might merit consideration, as also the question whether the *dictum* in *Union Government (Minister of Finance) v Olivier,* 1916 AD 74 at page 90, was intended to be of general application (as appears to have been accepted in the cases referred to in *Anderson*'s case at page 578) or was merely attuned to the particular circumstances of the case."

The deliberate withholding of approval is significant and is additional justification for the re-examination of the issue undertaken by the learned judge *a quo*.

It appears to be common ground that there is no direct discussion of this issue by the authorities on Roman-Dutch law. Mr *Andersen* contended that such statements as there were supported his contentions by what may be termed negative inferences in that intestacy, however arising, was treated in the same way. It encompassed failure to provide for an heir whether through the testator's lack of capacity to make the will, lack of proper formalities required for the making of the will, lack of direct institution of an heir, or renunciation by the heir. It also encompassed partial or total failure. Had the authorities conceived that the rules for ascertaining the heir would

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have been different depending on the way in which the intestacy had arisen then they would have been expected to indicate this by differentiating between intestacies on that basis.

The text-book writers state without examination or criticism that heirs *ab intestato* are to be determined as at the date of the testator's death, citing as authority the cases of *In re Anderson (supra)* and *Union Government (Minister of Finance) v Olivier (supra).*

The fact that the reasons given for a decision can be criticised as lacking conviction may raise doubts as to its correctness but does not automatically establish that the decision is wrong.

One of the main conceptual difficulties referred to by the learned judge *a quo* is that of the vesting of the interests of the residual beneficiaries on the intestacy. He states at page 9 of the judgment, after discussing *Anderson*'s case *(supra)* and *Ross*'s case *(supra)*:

> "In the second place as appears from the brief description of the cases, in neither situation did the interest of the residual beneficiaries vest until there was a failure of the relevant provision of the will. Notwithstanding this it was decided that the original testator must be deemed to have died intestate in relation to the residue in question, and the court held that such portion passed as on an intestacy, determining the intestate heir as at the date of the deceased's death. In so doing there is no explanation, much less

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> a reconciliation of the actual absence of vesting that occurred in fact, with the immediate vesting in law there must have been if the residual heirs inherit as if an intestacy. For in intestate an inheritance vests immediately on the death of the deceased with all the consequences which can and do flow from that situation. *In these decisions the inheritances initially vested in somebody else. How the initial vesting and its possible effects could be ignored was not explained*" (emphasis supplied).

The fact, however, is that neither In *Dodgson*'s case *(supra)* nor in *Anderson*'s case *(supra)* was there a vesting in any of the potential beneficiaries named in the will. It is precisely because there was no such vesting that the intestacies arose. Had there been a vesting of the corpus in any of the beneficiaries then it would be part of the estate of that beneficiary and would be distributable in accordance with his or her will or on death intestate as on an intestacy. In *Dodgson*'s case *(supra)* the widow had a usufruct. Her surviving children were to be her heirs in equal shares. She had no children. In that event the corpus was to go to a son by a previous marriage but if he predeceased the widow leaving issue they would take *per stirpes.* He predeceased the widow and left no issue. There never was a vesting in any of the named beneficiaries.

In *Anderson*'s case *(supra),* as has been mentioned, the court ruled that the gift to the son was a contingent gift and had not vested. For that reason the intestacy arose. Had the gift vested there would have been no intestacy.

In this case as well the intestacy arose because there was no vesting in Jane Swift since she died before attaining the age of 25 and there was a substituted gift over.

In this case an administrator had been appointed. According to the dicta in *Smith and Another v Estate of Smith,* 1949 (1) SA 534 (AD) at page 545 where the court said:

> "But the difficulty as to the *dominium* disappears where a testator bequeaths his estate to trustees, because the

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> trustees are fiduciaries in whom the *dominium* can reside and so that question as to time of vesting of the rights of the ultimate beneficiaries can be considered free from any difficulties as to the residence of the *dominium*."

If in this case, as *Dodgson*'s case *(supra)* and *Anderson*'s case *(supra)* the beneficial interest had all along not vested there does not seem to me to be any conceptual difficulty in holding that when it did vest it must be presumed to have vested from the date of the testator's death. The fact that some other beneficiary had in the meanwhile enjoyed a usufruct would be immaterial. Indeed it is quite often the usual situation

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that the corpus of an estate is vested in an ultimate beneficiary while successive intermediate beneficiaries enjoy the usufruct.

The learned judge *a quo* did at page 12 state that Jane Swift had only a contingent right to the corpus. He states also that she had a "vested interest to the fruits and even to the capital, for maintenance, education, travel and any other necessary expense". To speak of a "vested right" in that context may lead to confusion. The terms of the will give the administrator an absolute discretion to appropriate interest and if necessary capital for the purposes already mentioned. That would not create a vested right in the beneficiary.

Again at page 14 of his judgment the learned judge *a quo* states:

> "If one adopts the date of failure of the will as the date to determine the intestate heirs, one also avoids in the first place the fiction of deeming that inheritances that have vested in others for what may be long periods vest *ab initio* in someone else. Not only as Mr *Lazarus* argued might persons have died who would have been heirs *ab intestato* at the date of the testator's death, but assets or even whole estates may have been partly or wholly alienated or disposed of or used up in the interval. In the circumstances, to undo the acts of previous administrators or trustees would be no easy task, even if it were possible. Mr *Andersen* argued that the law had adequate means of redeeming such a situation by actions based on unjust enrichment or other quasi contractual relief."

The development of the argument seems, with respect, rather to miss the mark in part because the premise that inheritances vested in others would be affected is not correct. A partial intestacy cannot occur in relation to inheritances which have vested. In a situation in which income and portions of capital are spent on a usufructuary in accordance with the provisions of a will, there would be nothing to be undone. The ultimate disposition would be clearly subject to the intermediate.

Mr *Andersen's* reply as noted in the judgment seems inapposite to the case under discussion and rather contemplates the case in which a will thought to have been valid, and accordingly acted upon, is later found to be invalid - a situation so totally dissimilar that seeking an analogy there can only mislead.

Apart from considerations of vesting (which appears to me to have been crucial) the learned judge *a quo* concluded that choosing the date of the testator's death as the date at which to determine the heirs *ab intestato* would lead to consequences inconsistent with two well-known rules, of the old *schependomrecht*.

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The first is stated In Grotius, *Jurisprudence of Holland* (translated Lee) at 2.27.13:

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> "To begin then so long as relatives are found in the descending line they alone are entitled to the inheritance to the exclusion of all other kin; so that along with descendants of the first degree are admitted descendants further degrees, without limit, that is to say, children as representing a deceased parent *per stirpes,* making altogether so many stocks as the deceased had children in the first degree who survived him or left children to take their place."

The second is stated in Grotius *(supra)* at 2.27.6:

> "The fundamental principle of the law of Zeeland is 'the goods must go where they came from' which is understood to mean that children always represent their parents with a single hand. And since it would have been difficult to inquire from whom the property was come, accordingly this was taken in the sense of what most commonly happens (for it is to this that the laws usually have regard); and therefore, it was settled that the property must never go to the side of the survivor."

In fact the rules of intestate succession have now in part been fixed by legislation but even if that were not so, it appears to me that the choice of the date for determining an heir *ab intestato* cannot have a consistent effect one way or the other in the selection of the persons found to be such heirs. Effects will vary depending on the circumstances.

In this case, for instance, if one may illustrate, Jane Swift could have married and then died intestate before attaining the age of 25 years leaving children who survived her, her husband having predeceased her. Whether the date for the ascertainment of Mrs. Palombo's heirs *ab intestato* was the date of her death or the date of Jane Swift's death, the heirs *ab intestato* of Mrs. Palombo's would have been the same - viz., the surviving children of Jane Swift.

One of the consequences of selecting the date of the testator's death as the date for determining his heirs *ab intestato* may well be that the persons so determined to be heirs may have died at some date between the date of the testator's death and the date of the event which showed that the testator had died intestate. This, of course, could never be the case if the date selected for determining the heir *ab intestato* is the date of that event. It is argued, therefore, that the latter date should be preferred since the former might lead to a result inconsistent with the rule that estates should not succeed on an intestacy.

In considering this argument it is necessary to examine with care and state with precision the rule which it is argued may be contravened. In Corbett, Hahlo and Hofmeyer, *The Law of Succession in South Africa,* it is stated at page 109:

> "It is trite law that any institution or bequest is subject to the legal condition that the beneficiary should survive the testator."

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Again at page 111 in dealing with conditions which are held to be implied the authors state:

> "Every institution or bequest is subject to the legal condition that the beneficiary survive the testator."

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The rule does not appear to be stated by the authors specifically in the case of intestate succession but it is plain throughout the discussion of intestate succession that heirs must survive the person dying intestate. Once the person determined to be the heir has survived the deceased, therefore, the rule would not have been infringed. The fact that that person may not have benefited from the inheritance is, with respect, immaterial. It is survival which is a prerequisite to his becoming an heir. To say that estates cannot succeed on an intestacy is to propound a consequence of the rule and not the rule itself. The estate of an heir of a deceased person who dies one day after the death of that deceased will incontestably be entitled to the share of that deceased's estate which should have come to him.

One of the arguments which HATHORN, JP, advanced as favouring the selection of the date at which the event which showed that the deceased had died intestate as the date for determining the heirs *ab intestato* was that it recognises that up to that date the will was wholly operative. With respect, the choice of the earlier date in no way challenges that state of affairs. The fact that the estate reverts to those entitled *ab intestato* is itself a consequence of the will since it inevitably flows from the failure of those who had contingent interests to satisfy conditions which would have made these contingent interests vested interests. The intestacy, it should be remembered, is in such cases partial not total. In so far as they could have been fulfilled the testator's wishes would have been fulfilled.

