

1982 (1)

The Zimbabwe Law Reports 1982 [Part 1]

1982 (1) ZLR p1

JONES v MACEYS OF SALISBURY (PVT) LTD 1982 (1) ZLR 1 (HC)

Court High Court, Bulawayo

Gubbay J

26th to 30th October 1981 and 5th January 1982

Flynote

Delict - negligence - customer in store slipping on piece of food recently dropped by another customer - duty of care - precautions taken by store management - whether adequate.

Headnote

The plaintiff claimed for damages for injuries he had received as a result of a fall while shopping in the defendant's supermarket. He had slipped on a piece of ice cream dropped some ten minutes earlier by another customer, which had not in the intervening period been removed by the supermarket staff. The supermarket floor was cleaned daily before the store opened and it was the task of an employee to patrol the store during the day to clean away any debris on the floor. In particular, it was his duty to remove immediately any potentially hazardous matter seen on the floor.

Held, dismissing the plaintiff's claim with costs, that the failure to detect the ice cream before the plaintiff trod on it did not point to the inadequacy of the defendant's system, nor could it be said the defendant's system afforded its customers inadequate protection. The ice cream had not lain on the floor for long enough to justify a finding that the defendant breached its duty of care to its customers by omitting to clean it away.

Cases cited:

Alberts v Engelbrecht, 1961(2) SA 644 (T);

Gordon v Da Mata, 1969 (3) SA 285 (AD);

Turner v Arding & Hobbs, Ltd [1949] 2 All ER 911 (KBD);

Ward v Tesco Stores Ltd [1976] 1 All ER 219 (CA);

Dulhunty v JB Young Ltd (1976) 50 ALJR 150 (CA).

HI Bisset for the plaintiff.

CW Jordaan for the defendant.

Judgment

Gubbay J: During the lunch hour of 16th May, 1979, the plaintiff, then 60 years of age and partially disabled, entered the defendant's supermarket situated in Eighth Avenue, Bulawayo, in quest of a box of face tissues, a commodity in short supply at that time. Although the store was one he rarely patronized, he was familiar with its general layout. He

1982 (1) ZLR p2

GUBBAY J

took a small wire basket from a stack to the left of the main entrance and immediately made his way with it to the self-service area. He glanced down the second aisle and noticed an attendant standing at the far end, near the eastern wall. He proceeded to walk along that aisle looking at the shelves of the gondolas on his right, for that was where he expected the boxes of tissues, if available, to be displayed. There were no other shoppers in the second aisle. When he had progressed a few metres, his left leg suddenly shot out in front of him, the basket flew out of his hand, and he fell very heavily upon his buttocks with his right leg doubled underneath him. He straightened his right leg and attempted, without success, to stand up. He then observed a small piece of chocolate, to which was adhering what appeared to be ice cream, on the vinyl tiled floor close to where he was sitting. He looked at the underside of his left shoe and found a flattened trace of chocolate on the heel. The attendant he had previously noticed was the first person to reach him. He announced that the plaintiff had slipped on the chocolate. Thereafter an ambulance was summoned and the plaintiff was conveyed to hospital. He sustained a fairly serious injury to an already disabled and weak right knee joint.

That was all the plaintiff was able to prove. Save that he was of the opinion that the substance upon which he had slipped emanated from a "choc ice lolly", that is, a small rectangular block of chocolate-coated ice cream through which a portion of a short flat stick is inserted, he was unaware of how it came to be on the floor or for how long it had been there. Nonetheless the Plaintiff instituted an action against the defendant for damages. He seeks an award in the sum of \$3 717, of which \$1 717 represents the agreed special and general damages suffered and the balance of \$2 000 (reduced to that amount in argument), his loss of earnings.

Three employees of the defendant were called to testify. The security guard who was stationed at the public entrance to the supermarket said that shortly before the accident two schoolgirls, each aged about 15 years, came in eating choc ice lollies. They proceeded into the self-service area and he observed them walking down the second aisle towards the eastern wall. Some four or five minutes later, the two girls approached him and enquired where they could obtain packets of potato crisps. They were still holding their lollies. He indicated the sweet counter to the right of the doorway, behind the row of cash tills and outside the self-service area. The girls made their purchases and departed. About three minutes later, the plaintiff entered. Clearly, and this was not in dispute, the ice cream upon which the plaintiff slipped had been dropped on the floor by one of the girls.

1982 (1) ZLR p3

GUBBAY J

The manager of the supermarket described the system he employed for keeping the floor in a clean and safe condition. Every morning, before opening time, the unpolished vinyl floor tiles were scrubbed down with a liquid detergent. Thereafter, one employee was assigned the sole duty of ensuring the floor remained clean throughout the day. He patrolled the aisles of the self-service area and swept away or picked up spills from the goods displayed, dust, plastic bags, pieces of paper and the like. An additional precaution taken was the directive to the other staff members that any potentially hazardous matter seen on the floor was to be removed immediately.

In extolling the virtues of the system to the extent that even before the accident employees were instructed to prohibit customers from introducing ice creams and bottles of cool drinks into the self-service area, the manager was less than candid. I accept in preference the word of the security guard and the cashier that the instruction was only given in consequence of the plaintiff's fall. I also regard as somewhat exaggerated the claim that the necessity to be vigilant of the safety of shoppers, was continually urged upon the staff. Mr *Bisset*, who appeared for the plaintiff, labelled the defendant's manager, "Mr Superclean". Certainly that was the impression he endeavoured to impart.

Although the evidence adduced on behalf of the defendant fell short of establishing how long prior to the plaintiff's accident the floor in the second aisle had been inspected or swept, what was proved was that the piece of ice cream was deposited on the floor shortly before the plaintiff slipped upon it and fell. On the security guard's estimate, the critical duration would not have exceeded about 13 minutes, but I think it unlikely to have taken the two girls as long as 10 minutes to discover the whereabouts of the potato crisps and make their purchases. The supermarket was not busy and if the girls had searched the self-service area for four or five minutes, the subsequent purchase from the sweet counter would not have occupied an equal length of time. Of importance, in this connexion, is the plaintiff's admission that when ultimately he saw the chocolate-coated ice cream on the floor, it had not liquefied; it had only melted slightly. Mr *Jordaan* for the defendant, submitted that the period in question would not have exceeded seven minutes. I consider 10 minutes to be a more accurate assessment.

The plaintiff accepted that the size of the ice cream on the floor was too small to have been visible to the attendant standing at the eastern end of the second aisle. Its presence was not revealed to the plaintiff in his glance down that aisle. So too, I think, the security guard and the

1982 (1) ZLR p4

GUBBAY J

two cashiers nearest to him, engaged in the performance of their respective tasks, could not be expected to have observed it during the 10 minutes which preceded the accident. Indeed, I did not understand Mr *Bisset* to suggest the contrary.

The crucial question, then, is whether the defendant was negligent in permitting the ice cream, the cause of the plaintiff's fall, to be on the floor at the place where, and at the time when, the accident happened. The defendant's manager conceded in evidence that spills of slippery

substances did occur. It was appreciated that if left on the floor, they might cause injury to customers. The defendant's duty was, therefore, to guard its customers against such a risk and afford them reasonable protection by operating a proper and adequate system of inspecting and cleaning the floor of the supermarket. It was obliged to ensure that the floor was kept reasonably safe for the public using it. See *Alberts v Engelbrecht* 1961 (2) SA 644 (T) at 646 D; *Gordon v Da Mata* 1969 (3) SA 285 (AD) at 289H.

In the present case - unlike *Turner v Arding & Hobbs Ltd* [1949] 2 All ER 911 (KBD) *Ward v Tesco Stores Ltd* [1976] 1 All ER 219 (CA) and the Australian case of *Dulhunty v JB Young Ltd* (1976) 50 ALJR 150 (CA) - the circumstances in which the slippery substance came to be deposited on the floor, and for how long it remained there before the plaintiff trod upon it, are known. The failure to detect it does not, in my view, point to the inefficiency of the defendant's system. The piece of ice cream was of too small a size, and remained on the floor for too short a duration, to allow of such a contention. Nor do I consider that the system adopted by the defendant afforded its customers inadequate protection against an occurrence such as this. That this was the first accident of its kind in the supermarket is perhaps some indication that the precautionary measures taken for the safety of customers were reasonable. The floor was washed in the early morning. One employee kept watch during business hours. He roamed the aisles to make certain that litter or spillage on the floor was removed. Moreover, all members of staff were instructed that any substance seen on the floor was not to remain there. I think it also significant that the general state of the floor in the second aisle did not leave the plaintiff with an impression of untidiness or uncleanness; apart from the presence of the ice cream, the floor was clean.

I am satisfied that it has not been shown on the probabilities that this small piece of chocolate-coated ice cream lay on the floor for a sufficient length of time to justify a finding that the defendant breached the duty of care it owed its customers in omitting to sweep it away.

1982 (1) ZLR p5

GUBBAY J

In my opinion the accident happened even though the system of cleaning was working properly. It was not a defective system. I can do no better than to echo the words of LORD GODDARD, CJ, in *Turner's case (supra)* at 912C -

"Assistants cannot be expected to walk behind each customer to sweep up anything that he or she may drop ..."

If such were the duty, an unrealistically high and totally impracticable standard of care would be created. See *City of Salisbury v King*, 1970 (2) SA 528 (R AD) at 529C-D.

An alternative submission advanced by Mr *Bisset* was that a reasonable man in the position of the security guard, who apparently was the only employee to notice the two teenage girls enter the self-service area with ice cream lollies in hand, would have foreseen the real possibility of their dropping ice cream on the floor and someone slipping on it and injuring himself. He would therefore have refused them admission or alerted the cleaner to their presence. I do not agree. It was the security guard's duty to remain at the public entrance to the supermarket in order to search customers for possession of offensive weapons and prevent pilferage. It was not part of his function to prohibit, or warn of, the introduction into the self-service area of commodities

which, if deposited on the floor, might cause a hazard to customers. The security guard never contemplated such an eventuality, and having regard to the nature of his employment, his knowledge and experience, it does not seem to me that any blame attaches to him for omitting to act.

But even assuming that the possibility of an unwitting spill by the girls would have been foreseen by a reasonable person placed in the shoes of the security guard, I believe he would have discounted the real risk of injury. He would have been aware of the system adopted by management to keep the floor free of slippery material - a system I have found afforded customers an adequate degree of protection. He would have pinned his faith in that system and concluded that if dropped, the ice cream would not remain on the floor for an unduly long time. In short, he would not have thought to differentiate between the possibility of a spillage of something brought into the self-service area from outside and of one caused by the falling from a gondola of a carton of yoghurt or a packet of sugar.

In the result the plaintiff's action is dismissed with costs.

Webb, Low & Barry, plaintiff's legal practitioners.

Joel Pincus, Konson & Wolhuter, defendant's legal practitioners.

1982 (1) ZLR p6

S v MABHENA 1982 (1) ZLR 6 (HC)

Court **High Court, Bulawayo**

Newham, J

8th January, 1982

Flynote

Criminal law - Precious Stones Trade Act, No. 8 of 1978 - section 3 (1) - possession of stone accused erroneously believed to be an emerald - attempt - impossibility of attainment - dealing in and possession of precious stones - whether possible to convict of attempt when stones in question in fact not precious.

Headnote

The accused had been convicted of contravening section 3 (1) of the Precious Stones Trade Act, No. 8 of 1978, having been in possession of a stone which he believed to be an emerald. The stone was in fact a rough green beryl of no value at all. The question was whether it was possible to convict the accused of attempting to commit the offence.

Held, that the general principle is that "impossibility of attainment" does not prevent an attempt to contravene a statute from being an offence. If it is not to constitute an offence, it must be clear from the language of the statute that the legislature so intended. The section concerned prohibited both dealing in and possession of precious stones. The legislature must have intended that persons who deal in stones erroneously believing them to be precious should be

punished, and the position of persons who possessed stones in similar circumstances could not be regarded differently.

Cases cited:

R v Davies and Another 1956 (3) SA 52 (AD);

R v Kantor 1969 (1) RLR 50 (AD);

S v Grant 1974 (2) RLR 190 (GB);

R v Shongwe 1965 RLR 597 (AD);

S v Mpofu GS 12/1981 (not reported);

S v Phiri GS 41 /1970 (not reported).

Judgment

Newham J: The accused was charged with possessing one emerald in contravention of section 3 (1) as read with section 3 (2) of the Precious Stones Trade Act, 1978. The accused pleaded not guilty.

1982 (1) ZLR p7

NEWHAM J

It was alleged that the offence occurred at Sandawana Mine on 22nd May, 1981. The accused admitted being in possession of the stone, the subject of the charge, but denied that he knew it was an emerald. The accused's evidence was disbelieved. He was convicted and sentenced to six months' imprisonment with labour, of which three months' imprisonment with labour was suspended for five years on condition that he is not convicted within that period of any offence in contravention of section 3 (1) as read with section 3 (2) of the Precious Stones Trade Act.

In convicting the accused, the magistrate overlooked a vital piece of evidence. An affidavit from a gemmologist was produced as an exhibit, and this makes it clear that the stone in question was not an emerald falling within the definition of "precious stones" at all, but a rough green beryl of no value whatsoever.

In these circumstances the magistrate was mistaken in convicting the accused of the substantive offence and the verdict must be set aside. The question remains whether the accused should have been convicted of an attempt to contravene the section.

The magistrate obviously erred when he disbelieved the accused's statement that he did not know the stone was an emerald, for the stone was not in fact an emerald. But it must be accepted that the State proved that at the very least the accused believed that the stone was probably an emerald. He was shown to display an unhealthy interest in emeralds. He is a storekeeper of substance and sophistication and on the day in question had over \$100 in cash on his person. Moreover, he lives in the Belingwe area. I just cannot, therefore, credit that such a person would have any doubts as to what a green stone may turn out to be.

However, I was concerned with the point whether it is possible in law for an accused to attempt to possess an emerald when in fact he could not do so because what he thought was an emerald was not an emerald but another stone. I referred the matter to the Attorney-General for his advice. He has replied as follows:

"In my respectful submission it is legally possible for an accused to attempt to possess an uncut emerald, when that stone, is not, in fact, an emerald, provided of course, he believes that it is an emerald. The law dealing with impossibility of attainment in relation to criminal attempts is set out in the well-known judgment of *R v Davies and Another*, 1956 (3) SA 52. This case is a judgment of the South African Appellate Division and has been followed on a number of occasions by our courts. See *R v Kantor*, 1969 (1) RLR 50 and *S v Grant*, 1974 (2) RLR 190 and *R v Shongwe*, 1965 RLR 597. In a well-known and often cited passage, in the judgment of Schreiner, JA (*R v Davies and Another (supra)* at page 64), the following is stated:

1982 (1) ZLR p8

NEWHAM J

'Again statutory crimes may require consideration, for the language of statutes may convey a wide variety of legislative intentions. In general there is no reason why endeavours to commit statutory crimes should not amount to criminal attempts though such endeavours are fundamentally or absolutely unable to succeed. But the language of a particular statute may conceivably require a modification of the general principle.'

In *R v Kantor (supra)* Beadle, CJ, enlarged upon this. At page 54 of the judgment he is recorded as having said '... it appears that the general principle or general rule is that "impossibility of attainment" does not prevent an attempt to contravene a statute from being an offence. Before such an attempt can be held not to constitute an offence there must be something in the language of the particular statute which indicates that the legislature intended to depart from the general rule and intended that such attempts should not be offences ...'

The crisp point for decision, therefore, is whether there is anything express or implied in section 3 of the Act which indicates that impossibility of attainment in so far as possessing a precious stone is concerned, should not constitute an offence of attempting to contravene section 3 (1). It is clear upon a reading of section 3 of the Act that there is nothing expressly stated which indicates that an attempt to possess precious stones, in the circumstances which concern us, is not to be treated as an attempt. We can, therefore, direct our attention exclusively to whether there is a necessary implication that an attempt in these circumstances can be committed.

This precise point obviously emerged in the case of *S v Mpofo*, GS 12/1981. There, the accused possessed what she presumably believed were 25 emeralds but were, in fact, not emeralds at all, but some other stones. Her conviction for the substantive offence was altered upon review to one of an attempt to contravene section 3 (1) of the Act. Clearly Waddington, J, experienced no difficulty in accepting that it is possible to commit an attempt to possess emeralds when the subject matter were not emeralds at all. However, the judgment is a very brief one and it does not appear that the law was explored at all. With respect to the learned judge, I would like to consider the law a little more closely during the course of this particular enquiry.

It might be argued on behalf of the accused, that the legislature has no interest in persons possessing any stones other than diamonds or emeralds. Therefore, the fact that a person believes he possessed rough emeralds or rough diamonds is neither here nor there. A similar argument was proffered by Counsel, as he then was, in *Kantor's case (supra)*. Just as this argument did not succeed in *Kantor's case*, I do not think it can succeed in this case. Section 3 (1) of the Act is a simple one, it reads thus:

'Except as is provided in this Act. no person shall deal in or possess precious stones unless he is -

- (a) a licensed dealer; or ...'.

As can be clearly seen, dealing in and possessing precious stones are dealt with together. It seems to me this is

of significance. As far as dealing in precious stones is concerned, in my view, the legislature would have every

1982 (1) ZLR p9

NEWHAM J

reason for wishing to punish persons who deal in stones, wrongly believing that such stones are precious. If this were not the case, the persons could well be tempted to take a chance and hope that, with a bit of luck, what they imagined to be emeralds or diamonds would not turn out to be so, in which case they could successfully escape conviction. I do not imagine for a moment that it was the intention of the legislature to pander to this kind of attitude.

The legislature has every reason to inhibit persons from dealing with stones when those stones may well turn out to be precious for the purposes of the Act. I receive the strongest support for this view from the case of *S v Phiri*, GS 41/1970. In that case the learned review judge was concerned with someone who possessed metal which he thought was gold. He was convicted of the substantive offence but the learned review judge, on the basis of *Kantor's case (supra)*, altered the conviction to one of attempted dealing in contravention of section 3 (1) of the Gold Trade Act.

It will be seen from the judgment that the learned review judge had no difficulty whatsoever in deciding that the legislature intended to punish persons in the position of the accused in that case. It need hardly be said that section 3 (1) of the Gold Trade Act is cast in very similar terms to section 3 (1) of the Precious Stones Act, 1978. I think it must be accepted, therefore, that as far as dealing is concerned, the legislature must certainly have intended that persons who deal in stones thinking wrongly that such stones are precious stones, should be punished. What, therefore, is the position of persons who do not deal in stones but simply possess them in circumstances similar to those outlined above? It seems to me that the answer is a simple one. It is impossible, from a practical point of view, to separate possessing from dealing. A person who possesses precious stones is more than likely to be tempted into dealing with them in one way or another. If, therefore, the legislature is concerned at preventing dealing in stones, when a person wrongly believes them to be precious, similarly the legislature must be concerned at preventing possession of stones which a person wrongly believes to be precious. The fact that the two offences are dealt with together in the same provision is also indicative of this fact. In the result, therefore, it is my respectful submission that *Mpofu's case (supra)* was correctly decided and that as far as this case is concerned it must be accepted that the accused should be found guilty of an attempt to possess the stone ..."

I completely agree with these views and am greatly indebted to the Attorney General for his assistance. The conviction is, therefore, altered to one of attempting to contravene section 3 (1) as read with section 3 (2) of the Precious Stones Trade Act, 1978.

The sentence imposed by the magistrate is nonetheless an appropriate one and will stand.

Gubbay J: agrees.

1982 (1) ZLR p10

SYFIN HOLDINGS LTD v PICKERING 1982 (1) ZLR 10 (SC)

Court **Supreme Court Salisbury**

Fieldsend CJ Baron JA and Georges JA

3rd November, 1981 and 15th January, 1982

Flynote

Practice and procedure - prescription - Prescription Act, No. 31 of 1975 - section 15 (c) - date when a debt becomes due - cause of action arising from breach of contract - proof of damage arising from breach essential - when damage occurs.

Headnote

The respondent (plaintiff in the court *a quo*) was involved in a motor accident on the 3rd April, 1977, in the course of which a passenger in his vehicle was seriously injured. She sued him for damages. The respondent's insurers repudiated any liability to indemnify him under the policy he held with them on the grounds of non-disclosure of material facts relating to his medical condition. Judgment was given against the respondent in favour of his passenger. The respondent thereafter brought suit against the appellants, 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, in consequence of which the insurers were justified in claiming non-disclosure of material facts. He had, therefore, he claimed, suffered damages arising from his passenger's successful suit against him.

The relevant dates in this case were:

- (a) 3rd April, 1977: The accident occurred.
- (b) 21st April, 1977: The respondent claimed against his insurers.
- (c) 8th June, 1977: The insurers wrote to the appellants saying that they would repudiate any liability under the policy.
- (d) 8th June, 1978: The injured passenger wrote to the respondent, stating her intention of claiming damages from him.
- (e) 13th October, 1978: The injured passenger issued a summons.
- (f) 30th October, 1978: The respondent admitted liability to the passenger.
- (g) 9th January, 1981: The respondent issued summons against the appellant.

The appellant entered a special plea in bar, based on the Prescription Act (No. 31 of 1975), alleging that the respondent's claim was prescribed. The vital question was, therefore, when the debt became due or, in other words, when the

1982 (1) ZLR p11

respondent's cause of action against the appellants accrued. In the court *a quo* McNALLY, AJ, held that there could be loss to the respondent only when the injured passenger had actually formulated and made her claim against him, that is, on the 8th June, 1978. He accordingly dismissed the special plea with costs. The appellants appealed.

Held, that a breach of a legal obligation may give rise to a number of claims, the "debts" in respect of which may become due at different dates, since different facts may have to be proved to establish the existence of the particular "debt".

Held, further, that as the claim in this case was for breach of contract, proof of the damage from the breach is a prerequisite for the establishment of an action for breach of contract. No damage could arise until the respondent lost the indemnity to which he thought he was entitled under the policy. Any claim for such indemnity could not arise until the respondent became legally liable - by admission or by judgment of the court - to pay to the injured party the damages she had suffered. As the admission was made on the 30th October, 1978, prescription began to run on that date, and the respondent's claim was not prescribed.

Cases cited:

HMBMP Properties (Pty) Ltd v King, 1981 (1) SA 906 (N);

Cartledge & Others v E Jopling & Sons, Ltd, [1963] AC 758 (HL); [1963] 1 All ER 341 (HL);

Swanepoel v SAR & H, 1927 OPD 267;

Coetzee v SAR & H, 1933 CPD 565; 1934 CPD 221;

Oslo Land Co Ltd v Union Government, 1938 AD 584;

Howell v Young (1826) 5 B & C 259; [1824-34] All ER Rep 377;

Burger v Gouws & Gouws (Pty) Ltd, 1980 (4) SA 583 (W);

Hawken v Olympia Pools (Pty) Ltd, 1979 (3) SA 224 (T);

Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd, 1979 (4) SA 905 (W);

Pereira v Marine and Trade Insurance Co Ltd, 1975 (4) SA 745 (AD);

McKenzie v Farmers' Co-operative Meat Industries Ltd, 1922 AD 16;

Cook v Grill (1873) LR 8 CP 107;

Read v Brown (1888) 22 QBD 131;

Abrahamse & Sons v SAR & H, 1933 CPD 626;

Weber v Africander GM Co, (1899) 16 CLJ 128;

Collings v Heywood (1839) 9 Ad & E 633;

Bullock v Lloyd (1825) 2 Car & P 119;

Kelly v Pickering & Another, 1980 (2) SA 758 (R).

"as soon as a debt is due". A debt is "whatever is due - debitum - from any obligation": *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd*, (supra) at 344 G. In terms of the contract between the parties the appellant's obligation was to obtain for the respondent a private motor-vehicle insurance policy with the insurer. The appellant's breach of contract was complete when the insurer issued the policy and when the respondent was advised of this. Respondent suffered loss at the time the appellant obtained the defective policy, that is, the cost of replacing the defective policy with a valid one. He was entitled to reject the policy obtained and to claim specific performance: *Bullock Bros v Bloemfontein Town Council*, 1915 OPD 56. A claim for specific performance is a debt as defined. The fact that the respondent was unaware of the breach is irrelevant: see the *Escom* case, (supra); *Hawken v Olympic Pools (Pty) Ltd*, (supra).

AP de Bourbon, for the respondent. Before prescription begins to run against a creditor, he must have been entitled to bring his action. See *Wessels on Contract* (2nd edition), paragraph 2780. It has been made clear in many cases that "in order to be able to institute an action for the recovery of a debt the creditor must have a complete cause of action in respect of it"; per THIRION, J, in *HMBMP Properties (Pty) Ltd v King*, (supra). See also *Oslo Land Co Ltd v Union Government*, (supra). Where proof of damages - arising either out of contract or delict - is an essential averment of a cause of action, to make that cause of action complete, then the damages must have arisen before the period of prescription begins to run. To do otherwise, would mean that a creditor would lose his cause of action before he has in fact acquired it: see SCRUTTON, LJ, in *Huyton and Roby Gas Co v Liverpool Corporation* [1926] 1 KB 146 at 154-5; *Freeborn v Lemming* [1926] 1KB 160 at 164.

If Mrs. Kelly had not been injured or had never made a claim against the respondent, then he would have complete cause of action against the appellant. Indeed, the matter goes further; the fact that a claim is made is not of itself decisive. For example, if a claim is made but withdrawn just before trial or is dismissed because *volenti non fit injuria* is shown, the respondent would have no cause of action, in that no damages would have been suffered. The mere repudiation of liability does not give the respondent a complete cause of action. Different causes of action can arise from the same set of circumstances and it is the prescription of the particular cause of action that becomes the concern of the Court: *Evins v Shield Insurance Co*, 1980 (2) SA 814 (AD) at 839-40.

1982 (1) ZLR p13

FIELDSEND CJ

Judgment

Fieldsend CJ: The full facts upon which this appeal is based are set out in the judgment of my brother GEORGES which I have had the opportunity of reading and I shall not repeat them in detail.

The insured plaintiff and respondent is claiming damages from his insurance broker (defendant and appellant) arising from the latter's breach of mandate in failing to ascertain and disclose, in seeking from an insurer comprehensive motor insurance for the insured, certain medical information about the insured's propensity to epilepsy. As a result of this non-disclosure the

insurer justifiably repudiated its liability to indemnify the insured in respect of his liability to compensate a passenger injured in his car as a result of his negligence.

The insured claimed as damages from the broker -

- (a) the amount he had to pay the passenger for damages and costs: \$21 114,78 in all; and
- (b) the costs he incurred in attempting unsuccessfully to establish the insurer's liability: \$4 032,02.

The broker's plea in bar, which raises the only issue in this appeal, is based on the Prescription Act (No. 31 of 1975). Summons was issued on 9th January, 1981, and if the debt which it claimed became due earlier than 9th January, 1978, it is prescribed by the Act. The vital question is therefore when the debt became due, or to put the same question in other words, when did the insured's cause of action against the broker accrue.

It is clear beyond argument that before prescription can begin to run against a creditor he must have been able to bring his action. Wessels, *Law of Contract in South Africa*, 2nd edition, Vol 2, paragraph 2780. It is also clear that in order to be able to institute an action for the recovery of a debt, the creditor must have a complete cause of action in respect of it. *HMBMP Properties (Pty) Ltd v King*, 1981 (1) SA 906 (N) per THIRION, J, at 909. The difficulties arise in deciding when a cause of action is complete. For example, in the case just mentioned, where there was an anticipatory breach of contract, it was held that the wronged party's action for damages accrued only when he made his election to treat the contract as at an end and not when the anticipatory breach occurred.

There are authorities on parallel legislation both in England and South Africa as to when a cause of action accrues where damage flows

1982 (1) ZLR p14

FIELDSEND CJ

from a wrongful act - whether delictual or in breach of contract - which have resulted in some hard cases.

One such decision is *Cartledge & Others v E Jopling & Sons, Ltd* [1963] AC 758 (HL). There an employee had contracted pneumoconiosis due to a breach of a statutory duty on the part of his employer. This was an insidious disease and the employee only became aware of its symptoms considerably later. It was held that the cause of action arose when material damage was caused by the breach of statutory duty, although the employee was then ignorant of the damage, and that no new cause of action arose when he became aware of the damage. In large measure this decision was based on the principle that in personal injury claims only one cause of action can be brought in respect of any wrongful act complained of, and no further claim is possible where an injury for which damages has been awarded turns out to be more serious than originally thought. See the speech of LORD PEARCE at page 780.

Two earlier South African decisions - *Swanepoel v SAR & H*, 1927 OPD 267 and *Coetzee v SAR & H*, 1933 CPD 565 - though both interlocutory decisions, indicate that the result in South

Africa might be different. It should be noted, however, that when *Coetzee's* case came to trial (1934 CPD 221) it was held on the facts that the claim for damages was out of time because the epilepsy which followed the head of injury the employee had sustained had manifested itself outside the prescriptive period.

The judgment of WATERMEYER JA (who concurred in *Coetzee's* case (*supra*) in *Oslo Land Co Ltd Union Government*, 1938 AD 584 is more in accord with the decision in the House of Lords.

Cartledge's case (*supra*) is now covered by legislation aimed at eliminating the harsh result which the then law brought about: see section 1 (3) of the Limitation Act, 1963, and the new section 2A (6) introduced by the Limitation Act, 1975. And, of course, in our law section 15 (3) of the Prescription Act provides that a debt which does not rise 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.

In regard to damages for breach of contract, there is the English case of *Howell v Young* (1826) 5 B & C 259; [1824-34] All ER Rep 377 (KB) where the plaintiff, owing to the negligence of his solicitor, advanced money on inadequate security. Over six years later he became

1982 (1) ZLR p15

FIELDSEND CJ

aware of the negligence and suffered damage by loss of interest. It was held that his action accrued when the solicitor was negligent, not when he suffered damage by loss of interest, and that his claim was prescribed. *Burger v Gouws & Gouws (Pty) Ltd*, 1980 (4) SA 583 (W) is a similar type of case concerning the delivery of the wrong variety of onion seed as a result of which an inferior crop was obtained. It was held that the cause of action accrued on the delivery of the wrong variety of seed. See, too, *Hawken v Olympic Pools (Pty) Ltd* 1979 (3) SA 224 (T) and *Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1979 (4) SA 905 (W)

On the other hand, it is clear that in contracts of indemnity a claim against the indemnifier accrues only when the person who has the benefit of the contract has paid or at least where his liability has been determined by agreement or legal process: *Halsbury's Laws of England* 4th Edition., Volume 18., paragraph 696, and *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (AD) at page 758. A cause of action on the insurer's indemnity would therefore only arise when the creditor's liability to pay was determined and not on repudiation of the duty to indemnify to him.

These principles and decisions show how important it is to be clear as to the precise nature of the claim when any question of prescription is involved, because everything turns on the date when the cause of action accrues. The insured's claim, at least in regard to the sums he had to pay his passenger is for damages for breach of the broker's mandate, but it is not based upon the broker's failure to obtain a policy of insurance for him which might have given him claim to the same indemnity from the broker as he would have had from the insurer had the policy been obtained. If the broker had disclosed the true facts, as it is said he should have done, it may have been that he would not have been able to have obtained a policy for the insured. The basis of the claim must be that because of the broker's breach of duty the insured drove when

he was not covered by insurance, and in having to meet any loss or claims himself without any indemnities, he has suffered damage.

It necessarily follows if this is a correct analysis of the insured's cause of action that he will have no claim unless he suffers damage. If, for example, the broker's breach of duty was discovered before the insured had had an accident the insured would have had no claim for damages for the breach because he would have suffered no damage. Similarly, if the insurer with knowledge of the non-disclosure had nevertheless met its liability under the policy, the insured would have suffered no damage, and would have had no cause of action. Such a possibility is

1982 (1) ZLR p16

FIELDSEND CJ

not fanciful. For example the claim might have been only for damage to the vehicle which may have been stationary having been properly parked by an authorized driver when it was struck by an uninsured and impecunious drunken driver. Such a claim a reputable insurer might well have met and the insured would have suffered no damage. Again the insured would have suffered no damage if the insured's passenger in the present case had suffered only minor injuries and had not claimed from him.

It is these features which in my view distinguish the insured's claim from the claims of the plaintiffs in the three South African cases mainly relied upon by the broker. In *Burger's case (supra)* the plaintiff had a claim in contract for the delivery of the wrong onion seed as soon as it had been delivered; in *Hawken's case (supra)* the plaintiff had a claim based on defective work on the tennis court on the contractor's failure to do the work properly; in the *Escom case (supra)* the plaintiff had a claim against the supplier of pipes once the defective pipe was installed. In the insured's case he had no claim against the broker until he had suffered damages as a result of the broker's breach of duty.

Indeed it was conceded by Mr *Jordan* for the broker that there could be no accrued cause of action until there had been repudiation by the insurer, and a great deal of the argument was concerned with whether the insurer's repudiation of 8th June, 1977, was a repudiation of its liability in respect of the claim now in issue. But once the need for repudiation is conceded, as it had to be, it seems to me that it must necessarily follow that no cause of action can accrue until it is clear that the insured has to pay damages to the injured passenger. If he is not called upon to pay he suffers no damage.

That there is no liability on a breach of contract until some damage is suffered is in accordance with the general rule in Roman-Dutch law for, as my brother GEORGES has pointed out, in an action based on breach of contract it is necessary to allege that some damage has been suffered before a cause of action is disclosed. It is true that in an appropriate case action could be instituted for declaratory order, but that is a different "debt" from the one for which the insured is now suing.

On the stated case before us the first demand upon the insured by the passenger was within three years of the issue of summons and the earliest that a cause of action can arise against the broker for the sums paid to the passenger is on a demand by the passenger. The insured's

cause of action for damages in respect of these sums accrued within three years of the issue of summons and is not prescribed.

1982 (1) ZLR p17

FIELDSEND CJ

It was not argued in the Court below, nor before us, that the costs incurred in unsuccessfully seeking to hold the insurer liable were in any different category of damages. There may well have been sound reasons for the adoption of this attitude by the broker - for example, it may have been agreed between the parties that it was to the advantage of both of them that the insured should make an effort to establish that the insurer had no basis for its repudiation of liability. In the absence of such an agreement or understanding it may indeed have been difficult for the insured to found a claim for the recovery of the costs of his unsuccessful action against the insurer as damages flowing from the broker's breach of contract.

As matters stand, this being a dispute which was put before the Court on a stated case for the determination of the question of prescription only, it would not, I think be right to go outside the issues as they were argued before us and in the Court below. Accordingly, there is no basis for drawing a distinction at this stage between the insured's claims for the amounts he has had to pay the passenger and for the costs he has had to meet in attempting unsuccessfully to establish the insurer's liability.

For these reasons I would dismiss the appeal with costs.

Baron JA: I have had the opportunity to read the judgment of my brother GEORGES I agree with his reasoning and conclusion and have nothing I wish to add.

Georges JA: The facts in this dispute are largely agreed between the parties and there was submitted to McNALLY AJ (as he then was), who heard the matter in the Court below a "Stated Case" setting out the matters agreed upon.

On 28th January, 1976, the respondent appointed the appellant as his broker and agent to obtain for him a comprehensive insurance policy in respect of his motor-vehicle with Standard General Insurance Company Limited who will be referred to as "the Insurers". The respondent had a health problem and, for the purposes of this decision only, it is agreed that he asked the appellant's employee to find out from his doctor what answer should properly be given to a question on the form asking whether he suffered from any "physical or mental infirmity". The employee failed to do so and answered the question in the negative. The Insurers duly issued the policy applied for.

On 3rd April, 1977, whilst driving his private motor vehicle the respondent was involved in an accident as a result of which his car was seriously damaged, he himself suffered injury which required his admission

1982 (1) ZLR p18

GEORGES JA

to hospital for treatment and a passenger in his motor vehicle, who will be referred to as "the Injured Party", sustained severe bodily injuries. She had to be hospitalized and needed specialist medical treatment. The accident was caused by the respondent's negligence.

On 21st April, 1977, the plaintiff (respondent) through the appellant (defendant) submitted to the Insurers a claim with respect to the damage to his motor-vehicle. The Insurers replied on 8th June, 1977, as follows:

"CLAIM NO. A77/176/MP/77: JR PICKERING ACCIDENT 3RD APRIL, 1977.

We refer to various telephone conversations concerning the above and 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."

The respondent was promptly so advised.

Attorneys acting on behalf of the Injured Party wrote the Insurers on 24th August, 1977, stating her intention to claim damages for the injury she sustained and requesting the Insurers to confirm that they were the respondent's insurers within the terms of the Act. The Insurers replied on 31st August, 1977, stating that since the Injured Party was a passenger in the respondent's car she did not fall to be dealt with under the Road Traffic Act. They suggested that the attorneys should address the respondent.

On 8th June, 1978, attorneys for the Injured Party wrote the respondent giving particulars of her damages amounting to \$31 788,79 and asking whether he accepted liability or not. She eventually issued her summons on 13th October, 1978. This was served on 19th October, 1978. On 30th October, 1978, the respondent admitted liability to the Injured Party putting her to proof of her damages.

On 14th November, 1978, the respondent applied for an order joining the Insurers as a third party in the action instituted by the Injured Party. On 27th November, 1978, the Insurers filed a Notice of Intention to oppose the application but it was in due course granted.

On 13th February, 1980, the damages suffered by the Injured Party were agreed at \$18 786,00. The respondent's claim against the Insurers failed in the General Division of the High Court and an appeal to the Appellate Division was also unsuccessful. It was declared that the Insurer was not liable to indemnify the respondent in the amount of the Injured Party's claim.

1982 (1) ZLR p19

GEORGES JA

Two questions were posed for determination by the Court -

- "(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 the plaintiff's claim became prescribed before or after the 10th January, 1978,"

(meaning, as McNALLY AJ correctly decided, whether prescription began to run before or after 10th January, 1978 - the summons in this matter having been served on 9th January, 1981).

It is common ground that section 14 (d) of the Prescription Act, No. 31 of 1975 applies and that the period for prescription is three years.

Section 15 (c) provides:

"Subject to the provisions of subsections (2) and (3) prescription shall commence to run as soon as a debt is due."

In the circumstances of this case subsections (2) and (3) are inapplicable. Prescription would, therefore, have been begun to run as soon as the debt became due.

"Debt" is defined in section 2 (1) as follows -

"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."

This definition is clearly broad enough to include claims for specific performance or for declarations of rights in relation to any given set of circumstances. Mr *de Bourbon* submitted that there was no difference in meaning between the phrases "a cause of action accruing" and a "debt" becoming "due". This submission appears to me to be correct. The phrase "a cause of action accruing" has received careful judicial examination. In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at page, MAASDORP JA adopted a definition formulated in *Cook v Gill* (1873) LR 8 CP 107 and adopted by LORD Esher in *Read v Brown* (1888) 22 QBD 131:

"What is the real meaning of the phrase 'A cause of action arising in the City?' It has been defined ... to be this: every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

Though the issue in that case was jurisdiction the principle applies as well to the running of a period of prescription. Thus in *Abrahamse & Sons v SA Railways and Harbours*, 1933 CPD 626, WATERMEYER J stated:

"The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact

1982 (1) ZLR p20

GEORGES JA

which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all the plaintiff must set out in his declaration in order to disclose a cause of action. Such a cause of action does not 'arise' or 'accrue' until the occurrence of the last of such facts and consequently the last of such facts is sometimes loosely spoken of as the cause of action."

McNally AJ, listed a series of eight dates from which could be chosen the starting point of the running of prescription in respect of this debt. Mr *Jordaan* for the appellant in this Court concentrated on three -

- (1) the date of breach of contract when through the appellant's fault a policy of insurance was issued which instead of being unconditionally valid was voidable at the election of the Insurers. This can for all practical purposes be equated with the first date specified by the judge *a quo* - 28th January, 1976 - the date of the erroneous completion of the proposal form by the appellant's employee;
- (2) the date of the accident - the event insured against which could give rise to a claim for the indemnity ostensibly provided under the policy. That was the second date in the series set out by the learned judge *a quo* - 3rd April, 1977;
- (3) the date the Insurer wrote claiming to "repudiate all liability under the policy on the grounds of non-disclosure of material fact". This was in the letter of 8th June, 1977, already quoted. It was the third date in the series set out by the learned judge *a quo*.

If any of these dates is found to be the proper starting point the appellant succeeds. As has been mentioned, the respondent's summons was filed on 9th January, 1981, and that would have interrupted the running of time. If time began to run on any relevant date after 8th June, 1977, the action would have been timeously instituted.

It was not contended that the first date was the appropriate date; nonetheless it might assist in the elucidation of the problem if the consequences of choosing that date are examined. It would first of all be necessary to identify what facts a prospective plaintiff could prove at that stage and what action such facts would support.

Immediately the respondent became aware that the appellant's employee had given an incorrect answer to a question on the proposal form concerning his physical disabilities he would have realized, had he sought advice, that the policy covering his motor vehicle was now voidable at the election of the Insurer. If he had no accident so that no question of indemnity arose under the policy he would have suffered no loss of that type. If, however, he had paid money to the respondents for services rendered by them (which is unlikely in the circumstances)

1982 (1) ZLR p21

GEORGES JA

he could have sued to recover the sum paid on the basis that the appellants had not properly performed the services they had undertaken to perform. It will thus be seen that although no debt relevant to this enquiry could be said to have become due on that date there were other debts which may have become due. Any given transaction may therefore give rise to a number of claims the "debts" in respect of which may become due at different stages. Periods of prescription can therefore begin to run at different times.

The second date - the date of the accident - reinforces this conclusion. If the respondent had not realized until then that the policy covering his car was voidable he would then be in the situation in which he could contemplate serious possible loss as a consequence. Even before the Insurers exercised their option to declare the policy ineffective on the ground of material non-disclosure it would have been open to the respondent to sue the appellant claiming a declaration that it would be liable to him in damages for breach of contract in such sum as he

might be called upon to pay should the Insurers decline to indemnify him. The debt which would then be claimed would be a declaration of rights and it would be due as soon as all the facts needed to be proved to establish it were present. The possibility would exist that in the course of that action the Insurers could have declared their willingness to honour the policy in which case the action could not succeed but the basis for filing it would have been arguably sound.

The third date was pressed as the proper date for the commencement of the running of the period of prescription - the date of the letter "repudiating all liability". It was contended that at that date a further fact had fallen into place since the date of the accident itself. There was a letter from the Insurers which at lowest indicated that they were exercising their option to treat the policy as voidable. A declaration of rights against the appellant could then very clearly have been sought. That "debt" would be due. The issue was whether at that stage yet another "debt" would be due, namely the loss the respondent would suffer when called upon to pay to the Injured Party damages against which he had no indemnity from the insurers.

The damages claimed against the appellants in this case are damages suffered by reason of the loss of the indemnity under the voidable policy procured by the appellant. The policy was voidable because the appellants in breach of their mandate failed to carry out the instructions given. Although this is an action against the appellants as brokers it is relevant to determine when time would begin to run as against the

1982 (1) ZLR p22

GEORGES JA

Insurers in an action against them on the indemnity, for until a claim for indemnity arises and is not met the respondent would not have suffered the damage which is the subject of this action. This is a claim for breach of contract and proof of damage is one of the prerequisites for such a claim. A plaintiff in contract must aver and prove damage in order to succeed in a claim.

In *Weber v Afrikander GM Co*, (1899) 16 CLJ 128, GREGOROWSKI, CJ, stated:

"It is true that in England nominal damages are sometimes awarded where there has been a breach of contract without damage, but our law requires a definite *damnum* to give rise to an action for damages. The case where a right which may be valuable in the future is denied is the only case where *damnum* would be assumed in consequences of unlawful act."

In the *Law of Contract in South Africa*, Professor Christie accurately, in my view, points out that a plaintiff seeking to establish a right will more frequently ask for a declaration of rights though he is not bound to do so.

In contracts of indemnity the period of limitation begins to run from the time when the plaintiff actually suffers the loss not from the event which causes the loss: *Halsbury Laws of England* (4th Ed) Vol 28, paragraph 669. This was decided in *Collinge v Heywood* (1839) 9 Ad E 633 overruling *Bullock v Lloyd* (1825) 2 Car & P 119. In that case the defendant undertook to save the plaintiff harmless against any costs he might sustain or incur in an action of replevin which the plaintiff prosecuted at the defendant's request. He filed his action more than six years after his attorney had presented his bill for costs in that action but within six years of his having paid it. The defendant contended that the action was barred by the Statute of Limitations. Counsel

on his behalf argued that if the period ran from actual payment, the plaintiff by not paying might prolong the defendant's liability at pleasure and quoted the earlier case of *Bullock v Lloyd (supra)* where it had been held that a plaintiff in such circumstances might have sued the defendant for the whole costs as soon as he himself became liable for them. DENMAN, CJ stated:

"We thought it necessary to consider this case because there was a ruling at *Nisi Prius*, in *Bullock v Lloyd (supra)* which seemed to be in point. But I think that cannot be supported: it is too clear that, in a case like this, no damage has arisen till the party to be indemnified is called upon to pay. The mere default of the surety after the debt has accrued is insufficient because that default may be amended. Until the plaintiff was the sufferer, he had no right to action."

1982 (1) ZLR p23

GEORGES JA

It should also be noted that the indemnity under the policy in this case is against "... all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of death or a bodily injury to any person ..." in the event of an accident caused by or through or in connection with the use of the insured motor-vehicle. The conditions of the policy prescribe that the Insured shall make no admissions or promises to pay without the written consent of the Insurer. A claim for indemnity under the policy cannot therefore be made until the Insured person is legally liable to pay which, in my view, must mean a liability established by admission or judgment.

I do not conceive, therefore, that the period of prescription began to run in relation to an action for damages against the appellant from the date of the purported repudiation - 8th June, 1977. If the action contemplated was for a declaration of rights this would certainly be the date, on the assumption, of course, that the respondent accepted the letter as a clear expression by the appellant of its intention not to perform the obligations which the respondent claimed were due to him under the contract.

This conclusion, as the learned judge *a quo* pointed out, is supported by the decision in *Pereira v Marine & Trade Insurance Co. Ltd.*, 1975 (4) SA 745 (AD). It was held there that a claim for the indemnification must be for a fixed or specific amount and that, therefore, where the claim arises from the insurers undertaking to indemnify a third party no claim can exist until such liability has been determined either by agreement or by the legal process.

It has been urged that *Pereira's* case (*supra*) is not applicable because the insurer in that case was repudiating by virtue of conditions in the policy whereas here the repudiation is on the common law principle of material misrepresentation, destroying the contract altogether. A perusal of the judgment of BECK, J (as he then was), in *Kelly v Pickering & Another* (2), 1980 (2) SA 758 (R) shows that the learned judge found a breach of the warranties in the policy though he was prepared to hold that the evidence established material misrepresentation as well.

The distinction appears, in any event however, to be of no import. Whether the insurer's repudiation is on the ground of material misrepresentation or breach of warranty, the policy holder who files an action is asserting the validity of the policy and can only claim within its

terms. Under the policy the Insurer is not under an obligation to indemnify the Insured until the Insured becomes legally liable to pay. An insured who sues for payment of a sum which he claims by way of an indemnity before he has become legally liable to pay (as distinct from a

1982 (1) ZLR p24

GEORGES JA

declaration that he is entitled to such an indemnity) could be met with the plea that the action was premature, with an alternative plea that the policy was in any event void for material misrepresentation. It would seem, therefore, that since quantification of the claim by agreement or legal process is a prerequisite for claiming the indemnity it must also be a prerequisite for effective repudiation of the obligation to indemnify.

In the result I would hold that until the respondent's legal liability to pay had been established and the Insurers had refused to pay no question of damage suffered had yet arisen. The action has therefore been brought timeously.

The view which I have taken of the law makes it unnecessary to decide positively whether the letter of 8th June, 1977, written by the Insurers was in its terms a repudiation of liability.

In summary therefore I would hold:

- (i) A breach of a legal obligation may give rise to a number of claims the "debts" in respect of which may become due at different stages since different facts may have to be proved to establish the existence of the particular "debt".
- (ii) The claim in this case is one for breach of contract. Proof of the damage arising from the breach is a prerequisite for the establishment of an action for breach of contract.
- (iii) No damage could in fact arise until the respondent lost the indemnity to which he thought he was entitled under his policy.
- (iv) The claim for such indemnity could not arise until the respondent became legally liable to pay to the Injured Party the damages she had suffered. Accordingly the repudiation of the claim could not properly be made before such legal liability had been incurred.
- (v) Legal liability for payment of the damages to the third party arose when the respondent admitted liability for payment of such damages. This took place on 30th October, 1978. The Insurers were then clearly repudiating liability and an application was made on 14th November, 1978, to join them in the action.
- (vi) Time could not therefore begin to run before 30th October, 1978.

Accordingly I would dismiss the appeal with costs.

Scanlen & Holderness, appellant's legal representatives.

S v MADZIWA 1982 (1) ZLR 25 (HC)

Court High Court, Salisbury

Squires, J

27th January, 1982

Flynote

Statutes - construction of - Forest Act [Chapter 125] - section 57 (2) - no provision in Act to say a contravention of subsection constitutes an offence - when Courts will nevertheless treat contravention as an offence - penalty section applicable.

Headnote

Section 57 (2) of the Forest Act [Chapter 125], provides that "no person shall burn growing or standing vegetation on any land except in accordance with notice given in terms of subsection (3) to the occupiers of all adjoining land and to a police officer at the nearest convenient police station." There is nothing in the Act that specifically says that a contravention of section 57 (2) constitutes an offence, nor what the penalties are for a breach of section 57 (2).

Held, that section 57 (2) was intended to be and must be regarded as constituting an offence by its breach. In the first place, the language of the section is clearly mandatory. Secondly, the section forms part of Part VI of the Act, and section 62, which also forms part of Part VI, implies that any contravention of the Part constitutes an offence. Thirdly, there are other sections in the Act, which although not specifically stated to be offences if not carried out, can only realistically be enforced if they are regarded as offences.

Held, further that section 73, the general penalty section, applies to contraventions of section 57 (2) and the sentence would have to be altered in accordance with the sentences permissible under section 73.

Cases cited:

R v Forlee, 1917 TPD 52;

R v Baraitser, 1931 CPD 418;

R v Letoani, 1950 (3) SA 669 (OPD);

R v Abdullah, 1956 (2) SA 295 (AD).

Judgment

Squires J: The accused in this case was charged with contravening section 57 (2) of the Forest

Act [*Chapter 125*], in that on the 11th October, 1981, he set fire to and burnt an area of grass on a farm without giving the necessary notice to the nearest police station or to his neighbours in the guise of occupiers of the adjoining land. He pleaded guilty to the

1982 (1) ZLR p26

SQUIRES J

charge, was found guilty, and since his fire had got out of control and caused considerable damage on other property, he was sentenced to a fine of \$400 or four months' IWL, of which \$300 or three months was suspended for five years on appropriate conditions. The trial took place, it should be said, at a circuit court sitting, and the magistrate did not have access to his library. On his return to his usual court, and on further consulting the statute in question, he entertained doubt as to whether the sentence he had imposed was a permissible one, and consequently sent the matter for review.

The query was referred to the Attorney-General and the proper measure of the problem raised by the magistrate appears from the full and careful analysis of the question that has been forwarded by the Acting Director of Public Prosecutions, and for which helpful exercise I am grateful.

The first question which the case raises is whether section 57 (2) of the Forest Act constitutes an offence if it is breached. The magistrate assumed that it did, but it is by no means clear that it does - at any rate without the aid of judicial interpretation to that end. The working of section 57 (2) is as follows:

"57. (2) Subject to the provisions of subsection (4), no person shall burn growing or standing vegetation on any land except in accordance with notice given in terms of subsection (3) to the occupiers of all adjoining land and to a police officer at the nearest convenient police station."

It will be seen from the language used that there is nothing in section 57, or elsewhere in the Act for that matter, which in terms says that a contravention of subsection (2) is an offence - as does the language of section 65 (2), for example, or section 65 (5). Section 73 could have some bearing on the matter since it provides that -

"Any person contravening any provision of this Act or the condition of any permit under this Act for the contravention of which no penalty is expressly provided shall be liable to a fine not exceeding forty dollars or, in default of payment, to imprisonment for a period not exceeding three months."

This would clearly be the penalty section for contraventions of section 65 (2) or 65 (5) since no penalties are provided for those offences in section 65 itself. Similarly, it seems contraventions of any of the regulations made in terms of section 55 (2) which constitute offences would also fall to be punished under section 73.

But what is the situation to be so far as concerns section 57 (2) where, although a distinct duty is placed on any person who wants to burn

1982 (1) ZLR p27

SQUIRES J

growing or standing vegetation on any land, it is not said to be an offence to fail to discharge that duty?

On an examination of the rest of the Act and on comparison of this section with others, and by the application of a principle of statutory interpretation, it seems to me that section 57 (2) was intended to be, and must be, regarded as constituting an offence by its breach.

In the first place it seems to be a generally recognized principle that where the Legislature has, in the public interest, expressly prohibited an act in a manner that makes it clear it intended to create an offence, the Courts will - by necessary implication - treat any such contravention as an offence even though the Act in question does not explicitly state that such a contravention is an offence - see *R v Forlee*, 1917 TPD 52; *R v Baraitser*, 1931 CPD 418, and *R v Letoani*, 1950 (3) SA 669 (OPD). In *Baraitser's* case WATERMEYER, J (as he then was), said at 419:

"I do not, however, think it necessary to examine all the regulations in detail, because it is a general principle in the interpretation of statutes that whenever the Legislature prohibits an act in the interests of the public, and when the language of the Legislature was not merely directory, then a breach of such prohibition or duty is an offence, and if no remedy is otherwise provided for such breach, the common law method of redress (i.e. prosecution) is impliedly given."

In the first place it seems to me that the language of section 57 (2) is clearly mandatory. Not only is the use of the categorical imperative "shall" one such indication, but the underlying intention of the Legislature is reinforced when one considers the mischief which this section seeks to avoid. Because of the damage and harm that can be caused by veld fires and the consequent urgent need of farmers or other landowners to deal fully and expeditiously with such eruptions when they show signs of breaking out, the inconvenience of mobilising a labour force and summoning all possible assistance on an emergency basis is avoided if neighbours and the nearest police station are warned in advance that a landowner intends to burn. If neighbours so warned see signs of a fire they can, *prima facie* at any rate, proceed about their normal business on the assumption that it will be kept under control and their help in fighting it will not be required; or acting on the notice they may have taken such steps to protect themselves as may be necessary in case it does get out of control. That consideration, together with the presence of section 73, seems to make it clear that the Legislature intended the warning of neighbours and the nearest police station to be a duty on landowners who wanted to burn on their land, and that the omission to do so would be an offence.

1982 (1) ZLR p28

SQUIRES J

But there are other indications that point to the same conclusion. Section 57, as another example, forms part of Part VI of the Act. Section 62 in this context reads as follows:

"If any servant when acting under the direction or command of his employer by any act or omission contravenes any of the provisions of this Part, such employer and such servant may both or either of them be prosecuted, and, if convicted, punished under this Act."

It will be observed that this provision refers to contraventions "of this Part", namely Part VI. The only section in Part VI which specifically creates an offence in its own provisions, is section 65, to which reference has already been made. If section 65 contains the only offences in Part

VI then section 62 is very strangely worded, and it should have formed part of section 65. At the very least section 62 should not have referred to contraventions of Part VI as a whole, but merely to contraventions of section 65. In those circumstances it is another indication that the Legislature intended section 57 (2) to be an offence; for if the omission by a manager consists of failing to warn neighbours of an intention to burn, then since it is a provision of Part VI to warn such neighbours or police station, it would be fatuous to specifically provide it as an offence when committed by a servant if it does not also constitute an offence when done by the owner himself.

Moreover, there are other sections in the Act which, though they are not in terms stated to be offences if they are not carried out, can only realistically be enforced if they are regarded as offences. Section 56 (1), for example, enables regulations to be made in respect of "any demarcated forest". There is nothing in section 56 that specifically provides that contraventions of these regulations should be an offence, but it is highly unlikely the Legislature did not intend them to be, since there is really no other way of enforcing them. Similarly, a contravention of section 39 (1) is not specifically an offence, but if disregard of the conditions of a permit under section 39 (1) is to be enforced at all, it can only be by invoking section 73 - so that contravention of section 39 (1) must also be regarded as an offence. Cf. *R v Forlee*, (*supra*).

It might perhaps be argued that it is unnecessary to render a contravention of section 57 (2) an offence because of the provisions of section 68 (b) which, in general terms, makes it an offence to light fires on land and either leave them unattended or allow them to spread so that injury is caused. But effect has to be given to every separate part of a statute and by enacting section 57 (2) as a separate provision the Legislature must have intended it to play a different role to the requirement in

1982 (1) ZLR p29

SQUIRES J

section 68 (b). It is true that the two acts which constitute the offence may overlap but they will not necessarily do so, since the gravamen of section 57 (2) is the duty to warn neighbours or the police station nearest the scene of the burning whether it is left unattended or not or controlled or not. Even a controlled fire that does no harm must be advised in advance to the persons indicated. The giving of notice is the important requirement, and the failure to do so is, in my view, an offence. If that conclusion is correct, then it seems unarguable that section 73 is the correct penalty section.

On the facts of the present case, the accused could have been charged under section 68 (b) (ii) since this fire got out of control and burnt a very large area. But the prosecutor elected to charge this under section 57 (2) rather than section 68 (b) (ii), and by doing so he asked the Court, in the event of a conviction, to sentence the accused on the basis of section 73 and no other provision. The penalty in section 68 (d) can really only refer to contraventions of section 68, and cannot be taken to apply to persons who could have been charged under section 68 (b) but who have been convicted of some other offence. Nor can this Court on review adjust the sentence on the basis that the accused committed another and more serious offence (*R v Abdullah*, 1956 (2) SA 295 (AD)).

Not only the bringing of the charge under section 57 (2) precluded the magistrate from sentencing the accused under section 68, but also the wording of section 73, for the latter says plainly that it shall apply unless the provision which is contravened "expressly" provides for another penalty. Section 57 (2) equally plainly does not "expressly" provide for any penalty at all, whereas section 68 (d) does. The learned magistrate was therefore wrong in sentencing the accused under section 68, but quite correct in referring this case for review. The sentence he imposed was not a permissible one and cannot therefore stand. Moreover, Act 40 of 1981, which increased the penalties in section 73, had not come into operation by the time this offence was committed, namely the 11th October, 1981. The sentence can only be that allowed by section 73 prior to its amendment. The magistrate was limited to a fine of \$40 but having regard to the serious view he took of the accused's omission, and the increased penalties which the Legislature later implemented, there is every justification for imposing the previous maximum fine on the accused.

The sentence of \$400 or four months' IWL is therefore set aside and there is substituted a fine of \$40. The excess already paid by the accused will have to be refunded.

Waddington J: agrees.

1982 (1) ZLR p30

S v MUNUKWA & OTHERS 1982 (1) ZLR 30 (SC)

Court **Supreme Court Salisbury**

Fieldsend CJ and Georges JA

19th January and 5th February, 1982.

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - section 105C - confessions confirmed by magistrate - necessity for a thorough investigation by magistrate into both genuineness of confession and free and voluntary nature thereof.

Headnote

In terms of section 242 of the Criminal Procedure and Evidence Act [*Chapter 59*], the prosecutor may produce in evidence a statement confirmed by a magistrate in terms of section 105C, and once such a statement is produced the onus falls on the accused to prove either that he did not make the statement or that the statement was not made freely and voluntarily. The shifting of the onus in this way is justified on the ground that there has been a thorough investigation before confirmation by the magistrate. While the magistrate before whom the confirmation proceedings take place is not expected to be astute to discuss improprieties in the recording of the statement, he should nevertheless satisfy himself that an admission on the part of the accused that the statement was freely and voluntarily made is a genuine admission, made after the accused has thoroughly understood the meaning of these words and the consequences flowing from confirmation. If the admission is preceded or followed by allegations that the

accused has been beaten by the police, the magistrate is under a duty to probe the ambiguity in order to establish the unequivocal character of the admission.

It is not desirable for a magistrate to confirm parts of the statement and not others; in a case where the accused admits that some parts of the statement were made freely and voluntarily while alleging that other parts were not, the statement should not be confirmed and the issue should be left for determination at the trial in the usual way.

Cases cited:

S v Gwaze and Another, 1978 RLR 13;

S v Mujuru, 1976 (1) RLR 198;

R v Kazwayo, 1949 (3) SA 761 (AD);

Mubvumba and Jenny v R, 1962 R & N 118.

The appellants in person.

MJ Gillespie, for the respondent.

1982 (1) ZLR p31

GEORGE JA

Judgment

Georges JA: The appellants were charged with and convicted of robbery. The case for the prosecution was that acting together they used force, violence and threats thereof to take \$345,29 in cash from Tafirinyika Paul Zata, an attendant on duty at a petrol station in Bromley.

Although there was detailed cross-examination of Paul Zap, the person robbed, and Stanley Busiwork, another attendant on duty, as to the details of the robbery, there was no real challenge to the fact that a robbery had taken place at the station on 13th January, 1980, shortly after sundown. The point at issue was the identity of the robbers and the cross examination was directed to establishing that there was little opportunity for observing the robbers and considerable confusion as to the sequence of events which made it unlikely that subsequent identification of three of the four appellants could be held to be reliable beyond a reasonable doubt.

Certificates enabling the appellants to appeal in person against their convictions were granted because of possible weaknesses in the mode of identification and doubts as to whether confessions allegedly made by the appellants were admissible as confessions properly confirmed under section 105C of the Criminal Procedure and Evidence Act.

It is convenient to deal first with the issue of the admissibility of the confessions since, if they are admissible, there is clear proof of guilt. If they are not, consideration will have to be given as to whether the remaining evidence is adequate to found the convictions.

Section 105C was introduced by Act No. 50 of 1976, following upon recommendations made by

a Courts Enquiry Commission which reported in August, 1971. Subsection 3 was amended by Act 31 of 1978 section 4 and the section reads in part:

"(1) Where an accused has been brought before a magistrate, the prosecutor may apply to the magistrate for the confirmation of any statement alleged to have been made by the accused whether in writing or orally and reduced to writing.

(2) In an application in terms of subsection (1) -

- (a) the prosecutor shall produce the statement referred to in subsection (1) by handing it to the magistrate and shall inform the magistrate of the details of when, where and to whom it was made; and
- (b) the statement produced in terms of paragraph (a) shall be read over to the accused and the accused shall be informed of the details provided in accordance with that paragraph; and
- (c) the magistrate shall ask the accused whether -
 - (i) he made the statement; and

1982 (1) ZLR p32

GEORGES JA

(ii) he did so freely and voluntarily without his having been unduly influenced thereto;

and shall explain to him the provisions of subsection 1 (a) of section *two hundred and forty-two*.

(3) If the accused -

- (a) refuses to answer any question put in terms of subsection (2); or
- (b) admits that -

(i) he made the statement; and

(ii) the statement was made freely and voluntarily without his having been unduly influenced thereto;

the magistrate shall confirm the statement by endorsing upon it the word "confirmed" and his signature and the date and place of confirmation.

(4) If the accused alleges that -

- (a) he did not make the statement; or
- (b) the statement was not made freely and voluntarily without his having unduly influenced thereto;

the magistrate shall request him to give particulars sufficient to inform the State of the facts upon which he relies for his allegation and, so far as is reasonably possible, to identify those involved in the allegation, and shall inform him of the provisions of section *one hundred and five* E

(5) The magistrate may require a person who makes an allegation referred to in subsection (4) to be medically examined and may make such other investigation as he considers necessary or desirable in the circumstances."

Section 242 of the Criminal Procedure and Evidence Act provides, among other things, that a statement confirmed in terms of section 105C "shall be received in evidence before any court

upon its mere production by the prosecutor without further proof." There is a proviso stating that such a statement shall not be used as evidence against the accused "if he proves that the statement was not made by him or was not made freely and voluntarily without his being unduly influenced thereto".

The effect therefore is that once a statement has been confirmed the burden is on the accused to prove on the balance of probabilities that he did not make it or that he did not make it freely and voluntarily without undue influence.

Section 105E provides that if an accused person in any subsequent challenge to a statement which was produced for confirmation fails to mention any fact which he could reasonably have been expected to have mentioned at the confirmation the court or magistrate in determining

1982 (1) ZLR p33

GEORGES JA

whether the statement was made by the accused or was admissible may draw such inferences from the failure as appear proper and the failure may be treated as evidence corroborating any other evidence given against the accused.

Mr *Gillespie*, to whom we are indebted for the benefit of a balanced and comprehensive argument in the absence of legal representation on behalf of the appellants, informed us that he could find no cases in which any court had considered the functions of the magistrate under section 105C. We have not ourselves found any.

It is instructive to note that in considering the section in relation to the onus resting upon an accused person challenging a confirmed statement the Appellate Division (MACDONALD CJ, LEWIS, JP and DAVIES JA) in *S v Gwaze and Another*, 1978 RLR 13 quoted from the report of the Courts Enquiry Commission as follows:

"However that may be [referring to the procedure in South Africa] as under the procedure we suggest, confirmation will be by a judicial officer after a thorough investigation has been made we consider that the confirmed statement should be admissible on its mere production, but subject to the accused's right to challenge its admissibility. In such a case however the onus would be on the accused to prove its inadmissibility, an onus which he could discharge in the usual way by showing that there was a 'balance of probability' in his favour."

The judgment then continues: "There can be no doubt that the Legislature has adopted this recommendation".

The shifting of the onus on proof in relation to a confirmed statement is justified on the ground that there has been a "thorough investigation" before confirmation by a "judicial officer". This appears to me to be a sound approach to the interpretation of the section. While the magistrate before whom the confirmation proceedings take place is not expected to be astute to discern improprieties in the recording of the statement, he should nevertheless satisfy himself that an admission on the part of the accused that the statement was freely and voluntarily made is a genuine admission made after the accused has thoroughly understood the meaning of these words and the consequences flowing from confirmation. Analogies though capable of being misleading can often be of help in clarifying a proposition. The closest analogy to the acceptance of an admission that a statement has been freely and voluntarily made is the

acceptance of a plea of guilty by an accused; and indeed confirmation of a statement unusually leads to the result that a finding, if not plea, of guilty is well nigh inevitable. It has been repeatedly emphasized that such pleas ought not to be accepted unless the accused understands the

1982 (1) ZLR p34

GEORGES JA

charge and intends his plea to be an unequivocal plea of guilty. Wherever an accused makes a statement which appears to contradict the plea of guilty the Court is under a duty to probe the ambiguity in order to establish the unequivocal character of the admission. The same duty, in my view, arises where an apparent admission that a statement was freely and voluntarily made is preceded or followed by allegations that the accused had been beaten by the Police. The remark by MACDONALD, CJ, in *S v Mujuru*, 1976 (1) RLR 198 at page 202 is apposite:

"I need hardly say that if an assault is perpetrated by the Police on a suspect, it is probable that its purpose is to bring undue influence to bear upon him, and not that it is simply a wanton and sadistic assault."

