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THE ZIMBABWE LAW REPORTS 1983 [PART 1]

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REDGMENT v MINISTER OF DEFENCE 1983 (1) ZLR 1 (HC)

Court High Court, Harare

Squires J

9 December 1982 & 5 January 1983

Flynote

Statutes - Pensions and other Benefits Act 1979 - Constitution of Zimbabwe Rhodesia, 1979 (Act 12 of 1979) - section 37 (1) of Part I V of Third Schedule - retirement from uniformed force after not less than two years service as a contributor - Defence (Regular Force) (European Members) Regulations 1976 (RGN 100 of 1976) - Defence (Regular Force) (Medical and Dental Officer Cadets) Regulations 1976 (RGN 388 of 1976) - cadet joining defence forces in terms of latter still a "member" in terms of former and entitled to retire on same basis as other members - "defined" - meaning of.

Headnote

The applicant joined the then Rhodesian Army in February 1977 as a medical officer cadet. He was paid a salary while he trained as a medical practitioner, from which seven and a half per cent was deducted as pension contributions. In terms of the agreement he qualified as a medical practitioner and was appointed to commissioned rank.

In June 1982 he gave notice of his intention to retire early from the Army in terms of section 37(1) of the Pensions and Other Benefits Act 1979. The Army's legal advisers gave their view that he could not do so, as the constitutional provisions establishing the right of members of the defence forces to take early retirement did not apply to him as a medical cadet. The applicant sought a declaratory order that he was entitled to retire.

Section 37(1) of Part IV of the Third Schedule (Transitional Provisions) to the Constitution of Zimbabwe Rhodesia (Act 12 of 1979) gave the right of early retirement to a "member", who, in terms of section 35(2)(a) of the Part, included a member as "defined" in the Defence (Regular Force) (European Members) Regulations, 1976 (RGN 100 of 1976). It was argued on behalf of the Minister that the applicant was not a "member" of the defence forces, in that his conditions of service were governed by the Defence (Regular Force) (Medical and Dental Officer Cadets) Regulations 1976 (RGN 388 of 1976), which excluded such cadets from the ambit of the meaning of "member" in the Defence (Regular Force) (European Members) Regulations.

Held, that applying the normal rules of interpretation, the inescapable fact was that section 37(1) applied to persons who at the relevant date were "member" as defined in the

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European Members Regulations, that is, European male non-commissioned officers or soldiers. The applicant was such a person, having been attested into the army as a private soldier.

Held, further, that the object of the legislation was to cope with the then expected attainment of majority rule and to allow persons who joined the forces before majority rule was clearly envisaged to retire after at least one year's service under such rule, since the basis on which they had joined would have altered, possibly radically. It was clear that the legislation covered medical officer cadets and afforded them the same relief as other soldiers.

Held, further, that even if there were any inconsistency between the Medical Officer Cadet Regulations and the European Members Regulations, the plain wording of the intervening Act made it clear that the Act applied to the applicant.

Cases cited:

Pretorius v Minister of Defence 1981 (1) SA 1174 (ZAD);

West Ham Churchwardens & Overseers of West Ham v Fourth City Mutual Building Society & Another [1892] 1 QB 654;

Nestel v National & Grindlays Bank Ltd 1962 (2) SA 390 (AD).

I A Donovan, for the applicant

B Crozier, for the respondent

Judgment

Squires J: On the 21 February 1977, the applicant in this matter joined the then Rhodesian Army as a medical officer cadet. He joined in terms of an agreement by which he was paid a salary while he trained as a medical practitioner. Out of the salary of \$2 313 *per annum* he had to support himself and pay the university fees and charges for his medical training. In addition, seven and a half per cent of this salary was payable as a pension contribution. The scheme provided that, starting as a private, the medical officer cadet would pursue his studies during university terms, but be at the disposal of the Army during vacations. Upon successful completion of his studies, the agreement provided for appointment to commissioned rank as a 2nd lieutenant, with the pay and allowances due to such status under the appropriate officer Regulations. And upon completing his year of housemanship at a hospital and enrolment as a registered medical practitioner, he would be promoted to the rank of captain. Thereafter he was required to serve in the Army as a medical officer for at least four years.

The applicant duly passed through these various stages of his medical training and qualification, and on the 1 January 1982 he was registered as a medical practitioner. Shortly afterwards he was promoted to the rank of captain and has since served as a medical officer in the Zimbabwe National Army with that rank.

On the 28 June, 1982, however, he gave notice to the appropriate senior

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officers of his intention to retire early from the Army in terms of section 37(1) of the Pensions and Other Benefits Act, 1979. After being so advised by the Government law officers, the applicant's superiors replied that Part IV of the Third Schedule of the relevant constitutional provisions which establish the right of members of the Defence Force to take early retirement, did not apply to him as a medical cadet, and he was therefore not eligible for such premature departure from the Army's service. The applicant, equally satisfied that this conclusion is wrong, now seeks a declaratory order to the effect that he is entitled to terminate his service with the ZNA by giving three calendar months' notice.

Section 37(1) of Part IV of the Third Schedule (Transitional Provisions) to Act 12 of 1979, the constitution for Zimbabwe Rhodesia, provides that-

"37 (1) A member who, at the date of his retirement, will have completed not less than two years' service as a contributor since his last appointment as such may, at any time after he has completed a period of service of not less than one year after the effective date, retire from the Uniformed Force of which he is a member: Provided that a member who wishes to retire in terms of this paragraph shall give not less than three calendar months' notice of his intention to retire, which shall expire not earlier than the 30th April, 1980."

A "member" was defined in s 34(1) as ". . . a person to whom, in terms of paragraph, 35, the provisions of this part (ie Part IV) apply."

Paragraph, or section, 35 provides in subsection (2)(a) as follows:

"(2)The provisions of this Part shall apply to any member of the Regular Force of the Army or Air Force who has had continuous service as a contributor since before the 1st October, 1978, and who-

- (a) at that date was an officer as defined in the Defence (Regular Force) (Officers) Regulations, 1976, or a member as defined in the Defence (Regular Force) (European Members) Regulations, 1976, or the Defence (Regular Force) (Rhodesia Women's Service) Regulations, 1978; . . ."

Subparagraphs (b) and (c) include other categories of the Army or Air Force, as subsection (1) refers to the Police, and subsection (3) to the Prisons Service. And, of course, this part of the Third Schedule - Part IV - remained in force by virtue of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order 1980, as part of the Pensions and Other Benefits Act, 1979.

The applicant's case is that he is a "member" of the Regular Force of the Army to whom s 35(2)(a) applies, that is to say, at the 1 October, 1978 he was a member as defined in the Defence (Regular Force) (European Members) Regulations 1976, and who has had continuous service as a

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contributor - which means someone who pays contributions to the Consolidated Revenue Fund

in terms of pensions regulations - since before 1 October 1978. If he is a member within the ambit of section 35(2)(a) then he may, by reason of section 37(1) of these provisions, retire from the Army as long as he has completed at least two years' service as a contributor and served for not less than one year after the 30 April 1979 - both of which he has done.

The respondent's case is that the applicant is not a "member" of the Defence Force in terms of these constitutional provisions. This situation is a consequence of the fact that the Defence Regular Force (Medical and Dental Officer Cadets) Regulations No 388 of 1976 were promulgated after the Defence (Regular Force) (European Members) Regulations in RGN 100 of 1976. And the effect of the provisions of the Medical Cadet Regulations is to alter the ambit of "member" in the Regular Force European Members Regulations by excluding cadets from such meaning. This is achieved, so it was argued, by the fact that the Cadets Regulations specifically apply certain sections of the Regular Force European Members Regulations to medical cadets. These are ss 5, 22, 29, 30, 58, and 63, and they deal with the period of engagement, issue of free rations, deprivation of and deduction from pay and allowances in certain circumstances, permission to marry, and the prohibition from taking an active part in politics.

The fact that certain selected sections from the Regular European Members Regulations were specifically included in the Medical Cadets Regulations clearly implies that all the other sections are excluded, and *ex hypothesi* the definition of a "member" in the earlier Regulations - which definition reads, "a European male non-commissioned officer or soldier attested in the Regular Force other than the Guard Force" - is excluded.

This conclusion was said to be supported by a number of other factors.

First, it was argued that the word "defined" in s 35(2)(a) did not necessarily mean to expressly enumerate or specify, and in the context of the section should be construed simply as meaning a "member to whom the Defence (Regular Force) (European Members) Regulations 100 of 1976, apply." The Legislature must have intended such a meaning, otherwise s 35(2)(a) would have read merely as "a European member of the Regular Force of the Army or Air Force." Then, secondly, it was urged that if the Legislature had intended to include medical and dental officer cadets in s 35(2), it would have mentioned them expressly - as it does in respect of Police cadets in s 35(1)(b) of the Act. The especial mention of Police

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cadets and the complete omission of any reference to medical officer cadets was significant. Then, thirdly, it was said that the Pensions and Other Benefits provisions should not be construed so as to allow persons to avoid these contractual obligations: and conversely because they conferred an unusual privilege, on certain State employees, they should be restrictively construed.

However, despite these arguments, and despite the persuasive cogency with which Mr Crozier advanced them, I have little, if any, doubt that the applicant must succeed. But before proceeding to consider these aspects individually, it would be as well to set the stage by stating

what I believe to be the objection of the Legislature in enacting these particular provisions of Act 12 of 1979 as gleaned from the surrounding circumstances in which it was enacted and the provisions it contains.

To the perspective of the legislation already foreshadowed in the judgment in *Pretorius v Minister of Defence* 1981 (1) SA 1174 (ZSC) at 1177D, there may validly be added, and for the purposes of the present situation, the premise that the Legislature accepted that service under a majority rule government after the 30 April 1979 might well be radically different to what it was before. That meant that the basis upon which all existing public servants and members of the Police, Defence Forces and Prison Services had joined and embarked upon a career in those capacities, would therefore no longer exist; and might even assume a considerably different aspect. It was hoped that it would not, and that fears entertained by the prospect of majority rule would prove unfounded. To retain such skills as these persons represented, there was established on the one hand incentives to stay and continue to serve under the new political order - particularly over the first few crucial years. These incentives took the form of the gradually improving pension benefits that would flow from continued service after the effective date even if the officer concerned was not by then entitled to any benefits from his pensions regulations. But on the other hand, and in recognition of the fact that events might make such continued service unattractive, an opportunity was given for early retirement after at least one year's service from the 30 April 1979.

This was not disputed by Mr *Crozier*. It was only said that medical officer cadets were not included as being eligible for this relief.

Against that background then, the law applicable to the interpretation of statutes, as I understand it, seems to be well settled. It is that in determining the meaning of any word or phrase in a statute or statutory enactment,

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the first question to always ask is: what is the natural or ordinary meaning of that word or phrase in its context in the statute? If that is clear and unambiguous, then effect must be given to that meaning as being the intention of the Legislature, because that intention can only be derived from the words actually used. It is solely when that ordinary or normal meaning leads to a result that cannot reasonably be supposed to have been the intention of the Legislature that it is proper to look for some other meaning of the word or phrase.

Now, in the provisions here involved, whatever speculation suggests the Legislature might have intended or could have meant, the inescapable fact is that it used the words ". . . who at that date was . . . a member as defined in the Defence (Regular Force) (European Members) Regulations, 1976; . . .". The ordinary meaning of the transitive verb "define" is to "make clear" or "state the limits of", and the corresponding meaning of a "member as defined" in the phrase in question is "member as made clear or indicated in" the Regulations in question. That definition states that European male non-commissioned officers or soldiers attested in the Regular force were "members" in terms of those Regulations. And the applicant was clearly a European male soldier as at the 1 October 1978, having been attested into the Army as a

private on the 21 February 1977.

Prima facie at least, therefore, that is to say, on the ordinary plain meaning of the words, he is included in the description of "member as defined". And I really see nothing strange or untoward or absurd in such a state of affairs, or that it is a result that cannot reasonably be supposed to have been the intention of the Legislature. For medical officer cadets, like other members of the then Defence Forces or Public Service, had joined the Army or Air Force on the basis that the government they would serve would be of a particular kind, and that form of government, and the task of serving it, might conceivably become different - even radically different. And like other officers or members, or public servants, they would also be committed by the terms of their engagement to serving it, under sanction of forfeiting pension rights, despite the change of circumstances which they might regard as adversely affecting them. In short and subject to a few qualifications, the avenue of relief was open to anyone who joined these Services before the 1 October 1978, before it became clear, that a majority rule government would be installed in political office, who had been a contributor for the required period and had served for one year after the effective date. Far from being absurd, I am bound to say that the result is entirely logical and consistent. If there were any doubt as to the intention to include such medical officer cadets, it would be removed,

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in my view, by the omission to reproduce a limitation on early retirement such as appears in section 28(2)(c) for public servants. The insertion of such a limit shows that this question was not overlooked by Parliament, and had it wished to exclude medical officer cadets from the benefit of early retirement, it would surely have restated a similar restriction in Part IV. It did not do so, and such an omission seems to be calculated to ensure that such persons were to be included in the same relief as was available to other officers and members of the Defence Forces.

This conclusion also implies the rejection of Mr *Crozier's* argument that the subsequent promulgation of the Medical Officer Cadet Regulations, with its selected application of only some provisions of the European Members Regular Force Regulations, impliedly amended the definition of "member" in the earlier regulations by excluding cadets. Now, normally speaking, no part of a statute or statutory instrument ceases to be of force unless it is repealed. It is true that the whole or part of an enactment may be impliedly repealed by a later statute, but the test of this is a fairly stringent one. One must be able to say that the provisions of the later enactment are so inconsistent with, or repugnant to, the provisions of the earlier enactment, that the two cannot stand together. See *West Ham Churchwardens & Overseers of West Ham v Fourth City Mutual Building Society & Anor* [1892] 1 QB 654 at 658 *per* A L SMITH J

I must confess that I see no such inconsistency here. Even if one takes the definition provisions of the Medical Officer Cadet Regulations, it is clear that while a cadet may be engaged for a special purpose, he is still a soldier. And the mere fact that the word "cadet" is given this special meaning in the relevant Regulations does not detract from that. He is simply a soldier who joins the Army for a particular purpose, and whose life is *pro tanto* subject to some regulations that are different to other soldiers. But even if there was any inconsistency, as Mr *Donovan* points

out, the Medical Officer Cadet Regulations made a cadet subject to those regulations as extended by incorporation, rather than to the European Members Defence Force Regulations. The Pensions and Other Benefits Act of 1979 was superimposed on the regulations in RGN 100 of 1976 however altered they were by RGN 388 of 1976. And on to that situation, the hand of the Pensions and Other Benefits Act was laid, it being made applicable to members of the Defence Force "as defined" by the European Members Regulations, not to a "member subject to" the Medical Officer Cadet Regulations or a "member to whom the European Member Regulations apply".

In other words, I do not think there is any inconsistency and therefore

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any implied amendment of the earlier regulations by the later; but, even if there is, the plain wording of the intervening legislation ignores the provisions of the later Regulations.

Then it was argued that there was a particular significance in the omission to make provision in s 35(2) for Medical Officer Cadets, as provision was specifically made for cadets in the Regular Police Force in s 35(1). I regret to say that upon fuller reflection I can see no such significance.

An examination of the Police Cadet Regulations of 1965 shows that police cadets were enrolled only up to the age of 18 years. At that age, unless their service in the cadet branch was specifically extended by the Commissioner for a limited period, they were either appointed as patrol officers or constables, depending on their educational qualifications, or discharged. They were therefore not bound to serve as cadets for any great length of time. The provisions of section 35(1) of the Pensions and Other Benefits legislation, however, seem to aim at including any member of the Regular Police Force who, though only cadets at the 1 October 1978, had joined the Force as a career, and in fact had subsequently become patrol officers as long as they had served a year after the 30 April 1979.

Comparing the basis of engagement and appointment of cadets in the Police Force and the engagement of medical officer cadets in the Army or Air Force, there seems to have been no need to enact such a provision as s 35(1)(b) for medical officer cadets, because by the terms of their engagement as cadets they were, if they passed their examinations, committed to a career in those Regular Forces. Section 35(1)(b) provides for the person who, though only a cadet of a certain quality by the 1 October 1978, thereafter committed himself by accepting appointment as a patrol officer. It effectively broadens the ambit of s 35(1)(a) by including persons who, though not patrol officers at the time of the passing of the Act because of age, had every intention of becoming one and did so thereafter.

Nor, on further reflection, do I think any weight can be attached to Mr *Crozier's* argument that the legislation should not be interpreted so as to afford a basis for avoiding contractual obligations. This is undoubtedly a valid point in ordinary situations (cf *Nestel v National & Grindlays Bank Ltd* 1962 (2) SA 390 (AD) at 395H); but the position here is extraordinary in that the whole object and purport of the legislation was to allow the disregard of contractual obligations. But in any event the acceptance and recognition of such aids and presumptions to

the task of statutory interpretation are only of assistance where the application of the Legislature's

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words in their ordinary sense produces an absurd result. For the reasons already given I do not think there is any absurd result produced here, and the same reasoning and conclusion apply to the respondent's argument that because the legislation confers an unusual privilege, it should be restrictively construed.

For these reasons, then, it seems to me, at any rate, to be clear that the legislature intended medical officer cadets, such as the applicant, to be included in the provisions it enacted for early retirement in Part IV of the Third Schedule of the 1979 Constitution. The application must therefore succeed and there will be an order as prayed.

Calderwood Bryce Hendrie & Partners, Bulawayo, and *Scanlen & Holderness*, Harare, legal practitioners for the applicant.

Civil Division of the Attorney-General's Office, legal practitioners for the respondent.

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S v ZISHUMBA & OTHERS 1983 (1) ZLR 10 (HC)

Court High Court, Harare

Dumbutshena AJP

5 January 1983

Flynote

Criminal procedure - plea of guilty - Criminal Procedure and Evidence Act [Chapter 59] - section 255(2) (a) and (b) - distinction between procedures provided by two paragraphs - former relates to trivial offences and provides for limited penalties - latter correct one to use when offences serious - necessity to observe provisions of section 255(3) - when matter should be remitted for correct procedure to be followed.

Headnote

Where, in a trial before the magistrates Court, an accused person pleads guilty, the magistrate may proceed in terms of section 255; but a careful distinction should be drawn between the two procedures provided by subsection (2). The procedure provided by paragraph (a) relates to offences which, on the face of the charge, are trivial. The magistrate may then forthwith convict the accused and sentence him to any competent sentence other than imprisonment without the option of a fine, a whipping or a fine exceeding one hundred dollars. If the offence appears to be a serious one, whether *ex facie* the charge or from the agreed facts, the magistrate should proceed in terms of paragraph (h), which provides that he must explain the charge and its

essential elements to the accused and, if necessary, require the prosecutor to state the facts; he must also inquire from the accused whether he understands the charge and the essential elements of the offence and whether he admits those elements and the facts stated by the prosecutor. It is only if that procedure is correctly followed that it is competent to impose, for example, a custodial sentence. Further, the magistrate must record the details set out in section 255(3).

To mix the two procedures is an irregularity resulting in a miscarriage of justice. While it would be possible on review to remit the matter to be dealt with correctly, it would not be desirable to do so where the correct procedure could easily have been followed or where the accused had been in custody for a substantial period before sentence was passed.

Cases cited:

S v Kawara AD 133/80;

S v Mhondiwa 1976(1) RLR 134; 1976 (2) SA 444 (R);

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S v Mabhurukwa HC-H-258-82 (not reported);

S v Zindonda AD 15/79 (not reported);

Mukwevho & others v Van Wyk NO & Another 1960 (1) SA 496 (TPD).

Judgment

Dumbutshena AJP: The ten accused were charged with two counts of assault with intent to do grievous bodily harm. They all pleaded guilty to common assault. The public prosecutor indicated his readiness to accept their pleas of guilty to common assault. The magistrate considered the two counts as one for purposes of sentence. He sentenced each accused to 6 months' IWL and suspended 4 months for 5 years on appropriate conditions.

When the record was sent for scrutiny the regional magistrate drew the attention of the trial magistrate to the fact that he had proceeded in terms of para (a) of s 255(2) of the Criminal Procedure & Evidence Act [Chapter 59]. Indeed, the record shows that the trial magistrate recorded that he was proceeding in terms of paragraph (a) of s 255(2) of the Act.

According to the statement of facts to which all accused agreed, one complainant was "arrested" by the accused at his house because they suspected him of possession of a firearm. He was escorted to Masemo School where the second complainant was taken by the accused. They were both taken to the bush and questioned. When they denied possession of a firearm they were ordered to lie on the ground. They were then assaulted by the accused. One of the complainants was then forced to assault the other complainant. After the assaults the complainants were taken by the accused to Chireya Police Base where the accused made a report to the police. The accused left the complainants with the police. Both complainants

sustained injuries. One had external injuries on the buttocks and on the right arm.

The scrutinizing regional magistrate considered the case a serious one because ten people took part in the assault and the accused took the law into their own hands. He based his assessment of the offence on what was said in *S v Kawara* AD 133/80, a case in which the appellants assaulted three complainants on the buttocks in order to make them reveal the whereabouts of grenades. FIELDSEND CJ said at p 3:

"This is, therefore, not a case which can be treated lightly. The appellants' conduct was an unwarranted usurpation of the administration of justice, as well as a gross interference with the rights of the complainants."

The particulars of the common assault to which the accused pleaded guilty in this case reveal its serious nature. This is clear from the fact that

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the magistrate having proceeded in terms of section 255(2) (a) of the Criminal Procedure & Evidence Act [*Chapter 59*], sentenced the accused to terms of imprisonment, one of the punishments specifically prohibited by paragraph (a) of section 255(2) of the Act. Section 255(2) (a) is to this effect:

"(2) Where a person arraigned before a magistrates 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 -

- (a) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a whipping or of a fine exceeding one hundred dollars, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence other than -
 - (i) imprisonment without the option of a fine; or
 - (ii) a whipping; or
 - (iii) a fine exceeding one hundred dollars; or deal with the accused otherwise in accordance with law; . .

It was not competent for the magistrate to proceed in terms of s 255(2) (a) of the Act because it was clear from the nature of the particulars in the two counts and the facts agreed to by both the State and the accused that the offences charged were not of a minor nature. The trial magistrate has shown that he appreciated this in his letter to the regional magistrate.

Apart from what has been said above, to mix in one trial the procedures prescribed under parts (a) and (b) of s 255(2) in one and the same trial is, in my judgment, a fatal irregularity. This aspect alone distinguishes this case from *S v Mhondiwa* 1976 (2) SA 444 (R) and *S v Mabhurukwa* HC-H-258-82 (not reported).

In *Mhondiwa's* case (*supra*) the magistrate recorded that he had proceeded in terms of s 255(2) (b) of the Criminal Procedure & Evidence Act [*Chapter 59*]. The magistrate explained to the accused the charges and the essential elements thereof and was satisfied that the accused had understood and had admitted the elements of the offences and the acts stated in the

charges. The prosecutor did not, however, state the acts and omissions upon which the charges were based. The magistrate thought that such acts or omissions were apparent from the charges and there was, therefore, no need for a statement of facts. A statement of acts on which the essential elements were based is necessary. SMITH J (as he then was) set aside the convictions and sentences and remitted the matter to the magistrate in order to comply with the procedure set out in the section.

In *S v Mabhurukwa (supra)* the accused pleaded guilty to selling and dealing in or disposing of liquor without a licence contrary to s 114(1) (a)

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of the Liquor Act [Chapter 289]. The magistrate proceeded in terms of s 255(2) (a) of the Code. Accused was sentenced to a fine of \$100 or 50 days' IWL in default of payment, and the liquor, the subject of the charge, was ordered to be forfeited to the State. The magistrate believed that since the State had elected to proceed in terms of s 255(2) (a) of the Code, his hands were tied. The magistrate's attitude showed, as was pointed out at p 2 by SQUIRES J "not only a material lack of understanding of the procedure involved, but a misapprehension of the magisterial function . . . ". The result was the imposition of an inadequate sentence in an offence for which the Legislature prescribed heavy penalties and in which even a first offender may attract a fine of up to \$500 or 6 months' IWL; and a second offender \$1 000 or 12 months' IWL or both. In *Mabhurakwa's* case the review court refused to certify the proceedings as being in accordance with real and substantial justice.

In the instant case the magistrate stated that he had sentenced the accused in terms of s 255(2) (b) after having conducted the rest of the proceedings in terms of s 255(2) (a) because he had forgotten in terms of which section he was conducting the trial because the case came to him at the end of a long day. There was, therefore, a failure to use the Court's discretion properly. Under those circumstances there was a failure of justice in terms of the law.

In terms of s 255(2) (b) the magistrate should have followed the procedures there laid down. Subsection (2)(b) of s 255 says:

"(2) Where a person arraigned before a magistrate's 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 -

- (a)
- (b) the Court shall, if it is of the opinion that the offence merits any punishment referred to in subparagraph (i), (ii) or (i) of paragraph (a) or if requested thereto by the prosecutor-
 - (i) explain the charge and the essential elements of the offence to the accused and to that end require the prosecutor to state, in so far as the acts or omissions on which the charge is based are not apparent from the charge, on what acts or omissions the charge is based; and
 - (ii) inquire the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor;

and may, if satisfied that the accused understands the charge and the essential elements of the offence

and that he admits the elements of the offence and the acts or omissions on which the charge is based as stated in the charge or by the prosecutor, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence or deal with the accused

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otherwise in accordance with law."

Section 255(2) (b) should be read in conjunction with subs (3) of the same section. Subsection (3) of s 255 is to this effect:

"(3) Where a magistrate proceeds in terms of paragraph (b) of subsection (2) -

- (a) the explanation of the charge and the essential elements of the offence; and
- (b) any statement of the acts or omissions on which the charge is based referred to in subparagraph (i) of that paragraph; and
- (c) the reply by the accused to the inquiry referred to in subparagraph (ii) of that paragraph; and
- (d) any statement made to the court by the accused in connexion with the offence to which he has pleaded guilty;

shall be recorded."

These requirements were, of course, not carried out by the magistrate because not much attention was paid by the Court to what was happening because the Court had initially purported to conduct the trial under para (a) of s 255(2) and then, in a state of forgetfulness, sentenced the accused in terms of para (b) of s 255(2).

What is more disturbing is the fact that the magistrate appreciated the seriousness of the offences with which he was dealing but failed to exercise his discretion in making a choice between paragraphs (a) and (b). In his reasons for sentence he stated that the offences committed by the accused were serious and that the accused took the law into their hands instead of reporting the possession of a firearm by the complainants to the police. There was therefore adequate information before the Court upon which the Court assessed and imposed custodial sentences without the option of a fine contrary to the provisions of s 255(2) (a) under which the trial had commenced.

When the accused were sentenced in terms of s 255(2) (b) the magistrate had not gone through the procedural requirements laid down in para (b) nor had the provisions of s 255(3) been carried out.

The question is whether, in a case in which the Court purported to proceed in terms of s 255(2) (a) of the Act and in which the particulars of the offence and the agreed statements of facts reveal the serious nature of the offences committed by the accused, the reviewing Court should remit the case to the magistrate's court for the re-opening of the trial.

Before answering that question, guidance may be sought in what was

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said by MacDONALD CJ at pp 6-7 in *S v Zindonda* AD 15/79. The learned CHIEF JUSTICE said, commenting on the observance of section 255(3):

"The miscarriage of justice which occurred in this case would not have occurred under the procedure which had to be followed before the introduction of s 255(2), and this case demonstrates how important it is that the provisions of s 255(3) should be strictly and meticulously observed by magistrates. It can also be said that this was a case in which the magistrate should have taken full advantage of the powers conferred on him by s 255(4) since the charge read with the Agreed Statement of Facts contained no clear indication of the part played by each accused in the commission of the crime. Infinite care must always be taken to ensure that an unrepresented unsophisticated tribesman or tribeswoman fully understands the essential elements of the offence charged. The more complicated the offence the greater the care required."

In my judgment the confusion brought about by mixing two different procedures laid down in s 255 of the Act resulted in a miscarriage of justice. It would not, therefore, be proper to refer back the case to the magistrate. In coming to this conclusion I find support in what was said, under slightly different provisions and in different circumstances, by GALGUT J (as he then was) in a case dealing with the provisions of s 258(1)(b) of Act 56 of 1955 of South Africa in the case of *Mukwevho and Others v van Wyk NO and Another* 1960 (1) SA 496 (TPD) at 498E-G:

"The question now arises as to whether, on setting aside the convictions and sentences, the matter should be referred back to the magistrate for rehearing. In my view that would not be proper. In *R v Letuli and Another*, 1953 (4) SA 241 (T), the head-note which correctly reflects the judgment, reads:

"When an accused has pleaded guilty and the proceedings have been set aside, whether (1) because no evidence or insufficient evidence has been adduced of the commission of either the offence charged or of any other offence to which the accused has pleaded guilty or (2) because after the prosecutor has intimated his intention not to lead any evidence the magistrate has sentenced the accused without evidence on a charge of such a nature that the proviso to s 286 (1)(b) of Act 31 of 1917, as amended, should not have been invoked, the normal procedure for the Superior Court is not to direct a remittal for the hearing of fresh evidence: such remittal should only be directed in the exceptional cases where the desired evidence is such as would prove the case without delay without real dispute, where it has been omitted not deliberately but by oversight or through some misunderstanding, and, in addition where a satisfactory explanation is furnished as to why it had not been adduced in the first instance: and even in such exceptional cases the Superior Court's discretion to allow the Crown this privilege should be sparingly exercised.' "

In the instant case, besides the fatal irregularity mentioned above and the deliberate decision not to lead any evidence, there is a further reason why the matter should not be re-opened. The accused were sentenced on the 9 November 1982. The offences were committed on the 26 September 1982. Although the record does not show when they were arrested, according to the indictment they were to appear before the magistrate on the 5 October

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1982, and they must have spent some time in custody before they were sentenced. It would

therefore not be in the interests of justice to remit this case to the magistrate's court.

For the various reasons and circumstances expressed above the convictions and sentences are set aside.

Squires J agrees.

1983 (1) ZLR p17

GREENACRES FARM (PVT) LTD v HADDON MOTORS (PVT) LTD 1983 (1) ZLR 17 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ & Georges JA

7 December 1982 & 11 January 1983

Flynote

Contract - formation of - request to garage to "check over" a vehicle - not an authority as such to effect repairs without further authority.

Headnote

The appellant company sent a vehicle with a driver employed by it to the respondent service station. The driver brought a note which read:

"Please check over lorry and trailer as arranged by Mr Baines".

Baines, the managing director of the appellant, had arranged with an employee of the respondent to send the vehicle in for an opinion as to its condition and value, with a view to selling it.

The respondent took the note to be a request to effect repairs shown by the inspection and carried out work on the vehicle. When the appellant was presented with a bill, it refused to pay. The respondent sued, claiming that the note had formed the basis of a contract between them to effect the repairs.

Held, that in the absence of any evidence establishing a course of dealing between the parties which could operate in Haddon Motors' favour, the note itself could not be interpreted as a request, without further authority, to effect repairs found on the inspection, and so no contract was formed.

L H Cook for the appellant

M T O'Meara for the respondent

Judgment

Fieldsend CJ: The dispute in this case is over the liability of the appellant (Greenacres Farm

(Private) Limited) to pay the respondent (Haddon Motors (Private) Limited) the sum of \$224,10 for repairs to an

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FIELDSEND CJ

8-ton Savion truck and trailer.

Haddons based its claim squarely upon a contract between the parties. There was no claim in the alternative on any basis such as enrichment. For Greenacres it was denied that there was any contract between the parties for the repair of the truck.

For Haddons the only witness was the Managing Director of the firm, Thomas Haddon, and his evidence was virtually unchallenged. On 18 September 1980 he was standing in for his workshop manager who was away on call-up duty, and he was helping out in workshop reception. During the morning the appellant's African driver came in with the appellant's truck and trailer with a note reading: "Please check over lorry and trailer as arranged by *Mr N Baines*. Thanking you". It was signed S Hall, clearly on behalf of Greenacres Farm, the address of which appeared at the head of the note. The appellant was a long-standing customer of Haddons from whom it had bought the truck in question and by whom over the years it had had repairs done to vehicles.

Haddon asked the lorry driver what was wrong with the vehicle. The driver replied that the clutch had given trouble and he had to drive in one gear which had caused overheating; in the morning there was difficulty in starting the lorry though the starter motor did turn the engine over; the tail-light of the trailer needed replacing and a new ignition key was required.

Haddon had a job card prepared and arranged for these repairs to be done at once though the vehicle had not been booked in for an appointment. The repairs were completed in the course of the day. The labour component was three hours at a cost of \$36. The cost of parts was \$106,78 and \$80,32 was paid for work done by a subcontractor.

The principal witness for Greenacres was Graham Baines, the Managing Director of the appellant, and his evidence too was virtually unchallenged. In September 1980 Baines was contemplating selling his Savion truck and trailer. He thought it might be worth about \$10 000 but wished to have a somewhat better idea of its value. He telephoned Haddon Motors, the agents from whom he had purchased it. He spoke to a saleslady whom he knew but whose name he could not recall and she put him through to the workshop manager again whose name he did not know but whom he had recalled seeing on a previous occasion. He asked whether he could send the vehicle in some time at his convenience for an opinion on its

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FIELDSEND CJ

condition and its value. This was agreed. There was no mention of any charge.