In so far as beneficiaries failed to meet conditions, the lapsed bequests or legacies revert to be dealt with as on an intestacy.

The argument in favour of consistency between partial intestacy so arising and intestacy arising from any other cause impresses me as com pelting. To be an heir a person in the appropriate category need do no more than survive a deceased person who dies intestate in respect of any portion of his estate. If the date on which the heir is determined is shifted from the date of the death of that deceased then this well-known rule is changed so that someone in the appropriate category must not only survive the intestate but must also survive the date of the event which revealed that the testator had died intestate. There seems no argument in principle why this gloss on a well-accepted principle of the law should be introduce unless it was essential to maintain consistency with some more compelling rule.

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An example based on the Deceased Estates Succession Act [*Chapter 302*], as amended by the Deceased Estates Succession Amendment, 1977 (No. 18 of 1977), will illustrate the argument.

Section 3 as amended reads in part:

> "Subject to the provisions of section *four*, the surviving spouse of every person who on or after the 1st April, 1977, dies intestate wholly or partly is hereby declared to be an intestate heir of the deceased spouse according to the following rules - . . ."

Suppose a case in which a wife survives a husband who has died testate disposing of his property to beneficiaries under conditions which create contingent interests only. The conditions are in the result not fulfilled, and a partial intestacy (as in this case) is shown to have occurred.

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Before this fact is known the wife dies. Her representatives claim under the Deceased Estates Succession Act, as amended, that she was the surviving spouse of a person who had died partially intestate after the prescribed date. It does not appear to me that the claim could be resisted on the ground that she had not survived the date of the events which showed that there had been an intestacy.

Whenever the facts revealing the intestacy may occur it seems to me that the date of the intestacy must be the date on which the deceased died leaving a will the provisions of which were such that on the failure or the occurrence of certain events an intestacy could ensue. It is the failure to provide for that eventuality which leads to the intestacy and the date on-which the failure is revealed is purely fortuitous and should not be the basis of determining heirs ab intestate.

In support for his argument Mr *Lazarus* quoted a passage from Voet, 38.17.6 (Appendix). It should first be noted that the translator (GANE, J) notes that the appendix does not purport to give an explicit account of the Roman-Dutch law of intestate succession though principles from it have on occasions been cited. The subject dealt with is the Roman-Dutch law of succession in its various historical phases.

Again in 38.17.1, Voet defines intestacy in these terms:

> "Those die intestate who have left no will or not one rightfully made, whether they had the power as of right to make a last will or lacked the active capacity to do so, a reason for which those below puberty are declared to have departed this life intestate. In the strictest sense however those are properly called intestate who have not made a last will though they possessed the power to do so, or the inheritance from whom has not been entered upon under such wills since they were broken or ineffective."

The situation of partial intestacy being considered in this case does not appear to be contemplated. Rather the issue is being defined in terms of

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the institution of an heir representing the testator in a sense no longer extant in modern times.

Section 6 deals with children of disreputable marriages, that is marriage made without the consent of a parent and the succession of children born after the death of a grandparent. A grandchild born after the death of a grandparent could not in ancient law succeed as an heir to his grandfather since he was never under the *potestas* of the grandfather and an heir had to fall within the group of those under the *potestas* of the ascendant to whom they succeeded. Voet goes on to point out that Justinian changed this:

> ". . . by summoning to succeed in intestacy grandson and other descendants without any distinction, and by not shutting out at all grandsons conceived after the death of a grandfather, must be deemed to have summoned them to the inheritance from their grandfather just as much a' others who had already been born or conceived."

After this introduction follows the illustration pressed in argument by Mr *Lazarus:*

> "If, therefore, you suppose that one son has been disinherited, that another has been instituted under a condition, that a grandson from such disinherited son has been conceived and born during the pendency of the condition after the decease of the testator and that finally the disinherited son himself has also fulfilled his destiny, while the

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condition of the inheritor is still pending, such a grandson will as being the nearest come into the inheritance from his grandfather as the condition failing or the inheritance being rejected by the instituted person after the fulfilment of the condition since it cannot be said at any time to have been conferred on the intermediate father."

As I read the illustration, it is intended to emphasise the change made by Justinian and discussed in the main paragraph cited - that the grandson succeeds directly through the grandfather so that the fact that his father was disinherited and could not succeed in any event was immaterial because the inheritance was not through him.

The passage does not appear to me to give any guidance as to the time when the heirs are to be determined - that not being the purpose for which the illustration was devised. The concept of a disinherited son incapable of succeeding on an intestacy is one unknown to Roman-Dutch law in Zimbabwe. Even if a son had been deliberately excluded from a will, his right to succeed on an intestacy, should an intestacy for any reason arise, would remain intact and his children would succeed through him. There would be no need for them to be direct heirs of the grandparent as would have had to be the case in Roman law when a son had been disinherited. I do not see, therefore, that any principle can be deduced from the illustration applicable to the circumstances of this case.

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In the result I would conclude that there are no conceptual difficulties and no inconsistencies with acknowledged principles which would require that a partial intestacy of the type which occurred in this case should be treated differently from any other cause. Further it seems to me that whenever an intestacy may appear to have occurred it is rooted in the testator's failure to make adequate provisions in his will so that on his death he could be said to have died intestate in regard to that portion left undisposed, even though this may not have been revealed until long after. The same rule should therefore apply to all intestacies - that is that the date for the ascertainment of heirs *ab intestato* should be the date of the death of the deceased.

This conclusion makes it unnecessary to consider whether the rule should be affirmed on the basis that it had been consistently followed for so long that it should not be altered except for compelling reasons.

Accordingly I would allow the appeal.

Scanlen & Holderness, appellant's legal representatives.

Winterton, Holmes & Hill, first respondent's legal representatives.

Bowles, Brighton & Cole-Bowen, second and third respondents' legal representatives.

COMMERCIAL & INDUSTRIAL HOLDINGS (PRIVATE) LIMITED & ANOTHER v LEIGH-SMITH AND OTHERS 1981 ZLR 647

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Court **High Court, Salisbury**

Civil Application

Squires, J

1st October and 16th December, 1981

Flynote

Contract - contracts in restraint of trade - what are - reasonableness of restraint - on whom lies onus of proving or disproving reasonableness - evidence of reasonableness - equality of parties to contract as evidence of reasonableness - evidence of - public interest - whether restraint against public interest - "goodwill" as an asset of a business being purchased - meaning of.

Headnote

The respondents, who were husband and wife, set up a small textile printing business in Marandellas, where they acquired a piece of land and built a factory. They found a company, Granny Smith Prints (Pvt) Ltd., the second applicant, of which they were the sole shareholders. Because of chronic under-capitalization and thus shortage of funds, its expansion was inhibited, and its activities were mostly confined to producing customers' designs on customers' cloth, with few sales to the general public. A subsidiary of Commercial and Industrial Holdings (C.I.H.), the first applicant, used to purchase products from Granny Smith Prints; this trade led to the arousal of interest on the part of CIH in acquiring control of Granny Smith Prints. Inquiries were made, as a result of which CIH offered to purchase from the Leigh-Smiths two-thirds of the shareholding of Granny Smith Prints. The offer was accepted, and an agreement was entered into, in terms of which it was agreed, *inter alia*, that the Leigh-Smiths would become employees of Granny Smith Prints. The respondents also undertook that for a period of five years from the date on which their service with Granny Smith Prints terminated - for whatever reason - they would not, anywhere in the country, engage in or carry on or be employed by any business similar to or competing with that carried on by Granny Smith Prints where their employment ceased. Apart from this being a term of the agreement referred to, it was made a condition of their service with Granny Smith Prints.

Initially, the arrangements worked well, but subsequently, for a number of reasons, relations between the Leigh-Smiths and the new management of Granny Smith Prints deteriorated and, first, Mr Leigh-Smith and, later, his wife left the employ of Granny Smith Prints; as part of the terms of their resignations they sold their remaining shareholdings to CIH After they had left Granny Smith Prints, they formed a company called Blueberry Hill (Pvt) Ltd., of which between them they held the majority shareholding and by which they were employed.

The applicants sought an order from the court declaring that the respondents were acting in breach of the agreements of sale and service and restraining the respondents from engaging in any business similar to and competing with that of Granny Smith Prints. The application was opposed on the ground that the restraint should be declared void as being contrary to public policy, being unreasonable not only in the period of time and the territorial extent of the prohibition, but also because its only real object was to protect the applicants from competition,

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not to preserve any trade secrets or customer relationship.

The first issue was whether the applicants had to establish that the circumstances of the case made the restraint reasonable, or whether the respondents had to show that it was unreasonable. Secondly, assuming that the burden lay on the applicants to establish reasonableness, the applicants argued that the restraint imposed was to protect the goodwill for which CIH paid; and that the parties having contracted on a basis of equality, the court ought to enforce the restraint as being reasonably necessary for the protection of that goodwill.

Held, that the approach of our courts in the past, supported by a substantial number of South African decisions, has been to require the promissee to establish the special circumstances from which it may be concluded that the restraint is reasonable. This approach accords more with established principle, for once it is decided that a particular contract - such as the present ones - is in restraint of trade and does not instead promote or absorb trade, it is *prima facie* contrary to public policy (*Spa Food Products Ltd. and Others v Estate Sarif,* 1951 SR 279; *Pest Control (CA) Ltd. v Martin & Another,* 1955 (3) SA 609 (SR); *H. E Sergay Estate Agencies (Pvt) Ltd. v Romano,* 1967 RLR 81 (GD); 1967 (3) SA 1 (R); *Rhodesian Milling Co. (Pvt) Ltd. v Super Bakery (Pvt) Ltd.,* 1973 (2) RLR 145 (G.D.); 1973 (4) SA 436 (R); *Biografic (Pvt) Ltd v Wilson,* 1974 (1) RLR 38 (GD); 1974 (2) SA 342 (R); followed).