The test for admissibility of statements proposed in *R v Kuzwayo*, 1949 (3) SA 761 (AD) and adopted in *Mubvumba and Jenny v R* 1962 R & N 118 seems well established:

"[Was] the confessor's will swayed by external impulses improperly brought to bear upon it and calculated to negative his freedom of volition"?

Clearly external impulses may be improperly brought to bear which nonetheless fail to sway the confessor's will and an unequivocal admission that this was so may well be made, but the genuineness of such an unequivocal admission should be thoroughly investigated.

In this connection I would note that although the Criminal Procedure and Evidence Act, in section 105C (2) (c), provides that the magistrate shall ask the accused whether he made the statement and whether he did so freely and voluntarily without his having been unduly influenced thereto, it does not appear to me that the language of the Act need necessarily be followed word for word in the conduct of the proceedings. The question whether the accused made the statement is simple enough and needs no elucidation. The second question may well need elucidation. In that regard the questions appearing on the "Administrative Instruction to South African Magistrates Relating to the Recording of Confessions" which appears as Annexure I of the Report of the Courts Enquiry Commission, 1971, may well be adopted. Although designed to be asked by a person actually taking the statement, they are equally applicable to confirmation proceedings. The relevant questions read:

- "6. Have you in any way been influenced, encouraged or forced by the police or anyone else to make this statement?
7. Has any member of the police force or any other person whomsoever held out any promises or other inducements to you or any other person in connection with your or anyone else's release from custody,

1982 (1) ZLR p35

GEORGES JA

trial, sentence or in regard to any other matter whatsoever to make this statement? (Any suggestions of inducement must be fully investigated by means of further questions.)

8. (a) Have you any wounds or injuries?
- (b) Do you wish to tell me how you sustained them?"

Thereafter the general question as to whether the statement was freely or voluntarily made without undue influence could be put. It should be noted that the answers to the questions set out above, if they contain allegations of improper influence, will do no more than set out "the particulars sufficient to inform the State of the facts on which [the accused] relies for his allegation of undue influence".

While the form now provided does contain the question:

"Do you have any complaints to make against any person in a position of authority?"

that question comes at the end when it would appear that the decision to confirm would have already been made. The questions proposed above serve to particularise the complaints if any do exist and logically any such information as they do elicit would be most relevant in satisfying oneself as to the genuineness of an admission that the statement was freely and voluntarily given.

I now turn to consider the confirmation proceedings in the case of the appellants.

The first appellant, Manomano Shepard Munukwa is not noted as having complained in any way of maltreatment. There is nothing on the record which raises any doubt that his admission that the statement was voluntary was other than unequivocal. The validity of the confirmation proceedings is thus unchallengeable and the admission of the statement at the trial without further proof was proper.

The second appellant, Stephen Magaya, did, however, complain. He is noted as having said:

"I was assaulted at first and I thought I'd be assaulted again but the statement is an accurate reflection of what I said."

The magistrate then asked him whether he was influenced by the assaults and he is noted as replying:

"No the only thing is I was not sure of the persons who had rifles."

In answer to a further question he replied that he had been assaulted at the police station (presumably Goromonzi) by Africans and Europeans - many of them. No questions were asked as to the nature of the assaults

1982 (1) ZLR p36

GEORGES JA

or whether this appellant suffered any injuries as a result. The magistrate testified that he saw no injuries and none were indicated. He did not ask for indications. In his evidence at the trial he stated that he concluded that the appellant may have been assaulted to compel him to make further admissions with respect to the use of firearms during the robbery which he was unwilling to make. It is not on the record of the confirmation nor did he testify that he put that conclusion to the appellant to obtain his response to it. It seems quite likely that the appellant may have been agreeing that although beaten to speak or though speaking because he was beaten, he nonetheless did not say anything which was not true.

In his evidence the confirming magistrate stated that on his understanding of section 105C it would be open to him to confirm parts of a statement if the accused indicated that some parts of it were freely and voluntarily given and refuse to confirm other parts which the accused alleged were not so given. While this issue does not arise in this case it appears to me that would be a most undesirable course to adopt. In such a case the statement ought not to be confirmed and the issue left for determination at the trial in the normal way.

In my view the confirming magistrate had elicited from this appellant statements which were clearly contradictory and he ought not to have accepted the admission that the statement had been made freely and voluntarily without a thorough investigation. This did not take place. I would hold, therefore, that Exhibit 6 had not been properly confirmed.

The position with regard to Exhibit 7, the statement of Innocent Makumbe, the third appellant, is substantially similar. When asked whether he had made the statement read to him he is noted as having said:

"Yes but they assaulted me to force us to admit that we robbed men with arms. We merely went unarmed and threatened them with our hands. Weapons stayed in M/V."

He was then asked whether the statement was made under duress. His reply was:

"It is accurate but I forgot to elaborate that we had no weapons".

There is no reply to the question whether the statement was made under duress, the concern was the accuracy of the statement. Against that background the fact that the appellant replied in the affirmative to the question whether the statement had been freely and voluntarily made should not have satisfied the magistrate without further thorough investigation. I would hold that that statement also was not properly confirmed.

1982 (1) ZLR p37

GEORGES JA

In the case of the fourth appellant, Gordon Chiza, his answer to the question whether he had made the statement (Exhibit 8) freely and voluntarily was:

"I was severely assaulted but made it freely. Assaults did not influence me in making statements."

This reply impresses me as indicating some confusion of thinking which required clarification. It is of course possible that the assaults may have taken place some hours before the statements were recorded and that at the time of the recording there was no fear of further assaults. It is

also possible in the language of MACDONALD CJ that the assaults were acts of wanton sadism unconnected with extracting admissions. It may be that there were no severe assaults at all. These are, however, matters which required thorough investigation before the confirming magistrate could be satisfied that there was a genuine admission of voluntariness. No such investigation took place. I would accordingly hold that the fourth appellant's statement, Exhibit 8, was not properly confirmed.

Although these three statements had not been properly confirmed they could have been tendered at the trial in the normal way. Since, however, the prosecutor acted on the assurance that they had been confirmed he presented them, as the section provided, without further proof and on that basis they were admitted in evidence.

Mr *Gillespie* contended that the second, third and fourth appellants were such poor witnesses that it would have been open to the trial magistrate to conclude on the evidence as a whole that the statements were made freely and voluntarily. Among other untruths they denied that they had complained of assaults at the confirmation proceedings, alleging that at that state they still laboured under the fear of further ill-treatment when they were returned to the custody of the Police, as they expected to be.

The position, however, as it appears to me, is that the statements Exhibits 6, 7 and 8 were not properly tendered in evidence by the persons who recorded them. Apart from the evidence of the confirming magistrate that the second, third and fourth appellants admitted that they had made the statements uninfluenced by assaults, there was no evidence that these statements had been freely and voluntarily made. Having concluded as I have that these admissions ought not to have been accepted as genuine in the absence of further investigation it is not possible to use them at the trial as *prima facie* evidence of voluntariness.

1982 (1) ZLR p38

GEORGES JA

Accordingly there would be no proper evidence before the magistrate on which he could find that the statements were voluntarily made. The lack of credibility in the appellants' evidence by itself cannot be the basis of such a positive finding.

Except in the case of the first appellant, therefore, the convictions cannot be sustained unless there is enough evidence apart from their statements to support them.

[His Lordship analysed the evidence, and concluded:]

Giving all these factors due weight, however, it is my view that there is adequate evidence to support the convictions of the second, third and fourth appellants. There is substantial evidence confirming the identification and dispelling the possibility of error.

Accordingly the appeals against conviction are dismissed.

Fieldsend CJ: I agree with all that my brother has said. In particular it is imperative that more elaborate guidance should be given to magistrates as to the questions they should ask a person brought before them for the confirmation of a statement. Great care must be taken once there

is any question of a complaint having been made against the Police to ensure that the person in question fully understands to what he is admitting. Magistrates should also be astute to instigate enquiries at once into any such complaints and should not return anyone who complains to police custody. Indeed whenever possible persons whose statements have been confirmed should be remanded to prison: this should become an accepted and known procedure.

1982 (1) ZLR p39

S v NDHLOVU 1982 (1) ZLR 39 (HC)

Court **High Court, Bulawayo**

Gubbay, J

5th February, 1982

Flynote

Criminal procedure - sentence - principles of sentencing - sentences partly or wholly suspended for a period - proper judicial discretion must be exercised in determining duration of period - maximum period should not be imposed automatically - conditions of suspension - sentence of imprisonment suspended on conditions - preferable to relate breach of conditions of suspension to a subsequent sentence of imprisonment.

Headnote

While section 337 (1) (b) of the Criminal Procedures and Evidences Act [*Chapter 59*], provides that the whole or part of a sentence may be suspended "for a period not exceeding five years", thought must be given to whether the period specified should be less than the maximum. It is important to have regard to such factors as -

- (a) the nature of the offence and the circumstances of its commission;
- (b) whether the accused has exhibited a propensity to commit that sort of offence;
- (c) the personal character of the accused and whether the chance of a similar transgression is at all likely;
- (d) whether the offences to which the suspension relates are those which could be committed in circumstances of emotional distress or discomposure;
- (e) whether the offender is to be sentenced to a lengthy term of imprisonment which in itself could have the desired rehabilitative effect without the necessity of a further term suspended for the maximum period;
- (f) where the offence does not merit imprisonment, the possible unfairness of committing the offender to prison as long as five years afterwards.

Because of the real differences of opinion that can properly exist over what is the appropriate period of suspension, a judicial officer's discretion should be interfered with only if it is clear that

the period of suspension is unreasonably long.

GUBBAY J

Where that portion of a sentence which is to be suspended is one of imprisonment only, it is preferable to relate the breach of the conditions of suspension to a subsequent sentence of imprisonment, rather than to a fine. With the ever declining value of money, if the qualification of a fine is to be added, the quantum should be assessed with care and forethought.

Cases cited:

S v Wakiri, 1981 (2) SA 527 (ZA);

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

S v Nkokoto en Adhere, 1978 (2) SA 534 (O);

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

Judgment

Gubbay J: On a morning in late November of last year, the accused, a 20-year-old unemployed youth, happened to be strolling aimlessly among a pavement in the central shopping area of Bulawayo. Parked ahead of him at the side of the road was the complainant's motor-vehicle, a window of which was open. As he approached, the accused noticed a small portable radio of comparatively low value resting upon the rear seat of the vehicle. On the spur of the moment he decided to steal it. He shot his arm through the window, opened the door and grabbed the object of his attraction. As chance had it, he was observed. The alarm was raised and answered. Though fleet of foot and desperate to escape, the accused was apprehended a short distance away, with the radio still clutched in his hand. His impulsive and ill-considered action was rewarded with a sentence of 18 months' imprisonment with labour, of which 10 months was conditionally suspended for five years. That, to my mind, was a very severe punishment - particularly upon a first offender - and I told the magistrate so. On further reflection, he concedes that he attached insufficient weight to the temptation to which the accused had been subjected. The magistrate is indeed correct in saying that this type of theft is prevalent and the offender usually evades detection. If caught he deserves to be visited with a sentence in which the necessity for deterrence plays a significant role. But in each case what has to be looked to is the moral blameworthiness of the miscreant and a proper balance maintained between the inherent seriousness of his crime, the circumstances in which he committed it and his own personal situation. Applying that approach, I consider 10 months' imprisonment with labour, of which six months is suspended, will constitute a punishment both fair to the State and to the accused.

There is another aspect of the magistrate's sentence that concerns me. It relates to both the duration of the suspension and the qualification that a breach will occur if the accused is sentenced to a fine in excess of \$30 in respect of the commission of an offence involving dishonesty or the unlawful interference of a motor-vehicle.

GUBBAY J

There is reason to believe that the magistrate arbitrarily set the period of suspension at five years, because in endorsing the sentence on the reverse side of the charge sheet, he used a rubber stamp upon which these printed words appear:

"... of which ... is suspended for five years provided that during that period the accused does not commit any offence involving ... for which he is sentenced to imprisonment without the option of a fine or to a fine in excess of ."

Section 337 (1) (b) of the Criminal Procedure and Evidence Act [*Chapter 59*] provides that the whole or part of the sentence may be suspended "for a period not exceeding five years", and it is implicit that thought must be given to whether the period should be less than the maximum. The necessity to exercise a proper judicial discretion in determining the duration of the suspension was emphasized recently by FIELDSEND CJ in *S v Wakiri*, 1981 (2) SA 527 (ZA) at 530E-F, in these terms:

"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 en Andere*, 1978 (2) 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 it does not require any special circumstances to warrant ordering the maximum period - it is still necessary for the court in each case to give consideration to what period to choose."

Recognising that the purpose of rehabilitating the offender may be achieved by fixing the suspension at a period less than the maximum, the learned CHIEF JUSTICE went on to say that while a lengthy period of suspension is probably justified in respect of a wholly suspended prison sentence or where the offender is to be imprisoned for a very brief period only, it may well not be appropriate where he is to be subjected to a lengthy period of imprisonment (see at 530G-H). This *dictum* serves only as a guideline, for it is not hard to imagine circumstances in which a short period of suspension is called for notwithstanding that no effective period of imprisonment, or a brief period of imprisonment, is imposed.

Each case must obviously be dealt with on its own merits.

Without intending to formulate an exhaustive catalogue of relevant considerations, it seems to me that where a suspension of the sentence, whether in whole or in part, is to be ordered, it is important to have regard to the following:

GUBBAY J

- (a) The nature of the offence and the circumstances surrounding its commission. Was it carefully planned and premeditated, or was it committed in the heat of the moment or as a result of sudden temptation?
- (b) Has the offender exhibited a propensity to commit that type of offence? For instance, where over a long period of time he has converted moneys to his own use, or where he

has a relevant previous conviction but the effect of a partly suspended prison sentence has not been tried upon him.

- (c) The personal character of the offender. Is he a person of advanced age who has hitherto led a blameless life, or has he shown by genuine penitence or by the shock and disgrace of his trial that the chance of another similar transgression is entirely remote?
- (d) Are the offences to which the suspension will relate those which can be easily committed in circumstances of emotional distress Or discomposure?
- (e) Is the offender to be sentenced to undergo a lengthy period of effective imprisonment? That, in itself, should have the required rehabilitative effect and a suspension of a further term for the maximum period could be too onerous.
- (f) Where the offence does not merit a custodial sentence, it might be unfair if at some time within as long a period as five years the offender has to undergo the full sentence for a crime which would carry its own punishment.

I am mindful that very real differences of opinion can properly exist over the most appropriate period of suspension. In some cases it may be extremely perplexing to determine whether a period of imprisonment should be suspended for two years or five. For that reason interference with the exercise by a judicial officer of his discretion should only be countenanced where it is clear that the duration of the period of suspension is unreasonably long.

Even if it be assumed in this case that the magistrate did not select the period of five years purely as a matter of routine but gave consideration to its extent, I think it nonetheless merits reduction. The decision to steal the radio was a spontaneous one and would not have been made but for the accused having been tempted by the inadvertence of the complainant. I am satisfied, therefore, that a three-year duration is appropriate.

1982 (1) ZLR p43

GUBBAY J

The provision that the accused is not sentenced to a fine in excess of \$30 is, in my view, wholly unrealistic. With the steady decline in the value of money, if within three years or indeed a much shorter time, the accused were to commit a petty theft, the likelihood is that it would warrant a fine in excess of that amount. The court, if asked to bring the suspended term of imprisonment into operation, would then find it very difficult to pass a just sentence. It could not put into effect a portion of the suspended sentence and so might be constrained to impose either an inadequate fine or order a further suspension. To have recourse to further suspending the sentence solely on the ground that the provision making it operative was unreasonable is not what the power contained in section 337 (2c) of the Criminal Code was intended for. The availability of that power is not to be regarded in any way as sanctioning the making of such an oppressively narrow qualification. Generally I consider that where that portion of the sentence to be suspended is one of imprisonment only, it is preferable to relate the breach of the suspension to "a sentence of imprisonment without the option of a fine". If the qualification of a

fine is to be added, the quantum is to be assessed with care and fore thought.

The conviction is confirmed. The sentence is set aside and there is substituted therefor -

"Imprisonment with labour for 10 months, of which six months is suspended for three years on condition that the accused is not convicted of any offence involving dishonesty or the interference with a motor-vehicle, committed within that period, for which he is sentenced to imprisonment without the option of a fine."

Lloyd AJ: agrees.

1982 (1) ZLR p44

S v MBIRI 1982 (1) ZLR 44 (SC)

Court **Supreme Court Salisbury**

Fieldsend CJ and Georges JA

5th February, 1982

Flynote

Criminal law - Witchcraft Suppression Act [Chapter 73] - section 3 - naming a person cats a witch or wizard - necessary to impute that complainant used non-natural means in causing any disease or injury.

Headnote

In a charge under section 3 of the Witchcraft Suppression Act [*Chapter 73*], it is necessary for the State to allege that the accused imputed to the complainant the use of non-natural means in causing disease in a person or animal or in causing injury to a person or property. It is not enough to allege or prove merely that he said that the complainant was a witch or wizard. That a person uses non-natural means in order to obtain some financial benefit for himself-albeit at the expense of another - is not a contravention of the section.

Quare: whether the words "injury to any person" includes pecuniary injury such as might flow from some adverse effect to the goodwill of that person's business.

Cases cited:

R v Ntozonke, 1947 SR 59; 1947 (3) SA 9 (SR) (*sub nom R v Nyomo-cexe*);

R v K, 1965 RLR 571; 1966 (1) SA 366 (SR, AD).

A. A *Chimera*, for the appellant.

F. G *Smith*, for the respondent.

Judgment

Fieldsend CJ: The appellant was charged with contravening section 3 of the Witchcraft Suppression Act [*Chapter 73*]. The charge alleged that on the 9th of April, 1981, the appellant

wrongfully and unlawfully imputed to Josephat Sagonda the use of non-natural means, that is to say, did name or indicate the said Josephat Sagonda as being a wizard.

1982 (1) ZLR p45

FIELDSEND CJ

The evidence of the prosecution established, taking it at its best against the appellant, that the appellant had alleged that Josephat Sagonda was making his own employees wash their faces in a red liquid with the intention or for the purpose of inducing customers to go to his store rather than the appellant's store and that thereby the appellant was suffering a loss of customers.

There are two points which arise in this appeal. In the first place the charge is, on the face of it, defective. It is true that it follows in part the provisions of section 3 of the Witchcraft Suppression Act, but it is clear from the decision of TREDGOLD J (as he then was), in *R v Ntozonke*, 1947 SR 59 that the *gravamen* of a section 3 offence is imputing to another person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property. The words which follow in the section, that is, "whoever names or indicates any person as being a wizard or witch" are merely descriptive words and are not in themselves the words which constitute the offence.

It is necessary in a charge under this section to make the allegation that the person imputed used non-natural means to cause disease or injury to a person or property. That was not done in this case and for that reason it is clear that the charge is defective.

Even if it were not so the charge would be defective for lack of particulars. It is this lack of particularity which, in my view, has led to the wrong conviction of the appellant in this matter. The magistrate did not have put before him clearly what were the essentials of the offence. He considered that if there was merely an indication of the complainant as a wizard then the offence was established. That, on the authorities, is clearly not so: there must be an imputation that the complainant used non-natural means in causing disease or injury.

There is an additional point in that the evidence that was led, assuming the charge to have been in order, does not, in my view, establish a contravention of the section. That a person uses non-natural means in order to get some benefit for himself, albeit at the expense of another person whose customers are attracted to the alleged wizard's premises, is not a contravention of the section.

I refrain in this case from dealing with the position where it is alleged that a person uses non-natural means to drive customers away from another store. I would say only that I do not think that within the words "injury to any person" is included pecuniary injury such as might flow from some adverse effect to the goodwill of his business. It is true that the dictum of QUENET J (as he then was), in *R v K*, 1965 RLR 571

1982 (1) ZLR p46

FIELDSEND CJ

at page 572 that the word "injury" goes so far as to include any "hurt, loss, harm, detriment or

damage": but the issue in that case was whether the barrenness of a woman alleged to have been caused by witchcraft was an "injury" within the section. The decision that it was clearly right, but it was not necessary to have gone any further. Whether injurious effect on goodwill amounts to injury to property may be arguable but does not fall to be decided in this appeal because there was no driving away of customers alleged.

In the circumstances of this case there was no ground for the conviction of the appellant and indeed Mr *Smith*, who appeared for the State, conceded that the appeal should be allowed and the conviction and sentence set aside. It will be ordered accordingly.

Georges JA: I agree.

1982 (1) ZLR p47

TOBACCO FINANCE (PVT) LTD v ZIMNAT INSURANCE CO LTD 1982 (1) ZLR 47 (HC)

Court High Court Salisbury

Annotations [Link to Case Annotations](#)

Squires J

3rd December, 1981 and 10th February, 1982

Flynote

Delict - negligence - foreseeability - duty of care - remoteness of damage - irrelevant that precise rupture of harm or identity of plaintiff not foreseeable - sufficient if defendant should reasonably have foreseen general nature of harm that might befall some person exposed to risk of harm by defendant's conduct - economic loss only - no rule against recovery of provided other requirements such as foreseeability present, loss finite and no socially calamitous results in upholding claim - suretyship - Farmers Stop-order Act [Chapter 110] - cession of debt guaranteed by registered stop-order without ceding stop-order - does not render ineffective stop order and obligations thereunder.

Headnote

In 1976, a farmer registered a stop-order in favour of a company called Tobacco Sales Warehouse (Pvt) Ltd (TSW), as security for loans advanced to him to pay wages and purchase fertiliser. This stop-order was registered under the Farmers Stop-Order Act [Chapter 110] and it ceded all the proceeds of the farmer's 1977 wheat crop to TSW. In 1977, TSW ceded its claim against the farmer to the plaintiff, another subsidiary company of the same holding company, but the stop-order remained registered in the name of TSW. The plaintiff thereafter provided further loans to the farmer.

The farmer duly grew his wheat crop and insured it with the defendant against loss or damage. The crop was damaged by hail and, after arbitration, the defendant's liability to the farmer was assessed at \$18 088,35. The defendant paid this sum to the farmer; but the plaintiff did not in turn receive any payment from the farmer.

In terms of section 16 (1) of the Act, if any insurer of any crop is liable to pay in terms of the

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policy and if there are stop-orders registered in respect of that crop, the insurer is obliged to pay all but \$700 of the sum due to the Registrar of Stop-Orders. The Registrar then pays the holders of stop-orders and the residue, if any, is paid to the farmer.

1982 (1) ZLR p48

The plaintiff claimed for damages against the defendant, on the principal ground that the defendant had been negligent in failing to ascertain whether any stop-orders had been registered in respect of the farmer's crop. It was common cause that if the defendant had paid the money to the Registrar, the Registrar would have paid it to T'S.

The questions that had been to be decided were -

- (1) the validity of the cession to the plaintiff of TSW's claim and the consequent effect on the stop-order;
- (2) whether the defendant knew or ought to have known not only that the holder of a registered stop-order would have been entitled to the money the defendant owed to the farmer but that some other person might, in the ordinary course of business, have had an interest in the money by virtue of an agreement entered into with the holder of the stop-order;
- (3) whether the defendant consequently had a duty of care towards the plaintiff;
- (4) whether a loss which is a purely economic one is recoverable.

Held, that a right of action may be ceded without the accessory right of security being ceded as well; neither the law of suretyship nor the Act prevents or prohibits that.

Held, further, that on the facts the defendant must have known that persons other than the registered holder of a stop-order could have interests in such a stop order.

Held, further, that the doctrine of foreseeability in relation to the remoteness of damage does not require foresight as to the exact nature and extent of the damage that eventually occurs; it is enough if the defendant should reasonably have foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct. A person may owe a duty of care to those he foresees may be directly injured as well as those he foresees would be indirectly affected. The defendant was under a duty of care to ensure that it did not pay to the farmer any claim for the loss of a crop if there was a registered stop-order in respect of that crop; and that duty was owed to all creditors who relied on the stop-order as security for payment of their debts. In the circumstances, the fact that the plaintiff was not the holder of the stop-order made no difference.

Held, further, that it is not sound law to say that pure economic loss cannot be recovered in an action based on negligence simply for that reason. The mere fact that loss is economic only does not mean that it is indeterminate and unmanageable, provided that the loss is finite and no socially calamitous results will occur if the claim were to succeed. In any event, in the present case, public policy dictated that relief be granted to the plaintiff.

Cases cited:

Inter-Union Finance Ltd v Dunsterville, 1956 (4) SA 280 (D & CLD);

First Consolidated Holdings (Pty) Ltd v Bissett and Other, 1978 (4) SA 491 (WLD);

1982 (1) ZLR p49

SQUIRES J

Kroon v Enschede & Ors, 1909 TS 374;

Pearce & Anor v de Jager, 1924 CPD 455;

Union Government v Ocean Accident & Guarantee Corporation Ltd, 1956 (1) SA 577 (AD);

Shell & BP (SA) Ltd & Ors v Osborne Panama SA, 1980 (3) SA 653 (D & CLD);

Kruger v van der Merwe & Anor, 1966 (2) SA 266 (AD);

SCM (United Kingdom) Ltd v WJ Whittall & Sons [1970] 3 WLR 694 (CA); [1970] 3 All ER 245 (CA);

Dutton v Bognor Regis United Building Co Ltd & Anor [1972] 1 All ER 462 (CA);

Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd [1972] 3 All ER 557 (CA);

Ross v Caunters [1979] 3 All ER 580 (ChD);

Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901 (NPD);

Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd 1972 (2) SA 703 (R); 1972 (1) RLR 56;

Weller & Co & Anor v Foot & Mouth Disease Research Institute [1966] 1 QB 569; [1965] 3 All ER 560 (QBD);

Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd 1972 (4) SA 185 (T);

Pate v Greene & Co, 1907 TS 427.

JC Andersen SC with him BWK Whaley, for the plaintiff.

CL Mercer, for the defendant.

Judgment

Squire J: The facts of this case raise a problem in law of considerable interest. It appears that in September of 1976 a farmer called Marshall registered a stop-order, No. 8 072/76, in favour of a company called Tobacco Sales Warehouse (Pvt.) Ltd (TSW), as security for loans to be advanced to him to pay wages and to purchase fertilizer. This stop-order was issued and registered under the Farmers Stop-Order Act [Chapter 110], and it ceded all the proceeds of Marshall's 1977 wheat crop to the holder in so far as the whole amount of such proceeds may

have been necessary to discharge his debt to TSW. By January of 1977, Marshall owed TSW the sum of \$10 014,58 on the basis anticipated, at which time and for reasons purely of domestic convenience since they were both subsidiaries of one holding company, had the same employees, and were both in the same line of business - TSW ceded

1982 (1) ZLR p50

SQUIRES J

its claim against Marshall to the plaintiff. The stop-order, however, remained registered in the name of the former. Thereafter, the plaintiff took over the role of funding Marshall for his various requirements of purchasing or expenditure on his agricultural activities, and by the end of October, 1977, had accumulated a further claim against him in excess of another \$10 000.

The wheat crop was duly grown by Marshall and insured by him with the defendant against loss or damage. It so happened that the crop was damaged by hail; and, after a protracted dispute as to the liability of the insurer which actually went as far as arbitration under the policy, the defendant's liability to Marshall was eventually decided and assessed at \$18 088,35. The defendant subsequently paid this sum direct to Marshall, who, together with the money, has not since been seen and who - it may safely be guessed, at this stage - still owes the plaintiff the sums referred to earlier.

In terms of section 16 (1) of the Farmers Stop-Order Act, of course, it is required of the insurer of any crop, other than tobacco that is insured against hail, who becomes liable on a claim under that insurance, and if there are any stop-orders registered in respect of that crop, to pay all the money due under the policy - save for \$700 - direct to the Registrar of Farmers Stop-orders. This the insurer must do, despite anything to the contrary in the policy of insurance. Thereafter, by virtue of subsection (2) of section 16, the Registrar is required to pay such monies to the holders of such stop-orders as are unpaid, and the residue, if any, to the farmer. It also appears that, at the time the defendant paid the insurance claim direct to Marshall, TSW was the only holder of the stop-order in respect of this wheat crop who was unpaid. And it was the entire proceeds of the crop that were given as security for whatever claim TSW had.

In these circumstances, the plaintiff, possibly feeling somewhat aggrieved by defendant's disregard of section 16 (1) of the Act, instituted a claim for damages against the defendant in the sum of \$18 088,35. It based this claim on negligence on the part of the defendant in failing to ascertain whether any stop-orders had been registered in respect of Marshall's wheat crop, or, alternatively, it based it on the allegation that sections 16 (1) and (2) were enacted for the benefit of holders of stop orders registered under the Act, and the defendant had acted in breach of that provision to the plaintiff's loss.

1982 (1) ZLR p51

SQUIRES J

The consequent exchange of further particulars both for purposes of pleading and for trial, together with the plea, replication and pre-trial conference, revealed only two substantive areas of dispute - one of fact and one of law. It was disputed first whether the defendant was aware or

ought to have been aware that some person other than a registered stop-order holder might have an interest in the money payable to a registered holder by virtue of a cession of the principal debt without a consequent cession of the stop-order, and, secondly, as a matter of law, whether the damages claimed by the plaintiff were not too remote; and more particularly, in this respect, whether or not, in the circumstances of the case, it could be said that the defendant owed the plaintiff any duty of care. On the pleadings and other documents filed, it was admitted, therefore, that the defendant had been negligent in not paying to the Registrar of Farmers Stop-orders the sum for which it was liable under the policy of insurance, it being accepted that it normally ascertained the existence of stop-orders by inquiry of the Registrar, and that it had omitted to do so on this occasion.

Furthermore, and to put matters into a perhaps clearer perspective, it should also be stated that it was common cause that if the defendant had paid the \$18 088 - less the \$700 it may retain under the Act - to the Registrar, the Registrar would have paid it to T'S. It was also accepted by the defendant that if TSW had still been the holder of the principal debt, the defendant would be liable to it in the sum that it was owed by Marshall up to the limits of the proceeds of the policy. Nor was it disputed that the plaintiff had suffered the loss it claimed - subject to the \$700 retainable by the insurer - as the result of TSW not being paid through the Registrar. And, finally, as already touched on before, although there were initially other creditors of Marshall whose claims were included in the security given by the stop-order in question, in priority to that of TSW, it is accepted that by the time the plaintiff's claim arose the others had all been paid, and TSW was the only creditor so secured. So that it could have looked to the entire proceeds of the cropper the insurance - in satisfaction of any claim held by it.

Before proceeding to consider the real issues in dispute, the question of the validity of the cession of T'S.'s claim to the plaintiff and the consequent effect of the stop-order, was, at one stage of the proceedings, a matter of concern to the defendant. I did not, however, understand Mr Mercer to make any point of it in the event, save to say that it was only of relevance in removing the plaintiff's claim even further from the proximity of the defendant's wrongdoing, and it made the present claim

1982 (1) ZLR p52

SQUIRES J

even more tenuous. But in case I misunderstood him, and in deference to Mr Andersen's argument on the point, I should perhaps say that I can see nothing about the situation that injects any invalidity, for this reason, into the plaintiff's basis of claim.

The debt guaranteed by the stop-order was originally that owed to T'S.; and, while the principal debt was ceded to the plaintiff, the security was not. This raises two possible reasons for query. First, that when the transfer of a right of action takes place, any accessory obligation that guarantees it is discharged, unless it be transferred *simul ac semel*, because the former creditor is no longer *dominus* of the principal debt and can therefore no longer have any right or interest in the accessory obligation. Equally, and on the other hand, the cessionary no longer having any interest in it - since it has not been ceded to him - the accessory obligation also lapses for that reason.

The answer to this is identified and stated by CANEY, J, in *Inter-Union Finance Ltd v Dunsterville*, 1956 (4) SA 280 (D & CLD), and applied with approval in subsequent decisions such as *First Consolidated Holdings (Pty) Ltd v Bissett & Ors*, 1978 (4) SA 491 (WLD). There has always been, it seems, a respectable muster of opinion of old writers referred to in *Kroon, v Enschede & Ors*, 1909 TS 374 at 396 and *Pearce & Anor v De Jager*, 1924 CPD 455, amongst other discussions of the matter, which held that a cession of an accessory obligation in a contract of suretyship could take place after cession of a principal debt, and even long after. So that the accessory obligation would certainly survive the divorce from it of the claim for the principal debt. This was particularly the case when one considered the situation of a surety who pays the principal debt and who is thereafter entitled to all rights of recourse and contributions from the principal debtor and his co-sureties, respectively. The cession of action by the principal debtor to him would only take place after the principal debt was paid, and quite possibly long after. Yet there was no question that such accessory obligation lapsed because of any delay in that regard. It was this aspect of the law of a suretyship which led CANEY J in the *Inter-Union Finance* case to conclude that the rival rule referred to earlier was based on technicalities which were inconsistent with modern conditions, and that the better rule was that the accessory obligation could survive the ceding of the principal debt; and it did not lapse simply because the latter had been transferred to someone else.

The second possible difficulty is raised by the legislative requirements of registration of farmers stop-orders, and of any subsequent cessions of such securities, in order to establish and maintain their validity. Section

1982 (1) ZLR p53

SQUIRES J

12 of the Act, however, only provides that no cession of a stop-order is valid unless it is registered as a cession in terms of the Act. And when one considers the effect of the rights which a stop-order confers, together with the interest of creditors or potential creditors in knowing what income from farmer's crop or crops has already been so secured and to whom, this requirement is understandable. But, for the reasons just given, a right of action may be ceded without the accessory right of security being ceded; and it does not seem to me that the Act prevents or prohibits that. It only requires that changes of right in the security itself be publicized and makes it invalid as security if that is not properly done. If the cessionary of the right of action chooses to leave the security registered in the name of a cedent creditor, there appears to be, therefore, no reason why he may not do so. He takes a risk, it is true, because payment made by a debtor or the Registrar according to the registered stop-order would be, one imagines, good payment, as being payment to the creditor to whom it is due. But in the peculiar circumstances of this case, where the cessionary creditor of the right of action was effectively the *alter ego* of the cedent holder of the security, there would have been no such risk.

I turn then to consider the first of the two main issues in the matter, namely whether the defendant knew or ought to have known not only that a registered stop-order holder would have been entitled to the money the defendant owed to Marshall, but also that it knew or ought to have known that in the ordinary course of business some other person may have had an interest in the money by virtue of an agreement entered into with the registered stop -order

holder; and, having ascertained the identity of any registered stop-order holder, whether it should have ascertained from it whether anyone else had any right or interest.

Such evidence as there was on this issue came from the plaintiff only, for the defendant closed its case without calling any witnesses. This evidence established satisfactorily to my mind -

- (i) that the defendant has probably the largest volume of insurance business in this country, and is particularly active amongst farmers;
- (ii) that stop-orders from a very substantial part of the security that farmers offer to obtain credit facilities, and it is a universal practice for them to obtain credit on this basis;
- (iii) it is also a regular feature of what may be called the agricultural industry generally, that each year many crop farmers qualify for insurance compensation for damage to crops;

1982 (1) ZLR p54

SQUIRES J

- (iv) that the insurance proceeds for such damages are received by companies like the plaintiff;
- (v) it was not usual, indeed, it was almost singular, for a principal debt, secured by a stop-order, to be ceded without the accessory stop-order also being ceded; but
- (vi) cessions of debt were a constant and regular feature of normal commercial activity.

On the facts of this case, that is, both the evidence and the admissions made on the pleadings as a whole, there can be not the slightest doubt that the defendant must have been aware and, by inference, was aware of not only the need to inquire from the Registrar of Farmers Stop-Orders as to whether there were any stop-orders registered in respect of the crops of a particular insured farmer; but that, if there were, then such insurance would be paid to the Registrar for onward transmission to such registered stop-order holder or holders. It was not contended to the contrary, and it would have been difficult for an insurance company to claim that it was unaware of this obligation and its consequences.

In the view I take of the matter, it is not really necessary to decide the second leg of this dispute, namely the knowledge that ought to be imputed to the defendant as to the interests of other parties in a claim secured by a stop-order for reasons that are set out later. But, in case I am wrong on that point, it also seems to me to be established, at least on a preponderance of probabilities, that the defendant must have known that other persons could have an interest in such stop-orders. It is true that stop-orders are also ceded when the main right of action has been ceded, but the evidence reveals a high degree of credit facilities extended to farmers in the ordinary and normal course of commercial dealing by them, with the payment of some, and the incurring of fresh ones being a constant on-going situation throughout the progress of any agricultural season. It also establishes that cession of debts is by no means uncommon, and

although the Registrar is required by subsection '(5) of section 12 to register any cession of a registered stop-order as soon as may be, it is inevitable that in some cases at least, and even where a stop-order is ceded as well as the principal debt, there would be a delay between an agreement to cede a principal debt and the subsequent publishing of the new registration of the stop-order holder. It seems to be quite likely, these circumstances, that other persons could have an interest in stop orders other than the registered holder at any one time, and it would,

1982 (1) ZLR p55

SQUIRES J

in the circumstances revealed as normal commercial practice, be verging on the naive to conclude that a concern of the nature and breadth of activity on the defendant, would not be aware of this - if not of the fact, then at least of the possibility.

In this situation then, does, or did, the defendant have a duty of care towards the plaintiff? Relying on the conservative approach of courts to extensions of liability under the Aquilian action, or the English law equivalent, Mr Mercer argued that the defendant owed no such duty to the plaintiff in this case. He referred, in support of this, to the cautious attitude as expressed, for example, by SCHREINER JA in *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (AD), which attitude was still applied in resolving disputes of this nature such as *Shell & BP (SA) Ltd v Ors v Osborne Panama SA* 1980 (3) SA 653 (D & CLD). In particular, he urged that economic loss as sustained here by a party like the plaintiff, that is, someone not within the relationship contemplated by section 16 of the Stop-Orders Act, should not be accepted as a claim under the Aquilian action, and that liability on this basis should not be extended so far.

There are two prongs of an inquiry into the duty concept of negligence, the one fact-based, and the other policy-based. The first, as I understand the law, is really governed by the foreseeability test in deciding whether a defendant's behaviour was negligent in the circumstances, and the second by the range of relationships involved and the interests that should be permitted or protected, by the law. On this second level, the inquiry is divorced from questions of foreseeability and is really governed by broader considerations such as the ordinary notion of justice, the interests of the claimant or the defendant as balanced against the community as a whole, and the economic or even social effects of the claim, all of which compendiously may be said to broadly reflect the policy of law.

That being so, what is the position here as to the defendant's liability? Can it be said, in the first place, that the defendant could reasonably have foreseen the consequences of its omission to pay the proceeds of the insurance to the Registrar? For if it could not, then it would not be responsible, for the loss would be too remote.

The doctrine of foreseeability in relation to the remoteness of damage does not, of course, require foresight as to the exact nature and extent of the damage as it eventually occurs: *per* WILLIAMSON JA in *Kruger v Van der Mere & Anor*, 1966 (2) SA 266 (AD) at 272. It is sufficient if the person sought to be held liable therefor should reasonably have

1982 (1) ZLR p56

SQUIRES J

foreseen the general nature of the harm that might, as a result of his conduct, befall some person exposed to a risk of harm by such conduct. This test also seems to be to me to obviate any consideration of whether the injury or loss is direct or indirect; for, subject to the special considerations of pure economic loss, with which I shall deal later, a person may owe a duty of care to those who he foresees may be directly injured as well as to those who he foresees would be indirectly affected.

The question to be answered, then, is whether the loss suffered by the plaintiff was in fact foreseeable by the defendant in this sense? I am bound to say, on thinking the matter through as fully as I can, that I think it was.

The defendant, as an insurer of farmer's crops, knew that if any stop order had been issued and registered securing payment of the farmer's debts from the proceeds of such crop, the proceeds of any insurance payment in respect of that crop had to be sent to the Registrar of Farmers Stop-Orders. It could only ascertain the existence of such stop-orders on inquiry from the Registrar or his registrar, and it admits that that is normally what it did. It follows from this that the defendant knew that if a stop-order was so registered, and the proceeds of the insurance were not sent to the Registrar, the creditor or creditors of the farmer who relied on that stop-order as security would not receive the insurance payment in lieu of the payment for the proceeds of the crop.

These simple facts seem to me to put the defendant under a duty of care to ensure that it did not pay any claim for loss of a crop to the farmer insured, if there was a stop-order over such crop registered with the Registrar of Farmers Stop-Orders; and that it was a duty that it owed to all creditors who relied *pro tanto* on such stop-order as security for payment of their debts. The fact that here the plaintiff was not the holder of the registered stop-order does not, in the circumstances, seem to me to make any difference. An insurer like the defendant, obliged to pay the proceeds of any insurance for damaged crops to the Registrar of Stop-Orders, would not need to know, and would not be concerned to know, the identity of the creditors thus secured. It is the Registrar's function to thereafter pay the proceeds of the insurance over to the creditors secured by the stop-order. So it seems more than somewhat artificial, as a basis for avoiding liability, to say that the defendant did not know of the identity of the plaintiff or its relationship to T'S. in making its payment of the insurance proceeds, since the identity of the recipient of those proceeds is not relevant to its payment to the Registrar. Furthermore, in the particular circumstances of this case, the plaintiff was not just a third party with a separate contractual claim against

1982 (1) ZLR p57

SQUIRES J

T'S. Its relationship to the wrongdoing was as a creditor of the insured farmer; and T'S.'s stop-order was simply the conduit-pipe by which it would obtain payment from the proceeds of that crop in due course.

In those circumstances, the defendant's omission which created the risk of harm to all creditors

relying on the stop-order was a substantive part of the causative link leading to the loss sustained by the plaintiff. If the defendant had paid the insurance proceeds to the Registrar, the Registrar would have paid T'S., and through T'S. the plaintiff would have received payment of its claim. Since the defendant negligently did not pay the proceeds to the Registrar, the other consequences follow directly as a result of that negligence.

It seems to me, therefore, that it can be said here that the plaintiff was owed a duty of care by the defendant, and that the loss it suffered by not sending the proceeds of the insurance to the Registrar was reasonably foreseeable. It did not have to be known to the defendant that a registered stop-order holder might have ceded the principal debt to some one else as long as that someone else was directly affected by the omission to pay the insurance claim to the Registrar. As already said, the precise way in which the loss is eventually sustained does not have to be anticipated. It is enough for the general nature of the harm, in this case loss to the secured creditors, should reasonably be foreseen. And here, for the reasons already given, this must have been foreseen by someone like an insurer of farmers' crops. For these reasons, then, it seems to me that in this case the harm to the plaintiff by the defendant's omission was foreseeable.

That, however, is not the end of the matter for there is the additional inquiry posed by the nature of the loss.

It may be said at the start of the discussion on this aspect that I do not understand a loss to be non-recoverable simply because it is of a monetary nature, since all patrimonial loss is quantified in monetary terms. The underlying rationale of the rule that pure economic loss is not recoverable seems to stem from a policy requirement of confining delictual liability within reasonable grounds. This is sought to be achieved by limiting liability to damage arising from physical harm, because the potential physical consequences of an act are more restricted in their nature than are the economic consequences.

But, of course, like most other rules of law this one too, has a number of exceptions to it, the most notable being perhaps the dependent's action.

1982 (1) ZLR p58

SQUIRES J

Moreover, there seems to have been a discernible tendency over the last decade and a half, at any rate, both in South Africa and in England, if not to move further in the direction of accepting or recognizing liability for negligence that results in economic loss, then at least a readiness to consider such claims on the general basis that in any given case the problem of determining liability for acts of negligence is a pragmatic rather than a jurisprudential one. The English law decisions which reflect this trend are, for example, *SCM (United Kingdom) Ltd v W 1 Whittall & Sons* [1970] 3 WLR 694 (CA), *Dutton v Bognor Regis United Building Co Ltd & Anor* [1972] 1 All ER 462 (CA), *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1972] 3 All ER 557 (CA); and *Ross v Caunters* [1979] 3 All ER 580 (Ch. D); and in South Africa, the broad trend of development in this field is set out and considered by HOEXTER, J, in *Greenfield Engineering Works (Pty) Ltd v N K R Construction (Pty) Ltd*, 1978 (4) SA 901 (NPD). In our own jurisdiction there has been the decision in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd*, 1972 (1)

RLR 56; 1972 (2) SA 703 (R), although in this last decision the aspect of pure economic loss was not specifically discussed.

In view of these authorities, it does not seem to be sound to say any longer, if it ever was always the case and it was not just a problem of remoteness, that pure economic loss cannot be recovered in an action based on negligence simply for that reason. It is true that there have been authorities which go the other way, such as *Weller & Co & Anor v Foot & Mouth Disease Research Institute* [1966] 1 QB; 569, in England, and *Combrinck Chiropraktiese Kliniek (Edms) Datsun Motor Vehicle Distributors (Pty) Ltd*, 1972 (4) SA 185 (T), and I should deal at least with the decision in *Weller's* case because Mr Mercer placed great reliance upon it as reflecting the correct approach. But an examination of that judgment seems to me to show that not only was the claimant further removed from the wrongdoing than in the present case, but that WIDGERY, J (as he then was), in fact refused relief for largely practical reasons, and not as a matter of law. It was a claim by a firm of auctioneers for loss of business consequent upon the escape of foot and mouth disease virus from the defendant's Institute; and the plaintiff being an auctioneer of cattle, amongst other things, claimed a loss of income as a result. And although the clamp down on cattle moving in general and cattle sales in particular which followed the escape of this virus into the cattle population thereafter was a foreseeable consequence of the wrongdoing, the imposition of liability in that case for loss of business by someone not directly affected by the wrongdoing, would have opened the

1982 (1) ZLR p59

SQUIRES J

door to a very considerable variety of claims by substantial number of people. The learned judge said at page 577:

"... If this argument is sound, the defendants' liability is likely to extend far beyond the loss suffered by the auctioneers, for in an agricultural community the escape of foot and mouth disease virus is a tragedy which can foreseeably affect almost all businesses in that area. The affected beasts must be slaughtered, as must others to whom the disease may conceivably have spread. Other farmers are prohibited from moving their cattle and may be unable to bring them to market at the most profitable time; transport contractors who make their living by the transport of animals are out of work; dairymen may go short of milk, and sellers of cattle feed suffer loss of business."

In those circumstances, the granting of an action to someone like the plaintiff auctioneer firm would in truth have opened the flood-gates to an endless succession of claims against the defendant and it is that very situation which the rule against the allowing of pure economic loss was obviously intended to counter.

But it is equally clear that not all cases of economic loss have the same potential breadth of liability; and where they do not, it seems to me Mr Andersen's submission is sound that the law does not preclude recovery for loss of a pure economic nature. The mere fact that loss is economic only, that is, it does not arise from physical injury, does not mean that it is indeterminate and unmanageable. And if, as HOEXTER, J, put it in the *Greenfield Engineering Works* decision, the loss is finite, there is no need to speculate on the identity of possible claimants, and it is a single loss occurring once with no multiplicity of actions likely to follow in its train, then there is no pragmatic objection to allowing the recovery of pure economic loss

provided that other requirements of liability, such as foreseeability of harm, are present.

Mr *Mercer* did not, as I understood his argument, rely on the *Combrinck's Kliniek* decision or advance it as a judgment which supported the defendant's case. But, in the event that I misunderstood him, or it was an oversight, I should say that I am impressed with, and regard as correct, the criticisms of the decision by Professor Boberg that appears in the *Annual Survey of South African Law* of 1972. If the position is that our law does not deny recovery for pure economic loss where the door of consequential liability of the wrongdoer is not opened too wide, then it is difficult to see why, if the manufacturer of a defective motor car may be liable to anyone who suffers physical injury as a result of its negligent manufacture, it is not also liable for the far more limited and distinctly foreseeable economic loss of a hirer of such a defective vehicle.

1982 (1) ZLR p60

SQUIRES J

In the present situation, then, and so far as the loss by the plaintiff is purely economic, it does not seem to me that allowing its claim will open the door to the indeterminate and unmanageable flood of actions which could have followed in *Weller's* case. The loss is decidedly finite, it is single and will occur only once. While the precise identity of the plaintiff was not known to the defendant at the time the action arose, I do not think that this matters, since the creditors of an insured farmer as a class could legitimately count on or look to the insurer paying the proceeds of the crop insurance to the Registrar for payment of their claims. And as long as the creditor is one of that class, as it seems the plaintiff is, then this fact of anonymity should not debar any claim. As already emphasized, it is not as if the plaintiff is simply another creditor of T'S. who was counting on T'S. being paid in order to receive payment. The plaintiff here was a creditor of the insured farmer and relied for being paid on the stop-order just as directly as did the registered holder. Moreover, the upholding of the claim would have - in the words of HOEXTER, J, in the *Greenfield Engineering* case - no "socially calamitous" results. On the contrary, it will simply achieve a payment that should have been made in the first place.

Like HOEXTER, J, I bear in mind the caution against unnecessarily and unjustifiably extending the remedy under the *Lex Aquilia*; but on the facts of this case I do not think that by upholding the plaintiffs claim I am actually extending any limits of recovery. The *plaintiff's* case, it seems to me, falls within limits already stated.

But to the extent that it is necessary to exercise and reach a policy decision in the wider sense, then I think this claim should succeed for that reason, too. Apart from what has already been said about accepting loss of a purely economic nature as part of the decision at this level, the wider considerations already referred to also seem to point in the general direction of relief to a party like the plaintiff. It is, for example, clearly the policy of the law - given that persons who advance money to farmers, the repayment of which is secured by stop-order on his crops, should be repaid from the proceeds of those crops; and if the crops are no longer available to achieve this because of damage that is insured against, then the proceeds of any such insurance should do so. If such institutions as lend money to the agricultural sector did not have this protection, they would inevitably be less inclined to provide the credit that they do, to the

consequent detriment of agriculture and the country's economy generally.

1982 (1) ZLR p61

SQUIRES J

And, if by negligence on the part of the insurer concerned, such proceeds cannot be applied to repaying the farmer's debts, who should bear the loss? The most cogent answer, it seems to me, is the person responsible for this situation. Nor can I think of any reason why the insurer should not be liable in these circumstances. The task of paying such proceeds of insurance cover to the Registrar is imposed by the Act, and to uphold this claim might in addition serve to ensure that future payments are not made in such a careless manner to the detriment of the farmer's creditors.

And, finally, as already stated earlier, there will be no consequential liability in the form of further actions. It is only creditors directly affected by the failure to pay insurance proceeds to the Registrar who may look to such an insurer for relief. The scope of litigation should not in any event be increased by any tangible quantity and in the present case will not be increased at all.

All these considerations persuade me that I should grant relief to the plaintiff on its main claim of negligence.

This makes it unnecessary to consider the alternative ground pleaded by the plaintiff, namely that the defendant was in breach of a statutory duty under section 16 (1) of Chapter 110. Mr *Mercer* argued that the plaintiff was not of the class of people for whose benefit the duty was imposed on an insurer like the defendant, and it could not therefore avail itself of this rule of the law. He said this duty was imposed in favour of registered stop-order holders only, and *ex hypothesi* that excluded plaintiff. Reference to decided cases on this topic, and to the textbooks, shows that this basis of claim is more usually relied on where an interdict is sought, because of the requirement that a plaintiff seeking damages must show a breach of duty owed to himself, and not simply a breach of duty in the air. And it may be for that reason that Mr *Andersen* made no point of this alternative allegation. But the ambit of the words used by SOLOMON, J (as he then was), in *Patz v Greene & Co*, 1907 TS 427 at 433, clearly seems to cover the plaintiff, for the learned judge held that any member of the public who can show he has suffered damage through the contravention of a statute, is entitled to his remedy. [However, it is not necessary to pursue this aspect for it seems to me, for reasons already given, that the defendant is liable to the plaintiff on its main claim.

In the result, there will be judgment for the plaintiff in the sum of \$17 388,35, being the sum claimed less \$700 accepted by Mr

1982 (1) ZLR p62

SQUIRES J

Andersen as retainable by the defendant. The sum awarded will carry interest from the 27th March, 1980, by agreed amendment of the claim, and the plaintiff will also be awarded costs of suit.

Winterton Holmes & Hill, legal practitioners for the plaintiff.

Honey & Blanckenberg, legal practitioners for the defendant.

1982 (1) ZLR p63

S v MAVUNGA 1982 (1) ZLR 63 (SC)

Court **Supreme Court, Salisbury**

Georges, JA, and Dumbutshena, AJA

26th January and 12th February, 1982

Flynote

Evidence - identity - by means of footprints or shoeprints - precautions to be observed before such evidence can be accepted - identification parades - proper conduct of - judicial notice magistrate faking judicial notice of behavioral characteristics and criminal tendencies of former guerillas and their supporters and deducing from appellant's demeanour and behaviour that he was likely from his association with such persons to have committed offence - such matters irrelevant and prejudicial - sufficient bias to show a failure of justice.

Headnote

It is permissible for a court, when the issue is the identity of the accused, to rely on evidence relating to footprints allegedly made by the accused. However, it cannot rely on the bare assertion of a witness that he recognized the foot prints as the accused's; the characteristics peculiar to the particular set of footprints must be indicated before the correctness of the identification can be relied upon for conviction. There is no difference between the requirements in the case of evidence of footprints and those in the case of fingerprints. Impressions of footprints should be uplifted and produced as exhibits and a comparison made with prints taken from the suspected culprit.

Identification parades should also be carefully carried out to obviate errors. The officer conducting the parade should not call the witness to the parade; he also should have nothing to do with the rest of the investigations. The witness should not be given the impression that the suspect is in the parade; he should be asked whether the suspect is on the parade or to point out the suspect, if such person is present. The persons on the parade should all wear similar clothing and preferably clothing similar to that worn when the crime was committed.

The matters of which a court may take judicial notice are limited. It was a serious misdirection for the magistrate to take judicial notice of the behavioral characteristics and criminal tendencies of "mujibhas" (youths who aided guerillas), "terrorists" and "ex-guerillas". These matters were irrelevant and prejudicial to the accused because they tended to show that he was a person who was likely from his association with those classes of persons to have

1982 (1) ZLR p64

DUMBUTSHENA AJA

committed the offence with which he was charged. The magistrate's approach showed an absence of judicial objectivity, sufficient to show a failure of justice.

Cases cited:

R v Shekelele and Another, 1953 (1) SA 636 (T);

Aluverino v R, 1963 R & N 614;

R v Nkele, 1933 TPD 36;

R v Debati, 1951 (1) SA 421 (TPD);

R v Modesane, 1932 TPD 165;

S v Limekayo, 1969 (1) SA 5450 (E);

R v Nara Sammy, 1956 (4) SA 629 (TPD);

R v Sitimela, 1962 (4) SA 60 (SR);

R v Dhlumayo and Another, 1948 (2) SA 677 (AD).

The appellant in person.

B. H. Christie, for the respondent.

Judgment

Dumbutshena AJA: The appellant was convicted in the Magistrate's Court on one count of robbery. He pleaded not guilty. He was found guilty and sentenced to two years' imprisonment with labour.

The State proved the commission of the offence beyond any reasonable doubt. The only question is whether it was the appellant who committed the offence. To prove that it was the appellant who committed the robbery, the prosecution relied on the complainant's evidence that she recognized the appellant by his face and height and her subsequent pointing out of the appellant at an identification parade and the evidence of some State witnesses who deposed to recognizing the appellant's footprints after following a spoor that started at the complainant's house. The appellant gave evidence on oath, denying the commission of the offence. He challenged the evidence of identification and the manner the identification parade was conducted. One of his grounds of appeal was that "the trial was unjust and unfair".

Ronah Ndemera, the complainant, testified that she was asleep in her house at Matare Kraal in the Matare Communal Area when at about 12 midnight she was awakened by a knock at her door. When she made inquiries a voice said it was the comrades. The man at the door demanded money for batteries. He threatened to set the house on fire if he were not

given money. She produced \$3 and handed it to the man through a hole in the door. He demanded more money and she gave him \$1. After that he ordered her to open the door. She refused. The man forceably opened the door and gained entry into the house. She pushed him out of the house.

Outside the house her assailant opened an Okapi knife which the complainant got hold of before he had time to use it. They struggled for possession of the knife. The blade slipped off the handle. She remained holding the blade of the knife. Then the assailant produced an axe from under a coat he was wearing and assaulted her with it on her left eye, her cheek and left thigh. She bled. The medical report and affidavit prepared and sworn by Dr. William Nortje and produced in evidence corroborates the complainant's evidence on the assault. Upon examining the complainant, the doctor found the following injuries: a 2-cm cut on the lower left eye, a 3-cm abrasion on the left cheek, a 2-cm cut on the head and a 1-cm cut on the left thigh.

The complainant said her seven-year-old son awoke one Ronica, who found the complainant and her assailant struggling outside. When the assailant heard the noise made by Ronica, he is said to have run away. The following morning she made a report to the police and was taken to Bindura Hospital. She was detained in hospital for three days.

She said she observed the assailant's height and face at the scene of the crime. There was moonlight. She had not seen her assailant before. She observed also a long-sleeved coat that went below the knees, a cap and the fact that he was not wearing a long pair of trousers. She later picked him out at an identification parade.

There is no doubt that this evidence was a true description of what happened that night. The appellant does not dispute it but, as stated above, he denies involvement in the commission of the offence because he says he was at his home playing musical recordings in the company of other people and afterwards retired to bed with his younger brother.

Prosecution witnesses testified to seeing and following footprints from the scene of the crime to the vicinity of the appellant's house. There is conflict in this evidence. Constable Levy Matewo, who was with the other witnesses, testified to following the footprints up to the river and then lost them. He said they were going eastwards, whereas the appellant's house was to the west. Solomon Nekaiyo Karidza could not identify the footprints. He was with Erisha Matare and Edward Mudongo. He said he followed the footprints with Solomon Nekaiyo Karidza and Edward

1982 (1) ZLR p66

DUMBUTSHENA AJA

Mudongo up to the vicinity of the appellant's house and identified them as those of the appellant. Edward Mudongo testified to following the footprints with Solomon up to the river but lost them and never allowed them further. He could not identify the footprints.

It is only Erisha Matare who deposes to following footprints up to the vicinity of the appellant's house. It is possible that the appellant was arrested because, according to Constable Matewo, "We followed the footprints, and were informed of a possible suspect because of his general

behaviour in the area."

In considering whether there should have been a reasonable doubt as to the appellant's guilt, three matters arise for consideration.

First, the weight to be given to the evidence of identity by footprints. Mr *Christie*, who appeared for the respondent, argued that there were two pointers to the appellant's guilt: the footprint evidence and identity.

I now propose to deal with the footprint evidence first because it appears the magistrate gave it much weight. He said:

"The detail who attended the scene the day after the incident confirmed the evidence of the complainant as to a struggle between the complainant and an assailant by evidence of a mass of footprints of apparently a female (due to the size ± 7 shoes stated) with another, a male (size ± 9 shoe mentioned), the latter footprints leading oil to the river, which divides the complainant's from the accused's kraal. It is not disputed that the distance is between 500 m to 11/2 km between the kraals. The witness received a report from the complainant's uncle by marriage, Solomon, a resident of complainant's adopted (husband's) kraal, regarding the identity of the owner of the male footprints, whereupon the details proceeded to the accused's kraal.

The next witness "Solomon was his uncle of the complainant, who said he had known accused for a long time as a neighbour and who confirmed a common identification of the male prints.

The kraalhead of Matare kraal, that of complainant, then gave evidence that he had known the accused since birth. In the morning after the incident, he traced the footprints to the river, but could not identify them immediately as the person concerned had run on his toes. The latter fact was confirmed by Edward. Only when he saw the full prints when the person began to walk flat-footed, he could identify the print as those of the accused. The witness could track as a result of his experience the print of the accused due to his having known the accused since birth. The tracks were traced to the accused's yard, then he returned to Matare kraal to wait for police to arrive. Once over the river, the tracks were flat-footed, walking. The witness remarked that no one in the area had a print like the accused's, the most similar being that of the accused's father's young brother's son, but whose print was larger than that of the accused."

1982 (1) ZLR p67

DUMBUTSHENA AJA

The evidence of State witnesses who identified the footprints on a broad assertion that they were those of the appellant, or, in the case of one of the witnesses that knew the appellant's footprints because they had grown up together is, in my opinion, not enough. The Court has to be satisfied that that assertion is correct in the same way as it is to be satisfied through testing the evidence of ordinary bodily identification, because the danger of false identification exists whether the witness's testimony is based on the identification of facial or other bodily features or on that of footprints. In *R v Shekelele & Another*, 1953 (1) SA 636 (T) and *Aluverino v R*, 1963 R & N 614, the Courts indicated the matters to be inquired into and the questions to be put when identity is at issue. The witnesses in this case should have been asked by what characteristics or peculiarities, marks or indications they had recognized the footprints as those of the appellant. In the case of footprints and fingerprints the characteristics peculiar to a particular set of footprints or fingerprints must be indicated before the correctness of the identification can be relied upon for conviction. A general and broad statement that these are the footprints of the appellant is not enough. See *R v Nkele*, 1933 TPD 36; *R v Debatl*, 1951 (1) SA 421 (TPD). In *R v Modesane*, 1932 TPD 165 at 166, GREENBERG, J, (as he then was),

said:

"In principal, there is no reason why a person should not be convicted solely on the evidence of a footprint. The principle is exactly the same as that relating to a fingerprint. The only question which arises is whether the similarity is so close as to point with certainty to the conclusion that the footprint is the footprint of the person charged. We have been referred by the *Attorney-General* to a passage from Wigmore on *Evidence* (2nd edition volume 1, section 415), in which the learned author says: 'No doubt a witness E; to identity of footmarks should be required to specify the features on which he bases his judgment of identity; and then the strength of the inference should depend on the degree of accurate detail to be ascribed to each feature and of the unique distinctiveness to be predicated of the total combination. Testimony not based on such data of appreciable significance should. be given no weight' ".

Mr *Christie* argued that although the evidence of the identity of the footprints, standing alone, was not sufficient, it, in the instant case, does not stand alone because there is evidence of the identification of the appellant by the complainant at the identification parade. That may be true. One is, however, not sure that that was the view taken by the learned magistrate. From the many references made in the judgment to the evidence of the footprints, the probabilities are that the magistrate attached much weight to it and arrived at his decision heavily influenced by that evidence, because the spoor was said by at least one of the wit -

1982 (1) ZLR p68

DUMBUTSHENA AJA

nesses to have disappeared near the house of the appellant. It was also the identification of appellant's footprints that led to his arrest.

In cases in which the identity of the footprint of the suspect forms part of the evidence which the State relies upon for conviction, there is no difference between the requirements in such identification and the requirement in the case of fingerprint and palmpoint identification (*S v Limekayo*, 1969 (1) SA 540 (E.)). It is important to uplift impressions of footprints and produce a folium bearing the impression as an exhibit. There are many ways of doing this. The State can seek a conviction of an accused person, relying solely on the evidence of the prints thus lifted at the scene of the crime and the prints taken from the culprit for comparison purposes. Similarities of characteristics obtained on examination of the different prints is always, under these circumstances, sufficient evidence to warrant a conviction.

In *S v Limekayo* (*supra*) at 544D to 545A, JENNETT, JP, cited passages from cases which judges commended to juries as something worthy of consideration in cases involving the identification of culprits by footprints. These passages aptly express what should be done and what is expected of such evidence:

"In the other case the learned Judge PITTMAN, J (as he then was), was summing up to a jury and he said this:

'Now was it the accused? Well, the evidence against him centres round the footprints, one of which was found on the glass case in Mr Drake's shop, the other of which was taken of the accused on this arrest. You saw the photographs of the two prints, the one taken by Mr Thomas, who is no longer in the CID, but he says that on the 11th December he was able to do what led to his being in a position to take a photograph of the impression made upon the glass case and, then, when the accused was arrested, there was no difficulty in taking his foot impression. Mr Engelbrecht helps the case for the Crown here because he tells you that he has had some 14 years' experience in connexion with the comparison of finger and foot impressions and that as far as identification purposes are concerned, he places just as much reliance on

the comparison of footprints as he does on that of fingerprints. He has given you his opinion as a result of his investigations. He has not got the slightest doubt that the man who made the impression on Drake's show case with his foot on the night of the 10th December is the same man as made the impression in the charge office when the accused was arrested, in other words it is the accused.

Now that is his opinion. He gives it to you without any hesitation apparently, more than that, he goes out of his way to explain to you by means of photographs how he arrived at his conclusion. Remember that

1982 (1) ZLR p69

DUMBUTSHENA AJA

he pointed out to you that there were actually 26 points of similarity helped him to come to the conclusion that the two prints were made by the same foot. He says that had there been only eight that would have been sufficient for all practical purposes to be sure of the identity.'

Unfortunately the result of the trial is not given, but one gains the impression from his remarks that the learned Judge there presiding was prepared to commend to the jury as something worthy of their consideration this identification by means of footprints

Then finally there is the case against William Golli which took place in Glasgow on 4th November, 1952. It was before Lord VERNON and a jury and I think I should include in this record the relevant remarks of the learned Judge in his summing up. After referring to various things that an accused person might leave behind which might lead to his identification, the learned Judge went on. He said:

'In this case it is a toe print that is said to have been made by the accused and you have had photographs shown to you and you have them before you I understand and you have had the evidence of two very experienced men in the Identification Bureau in Glasgow who look after the whole of Scotland in that particular branch. They pointed out to you 22 different features in each of those photographs, one being the natural impression of the accused's toe and the other being a photographic reproduction of the impression that was left upon the safe by somebody's toe. If you accept the evidence of these two experts and it is for you entirely whether you believe them or not - if you accept their evidence you have 22 different similarities between the one and the other. That may or may not be pure coincidence that the impression made by the accused's toe has 22 similarities to the impression left by the unknown burglar on that safe. If you think it is a pure coincidence and that it may be that the accused was not there at all, then it is your duty to give him the benefit of the doubt. If on the other hand you think that that cannot be pure coincidence, but looking through the evidence of these two experts, it is a virtual certainty then you must convict him.'