A week or so afterwards the vehicle was to be driven to Harare to deliver seed maize and

Baines instructed Stanley Hall, his father-in-law, who looked after much of the clerical work on the farm, to give the driver a note to take the vehicle in to Haddon Motors. Baines did not tell Hall the reason for having the vehicle taken there, but must have indicated that he had already made the arrangements. The terms of the note show that.

The driver, who was not called as a witness, must have travelled the 140 kilometres from the farm to Harare with the load of maize before taking the vehicle to Haddon Motors and delivering the note as spoken to by Haddon.

Baines was very irritated when the truck did not get back to the farm at the time at which he had expected it. He asked the driver what had happened. The driver not unexpectedly replied that he did not know what had been done but that he had waited quite a while at Haddon Motors. He mentioned something about a globe for the trailer. Baines telephoned the saleslady at Haddons to whom he had first spoken to find out what had happened. She promised to enquire and ring back but did not do so. In due course a bill arrived which was not paid. Efforts to resolve the matter were unsuccessful and summons was issued.

At the trial it was accepted that the work done and the materials supplied by Haddon Motors were as claimed and that the charges were reasonable. The crucial issue was whether the work done and the materials supplied were done or supplied at the request of the appellant company or someone authorised on its behalf.

There was no evidence to show that the driver who delivered the note had ostensible authority to bind Greenacres Farm by requesting repairs to the vehicle. In my view for Haddons to succeed it has to rely on the note signed by Mr Hall as constituting a request to check over the vehicle and to do what repairs were necessary to put the vehicle into running order.

Haddon's evidence was that in the motor trade a request to "check over" a vehicle meant not only a request to check it over but also to put it into running order. He went so far in examination-in-chief as to say that such a request gave a garage *carte blanche* to do all repairs necessary. He qualified this later in his evidence saying that such a request would cover only

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maintenance work of the nature of that done in this case. He said that if major work was required it would be necessary to contact the owner for authority.

Within the trade this may be so, but that does not mean that every customer who brings his vehicle to a garage for a "check over" can be taken as being bound by what happens within the trade. In any event the unchallenged evidence of Baines was that whenever he sent in a vehicle for repair it was accompanied by a note specifying what repair was required, usually by reference to a telephone conversation. There was therefore no course of dealing established between the parties that could operate in Haddon's favour.

Haddon's case is made even more difficult by the unchallenged evidence of Baines that he had made an arrangement with the saleslady and the workshop manager that the vehicle was being sent in merely for a rough estimate of its value. There is confirmation of this in the evidence of

Haddon himself. He says that after the repairs had been carried out someone carried out a valuation and gave a figure of \$10 200 to Greenacres. He did not explain how this came to be done nor why no charge was made for it. Baines was entitled to assume that the words in the note "as arranged by Mr N Baines" would make it clear to Haddons that the vehicle was being brought in in terms of the arrangement he had made only days before. If Haddon had made sufficient enquiries he would have discovered what the arrangement had been. Then he would have been obliged to check by telephone (if necessary at Greenacres expense) before undertaking repairs.

Mr O'Meara's main line of argument for Haddons was that the appellant, through Baines, was careless in giving instructions to Hall and to his driver, that the note given to the driver was at best for the appellant equivocal and that Haddons were reasonably entitled to act as they did in effecting the repairs. The difficulties in this argument are twofold: first, it is difficult to say that the appellant was negligent having regard to the recent arrangement Baines had made with Haddons and to the reference in the note to an arrangement made by Baines; secondly, proper enquiries by Haddon as to an arrangement having been made as stated in the note must have revealed the reason for the vehicle being brought in.

In my view the evidence for the respondent fell far short of establishing that the note amounted to a request for repairs to the vehicle, which could by acceptance become a contract: accordingly no contract was established. The appeal must therefore be allowed with costs and judgment be entered

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FIELDSEND CJ

for the appellant with costs.

Georges JA: I agree with the result reached in the leading judgment prepared by the CHIEF JUSTICE and particularly with the conclusion that in the absence of a course of dealing the request to "check over" a vehicle should not be interpreted to authorise a garage owner to carry out any repairs found to be needed on such a check without further authority.

I would not, for my part, place as much emphasis on the words "as arranged by Mr Baines" in the note written by Mr Hall. The evidence is that Haddon thought that arrangements had been made for the vehicle to be brought in that day. Because of this he checked the appointment book, noted that there was no appointment but nonetheless prepared the job card and saw to it that the work was done - in part because Baines was a good customer.

It appears to me that such an interpretation of the phrase was not unreasonable. Had Haddon merely checked the vehicle and charged for that service alone I would hesitate to say that he would not have been entitled to do so on the basis that more thorough enquiries may have revealed that the purpose for which the truck had been brought in was to have a valuation placed on it.

I am aware that Haddon states that at some stage he did become aware that there had been some arrangement for the vehicle to be valued. I would prefer to base the decision on the

interpretation of the document presented to Haddon and constituting the request for services.

Atherstone & Cook, appellant's legal representatives.

Winterton, Holmes & Hill, respondent's legal representatives.

1983 (1) ZLR p22

S v MUNJARANJI 1983 (1) ZLR 22 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA & Georges JA

14 January 1983

Flynote

Criminal law - evidence - several counts - evidence on each count must be examined separately - evidence on one count cannot be used to reinforce evidence on other counts.

Headnote

Where an accused person is charged on several counts, the evidence on each count must be examined separately in order to arrive at a decision as to whether that count has been proved beyond a reasonable doubt. The evidence on one count cannot be used to reinforce the evidence on other counts. To treat as corroboration of a witness matter that is not corroborative is a misdirection entitling an appeal court to quash a conviction.

Cases cited:

R v Joubert 1949 (4) SA 533 (SR);

R v Thomas (1959) 43 CAR 210; [1959] 3 All ER 522 (CCA).

A J A Peck for the appellant

I R Deeks for the respondent

Judgment

Georges JA: The appellant in this matter appeared to answer three charges - forging a banker's cheque in the sum of \$625 drawn in favour of Michael Chayambuka, uttering the said cheque knowing it to be forged, and converting to his own use the sum of \$2 512,44, the property of the Co-operative Union, entrusted to him for depositing to the account of the Union. He was convicted on all counts. Courts 1 and 2 were treated as one for the purpose of sentence and a sentence of 9 months' imprisonment with labour imposed. On Court 3 he was sentenced to 24 months' imprisonment with labour. Of the total of 33 months 9 months were suspended for 5 years on condition that the appellant did not within that period commit any offence involving dishonesty and for which he was sentenced to imprisonment without the option of a

fine.

1983 (1) ZLR p23

GEORGES JA

At the close of the argument (and in effect by consent) the appeal against the convictions on Courts 1 and 2 was dismissed and the appeal against conviction on Court 3 was allowed. This necessitated a variation of the sentence which was altered to one of 9 months' imprisonment 3 months of which were suspended on the same conditions. The reasons now follow:

The appellant was employed as a clerk by the Bindura/Mt Darwin Co operative Union, (the Union).

Counts 1 and 2 concerned a cheque which the Union sent in error to Michael Chayambuka. The error was discovered promptly and a letter dispatched to Chayambuka asking him to return the cheque. Chayambuka received the letter and later the cheque which he took to the offices of the Union and handed to the appellant. The appellant forged the cheque by endorsing Michael Chayambuka's name on the back. He cashed the cheque. In the course of a reconciliation of the Bank statement it was discovered that the cheque returned by Michael had been cashed.

The appellant's defence was that Michael Chayambuka had agreed to lend him the money. The trial magistrate found that version of events unbelievable and for good reason. Michael Chayambuka's total income was approximately \$1 900 per annum and he had 8 children. The appellant earned \$4 200 per annum. It was quite inconceivable that Michael Chayambuka could have agreed to make such a substantial loan to the appellant. He denied having done so and the trial magistrate accepted his denial.

Mr *Peck*, for the appellant, did not seek to challenge this conviction. He pointed out that the charge alleged forgery of the cheque rather than of the endorsement on the cheque. The discrepancy is, however, not fatal since the cheque was indeed a forged cheque by reason of the forgery of the endorsement. It told a lie about itself in that it purported to have been a properly endorsed cheque payable to the person presenting it when in fact it was not.

In his heads of argument Mr *Deeks*, for the State, asked for an amendment of Courts 1 and 2 to make it clear that what had been forged was the endorsement. There has been no substantial miscarriage of justice and in my view there is no need at this stage to grant an amendment of the counts. It is enough to dismiss the appeal under section 11 of the Supreme Court of Zimbabwe Act 1981.

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GEORGES JA

The case presented by the State on Court 3 was that Annanias Mashanda, clerk to the Nyakudya Society, deposited with the appellant as clerk of the Union the sum of \$2 512,44. The appellant received the money and gave a receipt for it. Later when a check was made of the Union's books it was discovered that that sum of \$2 512,44 had never been deposited to the

bank account of the Union.

The appellant's explanation was that he had handed the money to Rabson Nyamhunda, another clerk employed by the Union, for depositing in the Union's bank account. Rabson Nyamhunda was a friend of the appellant, and they lived together. Rabson denied having received that sum from the appellant.

Surprisingly Rabson was not cross-examined when he was called to testify for the State save for one question. He was asked whether he could deny that the appellant had given the money to Annanias. He said he could not.

After the appellant had testified, the legal practitioner appearing for him applied to have Rabson recalled and it was put to him that the money had been passed on to him for banking. He maintained his denial.

In his judgment the trial magistrate referred to the fact that Rabson was a single witness with an interest. He went on to state:-

"Had this count been tried separately I would probably have found myself in doubt whether to convict or not. I have found Rabson to be a credible witness. Yet the matter does not end there, there being a cautionary rule to be observed. It seems to me that in this case the sum of the counts adds up to more than the separate parts so that the probative force of all the evidence is considerable. It is inconceivable that all the witnesses had ganged up against the accused. He himself had been shown to have been unsatisfactory and I believe the merits of Rabson as a witness and the demerits of the accused are beyond question."

This was a serious misdirection. When several counts are being tried together the evidence on each count must be examined separately in order to arrive at a decision as to whether that count has been proved beyond a reasonable doubt. The evidence on one count cannot be used to reinforce the evidence on other counts - *R v Joubert* 1949(4) SA 533 (SR).

Further this was a case as the magistrate was well aware in which it was dangerous to convict unless there was corroboration of Rabson's evidence. The magistrate treated as corroboration matter which was clearly not corroborative.

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GEORGES JA

English authority is clear that a verdict may be quashed if the judge erroneously points to a part of the evidence as being corroborative when it is not - *R v Thomas* (1959) 43 CAR 210.

In the present case not only was evidence treated as corroborative which was not but there is no evidence on the record which could be treated as corroborative.

Mr Deeks, for the State, did not support the conviction on Court 3.

The appeal on Court 3 was accordingly allowed and the conviction and sentence set aside.

Fieldsend CJ: I agree.

Baron JA: I agree.

MANDLBAUR v MANDLBAUR 1983 (1) ZLR 26 (HC)**Court** **High Court, Harare**

Dumbutshena AJP

11 & 26 January 1983

Flynote

Husband and wife - Matrimonial Causes Act [Chapter 39] - section 12(1)(c) - wife a citizen of and "ordinarily resident" in Zimbabwe - meaning of - "commencement of the action" - meaning of - High Court (General Division) Rules 1971 - Order 3 Rule 9(1).

Headnote

The plaintiff wife sought a divorce from her defendant husband on various grounds. While not opposing the divorce as such, he averred that the Court had no jurisdiction in the matter, in that she had left Zimbabwe for South Africa in September 1980 and became a resident of that country. She in turn asserted that the Court had jurisdiction in terms of section 12(1)(c) of the Matrimonial Causes Act [*Chapter 39*] in that, at the time of commencement of the action, she was a citizen of Zimbabwe and immediately preceding the commencement of the action had been ordinarily resident in Zimbabwe for a period of not less than four years and was still residing there.

She had been registered as a citizen of Zimbabwe in December 1981. A summons had been issued in April 1980 but was only served on the defendant, who was resident in South Africa, in January 1982.

The parties had been married in Johannesburg in 1965 and moved to Rhodesia in 1967, where they bought a house. In 1978 the defendant, in order to avoid being called up for military service during the war then taking place in Rhodesia (now Zimbabwe), decided to live in South Africa. He went there but they remained in Salisbury (now Harare) until April 1979. The whole family then went to Durban for a holiday and after that stayed in Johannesburg. In December 1979 the Plaintiff returned to Salisbury with the children and while in Rhodesia heard of the death of her father in Europe, where she went, returning in April 1980. Since that time she had lived in Salisbury with the two younger children of the marriage.

Held, that where, as here, the Plaintiff had left her domicile of choice without any intention of settling in another country permanently, she could not be said to have abandoned that domicile.

Held, further, that since the service of the summons commencing the action had to be effected in South Africa, the action commenced only when the process was served, by virtue of Order 3 Rule 9(1) of the High Court (General Division) Rules, 1971. Accordingly,

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the Plaintiff was a citizen of Zimbabwe at the time of commencement of the action.

Held, further, that apart from the facts already mentioned, the Plaintiff, by applying for citizenship, had formed the intention necessary for acquiring a domicile of choice which excluded all contemplation of any event on the occurrence of which her residence in Zimbabwe would cease.

Cases cited:

Winans v Attorney-General [1904] AC 287; [1904-7] All ER Rep 410 (HL);

Re Furse (deceased): Furse v Inland Revenue Commissioners [1980] 3 All ER 838 (ChD);

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

The Espanoleto [1920] P 223;

Ley v Ley's Executors & Others 1951 (3) SA 186 (AD);

Kennedy v Kennedy 1978 RLR 58; 1978 (2) SA 698 (R).

C S Grossman, for the plaintiff

Defendant in person

Judgment

Dumbutshena AJP: In this action the plaintiff seeks divorce on the grounds of cruelty, desertion and adultery. The defendant, in his plea, denies having treated the plaintiff with cruelty. He admits using foul and abusive language to the plaintiff but says that this was done under extreme provocation by the plaintiff. However, at the trial the defendant did not take issue with the allegations made against him by the plaintiff. He was only interested in the question of jurisdiction. In paragraph 3 of his plea defendant states:

"3. Defendant avers that this Honourable Court does not have jurisdiction in that plaintiff left Zimbabwe for the Republic of South Africa in about September, 1980, obtained employment there and became a permanent resident of that country taking out residence papers for the two minor children of the marriage at the same time. Defendant puts the plaintiff to the proof:-

- (a) that she is a citizen of Zimbabwe; and
- (b) that she has been continually resident within Zimbabwe for four years preceding the date of these presents."

The plaintiff, on the other hand, asserts that the Court has jurisdiction because she is a citizen of Zimbabwe and because she has been continually resident within Zimbabwe for four years immediately preceding the commencement of this action and is still so besiding.

The plaintiff was born in the United Kingdom. The defendant is a citizen of Austria. The parties

met in South Africa and on 5 December 1965 they got married to each other in community of property in Johannesburg in the Republic of South Africa. In 1967 the couple moved to Zimbabwe, where they believed better opportunities were available. The defendant established for himself a small business and jointly with his wife owned an employment agency. They bought a house in Hatfield.

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Zimbabwe was then Rhodesia, which was in the throes of a war of liberation. The plaintiff said in evidence that defendant left the country for South Africa in order to avoid call-ups.

Mandelbaur v Mandelbaur, Judgment No G-S-104-80, summarizes the goings-on between the plaintiff and the defendant in Rhodesia and South Africa.

In about 1978 the defendant decided, as mentioned above, to live in South Africa in order to avoid call-up difficulties. He did not, however, find good employment. In order to acquire more money he took up employment on a ship bound for Antarctica. He was thus away from his home in Salisbury from June 1978 to April 1979. The children remained with the plaintiff in Rhodesia during that time. When he returned, he went together with his family to Durban for a holiday. He says this trip was in preparation for taking up residence in Johannesburg. During this holiday he asked the plaintiff about an allegation of adultery committed with an Italian man in Salisbury during his absence. Because of this allegation the holiday in Durban was terminated and the family moved to Johannesburg. The plaintiff shortly afterwards left the defendant with the children and returned to Salisbury. She says the children stayed with the defendant during that time because she agreed to let them remain with him. The purpose of her returning to Salisbury seems to have been to settle her business affairs by selling the business. She also was to dispose of their house. While on this business trip in Rhodesia the plaintiff returned once more during what was then the Rhodes and Founders week-end holiday in order to see the children. While in Johannesburg, she raised the question of divorce with the defendant. However, the defendant did not agree to her suggestions. She then left Johannesburg for Rhodesia and spent approximately one week there - that was at the end of 1979. During that time she disposed of her flat and other possessions. While in this country, she then heard of her father's death in England. She returned to Johannesburg and shortly afterwards left for England. She stayed in Europe for four months before returning to Johannesburg. On her return to Johannesburg, she got for herself a separate flat and lived apart from the defendant. In the meantime, she arranged to get two of the younger children and arranged to bring them back to this country. When the defendant discovered that the children had been taken to Rhodesia, he followed them but did not succeed in taking them back to Johannesburg. The Plaintiff has since that time remained in this country. In *Mandelbaur's* case No GD 736/80, SQUIRES J granted custody and maintenance *pendente lite* to the plaintiff and custody of the eldest child of the marriage to the defendant.

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Right at the beginning of the proceedings Mr *Grossman*, for the plaintiff, indicated the plaintiff

had committed adultery and applied for condonation of that adultery. In her evidence she alleged that the defendant was living with another woman who had approached her and had indicated that she was having an affair with the defendant. Under those circumstances the plaintiff's adultery is condoned.

The above is the short history of the goings-on between the plaintiff and the defendant during that period. The plaintiff says she did not feel separated from him during that period because she believed that he was going to return to Salisbury - now Harare. They had gone on holiday to Durban in order to discuss what to do next. There was no reconciliation effected and the plaintiff thought of returning to Salisbury with the children. She had failed to persuade defendant to return to the then Rhodesia. She returned by herself without the children. However, she managed on another occasion to bring back from Johannesburg two children, David and Paul. John remained behind with his father. Having succeeded in bringing the children, she obtained for herself rented accommodation.

At the trial of this action defendant, who was not represented, indicated that he had no interest in the divorce. His sole concern was the Court's lack of jurisdiction. He bases his assertions on several grounds. He says he left Rhodesia in 1978 and went to South Africa. His wife, the plaintiff, followed him in September 1979. In December 1979 the plaintiff left Johannesburg for Salisbury in order to give up her flat and to sell the house in Hatfield. Defendant says plaintiff signed application forms for permanent residence for the two younger children while she was in South Africa. When asked about this during cross-examination, plaintiff said she could not remember whether she renewed her residence in South Africa. While plaintiff was in Salisbury her father died in England and she returned to South Africa in order to resign her job in Johannesburg in order to go and see her family in Europe.

She returned from Europe in April 1980. She somehow obtained a passport and removed the two younger sons to Salisbury.

Although defendant lived in Zimbabwe for 11 years and had the businesses mentioned above and a house, he denied that these acquisitions and his long period of residence in Zimbabwe meant he had a domicile of choice in this country. He had at no time formed an intention to live in Zimbabwe permanently. He said his home is in South Africa and he is an Austrian

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citizen. In *Winans v Attorney-General* [1904-7] All ER Rep 410 (HL) at 416 G-D, LORD MACNAGHTEN said:

"Then it was said that the length of time during which Mr Winans resided in this country leads to the inference that he must have become content to make this country his home. Length of time is, of course, a very important element in questions of domicile. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result. But in the case of a person like Mr Winans, who kept himself to himself and had little or no intercourse with his fellow men, it seems to me that at the end of any space of time, however long, his mind would probably be in the state in which it was at the beginning. When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died."

Perhaps the same could, judging from his evidence, be said of the defendant in this case. His

domicile remained Austria. He was here as a sojourner interested in the acquisition of wealth and whatever else he could accumulate during his 11 years in Zimbabwe.

Since the plaintiff returned to Zimbabwe in 1980 she has not gone back to South Africa to rejoin her husband. She said in evidence that reconciliation was tried while she was in South Africa and it failed. She had hoped that defendant would return to Salisbury. She wanted to return to Salisbury with the children. However, he did not agree. She returned to Salisbury without the children. It was after that that she managed to bring David and Paul.

In my view, where a person leaves her domicile of choice and goes to settle in another country with the sole object of effecting a reconciliation or any other object with her partner but has no intention of settling in that country permanently, and on her failing to effect reconciliation she strives to achieve another objective, as in the instant case, the getting of children in order to return to her domicile of choice, she cannot be said to have abandoned her domicile of choice. In *Re Furse (deceased): Furse v Inland Revenue Commissioners* [1980] 3 All ER 838 at 845g-846b. Fox J discussing a different matter with different facts but concerning the wish by the propositus to return to his domicile of origin, had this to say:

"Before I consider that I should refer to certain aspects of the law. In *Inland Revenue Comrs v Bullock* [1976] 3 All ER 353, [1976] 1 WLR 1178 the propositus Group Captain Bullock, came to England from Canada, which was his domicile of origin, in 1932. He had been in England some 40 years when the case was heard. He was then aged about 63. On retiring from the Royal Air Force in 1953 he wished to return permanently to Canada. He did not do so because his wife did not wish to live in Canada. It was found as a fact that he himself would return to Canada if his wife should predecease him. It was held by the Court of Appeal that Group Captain Bullock had never abandoned his intention of returning to Canada if he survived his wife, which was not an unreal

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possibility in view of their respective ages, and that, accordingly, he had never abandoned his Canadian domicile. BUCKLEY LJ said ([1976] 3 All ER 353 at 360, [1976] 1 WLR 1178 at 1186):

'No doubt, if a man who has made his home in a country other than his domicile of origin has expressed an intention to return to his domicile of origin or to remove to some third country on an event or condition of art indefinite kind (for example, 'If I make a fortune' or 'when I've had enough of it'), it might be hard, if not impossible to conclude that he retained any real intention of so returning or removing. Such a man, in the graphic language of JAMES LJ in *Doucet v Geoghegan* (1878) 9 Ch D 441 at 457, is like a man who expects to reach the horizon; he finds it at last no nearer than it was at the beginning of his journey. In *Aikman v Aikman* (1861) 4 LT 374 at 376 LORD CAMPBELL LC said that a mere intention to return to a man's native country on a doubtful contingency would not prevent residence in a foreign country putting an end to his domicile of origin. [Later BUCKLEY LJ said:] The question can perhaps be formulated in this way where the contingency is not itself of a doubtful or indefinite character: is there a sufficiently substantial possibility of the contingency happening to justify regarding the intention to return as a real determination to do so on the contingency occurring rather than a vague hope or aspiration?'

In *Inland Revenue Comrs v Bullock* both the requirements referred to by BUCKLEY LJ were satisfied. The contingency was a wholly clear and well-defined contingency, namely whether the propositus survived his wife; and there was a substantial possibility that the contingency might occur, having regard to the respective ages of the propositus and his wife."

In this case the compelling contingency which the plaintiff must have believed would occur in fact did occur when she, in a manner which met the disapproval of the defendant, brought back

to Rhodesia the two younger children of the marriage. And once her mission in Johannesburg was accomplished she settled permanently in her domicile of choice. A domicile of choice is acquired when a person fixes voluntarily his sole or chief residence in a particular place, in this case Zimbabwe, with an intention of continuing to reside there for an indefinite period. See *Re Furse (deceased) (supra)* at 848e.

The plaintiff says she has been living in Harare ever since May 1978. She shares with her two sons a large two-bedroomed flat besides the house she owns with the defendant.

What the defendant wants answered is whether this Court has jurisdiction to entertain an action for divorce and grant the relief plaintiff seeks. Defendant has submitted that this Court has no jurisdiction because he and his wife are not permanently resident in Zimbabwe. He has also submitted, not without reason, that plaintiff was not a citizen of Zimbabwe at the commencement of the action and that the citizenship she acquired was required after the commencement of the action in order to found jurisdiction.

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Mr *Grossman*, who appeared for the plaintiff, submitted, however, that the plaintiff was ordinarily resident in Zimbabwe and was only during her brief periods of absence temporarily absent from the country because of the children, who were in South Africa with her husband. She herself said when she got control of the children she brought them back to Zimbabwe. Mr *Grossman* relies for establishing jurisdiction on the provisions of s 12(1) (a) and (c) of the Matrimonial Causes Act [Chapter 39]. They read as follows:

"12. (1) Without prejudice to any jurisdiction exercisable by the Court apart from this section, the Court shall by virtue of this section have jurisdiction to entertain an action by a wife against her husband for divorce, judicial separation or nullity of marriage, and to grant such divorce, judicial separation or nullity of marriage on any grounds on which the same may be granted under the law of Rhodesia -

- (a) if the wife has been deserted by her husband, and the husband was immediately before the desertion domiciled in Rhodesia, notwithstanding that the husband has changed his domicile since the desertion; or
- (b)
- (c) if at the time of commencement of the action the wife is a citizen of Rhodesia and immediately preceding the commencement of the action has been ordinarily resident in Rhodesia for a period of not less than four years and is so residing."

Before considering the objective facts which go to establish that the plaintiff was ordinarily resident in Zimbabwe since 1967 when the parties first settled here and for four years immediately prior to the commencement of this action and is still so residing, I would like to deal with the question of citizenship first.

In support of plaintiff's claim that the Court assumes jurisdiction by virtue of s 12(1)(c) because at the time of the commencement of the action the plaintiff was a citizen of Zimbabwe and immediately preceding the commencement of the action she has ordinarily been resident in Zimbabwe for a period of not less than four years and is still residing here, Mr *Grossman*

submitted that the summons was issued but there was a long wait before service of the summons. During that long wait plaintiff applied and was registered as a citizen of Zimbabwe on 4 December 1981 as per Certificate of Registration as a Citizen of Zimbabwe, exhibit 1. After she had been registered as a citizen, application was made to this Court in case No HC 86/82 for leave to serve the summons and all other pleadings in the present case upon the defendant in the Republic of South Africa. MR JUSTICE McNALLY granted leave to so serve the summons issued on 24 April 1980

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and all other pleadings on the defendant. If I understood Mr *Grossman* well, the thrust of his submission was that the commencement of the action began with the granting of leave to serve the summons and other pleadings, and the effecting of service in the Republic of South Africa on 20 January 1982.

In terms of Order 3 Rule 9(1) of the High Court (General Division) Rules, 1971, every action commences when summons is issued, that is within the jurisdiction of the Court. But where it is necessary that service be effected outside the jurisdiction of the Court, action is there commenced by service of the summons and other pleadings. Rule 9 is to this effect:

"9. (1) Every action other than process of arrest of the defendant shall be commenced by a summons directed, where service is to be effected within the jurisdiction, to the sheriff or his lawful deputy and attested in the name of the Chief Justice and signed by the registrar who issues it.

(2) Where it is necessary that service be effected outside the jurisdiction, the action shall be commenced and the process served in the manner provided in rule 44 or 45, as may be appropriate."

In the instant case the plaintiff complied with the provisions of Rule 44 and the following order was then granted:

"IT IS ORDERED:-

That leave be and is hereby granted to serve the summons and all other pleadings issued in Case No. GO 726/80 upon the respondent in the Republic of South Africa.

That leave be and is hereby granted for all process to be served simultaneously on the respondent personally by the Deputy Sheriff, Johannesburg.

That the respondent be given not less than thirty (30) days between the service of documents upon him within which to enter an appearance to defend."

Service in the Republic of South Africa was effected in terms of Rule 45. The commencement of action was the date when the summons and pleadings were served on the defendant in South Africa. The action was instituted not upon the issue of the summons but on the service of the summons.

This Court assumes jurisdiction when service of the summons is effected outside Zimbabwe. At that point in time the action commences. See *Glen v Glen* 1971(1) RLR 196; 1971 (3) SA 238 (R) at 240H-241A. Within Zimbabwe, however, action is commenced by the issue of a

summons.

See *The Espanoleto* [1920] P 223 at 225.

In his plea, defendant averred that this Court had no jurisdiction because

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the plaintiff left Zimbabwe for the Republic of South Africa in about September 1980 and obtained employment there and became a permanent resident of that country, and also took out residence permits for the two younger children of the marriage. He, in a manner of speaking, challenged her to prove that she was a citizen of Zimbabwe and that she has been continuously resident within Zimbabwe for four years preceding the commencement of this action.

It is unnecessary to repeat some of the facts mentioned above. Suffice it to say that the plaintiff went to South Africa to spend a holiday with the defendant in Durban. Things did not work well because of the allegation of adultery made by the defendant against the plaintiff. They then went to Johannesburg. The plaintiff left defendant with the children and returned to Salisbury. In about September 1979 she returned to Johannesburg. At the end of 1979 she returned to Salisbury to conclude the tenancy of her flat. She then returned to Johannesburg and left there for England. On her return from Europe she took a separate flat in Johannesburg and shortly afterwards returned to Rhodesia with the two younger children and never went back to South Africa. On 24 April 1980 a summons was filed in the High Court. In the meantime plaintiff applied for citizenship. The summons and other pleadings were served on the defendant on 10 March 1982 after the plaintiff had become a citizen on 4 December 1981.

I am more than satisfied that the plaintiff, by applying for citizenship, had formed the intention necessary for acquiring a domicile of choice which excluded all contemplation of any event on the occurrence of which her residence in Zimbabwe would cease. This proves a final and deliberate intention to abandon her domicile of origin: see *Re Furse (deceased)* (*supra*) at 844d-e and *Ley v Ley's Executors & Ors* 1951 (3) SA 186 (AD) at 193A-194A.

The plaintiff's visits to South Africa and her short sojourn there, even during the time she obtained a job, were of a temporary nature. She had hoped her husband would return to Rhodesia because in the first place he had gone to South Africa to avoid call-up duties.

In *Kennedy v Kennedy* 1978 RLR 58; 1978 (2) SA 698 (R), GUBBAY J dealt with the meaning of the words "ordinarily resident" and "resident" in the following passage at 61 (700A-H of the South African report):

"The meaning of the words 'ordinarily resident' and 'resident' has been the subject of much judicial consideration. There are stray *dicta* to the effect that the word 'ordinarily' lends no added meaning to the word 'resident'. See *Hopkins v Hopkins* [1950] 2 All

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ER 1035 at 1038H-1039A. But the better view is that the two expressions do have different meanings. It is to be observed that s 12(1) of the Matrimonial Causes Act uses the word 'resided' in para (b) and the words 'ordinarily resident' in para (c). I have no doubt that the use of the two terms is not accidental, and that the Legislature intended each to bear a different signification. The section was amended in 1970 by the addition of para (c). The Legislature must be presumed to have known at that time that the Courts had differentiated in meaning between the terms 'resident' and 'ordinarily resident'. The rule is well expressed by LORD COLERIDGE in *Barlow and Another v Teale* (1884-85) 15 QBD 403 at 415, thus:

'Acts of Parliament use forms of words which have received judicial construction. In the absence of anything in the Acts showing that the Legislature did not mean to use the words in the sense attributed to them by the Courts, the presumption is that Parliament did so use them.'

(See also *S v Cuddington* 1974 (3) SA 371 (RAD) at 376F).

It seems to me that in para (c) the qualifying adverb 'ordinarily' was intended to indicate that the residence required, though it need not necessarily be continuous and may be broken by a temporary absence, has to be more than casual or intermittent. It must be the country where, in the settled routine of life, the *de cujus* regularly, normally or customarily, lives. In *Cohen v Commissioner for Inland Revenue* 1946 AD 174 at 185, SCHREINER JA said:

'But his ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.'

A similar test was propounded by KARMINSKI J in *Stransky v Stransky* [1954] 2 All ER 536 at 541F. (See also *Roberson v Roberson* 1963(1) PH B5.)

The word 'resided' in para (b) of s 12(1) denotes physical presence of some degree of permanence. It may be equated to 'actually resided'. A person is actually resident in the country in which he is in fact living. See *Biro v Minister of the Interior* 1957 (1) SA 234 (T) at 240F-G. Thus, a wife may actually reside in one country although be ordinarily resident in another. The fact that during the prescribed period her *real home had not been in the country where she actually resided, would be beside the point. Instances of this are to be found in Stransky v Stransky (supra) and Lewis v Lewis* [1956] 1 All ER 375. So in *Cohen v Commissioner for Inland Revenue (supra)* the taxpayer was ordinarily resident in South Africa where his home was even though he had resided outside that country for more than a year."

The plaintiff has proved compliance with the provisions of para (c) subs (1) of section 12 of the Matrimonial Causes Act [Chapter 39] on a preponderance of probabilities.

I need not therefore deal with the further submission made by Mr *Grossman* that the defendant deserted plaintiff and that the husband was immediately before the desertion domiciled in Zimbabwe, notwithstanding that the defendant is now domiciled in the Republic of South Africa. I,

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however, find, without discussing the evidence in depth, that defendant's desertion falls within the ambit of s 12(1) (a) of the Act. He came to the then Rhodesia in 1967. He established and managed businesses and acquired immovable property. He lived in this country for a period of eleven years before he left in July 1978 in order to avoid call-ups. His wife followed him down to South Africa but failed to effect reconciliation. So her sojourns in South Africa were of a

temporary nature.

Although defendant denied at the hearing of this action that he had wrongfully and maliciously deserted his wife, he indicated that he was not interested in the divorce proceedings as such. All he was interested in was the lack of jurisdiction. He did not deny that he had associated improperly with another woman. His wife said in evidence that he had told her that he was having an affair with another woman. That woman approached the plaintiff and asked her whether she minded her having an affair with her husband. Plaintiff said at the beginning of April that woman was living in the flat with the defendant. The allegations of cruelty in the plaintiff's declaration were not denied except to the extent that defendant denied that he had a domineering attitude and had assaulted plaintiff.