Held, further, that goodwill may be described as the balance of a purchase price that is more than the value of the assets of a business being purchased and could cover such intangible assets as a trade name and the reputation and connections of a business. On the facts, to call the balance by which the purchase price exceeded the nominal value of the equity of Granny Smith Prints "goodwill" was not an accurate description of the position.

Held, further, that in so far as whether the parties contracted on a basis of equality, the rule applicable nowadays is to inquire into the actual relative bargaining position of the parties to see if they were in fact on an equal footing or not. Only if they were is the fact that they agree on all the terms of the restraint of weight in deciding whether that restraint is reasonable.

SQUIRES J

On analysis of the facts, the parties did not bargain on an equal footing, the applicants actually being in the stronger position.

Held, further, that the provision that the restraint should apply for five years on termination of the respondents' employment with Granny Smith Prints, how ever caused, was unreasonable, because it could apply to a situation where, for example, the respondents were dismissed on due notice given. All the facts indicated that the restraint clause was designed to secure absolute protection against any form of competition by the respondents.

Held, further, that the restraint was too wide in area and for a longer period than could reasonably be necessary to protect the applicants interests.

Held, further, that even if the restraint were reasonable *inter partes*, it is still possible for the promissor to show that the restraint is against the public interest. At the present time the public

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interest is better served by having more skilled people working than less, more economic activity being generated than less and more foreign currency earned than less than by advancing the principle of sanctity of contract to a position of pre-eminence just to satisfy that principle.

Case cited:

Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd [1967]1 All ER 699 (HL);

Durban Rickshas Ltd v Ball, 1933 NPD 479;

Roffey v Catterall, Edwards & Goudré (Pty.) Ltd., 1977 (4) SA 494 (NPD);

National Chemsearch (SA) (Pty.) Ltd. v Borrowman and Another, 1979 (3) SA 1092 (TPD);

Highlands Park Football Club Ltd v Viljoen and Another, 1978 (3) SA 191 (WLD);

Spa Food Products Ltd & Others v Estate Sarif (supra);

Pest control (CA) Ltd. v Martin and Another (supra);

H. E Sergay Estate Agencies (Pvt) Ltd v Romano (supra);

Rhodesian Milling Co. (Pvt)Ltd. v Super Bakery (Pvt) Ltd. (supra);

Biografic (Pvt) Ltd. v Wilson (supra),

Connors Bros. Ltd. v Connors [1940] 4 All ER 179 (PC);

Herbert Morris Ltd v Saxelby [1916] 1 AC 668; [1916-17] All ER Rep. 305 (HL).

J C Andersen SC for the applicants.

A P de Bourbon for the respondents.

Judgment

Squires J: The first and second respondents, David and Charlene Leigh-Smith, are husband and wife, and they possess a talent - particularly Mrs. Leigh-Smith - developed by training and experience, for fabric design and printing an textile materials. Mr Leigh-Smith, who was

educated in Umtali actually trained as a photographer at an appropriate institution in the United Kingdom, where he received a diploma for that discipline, and worked in photography until about 1972, when his then employer died. But because of a paucity of prospects in photo-journalism at the time, which was his particular field of qualification, he and Mrs. Leigh-Smith started a small textile business in their home at Ruwa, which subsequently became Granny Smith Prints (Pvt) Ltd., the second applicant. Mrs. Leigh-Smith, also an Umtali girl, did a three-year training in textile design after a one-year foundation course at the Croydon College of Art in the United Kingdom, and graduated with a diploma from the

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Society of Industrial Artists. She thereafter completed one year of a two-year post-graduate course at another college of art in London, but then returned with her husband to this country. She worked for eight to nine months as a designer for David Whitehead & Sons after her return, and then left that organization to have her first child. By this time, Mr Leigh-Smith's employer had died, and they decided to set up their textile printing business, as referred to above.

Starting as a cottage industry in Ruwa in 1972, the respondents eventually moved to Marandellas, where they acquired a piece of land, built a factory, and subsequently carried on their operations from there. Granny Smith Prints (Pvt) Ltd was incorporated in March, 1974, with the Leigh-Smiths as the sole shareholders, but it suffered from chronic under-capitalization, and this situation prevented it from borrowing money and consequently inhibited its expansion. Its activities were therefore mostly confined to doing commission printing, that is, producing a customer's design on the customer's cloth according to his instructions. They were for this reason hampered in making and selling their own productions direct to the public. Moreover, a lack of foreign currency allocation contributed to their exclusion from acquiring machinery and raw materials - all of which posed real and substantial practical limits to the expansion of this business.

The first applicant, Commercial and Industrial Holdings (Pvt) Ltd (CIH), is something of a conglomerate - judged by local standards, anyway - and one of its subsidiaries in 1975 was a company called D Frenkel & Co. (Pvt) Ltd., which traded in Bulawayo as a wholesale merchant specializing in linens and curtains. This company began to purchase Granny Smith Prints' products in ever-increasing amounts, eventually arousing C.I.H.'s interest in acquiring control of Granny Smith Prints. Inquiries to this end were made, but, in the meantime, in circumstances referred to later, an exercise on the value and future financing of Granny Smith Prints was carried out at the end of 1975.

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The report on this inquiry was given, amongst others, to the chairman of CIH, and in January, 1976, CIH made a tentative offer to the Leigh-Smiths along the broad lines that CIH would acquire two-thirds of the shareholding in Granny Smith Prints, with the Leigh-Smiths retaining the remaining one-third, on a valuation (for these purposes) of Granny Smith Prints of $150 000. This meant that the Leigh-Smiths would be paid $100 000 for the two-thirds shareholding which they sold to C I.H., which would be payable by $60 000 in cash and $40 000 by shares in CIH Part of the proposal was that the capital of Granny Smith Prints would be increased to $50 000, so that CIH would inject about $33 000 of this, and the Leigh-Smiths $17 000 of the cash they were thus to be paid.

The proposal was accepted by the Leigh-Smiths in March of 1976 and the agreement that is annexure "1" to the applicants' notice of motion was accordingly entered into.

Part of the terms of this agreement was that the Leigh-Smiths would also enter agreements of service with Granny Smith Prints for not less than five years from the 1st April, 1976 - Mr Leigh-Smith as the general manager of the second applicant, and his wife as its designer. They also undertook that for a period of five years from the date when their employment with Granny Smith Prints terminated, for whatever reason, they would not, anywhere in the country, engage

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in or carry on or be employed by any business similar to or competing with that carried on by Granny Smith Prints when the employment ceased. This restraint was incorporated in the service agreements as well since it was imposed on the Leigh-Smiths not only as sellers of their shares but as employees as well. The term was duly reflected in the service agreements entered into by them on the 12th May, 1976, and it is the validity of this restraint which is now questioned.

The marriage, if it can be so called, of CIH to Granny Smith Prints and the Leigh-Smiths seemed to be happy at first, but in March, 1979, the factory at Marandellas was partly destroyed by a terrorist attack, an event which made CIH decide to re-locate it. It was initially proposed to move the operation to Bulawayo, where all C I.H.'s other subsidiaries operated, but for reasons which are disputed on the papers, it was decided to move it to Salisbury, where it presently is. Whether this move and the debate which preceded it caused a change is not clear, but thereafter relations between the Leigh-Smiths themselves and between them and C I.H.'s management of Granny Smith Prints deteriorated to

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the extent that the chairman of CIH agreed to allow Mr Leigh-Smith to resign from his contract of service with the Granny Smith Prints on condition that he sold his shares in Granny Smith Prints to CIH for the nominal sum of $1. The agreement by which Mr Leigh-Smith was so released from his agreement of service is also annexed to the papers in the notice of motion, and it specifically reminded him of the restraint on undertaking employment in the country or carrying on business directly or indirectly, similar to or competing with, that of Granny Smith Prints. It appears that he intended to return to his old trade, photography, and to that end Granny Smith Prints agreed to sell him a camera with which to do so; but in the event this was not possible, so he says, because of depressed conditions in that field.

Mrs. Leigh-Smith continued to work for Granny Smith Prints until about April, 1980. She then told the chairman of CIH that she wished to leave, and was thinking tentatively of working in a knitting and weaving concern - which does not compete with Granny Smith Prints. Subsequently, so the chairman of CIH says, she told him that she and her husband were thinking of emigrating, and she agreed to transfer her shares in Granny Smith Prints, of which she also held 2 500, at their par value of $1 each. It appears that the Leigh-Smiths did in fact go to France and even contemplated starting a business there, but a number of unforeseen difficulties in doing so put them off this course and they returned to this country at the end of June, 1980. In the event, Mrs. Leigh-Smith apparently continued her employment with Granny Smith Prints for another month until the end of July of that year.

It is further admitted by the Leigh-Smiths that in early June of 1980 Mr Leigh-Smith took steps to secure the name of Blueberry Hill (Pvt) Ltd., the third respondent, with a view to subsequent incorporation of it. The third respondent was, in fact, thereafter formed, and since its commencement of business on a date which does not appear from the papers - and since she left Granny Smith Prints' employ - Mrs. Leigh-Smith and her husband have been employed by it. Moreover, they own 30 per cent each of the issued shares and two other people own 20 per

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cent each.

The applicants claim that the respondents are acting in breach of the agreements of sale and service referred to above, and they seek an order declaring that to be so and restraining the Leigh-Smiths from engaging in any business similar to and competing with that of Granny Smith Prints until the expiration of five years from the date of their leaving its employment. *Pro tanto,* they also ask that Blueberry Hill (Pvt) Ltd. be restrained from employing the Leigh-Smiths. The applicants also ask, as against Blueberry Hill, that the employment of the Leigh-Smiths be

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terminated, and that the Leigh-Smiths actually dispose of their shares in Blueberry Hill within a reasonable time. There was also a prayer for delivery of the books of account of Blueberry Hill to ascertain the extent to which Granny Smith Prints' business had been affected by Blueberry Hill's trading activities, but this was not persisted in.