In the light of the authorities I have cited the evidence of footprint identification was manifestly unreliable.

Second is the question of the way the identification parade was conducted. It is not clear whether Patrol Officer Aftan Dombo Muchera was the investigating officer in this case. He says in his evidence he received a report from the complainant on the 20th November, 1980, at Manhenga Base Camp.

Investigations were carried out. The appellant was arrested and the identification parade was carried out on the 17th December, 1980. He fetched the appellant from prison. It will be noticed that more than three weeks had gone by since the arrest of the appellant. By that time, news of the arrest of the appellant must have been in full circulation

1982 (1) ZLR p70

DUMBUTSHENA AJA

in the village. It also seems that he selected and paraded ten men of similar height who wore civilian clothes. There is no evidence to show that those men were of the same age, complexion and position in life as the appellant, and that they wore, not just civilian clothes, but similar civilian clothes, and had similar grooming. Although under cross-examination the officer said they wore similar dress that appears to have been an afterthought because the appellant had said he had seen "smart chaps standing" at the parade.

The appellant, who appeared in person, argued that the identification parade was unfair because he wore creased and crumpled clothes which had been tied up in a bag in the remand prison. He had suggested to the officer the holding of the parade at the remand prison where there were inmates who wore khakis like himself. This was denied by PO Machera. There is, of course, nothing wrong with holding an identification parade in prison if the suspect is in prison, provided special security considerations make it unwise to hold it outside or, as the appellant suggests in this case, the suspect refuses to take part in a parade unless it is held in prison: Archbold: *Criminal Pleading Evidence and Practice* 38th ed. page 655 paragraph 1354.

There is another matter which seems irregular. PO. Machera went himself to call the complainant, so it seems from the evidence. He says:

"I then called the complainant. She came on parade. I said she was there to observe and place hand on shoulder of man who she thought responsible for robbery."

That, in my view, is improper, first because the officer conducting the parade should not himself call the witness and because the identifying witness is informed wittingly or unwittingly that the suspect is on the parade. The witness should be asked whether the person he has come to identify is on the parade or to point out the suspect "if such person is present on the parade" (*R v Nara Sammy*, 1956 (4) SA 629 (TPD)).

In my view the identification parade was unfair because it was not conducted by an officer who had nothing to do with the investigations. The other officer, Constable Matineyi, who was at the parade, appears to have been a witness or a mere spectator. Besides, the appellant appeared in the clothes he was arrested in and which were creased and crumpled. There is no evidence to support the view that the other men on the parade wore similar civilian clothes which were like those of the appellant - creased and crumpled. In the absence of other people wearing creased and crumpled clothes, the presence of the appellant as the only

1982 (1) ZLR p71

DUMBUTSHENA AJA

person wearing such clothes was, in my opinion, irregular. The identification parade was therefore irregular, especially when one takes into account the evidence that the complainant was looking at the clothing and the faces of the men on parade when there was no one wearing a coat and a cap, which were the items of clothing she had observed on the night when the crime was committed.

In *Nara Sammy's* case (*supra*) at 630H-631A, DOWLING, J, dealing with an irregularity of a

kind different from that in the present case, says:

"There are other decisions to which it is pertinent to refer as to the requirements for a proper identification parade. In *R v Masemang*, 1950 (2) SA 488 (AD), VAN DEN HEEVER, JA, remarks at page 493:

'The positive assurance with which an honest witness will sometimes swear to the identity of an accused person is in itself no guarantee of the correctness of that evidence. One often finds that a woman who was totally unable to point out her assailant at an identification parade will, when the accused is arrested on the strength of other evidence, swear positively at the trial that she recognizes him as her assailant. The innate and instinctive desire that there shall be retribution may be conducive to this.'

Then the learned Judge refers to Wills' *Principles of Circumstantial Evidence*, where the author cites certain cases in which persons are wrongly convicted on this type of evidence, and he continues:

But where such identification rests upon the testimony of a single witness and the accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognized procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight.' "

The complainant was the only identifying witness. She had admittedly observed her assailant wearing a coat and a cap. She observed his face and his height. The appellant was unrepresented. He put to the complainant questions on identity but they did not go far enough. The trial magistrate should have questioned the complainant in order to establish the facial features which enabled her in the moonlight and during the struggle for her life to identify the appellant by his face, and why appellant's height was so outstanding especially when there was conflicting evidence on the appellant's height. Solomon said the "accused is the tallest person in the area, there is no one like him in the area." Erisha Matlare said, "There are some at their kraal who are taller than accused". So it seems there was nothing peculiar about the appellant's height. We had the benefit of looking at the appellant when hearing his appeal. He was about six feet tall but he could not be described - as the magistrate did - as a handsome person.

1982 (1) ZLR p72

DUMBUTSHENA AJA

Some of the questions put to the complainant by the appellant were unsatisfactorily answered and should have been pursued by the magistrate.

The complainant was asked:

"Q. Have you good eyes?

A. Yes, I had plenty of opportunity to observe you during the assault.

Q. How identify my face, yet not my cap?

A. I was interested in person fighting me, not the cap.

Q. Brim up or down?

A. Up to you.

Q. Position at time?

A. Did not notice."

It seems clear from the above questions that the appellant was trying to find out by what facial features she had identified him. And, more importantly, how she could have identified his face without at the same time noticing the position of his cap. In my view, and having regard to what was said by HATHORN, ACJ (as he then was), in *Aluverino v R*, 1963 R & N 614 at 6151-616:

"A well-known passage on the point appears in the judgment of DOWLING, J, in *R v Shekelele and Another* (1), 1953 (1) SA 636 (T) at page 638, and reads as follows:

'Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognize. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for possibility of mistake. Where the accused is an ignorant native who is unrepresented by counsel or attorney and who is therefore unable himself to probe the evidence of identification and where the prosecutor has not done so, the court should undertake this task, as otherwise grave injustice may be done.'

The risk of a mistaken identity was not eliminated and the possibility of grave injustice was not eliminated. This is in spite of the fact that the complainant was an honest witness.

1982 (1) ZLR p73

DUMBUTSHENA AJA

The *third* point which calls for consideration is the possibility of prejudice not having been excluded. The magistrate seriously misdirected himself in this regard when he said in his judgment:

"The court can take judicial notice of the fact due to innumerable cases involving 'terrorists', 'guerillas', 'ex-guerillas', and 'mujibhas', as a result of this character evidence introduced by the accused himself, and which would be admissible in any event by the state on valid grounds (impugning the character of both police and civilian witness, and in view of the materiality of evidence as to identification outweighing prejudice), that the accused is likely to have been introduced to and may have imitated certain unlawful methods of attaining his ends. This association with such elements would explain the accused's performance in court, not in keeping with that of the normal peasant agriculturist. On a number of occasions during the trial, the accused used expressions such as 'I don't want this witness, I want so - and - so' and comported himself during the trial with an aggressive arrogance regrettably typical of ex-guerillas and 'mujibhas' in the Manicaland/Mashonaland area, who have appeared before this court."

The appellant mentioned in cross-examination of Erisha Matare the fact that he was a mujibha in 1979. There was no evidence led by the prosecution or defence on the *modus operandi* or behavioural characteristics of "mujibhas", "terrorists" and "ex-guerillas". The magistrate relied, in taking judicial notice of their mode of life, on his own personal knowledge of these people. When considering the taking of judicial notice of events and circumstances of matters of a relatively similar nature, but the facts of which were different, MAISELS, J, said this in *R v Sitimela*, 1962 (4) SA 60 (SR) at 61B-62:

"Quite apart from the weakness of the Crown case, it appears to me that the magistrate has seriously misdirected himself. He says that in his experience, particularly in remote areas such as this, Africans are capable of making definite identifications from spoor marks. He has thus apparently relied on his own experience in this case. What his experience is, is not stated; nor has the alleged ability of Africans in remote areas to make identification of spoor marks, as far as I am aware, ever been scientifically examined. In *R v Tagger*, 1944 AD 339, the Judges of the Provincial Division had, in dismissing an appeal from the magistrate, relied on their personal acquaintance with the method of mixing milkshakes. It was argued that they were entitled to take judicial notice thereof. WATERMEYER, CJ, at page 343, after saying that he was satisfied that the Judges were not entitled to take such judicial notice, said:

'The doctrine of judicial notice is, by all the authorities on the law of evidence which I have consulted, e.g. *Wigmore* sections 2565-2570; *Phipson*, 7th edition pages 19 *et seq.*; *Taylor*, 12th edition sections 4-21; *Best*, 10th edition paragraphs 253 and 254, still to-day rightly confined within very narrow limits. Thus *Phipson* says that Judges and juries can only take notice of matters "so notoriously or clearly established that evidence of

1982 (1) ZLR p74

DUMBUTSHENA AJA

their existence is unnecessary ... Although, however, Judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess ... they may not ... act on their own private knowledge or belief regarding the facts of the particular case." I may pause here to remark that, though it is hoped that the Judges of this Division conform to the standard of intelligence set by *Phipson*, they, to their regret, do not share the knowledge which the Judges who decided the case in the Provincial Division seem to possess as to the ingredients of the no doubt pleasant and innocuous beverage in issue in this case. *Wigmore* in section 2569 (a) draws the same distinction: "It is therefore plainly accepted that the Judge is not to use on the Bench, under the guise of judicial knowledge, that which he knows as an individual observer. The former is in truth 'known' to him merely in the peculiar sense that is known and notorious to all men, and the dilemma is only the result of using the term knowledge in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult but the principle is plain". I cannot help thinking that any knowledge used by the learned Judges in this case was knowledge which they possessed as the result of personal observation and not of notoriety.'

In addition, in the case of *R v Tusini arm Another*, 1953 (4) SA 406 (AD) the Court of Appeal in South Africa had to consider a judgment which contained the following passage:

'It is well known from the experience of this Court that Natives can, and do, recognize people they know in comparative darkness which, for a European, would make recognition quite impossible.'

DE BEER, AJA., at page 411, said, with reference to this passage:

'This is clearly a grave misdirection on a material point as there is no evidence whatsoever on record justifying this finding. It is not stated what the experience of the Court is in such a matter. The question of the superior vision of the Native in the dark may well have arisen in that Court, but whether it was scientifically examined I do not know. It would, however, be a surprising fact if every Native has this superior night vision; in any event neither of these witnesses were tested for this and it certainly is not such a notorious fact as to justify the Court taking judicial cognisance thereof.'

The evidential value of the appellant having been a mujibha in the absence of evidence of the mode of operation of "terrorists", "ex-guerillas" and "mujibhas", is in my view nil without admissible and credible evidence having been adduced by competent witnesses. The matters about which the magistrate took judicial notice were irrelevant and prejudicial to the appellant because they tend to show that the appellant is a person who is likely from his association with the classes of people mentioned by the magistrate, to have committed the offence with which he

was charged. For instance, after describing the way the appellant intimidated prosecution witnesses, the magistrate stated:

1982 (1) ZLR p75

DUMBUTSHENA AJA

"The above fits in with the behavioural pattern of a 'mujibha' and explains the inconsistencies in the evidence of the three - Matare, Solomon, and Edward."

He continued:

"The court can take judicial notice of the fact that such persons habitually made caches of supplies and weapons, and in this manner, persons such as the accused could well secrete items such as greatcoats and caps, axes and knives, whether 'operational' personnel, or more local 'mujibhas', the latter being common cause."

There is no doubt in my mind that the magistrate's approach in the assessment of the evidence before him was biased against the appellant and very favourably disposed towards the prosecution witnesses. There was in that approach an absence of judicial objectivity, especially in the evaluation of the evidence of the appellant.

In cases in which the prosecution has adduced some credible evidence which, considered by itself, may prove the prosecution case beyond a reasonable doubt, but in which there has been a failure of justice on account of misdirections and obvious bias resulting in prejudice to the accused, it is, in my view, in the interest of justice to allow the appeal. I find support for the view I have taken in what was said by SCREENER, JA (as he then was), in his dissenting judgment in *R v Dhlumayo & Another*, 1948 (2) SA 677 (AD) at 694-695:

"In view of the features of the case to which I have referred I find myself unable to express affirmative agreement with the judgment of the trial court; in fact I doubt its correctness. Added to this, there are, in the respects that I have mentioned, what I cannot but regard as serious defects in the court's examination and estimation of the facts, as set out in the judgment. In the light of LORD THANKERTON's third proposition it seems to me that I have therefore to ask myself not merely whether I am satisfied that the verdict was wrong, but whether taking into account the unsatisfactory features in the judgment as well as the impression created by the evidence of the record, I am satisfied that the appeal should be allowed."

In the light of the unsatisfactory features I have pointed out above, I would allow the appeal and set aside the conviction and sentence.

Georges JA: I agree.

1982 (1) ZLR p76

S v KONDONI 1982 (1) ZLR 76 (SC)

Court **Supreme Court, Salisbury**

Fieldsend, CJ, and Georges, JA

3rd and 16th February, 1982

Flynote

Criminal procedure - joint trials - Criminal Procedure and Evidence Act [Chapter 59] - sections 145 and 145A - no provision for joint trials of perverts separately charged with different offences even if there are some common features - appeal - notice of appeal - failure to set out grounds of appeal - makes purported notice of appeal a nullity - sanction to be applied against offending practitioner.

Headnote

There is no provision in the Criminal Procedure and Evidence Act [*Chapter 59*], which allows for the joint trial of persons separately charged with different offences, even if there are some common features to the cases. Neither section 145 nor section 145A permits this course, and the proceedings in such a case are, in effect, a nullity.

Rule 22 of the Appellate Division (Magistrates Court) (Criminal Appeals) Rules, 1979 (SI 504 of 1979) requires a notice of appeal to set out clearly and specifically the grounds of appeal. If this is not done there is no proper noting of an appeal and the purported notice is a nullity. In a glaring case of default, such as the present - where the legal practitioners did not have the grounds of appeal ready even when the appeal was called, contenting themselves with an application for a postponement in order to file an application for condonation of the late noting of the appeal - a sanction would be applied. The fairest and most effective sanction is to order that the defaulting legal practitioner should not be able to recover any charge against his client in respect of the defective notice of appeal or for any work done thereafter in respect of the appeal.

Cases cited:

Emerson v R 1957 R & N 743 (SR);

du Toit v R, 1958 R & N 177 (SR);

Kirby v R, 1961 R & N 197 (SR);

Tombs v Tombs, 1939 SR 205;

de Kuszaba-Dabrowoski et uxor v Steel, NO, 1966 R L.R 60; 1966 (2) SA 277 (RAD);

1982 (1) ZLR p77

FIELDSEND CJ

R v Juda; R v Magaya, 1962 R & N 573 (SR); 1962 (3) SA 937 (SR);

S v Tereza; S v Leonard, 1971 (1) RLR 12 (GD); 1971 (4) SA 188 (R);

S v Marimo; S v Ndhlovu, 1973 (1) RLR 70; 1973 (2) SA 442 (R).

G Chirimuuta, for the appellant.

BH Christie, for the respondent.

Judgment

Fieldsend CJ: The appellant was convicted on 2nd July, 1981, of three offences -

- (1) threatening on 22nd February, 1981, to kill Phinias Maronga in contravention of section 27 (c) of the Law and Order (Maintenance) Act [*Chapter 65*];
- (2) threatening on 24th February, 1981, to kill Phinias Maronga in contravention of the same section; and
- (3) indicating on 24th February, 1981, Phinias Maronga as a wizard in contravention of section 3 of the Witchcraft Suppression Act [*Chapter 73*].

He was tried in a joint trial with his brother Hepson or Happyson Kondoni who was charged in a separate charge sheet with -

- (1) possession on 22nd February, 1981, of a stick grenade in contravention of section 37 (1) of the Law and Order (Maintenance) Act, alternatively with threatening to destroy Maronga's home with a grenade in contravention of section 27 (c) of the same Act, and convicted on the main charge, and
- (2) indicating on 22nd February, 1981, Phinias Maronga as a wizard in contravention of section 3 of the Witchcraft Suppression Act,

and was convicted on each count.

On 16th July, 1981, the appellant's legal representatives lodged a notice headed "Notice of Appeal", which read:

"BE PLEASED TO TAKE NOTICE that the above Appellants hereby give notice of their appeal against the convictions and the sentences passed on them.

FURTHER TAKE NOTICE that the grounds on which the appeal is based will be issued and filed in due course."

No attempt was made to file any grounds of appeal.

This notice was no compliance with Rule 22 of the Appellate Division (Magistrates Court) (Criminal Appeals) Rules 1979 (SI 504 of 1979) which requires the notice to set out "clearly and specifically the grounds

1982 (1) ZLR p78

FIELDSEND CJ

of the appeal". In the result there was no proper noting of an appeal and Mr *Christie* who appeared for the State when this matter was called applied for it to be struck off the roll.

There is ample authority in regard to these Rules and their predecessors for the proposition that an inadequate notice of appeal is in fact a nullity. *Emerson and Others v R*, 1957 R & N 743 (SR) at page 748 E-F, du *Toit v R*, 1958 R & N 177 (SR) and *Kirby v R*, 1961 R & N 197 (SR) are but three early examples. On many occasions since then the Courts have had to comment on the continued failure of practitioners to observe the rules. The failure to file proper grounds of

appeal is not a mere formality. One of the main purposes of the notice is to give the appeal court the benefit of the magistrate's views on the points taken. See Rule 23.

Failure of practitioners to comply with the rules frequently puts the court in a very difficult position. It is unfair to penalise an appellant who may be in prison awaiting the result of his appeal in ignorance of his legal representatives' default, and the court is always reluctant to deny a person a right to approach the court if there is any chance of his appeal being successful. But to grant condonation of the default almost as a matter of course does nothing to encourage compliance with the rules.

The present is a glaring case of default. The practitioners realised that detailed grounds of appeal had to be filed because they gave notice that they would be filed, but even on the calling of the appeal they did not have them ready, contenting themselves with an application for a postponement in order to be able to file an application for condonation of the late noting of the appeal. This would have meant that the appellant would have had to remain in prison awaiting the determination of his appeal for an even longer period.

The time has come when the Court must make it clear that some sanction will be applied in this type of case. The fairest and most efficient sanction is that approved by QUENET, J (as he then was), in *du Toit v R* (*supra*) at pages 179-80, namely, ordering that a defaulting legal practitioner will not be justified in making any charge against his client in respect of an application for condonation. *Tombs v Tombs*, 1939 SR 205 provides a precedent for a sanction of this nature, a case which was approved in *de Kuszaba-Dabrowski et uxor v Steel*, NO, 1966 R.L.R. 60; 1966 (2) SA 277 (R, AD). I shall deal with this aspect later in the judgment.

1982 (1) ZLR p79

FIELDSEND CJ

The trial, however, has other unsatisfactory features. The appellant and his co-accused were charged separately, as indeed they had to be because, although they were charged with similar offences, they were alleged to have committed them on different days. In addition the appellant's brother was charged with an offence with which the appellant was not charged. It was therefore quite irregular for them to be tried together. There is no provision in the Criminal Procedure and Evidence Act [Chapter 59] for the joint trial of persons separately charged with different offences even if there are some common features. Neither section 145 nor section 145A permits this course.

There is a line of cases - *R v Juda*; *R v Magaya*, 1962 R & N 573 (SR), *S v Tereza and Others*; *S v Leonard and Others*, 1971 (1) R.L.R. 12 (GB) and *S v Marimo and Ors*; *S Ndhlovu and Ors.*, 1973 (2) SA 442 (R) - which lays down that there is no jurisdiction to hold such a joint trial and that the proceedings in such a case are in effect a nullity. This point was not taken on the appellant's behalf in the appeal but was raised by the Court at the hearing. Since there is, by reason of the defective notice of appeal, no appeal before the Court it seems right in the circumstances that the Court should now in terms of section 23 (2) of the Supreme Court Act, No. 28 of 1981, exercise its powers of review, and Mr Christie agreed that it should do so.

If we were to follow the precedent of *S v Marimo and Ors.* (*supra*) at page 446 the conviction

and sentence of the appellant would be set aside and the case remitted to another magistrate for the appellant to be tried alone, with a direction that if the appellant were again found guilty the magistrate would not impose a sentence greater than that imposed in the abortive trial, and In assessing sentence he would take into account the time the appellant has spent in prison since 2nd July, 1981. In the normal way a similar order would have been made in relation to the appellant's co-accused.

There are, however, reasons in this case why we feel that the Court should not order a re-trial, but rather leave to the decision of the Attorney-General whether proceedings should be started afresh. In the first place we understand that the Accused has been released under an amnesty in respect of the first count and that he has served the effective imprisonment imposed on the second count. There is in our view no need for the Court to exercise its powers of review in this case, but this also affects our decision in regard to the re-trial of the appellant.

The evidence showed that the co-accused was the principal offender in this affair. He was the one who instituted the enquiry into the complainant being the cause of the illness of the appellant's son; he was

1982 (1) ZLR p80

FIELDSEND CJ

the one who as an ex-guerilla on 22nd February, produced a stick grenade with which he threatened to destroy the complainant's home. There was no sufficient evidence that the appellant made common cause in this serious conduct. His action was limited to telling the complainant to keep quiet or he would kill him. It was the co-accused who alone on this occasion made the allegation of witchcraft against the complainant.

On 24th February, after a witch-doctor had been consulted, the appellant, acting alone, said to the complainant's wife that he was very bitter about the complainant having reported the co-accused to the police over the events of 22nd February and in effect announced that he would kill him if he did not leave the area. He repeated the allegation about the use of witchcraft. If these facts are true they establish serious offences, but nothing like such serious offences as those for which the co-accused was sentenced and is now free. And of course the appellant has been in prison now for some seven months.

By reason of all these facts the order we make is merely that the conviction and sentence are set aside because of the lack of jurisdiction of the trial court to try the appellant and the co-accused together. The appellant should not think, however, that there was any justification for him threatening the complainant and imputing witchcraft to him.

This order raises the problem of what sanction to impose for the defective notice of appeal, because now there will be no application for condonation of the late noting of an appeal. The appellant has been fortunate in that the very fact of the bringing of the case before the Court has resulted in the discovery of the lack of jurisdiction for the joint trial, but for this his legal representatives can take no credit.

In our view the proper order should be that the appellant's legal representatives should not be able to recover any fees for the actual preparation of the Notice of Appeal of 16th July, 1981, or

for any work done thereafter in respect of the appeal. This order will be served personally on the appellant before his release from custody.

There is one further matter in this sorry case. The appellant called a witness named Emerson whose evidence was sharply in conflict with that of the prosecution witnesses. During his cross-examination the prosecutor said that he did not wish to continue with his questioning as the witness might incriminate himself and said "the State wishes to proceed against the witness". The Court then ordered the witness to be arrested and further investigations to be made. There is nothing on the record to show on what charge the witness was ordered to be arrested

1982 (1) ZLR p81

FIELDSEND CJ

and the proceeding is most irregular. The impression is created that the arrest was ordered because the witness gave evidence contrary to that of the State, and even if that was not the reason, it is most unfortunate for that impression to be created. Nothing is more likely to discourage witnesses for the defence coming to Court, and that is not to be allowed.

Georges JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal representatives.

1982 (1) ZLR p82

S v MASANGO 1982 (1) ZLR 82 (SC)

Court **Supreme Court, Salisbury**

Fieldsend, CJ, and Georges, JA

3rd and 16th February, 1982

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - section 145A - joint trials of persons
nest alleged to have acted in concert - limitations of section - sentence - Witchcraft Suppression Act [Chapter 73] - section 3 - imputations of cause illness or death through non-natural means - factors affecting sentence - appeal - failure to file grounds of appeal and subsequent failure to apply for condonation of failure to note a proper appeal in time - sanction against legal practitioner.

Headnote

The appellant and a co-accused were charged jointly with contravening section 3 of the Witchcraft Suppression Act [Chapter 73], the allegation being that they had imputed to another woman the use of non-natural means in causing the death of a man. It was alleged that they had "both and each or one or other" committed the offence "upon or about the month of November, 1980". The evidence showed that in fact the appellant and her co-accused quite independently and on separate days made a separate allegation that the complainant was a

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witch.

The appellants' legal practitioner filed what purported to be a notice of appeal after the trial but this did not give any grounds of appeal. No grounds of appeal were filed subsequently, nor did the legal practitioner make a substantive application for condonation of the failure to note an appeal in time.

Held, setting aside the conviction in the exercise of the Court's power of review under section 23 of the Supreme Court Act, that section 145A of the Criminal Procedure and Evidence Act [Chapter 59], allows joint trials only of persons who are alleged to have committed separate offences "at the same time and place or at the same place and about the same time". Since this was not the situation here, the joint charge was irregular and there was no jurisdiction for the joint trial.

Held, further, that if a stop is to be put to the increasing number of witchcraft cases coming before the Courts, there must be a determined effort to stop the imputations being made. It is those who make imputations, not those who are imputed, who are the persons deserving the punishment.

1982 (1) ZLR p83

FIELDSEND CJ

Held, further, that to express the Court's displeasure at the various defaults displayed by the appellants' legal practitioner the practitioner would not be entitled to recover any fees for work done in respect of the appeal.

Cases cited:

S v Kondoni, SC 10/82; 1982 (1) ZLR 76;

S v Marimo and Others, 1973 (1) RLR 70; 1973 (2) SA 442 (R);

G. Chikumbirike, for the appellant.

B. H. Christie, for the respondent.

Judgment

Fieldsend CJ: The appellant was convicted of imputing to Agnes Madziwa the use of non-natural means in causing the death of one Mira, in contravention of section 3 of the Witchcraft Suppression Act [Chapter 73]. She was charged jointly with Willie Mira, the son of the deceased, it being alleged that they "both and each or one or other" committed the offence "upon or about the month of November 1980". There was a further charge of assault against the appellant's co-accused on which he was acquitted.

The appellant was not represented at the trial but consulted a legal practitioner after conviction in regard to an appeal. Within the prescribed period for noting an appeal a document entitled "Notice of Appeal" was filed on her behalf. This read:

"BE PLEASED TO TAKE NOTICE that the above Appellant hereby gives notice of her appeal against the

conviction and the sentence passed on her.

FURTHER TAKE notice that the grounds on which the appeal is based will be issued and filed in due course."

No grounds of appeal were filed before the hearing of the appeal. The State applied for the appeal to be struck off the Roll as it was not properly before the Court, there having been no compliance with Rule 22 of the Appellate Division (Magistrates Court) (Criminal Appeals) Rules 1979 (SI 504 of 1979) which requires a notice of appeal to set out "clearly and specifically the grounds of appeal."

As we have said in the case which preceded this on the Roll - *S v Kondoni* Supreme Court Judgment No. 10/82 *(1) - an inadequate notice of appeal is in fact a nullity. The only course open to an appellant in such circumstances is to make a substantive application for condonation of the failure to note an appeal in time. No such application was made but

1982 (1) ZLR p84

FIELDSEND CJ

the appellant's legal representatives applied for a postponement in order to file the application for condonation. This Mr Christie for the State opposed on the ground that there was no reasonable prospect of success in the appeal itself.

It is unnecessary to consider this application because - as in the previous case of *S v Kondoni* (*supra*) - there is a difficulty in regard to the manner of trial.

I have said that the appellant was charged with a co-accused, and on the face of the charge there can be no objection to that, nor to the joint trial of the two persons: see section 145 of the Criminal Procedure and Evidence Act [*Chapter 59*]. But it was clear from the outline of the *State* case - and the magistrate appreciated this fact - that the appellant and her co-accused were not alleged to have acted together. Indeed the facts relied upon showed that quite independently and on different days each made a separate allegation that the complainant was a witch.

The magistrate said that he nevertheless proceeded with a joint trial because he "considered that in all probability (1) no prejudice would result to either accused by their being charged in this manner and (I) much of the evidence led in the joint trial would have had to be led in each separate trial". It is easy to understand his approach which has some support from section 145A of the Criminal Procedure and Evidence Act. This reads:

"145A. Whenever it is alleged in an indictment, summons or charge that two or more persons have committed separate offences at the same time and place or at the same place and about the same time and the prosecutor informs the court that any evidence which is, in his opinion, also admissible at the trial of the other person or persons, such persons may be tried jointly for those offences on that indictment, summons or charge."

But, as BEADLE, CJ, said in *S v Marimo and Ors; S v Ndhlovu and Ors*, 1973 (2) SA 442 (R) at page 445G-446A:

"[A] view expressed is that, while it is not permissible on the grounds of lack of jurisdiction to try together cases indicted separately, where the accused have all been joined in the same indictment, albeit irregularly joined, such

trials can be condoned provided there is no prejudice to the accused.

I am not greatly impressed by this line of distinction as it seems to be a highly artificial one depending entirely on the particular procedure adopted by the prosecution. In both cases the effect is that a 'mass trial' has been held of a number of accused whose cases are entirely separate from each other, and the position does not seem to me to be affected by the fact that in the one case the accused have been irregularly joined together in one

1982 (1) ZLR p85

FIELDSEND CJ

indictment whereas in the other there has been no irregular joinder. It should not, I think, rest with the prosecution, by adopting the irregular procedure of wrongly joining accused together in one indictment, to make it possible to condone the irregularity of holding what is, in effect, a 'mass trial', whereas if the prosecution follows the correct procedure of indicting the accused separately from each other, it would not be possible to condone the holding of such a 'mass trial'."

We are, of course, not concerned here with a mass trial, but the principles are the same.

It is necessary to examine the facts of the case to see whether the appellant and her co-accused were properly joined in one charge. The co-accused's father died on 3rd November, 1980, and at his funeral on that day the co-accused alleged that the complainant was a witch who had caused his father's death and he struck her. The appellant was not present. The complainant reported the assault on her and the allegation made against her at the offices of Chief Makoni.

On the advice, apparently of Conald Makoni, the clerk at the offices, it was decided to hold a trial of the matter. This was convened on 19th November, the complainant and the co-accused being present. It was decided that an nganga should be consulted to determine the truth of the allegation against the complainant. Conald Makoni said that the person to be consulted was the Chief's nganga, the appellant, an acknowledged spirit medium. The complainant was called upon to pay a fee for this consultation, which she did. The co-accused did not accompany the party that went to visit the appellant.

The appellant appeared to go into a trance and spoke in Sena, which was translated into Shona by her 16-year-old daughter who regularly performed this function. There is some dispute as to exactly what was said by the appellant, but it was understood by those there to amount to an imputation of the complainant as a witch who had caused the death of the deceased. On return to the Chief it seems that it was found that the complainant had been imputed as a witch and she was ordered to pay a sum of money to the co-accused in respect of funeral expenses.

On these facts it is quite apparent that the appellant and her co-accused should not have been charged together. Their alleged offences were not committed at "the same time and place" nor "at the same place and about the same time". The joint charge was therefore irregular and there was no jurisdiction for the joint trial of the appellant and the co-accused. This case again shows the danger of not setting out sufficient particulars in a charge. Had the particulars been set out it would have been readily apparent that there could be no joint trial.

1982 (1) ZLR p86

FIELDSEND CJ

We considered the effect of a lack of jurisdiction of this nature in the case of *S v Kondoni* (*supra*), and the same considerations apply here. In the exercise of our powers of review contained in section 23 of the Supreme Court Act the conviction and sentence of both the appellant and of Willie Mira must be set aside. Each of those convicted was sentenced to twelve months' imprisonment of which four months were suspended on conditions. They will therefore have served the effective imprisonment imposed upon them and we do not propose to remit the case for re-trial. Any future action will be in the hands of the Attorney-General.

There are two disturbing features of this case to which we draw attention. First, the virtual encouragement of the appellant to indulge in the imputation of a person as a witch by having the matter referred to her by the Chief. Secondly, the apparent association between the appellant and the persons whom she referred to as "the comrades" who, she said, would be called to assault the complainant if she interrupted. If a stop is to be put to the increasing number of witchcraft cases coming before the Courts, there must be a determined effort to stop the imputations being made. It is these imputations which lead so frequently to illegal summary Justice being meted out by persons purporting to exercise authority on the excuse that they are seeking to eradicate witchcraft. It is those who make the imputations not those who are imputed who are the persons deserving of punishment. This makes it all the more unfortunate in this case that the convictions have had to be set aside. But it must not be thought that this means that the Court condones actions such as those of the appellant and her co-accused. The latter in particular seems to have made the reckless and highly irresponsible allegations which precipitated this whole affair.

Finally we cannot but make the same order in regard to the appellant's costs as we made in *Kondoni's* case (*supra*) because of the failure of the appellant's legal representatives to file a proper notice of appeal. The appellant's legal representatives will not recover any fees for the actual preparation of the notice of appeal of 25th August, 1981, or for any work done thereafter in respect of the appeal.

Georges JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal representatives.

1982 (1) ZLR p87

S v MACHONA AND OTHERS 1982 (1) ZLR 87 (SC)

Court **Supreme Court, Salisbury**

Georges, JA, and Smith, AJA

2nd and 18th February, 1982

Flynote

Criminal procedure - appeal - review - absence of jurisdiction in trial court as a ground for review - does not

preclude Supreme Court from dealing with matter on appeal in irregularity established ex facie the record - Criminal Procedure and Evidence Act [Chapter 59] - section 145 - joinder of trial of persons charged with receiving - limitations of section - effect of illegal joinder.

Headnote

Section 27 of the High Court of Zimbabwe Act provides that one of the grounds on which any proceedings may be brought on review is absence of jurisdiction on the part of the court concerned. This does not affect the ambit of the jurisdiction of the Supreme Court to hear appeals in cases where the grounds of appeal can properly overlap the grounds on which matters may be brought on review before the High Court. It is only where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the fact of the record that the proceedings should be by way of review rather than appeal.

Section 145 of the Criminal Procedure and Evidence Act [Chapter 59], provides that any number of persons charged with receiving at different times property obtained by an offence may be charged with substantive offences in the same indictment, summons or charge. Where, however, the property stolen was stolen on different occasions, although from the same person, it was obtained not by "an offence" but by "several offences". Furthermore, the accused persons were not charged in the same indictment, but were indicted separately. In these circumstances, although it was convenient to hold the trials jointly, a joint trial was impermissible and was accordingly a nullity.

Cases cited:

S v Sergeant Tom and Others, 1981 ZLR 547;

R v Juda; R v Magaya; 1962 R & N 573; 1962 (3) SA 937 (SR);

S v Tereza; S v Leonard; 1971(1) RLR 12; 1971 (4) SA 188 (R);

S v Marimo; S v Ndhlovu, 1973 (1) JLR 70; 1973 (2) SA 442 (R);

BWK Whaley, for the appellants.

1982 (1) ZLR p88

GEORGES JA

MT O'Meara, for the respondent. The magistrate combined the trials because the evidence was common to all the accused; but he could properly have done so only in terms of section 145 or 145A of the Criminal Procedure and Evidence Act [Chapter 59]. From the State evidence it appears that the property received by the various accuseds was stolen on different occasions. The question accordingly arises as to whether the items stolen can be said to be "property obtained by means of an offence". For section 145 to be applicable the expression "an offence" would have to be interpreted as meaning "any offence", but it does not seem that such a wide interpretation would be correct. Further, all the accuseds were charged on separate and distinct indictments; they were not charged in the "same indictment, summons or charge" (section 145) or in "an indictment, summons or charge" (section 145A). In such circumstances the procedure

adopted in the Court a quo was improper: *R v Juda*; *R v Magaya*, (*supra*); *S v Marimo and Ors.*; *S v Ndhlovu & Ors.*, (*supra*). If the cases could not properly have been joined in terms of sections 145 or 145A of the Criminal Procedure and Evidence Act, then the proceedings were null and void: *S v Tereza and Anor.*, (*supra*).

Judgment

Georges JA: In the proceedings which have led to this appeal five accused persons were charged in separate indictments for receiving from Alexander Mabande certain items of building material well knowing them to have been stolen. All the acts of receiving were alleged to have taken place in April and May, 1981. Each indictment set out all the material alleged to have been stolen by Mabande then went on to specify in the case of each accused person the particular items alleged to have been received by him. All the material had been stolen from the same source. Mabande had been in the employ of a firm, Gwelo Construction Company, as a driver delivering building material and his job gave him the opportunity to steal his employer's property.

It was therefore obviously convenient to have all these cases heard together. Mabande, the thief, would be a witness in each case and so would be the owner of the property, Clive Caumer-Cook, who controlled the company. Instead of having to testify five times they would do so only once. The trial magistrate decided therefore to hear the five cases together. Four of the five accused persons were convicted and one acquitted. Of the four who were convicted three appealed - Langton Machona, Farai Dondo and Dzingai Chawagarira. They are the appellants in this matter. Musekiwa did not appeal.

The grounds specified in the notice all dealt with the issue of merit contending that the magistrate had erred in relying on uncorroborated

1982 (1) ZLR p89

GEORGES JA

accomplice evidence, in rejecting the appellants' testimony when other explanations offered were not improbable, and in placing undue emphasis on the fact that the appellants paid cheaply for the items which they purchased.

In the Heads of Argument, however, there was a fresh submission that the proceedings were null and void because of illegal joinder.

Although there was at the end of the day no disagreements on the issue, the terms in which the Heads of Argument were couched appeared to raise some doubt as to the jurisdiction of this Court to deal with the issue and it may be well to examine and clarify the position.

The jurisdiction of this Court to hear appeals in criminal cases is established by section 9 (1) of the Supreme Court of Zimbabwe Act (No. 28 of 1981) which reads:

- "(i) The Supreme Court shall have jurisdiction to hear and determine an appeal in any criminal case from the judgment of any court or tribunal from which, in terms of any other enactment, an appeal lies to the Supreme Court."

The enactment in this case is section 67 of the Magistrates Court Act [*Chapter 18*] as amended by section 12 of Part V of the Schedule to the High Court of Zimbabwe Act, No. 29 of 1981. This reads in part:

- "(1) Any person Who is convicted of any offence by a court, may, subject to the provisions of this section and of any other law, appeal -
- (a) ...
 - (b) to the Supreme Court, if he appeals against such conviction or against such conviction and sentence or order of court following upon such sentence".

An appeal against conviction can be on grounds which include a challenge to the jurisdiction of the convicting court.

The section does, however, make the entitlement to appeal "subject to the provisions of ... any other law", and consideration must be given to sections 26 and 27 of the High Court of Zimbabwe Act. Section 26 establishes the jurisdiction of the High Court to review "all proceedings and decisions of all inferior courts of justice, tribunals and administrative authorities within Zimbabwe", again "subject to the provisions of this Act and any other law."

Section 27 reads:

- "(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;

1982 (1) ZLR p90

GEORGES JA

- (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.
- (2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings or decisions of inferior Courts, tribunals or authorities."

In my view this section setting out the grounds on which the High Court can exercise its powers of review is not intended to affect the ambit of the jurisdiction of the Supreme Court to hear appeals in cases where the grounds can properly overlap.

Our attention has been drawn to *S v Sergeant Tom and Others*, Supreme Court Judgment No. 190/81*(2) where LEWIS, JP., said:

"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 was 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 the record: there is not the slightest support for any of these allegations on the record before us. All the allegations were denied by 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 Act No. 29 of 1981."

As I understand it this case does not state that when the jurisdiction of a trial court is in issue proceedings should properly be by way of review as contended in the heads of argument. What it does state is that where issues are raised challenging the propriety of the proceedings of an inferior tribunal and the facts which have to be proved in order to support these issues do not appear as established on the face of the record, proceedings should be by way of review.

1982 (1) ZLR p91

GEORGES JA

In this case the joinder of the appellants in one trial is clear on the face of the proceedings. Whether or not such joinder is legally permissible and its effect on the validity of the proceedings are matters which can properly be considered on an appeal and are within the jurisdiction of this Court.

It should be borne in mind that this Court is vested with ample powers of review under section 23 of the Supreme Court of Zimbabwe Act, 1981, which reads:

- "(1) Subject to the provisions of this section, the Supreme Court and every judge of the Supreme Court shall have the same power, jurisdiction and authority as are vested in the High Court and judges of the High Court respectively to review the proceedings and decisions of inferior Courts of justice, tribunals and administrative authorities.
- (2) The power, jurisdiction and authority conferred in terms of subsection (1) may be exercised whenever it comes to the notice of the Supreme Court or a judge of the Supreme Court that an irregularity has occurred in any proceedings or in the making of any decision notwithstanding that such proceedings are, or such decision is, not the subject of an appeal or application to the Supreme Court:

Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review in the first instance before the Supreme Court ..."

The limitation on the powers of review pertain merely to questions of the procedure to be followed since the proviso prevents persons from initiating review proceedings.

I turn now to the issue of joinder. The powers of joinder in the Criminal Procedure and Evidence Act [Chapter 59] are set out in section 145 and 145A.

Section 145 deals with power to charge together in the same indictment persons charged with -

"... committing or procuring the commission of the same offence although at different times ...".

It also provides that -

"... any number of persons charged with receiving, although at different times, any property which has been obtained by means of an offence, or any part of any property so obtained, may be charged with substantive

offences in the same indictment, summons or charge and may be tried together, notwithstanding that ... the persons who so obtained the property is not included in the same indictment, summons or charge ...".

1982 (1) ZLR p92

GEORGES JA

In these proceedings the accused persons were not charged in the same indictment. They were separately indicted. It is, indeed, doubtful whether they could have been charged in the same indictment since the evidence established that Mabande on each occasion stole the particular items of property each of the accused persons received and thereafter delivered them to that person. He did not steal all the items at one time and thereafter distribute from his store. It would appear, therefore, that the property received by the accused persons was obtained by means of the commission of several offences and not merely of "an offence" as is stipulated in section 145.

Section 145A does not assist either in this particular case. It does provide for the joint trial of persons who have committed separate offences but there appears to be a condition that such persons must be jointly indicted. It reads:

"Whenever it is alleged in an indictment, summons or charge that two or more persons have committed separate offences at the same time and place or at the same place and about the same time and the prosecutor informs the Court that any evidence which is, in his opinion, admissible at the trial of those persons is, in his opinion, also admissible at the trial of the other person or persons, such persons may be tried jointly for those offences on that indictment, summons or charge."

It seems clear, therefore, that there can be a joint trial only of persons charged in the same indictment and that the joint trial of persons separately indicted is not permissible. There is the same condition that the prosecutor should be of the view that evidence admissible against one will be admissible against all.

There was in this case an impermissible joint trial. The effect of this has been well - established by a line of authorities.

In *R v Juda, R v Magaya*, 1962 R & N 573; 1962 (3) SA 937 (SR), the accused persons were charged separately with offences allegedly committed by each of them against the Native Tax Act. Because a large number of persons were awaiting trial at that time the magistrate "for reasons of expediency" held their trials together. The Court (LEWIS, J (as he then was), and MAISELS, J) held at page 575 that -

"... the present is not a case of an irregularity in the proceedings, the effect of which has to be considered in terms of sections 55 (2) of the Magistrates Court Act: the trial court simply had no jurisdiction to try these cases in this way and consequently the convictions and sentences cannot stand."

1982 (1) ZLR p93

GEORGES JA

S v Tereza and Others; S v Leonard and Others, 1971 (1) R L.R 12; 1971 (4) SA 188 (R) were cases of theft of maize by the accused from the same owner. The accused persons in *Tereza and Others* (*supra*) pleaded not guilty and the magistrate obtained the consent of the accused

so that the complainant would have to testify only once. JARVIS, J (as he then was), stated that it was quite clear that each accused person had been engaged in a separate criminal transaction based on different facts. He continued at page 13:

"In the present cases, the magistrate purported to try the accused jointly with their consent', but jurisdiction in criminal matters cannot be conferred by consent - see the remarks of AVORY, J, in *R v Dennis and R v Parker* [1924] 1 KB 867, at page 869, and quoted in *R v Juda; R v Magaya*, 1962 (3) SA 937 (SR), at page 939:

'In our opinion consent cannot give jurisdiction in a criminal Court, if indeed it can in any Court, where no jurisdiction exists. As was said during the argument in the House of Lords in *Crane v Director of Public Prosecutions*: "An irregularity can be waived by consent, but jurisdiction in criminal matters cannot be conferred by consent." This appears to us a question of jurisdiction and not a question of regularity or irregularity. No criminal court has jurisdiction to try two separate indictments at one and the same time, and therefore the consent given to such a trial cannot give jurisdiction." "

The convictions in that case were quashed.

The issue was re-stated in *S v Marimo and Others and S v Ndhlovu and Others*, 1973 (1) R L.R 70, 1973 (2) SA 442 (R). Referring to the procedure of trying persons charged on separate indictments as "mass trials BEADLE, CJ, in a judgment in which DAVIES, J, and BECK, J, concurred, set his face sternly against the practice. After reviewing the authorities and concluding that in Rhodesia "the practice has been not to condone the irregularity of holding mass trials", though pointing out that there was a line of cases which favoured condonation, he states at page 446:

"The holding of a mass trial' of a number of accused at one and the same time on charges which are in no way related to each other is fraught with so many dangers, and the potential prejudice to the accused is so great, that I do not think such form of trial should ever be condoned, lest condonation may be considered as setting the seal of approval on such form of trial and thus encourage inferior Courts to repeat the irregularity."

I see no good reason for departing from these well laid down principles. There has been a dear overstepping of jurisdiction in this case and the convictions of the appellants must be quashed.

1982 (1) ZLR p94

GEORGES JA

As has been mentioned, one of the accused, Musekiwa, charged on indictment CRB U 479/81, did not appeal. In the circumstances of this case it seems proper that his conviction also should be quashed. In the terms of section 23 of the Supreme Court of Zimbabwe Act it has come to the notice of this Court that an irregularity has occurred in the proceedings in which he was convicted and accordingly in exercise of the power of review his conviction is also quashed.

It remains to be considered whether the matter should be remitted for retrial by a different magistrate. The State did not support the convictions on the merits. For my part I would consider the merits arguable. It does not appear to me that the magistrate misdirected himself. It was on the facts a case in which one could justifiably conclude that the appellants were guilty or not guilty depending on the weight one gave to the circumstances.

Because of this it appears to me that the ends of justice would best be served if the matter was not remitted for retrial. Accordingly, I would make no such order.

In conclusion the appeals are allowed and in the exercise of the power of review the conviction of Musekiwa is set aside.

Smith AJA: I agree.

Ferguson, Ward & Doyle, appellant's legal representatives.

1982 (1) ZLR p95

S v LUNGA AND ANOTHER 1982 (1) ZLR 95 (HC)

Court **High Court, Bulawayo**

Gubbay, J

26th February, 1982

Flynote

Criminal law - robbery - what is - properly taken after violence used to perpetrate rape and while victim still in state of fear - fact that original interact to commit another crime irrelevant - criminal liability - accused an observer to another's act.

Headnote

The two accuseds were convicted, *inter alia*, of robbery. They had assaulted the complainant and carried out a number of depraved sexual assaults on her, including two acts of rape. After these acts the first accused ordered the woman to strip, which she did. Then second accused, exhibiting a spark of human decency, expressed disapproval of the woman being made to return home naked, so the first accused allowed her to put on her dress and pants again. He kept the other items of clothing she had been wearing.

Held, that it was irrelevant, in deciding whether the crime of robbery had been committed (as opposed to simple theft), whether the accused's original intention was to steal or to commit some other offence. If he knowingly makes use of the terror which he inspired in his victim in order to steal from him, he is guilty of robbery (*R v Wilson* (1902) 16 EDC 85 followed).

Held, further, that on the facts the second accused, although a party to the original assaults on the woman, was merely an observer to robbery and thus incurred no criminal liability for that crime.

Cases cited:

S v Moerane, 1962 (4) SA 105 (T);

S v Marais, 1969 (4) SA 532 (NC);

S v Jabulani, 1980 (1) SA 331 (N);

S v Matjeke, 1980 (4) SA 267 (BH);

S v Mogala en 'n Ander, 1978 (2) SA 412 (AD);
S v Makhalanyane en 'n Ander, 1980 (3) SA 425 (O);
R v John, 1956 R & N 157; 1956 (3) SA 20 (SR);
S v Hlabangani, 1977 (2) RLR 301 (GB);

1982 (1) ZLR p96

GUBBAY J

S v Yolelo, 1981 (1) SA 1002 (AD);
R v Blackham (1787) 2 East PC 711;
R v Wilson, (supra);
R v Mbande and Others, 1933 AD 382;
S v Mudimu, 1974 (1) RLR 13 (AD).

Judgment

Gubbay J: The two accused were jointly charged in the Court of the Regional Magistrate with two counts of rape and one count of robbery. The second accused was charged with a further count of indecent assault. After a protracted trial, they were found guilty. The first accused was sentenced to four-and-a-half years' imprisonment in respect of the rape offences, and to two-and-a-half years' imprisonment for the robbery. Of the total period of seven years, two years was suspended for five years on appropriate conditions. The second accused was sentenced to three years' imprisonment for the two rapes, and to one year's imprisonment on each of the robbery and indecent, assault offences. Of the total period of five years, one year was suspended for five years on similarly appropriate conditions. The convictions against both accused on the counts of rape and against the second accused on the count of indecent assault, and the punishments imposed in respect thereof, are in order and are confirmed. It is the convictions for robbery (count 3) with which this judgment is concerned. The question is whether the evidence disclosed the offence of theft rather than robbery and whether, in either event, the second accused was proved to have been a *socius criminis*. Regrettably, I find it necessary to recite in some detail the depraved and disgraceful conduct of the two accused.

On the evening of Sunday, 5th April, 1981, the complainant, an unmarried woman of no more than 20 years of age, while walking home alone in a comparatively deserted suburb in Bulawayo, was accosted by the two accused. The first accused asked if he could kiss her. She repelled his impertinence. He then forcibly kissed her and, with the assistance of the second accused, dragged her off the road into the bush. There she was thrown to the ground. The first accused removed her pants while the second accused held her down by the legs. Thereupon the first accused raped the complainant but failed to ejaculate. This angered him and he slapped her across the face. When ultimately he arose, the second accused inserted his finger into the complainant's private parts. Thereafter the first accused raped the complainant, for a second time while she was secured by the second accused, but again was unable to complete

his purpose. In his frustration he delivered another slap to her face and urinated in her private parts. When he had removed himself

1982 (1) ZLR p97

GUBBAY J

from on top of her, the second accused repeated his earlier act of gross indecency upon the complainant. Once he had desisted, the first accused ordered the complainant to strip naked. She complied. It was only then that the second accused exhibited a solitary spark of human decency. He expressed disapproval of the complainant having to return home naked, and in consequence she was permitted to put on her dress and pants. She was instructed to leave the scene and did so hurriedly. The jersey, petticoat and brassiere, which she had discarded on demand, were taken possession of by the first accused.

Hunt, South African Criminal Law and Procedure, Vol. 2 at page 640, defines robbery as follows:

"(It) consists in the theft of property by intentionally using violence or threats of violence to induce submission to the taking of it from the person of another or in his presence."

This definition has attracted an imposing body of judicial approval. Robbery is distinguished from theft, in that violence or a threat of violence which is intended to cause the victim to submit, is used to promote the taking of money or goods. Whether such intention exists depends upon the evidence before the court. An application of force or a threat of force against the victim which is not aimed at overcoming his resistance to the deprivation of his property, albeit dispossession occurs coincidentally thereafter, does not constitute the offence. See, for instance, *S v Moerane*, 1962 (4) SA 105 (T); *S v Marais*, 1969 (4) SA 532 (NC); *S v Jabulani*, 1980 (1) SA 331 (N), *S v Matjeke*, 1980 (4) SA 267 (BH). Likewise, violence directed at the property itself rather than at the victim's will to resist the taking - as where a shawl is snatched from a woman's shoulders or a bag out of her hand - is not sufficient. *Per contra*, if such violence is persisted in after the victim becomes aware of what is happening, and offers resistance. See *S v Mogala en 'n Ander* 1978 (2) SA 412 (AD at 414H-415A; *S v Makhalanyane en 'n Ander*, 1980 (3) SA 425 (O) at 429D-E. Nor is the offence committed where the violence, actual or threatened, is exercised immediately subsequent to the completion of the *contrectatio* with the object of facilitating escape or retaining possession. See *R v John*, 1956 R & N 157; 1956 (3) SA 20 (SR) at 21E-G; *S v Hlabangani*, 1977 (2) RLR 301 (GB) at 302F-H (contrast *S v Yolelo*, 1981 (1) SA 1002 (AD) at 1015G-H, *Hunt*, *loc cit*, at page 643 n 46).

In the light of these principles, the crisp point in the present matter is whether the conviction for robbery can be sustained where the violence was used, though undoubtedly of a terrifying nature, related to the earlier

1982 (1) ZLR p98

GUBBAY J

commission of the sexual assaults. It did not relate directly to the theft of the jersey, petticoat or brassiere.

This type of situation is touched on in *Gardiner and Lansdown*, South African Criminal Law and Procedure, 6th Edition, Volume 2 at page 1708, where, in discussing the ingredient of violence, it is stated:

"It is not even necessary to prove an express demand or threat by the accused if the property was given him by the victim under the influence of terror which he inspired, as where a woman gave money to a man to induce him to desist from criminally assaulting her and he received it ... or if the property was taken in circumstances which gave the victim no reasonable chance of resistance, as where a rebel searched and took money from a loyalist captive ..."

The examples cited by the learned authors in support of their proposition are taken from the facts in *R v Blackham* (1787) 2 East PC 711, and *The King v Wilson* (1902) 16 EDC 85.

I shall deal with Wilson's case first. The complainant, one Tomlinson, was a soldier in the British Forces at the end of the Boer War. Shortly before the termination of hostilities, he had the misfortune to be captured by a Boer Commando of which the accused was a member. He was disarmed and stripped of part of his clothing, including his boots. While he was thus surrounded, the accused searched his pockets and took his purse containing some money. It was that act of the accused which led to a charge of robbery. He was convicted by a magistrate. On appeal it was contended that, in as much as the taking of the money from Tomlinson's person was not accompanied by actual physical violence, the crime of robbery had not been committed. SHEIL J had no difficulty in disposing of this argument. He said at page 89:

"It is not necessary to constitute a crime that actual violence should be used, provided the person who has been deprived of his property was at the time in bodily fear occasioned either by threats or by other means likely to induce fear."

The learned Judge continued at pages 89-90:

"It seems to me that Tomlinson's situation was decidedly calculated to inspire fear. He was a captive. He had been disarmed and deprived of his accoutrements and boots. He was at the utter mercy of the rebels into whose hands he had fallen, and under such circumstances a Court or Jury might well presume such a degree of apprehension of danger as induced Tomlinson to part with his property, and, as that is all which the law requires, Wilson was, in my opinion, rightly convicted of robbery."

There is a distinct parallel between that case and the instant. Just as Tomlinson was in grave fear and, having been captured, was in no position to offer resistance, so too the unfortunate complainant, having

1982 (1) ZLR p99

GUBBAY J

been raped, was induced by terror into submission. In both cases the accused utilised the fear, which was all too apparent, to remove property from their respective victims.

A consideration of *R v Blackham* (*supra*) underscores the point, for the facts bear comparison. The report of that case is not available to me, but it is commented upon in *Russell on Crime*, 12th Edition, Volume 2 at page 861. The relevant passage reads:

"B. assaulted a woman with intent to ravish her, and she, without any demand from him, offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original

purpose, until he was interrupted. This was held to be robbery by a considerable majority of the judges, on the ground that the woman, from the violence and terror occasioned by the prisoner's behaviour, and to redeem her chastity, offered the money, which it was clear she would not have given voluntarily; and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original intent was to commit rape."

On the same page the learned author remarks that it will be robbery -

"... if the thief, after having first made an assault, ceases to use force and asks money for alms, which is given him by the party attacked, while there remains a reasonable ground for the continuance of the fear excited by the assault."

The English law on robbery is now codified in section 8 (1) of the Theft Act, 1968. The effect of that provision is to make the use of force *in order to steal* an essential element of the offence. Today it appears that *Blackham's* conduct would fall outside the ambit of the section. See *Archbold's Criminal Pleading, Evidence and Practice*, 38th Edition paragraph 1482. Be that as it may, I respectfully share the view expressed by SHEIL, J, in *Wilson's* case (*supra*) at 89 that the decision in *R v Blackham* accurately resects the Roman-Dutch law on the subject. (See also *Hunt, loco. cit.*, at page 644). If a person is rendered impotent by fear of violence, I do not regard it relevant whether the original intention of the accused was to steal or to commit some other offence. If he knowingly made use of the terror which he inspired in his victim to steal from him, he is guilty of robbery.

The evidence adduced from the complainant on this particular charge was scant, but one thing is clear. She had been subjected to vicious sexual assaults and was virtually paralysed with fear. The first accused must have been acutely aware that she was at his mercy. He must have appreciated that he had completely neutralized her resistance to anything

1982 (1) ZLR p100

GUBBAY J

he might demand. It seems to me that by stripping the complainant of her clothing and thereafter depriving her of the jersey, petticoat and brassiere, the first accused, in the full and certain knowledge that she was incapable of resisting, took advantage of his prior criminal conduct to steal. That the violence was directed at an end other than the removal of the clothing from the complainant is immaterial. The critical factor is that the state of abject fear which had been inspired in her was knowingly utilized in order to gain possession of the clothing from her. To suggest that any further violence, actual or threatened, was necessary to effect the theft is wholly unrealistic. It follows that as "the property was taken in circumstances which gave the victim no reasonable chance of resistance" (*per Gardiner and Lansdown*, *loc cit*, at page 1708), the first accused was, in my opinion, properly convicted of robbery.

The position of the second accused is somewhat different. Though a party to the dreadful rapes perpetrated by the first accused and himself sexually abusing the complainant, he demurred with the order that she strip. At his instigation she was allowed to replace her dress and pants. He was not prepared to be associated with any further humiliation of her. Moreover, there is nothing to suggest that he co-operated in the subsequent removal of the jersey, petticoat and brassiere by the first accused. It is not unlikely, therefore, that at the final stage of the whole horrific affair he was merely an observer. That, of course, is not sufficient to incur criminal

liability. See *R v Mbande and Other*, 1933 AD 382 at 392-393, *S v Mudimu*, 1974 (1) RLR 13 (AD) at 15B-F. The Attorney-General, to whom I am indebted for his invaluable assistance, agrees with me that the conviction of the second accused on this count should be quashed. It is so ordered.

I pass now to sentence. The punishment visited upon the first accused on count 3 is, in my view, severe enough to justify interference. I think that his motive in dispossessing the complainant of her garments may have been partly to add to her degradation and distress and partly to benefit himself monetarily. The value of the clothing was, after all, fairly nominal. Nonetheless the behaviour of the first accused was despicable and I rate his moral blameworthiness as high. Taking account of all the circumstances, I consider that the sentence should be reduced to 18 months' imprisonment with labour. This means that the total sentence on the three counts amounts to six years' imprisonment. Of that period 18 months will be suspended for five years on the conditions formulated by the regional magistrate.

1982 (1) ZLR p101

GUBBAY J

With regard to the second accused, his total sentence is now four years' imprisonment with labour. I propose to suspend one year thereof for five years on condition that he is not convicted of rape or indecent assault committed within that period and for which he is sentenced to imprisonment without the option of a fine.

Lloyd AJ: concurs.

1982 (1) ZLR p102

WEBB v SHELL ZIMBABWE (PVT) LTD 1982 (1) ZLR 102 (SC)

Court **Supreme Court, Salisbury**

Fieldsend, CJ, Georges, JA, and Beck, JA

18th February and 3rd March, 1982

Flynote

Principal and surety - contract of suretyship - surety being bound in respect of all debts from whatever cause arising, nothing excepted limitations of such provision - obligation of surety not to be extended beyond obligation flowing from contract itself - practice and procedure - application for summary judgment - bare denial by defendant of obligation - where such may constitute prima facie defence making summary judgment improper.

Headnote

The appellant entered into a deed of suretyship whereunder he bound himself to Shell Zimbabwe Ltd as surety and co-principal debtor for the repayment of all sums owed to Shell by a company called ET Services (Pvt.) Ltd ET Services owed some \$10 000 to another company,

OK Tyres. OK Tyres ceded this claim against ET Services to Shell, who, relying on the contract of suretyship, sought, by summary judgment, to claim the money from the appellant. The relevant portion of the deed of suretyship provided that the appellant bound himself as surety and co-principal in favour of Shell for the repayment of all sums of money due to Shell by ET Services - which was referred to in the deed as "the customer" - "from whatsoever cause arising ... nothing excepted".

Summary judgment was granted against the appellant in the High Court by McNALLY, AJ (as he then was). The appellant's principal ground of appeal was that in spite of the wording of the deed of suretyship he was not obliged to Shell in respect of the sum claimed.

Held, that when regard is had to the deed of suretyship as a whole, there are indications that the suretyship obligation was not meant to extend to indebtedness which Shell had acquired against ET Services from an extraneous source unconnected with the trading relationship between them. The obligation of a surety, however wide and general a guarantee may be, extends only to the obligations which flow from the contract itself, and not to those which flow, like the present, an extraneous source.

Held, further, that the mere denial by the appellant of any obligation, when considered in the light of all the material that was before the Court, cannot properly be regarded as a failure to disclose a good *prima facie* defence to the action, and summary judgment should not have been granted.

1982 (1) ZLR p103

BECK JA

Cases cited:

F J Hawkes Co Ltd v Nagel, 1957 (3) SA 126(W);

Patel v Patel & Another, 1968 (4) SA 51 (D & CLD);

Robb, NO v Standard Bank Ltd & Another, 1979 (2) SA 420 (R);

Breitenbach v Fiat SA (Edms.) Bpk., 1976 (2) SA 226 (T).

A P de Bourbon, for the appellant.

C S Grossman, for the respondent.

Judgment

Beck JA: The respondent (plaintiff in the court *a quo*) succeeded in obtaining summary judgment against the appellant. I shall refer henceforth to the respondent simply as "Shell".

After describing itself in its declaration as "a company carrying on business as suppliers of petroleum products", Shell went on to aver that the appellant had entered into a deed of suretyship "hereunder he had bound himself to Shell as surety and co-principal debtor for the repayment of all sums of money which a company called ET Services (Pvt.) Ltd might owe to

Shell; that ET Services owed \$10 471,45 to a company called KO Tyres (Pvt.) Ltd and that KO Tyres had ceded to Shell its claim against ET Services.

In his affidavit in opposition to Shell's application for summary judgment the appellant stated, *inter alia*, that "I have no knowledge of the indebtedness of the principal debtor to KO Tyres" and "it deny that the cession annexed to (Shell's) declaration gives (Shell) any right to call upon me to meet the indebtedness owed to KO Tyres (Pvt.) Ltd." (paragraph 5).

The cardinal point for decision is whether or not the indebtedness to which the suretyship extends must be limited to indebtedness which arises from direct transactions between Shell and the principal debtor, ET Services. If it must be so limited Shell cannot, of course, extend the appellant's liability, as surety, to cover a claim by Shell against the principal debtor which Shell acquired from an extraneous source, and not as the result of any direct transaction between itself and the principal debtor.

The dominant portion of the deed of suretyship reads as follows:

"I, the undersigned,

Robert Rodney WEBB

do hereby guarantee and bind myself as surety and co-principal debtor *singuli in solidum* unto and in favour of

1982 (1) ZLR p104

BECK JA

SHELL RHODESIA (PRIVATE) LIMITED

its successors and assigns (hereinafter collectively referred to as 'SHELL') for the repayment when due of all sums of money which

ET SERVICES (PRIVATE) LIMITED

(hereinafter referred to as 'the CUSTOMER') may now or from time to time hereinafter owe or be indebted in either contingently or unconditionally to SHELL from whatsoever cause arising and whether incurred prior to the signature hereof or hereafter, nothing excepted, whether such indebtedness be incurred by the CUSTOMER in its own name or in the name of any firm in which the CUSTOMER may be trading either solely or jointly with others in partnership or otherwise, such indebtedness to include interest, discount, commission, costs or other necessary or usual charges and expenses, in addition to capital."

For Shell, Mr *Grossman* contended before us that the words from whatsoever cause arising ... nothing excepted" are of sufficiently wide import to embrace a cause of indebtedness acquired by Shell against the principal debtor from an extraneous source. In support of that submission he relied upon the decision of WILLIAMSON, J (as he then was), in *FJ Hawkes and Co Ltd v Nagel*, 1957 (3) SA 126 (W). It was there held that an undertaking as surety to pay "any and all indebtedness now or hereafter due by (the principal debtor) from whatsoever cause arising" unambiguously meant "any debt whatsoever, howsoever arising". Because no evidence could properly be received to contradict this unambiguous language, a plea on the surety's behalf averring that it was an implied term of the guarantee that the surety would be bound thereunder only for such indebtedness of the principal debtor as arose from direct transactions between

the principal debtor and the plaintiff was held to be excipiable.

In *Patel v Patel and Another*, 1968 (4) SA 51 D & CLD CANEY, J, at page 56 F-G, said of this decision that it went:

" ... too far in holding ... that there was no limitation whatsoever to the words 'any debt whatsoever, howsoever arising' and consequently extending the surety's liability to cover a debt arising from an extrinsic cause, a claim on the debtor acquired by the creditors from an outside source and not, apparently, arising from the business between the creditor and the debtor."

That view of CANEY, J, was shared by GUBBAY, J, in *Robb NO v Standard Bank Ltd and Another*, 1979 (2) SA 420 (R) at page 426 A-B.

1982 (1) ZLR p105

BECK JA

I do not consider it necessary to express a view as to whether or not the *Hawkes and Co.* case (*supra*) was correctly decided. It does not emerge from the report of that case what the full terms were of the suretyship agreement, and one does not know therefore if there were any limitations upon the extent of the suretyship obligation that were to be discovered from the wording of the document as a whole. Presumably there was none, since none is mentioned in the judgment.