In case No GD 736/80, Judgment No G-S-104-80, SQUIRES J granted plaintiff (respondent in that case) an order *pendente lite* for the care and custody of the minor children. I was informed that both parties were happy with both the order for maintenance and the order for custody made by my brother SQUIRES. In these proceedings the plaintiff also prays for an order entitling her to sign all and any necessary documents to enable the minor children under her custody, viz David Bruce Mandlbaur and Paul Darryn Mandlbaur, to obtain passports', and a division of the joint estate.

There being no opposition to the divorce, I find that the plaintiff has proved the allegations of cruelty made against the defendant. I therefore make the following order:

IT IS ORDERED:

- "1. That the plaintiff be granted a decree of divorce.
2. That custody of the minor child of the marriage, namely JOHN HERBERT MANDLBAUR, born on the 9th day of January 1967, be and is hereby awarded to the defendant.
3. That custody of the two minor children of the marriage, namely DAVID BRUCE MANDLBAUR, born on the 3rd day of September 1969, and PAUL DARRYN MANDLBAUR, born on the 22nd day of January 1976, be and is hereby awarded to the plaintiff.
4. That the defendant pay maintenance for the said minor children, DAVID BRUCE

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MANDLBAUR and PAUL DARRYN MANDLBAUR, at the rate of R 100 per month for each such child in Zimbabwean currency, until each such child reaches the age of 18 years or becomes self supporting whichever is the sooner.

5. That the plaintiff be and is hereby authorized to sign all and any necessary documents to enable the said minor children, DAVID BRUCE MANDLBAUR and PAUL DARRYN MANDLBAUR, to obtain passports.
6. That there be a division of the joint estate.
7. That the defendant pay the costs of these proceedings."

This order is to be uplifted through an application made through the Chamber Book and upon

production of a certified copy of the marriage certificate.

D W Aitken & Co, legal practitioners for the plaintiff

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S v CHIROODZA 1983 (1) ZLR 38 (HC)

Court **High Court, Harare**

Dumbutshena AJP & Waddington J

17 & 26 January 1983

Flynote

Criminal procedure - sentence - factors affecting - offer of restitution - can be mitigating - where not made by accused no reason for trial court effectively to put words into his mouth.

Headnote

An offer of restitution, if made genuinely and with a realistic hope of achieving it, is a mitigating feature which in appropriate circumstances may help keep an offender out of prison. Similarly, voluntary acts of restitution or statements of an intention or desire to make restitution can properly be taken into account as compelling evidence of remorse and of the probability that the accused's rehabilitation is not an idle hope.

Where, however, an accused person at his trial makes no such statement, there is no good reason why the magistrate, before assessing sentence, should have created for the accused an opportunity of stating that he wished to make reparations virtually by putting words into his mouth. A statement by the accused in those circumstances could not easily be regarded as a genuine expression of remorse.

Cases cited:

Emerson & Others v R 1957 R & N 743;

R v Zindoga 1980 (2) SA 991 (RAD);

S v Tichana AD Judgment 68/79 (Not reported);

S v Spence AD Judgment 73/79 (Not reported);

R v Collins (1969) 53 CAR 388;

R v West (1959) 43 CAR 109;

S v Herselman 1970 (2) RLR 207; 1971 (2) SA 69 (RAD);

S v Nevsky 1976 (1) PH H 68 (A)

K J van Huyssteen, for the appellant

I A Deeks, for the State

Judgment

Waddington J: The appellant in this appeal against sentence was convicted with another person of the theft of property from their employer, which is a company trading in Hare. Both were sentenced to identical

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WADDINGTON J

punishments but only the appellant in this matter appeals against his sentence. The two offenders conspired to make out false order forms addressed to their employer company and arranged to deliver the goods so ordered to someone who was prepared to purchase them at the subeconomic price of \$190, which sum was shared between the appellant and his co-offender. The true value of the goods stolen was \$512.

The sentence imposed was one of 6 months' IWL, of which 3 months' IWL were suspended for 5 years on certain appropriate conditions. The total effective sentence, therefore, was one of 3 months' IWL. The appellant is a youngish man of some 26 years and he is a first offender. The appellant at his trial pleaded guilty and to that extent showed a certain amount of contrition. He also is married and has three minor children to support. As a result of his conviction he has lost his employment.

The single ground of appeal contained in the Notice of Appeal is that the effective sentence of 3 months' IWL is "excessive and harsh", taking into account the factors which I have already mentioned. It is suggested that the appellant should have been afforded the option of paying a fine. In his Heads of Argument, however, Mr *van Huyssteen*, who appeared on behalf of the appellant, did not develop the sole ground of appeal specified in the Notice of Appeal but instead relied on a new ground, namely that "the magistrate failed to canvass the possibility with accused, and failed to pass a sentence which would allow the accused the benefits of making restitution." Although the appellant had given no notice of this new ground of appeal to the State, the failure to do so was not the subject of any objection by the State, which, I might say, has been adopting a very indulgent attitude towards situations of this sort. (Cf *Emerson & Others v Regina* 1957 R & N 743).

The record of the appellant's trial consists, *inter alia*, of a verbatim transcript of all the exchanges between the appellant and the magistrate, who, by questioning, investigated the accused's personal circumstances to assist him in the assessment of sentence. The only thing the appellant had had to say in mitigation was that he was married with three children. The magistrate concluded his examination with a question which gave the appellant an opportunity of saying more in mitigation, but the appellant indicated that he had nothing further to say. It is quite true that the trial magistrate did not suggest to the appellant that it would be to his advantage to make an offer of restitution. It was the magistrate's failure to do so which constituted the principal thrust of Mr *van Huyssteen's* argument.

WADDINGTON J

There are several examples of cases where the payment of restitution by a first offender has been regarded by our Courts as mitigation of a particularly compelling character.

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

(per MacDONALD CJ in *R v Zindoga* 1980 (2) SA 991 at 992E-F).

In *S v Tichana* Judgment No AD 68/79, the same learned CHIEF JUSTICE made the following comments:

"This is a case in which there are competing public interests. On the one hand the interest which the public has in the avoidance of loss by the victims of the crime and, on the other hand, the public's interest in the imposition of a sentence which will deter others from committing such an offence. But for the fact that the appellant is a first offender who hitherto has been a useful member of society and not a burden upon it and who has been able to make full restitution, the need for a deterrent sentence in the form of imprisonment would have outweighed the interests of the 34 complainants, grave as the prejudice to them was. The fact that the appellant has by personal effort and enterprise been able to build up a business is a mitigating factor which is entitled to full weight and is, of course, the reason why he has been able to make full restitution. Restitution is, in itself, a mitigating factor more particularly in the case of a first offender, and for the reasons mentioned above is a particularly strong mitigating factor in the circumstances of this case."

In the case of *S v Spence*, Judgment No AD 73/79, DAVIES JA is reported at page 2 of the cyclostyed judgment as having made the following statements:

"The second matter which is of great importance and to which the magistrate does not appear to have attached weight is the appellant's offer to make good the bank's loss. As a result of the letter handed in, this Court is now aware that that was not an empty promise on the part of the appellant, but that he had the means of making good that promise. Again, this Court has frequently stressed the importance of restitution in offences against property. The mere promise of restitution is normally not sufficient, but if that promise is backed up by the actual fact of restitution made thereafter, then it is a matter of considerable importance, as far as sentence is concerned, on a first offender convicted of an offence against property. Not that it will in all cases justify interference with a sentence of imprisonment; in many cases again a sentence of imprisonment would be justified, notwithstanding restitution."

The three cases referred to above were all cases in which offers of restitution had actually been made by the accused at their trials or where the accused had expressed the wish to make restitution, albeit not being

WADDINGTON J

in a position to do so. In the present case there was no statement made by the appellant at any stage that he wished to make restitution to the complainant company. In the experience of the Court it is not at all uncommon for persons accused of offences involving dishonesty, to make

offers of or to pay restitution prior to trial or during their trials, notwithstanding the fact that they are not represented, as was the position in the instant case. Voluntary acts of restitution or statements of an intention or desire to make restitution can properly be taken into account as compelling evidence of remorse and of the probability that the accused's rehabilitation is not an idle hope. It is of interest that the English Courts have expressed reservations regarding the comparable practice of release pending sentence to see if a person would take steps to restore stolen property. In *R v Collins* (1969) 53 CAR 388, the comment was made that -

"... it leads him to think that if he complies with what the Court has suggested he will be put on probation; otherwise he will go to prison; and it is undesirable that an implicit bargain of that sort should be made with the accused."

In the case of *R v West* (1959) 43 CAR 109, the Court noted that the prisoner was not at the time of his plea of guilty in a position to make any reparation to his victim, but subsequently, in receipt of the information that he could pay reparation, sentence was postponed and the prisoner was let out of custody for six months. In this case the Court of Appeal in its judgment said:

"If a prisoner is thought fit to be put on probation, let him be put on probation. If it is not a matter of probation let him be sentenced there and then, but it is highly objectionable to postpone sentence and at the same time to turn the court into a money collecting agency."

Apart from considerations such as those which emerge from the *Collins* and *West* cases, however, the real point, in my view, is that in the instant case the appellant, at his trial, made no statement from which it is possible to infer that his remorse was such that he was moved to offer compensation to his victim. In the instant case also, unlike the situation in *Spence's* case (*supra*) where the appeal court was handed a letter which satisfied it that the appellant had made no empty promise, there was nothing from the appellant during the appeal indicating that he wished to make reparations and was in a position to do so. The point was raised only in the form of negative criticism of the magistrate for not assisting the appellant to create a state of affairs which might have persuaded the magistrate to impose an even lighter sentence than he did. Had the Magistrate gone as far as it has been suggested he should, any statement by the appellant that he wished to effect reparations could not easily have been regarded as a genuine expression of remorse justifying the action contended for by Mr *van*

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WADDINGTON J

Huyssteen. It is difficult in my view therefore to envisage any good reason why the magistrate, before assessing sentence, should have created for the appellant an opportunity of stating that he wished to make reparations virtually by putting words into the mouth of the appellant. Judging from the *Zindoga*, *Spence* and *Tichana* cases (*supra*), the rationale of a lighter sentence in this sort of situation flows from actual remorse expressed by a genuine offer of reparation or the actual payment of reparations. There is nothing of that sort present in this case.

S v Herselman 1970 (2) RLR 207; 1971 (2) SA 69 (RAD) was another such decision of this jurisdiction. In this case a school-teacher who was a first offender was convicted of stealing

monies entrusted officially to his care. There was proof that he had always intended repaying the monies to the owners and in due course all the outstanding sums were in fact repaid. These factors were taken into account on appeal in substituting a fine with an alternative of imprisonment for the original sentence of imprisonment passed by the trial court. The same common principle emerges from the South African decision in *S v Nevsky* 1976 (1) PH H68 (A).

In *Zindoga's* case MacDONALD CJ said that nothing is lost by making appropriate provision for the possibility of restitution even if the prospects therefor are remote. But the learned CHIEF JUSTICE cited as an example of the circumstances he had in mind the many occasions courts suspend prison sentences on condition reparations are made where there is a suspicion that the accused person still possesses his ill-gotten gains and even where the accused specifically states that it is not his intention to make restitution. Courts would also ordinarily do so if the complainant were needy. But the present case is not one of those instances, in my view, where there is some special consideration of the type just mentioned which would have justified the suspension of part of the sentence on condition that the appellant makes reparation. There is no evidence that the complainant is needy. The appellant is not entirely without assets, it is true, but there was no application for compensation in terms of section 341 of the Code. In the absence of any expressed wish by the appellant to effect restitution the sentence was in my view appropriate and no valid criticism can be levelled against the manner in which the magistrate exercised his discretion.

In my view, furthermore, the sentence imposed by the magistrate cannot possibly be regarded as manifestly excessive. The offence was committed as a result of a conspiracy by two employees against their employer. The appellant seriously breached his trust. The amount involved was not insubstantial. The trial magistrate made due allowance in assessing sentence

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WADDINGTON J

for the competing mitigating features in this case and suspended half of the sentence. I can see no grounds for interfering with the sentence, and would accordingly dismiss the appeal.

Dumbutshena AJP: I agree.

Sawyer & Mkushi, legal practitioners for the appellant.

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S v KOMBAYI 1983 (1) ZLR 44 (SC)

Court **Supreme Court, Harare**

Fieldsend CJ, Baron JA & Georges JA

12 January & 2 February 1983

Flynote

Criminal law - Miscellaneous Offences Act [Chapter 68] - section 3(1)(n) - swearing etc. in a public place - section 2 - "public place" - use of "includes" In definition - effect of - evidence - witness refreshing memory from notes - accused entitled to see such notes - trial court's refusal to grant request to see notes an irregularity - effect of irregularity - Supreme Court Act - section 11(2).

Headnote

The appellant was convicted of contravening section 3(1)(n) of the Miscellaneous Offences Act [Chapter 68], in that he had sworn or made use of obscene, abusive, insulting or threatening language in a public place. The incident occurred in the Vehicle Inspection Depot yard in Gweru, to which the complainant, a policeman, had removed a truck and trailer belonging to the appellant, on the grounds that the vehicles had certain defects. The appellant arrived and shouted at the complainant and at the senior vehicle inspector and used foul and insulting language.

During the course of the trial the complainant referred to notes he made at the time of the offence. The magistrate, however, denied to the appellant sight of the notes and so denied him the opportunity to cross-examine on them.

It was argued on appeal that the VID yard was not a "public place", in terms of section 2 of the Act, as the section defined the phrase exhaustively and the VID yard did not fall into any of the categories there listed. It was also argued that the failure to give the appellant sight of the complainant's notes was a serious irregularity.

Held, that the section did not define the phrase "public place" exhaustively. The section used the word "includes"; and while "includes" can be used to signify "means and includes", it did not do so here, where the phrase "public place" was one with a reasonably clear meaning in ordinary language and did not in that sense require definition. The reason for the extension of the ordinary meaning of the phrase was for the removal of doubts that may have been thought to exist following the many cases in which the phrase had been considered.

Held, further, that in any event the VID yard was, in the words of the section, an "open space . . . to which the public has access".

Held, further, that it was an irregularity for the trial court not to have allowed the appellant

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FIELDSEND CJ

sight of the complainant's notes. However, section 11(2) of the Supreme Court Act (No 28 of 1981) enjoins the Court not to set aside a conviction even if there has been an irregularity unless it appears that a substantial miscarriage of justice has in fact resulted. This could not be found, because the complainant's evidence was corroborated by that of other witnesses.

Cases cited:

Customs & Excise Commissioners v Savoy Hotel Ltd [1966] 2 All ER 299 (QBD);

Dilworth v Stamps Commissioners[1899] AC 99 (PC);
Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd 1945 AD 217;
Fish NO v Adam, trading as Charter Bazaar 1978 (2) SA 313 (R);
R v Kane [1965] 1 All ER 705;
Manderson v R 1909 TS 1140;
R v Debele 1956 (4) SA 570 (AD);
R v Elijah 1963 R & N 237; 1963 (3) SA 86 (SR);
R v Bass (1953) 37 Cr App Rep 51.
M T O'Meara for the appellant
M J Gillespie for the respondent

Judgment

Fieldsend CJ: The appellant was convicted of contravening s 3(1)(n) of the Miscellaneous Offences Act [Cap 68], namely swearing or making use of obscene, abusive, insulting or threatening language in a public place. He was sentenced to a fine of \$20 or 5 days' imprisonment.

The offence was alleged to have occurred in the Vehicle Inspection Depot Yard in Gweru, and the first point taken by Mr O'Meara was that the magistrate erred in law in finding that this Yard was a public place. This point was not taken in the court below, but it emerged clearly from the evidence that the Vehicle Inspection Depot Yard was a place to which the public, or those members of the public who had business at the Yard, had access. This fact was not challenged on appeal.

Mr O'Meara's argument was that s 2 of the Act defined "public place" exhaustively and that if the Yard could not be brought within that definition then it was not a public place. He referred to the portion of s 2 which reads:-

" 'public place' includes any -

- (a) road, street, thoroughfare, lane, footpath or bridge to which the public has access;
- (b) building, part of a building, police station, police camp, stream, river, lake, dam, swimming pool, garden, park, race course, open space, open air, theatre, drive-in theatre, aerodrome, sports ground, recreation ground, show ground, parade ground

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or other ground, whether enclosed or not, to which the public or any section of the public has access, whether on payment or otherwise and whether or not the right of admission thereto is reserved,"

and submitted that the Yard in question was not covered by any of those words.

It is an essential prerequisite for the success of this argument that the Act exhaustively defines public place. Unfortunately the word "includes" in a definition section is not used in only one sense. As SACKS J said in *Customs & Excise Commissioners v Savoy Hotel Ltd* [1966] 2 All ER 299 (QBD) at 301:

' "[the word] can have, according to its context, not only one or other of simple but in essence quite differing effects (for instance, in relation to the words that follow it may be found to have been used simply to enlarge, to limit, to define exhaustively or for the avoidance of doubts to repeat the preceding word or phrase), but it may also be used to secure on one and the same occasion more than one of those effects . . . ".

As was said in *Dilworth v Stamps Commissioners* [1899] AC 99 (PC):

"The word 'include' is very generally used in interpretation clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used these words or phrases must be construed as comprehending, not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include. But the word 'include' is susceptible of another construction which may become imperative, if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to 'mean and include' and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to these words or expressions."

The very Act we have to consider in this appeal illustrates that definition sections may be cast in different ways. "Boat", it is said -

"includes every description of water craft used or capable of being used as a means of transportation on water except such craft as are exempted from this definition by the Minister by notice in the *Gazette*."

This is clearly an exhaustive definition of boat. "Includes" must there have been used as signifying "means and includes". But when it came to defining "inland waters" the craftsman used a different technique. He provided:

"inland waters *means* such lake, dam, river or water as may be declared by the Minister, by notice in the *Gazette*, to be inland waters for the purposes of this Act. " (emphasis added)

This illustrates the difficulties of interpretation and shows that little

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assistance can be derived from other instances of the use of the word even in the same Act.

It can be contended that ordinarily the use of the word "includes" is to extend and not to limit the meaning of the word being defined: see *Rossmore Mansions (Pty) Ltd v Briley Court (Pty) Ltd*, 1945 AD 217 at 219, *Fish NO v Adam, trading as Charter Bazaar* 1978 (2) SA 313 (R) and the two Canadian cases referred to in *Words and Phrases* 2 ed vol 2 p34. Nevertheless in view of the equivocal nature of the word it is probably safer not to rely on what may be said to be its ordinary meaning but to examine the use of it in relation to the particular context in which it appears.

First, "public place" is a phrase which has a reasonably clear meaning in ordinary language and

in that sense does not require a definition. It may, however, require elaboration to ensure that places not ordinarily included in that meaning are covered. As BARRY J said in *R v Kane* [1965] 1 All ER 705 at 709:

"At common law, 'a public place' is a place to which the public can, and do, have access. I direct you as a matter of law that it matters not whether they come to that place at the invitation of the occupier or whether they come to it merely with his permission;"

The Australian, New Zealand and Canadian cases referred to in *Butterworths Words and Phrases* 2 ed vol 4 pp 225-226 are to the same effect. See too *Manderson v R* 1909 TS 1140 where it was held that a private lane to which the public had access although without legal right was a public place.

The phrase is not one such as "peace officer" which cannot be said to have a meaning in ordinary non-technical language. In *R v Debele* 1956 (4) SA 570 (AD) the Court had little difficulty in holding that a definition of this term introduced by the word "includes" was a comprehensive definition, primarily because the words did not have an everyday meaning.

The reason for the extension of the ordinary meaning of the words in the definition we have to consider must be [or the removal of doubts that may have been thought to exist following the many cases in which "public place" has been considered. Depending on its context this has been held sometimes to exclude and sometimes to include different places and premises. See for example the cases collected in Sisson's *South Africa Judicial Dictionary* pp 636-637.

But more importantly it would lead to unacceptable anomalies to hold that the definition section intended to define exhaustively what was a public place. It is for example an offence to appear in a public place without wearing such articles of clothing as decency, custom or the circumstances require [s 3(1)(a)].

In the course of argument Mr O'Meara was forced to concede that a strict interpretation of the words as an exhaustive definition of public place would result in unacceptable anomalies. To take a graphic but

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perhaps unlikely illustration, a person could appear with impunity in a state of near nudity in the Vehicle Inspection Depot Yard but not in a garden or park to which the public had access. A more prosaic but more practical illustration is that of an hotel car park. Swearing at a person there who has committed some driving peccadillo would not be an offence but to do so in the hotel foyer would be.

On ordinary principles of interpretation one seeks to avoid anomalies of this sort. In the present case that can easily be done by treating all the particular places referred to in (a) and (b) of the definition as clarifications or extensions of the ordinary meaning of the phrase "public place".

But in any event I think that the Yard here in question is almost certainly an "open space . . . whether enclosed or not . . . to which the public has access. "

I am satisfied that the Vehicle Inspection Depot Yard is a public place for the purpose of the Act.

Mr O'Meara's second point is that the trial was affected by a serious irregularity. To consider this point it is necessary to give a brief account of the facts.

Patrol Officer Kenny was on the afternoon of 15 July on uniformed traffic patrol in Gweru. He impounded a truck and trailer which he considered did not comply with certain regulations and took them to the Vehicle Inspection Depot Yard. There it was found by Mr Gillett, the senior vehicle inspector, that the vehicle was overloaded on certain of its axles.

Shortly after this the appellant arrived and according to the prosecution witnesses became very incensed. He was said to have been very angry, to have shouted at both Kenny and Gillett and have used foul and insulting language. According to Kenny he smelt strongly of liquor. This all occurred in the Yard in the presence of a number of people including members of the public.

Kenny and the appellant made their way to Gillett's office, Gillett having preceded them, where the appellant's behaviour and language continued as before. It is accepted, however, by the prosecution that this office was not a public place and that the appellant's behaviour there did not constitute a part of the offence charged.

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During the course of his evidence Gillett referred to, and on at least two occasions appeared to read from, some notes that he had before him. These, it was established, he had made in his office, immediately after the events in the Yard and while the appellant was present. It was therefore perfectly proper for him to refer to the notes. He said that he did not have a very good memory and that he found the whole incident rather disturbing. The purpose of the notes he added was to make sure that he would recall particularly the sequence of events, rather than the essential details, for he had a clear recollection of the appellant's behaviour and of the general nature of the words used as well as some of the specific and more abusive words.

Unfortunately the magistrate did not grant the appellant's request that he be allowed to see the notes. As is said in Hoffman & Zeffertt, *SA Law of Evidence*, 3 ed pp 346-7:

"A witness who used a document to refresh his memory must be prepared to produce it for inspection to the opposing party and to the court. If he wishes to withhold it because it is privileged he cannot refer to it in his evidence. If the witness refers to a part of a document, his opponent is not necessarily entitled to see the whole of it. He may see such parts 'as refer to the subject matter of the suit or afford a test of the accuracy or the reliability of the entry to which the witness has referred' . . . The purpose of cross-examining a witness on a document used to refresh memory is to test its accuracy and his credibility . . ."

To deny the appellant a sight of the notes used, and so to deny him an opportunity to cross-examine on them was clearly an irregularity. It is no answer to say that the appellant did not persist in his request to see the notes. He was not legally represented and in those circumstances the magistrate should have gone out of his way to ensure that he had an opportunity to see the notes and to cross-examine on them. I do not go so far as to say that the court itself should have called for the notes: of *R v Elijah* 1963 R & N 237; 1963 (3) SA 86 (SR), for that course may lead to difficulties of its own, but it should not have done anything to

discourage the appellant from seeing them. It is necessary therefore to consider the effect of this irregularity. In *R v Bass* (1953) 37 Cr App Rep 51 there had been kept from the jury, despite a request from the defence for them to be made available, the note-books of two police officers, where the issue was whether they had collaborated in the making of their notes and in the evidence they had given as to the voluntariness of a confession. The conviction depended entirely upon the acceptability of the confession and it must be assumed that defence counsel thought that a study and comparison of the note-books might have cast some adverse reflection

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on the police evidence. The appeal was allowed because of the irregularity.

In the present appeal the position is not exactly the same. Here there was evidence of the commission of the offence other than that of Gillett and what we have to consider is the effect of depriving the appellant of the possible advantage of having been able to cross-examine Gillett on his notes.

The principal witness was of course Kenny. Of him the magistrate said:

"Kenny gave his evidence quite well, although it is possible there was a little animosity in his mind and I would not have accepted his evidence without corroboration I think, not in its entirety. But I have accepted his evidence where it is corroborated by Gillett, and where it is corroborated by Gillett, I find that the accused did make use of the phrases complained of. I have said that these phrases are insulting, one of them was obscene, they are abusive and I find accused GUILTY of that charge."

I read this as meaning that the magistrate thought that Kenny might have exaggerated, not that his evidence as a whole was unreliable.

The magistrate did not deal with the evidence of Sutton, the senior driving examiner. It would have been better if he had, but that he did not do so cannot mean that he rejected his evidence. In dealing with the facts he retails it without comment and had he found it unreliable or suspect I am sure he would have said so, especially as Sutton was an apparently disinterested witness. He was not involved in the incident at all but was merely an observer of part of it from his office. He said that he saw Kenny and the appellant together, the latter shouting in a high-pitched and uncontrolled way and waving his arms at Kenny. He heard the appellant using on numerous occasions an obscenity which was clearly a swear word. His window was however closed and he did not hear or note what other words were used.

The appellant denied losing his temper, swearing or using foul and abusive language. Indeed he said he did not even really understand the foul expletive he is said to have used so frequently that afternoon to be insulting. It was, he said, a word he never used.

This Court in terms of s 11(2) of the Supreme Court Act is enjoined not to set aside a conviction notwithstanding that it finds there has been an irregularity unless it appears that a substantial miscarriage of justice has in fact resulted. We now have to look at the evidence as a whole and treat Kenny's evidence with the caution that the magistrate considered it right to treat it. On that basis it would be dangerous to find that all the

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words to which Kenny deposed were spoken by the appellant, because the detailed evidence of Gillett depended to a substantial if indeterminate extent upon him having refreshed his memory from his notes, and Sutton did not hear any of them through the closed window.

But there is still ample evidence in the evidence of Sutton and even in the general evidence of Gillett that the appellant was so angry as to be almost unable to control himself and that he was at least swearing at Kenny. This is adequate corroboration in my view of the general evidence of Kenny that the appellant was swearing at him in the Yard, particularly as the appellant maintained he did not lose his temper and did not use the language to which Sutton deposed. In my view the conviction must be upheld on that basis, though not on the basis that all the words deposed to by Kenny were used.

There was understandably no appeal against sentence. Even on the basis that not all the words deposed to by Kenny were used there is no warrant for any change of the small fine imposed. Swearing at a uniformed policeman doing his duty in a public place before a number of people cannot be disregarded.

Baron JA: I agree.

Georges JA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

WITHAM v DIRECTOR OF CIVIL AVIATION & ANOTHER 1983 (1) ZLR 52 (HC)

Court High Court, Harare

Squires J

27 January & 9 February 1983

Flynote

Statutes - Air Navigation Regulations 1954 (FGN 246 of 1954) - section 91(6) - special "limitation" imposed by Director of Civil Aviation on exercise of privileges conferred by pilots licence - meaning of - does not include "condition" - while ambit of licence may be restricted flying cannot be entirely prohibited on condition a particular requirement is met.

Headnote

In terms of section 91(6) of the Air Navigation Regulations 1954 (FGN of 1984), the Director of Civil Aviation may "impose any special limitation on or in connection with the exercise of the privileges conferred by [a pilot's flying] licence". The word "limitation" does not include "condition"; it means "a limiting provision or rule or circumstance", that is, confining or restricting

the exercise of the privileges of the particular licence. It does not allow the Director effectively to prevent the holder of a licence from flying at all unless he meets a particular requirement.

The applicant had, in contravention of section 35(a) of the Aviation (Rules of the Air and Air Traffic Control) Regulations 1971 (RGN 718 of 1971), flown an aircraft in weather conditions requiring compliance with the instrument flight rules set out in those Regulations without also being the holder of a valid instrument rating. The Director had, in terms of section 91(6) of the Air Navigation Regulations, purported to issue a limitation in the form of a requirement that the applicant's private pilot's licence would only be valid or renewable if he obtained an instrument rating. The applicant sought to have the Director's order set aside.

Held, that as the effect of the Director's order was to prevent the applicant from flying altogether until he obtained an instrument rating, he was imposing a condition on the applicant's holding of a licence, not a limitation and such an order was *ultra vires* section 91(6).

Cases cited:

Medical & Dental Council of South Africa v McLoughlin 1948 (2) SA 355 (AD);

Van Eck & Van Rensburg NO v Etna Stores 1947 (2) SA 984 (AD);

Broadway Mansions (Pty) Ltd v Pretoria City Council 1955 (1) SA 517 (AD);

Smith v East Elloe Rural District Council [1956] 1 All ER 855 (HL).

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C S Grossman, for the applicant

J B Colegrave, for the respondent

Judgment

Squires J: The applicant in this case is the holder of a private pilot's licence to fly aeroplanes. He has held such a licence - in this country, at any rate - since December 1970, and he relies on this licence in order to earn his living. The terms of such authority enable him to fly all single and multi-engined aircraft with a gross weight of less than 12 500 lb, but this level of competence does not include an instrument rating - that is to say, the proven and tested ability to fly in or through cloud or other meteorological conditions without visual aid, and relying only on the assistance of instruments.

In mid-September last year it was reported to the first respondent that on a flight made by the applicant on 3 September from a landing ground near Charles Prince Airport to Hippo Valley to deliver a cargo of freight, the applicant carried out an instrument let down at his destination in conditions of cloud that required instrument flying. And, furthermore, that some twenty minutes later, when the applicant had unloaded his cargo and was leaving Hippo Valley, he requested clearance from the local Air Traffic Controller at Buffalo Range to climb to a flight level of 10 500 feet, again through cloud conditions that would have required instrument flying.

In consequence of this report, the first respondent required applicant's answer to these

allegations, together with his log book, and this was furnished on 24 September. In substance, the applicant disputed the report against him to the extent that although he did in fact land at Hippo Valley through cloud, he said he did not request such a landing, but did so in answer to an instruction from the Air Traffic Controller. At the time he received this instruction he was still some five minutes distance from his destination and responded on the assumed basis that he would be able to fly in and land with visual aid. Because his flight plan, which would have been known to Buffalo Range Traffic Controller, made it clear from the flight level he used that he was not instrument rated, he assumed the Controller gave this instruction with such a landing in mind. This belief proved wrong in the event, and the landing was in fact through cloud; but it was carried out entirely without mishap. On the return journey he denied that he flew back through weather conditions that required instrument rated flying, and said that by making slight deviations from his course he was able to fly with the aid of visual flight rules all the way back to Charles Prince.

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Apart from this report, it appears that the applicant also gave an explanation in person to the first respondent.

After further investigation into these allegations, however, first respondent, who is the Director of Civil Aviation, was satisfied that these flights of the applicant were carried out in contravention of s 35(a) of the Aviation (Rules of the Air & Traffic Control) Regulations 1971 (RGN 78/1971) - that is to say, that the applicant flew his aircraft in conditions requiring compliance with the instrument flight rules without a valid instrument rating granted under the Air Navigation Regulations 1954 (FGN 246/1954). Being the officer of the Government vested with responsibility for safety in air travel, and acting as he undoubtedly thought he was, in the interests of all users of air space in the country - particularly in view of the approaching rainy season - he issued "a limitation in respect of (the applicant's) Private pilot's licence . . ." in terms of s 91(6) of the Air Navigation Regulations. This took the form of a requirement that the applicant's private pilot's licence would only be valid or renewable if he held a valid instrument rating, and the applicant's licence was to be endorsed accordingly.

It was subsequently suggested, apparently by the second respondent when he gave consideration to the report of the Director on this matter, that the infringement by the applicant was sufficiently serious for his licence to be entirely suspended for a limited period. The first respondent thereafter further considered the matter, and in the end result suspended the applicant's licence for a period of three months from 1 December 1982.

In those circumstances, and after unsuccessfully seeking through his attorney the revocation of the suspension and the removal of the qualification on his licence, the applicant instituted the present motion proceedings to have both these decisions set aside. At the hearing, however, Mr *Grossman*, who appeared for the applicant, abandoned the prayer for relief against the second respondent and the setting aside of the suspension of the applicant's licence. The issue that remains for decision is the validity of the restriction placed on the applicant's private pilot's licence under s 91(6) - namely that the licence would not be valid or renewable unless the

applicant acquired and held a valid instrument rating.

From an examination of the respondent's affidavits and the several annexures attached to them, it is apparent that the Department of Civil Aviation had suspected the applicant of undertaking flights that required an instrument rating for some time prior to the flight that gave rise to

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present proceedings. Furthermore, it seems to have disapproved of the applicant flying for reward on a private pilot's licence and without being the holder of an instrument rating, since the usual practice for those who earn a living from providing pilot services is to hold a professional pilot's licence, and these persons usually possess such an additional rating. It is also complained by the applicant that some of the language used in the affidavit of the Chief Operations Officer that was filed in opposition to the applicant's claim, was sufficiently aggressive in content as to reflect a discernible bias against the applicant, and that in two important respects the Chief Operations Officer's conclusion relied on evidence that was clearly hearsay.