The Leigh-Smiths, on the other hand, claim that the restraint in question should be declared void as being contrary to public policy. It is unreasonable, so they say, not only in the period of time and the territorial extent of its prohibition, but because its only object is to protect the applicants from competition and not to preserve any trade secrets or customer relationship. Furthermore, they say the bulk of Granny Smith Prints' business is commission printing, and this represents a very small part only of Blueberry Hill's trade. Blueberry Hill's main activity is producing its own design work which it sells direct to retailers and wholesalers, and work that is presently being exported. Granny Smith Prints, they say, exports none of its production, and in this respect at least there is no competition between the two. Apart from this, it is also said that despite one well-intentioned attempt and several inquiries neither Mr nor Mrs. Leigh-Smith can find any other means of supporting themselves than by working in the field of textile printing. If they were restrained from carrying on this means of livelihood they would have to leave the country.

As I understand the approach to disputes of this kind, the first step is to decide whether the relevant term or terms of the particular contracts here involved should be classified as a restraint of trade, since it is only a contract of that nature which is distinguished from the ordinary run of contracts by being enforceable only if it is reasonable. The task is made easier in this particular case since I understood Mr *Andersen*, for the applicants, to accept that the effect of these agreements was to create a restraint of trade. But in case I am mistaken in that understanding, I would nevertheless come to the same conclusion by applying the test of classification suggested by LORD PEARCE in the decision of *Esso Petroleum Co. Ltd. v Harper's Garage (Stourport) Ltd.* [1967] 1 All ER 699 (HL) at 727. By preventing the Leigh-Smiths from carrying on the trade of textile fabric designers on their own or in employment of anyone else, it seems to me to be clear beyond argument that the agreements in question are sterilizing - to use the terminology of LORD PEARCE - their production or services, once they have left Granny Smith Prints' employ, and are therefore in restraint of trade.

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That being so, the next step, as I further apprehend the law, is to investigate the reasonableness of the restraint, for a restraint of trade may be justified in the special circumstances of any case; and it is, at this point that the difficulties to be manifest, no as single spies, but in battalions.

The first of such difficulties is whether the applicants, as promissees, have to establish the special circumstances that make the restraint a reasonable one in the circumstances, or whether the respondents, having agreed to the restraint and who now wish to resile from that agreement, must show it to be unreasonable.

As I have been able to find my way through the authorities cited by counsel, it seems that the former view held sway, as exemplified by *Durban Rickshas Ltd v Ball,* 1933 NPD 479 (a full Bench decision), especially at 493, in South Africa, being generally followed in this country, until 1977, albeit with intermittent and perhaps increasing sounds of dissent from such a view. In 1977 there was decided, also by a full Bench of the Natal Provincial Division, the appeal of *Roffey v Catterall, Edwards & Goudré (Pty.) Ltd.,* 1977 (4) SA 494, in which it was held that the conclusion in the *Durban Rickshas* case was wrong; and, in substance, that because of the primary importance attached by Roman-Dutch law and South African law to the principle of sanctity of contract, there was no need for the promissee to prove reasonableness in such a dispute - the effect being that if the person complaining of the restraint wished to avoid it, he must show it was unreasonable.

This in turn, however, has been specifically not accepted by the full Bench of the Transvaal Provincial Division in *National Chemsearch (SA) (Pty.) Ltd. v Borrowman & Anor.,* 1979 (3) SA 1092.

In such a clash of Titans, and until the matter is resolved by higher authority in this jurisdiction, the sensible, if not the only course to take, is to apply and adhere to the approach of our courts in the past - supported, as it is, by a substantial number of South African decisions as are set out, for example in *Highlands Park Football Club Ltd v.*

Viljoen & Anor., 1978 (3) SA 191 (W). But in decisions such as Spa Food Products Ltd *& Ors v Estate Sarif,* 1951 SR 279, Pest control (CA) *Ltd. v Martin & Anor.,* 1955 (3) SA 609 (SR); *H. E Sergay Estate Agencies (Pvt) Ltd v Roman,* 1967 (3) SA 1 (R); *Rhodesian Milling Co. (Pvt) Ltd. v Super Bakery (Pvt) Ltd.,* 1973 (4) SA 436 (R), and *Biografic (Pvt) Ltd v Wilson,* 1974 (2) SA 342 (R), to name only some, though manifesting a sympathy for the sanctity of contract, our courts have consistently applied what may be called the "old

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approach" and have required the promissee to establish the special circumstances from which it may be concluded that the restraint is reasonable. This approach also seems to me to accord more with established principle, for once it is decided that a particular contract is in restraint of trade and does not rather promote or absorb it, then it is *prima facie* contrary to public policy; and the other principle of *pacta servanda sunt,* being applicable to contracts that are not so

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affected should be deferred in consideration.

There is also merit, in my respectful view, in Professor Kerr's point that it is easier to lead evidence of positives in establishing why something is reasonable, particularly where these are peculiarly within the knowledge of the promissee. In his work, *Principles al the Law of Contract,* 2nd edition, page 105, the learned author says:

> "If the rule were changed, the covenantor would have the much more difficult task of proving a series of negatives; namely, that the covenantee had no interest worthy of protection, that there was no need for the restriction to last the period of time mentioned, and/or that the covenantor's operations did not extend, and were not intended to extend, to the area mentioned."

In my view, the onus is on the person claiming that the restraint is reasonable.

On that basis, then, I turn to consider the next aspect, which is the circumstances relied upon by the applicant that show this restraint to be reasonable. And in this regard not the least difficulty is the existence of some disputes of fact on the papers - though it was urged by both parties that the matter could be decided on the papers notwithstanding these, since relief could be given on the admitted facts, or on facts alleged by the applicants which are not disputed by the respondents; or, of course, if it should turn out on a close analysis that the disputes were not matters of real substance.

As I followed the applicants' argument, the circumstances that made the restraint reasonable were, first, that although Grany Smith Prints' business may not have been carried on in every part of the country at the time the agreement was concluded, the possible and potential ambit of its sales and customers made the extent of its interest that wide; and on the authority of *Connors Bros Ltd v Connors* [1940] 4 All ER 179 (PC) at 194B-C, it was not necessary, in establishing the reasonableness of a restraint, to prove to the satisfaction of the court that the business which the agreement is designed to protect has actually been carried on in every part of the area mentioned in the agreement. The area protected was therefore quite justified.

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Secondly, so far as the period of time was concerned, the facts showed that the growth and success of Granny Smith Prints' business depended largely, if not entirely, on the personalities and expertise of the Leigh Smiths - particularly the skill and ability of Mrs. Leigh-Smith at textile designs. In that situation, a period of five years after leaving Granny Smith Prints' employ was not too long a time, comparing it to periods of restraint in other cases, for CIH to secure and protect the return of its purchases.

The most stress, however, was laid upon the argument that when CIH purchased the majority of issued shares in Granny Smith Prints, apart from the value attached to its assets, the balance - and the greater part of the purchase price - must have been paid for goodwill. Emphasis was also laid on the fact that the Leigh-Smiths, in entering this agreement, contracted on a basis of equality with CIH therefore, in burdening themselves to first work for Granny Smith Prints and thereafter not to compete with it, they were carrying out no more than they agreed to and were paid for. In the resulting situation, there was thus greater room for allowing as between buyer

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and seller a larger scope for freedom of contract and a correspondingly larger restraint in freedom of trade than there would be in the case of restraint of opportunity for freedom of trade in an employer/employee relationship. In other words, there was a distinction between an agreement required to protect the goodwill of a business from competition by a vendor and an agreement required to protect the owner of the business from competition by a former employee.

The present dispute was the former situation. If one did not allow that, the purchaser would not get what he contracted to buy nor would the vendor give what he intended to sell.

Nor was it necessary to establish that Granny Smith Prints had in fact sustained any harm from the Blueberry Hills' trading. This was not a relevant consideration, so the argument went, since one must look to the situation when the agreement was entered into. But even if it was a fact to consider at the moment, and even though the harm suffered by Granny Smith Prints was a matter of dispute on the papers, it was unrealistic to suggest that the Blueberry Hill's entry into the limited waters of the printed textile trade would not have some effect on others already in it, including Granny Smith Prints.

Nor was it of any consequence that the Leigh-Smiths would be adversely affected. Even assuming that were true, though it was claimed to be difficult to credit that Mr Leigh-Smith could find nothing else to do, and his wife could not put her considerable talent to use in some

other form of artistic production, that was the inevitable effect of the restraint of trade agreement, and any hardship had to fall where it was agreed to fall.

Mr *de Bourbon,* on the other hand and on the merits of the dispute, argued that the restraint originally relied on by the applicant was the restraint entered into by the Leigh-Smiths as employees of Granny Smith Prints, and the purpose of that restraint was simply to debar competition. Furthermore, it was alleged, so he said, by way of a replying affidavit, which was not the proper basis to found an allegation of this nature in notice of motion proceedings. Apart from that, he submitted that the restraints imposed on the respondents were inherently unreasonable, having regard to what Granny Smith Prints required to be protected, and the limits of area and period were far wider than was necessary. In short, he said, not only were the restrictive terms of the present agreement open to the objection that they constituted a purchase of protection against mere competition, but the terms themselves were so wide that they could not pass the test for reasonableness.

In the light of those contending submissions, what should the answer be?