In the instant matter, however, when regard is had to the deed of suretyship as a whole, there are indications - *prima facie* at least - that the suretyship obligation was not meant to extend to indebtedness which Shell acquired against the principal debtor from an extraneous source unconnected with the trading relationship between Shell and the principal debtor. Thus, the principal debtor is throughout referred to as "the Customer" of Shell, indicative of a continuing trading relationship between those two parties. Again, the wide general words "from whatsoever cause arising ... nothing excepted" are immediately followed by words that seem to envisage indebtedness arising from a trading relationship between Shell and the principal debtor, namely "whether such indebtedness be incurred by the Customer in its own name or in the name of any firm in which the Customer may be trading either solely or jointly with others in partnership or otherwise, such indebtedness to include interest, discount, commission, costs or other necessary or usual charges and expenses, in addition to capital". Thirdly, the deed contains a number of subsidiary provisions - not reflected in the dominant portion that I have quoted previously - in which a direct, continuing business relationship between Shell and the principal debtor as Shell's "customer" seems to be envisaged. The first of these provisions, for instance, is to the effect that it shall always be in the discretion of Shell as to the extent, nature and duration of the facilities allowed the customer.

It was stressed in the *Patel* case (*supra*) that the obligation of the surety "is not to be extended to any other subject, to any other person or to any other period of time, than is expressed or necessarily included in it" (Burge on *Suretyship*, page 40); and that even wide general words are subject to; limitation, for -

"However wide and general a guarantee may be, it only extends to the obligations which flow from the contract itself, and not to those which flow from any extraneous source."

(*Van der Linden, Institutes*, 1.14.10; Juta's translation, page 120).

The cases to which I have referred were not brought to the attention of McNALLY, AJ (as he then was), before whom the argument in the court *a quo* seems to have proceeded on different lines altogether. Had

1982 (1) ZLR p106

BECK JA

attention been focussed on the context in which the wide words relied on by Mr *Grossman* were used, and on the nature of the transaction as it appears from the entire deed of suretyship, I hardly think that the learned judge would have granted summary judgment.

Other than to dispute that the cession in question gives to Shell the right to call upon him to meet the debt that was owed by ET Services to KO Tyres, the appellant has not defined with precision the nature of his defence. Nevertheless, if on all the material that is properly before it, the court sees a reasonable possibility that an injustice may be done if summary judgment is granted, it ought not to grant it, even if the defendant's affidavit is balder than it should be (*Breitenbach v Fiat SA (Edms.) Bpk.*, 1976 (2) SA 226 (T) at 229 H). On all the material that was before the court *a quo* it is apparent, in my view, that it is reasonably arguable that, on a proper construction of the deed of suretyship, the guarantee does not extend to claims against the principal debtor which Shell acquired by cession, at least, not to claims acquired by cession from a party not connected with the continuing trading relationship that apparently existed between Shell and the principal debtor. It may be that the relationship between KO Tyres (possibly a subsidiary of Shell) and ET Services (clearly a garage concern) was such that the indebtedness ceded was connected with the trading relationship between the parties: put this is not apparent on the face of the papers, and there is the appellant's denial in paragraph 5 of his affidavit. So even if, on a construction of the deed as a whole, the suretyship obligation is found to be wide enough to extend to some claims acquired by cession, it would still be necessary to know on the facts whether the debt that was owed to KO Tyres was such a debt as fell within the contemplation of the deed, if ceded to Shell.

In these circumstances the mere denial, to which I have referred, that is contained in the defendant's affidavit, when considered in the light of all the material that was before the Court, cannot properly be discounted as a failure to disclose a good *prima facie* defence to the action, and summary judgment ought not to have been granted. This conclusion makes it unnecessary to deal with other submissions that were advanced by the appellant's counsel.

The appeal must therefore be allowed with costs, and the order of the court *a quo* altered to read: "The Application is dismissed and leave is given to the defendant to defend the action. The costs of the proceedings in the court *a quo* are to be costs in the cause."

1982 (1) ZLR p107

BECK JA

Fieldsend CJ: I agree.

George JA: I agree.

Seirlis, Higham & Lewis, appellant's legal representatives.

Kantor & Immerman, respondent's legal representatives.

1982 (1) ZLR p108

S v KAYUMBA 1982 (1) ZLR 108 (SC)

Court **Supreme Court, Bulawayo**

Fieldsend CJ, Georges, JA and Beck JA

9th March, 1982

Flynote

Criminal law - Reserve Bank of Zimbabwe Act [Chapter 173] - section 13 (1) (l) - using or having in one's possession forged currency notes - mens rea - necessary to show knowledge by accused of nature of thing used.

Headnote

The appellant was convicted of contravening section 13 (1) (b) of the Reserve Bank of Zimbabwe Act [*Chapter 173*]. He had offered what in fact was a forged US\$100 note in payment for some goods. It was found that the appellant had an honest, though unreasonable belief, that the note was genuine.

Section 13 (1) (b) of the Act penalises any person who "without the authority of the Bank, uses or, knowing that it is to be used for an unlawful purpose, has in his possession any material whatsoever upon which has been engraved or made any such words, figures, letters, marks, lines or devices as are mentioned in paragraph (a)".

The prescribed penalty is imprisonment for up to seven years.

Held, that possession is penalized only where the possessor knows that the item, be it a printing plate or a spurious note, is to be used for an unlawful purpose. The same consideration must apply to the use of such an item, namely, it must be used for an unlawful purpose. This, of necessity, involves a requirement of the knowledge of the nature of the thing used.

Cases cited:

Scherras v de Rutzen [1895] 1 QB 918; [1895-9] All ER Rep. 1167;

R v Lim Chin Aik [1963] 1 All ER 223 (PC);

R v Sibanda, 1964 (1) SA 311 (SR); 1963 R & N 593;

Warner v Metropolitan Police Commissioner [1969] 2 AC 256; [1968] 2 All ER 356 (HL).

C W Jordaan, for the appellant.

H I Bisset, for the respondent.

1982 (1) ZLR p109

FIELDSEND CJ

Judgment

Fieldsend CJ: The appellant was convicted of contravening section 13 (1) (b) of the Reserve Bank of Zimbabwe Act [*Chapter 173*]. The charge which, save for adding the words "unlawfully and", followed the wording of the section, alleged that the appellant:

"... did unlawfully and without the authority of the Reserve Bank of Zimbabwe, use or, knowing that it was to be used for an unlawful purpose, have in his possession any material whatsoever upon which had been engraved or made any such words, figures, letters, marks, lines or devices peculiar to and used in or upon any note, that is to say, the accused used or had in his possession a forged \$100 note purporting to be in American currency".

The evidence established that on 3rd April, 1981, the appellant received three \$100 American notes from a named American who owed him money. Two of these notes were genuine and one was a forgery. On 4th April the appellant tendered the three notes in payment for some goods he wished to purchase in a shop in Bulawayo. The manager of the shop was unfamiliar with American notes and also noticed that one of the notes was obviously different from the other two. He checked with his security manager and in the event the police arrived and the appellant was arrested.

After considering the appellant's evidence the magistrate decided, though with some understandable hesitation, that the appellant may have had an honest belief that the questioned note was a genuine \$100 American note. In fact in his original judgment he found on a balance of probabilities that the appellant had gone sufficiently far to show that he had an innocent mind in regard to, that note. He found, however, that the belief was an unreasonable one.

The magistrate adopted this approach because he considered that the section cast a persuasive burden upon the appellant to establish both a *bona fide* belief in the genuineness of the note and that he had reasonable cause for so believing, once the external elements of the offence had been established.

Mr Bisset has conceded in this appeal that the magistrate erred in concluding that the section cast any onus upon the appellant. Being of the view that this concession was rightly made we allowed the appeal and set aside the conviction and sentence for reasons to be given later. These are the reasons.

The principle to apply to the interpretation of penal sections of this nature was clearly enunciated by WRIGHT J in *Sherras v de Rutzen*

1982 (1) ZLR p110

FIELDSEND CJ

[1895] 1 QB 918 at page 921, and endorsed by the Privy Council in *R v Lim Chin Aik* [1963] 1 All ER 223 at page 227 in these terms:

"Counsel for the appellant founded his argument on the formulation of the problem contained in the judgment of WIGHT J in *Sherras v de Rutzen*, [1895] 1 QB at page 921. The language of that learned and experienced Judge was as follows:

'There is a presumption that *mens rea*, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered ...'

It is to be observed that in that case the court held the presumption: not to be displaced even though the word 'knowingly', which was not found in the sub-section involved in the case, did appear in another sub-section of the same section."

These decisions were expressly adopted in *R v Sibanda*, 1964 (1) SA 311 (SR.).

The penalty for a contravention of section 13 (1) (b) is imprisonment, without the option of a fine, for up to seven years. This of itself is some indication that the offence is one requiring a mental element which it is incumbent upon the prosecution to establish: *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 at page 278; [1968] 2 All ER 356 (HL)

More important, however, is the structure of the whole subsection in which the paragraph in question appears. Section 13 (1) (a) penalises

"(1) Any person who -

- (a) without the authority of the Bank, engraves or makes upon any material whatsoever any words, figures, letters, marks, lines or devices, the print of which resembles in whole or in part any words, figures, letters, marks, lines or devices peculiar to and used in or upon any note;"

This paragraph covers a person who produces the plates or other devices from which bank notes can be produced. There is no requirement that the person should have an intention to defraud or deceive, compare section 5 of the English Forgery Act 1913 which deals with the forgery of certain seals and dies. The conclusion is, however, inescapable that at least the person must know that he is making a plate which will produce a print which resembles, in whole or in part, a bank note. What of the person who produces type which would make a print resembling for example, the words "I promise to pay the bearer" which appear on every bank note? He surely only commits an offence if he knows that these ordinary words resemble in form the words on a note.

1982 (1) ZLR p111

FIELDSEND CJ

At the other end of the scale section 13 (1) (c) penalises, with a fine of \$50, any person who

"wilfully defaces, soils or damages any note or writes or places any drawing thereon or attaches thereto anything in the nature of an advertisement."

Else use of the word "wilfully" clearly means that the person must be shown to have known that what he is defacing or damaging is a bank note. He who tears in half a genuine foreign note that

he is told is a forgery would not commit even this minor offence.

This brings me to section 13 (1) (b) itself. This section penalises

"(1) Any person who -

- (b) without the authority of the Bank, uses or, knowing that it is to be used for an unlawful purpose, has in his possession any material whatsoever upon which has been engraved or made any such words, figures, letters, marks, lines or devices as are mentioned in paragraph (a):".

Possession is only penalised where the possessor knows that the item, be it a printing plate or a spurious note, is to be used for an unlawful purpose. He must therefore be proved to have known that the note was spurious. Can the position be any different in regard to the use of a note? In terms of logic, clearly not, but do the words of the statute trace one to a different conclusion?

Wording of this sort appears to be common form in similar provisions in other countries. See for example section 9 (b), (d) and (e) of the English Forgery Act 1913 where the phrase is "uses or knowingly has in his custody or possession" certain items; and section 21 (d) of the South African Reserve Bank Act (No. 29 of 1944). I have, however, been able to find no authority where the phrase has been considered. It could, perhaps, be argued that by expressly requiring knowledge of the unlawful purpose for the possession offence but not for the using offence the paragraph seeks to draw a distinction. But I think that that argument would be without substance. It cannot be every use of a spurious note that is penalised by the paragraph. For example a person who uses a spurious note as a spill with which to light his cigar can never have been intended to be within the paragraph. Nor, with a prescribed penalty of imprisonment for up to seven years, can it have been intended that the innocent tendering of a facsimile note was within the paragraph. Despite the arrangement of the words of the

1982 (1) ZLR p112

FIELDSEND CJ

paragraph the word "uses" must be read as being subject to the words which govern possession, namely "for an unlawful purpose". This of necessity involves a requirement of the knowledge of the nature of the thing used.

In *Warner v Metropolitan Police Commissioner* (*supra*) - a case concerning a section penalising the unauthorised possession of drugs - considerable stress was laid upon the evil aimed at and upon the need for strict control of drugs. The same considerations do not apply here, where the legislature only penalises possession on proof of knowledge of the nature of the plate or note. There would be no purpose in providing for a stricter test for the use of such a thing.

For these reasons we were of the view that Mr *Bisset's* concession was rightly made.

Georges JA: I agree.

Beck JA: I agree.

Ben Baron & Partners, appellant's legal representatives.

S v LEZAR AND ANOTHER 1982 (1) ZLR 113 (HC)

Court **High Court, Bulawayo**

Gubbay, J, and Lloyd, A J

5th and 19th March, 1982

Flynote

Criminal procedure - sentence - Prevention of Corruption Act [Chapter 70] - acceptance of a bribe as consideration for selling of a motor car - factors affecting sentence.

Headnote

The two appellants had been convicted of contravening section 3 (a) of the Prevention of Corruption Act [Chapter 70]. They had pleaded guilty. The first appellant, who had no business connections with the motor industry, introduced a potential customer to the second appellant, a salesman with a firm of motor dealers which came into possession of a new motor-vehicle which it wished to sell. The customer, who was actually a policeman, paid \$500 to the first appellant as a consideration for having arranged the sale. Half of this sum was to go to the other appellant. The evidence showed that there was a scarcity of new vehicles in the country and that customers were sometimes willing to pay a "premium" to salesmen in order to ensure that they acquired a vehicle.

Both appellants were sentenced to an effective term of imprisonment. Against this sentence they appealed.

Held, that the offence - "statutory bribery" - is a serious one calling for a deterrent sentence, striking, as it does, at the very heart of commercial honesty and integrity.

Held, further, however, that where possible sentences other than imprisonment should be imposed if the objects of retribution and deterrence can be achieved. Imprisonment is only justified if it is necessary that the offender be removed from society for the protection of the public and if the objects striven for by the sentencing authority cannot be attained by other methods of punishment (*S v Scheepers*, 1977 (2) SA 154 (AD) applied).

Held, further, that in the peculiar circumstances of the case a prison sentence was not called for. The appellants were first offenders and had pleaded guilty. The firm of motor dealers did not normally deal with the type of vehicle involved; there was no prejudice to the general public and no detriment was caused to others less financially well-off than the customer in this case.

LLOYD AJ

Cases cited:

S v A, 1979(4) SA 51 (R);

S v Gwarada, 1981 (2) SA 531 (ZAD);

S v Narker and Another, 1975 (1) SA 583 (AD);

S v Kumalo, 1973 (3) SA 697 (AD);

S v Scheepers (*supra*).

CW Jordaan for the appellants.

HI Bisset for the respondent.

Judgment

Lloyd AJ: The appellants were jointly charged with a contravention of Section 3 (a) of the Prevention of Corruption Act [*Chapter 70*] (hereinafter referred to as "the Act") in the following terms:

"... in that upon or about the 19th day of November, ... 1981 and at or near Bulawayo in the said Province the said accused did each and both or one or other of them wrongfully and unlawfully accept or obtain, or agree to accept, or attempt to obtain from any person, to wit, Detective Inspector Lubbe of the Criminal Investigation Department, Bulawayo, aforesaid, for themselves or any other person any gift or consideration, as an inducement or reward for doing or forbearing to do, or for having done or foreborne to do any act in reaction to their principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his or their principal's affairs or business; that is to say, did wrongfully and unlawfully agree to show favour to the said Detective Inspector Lubbe and did both and each of them agree to supply a Datsun Pulsar to the said Detective Inspector Lubbe providing that the said Detective Inspector Lubbe pay an additional cost of \$500 (five hundred dollars) over and above the cost price of the said Datsun Pulsar."

To this charge each of the appellants pleaded, and were found, guilty. They were each sentenced to undergo seven months' imprisonment with labour, of which four months' imprisonment with labour was suspended for five years on condition that the appellant was not convicted of any offence of which dishonesty is an element or of a contravention of the Act, committed during that period.

The first appellant is employed by Olivine Industries (Private) Limited in its marketing department. Neither his firm nor himself has any connexion with the motor trade. The second appellant was employed by lagoon Motors and as a salesman therefore had access to would-be purchasers of new motor-cars. Roben Motors was not the agent for Datsun motor-vehicles but came into possession of a new Datsun Pulsar passenger motor-car, which is the vehicle involved in this case and which it wished to sell.

1982 (1) ZLR p115

LLOYD AJ

The evidence of the second appellant revealed that in the motor industry in Zimbabwe there is an acute shortage of new motor-vehicles and that it is virtually impossible to obtain one unless

the would-be purchaser places himself on a waiting list and is prepared to wait for a considerable time before a vehicle becomes available to him.

The learned regional magistrate in his judgement on sentence found as a fact that the first appellant meets many people in the course of his employment and "that he was willing to, and indeed did do, the major negotiations with the potential purchaser who was willing to pay a premium for a motor-vehicle". Her name had been given to the first appellant by the second appellant. The former contacted the would-be purchaser who agreed to discuss with her husband the "premium" of \$500. However, having already purchased another motor-car and being incensed by a remark made by the first appellant in their telephone conversation, she reported the matter; to the Criminal Investigation Department of the Police which, through the would-be purchaser, arranged for one of its members to be referred to the first appellant as a prospective purchaser of the Datsun Pulsar. Negotiations were successful, the vehicle was "sold" to the policeman and the first appellant was paid \$500, a sum which he had already agreed would be shared equally with the second appellant.

The Act, described in its preamble as being "to make for the better prevention of corruption", finds its origin in Ordinance 7 of 1913 when the penalty laid down for contravention of its provisions was a fine of £500 or imprisonment for two years or both such a fine and such imprisonment. It may reasonably be presumed that in the intervening 69 years, during which the penalties for contraventions of the Act have remained the same, the attention of the Legislature has not been drawn to the necessity for an increase in the maximum penalties under the Act as a result of an increase in the prevalence of offences against its provisions.

The learned regional magistrate found that the appellants had by their agreement taken advantage of the shortage of a particular commodity in the country to try to enrich themselves. He held that their plan was well executed and premeditated in which each played an equal part, their motive being to make a premium at the expense of those fortunate enough to be in a financial position to pay the premium, and to the detriment of those not so financially well-off, who believed in the honesty and integrity of the motor dealers in this country, to

1982 (1) ZLR p116

LLOYD AJ

whom the State has entrusted the distribution of these scarce and expensive commodities." He referred to public indignation being aroused by the actions of the appellants, not a major factor to be taken into account, he said, but nevertheless a factor in assessing sentence.

Having set out the purposes of sentence as fourfold, retributive, deterrent, reformatory and punitive, in this case he felt, having regard to the prevailing circumstances, that the deterrent aspect was perhaps the most important. He went on to say: "Particularly as this type of offence is not easily detectable and for the reasons I have already given, the sentence must be such as to warn others that this sort of behaviour will not be tolerated as it strikes to the roots of our society, and it is insidious crime, difficult to eradicate. It can, if unchecked or if inadequately punished by the Courts, have a demoralising effect on business standards and fair trading."

Mr *Jordaan*, who appeared for the appellants, submitted that the learned regional magistrate

erred in relying upon the considerations which I have set out above and in concluding that the deterrent aspect in of sentence was the most important aspect. He submitted, relying upon *Hunt*, South African Criminal Law and Procedure, Vol. 2 page 225, and *S v A*, 1979 (4) SA 51 (R) at 60E-F, that the Act was designed to safeguard the interests of employers or principals, the prejudice caused to them being of primary importance and not the prejudice to the general public. The reference in the lodgement of the court below to public indignation being aroused by people like the appellants, he submitted, lost sight of the nature of the offence since the appellants were not charged with contravening a statute dealing with price control. Since there was no waiting list for the car involved, no actual prejudice had been caused to the general public nor "detriment to" those not so financially well-off." The seriousness of the offence where the offender was not in a position of great authority or trust was thus lessened. The second appellant was employed as a salesman, it appearing that he had no real authority regarding the allocation of vehicles. The first appellant was not employed by the complainant Roben Motors and was guilty as a *socius criminis* to the second appellant's offence.

Referring to the extent of the prejudice caused to the employer or principal, Mr *Jordaan* submitted that the conduct of the appellants could not cause any monetary prejudice to the complainant, since it would receive the same purchase price whether the vehicle was sold to the briber or to another customer. He submitted that the finding that the complainant was prejudiced in its reputation was completely

1982 (1) ZLR p117

LLOYD AJ

unjustified because it could not be understood that the complainant was a party to, or condoner of, the offence; the second appellant testified to being at pains to ensure that his employer was not involved in the transaction.

As to the first appellant, Mr *Jordaan* urged that there was no active persuasion of the original would-be purchaser by him and that it was she and members of the CID who assumed an active role after the initial contact. There was also evidence that the first appellant was somewhat reluctant to go through with the transaction.

Turning to the circumstances surrounding the offence, Mr *Jordan* submitted that the complainant happened to have a Datsun Pulsar in c stock with which it did not normally deal and for which there was no waiting list. The second appellant was in severe financial difficulties of which the first appellant was aware. The latter knew of people prepared to pay a premium for a new vehicle and the second appellant decided to commit the offence in view of his pressing financial problems.

Dealing with the factors personal to the appellants, they were aged 38 and 34 respectively. Both were married with young children. They were first offenders and had pleaded guilty. The agreed facts showed that they were genuinely contrite, co-operative and helpful during the course of the investigations. The second appellant had lost his employment as a result of the offence. Relying on the dicta in the case of *S v Gwarada*, 1981 (2) SA 531 (ZAD) at 533A-E, Mr *Jordan* submitted that the learned regional magistrate overlooked the deterrent effect of a fine

where the criminal conduct was aimed at securing a financial advantage.

Mr *Bisset*, for the State, in supporting the sentences upon the appellants, submitted that the Act in providing protection against corruption for the benefit of employers also provided protection to the public at large. The facts that the appellants were not charged with contravening price control legislation and that there was, in fact, no actual prejudice to the general public did not assist the appellants who brazenly and to the prejudice of the second appellant's employer and the would-be purchaser, attempted to obtain an advantage to which they were not entitled. The second appellant's Hence was a serious breach of the trust reposed in him by his employer. The first appellant knew of this breach.

The passage from *Hunt (supra)* referred to by Mr *Jordaan*, states that the Act not only seeks to protect the interests of the State and of the community in an upright public administration, but also fee interests

1982 (1) ZLR p118

LLOYD AJ

of private employers and principals in having upright employees and agents. Mr *Bisset* put the protection as being designed to shield the public against dishonest commercial practices.

Against the background of the facts and the submissions of counsel, the grounds of appeal against sentence fall for consideration. They are that the trial court misdirected itself in finding that this was an aggravated and/or prevalent type of offence under the Act and that a deterrent sentence was therefore necessary, or alternatively, that the sentence was manifestly excessive.

That the offence is a serious one cannot be gainsaid and as such calls for a deterrent sentence. It is "statutory bribery" although not so serious as common law bribery which can be committed only in respect of State officials. In *S v Narker and Another*, 1975 (1) SA 583 (AD) at 586A-B,

Holmes JA said:

"Bribery is a corrupt and ugly offence stiking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence, see *R v Chorle*, 1945 AD 487 at pages 496-7; and *Limbada v Dwarika*, 1957 (3) SA 60 (N.)."

This passage translated into the commercial field of employer and employee can perhaps be thus: "calculated to deprive society of fair business dealing - of a proper and honest regulation of commercial affairs". Looked at in this light the present offence strikes at the very heart of commercial honesty and integrity.

Yet, in the final analysis of this case, in so far as sentence is concerned, the remarks of the South African Appellate Division in *S v Kumalo*, 1973 (3) SA 697 at 698A-B are appropriate:

"Punishment must fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances ... The last of these four elements is sometimes overlooked."

(The underlining is mine).

It would appear that basically the learned regional magistrate lost sight of the rather unusual circumstances surrounding the present offence. In particular these were, firstly, that the complainant did not deal in this type of vehicle for which there was no waiting list; secondly, there was no actual prejudice to the general public and the appellants had not caused any "detriment to those riot so financially well-off", in the absence of a waiting list for the vehicle, thirdly, in the result the vehicle was allocated by management and without reference to the second appellant.

1982 (1) ZLR p119

HOLMES JA

Further, the learned regional magistrate had regard to public indignation and the prevalence of the offence. There is no evidence that the practice, of seeking premiums, as they have been termed, was rife or existed at all. Finally, it would seem that an exaggerated view of the seriousness of the offence was taken and of the necessity to stamp it out, resulting in a decision that imprisonment was the only punishment for it.

In *S v Scheepers*, 1977 (2) SA 154 (AD) at 159, VILJOEN, AJA referred to punishments appropriate for retributive and deterrent purposes:

"Imprisonment is not the only punishment which is appropriate for retributive and deterrent puposes. Apart from the fact that the Republic's prisons are overcrowded and that the upkeep of prisons and the maintenance of prisoners place a tremendous economic burden on the State, there are also other disadvantages attaching to imprisonment. The convicted person is removed from society, he is deprived of all responsibility and opportunities of acting independently as a free member of the community, his life is disrupted, manpower is lost and the prisoner comes; into contact with elements which are not at all elevating and a stigma attaches to him which is out of all proportion to that which he possibly deserves. If the same purposes in regard to the nature of the offence and the interests of the public can be attained by means of an alternative punishment to imprisonment, preference should, in the interests of the convicted offender, be given to the alternative punishments. I am personally of the opinion, that imprisonment is only justified if it is necessary that the offender be removed from society for the protection of the public and if the objects striven for by the sentencing authority cannot be attained by any alternative punishment."

This case is concerned with a single fall from the honesty and rectitude required by the Act, on the part of two young businessmen aged respectively 38 and 34 years. The principal offender in terms of to Act was the second appellant, employed by the complainant, and the more active participant in securing the bribe from the would-be purchaser was the first appellant who, in relation to the actual offence, was, as Mr *Jordaan* rightly submitted, a *socius criminis*. As previously said, there is no evidence of the prevalence of the offence which they committed. The second appellant was in grave financial difficulties at the time. These difficulties will have been exacerbated by the loss of his employment arising from his conviction and the costs of his defence. He, like the first appellant, is the father of a young family. In his precarious financial plight he yielded to temptation. The firm appellant was aware of these difficulties of his co appellant and, while stipulating for an equal share of his ill-gotten gains, said he was conscious of his co -appellant's plight. There is nothing fin the evidence to gainsay his alleged compassion.

1982 (1) ZLR p120

HOLMES JA

These were "the circumstances", the Fourth criterion of punishment as adumbrated in *Kumalo's* case (*supra*), in which punishment had to be assessed. As has been said, the case was unusual, the temptation of the appellants significant, the offence was not prevalent, the public was not prejudiced by the unusual circumstances in which the acts of the appellants arose.

In all these circumstances is the justice of the case to be met by imprisoning the appellants? In my view it should not be so met for the very reasons supplied by VILJOEN, AJA, in *Scheepers'* case (*supra*).

The appellants have fallen from grace on one occasion only in unusual circumstances. I am satisfied that the stigma of their trial and its attendant publicity, the disruption of the second appellant's commercial life, and the frustration of their somewhat amateurish attempt to gain a shameful profit for themselves, are all factors which will ensure their commercial honesty in future. If I am wrong in this belief, a suspended sentence of imprisonment will help to ensure it. I am also satisfied that a substantial fine will have a very salutary effect, especially when it is considerably greater than the illegal profit which they sought.

For all these reasons the appeals against the sentence of imprisonment imposed upon the appellants are upheld. The sentence are set aside and the following sentences are substituted therefor:

"Each of the accused is sentenced to pay a fine of \$600 or, in default of payment, to undergo three months' imprisonment with labour. In addition, three months' imprisonment with labour, the whole of which is suspended for three years provided that during that period the accused is not convicted of the offence of bribery or of a contravention of section 3 of the Prevention of Corruption Act [*Chapter 70*] for which he is sentenced to imprisonment without the option of a fine."

Gubbay J: I agree. The appeal against the sentences is allowed to the extent set out in the judgment of my brother LLOYD. In respect of each appellant the warrant of committal is suspended for a period of seven days from today.

1982 (1) ZLR p121

S v FRACTION 1982 (1) ZLR 121 (HC)

Court High Court, Salisbury

Squires, J

31st March, 1982

Flynote

Criminal law - theft - what is - removal of property from innocent possessor who had no rights against owner of property in order to return property to rightful owner - such conduct not theft.

Headnote

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The accused, in order to raise money for gambling, had pledged a borrowed bicycle as security for a loan. The next day he returned to the home of the person who had possession of the bicycle and by a ruse took possession of it. He returned it to its true owner.

Held, that had the owner of the bicycle taken it from the innocent possessor, who had no real or personal rights against him, he would certainly not be guilty of theft. Equally, neither should someone like the accused be guilty of theft, for he did not intend to steal the bicycle from its owner but only to redeem his own folly in pledging it.

Cases cited:

R v Fortuin, (1883) 1 Buch AC 290;

S v Sibanda, G-B-65-79 (not reported);

S v Ndlovu; *S v Ngwenya*, 1971 (2) RLR 190;

R v Sibiya, 1955 (4) SA 247 (AD).

Judgment

Squires J: The accused in this case was charged with one count of theft by conversion, one count of pretending to be a policeman in contravention of section 70 A) (a) of the Police Act [Chapter 98] and one count of theft by false pretences. The facts arose out of a not unfamiliar sequence of events that show the rural peasant's somewhat elastic regard for the laws of property combined with his belief that the gods will always smile upon him. The accused, who apparently lived in or near Karoi, wanted to visit a beer-drink at a nearby farm and borrowed a bicycle from a friend to enable him to travel more quickly and comfortably. After enjoying the wares of the beer maker, and despite - or because of - the lateness of the hour, he repaired to another nearby farm in search of further entertainment. This he found in

1982 (1) ZLR p122

SQUIRES J

a gambling school, but unfortunately his desire to take part was outweighed by an extreme paucity of cash and the members of the school declined to let him play on credit. The solution to the problem lay ready to hand in the loan of his friend's tricycle, and he thereupon raised a loan from one Ruwende in the sum of \$8 on the pledge of the tricycle as security for its repayment. The agreement was that the loan would be repaid on the following day, when the accused was to return and collect the bicycle upon repayment of the money lent. Armed with his \$8 the accused was then welcomed into the school, and whether he be regarded as a fool or not, for the remainder of the night he was steadily parted from it, until by 5 a.m. he was as penniless as when he first wanted to join. Like many another unsuccessful punter he then had to proceed home on foot, but later the following day he returned to the home of Ruwende, possibly to negotiate a roll-over of facilities or re-schedule the repayment of the \$8. However, he found only Ruwende's wife at home, who perhaps unwisely told him that Ruwende was away at work. He turned this situation to account by announcing to Ruwende's wife that he was a policeman investigating a cycle theft, and that he had good cause to believe that Ruwende was

in possession of a stolen cycle - which as a matter of law he probably was. He required the handing over of the bicycle to him, an order with which Ruwende's wife hastily complied. By such stratagem the cycle was thereafter restored to its rightful owner, but the lender of the money was not repaid.

The pledging of the tricycle to Ruwende was the subject of the charge of theft by conversion, the giving out to Mrs. Ruwende that he was a policeman was the subject of the second, and the obtaining of the bicycle on the strength of the false representation that he was a police man was the subject of the charge of theft by false pretences.

The accused pleaded guilty to all three charges, was found guilty by the magistrate, and sentenced to a fine of \$30 or 60 days' IWL on the first count, and \$40 or 80 days' IWL on counts 2 and 3, which were taken together for purposes of sentence. Of the total of \$70 or 140 days' IWL, \$30 or 60 days' IWL was suspended for five years on appropriate conditions.

When sent to him for scrutiny, the Regional Magistrate entertained doubts about the propriety of the convictions, and accordingly sent the matter to this Court in terms of section 63A (2) (a) of the Magistrates Court Act. Not only was he concerned about the possibility of a splitting of charges on counts 2 and 3, but doubted whether the facts supported a conviction on count 1.

1982 (1) ZLR p123

SQUIRES J

So far as count 1 is concerned, however, it seems the Regional Magistrate's doubts were unfounded. It is quite true that one of the elements of theft is an intention to deprive the owner or possessor permanently of his ownership or possession of the stolen property. At the same time, however, it appears to be settled law that a constructive intention to deprive the owner permanently of his goods will suffice. So, if the taker, while the goods are in his possession, discards or disposes of the property, and in so doing is reckless as to whether or not the owner ever recovers it, then he commits theft. See *R v Foreskin*, (1883) 1 Buch. AC 290; *S v Sibanda*, G B 65/79. This seems to be the position here. When the accused pledged the complainant's cycle to Ruwende, he was on his own admission reckless as to whether the complainant ever recovered the bicycle; and had he been unable to pay the \$8 back the next day, and Ruwende wanted to sell the tricycle to recoup his loan, he appreciated that Ruwende could do so. This, it seems to me, is theft just as much as it is theft to take the car of another and abandon it without caring whether the owner sees it again or not.

But so far as counts 2 and 3 are concerned, particularly count 3, I think the Regional Magistrate's doubts are fully justified.

In the first place it seems clear that there was a splitting of charges because the false pretence alleged in count 3 was the substance of the impersonation alleged in count 2. Because even if there were two acts committed here which could be said to be criminal if standing alone, they were clearly done with one intent, namely to regain possession of the bicycle. The two acts really constituted one criminal transaction and in such a case the accused ought only to be charged with one offence. Cf *S v Ndhlovu*; *S v Ngwenya*, 1971 (2) RLR 190.

But in the second place and even discounting the splitting of the charges, I have grave doubts

as to whether count 3 can be sustained. The charge alleges in substance - though its details are untidy - that the accused falsely pretended to be a policeman to Mrs. Ruwende, and by means of that false pretence obtained possession of the bicycle from her, which he thereupon took for his own use. In fact he did not take it for his own use, but to restore it to the true owner, which it appears that he did before ever the matter was reported to the police. Can one commit theft if overtakes property even from an innocent possessor in order to restore it to the rightful owner, where that innocent possessor does not hold it on the basis of any real or personal right against the owner? The owner would certainly not be committing theft if he took back the property from such a person, and I do not think that someone

1982 (1) ZLR p124

SQUIRES J

like the accused, who was taking it to restore to the owner, should be guilty of theft either, for he certainly did not intend to steal it from the owner but only to redeem his own folly in pledging it to Ruwende. While there was certainly a deceit practised on the custodian of the bicycle, and the pledgee may have been deprived of his security for the loan, it was certainly not theft by this accused of the bicycle as had been charged. As was said by SCHREINER, ACJ, in *R v Sibiya*, 1955 (4) SA 247 (AD) at 257A:

"A thief is with us a criminal and a person should not be stigmatized as a thief unless he has done what in South Africa is well recognized as constituting the crime of theft, In other words ... unless In common parlance, he "intended to steal the thing."

With the agreement of my brother WADDINGTON therefore the conviction on count 3 must be quashed. Since the sentence related to this count was part of the globular sentence imposed on counts 2 and 3, it is necessary to re-assess the sentence imposed on count 2 since that imposed on count 3 must obviously be set aside.

Normally, of course, impersonation of a policeman is regarded seriously since it is so often the means used to search or rob some innocent victim or otherwise effect some criminal intent. Here, although it is true the accused lied in so pretending, it was not to commit an offence so much as to repair the damage he had done to the owner of the cycle. It is also true that Ruwende is \$8 out of pocket, but according to the inquiries of the Director of Public Prosecutions, there is every hope that this sum will be repaid shortly. In those circumstances, and on the safe assumption that the accused will have learnt his lessons from the fine imposed on count 1, the justice of the case will be met by a caution and discharge on count 2. The conviction and sentence on count 1 is confirmed. But the remainder of the sentence, including the suspended sentence, is set aside, and substituted by a caution and discharge on count 2.

1982 (1) ZLR p125

S v NDHLOVU 1982 (1) ZLR 125 (HC)

Court High Court, Bulawayo

Gubbay, J

2nd April, 1982

Flynote

Criminal law - Exchange Control Regulations, 1977 - section 5 (1) - failing to offer foreign currency for sale to an authorised dealer - offence applies only to such currency in excess of value of \$20 - no offence committed if value is \$20 or less.

Headnote

It is not an offence to receive any amount of unsolicited foreign currency through the post. It is an offence to possess more than \$20 worth of foreign currency and fail to offer that currency for sale to an authorised dealer. However, the offence applies only to the currency in excess of \$20 in value and a fine imposed and forfeiture order made should be restricted to that amount.

Where the accused had in his possession R100 in South African currency, whose local value was \$76, he committed an offence in respect of only \$56 worth of that currency when he failed to offer it for sale to an authorised dealer.

Case cited:

S v Ferrao, 1973 (2) RLR 224 (AD).

Judgment

Gubbay J: The accused was charged with contravening section 5 (1) of the Exchange control Regulations, 1977, in that he had in his possession, in Zimbabwe, 100 rands in South African currency and had failed to offer such foreign currency for sale to an authorised dealer as soon as was reasonably possible in the circumstances. He was convicted upon his plea of guilty and no special reasons being found in terms of section 5 (3a) of the Exchange control Act [*Chapter 170*], was sentenced to a fine of \$76 (being the value of the currency concerned) or, in default of payment, two months' imprisonment with labour. In addition, it was ordered that the R100 be forfeited to the State.

The facts were brief. The accused received in the post from South Africa the sum of R150. He disposed of R50 to an authorised dealer and retained the balance.

1982 (1) ZLR p126

GUBBAY J

The regional magistrate before whom the proceedings were laid for scrutiny, queried the propriety of the conviction, sentence and order for forfeiture, on the ground that section 5 (1) of the Regulations permits of the possession in this country of up to \$20 of foreign currency. He referred the trial magistrate to *S v Ferrao*, 1973 (2) R L.R 224 (AD), in support of his opinion that the accused should only have been convicted of failing to offer for sale the amount of foreign currency in excess of the equivalent of \$20 and further, that the fine imposed, and the forfeiture order made, should have been restricted to this amount.

In *S v Ferrao* (*supra*) BEADLE CJ upheld the order of the Court *a quo* declaring that the Mocambique escudos unlawfully in the possession of the appellant were to be forfeited, save that he reduced the amount thereof by escudos to the value of \$20 (see at pages 226D-E and 228E). Unquestionably the same approach applies to the provisions of section 5 (3a) of the Act. If a person is entitled to possess \$20 in value of foreign currency without surrendering it to an authorised dealer, he should not incur a minimum fine in respect of it.

The trial magistrate contends that *S v Ferrao* is distinguishable on the basis that as in the present case the accused obtained the foreign currency otherwise than through an authorised dealer, the entire amount was possessed illegally *ab initio*; consequently the conviction, mandatory fine and order for forfeiture in respect of the sum of R100, was warranted. In my view this contention is untenable. There is no suggestion that *Ferrao* obtained so large an amount of escudos from a local authorised dealer. To the contrary there is every vindication from a perusal of the acts that he did not. But of far more significance, the Regulations simply do not prohibit the unsolicited receipt of foreign currency in this country through the post. A criminal sanction is only incurred when the recipient fails, if the foreign currency exceeds \$20 in value, to offer such excess for sale to an authorised dealer in accordance with his obligations under section 5 (1).

The conviction of the accused in respect of the unlawful possession of R73,57 is confirmed. The sentence is altered to a fine of \$56 (being the equivalent, to the nearest dollar, of R73,57) or, in default of payment six weeks' imprisonment with labour. The order for forfeiture is reduced from R100 to R73,57.

Lloyd AJ: has read this judgment and agrees, with it.

1982 (1) ZLR p127

S v MOYO 1982 (1) ZLR 127 (HC)

Court **High Court, Bulawayo**

Gubbay, J, and Lloyd, A J.

2nd and 16th April, 1982

Flynote

Criminal procedure - sentence - customs and Excise Act [Chapter 177] smuggling - order of forfeiture in terms of section 190 (1) (b) (i) - not competent for court to make forfeiture order *mero motu*.

Headnote

It is not competent for a court, in passing sentence for an offence under the Customs and Excise Act [Chapter 177], *mere motu* to order the forfeiture of smuggled goods. A forfeiture order is in the nature of a civil judgment in favour of the Controller of Customs and Excise; it does not form part of the sentence of the court. The Controller has a discretion as to whether or not to ask for forfeiture of smuggled goods. It thus offends against principle that the court, in the

absence of a request from the Controller or even contrary to intimation that a forfeiture order is not sought at all, should be entitled *mero mote* to grant an order for forfeiture.

Cases cited:

S v de Wet, 1979 RLR 147; 1979 (2) SA 1183 (RAD)

Attorney-General (Transvaal) v Steenkamp, 1954 (1) SA 351 (AD);

R v Alfred, 1966 RLR 501; 1966 (3) SA 701 (R)

H I Bisset for the appellant.

J James, for the respondent.

Judgment

Gubbay J: The appellant was convicted upon a plea of guilty of contravening section 165 of the Customs and Excise Act [*Chapter 177*]. He was sentenced to a fine of \$500 or, in default of payment, three months' imprisonment with labour, and it was ordered that the goods he had smuggled into Zimbabwe be forfeited to the State. Summary judgment was granted in favour of the Controller of Customs and Excise in the sum of \$180,95, representing the unpaid customs duty on the smuggled goods. The appellant was also convicted of four contraventions of the Immigration Act, 1979, relating to his unlawful exit from, and re-entry into, Zimbabwe. These offences were taken as one and he was sentenced to a fine of \$50 or, in default of payment, 30 days' imprisonment with labour.

1982 (1) ZLR p128

GUBBAY J

An appeal was noted on various grounds against both sentences and against the order of forfeiture, but Mr *Bisset*, who appeared for the appellant, wisely abandoned the appeal in respect of the contraventions and the Immigration Act.

According to the statement of agreed facts, the appellant had been employed in the Republic of South Africa. On 12th December, 1981, he departed therefrom in possession of a large quantity of ladies' and childrens' clothing, to the value of \$517. The articles were intended for the personal use of his wife and two children, and in entering this country by evasion the appellant failed to declare them.

Following upon verdict, the prosecutor made application to the magistrate for the grant of summary judgment in favour of the Controller for the unpaid duty on the articles. He specifically advised the magistrate that he was not seeking a declaration that they be forfeited to the State, giving as the reason that the appellant had purchased the clothing with his hard earned savings. The magistrate, though unimpressed by the cogency of this explanation, did not suggest to the prosecutor that he reconsider his decision, nor did he enquire whether he was acting pursuant to the authority of the Controller. Being of the opinion that the exercise of the Court's discretion under section 190 (1) (is) (i) of the Act to declare articles to be forfeited to the State was in no way affected by what the prosecutor requested or refrained from requesting, he made the order

in question.

Mr *Bisset* submitted that it was not competent for the magistrate *mero mote* to declare the smuggled goods to be forfeited to the State where it was expressly intimated that such an order was not sought. He relied heavily on the *ratio decidendi* in *S v de Wet*, 1979 (2) SA 1183 (RAD) at 1187F-1188D. In that case the prosecutor, in compliance with an instruction from the Controller, applied to the regional magistrate only for summary Judgment for the unpaid duty on two diamond rings the appellant had received into his possession in contravention of section 157 (2) (by of the Act. The regional magistrate, purporting to act in terms of section 190, (1) (b) (ii), gave summary judgment in favour of the Controller in the sum of \$4185, being the duty paid value of the rings. He made no order in respect of the unpaid duty. DAVIES, JA, with whom MACDONALD, CJ, and LEWIS, JP. concurred, held that as summary judgment is by its very nature a civil judgment, the regional magistrate was not empowered to grant it *mero motu*. It was for the Controller to determine what he sought and instruct the prosecutor accordingly.

1982 (1) ZLR p129

GUBBAY J

Mr *Bisset* argued that a forfeiture order is of the nature of a civil remedy, no less than is the grant of summary judgment in favour of the Controller. He advanced three points in support of this proposition. Firstly, an order of forfeiture made in pursuance of a statutory power is not considered to be part of the sentence of the Court. See *Attorney-General (Transvaal) v Steenkamp*, 1954 (1) SA 351 (AD), *R v Alfred*, 1966 (3) SA 701 (R) at 702 *fin*. Secondly, the provisions of Action 190 are expressed to be without derogation from the provisions of section 176. The latter section entitles the Controller to declare articles to be forfeited. If criminal proceedings have been instituted, his right to order forfeiture is suspended, but will be revived if those proceedings are "abandoned or discontinued or are concluded otherwise than with the conviction of the accused". (See section 176 (6) (c)). If the accused is convicted, then the Controller is obliged to seek a forfeiture order under the provisions of section 190 (1) (b) (i) of the Act. His right to proceed under section 176 is lost. This is because It is easier and more expeditious for the Court which has adjudicated at the trial of the accused to determine whether the articles concerned in the offence should be forfeited. It obviates the necessity for the Controller to take further proceedings and so leads to finality. But just as the Controller may decide in the exercise of his discretion not to enforce his power under section 176 (6) (b) so too, if he considers that the facts proved at the trial do not warrant it, he may refrain from asking the Court to order forfeiture. Finally, forfeiture and summary judgment for an amount equal to the duty paid value of the articles, are dealt with *pari passu* in section 190 (1) (b) of the Act. This indicates that the lawmaker intended the two remedies to be related in nature. It would be anomalous, to say the least, if a Court, which could not *mero motu* grant sublumary judgment for the duty paid value of articles, could nonetheless against Me wish of the Controller, declare them to be forfeited to the State.

Mr *James*, for the State, did not contest the validity of Mr *Bisset*'s argument. I am in no doubt that it is correct.

In S v de Wet, (*supra*), DAVIES, JA, at 1187G-H said:

"It clearly offends against principle that a court should be entitled *mero mote* to grant a civil judgment to a person who does not seek it. Moreover the person in whose favour a civil judgment is granted has the power to decide, in the final event, whether or not to enforce the judgment by execution; one cannot have a situation in which a court *mero motu* grants a civil judgment in favour of a person who has in his power not to enforce it, for such a judgment would then become a *brutum fulmen* and the court would be brought into contempt."

1982 (1) ZLR p130

GUBBAY J

I think it offends equally against principle that a Court should be empowered to impose ownership in goods upon the State where its officer and servant, the Controller, is opposed to their acceptance. One has only to postulate the forfeiture of contaminated or perished foodstuffs, the disposal of which would involve the Controller in inconvenience and expense. Furthermore, an order of forfeiture requires that the articles be taken possession of. If the State were to decline delivery, the Court could not enforce its order. In the result the order would become a *brutum fulmen*.

It follows that the order declaring the goods smuggled by the appellant to be forfeited to the State cannot stand. Mr *Bisset* conceded, properly in my view, that in such event there was no justification for reducing the fine imposed upon the appellant. The appeal is, therefore, allowed to the extent that the order of forfeiture is set aside.

Lloyd AJ: I agree.

Lazarus & Sarif, appellant's legal practitioners.

1982 (1) ZLR p131

S v RAUTENBACH 1982 (1) ZLR 131 (HC)

Court High Court, Salisbury

McNally, J

21st April, 1982

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - section 210 - conviction of lesser offence with which not actually charged - failure to display vehicle licence and valid certificate of fitness - competent verdicts on charges of failure to keep vehicle licensed and of not being in possession of certificate of fitness, provided no prejudice to accused.

Headnote

The accused was charged with failure to keep his trailer licensed, in contravention of the Vehicle Registration and Licensing Act [Chapter 265] and with not being in possession of a valid certificate of fitness for the trailer, in contravention of the Road Motor Transportation Act [Chapter 262]. In fact the trailer was licensed and the accused did have a valid certificate of

fitness. However, he had not displayed these documents. Failure to display them amounted to contraventions of other sections of the respective Acts. The question arose whether it was competent to convict the accused of these lesser offences, relying on the provisions of section 210 of the Criminal Procedure and Evidence Act [*Chapter 59*]

Held, that section 210 covers the situations where -

- (a) the commission of the offence defined in the enactment includes the commission of another, lesser, offence; or
- (b) the commission of the offence as set forth in the charge includes the commission of another, lesser, offence.

In either case the accused must not be prejudiced by invoking the section.

Held, further, that failure to keep a vehicle licensed necessarily included a failure to display the certificate. In the circumstances of the present case, no prejudice could result to the accused if section 210 were invoked.

Cases cited:

R v Ackerman, 1920 CPD 245;

R v Loyi, 1942 SR 129;

R v Moosa & Others, 1960 (3) SA 517 (AD);

1982 (1) ZLR p132

McNALLY J

S v Ndwande, 1976 (1) SA 323 (N);

S v Josiya, 1970 (2) RLR 43, 1970 (4) SA 549 (R);

S v Tshayisa & Another, 1973 (3) SA 872 (E).

Judgment

McNally J: The accused in this case was charged with failing to keep his trailer licensed, in terms of the provisions of section 22 (1) as read with section 45 of the Vehicle Registration and Licensing Act, No. 23 of 1970 (which Act is now Chapter 265), and with not being in possession of a valid certificate of fitness for the said vehicle in contravention of the requirements of section 5 (1) (c) as read with section 5 (3) of the Road Motor Transportation Act [*Chapter 262*]

In fact, the accused had both these documents and produced them at his trial. However, he appears to have conceded that he was guilty of failing to carry or display these documents, whereupon the Magistrate found him guilty of "the alternative charges" and fined him \$30 and \$20) respectively.

Unhappily, there were no alternative charges in the charge sheet. The Magistrate has asked that his error be remedied. He has not made any suggestion as to how it is to be remedied. He

has left it to this Court to solve what is not an easy problem.

The accused has *prima facie* committed two offences, but they are not the offences charged. Section 29 of the Vehicle Registration and Licensing Act [Chapter 265], as read with sections 43 and 45, makes it an offence not to display and maintain a licence upon the vehicle to which it relates, in the prescribed manner. Section 12 (1) (b) of the Road Motor Transportation Act [Chapter 262] requires the owner of a public service vehicle to maintain in such a position and in such a manner as may be prescribed a current certificate of fitness firmly affixed to the motor vehicle to which it relates. Section 36 (1) (b), as read with section 36 (2), makes it an offence to fail to produce the certificate on demand by a proper authority.

The manner of display is prescribed in Part III of RGN 733 of 1970, in the case of the licence, and in section 7 of RGN 881 of 1972 in the case of the certificate of fitness.

The question is - what is to be done? Section 210 of the Criminal Procedure and Evidence Act [Chapter 59] provides as follows:

"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."

1982 (1) ZLR p133

McNALLY J

The decided cases on this or on identical sections run from *R v Ackerman*, 1920 CPD 245, through *R v Loyi*, 1942 SR 129 to *R v Moosa & Others*, 1960 (3) SA 517 (AD) at 530H *et seq.* The latter case has frequently been referred to, most relevantly and recently in *S v Ndwandwe*, 1976 (1) SA 323 (N), but also in these courts in *S v Josiya*, 1970 (4) SA 549 (R). I note in passing that a conviction for assault was not allowed to stand on a charge of fighting (in contravention of a statute) in *S v Tshayisa & Another*, 1973 (3) SA 872 (E.).

It is clear that the applicability of section 210 of the Code arises in two situations -

- (a) where the commission of the offence as defined in the enactment includes the commission of another (lesser) offence; or
- (b) where the commission of the offence as set forth in the charge includes the commission of another (lesser) offence

and in every case provided that the accused is not prejudiced by the amendment.

It is equally clear that *Moosa's* case has modified the decision in *Ackerman's* case to the extent that SCHREINER JA said in the former case that GARDINER, J, was wrong in the latter case in saying that there must actually be some mention (in the indictment, summons or charge) of the minor offences. What GARDINER, J, said was, "I am disposed to think that there must be some mention of the minor offence, in the way in which statutory offences ought to be mentioned, namely, by reference to the section alleged to have been contravened."

I turn to the facts of the present case. On the first count there is alleged "that the said accused,

being the owner of a registered vehicle ... did wrongfully and unlawfully fail to keep the said vehicle licensed ... and thus the said accused did commit the crime of contravening section 22 (1) as read with section 45 of the Vehicle Registration and Licensing Act, No. 23 of 1970."

The offence as defined in the enactment is a breach of the requirement that "the owner of every registered vehicle shall keep such vehicle licensed in terms of the provisions of this Act". The offence set forth in the charge is essentially the same.

In *Moosa's* case the learned Judge of Appeal could say, "Where, as here, the charge alleges that the accused contravened section 61 (1) (c) in that he possessed dagga for sale, this includes a contravention of

1982 (1) ZLR p134

McNALLY J

section 61 (1) (d) in the form of an allegation that he possessed dagga. Possessing dagga for sale is nothing but possessing dagga with, super added, a purpose."

By parity of reasoning it seems to me that one can say that failure to keep a vehicle licensed necessarily includes a failure to display and maintain a licence upon the vehicle to which it relates, in the prescribed manner. To use the words of SCHREINER, JA adapted, one could say, "Failing to possess a licence is nothing but failing to display a licence with, superadded, a reason."

The same thinking applies to the second count. The enactment requires that "no person shall operate or cause or permit to be operated on any road any public service vehicle unless . . . he is in possession of a valid certificate of fitness for such vehicle." The charge alleged that "the accused, being the owner of a public service vehicle ... operating under a road service permit, did wrongfully and unlawfully operate or cause or permit to be operated on a road ... the said public service vehicle not being in possession of a valid certificate of fitness for the said vehicle."

Again, I think failure to possess a valid certificate of fitness necessarily includes failure to display it. If you display it, you must possess it. If you do not possess it, you cannot display it. If you possess it, you may or may not display it.

Finally, I must consider whether it would prejudice the accused in any way if the charge is amended at this stage. It appears that at the hearing the accused "produced both documents above and admitted that he did not have them at the time of arrest". The Magistrate must mean that he admitted that he did not have them in his possession on the vehicle, otherwise I do not know why the Magistrate did not convict him as charged. But whatever the accused meant, he must have intended at least to admit that he was not displaying them as he was required to do. Bearing in mind that this is a statutory offence for which *mens rea* is not required, is it reasonable to suppose that he might have had some valid excuse for this failure to display which he omitted to mention? I do not see any reasonable possibility of this, particularly since he pleaded guilty to the so-called alternative charge. Moreover, the amended charges could not take the accused by surprise since it was his failure to display the licence/certificate in the first place which gave rise to the inference that he did not possess them. Accordingly, I

regard this as a props case for the application for the provisions of section 210 of the Code.

1982 (1) ZLR p135

McNALLY J

Accordingly, on count 1 the conviction is altered to a conviction of contravening section 29 of the Vehicle Registration and Licensing Act [*Chapter 265*], as read with sections 43 and 45 of the said Act and Part III of RGN 733 of 1970.

On count 2 the conviction is altered to a conviction of contravening section 12 (1) (a) of the Road Motor Transportation Act [*Chapter 262*], as read with sections 80 and 81 of the said Act and section 7 of RGN 881 of 1972.

Subject to the above, the convictions and sentences are confirmed.

Squires J: agrees.

1982 (1) ZLR p136

GWINYAYI v NYAGUWA 1982 (1) ZLR 136 (SC)

Court **Supreme Court, Salisbury**

Georges, JA, and Dumbutshena, AJA

29th January and 28th April, 1982

Flynote

Practice and procedure - costs - ward of costs on an attorney and client scale - necessary to find that action was dishonest or fraudulent or motivated by malice.

Headnote

Attorney and client costs should be awarded against an unsuccessful party in exceptional circumstances. Before an award of costs is made on an attorney and client basis, there must be a finding that the claim was dishonest or fraudulent or motivated by malice. The fact that the party was a bad witness should not be considered as a factor, nor should the act that the case was litigated on a basis that was in fact misconceived. The fact that a party to a contract was anxious to end what she considered a bad bargain and to take advantage of any breach on the part of the other party which might justify cancellation would also not in itself be enough to justify an order for costs on an attorney and client scale.

Case cited:

Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging, 1946 AD 597.

M J Gillespie, for the appellant.

N M R Gardener, for the respondent.

Judgment

Georges JA: The appellant, the plaintiff in the court *a quo*, is the owner of business premises at Stand 1463, Kambuzuma. In July 1976 she sub-leased these premises to the respondent for a period of four years at a rental of \$120 per month payable in cash in advance on or before the 5th day of the month to which the rental related.

Clause 8 of the lease provided as follows:

"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 payment shall be construed to waive her rights."

1982 (1) ZLR p137

GEORGES JA

Clause 9 gave the respondent the option of renewing the sub-lease for a further period of four years on the same terms and conditions as the sub-lease but without the option to renew provided that the respondent gave notice in writing of his intention to renew within a stated period prior to the expiration of the original sub-lease.

It appears that rent was paid promptly until some time in 1979 when the appellant left for what was then known as the Tribal Trust Lands and she asked the respondent to pay the rent to Sagit Trust. They held a bond on the premises and monthly payments had to be made to them. She discovered some time after her departure that the respondent had been late in making the monthly payments to Sagit.

As a result she served on the respondent what has been described as a notice to quit.

[His Lordship outlined the course of events and continued:]

Summons was filed on 12th December, 1980, claiming an order for eviction on the ground of breach of the lease agreement - the allegation being that the rent had not been paid on time. Fourteen late payments were itemized stretching from February 1979 to June 1980.

It was clear on the evidence and on the pleadings that the action could not succeed. The trial magistrate granted absolution from the instance at the close of the case for the appellant.

[His Lordship dealt with the merits of the case, and continued:]

In considering the question of costs the trial magistrate came to the conclusion that he should order the appellant to pay the respondent's costs on an attorney and client basis. A number of factors led to that decision. He found that the appellant and her husband were unsatisfactory witnesses - a finding supported by a reading of the record. He was quite correctly suspicious about the authenticity of copies of two letters produced by the husband on the second day of the trial. They were letters which he claimed to have written to the respondent complaining among other matters of late payment of rent. They had not been disclosed during discovery and the appellant's legal representative seemed unaware of their existence on the first day of the

trial. He found that the appellant was bent on evicting the respondent by fair means or foul - a finding based in part on the evidence that an earlier order for eviction had been sought on the patently false allegation that the respondent had not given timeous notice of his intention to exercise his option to renew.

1982 (1) ZLR p138

GEORGES JA

Even though it is conceded that the appellant and her husband were bad witnesses that of itself should not be considered as a factor in deciding whether costs should be awarded on an attorney and client scale. There should be a finding that the claim was dishonest or fraudulent or motivated by malice. This is the law in South Africa - see *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*, 1946 AD 597 at pages 609-10.

The trial magistrate should certainly not have taken into account the fact that an earlier claim had been based on an allegation of fact that was patently false. That claim had in any event been withdrawn as soon as the facts had become clear and on that basis it was not reasonable to conclude that the appellant wanted by fair means or foul to evict the respondent.

It must also be borne in mind that the case was litigated in the court *a quo* on a basis that was in fact misconceived - namely that a landlord was entitled to cancel a lease if the tenant was persistently late in paying rent, and the issue to be decided was whether the appellant had elected within a reasonable time to exercise the right to cancel. As I have indicated the right to cancel the lease for late payment arose each month when the rent was not paid on time and once late payment was accepted the right was lost. Much of the evidence canvassed at the trial was therefore irrelevant.

In the light of that misconception shared by both sides and the magistrate's misdirection in taking into account the earlier action for eviction which had been withdrawn, the manner in which the trial magistrate exercised his discretion in awarding costs is open to review.

Attorney and client costs should be awarded against an unsuccessful party only in exceptional circumstances. There was evidence that rent had on occasions not been paid on time. There was a misconception of the legal position. The appellant's conduct in this matter cannot be characterized as dishonest or malicious. It is true that she was anxious to end what she thought was a bad bargain and to take advantage of any breach on the tenant's part which would justify cancellation. That of itself is not enough to justify an order for costs on that scale.

Accordingly the appeal is dismissed with costs, but the order for costs in the court *a quo* is varied. There will be the usual order for party and party costs in favour of the respondent in that court.

Dumbutshena AJA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

Kantor & Immerman, respondent's legal representatives.

S v MATANHIRE 1982 (1) ZLR 139 (HC)

Court **High Court, Harare**

McNally, J

5th May, 1982

Flynote

Criminal procedure - sentence - principles of sentencing - first offenders - sentences of imprisonment - approach that courts should take.

Headnote

When sentencing first offenders, the courts should consider very carefully whether to send them to prison. The courts should resort more frequently to, fines than they have done in the past, if the circumstances of the case allow it. This does not mean a blanket rule that criminals only lose their amateur status after their second offence. The court should, in each case, ask itself: "Is it necessary to send this man to prison for this offence?" Only if the answer is "yes" should a term of imprisonment be imposed.

Cases cited:

S v Julius, G-S-269-80 (not reported);

S v Gwarada, 1981 (2) SA 531 (ZAD); 1981 ZLR 17;

Attorney-General v Mantwana & Another, SC 20/82 (not reported);

Harvey v The King, 1951 SR 93.

Judgment

McNally J: Whether or not to send first offenders to prison is perhaps the most difficult of all decisions for a magistrate to make. It is undoubtedly a fact that each time one sends a man to prison it becomes that much easier to send the next man to prison. The fine edge of the agony of the decision becomes blunted with use. It is perhaps one of the roles of the reviewing judge to sharpen that edge from time to time. One does this with humility, and in the hope that one has chosen an appropriate occasion.

The call for a new approach to sentencing was made in a judgment of DUMBUTSHENA, J, in this Court in the case of *S v Julius*, G-S-269-80, and was strongly supported by the CHIEF JUSTICE in *S v Gwarada*, 1981 (2) SA 531 (ZAD) at 533D in the following words:

"In a somewhat different context his Lordship Mr Justice DUMBUTSHENA in *S v Julius* recently stressed the merits of a fine as a punishment, and the

McNALLY J

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 that he said in that judgment."

The Supreme Court again approved this new approach in the case of *Attorney-General v Mantwana & Another*, Judgement No. SC 20/82. In that case it was necessary to point out that the new approach should not be taken too far. Clearly where large sums of money have been misappropriated and recovery is unlikely, the offender must be shown that crime does not pay. In such a case a man who steals thousands cannot be fined hundreds. Nor can he be sent to prison for so short a time that he can say at the end, "six months in prison for \$2 500 is not a bad deal." This is particularly so when it is unlikely (as it so often is) that the complainant will seek to assert his right of civil action against the accused.

Thus the new approach must not be seen as a blanket rule that criminals, as it were, only lose their amateur status after their second offence. One must bear in mind the dictum of TREDGOLD, CJ., in *Harvey v The King*, 1951 SR 93, that:

"The feeling seems to be abroad that first offenders are almost of right entitled to a suspended sentence, and I would like to say that before a suspended sentence is imposed there must be special circumstances which justify the court in an assumption that the effect of the suspended sentence would be beneficial not only to the individual concerned but to the interests of society at large."

I venture to suggest that it would be appropriate to ask oneself in each case - "Is it necessary to send this man to prison for this offence?". In many but not all cases involving housebreaking and theft, car theft, cycle theft and a host of others, the answer will be, regrettably, "Yes." In some, however, it will be "No".

The present case seems to me to fall into the latter category.

The accused, a private soldier, was in a bar, drinking, at about 9 p.m. on 28th February. So was the complainant, an army officer. The complainant departed, leaving his briefcase behind. The accused saw it, took it behind the bottle store, opened it and found \$4 820,88 inside, which he removed and hid. Shortly thereafter the complainant returned, looking for his briefcase. He met the accused in the vicinity of the bottle store, and questioned him. The accused first denied knowledge but then admitted and handed back the briefcase and all the money. The accused is a first offender aged 25 with a wife and child and regular employment in the Army. He had been in custody for two months pending sentence on 21st

McNALLY J

April, 1982. The magistrate took into account all the factors which were relevant and sentenced him to 18 months' imprisonment with labour, of which he suspended 10. He remarked that "the owner of the case was careless and it was fortuitous that it contained so much. One can, I think, understand accused's temptation on seeing the large amount of money."

Despite this proper appreciation of the factors involved, I have come to the conclusion that the

sentence was disturbingly inappropriate. The accused has gained nothing and the complainant (whose casual carelessness in even entering a bar at that time of night with that much money was quite staggering) has lost nothing. Thus the practical evil caused by the wrongdoing was minimal. One then looks to the moral blameworthiness. There was no premeditation, and within an hour restitution and confession had taken place. For so short-lived a lapse, a short, sharp, punishment, coupled with a suspended sentence of imprisonment, seems to me to be ideally suited. I ask myself, is it necessary to send this man to prison for this offence, and I answer no, it is not.

The accused received a salary of \$98 a month as a soldier, and said he had \$150 in savings. Bearing in mind that he will have spent about two weeks serving his sentence, of which account will have to be taken in assessing what proportion of his fine should be remitted, I propose to set aside the sentence and in its place the following is substituted:

"A fine of \$200 or, in default of payment, two months' imprisonment with labour; in addition, 15 months' imprisonment with labour, the whole of which is suspended for three years on condition the accused does not during that period commit any offence involving dishonesty for which he is subsequently convicted and sentenced to imprisonment without the option of a fine, or to a fine in excess of \$50."

Squires J: agrees.

1982 (1) ZLR p142

S v NEILL 1982 (1) ZLR 142 (HC)

Court **High Court, Harare**

Squires and McNally, JJ

5th April and 12th May, 1982

Flynote

Criminal procedure - appeal - appellant released on bail - thereafter becoming fugitive from justice by leaving country in breach of bail conditions - appeal struck off roll notwithstanding appearance of counsel on appellant's behalf.

Headnote

The appellant was convicted of an offence under the Exchange control Act and sentenced, *inter alia*, to a term of imprisonment. He was released on bail pending an appeal to the High Court but before the hearing of the appeal left the country in breach of his conditions of bail, by so doing becoming a fugitive from justice. Counsel for the State requested that in these circumstances the appeal be dismissed or at least struck off the roll, even though counsel appeared on the appellant's behalf. Appellant's counsel argued that the Court had a discretion as to whether or not to hear the appeal and advanced arguments as to why that discretion should be exercised in favour of the appellant.

Held, that it is clear that the only category of person who has absolutely no right to institute

proceedings at law is the fugitive from justice, or "outlaw". A court will not entertain actions by persons who put themselves beyond its reach by going into hiding or fleeing the country. The fact that the proceedings were, because of the level of punishment, reviewable did not alter the situation: review is a process of the Courts which can provide an avenue of relief to an accused person, and a fugitive from justice also puts himself beyond the help of review proceedings by reason of his status as such.

Held, further, that even if the Court did have a discretion in the matter, this was not a proper case in which to exercise it in favour of the appellant. By breaching the conditions of his bail, the appellant had shown contempt for the laws and judicial processes of the country. For the Court to entertain his appeal it would be stultifying its own processes and conniving at and condoning the appellant's actions.