In addition, and on the papers as they eventually stood there were areas of dispute of fact, particularly as to what the applicant did when landing and taking off at Hippo Valley, some of which disputes imported the measure of hearsay evidence referred to above. Notwithstanding these disputes, and the hearsay evidence, it was the applicant's wish to have the matter determined on the papers because of the urgency of the situation. In those circumstances, it was accepted by Mr *Grossman* that I proceed on the basis of the respondent's allegations of fact.

In that situation, then, it was argued by Mr *Grossman*, albeit as a second string to his bow, that the first respondent's decision could be impeached for not only the apparent bias against the applicant, but also on the basis of a failure to apply the *audi alteram partem* rule. In this second respect, he argued that it was clear from certain passages in the respondents' affidavits that the alleged breaches by the applicant of his restricted flying authority prior to the flight in question had played a material part in the decision to impose the limitation under s 91(6), and the applicant had never been given any opportunity to answer these complaints.

Because of the view I take of the respondent's decision on Mr *Grossman*'s main argument, it is not necessary to reach a decisive conclusion on these secondary submissions. Suffice it to say that on a *prima facie* consideration, I do not think I would have acceded to them. For although, in the first place, the applicant may have been under scrutiny by the first respondent's department, it is quite clearly only in respect of the present infringement that the action has been taken against him. And it is common cause that not only was the applicant given an opportunity to make a written reply to this allegation, but he also had an opportunity to put his case in person to the first respondent. It was only after receiving these replies that the respondent further investigated and considered the matter and then made

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his eventual decision; and, to repeat, it is quite clear from his letter of 26 November 1982 to the applicant, advising him of the decision that it was made solely in respect of the flight to and from Hippo Valley on 3 September. It does not seem to me, therefore, that there is any breach of the *audi alteram partem* rule here.

Secondly, and although there are passages in his report, and even in the affidavit filed by the Chief Operations Officer, which might indicate a firmly held view of the applicant's culpability, the mere interest or even enthusiasm which an official may have in the discharge of his functions in pursuance of the object or purpose of his office, is not bias in the sense required by the law in the matter of reviews. He is one of the officers appointed to carry out the provisions of the Air Navigation Regulations 1954. And it clearly was his duty in this case to investigate and report upon the allegations made to the Department of Civil Aviation. In fact, he seems to have acted as the *pro forma* complainant and possibly even as the prosecutor. But the mere fact that an official or a body charged with overseeing conduct in a particular line of activity appoints one of its or his officials to make an inquiry, even where the official's normal function is to advise the tribunal or body he works for, does not amount to an irregularity. Cf *Medical and Dental Council of South Africa v McLoughlin* 1948 (2) SA 355 (AD). The important distinction is that the official doing such investigation is not the adjudicator. The facts show that the Chief Operations Officer investigated the allegation, gave his findings to the first respondent in the form of the report annexed to the papers, and, after hearing the applicant, it was the first respondent who made the decision in the manner I have already tried to describe. So, if there was any bias in the sense of an unreasonable antipathy to the applicant, there is nothing to suggest it was subscribed to by the first respondent, or that the Chief Operations Office was in any way party to the first respondent's decision.

On a superficial consideration of these complaints, then, it does not appear to me that there is any substance in them.

I turn then to the main argument of the applicant's counsel which is that the authority given to the first respondent in section s 91(6) of the Air Navigation Regulations 1954 does not empower him to make the order he made in this case. There is a well-known and formidable line of authorities of which *van Eck NO & van Rensburg NO v Etna Stores* 1947 (2) SA 984 (AD) at 996; *Broadway Mansions (Pty) Ltd v Pretoria City Council* 1955 (1) SA 517 (AD) at 522, and *Smith v East Elloe Rural District Council* [1956] 1 All ER 855 (HL), are good examples, which enunciate the principle

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that power given to a public body for a particular purpose cannot be used for any other. Put in another way, it is equally trite that where a person or body owes its existence to and derives its powers from a statute or regulations, it can do no valid act unless it or he is authorized to do so by the statute or other source of its powers. It follows from this that where such tribunal or official's powers are restricted, it or he must observe such limits and may not exercise a power

that is not given to it; if it does, it is acting *ultra vires*.

Now, s 91(6) of the Air Navigation Regulations 1954 reads as follows:

"(6) The Director may on the grant or renewal of any particular licence or at any time during the period it remains in force impose any special limitation on or in connection with the exercise of the privileges conferred by the licence. Any such limitation shall be entered in the licence and may at any time be removed by the Director upon his being satisfied that the same need no longer be imposed."

In substance, Mr *Grossman's* argument on this ground of his case is that s 91(6) only provides for the Director to impose a special limitation on or in connection with privileges conferred by that licence. It does not link the word "limitation" with the word "condition" as the lawgiver does in sub ss (5) (a) (i) and (13) of s 91. It must therefore have meant the subsection to have a smaller scope of action than the Director enjoys under the other two provisions; and that such reduced power does not extend to attaching conditions to the validity or renewal of a licence which in effect prevented it being used at all. In short, he said limitation does not mean prohibition unless a new and another skill is acquired.

Mr *Colegrave* did not dispute that s 91(6) must have been intended to have a lesser effect than s 91 (5) (a) and 91(13) because of the pointed omission of the word "condition"; and he did not seek to argue that the words "or condition" must be necessarily read into the section. In such an attitude he is clearly right since the requirements necessary to justify a court reading words into a statutory enactment are patently not present here. He argued, however, that in effect the first respondent had not taken away the applicant's private licence but had merely limited its use by saying that it could in future only be used if the applicant acquired an instrument rating.

The difference between the two arguments therefore really lies in the precise effect of the first respondent's order, and the issue is in truth a very narrow one - namely whether the first respondent had the power to do what he did under s 91(6). I am not concerned in these proceedings to decide whether he had such a power under any other provision or might

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achieve the same result by any other means.

Mr *Grossman's* complaint, as indicated above, is that the first respondent has not merely imposed a limitation on the exercise of the privileges conferred by the applicant's licence but he has effectively negated the licence by preventing the applicant using these privileges at all unless he adds a new dimension to his flying skills. Having regard to the requirements of achieving an instrument rating that are set out in s 106 of the Regulations, it is clearly not something that is granted for the asking. It requires a specified and proven degree of ability, experience and knowledge, over and above that required of someone without it.

The word "limitation" has several meanings. But in the sense in which it is used here it must mean "a limiting provision or rule or circumstance". And "limit" used as a verb means "to confine within limits, to bound or restrict". So the ordinary meaning of "... imposing a ... limitation ... " in s 91(6) is to set a limiting rule or provision by confining the exercise of the privileges of the particular licence. Confining or limiting the privileges of the licence is clearly not

the same as preventing their exercise altogether. It means that of the total granted privileges of that particular licence such privileges may henceforth be exercised on a more restricted basis, whether that restriction applies to the number of engines in the aeroplane that may be flown, the lesser weight of such aeroplane, the hours of flying, or the conditions of flying; or, to take extreme examples, flying on particular days of the week only or during particular hours of the day. In short, it means that while the ambit of the licence may be restricted it cannot be entirely prohibited unless a particular requirement is met.

Furthermore, in considering the nature of the respondent's order, it seems to me quite proper to look to its effect. And the simple answer to Mr *Colegrave's* contention seems to me to be the fact that the order does not restrict or limit the presently permitted sphere of operations of the applicant's licence. That is to say, it does not continue to permit the flying, but on a less extensive basis. This order prevents his flying altogether until he obtains an instrument rating. In other words, the Director is requiring the achievement of that specialized rating as a prerequisite to the renewal or continued validity of the applicant's licence, and that seems to me to be imposing a condition and not a limitation. And s 91(6) does not give the Director authority to do that. Had the word "condition" been included in s 91(6) as it is in other subsections, the first respondent could well have made the order he did because the authority to impose a condition would have allowed him to demand or require something which is a prerequisite

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to the granting or issuing of a licence. That is the essential meaning of the word "condition", and it would have provided a proper basis for the action ordered by the respondent.

In my opinion, therefore, the applicant must succeed, and the relief sought against the first respondent must be granted. In those circumstances, there will be an order setting aside the first respondent's decision under s 91(6) that the applicant's private pilot's licence be valid or renewable on condition he holds a valid instrument rating. The application for an order declaring invalid the suspension of applicant's licence for three months from 1 December 1982 is dismissed. As the applicant had to come to Court to obtain the relief relating to the first respondent's order, the setting aside of that order will carry the award of the costs involved in so doing. However, because the relief sought against the second respondent was misconceived but withdrawn before the hearing, the applicant is to pay the costs incurred by the second respondent in resisting the application.

Atherstone & Cook, legal practitioners for the applicant

Attorney-General, legal practitioners for the respondent.

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S v MAFUKA 1983 (1) ZLR 60 (HC)

Court High Court, Harare

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McNally J

9 February 1983

Flynote

Criminal Law - Harmful Liquids Act [Chapter 63] - s 3(1) - possession or manufacture of *kachasu* - not penalised by section - whether *kachasu* a "concoction" in terms of section - evidence - necessity to observe provisions of s 4 - Customs and Excise Act [Chapter 177] - whether manufacture, possession or sale of *kachasu* can be prevented under.

Headnote

There has long been an incorrect belief on the part of the police, prosecutors and courts that *kachasu* is a "concoction" as defined in s 3(1) of the Harmful Liquids Act [Chapter 63], the mere possession of which is unlawful. In fact, to be harmful in terms of the section, the liquid in question must be a concoction made from the fermentation of treacle, sugar or other substances; but *kachasu* is not so made. *kachasu* is a distillate from the berries of the *masawa* or *masau* tree and if manufactured carefully by skilled persons is no more harmful than any commercial liquor. Unskilled producers, on the other hand, may produce a liquid that is dangerous, but this does not make *kachasu* a harmful liquid in terms of the Act.

The requirements of s 4 of the Act, which relate to the evidence necessary to prove a charge under s 3, are often overlooked. These are that a sample of the concoction in question must be produced, even where there is a plea of guilty.

There may be no technical objection to prosecuting the producers of *kachasu* under the Customs and Excise Act [Chapter 177], there being various applicable sections which proscribe aspects of such conduct. However, such an approach is bizarre in the extreme, since the Act is a fiscal one and the real motive of the police is not to protect the *fiscus* but to prevent harm to the health of the nation.

Cases cited:

R v Baureni 1963 R & N 890;

S v Chikomo HC-4-163-82;

S v Tapera G-S-111-81;

S v Chakota G-S-201-81;

R v Jim u Judgment 442 of 1953;

S v Mpofu H-B-75-81;

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S v Nyathi H-B-40-82;

S v Ndhlovu H-B-98-82;

Judgment

McNally J: This judgment deals with prosecutions for possessing and distilling the drink called *kachasu*; the evidential provisions of the Harmful Liquids Act [Chapter 63]; and the use of the Customs and Excise Act [Chapter 177] to penalise illicit drinking.

There is a long-standing and apparently entirely incorrect belief, held not only by police prosecutors and magistrates but also by members of this Court (including, until now, myself) that *kachasu* is a concoction as defined in s 3(1) of the Harmful Liquids Act [Chapter 63]. See *R v Baureni* 1963 R & N 890; *S v Chikomo* HC-H-163-82. (But, *contra*, see the judgments of PITTMAN J in *S v Tapera* G-S-111-81, and *S v Chakota* G- S-201-81).

The position is as follows. Section 3(1) prohibits the possession, custody, use, drinking or supplying of:

- (a) "any of the concoctions made from the fermentation of treacle, sugar or other substances and known as Skokiaan, barberton, qilika, isityimiyana, hopana, qediviki or uhali; or
- (b) any concoction which, though called by another name, is substantially similar to any of the concoctions named in paragraph (a); or
- (c) any concoction, other than African beer as defined in the African Beer Act [Chapter 229], produced by the fermentation or distillation of any substance the consumption of which would, in the opinion of the Minister, be prejudicial to the health and well-being of the people of [Zimbabwe] and which he may specify by notice in the *Gazette*" (Note that this section has not been amended although the African Beer Act [Chapter 22] has been repealed by section 32 of Act 39 of 1974).

Kachasu is not named in section 3(1)(a), nor has it been specified by the Minister in terms of section 3(1)(c), as has nipa in RGN 563 of 1971. In order to fall under the section, therefore, *kachasu* must be brought within the terms of subsection (b).

In this connection it is necessary to refer to a decision which has been neither reported nor effectively distributed, and for which I am indebted to the Attorney-General's staff. It is the case of *R v Jimu* Judgment No 442 of 1953, a judgment of MORTON J. In his judgment he said:

"To be harmful in terms of s 3(1)(a) or (b) a liquid must be a concoction made from the fermentation of treacle, sugar or other substances. The word 'concoction' is used throughout the Act and I understand the legislature to have meant that the liquid must have been produced from a variety of materials, that is, either a liquid produced by the fermentation of two or more substances or a liquid so produced from one substance to which some other substance has been added. One of those substances must be treacle or sugar or other substance of a like nature.

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The only witness for the Crown was an African constable. He said that *kachasu* was a concoction substantially similar to skokiaan, but he also said that it was a colourless liquid distilled from the berries of the masawa tree. This latter evidence shows that, far from being substantially similar to skokiaan, it is a straight distillate from natural fruit and in its nature substantially similar to wine brandy or peach brandy. If such evidence were accepted as sufficient evidence in terms of s 4(1), then on similar evidence whisky, brandy and gin would be harmful liquids, which the legislature did not intend . . . The uncontrolled distillation and possession of kachasu may be a mischief

but, it is not a mischief at which the statute aims." (MORTON J's underlining).

The Attorney-General reported the result of further researches as follows:

"In view of the possibility that, in the close on thirty years since *Jimu's* case, the method of manufacture of kachasu might substantially have changed, I consulted Hannan's Shona Standard Dictionary, in which it is defined as 'Liquor distilled from beer. Liquor distilled from the fruit of the masau tree.' The two definitions suggest that kachasu has become a generic name for liquor which may be distilled from various bases, with or without additives. Enquiries from an expert at African Distillers elicited that if made with fruit (berries) and provided that the natural fruit used contains sufficient sugar, no additive is needed to produce the distillate, there being sufficient wild yeast floating in the air to preclude the necessity of adding yeast. In such circumstances, it would not be a concoction. However, he did point out that some varieties of wild yeast result in a spirit high in methanol content, which is dangerous; also, that the habit of speeding up fermentation by spitting into the container has the same effect, due to the presence of certain enzymes in saliva. The expert conceded that, as in the case of the moonshiners during the period of American prohibition, a skilled, albeit illicit, distiller can produce a spirit no more harmful than, say, brandy. The only possible danger then would be that, due to the fact that such people have no means of checking the strength of their product when they take it from the still, the liquid may have an unduly high alcohol content. It appears, for example, that spirit removed on a very cold day is likely to be considerably stronger than that produced on a very hot day. In these circumstances a regular purchaser might become dangerously or stuporously drunk, even on less than his normal quota, and could finish up with alcoholic poisoning.

Kachasu, under that name, was manufactured commercially some ten years ago, which proves that, with controlled distillation, it is harmless. Due to the imponderables mentioned above, it would seem that it may or may not be harmful when distilled under illicit conditions. Judging by recent Press reports, its consumption from illicit stills is, at present, causing serious damage, in some cases death, and it seems faintly ridiculous to penalise the manufacturers of a potentially lethal liquor under a fiscal statute. The Attorney-General intends to raise the matter of a possible amendment to the Harmful Liquids Act with the Secretary for Home Affairs."

The reference to the fiscal statute is a reference to the fact that offenders are often prosecuted under s 167 of the Customs & Excise Act [*Chapter 177*]. It seems, therefore, that pending amendment to the legislation or a specification in the *Gazette* by the Minister *kachasu* is not to be regarded as a harmful liquid in terms of chapter 63. Indeed, if it is in fact not a 'concoction' at all, as MORTON J suggested, it may be that the Minister

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is not empowered to specify it in terms of s 3(1)(c) of the Act. But I prefer to leave such matters of chemistry to be decided in the light of full evidence, and I make no ruling on the point.

The next area of error concerns the evidence to be held in prosecutions under the Harmful Liquids Act. What is overlooked is that even where there is a plea of guilty, the provisions of s 4 of the Act must be observed. Section 4 reads:

"4. (1) At the trial of any person charged with an offence under section three a sample of the concoction forming the basis of the charge shall be produced and put in evidence and the evidence of a reliable witness to the effect that he is familiar with such concoction and that he has satisfied himself by tasting the sample that such concoction is a concoction mentioned in section *three* shall be sufficient evidence of the nature of the concoction.

(2) If at the trial of any person charged with an offence under section *three* the court is satisfied that the prosecution is for any good and sufficient reason unable to produce a sample of the concoction forming the basis of the charge, the evidence of any reliable witness, including that of any person who was present when the alleged offence was committed, to the effect that he is familiar with the concoction in question and having tasted such concoction on the occasion when the alleged offence was committed that he is satisfied that such concoction was

a concoction mentioned in section three shall be sufficient evidence of the nature of that concoction.

(3) Where at the trial of any person charged with an offence under section *three* there is produced a sample of the concoction forming the basis of the charge, the court shall at the accused's request cause a portion of the sample to be delivered to an analyst named by the accused for the purpose of analysis at the accused's expense."

It will be seen that, unless the Court satisfies itself in terms of sub-section (2), a sample of the concoction forming the basis of the charge *must* be produced. This has been made clear in a number of judgments of this Court, among them -

S v Tapera (supra);

S v Chakota (supra);

S v Chikomo (supra);

S v Mpofu H-B-75-81;

S v Nyathi H-B-40-82;

S v Ndhlovu H-B-98-82.

In these last two cases, it may be noted that the alleged harmful liquid involved was something called tototo. It was said that the charge should have alleged a contravention of s 3(1)(c). I must assume therefore that there was some evidence that tototo is the same thing as *nipa* because *nipa* is the only liquid at present falling under s 3(1)(c). The judgments themselves are silent on this point, and are thus, with respect, a little confusing.

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The final area of confusion relates to the use of the provisions of a fiscal statute, the Customs & Excise Act [*Chapter 177*], to prosecute persons distilling liquor.

The first thing to be borne in mind is that the object of that Act is to protect the *fiscus*, ie to ensure that customs and excise duties are collected. LEWIS J (as he then was) had this to say in *R v Baureni* 1963 R & N 890 at 892D-E:

"Section 109 of the Customs and Excise Act [the equivalent of today's s 108] deals with the manufacture of liquor containing more than 3 per cent proof spirit without a licence from the controller to manufacture such liquor. It is clear that the object of the section is to safeguard the revenue of the *fiscus* by preventing the manufacture, without a licence, of liquor of a type which, with a licence, can be lawfully manufactured and sold to the public, and which is subject to excise duty or surtax. It obviously cannot refer to a harmful liquid such as kachasu [here, with respect, reference to kachasu would seem to be incorrect] or *nipa* or any of the concoctions specified in the Harmful Liquids Act of 1949 because such liquor cannot be lawfully manufactured at all. It cannot even be possessed or consumed or sold or in any way supplied to any person. Hence no licence can be granted at all for the manufacture of a harmful liquid and no excise duty or surtax could be levied upon it. The manufacture of a harmful liquid is specifically dealt with in s 3 of the Harmful Liquids Act of 1949, which I have quoted above."

Thus, someone selling *nipa* should not be charged under the Customs and Excise Act but under the Harmful Liquids Act. His wrongdoing is not his failure to pay excise duty, but his harming of

his fellow-citizens.

Assuming that *kachasu* is not a harmful liquid (at least as defined in the Act), there may be no technical objection to the prosecution of sellers of *kachasu* under various sections of the Customs & Excise Act. Reference has already been made to s 108, as amended by s 7 of Act 53 of 1981. Such persons might also be prosecuted under s 110(1) which reads, in part, "No person shall keep or use a still unless . . .". Or, finally, they might be prosecuted under the miscellaneous offences section, s 167. Sub-section (b) penalises any person who -

"(b) has upon his premises or in his custody or under his control or purchases, sells or otherwise disposes of any goods liable to excise duty or surtax which have been manufactured in breach of the provisions of this Act, unless such person proves that he was unaware that such goods were so manufactured; . . .".

However, I imagine that most remote peasant *kachasu* distillers would not have much difficulty in satisfying a court that they were unaware of the fact that they require a licence. Perhaps it would be easier to achieve a conviction under subs (e).

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I must confess, however, that I consider that such an approach is bizzare in the extreme. When one prosecutes a person under this fiscal Act one is saying in effect, "Produce the goods by all means, but you must contribute to the State by way of excise duty if you do so". The police do not arrest *kachasu* distillers for that reason at all. The police are trying to stop people from distilling *kachasu*. They are not trying to compel them to get a licence.

In my respectful view, this matter requires legislative intervention by way of an amendment of the Harmful Liquids Act. It may be desirable to penalise the possession of stills under this Act, and perhaps to define the distinction between prosecutions under this Act and those under Chapter 177.

I return finally to the facts of the two cases under review. Elisha Mafuka was found with five litres of distilled *kachasu* and convicted of contravening s 3(1)(b) of the Harmful Liquids Act. The requirements of s 4 of the Act were not complied with but in any event *kachasu* does not, as the law now stand, fall under the Act. The conviction must be set aside.

On the second count he was convicted under s 110(1) as read with s 188 of the Customs & Excise Act [*Chapter 177*]. Although I have expressed concern about the use of this Act, I am not prepared to say that a conviction under this section is wrong. There is support for using this section in *R v Baureni* (*supra*) at 893B, and accordingly I confirm the conviction.

The two counts were treated as one for sentence, so it is necessary to sentence the accused afresh on count 2. I propose to reduce the fine of \$70 or, in default of payment, 50 days' IWL, to one of \$40 or, in default of payment, 20 days' IWL.

Accordingly, in the case of *S v Mafuka*, the conviction on count 1 and the composite sentence are set aside. The conviction on count 2 is confirmed and the sentence is altered to read, "a fine of \$40 or, in default of payment, 20 days' imprisonment with labour".

In the case of *S v Nyamutoba*, the accused was "wrongfully and unlawfully without a permit found in possession of 150 litres of *kachasu*" and was convicted under s 167(b) of the Customs & Excise Act. The magistrate, in sentencing him, spoke of *kachasu* as a harmful liquid. The wording of the charge is hopelessly inappropriate for a charge under the section, whose provisions have been set out earlier in this judgment. With the

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agreement of the Attorney-General, therefore, the conviction and sentence are set aside.

Waddington J agrees.

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Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Fieldsend CJ, Baron JA & Georges JA

14 January & and 25 February 1983

Flynote

Contract - marriage brokage agreement - public policy - whether such contracts enforceable.

Headnote

An agreement to introduce men and women, or one man and one woman, to each other with a view to marriage cannot for itself be contrary to public policy. The only basis for finding it to be so is that because of the introduction of a monetary reward such a contract has a sufficient tendency adversely to affect the public good. The mere introduction of persons for reward with a view to marriage does not in itself lead to reckless and unsuitable marriages: that is no more likely than that a couple might be inclined to live together out of wedlock to avoid paying the fee. Furthermore, the very fact that marriage itself is hedged about with necessary preliminary requirements and solemnities virtually nullifies any tendency to recklessness.

In general, the objection to this type of contract, as shown in the English and South African cases, has been an emotional and sentimental one: marriages should be made in heaven, uncontaminated by any kind of monetary consideration; but this is not a consideration of public policy. The doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable. The encouragement of marriage is, on this basis, in accordance with public policy. In modern society it is often difficult for people of similar tastes and outlooks to meet one another; there is nothing contrary to public policy in putting such people in touch with each other even though a fee is charged. It is far better that this should be

done openly with a view to the possibility of marriage rather than of friendship, as more permanent associations are likely to be encouraged.

Authorities cited:

Treitel, Law of Contract, 5 ed, p 326;

Hermann v Charlesworth [1905] 1 KB 24;

Cheshire & Fifoot, Law of Contract, 9 ed pp 331, 367;

Chitty on Contracts 24 ed para 957;

Halsbury's Laws of England 4 ed Vol 9 para 412;

Anson's Law of contract 25 ed p 357;

Hurwitz v Taylor 1926 TPD 81;

Bynkershoek Quaest Juris Priv 2.6;

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Voet ad Pandectas 23.1.1.;

Groenewegen de leg Abr ad Cod 5.1.6;

Van Leeuwen 4.2.13;

Van der Keessel Thes 482;

King v Gray (1907) 24 SC 554;

Pillay v Yeanamoothoo (1917) 38 NLR 155;

WG Hoal, Marriage Brokerage; (1919) 36 SALJ 352;

Christie, The Law of Contract in South Africa p 351;

Wessels on Contract 2 ed Vol I para 530-1;

FP van den Heever, Breach of Promise and Seduction in South African Law;

Fender v St John-Mildway [1938] AC 1; [1937] 3 All ER 402;

Egerton v Brownlow (1853) 4 HLC 1; [1843-60] All ER Rep 970;

Kuhn v Karp 1948 (4) SA 825 (TPD)

Goldin & Gelfand, African Law and Custom in Rhodesia;

Evantural v Evantural (1874) LR 6 PC 1.

I A Donovan for the appellant

A P de Bourbon for the respondent

Judgment

Fieldsend CJ: The appellant, Mrs Anne Olsen, carries on a business under the style of Anne Olsen Introductions. She provides a service which aims at bringing together people who might not otherwise meet, normally for the purpose of companionship leading to marriage.

In September 1979 the respondent, Peter Standaloft, applied to register with what the appellant called her Marriage Bureau. He agreed to pay the registration fee of \$85, and undertook in the event of his concluding a marriage with a person introduced by or through the Bureau to pay a further fee of \$150, payment to be made or instalments to commence in the month in which his marriage took place.

He duly paid the registration fee and was introduced by the Bureau to some 6 or 7 women. On 6 September 1980 the respondent married a person to whom he had been introduced by the appellant. In October 1980 he undertook to pay \$60 which his wife had agreed to pay the appellant when she had registered with the Bureau in the event of her marrying a person to whom she was introduced by the appellant.

The appellant sued for the \$210 that the respondent had undertaken to pay. The respondent denied liability, contending that the agreement was a marriage brokerage contract and thus unenforceable as being contrary to public policy. His contention was upheld in the magistrate's court and it is against this decision that the appellant now appeals.

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The issue in the appeal is whether an agreement stipulating for payment for effecting an introduction with a view to marriage is enforceable, particularly where payment is made dependent upon a marriage eventuating.

As this intriguing subject has never been decided in this jurisdiction it is necessary to look into the legal and historical background in some detail.

English Law

A useful starting point on the English law is *Treitel, The Law of Contract* 5 ed (1979) p 326. There the learned author says:

"A marriage brokerage contract is one by which a person promises in return for a money consideration to procure the marriage of another. Until the eighteenth century such contracts were valid at common law. But this made it possible for servants of young heiresses to obtain payment for assisting their charges to elope with fortune hunters. Equity therefore prevented the enforcement of these contracts 'that marriages may be on a proper foundation . . . and to prevent that influence which servants more especially would gain over young ladies.' The principle is not restricted to contracts to procure a marriage between one of the contracting parties and a *particular* third person. It was held in *Hermann v Charlesworth* that a contract simply to find a spouse for a client was also invalid, because 'it involved the introduction of the consideration of a money payment into that which should be

free from any such taint.' The harmful tendencies of such contracts are by no means self-evident."

It is worth referring to the dictionary meaning of "brokage" which is a word seemingly with almost sinister undertones. The Shorter Oxford Dictionary says of it:

"a. The corrupt jobbing of offices; the bribe unlawfully paid for any office. b. Trafficking in match-making, etc.",

though the word is indicated as obsolete, and now equivalent to brokerage which does not have these undertones.

The most recent English case is *Hermann v Charlesworth*, heard first on appeal in the Divisional Court ([1905] 1 KB 24) and then in the Court of Appeal ([1905] 2 KB 123). The facts were straightforward. Miss Hermann agreed -

"In consideration of being introduced to or put in correspondence with a gentleman through the influence of the proprietor of the paper entitled The Matrimonial Post and Fashionable Marriage Advertiser, and in the event of a marriage taking place between such gentleman and myself, . . . to pay the said proprietor the sum of £250 on the date of my said marriage."

She also agreed to pay at once, which she did, a "special client's fee"

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of £52 of which all but £5 would be refunded if within 9 months no engagement or marriage took place. Charlesworth introduced Miss Hermann to several gentlemen and interviewed and wrote to others on her behalf but no marriage or engagement followed. Before the expiration of the 9 month period Miss Hermann sued for the return of the whole of the sum of £52 which she had paid. She succeeded in the Westminster County Court, she failed in the Divisional Court (ALVERSTONE LCJ, KENNEDY and RIDLEY JJ) and succeeded in the Court of Appeal (COLLINS MR, MATHEW and COZENS-HARDY LJ).

It will be seen that this is a very far-reaching decision, at least so far as the £5 is concerned. It means that a mere introduction of persons for a reward with a view to marriage is contrary to public policy, regardless of whether there is provision for a further payment should a marriage result. One can only assume that it is the introduction of a money payment into that which should be "free from such taint" which constitutes the objectionable feature of such contracts. With respect I do not find that reasoning convincing.

This is now the case referred to in all the English textbooks as representing the present English law which, of course, it does: See Cheshire and Fifoot, *Law of Contract* 9 ed (1976) p 367, Chitty on *Contracts* 24 ed (1977) para 957 (both without comment), *Halsbury's Laws of England* 4 ed (1974) vol 9 para 412 (but see footnote 2 which reads: "Despite the rule as to marriage brokage contracts it is well known that there are a number of flourishing marriage bureaux. *Quare*, as to the position of an agency which purports only to provide introductions with a view to friendship."), Anson's *Law of Contract* 25 ed (1979) p 357 (but see footnote 3 which reads "*sed quaere*" and the final words of the paragraph: "although it is difficult to see that any harm at all is caused by such an agreement").

South African Law

The South African law is by no means as settled as the law in England, particularly as the Roman-Dutch jurists were almost unanimously of the view that marriage brokerage contracts were enforceable. We are fortunate that these authorities have been collected in *Hurwitz v Taylor* 1926 TPD 81. Bynkershoek (*Quaest Juris Priv*) devotes the whole of Chapter 6 of Book 2 to the question and is firmly of the view that such contracts are enforceable, both on the basis of authority and sound reason. Voet (23.1.1.) does no more than deal with Roman law without comment, but the decision on which Bynkershoek relies was decided only after Voet's death. Only

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Groenewegen (*De Leg Abr ad Cod* 5.1.6.) is firmly of the opposite view, saying that the constitution upon which he is commenting must be confined to the Italians. The other authors who deal with the subject all adopt Bynkershoek's approach, including van Leeuwen (4.2.13) and van der Keessel (*Thes* 482).

The first case in the Cape of Good Hope to deal with the question was *King v Gray* (1907) 24 SC 554. Unfortunately no Roman-Dutch authority but the inconclusive passage from Voet was referred to. DE VILLIERS CJ, sitting alone on appeal, followed the then recent case of *Hermann v Charlesworth* (*supra*). The substance of his judgment is at pp 557-8:

"Now, at first sight, it would appear as if the practice of employing matrimonial agencies for finding suitable matches rather deserves encouragement, as tending to promote lawful wedlock and legitimate increase of population, and if marriage could be regarded as a contract, and nothing more than a contract, I should see no objection to the employment of brokers to bring about engagements, or to give introductions with a view to such engagements. But over and above the contract of marriage is the *status* which the contract confers on those who have entered into it. That *status* is a matter of important public concern, involving as it does the relations of the parties, not only to each other, but towards the offspring of the marriage, and even towards the State. So important is the maintenance of that *status* considered by the law that the parties themselves cannot by agreement put an end to it. In bringing about an ordinary contract between two parties, a broker has only to consider the advantage of the one who employs him, and if unsuitable or ill-advised contracts are thus made, it is generally the parties alone who suffer, and it is competent for them to agree upon annulling such contracts. If the broker is the means of bringing about an ill-assorted marriage, the act is irrevocable unless the State intervenes, and by means of a judicial decree puts an end to the contract and its consequent *status* on special grounds allowed by law. By making the possession of wealth the only consideration, the broker would naturally lose sight of the still more important matter of mutual regard and affection, which are so essential to the peace and happiness of the family life. Then there is the temptation for the broker to use illegitimate means to attain his end. His sole object is to bring about a match, and earn his commission. Few people would care to confess that they owe their marriage to the intervention of a matrimonial agency, and the consequence is that even if a person were entrapped into an ill-advised marriage by the most glaring falsehoods on the part of the agent, his mouth would generally be kept closed as to the real cause of his misfortune. The recognition of contracts such as that now in question would tend to expose the guardians of wealthy wards to great temptation at the hands of unscrupulous matrimonial agents, and would, in my opinion, prove generally prejudicial to the public welfare."