The applicants' case, as I have tried to show, is that the restraint imposed was to protect the goodwill for which CIH paid; and the parties having contracted on a basis of equality the court will enforce the restraint as being reasonably necessary for the protection of that goodwill.

Having considered the matter as carefully as I can, I regret to say that I do not think I can accept

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either of these two contentions.

So far as the purchase price of the shares being for goodwill is concerned, there is in the first place no mention whatever of goodwill in the agreement by which the respondents disposed of their shares in Granny Smith Prints. This may not be conclusive, of course, but had goodwill accounted for such a substantial part of the price, I think one might have expected some reference to it, especially in view of the detailed requirements of the balance sheet that the respondents were obliged to produce in terms of the agreement. The basis on which it is advanced as being the object of the purchase price over and above the book value of Granny Smith Prints' assets is the statement by C I.H.'s chairman, elaborated by the affidavit of Granny Smith Prints' present manager in the answering affidavit. Both these deponents are accountants by profession,

and for that reason, of course, are qualified to read and interpret balance sheets. In substance, C I.H.'s chairman points out that the tangible asset value of Granny Smith Prints on the day before CIH acquired control of it, was $39 177. CIH paid $100 000 for two-thirds of the equity of Granny Smith Prints, and two-thirds of that equity at that date was $26 118. The balance by which the total purchase price exceeded this sum, therefore, must have been for goodwill.

Now, while it may be accepted that goodwill is a compendious word and may be used to identify the balance of a purchase price that is more than the value of the assets of a business being purchased, and that it could cover intangible assets like a trade name, the reputation and connections of a business, including its management expertise and know-how, I am not persuaded, in the circumstances of this case, that it is an accurate description of the position.

In the present case, and at the time CIH was becoming interested in Granny Smith Prints by reason of the products purchased by D Frenkel & Co. (Pvt) Ltd., Granny Smith Prints was considering ways to acquire more capital to finance an expansion of its activities. The exercise undertaken to this end is included in the papers as annexure "5" to the founding affidavit, and this in turn shows that the respondents were being advised that the best way of obtaining the needed infusion of capital would be to dispose of some of their equity in Granny Smith Prints, without relinquishing their interest in and benefit from it.

In estimating the worth of this kind of business, the author of the report says that it should be valued on an earnings basis, and that the asset value is only useful as a guide to the asset backing of any purchase price - perhaps not surprisingly, in view of the contemporary unreliability of historical cost accounting because of inflation. While acknowledging the difficulty of projecting an earnings valuation, the author - taking a profits growth of $20 000 *per annum* and applying an appropriate "earnings multiple" based on a price earnings ratio of 4 to 5 - eventually concluded that Granny Smith Prints had a reasonable earnings valuation in the region of $200 000.

While it is not completely clear who approached whom first, by early 1976, the then chairman of

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CIH had visited Granny Smith Prints, and at some time about then had read this report. His letter of the 29th January, 1976, containing an exploratory offer to acquire, for C I.H., two-thirds of the equity in Granny Smith Prints, seems to me to broadly follow the line suggested in the report on the valuation of Granny Smith Prints for this purpose and to be acting upon it. It is true that he made his offer on a value of Granny Smith Prints of only $ 50 000, but

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this may have been simply a more cautious and conservative estimate or an endeavour to obtain a better bargain CIH

Again, in neither of these two documents is goodwill mentioned, and this is not surprising since it was not a situation in which that aspect would be relevant. The previous owners were not getting out of the business and therefore disposing of their trade expertise or such customers as they had attracted into a regular source of orders.

And there is no suggestion, as contemplated at that time, of any competition to be prevented. On the contrary, the immediate objective of the arrangement was for the respondents to enter service agreements that would keep them in Granny Smith Prints' employ for five years, during which time the anticipated return on the $100 000 paid by CIH - bearing in mind the advantages of disposing of Granny Smith Prints's increased output through another subsidiary - should have been substantially recouped if not actually earning a profit.

In these circumstances I do not feel able to accept as correct the assertion by C I.H.'s chairman that simply because the asset value of Granny Smith Prints was less than the purchase price paid for the shares bought by CIH then the difference must be for goodwill, and that the consequent restraint of trade must be considered on that basis.

Nor does it seem to me, as already indicated, that it can be validly contended here that the parties contracted from positions of equality, and that therefore the restraint is to be more generously interpreted than if they contracted on an employer-employee relationship.

In the first place, this superficial classification of bargaining basis seems to be out of favour at the present tine. The mere fact that one party is an employee has been held, quite rightly, it would seem, not to mean that he is necessarily in an interior bargaining position. On the contrary, in these days of trade unions and skills shortage pressure, an employee may well hold the stronger position. But even where the parties are two businessmen in fact contracting on an equal footing, that fact alone does not provide conclusive evidence that the terms agreed between them are reasonable, though it may be weighty evidence that the restraint is no more than is necessary to protect the interests of the parties.

Experience has shown that possibilities of equality and inequality exist in all types of contract, depending on the circumstances; and the rule applicable nowadays, as I understand it, is to inquire into the actual

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relative bargaining position of the parties to see if they were in fact on an equal footing or not. Only if they were is the fact that they agree on all the terms of the restraint of weight in deciding whether the restraint is reasonable.

The agreement in this case seems to involve a relationship between the parties that has both elements of seller and buyer and employer and employee. Indeed, clause 16 of the agreement in question makes the point that the restraint is imposed on both bases.

What do these facts show as indicating the major factor m bringing about the agreement? C I.H., it seems clear, had the greater economic strength, in that it was the potential provider of the means whereby Granny Smith Prints could increase in size and production so as to achieve its full potential. The respondents, on the other hand, were the supplicants for this infusion. Without it they would continue as a small business limited more or less indefinitely by the inhibition of under-capitalization. To break out of this restriction and come under C I.H.'s funding aegis, they would have to accept its conditions.

They could have refused, of course, and were on an equal footing to do so, but I do not think that that ability is the real test of contracting from a position of equality, any more than it is for the average person who has to enter into a "standard term" contract. He can refuse if he wants to, but if he needs the goods or services badly enough, he can only have them on the terms offered. To say that such a choice is contracting on an equal footing is to overlook the realities of the situation and almost begs the question.

To the extent that the Leigh-Smiths were selling their shares in Granny Smith Prints for the above reasons the relationship was one of buyer and seller, but it seems to me that it was even more important for CIH to obtain the services of the two respondents. On the report prepared for purposes of attracting an investor in Granny Smith Prints, it is clear that Granny Smith Prints would have been of little value without the Leigh-Smiths, and it clearly would not have had the potential earnings value referred to without them.

It must therefore have been of fundamental importance to CIH in acquiring two-thirds of Granny Smith Prints' issued shares that the Leigh-Smiths undertook to enter the employ of Granny Smith Prints, and equally I do not think CIH would have been interested in acquiring this equity unless the respondents agreed to stay in its employ. Only in that way could the products of Granny Smith Prints,

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that first attracted C I.H.'s attention, keep coming, and by keeping such services and controlling Granny Smith Prints' sales CIH could ensure the supply went to its other subsidiary and possibly at a lower cost.

The respondents, on the other hand, gained a better base from which to expand their abilities and activities, but the fact that they henceforward accepted a minority interest in Granny Smith Prints shows they were interested in and prepared to accept such a change in order to carry on

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those activities for someone else, or at least in the greater part for someone else.

In all these circumstances, I do not feel able to accept that the parties contracted on an equal footing. The respondents did not themselves have the capital to overcome the inhibiting restrictions on the development of their business. They therefore had to acquire it elsewhere. They were advised the best way of doing so was to sell part of their shareholding in Granny Smith Prints for such capital. If they did not do so they would continue to struggle with these difficulties. C I.H., on the other hand, was faced with no such difficult choice. Its subsidiary was already purchasing a good deal of Granny Smith Prints' output, and its desire to buy into a controlling interest of Granny Smith Prints was the greater use CIH could make of the Granny Smith Prints in its group of companies - the vertical integration referred to in one of the reports on the papers. But it did not have to do so to the same extent as compulsion lay on the respondents. It is almost the same situation as the employee wanting work and the employer being able to offer it, on his terms. That is not a position of bargaining equality if for no other reason that the need of the one was greater than that of the other.

In my view, therefore, the onus on the applicants in this case is that which rests on a promised seeking to enforce a restraint where the parties have bargained on an unequal footing. In other words the onus on the applicants is to show that the restraint clause goes no further than is reasonably necessary to protect the interests of the parties, and since in my view they did not contract on an equal footing, that onus will not be as easy to discharge as if they had.

As already stated, there are several areas of the case in which there are disputes on the papers, some more strong than others. Most of those, it seems to me, need not be decided for they relate to extraneous matters, such as the circumstances in which the respondents came to

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leave Granny Smith Prints' employ. Yet again there is at least one, namely, whether the respondents are enticing Granny Smith Prints' work force away, that seems to be convincingly answered on the papers - against CIH But one of the areas in which there are differing versions, though of a lesser degree and extent, is that which bears on the question of the reasonableness of the restraint. Where this has occurred, I have accepted the respondents' version where this differs from the applicants' - not because of lack of confidence in applicants' allegations flowing from the rebuttal of its claim that respondents were poaching their old workers - but because these being motion proceedings any dispute should be decided on the respondents' version, unless there is good reason not to do so, such as a substantial conflict that is impossible to resolve.

Apart from its reliance on the aspect of goodwill, the applicants claim that the business of Granny Smith Prints was built up by the Leigh-Smiths as a result of their talents and expertise and this had led to a special relationship not only with their customers but with their staff. The respondents accept Granny Smith Prints' business was built up by them, but deny that it resulted in any special customer relationship. Such custom as they attracted came from the quality of the work they did and not any special personal propositions, so that anyone else doing the same quality work would also attract those customers. They also accept that such

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employees as they trained got on well with them, but also explain that as not being the result of any special qualities but rather avoiding the type of attitude that Granny Smith Prints' present manager - who has different ideas of staff discipline - apparently manifests from time to time.