Cases cited:

Mulligan v Mulligan, 1925 WLD 164;

S v Nkosi, 1963 (4) SA 87 (T);

S v Kennedy, 1967 (1) SA 297 (C);

1982 (1) ZLR p143

SQUIRES J

S v Isaacs, 1968 (2) SA 184 (AD);

S v Moshesh & Ors, 1973 (3) SA 962 (AD);

S v Molotsi & Ors, 1976 (2) SA 404 (O);

Maluleke v Dupont, NO, & Another, 1966 RLR 620; 1967 (1) SA 574 (RAD).

JC Andersen SC for the appellant.

IR Deeks, for the State.

Judgment

Squires J: The appellant in this case was convicted, on his plea of guilty, of exporting foreign currency from this country in contravention of the Exchange control legislation. The local equivalent of the foreign currency thus exported was \$10147,04, spread out over a period of more than a year and some 22 different occasions. He had a previous conviction for contravening the same provision of the Exchange control Act in 1978, when he was convicted of acquiring foreign currency other than from an authorized dealer. In the present case, and emphasizing the point that the appellant had a previous conviction under section 5 (1) of the Act less than four years before, the Regional Magistrate who convicted the appellant declined to suspend all or any part of the obligatory sentence of imprisonment. He accordingly sentenced him to a fine equal to the amount of the currency involved, namely \$10147,04; six months' imprisonment with labour suspended for three months on condition that the appellant

repatriated during that period the equivalent in foreign currency of the sum exported, and four months' imprisonment with labour.

The appellant noted an appeal-solely against the sentence of four months' I W.L., alleging a number of misdirections in the approach to, P and assessment of, the matter by the trial Court. He was granted bail pending the prosecution of his appeal in the sum of \$20 000 cash, with a further sum of \$20 000 in the form of an acceptable surety. He was also required to surrender his travel documents and report twice weekly to a local police station on fixed days and within a stipulated period. Shortly before the appeal was due to be heard, it was reported to the Registrar that the appellant had left the country in breach of his conditions of bail. When the appeal was called, an affidavit from the Regional Magistrate was placed before us to this effect, stating that the appellant had apparently failed to report to the Police as required by his conditions of bail, and that a warrant for his arrest had been issued.

In that situation, Mr *Deeks*, on behalf of the State, raised as a preliminary report the submission that the appellant was a fugitive from justice, and he requested therefore that the appeal should be dismissed

1982 (1) ZLR p144

SQUIRES J

or at least struck from the roll, notwithstanding the appearance of Counsel on behalf of the appellant to prosecute the appeal. In support of his contention, Mr *Deeks* referred us to a number of decisions of the Supreme Court of South Africa which supported his contention, namely:

Mulligan v Mulligan, 1925 WLD 164;

S v Nkosi, 1963 (4) SA 87 (T);

S v Kennedy, 1967 (1) SA 297 (C);

S v Isaacs, 1968 (2) SA 184 (AD);

S v Moshesh & Ors, 1973 (3) SA 962 (AD), and

S v Molotsi & Ors., 1976 (2) SA 404 (O.).

It was accepted by Mr *Andersen*, who appeared for the appellant at the hearing of the appeal, that the appellant had indeed left the country, estreated his bail, and could be regarded as a fugitive from justice. But he nevertheless argued that as there was no provision in the Rules of Court that dealt with such a situation, the Court was left with a discretion whether to hear the appeal or not. The High Court Act, in section 56 (3), gave the Court a basis of flexibility on which to act if rules relating to the procedure on appeal from an inferior court made no provision for a particular situation, so the Court here could act as it thought best to achieve substantial justice in the circumstances. Furthermore, he said that the Courts in South Africa, in the exercise of their appellate jurisdiction, also regarded themselves as having a discretion in dealing with the matter whether under the rules for not prosecuting the appeal, or under the common law. Here, at least, the appellant had arranged for his appeal to be argued and he could not be worse off

by reason of being merely a fugitive from justice than the appellant in *Isaac's* case.

He urged that the Court should exercise its discretion in favour of the appellant, not only because on the merits the appeal was at least arguable, but because the appellant's action could not be stigmatized as a bad example of contempt of court. He had co-operated fully with the Police in their investigation of his offence, he had shown contrition by accepting liability in pleading guilty, had arranged the repatriation of the foreign currency exported, and his flight from the country was not an attitude of defiance or even disregard for the country's legal processes, but rather shock at the sentence, amplified by current publicity surrounding the present conditions in the country's prisons.

1982 (1) ZLR p145

SQUIRES J

Moreover, he argued that the sentence was of a reviewable category in terms of the Magistrates Court Act and the proceedings would by law have to be reviewed by this Court in other circumstances. The merits of the case were of such a nature that the Court in its reviewing capacity might well take the view that the matter should be argued; and such a process could be avoided if the Court were to exercise its discretion in favour of the appellant and hear the case on the merits.

Mr *Deeks* accepted that the Court had a discretion to hear the appeal. For that reason, and because we were unsure of the law on the matter - particularly the impact of Mr *Andersen's* argument that the case would have to be reviewed in any event - and because both Counsel were ready to argue the merits, we indicated at the conclusion of argument on the preliminary point that we would reserve our decision on that aspect and hear argument on the merits as well. In that situation, at least, Counsel would not have to appear again to argue the matter if the preliminary point were decided in favour of the appellant.

After anxious deliberation of the arguments, I regret to say, however, that in my view we ought not to hear the appeal. I say so with regret because, on what consideration I have given to the merits, the appellant's case to my mind is not without substance.

But the appellant is a fugitive from justice in the sense that, having been convicted by a court of this country, he has fled its jurisdiction and, by doing so, has effectively set its laws at naught. Whatever his motive was for so acting, he has shown by so doing that he is not prepared to accept or abide by decisions of our system of courts and the effect of those decisions if they should be to his serious disadvantage. And, by fleeing the country and still prosecuting his appeal, he is wanting to seek the relief which is available from these Courts, but without being prepared to submit himself to them if he is unsuccessful.

Despite the concession by Mr *Deeks*, I am not at all sure that there is a discretion in the court where a litigant is a fugitive from justice. The matter, after all, is one of *locus standi in judicio*, the right and basis to approach the court for relief. And in our law it seems to be clear that the only category of person who has absolutely no right to institute proceedings at law is the fugitive from justice or outlaw.

In the judgment of *Mulligan v Mulligan*, (*supra*) DE WAAL, J, (as he then was) investigated a

number of old Roman-Dutch authorities on the subject, and it seems clear from them that exiles or fugitives from justice, amongst others, appear to have laboured under a legal dis -

1982 (1) ZLR p146

SQUIRES J

ability which exposed them to an exception to any suit instituted by them in civil proceedings. English law appears to be to the same effect. An "outlaw" - as that jurisprudence calls a fugitive from justice - "can neither sue on his contracts nor has he any legal rights which can be enforced." And whether the status is the result of being exiled or banished, or its modern equivalent, or voluntary flight from the court's processes, the consequence is the same. As assessed by DE WAAL, J, at page 167 of the report referred to:

"In either case the person, whether he be in exile or a fugitive from justice is not amenable to the processes of the court, and as such, in my opinion, cannot invoke the authority of the court for the purpose of establishing his legal rights. Before a person seeks to establish his rights in a court of law he must approach the court with clean hands; where he himself, through his own conduct makes it impossible for the processes of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil rights and interests."

In that situation there does not seem to me to be room for any discretion, for if an exception can be taken to the plaintiff, applicant or appellant, fugitive from justice, by the other party concerned, on the grounds of *locus standi* on the part of the instigator of the relief, it is difficult to see that there is any discretion in the matter.

The judgment *Mulligan's* case has been approved and acted upon ever since. In South Africa it was specifically approved by the court of the Transvaal Province Division in *S v Nkosi*, (*supra*) when that court struck off the roll an appeal by a person convicted by a Magistrates court who had noted an appeal, but who had escaped from custody prior to the hearing. Notwithstanding that appearance seems to have been made for him at the appeal, this result was ordered on the application of the State. Moreover, in doing so, HILL, J, added the weight of American decisions to the same effect, and concluded his review of the authorities with the words that the appellant "had no right to approach the court for the relief sought by the appeal." This reasoning and result have been approved and followed in *S v Kenned*, (*supra*), by the Cape Province Division, and by the Orange Free State in *S v Molotsi and Ors* at 405H-406A.

In our own courts it has been applied with approval in the case of *Maluleke v Dupont, NO & Another*, 1966 RLR 620, where FIELDSEND, AJA, (as he then was), after citing the passages from *Mulligan's* case referred to above, said at 625F:

"This passage, in my view, makes it clear that a court will not entertain an action by a person who puts himself beyond its reach by going into

1982 (1) ZLR p147

SQUIRES J

hiding or fleeing the country without any explanation, regardless of whether or not he is in contempt of any particular order or warrant of the court.

On this basis, I consider that the applicant is not entitled to proceed with his application, which should be struck off the roll."

In the case of *S v Isaacs*, (*supra*), it is true that OGILVIE THOMPSON, JA (as he then was), said at 185G-H that where an appellant is a fugitive from justice an appeal noted by him "may be struck off the roll". But in that case the State applied for the more final and definitive order of dismissing the appeal for want of prosecution, and in that regard - which constitutes the burden of the judgment - the Rules of court clearly gave the Appellate Division a discretion which the court eventually decided to exercise against the appellant by dismissing his appeal. It seems to me therefore, that, having approved the Provincial Court's decisions in the *Nkosi* and *Kennedy* cases, what the learned Judge of Appeal meant when he said an appeal noted by a fugitive from justice "may be struck off the roll" was, simply that such an order was proper, not that the court had a discretion. In *S v Moshesh & Ors.*, the same situation arose as in *Isaac's* case, with the same result, and no consideration was given to the present problem.

Nor do I think it could be said, if I understood Mr *Andersen's* argument correctly, that section 56 (3) of the High court Act imports a discretion in a situation of this kind. More mature consideration of the wording of that provision leads me to conclude that the discretion there given to the court relates only to deficiencies in Rules, of court or other enactments which lay down the procedure to be followed in the hearing of an appeal from, or a reviewing of, any lower court or Tribunal. The words of the subsection make it clear that such discretion as it gives this court in hearing and dealing with such matters is limited to supplementing the statutory provisions that regulate such process where those provisions make no, or inadequate, provision to achieve a satisfactory and complete procedure. In any such hiatus or omission this court can act as it thinks will best achieve the objects of the enactment concerned. It does not, in my view, go further and confer an unlimited discretion to hear appeals to which there might otherwise be valid objection.

And while at first I was also attracted by the argument that the proceedings in the present appeal would be reviewable because of the level of punishment imposed, I am also satisfied on further reflection that this argument cannot be accepted either. In the first place, and more decisively, it is of course now the law by reason of the 1976 amendment to section 63 of the Magistrates court Act that, where an

1982 (1) ZLR p148

SQUIRES J

accused person is defended by a legal practitioner, the proceedings that constitute his trial and sentence do not have to be sent on review unless specifically requested within three days of the hearing. That was not done in this case, so these proceedings would not be reviewable in the normal course of events.

But even if they were, review by the court is in substance a potential and occasionally an actual form of relief provided in the laws and processes of the courts of this country. It is true that procedure is automatic and does not have to be instituted by the accused, and is designed for the 90 per cent. of accused persons who come before the magistrates who are undefended and unsophisticated, but it is nevertheless a process of the courts which is available to an accused

person once he is convicted and sentenced, and which can provide an avenue of relief to him if circumstances so warrant. If that is so, then it seems to me, on principle, that a fugitive from justice. puts himself beyond the help of review proceedings by the court by reason of his status as such, just as much as he puts himself beyond its relief by instituting process in person. For the same reasons as he excludes himself from one form of help by the courts, he excludes himself from all forms.

However, even if I am wrong in this regard, and a discretion does reside in the court where an appellant becomes a fugitive after conviction and before his appeal, I do not think that this is a proper case in which to exercise it in favour of the appellant. Mr *Andersen* sought to distinguish the other cases where an appeal properly noted was struck off the roll, on the basis that the appellant in each such case had escaped from gaol; whereas the present appellant had only breached the conditions of his bail for the reasons already set out. In my view, this is a distinction without a difference, and in principle the effect of both such acts is the same. Whether one escapes from custody or flees the country in breach of conditions of bail, the culprit has shown a disrespect or disregard - or "contempt", in legal language - of the laws and judicial processes of the country. He has disregarded and defied them and sought to place himself beyond their reach. So whether he escapes from custody or breaches his bail and absconds, he is a fugitive from justice and, as such, puts himself beyond the pale of the court's assistance. As was said by DE WAAL, J, in *Mulligan's* case at 270:

"Were the court to entertain a suit at the instance of such a litigant it would be stultifying its own processes and it would, moreover, be conniving at and condoning the conduct of a person, who through his flight from justice, sets law and order in defiance."

1982 (1) ZLR p149

SQUIRES J

Notwithstanding that the appellant has in the result of his flight from the country suffered severe financial loss, had his home and business disrupted, and those dependent on him for employment will also suffer, and substantial as these considerations may be to any individual, I do not think that they are compelling enough to justify the court conniving at defiance of its own laws and processes. To do so, it seems to me, would invite the same disregard of bail conditions by any applicant convicted of an offence and released on bail pending his appeal.

In my judgment therefore, the court should decline to entertain the appeal and it should be struck off the roll.

The application made by the State to this end is therefore granted.

McNally J: concurred.

Gill Godlonton & Germans, legal practitioners for the appellant.

Attorney-General, for the State.

1982 (1) ZLR p150

S v NANGANI 1982 (1) ZLR 150 (SC)

Court Supreme Court, Salisbury

Annotations [Link to Case Annotations](#)

Fieldsend, CJ, Baron, JA, and Georges, JA

25th March and 18th May, 1982

Flynote

Criminal procedure - charge of murder - plea of guilty - Criminal Procedure and Evidence Act [Chapter 59] - section 255 (1) - nature of evidence that must be led - essential to establish mens element - not enough to lead evidence aliunde of commission of offence - desirability of adhering to practice of recording plea of not guilty criminal law murder - provocation as a defence to murder - intent to kill - possible to convict of culpable homicide even if provocation produces mens to kill - adultery as provocation - not limited to legal unions - factual, not formal, nature of liaison must be considered - undesirability of charging other offences at the same time as murder if not arising out of one course of conduct.

Headnote

The appellant was charged in one indictment with one count of murder and three counts of robbery. When pleading to the murder charge, he admitted unlawfully killing the deceased, his "common law" wife, because he had found her having an affair with someone. A plea of guilty was entered. The only evidence led was an affidavit from a policeman, describing the circumstances in which the deceased's body was found, and the post-mortem report. The outline of the *State* case was also put in. This showed that the deceased was found by the appellant asleep with another man in circumstances indicating that she was having an affair with him, and that the appellant pursued her and shot her with a rifle. These facts were formally admitted by the defence. The trial court immediately found the appellant guilty of murder without any statement of the facts found, without a finding of the nature of the appellant's intent and without considering whether or not there may have been provocation. Having followed this course, when it came to the question of extenuating circumstances, the court realised that it had no material on which to make a finding of an actual or constructive intention the appellant's part. It therefore allowed the appellant to give evidence, in which he described his liaison with the deceased and the circumstances in which he came to kill her. The appellant's evidence was uncontradicted. In spite of this evidence, the court found that there were no extenuating circumstances and sentenced the appellant to death. On the robbery charges he was sentenced to an effective term of five years' imprisonment.

1982 (1) ZLR p151

Held, that although the requirements of section 255 (1) of the Criminal Procedure and Evidence Act [Chapter 59] had not been entirely ignored, the reality is that it is not enough to lead formal evidence *aliunde* of the commission of the offence. The mental element accompanying the killing is a vital issue and can normally be determined only after hearing oral evidence of the circumstances of the killing.

Held, further, that this was a case which showed the importance of following the practice which has grown up in our courts of always entering a plea of not guilty to murder and establishing the accused's guilt in the normal way (*R v M'kosi*, 1935 (2) PH, H134 (SR), applied).

Held, further, that provocation can, in appropriate circumstances, have the effect of excusing or reducing an intentional killing, at least to the point of reducing murder to culpable homicide, even where the killing is intentional (*Tenganyika v R*, 1958 R & N 228 (FSC), followed).

Held, further, that the provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intent to kill. It must also be such that in the circumstances an ordinary man would have lost his self-control and acted as the accused did.

Held, further, that the difficulty, in a plural society, of applying the test of the "ordinary" or "reasonable" man can be avoided by requiring that the provocation be such that it could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as he did and that it actually caused the accused to lose his self-control.

Held, further, that the fact that the appellant's union with the deceased was not a formal, legal one, was not conclusive against him. The factual, not the formal, position must be examined.

Held, further, that although it is permissible, in terms of the proviso to section 131 of the Criminal Procedure and Evidence Act to join in the same indictment counts of murder and of other offences, this is an undesirable course where the offences are quite separate and distinct and should only be resorted to where they arise out of one course of conduct.

Cases cited:

R v M'Kosi, (*supra*);

R v Kumalo & Another, 1930 AD 193;

S v Fisher & Another, 1969 (2) SA 632 (AD);

S v Mavhungu, 1981 (1) SA 56 (AD);

R v Krull, 1959 (3) SA 392 (AD);

Tenganyika v R (*supra*);

Phillips v R (1969) 53 Cr App Rep 132;

R v Bureke, 1959 (2) R & N 353 (FSC);

R v Majhaye, 1965 RLR 106;

1982 (1) ZLR p152

FIELDSEND CJ

Practice Direction (Precedent), 1981 (4) SA 981;

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R v Koning, 1953 (3) SA 220 (T);
R v Mathlau, 1958 (1) SA 350 (AD);
S v Goliath, 1972 (3) SA 1 (AD);
Abbott v R [1976] 3 All ER 140 (PC);
R v Pascoe, (1883) 2 SC 427;
R v Moboso, 1944 OPD 192;
R v Blockland, 1946 AD 940.
M J Gillespie, for the appellant.
S Ahmed, for the respondent.

Judgment

Fieldsend CJ: The appellant was charged in one indictment with three counts of robbery and one count of murder. He was convicted on all counts. On counts two, three and four - the robbery counts - which involved the use of a fire-arm, the appellant was sentenced respectively to four years' imprisonment of which two years were suspended, five years' imprisonment of which two were suspended and six months' imprisonment of which all was suspended - a total effective sentence of five years' imprisonment. On count one, the charge of murder, the appellant was sentenced to death.

The appellant appealed initially only against sentence on count one. *Mr Gillespie*, who appeared for him on appeal, applied by notice of motion for the plea of guilty to be altered to one of not guilty and for leave to amend the notice of appeal to include an appeal against conviction. *Miss Ahmed*, for the State, did not oppose either of these applications. For reasons which appear below the applications were granted.

On arraignment the appellant said in regard to the murder charge:

"I understand the first count, it is correct that I murdered her. I did so unlawfully, and the reason for that was that I found her having an affair with someone."

Thereupon a plea of guilty was entered. This was the initial error. It could be said that on the face of the appellant's first sentence he was pleading guilty to murder. But in the light of what followed it could not be said that the plea was a unequivocal admission of anything more than an unlawful killing, which amounted to culpable homicide. Without some further investigation of the appellant's state of mind and of the circumstances of the killing it was wrong to accept his plea as a plea of guilty to the murder of the deceased.

1982 (1) ZLR p153

FIELDSEND CJ

It was for this reason among others that we allowed the plea that was entered to be changed to

a plea of not guilty.

In addition, of course, section 255 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*] requires evidence to be led before a conviction for murder can be recorded. It reads:

"Where a person arraigned before the High court on any charge pleads guilty to the offence charged or to any other offence of which he might be found guilty on that charge and the prosecutor accepts that plea, the court may, if the accused has pleaded guilty to any offence other than murder, convict and sentence him for that offence without hearing any evidence."

In this case the only evidence placed before the court was an affidavit by a patrol officer deposing as to the circumstances in which the body of the deceased had been found and the post mortem report.

The State outline was also tendered. In so far as it dealt with the facts that resulted in the killing of the deceased this read:

"On the 21st December, 1980, David Sibanda was asleep in the Fimbire Section of Liebig's Ranch at Nuanetsi. Because of the heat, a number of people were sleeping in the open. The deceased Esther Sibanda was also sleeping in the open. David Sibanda was awakened by the sound of a woman crying. He asked what had happened. He then saw the accused armed with a rifle, which he pointed in his direction. The accused asked Sibanda what he wanted. Sibanda became frightened and ran away to summon help. En route he heard the sound of rifle fire.

Bob Chivasa Mayo, a foreman at Fimbire Section was awakened by the sound of running feet. He saw the deceased running into one of the huts in the compound. The accused who was chasing her, followed her into the hut. He heard the deceased cry out. The deceased left that hut and ran to another hut. The accused was still following her.

He was holding the rifle and pointing it at her. They disappeared from his view. He then heard a rifle shot."

The defence outline on count one read:

"The plan, medical evidence, charge sheet and the relevant affidavits are admitted.

The accused admits the facts outlined in the State summary. The deceased was the accused's common law wife who was unfaithful to him."

The court immediately found the appellant guilty of murder, without any statement of the facts found, without a finding of the nature of the appellant's intent, and without considering whether or not there may have been provocation.

1982 (1) ZLR p154

FIELDSEND CJ

While it is true that some evidence had been taken so that section 255 (1) had not been entirely ignored, the reality is that the provisions of that section are not normally satisfied merely by formal evidence *aliunde* of the commission of the offence. In every murder case the mental element which accompanies the killing is a vital issue. This can normally be determined only after hearing oral evidence of the circumstances of the killing.

This was a case which showed the importance of following the practice which has grown up in our courts of always entering a plea of not guilty to murder and having the facts proved as on

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such a plea - see *R v M'kosi*, 1935 (2) PH, H134 (SR).

The case would then have proceeded, as DE VILLIERS, CJ, said in *R v Kumalo art Anor*, 1930 AD 193 at page 202:

"... in the same way as it proceeds in every other case where such a plea has been recorded, and the guilt of the accused has to be established in the same way";

but of course taking into account the words spoken by the appellant when he was called upon to plead. As STRATFORD, JA, said in the same case at page 207:

"The formal withdrawal of a plea of guilty no doubt gives the accused the right to full trial on the issue of his guilt but that does not alter the fact, if it is the fact, that he has solemnly and freely admitted his guilt; that confession stands as admissible evidence."

Having followed the course which it did the court realised when it came to consider sentence and the question of extenuating circumstances that it had made no decision as to whether the appellant had an actual or constructive intent to kill and indeed that it had no material on which to make that decision. This would not have been the case had evidence of the circumstances of the killing been given at least by David Sibanda, who was presumably the person with whom the appellant thought the deceased was being unfaithful.

The court allowed the appellant to give evidence on the issue of extenuating circumstances, and held that the *onus* of establishing their existence was on him. The effect was to place on the appellant the *onus* of establishing that he did not have an actual intent as a factor of extenuation when the *onus* of establishing the intent with which he acted

1982 (1) ZLR p155

FIELDSEND CJ

should have rested on the State. Additionally, in this particular case where the plea and the defence outline had raised an issue of provocation the *onus* should have been on the State to disprove provocation.

In the result the only further evidence led was from the appellant and was on the following lines: The appellant and the deceased had lived together for almost two years as husband and wife. Nothing had been done about lobola because of the war and there had been no marriage ceremony. One child had been born of the union in about March 1980, but had died in hospital. After the end of hostilities the deceased went in search of her family who had been scattered because of the war. She returned after her first search but left again to look for her brothers. When she had not returned after two weeks the appellant went in search of her to be told that she had moved on from her parent's kraal to a farm in the area.

He found the deceased on the night of 21st December, 1980, sleeping outside a hut in the farm compound. She was under a blanket which she was sharing with another man - presumably David Sibanda - with two young children on the other side of her. In all there were five persons sleeping in a row outside the hut. He asked who this man was. The deceased whispered to him and he ran away. The appellant, who was armed with a rifle, pursued this man for a short distance and then returned to where the deceased was. She then started to run and he

pursued her, eventually, after a short chase, firing the shot which killed her.

These facts were uncontradicted. Despite an adverse finding on the appellant's credibility because on at least three occasions he paused for a considerable time before answering questions, the court accepted that the appellant had no idea until that night that the deceased was being unfaithful to him. It did hold, however, that it was not satisfied that the deceased was sharing a blanket with the other man involved. It also found that the appellant was not justified, even if the pair were sharing a blanket, in concluding that this necessarily established that the deceased was being unfaithful. I would only say that such a fact would be more than adequate to establish adultery in a divorce case.

The court concluded that there were no extenuating circumstances and sentenced the appellant to death.

The trial court could not in the light of the evidence given in extenuation after its finding of guilty reconsider its verdict: *S v Fisher Id Anther*, 1969 (2) SA 632 (AD). But on appeal this court is entitled to look at

1982 (1) ZLR p156

FIELDSEND CJ

the evidence to determine whether the verdict of guilty of murder should stand. As TROLLIP, JA, said in *S v Mavhungu*, 1981 (1) SA 56 (AD) at page 65:

"... where the accused is convicted of murder, there is only one overall proceeding and a single, albeit composite, verdict of guilty of murder with or without extenuating circumstances, as the case may be. The trial only ends when such a verdict is delivered. It follows that, for the purpose of an appeal against that verdict, the record of the evidence of the entire proceedings must be laid before this court for its consideration. And in considering whether the verdict was right or wrong this court can also have regard to the evidence adduced in extenuation."

In that case, the facts of which were far stronger against that appellant than the facts of this case, the appellant had been properly convicted of murder, oral evidence on the merits having been heard and the appellant electing not to give evidence. On the hearing as to extenuating circumstances the appellant gave evidence which indicated that he may have been guilty merely as an accessory after the fact to murder and not of murder. The appellant was granted leave to appeal and the Court instead of remitting the case for rehearing considered the appeal on its merits in the light of the record before it.

Miss *Ahmed* accepted that this was the course that should be followed in the present appeal, and that throughout the *onus* was on the State to show the absence of provocation. She conceded that we could only uphold the conviction for murder if we were satisfied that on the evidence the trial Court, had it properly considered the question of provocation on all the evidence, must inevitably have concluded that there was no provocation sufficient to reduce the offence from murder to culpable homicide. That this was a proper concession is apparent from *R v Krull*, 1959 (3) SA 392 (AD). In that case the trial court wrongly failed to take into account the combined effect of provocation and drunkenness upon the appellant. SCHREINER JA said at page 400:

"This court is not in as good a position as was the trial court to assess the seriousness of the insult as it might

have appeared to the appellant in his condition at the time, . . . It seems to me that, if it had examined the facts from the point of view of intoxication and provocation taken together, the majority of the trial court might well have concluded that the proper verdict was culpable homicide ... We have not before us material from which, sitting on appeal, we can say that such a conclusion would have been wrong. That being so the verdict of murder cannot stay. But there is no reason to doubt that the killing was unlawful and the verdict must accordingly be altered to one of culpable homicide."

1982 (1) ZLR p157

FIELDSEND CJ

Miss *Ahmed* contended, however, that this Court could decide on the appellant's own evidence that the defence of provocation could not succeed. She based her contention primarily upon the fact that the appellant admitted that he intended to kill the deceased, and that in those circumstances on the authority of *R v Krull (supra)* the defence of provocation could have no place.

In my view Miss *Ahmed's* contention that the appellant admitted an intention to kill the deceased is sound. It is true that at one stage in his cross-examination the appellant sought to show that he had shot the deceased by mistake, intending only to frighten her into stopping so that he could get hold of her. This explanation is not credible in the light of his other evidence -

- (a) that when he found the couple sleeping together it was his intention kill them both; and
- (b) that he wanted to kill both of them because he was "very much angry."

Also to be considered is the form of his plea in which he does not raise the question of accident. I have not overlooked his one answer:

"I did not intend to kill her, but I was angry to find her with another man."

That I do not think detracts from his earlier admissions, it is but an explanation of why he shot the deceased, whom he would not otherwise have wanted to kill.

The essence of this appeal lies in Miss *Ahmed's* contention that once the appellant had admitted his intention to kill the deceased the defence of provocation is not open to him. There is an apparent divergence of views on this proposition between the law in South Africa, particularly since the decision in *R v Krull (supra)*, and in this country since the decision in *Tenganyika v R*, 1958 R & N 228 (FSC).

Burchell and Hunt, *South African Criminal Law and Procedure*, Volume 1, page 243, quote the following passage from the judgment of SCHREINER JA In *R v Krull*, (*supra*), at page 399:

"Under our system it does not follow from the fact that the law treats intentional killing in self-defence, where there has been moderate excess, as culpable homicide, that it should also treat as culpable homicide a killing which though provoked was yet intentional (and this must mean intentional in the specialized murder sense, see page 398C)). Since a merely provoked killing is never justified there seems to be no good reason for holding it to be less than murder when it is intendedly."

1982 (1) ZLR p158

FIELDSEND CJ

They continue at page 244:

"This means that provocation no longer reduces the unlawfulness of the *actus*. In coming to this conclusion Schreiner, JA did not refer to the examples, such as the killing by a husband of his wife's paramour, given in the Roman and Roman-Dutch law where a killing which was possibly intentional was punishable by sentence other than death. It is respectfully submitted, however, that since provocation is now regarded by our courts merely as a factor to 'be taken into account in determining whether the accused had the necessary intention to kill, Schreiner, JA's view is in line with principle and the instances quoted by the old writers should either be regarded as exceptional cases or, preferably, should be explained on the basis that the killing was treated as culpable homicide on the ground that the intention to kill was absent.

If provocation cannot, or does not, have the effect of reducing an intentional killing to culpable homicide, it may, of course, be taken into account as an extenuating circumstance."

In *Tenganyika v R (supra)* the Federal Supreme Court, albeit to some extent *obiter*, considered a different approach to the problem, perhaps best summarized at page 245 of Burchell and Hunt as follows:

"Where the charge is one of murder and there is evidence of provocation, it was held that two separate inquiries must be made. First, was intention to kill present? In making this inquiry account must be taken of all the facts - provocation, intoxication and any other eccentricity or abnormality the accused may have had. And since the test for intention is subjective, at this stage provocation will be considered subjectively. If the court is left in doubt as to whether the intention to kill was present the accused could, at most, be convicted of culpable homicide. On the other hand, if the court is satisfied that the intent to kill was proved, the Federal Supreme court took the view that a second inquiry must be made, namely whether the "provocation which the accused received was sufficient to warrant a verdict of culpable homicide despite the fact that the killing was intentional. On this point Tredgold CJ, held the test to be objective 'whether the accused was so provoked that, in the circumstances, a reasonable man would have lost his self-control."

The learned CHIEF JUSTICE did not, of course, say that where an intention to kill has been established, an accused can escape conviction for murder by showing merely that in the circumstances a reasonable man would have lost his self-control. Clearly there would have to be some evidence '(leaving aside the question of *onus*) that the accused himself lost his self-control. As he said at page 237:

"... to suggest that provocation is only a defence when it excludes the intention to kill is to narrow its limits unwarrantable ... it is not difficult to envisage circumstances in which it might properly be held that the accused had been provoked beyond endurance and to a point when any ordinary person would have been deprived of his self-control and acted in the same manner." '(Emphasis added).

1982 (1) ZLR p159

FIELDSEND CJ

The question what is meant by loss of self-control, and how that may differ from a lack of intention are separate matters. As LORD DIPLOCK indicated in *Phillips v R* (1969) 53 Cr App R 132 at page 135, loss of self-control is not absolute but is a matter of degree: there are many intermediate stages between icy detachment and going berserk. And as SCHREINER JA said in *Krull's case (supra)* at pages 398-99:

"That acts done after a man has lost control of himself may still in a sense be said to be intended is no doubt true. But also it may fairly be and is, said that such acts are not really intended ... Whether one says that a provoked

man loses the power of self-control or becomes unable to form the intention to kill seems to me to be substantially a question of the choice of words. Either form is probably only a roughly approximate description of the actual mental processes. Legal systems can only attempt by one approach or another to give effect to the basic idea, which is that the provoked person may have been so upset that the mental element requisite for murder may not have been present."

Tenganyika's case (supra) has been followed in this country, despite the criticism of it in *Krull's case (supra)*. See for example *R v Bureke*, 1959 (2) R & N 353 (FSC); *R v Majhaye*, 1965 RLR 106. We are not bound by these decisions - see section 24 (2) of the Supreme Court Act, No. 28 of 1981 - but unless there is good reason for departing from them we would not want to give a new direction to the law at this stage: Practice Direction (Precedent), 1981 (4) SA 1981.

There are arguments both of principle and expediency in favour of each of the two approaches. The South African approach follows the logical and systematic application of the strict law that an intentional killing of another person is murder unless there is a legitimate excuse, such as a justifiable homicide (*R v Koning*, 1953 (3) SA 220 (T)) or self defence (*R v Mathlau*, 1958 (1) SA 350 (AD)). To act under provocation, it is said, is not to act with any justification. As SCHREINER JA put it in *Krull's case (supra)* at page 399C:

"In self-defence the motive is fear, which from the law's viewpoint is a better motive than anger, which operates in provocation."

Provocation may be an extenuating circumstance and a mitigating factor, but once it is established that a person acted with intent to kill then he is guilty of murder. In my view there are two answers to this view.

First, if the law recognizes that provocation is an extenuating circumstance then there is no question of principle involved in recognizing it as a circumstance which may reduce murder to culpable homicide. It is only a question of the effect to be given to it. Both self-defence and duress - see *S v Goliath*, 1972 (3) SA 1 (AD) - are now recognized

1982 (1) ZLR p160

FIELDSEND CJ

as defences to murder. Either may be a complete defence or may operate to reduce murder to culpable homicide, depending on the facts. But in each case it is accepted that what is excused or reduced is an intentional killing. There is therefore no anomaly in recognizing that provocation may have a similar effect, or at least may reduce murder to culpable homicide even where the killing is intentional.

In the second place to exclude provocation as a defence to an intentional killing is to impose too demanding a standard on ordinary people and to overlook the realities of human behaviour. In practice what may happen when a person is grievously provoked is that he becomes so angry that he intends to kill or to do serious injury to another. That is the position of the classic case of a person who kills his spouse caught in an act of adultery. It is not that he does not realize what he is doing, but that his self-control is so overborne that his intentional killing is partially excused. To require that the loss of self-control must be such that the consequences of the act are not intended is to ignore the true effect of provocation. Further if strictly applied such a test would in very few cases admit of the defence. It must be very rare for a person to be able

to say that he lost control of himself to the extent of not intending the consequences of his reaction.

The approach of *Tenganyika's case (supra)* and of the English common law authorities can be characterized as somewhat unsystematic and as departing from the strict definition of the offence of murder. It can also be said that the approach does not give sufficient weight to the importance of enforcing proper standards in trying to reconcile that aim with the objective of treating the individual fairly. In its favour is that it recognizes that criminal law must take into account the realities of human reaction to situations of stress.

The choice between these two approaches is to be made rather on considerations of practicality than on strict legal theory. If duress is to be recognized as a complete defence to a charge of murder as a principal offender, as it is in South Africa and as LORD WILBERFORCE and LORD EDMUND-DAVIES would have advised in *Abbott v R* [1976] 3 All ER 140 (PC) at page 148, then I see no insuperable objection to allowing provocation to operate to reduce murder to culpable homicide even where there is proved an actual intent to kill. Both are defences which make some concession to human weakness, and provided they are suitably circumscribed I see no undermining of the fabric of society by accepting them as defences. The same can be said

1982 (1) ZLR p161

FIELDSEND CJ

of self-defence. This can be a complete defence. It can also reduce murder to culpable homicide if the bounds of self-defence are exceeded to a limited extent. Both are inroads into strict legal logic, and a recognition that an unlawful intentional killing may be something less than murder.

Both as a matter of principle and expediency I would favour the approach enunciated in *Tenganyika's case (supra)* and since followed in this country. This is not the occasion on which to attempt to lay down authoritatively the limitations on the defence. It is sufficient for the purposes of this case to adopt the tests laid down in *Tenganyika's case (supra)*. The provocation must be such as to have actually caused the accused to have lost his self-control, though not necessarily his capacity to intend to kill. The provocation must also have been such that in the circumstances an ordinary man would have lost his self-control and acted in such a manner. The reference to the effect of the provocation on the ordinary or on the reasonable man is not a very satisfactory test to have to apply in a plural society. There is now particularly in South Africa greater stress being laid on the subjective approach to the mental element in crime. It may be that the solution is not to apply the test of the reasonable man, but to bring in the necessary objective factor in a different way. This could be done by requiring that the provocation was such that it could reasonably be regarded as sufficient ground for the loss of self-control that led the accused to act against the victim as he did. This, together with the requirement that the provocation actually caused the accused to lose his self-control, would cover both the objective and subjective criteria that any system requires if proper regard is to be paid to the sanctity of human life and the need to allow of a conviction for murder, the most serious of crimes, in a proper case. They are criteria which were approved by the English Criminal Law Revision Commission (1980) Cmd. 7844, paragraph 81, and they accord with the

reasoning in *Tenganyika's* case (*supra*) and in *Bureke's* case (*supra*).

Turning to the facts of this appeal I would say at once that had the trial taken its ordinary course, and the issue of liability been considered after evidence for the prosecution of the circumstances of the killing, it may well have been that a proper finding would have been that the appellant did not lose his self-control to the extent that the offence was reduced from murder to culpable homicide. Even if that had been the finding it may also have been correctly found that the appellant's reaction was not reasonable in the circumstances.

1982 (1) ZLR p162

FIELDSEND CJ

A relevant feature was that there was some doubt about the stability and permanence of the appellant's relationship with the deceased. But it is not conclusive against him that there was no formal marriage. The law has moved since the days of *Regina v Pascoe* (1883) 2 SC 427 when DE VILLIERS, CJ, instructed the jury to convict of murder an accused who had killed his wife and another man found in adultery with her if they found there was no legal (i.e. Christian) marriage. In *R v Moboso*, 1944 OPD 192 an accused was held to have been rightly convicted only of culpable homicide where he had killed a person found committing adultery with his wife to whom he was married by customary law. See too *R v Blokland*, 1946 AD 40 at page 944. Where provocation is in issue it seems to me that it is the factual and not the formal position that must be examined. If two persons have a stable and continuing union it may be that the discovery of one in an act of infidelity may constitute provocation. The nature of the relationship in this case should have been more fully explored.

Of more importance would have been evidence of the appellant's behaviour on the night in question. One has the impression that his legal representative did not regard this an offence for which the death penalty would be imposed. In this he may have been right. But in the result insufficient attention was paid to the appellant's mental attitude, to the question of whether he lost his self-control, to the lapse of time between his discovery of his wife and the killing. Whilst he did not find her actually committing adultery the circumstances in which he found her were such as to lead him to think she had without some explanation from the man concerned. The whispered conversation between the man and the deceased followed by the former's flight must have confirmed the appellant's initial conclusion.

If all these matters had been considered, and bearing in mind that the *onus* was on the State to establish that there was no provocation, it cannot be said that a properly directed court might not have returned a verdict of culpable homicide.

That is the verdict which must now be returned on appeal.

So far as sentence is concerned, this is undoubtedly a very serious case of culpable homicide. The assessment of sentence is, however, complicated by the fact that the appellant was on the same indictment charged with three counts of armed robbery. On these counts he was sentenced to a total of nine years and six months' imprisonment of which four years and six months were suspended on certain conditions for five years. Had the culpable homicide conviction stood alone a

FIELDSEND CJ

sentence of seven years' imprisonment would not have been out of place. As it is I think that a period of five years, when regard is had to the five years to be served on the other counts, will be adequate.

The appeal is allowed to the extent that a verdict of culpable homicide is substituted for that of murder, and the sentence is altered to imprisonment for five years on that count.

Finally I would say again that it is undesirable to join in the same indictment counts of murder and of other offences. This is permissible in terms of the proviso to section 131 of the Criminal Procedure and Evidence Act [*Chapter 59*] and it may well be convenient where the offences all arise out of one course of conduct. But where as here the offences are quite separate and distinct they should be charged in separate indictments and the murder charge tried first.

Baron JA: I agree.

Georges JA: I agree.

Pro Deo.

GRAHAM AND OTHERS v KRAMER 1982 (1) ZLR 164 (SC)

Court **Supreme Court, Salisbury**

Fieldsend CJ, Georges, JA and Beck JA

5th March and 19th May, 1982

Flynote

Contract - of sale - "terms and conditions" of contract - meaning of - sale of company shares held by non-resident shareholders - prior agreement that resident shareholder should have option to include his shares in sale on same terms and conditions - part of agreement of sale that non-residents be paid in foreign currency - whether such a "term and condition" of sale - whether resident shareholder entitled to insist that purchase price for his shares be paid abroad - when and what terms may be implied.

Headnote

The appellants were majority shareholders in Central African Pharmaceutical Holdings Ltd. (CAPS) and were resident outside Zimbabwe. The respondent was managing director of CAPS and lived in Zimbabwe and himself held a substantial number of shares in CAPS as well as controlling for purposes of sale a further 328 000 shares through a company known as Gerros (Pvt.) Ltd. In 1975 the respondent and the first appellant entered into an agreement which provided that if the first appellant proposed to reduce his effective control of CAPS by disposing of a block of shares he would give the respondent and a third party the first refusal. In addition,

if the first appellant did sell effective control, the respondent and the third party would have the right to require either that the first appellant included the Gerros shares "on the same terms and conditions"; or that the Gerros shares be excluded and remain in the hands of Gerros.

By 1980 the first appellant and the group he represented were of the view that their shares should be sold to an international pharmaceutical company.

To protect the interests of all concerned, an agreement was drawn up which provided that -

- (a) the shares owned by the appellants were regarded as including the Gerros shares;
- (2) the first appellant would lead negotiations for sale but keep the respondent informed of developments, while the respondent would provide all necessary information to a prospective buyer;

1982 (1) ZLR p165

GEORGES JA

- (3) the respondent would at all times have the option to include his shares in any overall sale agreement concluded on the same terms and conditions of sale as would apply to the appellants' shares.

The proposed sale to the international company fell through. Subsequently, unbeknown to the respondent, the first appellant arranged to sell the appellants' shares to the "Government of Zimbabwe. Part of the agreement of sale provided that the non-resident shareholders would be paid in foreign currency over a period. When he learnt of the agreement, the respondent decided not to exercise his rights of first refusal of the appellants' shares, but claimed to have his block of shares included in the sale on the same terms and conditions as applied to the other shares, in particular the right to be paid in foreign currency. He sought and obtained an interdict restraining the appellants from transferring their shares to the Government before they were offered for sale to him "on terms no more onerous (*sic*) than those on which the said shares were offered to the Government".

On appeal, the issues to be decided were -

- (1) whether the appellant was obliged merely to offer the respondents' shares to an intending purchaser as part of a package deal or whether the appellant was obliged to ensure that they were included in such a deal;
- (2) whether the provision enabling the appellants to be paid abroad was a "term and condition" of the agreement;
- (3) whether the appellant was in breach of the agreement in failing to obtain a similar benefit for the respondent;
- (4) if he was in breach, whether the respondent was entitled to an interdict.

Held, allowing the appeal with costs, that the appellants were obliged, under the 1975 and 1980 agreements, to have the respondents' shares included in a sale agreement and failure to

do that would be a breach of the obligation.

Held, further, that the provision whereby the appellants would be paid abroad was a term, tiff not also a condition, of the agreement with the "Government.

Held, further that the entitlement to remit abroad funds from Zimbabwe, whether by residents or non-residents, is a matter for ministerial discretion and it was legally permissible door the appellant to have made it a condition of the sale that the respondent be paid abroad.

Held, further, that there would have been a convincing case for an interdict if the 1980 agreement had contained a negative undertaking that the appellants would not sell their shares unless they could include the respondents' shares on the same terms and conditions as their own. However, applying the normal tests as to what terms may be applied in a contract, there were no grounds for reading into the contract a negative undertaking of that kind, and the respondent was not entitled to an interdict.

1982 (1) ZLR p166

GEORGES JA

Cases cited:

Reigate v Union Manufacturing Co [1918] 1 KB 592; (1981) 118 LT 483, [1918-19] All ER Rep 143;

Tension Envelope Corp (SA) Ltd v Zeller and Another, 1970 (2) SA 333 (W);

Farmers Co-op. Society (Reg) v Berry, 1912 AD 343;

Lumley v Wagner (1852) De G, M & G 604: [1843-60] All ER Rep 368 (LCCT).

R H Zulu, SC, with him *A P de Bourbon*, for the appellants.

JC Andersen SC with him *C S Grossman*, for the respondent.

Judgment

Georges JA: Central African Pharmaceutical Holdings Ltd (CAPS) is a public company incorporated in Zimbabwe and listed on the Zimbabwe Stock Exchange. The first appellant, Gerard Stanley Graham, controls for purposes of sale 1 316 650 shares in CAPS. He also represents the second, third, fourth, fifth, sixth and seventh appellants who together control for purposes of sale 909 388 shares in CAPS. It is agreed that the appellants' shareholding in practical terms constitutes a controlling interest in CAPS.

The respondent, Maurice Mendy Kramer, is the Managing Director of CAPS. He is the registered holder of 176 559 shares in CAPS. He also owns all the ordinary shares in a company known as Gerros (Private) Ltd (Gerros) which itself owns 328 160 shares in CAPS. The company structure of Gerros provides for two management shares, both of which are vested in HH Gollop, as nominee for the first appellant. In effect, therefore, the respondent controls for purposes of sale 504 713 shares in CAPS but in relation to the Gerros' shares the

concurrence of the first appellant would be required.

Despite their controlling interest in CAPS, the first appellant and the other appellants for whom he acted had no representation on the Board of the Company. Quite clearly, however, the respondent and his management team, on behalf of whom he acted as spokesman and negotiator, depended on the support of the first appellant if they were to retain management control of CAPS.

In March, 1975, the respondent and Gollop, the nominal holder of the two management shares in Gerros, and a third party entered into an agreement (the 1975 agreement) which provided that if the first appellant proposed to reduce his "effective control" by disposing of a block of shares, he would give the respondent and the third party the first refusal. Further, if the first appellant did sell the effective control

1982 (1) ZLR p167

GEORGES JA

then the respondent and the third party would have "the right to require either that GSC [the first appellant] includes the Gerros' block of shares in the sale on the same terms and conditions, or that it is excluded and remain in the hands of Gerros".

By 1980 the first appellant and the group he represented were of the view that a sale of their total shareholdings to an international pharmaceutical company would be in the best interests of CAPS. The respondent and his management team concurred in that view. An agreement was concluded on 29th February, 1980 (the 1980 agreement), for the purpose of safeguarding the interests of the management team (represented by the respondent) and the holders of shares carrying effective control (represented by the first appellant) and Gollop (as the holder of the management shares in Gerros). The holders of the shares carrying effective control were referred to as "the consortium" and the shares owned by them were defined so as to include the Gerros' shares - though these shares were beneficially owned by the respondent.

The agreement provided that the first appellant would lead any negotiations for sale and would keep the respondent informed of all developments while the respondent on his part would make available on a confidential basis all the information that a prospective purchaser would need to make a decision on whether or not to acquire effective control. It provided that, should they wish to, the first appellant would ensure that the respondent and his management team would be afforded ample opportunity to work out with any prospective buyer their personal future.

Clause 7 of the 1980 agreement reads as follows:

"Kramer is not at present proposing to sell Kramer's shares. Nor are any Directors in the Group, so far as Kramer is aware, who are in the management teams, planning to sell their personal shareholdings for options) in CAP's shares. Kramer shall, however, at all times have the option to include Kramer's shares in any overall sale agreement concluded on the same terms and conditions of sale as would apply to the consortium's shares."

The agreement then referred to the 1975 agreement relating to rights of first refusal to which reference has already been made. These arrangements were extended to 31st March, 1982, but it was provided that the rights of first refusal would not apply to an overall sale of the consortium's shares negotiated by the first appellant in consultation with the respondent where

the respondent had agreed in writing to the negotiations proceedings.

1982 (1) ZLR p168

GEORGES JA

Efforts to sell to an international pharmaceutical company as had been contemplated failed to materialise and the possibility of a local purchaser was then explored. The respondent sought, under threat of court proceedings, an assurance that the 1975 and 1980 agreements would still be effective though the sale would not be to an international company. That assurance was given.

Thereafter, so far as the respondent was concerned, there appeared to be no further developments until he was asked to attend at the offices of Messrs Gollop and Blank on 29th July, 1981. He duly attended. Mr Gollop and the first appellant were present. The first appellant then informed him that the consortium had agreed to sell its shares to the Government of Zimbabwe at \$1,80 per share. The Gerros' shares were to be included.

In an affidavit filed on behalf of the appellants Mr Gollop stated:

"I admit that neither I nor the First Respondent [the first appellant] informed the Applicant of the progress of the negotiations conducted on behalf of the consortium with Government representatives until a verbal contract with Government had been concluded. I and First Respondent considered that we had good reason not to give the Applicant such information ...".

The respondent was concerned that the Gerros' shares had been included in the sale and that he had not been given the option to purchase the shares in CAPS that were being sold which was his right under the 1975 agreement which had been extended to 31st March, 1982, by the 1980 agreement. He could not, of course, sensibly consider whether to exercise that right of first refusal until he had detailed knowledge of the agreement made by the consortium with the Government of Zimbabwe. His advisers threatened to file proceedings to compel production of the agreement. Shortly before the proceedings were actually filed he was given a copy of the heads of agreement.

These provided for the sale of the shares at \$1,80 per share and for the payment of the total purchase price (including the Gerros' shares) of \$4 597 566,40 in Zimbabwe currency free from any tax or deduction. It noted that all of the sellers (save Marwen Ltd and Gerros) were non-residents and that Exchange control Authority would be required for the transaction involving their shares. Annexed to the heads was a "Draft Authorization" signed by the parties detailing the authorizations which would be granted. The purchaser, the Government of Zimbabwe represented by the Minister of Finance, undertook that the requisite authorizations would be granted by the appropriate authority.

1982 (1) ZLR p169

GEORGES JA

After the heads of agreement had been delivered a further affidavit was sworn recounting the events which had occurred since 7th September and this was filed with the proceedings referred to above as an annexure. The respondent sought an order restraining the appellants

from transferring or taking any steps to transfer their shares in CAPS to the Minister of Finance, the eighth respondent in the motion proceedings.

The first appellant undertook personally to be available as a consultant to the Government as and when required subject to his other commitments and to payment of reasonable expenses.

Apart from the authority to sell the shares, the document entitled "Draft Authorization" provided that the non-resident shareholders would be permitted to cede and transfer on donation to a Swiss company, IFTI, the whole of the proceeds of the sale of the shares. Out of this sum IFTI would be authorized to remit to Switzerland US\$1 000 000 with interest at 4 per cent. from 27th July, 1981, to date of remission. The balance of the purchase price was to be invested by IFTI in six-year 41/2 per cent. Government bonds redeemable as to 1/6 of the capital value in foreign currency on or before 27th July in each year, the remission each year to include interest from 27th July, 1981, to date of remission.

The respondent received the heads of agreement on 7th September, 1981, and was required speedily to make up his mind as to whether he would purchase the shares on the terms available to the consortium. By letter dated 1st October, he elected not to exercise his right of first refusal (given by clause 3 (c) (i) of the 1975 agreement) but instead claimed to have all his shares included in the sale on the same terms and conditions as applied to the other shares being sold (in terms of clause 7 of the 1980 agreement). In particular he required that the purchase price be paid to him "in foreign currency in the same way as the purchase price is being paid to Mr Graham". The letter asserted that the first appellant could not properly enter into an Agreement for Sale for his shares unless he was able to honour the obligation to include the respondent's shares on the same terms and conditions.

The reply sent on behalf of the appellants noted the election and pointed out that as a resident the respondent could not ask that the provisions of the Agreement of Sale applicable to non-residents be made applicable to him. Nonetheless enquires would be made of Government and in due course he would be advised.

1982 (1) ZLR p170

GEORGES JA

There had by then been prepared for filing a notice of motion on behalf of the respondent (as applicant) naming all the appellants, the Minister of Finance and CAPS as respondents asking for delivery to the respondent of the Heads of Agreement and for an order restraining the appellants from transferring their shares in CAPS to the Government of Zimbabwe or any other person before the said shares were offered for sale to the respondent on terms no more onerous (sic) than those on which the said shares were offered to the Government Zimbabwe. The heads of agreement were in fact delivered and these proceedings were not filed.

After the heads of agreement had been delivered a further affidavit was sworn recounting the events which had occurred since 7 September and this was filed with the proceedings referred to above as an annexure. The respondent sought an order restraining the appellants from transferring or taking any steps to transfer their shares in CAPS, to the Minister of Finance, the eighth respondent in the motion proceedings.

The Minister and CAPS did not appear in the proceedings, and the issues were argued between the appellants and the respondent before Squares, J. SQUIRES, J, granted the order restraining the appellants in the terms prayed for by the respondent and declared that the shares to be included in the terms of clause 7 of the agreement of 29th February, 1980, should be the shares the respondent owned as the date such sale was concluded and not only the shares he owned at the date of the agreement. He also ordered the appellants to pay the costs of the motion and of the preparation of the proceedings to compel the appellants to deliver to the respondent the heads of agreement concluded with the Government. The present appeal challenges this order.

The arguments canvassed a wide range of issues but for the purpose of determining this appeal the following appear to be the crucial questions:

- (i) What was the nature of the obligation assumed by the first appellant under clause 7 of the 1980 agreement? Was it an obligation limited to offering the shares owned by the respondent as part of the package in any negotiations for the sale of "effective control" to an intending purchaser or did it require that the first appellant ensure that the respondent's shares be included in any agreement concluded with such purchaser?
- (ii) Was the provision in the heads of agreement between the first appellant and the Government of Zimbabwe that the sale of

1982 (1) ZLR p171

GEORGES JA

the shares be subject to the granting of the requisite authorizations by the appropriate authority to enable the funds received by the non-residents to be remitted abroad a "term and condition" of the agreement?

- (iii) If it was a term and condition of the agreement, was the first appellant in breach in failing to obtain a similar term or condition for the respondent even though he was a resident of Zimbabwe?
- (iv) If the first appellant was in breach was the respondent entitled to an interdict to restrain the sale?
- (i) *The nature of the obligation under clause 7 of the 1980 agreement*

In my view clause 7 of the 1980 agreement should be considered against the background of clause 3 (c) (i) (ii) and (iii) of the 1975 agreement which was itself extended to 31st March, 1982, by the 1980 agreement. The 1975 agreement covered only the Gerros' shares. The 1980 agreement dealt with the respondent's shareholding which was not held through Gerros. There is, of course, a collateral issue as to whether the respondent's shareholding should be ascertained at the date of the 1980 agreement or at the date when the option under that agreement fell to be exercised but this does not affect the issue now being considered.

Both clauses can be said to lack precision. The situations with which they were intended to

deal were, however, clear. The Graham consortium held a percentage of the share capital which gave it effective control of CAPS but they played no active part in management. The management team also had a stake in the share capital and would also be vitally interested in retaining management of the company. If the power of the Graham consortium was used against them they might be ousted.

The agreement of March, 1975, accordingly provided that should the consortium wish to sell any portion of its holding the respondent and his team would have a right of first refusal. If however they wished to sell all their shares (in effect transferring "effective control") not only would there be a right of first refusal but the respondent and Arenson (then part of the management team) were given:

"... the right to require that CSG [the first appellant] includes Gerros' block of shares in the sale on the same terms and conditions, or that it is excluded and remains in the hands of Gerros ...".

The meaning of this clause has not been analysed as closely as has been clause 7 of the 1980 agreement but the language of each is sufficiently similar to make it helpful to do this. The obligation undertaken under clause 3 (c) (ii) does not appear to me to be limited only to including

1982 (1) ZLR p172

GEORGES JA

the Gerros shares as part of the package offered to the prospective purchaser. It does not speak of including the shares in any offers made. It speaks of including them "in the sale" if effective control is being passed. If the prospective buyer refused to accept the Gerros shares as part of the deal, the consortium could not, in my view, argue that it had fulfilled its obligation by having made the offer. At the very least if the management team wished to dispose of the Gerros holding because effective control in CAPS had been transferred to a purchaser with whom it did not wish to work, and if they had to sell at a price lower than that which the consortium had received, they would be entitled to claim the difference in prices as damages for breach of the agreement.

Clause 7 provides that the respondent should have the option of including his shares "in any overall sale agreement concluded" by the consortium.

The purport appears to me identical with that of Clause 3 (c) (ii) discussed above. The obligation undertaken by the consortium is to have the shares included in a sale agreement and failure to do that would be a breach of the obligation. It was strongly contended that the clause required no more than putting up the shares on offer with the consortium's shares and that any other interpretation involved implying a term that the consortium undertakes that in any contract for the sale of effective control the respondent's shares would be included. The issue appears to me to be one of interpretation, and not of implying a term. Change in effective control might affect the value of the shares. The management team wished to ensure that in that situation they would not be left with a large holding of diminished value. The language used to effect that purpose seems adequate. There was the obligation to see that the shares were "included" in any "overall sale agreement concluded" by the consortium.

The Gerros shares were, of course, included in the overall sale agreement. The respondent was not consulted as to whether he wished that to be so or not. The respondent's personal holding in CAPS was not included in the agreement but it appears that the consortium had indicated to the Government that it might have to be included. In a letter dated 7th October 1981 to the Minister of Finance the appellants' legal representative stated in part:

"You will also recollect that we also disclosed there was a number of shares owned by Mr Kramer personally, but we did not know the number, which would have to be included in the sale as he requested it."

This view of the obligation undertaken by Clause 7 appears to conform closely to the interpretation reached above.

1982 (1) ZLR p173

GEORGES

- (ii) *Was it a "term and condition" of the Heads of Agreement that the non-resident shareholders should be entitled to remit abroad their share of the purchase price?*

Having defined the nature of the obligation undertaken there remains to be determined what was meant by "terms and conditions". The respondent's shares had to be included in the sale on the same terms and conditions as the consortium's.

There are, of course, significant differences between "conditions" and "terms" in relation to a contract. Conditions affect the very existence of a contract or obligation determining whether it comes into operation at all. Terms define the nature of the obligation. It is pointed out in Wille's *Principles of South African Law*, 7th Ed, by J T R Gibson at page 342 the words are often loosely used on contracts taken from English precedents in which the distinctions are not meticulously maintained.

As has been mentioned, when the 1980 agreement was concluded the parties contemplated that the sale would be to an international pharmaceutical company. It was therefore accepted that compliance with Exchange control regulations would be essential. Clause 12 dealt in part with this issue:

"The implementation of any sale of shares above preferred to and of the consequential arrangements pursuant to any such sale will be subject to obtaining any necessary Exchange control or other Government authorizations."

It is, however, unlikely that any of the parties contemplated that the purchaser would be the Government itself with which, in the final analysis, rested the power to decide whether Exchange control authorizations would be granted or not.

Paragraph 11 of the heads of agreement between the Minister of Finance and the consortium notes, in effect, that all the vendors except Marwen (Private) Ltd and Gerros (Private) Ltd were non-residents of Zimbabwe and that Exchange control authorization would be required for any transactions to which they were parties. The Minister of Finance then undertook

"... as part of this agreement of sale that the authorizations set out [in an annexure signed by or on behalf of the parties simultaneously with the agreement and entitled Draft Authorization] will be granted by the appropriate authority."

GEORGES JA

It has been contended that these provisions are not "terms and conditions" within the meaning of the 1980 agreement but are part of the process of implementing the sale, and that as methods of implementation they did not have to be the same for everybody.

The details of the authorizations have already been set out and need not be repeated. The purpose they were intended to achieve was to permit the non-resident shareholders to remit their portion of the purchase price out of Zimbabwe over six years. That, in my view, was a term and condition of the agreement. To ensure that this was honoured paragraphs 13 and 14 provided that completion of all the sales would take place simultaneously not later than 27th October 1981 and that on completion the sellers should hand over completed share certificates against payment of the purpose prices and receipt of such the various Exchange control authorizations as had not already been issued to enable the necessary preparations for completion to be carried out.

In a sense the method by which the funds were to be remitted abroad could be described as methods of implementation and they could be varied to suit the respondent's particular circumstances while ensuring for him the same term and condition - the right to remit his money abroad over a period of six years. He could have been accorded the same right without using the mechanism of the donation to the Swiss Bank, the blocked account and the purchase of Government Bonds, which met the needs of the consortium. The terms and conditions would then have been identical though the methods of implementation would have been different.

Reference was made to paragraph 15 of the 1980 agreement to support the contention that not all "terms and conditions" set out in the agreement were "terms and conditions" of the sale. In that paragraph Mr Graham undertakes to be available for consultations of any "management, organizational, administrative or general policy problems concerning the CAPS group, upon which the purchaser may desire his assistance;". This undertaking is subject to the arrangement of convenient terms and the fixing of appropriate fees. This seems to be collateral agreement between two of the parties to the agreement of sale included as a matter of convenience in that agreement. It is not a term of the agreement of sale. Breach could only occur after the sale had been concluded. The issue can, in my view, be quite simply tested. Had the respondent in exercise of his right of first refusal coffered to purchase the consortium's shares for cash payable in Zimbabwean dollars at \$1,80 per share but without an entitlement to remit, the con-

GEORGES JA

sortium could certainly have properly claimed that that offer was not such that they were bound to accept it. The fact that the purchase price was not remittable would have made it an offer of a different character. On the other hand it would be immaterial if the only difference was that Mr Graham's services as a consultant would not be needed.

In summary, the provision that in the case of non-resident shareholders the purchase price was

to be remittable abroad is certainly a term, if not also a condition, of the sale agreement.

- (iii) *Was the first appellant in breach of Clause 7 in failing to obtain for the respondent an entitlement to remit the purchase price abroad even though he was a resident of Zimbabwe?*

It has been argued on behalf of the appellants that it would be reasonable to draw a distinction between shareholders who are residents of Zimbabwe and those who are non-residents. The Exchange control Regulations, 1977, draws such a distinction. It is not, however, a distinction relating to the entitlement to remit funds abroad; it applies to the surrender of foreign currency, dealing with foreign currency outside Zimbabwe and the transfer of securities, to mention some areas. The entitlement to remit abroad funds from Zimbabwe, whether by residents or non-residents, is a matter for ministerial discretion, guided no doubt by prescribed policy considerations.

The Minister quite clearly could consider it proper to grant authorization to remit in the case of a non-resident shareholder and to refuse it in the case of a resident shareholder. This seems entirely reasonable. The fact, however, is that he can, if he wishes, authorize remittance by a resident. There would be no breach of the law. The learned judge *a quo* was, in my view, correct in stating that it may have been possible to exert pressure on the Minister to grant authorizations to remit to all shareholders. Spending on show anxious the Government was to acquire the company the concession could legally have been made.

- (iv) *If the first appellant was in breach, was the respondent entitled to an interdict to restrain the sale?*

There would be a convincing case for the grant of an interdict if Clause 7 of the 1980 agreement (and necessarily also Clause 3 of the 1975 agreement) contained a negative undertaking that the consortium would not sell its shares unless it could include the respondent's shares on the same terms and conditions as its own shares in any agreement for sale it might conclude. The learned judge *a quo* was prepared to

1982 (1) ZLR p176

GEORGES JA

hold as a matter of law that there was such a negative undertaking though, in his view, in the absence of such an undertaking an interdict should still be granted.

It does not appear to me that as a matter of pure interpretation it would be correct to read such a negative undertaking into either clause. There are no words to support it. The undertaking, if it is to be found, must be implied.

The law as to the circumstances under which a term may be implied can be described as trite, though difficulties may be encountered in its application. The formulation by SCRUTTON, LJ, in *Reigate v The Union Manufacturing Co* [1918] 1 KB 592, 118 LT 483 is the most often quoted:

"You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident 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 have replied 'of course, so and so, we did not trouble to

say that, it is too clear.' "

I have already indicated that Clause 7 of the 1980 agreement seems intended to protect the respondent as a minority shareholder in control of management against the financial loss he could foreseeably suffer if the share value dropped as a result of the transfer of "effective control". Safeguarding the minority against that possibility did not require that the appellant should never be able to sell unless the respondent's shares were included in the sale. The consortium might find a buyer willing to buy its shares at an acceptable price but unable or unwilling to make the further outlay required to buy the considerable number of shares held by the respondent personally and through Gerros. If it appeared in his interests to do so the appellant could proceed with the sale and compensate the respondent for any loss he might suffer. The respondent would then be placed in the same position in which he would have been had his shares been included in the sale and the consortium would have divested itself of its interest in CAPS. Business efficacy thus does not seem to demand the implying of a negative undertaking.

The fact is that an unusual situation, not contemplated when the contract was concluded, has arisen in this case. The parties contemplated that the purchaser would have been an international pharmaceutical company. Such a purchaser would have had no control over the grant of authorizations to remit funds abroad and the granting of such authorizations could not have been a term or condition of the sale. The purchaser in this case is the authority empowered to authorize the

1982 (1) ZLR p177

GEORGES JA

remittance of funds from Zimbabwe. The business efficacy of the contract must, however, be judged against the circumstances contemplated by the parties, not in the light of the unusual situations which did develop.

Nor can the implication be based on the "officious bystander" test. If such a bystander had asked the parties at the time of negotiations what would happen if the consortium found a buyer willing to purchase the respondents' holding, it does not seem to me that both parties would have inevitably agreed that in such circumstances the consortium would not sell. The answer could easily also have been that the consortium would be free to sell once it was prepared to make good the respondent's loss. The test for implying clauses in contracts must be strictly applied, for the Courts do not regard it as part of their function to make contracts for parties which they have not made for themselves.

In my view, on the facts of this case, it would not be proper to grant an interdict unless a negative undertaking could be found either by interpretation or implication in the agreement. To do so would be to hold the appellants to an undertaking to which they had not bound themselves in the agreement which they signed.

The law in England on this subject is stated in Volume 24 of Halsbury's *Laws of England*, 4th edition, paragraph 1004:

"The court will often decline to imply a negative covenant into a contract containing an affirmative covenant and

to interfere by way of injunction to restrain its breach. Examples are where specific performance to the affirmative contract is impossible such as in the case of a contract for personal service."

A nearly identically worded passage from Volume 21 of Halsbury 3rd Edition paragraph 812 was quoted by FRANKLIN, AJ (as he then was), in *Tension Envelope Corp (SA) Ltd v Zeller and Anor*, 1970 (2) SA

333 (W) at page 341E as accurately stating the South African law on the subject.