This was a very different type of case from the present. There King was suing in respect of Gray's and Gray's wife's liability under separate contracts with King for commission for services rendered to each of them in introducing them to each other, a marriage having followed. King had stipulated for certain preliminary fees which were paid and were not in issue. Thereafter

further fees were payable on an introduction being made

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and further fees on a marriage eventuating. The scale of fees -

"... for such introductions varied with the incomes of the persons to whom his clients were introduced. For introduction to a lady or gentleman with an income not exceeding £50 per annum the fee was only a guinea, but the fee gradually increased up to fifty guineas for introduction to a lady or gentleman with an income of £5 000 per annum. In addition to such fees £10 was payable in all cases upon marriage, but where the fortune of the lady wedded exceeded £400, a further two and a half per cent was payable on the excess. It would appear that both the defendants paid the preliminary fees, and that the second defendant, upon receiving the introduction to the first defendant, promised the plaintiff to pay the commission usually charged by him. It is not clear that the first defendant knew that he was liable to pay more than the preliminary fee, and, in the absence of any promise on his part to pay the commission, the summons against him was properly dismissed."

As to both respondents it was held that the contract was contrary to public policy and unenforceable.

The second case - *Pillay v Yeanamoothoo* (1917) 38 NLR 155 - takes the controversy no further. That concerned a claim for the return of 10 guineas paid in consideration of the recipient father's undertaking to give his daughter to the payer in marriage. The objectionable features of such a contract are easier to discern than those of the contract we have to consider.

In an article in (1919) 36 SALJ 352 W G Hoal, after examining the Roman-Dutch authorities and the previous two cases, concludes:

"In view of the fact that South African cases have been decided practically without reference to Roman-Dutch authorities, the question must be considered as open, and, when the point again comes up for consideration it may be that the Courts of this country, after a consideration of such authorities, will take a view of public policy different from that recognised by the Courts of England."

Finally there is *Hurwitz v Taylor (supra)*. In that case Taylor promised Hurwitz £10 if he should introduce a suitable suitor to his daughter and a marriage should result from the introduction. Within 5 months of the agreement Taylor's daughter married a person introduced by Hurwitz and Hurwitz sued for his £10. He was not a matrimonial agent.

After a careful review of all the authorities, ancient and modern, GEY VAN PITTIUS AJ, sitting with BARRY AJ, held that the agreement was against public policy and unenforceable. The substance of his judgment is at pp 92-3 where, after referring to the judgment of DE VILLIERS CJ in *King v Gray (supra)*, he says:

"He points out that marriage is not an ordinary contract because it also creates a status, which status is a matter of important public concern, and cannot be put an end to by agreement of the parties. He also draws attention to the temptation for the

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broker to use illegitimate means to attain his end. That opinion, coming from so eminent an authority, is of great

weight on the question of public policy, even though as already pointed out the Roman-Dutch authorities were, so to say, not referred to. That decision is based on the broad principles as to what the Court considered to be contrary to public policy or prejudicial to public welfare, and I have not been able to find a single case in our South African decisions where a claim on such a contract has been enforced by the courts.

The element of money may be at the root of the evil, as pointed out by COLLINS MR, but it is difficult to see how that element alone can make the contract illegal. One may have cases where the broker acted fairly and honestly, and where the introduction led to a happy marriage; still courts have refused to enforce claims for remuneration. There is nothing to show in the present case that the plaintiff acted otherwise than fairly and honestly. The marriage broker however is paid by results, ie, in case his introduction leads to marriage, and it needs very little imagination to foresee that such contracts may in general lead to disastrous consequences. As already pointed out the Court, according to Voet and van der Linden, is entitled to take such consequences into consideration . . .

Introductions by friends or relatives, which may indirectly lead to marriage, but are not made for that purpose, are well recognized in private life, but the element of payment is absent, and therefore removes, in my opinion, the temptation of inducing parties to marriage simply with a view to obtain the reward. The matter is certainly not free from difficulty, and it is not without some hesitation that I have come to the conclusion stated above."

Of the writers on the South African law of contract, Christie, *The Law of Contract in South Africa* (1981) p 351 merely refers to the cases as establishing the law they state, while Roberts, in the second edition of *Wessels on Contract* (1951) deals critically with them at Vol 1 paragraphs 530-1. He submits that marriage brokerage contracts are legal in South Africa. Perhaps not surprisingly F P van den Heever in *Breach of Promise and Seduction in South African Law* (1954) adopts the same critical line.

The problem and the approach

This Court is therefore faced squarely with the question whether the contract that we have to consider is or is not enforceable. It is only not enforceable if it is held to be contrary to public policy: a question which has to be decided for this country at this time. In the area of public policy a number of difficult questions arise.

As is said in Cheshire and Fifoot, *Law of Contract* 9 ed p 331:

"Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era.

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There is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents. (*Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co* 1894 AC 535 at 553).

Such flexibility may manifest itself in two ways: by the closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant. So in the nineteenth century it was stated that Christianity was part of the law of England and that accordingly a contract to hire a hall for a meeting to promote atheism was contrary to public policy but fifty years later this view was decisively rejected.

More controversy surrounds the question of whether the courts still retain freedom to recognise new heads of public policy . . .

It is thought however that the least satisfactory answer would be that the law is totally petrified.

A final observation may be made as to the way in which the courts determine the content of public policy. Apart from reliance on previous precedents, this is done by *a priori* deduction from broad general principles. It is not the practice in English courts for the parties to lead sociological practices or economic evidence as to whether particular practices are harmful and it is doubtful to what extent such evidence would be regarded as relevant if it were adduced."

In attempting to formulate the correct approach to a problem of this nature I cannot do better than respectfully follow the careful analysis of LORD ATKIN in *Fender v St John-Mildmay* [1938] AC 1. One would wish to quote a great deal of this judgment but I shall confine myself to some key passages.

The learned LAW LORD at p 12 warns that the doctrine of public policy should be invoked to strike down a contract only in clear cases in which the harm to the public is substantially incontestable.

This is in accord with the accepted principles of Roman-Dutch law which, even more than the English law, tends as a matter of policy to attach importance to the need to uphold the sanctity of contracts made by equal contracting parties. He goes on to say that in some cases where the promise is to do a harmful thing a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The ground is even more slippery when as in *Egerton v Brownlow* (1853) 4 HCL 1 the court has to judge whether a contract has a tendency adversely to affect the public good.

The test he proposes in such a case is whether, taking the class of contract as a whole that is under consideration,

"... the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful ie, contrary to public policy; and that it is likely that they will yield to it ... To avoid a contract it is not enough that it affords a motive to do wrong: it must surely be shown that such a contract generally affords a motive and that it is likely to be effective."

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LORD ATKIN's general principle, which has been fully accepted into Roman-Dutch law - see *Kuhn v Karp* 1948 (4) SA 825 TED at 840 - is that

"... the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds. I think that this should be regarded as the true guide. In popular language, following the wise aphorism of Sir George Jessel cited above, the contract should be given the benefit of the doubt."

Application of the law to the facts

It is important to appreciate at the outset that an agreement to introduce men and women, or even one man and one woman, to each other with a view to marriage cannot of itself be contrary to public policy. The only basis for finding that it could be so is that because of the introduction of monetary reward such a contract has sufficient tendency adversely to affect the

public good.

We have the opinions of three judges of the Court of Appeal in England, DE VILLIERS CJ in the Cape and two judges in the Transvaal (though these with some hesitation) that a contract of the general nature of that we are considering was contrary to public policy in those jurisdictions at the times they were decided. These views must be accorded the persuasive weight due to them, but they are not of course decisive or binding upon us.

First, it is necessary to analyse the contract. It took the form of an application to register with the marriage bureau. The applicant (the respondent) warranted the accuracy of the information supplied about himself in the questionnaire he had completed. He agreed to pay the registration fee of \$85 at once, and a further fee of \$150 in the event of his concluding a marriage with a person introduced by or through the bureau.

This was not therefore a contract under which the appellant undertook to procure a marriage either with a particular person or with some person generally. It was a contract under which the appellant undertook for reward to introduce the respondent to women with a view to marriage. If she did this so successfully that the respondent married one of the women introduced to him she would be entitled to a further fee. This puts the contract virtually on all fours with that considered in *Hurwitz v Taylor (supra)*, though in that case it was the girl's father who had engaged Hurwitz to find a suitable suitor.

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Mr *de Bourbon* for the respondent submitted that MATHEW LJ in *Hermann v Charlesworth (supra)* advanced the most cogent reasons for holding such a contract to be unenforceable. At p 136 he said:

"I think that we ought to be slow to apply to such contracts the term *turpis causa*, or to speak of the plaintiff, in such a case as the present one, as *allegans turpitudinem*.

Here, according to the view that I take, there is nothing analogous to a contract in restraint of trade or a contract to stifle a prosecution. The object of the Courts in discountenancing marriage brokerage contracts and pronouncing them to be illegal has been to prevent reckless and unsuitable marriages. The real nature of such a contract is that it is *nudum pactum*, and the law declares that it imports no consideration, and that no rights arise under it."

With respect I find it difficult to see how the mere introduction of persons for reward with a view to marriage can lead to reckless and unsuitable marriages. Mr *de Bourbon* contended that while it was not suggested that there was anything immoral in such contracts, and while it was not suggested that the appellant's operations were in any way immoral, the whole concept was such that the courts ought not to enforce such an agreement. Whilst there is authority for this proposition it is a very broad submission. I would wish to examine it further before adopting it without analysis.

COLLINS MR in *Hermann v Charlesworth (supra)* said at p 130 that at the root of the question of the illegality of a marriage brokerage contract is the introduction of the consideration of a money payment into that which should be free of any such taint. With respect to the learned MASTER OF THE ROLLS this reasoning overlooks the fact that frequently marriages are

affected by the "taint" of money. Indeed GEY VAN PITTIUS AJ at p 92 of *Hurwitz v Taylor (supra)* said he found it difficult to see how that element alone could make the contract illegal. Marriage settlements, and the provision of a dowry to make a nubile woman more attractive, were then, and still are, accepted as part of everyday life. At that time the fear of an action for damages for breach of promise of marriage could bring pressure to bear upon a reluctant bridegroom to enter into what he might then regard as a loveless and unsuitable union, and such an action is still available in Zimbabwe.

The tendency of a marriage brokage contract such as this to lead to reckless and unsuitable marriages as relied on by MATHEW LJ is difficult to discern. That is no more likely than that a couple might be inclined to live together out of wedlock in order to avoid the extra fee; and that has never been suggested as a substantial reason for striking down such agreements. Further, the very fact that marriage itself is hedged about

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with necessary preliminary requirements and solemnities also virtually nullifies any tendency to recklessness. This also meets the point made by DE VILLIERS CJ in *King v Gray (supra)* that marriage is important because it involves a change of status. This is only another way of saying that marriages should not be hurriedly or recklessly entered into. He also refers to the possibility of the "broker" losing sight of the mutual regard and affection which parties to a happy marriage should have for one another. The facts in *King v Gray (supra)* which I have already set out above, distinguish it from this case and may certainly justify some of the strictures passed by DE VILLIERS CJ on the contract there under consideration. The terms of the contract there may well have had a tendency to tempt the "broker" to encourage the man to marry the wealthier woman, regardless of her suitability as a wife.

In *Hurwitz v Taylor (supra)* it is said at p 93 that it needs little imagination to see that such contracts may in general lead to disastrous consequences. That may perhaps be so in a contract such as that in *King v Gray (supra)*, but I find it hard to imagine such consequences in upholding the contract in this appeal.

It was also said in that case and in *King v Gray (supra)* that the "broker" may be tempted to over-persuade the parties to marry, possibly by illegitimate means, merely to secure his remuneration. In a matter so personal to the parties themselves as a marriage I regard this as most unlikely and certainly not within the test proposed by LORD ATKIN. Any such pressure would never be greater than family pressures coupled with the carrot of a marriage settlement or the like.

It is difficult to escape the feeling that in general the objection to this type of contract has been an emotional and sentimental one. Marriages, it seems to be thought, should be made in heaven, uncontaminated by monetary considerations of any kind. That is basic to the reasoning of COLLINS MR at p 130 of *Hermann v Charlesworth (supra)* and is echoed by DE VILLIERS CJ in *King v Gray (supra)* at p 558 where he says "Few people would care to confess that they owe their marriage to the intervention of a matrimonial agency". But these are not to my mind considerations of public policy. I cannot discern in that approach any compelling reason to

declare such contracts unenforceable.

Giving the best consideration that I can to this problem I cannot but agree with the first sight approach of DE VILLIERS CJ in *King v Gray (supra)* when he says at p 557:

" . . . it would appear as if the practice of employing matrimonial agencies for finding suitable matches rather deserves encouragement, as tending to promote lawful wedlock

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and legitimate increase of population . . .".

I am comforted by the thought that ALVERSTONE LJ, KENNEDY J (then shortly to become a Lord Justice of Appeal) and RIDLEY J had little difficulty in reaching the same conclusion.

My reasons are briefly that the encouragement of marriage is in accord with public policy; that in modern society it is often difficult for people of similar tastes and outlook to meet one another; that there can be nothing contrary to public policy in putting such people in touch with one another even though a fee is charged; that it is far better that this should be done openly with a view to the possibility of marriage rather than of friendship, as those seriously contemplating marriage and not some more transitory association are likely to be attracted; that to charge an additional fee if marriage results is likely to ensure that the agency will at least honour its obligation to effect introduction; and that to charge a large fee only for introduction can result in unequal treatment of those who make use of such agencies.

I would allow the appeal with costs and enter judgment for the plaintiff in the Court below in the sum of \$210 with costs.

It may seem that the reasoning underlying this judgment is directed at considerations of public policy as they impinge upon the ideas of marriage in what might be called the "Western" - as opposed to the traditional - section of our society. The contract in question was of course concerned with persons of a section whose fundamental assumptions were "Western", and for that reason the reasoning was directed in the way it was.

It could be that in plural society what was not contrary to public policy in one section of society might offend against the fundamental assumptions of another section and have to be struck down as contrary to public policy in that section. Such a conflict might very well lead to difficult problems for the courts.

Fortunately, however, there does not seem to be any consideration of public policy which would require such a contract as the present, say in the Shona community, to be treated as unenforceable. It appears from Goldin and Gelfand, *African Law and Custom in Rhodesia* (1975) p 161 that, despite specialised procedures customarily required for the arranging of marriages, these formal preliminaries begin only after the young couple have made their own decision to be married. There would therefore appear

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to be no objection to men and women being able to widen their choice of partner by malting use of a service such as that of the appellant in this appeal. I must stress, though, that this aspect of the case was not dealt with in argument.

Georges JA: I concur in the judgment of the CHIEF JUSTICE.

Baron JA: The written contract signed by the defendant was on a printed form headed "MARRIAGE BUREAU OF RHODESIA". The relevant clause reads:

"That I agree and undertake upon signature hereof to effect payment of the registration fee of \$85 due to the Bureau. I hereby further undertake and agree that in the event of my concluding a marriage with a person introduced by or through the Bureau a further fee of \$150 shall be paid to the Bureau, payment to be made, or instalments to commence, in the month in which the said marriage takes place."

Thus on the face of it the emphasis is on marriage. And that this was indeed the intention of the plaintiff is confirmed by her evidence. She described her bureau as "a service which aims at bringing together people who would not otherwise meet, like-minded people, normally for the purposes of companionship, leading to marriage"; then a few lines later she said: "I think the main objects are alleviating loneliness, bringing people together for the purpose of marriage". She put the nature of the agency beyond doubt in the following two passages:

"I charge a smaller fee on registration, making the provision that if I am successful in finding the person a suitable companion, which leads to marriage, then there is a marriage fee because I prefer to charge the larger fee on success. " (my underlining.)

And then, a few sentences later, comes the following passage. She was asked what aspects she looked at to enable her to assess whether persons were compatible, and she replied:

"Well, initially, of course, the most important thing is whether the person is marriageable, ie whether he or she is already married.

Q. They must disclose that to you? A They must disclose that to me, yes.

Q. And if a person says he is already married? A Then he wouldn't be taken on unless there was a divorce pending within a very short period of time, in which case I would take him on provisionally. Just to assess him whilst we are waiting for the divorce to come through."

(All the foregoing extracts are from the plaintiff's evidence-in-chief).

It is thus plain that the plaintiff was not running what may for convenience be called a simple introduction agency, by which I mean an agency which charges its fees for its introductions and has no financial interest in whether

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or not the persons introduced subsequently marry. Here the agency had a substantial interest - in the event of a marriage a fee nearly double the registration fee became payable. It is self-evident that "success" in the sense of an introduction leading to a marriage represents also considerable financial success. The issue is whether the courts should decline to enforce such

a contract on the ground that it is "contrary to public policy or prejudicial to the public welfare" (DE VILLIERS CJ in *King v Gray* (1907) 24 SC 554 at 557).

Mr *Donovan*, on behalf of the plaintiff, submitted that the almost unanimous view of the Roman-Dutch authorities was that marriage brokerage contracts were not illegal or contrary to public policy, that in *King v Gray* (*supra*) no extensive research into the Roman-Dutch authorities was made, and that although such research was made in *Hurwitz v Taylor* 1926 TPD 81 the Court in that case placed considerable reliance on the views of DE VILLIERS CJ in *King v Gray* (*supra*) as to the consequences flowing from such contracts in concluding that they were contrary to public policy. He submitted that the doctrine of public policy should only be invoked in clear cases in which the harm to the public is substantially incontestable (*Fender v St John Mildmay* [1938] AC 1, *per* LORD ATKIN at p 12, that, the harm to the public of marriage brokerage contracts was not substantially incontestable, and that this Court should therefore follow the views of the Roman-Dutch authorities.

I have great difficulty with the logic of the last step in this argument. As Treitel, *The Law of Contract* 5 ed, points out at p 326, until the eighteenth century such contracts were valid at common law in England also, but because of the potential harm equity prevented their enforcement. The question is not what was or was not regarded as contrary to public policy two or three hundred years ago, but what is so regarded today. This was the view taken by VAN PITTIIUS AJ in *Hurwitz v Taylor* (*supra*) at p 92:

"According to the decision of the Privy Council," (in *Eventual v Evantural* (1874) LR 6, PC 1) "the determination of what is contrary to public policy varies from time to time in accordance with the principles which for the time being guide public opinion. That being the view, - and if I may be allowed to say so, in my opinion, a correct view, - then it follows that this Court is not necessarily bound by the view adopted by the Hooge Raad on this point." (The decision of the Hooge Raad was in 1723).

I respectfully agree. But for the same reason I cannot accept Mr *de Bourbon's* submission that the values of our society were broadly similar to the values of the South African society in 1926, and that the issue in this case is whether there has been a change in those values in Zimbabwe since that time. I think the relevance of the cases in which this question

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has been considered lies in an examination of the factors regarded as potentially harmful to those societies at those times, so that we may assess whether in our view those factors represent potential harm to our society today; and of course we must consider also any other potential dangers which are present today and relevant to our society.

A question with which I have had considerable difficulty is: who are the public with whose welfare we are concerned? How does one approach the problem in a society in which there are several ethnic and cultural groups? This situation obtains not only in a society such as ours, but also in for instance England, where there are several groups who by reason of their ethnic and national origins have cultural traditions different from those of the majority of the population. Where the persons concerned are members of such a group, is the Court entitled to have regard to the culture and traditions of that group in considering the question of potential harm?

Or is the correct approach to consider the potential harm to the society as a whole, but taking into account that that society is not homogeneous? The problem does not appear to have been addressed in England, perhaps because the cases have involved members of the majority group. Nor does the problem appear to have been addressed in South Africa, although the reason there was perhaps because the culture and traditions of the majority of the population were not regarded as relevant. In the view I take, I can leave these problems open. I may say that, notwithstanding the plaintiff's evidence that she had African clients who had been educated abroad and who were looking for wives at their new level, I am frankly unable to envisage a marriage bureau being able to make a living within the African community;

I think such an agency would today be totally foreign to African culture and traditions. But if at some time in the future, contrary to my expectations and belief, such agencies were found to be taking root and being patronised by the African community, that would be the time, not now, to consider the question of potential harm and the public welfare. Be that as it may, I have approached this case from the point of view of the community to which the defendant and the women to whom the plaintiff introduced him belonged.

In *Fender v St John-Mildmay* (*supra*) the action was for damages for breach of promise. The plaintiff had met the defendant, to her knowledge a married man, in 1930; in 1932 sexual intercourse began to take place between them. On 16 January 1933 the defendant's wife obtained a decree nisi for the dissolution of her marriage with him. In February and again in April 1933 the defendant promised to marry the plaintiff when the decree was made absolute; the decree was made absolute in July but the defendant

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refused to marry the plaintiff. The action failed at first instance on the ground that the contract was illegal and unenforceable as being contrary to public policy; the appeal to the Court of Appeal was dismissed by a majority. The appeal to the House of Lords was successful by a majority of three to two (LORD ATKIN, LORD THANKERTON and LORD WRIGHT, LORD RUSSELL OF KILLOWEN and LORD ROCHE dissenting). In discussing the doctrine of public policy LORD ATKIN, having said that a number of cases from which he had quoted illustrated the serious warning that the doctrine should only be invoked in clear cases in which the harm to the public was substantially incontestable, said at p 12:

"But there is no doubt that the rule exists. In cases where the promise is to do something contrary to the public policy which for short I will call a harmful thing, or where the consideration for the promise is the doing or the promise to do a harmful thing a judge, though he is on slippery ground, at any rate has a chance of finding a footing. The contract is unreasonably to restrict a man's economic activities, to procure a marriage between two persons, to oust the jurisdiction of the court. These things are decided to be harmful in themselves. To do them is injurious to public interests. But the doctrine does not extend only to harmful acts, it has to be applied to harmful tendencies."

It is to be observed that included in the contracts which "are decided to be harmful in themselves" is a contract to procure a marriage between two persons. In *Hermann v Charlesworth* [1905] 2 KB 123 (CA) the contract, in its essential characteristics very similar to the contract before us, was described as a contract to procure a marriage. It would seem

therefore that LORD ATKIN in *Fender's* case (*supra*) was in no doubt that the type of contract we are considering was harmful in itself and contrary to public policy. But I am content to examine the present contract by reference also to LORD ATKIN'S "tendency" test; in this regard he said at p 13:

"But assuming, as we must, that the harmful tendency of a contract must be examined, what is meant by tendency? It can only mean, I venture to think, that taking that class of contract as a whole the contracting parties will generally, in a majority of cases, or at any rate in a considerable number of cases, be exposed to a real temptation by reason of the promises to do something harmful, ie contrary to public policy; and that it is likely that they will yield to it. All kinds of contracts provide motives for improper actions, eg benefits deferred until the death of a third party, and contracts of insurance. To avoid a contract it is not enough that it affords a motive to do wrong: it must surely be shown that such a contract generally affords a motive and that it is likely to be effective."

The questions, then, are whether a contract such as that now under consideration generally affords a motive to do wrong; and whether in a considerable number of cases, though not necessarily a majority, the party in question is likely to yield to the temptation.

In *Hermann v Charlesworth* (*supra*) the plaintiff entered into a written

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agreement to pay to the defendant, the proprietor of a paper known as The Matrimonial Post and Fashionable Marriages Advertiser, the sum of £250 in the event of a marriage taking place between herself and a gentleman introduced to her through the influence of the paper. She also entered into a verbal agreement to pay the defendant a "special client's fee" of £52 all but £5 of which was to be returned in nine months if no marriage or engagement took place within that period. After some four months the plaintiff brought an action to recover the £52; she succeeded as to the whole amount. I have some difficulty with this decision on a point which, however, does not concern us in the present case; the Court of Appeal does not appear to have differentiated between the £47 and the £5; it seems to me at least arguable that there were in truth two contracts, and that the contract as to the £5, which seems to have been in the nature of a registration and introduction fee, stood on a different footing from the £47 and had been executed.

That reservation apart, however, the case is important for the reasons on which the decision was based. The contract was regarded as one to procure a marriage, and the court specifically declined to draw the distinction that had been drawn by the Divisional Court between a contract for reward "to introduce a number of persons with a view to promoting a marriage with one or other of them and the case of a contract the object of which is to procure the marriage with a particular person" (*per* MATHEW LJ at P 135). In the course of the discussion of that issue COLLINS MR said at p 130:

"I can see no distinction in this respect between a contract relating to one particular person and a contract that relates to a whole class. Many elements have no doubt entered into the judgments in different cases, but at the root of the question of the illegality of a marriage brokerage contract is the introduction of the consideration of a money payment into that which should be free from any such taint. No doubt, apart from that fundamental objection, other elements may intervene, such as an abuse of the power of influencing possessed by a parent or guardian or other person having that power; but those are illustrations of the mischief, and not the ground on

which the principle is founded."

I find the reference to the taint of a money payment unrealistic and unconvincing; it overlooks the fact that the dowry has from early times been commonplace in many societies and cultures. But in fairness, I think the learned MASTER OF THE ROLLS may perhaps have been speaking of the kind of money payment which had been made in the case before him; certainly he had earlier, at p 129, put the matter on what I respectfully believe to be a proper basis when he said:

"The principle" (on which this branch of the law as to such contracts rests) "is

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clearly stated in *Cole v Gibson* (1 Ves Sen 503), where LORD HARDWICKE in his judgment said: 'To be sure, this Court has been extremely jealous of any contract of this kind made with a guardian or servant, especially, with a servant, in respect of the marriage of persons over whom they have an influence; (and has been justly so; *nothing tending more to introduce improper matches*) . . .'. (my emphasis).

Thus the mischief apprehended was the danger of improper matches, (and the fact that a particular match may have turned out to be proper did not matter). MATHEW LJ expresses similar sentiments at p 136:

"The object of the Courts in discountenancing marriage brokerage contracts and pronouncing them to be illegal has been to prevent reckless and unsuitable marriages."

In *King v Gray* (*supra*) the plaintiff was the editor of a paper called the Matrimonial Post. The contract under consideration provided for payment of an introduction fee which increased according to the income of the person to whom the client was introduced; in addition a sum of £10 was payable in all cases of marriage, but if, as DE VILLIERS CJ put it, "the fortune of the lady wedded exceeded £400", a further two and a half per cent was payable on the excess. The magistrate, on the authority of *Herman v Charlesworth* (*supra*), held that the contract was contrary to public policy and unenforceable. On appeal DE VILLIERS CJ, sitting alone, discussed *Hermann v Charlesworth* (*supra*) and concluded that-

"There can be no doubt, therefore, that under the English law a contract such as that now in question would not be enforced, and the question remains whether under our own law the plaintiff is entitled to relief."

Thus DE VILLIERS CJ did not rely on *Hermann v Charlesworth* (*supra*); he seems rather to have examined the case to see whether the English law, on which the magistrate apparently relied, was what the magistrate said it was. Having confirmed that point, DE VILLIERS CJ examined shortly the position under the Roman law and certain statements by Voet and expressed his views as to the enforceability of marriage brokerage contracts under South African law. Referring to a passage in Voet he said at p 557:

"This passage shows that in his time questions affecting marriage were regarded as matters of public right, and that any interference with the freedom of marriage was treated as an injury to the public."

And later on the same page he set out at some length his objections to the recognition of marriage brokerage contracts:

" . . . if marriage could be regarded as a contract, and nothing more than a contract, I should see no objection to

the employment of brokers to bring about engagements, or to give introductions with a view to such engagements. But over and above the contract

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of marriage is the *status* which the contract confers on those who have entered into it. That status is a matter of important public concern, involving as it does the relations of the parties, not only to each other, but towards the offspring of the marriage, and even towards the State. So important is the maintenance of that *status* considered by the law that the parties themselves cannot by agreement put an end to it. In bringing about an ordinary contract between two parties, a broker has only to consider the advantage of the one who employs him, and if unsuitable or ill-advised contracts are thus made, it is generally the parties alone who suffer, and it is competent for them to agree upon annulling such contracts. If the broker is the means of bringing about an ill-assorted marriage, the act is irrevocable unless the State intervenes, and by means of a judicial decree puts an end to the contract and its consequent *status* on special grounds allowed by law. By making the possession of wealth the only consideration, the broker would naturally lose sight of the still more important matter of mutual regard and affection, which are so essential to the peace and happiness of family life. Then there is the temptation for the broker to use illegitimate means to attain his end. His sole object is to bring about a match, and earn his commission."

In *Hurwitz v Taylor (supra)* VAN PITTIUS AJ examined the Roman-Dutch authorities in depth. But as I have mentioned above, he adopted the view expressed in *Evantural v Evantural (supra)* that the determination of what is contrary to public policy varies from time to time in accordance with the principles which for the time being guide public opinion, and that he was not necessarily bound by the views of the Hooge Raad in 1723. He then proceeded to set out the considerations which he regarded as important. He referred to *King v Gray (supra)*, citing shortly the points made by DE VILLIERS CJ which I have cited at length above; he then continued at p 92:

"That opinion, coming from so eminent an authority, is of great weight on the question of public policy, even though as already pointed out the Roman-Dutch authorities were, so to say, not referred to. That decision is based on the broad principles as to what the Court considered to be contrary to public policy or prejudicial to public welfare, and I have not been able to find a single case in our South African decisions where a claim on such a contract has been enforced by the courts."

He then points out that the marriage broker is paid by results and that "it needs very little imagination to foresee that such contracts may in general lead to disastrous consequences." I agree. It seems to me that the consequence that the marriage should prove to be unsuitable is highly undesirable, and if children should be born of such a marriage the consequences can truly be described as disastrous.

Van Pittius AJ: pointed out also that this class of contract was not recognised by the foremost countries of the world and had been reprobated by the Courts of England, America and France, and that the German code of 1900 provided that no obligation is created by such contracts; he said that the court is entitled to take cognisance of the views held in those countries

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in deciding whether such contracts are contrary to public policy.

It seems to me that the considerations taken into account by the courts in the cases I have cited are as real today as they were when the cases were decided. In particular, it cannot seriously be suggested that the courts in Zimbabwe today should regard "improper matches" or unsuitable marriages less seriously than did the courts of England and South Africa one hundred or fifty years ago. The real question is the second of those I posed earlier, namely whether the kind of contract we are here considering is likely to increase the danger of unsuitable marriages in a considerable number of cases.

DE VILLIERS CJ in *King v Gray* (*supra*) drew attention to the temptation for the broker to use illegitimate means to attain his end. VAN PITTIUS AJ in *Hurwitz v Taylor* (*supra*) cited that dictum, and later referred to the element of payment being absent where introductions are by relatives and friends, thereby removing "the temptation of inducing parties to marriage simply with a view to obtain the reward". That these are real temptations and dangers is confirmed by the evidence of the plaintiff in this case. She agreed that someone else might "get up to some sort of chicanery to bring about success", but said that it depended on the common sense of the individuals concerned (whether she meant the agency or the clients was not explained). In answer to a question by the magistrate as to whether a person in a position such as hers might abuse the system and profit immorally she said:

"I don't quite understand the inferences, all I know is that there have been other bureaux to my knowledge, who have operated differently and very unscrupulously, but they didn't operate the way that I do."

But, of course, the question is not whether this broker or that broker operates honestly; there was no suggestion by the defendant that the plaintiff behaved other than honestly. The question is whether in this kind of contract, under which the major portion of the broker's fees are earned if a marriage takes place, there is not a built-in temptation to encourage a marriage. And I do not think that the encouragement need necessarily be by illegitimate means in the sense of conscious pressure or inducement. In the nature of things people who go to marriage bureaux are likely to be shy or lonely or both; they will have few people with whom they can discuss delicate matters or from whom they can seek advice. They are likely to treat a person such as the plaintiff as if she were a marriage counsellor; they will already have discussed themselves and their circumstances with her in great detail. So if they are at all uncertain as to whether they should marry the

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VAN PITTIUS AJ

person to whom they have been introduced, what would be more natural than to go to the broker to discuss their reservations? And what would be more natural than for the broker to seek to allay those reservations, perhaps unconsciously and in no more "illegitimate" a fashion than by "pushing her wares"? It is in this sense, simply of encouragement, that I read LORD ATKIN'S "motive to do wrong".

That these are real possibilities is clear from the record in this case. On the contract put in by the plaintiff as an exhibit there appears a handwritten note "To marry 6/9/80"; the plaintiff also said in evidence that she asked for her marriage fee before the marriage because she was aware that it was to take place. It is clear that she was in touch with at least one of the parties

before the marriage. And it is to be observed also that the marriage proved unsuitable; it took place on 6 September 1980 and had been dissolved by the time of the hearing in May 1982.

To summarise my conclusions:

(1) There is no distinction between a contract to promote a marriage with one particular person and a contract to promote a marriage with one or other of a number of persons; both are therefore contracts to procure a marriage, and the present is such a contract.

(2) As recently as 1938 no less an authority than LORD ATKIN, in *Fender v St John-Mildmay* (*supra*), described such contracts as "harmful in themselves; to do them is injurious to public interests". I can see no basis for taking a different view in 1983.

(3) But even if the present contract falls into the category to which LORD ATKIN'S "harmful tendency" test must be applied, in my view such tendency is present; in my view, where a contract provides that the major portion of the broker's fee is payable only if a marriage takes place there is a built-in temptation to encourage a marriage, and this temptation is likely to be effective in a considerable number of cases.

I would dismiss this appeal.

Winterton, Holmes & Hill, appellant's legal representatives.

A Ebrahim, respondent's legal representative.

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CONE TEXTILES (PVT) LTD v REDGMENT & OTHERS 1983 (1) ZLR 88 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Fieldsend CJ, Georges JA & Beck JA

2, 3, 4, & 25 February 1983

Flynote

Arbitration - misconduct of arbitrator - bona fide mistakes of fact or law do not amount to misconduct - necessary to establish total lack of judicial capacity - arbitrators wrongly joined as parties - costs awarded in their favour on attorney and client basis.