In so far as there is a dispute in these respects, I accept the explanations given by the respondents, not only for the reason stemming from the nature of the proceedings, but because they are considerably reinforced by the probabilities. What the respondents sold was a product the attraction for which depended on its inherent quality. They did not sell a service in which the personality of either or both was something that customers would go to in preference to other people offering the same service. And so far as staff are concerned, the present general manager of Granny Smith Prints admits that he sometimes shouts and swears at employees. It can hardly be the respondents' fault if some of the employees exposed to this take exception to it.

Apart from these facts there is the nature of Granny Smith Prints' business. It did both commission printing and direct sales, from a factory in one of the smaller centres of the country. Its main customers were

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two in Bulawayo - one of which was a subsidiary of CIH - and one in the Midlands. Such *ad hoc* customers as it had in the form of large retail stores bought, so it appears, from any textile printing factory that produced a commodity the retailer wanted. Granny Smith Prints had no exclusive rights to any of them.

In those main circumstances then, can the restraint be said to be reasonable? Thinking the matter through as best I can, I think the answer must be that it is not.

In the first place, although the agreement to work for Granny Smith Prints was for a duration of five years, the Leigh-Smiths' employment could cease for any reason. The restraint became operative on "termination of their employment by the company, however caused". So even if, for example, Granny Smith Prints were to retrench its staid and make one or other or both of the respondents redundant, they could not carry on their former trade. Even more unreasonable would be the possibility that the company could dismiss either respondent on giving due notice, and still prevent them from carrying on that type of work. And although the salary payable is calculated on an annual basis, the other circumstances of the case seem to indicate that the respondents were paid and employed on a normal monthly basis.

Certainly, it was not claimed that they had to stay for five years when each wanted to leave, and it is unlikely they would have accepted a salary of $500 per month fixed for five years. But the matter goes further than that. The restraint, it will be observed, is to apply to any business similar to or competing with that carried on by Granny Smith Prints when the employment of respondent was terminated. So if, for example, Granny Smith Prints had extended the breadth of its business activities to include all forms of textile design, screen printing, interior decorating, pottery, or even photo-journalism to complete the example, by the time the respondents' employment was terminated, the respondents could follow none of these other possible

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avenues of trade activity. That seems to me to be going well beyond a reasonable need to protect C I.H.'s investment in a business which did only commission printing or direct sale of their own designed textiles. In fact, these circumstances make me agree with Mr *de Bourbon's* submissions that the restraint clause is designed to secure absolute protection against any form of competition whatever by the respondents far five years.

In addition to these aspects, there is also the area and period of prohibition. The business of which control was acquired by CIH was conducted in Marandellas. The customers seem to have been in Bulawayo,

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Gatooma and Salisbury. Now, while me decision in *Connors Bros. Ltd. v Connors (supra)* establishes that a purchaser is entitled to develop a business bought, and it is legitimate to secure an area in which to develop it free of competition, the real question is whether the restraint is confined to the area in which competition would in all probability inure, to the detriment of the purchaser: *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688. While it may be that Granny Smith Prints could eventually have sold its products over the entire country instead of in the places it did, there is no evidence at all that it intended to expand its business that far or even had any hopes of doing so. And unless it is shown to be necessary to protect its interest on such a country-wide basis, it also seems to me that there is validity in the submission that the restraint, even if it was otherwise acceptable, is too wide in area. I think the same may be said for the period. There are no trade secrets in the work respondents did, no techniques nor modes of artistic execution, that are not learnt by or taught to others in those skills. It does not seem to me, therefore, that it would take Granny Smith Prints five years to acquire or even train someone else to do the work previously done by respondents if their employment was terminated. In fact, on the affidavits, Mrs. Leigh-Smith found someone to take her place before she left. So this aspect, too, seems to have been intended for no other reason than pure sterilization of the respondents' skills, to protect Granny Smith Prints from any competition for five years. In that respect, too, I think it was more than was reasonable to protect C I.H.'s interests.

But even if I am wrong in one or more or all of these conclusions it is still possible notwithstanding that a restraint may be reasonable *inter partes,* for the promissor, or restrained person, to show that it is against the public interest. Public interest is, of course, a criterion that may vary from time to time and form case to case, and in deciding an issue of this nature I do not think one can do more than try to assess whether the larger interests of the country require that the skills of the respondents be sterilized for five years, if not for good, in the interests of carrying out this contract. On the one hand the country faces a severe if not an acute shortage of skills, a shortage that grows each month. The respondents have very considerable skills, and moreover those skills can generate employment for others than themselves, and wealth in commensurable quantities. Not only is that beneficial to the public weal, but the evidence is that these skills can, and in fact are, contributory to the country's exports - another desirable quality that assumes a particular importance in the country's present circumstances. On the other hand there is the requirement that contracts are made to be carried out, and that people should not

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be allowed to solemnly enter agreements and

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then depart from them if the results appear too burdensome. If almost everyone who entered a restraint of trade were permitted to resile therefrom too easily, the situation would become fraught with uncertainty and the sanctity of contract would super.

In the circumstances of this case, and giving the most conscientious consideration to the problem that I can, I am bound to say, however, that I think it is a case where the private rights of contract ought to defer to the public interest in freedom to trade. It seems to be manifest that at the present time the public interest is better served by having more skilled people working than less, more economic activity being generated than less, and more foreign currency being earned than less, than by advancing the sanctity of contract to a position of pre-eminence just to satisfy that principle. It is not a conclusion to which I would willingly come but the obvious merits and demerits of the choice seem to me to have no choice.

For all these reasons, then, I am of the opinion that this restraint clause is unreasonable and therefore void, and should not be enforced.

In the circumstances, the application must be dismissed with costs.

Atherstone & Cook, legal practitioners for the applicants.

John May & Co., legal practitioners for the respondents.

THE STATE v CHISIWA 1981 ZLR 666

Court **High Court, Salisbury**

Criminal Appeal

Beck, JP, and Squires, J

7th and 17th December, 1981

Flynote

Criminal procedure - sentence - Firearms Act [Chapter 308] - section 5(2) - mandatory sentence unless there existed "special reasons in the case" - meaning of - bona fide and reasonable mistake of law - can amount to a special reason.

Headnote

The appellant was convicted on his plea of contravening section 5 (2) of the Firearms Act [*Chapter 308*], in that he had possessed a pistol and ammunition without the necessary licence.

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While admitting his possession, he claimed that he did not know that such possession was unlawful without a permit. He had found the pistol on the bank of a stream and kept it. He had the general intention or handing it in to the police, not because he was aware of the Government campaign aimed at securing the surrender of all unlicensed firearms, but because he was aware that it was an instrument that might cause harm. For the same reason, he hid the pistol in his garden rather than leave it where his or other children might find it.

The magistrate, in finding that there existed no "special reasons in the case" that would justify imposing any sentence other than the mandatory sentence of five years' imprisonment, expressed great doubt about the appellant's professed ignorance of the campaign.

The real question on appeal was whether a bona fide mistake of law, even if it were held to be not wholly reasonable, could amount to a "special reason" in terms of the Act.

Held, that there is no difference between a "special reason" and a "special circumstance", but there is a distinction between "a circumstance of the offence" and "a circumstance of the case". The latter connotes a wider breadth of considerations and can refer to circumstances peculiar to the offender.

Held, further, that the magistrate had erred in rejecting the appellant's claim that he was unaware of the campaign to surrender firearms. To attach to a person like the appellant the same degree of awareness as is entertained by someone like the magistrate himself is a dangerous fallacy.

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Held, further, that it is perfectly proper in principle to record a bona fide mistake of law as a mitigating feature. This approach is in conformity with the general development of the criminal law, that of criminal liability on a subjective basis. Even if the mistake of law were not sufficient to excuse the offence, it certainly would be a factor in mitigation. In appropriate circumstances, as existed in this case, it would amount, to a "special reason", and allow the court to impose a sentence other than the mandatory sentence.

Cases cited:

Da Costa Silva v R, 1956 R & N 369;

Whittal v Kirby [1946] 2 All ER 552 (KBD);

S v de Blom, 1977 (3) SA 513 (AD);

S v Bledig & Another, 1974 (1) RLR 100; 1974 (2) SA 613 (RAD);

S v Johnson, 1977 (2) RLR 3; 1977 (4) SA 116 (RAD);

S v Banet, 1973 (4) SA 430 (RAD); 1973 (1) RLR 335;

S v Zemura, 1974 (1) SA 584 (RAD); 1973 (2) RLR. 357.

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C S Grossman for the appellant, at the request of the court.

M J Gillespie for the respondent.

Judgment

Squires J: The appellant in this case was charged in the court of the magistrate at Umtali with contravening section 5 (2) of the Firearms Act [*Chapter 308*], as amended, in that he possessed on the 19th September, 1981, a Tokarev pistol and 31 rounds of ammunition without holding a firearm certificate in force and in relation to that weapon at the time. He pleaded guilty to the charge and was found guilty. He was represented at the trial by a legal practitioner and the only issue was whether there were any special reasons in the case why the mandatory penalty should not be imposed by way of sentence. The basis of the appellant's claim in this respect was that he did not know when he possessed these weapons that it was unlawful to do so without a permit.