It cannot, of course, be said that performance of the positive covenant in this case- ensuring that the respondent's shares are included in the concluded sale agreement on the same terms and conditions as the consortium's shares - is impossible in the exact sense that a contract for personal service is impossible. The situation, however, seems analogous. The appellants cannot specifically perform the undertaking unless they find a willing purchaser: something which is not within their control. They could, of course, refrain from selling but this, as I have endeavoured to point out, is an undertaking which they have not given.

1982 (1) ZLR p178

GEORGES JA

The passage quoted by the learned judge *a quo* from the judgment of INNES, J, as he then was, in *Farmers' Co-op Society (Reg) v Berry*, 1912 AD 343 at pages 350-1 recognizes that decrees of specific performance will not be issued where it is impossible for the defendant to comply with them. The other authority cited is *Lumley v Wagner* (1852) De G, M and G 604 at page 619, but that was a case in which there was an explicit negative covenant in terms of which the injunction could be framed.

Accordingly I would hold that the respondent was not entitled as he claimed, to an interdict restraining the appellants from transferring or taking any steps to transfer their shares in CAPS Holdings Ltd to the Government of Zimbabwe.

Considerable argument centred on whether an interdict should be granted since a remedy in damages would be inadequate. A decision on that issue is not necessary in view of the conclusion reached above. It is certainly possible to compensate the respondent for loss incurred by reason of any diminution of the actual value of the shares. This may not arise since the Government of Zimbabwe may well be prepared to purchase the shares at \$1,80 per share.

Whether the respondent has suffered damages because he has not been granted permission to expatriate the funds and how such damage, if any, is to be assessed are more difficult questions. It sums to me that it can validly be argued that a resident of this country cannot be said to have suffered loss if he is paid in this country for shares which he owns here.

One final matter was argued, namely whether the shares to which Clause 7 of the 1980 agreement applied were the shares which the respondent owned at the time he signed that agreement or the shares which he owned at the date when the consortium entered into the agreement to sell their shares and so pass effective control. I agree with the conclusion reached by the learned judge in the court *a quo* that it applied to the shares which he held at the latter date. In the agreement "Kramer's shares" are defined as the; shareholding in CAPS

owned and controlled by Kramer or any member of his family. If, as I have concluded that clause was intended to safeguard of control there is no reason why that protection should be limited to the straws he held at the time of the agreement. If that had been the intention it could easily have been expressed by setting out in the agreement what was the size of his holding then.

1982 (1) ZLR p179

GEORGES JA

In the results the appeal should be allowed to the extent that the interdict granted on 3rd December, 1981, is set aside. There has been no appeal against the order that the first appellant, Gerard Stanley Graham, pay the costs of the application which had been prepared, though not filed, to obtain delivery of the draft heads of agreement between the consortium and the Government. The declaration that the respondent's shares to be included in any sale in terms of Clause 7 of the 1980 agreement should be the shares he owns at the date of such agreement, and not the shares he owned at the date of the 1980 agreement, will stand.

The appellants have been substantially successful since the central issue was whether or not an interdict should be granted. In those circumstances they are entitled to their costs in this court and of the hearing in the court *a quo*.

Fieldsend CJ: I agree.

Beck JA: I agree.

Gollop & Blank, appellants' legal representatives.

Atherstone & Cook, respondent's legal representatives.

1982 (1) ZLR p180

TOBACCO SALES LTD v AGRICULTURE INVESTMENTS (PVT) LTD AND OTHERS 1982 (1) ZLR 180 (HC)

Court High Court, Harare

Squires, J

1st April and 19th May, 1982

Flynote

Contract - of sale - option to purchase - option granted for an indefinite time - not void for vagueness on that ground alone - Companies Act [Chapter 190] - section 186 (c) - transfer of shares after liquidation - principles on which court should act - costs - case defended due to uncertainty created by applicants' founding affidavit - no order of costs made.

Headnote

An option to purchase can remain open for an indefinite time, if that is what the parties to the contract have agreed. Such an agreement can endure for an indefinite time and during that time be exercisable at the will of the grantee. The contract cannot be held to be void for vagueness for that reason alone. If the grantor did wish to withdraw the option for any unforeseen reason, he would at least have to give reasonable notice before he could even begin to claim that it was validly withdrawn.

Section 186 (c) of the Companies Act [Chapter 190] provides that in a winding up by the court any transfer of the company's shares shall be void unless the court orders otherwise. The court will give its consent to such transfer according to the judge's opinion of what would be just and fair in each case. The exercise of the discretion is controlled only by the principles which apply to every kind of judicial discretion.

Mere concern, however legitimate, for the interests of a party to litigation will not excuse liability for costs if that concern unsuccessfully puts someone else to the expense of coming to court to establish his case. Where, however, the case is unsuccessfully defended because the party is misled into opposing a claim by the uncertainty created by the successful applicant's founding affidavit, there are grounds for denying the successful party his costs and making no orders as to costs.

Cases cited:

Hillas & Others v Arcos Ltd (1932) 174 LTR 503 (HL); [1932] All ER Rep 494;

Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd, 1964 (1) SA 669 (WLD);

1982 (1) ZLR p181

SQUIRES J

Glabe Electrical Transvaal (Pty) Ltd v Brunhuber & Others, 1970 (3) SA 99 (ECD);

Treadwell & Another v Roberts, 1913 WAD 54;

Hanekom v Mouton, 1958 (1) PH, A 9 (C);

Greenhalgh v Mallard & Others [1943] 2 All ER 234 (CA);

Re Onward Building Society (1891) 2 QBD 463; [1891-4] All ER Rep. 1953;

Re Steane's (Bournemouth), Ltd [1950] 1 All ER 21 (Ch D);

Re Clifton Place Package Ltd [1970] 1 All ER 353 (CA).

JC Andersen SC with him I A Donovan, for applicant.

A P de Bourbon, for the second respondent.

No appearance for the 1st, 3rd and 4th respondents.

Judgment

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Squires J: Tobacco Sales Ltd., the applicant in this matter, seeks an order authorizing the liquidator of Agriculture Investments (Pvt.) Ltd the 1st respondent, to transfer to the applicant the shares held in Agriculture Investments by the Commercial Grain Producers' Association the second respondent. The second respondent opposes the relief claimed, whereas Agriculture Investments and the third and fourth respondents - who did not appear at the hearing of the application - have all indicated that for one reason or another such interest as they have in the matter does not incline them to go to the lengths of opposing the application and they will abide by the decision of the Court.

The facts of the matter, stated as briefly as is consistent with relevance, are that Tobacco Sales and the second, third and Fourth respondents were, and are, all shareholders in varying amounts in Agriculture Investments. By September or October of 1979, Agriculture Investments, it seems, was facing what is euphemistically described in the business world as liquidity problems - to the extent that liquidation seemed a real possibility. The minutes of an Extraordinary General Meeting of the shareholders held on the 30th October, 1979, reflect this situation, and record the inconclusive debate of the shareholders as to what should be done about it. Various possible actions were discussed, and a resolution to place the company into voluntary winding up was actually put to a vote but defeated, in the main by the applicant voting against it.

But the significant facts that emerge from his meeting were, first, that certain of the shareholders, including the applicant, thought that the assets of Agriculture Investments were worth far more than appeared to be the case at that time and were anxious to avoid liquidation; and, secondly, that of those who did not subscribe to that view, and who wanted

1982 (1) ZLR p182

SQUIRES J

liquidation as the answer, the Commercial Grain Producers' Association said so most plainly. Indeed, according to its then Chairman who was present at this shareholders' meeting, its Executive Committee wished to withdraw from involvement in Agriculture Investments and its activities, and regarded its investment in the enterprise as having been written off.

The Commercial Grain Producers Association had by then twice offered its shares for purchase, once to the third respondent and once to the applicant, both for the sum of \$2 094. The third respondent only wanted to buy if it could acquire the shares of the other shareholders too, but the applicant was not disposed to sell its shares and the offer [fell away. On the 9th October, 1979, Commercial Grain Producers' Association offered its shares to the applicant at the same price; and though nothing seems to have been done about it prior to the Extraordinary General Meeting referred to above, it may have had something to do with the proposals for the future of Agriculture Investments that the applicant was going to submit to other shareholders. On the 22nd November, 1979, however, the applicant wrote to the Commercial Grain Producers, Association confirming a previous verbal agreement whereby the applicant had taken an option to acquire the Association's shares in Agriculture Investments. The option payment was \$2 094, which was the same as the selling price of the shares, and was to cover the purchase price of the shares in the event of the option being exercised. The option was furthermore stated to be

open for an indefinite period.

Agriculture Investments seems to have survived for a little over a year longer, however, for it was not until the 10th December, 1980, that it was placed in provisional liquidation, apparently by the third respondent, and that order was subsequently confirmed. With the passage of time, though, it became clear that those shareholders who believed that Agriculture Investments' assets had a latent value in excess of the 1979 level were entirely correct in their estimate, for after paying all its creditors in full, the company has assets worth something like \$190 000 available for realization and distribution to shareholders.

Claiming that it had exercised its option to acquire the Commercial Grain Producers' Association's shares, the applicant now seeks transfer of those shares to it. As already stated, the first, third and Fourth respondents did not appear at the hearing. The first respondent manifestly has no interest in the outcome, and, while the third and Fourth respondents have an interest - since for different reasons they do not wish to forego any possible benefits attaching to their shareholding - they are content to accept the decision of the court in the matter. The

1982 (1) ZLR p183

SQUIRES J

Commercial Grain Producers' Association opposes the application, and entered an appearance. But it should be made clear, perhaps, that it is a wholly new Executive Committee that now directs the Association as opposed to those who wished to withdraw from Agriculture Investments in 1979. Being responsible to the Association's members for the Association's funds - all of which come from levies on crops grown by the members - the present Committee's concern is to ensure that any possible interest of Association members in the Association's shares is not relinquished without adequate debate of the matter.

The Association bases its opposition on three grounds. First, it says the basis on which the applicant now claims to be entitled to the Association's shares is far too uncertain and nebulous for the court to hold that there came into existence any valid and binding agreement in terms of which the Association has now become obliged to transfer its shares to the applicant. Secondly, it says that even if it did, the Articles of Association of Agriculture Investments require an offer of the shares to the other shareholders before they can be transferred to the applicant. In parenthesis, it may be said that it is in this respect that the third and Fourth respondents have an interest in the matter. And, thirdly, it says that the court has a discretion whether to order the transfer of any shares in a company that is in liquidation in terms of section 186 (c) of the Companies Act, which discretion should only be exercised if strong reasons are present to sanction such a transfer, and there are no such reasons in the instant case.

So far as the first ground is concerned, it is certainly clear, and I think common cause, that a businessman's agreement, being occasionally haphazardly and inadequately composed, ought to be approached with a broad but fair regard to what the parties actually meant without being too astute or subtle in finding defects in it. That does not mean, of course, that a court can make a contract for them or go outside the words they have used. But if it is clear enough to understand from the words used by the parties, then effect should be given to it if at all possible. This approach appears from decisions such as *Hillas & Ors v Arcos Ltd* (1932) 174

LTR 503 (HL), as approved and applied in cases such as *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd*, 1964 (1) SA 669 (WLD) at 670H, and *Globe Electrical Transvaal (Pty) Ltd v Brunhuber & Ors*, 1970 (3) SA 99 (ECD) at 105.

Approaching the matter on this basis, it is abundantly clear that on the 22nd November, 1979, the applicant wrote to the Association's then chairman, confirming the grant by the latter on behalf of the Association

1982 (1) ZLR p184

SQUIRES J

of an option to the applicant to buy the Association's shares in Agriculture Investments. The option price was to be \$2 094, and it was specifically stated this would also be the price of the shares if the option were exercised. Moreover, this option, it was specifically stated, was to remain open for an indefinite period. It is likewise abundantly clear, it being so admitted by the Association in the present proceedings, that the payment for the option was received and accepted by the Association.

What is uncertain, and is the main thrust of the Association's doubts, is whether this was really ever properly exercised so as to turn it into a binding contract - an uncertainty that substantially flows from the confused and contradictory recital of events leading up to this that is given in the founding affidavit filed by the applicant. This affidavit, for example, speaks at various places of the applicant "accepting" an option which had already been given, instead of confirming such agreement or option; and enclosing a cheque as the "purchase price" of the shares - which manifestly were not then being bought in an agreement of sale. The replying affidavit, however, satisfies me, after trying to trace the various developments through the papers, that the applicant's representative in this transaction meant to acquire an option on these shares and did so, as confirmed by his letter of the 22nd November, 1979. He had valid reasons at that time for only wanting to secure a right to become the owner of the Association's shares; and an option to acquire them, especially if given on an indefinite basis, would have been the best way to meet his various difficulties. But why the matter is so defectively set out in the founding affidavit is not explained, since the effect of what he later deposed to, it seems to me, could have been easily and accurately reflected in that affidavit..

But be that as it may, it seems eventually clear, as already stated, that the applicant desired and obtained an option to acquire the Association's shares, and that the purchase price, if it decided to exercise that option, would be \$2 094. Furthermore, all the parties involved, particularly as shareholders in Agriculture Investments, understood this to be the case.

What is not dear is when and by what means the applicant exercised this option so as to acquire the right to transfer of the shares. There are both minutes of meetings of Agriculture Investments and correspondence annexed to the affidavits, which show that by the 8th May, 1980, the option apparently had not been exercised, but at a meeting of Agriculture Investments on the 6th October, 1980, there is a statement which suggests that by then it had been exercised, and that transfer of the shares thus acquired was being sought. On the 31st October, a letter

SQUIRES J

was written by the applicant to the Association, asking for the latter's shares to be transferred to the applicant with effect from the 1st November 1980 - a request that was copied to the Secretary of Agriculture Investments.

Thereafter, liquidation intervened without the shares being transferred to, the applicant, and the request to transfer the shares of the Association to the applicant was later renewed to the liquidator in May of 1981. After advising the third and fourth respondents of this request (to which, it may be said, neither had any objection), the liquidator was prepared to do so but was prevented from taking this step himself by the provisions of section 186 (c) of the Companies Act.

The question then arises whether this evidence really supports the conclusion that the option was exercised and a right to the shares thereby vested in the applicant. It seems to me, however, that, like any other over, the option thus granted could be accepted or exercised in any way contemplated by the parties. In this particular case, the Association, having indicated its total lack of interest in its shares in Agricultural Investments, and having accepted an option price which was also to be the purchase price if the option was exercised, it could be said that the parties at least impliedly dispensed with any necessity for formal notification and acceptance by the grantee of the option, and that the Association simply left it to the applicant to make up its mind whether it wanted the shares or not without any further formalities or performance that an offeror can expressly or impliedly render notice of acceptance unnecessary appears from such authorities as *R v Net*, 1921 AD 339, and this is what it seems the Association did. Though it is not without some sifting through the evidence, rather like making up a jigsaw puzzle, the facts eventually seem to fit together to establish that, having been granted an option to purchase the Association's shares, the applicant exercised this option some time after the 8th May and before the 6th October 1980.

Although not pursued in argument by Mr *de Bourbon*., the Association also raised in its opposing affidavit the question of whether the sum of \$2 094 could properly constitute both a consideration for the option and the purchase price of the shares when the option was exercised. While it is certainly unusual to do so, I can think of no reason why such an arrangement would be invalid. The intention of the parties seems clear, and erect should be given to that. It is that the applicant wanted to purchase the Association's shares but for the reasons given in the replying affidavit did not wish to do so until the various difficulties in the way had been resolved. Since the \$2 094 was the Association's asking price

SQUIRES J

when it was seeking a buyer for the shares, it seems safe to assume, as was stated by the parties in their option agreement, that that sum was in fact to be regarded as the purchase price if and when, as was expected, applicant decided to exercise the option. In that case the share would become transferable to the applicant upon the exercising of the option without further

ado. But to secure such an advantage, the applicant obviously decided to over \$2094 as the payment so that the Association did not lose in the event of the applicant either not exercise the option or of deciding to do so.

Mr *de Bourbon* did, however, argue that the purchase price paid must bear some relationship to the true value of the articles purchased to show that there was a genuine *animus emendi*. But though the price of 0,02 cents per share may seem paltry in the light of the present value of the assets of the Agricultural Investments, it is clear that at the time the option was granted by the Association, even that price was regarded as acceptable. It had made two attempts to sell its shares at that figure before it gave the applicant the option requested; and if the owner of an article attempts to sell it at a particular price to a variety of would-be purchasers, it seems to me that it can be safely assumed that the price sought at least approximates to the true market value of the goods offered. I do not think therefore that there is any substance in this point either.

Mr *de Bourbon* also attacked the validity of the option on the basis that it was granted for an indefinite time. Relying on *Treadwell & Anor v Roberts*, 1913 WLD 54, he said that this made the option void for vagueness. It is true that in that decision WARD, J, did say that the effect of an option couched in such terms was either that the grantor could terminate it at any time, or else that the expression "... was one that was too vague for the Courts to deal with." But from the remarks that follow this passage in the judgment, it seems that the learned Judge was saying that where the parties have intentionally not set a time limit on the operation of their option, the Court could not import or imply a reasonable time without re-write in the contract for them; and therefore because a Court could not put a limit on the time, it was either terminable at any time or else could not be enforced. But by holding that, he seems to have done precisely what he said he could not do - naively, disregard the clear intention of the parties and re-write the contract for them. With the difficulties thus inherent in that decision, I have some hesitation in regarding it as decisive of a question of the present nature, and in doing so also derive considerable support and

1982 (1) ZLR p187

SQUIRES J

comfort from the fact that in *Hanekom v Mouton*, 1958 (1) PH, A9 (C) WATERMEYER, J (as he then was), held that a similarly worded agreement was exerciseable at the will of the grantee, and that such an option could endure for an indefinite time.

It may well be that the duration of such an option is still an undecided question in our law, but it does not seem to me to be void for vagueness. There is no suggestion that the parties ever disagreed on the meaning of the words or did not fully understand what they had said, and they must have known from their choice of language that the option would at least be open for acceptance for an indefinite time and that if the grantor did wish to withdraw it for any unforeseen reason, he would at least have had to give reasonable notice before he could even begin to claim that it was validly withdrawn.

In the present case, it is common cause that the Association never made any attempt to set a term on the period of the option or ever queried its purportedly indefinite character. And, on the

same basis as was applied in *Hanekom v Mouton (supra)*, it seems to me that such an agreement can endure for an indefinite time and during that time is exercisable at the will of the grantee. It cannot therefore be held to be void for vagueness for that reason alone.

The Association also raised the argument that if its shares in Agriculture Investments are transferable to the applicant, then clause 8 of Agriculture Investments' Articles of Association require it to offer those shares, through the directors, to the other shareholders at a fair value, and the fact that the third and fourth respondents declined to avail themselves of an opportunity to acquire the shares when they were directly offered to them previously is no answer to the present requirement placed on the Association to do so again.

The validity of this argument, of course, depends on the provisions of the Articles in question, for, subject to the requirements of the Companies Act, which usually means disposal of shares in a private company is controlled by the directors, a shareholder - like anyone else who owns property - may dispose of that property as he pleases, unless some proper restraint operates to curtail that right. As was put by the then Master of the Rolls (LORD GREENE) in *Greenhalgh v Mallard & Ors* [1934] 2 All ER 234 (CA) at 237B-C:

"... in the case of the restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent

1982 (1) ZLR p188

SQUIRES J

in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention."

In deciding this issue, clause 8 - and only clause 8 - of the articles has been put before me; and there is nothing else in Agriculture Investment's domestic rules available that might assist in the interpretation of this provision.

This clause deals with the "Transfer and Transmission of Shares" and the first paragraph reads as follows:

"8. (a) No shares shall be transferred to any person who is not a member of the Company as long as any member (hereinafter called 'the purchasing member') is willing to purchase the shares at the fair value."

It will be seen from its words that this paragraph specifically forbids the transfer of shares to any non-member company, as long as any member is willing to purchase them at the same price or a value that is fixed as fair.

Mr *de Bourbon* conceded the clarity and effect of this paragraph, but he pointed to paragraph (b) of clause 8, which reads as follows:

"Any shareholder proposing to transfer any share (hereinafter called 'the proposing Transferor') shall give notice in writing (hereinafter called 'the transfer notice') to the Directors of the Company that he desires to transfer the same. Such notice shall constitute the Directors his agent for the sale and transfer of the shares specified therein to the other members of the Company in proportion to their shareholding:

PROVIDED ALWAYS that any share not taken shall be offered to the remaining members in proportion to their shareholding, and PROVIDED FURTHER that no shares shall be transferred to a person who is not a member so long as any member is willing to purchase the shares."

This paragraph, he said, was not merely a mechanical provision, but separately introduced the requirement that governed the right of any shareholder who wished to transfer any share, whether to an existing member or to; an outsider.

I have read and re-read several times both paragraphs and the many others that follow in clause 8, and am bound to say that the meaning and effect of the clause as a whole, seem, to me at any rate, to be too clear for argument. It is true that paragraph (it) does not in terms say that the shares referred to in that paragraph are those referred to in paragraph (a) by the use of a qualifying word like "such". But a reading of the whole clause satisfies me beyond any doubt that the clause takes its tenor

1982 (1) ZLR p189

SQUIRES J

from paragraph (a) and thereafter sets out the procedure and process that must be followed if a shareholder wants to transfer his shares "to any person who is not a member of the company", as provided for in paragraph (a).

Apart from the improbability of the craftsman setting out in the first paragraph a general prohibition on transfer of shares to non-members if any members were willing to buy at the fair value, and then introducing in the next paragraph another prohibition on transferring any share whether to member or non-member alike, except by offering them to the others, both linguistically and contextually it is strikingly apparent that paragraph (b) is simply the first step that must be taken before shares can be transferred to anyone who is not a member, as is qualifiedly prohibited by paragraph (a). Descriptions in paragraph (a) and paragraph (b) such as "purchasing member" or "proposing Transferor", respectively, are referred to in the appropriate context through all the succeeding paragraphs. And even in the proviso to paragraph (b), upon which Mr *de Bourbon* laid particular stress, there is a clear reference to the "member willing to purchase" who is identified in paragraph (a).

Quite clearly, in my view, paragraph (b) does not extend the ambit of the shares that are affected by paragraph (a) of clause 8, and only provides the first requirement on any would-be proposing transferor to a non-member, that is, to give written notice to the directors of the intention and the effect of that notice - which is to oblige the directors to offer and transfer, if taken up, such shares as the transferor wishes to sell to the other members in proportion to their existing shareholding. In short, it simply helps secure the usual right of pre-emption that a shareholder in a private company is invariably given if another share" holder wishes to dispose of his shares to an outsider.

But equally clearly the requirement to so offer shares is limited to the situation where the would-be purchaser wishes to sell to a person who is not a member. Clause 8 does not introduce, in my judgment, any further restriction than that, and since a shareholder's right to transfer his shares is unfettered save where specifically cut down or diminished, it follows that in terms of clause 8, at any rate, there is no such restriction imposed if one shareholder wishes to

transfer his shares to another existing shareholder.

So far as the last point is concerned, Mr *de Bourbon* argued that section 186 (c) was peremptory in its language and, if any transfer of shares were made after liquidation, such transfer was void unless

1982 (1) ZLR p190

SQUIRES J

made with the court's approval. Only if strong reasons were present, he said, would the court grant its approval, and this requirement excluded a situation where the sale and transfer of shares were agreed in contemplation of liquidation.

It is true that in *Re Onward Building Society* (1891) 2 QBD 463, both BOWEN and KAY, LJ, said that before the court would exercise its discretion to order the transfer of the share after liquidation - or resettle the register as the relief was there claimed that would require strong reasons to do so. But that statement must be read in the light of the facts of that case, which were that the applicant's interest in acquiring the share rose after the winding up, and the only discernible reason put forward for wanting the share transferred to him - or the company he really represented - was in order to vote at the meetings in the winding up. The real reason was probably the prospect of a dividend on liquidation, but, that, too, with its element of speculation, was not acceptable as a good reason; and the court upheld the County Court's decision to refuse to sanction the transfer - a conclusion which should not really surprise anyone.

A better statement of the general approach to a provision of this sort seems to me to be in the judgment of VAISEY, J, in *Re Steane's (Bourne-mounth) Ltd* [1950] 1 All ER 21 (Ch D) at 25, where the learned Judge said:

"... each case must be dealt with on its own facts and particular circumstances (special regard being had to the question of the good faith and honest intention of the persons concerned), and that the court is free to act according to the judge's opinion of what would be fair and just in each case ... The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion."

This was approved and applied by the Court of Appeal in *Re Clifton Place Garage Ltd* [1970] 1 All ER 353, and seems to me to be indisputably the best approach to a problem of this sort.

What would be just and fair in this case, then?

I am impressed by the fact that the applicant first wanted, and tried, to acquire these shares well before the event of liquidation; and on my finding exercised its option to do so before winding up was applied to Agriculture Investments. It had exhibited a faith in the long-term viability of the Agriculture Investments, and thought its value and prospects were worth an effort to save. It tried with conspicuous persistence to avoid

1982 (1) ZLR p191

SQUIRES J

the liquidation of the company and proposed alternative schemes to keep it going. But these came to nought and someone else eventually placed the company in liquidation. Its continuing desire to obtain these shares that no-one else wanted may therefore properly be regarded as an indication of its belief in their value and in the eventual success of the company. On the other hand, the Association was obviously only too glad to offer its shares for purchase to the applicant, and the situation that would thus follow was at least acquiesced in, if not actually approved by the other shareholder. That is the result they thought had occurred or would occur and no-one objected or made any protest. But for the omission, whether fortuitous or not, to transfer the shares in October or November of 1980 when requested to do so, the anticipated transfer would have taken place before liquidation and there would not have been any need for the present proceedings.

In these circumstances, I would have thought it patently unfair on the applicant to now keep it out of those shares, and unduly and even capriciously considerate to the Association to allow it to keep them or distribute them amongst all shareholders. Moreover, there is the important requirement of public policy that *pacta servanda sunt*. The Association made a bargain and ought to be kept to it, especially when considerations of fairness are the criterion.

In short, it seems eminently fair and just to me if the order sought were to be granted.

That leaves the question of costs. These were only claimed against the Association because it alone had opposed the application, the other respondents - as already stated - being content to leave things to the Court's decision. Mr *de Bourbon*, in arguing to the contrary, said that the Association had opposed the application because of the uncertainty of the position and because of the responsibility its executive had to its members, particularly in a fiduciary capacity as protector of its property.

I would not have thought that the second reason by itself was sufficient to avoid liability for costs if the decision went against the Association. Mere concern, however legitimate, for the interests of a party to litigation, will not excuse liability for costs if that concern unsuccessfully puts someone else to the expense of coming to court to establish his case.

But there is more substance, in my view, in the factor of the uncertainty, and particularly in the situation that this uncertainty was unnecessarily exacerbated by the considerable confusion of thought that is apparent in the applicant's founding affidavit. Anyone reading that could understandably conclude that the deponent was at best unsure of his facts and at worst did not know what he was talking about; and in either event

1982 (1) ZLR p192

SQUIRES J

that perhaps a valid agreement of sale had never been achieved. And while the uncertainty was to an appreciable extent cleared up by the replying affidavit, there are still letters which restore some of the original Uncertainty, such as annexure BB, and which are not adequately explained even in that affidavit. Moreover, those are the facts which should have been presented in the founding affidavit.

While it may not be a sufficient ground by itself to deprive the applicant of its costs as a mark of

disapproval for the confused and confusing presentation of its case on affidavit, the matter goes somewhat further in the present case because I have little hesitation in holding that the Association could validly entertain doubt as to the reliability of the applicant's explanation of what occurred - particularly on the founding affidavit, and therefore entertain some legitimate basis for being misled into opposing the application. In those circumstances I propose to make no order as to costs.

There will therefore be an order in terms of paragraphs 1 and 2 of the draft order attached to the notice of motion.

Winterton Holmes & Hill, legal practitioners for the applicant.

Coghlan Welsh & Guest, legal practitioners for the second respondent.

1982 (1) ZLR p193

FREELANCE CONTRACTING (PVT) LTD v DE CLERK 1982 (1) ZLR 193 (SC)

Court **Supreme Court, Salisbury**

Baron, JA, and Beck, JA

30th March and 21st May, 1982

Flynote

Delict - negligence - *res ipsa loquitur* - application of - gives rise to an inference, not presumption - plaintiffs case must fail if acceptable evidence given by defendant which reveals no fault on his part even if occurrence in question remains unexplained.

Headnote

The respondent (plaintiff in the court *a quo*) was a dairy farmer whose equipment included a milk cooler. This machine broke down, because its motor burned out. The reason for that was never explained. He sought the help of the defendants, a firm of refrigeration mechanics. Part of their repair consisted in flushing out the system and replacing the refrigerant fluid. The usual cleaning fluid was unavailable and a substitute, which had been successfully used on numerous other occasions, was used in its place. The cooler worked for a while but repeatedly broke down and finally the motor burnt out. The filters in the system were found to be blocked. The system was flushed out and a black sludge came out. In spite of their flushing out, the filters continued to get blocked until finally the compressor broke down. The copper pipes which formed part of the system were analysed and a deposit of copper chloride was found in their internal surfaces. The defendant was unable to explain the cause of the continual breakdowns, through he did have a plausible explanation for the presence of the copper chloride.

The plaintiff claimed damages, his case being that if the cause of the break downs was unexplained, the maxim *res ipsa loquitur* applied and there rested on the defendant an *onus* of giving an explanation for the break downs which was inconsistent with its negligence.

Held, that the maxim *res ipsa loquitur* does no more than raise an inference of negligence, which a court is not compelled to draw. It does not give rise to a presumption. It is no more than a rule of evidence, the essence of which is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence.

1982 (1) ZLR p194

BARON JA

Held, further, that the ultimate enquiry is not into the cause of the occurrence but into the conduct of the defendant. Where, as here, an occurrence is unexplained but the evidence as to the defendant's actions is accepted and reveals no fault on his part, the plaintiff's action must fail.

Cases cited:

Paola v Hughes (Pty) Ltd & Another, 1956 (2) SA 587 (N);

Rankisson v Springfield Omnibus Services, 1964 (1) SA 609 (D);

Arthur v Bezuidenhout & Mieny, 1962 (2) SA 566 (AD);

Barkway v South Wales Transport [1950] 1 All ER 392 (HL).

FG Smith, for the appellant.

C S Grossman, for the respondent.

Judgment

Baron JA: This is an appeal against a judgment in the magistrate's court whereunder the respondent (the plaintiff below and to whom I shall refer hereafter as the plaintiff) was awarded damages against the appellant (the defendant) in the sum of \$1 000 for loss suffered as a result of the defendant's negligent performance of a contract of repair. In fact, at the time of the events in question the plaintiff was a company and the defendants carried on business as a partnership, but the incorrect citing of the parties was accepted by consent.

I do not propose to recite the facts at any length, because Mr *Grossman* conceded that if his submissions as to the proper application of the maxim *res ipsa loquitur* be wrong the plaintiff cannot be held to have discharged his *onus* and the appeal must succeed.

The plaintiff was a dairy farmer whose equipment included a milk cooler which was a specialised type of refrigerator. In May, 1979, this cooler, which was then some 10 years old, broke down. The plaintiff sought the services of a firm of refrigeration mechanics, Stakold Refrigeration and Dairy Services, which had looked after his refrigeration equipment for many years: however, this firm was at the time over-loaded with work and short-staffed, and consequently passed on the request to the defendant, another firm of refrigeration mechanics. The defendant partnership consisted of a Mr Williams, who had been in the trade for 30 years and was accepted as a refrigeration expert, and a Mr Carter, who was also a very experienced refrigeration mechanic; the proprietor of Stakold was a Mr Cole, who had been in the trade for

25 years and was also accepted as an expert. There was very little disagreement between the experts, and certainly not on any major point.

1982 (1) ZLR p195

BARON JA

The original break-down of the cooler was found to be due to the motor having burnt out; the cause of this burn-out was never established. Mr Carter, when he removed the compressor unit from the cooler, noted a characteristic smell which indicated that the burn-out had contaminated the whole system. It was common cause that when a system has been contaminated in this way it must be thoroughly flushed out before the compressor unit is re-installed. Mr Williams, who carried out this first re-installation, described his procedure and it is clear from Mr Cole's evidence that no criticism can be levelled at the procedure itself; the plaintiff's complaint is that the cleaning agent used for the flushing process was not suitable and caused the subsequent repeated breakdowns of the cooler.

The refrigerant in common use in this country at the time was a substance known as Freon 12 (F. 12); the manufacturers of this product made also a cleaning agent, Freon 11 (F. 11), and if both were readily available a refrigeration mechanic would naturally tend to buy both from the supplier. However, for some time both products had been in somewhat short supply, and while there was no available substitute for F. 12 the defendant had for about a year prior to the event under review been using a cleaning agent known as Magselect, with complete success, the defendant had first used Magselect on the expert advice of his suppliers, and once again it is clear from Mr Cole's evidence that no criticism can be levelled at the defendant on this score.

After Mr Williams had installed the compressor unit, complete with the re-wound motor, the cooler worked for a short time (the precise time was in dispute but is not relevant); Mr Williams and Mr Carter visited the plaintiff's farm on a number of occasions, replaced driers (filters) and carried out other repairs, but in spite of all their efforts the machine repeatedly broke down and finally burnt out again. The plaintiff then called in Mr Cole, who found excessive wear on various parts in addition to the burnt-out motor; he had the motor re-wound and supplied a compressor unit of his own in order to get the cooler working until the spares to replace the worn parts of the plaintiff's unit arrived. However, the following day the unit seized and the motor burnt out, and the drier was found to be blocked. Mr Cole therefore decided to install a unit with an external motor (by which I understand him to mean a motor connected to the compressor shaft by means of a belt), but he first flushed the system out very thoroughly; a quantity of black sludge came out. In spite of the thorough flushing of the system the driers repeatedly became blocked, until finally the compressor broke down;

1982 (1) ZLR p196

BARON JA

Mr Cole decided that it would be necessary to replace the copper pipes and brought the piping back to his workshop for examination. Expert analysis established that there was a deposit of copper chloride on the internal surfaces of the pipes. Mr Cole ordered the necessary components, but shortly before they arrived the plaintiff informed him that he had found

someone who had a complete unit in stock. It seems that the cooler has worked satisfactorily since the new unit has been installed.

We have then the following position: the plaintiff's machine broke down and it was found that the motor had burnt out; the cause of that initial burn-out is unknown. The defendant repaired the machine, using procedures which the plaintiff's expert acknowledged were correct; that expert acknowledged also that if he had been unable to obtain the cleaning agent of his choice - F 11 - he would have sought advice from chemical experts, and if those experts had recommended Magselect he would have used it. The defendant had not only been using Magselect successfully for a year before the events under review but had used it equally successfully ever since. The plaintiff's expert's subsequent efforts to repair the machine had been unsuccessful and it continued to break down for reasons which that expert was unable to explain. The defendant equally was unable to explain the repeated breakdowns.

although he offered a plausible explanation for the deposit of copper chloride in the pipes.

The plaintiff alleged that the defendant was negligent in using Magselect as a cleaning agent, he sought to establish that this substance resulted in formation of a copper chloride deposit in the copper pipes of the cooling system or the dilution of the oil lubricating the moving parts of the unit, or both, and that the repeated failure of the unit was due to one or other or both of these causes. As I have said, Mr *Grossman* accepted that the evidence does not establish that the Magselect was responsible either for the formation of the copper chloride deposit in the pipes or for any dilution of the oil and he was clearly right to do; the expert chemical evidence directly rules out the former, and both allegations are ruled out if one accepts - and it was never challenged - that the defendant had for some years both before and after these events used Magselect without any ill effects. But Mr *Grossman* submits that it is not for the plaintiff to establish that the use of Magselect had the foregoing consequences his position is summarised in the concluding sentence of the plaintiffs heads of argument (which Mr *Grossman* did not draw, but which he adopted).

1982 (1) ZLR p197

BARON JA

"The Respondent's case is simply that if the cause (of the break-downs) is unexplained, the maxim of *res ipsa loquitur* applies and there thereupon rested on the Appellant an onus of giving an explanation which was inconsistent with its negligence."

It was clear from the argument both in the court below and before us that the "explanation" called for was not of the defendant's conduct, but of the cause of the repeated breaking down of the cooler. In support of his submission Mr *Grossman* cited a dictum of SELKE, J, in *Poala v Hughes (Pty) Ltd and Anor*, 1956 (2) SA 587 (H) at page 595A to D:

"But, if the legal position is, as I suppose it to be, that the plaintiff had made a *prima facie* case which it was then for the defendant to answer, and the defendant did not show that the breaking of the chandelier was, at least, not inconsistent with the exercise of due diligence by him, there should have been judgment for the plaintiff. It follows, then, that, even if the magistrate's findings that the foreman and his assistant lowered the chandelier smoothly and with due care and skill and in accordance with a method universally used, which was a safe method - and I feel bound to express some doubt whether these findings are justified upon the evidence - they do not entitle the defendant to a judgment for absolution, because, as I said earlier, the net conclusion to which the magistrate

comes is that the cause of the accident was unexplained.

I am unable to agree with the magistrate's view that the circumstances of this particular case are not such as give rise to the application of the principle of *res ipsa loquitur*."

This passage certainly supports Mr Grossman. But the case has been specifically questioned in *Rankisson v Springfield Omnibus Services*, 1964 (1) SA 609 (D), at 617G, where MILLER, J, pointed out that on this point it was not reconcilable with *Arthur v Bezuidenhout and Mieny*, 1962 (2) SA 566 (AD).

Quite apart from the persuasive authority of *Arthur v Bezuidenhout* (*supra*) (which was also cited to us by Mr Grossman) I would not, with respect, be prepared to follow the approach of SELKE, J, in *Paola's case* (*supra*) as expressed in the passage cited above, which seems to me not only to place too high a burden on a defendant faced with a *prima facie* case arising because of the doctrine of *res ipsa loquitur*, but also to place undue emphasis on an explanation by the defendant of the occurrence in question. It is clear from both the South African and the English cases that the maxim *res ipsa loquitur* does no more than raise an inference of negligence; thus in *Arthur v Bezuidenhout*, (*supra*), OGILVIE THOMSON, JA (as he then was), said at page 574E:

"The maxim *res ipsa loquitur*, where applicable, gives rise to an inference rather than a presumption. Nor is the Court, or jury, necessarily compelled to draw the inference."

1982 (1) ZLR p198

BARON JA

And at the foot of the same page:

"... once the plaintiff proves the occurrence giving rise to the inference of negligence on the part of the defendant, the latter must adduce evidence to the contrary. He must tell the remainder of the story, or take the risk of judgment being given against him. How far the defendant's evidence need go to displace the inference of negligence arising from proof of the occurrence complained of by the plaintiff depends upon the facts of the particular case. In *de Wet v Adams*, 1935 TPD 247, for instance, the plaintiff's action failed because, although the Court considered that, solely on the expert evidence, plaintiff's contention was the more probable, the defendant was accepted as a truthful witness, and the Court held that there was not such a preponderance of probability against the defendant explanation as to discharge the *onus* resting upon the plaintiff."

And at page 576C:

"Before it gives judgment in favour of the plaintiff, the Court must be satisfied that, having regard to the evidence as a whole, the plaintiff has proved, on a balance of probabilities, his allegation of negligence against the defendant."

In *Barkway v South Wales Transport* [1950] 1 All ER 392 (HL) LORD PORTER said at page 394H-395A:

"The doctrine (of *res ipsa loquitur*) is dependent on the absence of explanation, and, although it is the duty of the defendants, if they desire to protect themselves, to give an adequate explanation of the cause of the accident, yet, if the facts are sufficiently known, the question ceases to be one where the facts speak for themselves, and the solution is to be found by determining whether, on the facts as established, negligence is to be inferred or not."

And in the same case LORD RADCLIFFE said at page 403 G:

"I find nothing more in [the maxim *res ipsa loquitur*] than a rule of evidence, of which the essence is that an event which in the ordinary course of things is more likely than not to have been caused by negligence is by itself evidence of negligence. In this action much more is known than the bare fact that the omnibus mounted the pavement and fell down the bank. The true question is not whether the appellant adduced some evidence of negligence, but whether on all the evidence she proved that the respondents had been guilty of negligence in a relevant particular."

It seems to me clearly to emerge from these cases that the ultimate enquiry is not into the cause of the occurrence but into the conduct of the defendant. This is not to say that the cause of the occurrence is irrelevant; there may well be circumstances in which the finding as to such cause will have an important, and perhaps even conclusive, bearing on the findings as to the defendant's conduct, as for instance where the defendant has deposed to his actions and procedures and the court

1982 (1) ZLR p199

BARON JA

must decide whether his evidence can be accepted. But the fact remains that the plaintiff's claim is based on alleged negligence, the *onus* of proving which is upon him, and hence where, as here, an occurrence is unexplained but the evidence as to the defendant's actions is accepted and reveals no fault on his part, the plaintiff must fail. I would allow this appeal with costs, and substitute for the magistrate's order an order of judgment for the defendant with costs.

I should perhaps add that I am far from satisfied that there is in the present case an "occurrence" giving rise to the doctrine of *res ipsa loquitur*. The kind of occurrence which had been held to give rise, in the absence of an explanation, to an inference of negligence is where a lorry suddenly veers onto its incorrect side of the road or a bus suddenly mounts a pavement and falls down a bank. In the present case, the occurrence which is said to give rise to the inference was the repeated breaking-down of the cooler; but the cause of the original break-down, as a consequence of which the defendant was called in, was never established. It is more than arguable therefore that what we have here is a failure to repair a defect which had already manifested itself rather than the manifestation of a new defect. However, this point was not argued before us and I have therefore dealt with the matter on the basis on which it was argued.

Beck JA: I agree.

Ali Ebrahim, appellant's legal representative.

Gill, Godlonton & Gerrans, respondent's legal representatives.

1982 (1) ZLR p200

VIRIRI v WELLESLEY ESTATE (PVT) LTD 1982 (1) ZLR 200 (SC)

Court Supreme Court, Salisbury

Baron, JA, and Beck, JA

1st April and 21st May, 1982

Flynote

Delict - negligence - collision between motor vehicle and stray cow at night - "driver's dilemma" - test always remains one of foreseeability - apportionment of damages - assessment of - costs - award of costs in case where damage apportioned - principles to follow in assessing costs - desirability of making a single order.

Headnote

The plaintiff was driving home at night along a country road in an area in which he knew cattle were to be found. The road was straight and the verges clear, so there was nothing on either side of the road which could afford cover for an animal. Although the fence of the farm alongside the road was generally in good repair, it was frequently damaged by trespassers, but repairs were made when any damage was found. One of the defendant's cattle had a propensity for escaping from its paddock and leading other animals out. On the night in question the cow concerned escaped and wandered onto the road, where it was struck and killed by the plaintiff's vehicle. The vehicle itself was severely damaged. The plaintiff sued the defendant for \$1 000, being the value of the damage to the vehicle.

He alleged that the defendant was negligent in allowing its cow to wander onto the road. The defendant counter-claimed for the loss of the cow, claiming that the plaintiff was himself negligent, in failing to keep a proper look-out and in driving at a speed excessive in the circumstances.

The magistrate found that, on the plaintiffs claim, the plaintiff himself must bear 80 per cent of the responsibility of the accident. On the counter-claim, he held that the plaintiff was wholly responsible for the accident. He ordered the plaintiff to pay four-fifths of the total costs. The plaintiff appealed.

Held, that in view of the propensity of the cow concerned to stray, an accident of the very type which occurred was clearly foreseeable and the defendant was negligent in failing to take steps to guard against it.

1982 (1) ZLR p201

Held, further, the question of the plaintiff's negligence, that the question of a driver's negligence falls to be determined on the basis of the standard considerations concerning negligence and in particular the test of foreseeability. When driving in cattle country, a driver should foresee the danger of cattle straying onto the road, particularly at times when the herdsman are off duty. This does not always apply, as, for example, where cattle suddenly stampede from behind cover; but in the present case, if the plaintiff had been driving prudently, he would have seen the cow before he hit it.

Held, further, that the apportionment of damages is very much a value judgment; but where the apportionment is in the region found by the magistrate one is really approaching the point of

saying that the defendant's fault was hardly more than nominal. On the facts, this was not the situation and a more proper apportionment was two-thirds to one-third.

Held, further, that the award of costs should not mechanically follow the result in cases like the present. The combination of apportionment and a counter claim raises additional and frequently complex considerations, such as double taxation. It is undesirable to lay down rules as to the award for costs in cases such as the present; but generally, in the absence of special circumstances, the question of costs will turn on substantial success. The court will seek to reflect its over-all view of the success of the parties in a single order for costs. Viewing the case as a whole, justice would be done by awarding the plaintiff half his costs in the court below on both the claim and counter-claim.

Cases cited:

Morris v Luton Corporation [1946] 1 All ER 1 (CA);

Baker v Longhurst (E) & Sons, Ltd [1933] 2 KB 461;

Tidy v Battman [1934] 1 KB 319;

Tart v Chitty (GW) & Co Ltd [1933] 2 KB 453;

S v van Deventer, 1963 (2) SA 475 (AD);

Hoffman v SAR & H, 1955 (4) SA 476 (AD);

R v Wells, 1949 (3) SA 83 (AD);

Manderson v Century Insurance Co Ltd, 1951 (1) SA 533 (AD);

Nebel v Eloff, 1963 (3) SA 674 (T);

Bhyats' Store v van Rooyen, 1961 (4) SA 59 (T);

R v Venter, 1959 (2) SA 520 (E.);

South British Insurance Co Ltd v Smit, 1962 (3) SA 826 (AD);

Venter v Dickson, 1965 (4) SA 22 (E);

Basson v Pietersen, 1960 (1) SA 837 (C);

Botha v African Bitumen Emulsion (Pty) Ltd, 1960 (2) SA 6 (T);

Smith v W H Smith & Sons Ltd [1951] 1 All ER 528 (CA).

BWK Whaley, for the appellant.

CS Grossman, for the respondent.

BARON JA

Judgment

Baron JA: The appellant (the plaintiff below and to whom I will continue to refer as the plaintiff) sued the respondent (the defendant) for damages in the sum of \$1 000 in respect of damage to his motor-vehicle occasioned as a result of a collision between that vehicle and a cow belonging to the defendant. On the night of the 2nd November, 1980, at approximately 9.15 p.m. the plaintiff was returning to his home at Inkomo Barracks from the direction of Darwendale village on a road which ran alongside a farm owned by the defendant when he collided with the defendant's cow. The point at which the collision took place is approximately one to one and a half kilometres beyond the extremity of the defendant's farm. The plaintiff's car was so seriously damaged that the estimate for repairs was \$1 500 and it was consequently regarded as a write-off; the defendant's cow had a very severe injury to the stomach and both rear legs were broken, and appears to have died either instantaneously or shortly after the accident.

The plaintiff alleged that the defendant was negligent in allowing its cow to wander onto the road. The defendant denied that it was negligent and alleged in turn that the plaintiff was negligent in failing to keep a proper look-out for cattle and in driving at a speed which was excessive in the circumstances; the defendant counter-claimed in respect of the loss of its cow, the amount claimed in the pleadings being \$150, but at the trial the defendant did not persist in its claim for this amount and informed the court that, subject to the question of liability, the amount would be decided by consent between the parties.

The magistrate held that on the plaintiff's claim the plaintiff himself must bear 80 per cent. of the responsibility for the accident and consequently awarded him damages in the sum of \$120; on the counterclaim, however, the magistrate held that the plaintiff was wholly responsible for the accident and that the defendant's counter-claim therefore succeeded. On the question of costs the magistrate ordered that the plaintiff pay four-fifths of the total costs. Mr *Grossman*, on behalf of the defendant, confessed himself unable to understand why the magistrate did not use the same apportionment of responsibility in both the claim and the counter-claim and did not support the magistrate's order in this regard; however, he supported the remainder of the order, including the order as to costs.

I will deal first with the allegation of negligence against the defendant. The defendant's manager (to whom I will refer for convenience as the defendant) told the court that he had had a great deal of trouble from trespassers, who constantly damaged his fences, this evidence was confirmed by a police officer, Sergeant Mutema, who told the court that he

1982 (1) ZLR p203

BARON JA

was aware of the frequent reports made by the defendant to the police concerning the activities of trespassers and the damage caused to the fences on the defendant's farm. The defendant said that apart from the damage caused by the trespassers his fences were in good condition, and he described his routine concerning their maintenance; he said in particular that his chief herdsman and another herdsman examined the fences constantly and repaired them as

necessary, and this was corroborated by the herdsman. The defendant was corroborated as to the general condition of his fences once again by Sergeant Mutema. It must be said that in this regard the evidence of the plaintiff, who said that the fences generally were in poor condition, cannot be accepted. As to the condition and maintenance of the fences, therefore, I do not think that the evidence establishes negligence on the part of the defendant.

However, the matter does not end there. The defendant's chief herdsman told the court that this particular cow had a propensity for escaping from its paddock and for leading other animals out, and that he had reported these facts to the defendant. He said that he had expected this cow to be involved one day in a collision with a motor-vehicle or a train (a railway line runs alongside the road in question). In these circumstances an accident of the very type which actually occurred was clearly foreseeable; the defendant could have taken very simple steps to guard against such an accident - for instance, by tethering this particular cow at night and at other times when the herdsman were off duty - and he must in my view be held to have been negligent in failing to take such steps.

I turn then to the allegation that the plaintiff was himself negligent in failing to keep a proper look-out and in driving at a speed which was excessive in the circumstances. The plaintiff said he had lived at Inkomo Barracks for over three years; he was familiar with the road in question and was aware that there were cattle on the defendant's farm. The road had a nine-foot tarmac surface it was straight and the verges were clear, so that there was nothing on either side of the road which could afford cover for an animal. The plaintiff said that he was on his way home from Darwendale and that he was driving at 35 to 40 mph.; he explained that a reconditioned engine had just been installed in his car and for that reason he was driving at this modest speed. He described the night as "something like a light night, it wasn't very dark, neither was it very bright". It was common cause that the cow was black. The plaintiff said that his headlights were on full beam, but that the animal suddenly flashed across the road as if it was being chased, and that he had no opportunity to stop before hitting it. The magistrate did not accept this evidence; he pointed out that there was no cover on the side of the road and that the cow could not therefore have just appeared from nowhere.

1982 (1) ZLR p204

BARON JA

He held that with his lights on full beam and travelling slowly the plaintiff must have been able to see the cow moving on the side of the road, he did not believe that the cow could have sprinted from a position outside the plaintiff's field of vision to the middle of the road "in a flash".

I see no grounds for holding that the magistrate's conclusion was wrong. There was no evidence that the cow was actually being chased on the contrary the plaintiff, who was questioned in chief on this point, said that after the accident he tried with the aid of a torch to find out whether there were other cattle in the vicinity but could find none, nor could he find any person. He said also that the cow was moving fast - "it appeared as though it was abnormal". It is understandable therefore that the magistrate was not prepared to accept that the cow suddenly darted across the road, behaviour that would be most unusual, particularly since the plaintiff was in certain important respects a somewhat unsatisfactory witness. I have already referred to his evidence as to the general condition of the fences; in addition, his evidence as to

skid marks was contradictory and an obvious attempt to retrieve a damaging statement, and his allegation that the defendant had intimidated his chief herdsman was contradicted by Sergeant Mutema.

The magistrate relied also on the extent of the damage to the car and the injuries to the cow, and he drew the inference that this damage and these injuries were so severe that "it can only be assumed that plaintiff was travelling at a speed in excess of 40 mph." In translating the damage and the injuries into speed I think the magistrate was in error; this would require expert evidence, and there was none. But I am in no doubt that the evidence established that the plaintiff was either travelling at a speed which was in the circumstances excessive or alas not keeping a proper look-out. Sergeant Mutema said that he found skid marks on the tarmac surface, approximately four metres in length, ending at the point of impact. If the plaintiff's evidence as to his speed was true then, making allowance for a normal person's reaction time of two-thirds to three-quarters of a second, a simple calculation establishes that the plaintiff first saw the cow when he was only about twenty yards from the point of impact, a distance he would cover in one second. Unless the cow had been jolted out of its normal behaviour pattern (for instance, by being frightened by a snake) it would have been walking at a cow's normal leisurely pace of perhaps three miles per hour, or four-and-a-half feet per second; hence the front portion of the cow would have already been on the tarmac when the plaintiff first saw it. And even if the cow had been moving at, say, four times its normal walking pace it would

1982 (1) ZLR p205

BARON JA

still have been only six yards from the centre of the tarmac when the plaintiff first saw it. There was no cover on the side of the road, and the inference to me to be inescapable that the plaintiff was either travelling faster than was safe or should have seen the cow very much sooner than he did.

The question is whether this conclusion establishes negligence on his part. Mr *Whaley*, on behalf of the plaintiff, submitted that the duty of a driver in cattle country is no higher than his duty in other circumstances, and he submitted that the "driver's dilemma" proposition that a person must drive at night at such a speed as to be able to pull up within the range of his vision has been exploded.: In *Morris v Luton Corporation* [1946] 1 All ER 1 (CA) at page 3 LORD GREENE, MR, having referred to a well-known passage in the judgment of SCRUTTON, LJ, in *Baker v Longhurst (E) & Sons, Ltd* [1933] 2 KB 461, which appeared to lay down that a person riding in the dark must be able to pull up within the limits of his vision, said:

"I cannot regard that observation of SCRUTTON, LJ, as in any sense affecting other cases where the circumstances are different.

In the hope that this suggested principle may rest peacefully in the grave in future and not be resurrected with the idea that there is still some spark of life in it, I should like to say that I am in agreement with the observation of LORD WRIGHT sitting in this court in *Tidy v Battman* where he says ([1934] 1 KB 319, at page 322), referring to *Tart v Chitty (GW) & Co, Ltd* [1933] 1 KB 453 and *Baker v Longhurst* that they show:

'.... that no one case is exactly like another, and no principle of law can in my opinion be extracted from those cases. It is unfortunate that questions which are questions of fact alone should be confused by importing into them as principles of law a course of reasoning which has no doubt properly been applied in

deciding other cases on other sets of facts."

These remarks of LORD GREENE were specifically adopted by OGILVIE THOMPSON, JA (as he then was), in *S v van Reverser*, 1963 (2) SA 475 (AD) at page 481 D-F:

"As was reaffirmed by the majority of this Court in *Hoffman v SA R & H*, 1985 (4) SA 476 (AD) at page 478, 'there is obviously a relationship between speed and visibility'; and, in appropriate cases, a driver's failure to regulate his speed so as to be able to pull up within the range of his vision may establish and has in the decisions of this Court not infrequently been invoked to establish - negligence on the driver's part. See *R v Wells*, 1949 (3) SA 83 (AD) at page 88 There is no rule of law to that effect: the ghost so elaborately laid by LORD GREENE remains undisturbed. The issue is essentially one for decision on the facts of the particular case."

1982 (1) ZLR p206

BARON JA

Mr *Whaley* is therefore right to the extent that there is no rule or principle of law by virtue of which the very fact that a driver runs into an unlighted obstruction at night raises a *prima facie* inference of negligence. But having said that, *van Deventer's* case (*supra*) and *Manderson v Century Insurance Co Ltd*, 1951 (1) SA 533 (AD) make it clear that the question of the drivers negligence falls to be determined on the basis of the standard considerations concerning negligence and in particular the foreseeability test, thus if a driver who foresees or should foresee the danger of unlighted obstructions in the road, or cyclists or pedestrians who might be difficult to see, nevertheless drives at such a speed that he is unable to avoid an accident when he finally sees the obstruction or pedestrian or cyclist, he will be guilty of negligence provided the State or the plaintiff, as the case may be, has proved that the obstacle was one which was capable of being seen an good time by a driver keeping a proper look-out.

From this starting point the duty of a person driving at night cattle country falls into place. Mr *Whaley* is in one sense correct when he says that a driver's duty in cattle country is no higher than in other circumstances, if by this he means no more than that the same foreseeability test applies to both situations. But this, of course, is the crux of the question. It seems to me self-evident that a person driving on a road which to his knowledge runs alongside a farm on which cattle in substantial numbers are kept should foresee flee danger that one or more of such cattle will stray onto the road, particularly at times when the herdsman are off-duty. Hence when driving at night such a person must regulate his speed so that should an animal suddenly appear on, or attempt to cross, the road in front of him he is able to avoid colliding with it; it has been said that a motorist is entitled to expect other motorists and road users to behave with at least a modicum of reasonableness, but the law does not recognize the reasonable cow. I have no hesitation in saying that if a person drives at a speed or in a manner which makes it impossible for him to avoid an accident in such circumstances he does so at his peril.

This is not to say that the "drivers dilemma" proposition always applies even in cattle country. In *Nebel v Eloff*, 1963 (3) SA 674 (T) the court accepted the evidence of the defendant and other witnesses that a number of cattle had suddenly stampeded onto the road from a point at the side of the road where they had been concealed from view

1982 (1) ZLR p207

BARON JA

by trees and vegetation. COLMAN, AJ, as he then was, after referring to *Manderson v Century Insurance Co Ltd*, (supra), *Bhyat's Store v van Rooyen*, 1961 (4) SA 59 (T) and *R v Venter*, 1959 (2) SA 520 (E), said at page 676 A:

"I do not think, however, that any of those authorities would support the proposition that a motorist travelling even in cattle country must so regulate his conduct that he will be able to avoid an accident if an animal or a number of animals suddenly emerge onto the carriage-way ahead of him from a place where they were previously not visible at a stage when he is very close to them."

However, the facts before us are different on the crucial question of cover at the sides of the road. I am satisfied that on this road the plaintiff, had he been driving prudently, would have seen the cow moving from the side of the road in time to avoid hitting it. I am satisfied therefore that the magistrate was right to hold that the negligence of plaintiff had been established.

Both parties having been negligent, the question of apportionment arises. As I have indicated, the magistrate held that on the claim in convention the plaintiff must bear 80 per cent. of the responsibility whereas on the claim in reconvention he must bear it all. Like Mr Grossman, I must confess my inability to understand the logic of this approach, but there may nonetheless be some significance in the fact that it was adopted; it seems to me to indicate that the magistrate regarded the defendant's fault as very minor indeed. I would not lightly interfere with a trial court's decision on the question of apportionment, which is very much a value judgment (see for instance the remarks of OGILVIE THOMPSON, JA, in *South British Insurance Co. Ltd v Smit*, 1962 (3) SA 826 (AD) at page 837 F); but this is a case in which it must, I think, be said that the magistrate was clearly wrong, and his Freudian slip in attributing no fault whatever to the defendant in respect of the counter-claim seems to underline the error. We have here a farmer whose chief herdsman has warned him not only of the propensity of this particular animal to break out of its paddock but also of the fact that it led other animals to do the same. The failure of the defendant to take steps to prevent precisely the kind of accident which actually occurred must, in my view, be regarded far more seriously than the magistrate regarded it. When one approaches figures like four-fifths to one-fifth in terms of degrees of blame one is really approaching the point where one is saying that the defendant's fault was hardly more, than nominal. It is true that the plaintiff could, notwithstanding the defendant's negligence, have avoided the accident, but this does not warrant an apportionment which comes close to fixing the whole of the blame on the plaintiff.

1982 (1) ZLR p208

BARON JA

I have no doubt had I been sitting at first instance I would have apportioned the blame as to two-thirds on the plaintiff and as to one-third on the defendant, and the only question which has exercised my mind in this case is whether the substitution of this apportionment for that of the magistrate would amount to unwarranted tinkering, with his value judgment. I have come to the conclusion that it would not; the difference in terms of proportions between four-fifths to one-fifth and two-thirds to one-third is in fact very substantial, although it may not in a given case translate into substantial sums of money.

I turn finally to the question of costs. This has, I confess, caused me no little difficulty. Where responsibility is apportioned but there is no counter-claim the cases indicate that a plaintiff whose claim is reduced because he has been held partly to blame will generally be awarded his costs, as in the case of a plaintiff who recovers less than he claims; the rationale is that in both cases the plaintiff had to come to court. I venture to think that even in this situation a too mechanical application of the rule could lead to unfair results, as for instance where the defendant has suffered no loss but succeeds in establishing that the plaintiff's loss was brought about mainly by his own negligence; substantial success is not to be measured on a purely monetary basis. Be that as it may, the combination of apportionment and a counter-claim raises additional and frequently complex considerations, and the cases show that there is considerable difference of opinion as to the proper approach (see Cillier's *Law of Costs*, Chapter 9, and the cases there discussed.) There has, for instance, been criticism of *Bhyat's Store v van Rooyen* (*supra*) which was relied upon by Mr *Whaley*. Mr *Whaley* submitted that even if the plaintiff recovers only a portion of his damages as claimed he has achieved substantial success, particularly bearing in mind the trivial sum claimed by the defendant in its counterclaim, and he cites *Bhyat's* case (*supra*) at page 69 B-D, where MARAIS, J, said:

"(Claims and counter-claims for damages arising from contributory negligence seem to be eminently of the type where the principle stated in *Fripp's* case" (1913 AD 354) "is applicable. No hard and fast rule can be laid down and the award of costs must always depend on the facts of each case, but where the bulk of evidence relates to 'one set of circumstances' and

'the broad issue between the parties is whether the one or the other is to succeed in recovering a balance'

it would appear desirable to award the costs of the whole action to the party in whose favour the final balance between the opposing claims is found to be."

1982 (1) ZLR p209

BARON JA

I cannot, with respect, subscribe to this approach; I kind myself in agreement with those who have criticised it, and in particular with the remarks on MUNNIK, J, in *Venter v Dickson*, 1965 (4) SA 22 (E) at page 27F:

"... I do not think that in such cases, especially where as in the present case the *quantum* of damages is not in issue, the 'broad issue' is whether the one or the other is to recover a balance. In my view the real issue is the degree to which each party is at fault."

It is self-evident that in contributory negligence cases the final outcome in terms of monetary balance may well turn on which party suffered the greater loss, a purely coincidental factor; the present is such a case.

On the other hand, I do not think the apportionment of costs on claim and counter-claim in the same proportion as the apportionment of blame is a satisfactory approach; a mechanical rule of this kind tends to divert the court from a consideration of other important factors. Furthermore, it will involve double taxation (see *Bhyat's* curse (*supra*); *Basson v Pietersen*, 1960 (1) SA 837 (C); *Botha v African Bitumen Emulsion (Pty) Ltd*, 1960 (2) SA 6 (T); *Smith v W H Smith & Sons Ltd* [1952] All ER 528 (CA)); the problem of the advantage to the plaintiff arising from the Rules of Court in question arises also in Zimbabwe under the Magistrates Court (Civil) Rules 1980,

Order 32, Rule 2 (7).

It would, I think, be undesirable to attempt to lay down rules as to the award of costs in cases such as the present, in the authorities demonstrate anything it is that to elevate to a rule the rationale behind an order made in earlier case, which was no doubt perfectly fair and just in relation to the facts and circumstances of that case, can lead to unjust results. I think that within the broad constraints of the principles and guidelines which have been developed over the years the courts can safely be left to exercise their discretion on the facts and circumstances of the particular case under consideration. I cannot do better than to cite SIR RAYMOND EVERSHED, MR in *Smith v WH Smith (supra)* at page 530A:

"I do not wish to be thought to be laying down any rule of practice to be followed in all cases in which there are cross claims for negligence and each side is held equally or approximately equally to blame. The judges of the Queens Bench Division have great experience in this class of case and deal with matters of costs according to their discretion, avoiding when possible the complexities of a double taxation."

Generally, in the absence of special circumstances (for instance, misconduct) the question of costs will turn primarily on substantial success; the first question is therefore to decide to what extent the parties have been successful. This is not the same question as the extent to which

1982 (1) ZLR p210

BARON JA

each party is held responsible for the accident; a party may be held party to blame for an accident and yet be substantially successful in the action as a whole notwithstanding failure on certain issues, including issues raised in a counter-claim. One must look at the overall picture.

I think it is true to say that the plaintiff in this case had to come to court. This is not a consideration to which I would normally attach any great weight, since it puts a premium on "getting in first"; where both parties have suffered substantial loss it does not seem to me to be of any great consequence which one happens to be the plaintiff. But where, as here, the defendant's loss is fairly trivial and the probabilities are that he would not have sought to recover it save that he had been brought to court, the case comes close to one in which there is no counter-claim at all.

Another important guideline, to which I have already made reference, is the desirability of avoiding the complexities and possible injustice of a double taxation; the court will thus seek to reflect its over-all view of the success of the parties in a single order for costs.

In the present case each party alleged that the other was negligent and solely to blame for the accident. The plaintiff has been successful in establishing that the defendant was negligent - a vital success if he was to recover anything at all - and in monetary terms he has recovered \$333,33; he has been successful also in resisting to an extent the allegation that he was solely to blame for the accident. The defendant has been successful in resisting the allegation that it was solely to blame; it has succeeded in establishing that the plaintiff was negligent to the greater extent, and in monetary terms it has recovered such amount as the parties agree represents two-thirds of the value of the cow (say, \$100). Viewing the case as a whole I think the defendant's success, which includes substantial success on its counter-claim, is of such

significance as to deserve recognition in the order as to costs. Seeking to resect in a single order the success and failure on both sides, I think justice will be done if the plaintiff recovers half his costs in the court below on both claim and counter-claim.

In the result, I would make the following order: The appeal is allowed with costs. The magistrate's order is set aside. The responsibility for the collision is held to lie as to two-thirds with the plaintiff and as to one-third with the defendant. There will be judgment in favour of the plaintiff on the claim in convention in the sum of \$333,33; there will be judgment in

1982 (1) ZLR p211

BARON JA

favour of the defendant on the claim in reconvention in such sum as represents two-thirds of the value of the cow as agreed between the parties. The defendant will pay the plaintiff half his costs in the court below.

Beck JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives.

Honey & Blanckenberg, respondent's legal representatives.

1982 (1) ZLR p212

S v NCUBE AND ANOTHER 1982 (1) ZLR 212 (SC)

Court Supreme Court, Bulawayo

Georges, JA and Beck, JA

26th May, 1982

Flynote

Criminal Law - Criminal Procedure and Evidence Act [Chapter 59] - section 48 (1) - escaping from lawful custody - "custody" - what is.