Headnote

The grounds on which an arbitrator's award can be set aside on review are limited to "misconduct" or the improper procurement of the award. "Misconduct" does not include finding a fact without adequate evidence or *bona fide* mistake either of fact or of law. A mistake would only amount to misconduct if it is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator. Similarly, before a review

court would interfere with an arbitrator's award on the ground that there was no evidence to support his finding, it would be necessary to show that the lack of evidence established a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed by the parties to adjudicate.

It is not the practice to make an award of costs against an arbitrator unless the facts are wholly exceptional (e.g. fraud on the part of the arbitrator, collusion or the like). Persistence in a claim against an arbitrator, in the absence of proof to support allegations made of misconduct on the part of an arbitrator, is indicative of recklessness and is sufficient to entitle the court to grant costs to the arbitrator on an attorney and client scale.

Cases cited:

Clark v African Guarantee and Indemnity Co Ltd 1915 CPD 68;

GKN v Matbro [1976] 2 Lloyd's Rep 555;

Dickenson & Brown v Fisher's Executors 1915 AD 166;

McKenzie NO v Basha 1951 (3) SA 783 (N);

Concrete Construction (Pty) Ltd v Keidan & Co (Pty) Ltd 1955(4) SA 315 (AD)

Port Sudan v Chettiar [1977] 1 Lloyd's Rep 166.

C S Grossman, with him *J B Colegrave*, for the appellant.

A P de Bourbon, for the first and second respondents.

I A Donovan, for the third respondent.

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Judgment

Fieldsend CJ: In the 1970's Cone Textiles (Cone Textiles (Private) Limited) decided to build a large textile factory on the outskirts of the capital. An architect, Mandlestam, and consulting structural engineers, Brunettes, were appointed, plans drawn and contractors engaged. The project was substantial with a total cost estimated at close on \$2M, and the area of the factory some 4 acres.

Pettigrews (C Pettigrew (Private) Limited) were appointed contractors and a number of subcontractors were nominated, including Stewarts and Lloyds for the structural steel work, Lunneys for the roof sheeting and Rhodesian Corrosion control (RCC) for the roof flashings.

There were serious problems with the roof of the factory which it was accepted were in part design faults for which Mandlestam was responsible. He was dismissed by Cone Textiles and replaced by another architect, Baeck. There were other complaints about the building and as to the payment to which Pettigrews were entitled, the main one of these relating to the floor.

Cone Textiles and Pettigrews have long been at arm's length as the numerous decisions of the

courts since 1976 show. More specifically their disputes were referred to arbitration in 1978 in which Pettigrews mainly succeeded. This award was, however, set aside on appeal on the ground of excess of jurisdiction by the arbitrator, though the merits of his award were not dealt with.

In November 1981 the disputes were referred to a panel of two arbitrators, Redgment and Sandison. Their award, given in December 1981, was largely in Pettigrews' favour. It was challenged unsuccessfully on review before McNALLY J. It is against this decision that Cone Textiles now appeals.

The issues argued both before the Court below and before us fell fortunately within a fairly narrow compass. They concerned the arbitrators' findings in regard to (a) the floor and (b) the roof, and in addition (c) Cone Textiles' claim against the arbitrators for costs: this was refused by the Court below with attorney and client costs.

(a) *The floor*

Originally the major complaint about the floor was that it was not up to strength. This was considered at the original arbitration and found not to be substantiated. It was not persisted with in the second arbitration.

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The other complaint concerned the levelling of the factory floor. This was considered at the first arbitration and the arbitrator found that an area of some 25m² was improperly laid. He assessed the amount by which Pettigrews' charges should be reduced to be \$162,50.

At the second arbitration further evidence was led about the poor levelling of the floor, particularly by Mr Moores. He found that 75% of the total floor area was not level within the requirements of the specification which called for a tolerance of 3 mm under a 3 metre edge. The issue before the arbitrators was what amount should be deducted from the contract price in respect of the defects that they found proved.

Cone Textiles' complaint is that the arbitrators reduced the amount by only \$162,50. This it was said was insupportable on the evidence and disclosed such gross incompetence on the part of the arbitrators as to constitute legal misconduct. This it was said justified the Court below and this Court in setting aside this part of the arbitrators' award.

(b) *The roof*

It was common cause that the roof of the factory was unsatisfactory, that it leaked and that it had to be continually repaired to keep out the water.

The first point the second arbitrators were called upon to decide was the apportionment of responsibility for the leaking roof between design faults and constructional shortcomings. They decided that 75% was due to design faults and 25% due to constructional shortcomings. This figure is accepted for the purposes of this appeal.

The second point that the arbitrators were asked to decide was what amount in money should be deducted as the cost of making good the constructional faults. It was agreed that if this did not exceed \$30 000 (accepted for present purposes as the cost of the temporary repairs that had been effected) then the arbitrators should make an award. The arbitrators found that no loss in excess of \$30 000 had been sustained and fixed the figure for compensating for the roof at that sum. This figure is attacked by Cone Textiles as being insupportable on the evidence and as indicative of gross incompetence by the arbitrators, warranting setting aside of the award.

The third point referred to the arbitrators on the roof question was whether

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Pettigrews were liable for the defective work of the subcontractors Lunneys, Stewarts and Lloyds and RCC. In the event Pettigrews accepted liability for Lunneys' workmanship, and the arbitrators found they were not liable for that of Stewarts and Lloyds or RCC.

This decision again Cone Textiles attack on the basis that it was insupportable on the evidence and that the arbitrators were guilty of legal misconduct.

(c) *Costs against the arbitrators*

The founding affidavit in the Court below was made by a director of Cone Textiles, Joseph Pitluk. The following allegations are made against the arbitrators in the affidavit -

- (i) they misconducted the proceedings in ruling that Cone Textiles could not reclaim in the arbitration the sum of \$50 000 paid by them in consideration of accelerated completion by Pettigrews (this fell away before us);
- (ii) they misconducted the proceedings in allowing evidence of Cone Textiles' profits to be given;
- (iii) they grossly misconducted the proceedings in failing to give Cone Textiles the opportunity to lead evidence of loss sustained by it due to defective levelling of the floor;
- (iv) the sum of \$162,50 was so grossly absurd for the loss sustained due to the defective floor that no reasonable arbitrator could have arrived at it;
- (v) the whole award was one that no reasonable arbitrator could have arrived at, and the arbitrators must have refused or failed entirely to apply their minds to the issues;
- (iv) in failing to find whether the contract had been completed, their failure to apply their minds constituted a gross irregularity and resulted in gross injustice;
- (vii) to avoid having to make any findings on the cost of remedying defective work by the subcontractors they deliberately found that the total cost of remedying an the

defects amounted to \$30 000 and acted arbitrarily;

- (viii) their apportionment of responsibility for the \$30 000 between the three subcontractors was completely arbitrary and illogical; and they wrongfully endeavoured to avoid making findings on issues and to avoid having to hear further evidence; and
- (ix) in finding that Pettigrews were not responsible for defective work by Stewarts and Lloyds and RCC they misconducted the proceedings in failing entirely to direct their minds to the issue, and their finding was so grossly unreasonable as to indicate the lack of judicious (*sic*) and impartial approach.

In a replying affidavit Pitluk said that he accepted without reservation that neither arbitrator had any bias, malice or interest in the cause and had never alleged that. The claim for costs was, however, persisted in in the Court below and even in this Court though without quite the same fervour. Alternatively it was contended that the arbitrators should not have

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been awarded costs on the attorney and client scale.

The law

There was little dispute as to the law. The starting point is that the parties have chosen to go to arbitration instead of resorting to the courts, they have specifically selected the personnel of the tribunal, and they have agreed that that award shall be final and binding: *Clark v African Guarantee and Indemnity Co Ltd* 1915 CPD 68 at 77. It is for these reasons that a court will always be most reluctant to interfere with the award of an arbitrator.

It is true that there is a difference in wording between the South African Act and s 12 of our Arbitration Act [Cap 12], but I do not think that difference is of any real importance. The South African Act gives a court the power to set an award aside where an arbitrator has misconducted himself or an award has been improperly procured. Our section gives that power where an arbitrator has misconducted the proceedings or the award was improperly procured. The English Act (s 23 of the Arbitration Act 1950) gives the power where the arbitrator has misconducted himself or the proceedings. *Russell on Arbitration* 20 ed p 364 gives the history of the English section. The power to set aside for "misconduct" generally was introduced by the 1889 Act; the reference to "misconduct of the proceedings" was new in 1934, but is said to have been "in substance declaratory".

Although *Russell* indicates that the term "misconduct" in the section would appear to be used in its widest sense, the discussion which follows shows that, with limited exceptions peculiar to English law such as an admitted mistake of law or fact by the arbitrator and an error of law on the fact of the award, the courts in England do not follow a very different line to the courts in South Africa. For example, finding a fact without adequate evidence is not misconduct in any event: *Russell* p 421. And as LORD DENNING MR said in *GKN v Matbro* [1976] 2 Lloyd's Rep

555 at 575:

"The weight of evidence and the inferences from it are essentially matters for the arbitrator. I do not think that the awards of arbitrators would be challenged or upset on the ground that there was not sufficient evidence or that it was too tenuous or the like."

It is therefore safe to follow the line that has been established by a case such as *Dickenson & Brown v Fisher's Executors* 1915 AD 166. In the words of SOLOMON JA at p 176:

"Now if the word 'misconduct' is to be construed in its ordinary sense it seems to me impossible to hold that a bona fide mistake either of law or of fact made by an

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arbitrator can be characterised as misconduct, any more than that a Judge can be said to have misconducted himself if he has given an erroneous decision on a point of law. Nor can I conceive of a Court removing an arbitrator for misconduct merely because he has made a mistake whether of law or fact. Cases may no doubt arise where, as was said by the late CHIEF JUSTICE in the case of *Landeshut v Koenig* (20 SCR, at p 34), 'the mistake is so gross or manifest that it could not have been made without some degree of misconduct or partiality on the part of the arbitrator.' But in such cases the mistake would merely be evidence to show that there had been misconduct and if an award were set aside in such circumstances it would really be on the ground of misconduct and not of mistake. It may be also that an arbitrator has been guilty of the grossest carelessness and that in consequence he had come to a wrong conclusion on a question of fact or of law, and in such a case I am not prepared to say that a Court might not properly find that there had been misconduct on his part. But in ordinary circumstances where an arbitrator has given fair consideration to the matter which has been submitted to him for decision, I think it would be impossible to hold that he had been guilty of misconduct merely because he had made a bona fide mistake either of law or of fact."

And in *Clark v African Guarantee and Indemnity Co Ltd (supra)* (coincidentally decided on precisely the same date as *Dickenson's case (supra)* GARDINER J said at p 78:

"No case in our Courts was quoted in argument in which an award was actually set aside on the ground that there was no evidence to support the arbitrator's finding, and I am satisfied that, before the Court would interfere, it would be necessary to show that the lack of evidence established a total want of that judicial capacity which is required even of an ordinary fair-minded layman appointed to adjudicate by the parties to a dispute. If the arbitrator has taken evidence and has fairly considered it, the Court will not set aside the conclusion he has come to upon that evidence, because he has drawn inferences which, though possible, are not acceptable to the Court."

See too *McKenzie NO v Basha* 1951 (3) SA 783 (N).

The approach outlined above was adopted by McNALLY J in the Court below, it was not suggested to us that he was wrong, and that is the approach we have to apply now to each of the main issues in turn.

The floor

It was clearly established on the evidence that the level of the floor did not measure up to the tolerance in the specification. Moores' evidence was that only 20% to 25% of the floor was within the limits of the specified tolerance. Mr Grossman's argument was that Pettigrews had not provided the floor it contracted to supply and that accordingly there had to be a

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financial adjustment to compensate for its defective nature.

The arbitrators awarded the sum of \$162,50, saying:

"We find and direct that the work executed was defective in that there was a failure to level the floor to the specifications required, but that this failure occasioned no loss greater than \$162,50 to the Respondent."

This, I am satisfied, is a clear finding that despite the failure to meet the specification exactly no financial adjustment was required other than in that sum.

Mr *Grossman's* attack on the award is twofold: First, he says that the remarkable coincidence between the sum awarded and the sum fixed in the first arbitration for the re-laying of 25m² of defective flooring is such a coincidence as to show that the arbitrators could not have taken into account the evidence of Moores. I do not think that such a conclusion is warranted. It is far more likely that the arbitrators were impressed with the argument presented to them that there was no basis on which Cone Textiles were entitled to an award for the cost of re-laying the floor as a whole. All the evidence was that this was unnecessary and in any event a quite impractical proposition in a working factory. There was certainly evidence upon which the arbitrators could reach the conclusion that so far as the floor as a whole was concerned there was no call for an adjustment in the amount due to Pettigrews.

Secondly, Mr *Grossman* argues that the replying affidavit of the arbitrator Sandison shows that the arbitrators had entirely misunderstood the evidence and the issues. Sandison stated that Pettigrews had performed the work they were required to do in terms of the contract and that the only area of floor which was defective was a portion of a passageway measuring 25m², the cost of repairing which was \$162,50. He added:

"We concluded the Second Respondent had done the work they were told to carry out and that the defects were not attributable to them.

Evidence was led that the architect and the Clerk of Works accepted the work on the floor area and we made our own inspection thereof."

I can understand Mr *Grossman's* concern at this passage which, on the face of it seems to conflict with the award. But this affidavit reflects the view of the non-legal arbitrator. It is, I think, capable of bearing the meaning that the only *substantially* defective area of floor was the 25m² in the passageway, and that the other defects were defects for which Pettigrews did not have to make any adjustment. Such a reading is consistent with the passage in the award, and is certainly supportable on the evidence before the arbitrators.

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McNALLY J decided that the arbitrators were justified in holding that the failure to level the floor to the contractual tolerances did not warrant any adjustment in the amount due to Pettigrews. I find it unnecessary to do more than say that his conclusion was justified for the reasons that he

gives.

There is no ground for interfering with the arbitrators award in regard to the floor.

The roof

The roof gives rise to a more complex problem. It was common cause that the design of the roof was quite unsuitable and would inevitably and regardless of workmanship have resulted in the leaking of rainwater into the factory. There was evidence that even with perfect workmanship the roof as designed had a very limited life, put by one witness as low as six years. It was also established that the workmanship of Lunneys, Stewarts and Lloyds and RCC was not up to standard and was responsible in some degree for the leaking, and the defective nature of the structure.

Again the issue before the arbitrators was whether there were defects in the roof due to bad workmanship for which Pettigrews were responsible, and if so what deduction should be made from the contract price because of such defects. It was further accepted that if it was found that no more should be deducted from the contract price than the amount expended by Cone Textiles in patching the roof (finally agreed at \$30 000) the arbitrators should make a final award. If the sum was more than \$30 000 then it was agreed that the arbitrators would hear evidence on the amount at a subsequent hearing.

Evidence was led in great detail of the defects in the roof from which it was clear that as a roof to provide a proper cover for the factory floor it was quite unsatisfactory. There was no dispute as to the extent that its condition was due to design faults as against poor workmanship. The arbitrators apportioned the responsibility as being 75% due to design faults and 25% to poor workmanship, and before us this was not challenged.

Mr *Grossman's* main contention was that that in fixing a figure of \$30 000 as the total amount to be deducted from the contract price for the roof the arbitrators were so wrong that they were guilty of gross incompetence. There was evidence that the only real solution to the whole problem was

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to erect a new properly designed roof. This would have cost something more than \$400 000, and this he contends is more nearly the figure that the arbitrators should have found.

The fallacy underlying this argument is that the arbitrators were not asked to determine what would be the cost of producing a properly designed and constructed roof. They were asked to determine what should be deducted from the contract price for the roof that Pettigrews undertook to build, having regard to the fact that the roof was not properly designed. The arbitrators were therefore not to be concerned with how much a proper roof would have cost. They were concerned with the extent to which bad workmanship had contributed to the defective condition of the roof actually erected over the factory.

This roof had already lasted longer than one of the estimates given for its probable life, having

regard to the design defects. It was therefore not an unreasonable approach to say that the amount to be deducted from the contract price was the amount spent in remedying the defects in this badly designed roof that were attributable to defective workmanship. It would have been quite wrong to have taken as a starting point the cost of producing a properly designed roof and attributing 25% of that to the debit of the contractors. Pettigrews agreed to build the roof as designed, not a properly designed roof.

In these circumstances it was not an easy task to determine the liability of the contractors, as the learned judge below said. It is circumstances such as this which make arbitration the best way to determine these difficult and technical disputes. None of Mr *Grossman's* detailed arguments convince me that the arbitrators adopted an unacceptable approach to the issue before them. The learned judge below has referred in detail to the arguments in support of the arbitrators' conclusions and it would be superfluous to cover them again. Suffice it to say that there was evidence upon which the arbitrators could honestly and fairly have reached the conclusion they did.

The final point on Pettigrews' liability for the defective roof turns upon whether they were liable for the bad workmanship of Stewarts and Lloyds and RCC, two of the subcontractors. These firms were both nominated subcontractors, and normally Pettigrews would have been responsible for any of their defective workmanship.

In the arbitration (indeed in both arbitrations), in the Court below and

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before us reference was made by both parties to documentary evidence on this issue. Some pointed to the liability of Pettigrews for the work of these two subcontractors, some pointed to there not being liability. Stress was laid for Pettigrews on the special nature of the roof on this large expanse of floor space, on the specialised nature of the work, and on the exercise of specialised supervision by the consulting structural engineers, Brunettes.

It may be that a court of law would not lightly conclude that a contractor is not liable directly to a nominated subcontractor, and not directly responsible for a subcontractor's defective workmanship: *Concrete Construction (Pty) Ltd v Keidan and Co (Pty) Ltd* 1955 (4) SA 315 (AD). But circumstances may arise where matters are taken out of the main contractor's hands so that his responsibility comes to an end. This is what the arbitrators found after hearing all the evidence in this case. This is apparent from their finding that Pettigrews were not responsible for the defective work of Stewarts and Lloyds and RCC.

The arbitrators, as appears from Sandison's affidavit, directed their minds to the issues and cannot be said to have reached a grossly unreasonable conclusion. I see no reason for interfering with their conclusion, nor with those of the learned judge below who considered this aspect.

Costs against the arbitrators.

As to Cone Textiles' claim for costs against the arbitrators I cannot do better than refer to the

words of DONALDSON J (as he then was) in *Port Sudan v Chettiar* [1977] 1 Lloyd's Rep 166 at 179, quoted in *Russell on Arbitration* at p 445:

"So far as costs are concerned, it is not the practice to make an order against an umpire or arbitrator unless the facts are wholly exceptional, eg fraud by the arbitrator, or he takes an active part in the proceedings as the parties to the arbitration. I personally have no recollection of any such order ever being made. Merely attending by Counsel, as was eventually done in this case, or giving the Court information which is thought to be helpful would not in any way involve the arbitrator in any risk or liability or the costs of the proceedings. Indeed, in appropriate cases, it would be more likely to earn the appreciation of the Court which I should like to express in relation to the courtesy of the board in attending these proceedings as they did. In a case in which a party impugns the conduct of arbitrators in other than the most technical respects and the complaint fails, the arbitrators will be entitled to an order for costs if they appear. "

And of course, having been responsible for joining the arbitrators, Cone Textiles cannot complain that they appeared in the proceedings to defend themselves against the imputations against them and the claim for costs.

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So far from being entitled to costs it is right that Cone Textiles should pay the costs of the arbitrators in any event.

The remaining question is the scale upon which they should pay these costs. I have already set out the allegations made against the arbitrators, and I find Pitluk's disclaimer of the seriousness of those allegations somewhat hollow. It must be clear to any lawyer that costs will be awarded against an arbitrator only in most exceptional circumstances, *Russell op cit* at p 451, as where his action is such as to warrant his removal for collusion or the like. Persistence in the claim was therefore indicative at least of recklessness.

It must also be remembered that an arbitrator cannot be compelled to give reasons for his award, and the device of joining an arbitrator by claiming costs against him could be used as a device to secure some reasons on which to base an attack on the award. But this consideration was not relied upon by the arbitrators as a basis for seeking attorney and client costs. Mr *de Bourbon* restricted his argument to the serious allegations made and the reckless nature of the claim for costs in the light of the authorities.

These factors alone were in my view sufficient to entitle the learned judge below to exercise his discretion to grant costs on an attorney and client basis and I would not interfere with that discretion.

In conclusion so far as Pettigrews are concerned I would dismiss Cone Textiles' appeal with costs. So far as the arbitrators are concerned I would also dismiss the appeal with costs together with the costs of the application for leave to appeal. It was not contended that the costs of the arbitrators in this appeal should be awarded on the attorney and client scale.

Georges JA: I agree.

Beck JA: I agree.

Byron Venturas & Travlos, appellant's legal representatives.

Gill, Godlonton & Gerrans, respondents' legal representatives.

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MINISTER OF HOME AFFAIRS v BICKLE 1983 (1) ZLR 99 (SC)

Court Supreme Court, Harare

Fieldsend CJ, Baron JA & Georges JA

18 & 25 February 1983

Flynote

Practice and Procedure - proceedings brought by person temporarily outside court's jurisdiction - person there because of fear of unlawful administrative action by Minister - not thereby a fugitive from justice.

Headnote

The respondent had issued notice of motion proceedings against the appellant Minister, following an order made by the Minister declaring the respondent's property to be forfeited to the State in terms of the Emergency Powers (Forfeiture of Enemy Property) Regulations, 1981 (SI 925D/1981). The proceedings sought to challenge the validity of the order.

The respondent had in late 1981 committed certain offences under the Immigration Act and the Customs and Excise Act. He was also alleged to have at the same time contravened the Official Secrets Act, by bringing into Zimbabwe two foreign agents. He was arrested on these charges in February, 1982 and held incommunicado for 54 days, then remanded in custody until his trial in May, 1982. At the trial he was acquitted on the charges under the Official Secrets Act but convicted of the other offences and fined \$3 000. Following the trial he openly and lawfully left Zimbabwe for South Africa for a holiday. While he was there the Minister made the order referred to.

The respondent, a native and citizen of Zimbabwe, had every intention of returning to Zimbabwe but did not do so because of fear of the Minister unlawfully making a detention order against him. The Minister, in seeking to justify the forfeiture order, had at least justified the respondent's fear of detention should he return.

The Minister took the preliminary point that the respondent had no right to approach the court for relief because he had put himself physically beyond the jurisdiction of the court and was therefore a fugitive from justice. GUBBAY J decided this point against the Minister, who appealed to the Supreme Court.

Held, that if the courts are to fulfil their obligations under the Constitution they cannot, save in most exceptional circumstances, deny an aggrieved person access to them. They should not deny a person an opportunity to seek their protection unless he has, by his conduct, put himself outside the processes of the court or unless it is plain that the contempt of which he may be

guilty itself impedes the course of justice.

Held, further, that as no process, either judicial or executive, had been issued against the respondent, he could not be held in contempt either of any process or of the law.

Cases cited:

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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 Mosheshe 1973 (3) SA 962 (AD);

S v Molotsi en Andere 1976 (2) SA 404;

S v Neill 1982 (1) ZLR 142;

Maluleke v Dupont NO & Another 1967 (1) SA 574 (RAD); 1966 RLR 620;

Herf v Germani 1978 (1) SA 440 (T);

Mulligan v Mulligan 1925 WLD 164;

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA);

Hawkins v Hall (1856) 1 Bear 73; 41 ER 109;

Davis v Trevanion (1845) 14 CJ QB 138.

F C Blackie SC, with him *C S Grossman*, for the appellant.

J C Kriegler SC, with him *C W Jordaan*, for the respondent.

Judgment

Fieldsend CJ: Colin Bickle has instituted proceedings against the Minister of Home Affairs by way of notice of motion supported by affidavit. The proceedings arise from an order made by the Minister on 15 October 1982 under s 3 of the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981(SI 925D/1981), declaring Bickle's property to be forfeited in terms of the Regulations. That section purports to empower the Minister "if it appears to [him] that any person is an enemy of the State" to declare that the property of that person shall be so forfeited.

Bickle seeks to challenge the validity of the order on two grounds -

- (a) that the Regulations are invalid and of no force or effect, because they conflict with the Constitution of Zimbabwe and because they were not properly made in terms of the Emergency Powers Act [Cap 831]; and
- (b) that the Order issued under the Regulations is invalid and of no force or effect because it was improperly

made. The Minister denies the premises upon which each of these grounds are based, and maintains that the Regulations are valid and that his order was properly made under them.

This appeal, however, is not concerned with the main dispute. The Minister has taken the preliminary point that Bickle has no right to approach the Court for relief because he has put himself physically beyond the jurisdiction of the Court, and is to be treated as what the law knows as a fugitive from justice. This preliminary point, which, if successful, could put a stop to the proceedings, was decided by GUBBAY J against the Minister. It is against his decision that this appeal is now brought.

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FIELDSEND CJ

It is necessary to set out the background to the case in a little detail.

On 28 November 1981 Bickle flew his private plane from Zimbabwe to South Africa and back, admittedly committing three offences against the Immigration Act and two offences against the Customs and Excise Act. The customs offences involved the unauthorised export of a quantity of firearms and the illegal import of 12 bottles of whiskey. The Immigration Act offences involved leaving Zimbabwe at a place not defined as a port of exit and conveying another person on the same journey and conveying two other persons into Zimbabwe through a place not being a defined port of entry. He pleaded guilty to all these offences (and another offence under the Immigration Act on 12 December 1981) and on 27 May 1982 was sentenced to a total fine of \$3 000, which he has paid.

He was also charged with contravening s 7(c) of the Official Secrets Act [Cap 97] in that on 28 November 1981, being aware that the two persons he brought into the country on his return journey from South Africa were foreign agents or had been in communication with a foreign agent, unlawfully failed to report their presence in Zimbabwe to a police station. On this charge he was acquitted on 24 May 1982 on the basis that he did not know that either of these two persons was a foreign agent or had been in communication with a foreign agent.

Bickle was first detained by the police and members of the CIO in February 1982 and held incommunicado for 54 days. He was then remanded in custody without being granted bail until he was eventually released on 27 May 1982. During his detention he was interrogated at length by members of the police and the CIO with whom he said he co-operated fully. This interrogation ceased after 5 weeks, leaving him with the impression that his interrogators were inclined to accept his answers and explanations. This, he has said, he believes was confirmed by the fact that his trial proceeded on the basis of an agreed statement of facts, which included the admitted fact that he did not have actual knowledge of the fact that either of the persons he brought back from South Africa was a foreign agent or had been in communication with a foreign agent.

Bickle has said in his affidavit that as a result of the period he had spent in detention and custody and the strain of the criminal trial he was mentally and physically exhausted and decided to go abroad for a holiday. He left openly and lawfully on 10 June 1982 intending to visit his daughter and friends in Natal, hoping to return to Zimbabwe when his legal advisers

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had, as he put it, cleared the air with the Minister. He was born in Zimbabwe, is a citizen of Zimbabwe, and regards the country as his permanent home. He says that he has every intention of returning to Zimbabwe and that it is only the fear of unlawful detention which prevents him from doing so.

It is unnecessary to go into any detail as to the basis for the respondent's fear of unlawful detention. He has set out the facts upon which he bases his fear. These facts may well not go so far as to show that he has a justifiable fear that he will be illegally detained. But they do establish that he may well have a fear that he will be detained for reasons which he does not think would be warranted. The Minister clearly has strong suspicions against Bickle. He has made it clear in his affidavit and in a statement in Parliament that he is unhappy about the magistrate's decision in the criminal case, that he does not accept that Bickle was unaware that the persons who flew in were anti-Government persons or that any reasonable person could have concluded that he was unaware of that. He adds that he wished Bickle to see him or a senior police officer to see if he could explain or dispel this strong suspicion which was confirmed by his failure to see the police and by his departure for South Africa. Indeed, in seeking to justify the forfeiture order, the Minister has at least justified Bickle's fear of detention should he return.

It is on these facts that we have to decide whether Bickle is disentitled from bringing his application before the Court.

There are numerous cases in South Africa, and one in our High Court, in which a convicted person who has either escaped from custody or had estreated his bail granted pending appeal has been denied the right to continue with his appeal: *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 Mosheshe* 1973 (3) SA 962 (AD), *S v Molotsi en Andere* 1976 (2) SA 404 (O), *S v Neill* 1982 (1) ZLR 142.

There is one case - *Mulligan v Mulligan* 1925 WLD 164 - in which a civil litigant has been denied the right to approach the Court for relief because he was a fugitive from justice. In that case the applicant sought to restrain his wife from disposing of certain property pending action. It was admitted in his petition that he was a fugitive from justice, having escaped from arrest in 1915 pending his trial for an offence under the Gold Law. He had been in hiding in Johannesburg until April 1925 when he surrendered to the authorities. He was convicted and sentenced to 12 months' imprisonment, but released on bail, presumably pending appeal. He had then estreated his bail and again gone into hiding. The Court (DE WAAL

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J) held that his conduct disentitled him to seek relief in the application against his wife. The judgment concludes:

"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."

There are two cases which have considered the position of persons who have neither escaped from custody nor estreated their bail pending appeal after conviction.

The first is *Maluleke v Dupont NO and Another* 1967 (1) SA 574 (RAD); 1966 RLR 620. There the appellant was pursuing a case started in 1963 in which he was challenging legislation which banned Sunday meetings. Between then and final return day of the rule he was granted, the unilateral declaration of independence of 11 November 1965 had occurred, and a restriction order against the applicant had been made by Desmond Lardner -Burke on 9 February 1966 and served on 14 February. In April 1966 the applicant breached the terms of the order by failing to report and by leaving his restriction area and a warrant was issued for his arrest. This warrant could not be served and it was alleged that the applicant had either left the country or gone into hiding.

The case was complicated by the fact that the validity of the restriction order and the warrant of arrest were put in issue because they were made after the unilateral declaration of independence. Although purporting to find it unnecessary to examine the validity of the order or the warrant QUENET JP (with whom MacDONALD JA concurred) said:

"The admitted facts established that the applicant either fled the country or was in hiding, and that it is not possible to effect service of process upon him. It is clear, then, that the applicant has deliberately put himself beyond the reach of the law. *I cannot accept the suggestion that his flight might have had nothing to do with disobedience to the restriction order.* We were informed from the Bar that his attorney has no information in regard to his whereabouts and had not heard from him. If his flight had nothing to do with the fact that a warrant of arrest had been issued, it is difficult to see why he should have failed to keep his attorney informed of his whereabouts. In any event, I cannot see any difference in principle between defiance based on fear of being brought to justice and defiance arising, simply, from a refusal to be bound by the law. In both cases the act of defiance is directed to the same end - to place oneself beyond the law. And in both cases the result must be the same: the law will deny its protection to those who place themselves beyond its reach."

The sentence I have emphasised seems to indicate that the learned judge did in fact rely on the applicant seeking to evade the order at least. I was

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a member of that Court and in a separate judgment I based my conclusion on the admitted facts that the applicant had either fled the country or was in hiding; that no process could be served on him; that even his attorney had no knowledge of his whereabouts; and that there was no explanation from him of any sort for his disappearance.

The second case is *Herf v Germani* 1978 (1) SA 440 (T). That case concerned a woman against whom an order for committal for contempt of Court had been made because of her failure to surrender custody of a minor child. She deliberately avoided service of the order, and then sought to have the order that she surrender custody of the child suspended pending her application for condonation of the late noting of an appeal against that order. It was contended she was a fugitive from justice. This was rejected by MELAMET J in these terms:

"The present case, in my view, is more analogous to that of a party who wilfully disobeys an order of Court and persists in such disobedience. In such a case a Court would refuse to assist such person until the impediment of disobedience is removed or until good cause is shown why it should not be removed."

The facts in the present appeal are not on all fours with any of the authorities to which we have been referred. As Mr Kriegler for Bickle has pointed out, there is no allegation that Bickle has committed any crime for which he is still liable to be convicted; that any judicial process has been issued against him or is contemplated; that any executive process has been issued against him; that he left Zimbabwe unlawfully or even surreptitiously; that his continued absence from Zimbabwe is unlawful; that he has hidden or sought to withhold information as to his whereabouts; that he would not be amenable to any judicial process which might be issued.

Looking at these facts in the light of the circumstances of Bickle's departure in June 1982 which I have already detailed, Mr *Blackie*, for the Minister, concedes that Bickle does not fit into any of the categories of fugitives from justice. The closest parallel is *Maluleke's* case (*supra*), but there are substantial distinguishing features between that case and the present. On the majority judgment there was clear reliance on Maluleke's flight from his restriction area which constituted an offence, and on his avoiding a warrant of arrest for this offence. Even on my judgment the distinctions are very clear: in particular there Maluleke had concealed his whereabouts even from his own attorneys and had given no explanation for his disappearance. In the present case Bickle has frankly explained in his affidavit why he left Zimbabwe and why he is fearful of returning until the whole matter is settled, and has kept his legal representatives informed of where he is.

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Mr *Blackie* contends that we should extend the grounds upon which the Court will deny a litigant access to it beyond what he calls the traditional approach which underlies all the decisions to which we were referred. He argues that the Court should take a wider view of its responsibilities to the law: that it should deny its process not only to those who have shown that they are not prepared to accept the processes of the Court, but also to those who have placed themselves beyond the reach of the law of the land in such circumstances as to indicate that they are not prepared to accept the law.