The facts of the case show that the appellant, who lives in Dangamvura, near Umtali, had found the pistol and ammunition by chance on the bank of a stream along the Biriwiri road in the Eastern Districts. He had gone down to the stream to obtain water to replenish the radiator of a car, and noticed the firearm while climbing down the bank. He took the pistol home with him to his house and hid it in his garden. He did this, he says, to obviate its discovery by his, and other, children, who frequented the house and who might have found it there. After obviously giving the matter thought, he concluded that he should hand in the weapon to the police because he was aware of a general desirability to do this in respect of any weapon or instrument that could cause harm, especially to children; and he formed a general intention to do so. He had become aware of the desirability of such a course, he said, following the

detonation of an explosive like a mine near the market square in Umtali, which device someone had found and kept, with consequent serious results.

Almost immediately after his return home with the pistol and ammunition, he received word from his home kraal, which was far away in the rural areas, that one of his children there was sick; and he had to leave straight away to go home and deal with this crisis. On the last part of the way to his kraal, however, which he covered on foot, he was set upon and assaulted by three men - quite severely, it seems, since he had to be treated for the experience in Chipinga Hospital, where he was detained for a week. After his return home there then ensued a period of some ten days to two weeks before the offence, during part of which, however, he was still attending hospital on an out-patient basis. The weapon in question in the meantime remained in its hiding place. He retained his intention to hand it over to the police, but he either forgot to do so or, when he did remember, an opportune moment did not present itself. Eventually, on the 19th September, he was asked by friends to come to a ZANU political meeting at Middle Sabi. He was not politically active himself but decided to go in response to their persuasions. Believing that it would be prudent to protect himself against any similar assault as had befallen

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him shortly before, he took with him the pistol in an apparently loaded condition.

While he was not set upon himself, a fight broke out at Tanganda Halt on the journey which he and his companions were making to Chisumbanje for the political meeting. This occurred between some of the ZANU adherents who were going to the meeting, and supporters of a rival political party. This incipient public brawl the appellant brought to an abrupt and decisive halt by firing the pistol twice. But on arrival at Chisumbanje, the police, having been told that someone on the bus was armed, arrived to carry out a search. The accused, who did not attempt to conceal the weapon, handed it over to them, and it was that unauthorized possession - on the 19th September - with which he was charged.

It also appeared, in the course of a lengthy and what seems to have been fairly rigorous examination of the appellant by the magistrate, that he was unaware of a recent campaign by the Government, through the police, to have handed in all unlicensed firearms or other offensive weapons. This campaign consisted of a three-month period of amnesty during which any weapon possessed unlawfully could be handed in without fear of prosecution for its unlicensed possession; and notice of severe penalties which would be imposed on anyone thereafter found

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in unauthorised possession of such a weapon or firearm was given in the same process.

Despite allegedly extensive advertising of the campaign in the media, and at political rallies, as put by the magistrate, the appellant maintained he was aware of no more than the need to keep dangerous objects away from people to the extent already indicated. He did not own or watch TV, nor own nor listen to a radio; he seldom read a newspaper, did not as a rule attend political rallies, and had little time for prolonged social chatter or exchanges in the course of which he might have discovered the existence of the campaign referred to by the magistrate.

The magistrate directed himself to the nature of a "special reason in the case", by reference to a passage in the decision of this court in *da Costa Silva v R,* 1956 R & N 369 at 372, as follows:

> "A special reason within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment. A circumstance peculiar to the offender as distinguished from the offence is not a special reason within the exception."

Applying this to the present matter, the magistrate professed himself to be exceedingly dubious about the appellant's claim to be ignorant of the amnesty campaign for unlicensed firearms and the subsequent unlawfulness of his unauthorised possession of the pistol. The main reason for so thinking seems to have been that the accused was admittedly aware of the need to be on the look-out for dangerous objects and that these should be handed to the police because of the potential for harm that these contained if ignorant people found them and used them for any reason. The magistrate, in his judgment, recalled that this caution, too, was the subject of a media campaign, and considered it strange that the appellant should know of this development but not of the firearms amnesty campaign and the unauthorized possession thereafter. For

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these reasons, he thought the hiding of the pistol by the accused in his garden was more likely to have been because the accused wished to avoid having it in his possession, which in turn was confirmation that the accused's belief that unauthorised possession of such firearm was not unlawful could not reasonably be true.

In the result, although he accepted the finding of the pistol was fortuitous and that that was a mitigatory factor, the magistrate held that there were no special reasons for not imposing the mandatory penalty and he sentenced the accused to the five years' imprisonment with labour that is provided in the section.

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The accused applied for leave to appeal in person against the sentence.

This was granted, and in view of the unusual nature of the issues which could arise, particularly the existence of a mistake of law and its possible consequences on penalty, counsel was assigned to him to argue the matter on his behalf. The court is indebted to Mr *Grossman* for undertaking this task, and for the assistance which he has provided.

The real question in this appeal, then, was whether a *bona fide* mistake of law, even if it is held to be not wholly reasonable, can amount to a special reason in considering the penalty for an offence charged under this section of the Firearms Act.

So far as the meaning and nature of special reasons are concerned, the magistrate in this case was correct in accepting that there was no difference between a "special reason'; and a "special circumstance", and the reasoning in judicial decisions that consider the words "special circumstances" can be applied, where apposite, to the words "special reasons". But he was wrong in limiting his identification of such to circumstances related to the offence and not also those related to the offender.

It is true that BEADLE, J (as he then was), did apply in part of his judgment in the *da Costa Silva* case the definition referred to by the magistrate, which is taken from the judgment of LORD GODDARD, CJ, in the English case of *Whittal v Kirby* [1946] 2 All ER 552 (KBD) at 555. But it is clear from what follows that the learned judge did so only to show, even on that limited meaning, that the circumstances of *da Costa Silva*'s case could properly be called special. If regard is paid to what be said later in his judgment at page 379 of the report, it will be seen that the learned judge did not agree with the limitation placed on the words "special reasons" by the LORD CHIEF JUSTICE in *Whittal v Kirby* in limiting the words as if they read "special reasons relating to the offence". There was a difference, BEADLE, J, said, between "a circumstance of the offence" and "a circumstance of the case", and the latter connoted a wider breadth of considerations than the former, and he said at page 379G-H:

> "The court is here dealing with the quantum of punishment, and in making a decision on this I think that any fact which might legitimately be considered as an aggravating or mitigating feature of the case must be regarded as a 'circumstance of the case', even though it may not be 'a circumstance of the offence'."

Save that that passage does not emphasize the word "special" sufficiently, it does, in my view,

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indicate the ambit the factors which may be urged on a court and which it may take into account when considering whether a penalty may be affected by such reasons.

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It is most important, however, not to overlook the word "special" in the section. The clear intention of the Legislature in using this word is that the reasons have to be out of the ordinary, either in their extent or their nature, and by definition, therefore, not all mitigatory factors may be special reasons. On the other hand, if they are "special reasons" they will always be mitigatory, whether they arise from the commission the offence, or the facts and conditions affecting the offender. It should be clear from this that the court may have regard to factors arising either out of commission of the offence or peculiar to the offender, as long as they are out of the ordinary. This will involve the making of a value judgment, since the question whether such reasons exist will often be a matter of degree. And, furthermore, by use of the plural "reasons" it should be borne in mind that the Legislature clearly avowed for the cumulative effect of a number of reasons to be taken into account by the court in arriving at its decision.

The next issue is whether the magistrate was justified in rejecting the accused's claim that he was ignorant of the prohibition on the possession of such a weapon. In this respect, and with all due deference to the magistrate, his approach seems to me to be a good illustration of the dangers of a judicial officer descending too far into the arena. He clearly relied on his own knowledge of the extent and intensity of what may be called the firearms amnesty campaign; and he measured the acceptability of the accused's claim to the contrary against his own knowledge. He proceeded on the basis that because he, the magistrate, was fully aware of the efforts made to advise the public of the necessity to surrender illegally held weapons, and the consequent penalties that would be imposed if they did not, then at least every person in the country of some education and living in an urban environment would also know of it. To my mind this does not follow at all, any more than all persons living in an agricultural environment appear to be aware for the mandatory penalty for stock theft. The magistrate, in the nature of his daily work, would know of or even be concerned in the frequency of cases that involve the illegal possession of firearms or other weapons, and would naturally be following, or at least be aware of, steps being taken to improve the lawlessness which this situation generated. But no such emphasizing of the matter would have occurred in the daily life of someone like the appellant, and to import and attach the same degree of awareness as is entertained by someone like the magistrate to such a person as the appellant, as almost a matter of judicial notice, seems to me to be a dangerous fallacy.

Moreover, I also think the magistrate misdirected himself in attributing the appellant's awareness of the need to be aware of dangerous

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objects to another campaign of a similar nature - an attributed awareness which helped to satisfy him that the accused must have known of the later amnesty campaign. In so doing, the

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magistrate seems to have overlooked the accused's explanation that he became aware of the need to take precautions against explosive devices or other dangerous weapons only because of the device that exploded near the market square as a result of someone finding it and keeping it.

Finally, I do not think the magistrate was justified in concluding that because the appellant hid this weapon in his garden, he knew that his possession was unlawful and therefore wished to avoid the possibility of being found with it. Certainly, the fact of such concealment is consistent with such a guilty mental state, but the accused's explanation was that he wished to keep the weapon as safe as possible from discovery by children. The magistrate seems to have rejected this explanation because he believed it would have been safer to lock up such a weapon in a cupboard if preservation from prying hands was the object. But it was not put to the appellant that he had such facilities, and it is not impossible that he could have answered such a question satisfactorily and convincingly if it had been.

These misdirections are, in my view, of sufficient weight to invalidate the sentence imposed by the magistrate, and to leave this court at large to consider an appropriate penalty. And it is in this respect that the most important issue in the case arises; namely, whether a *bona fide* mistake in law, such as wrongly believing that it was not an offence to possess a firearm without a licence, even though such mistake may not be wholly reasonable, can be said to be a special reason for purposes of the penalty imposed by section 5 (2) (b) (i) of the Firearms Act as amended by Act 37 of 1981.