Headnote

Lawful custody, within the meaning of section 48 (1) of the Criminal Procedure and Evidence Act [Chapter 59], is not an automatic and inevitable consequence of a lawful arrest having been effected, but is a separate and distinct state of affairs that is only brought about where an element of *de facto* control is gained over the freedom of the arrested person after the act of lawful arrest has taken place. Once that control has been gained over the arrested person, the court should not be astute to find that lawful custody has been abandoned because of a relaxation in the effectiveness of that control, of which the person in custody has taken advantage. Where every vestige of control is not voluntarily abandoned and when it is, or ought to be, apparent to him that a temporary relaxation of the extent of control exercised over him is

not intended by his custodians to be an abandonment of the lawful custody established over him, he is not free to take advantage of the situation by decamping.

Cases cited:

R v Dube, 1969 (2) RLR 117,

R v Hartzler, 1933 AD 306;

S v Gwabuya, 1976 (1) SA 174 (R);

R v Makamoli, 1945 GWLD 7;

R v Maposa, 1968 (1) RLR 70;

R v Ncapo, 1945 EDL 8;

R v September, 1959 (4) SA 256 (C);

S v Moloji, 1965 (1) PH, H91 (O).

H I Bisset, for the appellants.

J James, for the respondent.

1982 (1) ZLR p213

BECK JA

Judgment

Beck JA: Both appellants were convicted of contravening section 48 (1) of the Criminal Procedure and Evidence Act [*Chapter 59*] and were sentenced to six weeks' imprisonment with labour. At the conclusion of argument we dismissed the appeal against conviction but seduced the sentence to a fine of \$50, or 50 days' imprisonment with labour in default of payment, and intimated that reasons for our decision would be furnished later. These are the reasons.

The relevant portion of section 48 (1) of Chapter 59 reads:

"48. (1) Any person who, having been arrested and being in lawful custody, but not having yet been lodged in any prison, escapes or attempts to escape from such custody shall be guilty of an offence ...".

The facts of the instant case were that the appellants were lawfully arrested by the police and were taken into lawful custody. Thereafter they were taken by the police on indications. For this purpose the appellants were placed in the back of an open police truck. They were handcuffed together and a police constable was placed in the back of the truck with them. They drove to a butchery in a business centre, parked outside it, and one of the three policemen entered the butchery to locate a person whom the Police wished to interview while the other two stayed at the truck. After a while, however, the two policemen who stayed at the truck with the appellants left the vehicle and also entered the butchery. They emerged about five minutes later to find that the appellants, although handcuffed together, had absconded.

It was contended on behalf of the appellants, that by leaving them unguarded in the police truck for a few minutes, the police abandoned the lawful custody that had been established over them and their flight when the policemen's backs were turned was not, in consequence, an escape such as is contemplated by the section. For this submission Mr *Bisset* relied on *R v Dube*, 1969 (2) RLR 117, the facts of which bear some similarity to the facts of this matter.

Ever since the majority decision in *R v Hartzer*, 1933 AD 306, it has generally been accepted in the courts of the country and of South Africa that lawful custody, within the meaning of that section, is not an automatic and inevitable consequence of a lawful arrest having been effected, but is a separate and distinct state of affairs that is only brought about when an element of *de facto* control is gained over the freedom of the arrested person after the act of lawful arrest has taken place. Thus, it was held in *S v Gwabuya*, 1976 (1) SA 174 (R) that custody had not been established over the arrested person before his alleged escape, since he had neither submitted himself to the control

1982 (1) ZLR p214

BECK JA

of the person who effected the arrest, nor had the latter assumed any kind of actual control over his person. Similarly, it was held in *R v Makamoli*, 1945 GWLD 7, and in *R v Maposa*, 1968 (1) RLR 70, that no custody had yet been established over the accused persons because they had immediately run away upon the arrests being effected and before any form of physical control was gained over them. On the other hand, in *R v Ncapo*, 1945 EDL 8, and again in *R v September*, 1959 (4) SA 256 (C) it was decided that custody had been established where, following upon the initial act of arrest, a measure of physical control was for a short time successfully exercised over the person arrested before he broke free and ran away.

Once the necessary *de facts* control has been gained over an arrested person, however, so as to place him under lawful custody within the meaning of the section, I do not think the Court should be astute to find that lawful custody has been abandoned because of a relaxation in the effectiveness of that control, of which the person in custody has taken advantage. Police officers should not be encouraged to use, for example, leg irons when handcuffs will do, or be discouraged from permitting any amelioration, which they might otherwise think could reasonably be allowed, of the physical restraints unposed on a person in custody. Where every vestige of control is not voluntarily abandoned, and when it is, or ought to be, apparent to a person in lawful custody that a temporary relaxation of the extent of the control exercised over him is not intended by his custodians to be an abandonment of the lawful custody established over him, he is not, in my view, free to take advantage of the situation by decamping.

In the instant case the appellants were able to jump off the police truck and run away because the policemen temporarily ceased to keep the appellants under their personal surveillance and thereby greatly diminished the degree of the *de facto* control to which the appellants had been subjected. But the two appellants had nevertheless been left in the police truck handcuffed to each other, a condition which significantly hampered their freedom as well as proclaiming to all and sundry that they were men in custody. Their custodians had the key to the handcuffs, and it was obvious in the circumstances that the departure of the policemen from the truck to enter the adjacent butchery was a very temporary thing. To hold in these circumstances that lawful

custody was abandoned would be to fly in the face of common sense in my view, and I must confess that I think that the decisions in *R v Dube* (*supra*), and in *S v Molo*, 1965 (1) PH 91 (O) which was followed in *Dube's* case (*supra*), went too far in holding that lawful custody was

1982 (1) ZLR p215

BECK JA

abandoned, having regard to the facts in both those cases where the person in custody was placed in handcuffs by the arresting policemen, who then temporarily left his charge unsupervised, or not effectively supervised, while he attended to other duties.

It was for these reasons that we dismissed the appeal against conviction. Because of the temptation offered to the appellants, however, we altered the sentence to the extent set out at the commencement of these reasons.

Georges JA: I agree.

Lazarus & Sarif, appellants' legal representatives.

1982 (1) ZLR p216

S v MASSON 1982 (1) ZLR 216 (SC)

Court **Supreme Court, Harare**

Fieldsend, CJ, Baron, JA and Beck, JA

24th May and 1st June, 1982

Flynote

37 (1) - unlawful possession of arms or ammunition - possession - meaning - of - only necessary to straw custody or control, not possession animus possidendi - sentence - factors affecting.

Headnote

It is not necessary, on a charge of unlawful possession of arms or ammunition in contravening of section 37 (1) of the Law and Order (Maintenance) Act [*Chapter 65*], for the prosecution to show, once physical detention of the arms or ammunition is established, that the accused also intended to hold them for his own benefit. It is sufficient if the accused had mere custody or detention of them, provided that he knew what they were.

Unlawful possession of arms or ammunition is a very serious matter, particularly where there is any possibility of them being discovered and used for criminal purposes. Too lenient a sentence is likely to encourage others to take the risk of not handing in weapons but to conceal them in one way or another. On the other hand, unwarranted harshness in the punishment of an individual must not be resorted to as means of deterring others nor to satisfy public opinion.

Cases cited:

R v Sibanda & Another, 1963 R & N 593; 1964 (1) SA 311 (SR);

S v R, 1971 (3) SA 789 (T);

S v Brick, 1973 (2) SA 571 (AD);

R v Shaba, 1964 RLR 162;

S v Mahlanze, AD 86/81 (not reported).

A P de Bourbon, for the appellants.

H A Eleftheriades, for the respondent.

Judgment

Fieldsend CJ: The two appellants were convicted of being in possession of a quantity of offensive weapons contrary to section 37 (1) of the Law and Order (Maintenance) Act [Chapter 65]. It was alleged

1982 (1) ZLR p217

FIELDSEND CJ

that between October, 1981 and February, 1982, they were in possession of a miscellaneous collection of weapons and explosives all of which except for two Icarus flares and 53 rounds of blank ammunition fell within the definition of arms of war. The first appellant was sentenced to imprisonment for five years of which two-and-half years were suspended on certain conditions. The second appellant was sentenced to 12 months' imprisonment all of which was suspended. Both appellants now appeal against their convictions and the first appellant appeals also against his sentence.

The case proceeded in a somewhat unusual fashion for a serious charge of this nature. The appellants pleaded not guilty but the State led no evidence. An agreed statement of facts was put in by the appellants' legal representative covering the following matters:

- (1) The first appellant was a safari operator. In September and October, 1981 he was living in a house at Benholm Ranch, a farm in the Kwe Kwe area owned by his mother. Until September, 1981, the farm manager, one Rawson, lived in a closely adjoining house, and in that month he left Zimbabwe for a holiday in America.
- (2) In October, 1981, in undisclosed circumstances, the first appellant found a suitcase under Rawson's bed containing the assorted collection of arms. He was frightened to hand in the weapons to the police because he feared his explanation of how he had come into possession of them might not be believed. He therefore instructed a senior employee, Raphael, to conceal the suitcase at a nearby farm, Mary Ann farm, which he owned.
- (3) The suitcase was concealed by covering it with grass in a little gully about 50 yards

from one of the first appellant's game lodges on that farm. It is unclear whether the first appellant saw where the suitcase was concealed or how. He said in his evidence that this was done as a temporary measure so that the arms would not be discovered if the house should be searched by the police.

- (4) The first appellant must, however, have been told where the arms were hidden because in January, 1982, he removed them to a new place. The contents were removed from the suitcase and put between two long rocks. The gaps were plugged with rocks and presumably these were put on top of the arms as well. Unfortunately there was no description of exactly how the arms were concealed when the police found them on 5th February, 1982.

1982 (1) ZLR p218

FIELDSEND CJ

- (5) The first appellant said that his intention in of the arms on the second occasion was to prevent any animal finding them and possibly being injured, adding later that he also intended to conceal them from any inquisitive person.
- (6) The second appellant, the brother of the first appellant, is aged about 19 years and is a University student. His only involvement was helping his brother in January, 1982, when the weapons were concealed for the second time. He said that he feared that if employees knew where the arms were concealed they would not be safe from anyone and that was why he and his brother acted as they did.

The first point taken by Mr *de Bourbon*, who appeared for the c appellants, was that section 37 (1) of the Law and Order (Maintenance) Act required that before there could be a conviction under the section it must be shown that an accused person not only had physical detention of the arms but also intended to hold them for his own benefit.. He contended that the facts of this case did not establish that either of the appellants had such an intention.

The section reads:

"Any person who, without lawful authority (or reasonable excuse) the proof of which lies on him, has in his possession or in or upon any premises occupied by him any offensive weapon or any offensive material shall be guilty of an offence."

The nub of the question to be decided is whether the words "has in his possession" are to be read in their ordinary everyday sense, or whether they are to be read as meaning that the possession must be legal possession, either natural possession or civil or juridical possession. If the ordinary meaning is to be given it is sufficient that the appellant had mere custody or detention of the arms, provided that he knew what they were and that he had custody: *R v Sibanda and Anor.*, 1964 (1) SA 311 (SR). If the more technical legal meaning is to be given it is necessary to show at least that the appellant intended to hold the arms for his own use or benefit; *S v R*, 1971 (3) SA 798 (T) and *S v Brick*, 1973 (2) SA 571 (AD) *per* JANSSEN, JA

The matter is not free from authority. In *R v Sibanda* (*supra*) BEADLE, CJ, and YOUNG, J, held the predecessor section, which was in identical terms, required that the prosecution would

discharge the onus upon it of proving the accused's mental element by showing that

1982 (1) ZLR p219

FIELDSEND CJ

the accused had *animus detentio*, and that it did not have to show *animus possidendi*. As the learned CHIEF JUSTICE so clearly put it:

"For example, a messenger carrying offensive material from one place to another at the request of the owner would be held to be in possession if he knew that the material which he was carrying was offensive ...".

This decision was not strictly necessary for the purposes of that case, but, in my view, it clearly accords with both common sense and with the intention of the legislature. The legislation is concerned with the maintenance of law and order, and to that end penalises in section 37 (1) anyone who has a weapon. It is not concerned with the niceties of whether the holder has juristic or any other type of legal possession.

It is the holder of arms at whom the section is directed.

The majority judgment in *S v Brick (supra)* is further strong support for this conclusion. That case concerned the South African Indecent or Obscene Photographic Matter Act, 37 of 1967. Section 2 (1) penalized any person who had in his possession any indecent or obscene photographic matter. OGILVIE THOMPSON, CJ, and POTGIETER, JA, held that once it was shown that the holder was aware of the existence of such matter in his detention, custody or control it was not necessary that it should be shown that he intended to exercise control over it for his own purpose or benefit..

The dissenting judgment of JANSSEN, JA, was founded partly on the meaning of "possession" in ordinary legal parlance, and partly on the unreasonable results which might flow from interpreting "possession" as meaning mere detention, custody or control. The latter consideration has no place in the section we are considering, because it is always open to an accused to show that he had lawful authority or reasonable excuse for his possession. Thus a person who had found an abandoned weapon which he had picked up and was carrying to the Police Station to hand in would clearly have a reasonable excuse.

The *obiter dictum* in *R v Sibanda (supra)* and the reasoning in *S v Brick (Supra)* are with respect convincing and correct. Section 37 (1) of the Law and Order (Maintenance) Act penalizes a person who has custody or control of arms, and not only a person who has legal possession. On this basis the appeal against conviction in the case of each appellant must be dismissed. This makes it unnecessary to consider whether the appellants intended to exercise control over the arms for their own purposes. The point would only arise, in any event, in respect of the second appellant. In respect of the first appellant at the least the first concealment would, I think, have been within the section. He took the arms into his custody and he had them concealed on his

1982 (1) ZLR p220

FIELDSEND CJ

own property so that in the event of a search of his house the arms would not be found. That amounts to exercising control for his own purposes and would be sufficient to constitute possession even in the narrower sense of natural possession. It is this concealment which is the more serious of the two not only because the weapons were left only superficially concealed, but also because at least one of the first appellant's employees knew where they were.

I turn now to the question of sentence which, of course, affects only the first appellant. The case must be approached on the basis of the admitted facts. Mr *Sithole*, who appeared for the prosecution in the court below, accepted that unknown to the first appellant Rawson left the arms behind in a suitcase under his bed, that the first appellant was frightened of handing them to the police because he might not be believed as to how he had come into possession of them, and that the arms were subsequently concealed so that no human or animal would find them. It was also common cause that the first appellant in concealing the arms did not have any intention of using them at a later stage or even of returning them to Ransom should he have returned to Zimbabwe. It must therefore be accepted that there was nothing sinister or in any way subversive in this foolish concealment. It was also accepted, we were told, that the farm on which the weapons were concealed was very remote, there being no human habitation within about 30 kilometres of the place of concealment.

One has some sympathy with the magistrate in his difficulty in assessing sentence on the sparse facts that were put before him. This case illustrates once again the dangers of accepting facts put forward by the defence, particularly in serious cases. For example, in the agreed statement of facts no mention was made of the first appellant's intention in regard to the first concealment. This only emerged during cross-examination of the first appellant when he said that the arms were removed in case there was a search of the house.

Mrs. *Eleftheriades*, who appeared on appeal for the State, conceded that the sentence imposed by the magistrate was excessive, but very properly she did not herself suggest what a proper sentence should be.

The degree of blameworthiness of the first appellant is more in the nature of a reckless disregard of the consequences of his actions than of any evil intent. From October to January he left these weapons without knowing exactly how they had been concealed and in the knowledge that Raphael at least knew where they were. They could have been found and used with very serious consequences. The employee who hid them could have told anyone of their presence and weapons of this

1982 (1) ZLR p221

FIELDSEND CJ

sort could be a great temptation even if only to someone wishing to sell them. Even the second concealment seems to have been a superficial affair, but it is hardly necessary to deal with this. Even if the concealment had been perfect it would not have mitigated the recklessness of the first concealment.

The appellant was guilty of a high degree of irresponsibility and in the present situation in this

country it must be brought home to every one how serious it is to possess or to store arms, particularly arms of this nature, where there is any possibility of them being discovered and used for criminal purposes.

I have not lost sight of the fact that these arms were apparently concealed in a very remote area in a place where there were no people living within about 30 kilometres. Nevertheless, as I have already said, there was someone other than himself who knew where the arms were. The Court would be failing in its duty if it did not regard an offence such as this as serious.

Recent amendments to section 5 of the Firearms Act by Act 37 of 1981 which provides a less serious offence of possession of arms indicate the seriousness with which the Legislature regards these cases. That Act now provides a mandatory sentence of five years' imprisonment unless there are special reasons in the particular case why such a sentence should not be imposed. And, of course, with a mandatory sentence no suspension is possible: see section 337 of the Criminal Procedure and Evidence Act and paragraph 3 of the Sixth Schedule. It follows logically that, unless there are such special reasons, in a prosecution under section 37 (1) of the Law and Order (Maintenance) Act which carries a maximum sentence of death or life imprisonment a court could not normally impose a sentence of less than five years' imprisonment if it was to give effect to the expressed intention of the Legislature. I am, however, satisfied that in this case there were such special reasons present: the appellant came into possession of the arms through no fault of his, it was accepted that he was fearful of the consequences, he attempted to dispose of the arms so that no-one would recover them, he had no intention of keeping them for his own use, and the arms were disposed of in a very remote area.

Mrs. *Eleftheriades*' concession that the sentence was excessive is in effect a concession that there are such special reasons in this case, and it would not be right, even in the general public interest, to lose sight of the circumstances. Unwarranted harshness in the punishment of an individual must not be resorted to as a means of deterring others (*R v Sham*, 1954 R L.R 162) nor to satisfy public opinion.

1982 (1) ZLR p222

FIELDSEND CJ

I cannot agree, however, that a wholly suspended sentence, as in one of the cases referred to us, was either appropriate there or would be appropriate here. This is undoubtedly a case which warrants a sentence of imprisonment both on its own merits and as a warning to others. The whole approach of fire legislation and the efforts of the Government have in recent months been directed to ensuring that all weapons of war and other arms are handed in to the authorities. It is only if this is done that they can be neutralized and a stop be put to the present spate of offences involving the use of firearms. Too lenient a sentence in a case like this is likely to encourage others to take the risk of not handing in weapons but to conceal them in one way or another. But imprisonment for a first offender with his own business and with other responsibilities is a heavy punishment almost regardless of its length. An effective sentence of two-and-a-half years is, in my view, singularly inappropriate. It fails to take proper account of all the circumstances as does the overall sentence of five years.

Mr *de Bourbon* suggested that the 60-odd days that the first appellant had been in prison was an adequate punishment, and that a sentence of three months' effective imprisonment which, taking into account the normal remission would result in his immediate release, would be appropriate. Such a sentence would in my view be inadequate. It would not reflect the serious view which the Legislature takes of these offences and it would not be in line with other decisions of this court, see for example *S v Mahlanze*, Appellate Division Judgment No. 86/81 where a sentence of 12 months, with six suspended, was imposed on a country dweller who found a rusted automatic weapon in the bush, oiled it and kept it to shoot wild pigs which were damaging his lands, intending eventually to hand it in.

In my view least sentence that can be imposed on the first appellant is imprisonment for 18 months, of which twelve months are suspended for five years on condition that during that period the appellant is not convicted of any offence involving the possession of arms or offensive material in contravention of either the Law and Order (Maintenance) Act or off the Firearms Act

Baron JA: I agree.

Beck JA: I agree.

E C Moffit and Pratt, appellants' legal representatives.

1982 (1) ZLR p223

DABENGWA AND ANOTHER v MINISTER OF HOME AFFAIRS AND OTHERS 1982 (1) ZLR 223 (HC)

Court **High Court, Harare**

McNally, J

4th and 7th June, 1982

Flynote

Procedure - appeal noting of - effect of noting an appeal - suspension of execution of judgment or operation of order appealed against unless Court otherwise directs - circumstances in which Court may properly direct that leave to execute judgment or to proceed in terms of order be granted.

Headnote

The applicants were the wives of two men who had been detained by the Minister of Home Affairs in terms of the Emergency Powers (Maintenance of Law and Order) Regulations. The Protecting Authority for the Harare North Province had made a further order under the Regulations, prohibiting the E men from communicating with their legal representatives. The applicants obtained from the High Court (McNALLY, J) a ruling that the detainees had a constitutional right to see a lawyer. On the same day their lawyer did see them, but the next day (3rd June, 1982), a notice of appeal against the judge's decision was lodged. The applicants then sought an order that, notwithstanding the noting of the appeal, communication between the

men F and their lawyers be permitted pending the outcome of the appeal.

Held, that the principles which a Court will apply in deciding whether to grant leave to execute or to proceed in terms of an order appealed against are-

- (1) the potentiality of irreparable harm or prejudice being sustained by the respondent if leave to proceed in terms of the order were granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the applicants if leave were refused;
- (3) the prospects of success of appeal, in particular, whether the appeal is frivolous or vexatious or has been noted *mala fide*;
- (4) if there is potential harm or prejudice to both parties, the balance of hardship or convenience (*South Cape Corporation (Pty.) Ltd v Engineering Management Services (Pty.) Ltd.*, 1977 (3) SA 534 (AD) at 545, followed).

1982 (1) ZLR p224

McNALLY J

Held, further on the facts, that -

- (1) there was some possibility, however slight, of very great harm to the State and its citizens if the application were granted;
- (2) since the appeal was likely to be heard in a short time, the detainees would not suffer irreparable harm by reason simply of a short delay;
- (3) the case was an important one and the appeal was not frivolous or vexatious, instigated merely to delay justice to the detainees;
- (4) if the appeal were heard in a short time, the balance of convenience dictated that it was better to move too slowly than too fast;
- (5) if, however, there was going to be a lengthy delay and if the detainees were denied visits from their wives or some impartial outsiders, the balance of convenience might change, and the applicants could raise the matter again before the Court.

Case cited:

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd, (*supra*).

A P de Bourbon, for the applicants.

S M Muchecheitere, for the respondents.

Judgment

McNally J: On Wednesday, 2nd June, 1982, I gave judgment in favour of the present applicants, ruling that their detained husbands had a constitutional right to see a lawyer. That afternoon, in pursuance of the judgment, their lawyer was allowed to see them both, and he did so. He has not recorded any complaint about their health or well-being, or about their treatment

while in detention. I have no doubt that he would have, had there been anything significant to say.

The next day, Thursday, 3rd June, a notice of appeal against my decision was lodged. In the ordinary course of events, in terms of our common law, the noting of an appeal suspends the execution of a judgment or the operation of an order, unless the Court otherwise directs. See Herbstein & van Winsen, *The Civil Practice of the Superior Courts*, 3rd edn, page 718.

The State authorities were therefore entitled to do what they did, namely to advise Mr *Elliott*, the detainees' lawyer, that he would not be permitted to see them on Friday, 4th June, as he had arranged. This refusal has given rise to the present application, seeking an order that communication be permitted pending the outcome of the appeal. Once again, such an application is quite proper and reasonable. The general rule to which I have referred earlier may be departed from in a proper case.

1982 (1) ZLR p225

McNALLY J

The principles which a Court will apply in coming to a decision were set out by CORBETT, JA, in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, 1977 (3) SA 534 (AD) at 545E, in the following terms:

"In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alibi*, to the following factors -

- (1) the potentiality of irreparable harm or prejudice being sustained by the appeal (respondent in the application) if leave to execute were to be granted;
- (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
- (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
- (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

In the present case we have to substitute for the words "leave to execute" the words "leave to proceed in terms of the order". Both Mr *de Bourbon*, for the applicants, and Mr *Muchechetere*, for the respondents, were agreed that I should apply these criteria in coming to my conclusion.

As far as facts are concerned, there are few new facts of any importance before me in this application, which were not revealed in the earlier proceedings.

Mr *Elliott*, in his affidavit, says that the detainees' wives have now been told they may no longer see their husbands, and I am invited to find that this is some kind of punitive or threatening conduct on the part of the authorities. Messrs. Hedges (the second respondent) and Arnold, in their affidavits, repeat that further communication with their lawyer by the detainees could cause prejudice to the process of investigation and the administration of justice. It is alleged that the security of the State and the tranquility of its citizens are involved "to the utmost degree". It is

suggested that the interview which has already taken place may have caused harm, but that further interviews may cause further harm. It is alleged that Mr *Elliott* may unwittingly cause harm, however properly he acts, simply because people will be able to draw conclusions from what he does and who he sees after interviewing the detainees.

1982 (1) ZLR p226

McNALLY J

Further particularity in the respondent's affidavits cannot be expected, says Mr *Muchechete*, because State privilege clearly operates to make it undesirable to say more.

One other point of relevance is that I was advised just prior to the hearing that the Supreme Court would be able and willing to hear the appeal lodged by the respondents, on the 9 and 10 June. Mr *Muchechete* is unable to say at this stage whether these dates will be acceptable to him, so I cannot proceed on the assumption that the appeal will be heard this week.

I approach this matter on the basis that there is an *onus* on the applicants to satisfy me that the normal procedure should be departed from, but that, to use the words of CORBETT, JA, in the *South Cape* case (*supra* at page 549A), this "should not be regarded as displacing the wide ultimate discretion which the Court enjoys in deciding whether or not to grant leave."

I will consider the four criteria listed earlier by me.

1. *The potentiality of irreparable harm to the State if the application is granted.*

Mr *de Bourbon* suggests that if there is any possibility of harm, which is denied, it has already taken place, because Mr *Elliott* saw his clients on Wednesday. The respondents say that may be so, but more harm may flow from further visits. Although I have no details of the potential harm, and although it may be that Messrs. Hedges and Arnold (and the first respondent, who supports their view) are taking the traditionally cautious, perhaps ultra-cautious, view of the conscientious policeman, I must accept that there is some possibility, however slight, of very great harm to the State and its citizens, if the application is granted. When a Minister and two very senior policemen express concern about the safety of the State, I cannot brush their concern aside as of no account.

Now, it is true that if the State's appeal is dismissed, that risk of harm will have to be taken. But that will be because the highest Court in the land will have decided that the individuals concerned have fundamental rights which cannot be overridden. At present it is no more than my view that that is so. My view may be overturned. If it is, that small risk of great harm will have been taken wrongly. It is also important to note that it will have been taken irreversibly.

2. *The potentiality of irreparable harm to the detainees if this application is refused.*

1982 (1) ZLR p227

McNALLY J

Obviously, if the appeal is allowed, the detainees will have lost nothing to which they have a right. We are concerned only with a situation in which the appeal is dismissed. They will then

have been denied access to their legal advisers, wrongly, for some period between say, at best a week and at worst perhaps a few months.

They have already been denied that right, if I am correct in holding that it is a right, for almost three months, save for the one interview with Mr *Elliott* on 2nd June. They have been able presumably to gain some advantage from that interview, and at least it has supplemented the weekly visits from their wives and confirms that they are alive and presumably reasonably well. Furthermore, and as I said earlier, one may assume from the absence of any reference to it in Mr *Elliott's* affidavit, that they do not complain of ill- treatment or grossly improper interrogation. The cancellation of the wives' visits may be a form of pressure on the detainees but it is not an action which the applicants can or do challenge as unlawful. It appears that "a charge has been put to them" (paragraph 4 of Mr *Elliott's* affidavit) but since "numerous persons remain to be seen" (paragraph 6 of Mr Hedges' affidavit) it is unlikely that the matter will come early to trial.

The detainees must inevitably now know that their wives' application was successful and has been taken on appeal. One of them has apparently made a statement, the other has declined to do so. Both have seen their lawyer since then. Both have no doubt been advised generally if hurriedly, and both must know that the matter is to be finalised relatively soon in the Supreme Court.

In these circumstances, I find it difficult to conceive that they will suffer irreparable harm by reason simply of a relatively short delay.

3. *The prospects of success of the appeal.*

Both Counsel were agreed that this is an important case and the appeal cannot be treated as frivolous or vexatious, instigated merely to delay justice to the detainees. There is no ground here for granting the application.

4. *The balance of convenience, or the balance of harm.*

It will by now be apparent that I believe there is a greater danger in moving too fast than in moving too slowly. If my earlier judgment is upheld on appeal, the detainees will get what they asked for, slightly delayed. If my decision is reversed, the safety of the State will not have been put at risk for a wrong reason.

1982 (1) ZLR p228

McNALLY J

However, there is one aspect of the matter which causes me concern. The State is entitled, under the law, to refuse to allow the detainees' wives to visit them. The State is also entitled to take advantage of the time allowed, before it presents its appeal. But if both those things happen it may be many weeks, if not months, before the appeal is resolved, and in the intervening period it may be that nobody except the State's officials will set eyes on the detainees.

It seems to me that the fundamental right to see a lawyer has two facets to it. The first and most obvious is the right of any person to be advised of his legal rights. But underlying that is an

even more important principle - the right of a detained person to be seen by someone other than a State official to be alive and well.

If there is going to be a lengthy delay, and if the detainees are denied visits from their wives or from some impartial outsiders such as, for example, representatives of an international welfare organisation, then it is possible that the balance of convenience might change. It might become necessary for this Court to consider, in those circumstances, whether visits by the detainees' lawyer should not be permitted, even if only on a restricted basis.

I must make it clear that there is no suggestion, on the papers before me, that the detainees have been badly treated. None the less, and for the reasons I have given, I propose to grant the applicants the right to raise this matter again before this Court if so advised.

As far as costs are concerned, Mr *de Bourbon* proposed that they be made costs in the appeal and Mr *Muchechedere* did not demur.

Accordingly, it is ordered that the application is dismissed, costs to be costs in the appeal. However, leave is granted to the applicants to raise the matter again on the same papers, supplemented as necessary, after three weeks from to-day's date, or earlier on a certificate of urgency, on giving 72 hours' notice to the respondents.

Scanlen & Holderness, legal practitioners for the applicants.

State Attorney, legal practitioner for the respondents.

1982 (1) ZLR p229

S v KWADIRA 1982 (1) ZLR 229 (SC)

Court **Supreme Court, Harare**

Fieldsend, CJ, Baron, JA and Beck, JA

2nd and 8th June, 1982

Flynote

Criminal law - motoring offences - driving without due care and attention - fire engine entering intersection against red light - duties of - driver of - cannot insist on precedence over other traffic nor assume automatically that precedence will be given - duty to ensure, before entering intersection, that can do so without endangering other traffic.

Headnote

A fire-engine is bound by regulations relating to traffic signs and traffic lights. This means that it is an offence for the driver of a fire-engine to enter an intersection against a red light. The only other protection given to fire-engines is the provision requiring other traffic to give way to a fire-engine or other privileged vehicle travelling with its warning devices in operation. When a fire-engine enters an intersection, extreme caution is to be used and the driver is not to cross until it is clear that the drivers of other vehicles appear aware that he is proceeding. He is not

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entitled to assume that he will necessarily be given precedence by drivers proceeding with the lights in their favour. What circumstances will suffice to satisfy the reasonable fire-engine driver that all other affected traffic is aware of his presence will vary according to the facts of each case.

Cases cited:

Buckoke v Greater London Council [1971] 2 All ER 254 (CA);

Rondalia Assurance Corp of SA Ltd v Collins NO 1969 (4) SA 354 (T);

Evans v R 1962 R & N 397 (SR);

S v Labuschagne, 1979 (3) SA 1320 (T).

DR Granger, for the appellant, cited *inter alia*: *Johannesburg City Council v Putco*, 1963 (3) SA 157 (W); *S v Philip*, 1968 (2) SA 209 (C); *Davidson v Cape Town City Council*, 1965 (2) SA 559 (C); *Minister of Justice v Bristow-Jones*, 1950 (4) SA 362 (T) *R v Marais*, 1964 CPD 261.

1982 (1) ZLR p230

FIELDSEND CJ

M J Gillespie for the respondent.

Judgment

Fieldsend CJ: This appeal arises out of a collision between a fire-engine and an omnibus, and the conviction of the driver of the fire-engine for driving without due care and attention in contravention of section 42 of the Road Traffic Act (48 of 1976).

At about mid-day the appellant was driving his fire-engine on a fire call northwards in West Road towards its intersection with Argyle Road to his right and Quendon Road to his left. This intersection is controlled by traffic lights. The omnibus was approaching the same intersection travelling westwards in Argyle Road. The fire-engine was sounding its siren as it approached the intersection but it appears not to have been equipped with any visual warning device such as a flashing red or blue light.

The traffic lights were against the traffic in West Road, but because of the fire-engine's siren a number of cars in both Argyle and Quendon roads were stopped to allow its passage. In particular Robert Young, the only prosecution witness, was stopped in Quendon Road facing east at the double white lines marking the beginning of the intersection. His evidence was that the fire-engine slowed as it approached the intersection and then picked up speed as it entered the crossing against the light. He saw the omnibus approaching in Argyle Road, apparently oblivious of the presence of the fire-engine. It entered the intersection at something like 50 km/h and the collision, which he saw as inevitable, occurred.

Unfortunately no police plan of the Scene of the collision was produced in the court below, nor was any evidence given of the finding of glass or other debris on the road which might have indicated the point of impact of the two vehicles. There was no police evidence of the damage

to either of the vehicles. By consent the defence put in without formal proof photographs of the intersection and of the damage to the fire-engine. The latter photographs are consistent with the omnibus having struck the front right-hand corner of the cab of the fire-engine which is the foremost part of that vehicle. This is what the appellant says happened. The damage shown is also consistent with the fire-engine having struck the side of the bus after turning partly left in an effort to avoid collision. Although Young's evidence was that it was the fire-engine which struck the side of the bus, there was no evidence of such an evasive movement.

The general point to be considered concerns the duties of the driver of a fire-engine proceeding on a fire call. The regulations relating to traffic signs and traffic lights (GN 573 of 1973) apply to all vehicles and are binding on the drivers of fire-engines. This means that it is an offence

1982 (1) ZLR p231

FIELDSEND CJ

for the driver of a fire-engine to enter an Intersection by traffic lights against a red light. This is not the place to consider the wisdom of such a provision. It is, or was in 1971, the position in England: *Buckoke v Greater London Council* [1971] 2 All ER 254 (CA) at page 257. The position in South Africa is slightly different under the provincial Ordinances, of which section 74 of the Road Traffic Ordinance 19 of 1955 (C) is typical. That section reads:

"The provisions of this Ordinance relating to road traffic signs shall not apply to a vehicle while it is being used, with due regard to the safety of other traffic, as a fire-engine provided that ... a siren ... is constantly sounded while the vehicle is so used on a public road in disregard of any road traffic sign."

The result of this would appear to be that if in disregarding a traffic light due regard is not paid to the safety of other traffic, the driver of a fire-engine would contravene the regulations relating to traffic lights, as well, of course, as possibly being guilty of negligent or reckless driving. The result is, in effect, similar to the factual position in London where prosecutions of fire-engine drivers for crossing against the lights are negligible in number and not in practice proceeded with unless the driver is thought to have driven carelessly or recklessly: *Buckoke's case (supra)* at page 266C.

Apart from being exempted from speed limit restrictions fire-engines are given no other special privileges. But section 16 of RGN 308/1974 provides for the duties of other traffic when a fire-engine (or other privileged vehicle) is travelling with its warning devices in operation.

It reads:

- "16. On the approach and during the passing of any ambulance or any vehicle used by a fire-brigade or the police, on which a warning device is being sounded, the driver of any vehicle on any road shall -
- (a) if he is travelling on a road consisting of a single carriage-way, draw his vehicle to a halt at the extreme left of the road and remain stationary for as long as may reasonably be necessary; or
 - (b) if he is travelling on any other road, move his vehicle to such a position as to facilitate the passage of such ambulance, fire-brigade or police vehicle, and, if necessary, draw his vehicle to a halt in a safe position and remain stationary for as long as may reasonably be necessary."

This, is of importance because it affects the way in which the reasonably prudent driver of a

fire-engine can expect other drivers to behave in relation to his passage along the road.

1982 (1) ZLR p232

FIELDSEND CJ

This is not the occasion to attempt to do more than deal with a fire brigade driver's duty at intersections controlled lights. With two qualifications which I shall deal with in a moment, it is difficult to put such a driver's duties more succinctly than in the London Fire brigade's instructions to its drivers, approved by the Court of Appeal in *Buckoke's case (supra)*. It is in these terms:

"Drivers of fire brigade vehicles are under the same obligation at law to obey traffic lights signals as the drivers of other vehicles. If, however, a Brigade driver responding to an emergency call decides to proceed against the red light, he is (unless signalled to proceed by a police constable in uniform) to stop his appliance, car or other vehicle, at the red light, observe carefully the traffic conditions around him, and to proceed only when he is reasonably sure that there is no risk of a collision; the bell is to be rung vigorously and/or the two-tone horn sounded and the blue flashing light(s) operated. Extreme caution is to be used and the driver is not to cross until it is clear that the drivers of other vehicles appear aware that he is proceeding. The onus of avoiding an accident in such circumstances rests entirely on the Brigade driver, who is to remember that a collision might well prevent his vehicle from reaching its destination and might also block the road for other essential services; no call is so urgent as to justify risk."

The first qualification I would make to suit local conditions relates to the flashing blue light. Apparently these are not standard on fire-engines in Harare. The second qualification is that given our less dense traffic conditions I would not think it necessary actually to bring the fire-engine to a Stop at every traffic light so long as it is clear that it can proceed with safety to other vehicles. Indeed to bring the fire-engine to a stop may indicate that the driver is going to observe the message given by the lights and mislead other traffic.

In short, a brigade driver cannot insist on his precedence nor assume automatically that it will be afforded. In regard to traffic on the same road such a driver obviously can legitimately assume that vehicles within sight and sound will behave as they should. But he cannot so easily make the same assumption as to traffic entering the road in which he is travelling which would otherwise have precedence over vehicles in that road. In regard to robot-controlled intersections, where drivers are accustomed to assume that traffic will not enter against the lights, a brigade driver has no precedence save that afforded by the provisions of section 16 of the Regulations. These do not entitle him to assume that he will necessarily be given precedence by drivers proceeding with the lights in their favour.

1982 (1) ZLR p233

FIELDSEND CJ

As was held in *Rondalia Assurance Corp of SA Ltd v Collins* NO 1969 (4) SA 345 (T):

"... when [a fire-engine] enters a robot-controlled intersection against the red and becomes involved in a collision with traffic entering the intersection with the green light in its favour, such driver is not entitled to say that he assumed that such traffic would become aware of him and that it would keep out of his way. He must therefore be particularly careful to make sure that no other traffic with the green light in its favour is about to enter the intersection, or otherwise that all such traffic has become aware of his presence and his intention to go forward

against the red light."

This decision is in accord with a long line of cases which are conveniently collected in *Evans v R* 1962 R & N 397 (SR). The same principle was applied in *S v Labuschagne*, 1979 (3) SA 1320 (T), although in that case the brigade driver was exonerated on appeal. With his siren sounding and a red light flashing he had entered an intersection with the lights on amber against him. It was held that he was on the facts entitled to assume that a vehicle 50 yards to the east of the intersection at that stage would not endanger his passage through the crossing.

From these cases it is clear that the driver of a fire-engine may not enter a robot-controlled intersection against the traffic lights unless he can do so without endangering other traffic. This means that before he enters against the lights he must be satisfied that all cross-traffic is aware of his presence and of his intention to proceed against the lights in time to give him precedence. What circumstances will suffice to satisfy the reasonable fire-engine driver that all other affected traffic does have that timeous awareness will, of course, vary according to the facts of each case.

I now come to the facts of this appeal. As I said, the evidence presented by the prosecution was very scanty; but the appellant gave evidence and Mr *Granger* has most co-operatively provided us with a detailed plan of the intersection and an aerial photograph of the area.

It was common cause at the trial, and this is borne out by the exhibits, that this intersection is a very dangerous one. The appellant admitted that traffic approaching from his right in Argyle Road was very difficult to see because of a wall and a thick overhanging tree shown clearly on the photograph. This made it hazardous for him to enter the intersection against the lights because it was difficult to be certain that there was no traffic approaching which he could not see and which could not see him.

There is a dispute about how the appellant proceeded into the intersection.

1982 (1) ZLR p234

FIELDSEND CJ

Young's evidence was that the fire-engine approached the intersection at about 30 km/h, slowed down as it approached the lights and then picked up speed again. He thought that it would have been travelling at about 30 km/h when it hit the bus. His evidence was that the front of the fire-engine struck the left-hand side of the bus. Having regard to the relative positions of the vehicles he could not have seen the actual impact, and he based his conclusion on the damage to the two vehicles. Unfortunately there was no photograph or other evidence of the damage to the bus. Photographs of the fire-engine which were admitted by consent showed that the likely impact was between the left front of the bus and the right front of the fire-engine. From this it seems clear that it was the bus which ran into the fire-engine..

Young's evidence reads well on the record. He was a disinterested witness who was obviously saying what he believed to be the truth. On the other hand he was caught up in a dangerous situation and was trying to keep his eyes on two vehicles at the same time. His evidence as to the actual collision was based on a deduction from the damage to the vehicles rather than an actual observation. Had there been evidence of the precise point of impact based on debris or

other signs on the road supported by accurate measurement of their location it may have been easier to accept Young's evidence. But there was not before the trial even a sketch plan of the intersection, let alone an accurate plan such as Mr *Granger* so helpfully provided for us on appeal. I would stress again how important it is in traffic cases to provide this type of information.

Against Young's evidence has to be set that of the appellant. He said that he brought his vehicle to a halt at the heavy white line that marks the stopping place for vehicles when the lights were against them, and moved forward very slowly from that point. In his evidence-in-chief he said he saw the bus approaching just as he was crossing a white line, that he stopped again and was immediately hit by the bus. In cross-examination he said that he stopped at the heavy white line and then moved forward to a second stopping point to be sure that he could see clearly in both directions that it would be safe to proceed.

Mr *Gillespie* argued that even on the appellant's own evidence he had been shown to be negligent. It was common cause that this was a dangerous intersection because of a wall and an overhanging tree on the south-eastern corner. The appellant said he realized this and that that was why he proceeded cautiously. It may well have been that when he stopped at the heavy white line he could not see far enough into Argyle

1982 (1) ZLR p235

FIELDSEND CJ

Road to be sure that it was safe to proceed. If that was the position it was unsafe for him to proceed across the intersection with the lights against him. It would have been right for him to have moved forward to a position where he could have seen properly. It is quite clear from the plan and the photographs before us that he could have seen the bus approaching by advancing a short way, but without crossing the final line marking the intersection itself. From this position he would have caused no obstruction to traffic travelling from east to west.

I am convinced by Mr *Gillespie*'s argument. Put shortly, the result is that had he been keeping a proper look-out the appellant could have seen the approaching bus before he put his fire-engine in the carriage-way for east-west traffic. In entering upon such a carriage-way against the lights without seeing that it was safe to do so he was guilty of some negligence.

For these reasons I think that the appeal should be dismissed.

Baron JA: I agree.

Beck JA: I agree.

Granger and Archer, appellant's legal representatives.

1982 (1) ZLR p236

MINISTER OF HOME AFFAIRS AND OTHERS v DABENGWA AND ANOTHER 1982 (1) ZLR

236 (SC)

Court Supreme Court, Harare

Fieldsend, CJ, Georges, JA and Beck, JA

12th June, 1982

Flynote

Statutes - Constitution of Zimbabwe, 1980 - paragraph 2 of Schedule 2 - right of detainee to obtain and instruct legal representative of his choice - section 26 (2) (c) of Constitution - saving of existing laws inconsistent with Declaration of Rights - Emergency Powers (Maintenance of Law and Order) Regulations, 1980 - section 43 - provision enabling protecting authority to prohibit detainee from communicating with legal representatives - such ultra vires paragraph 2 of Schedule 2.

Headnote

The husbands of the respondents were detained by the Minister in terms of the Emergency Powers (Maintenance of Law and Order) Regulations, 1980. Shortly after their detention the protecting authority for the Harare North Police Province issued an order in terms of section 43 of the Regulations prohibiting the detainees from communicating with or receiving communication from their legal representatives. This order was confirmed by the Minister in terms of section 43 (b).

The respondents then applied to the High Court (McNALLY, J) for an order directing the appellants to allow the detainees to have access to their legal representatives. The basis of the application was that the order of the protecting authority and its confirmation by the Minister were incompetent because section 43 of the Regulations is *ultra vires* paragraph 2 of Schedule 2 of the Constitution, in so far as it purported to allow the protecting authority to prevent the detainees from instructing and holding communication with their legal representatives. The appellants contended that, because the provisions of section 43 of the Regulations are in identical terms to regulations that were in force at the date the Constitution came into effect, they were saved by section 26 (2) (c) of the Constitution, even though they were inconsistent with the Declaration of Rights. They argued that even though section 43 of the Regulations was inconsistent with paragraph 2 of the Schedule 2, the inconsistency was irrelevant, the Schedule having no significance apart from section 25 of the Constitution, which was part of the Declaration of Rights.

1982 (1) ZLR p237

FIELDSEND CJ

Held, dismissing the appeal with costs, that the power to make provisions for a period of public emergency is specifically required to be exercised in accordance with Schedule 2, paragraph 2 of which gives a detainee a right to instruct and consult with a legal representative of his choice.

Held, further, that Schedule 2 is not part of the Declaration of Rights; it affords a separate right which is enforceable in a time of public emergency. It is a special right, of value only to people

whose ordinary rights have been suspended in such a time. To allow that right in turn to be suspended when there is a state of emergency would be to render it entirely nugatory.

Held, further, that insofar as it conflicts with paragraph 2 of Schedule 2, section 43 of the Regulations is not saved by section 26 (2); and that the instructions issued under section 43 prohibiting the respondents from instructing and consulting with their legal representatives were at variance with the provisions of paragraph 2 and were therefore ultra vires to that extent.

Cases cited:

Minister of Home Affairs v Fisher [1979] 3 All ER 21 (PC);

Sigaba v Minister of Defence and Police and Another 1980 (3) SA 535 (Tk SC)

BC Brown for the appellants.

AP de Bourbon for the respondents.

Judgment

Fieldsend CJ: This is an appeal against an order of the High Court (McNALLY, J) directing that each of two detained persons, Dumiso Dabengwa and Lookout Masuku, should be permitted to obtain and instruct without delay a legal representative of his choice and to hold communication with him.

The applications were made to the High Court by the wives of the detainees, who have been detained since 10th or 11th March, respectively, in terms of orders made by the Minister of Home Affairs under section 17 of the Emergency Powers (Maintenance of Law and Order) Regulations 1980. Until recently the detainees were allowed visits from their wives, but the Protecting Authority for the Harare North Province issued orders on 10th and 26th March, in terms of section 43 of the same Regulations prohibiting them from communicating with their legal representatives.

1982 (1) ZLR p238

FIELDSEND CJ

The relevant provisions of section 43 read:

"43. (1) Subject to the provisions of this section, a protecting authority may by order prohibit, either absolutely or subject to such conditions as he may fix -

(a) any restricted person or detained person from communicating, by word of mouth, in writing or otherwise, with or receiving any such communication from any person who is outside the restriction area or place of detention, as the case may be;

(b) ...

(2) ...

(3) A protecting authority shall not prohibit a restricted person or detained person from communicating with or receiving any communication from his legal representative unless the protecting authority is of the opinion that hindrance fits reasonably likely to be caused to the processes of investigation or the administration

of justice if he does permit such communication.

- (4) Where the protecting authority has prohibited a restricted person or detained person from communicating with or receiving any communication from his legal representative the protecting authority shall, as soon as the grounds specified in subsection (3) cease to exist, notify the restricted person or detained person that he may communicate with and receive communications from his legal representative.
- (5) Any person who is aggrieved by the provisions of and order made under subsection (1) or any measures taken under subsection (2) may make representations thereon in writing to the Minister.
- (6) On receipt of any representations in terms of subsection (5) the Minister may, having regard to the provisions of subsections (3) and (4), confirm the order made by the protecting authority or direct the protecting authority to amend the order in such manner as the Minister may specify."

Despite representations on behalf of the detained persons in terms of subsection (5) the Minister has under subsection (6) confirmed the order of the protecting authority.

The basis of the application was that the order of the protecting authority and its confirmation by the Minister were incompetent because section 43 of the Regulations is *ultra vires* paragraph 2 of Schedule 2 of the Constitution of Zimbabwe in so far as it purported to allow the protecting authority to prevent the detainees from instructing and holding communication with their legal representatives.

1982 (1) ZLR p239

FIELDSEND CJ

Schedule 2 is headed "Savings in the event of public emergencies." It is cross-referenced in the side-note to sections 25 and 68 of the Constitution. Section 25, which is part of the Declaration of Rights, is set out in full below. Section 68, which is not part of the Declaration of Rights, deals with the declaring of a state of public emergency and the procedures required.

Paragraph 2 (1) (a) of Schedule 2 reads:

"2. (1) Where a person is detained under any law providing for preventive detention -

- (a) he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him;"

On the face of it, an order prohibiting a detainee from instructing and holding communication with his legal adviser would be contrary to paragraph 2 (1) (a) of the Schedule and unconstitutional, as would any regulation or Act of Parliament authorising it. The appellants contended in the Court below that because the provisions of section 43 of the Emergency Powers Regulations 1980 are in identical terms to regulations that were in force at the date of the coming into force of the Constitution - 18th April, 1980 - they are saved by section 26 (2) (c) of the Constitution. This section, which forms part of the Declaration of Rights, reads:

"26. (2) ... nothing contained in or done under the authority of any written law shall be held to be in contravention of the Declaration of Rights to the extent that the law in question -

- (a)

- (b)
- (c) repeals and re-enacts an existing law without alteration;".

The learned trial judge held that Schedule 2 was not part of the Declaration of Rights, which forms Chapter III of the Constitution, and accordingly section 43 of the Regulations was not saved by section 26 (2) (c). It is against this decision that the appellants now appeal.

1982 (1) ZLR p240

FIELDSEND CJ

The reasons of McNALLY, J, for reaching the conclusion that he did were -

- (1) that on the face of the Constitution Schedule 2 was not part of the Declaration of Rights;
- (2) that the legislative history indicated that Schedule 2 was deliberately excluded from the Declaration of Rights;
- (3) that there was a sound reason for the special provision in the Schedule entitling a detainee to consult with his legal representative being separate from those rights given by the Declaration of Rights.

The starting point, as with any problem involving statutory interpretation, must be the structure and the words of the statute itself.

The interpretation section of the Constitution (section 113 (1)) provides:

"Declaration of Rights' means the Declaration of Rights set out in Chapter III".

Chapter III, headed "Declaration of Rights", contains sections 11 to 26 inclusive. Schedule 2 appears after section 114 and is first referred to in section 25. That section reads:

"25, Notwithstanding the foregoing provisions of this Chapter, an Act of Parliament may in accordance with Schedule 2 derogate from certain provisions of the Declaration of Rights in respect of a period of public emergency or a period when a resolution under section 68 (6) is in effect."

There is no suggestion that Schedule 2 is deemed to be incorporated in section 25 or into Chapter III any more than that it should be treated as part of section 68 (to which it is also cross-referenced) which is not part of Chapter III. Furthermore, section 52, which provides for the alteration of the Constitution, specifically entrenches in subsection (4) for ten years -

- "(a) any of the provisions specified in Schedule 5 being provisions relating to the fundamental rights and freedoms of the individual; [and there is included in that Schedule paragraph 2 of Schedule 2],
- (b) any of the provisions of Chapter m not so specified, section 68 or paragraph 1 of Schedule 2, if such Bill would derogate or further derogate from, or make or provide for any exception or further exception to, any of the provisions specified in Schedule 5;".

If Schedule 2 were part of Chapter III there would have been no need to refer to paragraph 1 of Schedule 2. The words "any of the provisions of Chapter III not so specified" would have

included that paragraph.

1982 (1) ZLR p241

FIELDSEND CJ

But there is a wider point. Section 13 (1) provides that no person may be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2). Subsection (2) then lists the cases referred to in subsection (1) as -

- "(a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Zimbabwe or elsewhere, in respect of a criminal offence of which he has been convicted;
- (b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of the Senate or the House of Assembly punishing him for a contempt;
- (c) in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law, including any African customary law;
- (d) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court or before the Senate or the House of Assembly in execution of the order of the Senate or that House;
- (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;
- (f) in execution of the order of a court or with the consent of his parent or guardian, for the purposes of his education or welfare during a period beginning before he attains the age of twenty-one years and ending not later than the date when he attains the age of twenty- three years;
- (g) for the purpose of preventing the spread of an infectious or contagious disease;
- (h) if he is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care, treatment or rehabilitation or the protection of the community; or
- (i) for the purpose of preventing his unlawful entry into Zimbabwe or for the purpose of effecting his expulsion, extradition or other lawful removal from Zimbabwe or the taking of proceedings relating thereto."

Subsection (3) then follows in these terms: -

"(3) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him."

It is clear that the "arrest or detention" referred to in subsection (3) can only be arrest or detention of the types referred to in subsection (2), because those are the only cases in which a person may lawfully be

1982 (1) ZLR p242

FIELDSEND CJ

deprived of his liberty. It follows that the power given by section 25 to derogate from certain provisions of the Declaration of Rights is not a power to derogate from section 13 (3). Furthermore the power to make provisions for a period of public emergency is specifically required to be exercised in accordance with Schedule 2.

As we have seen, paragraph 2 of Schedule 2 specifically gives a detainee the right to instruct and consult with a legal representative of his choice. This was necessary in order to ensure that notwithstanding the derogation from subsections (1) and (2) of section 13 allowed by section 25 a detainee should have the separate and distinct right of access to his legal representative.

Other rights are given to detainees by the Schedule: the right to a tribunal; the right to be represented at a tribunal, the right not to be detained on the same grounds as before if released after his case has been considered by a tribunal; the right not to be detained for more than 14 days without a Ministerial order. These are all rights separate and distinct from those conferred by the Declaration of Rights.

Section 25 can perhaps properly be characterised as a derogation from the Declaration of Rights but with in-built restrictions. The restrictions in turn confer rights when the section is invoked.

The conclusion can be tested in this way. Let it be assumed that under an existing law there was a power to detain during a period of a public emergency, but that that law did not provide for a review tribunal. An argument that such an existing law was saved by section 26 (2) (b) would, in my view, be quite untenable. The Constitution now provides specifically that a detained person is entitled to such a tribunal. That would be an over-riding provision.

Mr *Brown* urged what is the strongest possible point available against this conclusion, namely that Schedule 2 could have no existence independent of section 25 and must therefore be regarded as part of that section, and therefore as part of the Declaration of Rights into which that section falls. This argument depends upon finding that Schedule 2 could have no purpose were it not for section 25, on the basis that if there were to be no saving such as there is in section 25, there would be no need for Schedule 2.

Mr *de Bourbon* argued that even if section 25 were repealed Schedule 2 would still serve a purpose because it would provide limits to what could be done under the Emergency Powers Act [Chapter 83] if a state of emergency was declared under section 68 of the Constitution (to

1982 (1) ZLR p243

FIELDSEND CJ

which of course Schedule 2 is also cross-referenced). I would not like to hold in this appeal that without section 25 the fundamental rights and freedoms guaranteed by subsections (1) and (2) of section 13 could be over-ridden. But leaving that point aside there is substance in the argument that, even without section 25, Schedule 2 could serve the purpose to which Mr *de Bourbon* has referred.

In any event, even if the Schedule could have no existence apart from section 25, it does not follow that the Schedule necessarily becomes part of section 25: it may be dependent on its existence but it makes provisions separate from and in some respects different from section 13 (3).

Nor do I think that, by virtue of the inclusion of paragraph 2 of the Schedule in Schedule 5 and its characterisation by section 54 (4) (a) as a provision relating to fundamental rights and

freedoms of the individual, it becomes part of the Declaration of Rights. The fact that section 11 says that "the provisions of this 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" does not mean that there are not other rights and freedoms which the Constitution affords. In my view it is clear that paragraph 2 of Schedule 2 affords a separate right which is enforceable in a time of public emergency.

Mr *Brown* contended that if Schedule 2 were not to be regarded as part of the Declaration of Rights the anomalous position would arise that the rights given by it could not be enforced by direct application to the Supreme Court as could other rights given in that Declaration under section 24. This may be an anomaly but I do not think it is a serious one, because there is always a right to go to the High Court and from there to the Supreme Court. That this can be done speedily is shown by the very little delay there has been in this case.

I think that the furthest Mr *Brown's* argument can be taken is that there is perhaps some ambiguity in the Constitution. Assuming this for the moment, one looks to the principles applicable to the interpretation of Constitutional provisions relating to fundamental rights and freedoms. These were touched upon by the Privy Council in *Minister of Home Affairs v Fisher* [1979] 3 All ER 21, in particular at page 26. There LORD WILBERFORCE said:

"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,

1982 (1) ZLR p244

FIELDSEND CJ

and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of 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."

For the general principle relating to the interpretation of provisions which interfere with fundamental rights and liberties I refer also the judgment of ROSE INNES, J, in *Sigaba v Minister of Defence and Police and Anor*, 1980 (3) SA 535 (Tk SC) at page 541, where the learned judge says:

"On the one hand, a statute depriving the subject of his rights should in a case of ambiguity be restrictively interpreted in favour of liberty, so as to give the words that meaning which least interferes with the liberty of the individual: *Dadoo Ltd and Ors v Krugersdorp Municipal Council*, 1920 AD 530 at 552. The apparently competing canon is that the interests of the individual must sometimes in times of extreme emergency, such as war or the declaration of martial law, yield to the public safety. Thus in *Krohn v Minister for Defence of the Union of South Africa, and the Special Court under Martial law Regulations, Pretoria*, 1915 AD 191 at 197 it was said that -

'the State may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with the urgent danger.'

It may be remarked that this *dictum* refers to the State being compelled to disregard individual liberty, not that the Courts are compelled to do so, unless Parliament so enacts. I consider that the criteria for ascertaining the intention of a statute do not differ according to the relative tranquillity or disruption of the community, but remain

the same. The same rules of interpretation apply, but in grave emergency the purpose of the Legislature to subordinate private freedoms to what it considers the public need may compel it to enact restraints on the liberty of the citizen and if that is the intention clearly expressed there is no room for the presumption in favour of liberty in giving effect to the measure."

But in my view the structure of the Constitution is so clear as to leave no room for ambiguity. In addition it is comforting to know that this conclusion coincides with equity and common sense. It is contrary to any true concept of justice that at the discretion of a police officer a detained person should be unable to obtain legal advice and consult with his legal representative. As McNALLY, J, rightly pointed out, this right is a special one, of value only to people whose rights have been suspended in an emergency situation. To allow that right in turn to be suspended when there is a state of emergency would be to render it entirely nugatory.

1982 (1) ZLR p245

FIELDSEND CJ

The reasoning advanced in the Court below, based on an apparently deliberate change of structure in the legislation from the 1961 and the 1965 Constitutions, is not in my opinion sound. It is true that the equivalent sections are there within the Declaration of Rights, but the reasoning overlooks the point that in each case the equivalent section to the present section 26 (2) (the general savings provision) specifically excludes the section dealing with savings in the event of public emergencies. Mr *de Bourbon*, in his heads of argument, relied on this reasoning and sought to reinforce it by reference to the 1979 Constitution which he said included section 132, the equivalent of section 25 and Schedule 2, in the Declaration of Rights. This overlooks the specific provision in section 169 (1) that "Declaration of Rights" means sections 121 to 131, thus excluding section 132.

Consideration of legislative history leads, I think, to the same conclusions as that found by McNALLY, J, but for somewhat different reasons. Chapter VIII of the 1979 Constitution, headed the "Declaration of Rights", was in very similar form to, the present Chapter III. Section 132 contained savings for periods of public emergency and was to the same effect as the present section 25 and Schedule 2 read together. In the definition section "Declaration of Rights" was defined so as to exclude section 132. Hence the rights given by section 132 were not rights given by the Declaration of Rights. It follows that the special savings contained in section 133 (the' equivalent of the present section 26) did not apply to those rights. This followed the precedent of both the 1961 Constitution and the 1965 Constitution which were the last two before that to provide a justiciable Declaration of Rights.

The argument cannot, I think, be countenanced that there was any intention to extend the savings under the 1979 Constitution by adopting the different legislative technique of using a schedule instead of following the form of the old Constitution. It is unlikely in the extreme that there was any intention to lessen the protection that was given to; detainees under the 1979 Constitution.

In my view, the learned trial judge was clearly right in reaching the conclusion that, insofar as it conflicts with paragraph 2 of Schedule 2, section 43 of the Regulations is not saved by section 26 (2); and that the instructions issued under the section prohibiting the respondents from instructing and consulting with their legal advisers are at variance with the provisions of

paragraph 2 of Schedule 2 and that they are therefore *ultra vires* to that extent.

1982 (1) ZLR p246

FIELDSEND CJ

Accordingly the order of the Court below must be upheld and the appeal dismissed with costs.

It is satisfactory to be able to reach the conclusion that the Constitution, so carefully worked out to ensure the protection of human rights, does not deprive a detainee of this most important right. At a time when some other countries have tended to erode such rights it is encouraging to know that our Constitution clearly recognises and provides protection for such a basic right.

Georges JA: I agree.

Beck JA: I agree.

State Attorney, appellants' legal representative.

Scanlen & Holderness, respondents' legal representatives.

1982 (1) ZLR p247

COMMERCIAL AND INDUSTRIAL HOLDINGS (PVT) LTD AND ANOTHER v LEIGH-SMITH AND OTHERS 1982 (1) ZLR 247 (SC)

Court **Supreme Court, Salisbury**

Fieldsend CJ, Georges JA and Beck JA

31st March and 14th June, 1982

Flynote

Contract - covenants - in restraint of trade - reasonableness of - distinction between such restraints imposed on a workman and those imposed on a merchant selling a business - date on which reasonableness or restraint determined - public interest as a factor - good will - meaning of - goodwill as a factor in determining reasonableness of restraint - validity of provision restraining employee for a period after termination of employment "however caused" - validity of provision extending to "any business similar to or competing with that carried on" by buyer.

Headnote

The first two respondents were husband and wife. Mrs. Leigh-Smith was a talented textile designer. In 1972 they decided together to start a small textile printing firm called Granny Smith Prints, which was incorporated in 1974. A factory was built at Marandellas. Because the company was under-capitalized, the Leigh-Smiths decided to sell some of their equity to a purchaser who could provide the inputs of capital and allocation of foreign currency necessary to make the "company viable. The appellant company (CIH) became interested in buying Granny Smith Prints and made investigations into its financial state and prospects. These

showed that its net assets were worth some \$38 000 and that its profits could be in the region of \$20 000 or more a year, assuming that the expertise of and management by the Leigh-Smiths were retained. After negotiation, CIH paid the Leigh-Smiths \$100 000 for two-thirds of the equity of Granny Smith Prints (Pvt) Ltd. The agreement between the parties also provided that the Leigh-Smiths would enter into service agreements with Granny Smith Prints. There were clauses in both the agreement of sale and the service agreements which imposed restraints on the business activities in which the Leigh-Smiths might engage on the termination of their employment with Granny Smith Prints. Both were to similar effects, and provided "for a period of five years ... after the date of termination of [their] employment ..., however caused, the "[Leigh-Smiths] ... undertake that they will not anywhere in Rhodesia engage in or carry on either alone or in partnership or be employed or interested directly or indirectly in any capacity whatsoever in any business similar to or competing with that carried on by [Granny Smith Prints] at the date of such termination."

For a number of reasons, including the destruction of the factory at Marandellas by guerilla action, the arrangement did not work well. In December,

1982 (1) ZLR p248

1979, Mr Leigh-Smith decided to and sold his shares to CIH for the nominal sum of \$1. His resignation was accepted on condition that the restraint clause would apply until March, 1986. In July, 1980, Mrs. Leigh-Smith also resigned, selling her shares for \$2 500. The Leigh-Smiths emigrated, but finding no suitable work outside the country, returned to Zimbabwe. They formed a company called Blueberry Hill (Pvt.) Ltd., the third respondent, which carried on business that competed with that of Granny Prints, although the bulk of its business did not so compete. CIH and Granny Smith Prints sought a declaration that the Leigh-Smiths were bound by the restraint clauses and that Mr Leigh-Smith was further bound by his agreement to the condition for acceptance of his resignation. They claimed an order restraining the Leigh-Smiths in accordance with the terms of the restraint clauses. SQUIRES, J, dismissed the applications, holding, in broad terms, that the restraints were unreasonable. The appellants appealed.

It was argued, for the appellants, that, in view of the large difference between the real value of Granny Smith Prints at the time of purchase and the price paid for it, the difference represented "goodwill" which CIH were entitled to protect. It was also argued that the reasonableness or otherwise of the restraint should be decided at the date of the agreement, and not in the light of circumstances occurring later. The respondents not only attacked the reasonableness of the restraints in general, but in particular argued that the restraint claim was unreasonable in its reference to the termination of the Leigh-Smiths' employment "however caused" and its extension to "any business similar to or competing with that carried on by" Granny Smith Prints.

Held, allowing the appeal with costs, that "goodwill" not only refers to an asset accumulated over time attaching to name or place or reputation, but equally can be said to include the value of prospective earnings over a period, as here, where the buyers purchased an asset which in terms of its tangible value was worth far less than the price paid but expected to recover the difference in a reasonable time. As a purchaser buying a share in a business on the basis of its estimated future profitability, CIH would have been entitled to protect that business from competition by the sellers for a reasonable period.

Held, further, the reasonableness of a restraint of trade clause must be judged as at the time fit was entered into, taking into account what was in the contemplation of the parties, as can be determined from the broad agreement which they reached.

Held, further, that although the courts are inclined to take a less favourable view of restraint agreements entered into between master and servant than of such agreements between seller and purchaser, the facts showed that in this case, although the two situations were combined, the bargaining positions of the parties were not significantly unequal and CIH were entitled to make a covenant designed to afford them adequate protection for what they had paid for.

1982 (1) ZLR p249

GEORGES JA

Held, further, that the words "however caused" in the restraint clause did not in practical terms affect the operation of the clause. If termination arose from breach of contract by the employer, then the damages payable to the employee would be assessed in the light of the restraint. If termination of employment arose from any other cause, the restraint clause was reasonable.

Held, further, that the extension of the restraining to "any business" similar to or competing with that carried on by Granny Smith Prints was not unreasonable simply because on a strict construction improbable and unlikely events might be covered. The words should be interpreted in the light of reality.

Held, further, that reasonableness in the public interest must, like reasonableness as between the parties, be judged as at the date of the agreement.