This is a far-reaching proposition, particularly as Mr *Blackie* contended, as he had to contend to succeed in this appeal, that a person who leaves the country because he fears that an administrative order may be made against him, say for his detention, but before any such order is made, is precluded from approaching the Court for any relief. Indeed, Mr *Blackie* went further and contended that a person who left the country for no such reason but who later stayed away because of the fear of such an order should also be denied access to the Court.

It is hardly necessary to do more than state this proposition to see that it cannot be accepted. An example may illustrate this: a person who is a visitor to, but not a resident of, Zimbabwe hears a rumour that he may be arrested under s 21(1) of the Emergency Powers (Maintenance of Law and Order) Regulations (SI 441 of 1980). This section allows him to be arrested and detained for 30 days by any police officer who has reason to believe that there are grounds which would justify a Ministerial detention order under section 17. To avoid the possibility of

arrest he leaves the country and returns home. Thereafter a dispute arises over property stolen from his hotel while he was here. Surely he is not to be denied access to the Courts by reason of his departure to avoid the possibility of arrest.

It may be argued that this is an extreme case, especially because the reason for him leaving the country and the cause of action upon which he wishes to approach the Court are entirely unconnected. But unless *Mulligan v Mulligan (supra)* is wrongly decided on this point it is authority for the proposition that there need be no connection between the action sought to be brought and the conduct which disentitles the prospective litigant.

Perhaps one should take a slightly different example. The same visitor to Zimbabwe, but who owns a farm here, hears a rumour that the Minister

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is about to make a detention order against him under s 17 of the Regulations. He knows that there is another person with a similar name with whom he is being confused, so to avoid the possibility of detention he leaves the country. Thereafter and in his absence the Minister makes an order against his property which he wishes to challenge. He is surely not to be denied access to the Court until he returns to the country and subjects himself to arrest and detention. Nor can it make any difference that the person in question is a resident of the country who has left temporarily in the same circumstances.

Mr *Blackie's* contention involves a misconception of the role of the Courts. Their duty is, of course, to enforce the law of the land and to rule against or to punish anyone who acts contrary to it. But in the normal way they do this only in cases brought before them to enforce the law, whether it be civil or criminal. If the Courts are to fulfil the obligations put upon them by the Constitution they cannot, save in most exceptional circumstances, deny an aggrieved person access to them. Section 18(1) of the Constitution provides that every person is entitled to the protection of the law and s 18(9) provides that every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial Court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.

It must not be forgotten that what we are dealing with in this appeal is the impact of administrative action by Government upon the individual. In this area the Courts should not be astute to find reasons for abdicating their responsibility. They should not deny a person an opportunity to seek their protection unless he has by his conduct put himself outside the processes of the Court. It is not part of the Courts' function to deny a person access to them in order, for example, to assist some administrative process.

The public policy consideration in this case appears to me to be governed by s 24 of the Zimbabwe Constitution Order. This grants to any person who alleges that the Declaration of Rights has been or is likely to be contravened in relation to him the right to apply to the Supreme Court for relief. This constitutional right of access should prevail unless it is plain that the contempt of which the applicant may be guilty itself impedes the course of justice. As

DENNING LJ said in *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) at 574:

"It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other

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effective means of securing his compliance."

It is interesting to note that in England, where until 1879 there was a judicial procedure for declaring a person an outlaw, the Courts did not deny a declared outlaw access to them without exception. In, for example, *Hawkins v Hall* (1856) 1 Beav 73; 41 ER 109 an outlaw was allowed to apply to the Court to set aside an attachment which had been irregularly issued against him and was successful in his application. See too *Davis v Trevanion* (1845) 14 LJ QB 138. If that principle were to be applied here Bickle, even if he were an outlaw, would be entitled to seek the protection of the Court from the action taken against him and his property. He would only be defending himself against what he alleges is an illegal action.

It is unnecessary to decide in this appeal what the position would have been had a detention order been issued before Bickle left the country on 10 June. I have grave doubts as to whether the mere fact that an order had been issued would have been sufficient to characterise Bickle's departure as a flight from justice which would have precluded him from approaching the Courts. After all there appears to be no offence in the Regulations of avoiding arrest under a s 17 order. Indeed it would seem that a detention order can be effective only when a person has been physically detained under it. And no warrant for an arrest can be issued under 37(1) of the Criminal Procedure and Evidence Act [Cap 59] on the basis of a detention order, for under that section there must be an allegation of an offence. It would be even more difficult to contend that a person is in the position of a fugitive from justice merely because, being outside the country when an order is made against him, he declines to return.

On the facts of this case no process, either judicial or executive, has been issued and Bickle cannot be held to be in contempt either of any process or of the law. In those circumstances there is no basis upon which the Court should close its doors to him where he is seeking to redress what he alleges is an unlawful action against him.

The appeal must be dismissed with costs.

Baron JA: I agree.

Georges JA: I agree.

State Attorney, appellant's legal representatives.

Webb, Low & Barry, respondent's legal representatives.

1983 (1) ZLR p108

S v PANJE 1983 (1) ZLR 108 (HC)

Court High Court, Harare

Squires J

2 March 1983

Flynote

Criminal law - arson - accused setting fire to his own property - when offence committed

Headnote

Arson is the unlawful setting on fire of an immovable structure, with intent to injure another. To set one's own property on fire would not constitute an offence, unless someone else's property was also set on fire. Where the accused had permitted his wife to occupy one of his huts, she enjoyed a right to use that hut. That right was part of her general store of proprietary assets, and by setting the hut on fire, he intended thereby to deprive her of that right and benefit.

Case cited:

R v Wardle 1958 R & N 446; 1958(3) SA 702 (SR).

Judgment

Squires J: The accused in this case was charged with the offence of attempted murder, alternatively arson. Briefly stated, the facts were that on 11 July last he set fire to the hut occupied by his senior wife, Vaida Panje. Earlier that day he had quarrelled with her in apparently very acrimonious exchanges, and still angered by her taunts, decided to set on fire the hut that she occupied. She was in fact sleeping in the hut at the time, together with two other women, but the accused did not secure the door and in fact called out to his wife to leave the hut. All these women managed to leave the hut unscathed but the wife's blankets and some kitchen utensils were burnt as was a dress belonging to one of the others. The hut had been constructed by the accused, but he had never slept there, and he had made it available to his complainant wife for her use.

The accused was convicted on the alternative charge of arson and sentenced to a term of imprisonment of 20 months' IWL, of which 10 months were suspended for 3 years on appropriate conditions that the

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SQUIRES J

accused avoided conviction for offences against other people's property of a particular level.

With respect to the magistrate, two matters in these proceedings call for comment and correction.

The first relates to the charge which alleges that the hut set on fire was the property or in the lawful possession of the wife and that the accused " . . . did then and there and thereby burn and destroy the said hut with intent to injure the said Vaida Panje in her property". Now, arson is, of course, the unlawful setting on fire of an immovable structure with intent to injure another; and in apparent recognition of the fact that this hut was the property of the accused, the magistrate convicted him of arson on the basis that he is setting of the hut on fire destroyed some of the property the women had inside the hut. To do that, however, he should have amended the charge to allege that while the hut was the accused's own property his intention was to set it on fire to damage the belongings of the occupants at the time. He has therefore been convicted on an uncharged and unjustified basis.

However, it seems to be legally possible to redeem and uphold the conviction, because although the hut itself was the accused's own property, he had permitted the complainant to occupy it. She therefore enjoyed a right to use the premises, which right must be regarded as part of her general store of proprietary assets. It was this right and benefit the accused intended to deprive her of when he set the hut on fire and his actions on that basis establish the offence of arson as charged. On that basis then, the conviction for arson is confirmed.

The second aspect of the case that calls for comment is the sentence. In considering this matter, the magistrate, amongst other factors, regarded as " . . . the main aggravating factor . . . the fact that there were three people inside the hut when (the accused) set fire to it, and it was very fortunate . . . that they were able to get out of the hut uninjured." This was, it should be stated, the essence of the attempted murder charge of which the accused was acquitted.

In the first place, and as was discussed by BEADLE J (as he then was) in *R v Wardle* 1958 R & N 446, it seems to be clearly wrong in principle that a person who is convicted of one offence should be punished as for a more serious offence of which he has not been convicted. But, in addition, the evidence in the present case showed quite clearly that the accused did

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SQUIRES J

not know there was anyone else in the hut besides his senior wife, and he equally clearly warned the only person whose presence he knew of to leave the hut before he set fire to it. This she did, and the accused's limited desire of injuring her in her property was all he aimed at, and all he achieved. He could not be found guilty of attempted murder for that very reason; and, that being so, it should not be taken into account in aggravation of the sentence for the conviction of arson. Had he recklessly set fire to a hut in which people were, or might well have been asleep without warning, the magistrate's approach may have been a sound one, but that was not the situation.

It seems to me for these reasons that the magistrate misdirected himself on the question of sentence and that it should be considerably reduced, since the main feature of aggravation was not one properly constituting aggravation. It was also accepted here that feelings between accused and his wife were severely strained, that he had been drinking, and that he had been in custody for some five months awaiting trial. In those circumstances, and notwithstanding that the crime of arson is not to be lightly regarded, I have no doubt that the sentence here imposed

was far too severe.

With the agreement of WADDINGTON J then, the sentence is set aside, and there is substituted the following:

"8 months' IWL, of which 4 months is suspended for 3 years on condition the accused is not convicted in that period of any offence involving arson or malicious injury to property for which he is sentenced to a fine of more than \$50 or to imprisonment without the option of a fine."

The proceedings are otherwise confirmed.

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S v ZVONDANI & OTHERS 1983 (1) ZLR 111 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Beck JA

3 March 1983

Flynote

Criminal procedure - sentence - uniformity of sentences passed on joint offenders - no principle of law that sentences must be uniform - only if disparity of treatment is suggestive of arbitrariness or caprice will appeal court interfere on cases of lack of uniformity.

Headnote

While it is desirable to achieve as much uniformity as the circumstances of any given situation require, uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial court and with the accepted limitation of appellate interference therewith. Sentences can be set aside or corrected on appeal only if they are vitiated by misdirection or irregularity or are disturbingly inappropriate. Lack of uniformity is not *per se* a ground for interference unless the circumstances are such that lack of uniformity is evidence of arbitrariness or caprice on the part of the trial judge.

S v Zuze 1972 (1) RLR 255; 1972 (3) SA 214 (RAD) explained.

Cases cited:

S v Shadaya 1977 (2) RLR 22; 1977 (4) SA 108 (RAD);

S v Zuze (*supra*);

S v Reddy 1975 (3) SA 757 (AD);

S v Giannoulis 1975 (4) SA 867 (AD).

J B Colegrave, for the appellants

Y Omerjee, for the respondent

Judgment

Beck JA: All three appellants were convicted by McNALLY J and assessors of the murder of Joseph Largesse in the homestead of Ngwako Farm, Darwendale, on the night of 15 September 1981. The trial Court found the first appellant to be between 20 and 22 years old, the second appellant to be between 18 and 20 and the third appellant to be 20 or 21. They were respectively sentenced to 16, 12 and 20 years' imprisonment with labour, and have all appealed against sentence only. Mr Colegrave,

1983 (1) ZLR p112

BECK JA

who appeared for all three appellants, understandably found himself unable to advance any argument on behalf of the first and second appellants, and his submissions have therefore been confined to the appeal of the third appellant.

The evidence established that the three of them set out to perpetrate a robbery at the farm homestead. The intention to do so was initially conceived by the first and second appellants, the older first appellant being, in the finding of the trial court, the more dominant character of the two. They recruited the third appellant to join in the conspiracy. Having joined them in their plot, however, the third appellant certainly showed no lack of enthusiasm. He was armed with a knife of lethal proportions; it was he who climbed a pole to cut the telephone wires and isolate the homestead; it was he who threatened and subdued the house servants and ascertained from them the whereabouts in the house of the members of the Largesse family; it was he who went ahead of the second appellant into the house itself while the first appellant stood guard over the servants; and it was he who actually killed the deceased by a single knife-blow to the heart.

Mr *Colegrave's* argument was that there was really nothing to choose between the moral blameworthiness of the first appellant and that of the third appellant, and that it was therefore disturbingly inappropriate for the learned trial judge to have imposed on the third appellant a sentence that exceeded by four years the sentence he imposed on the first appellant.

It must be said at the outset that there is nothing in the personal circumstances of the third appellant, or in the nature and the surrounding circumstances of his crime, to suggest that the sentence of 20 years that was imposed on him was at all excessive. The evidence established that having entered the house at night to rob, armed with a lethal knife, and with two sturdy young accomplices within hailing distance and also armed, the third appellant met the unsuspecting and unarmed deceased in a passage as the latter was on his way to his bedroom and drove the knife into his heart. At the point in the passage where they met there was a doorway through which the third appellant could have retreated to the back exit from the house. The trial Court surmised, because of the absence of any struggle, that the meeting between the deceased and the third appellant must have been sudden and unexpected and that the fatal blow was struck "almost instinctively". It was on the strength of this surmise as to the "almost instinctive" nature of the knife thrust that the trial Court came to the conclusion in respect of the third appellant that extenuating circumstances existed "by the very narrowest of margins". In

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him the learned trial judge commented, with every justification, that the third appellant had avoided the death sentence "by a hair's breadth".

With regard to the first appellant, however, the Court's finding that extenuating circumstances also attached to his guilt was made "by a less narrow margin". In sentencing him the learned trial judge pointed on the one hand to the fact that he played a major role in organising the venture, and that in guarding the servants he performed an important task; on the other hand he emphasised that the first appellant "did not strike the fatal, or any, blow".

Quite clearly therefore neither the trial Court as a whole when considering the existence or otherwise of extenuating circumstances, nor the learned trial judge alone when considering sentence, took the view that the moral blameworthiness of the first and third appellants was the same. It might indeed have been unfair towards the first appellant had the view been taken that his moral guilt was really indistinguishable from that of the third appellant. His was not the hand that thrust the knife into the deceased's heart, and while a constructive intent to kill was properly found to be proved on the basis of their common purpose to break in and rob at knife-point, it does not necessarily follow that the first appellant, had he been in the situation of the third appellant, would himself have acted quite so precipitately and so viciously.

It is, of course, a well established principle governing the exercise of the judicial discretion in assessing sentence that, where the degrees of participation in an offence are substantially equal, and when factors personal to the participants are not materially different, the sentences imposed should avoid a pronounced disparity of punishment. If they do not avoid such disparity, interference on appeal may be warranted, and not infrequently occurs, as is reflected in *S v Shadaya* 1977 (2) RLR 22 and in the authorities there collected.

In the judgment in *Shadaya's* case (*supra*) the following passage from the judgment of MACDONALD ACJ (as he then was) in *S v Zuze* 1972 (1) RLR 255 at p 257 is quoted with apparent approval:

"Where a number of persons are convicted of the same crime there must, of course, if justice is to be done, be reasonable uniformity between the sentences imposed on each of them . . .

Where there is no uniformity in the sentences imposed on persons jointly charged with the same offence, then one of two things should happen. If the sentences imposed on some are too light the Attorney-General should take the necessary steps to have the sentences increased. If he does not do so an accused person who receives a sentence

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which, by comparison, is clearly disproportionate should have his sentence reduced so as to bring it into conformity with the other sentences."

This is a passage that is not infrequently relied upon when it is sought on appeal to achieve an amelioration of sentence in the light of a more lenient treatment of a co-offender. It is not out of place therefore to draw attention to the following salutary observations concerning this very passage made in *S v Reddy* 1975 (3) SA 757 (AD) by BOTHA JA at p 760 D-G:

"What is more important, however, is that the remarks of MACDONALD ACJ cannot, in the light of the judgment as a whole, be construed as laying down the proposition that where there is a lack of uniformity in the sentences imposed on persons jointly charged with the same offence, the sentences which are too lenient or too heavy by comparison, should by reason only of the lack of uniformity, either be increased or decreased on appeal, as the case may be, so as to bring them into conformity with the other sentences. Sentences can be set aside and corrected on appeal only if they are vitiated by misdirection or irregularity or if they are, having regard to all the relevant circumstances of the case and of the accused persons, disturbingly inappropriate, but not by reason only of the fact that they are not in conformity with the sentences imposed upon the other accused persons.

It may be that where there is no uniformity in the sentences imposed on persons jointly charged with the same offence and notwithstanding the fact that the relevant circumstances in relation to the several accused persons are reasonably identical, such lack of uniformity may be evidence of arbitrariness or caprice on the part of the judicial officer concerned, justifying interference by the Court on appeal."

In common with the South African and the English approach our own courts have shown a proper awareness of the desirability of achieving as much uniformity as the circumstances of any given situation require, while recognising, in the words of HOLMES JA in *S v Giannoulis* 1975 (4) SA 867 (AD), at p 873 F that:

"Uniformity should not be elevated to a principle, at variance both with a flexible discretion in the trial Court and with the accepted limitation of appellate interference therewith."

In the instant case it was not, as I have indicated, the view of the learned trial judge that the moral blameworthiness of the third appellant was quite the same as that of the first appellant. In considering that the moral blameworthiness of the third appellant was to some extent different from that of the first appellant, primarily because it was the former who impetuously resorted to the actual use of his weapon with such devastatingly fatal accuracy, the trial judge did not misdirect himself; nor was that even suggested in argument by Mr *Colegrave*. In translating that difference into sentences of 20 years and 16 years respectively, the first appellant received

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BECK JA

the benefit of a flexible discretion, judicially exercised, that cannot be said to have resulted in a disparity of treatment that is suggestive of arbitrariness or caprice so as to be disturbingly inappropriate and the third appellant can have no good reason for harbouring (if he does) any sense of grievance.

For these reasons we dismissed the appeals of all three appellants against sentence at the

conclusion of argument.

Baron ACJ: I agree.

Georges JA: I agree.

Pro Deo.

1983 (1) ZLR p116

CHIBANDA v KING 1983 (1) ZLR 116 (HC)

Court **High Court, Harare**

Dumbutshena AJP

24 February & 9 March 1983

Flynote

Practice and procedure - application for stay of execution of judgment - evidence necessary to support application - Court must be satisfied that injustice would be caused if stay not granted.

Headnote

In an application for stay of execution of a judgment of the Court, it is not enough for the applicant merely to allege hardship. He must satisfy the Court that he may suffer irremediable harm or prejudice if execution is granted. One way to do this would be to adduce evidence that he now has sufficient means to make payment on due date; but he must have a strong case to present to the Court. It must also be borne in mind that if the Court were to extend mercy, it would be doing it at the expense of a litigant who has already established in Court his right and title to what is being claimed. Such mercy should rather be sought in the action itself, before judgment is given, not afterwards.

Cases cited:

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

Santam Insurance v Paget (2) 1981 ZLR 132;

Watson v Hunter & Another 1948 (3) SA 1106 (D & CLD);

Lovius & Shtein v Sussman 1947 (2) SA 241 (O);

TC Trustees Ltd & Another v J S Darwen (Successors) Ltd [1969] 1 All ER 271 (CA).

C K Matemba - Mutasa, for the applicant

I A Donovan, for the respondent

Judgment

Dumbutshena AJP: On the 25 July 1980 the applicant and the respondent entered into an agreement of sale. The respondent agreed to sell Shangri - La Farm at the price of \$41 000 and the applicant agreed to buy the same on the following conditions:- He had to pay a deposit of \$19 250, which included the respondent's agent's commission of \$1 800. The deposit on the purchase price was therefore \$17 450. The applicant passed a first mortgage bond over Shangri-La Farm in favour of the

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respondent in the sum of \$22 500, the balance of the purchase price. Interest on the capital sum, the balance of the purchase price, was to be calculated from time to time at the rate of 10% *per annum* with effect from the 25 July 1980 and was payable in arrear on the 31 December 1980. After that it was paid quarterly in arrear on the 1st day of March, June, September and December each year. This interest, with the consent of the applicant, was later increased to 12% *per annum*. The capital was paid by eight annual instalments of \$2 812,50 each on the 31 August of each year, commencing on the 31 August 1981.

The applicant alleges in his founding affidavit that on the 27 October 1980 he and his two daughters were involved in a motor car accident in which they were seriously injured. Respondent's legal practitioners were advised of this accident by letter dated the 17 March 1981. That letter is said by the respondent, in his answering affidavit, to have been written in response to a letter from his legal practitioners. However, the applicant has deposed on the papers to the extent of his injuries by alleging that his 4th, 5th and 6th ribs were broken and he had to stay in Parirenyatwa Hospital from the 27 October 1980 to the 17 November 1980. His condition, although not the types of injury, is confirmed by Mr William C Auchterlonie, a neurological surgeon, by letter dated the 29 June 1981, as follows:

"TO WHOM IT MAY CONCERN

Re: MR S CHIBANDA

This man as a result of a head injury, was admitted to hospital on 27th October 1980. He is only now recovering from a very severe head injury and is only now aware of his situation and conditions and therefore will only now be able to attend to his business affairs.

Yours sincerely,
(sgd) W C AUCHTERLONIE
WILLIAM C AUCHTERLONIE"

In Case No GD 1376/81 a judgment in favour of the respondent was entered in the sums of \$22 550 and \$73,95, together with interest on the sum of \$22 550 at the rate of 12 % *per annum* from the 1 July 1981 to the date of payment, and costs on an attorney and client scale.

Mr *Mutasa*, who appeared for the applicant, informed the Court that the applicant did not quarrel with that judgment. However, having obtained that judgment, respondent sued out a writ of execution in satisfaction of that judgment. The applicant, in these proceedings, has sought a

stay of execution.

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It is common cause that the applicant was in arrear in his interest payments. It is also common cause that the applicant had made good the default. Evidence of this is contained in a letter written by respondent's legal practitioners to applicant's legal practitioners, dated the 6 July 1982. The body of the letter reads:

"We refer to previous correspondence in respect of the above matter and confirm that as your client has brought his arrear instalments of interest up to date, our client is prepared to continue with the Bond. We presume, of course, that your client has already paid his interest for the quarterly period ending 30 June 1982, into our client's Standard Bank Limited Account.

Finally, our client has instructed us to advise your client that should he fall into arrears with his instalments in terms of the Bond in the future, we are to proceed with the cancellation of the Bond without further notice."

At the time of the hearing of this matter the applicant had paid, albeit irregularly, all the interest due. It is not part of the applicant's case that some payments were not made on due date; the thrust of Mr Mutasa's argument was that all payments have, as of now, been made. He argued that applicant should be granted leave to continue paying the balance in the sum of \$16 923 by instalments, because to refuse the applicant the order he prays for would not be in the interests of real and substantial justice.

I must say I have sympathy for that line of reasoning because it would be wrong, "humanely" speaking, to refuse to grant an applicant the order he seeks when he has already paid a more than substantial part of the amount of the purchase price. But a Court has to determine applications such as this one in terms of agreements entered by the parties. In the instant case clause 2 of the mortgage bond reads:

"2. That should the Mortgagor(s) fail to pay the Interest, instalments of capital (if any), premiums of insurance, or other sums due in accordance with the terms and conditions of this bond promptly on due date, or fail to carry out any of the terms and conditions hereof, the Capital, Interest and all other sums due hereunder shall immediately be considered as legally claimed and due, without notice, notwithstanding the exercise by the Mortgagee(s) of any other right granted hereunder. "

It is in terms of that clause that a decision has to be made.

Mr *Mutasa*, without leading evidence of his client's improved means or his enhanced ability to pay, says, in effect, because the applicant is now no longer disabled he will not fail to pay the smaller amount still outstanding. Standing by itself and unsupported by evidence, Mr *Mutasa*'s argument seems reasonable, especially when it is realized that the applicant

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has paid all the arrears and has not since August 1982 defaulted. I believe, if it were possible, it would be for the good of all the parties if the respondent were to leave things as they are by withholding, by a voluntary stay of execution, until things begin to go wrong again. Because the

respondent is getting his money, it is apparent that he will not suffer any prejudice as long as the applicant continues to pay. By giving the applicant, as he did on numerous occasions in the past, another chance, he will in a way be showing tolerance, which may in the end result in the final settlement of the purchase price. If the applicant were to fail again, then the respondent would, unencumbered by a conditional stay of execution imposed by the Court, lift the voluntary stay of execution induced by a feeling of mercy and bring back into effect the wrath of the writ of execution.

This, however, is in my judgment not a fit case for the Court to make the stay of execution subject to conditions, because the applicant has by his affidavits not adduced sufficient evidence to satisfy the Court that he now has sufficient means to make payments on due date. It is true that the Court has inherent power to control its own process, but that power cannot in my view be exercised in the absence of circumstances, revealed by credible evidence, which justify the Court staying, upon conditions, execution. In *Cohen, v Cohen* 1979 (3) SA 420 (R), GOLDIN J (as he then was), said at 423B-C:

"Execution is a process of the Court and the Court has inherent power to control its own process subject to the Rules of Court. Circumstances can arise where a stay of execution as sought here should be granted on the basis of real and substantial justice. Thus, where injustice would otherwise be caused, the Court has the power and would, generally speaking, grant relief. (see *Williams v Carrick* 1938 TPD 147; *Graham v Graham* 1950 (1) SA 655 (T) at 657-9). No such situation justifying a stay of execution exists on the facts before me. As stated above, if the relief claimed is granted, respondent will be deprived of her rights under the agreement merely on the basis of allegations contained in a declaration."

In *Santam Insurance Co Ltd v Paget* 1981 ZLR 132, a case in which reference was made to *Cohen's* case (*supra*), GUBBAY J (as he then was) had this to say on the *onus* which rests on the applicant in a case such as this one:

"The onus rests on the party claiming this type of relief to satisfy the court that injustice would otherwise be caused him, or to express the proposition in a different form, of the potentiality of his suffering irreparable harm or prejudice. That task is by no means easy where, as in the present case, the judgment it is sought to suspend sounds in money, for the giving of effect to it, unlike with orders for ejectment or the transfer of property, does not render difficult any restitution that may have to be made. See *Skinner v Shapiro* (II) 1924 WLD 174 at 176; *Graham v Venter* 1924 OPD 46; *Zaduck v Zaduck* 1966 (1) SA 550 (SR) at 551E."

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Mr *Mutasa* did not in his submission rely on any evidence showing an improvement in the financial circumstances of the applicant since resuming the conduct of his business after his illness. He urged the Court that the mere fact that the applicant has been able to pay arrears was sufficient. He submitted that if the goods which are vital for applicant's farming operations were to be sold applicant would be ruined. By his submission he seemed to brush aside the erratic manner in which instalments were paid.

It is true that execution has been stayed pending payment by instalments of the amount of the judgment. See Herbstein and Van Winsen: *The Civil Practice of the Supreme Court in South Africa* 3 ed, p 643. It is, however, especially in a case where the applicant, paying through instalments, has in the past defaulted, for the applicant to show good and sufficient reason why the Court should grant him a stay of execution in spite of his failure in the past to pay timeously.

I agree with what CARLISLE J said in *Watson v Hunter & Another* 1948 (3) SA 1106 (D & CLD) at 1114:

"Now it seems to me that the applicant must come to Court with a very strong case before the Court will stay the execution of its judgment."

Mr *Donovan*, who appeared for the respondent, urged the Court while admitting that the respondent has accepted some payment without prejudice after judgment was obtained - not to grant a stay of execution, because applicant was not seeking a stay of execution pending the happening of a certain event. He said what the applicant was seeking was the right to continue paying by instalments as if the original agreement (which was cancelled) remained effective or as if he was seeking the rescission of the judgment obtained on the 24th September 1981. The applicant did not apply for rescission of that judgment. See *Herbstein and Van Winsen, loc cit.* But may not a defaulting applicant seek a stay of execution where the respondent has, in spite of the cancellation of the agreement, accepted payments and albeit without prejudice? This point was not, however, argued and I need not therefore come to any conclusion on it.

Mr Mutasa's submission that it would be inequitable to refuse the applicant the order he prays for, and that the essence of authorities such as *Cohen's case (supra)* is the achieving of real and substantial justice, in the instant case, by granting the applicant his order, can only be fulfilled, in my judgment, where the applicant has discharged the onus of proof on a balance of probabilities. I agree with Mr *Donovan* that equitable remedies, if they were available, should not be granted at the expense of a litigant who wants to enforce his rights. In *Lovius & Shtein v Sussman*

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1947 (2) SA 241 (O), a case cited by Mr *Donovan*, VAN DEN HEEVER J said at p 243

". . . I have difficulty in seeing how the Court is allowed to extend mercy at the expense of a litigant or prevent the subject from enforcing, with all the expedition which legal process allows, a right which he has vindicated in Court."

No matter how one may, as I have already indicated, sympathize with the applicant, I am of the opinion that the strong allegation of hardship which will befall the applicant should his application fail, is insufficient to attract mercy because the allegation is not supported by evidence. The applicant, by his affidavit, should have adduced the relevant facts upon which the allegation of hardship was based. Further, there should have been instanced in the affidavit the source of the applicant's income and property, the amount of that income, and his ability to generate more income from his business and farming operations, in order to prove his ability to pay instalments on due date without defaulting in his obligations under the agreement. The Court, under these circumstances, would be better able to exercise its judicial discretion in an equitable manner. This, unfortunately, is not the position in the instant case. If the application for a stay of execution had been based on the happening of a future event - which event would put the applicant on a better financial footing for purposes of liquidating the amount now due than he is at present - I would have felt it my duty to interfere and suspend the right of the respondent who, so far as the Court is concerned, has already established his right and title.

Even then I do not believe that equity, were it exercisable within the jurisdiction, would have come to the relief of the applicant, as was urged upon the Court by Mr *Mutasa*. In *TC Trustees Ltd & Anor v J S Darwen (Successors) Ltd* [1969] 1 All ER 271 (CA), a case in which there was a condition similar to clause 2, that is, the principal moneys were to become immediately payable if the defendants defaulted in payment of the half-yearly interest for 21 days, it was held that equity and such equitable relief as might be available should have been sought in the action itself before judgment was given, and could not be used as a ground for a stay of execution. At 273f-h, LORD DENNING MR had this to say:

"Counsel for the defendants urges us to relieve the defendants from the consequences of their mistake. It was, he says, a slip in the office. They mistook the date for payment. As soon as they realised it, they paid the interest. It was only a week late. He says that, just as the original loan notes were payable by instalments, so it is fair that the judgment debt should be.

It seems to me that, if the defendants are entitled to relief at all, it can only be by way of relief in equity. In strict law, once default was made, the whole sum became due. And it is only in equity that they can be relieved. I doubt whether equity would relieve in a case like this. We are very familiar with conditions of this sort whereby, on failure to pay one instalment, the whole becomes due. I have never heard of equity

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granting relief against such a condition. But, nevertheless, even if there was room for relief in equity, I think relief must be sought in the action itself, before judgment is given, and not afterwards. It cannot be made a ground for a stay of execution."

The above is a complete answer to applicant's reliance on equitable remedies in cases of this nature.

For the reasons expressed above, I am of the view that the application must be dismissed with costs.

Hove Mutasa & Associates, legal practitioners for the applicant.

Atherstone & Cook, legal practitioners for the respondent.

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S v MUTADZA 1983 (1) ZLR 123 (HC)

Court High Court, Harare

Dumbutshena AJP

9 March 1983

Flynote

Criminal law - assault with intent to do grievous bodily harm - plea of guilty - necessity to clarify what accused is admitting to - sentence - factors affecting - accused adopting an insolent and uncontrite approach in court -

relevance of.

Headnote

Where an accused person pleads guilty to a charge of assault with intent to do grievous bodily harm, the court must be satisfied that the accused is actually admitting to that offence, as opposed to common assault. He must admit an intention to do grievous bodily harm, whether actual or constructive, or the facts must be such that the court can safely infer that he had the necessary legal intent.

When passing sentence, magistrates should not allow themselves to be over-influenced by the attitude of the accused in court. Rudeness and lack of contrition are no ground for awarding a punishment greater than the offence actually merits.

Cases cited:

R v Edwards 1957 R & N 107;

S v Mbelu 1966 (1) PH H176.

Judgment

Dumbutshena AJP: The accused was convicted on his own plea of guilt of assault with intent to commit grievous bodily harm. He was sentenced to 6 months' IWL, of which 3 were conditionally suspended.

The facts of the case are these:

On the 5 February 1983 the accused was drinking beer at Mushandirapamwe Restaurant in the company of his girlfriend. After some time they began to quarrel. They started fighting. The complainant approached them in an attempt to stop the fight and the argument. He told the accused to give his girl friend back her sunglasses. This annoyed the accused. The accused argued with the complainant and hit him with

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a bottle of beer on the mouth. The complainant fell to the ground. The complainant lost one tooth and another tooth was cracked. He also sustained the following injuries: a laceration on the upper lip and a bruised and swollen upper lip.

The accused agreed with the statement of agreed facts, Exhibit 1, and the medical report, Exhibit 2. When the elements of the offence were put to him, the following questions, among others, were asked:

"Q. Agree that you struck the complainant with a bottle of beer on the mouth thereby causing his tooth to fall off and cracking the other one?

A. Yes.

Q. Intention?

A. I wanted him to go away from me. I wanted to talk with the woman."

When the record came before the scrutinizing regional magistrate, the question of intention made him comment as follows:

"Whilst the record indicates that the accused admitted assaulting the complainant with a bottle causing a tooth to fall out and a second tooth to crack, when asked his intention he replied 'I wanted him to go away from me. I wanted to talk with the woman.' This does not appear to be an admission that he intended to cause the complainant grievous bodily harm. In fact this specific question should have been put to him.