Mr *Gillespie*, who appeared for the State, argued that it could not, because of the principle *"ignorantia juris haud excusat".* Although this rule had been rejected as part of the criminal law in South Africa in *S v de Blom,* 1977 (3) SA 513 (A.D.), it was still applicable in this country, at any rate to the extent that it was binding on this court. As authority for this proposition he referred us to *S v Bledig & Anor.,* 1974 (1) RLR 100 and *S v Johnson,* 1977 (2) RLR 3. And while this rule applied, a defence of reasonable mistake of law could not be raised to a criminal charge, and if such a mistake constituted no defence to a criminal charge it could also not be validly advanced as a special reason to mitigate the rigours of a penalty.

An examination of these decisions does not, however, seem to me to support these contentions.

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Johnson's case was concerned with a *bona fide* claim of right raised as a defence to a charge of robbery, not the application of the principle referred to. It is true that in the judgment the learned JUDGE PRESIDENT did refer to *S v Banet,* 1973 RLR 335; 1973 (4) SA 430 (RAD), which had been criticized from another quarter as offending against the principle *"ignorantia juris haud excusat"*, and said that if *Banet's* case was correctly decided it would generate difficulty in some cases where money was accepted in trust form and handled for other purposes. But nowhere is it said that a plea of reasonable mistake of law can never be raised as a defence or advanced as a feature of mitigation.

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In *Bledig*'s case the appellants, as directors of a scrapmetal dealer's business, were dealers in second-hand goods for purposes of the Second hand Goods Act [*Chapter 237*], and in breach of section 4 of the Act a smelting-pot had been found on their premises, for which they had no written permission. The smelting-pot had been found on the appellant's premises, albeit some distance away, and disconnected from, their heating apparatus. They claimed that the heating apparatus had been disassembled and the smelting-pot was not being used, and in those circumstances no permit was required to possess the smelting-pot. As one of the arguments on appeal, it was submitted that the appellants did not have the necessary *mens rea* to constitute the offence, since once they had disassembled the smelting-pot from the heating apparatus they *bona fide* believed they no longer had a "smelting-pot" within the meaning of section 4. The decision of *S v Zemura,* 1973 (2) RLR 357; 1974 (1) SA 584 (RAD) was advanced in support of this, but the court declined to accept it as authority for such a submission. It held that the decision in *Zemura's* appeal was only authority for the special circumstances of the case and these constituted a special exception to the ordinary rule of *"ignorantia juris non excusat".*

It is true that the learned JUDGE PRESIDENT, who again gave the judgment of the court, said that to extend an exception to the maxim in question beyond the strict limits of *Zemura's* case would be extremely dangerous and would tend to frustrate the enforcement of statutory provisions. But he does not say that a *bona fide* and reasonable mistake of law can never be a defence. On the contrary, in that judgment itself, he said:

> "Had the appellants in the instant case sought advice from the office of the district commissioner, whose duty it is to issue permits in terms of the section, and been told by a responsible official there that they need not obtain a permit as long as they dismantle the heating apparatus, the position would, of course, have been entirely different.. They did no such thing. They

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> did not even take legal advice. They took a chance by placing their own erroneous interpretation on the section.
>
> In the circumstances, therefore, their mistake of law, even if bona fide, afforded them no defence, and they were both rightly convicted of the charge."

It seems to be clear, therefore, that on the facts of that case the court held that the appellants' mistake of law was not reasonable, and, even if *bona fide,* therefore afforded them no defence. Since they were dealers in second-hand goods, they could at least be expected to know the requirements of legislation that regulated their daily trade, or to have taken advice upon them. And by any standards such a mistake of law could hardly be called reasonable. Such a decision seems to me to be wholly consistent with *de Blom*'s case and *a fortiori* it does not say that a *bona fide* mistaken belief could not be a mitigating factor when considering punishment.

On the other hand, there are other decisions of our appellate authority, such as *Zemura's* case and *Banet*'s case which also show a readiness to depart from the principle *"ignorantia juris non excusat"* where the circumstances justify it, and they are all in conformity with, and contribute to, the main stream of development towards criminal culpability on a subjective basis. And in the field of *mens rea* this is reflected in the requirement which today can be said to command general, if not universal, acceptance, that a just system of criminal law should as far as

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practically possible recognize non-culpable ignorance of the law as negativing criminal liability.

I am even less able to accept Mr *Gillespie's* argument that reasonable mistake or ignorance of the law cannot be a factor of mitigation in punishment, if for no other reason than *dolus* and *culpa* will attract, and always have attracted, different assessments of blameworthiness and correspondingly different punishment. It seems to me to be so obvious that someone who commits an offence, knowing that he is doing so, is more deserving of punishment than someone who does not know, that it does not need authority to support it. A just system of criminal law must place emphasis on the principle of *nulla poena sine culpa,* and seek to ensure as far as possible that violations of the law are punished only in proportion to their relative blameworthiness.

Translated into the field of punishment under the statute in question, it is in my view perfectly proper in principle to regard a *bona fide* mistake of law as a mitigating feature. Whether it will amount to a special reason depends on the circumstances; but if in the exercise of the value judgment referred to earlier a judicial officer feels that the

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mistake of law and its reasonableness and the facts that support it are out of the ordinary, then he may validly regard that as a special reason and impose a sentence other than the mandatory one. Indeed, the magistrate in the instant case properly recognised that fact for he said that had the appellant lived in a remote tribal area, or been a complete newcomer to the country with no knowledge of its laws, he would have regarded the case differently. This must be so, and it may well be that such a person could even successfully raise the absence of *mens rea* as a complete defence to the charge if de *Blom's* case is to be followed in this jurisdiction.

In the present case the appellant's evidence was that he did not know it was an offence to keep the pistol without a permit, and in the circumstances of the case it does not strike me as being so improbable that it could be safely rejected. He did appreciate that it should be handed in to the police or some other suitable authority, but that was not because he knew it was an offence to keep it. It was because he realised such things could cause harm. However, while his mistaken belief in his possession was initially not unreasonable, this must be offset to a degree by his taking it to the political meeting, where, while he might not have anticipated the actual occurrence which resulted in its use, he ought to have realized it was at least increasing the risk of harm being caused by the pistol compared to keeping it concealed at home, and *a fortiori* being handed in. The mitigating reasonableness of the initial belief in this respect is to some extent offset by this later act, so one cannot take too lenient a view of his conduct over all. But, notwithstanding that aspect, I am of the view that his *bona fide* belief in the first instance that it was not an offence to merely possess the weapon without a licence, was a special reason within the meaning of section 5 (2) (b) (i) of the Act.

I would therefore allow the appeal and set aside the mandatory sentence of five years imposed by the magistrate and substitute a fine of $300 or, in default of payment, 12 weeks'

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imprisonment with labour.

Beck JP: I agree. The appeal is allowed and the sentence is altered to read: "Fined $300 or, in default of payment, 12 weeks' imprisonment with labour."

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Endnotes

1 (Popup - Popup)

The remainder of the Judgment is not material to this report

2 (Popup - Popup)

Also reported in 1975 (1) SA 247, sub nom. S v Mushonga - Editor.

3 (Popup - Popup)

Since this judgment was delivered, section 70 of the Magistrates Court Act has been repealed and replaced by section 11 (4) of the Supreme Court of Zimbabwe Act, 1981 (No. 28 of 1981), and section 38 (4) of the High Court of Zimbabwe Acr, 1981 (No. 29 of 1981), both of which sections confer the discretionary powers advocated by the learned judge. - *Editor*

4 (Popup - Popup)

*Reported at page 66 of this volume - *Editor.*

5 (Popup - Popup)

Since the judgement was delivered, section 70 of the Magistrates Court Act has been repealed and replaced by section 11 (4) of the Supreme Court of Zimbabwe Act, 1981 (No. 28 of 1981) and section 38 (4) of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981). Both these sections confer greater discretionary powers on the appeal court. - *Editor*.

6 (Popup - Popup)

*The African Law and Tribal Courts Act [*Chapter 237*] has been repealed and replaced by the 'customary Law and Primary Courts Act, l981 (No. 6 of 1981).

- *Editor.*

7 (Popup - Popup)

It is now reported at page 73 of this volume. - *Editor.*

8 (Popup - Popup)

Now reported at page 51 of this volume. - Editor.

9 (Popup - Popup)

The Judgment has been amended slightly so as to omit all mention of the names of the persons involved

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10 (Popup - Popup)

The text of the Amnesty was published in the *Gazette* of the 5th September, 1980, in General Notice 816 of 198 - *Editor.*

11 (Popup - Popup)

These judgments are reported respectively on pages 61 and 270 of the 1980 Zimbabwe Law Reports - *Editor*.

12 (Popup - Popup)

The judgment of the court *a quo* is reported at page 87 of this volume - *Editor.*

13 (Popup - Popup)

Now reported at page 284 of this volume. - *Editor.*

14 (Popup - Popup)

Reported in 1966 RLR 656 *sub. nom A R Bardwell & Co. (Pvt.) Ltd v Bourley.* The passage referred to is at page 660C - *Editor.*

15 (Popup - Popup)

*The High Court act [*Chapter 14*] has been repealed and replaced by the High Courtof Zimbabwe Act, 1981 (No. 29 of 1981); the equivalent section of the latter Act is section 44 (2) (b). - *Editor*.

16 (Popup - Popup)

*See page 296 of this volume - *Editor.*

17 (Popup - Popup)

*Reported at page 56 of this volume - *Editor.*

18 (Popup - Popup)

* Reported at page 17 of this volume - *Editor*

19 (Popup - Popup)

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* Now reported at page 108 of this volume. - *Editor*

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