Held, further, that the agreement, in the case of Mr Leigh-Smith, extending the restraint for a further two years, was invalid.

Cases cited:

Inland Revenue Commissioners v Muller & Co's Margarine Ltd [1901] AC 217; [1903] All ER Rep 413;

In re Brown, 242 NY 1;

Aling v Olivier, 1949 (1) SA 215 (TPD);

Drewtons (Pty) Ltd v Carlie, 1981 (4) SA 305 (C);

Herbert Morris Ltd v Saxelby [1916] AC 688; [1916-17] All ER Rep. 305;

Nordenfeldt v Maxim Nordenfeldt [1894] AC 535; [1891] All ER Rep 1;

Biografic (Pvt) Ltd v Wilson, 1974 (2) SA 342 (R);

Diner v Carpet Manufacturing Co of SA Ltd, 1969 (2) SA 101 (D);

Connors Bros Ltd v Connors [1940] 4 All ER 179 (PC);

National Chemsearch (SA) v Borrowman and Anor, 1979 (3) SA 1092 (T);

Poolquip Industries v Griffin and Anor, 1978 (4) SA 353 (W);

Littlewoods Organization Ltd v Harris [1978] 1 All ER 1026 (CA).

JC Andersen SC for the appellant.

AP de Bourbon with him MJ Gillespie for the respondents.

Judgment

Georges JA: The first and second respondents in this appeal (the Leigh-Smiths) are husband and wife. The third respondent (which will be referred to as "Blueberry Hill") is a company of which the first respondent was the managing director, and in which he held 30 per cent. of the shares and his wife 30 per cent. The first appellant (which will be referred to as "CIH") is the parent company of a large group of companies of which the second appellant (which will be referred to as "the company") is a wholly owned subsidiary.

1982 (1) ZLR p250

GEORGES JA

David Leigh-Smith is a photographer by training and his wife, Charlene, a textile designer. She is apparently very talented in her field. In 1972, it happened that they were both out of a job and they decided together to start a small textile printing firm which they called Granny Smith Prints. Later they bought a property at Marandellas and built a factory there. The firm was incorporated on 27th March, 1974, and the company came into being.

The company was, however, undercapitalized. It had no foreign currency allocation and was thus denied access to overseas markets for raw materials and machinery. It was forced to do commission printing, i.e. producing customers' designs on their cloth to their instruction, rather than direct selling of original designs. The Leigh-Smiths decided that it would be best to sell some of their equity to a purchaser who could provide these inputs. In 1975 and 1976, CIH owned a wholesale merchandise firm in Bulawayo which purchased an increasing amount of the products supplied by the company. As a result the holding company became interested in purchasing it.

Towards that end, the Leigh-Smiths appointed a bank (referred to as "Standard") to act for them in preparing a "preliminary valuation" of the company and "to assess future financing". This report was given to the then chairman of CIH.

The report showed the net tangible assets of the company to be \$29 172. To that could be added the value of the land on which the factory stood which was owned by the Leigh-Smiths and which could be conservatively valued at \$8 436 after taking into account the bond on it. Assets could thus be put in the region of \$38 000.

Profits for the period 31st March, 1974 to 31st March, 1975, were \$9 068 and for the period 31st March, 1975, to 31st October, 1975, were \$15 264 after putting aside a reserve for estimated tax. Indications were that the profits for the 1975 year could exceed \$25 000. The constraint on

expanding profits was lack of capital but even with that constraint it was estimated that profits could be kept at \$20 000 per annum.

The report stated that the future of the company depended

"almost entirely on Mr and Mrs. D Leigh-Smith who provide not only the technical expertise, but also the drive that has been responsible for the significant growth and performance achieved by the company in its short existence."

1982 (1) ZLR p251

GEORGES JA

Using the "profit growth figure" of \$20 000 per annum and applying an earnings multiple of 4,5 the report arrived at an "earnings valuation" in the region of \$20 000 as reasonable. A rider was added in these words:

"This, of course, assumes the retention of present management and expertise."

The recommendation was that the Leigh-Smiths should sell 50 per cent. of their interest in the company. A method for payment was outlined which would ensure injection of fresh capital into the enterprise.

The report formed the basis of negotiations between CIH and the Leigh-Smiths CIH eventually paid \$100 000 for two-thirds of the equity of the company.

The agreement between the Leigh-Smiths and CIH for the sale of their shares in the company was concluded on 13th May, 1976. In that agreement the Leigh-Smiths were referred to as "the sellers", CIH as "the purchaser" and the company as "the company".

Clause 7 of that agreement provided:

"The sellers undertake that prior to the completion date they will enter into service agreements with the company whereby David Leigh-Smith will serve the company as its general manager ... and Charlene Leigh-Smith will serve the company as its designer for not less than five years from the effective date and otherwise on terms to be mutually agreed ...".

Each of the Leigh-Smiths did sign a service agreement with the company - effective date being 1st April, 1976 - and the company continued under the management of David Leigh-Smith with his wife as designer.

There were clauses in the contract of sale and in each of the service agreements imposing restraints on the business activities in which the Leigh-Smiths might engage on the termination of their employment with the company.

Clause 16 of the agreement of sale provided:

"For a period of five years next after the date of termination of their employment, however caused, the sellers respectively undertake that they will not anywhere in Rhodesia engage in or carry on either alone or in partnership or be employed or interested directly or indirectly in any capacity whatsoever in any business similar to or competing with that carried on by the company at the date of such termination and it is agreed that notwithstanding the fact that such restraint will be incorporated in the said service agreements the restraint is imposed on the sellers as vendors as well as employees."

Clause 9 of each service agreement was in identical terms and read:

"For a period of five years next after the date of termination of the employee's employment by the employer, however caused, the employee undertakes that he [or she] will not anywhere in Rhodesia engage in or carry

1982 (1) ZLR p252

GEORGES JA

on either alone or in partnership or be employed or interested directly or indirectly in any capacity whatever in any business similar to or competing with that earned on by the employer at the date of such termination."

The evidence suggests that David Leigh-Smith did not adapt easily to the controls which would be expected in a situation in which he was general manager of a subsidiary company forming part of a group. The complaint was that he tended to make decisions as though he was responsible only to himself. On his part there was a feeling that upper management decisions made working conditions difficult.

In March, 1979, the factory at Marandellas was damaged by guerilla action. It was necessary to relocate. The Leigh-Smiths would not move to Bulawayo and the decision was taken to move to Salisbury.

Perhaps as a consequence of stresses in the workplace among other factors there was domestic upsets between the Leigh-Smiths and they found working together impracticable. David Leigh-Smith decided to resign and return to photography. His resignation was accepted by letter dated 10th December, 1979. The company was then losing money in part because of the expense of relocation. He sold his shares to CIH for \$1. The letter accepting the resignation specifically drew attention to clause 9 of the employment agreement and the restraint which the clause had imposed on him, and accepting the resignation on the term that that clause would apply until March, 1986. David Leigh-Smith signed the letter agreeing to that term relating to his release.

Charlene Leigh-Smith continued to work for the company but towards the middle of 1980 she said she wanted to leave. She said they were thinking of emigrating. By letter dated 25th July, 1980, her resignation was accepted.

The letter made specific reference to clause 9 of the employment agreement stating that the board's acceptance of the resignation was subject to the clause applying until July 1986 and continued:

"You, (*sic*) no doubt appreciate the considerable effect that your departure will have on the company's business operations and accordingly I must emphasise that you must, in no way, involve yourself in any business activity similar to the carried on by Granny Smith Prints (Pvt.) Ltd.

However, at our meeting on 30th June, 1980, you assured me that you would be engaging yourself in interior decorating or pottery, which activities are perfectly in order.

A second copy of this letter is enclosed for your signature confirming your acceptance to the terms enumerated above."

She declined to sign the copy as requested.

GEORGES JA

There was a contemporaneous agreement that she would sell her shares in the company to CIH for \$2 500.

The Leigh-Smiths did in fact go to France but found difficulties settling there. They returned to Zimbabwe. The husband had difficulties finding employment as a photographer and the wife could not purchase the necessary equipment to set up as a potter, an area in which she had no training. She states that she found it impossible to break into the business interior decorating.

By 6th June, 1980, the Leigh-Smiths had applied to the Registrar of Companies for the use of the name Blueberry Hill (Pvt.) Ltd. In due course that company was formed and, as has been mentioned, David Leigh-Smith was managing director. His wife was a director. Blueberry Hill operated less than a kilometre from the premises from which the company operated.

Admittedly two technicians employed by the company left their employment with the company and worked for Blueberry Hill - one of them for a short while only. It was asserted on behalf of the company that these employees had been induced to leave. This was denied and one of the employees, Simon Chizengeni, swore an affidavit stating that he left because of the attitude of the company's then manager, Mr A R James, who used to shout and swear at employees. After leaving the job he went back to his home in the communal lands and it was only on his return that he took up employment with Blueberry Hill.

There is a dispute on the affidavits as to the role played by Mr A R James as manager of the company and the effect of his attitude in driving Mrs. Leigh-Smith to leave. The resolution of that dispute is, however, not an issue of moment in the decision of the issues which arise in this case.

CIH asserted that Blueberry Hill competed directly with the business of the company. David Leigh-Smith admitted this but pointed out the company was engaged primarily in commission printing and that, while Blueberry Hill did a small amount of that work, it was primarily engaged in producing its own design work which it exported and sold to local wholesalers.

In the premises CIH and the company sought a declaration that the Leigh-Smiths were bound by clause g of the agreement signed by them on 13th May, 1976, and that additionally David Leigh-Smith was bound by his acceptance of the conditions for release set out in the letter of the 10th December, 1979, paragraph 2 of which reiterated the provisions of clause 9.

GEORGES JA

They also claimed an order restraining the Leigh-Smiths from carrying on the business of Blueberry Hill and an order restraining them from engaging in or carrying on either alone or in partnership or by being employed or interested directly or indirectly in any capacity whatever in any business similar to or competing with the business carried on by the company at the date of the termination of the employment of each of them with the company for a period off five years.

This was in effect an order for restraint in terms of clause 9.

There was also a claim for an order directing the Leigh-Smiths to make the books of Blueberry Hill available to CIH and the company and finally there was a prayer for costs.

The application came before SQUIRES J who in broad terms held that the restraints imposed on the Leigh-Smiths were unreasonable and dismissed the application.

It was rightly accepted in the Court *a quo* that the agreement sought to be enforced was an agreement in restraint of trade. There was, however, argument as to whether the onus of establishing that the restraint was reasonable in all the circumstances rested on the appellants who sought to enforce it or whether the onus rested on the respondents who were resisting enforcement to show that it was unreasonable. SQUIRES, J, held that the party seeking to enforce the covenant had to show that it was reasonable. Mr *Andersen*, who appeared for the appellants, challenged that finding. Mr *de Bourbon*, for the respondents, supported it but contended that the decision of the issues raised in this case would not in the final analysis depend on a decision as to where the *onus* lay. I do not understand that Mr *Andersen* seriously challenges this view.

Indeed that particular issue though canvassed in the heads of argument was not discussed in depth in argument before this court. In recent times it has been the subject of sharp disagreement in the courts of South Africa. In Zimbabwe, as the learned judge *a quo* correctly pointed out, the decided cases have all held that the onus lies on the party seeking to enforce a covenant in restraint to show that it is reasonable. There has, however, been no decision at appellate level.

I agree that the decision of this case does not turn on the issue of *onus*. The relevant facts on which the reasonableness of the covenant must be decided are not in dispute and the decision as to reasonableness is a matter of law not involving *onus* once the facts have been established.

1982 (1) ZLR p255

GEORGES JA

One of the principal contentions of Mr *Andersen*, for the appellants, was that this was a case of vendor and purchaser and that a significant part of the purchase price had been paid for the goodwill of the business. The tangible assets of the concern, a two-thirds interest which had been bought for \$100 000, could only be valued at some \$26 000. The difference between those two figures could only be ascribed to the value of the goodwill, although that word had not been mentioned.

The term "goodwill" has not proved easy to define. In *Inland Revenue Commissioners v Muller & Co's Margarine Ltd* [1901] AC 217 at pages 234-4 LORD MACNAGHTEN defined it as follows:

"It is the benefit and advantage of the good name, reputation and connexion of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old established from a new business at its first start."

In the case of *In re Brown* 242 NY 1 at page 6 CARDOZO, J, states:

"Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition. ...such expectancy may come from succession in place or name or otherwise to a business that has won the favour of its customers. It is then known as goodwill."

The definitions, much as they vary, all stress goodwill as an asset accumulated over time attaching to name or place or reputation. But it can equally be said to include the value of prospective earnings over a period. The business in this case was very young. Begun in 1972 it was incorporated in 1974 and sold in 1976. As the report made clear the estimated value took into account the prospect of expanded profit which would be likely if the talents of the Leigh-Smiths continued to be available and if there was an injection of capital and access to foreign exchange. Reference was made to the fact that the future of the company depended on the technical expertise and drive of the Leigh-Smiths. The passage has been quoted earlier. Important also was the fact that one of the major customers of the company was another subsidiary of CIH - Fraenkel Ltd. The report expressed the matter thus:

"In the circumstances management considers the time opportune to dispose of a portion of the equity to a shareholder who can provide the necessary finance and foreign currency whilst at the same time ensuring the company has a captive market for the sale of a portion of its production sufficient to ensure the basic viability of the venture."

The past achievements of the company were not looked upon as necessarily valuable in themselves;. Rather they were indications of what could be achieved in the future and this was the basis on which the price was calculated. It was an earnings valuation based on the period it would take to recoup the purchase price. This is precisely the method used in

1982 (1) ZLR p256

GEORGES JA

valuing goodwill - so many years' purchase on the amount of profits or, in some businesses, receipts - see *Lindley on Partnership* 12th Ed page 475. CIH was purchasing an asset which in terms of its tangible value was worth far less than the price paid. The difference represented the value of the prospective earning capacity. This was an interest as deserving of protection as would be an established reputation.

Mr *de Bourbon* stressed correctly that a covenant in restraint of trade is reasonable only where it has been obtained to protect a legitimate interest and that generally no trader is permitted to protect his business against competition *per se*. But of course, as a purchaser buying a share in a business on the basis of its estimated future profitability having regard to past performance, CIH would have been entitled to protect that business from competition by the vendors for a reasonable period of time.

The issues in this case are somewhat complicated by the fact that the relationship between the contending parties encompasses both that of vendor and purchaser and employee and employer. CIH seeks to enforce the covenant in clause 16 of the sale agreement as a vendor. The company seeks to enforce clause 9 of the employment agreements as an employer. The covenants are in near identical terms and the periods of restraint are the same. The draft orders appended to the application refer to clause 9 of the employment agreements. In my view

different considerations apply to the two covenants.

No case was cited to us in which the vendor of a business became an employee of the business now in the hands of a new owner and bound by a restraint on future employment. The situation is adverted to in Heydon, *The Restraint of Trade Doctrine*, at pages 201-2. He states:

"Where a covenantor sells his business and enters the employment of the buyer or sells shares in a company and then agrees to serve the buyer restrictive covenants are treated as goodwill agreements, for sellers in those circumstances must not be allowed to derogate from their grant. Each case must be decided as it arises and it may be necessary to go behind the form of the transaction."

In this case since separate covenants have been agreed in respect of the sale of the business and of the contract of employment it seems proper to me to consider the reasonableness of the covenants in respect of each of the contracts.

As I have indicated, CIH had a legitimate interest to protect on the acquisition of the share in the business which made it reasonable to insist on a covenant against competition by the vendors. The issue then is whether the terms of the covenant were reasonable.

1982 (1) ZLR p257

GEORGES JA

In deciding the issue it must first be determined at what stage the judgment as to, reasonableness should be made. Ought circumstances which have occurred since the making of the agreement be taken into account? The view expressed by PRICE, J, in *Aling v Olivier*, 1949 (1) SA (T) at 219 commends itself as sound. He stated:

"If the validity of the restraint of trade clause had to be tested by reference to the facts on any date other than the date when the agreement was made, the question of such validity would always remain uncertain. Events might interpose between the date of the contract and the date of hearing of a case some of which might make a restraint clause invalid which was originally valid and then other events might occur to make that clause valid again. If the validity of the clause had to be determined by events which had occurred after the date when the contract was entered into the enquiry would become arbitrary and artificial. The clause is valid or invalid *ab initio* and therefore the only facts that are relevant are the facts at the moment the contract was signed."

I am aware that this formulation has been criticised most recently by VAN DEN HEEVER J in *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at pages 312-3. I am not convinced, however, that the existing law is so plainly wrong in logic or in good sense that any radical departure is required.

The reasonableness of a restraint must be judged as the time when it was entered into, taking into account what was in the contemplation of the parties as can be deduced from the broad agreement which they reached. A contract may, for example, be made terminable by one month's notice on either side though it may be clear that the parties contemplated employment for an indefinite period terminable in the manner prescribed. In such a case it would not be proper to assess the reasonableness of the restraint on the basis that the contract was one for employment for one month certain. On the other hand, if notice was in fact served at the end of the first month and the employment terminated at the end of the second that fact would be relevant not in deciding whether the restraint was valid or not but rather in deciding whether an interdict should be granted for its enforcement. The employer may have much difficulty in

proving that the employee in that period acquired such familiarity with the business as to cause the harm which the restraint was aimed at preventing. In the Absence of proof of threatened harm an interdict would not be granted.

I would therefore add one qualification to the principal enunciated by PRICE, J It may be possible to discover from the contract circumstances which were in the contemplation of the parties when the contract was

1982 (1) ZLR p258

GEORGES JA

concluded and in which they contemplated that the restraint would operate. These probabilities should be taken into account in deciding on the validity of the contract.

The cases, both English and South African, support the proposition that covenants entered into by an employee are regarded more strictly by the restraint of trade doctrine than covenants given by a vendor on the sale of a business where transfer of goodwill is one of the assets purchased.

The distinction between a covenant in restraint imposed upon a workman and such a covenant imposed upon a merchant selling his business to another has been expressed by LORD ATKINSON in *Herbert Morris Ltd v Saxelby* [1916] AC 688 at 699 and 702 in words which it would be difficult to dispute:

"Public policy requires that every man shall be at liberty to work for himself and shall not be at liberty to deprive himself or the State of his labour, skill or talent by any contract that he enters into. On, the other hand, public policy requires that when a man has by skill or by any other means obtained something which he wants to sell, he should be at liberty to sell it in the most advantageous way in the market; and in order to enable him to sell it advantageously he should be able to preclude himself from entering into competition with the purchaser. In such a case the same public policy that enables him to do that does not restrain him from alienating that which he wants to alienate, and therefore enables him to enter into any stimulation, however restrictive it is, provided that restriction, in the judgment of the court, is not unreasonable having regard to the subject matter of the contract.

These considerations in themselves differentiate in my opinion the case of the sale of goodwill from the case of master and servant and employer and employee."

In formulating the proposition in the *Nordenfeldt* case [1894] AC 535 LORD MACNAGHTEN made no specific reference to goodwill. He stated at page 566:

"To a certain extent, different considerations must apply to cases of apprenticeship and cases of that sort, on the one hand. and cases of the sale of a business or dissolution of partnership on the over. A man is bound an apprentice because he wishes to learn a trade and to practise it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some over reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant or between an employer and a person seeking employment."

Emphasis is here placed on two considerations - that the vendor may not be interested in continuing in trade and equality of bargaining position. The first is clearly inapplicable here. The second does apply. It

GEORGES JA

is difficult to contend that the bargaining strengths of the Leigh-Smiths and CIH were significantly. The report prepared by Standard paints a picture of a business which had achieved much in a short time. There is nothing to suggest that they could not have continued earning together some \$20 000 a year - a not inconsiderable sum - with the advantage of owning their own business. The decision to sell was made because it was considered that it would provide scope for expansion and more exciting work, and not in order to rescue the concern from financial difficulties as was the case in *Biografic (Pvt) Ltd v Wilson*, 1974 (2) SA 342 (R). The Leigh-Smiths retained a significant shareholding stake in the business and between them would earn \$12 000 per annum with a car and a house in which to live. Neither the character of the bargain struck nor the objective circumstances of the parties support the contention that bargaining strengths were unequal.

LORD WATSON'S formulation in the *Nordenfeldt* case (*supra*) makes no specific reference to goodwill. He states at page 552:

"I think it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished it, upon some score of public policy, the law reserved to the seller an absolute and indefeasible right to situate a rival concern the day after he sold. Accordingly it has been determined judicially that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy and is therefore capable of being enforced."

In *Diner v Carpet Manufacturing Co of SA Ltd*, 1969 (2) SA 101 (D) at page 105 VAN HEERDEN, J, stated the principle in these words:

"Courts are inclined to take a far stricter and less favourable view of agreements entered into between master and servant than it does of similar agreements between seller and purchaser and accordingly a restraint which would be unreasonable as between employer and employee could be reasonable as between seller and purchaser of a business. Public policy requires that, when a person has by his skill or other means obtained something which he wishes to sell, he should be at liberty to sell it advantageously in the market and in order to enable him to sell it advantageously it is necessary that he should be able to preclude himself from entering into competition with the purchaser. The possibility of such competition would necessarily depreciate the value of the goodwill sold and it is thus in the interest of the public that the sale of a goodwill should not be interfered with for an agreement excluding such competition would enhance the value of the goodwill and consequently probably increase the price demanded and paid. All restrictions on trading accordingly are permissible which are

GEORGES JA

necessary to secure that the seller shall get the highest price for what he has to sell and the purchaser shall get all he has paid for. The test is whether the restraint affords no more than adequate protection to the party in whose favour it is imposed in respect of the enjoyment of the benefit of the goodwill he has purchased. The enquiry must, therefore, be whether competition in the area to which a restraint extends would in all probability injure the purchaser of the goodwill and it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required in order to decide upon the adequacy of the protection."

The evidence makes plain that CIH paid a sum well over the tangible assets owned by the

company for the purchase of the concern. They were paying for the prospects of future profit judged against performance during the short period of the company's existence. This was analagous to goodwill. That prospect could be jeopardised if the company was not protected from immediate competition from the Leigh-Smiths. CIH was thus within the formulations set out above, which with respect one cannot but accept as sound, entitled to make a covenant designed to afford them adequate protection.

It remains to be determined whether the covenant in this case falls within that ambit. It will have been noticed that both LORD WATSON and VAN HEERDEN, J, stress as most important the area over which protection is sought. In *Connors Bros Ltd v Connors* [1940] 4 All ER 179 VISCOUNT MAUGHAM stated at page 195:

"If the restriction as to space is considered to be reasonable, it is seldom in a case where the sale of goodwill is concerned that the restriction can be held to be unreasonable because there is no limit as to time."

In this case the restraint extended over the whole of Zimbabwe (then known as Rhodesia). The company was, as has been mentioned, engaged in commission printing of customers' designs on fabric supplied by them. It hoped to expand into producing and printing its own designs. Customers would thus be persons engaged in wholesale trade. The report prepared by Standard in January, 1976, gives no indication of the spread of the market, but after the factory was destroyed and a decision had to be made whether it should be relocated elsewhere or not an analysis was made of the market spread. This showed that in 1978, excluding minor customers, Bulawayo accounted for 55 percent of sales, Salisbury for 20 percent and the Midlands for 40 percent.

The report notes that:

"Our existing net of customers embraces, I would say, the whole Rhodesian market."

1982 (1) ZLR p261

GEORGES JA

This can be taken as the position in 1978 and it must certainly have been what was in the contemplation of the parties when the sale took place in 1976 with the intention of expanding the activities of the company. In his replying affidavit the husband agreed that the company marketed its products throughout Zimbabwe though it had no particular areas of the country in which it had secured the complete market. The husband states also in his affidavit that there are 12 other companies operating in the field, indicating that it is to some extent specialised. With business confined to wholesalers the customers would necessarily be limited. In that situation a restriction extending to the whole of Zimbabwe cannot be said to be unreasonable. Wherever in Zimbabwe a competitor may be located the thrust would be to acquire customers over the whole country. It is not easy to see how the area could be sensibly restricted having regard to the nature of the concern.

The restriction as to time was in a sense unusual because the Leigh-Smiths were to become employees of the company. Time did not, therefore run from the date of the sale but from the date of the termination of their employment, which was agreed to be for five years. The restraint was to last for five years from then. In considering reasonableness the question could

accordingly be asked whether a restraint of ten years from the date of the sale, on the basis that there was not to be any employment, could be regarded as unreasonable. As I have mentioned, the decided cases support the view that in the case of the sale of a business once the area of restraint is considered reasonable the period over which the restraint extends is not likely to be considered unreasonable. The rationale of that approach is that the purpose of the covenant is quite plainly to restrain competition to protect the asset purchased. I would not for my part accept that viewpoint without substantial reservations - particularly in cases in which the nature of the business requires that the area of restraint be extensive. Where the area of restraint is limited the factor of time becomes less important.

In this case the period of five years from the date of termination of employment does not appear to be excessive. So long as the employment continued the parties would be jointly building up the asset which they jointly owned. On the termination of that employment a period of protection from competition does not seem unreasonable.

It was contended that the period of restraint was unreasonable in that had the Leigh-Smiths worked for the company for, say, 20 years before leaving, then the company may have completely recouped the portion of the purchase price paid for the intangible assets akin to goodwill.

1982 (1) ZLR p262

GEORGES JA

That argument, in my view, does not take into account the reality that the Leigh-Smiths, in addition to being employees, would be substantial shareholders in the company, an arrangement not unlike a partnership. As events proved and as indeed could be foreseen the termination of their employment involved at the same time the disposal of their interest in the company. So long as they remained as employees and shareholders of the company the goodwill of the company would in the normal course of things be further built up. It does not seem unreasonable that on the termination of their employment there should be a prohibition from competition for five years. If on the other hand the employer - employee relationship ended very quickly even before the period of employment stated in the service agreements I would not think a period of restraint of up to 10 years unreasonable.

Other aspects of the restraint clause drew criticism. It was pointed out, for example, that the restraint was to be effective from the date of termination "howsoever caused". A similar phrase was considered by DAVIES J in *Biografic (Pvt) Ltd v Wilson*, (*supra*). The agreement containing the restraint clause was dated 30th January, 1970. The restraint clause provided

"That upon the expiry or termination of this agreement for any reason whatsoever before 31st January, 1975, or should either or both operators cease before 31st January, 1975 to be employees, shareholders or directors of [Biografic] for any reason whatsoever ...";

the operator should not engage in certain business activity. DAVIES, J, stated at page 349:

"In the instant case I see no justification for giving the words 'any reason whatsoever' a restricted meaning; in my view it must be accepted that the promoters intended to secure absolute protection against competition from the respondent for five years. I agree with Mr McNally's submission that clause 11 is in this respect unreasonable. If, for instance, the affairs of the applicant had not prospered, and it had become necessary, in order to operate

profitably, to cut down on salaries, respondent might have had no practical option but to accept a termination by applicant of his contract. In such an event it would have been unreasonable to restrict the avenues Of alternative employment until January, 1975, in the manner contemplated by clause 11."

In *National Chemsearch (SA) v Borrowman and Anor*, 1979 (3) SA 1092 (T) BOTHA, J, disagreed with this approach In the circumstances of this case I would also disagree with the approach taken by DAVIES, J It does not appear to me that the words "howsoever caused" affect in practical terms the operation of the clause. Termination of employment could arise in only three circumstances apart from effluxion of time: mutual agreement, breach by the employer or breach by the

1982 (1) ZLR p263

GEORGES JA

employee. In the case of mutual agreement if provision is not specifically made with regard to the operation of the restraint, there would be no reason why the restraint should not apply. If termination arises from breach by the employee then clearly the restraint would be applicable. If it arises from breach by the employer - that is dismissal without cause within the period of five years provided for in the service agreement then the employee would be entitled to have his damages assessed on the basis that he may be restrained from working in any similar concern for the period still to run of the five year term agreed. I would hold, therefore, that the inclusion of the phrase "howsoever caused" does not make the restraint unreasonable.

The covenant purports to extent to "any business similar to or competing with that carried on by the company at the date of such termination".

Mr *de Bourbon* contends that this makes it unreasonable in that reasonable protection should be limited to business carried on by the company at the date of the sale. There is support for that proposition in Heydon, *The Restraint of Trade Doctrine* page 190. The author states:

"A covenant not to enter 'any business competing or liable to compete in any way with that for the time being carried on' by the buyer is void because it is framed with reference to the buyer's future activities, not the scope of the seller's business at the time of sale."

One of the authorities quoted for that proposition is the *Nordenfeldt* case (*supra*). I can find in that case no positive statement to that effect though plainly the description in the covenant there of the activities to be restricted conformed with what was the existing business of the company. The case can thus not be said to support the general proposition.

In an area such as this where the reasonableness of a covenant has to be assessed it seems to me unwise to prescribe rules of general applicability. The circumstances of each case must be defined and the covenant properly interpreted. In *Poolquip Industries v Griffin and Anor*, 1978 (4) SA 353 (W) COHEN, AJ, had to rule on a covenant which restrained an employee from -

"... being interested either directly or indirectly and whether as a director, partner, owner, principal, agent, representative or shareholder, financier or employee, or in any way whatsoever, in a business similar to that being carried on by the employer or in any business which competes or is likely to compete with the business being conducted by the employer at the time of termination of the employment."

GEORGES JA

At page 360 he stated his approach thus:

"In construing these provisions to ascertain the intention of the parties as expressed in the contract, I must give effect to the grammatical and ordinary meaning of the words and have regard to the object sought to be attained by them ... By this I do not mean that the Court will make a new contract for the parties or carve out of the agreement a reasonable restraint if their covenant goes further than is reasonably necessary for the protection of the covenantor's interest. But on the other hand, if on a permissible interpretation of the contract a reasonable restraint can be construed, it must be given effect to notwithstanding that on a strict construction improbable and unlikely events, which would make the contract unreasonable might be covered thereby."

Support for this approach can also be found in the majority judgment in *The Littlewoods Organization Ltd v Harris* [1978] 1 All ER 1026 (CA).

This was a fairly specialised commercial activity the scope of which was well known to both parties. Nothing on the record indicates the possibility of misunderstanding between the contracting parties. It encompassed screen printing either of original designs or of customers' designs on fabric provided. This was precisely the activity undertaken by Blueberry Hill.

The learned judge *a quo* accepted the argument that the covenant was too wide because had the appellants expanded their business to include pottery, interior decorating or photo-journalism by the date of the termination of the employment of the Leigh-Smiths they would have been precluded from following any of these fields of endeavour. With respect these projections can with reason be described in the language COHEN, AJ, as "improbable and unlikely". This was an arrangement between business people contemplating the development of a screen printing business. The words can be interpreted in the light of that reality. I would not invalidate the covenant on that ground.

If, as I have concluded, the company and CIH could properly protect themselves against competition because of the nature of the proprietary interest which they acquired then the nature of the restraint agreed on, that is that the Leigh-Smiths should not -

"... engage or carry on either alone or in partnership or be employed directly or indirectly in any capacity"

in the activities described, cannot be said to be unreasonably wide.

Finally, the learned judge *a quo* held that even if the covenant was reasonable as between the parties, it was not in the public interest. In considering that issue the learned judge gave weight to the undeniable shortage of skills in Zimbabwe, the acknowledged talents of the Leigh-

GEORGES JA

Smiths and the possibility that the use of these talents help generate both wealth for the country and employment for its residents. The approach is original and also attractive and it is with some regret that I find myself unable to agree.

One difficulty immediately presents itself. I have already held that the reasonableness of the
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covenant *inter partes* ought to be considered as at the date on which it was agreed, taking into account such matters as must have been in the contemplation of the parties having regard to the contract which they concluded. I can see no good reason why reasonableness as regards the public interest should not also be judged as of that date.

Heydon, *op. cit.*, at page 200 states that Courts are unlikely to strike down as unreasonable in the public interest a covenant which they have held to be reasonable between the parties and there would seem to be compelling reason for that approach. The fundamental decision on the ground of public policy that persons ought to be able to dispose of at the best price business concerns built up by their skill and labour takes into account the unavoidable consequence of a restraint being imposed on the vendor in order to enhance the price.

There may be an additional factor where the transaction tends to the creation of a monopoly but that is not the position in this case. As has been mentioned, there are some 12 other firms in the field. In the absence of the Leigh-Smiths they could expand and generate additional wealth and employment.

The fact is that the Leigh-Smiths found it difficult to work with a management structure which was, from their point of view, unsympathetic and stalling. They had made a mistake in trading freedom for the possibility of expansion and wished to resile. I find it difficult to accept that overriding considerations of public interest can be brought to their aid.

In the result, therefore, I would hold that the covenant contained in clause 16 of the sale agreement is valid. This conclusion makes it unnecessary to consider the submissions made on severance. There is no need either to consider the validity of the covenant contained in clause 9 of each of the slice agreements. The restraints imposed by these covenants is no different in terms of area, period or scope of activity from that imposed by clause 16 of the sale agreement.

In the letter of 10th December, 1979, setting out the terms for releasing the husband from his service agreement reference is made to the restraint clause in that agreement, and it is stated that the restraint there agreed

1982 (1) ZLR p266

GEORGES JA

to would still apply until 31st March, 1986. The husband signed that letter indicating agreement with its terms. In effect therefore he agreed to a restraint for almost a seven-year term rather than the five-year term provided for in the covenant. This extension is, in my view, clearly invalid. He was anxious to be released from his contract, he could have faced a possible action for breach of contract, and his shares were valueless having regard to the financial condition of the company at that date. His employment had terminated on 10th December, 1979, and the restraint became emotive on that date for five years.

Paragraph 17 of the appellants' heads of argument states that Blueberry Hill no longer carries on any business and that the Leigh-Smiths have obtained employment which does not compete with the company's business. The draft order submitted with the notice of motion contained a prayer that Blueberry Hill be directed to make available to the appellants its books of account

and documents relating to the conduct of its business. The statement of the relief as set out in the Notice of Appeal makes no reference to this remedy.

Accordingly I would allow this appeal and order as follows:

The respondent David Leigh-Smith is interdicted for a period of five years from 10th December, 1979, and the respondent Charlene Leigh-Smith is interdicted from 31st July, 1980, for a period of five years from engaging in or carrying on either alone or in partnership or from being employed or interested directly or indirectly in any capacity whatever in a screen printing business in Zimbabwe.

The Leigh-Smiths will jointly and severally bear the costs of the notice of motion in the Court *a quo* and of the appeal to this Court.

Fieldsend CJ: I agree.

Beck JA: I agree.

Atherstone & Cook appellants' legal representatives.

John May & Co respondents' legal representatives.

1982 (1) ZLR p267

S v TAMAYI AND OTHERS 1982 (1) ZLR 267 (SC)

Court **Supreme Court, Harare**

Baron, JA, and Beck, JA

25th June, 1982

Flynote

Criminal law - theft - claim of right as defence to - not limited to cases of forcible taking of moneys in satisfaction of debt admittedly owed - includes bona fide belief in entitlement to goods taken.

Headnote

The defence to a charge of theft of claim of right is not limited to cases of the forcible taking of moneys in satisfaction of a debt admittedly owed. It includes the situation where the accused *bona fide* "believes that he is entitled to be supplied by the complainant with the goods taken. The reasonableness of that belief is not the issue, save to the extent that a court might well conclude that the belief was so unreasonable that the accused could not possibly be bona fide when he asserted it.

Cases cited:

S v Johnson, 1977 (2) RLR 3; 1977 (4) SA 116 (RAD);

S v Ferreira, 1970 (2) SA 729 (O).

RM Passaportis for the appellants.

JB Colegrave for the respondent.

Judgment

Baron JA: The 11 appellants were charged with stock theft, the subject of the charge being 20 head of cattle and six goats, the property of or in the possession of a number of persons named in the charge sheet.

The events leading up to the incidents giving rise to this charge were these: a relative of the appellants had been killed, certain people were taken into custody by the police and after a very few days released. This appears to have dissatisfied the appellants who quite clearly believed that one of the complainants, one Mudyiwa, had either directly or in his capacity as the head of his kraal been responsible for the death of the deceased. In accordance with custom they wished to discuss the question of the killing of their relative with Mudyiwa but, from the record, it seems that he might have been avoiding them, but in any event they had been unable to talk to him. On the day when these events really

1982 (1) ZLR p268

BARON JA

developed they went to Mudyiwa's kraal in another effort to talk to him. According to Mudyiwa himself he ran away when he saw the appellants coming; they seemed to him to be in an angry mood and certainly it is clear from their own evidence that they were carrying axes and generally were indeed in a belligerent mood. Being unable to talk to Mudyiwa they rounded up the 20 head of cattle and the six goats the subject of the charge, and apparently also some sheep with the removal of which they were not charged. Three days later one beast was killed and was buried with the deceased relative of the appellants.

Mr *Colegrave*, on behalf of the State submits-correctly-that the *mens rea* of the appellants must be considered at two stages. He submits that if at the time when they took the 20 beasts the appellants were shown to have done so with *animus furandi*, then the case against them has been proved, and he submits that in any event if at the time they killed the one beast which they buried with the deceased they did so without any claim of right made in good faith the case is proved in respect of that beast.

Dealing first with the taking of the 20 beasts, Mr *Colegrave* conceded that if it might reasonably be true that the appellants drove the beasts away for no more sinister reason than to "encourage" Mudyiwa to talk to them about their relative, but with no intention at that time permanently to deprive the various owners of their cattle, then the appellants were entitled to the benefit of the doubt as to their intention and could not be said to have the necessary *animus furandi*. It seems to me from a reading of the record, and bearing in mind that with the exception of the beast that was killed all the cattle and goats were in fact returned to their various owners, and that those cattle were apparently grazing generally in the vicinity of Mudyiwa's kraal, that there must be a doubt as to the appellant's intention. Their *bona fides* generally seem to me to

emerge very clearly from the record and Mr *Colegrave* accepts that this is so; he accepts that their evidence both in chief and in cross-examination appears to be entirely frank, and consequently when they say that they took the cattle only because they wanted to force Mudyiwa to come and talk to them this evidence, to put it at its lowest, might reasonably be true. In my view the State has not established that the appellants at this stage of the affair intended permanently to deprive the owners of their cattle.

I turn then to their state of mind at the time of the killing of the one beast. A number of appellants-five of them in fact-were questioned as to their reason for the slaughter of the beast. I will not recount all their answers but some of them are of particular significance. The second

1982 (1) ZLR p269

BARON JA

appellant for instance said this:

"Q. Why did you kill one beast before Mudyiwa came?

A. We waited. It was a burial token and when he came we would speak to him about it.

Q. If someone kills somebody what do you do?

A. You speak to the person and is ordered to pay and matter is finished."

The seventh appellant said: "We killed one beast for deceased's head." The eighth appellant was somewhat more explicit. He said:

"Q. Why did you kill it without permission?

A. Its common cause among Africans that if someone dies he must be buried with a beast if murdered.

Q. Why did you kill cattle before you spoke to Mudyiwa?

A. We saw it was late."

That last answer, possibly a little obscure in itself, is explained in the cross-examination of the ninth appellant in the following passage:

"Q. Why did you kill beast before Mudyiwa came?

A. So that we buried deceased in a traditional manner."

It seems to me to emerge not simply from this evidence but from the record generally that the appellants were concerned to discuss with Mudyiwa the consequences of the death of their relative; they wished to ensure that proper compensation was paid and that the deceased was buried in the traditional manner. The question is whether, assuming in their favour that they killed the beast because they *bona fide* believed that Mudyiwa was obliged to supply them with a beast and that they were entitled to be provided with that beast by Mudyiwa, this constitutes a *bona fide* claim of right. Mr *Colegrave* once again concedes that if it is reasonably possible that this was their state of mind the appellants are entitled to their acquittal.

The question of the ambit of the defence of claim of right was dealt with at length in the case of

S v Johnson, 1977 (4) SA 116 (R.,AD..) In particular it was held in that case that the defence of claim of right was not necessarily limited to cases of the forcible taking of moneys in satisfaction of a debt admittedly owing. At page 122 LEWIS, JP, cited at some length from the judgment of SMUTS, J, in *S v Ferreira*, 1970 (2) SA 729 (O), a case which on the facts has certain points of similarity to the present:

"His case is that he has a claim for compensation and therefore he kept the heifers as security ... The *onus* rested on the State to have proved

1982 (1) ZLR p270

BARON JA

the necessary subjective state of mind which is a fundamental essential of the crime of theft. To have satisfied this *onus* the State should have proved that the accused's evidence that he believed that he had a claim for compensation, was false."

It is clear from the *Johnson* case (*supra*) and all the cases cited therein that the reasonableness of an accused person's belief is not the issue save to the extent that a court may well conclude that the belief was so unreasonable that the accused could not possibly be *bona fide* when he asserted that he held it. Here this cannot be said. We were referred by Mr *Passaportis* on behalf of the appellants to *African Law and Custom in Rhodesia* by Goldin and Gelfand, from which it is quite clear that the African Customary Law and the traditional procedures in circumstances such as the present are such that when the appellants asserted their belief in their right to slaughter this beast and bury it with the deceased it cannot be said that their assertion might not reasonably be true.

In the circumstances I am satisfied that this appeal must be allowed and the convictions and sentences set aside.

Beck J A: I agree.

Winterton, Holmes & Hill, appellants' legal representatives.

1982 (1) ZLR p271

S v MUPFUDZA 1982 (1) ZLR 271 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Baron JA, Georges JA, and Beck JA.

29th June, 1982

Flynote

Criminal procedure - evidence - sexual cases - not sufficient for court merely to believe complainant - corroboration aliunde also essential unless all circumstances of case satisfy court that danger of false

incrimination has been excluded.

Headnote

There are several types of witness who, for one reason or another, must be regarded as suspect and whose evidence must be approached with particular caution. Among these are complainants in sexual cases. For such witnesses, corroboration is usually required; but trial courts frequently forget that they must first decide whether the complainant is credible. If not, the matter is at an end and the question of corroboration of his testimony does not arise. Only if the witness is believed does the court then proceed to consider whether it might not have been deceived by a plausible witness.

In many cases, the elements of belief in the witness and corroboration for his evidence will be intermixed; but even in the absence of corroboration there may be circumstances which can properly satisfy the court that the danger has been excluded. The possible motives for false incrimination must be considered, together with the evidence in the case, in order to decide whether in the circumstances the danger of false incrimination can safely be regarded as having been excluded. If the court believes the witness, and if the circumstances of the case do satisfy the court that the danger of false incrimination has been excluded, then a conviction is proper notwithstanding the absence of corroboration.

Cases cited:

DPP v Kilbourne [1973] 1 All ER 440 (HL);

R v Turner (1975) 61 Cr App R 67;

Beaker v Westenruad, 1942 WLD 214;

R v Ncanana, 1948 (4) SA 399 (AD);

R v Lembikani & Another, 1964 R & N 7;

S v Mubaiwa, 1980 ZLR 477;

R v Judson, 1965 RLR 501; 1966 (1) SA 88 (SR, AD);

Katebe v The People, 1975 ZR 13.

The appellant in person.

1982 (1) ZLR p272

BARON JA

H. A Eleftheriades, for the respondent.

Judgment

Baron JA: At the conclusion of the hearing the Court allowed the the appeal against the conviction for rape and indicated that it would give its reasons later. However, for reasons it gave at the time the Court substituted a conviction for a contravention of section 3 of the

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Criminal Law Amendment Act [*Chapter 58*].

The appellant was convicted of rape and sentenced to three-and-a-half years' imprisonment. At the relevant time the complainant was 15 years and a few months of age and lived with her parents at Mafolo Farm, Karoi. The prosecution alleged that on the 24th November, 1981, the appellant arrived at the residence of the complainant's parents and asked to be put up for the night as his cycle had broken down. During his conversation with the complainant's mother it emerged that the appellant was a nganga (witch-doctor) and the complainant's mother thereupon asked him if he could treat an elder daughter, Sinodiya, who had been married for some three years but had not yet borne a child.

The prosecution alleged that on the morning of the third day after the appellant's arrival, namely on Thursday, the 26th November, the appellant, on the pretext of treating the complainant for some ailment, instructed her to sit on the floor of his room and close her eyes, whereupon he threw her on her back and in spite of her resistance forcibly raped her. The appellant on the other hand said that he had arrived at the residence of the complainant's parents on the 16th November, that the complainant's sister, who was the principal reason for his remaining at the place, was not in fact brought and that in the meantime he had asked the complainant to marry him and that she had agreed and had come to his room and had intercourse with him on three successive nights prior to the morning of the alleged rape. It was common cause that the complainant was a virgin prior to her having intercourse with the appellant.

We thus have the very common situation in which it is necessary to decide whether an admitted act of intercourse was or was not with the consent of the complainant. The magistrate, having recited the evidence (but, it has to be said, not entirely accurately in one or two quite important respects), warned himself in the following terms:

".... the court is aware of the danger of a complainant alleging rape when in fact there has been intercourse with her consent, and it seeks corroboration of her evidence before it convicts."

1982 (1) ZLR p273

BARON JA

It is clear, however, from the remainder of his judgment that the magistrate did not find the corroboration he sought; he convicted the appellant because he disbelieved him and believed the complainant, as the following concluding passage in his judgment makes clear:

"I find the accused to be evasive and a contradictory witness and most unconvincing, I have no hesitation in disbelieving him where his evidence conflicts with that of the complainant."

Since this is only one of several recent cases in which the cautionary rule and its proper application seem not to have been fully understood, it may be helpful to deal with the subject in some detail.

There are several types of witness who, for one reason or another, must be regarded as suspect and whose evidence must be regarded as suspect and whose evidence must be approached with particular caution; among the more common are the accomplice, the complainant in a sexual case and the person found in possession of stolen property or through whose hands it has passed. In all such cases there is potentially a danger of false incrimination,

and before a trial court can safely convict on the testimony of such a witness it must satisfy itself that that danger has been excluded. But before I examine the circumstances in which a court can properly be so satisfied I must stress a point which is all too frequently overlooked.

The court looks for corroboration of the evidence of a suspect witness. But - perhaps precisely because of the search for corroboration - trial courts frequently forget that the court must first decide whether the suspect witness is credible; in other words, the court must first decide whether, taking into account all the circumstances of the case, including demeanour, the probabilities, and all the other considerations which triers of fact properly take into account in assessing credibility, it believes the witness. If not, the matter is at an end, and the question of corroboration of, or support for, his testimony does not arise; it is only if the court believes the witness that in cases where a cautionary rule applies it then proceeds to consider whether it might still not have been deceived by a plausible witness. LORD HAILSHAM stressed this point in *DPP v Kilbourne* [1973] 1 All ER 440 (HL) at page 452:

"Corroboration is only required ... if the Witness requiring corroboration ... is otherwise credible. If his evidence is not credible, a witness's testimony should be rejected and the accused acquitted, even if there could be found evidence capable of being corroboration in other testimony. Corroboration can only be afforded to ... a witness who is otherwise to be believed. If a witness's testimony falls of its own inanity the question of his needing ... corroboration does not rise."

1982 (1) ZLR p274

BARON JA

This two-stage approach is very clearly expressed by JAMES, LJ, in *R v Turner* (1975) 61 Cr. app. R 67; it was argued on behalf of one of the appellants that the trial judge "fell into error in his direction to the jury as to corroboration in that he failed to make it clear that the jury had to be satisfied that (the accomplice) was a credible witness before they considered the question whether there was ... (corroboration) ... ". In rejecting this submission JAMES, LJ, said at page 84:

"The judge did not in simple and precise terms direct the jury to approach the question of corroboration in two stages, first, the credibility of (the accomplice), and secondly - and only if (the accomplice) was found to be credible - the existence of credible evidence, independent of (the accomplice) which supported (his) evidence ... The whole tenor of the summing - up was that the jury would have to be satisfied of the truth of (the accomplice's) evidence before they could convict and that, even then, they ought not to convict unless they found corroborative evidence." (my emphasis).

A similar approach was adopted in *Bekker v Westenraad*, 1942 WLD 214 (a paternity case), where RAMSBOTTOM, J (as he then was), said at page 22:

"[The woman] may be believed, but she will not succeed in her action unless there is in addition evidence *aliunde* to corroborate her. If she is not believed, that is the end of her case. If she shows herself to be a truthful and credible witness there is no reason why she should not be believed, though she will not be entitled to judgment unless there is corroboration. But if in addition to her testimony which has been believed, there is evidence *aliunde* which corroborates her, she is entitled to judgment. There are therefore two elements in the enquiry; is the plaintiff to be believed, and is there corroboration? In many cases no doubt these two elements will be intermingled; the corroborating evidence may induce the court to accept the plaintiff's words; but there are other cases in which, without corroboration the court is in no doubt as between the parties, that it is the plaintiff who is speaking the truth, and in such a case the plaintiff is entitled to succeed, provided there is such corroboration of her evidence as the law requires. The method of considering first the credibility of the plaintiff and then whether her evidence is

corroborated has been adopted in a number of cases of which *Scholte-meyer v Potgieter* (1916 TPD 188), *Smit v Swart* (1916 TPD 197), *Mackay v Ballot* (1921 TPD 430), are examples. This method appears to me to be logical and satisfactory and I propose to adopt it."

The importance of this two-stage approach is illustrated in the present case. The magistrate convicted the appellant because he found him to be an unsatisfactory witness and he believed the complainant; he does not appear to have appreciated that believing the complainant was only the first stage in the enquiry, and that, believing her, he must still satisfy himself that he had not been deceived. His acceptance of and reliance on the complainant's evidence seems to me to have been based on precisely the same considerations as are taken into account in assessing

1982 (1) ZLR p275

BARON JA

the evidence and credibility of a witness in any ordinary case. Such an approach is clearly incorrect in a case where, for one reason or another, a cautionary rule must be applied; in all such situations the court must not only believe the suspect witness but must in addition be satisfied that the danger of false incrimination has been excluded. If this were not the position then the cautionary rule would have little meaning all cases would be reduced to a straightforward assessment of the credibility of the witnesses.

The question then is: in what circumstances can the court be satisfied that the danger of false incrimination has been excluded and that it is safe to rely on the evidence of the suspect witness? Ideally the court will rely on corroboration, in its stricter sense, implicating the accused. But even in the absence of corroboration there may be circumstances which can properly satisfy the court that the danger has been excluded. These circumstances do not lend themselves to close description; the nature and sufficiency of the evidence in question will depend on the nature of the facts of the particular case. The danger in all cases of this kind is of false incrimination, but the reasons for that danger - the possible motives of the suspect witness - may be many and various, and will vary from case to case. The possible motives for false incrimination of the accomplice, the complainant in a sexual case and the possessor of stolen property will inevitably be very different, the accomplice may seek to implicate the wrong person because of his relationship with the real culprit or culprits, or because of his fear of them, or because of a hope that he will receive a share of the proceeds of the crime. The complainant in a sexual case may allege that a consensual intercourse was a rape out of fear of a father or a husband; or she may accuse the wrong person of what was clearly a rape in order to protect the real culprit; the possessor of stolen property may falsely incriminate an innocent man in order to exculpate himself. It is the possible motives in the particular case which the court must consider together with the evidence in the case in order to decide whether in the particular circumstances the danger of false incrimination can safely be regarded as having been excluded. But because of the great variety of possible motives it is perhaps easier to describe what will not, rather than what will, sufficient to exclude the danger.

This question has been considered in a number of cases both in South Africa and here. In a leading case of *R v Ncanana*, 1948 (4) SA 399 (AD) SCHREINER JA said at page 405:

"The risk that he may be convicted wrongly ... will be reduced, and in the most satisfactory way, if there is

corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness

1982 (1) ZLR p276

BARON JA

or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

This case has been followed here (see for instance *R v Lembikani and Anor*, 1964 R & N 7). However, the "merits and demerits" test has been the subject of some comment; in *S v Mubaiwa*, 1980 ZLR 477, LEWIS, JP., said:

"[This dictum] is one which always causes some difficulty of interpretation, (See *R v J*, 1966 (1) SA 88 (SR, AD) *3) at pages 91 B-F and 93 H-95 A) but it seems to me that it amounts simply to this: First of all the court has to properly warn itself of the dangers of accomplice evidence; having done so, then by contrasting the evidence of the accomplice with that of the accused and viewing it against all the surrounding circumstances and the general probabilities of the cases it has to be satisfied beyond reasonable doubt that the danger of false incrimination has been eliminated. It is not sufficient for the trial court merely to warn itself of the dangers of false incrimination and then to convict simply on its faith in the honesty of the accomplice based on nothing more than his demeanour in the witness box and the plausibility of his story." (my emphasis).

It is thus clear that a "suspect witness" case, in which a cautionary rule must be applied, is different from the ordinary case in which the decision will turn on the findings as to credibility, there must be something more than is required in the ordinary case to satisfy the trier of fact that the danger of false incrimination has been eliminated.

One or two illustrations of what I mean by "something more" may help to explain the proper approach. In *R v J* (*supra*), a girl aged 10 years and eight months had been raped in the garden of a house belonging to the appellant's parents, who were giving a party after the wedding of their daughter; among the guests were the complainant's parents and their three daughters, of whom the complainant was the youngest. The two families were thus well known to each other, and no question of honestly mistaken identification arose, nor was it disputed that the complainant had been raped by someone and was immediately afterwards in a state of genuine shock and distress. The only question was whether the appellant was proved to have been her assailant. LEWIS, AJA (as he then was), said at page 94 H:

"It seems to me, therefore, that, where the identity of the offender is the sole issue, the approach to be adopted, at the stage when the court weighs up all the evidence and considers its verdict, should depend on the particular circumstances of each case. Generally speaking, the special formula

1982 (1) ZLR p277

BARON JA

as laid down by WATERMEYER, CJ, [in *R v W* 1949 (3) S, 772 (AD)] will be appropriate where it is a question of the complainant's word against that of the accused, where the court can derive no real assistance from the surrounding circumstances and where the danger of a false identification has not been eliminated; but if the surrounding circumstances exclude any reasonable possibility of mistaken identity or of any potential motive to falsify the identity of the offender, then the underlying reason for that special approach will fall away. In that type of

case, provided the court has properly cautioned itself initially, I can see no reason why the question of the accused's guilt, at the verdict stage, should not be treated in the same way as it is in any other criminal case."

A similar approach was adopted by the Zambian Supreme Court in *Katebe v The People*, 1975 ZR 13. There the complainant answered a knock at her front door at about 11.30 p.m.; at the door were two young men whom she knew, who told her that her young sister wanted to see her. When she went outside the appellant threw her to the ground and attempted to rape her. She shouted for help and the barman of a nearby bar came to her rescue, whereupon the appellant and his companion ran away. The Supreme Court said:

"The reasons for (the cautionary rule in sexual cases) are legion ...; obviously there are circumstances in which a woman will make false allegations - in order to protect a boyfriend, or in circumstances where she may fear the anger of a husband or a father. In the present case there is nothing to suggest that any of these factors is present. We can see no motive for the prosecutrix in this case deliberately and dishonestly making a false allegation against the appellant. This case is in practice no different from any other in which the conviction depends on the reliability of the evidence of a complainant as to the identity of the culprit ...".

These cases demonstrate that the cautionary rule should not be applied slavishly; if the court believes the "suspect" witness, and if the circumstances of the case satisfy the court that the danger of false incrimination has been excluded, then a conviction is proper notwithstanding the absence of corroboration. But equally, it is idle for the court religiously to recite the corroboration warning and then to proceed just as it would in any ordinary case.

I turn then to the facts of this case. There can be no doubt that, as found by the magistrate, the appellant was not a satisfactory witness; in certain respects I find difficulty in accepting his evidence. However, it seems to me clear on the face of the record that the complainant and her parents were also unsatisfactory witnesses. That being so, arguably the magistrate should have been in doubt as to whether or not to accept the evidence of these witnesses, and particularly that of the complainant when she said that the intercourse was without her consent. It is certainly

1982 (1) ZLR p278

BARON JA

arguable that the matter should not have gone beyond the first stage to which I have referred above; it seems to me that while the magistrate examined critically the appellant's evidence and his behaviour in the witness - box he did not direct the same critical examination to the prosecution evidence, and did not in fact address himself to the various unsatisfactory features to which I will return in a moment. But even assuming that the magistrate was justified in believing the complainant on the crucial issue of lack of consent, where, as here, both the prosecution Witnesses and the accused are unsatisfactory the matter can hardly be said to come within the "merits and demerits" test enunciated by SCHREINER JA in *R v Ncanana* (*supra*).

I must deal shortly with the unsatisfactory features in the prosecution evidence. A crucial finding in the case was that the appellant had not arrived at the home of the complainant's parents some 10 days prior to the 26th November, but had in fact arrived only on the 24th. If in truth he had arrived only on that day then clearly his story cannot be true in its essential characteristic, namely that he and the complainant had agreed to marry and that intercourse took place on

three successive nights following that agreement. But if doubt is cast on the evidence of the prosecution witnesses in regard to the date of the appellant's arrival then the case takes on an entirely different complexion. In this regard there is a significant piece of evidence given by the appellant which was never satisfactorily explained by the prosecution witnesses. The appellant was aware that a foreman on the farm had been injured while at work and was aware of the circumstances of the accident, the accident took place some days prior to the 24th. The appellant alleged that he had already arrived when this incident took place. It is, of course, possible that he had learned of it after his arrival and for that reason was familiar with the details. But the evidence has a ring of truth and, as I have said, was not satisfactorily explained. The magistrate did not advert to this evidence in his judgment.

Another item of evidence relating to the date of the appellant's arrival is the medical certificate. The doctor's affidavit discloses that he examined the complainant on the 30th November, namely four days after the alleged rape; it discloses that the condition of the hymen was consistent with it having been ruptured approximately one week earlier. This opinion is of some importance and it is unfortunate that the doctor was not called. It may be argued that the difference between four days and one week is not so great as to render the doctor's certificate inconsistent with the evidence of the complainant; on the other hand it may be argued that doctors very frequently when deposing to manifestations being con-

1982 (1) ZLR p279

BARON JA

sistent with certain conclusions are frequently referring to the patient's account of the events in question. Had the doctor been called he would have been able to tell the court whether the condition of the hymen was consistent with an alleged rape four days earlier; he would have been able to tell the court also what the complainant herself had told him at the time of the examination. The failure to call the doctor to clear up matters which very obviously needed to be cleared up is a matter which causes me considerable concern. One knows that doctors are busy people and that it is desirable not to waste their time, but when the outcome of a trial on a serious charge may depend on a doctor spending 15 minutes in court it is, in my view, the clear duty of the prosecution to call the doctor, and, if the prosecution does not do so, the clear duty of the court. If as a result of the failure to call the doctor there is a doubt as to whether the condition of the hymen was consistent with it having been ruptured on the 26th November, that doubt must be resolved in favour of the appellant.

There are other unsatisfactory features of the prosecution evidence. There was a conflict between the complainant's parents as to whether or not discussions had taken place with the appellant concerning compensation. The appellant said compensation had been demanded and that a figure of \$40 was mentioned. The complainant's father denied that any such discussions had taken place, but the complainant's mother confirmed that discussions had taken place concerning compensation although she was not present all the time and did not hear the figure of \$40 being mentioned. Mrs. *Eleftheriades* very properly indicated to the Court that this discrepancy between the testimony of the complainant's parents caused her concern. Certainly if such discussions in fact took place - which in view of the evidence of the mother seems likely - it adds credence to the evidence of the appellant that the allegation of rape was made only

when he indicated that he was returning to his home and that he could not use the funds in his possession for the payment of compensation.

Another improbability in the complainant's story is the fact that when, as is alleged, she reported to her mother no examination was carried out. The magistrate clearly appreciated the importance of such an examination because he himself put the following questions:

"Q. Before the police came did you examine your daughter to see if she had had intercourse?

A. I lost all my strength and became weakened because of this.

Q. Was your daughter a virgin prior to this?

A. I believe she was a virgin but I cannot categorically state she was, I don't know."

1982 ZLR p280

BARON JA

I find these answers quite remarkable. It is my experience both in this country and in neighbouring countries that when an allegation of this kind is made by a girl there is an immediate examination by the elderly women of the village, frequently the mother does not participate in such examination. Here we have a woman whose daughter was without question a virgin until she had intercourse with the appellant and yet the mother does not bother to ensure that she is examined and indicates that she is not certain that her daughter was a virgin. It is at least arguable that the mother knew of her daughter's association with the appellant.

Another unsatisfactory feature of the evidence is that relating to the complainant's underpants. She told the court in evidence in chief that they were in the possession of the Karoi police and that they were not damaged in any way. In cross-examination she said that her pants had been removed by the appellant and that after the rape she had put them on and rushed to report to her mother. It is quite clear that had the complainant's hymen been ruptured immediately before she put her pants on again there would have been blood on them. She was not asked whether she had washed her pants and there is no evidence as to whether she did or not. But the court must assume, since the pants were not produced as an exhibit, that there was no indication of blood on them.

The magistrate expressed the view even if it were true that the appellant had been at the complainant's parents' house for some 10 days a girl of the complainant's age and in her position would not have spent three nights with a comparative stranger. This was an assumption which, in my view, the magistrate was not entitled to make. We have here a girl who has never been to school and whose parents live a very simple rural existence, and in my view it is or from unlikely that such a girl would regard as a privilege, and something which would provide security for her future, marriage to a nganga, notwithstanding that he is considerably older than she. One knows from one's experience that such marriages are not uncommon.

Another factor which influenced the magistrate has more weight. The complainant, in answers to questions put to her in cross-examination by the appellant, countered his allegation that they had agreed to marry by pointing out that had there been such an agreement there would have been an exchange of love tokens, and that in fact there had been no such exchange. This is

certainly a factor which militates against the appellant's assertion that he and the complainant had agreed to marry, but it does not rule out the possibility that by blandishments and the use of his

1982 (1) ZLR p281

BARON JA

influence as a nganga he had persuaded the complainant to have intercourse with him. In my view the absence of love tokens, although of weight, is not of such weight as to over-ride all the unsatisfactory features in the prosecution case.

Finally in connexion with the evidence generally I must comment on the magistrate's assessment of the complainant and her mother as simple people. The evidence is that the complainant had never been to school; but the strong impression I have from the record is that far from being simple both the complainant and her mother were argumentative and shrewd.

The possible motives in this case which give rise to the danger of false incrimination are, as the evidence and the cross-examination by the appellant make clear, that the complainant and her parents, angered that the complainant was persuaded by a promise of marriage to have intercourse with the appellant and finding that the appellant had either changed his mind or had never intended to marry the girl, and angered also by the appellant's refusal to pay compensation, made an allegation of rape. As I have said, arguably the weaknesses in the prosecution case are such that the magistrate should have been in doubt as to the credibility of the complainant and her parents. However, accepting that he was entitled to be satisfied as to their honesty, the second stage of the enquiry consists in examining the circumstances of the case within the context of the evidence as a whole and deciding whether there is anything in those circumstances which, apart from his faith in the honesty of the witnesses, satisfies him that the possible motives do not in fact exist. Clearly there is nothing in this case of that nature. The Appellate Division in *R v J (supra)* was able to say that in the particular circumstances of the case, they could see no motive for false incrimination; the Supreme Court in Zambia in *Katete v The People (supra)* was able to say that, in the particular circumstances of that case, there was no reason not to approach the question of the identification of the accused in the same way as it would be approached in any other identification case. In the present case there are no circumstances of that kind; there is nothing in the surrounding circumstances from which it could be argued that there is no potential motive for false incrimination.

There being no corroboration and it being impossible to say that the "merits and demerits" test had been met, this conviction could not, in our view, stand and the appeal against the conviction for rape was for these reasons allowed at the conclusion of the hearing.

1982 (1) ZLR p282

BARON JA

However, the matter did not end there. The Court was satisfied that the appellant had clearly contravened section 3 of the Criminal Law Amendment Act [*Chapter 58*], and that he had not satisfied the Court in terms of paragraph (i) (c) of the proviso that he had reasonable cause to

believe that the complainant was of or above the age of 16 years.

The first witness to give evidence at the trial was the complainant. At the conclusion of her evidence-in-chief the magistrate took great pains to explain to the appellant that, apart from the charge of rape which he was facing, it was also possible that he might be convicted of an offence under the Criminal Law Amendment Act. The record shows that, following a discussion between the court and the prosecutor, the magistrate referred to the Act and explained to the appellant the offence of which he might possibly be convicted and of the defences open to him under that section.

In the event the appellant never challenged that the girl was in fact only a little over 15 years of age at the relevant time nor did he ever suggest that, either because of her appearance or for any other reasons, he believed and had reasonable cause to believe that she was over sixteen. His attitude throughout was that according to African custom once a girl is old enough to menstruate she is an adult. It is quite clear therefore that the appellant did not discharge the *onus* which the section in question throws upon him of satisfying the court that the defence set out in the proviso was available to him. He clearly did not believe that the girl was over 16; he simply did not think about her age at all. In these circumstances the contravention of the section was established and this Court, having set aside the conviction for rape, substituted a conviction under section 3 of the Criminal Law Amendment Act.

The question then arose: what was an appropriate sentence in all the circumstances of this case? We have here a man of 42 or 43 years of age, professing to be a nganga, who has clearly taken advantage of a young girl, the daughter of the household, so to speak, in which he had been made welcome and where he was being fed. He had purported to exorcise this girl for some kind of spirit which he said had possessed her, and it seems clear that, although there was doubt about the rape and for that reason the conviction for rape was set aside, there can be no doubt that the appellant was in a position of considerable influence over the girl. All these circumstances seemed to us to be circumstances of quite considerable aggravation.

1982 (1) ZLR p283

BARON JA

We did not overlook the fact that the appellant, at the time he committed the offence, appeared to think that once the girl was, in his phraseology, an adult her actual age was not relevant. We took into account also that the appellant was in custody for some three months prior to his conviction in March of this year.

Taking all the circumstances into account, we were of the view that an appropriate sentence was nine months' imprisonment with labour. We did not consider that this was the kind of case in which it would serve any purpose for any portion of the sentence to be suspended, this is not the kind of offence where a deterrent against future repetition would appear to be necessary.

In the result, therefore, the appellant was sentenced to nine months' imprisonment with labour.

Georges JA: I agree.

Beck JA: I agree.

Endnotes

1 (Popup - Popup)

See page 76 of this volume. - EDITOR.

2 (Popup - Popup)

See 1981 ZLR 547. - EDITOR.

3 (Popup - Popup)

Reported sub. nom. R v Judson, 1965 RLR 501. - Ed.