It appears that accused and his girl friend were having an argument when the complainant for no reason interfered and took the side of the girl friend. Accused then struck complainant on the mouth with a beer bottle.

In my view on these facts there was no intention the part of the accused to cause the complainant grievous bodily harm, and a verdict of common assault should have been returned."

It is clear from the accused's reply to the question on intention that he never admitted having had an intention to commit grievous bodily harm. He did admit assaulting the complainant. An assault is one of the elements of the substantive crime of assault with intent to do grievous bodily harm. For that crime to be complete, the assault must have been committed with intent to do grievous bodily harm.

There is no passage in the record where the accused admits having intended to cause the complainant grievous bodily harm. All that is expressed in reply to the question on intention is accused's motive for hitting the complainant. He wanted him to go away so that he, the accused, could talk to his girl friend. Hunt's *South African Criminal Law and Procedure* Vol II 2 ed at p 490 describes the crime of assault with intent to do grievous bodily harm this way:

"There must be: (a) an assault, (b) committed with intent to do grievous bodily harm.

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The intent to do grievous bodily harm

(1) It is not necessary that X should actually cause grievous bodily harm: it is enough that he intends to cause it, for the crime is not 'causing grievous bodily harm', it is: 'assault *with intent to do* grievous bodily harm'. If X intends a grievous injury, but causes a slight one or none at all, he may accordingly be guilty of assault with intent to do grievous bodily harm. Of course where a slight injury is caused the court may be unwilling to accept that X really did intend a severe one, but that is a matter of evidence, not of substantive law. Conversely, it does not necessarily follow from the fact that X does cause a serious injury that he intended that result.

(2) As with common assault 'intention' means actual or legal intention, and motive is irrelevant. What is required is that X must have known, or at least foreseen the possibility, that his conduct (whether this took the form of the application of force or threats) might cause Y grievous bodily harm.

(3) Provocation, intoxication, insanity and automatism are just some of the circumstances in which X may be incapable of formulating the necessary *mens rea*. The propriety of reducing assault with intent to do grievous bodily harm to common assault where provocation and/or voluntary intoxication negatives *mens rea* has already been questioned. The issue in such cases should be: assuming X did not have the state of mind required for assault with intent to do grievous bodily harm, did he have that required for common assault? If it is not possible to

say that he had the one intent it will often not be possible to say that he had the other either.

(4) The question arises: what is 'grievous bodily harm'? An extraordinary provision of the Transkeian Penal code which was repealed in 1951 was reminiscent of the two thousand years' old Law of the XII Tables. It provided:

'The following kinds of hurt only are designated 'grievous' bodily harm, viz.: 1. Emasculation; 2. permanent privation of the sight of an eye; 3. permanent privation of the hearing of an ear; 4. privation of any member of joint; 5. destruction or impairing of the powers of any member or joint; 6. permanent disfiguration of the head or face; 7. fracture or dislocation of a bone; 8. any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.' "

The headnote to *R v Edwards* 1957 R & N 107 describes the crime under discussion simply in these words:

"To establish the offence of assault with intent to do grievous bodily harm, it is sufficient to prove that the accused committed the assault either knowing that what he did was likely to cause grievous bodily harm or being reckless and careless as to whether or not such harm resulted. In this relation, grievous bodily harm means such bodily harm as seriously interferes with health".

The case of *Edwards (supra)* is a leading authority on the crime of assault with intent to commit grievous bodily harm. It distinguishes the approach of the Courts in this country from the extraordinary provisions of the Transkeian code cited above. BEADLE J as he then was, discussed a number of authorities and came to the conclusion that the provisions of the Transkeian code were not a safe guide in deciding whether or not an injury was severe enough for a conviction of assault with intent to do grievous bodily harm. He said at 110D-G:

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"In *Matsukis's* case (*supra*) the High Court in describing what degree of injury was necessary to constitute the crime referred with approval to an instruction given by WILLES J to the jury in the case of *R v Ashman*. That instruction was this: 'You must be satisfied that the prisoner had an intent to do grievous bodily harm; it is not necessary that such harm should have been actually done or that it should be either permanent or dangerous: if it be such as seriously to interfere with comfort or health it is sufficient.' It will be seen that in that case it was held that any injury which would interfere seriously with comfort or health would be sufficient. In the case of *Bourbon v R (supra)*, CLAYDEN ACJ defined the offence thus: 'In order that the offence of assault with intent to do grievous bodily harm should be found proved, there must be shown either harm which in itself is such as seriously to interfere with health or, if there is not that harm actually inflicted, intention to inflict harm of that kind.' It will be seen that CLAYDEN ACJ does not refer to an injury which seriously affects the comfort of the complainant. He has confined his description of the offence to injuries which seriously interfere with the health of the complainant. I do not know whether the omission of the word 'comfort' is of great significance, so long as sufficient stress is laid on the word 'seriously'. However, I prefer to accept the definition given by the Federal Supreme Court and I approach these charges therefore on the basis of considering whether the injuries actually sustained are such as might seriously interfere with health of the complainants or, if injuries of such severity were not actually suffered, whether the evidence nevertheless discloses an intention to inflict injuries of that character."

Of course, the accused's intention can also be inferred from his acts. If he used a dangerous weapon - a weapon likely to cause grievous bodily harm - and used it in a manner which is likely to cause such harm, he may be presumed to have intended to cause grievous bodily harm. See *R v Edwards (supra)* at 110H.

In the instant case the accused used a beer bottle. There is no evidence as to its size. There is no evidence on the degree of force used. In his report the doctor who examined the complainant

stated that no permanent disability was likely to result. In my judgment, from these circumstances accused's intention cannot be inferred. I am strengthened in the view I take by what was said by MILLER J in *S v Mbelu* 1966 (1) PH H 176. He put what I have discussed above in these words:

"Now where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these factors are exhaustive; I do suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or the instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation

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on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault . .
."

It is clear from what is said above that for an accused person to understand the nature of the allegation he is facing he must be made to understand that the harm allegedly intended was of such a serious nature as to interfere with health. It is important that the accused should be made to understand what is meant by intent to do grievous bodily harm. It might, in cases of this nature, be advisable for the Court to ask questions along these lines:

- (a) Did you intend to inflict harm of such a nature as might seriously interfere with complainant's health?
- (b) If you did not actually intend such harm, were you reckless or careless as to whether such harm resulted?
- (c) Do you understand that you are pleading guilty not just to common assault but to the more serious offence of assault with intent to commit grievous bodily harm?

It is my opinion that questions along these lines would make an accused person understand the elements of the offence being put to him. The accused, in my view, was wrongly convicted of assault with intent to do grievous bodily harm.

He was sentenced effectively to 3 months' IWL. He is a first offender.

He pleaded guilty and this in some way showed contrition. The complainant did not receive permanent disability.

More importantly, the accused is employed. Sending a first offender, who is employed, to prison even for 3 months is in my judgment not the right thing to do. When he has served his sentence he will find his employment closed to him. I do not agree with the attitude adopted by the trial magistrate. He stated in his reasons for sentence:

"When the Prosecutor informed the Court that the complainant was applying for compensation for his lost teeth in the sum of \$100 the accused rudely replied, 'Is it worth it?' (page 3 of record).

Throughout the proceedings the accused displayed a boastful, I-don't-care type of attitude, hence I likened his

behaviour to that of Mohammed Ali after winning an international boxing tournament.

After accused's trial, a considerable number of the people in court left. I gained the impression that his behaviour throughout the trial was meant to impress this group which was either composed of his friends or relatives.

To treat the accused lightly would, in my opinion, have left the audience with the impression that being rude and showing no contrition for one's misdeeds was condoned by our courts.

The sentence I arrived at was a result of considering all the above in their totality."

In considering extraneous matters such as those stated above, the

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magistrate threw out of the window his cloak of justice and jumped into the arena in order to fight the accused. He at once became a contestant, referee and judge in his own cause and ended winning, albeit wrongly, every point of the encounter. That is not the attitude of mind a judicial officer should be in when dispensing justice.

Accordingly, the conviction and sentence are set aside and substituted by the following:

Accused is convicted of common assault and sentenced to a fine of \$50 or, in default of payment, 30 days' imprisonment with labour. The accused has by now served about one month of his original sentence and should be freed immediately.

McNally J agrees.

1983 (1) ZLR p129

S v TSHUMA 1983 (1) ZLR 129 (HC)

Court High Court, Bulawayo

Gubbay J

11 March 1983

Flynote

Criminal procedure - suspended sentence - conditions of suspension - condition that accused does not commit "any offence involving theft or dishonesty" - section 48(1)(a) of Road Traffic Act 1976 (interfering with a motor vehicle) not necessarily such an offence.

Headnote

Where a sentence is suspended on condition that the accused does not commit an offence involving dishonesty, it can only be brought into operation if he is convicted of an offence of a kindred nature to theft. The offence of interfering with a motor vehicle, in contravention of section 48(1)(a) of the Road Traffic Act 1976, does not necessarily involve dishonesty and is not necessarily of a kindred nature to theft, so it cannot be inferred that the accused ought to have

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understood that if he was to commit that offence he would be liable to have the suspended sentence activated.

Cases cited:

R v Burke 1976 (1) RLR 105 (GD);

S v Navison G-S-148-76 (not reported);

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

Judgment

Gubbay J: The two accused were convicted of interfering with a motor vehicle in contravention of s 48(1)(a) of the Road Traffic Act 1976. The evidence disclosed that in the early hours of 14 November 1982 they had attempted to remove the vehicle's battery but were disturbed in the process.

The magistrate sentenced the first accused to six months' imprisonment with labour and ordered that a suspended sentence of nine months' imprisonment with labour imposed on 30 July 1982 be brought into effect. The second accused was sentenced to four months' imprisonment with labour, and a suspended sentence of \$25 or 15 days' imprisonment with labour imposed on 21 October 1982 was put into operation. The previous conviction of each accused was for theft and the condition of suspension

1983 (1) ZLR p130

GUBBAY J

was that he did not commit "any offence involving theft or dishonesty" within the period of the suspension.

The question is whether a contravention of s 48(1)(a) of the Road Traffic Act is an offence of a kindred nature to theft, for this is what the phrase "any offence involving dishonesty" has been held to mean. See *R v Burke* 1967 (1) RLR 105 (GD) at 106E-F *per* DAVIES J (as he then was). One may pose the question another way: when suspending the sentences of the accused upon the condition in question, did the magistrates have in mind the type of offence of which they have now been convicted? The answer is to be found in the unreported judgment of SMITH J (with whom JARVIS J concurred) in *S v Navison* G-S-148-76, where it is said:

"The offence of interfering with a motor vehicle in contravention of section 103(2)(a) of the Roads and Road Traffic Act [Chapter 263] does not necessarily involve dishonesty and is not necessarily an offence of a kindred nature to theft. It cannot, therefore, be said that the magistrate who imposed the condition had this offence in mind. It certainly cannot be said beyond reasonable doubt that the accused, who was convicted of housebreaking with intent to steal and theft when this condition was imposed, ought to have appreciated that the present offences fell within the ambit of the condition."

(See also *S v Taylor* 1971 (2) RLR 55 (GD) at 59A-D; 1971(3) SA 86 (R)).

Quite apart then from the doubt as to whether the magistrates who imposed the condition ever intended to include the unlawful interference with a motor vehicle within its ambit, it cannot be

inferred that the accused ought to have understood that if they were to commit that offence, they would be liable to have their suspended sentences activated.

In the result, and in respect of each accused, the conviction and sentence is confirmed, but the order that the suspended sentence be brought into operation is set aside.

Waddington J agrees with this judgment.

1983 (1) ZLR p131

S v NYAMWEDA 1983 (1) ZLR 131 (SC)

Court **Supreme Court, Harare**

Georges & Beck JJA

15 March 1983

Flynote

Criminal procedure - plea of guilty - accused admitting offence but disputing method - court entitled to convict on basis of plea - sentence - plea of guilty - facts on which accused should be sentenced.

Headnote

The appellant was charged with theft and pleaded guilty. An agreed statement of facts was put in, which described an incident of pocket picking in a Harare hotel. The appellants when asked if he had any defence to offer, stated that he had found the money on the floor of the hotel. The magistrate sentenced him on the basis that he was guilty of pocket picking. It was argued for the appellant that in view of what the appellant said the magistrate should have recorded a plea of not guilty.

Held, that as the appellant's admission was to what amounted to theft by finding, the magistrate had not erred in accepting the admission as a plea of guilty to theft.

Held, further, that the magistrate erred in sentencing the appellant on the basis that he had picked the complainant's pocket. He should have asked the prosecutor whether he accepted the appellant's story; if he did not accept it, a plea of not guilty could have been entered. Since that course was not followed, the appellant should have been sentenced on the basis of what he admitted.

Cases cited:

S v Mupari AD 125/1979 (not reported);

S v Bezvero & Others 1976 (2) RLR 43.

D M Foroma, for the appellant

S Ahmed, for the respondent.

Judgment

Georges JA: The appellant was charged with theft. The charge read:

" . . that upon or about the 22nd day of January, 1983 and at or near Ambassador Hotel . . . the said Bongai Nyamweda did wrongfully and unlawfully steal \$14,00 Zimbabwean currency, the cash of the Complainant Temba Bhebe, and in the lawful H possession of Temba Bhebe a person there residing."

The record shows that the charge was put to the appellant who stated

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that he understood it and admitted it. The facts were put as follows:

"on the 22 January 1983 at about 14.15 hours at the Ambassador Hotel in Harare, the accused was observed by Patrol Officer Katsande taking money from the complainant's pocket. Patrol Officer Katsande then approached the complainant who had not observed the theft and he then asked him to search his pockets to see if he had all his money. The complainant then discovered that the \$14 that he had in his pocket had disappeared. As a result of which the Patrol Officer then arrested the accused, and the accused immediately admitted that he had stolen the money. The total amount that he had stolen is indicated as \$14, all recovered. The accused had no right to take the money from the complainant."

Questioned by the court the appellant then admitted those facts, and admitted stealing as alleged. He also admitted that he intended to deprive the complainant permanently of the money and that he had no right to do so. He was then asked:

"Q. Any defence to offer?".

His reply was:

"Your Worship, this \$14 was on the floor and I picked it up. I did not know that it belonged to him. Later on it was found out that it belonged to the complainant."

In answer to the question whether his plea was an admission of the facts and the charge and elements he replied that it was.

The magistrate convicted him on his plea of guilty and sentenced him to 6 months' imprisonment with labour 3 months of which were suspended on the usual terms. The appellant appealed, contending in essence that the conviction ought not to have been recorded on the admissions made.

The Attorney-General filed a notice with the Registrar stating that he did not wish to support the conviction on the basis that -

"[The] magistrate clearly erred in proceeding on the basis of a guilty plea after the appellant had put in issue the alleged facts and essential elements of the charge."

It was in consequence suggested that the conviction be quashed and the proceedings set aside to be remitted to the same magistrate for trial afresh.

After consultation it appeared to us that the issue required argument and we requested that the

matter proceed though neither side had filed heads of argument. We have now had the benefit of hearing Miss *Ahmed* for the Attorney-General and Mr *Foroma* for the appellant.

Mr *Foroma* contends that once the appellant maintained that he had picked up the money from the floor and had not taken it from the complainant's pocket the magistrate should have entered a plea of not guilty and proceeded to hear the matter. He based his argument on s 255A

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of the Criminal Procedure and Evidence Act [Cap 59] which reads in part:

"If the court, at any stage of the proceedings in terms of section *two hundred and fifty-five* [which deals with the procedure on a plea of guilty] and before sentence is passed -

- (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
- (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based;

...

the court shall record a plea of not guilty and require the prosecution to proceed with the trial."

Mr *Foroma* argues that once the appellant had asserted that he had picked up the money from the floor the magistrate ought not to have asked the two further questions which he did ask as to whether the appellant's plea was an admission of the facts and the charge and the elements and whether the appellant had anything to say to the charge itself. He should immediately have proceeded to trial on the basis presumably that an act on which the charge was based had not been admitted.

It appears to me that there is necessarily an overlap between the elements of an offence and the acts on which the charge is based. *Contrectatio* is an essential element of theft. This requires an act, in this case taking money which was the property of the complainant. The charge which the appellant faced was one of theft and he admitted the act of taking the complainant's property - though he disputed the method. In my view, therefore, the magistrate did not fall into error in accepting the appellant's admission as a plea of guilty to theft since the admitted facts constitute an admission at least to theft by finding.

The law in relation to theft by finding is accurately stated in Volume 2 of *South African Criminal Law and Procedure* (Ed Milton) at p 629:

"*Res Derelicta*. Abandoned property cannot be stolen, but it must not merely have been lost, its owner having had no intention to abandon. Where the property was merely lost and not abandoned, being capable of being stolen, the critical question is always whether the accused had the intention to steal in its two aspects - *first*, did he intend to deprive the owner permanently of the full benefits of his ownership, or merely to look after the *res* pending inquiries; *secondly*, did he genuinely believe it to have been abandoned?"

In this case the appellant clearly and unequivocally admitted that he intended to deprive the owner permanently of the property, and there is no room for suggesting that anyone who saw \$14,00 on the floor of a hotel room could possibly have believed that the money had been

abandoned. In any event the appellant did not dispute that on being confronted

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immediately after the event he admitted that he had stolen the money. He differed only in that he maintained that he had picked it up.

The record, therefore, discloses an unequivocal plea of guilty to the charge of theft on which the magistrate could proceed to convict the appellant.

The trial magistrate did, however, err in sentencing the appellant on the basis that the appellant had picked the complainant's pocket. He should have asked the prosecutor whether he accepted the appellant's plea as it has been proffered. If the prosecutor declined, a plea of not guilty could then have been entered so that the method by which the money had been taken could be investigated.

The situation has arisen in analogous cases. In *S v Mupari* Appellate Division Judgment No 125/79 agreed facts were handed in by the prosecutor. The case was that the appellant had been found walking in an area which was under curfew, and that he knew that the area was under curfew. He was asked to produce his permit and had none. After he had pleaded guilty the magistrate asked:

"Q. Do you have any defence to the charge?".

The appellant replied:

"I was dropped at a wrong place by a bus and I lost my way and found myself in the curfew area."

There was no further investigation of the reply and the magistrate sentenced the appellant on the basis that he was wilfully in the curfew area at a time when he should not have been. This was held to be clearly wrong.

That case differs from this case in that there was no agreed statement of facts but this distinction does not appear to me to be vital. Here the State was alleging that there was a theft by pick pocketing. The appellant was admitting at least theft by finding.

In *Mupari's* case (*supra*) the State argued "with great vigour" that the matter should be remitted so that it could be cleared up. LEWIS JP did not accept this argument. He stated:

"It does not seem to me, however, that this course would be appropriate at all. This was a case where it was up to the State to make up its mind whether it was going to accept a plea of guilty in the form tendered by the appellant or have the reason for his being in the curfew area investigated by evidence, or by cross-examination of the appellant."

In support he referred to the *S v Bezvero and Others* 1976 (2) RLR 43.

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This approach seems to me with respect eminently reasonable. In this case the State could, after the appellant's reply, have sought to establish that the theft was by picking pockets and not by finding, but did not do so.

There is no doubt, however, that the magistrate convicted the appellant on the basis that he had picked a pocket. He stated in his remarks on sentence:

"On the 22nd of this month accused was at Ambassador Hotel where he was observed by Patrol Officer Katsande taking money from the complainant's pocket."

In his comments on the Notice of Appeal the magistrate stated:

"Accused admitted most of the facts but hesitantly said he picked up the money on the floor. I disbelieved accused on that point . . .".

The magistrate erred gravely in disbelieving the appellant when there had been no investigation of the different versions. His admission of the facts as originally put cannot be held too strongly against him since the facts were not put to him sentence by sentence but as an entire whole. His acceptance is consistent with an admission of the theft but a denial of the method, as the subsequent specific question revealed.

The result is that the basis on which the appellant has been sentenced is wrong. He was sentenced as a pickpocket. The magistrate said - quite correctly:

"However, pocket picking is a serious offence and unfortunately a prevalent one. I do not have to add that this is a very difficult offence to detect and that also many people have lost very valuable documents in the hands of skilled people who know how to pick other people's pockets."

The appellant should have been sentenced on the basis of theft by finding - an offence of lesser moral blameworthiness. There is an element of succumbing to temptation rather than deliberately exercising skill to deprive unsuspecting victims of their property. For a first offender a prison sentence would hardly be appropriate save in the most exceptional circumstances - a category into which the present circumstances do not fall.

The appellant is 25 years old and, as I have mentioned, a first offender. The property stolen was all recovered, though fortuitously and not by the appellant's design. He did, however, fully co-operate with the police. He was well employed at the time as a programme computer with the Zimbabwe Broadcasting Company. A fine and a suspended sentence seems adequate punishment in such a case.

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Accordingly I would dismiss the appeal against conviction. I would allow the appeal against sentence, quash the sentence imposed and substitute therefor a fine of \$50 or, in default of payment, 25 days' imprisonment with labour, the warrant of committal to be suspended for 7 days. In addition there will be a sentence of 3 months' imprisonment with labour, the whole of it suspended for 5 years on condition that the appellant does not commit within that period any offence involving dishonesty for which he is sentenced to imprisonment without the option of a fine. The appellant has served a period of imprisonment between the date sentence was

passed and the date on which bail was granted. That period should be treated as having been served in default of payment of the fine so as to reduce *pro tanto* the amount to be paid on the fine or the period to be served in default of payment thereof.

Beck JA: I agree.

Sawyer & Mkushi, appellant's legal representatives.

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BARKER McCORMAC (PVT) LTD v GOVERNMENT OF KENYA 1983 (1) ZLR 137 (HC)

Court High Court, Harare

Waddington J

24 February, 3, 4, 10 and 16 March 1983

Flynote

Constitutional law - sovereign immunity - restrictive as opposed to absolute doctrines - distinction between acts *jure imperii* and acts *jure gestionis* - act of State - recognition by Government that a building is the embassy of another sovereign State - actions against sovereign States - whether proper for court *mero motu* to raise question of immunity even if State itself does not.

Headnote

The applicant company in 1976 entered into a lease, lasting 5 years, giving it the tenancy of part of a building in Harare, which it used as its business premises. The lease also provided an option to renew the lease for a further period of 3 years, after 31 March 1981. Towards the end of 1980, however, the then owners of the building sold it to the Government of Kenya, which wanted to use it as its high Commission in Harare. The Government made plain from the beginning its desire to obtain the use of the whole of the building, its attitude being mainly influenced by concern for the security of the High Commission. However, it did allow the company to go on occupying its part of the building after 31 March 1981 but by September 1982 the company found itself constrained to move to other, more expensive premises. It sought to claim from the Kenyan Government the difference between what it now had to pay and what it would have paid had it continued to occupy the other premises.

An attempt was made by the Deputy Sherriff to serve a summons but he was refused access to the High Commission. The company accordingly sought directions, through the Chamber Book, as to how to effect service. McNALLY J who considered the Chamber Book application, set the matter down for argument, giving his view that a sovereign State could not be sued for the type of relief claimed.

When the matter was heard, counsel for the company argued that the court should not *mero motu* raise the question of immunity. It should have been raised, if at all, as a defence. It was also argued that in any case States do not enjoy absolute immunity, but a restricted one, which

pertains to acts *jure imperii* as opposed to acts *jure gestionis*, such as commercial transaction.

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Held, that it would have been wrong for the court to have adopted the supine attitude that it should not *mere motu* raise the question of sovereign immunity. A proposal to sue a sovereign State in the municipal courts of another State is a very serious action, justifying action *mero motu* by the Court.

Held, further, that the acts of a domestic Government in the matter of foreign affairs are acts of state which cannot be challenged in its municipal courts. The recognition of premises as the embassy of another State is such an act of State.

Held, further, that assuming that the restrictive doctrine forms part of our law, on the facts it was clear that the purchase of the premises by the Kenyan Government was an act *jure imperil*, the motive for the purchase being the setting up of its High Commission. The matter of the company's occupation was incidental to this purpose; there was no desire to enter into commercial dealings with the company.

Cases cited:

Prentice, Shaw & Schiess Inc v Government of Bolivia 1978 (3) SA 938 A);

Kafraria Property Co (Pty) Ltd v Government of Republic of Zambia 1980 (2) SA 709 (E);

Thai - Europe Tapioca Service Ltd v Government of Pakistan & Others [1975] 3 All ER 961;

Madzimbamuto v Lardner - Burke NO & Another 1966 RLR 756;

Salaman v Secretary of State for India [1906] 1 KB 613; (1906) 75 LJKB 418;

The Arantzazu Mendi [1939] 1 All ER 719 (HL);

Duff Development Co Ltd v Kelantan Government & Another [1924] AC 797; [1924] All ER Rep 1;

De Howorth v SS India 1921 CPD 451;

Parkin v Government of the Republique Democratique du Congo & Another 1971 (1) SA 259 (W);

Leibowitz & Others v Schwartz & Others 1974 (2) SA 661 (T);

Lenda lease Finance Co (Pty) Ltd v Corporation de Mercadeo Agricola & Others 1975 (4) SA 397 (C);

Inter - Science Research & Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T).

C S Grossman, for the applicant.

M J Gillespie, for the respondent (on 24 February); *postea* no appearance for the respondent.

Judgment

Waddington J: The applicant in this case, which I shall refer to as "the company", carries on business as an advertising agency in Harare. The company, in terms of Rule 46 of the High Court (General Division) Rules 1971, seeks directions for the substituted service within Zimbabwe of a summons and declaration on the Government of Kenya (hereinafter called "the Government"). The company wishes to recover damages of \$55 691,35 and costs of suit from the Government. The cause of action relied on arises out of breach of contract committed by the Government in Harare.

In 1976 the company entered into an agreement of lease with the owner of a building situated in Park Lane, Harare. Under the agreement the

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company occupied only a portion of the building. The company's rights of tenancy extended for a period of five years, terminating on the 31 March 1981. The company also enjoyed the right to exercise an option to renew its lease for a further period of three years after the 31 March 1981. The owner would be entitled to demand an increased rent up to a new maximum level specified in the contract. Towards the end of 1980 the owner of the building concerned sold it to the Government which was aware of the company's then existing rights.

On 2 October 1980, the company's lawyers wrote a letter to the original owner purporting to exercise the option to renew the lease for a further period of three years beyond the 31 March 1981. A copy of the letter was also despatched to the lawyers of the Government, the new owner.

Although it must be accepted that the Government was aware of the company's leasehold rights when it purchased the building, it is plain from a number of letters annexed to the company's supplementary affidavit that the Government was not at all anxious for the company to continue its tenancy. The building concerned is, after all, the High Commission of the Government.

The first indication of the Government's opposition is contained in a letter dated 9 December 1980 from the Government's lawyers addressed to the company's lawyers. The attitude of the Government then was that the company did not have a right to renew the lease. Then, on 6 January 1981, the Government's lawyers wrote to the company's lawyers advising that the Government had instructed that the company should vacate the premises on 31 March 1981, stating -

"We think that it would be inadvisable for your clients to plan on continuing to occupy the premises referred to above after the 31st March of this year."

A further letter emphasizing the Government's attitude was written on 20 January 1981. On 8 April 1981 there was another letter in which the Government, having accepted the new maximum level of rent tendered by the company for the premises, stated through its lawyers -

" . . . the acceptance of such rental is made entirely without prejudice to our client's rights and in no way implies recognition of your client's rights to renew the existing lease. "

After this there is then a gap in the correspondence. The next letter is dated 23 December 1981. Once again, the Government's lawyers wrote to the company's lawyers. The gist of the communication was that the Government's major concern was the security of its building and personnel.

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The Government would take whatever steps it deemed necessary to maintain security and protect its assets and personnel. The Government proposed that the company and its clients would not be allowed entry into or exit from the building after 5.30 or 6 pm. The Government warned the company that these proposals would shortly be finalized. Other correspondence attached to the company's supplementary affidavit discloses that the company vigorously opposed any such diminution of what it believed were its legal rights. For the Government's part, it was made equally plain that the security of the High Commission would continue to be paramount.

A perusal of the remaining correspondence demonstrates a deterioration from that stage in the saga in the relationships between the company and the Government. The exact course of events thereafter is not disclosed in the papers. The company's declaration, which is attached to the application, merely states in para 6 that -

"Notwithstanding the Plaintiff's exercise of its option to renew the Lease, the Defendant refused to permit the Plaintiff to occupy the property in terms of the Lease and demanded that the Plaintiff vacate the property."

It is also stated that about September 1982 the company vacated the property. Again, the precise manner in which the company vacated the property is not made clear. The company was then obliged to obtain alternative accommodation. This is costing a great deal more than the company would have had to pay the Government had it been permitted to continue in occupation of its portion of the High Commission. It is that sum which, together with costs, the company now seeks to recover.

An attempt to serve summons and declaration was made but the Deputy Sheriff stated in his return that he was not allowed on the High Commission premises. Service by him at the Embassy gates was refused by the Deputy Secretary to the Kenya High Commission representing the Government. The company accordingly sought directions through the Chamber Book as to how service should be effected. My brother McNALLY, who considered the chamber book application, made no order but granted leave to the company to set the matter down for argument. No doubt he did not wish to refuse the application without affording the company an opportunity of addressing argument to the Court. That is how the matter has come before me.

Before addressing myself to the merits of the application, there is one matter that should be explained. McNALLY J in making no order in the chamber book application, indicated that it was his view that a foreign

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State could not be sued within this jurisdiction for the type of relief claimed.

He cited the reasons given in the case of *Prentice, Shaw & Schiess Inc v Government of Bolivia* 1978 (3) SA 938 (T). Mr G GROSSMAN, who appeared for the company, criticized the approach of McNally J and the similar attitude of this Court in the instant application. He submitted that neither McNALLY J nor the Court should *mero motu* have considered the question of the possible immunity from suit of the Government at this stage of the proceedings, if at all. Had the Government appeared and raised the point as a defence, then it would have been proper to have taken this intriguing question into account. But as the Government has chosen not to be represented, it was not for the Court or McNALLY J to seek out and find possible defences on behalf of the Government.

In my view, this supine attitude would have been wrong. The Courts in at least two similar and recently decided cases in South Africa adopted anything but a supine attitude. In the *Government of Bolivia* case (*supra*), at 939H, GOLDSTONE AJ (as he then was) is reported in the following terms:

"Mr *Southwood*, who appeared for the applicant, in a helpful argument, submitted that all the requisites entitling the applicant to the orders sought by it were established. However, he realised that the difficulty in the way of such relief being granted was the principle of public international law that the courts of a country will not by their process make a foreign State party to legal proceedings against its will . . ."

It is clear to me that had counsel for the applicant in that case not raised the question, the learned ACTING JUDGE most certainly would. There is another case brought *ex parte* where a similar course was adopted. In *Kafraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709E at 711E, EKSTEEN J is reported as saying:

"There was therefore no appearance for the respondent, but Mr *Kroon*, who appeared on behalf of the applicant, very properly dealt with the possible objection that the respondent may enjoy sovereign immunity against any process in our Courts. He submitted, however, that the application related to a purely commercial transaction and that, by virtue of the restricted view international law took of the doctrine of sovereign immunity today, respondent would not be entitled to claim any such immunity in the circumstances of this case."

Once again, therefore, it is demonstrated that a proposal to use a sovereign State in the Courts of another State is regarded as a very serious matter justifying action *mero motu* by the Court. The reason is explained by LORD DENNING MR in his judgment in *Thai- Europe Tapioca Service Ltd v Government of Pakistan, Ministry of Food and Agriculture, Directorate of Agricultural Supplies Imports and Shipping Wing* [1975] 3 All ER 961 at 965a-b:

"Counsel for the Plaintiffs has taken us through a fascinating study of sovereign

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immunity and its development. But I do not think we need follow him today through its ramifications. The general principle is undoubtedly that, except by consent, the courts of this country will not issue their process so as to entertain a claim against a foreign sovereign for debt or damages. The reason is that, if the courts here once

entertained the claim, and in consequence gave judgment against the foreign sovereign, they could be called upon to enforce it by execution against its property here. Such execution might imperil our relations with that country and lead to repercussions impossible to foresee. We have quite recently had examples in our courts where this general principle has been applied."

"So it seems to me that the general principle must be applied unless it comes within any of the recognised exceptions. But the exceptions are several and they are important. " (paragraph e at page 965).

It seems to me that it is essential that in cases of this description where the harmonious relations between Zimbabwe and another State could be adversely affected by the institution of civil action in the Courts of this jurisdiction, it is the clear duty of the Court to ensure that action is brought against the foreign sovereign State only in the most proper of circumstances. The need for caution in this field is no less pressing in Zimbabwe than it is in the United Kingdom. I think that caution should be exercised in this case.

It was for the reason given above that on 3 March 1983 when argument was first addressed to the Court, I adjourned the proceedings. The purpose of the adjournment was to enable the Registrar to obtain a certificate from the Minister of Foreign Affairs concerning the status of the premises in question in this case. On the papers at that time there was doubt whether the building was in fact the High Commission of the Government and, if so, for how long it had been recognised by the Government of Zimbabwe as the High Commission. It seemed to me that the recognition of a building as an Embassy or High Commission is no less an act of State than the recognition of the sovereign power itself. It is an act of a Government concerning its foreign relations with another country. In *Madzimbamuto v Lardner - Burke NO & Another* 1966 RLR 756 at 801, LEWIS J (as he then was) stated:

"However, the rule as to the conclusive nature of such certificates seems to be restricted to the realm of foreign affairs. Professor Wade deals with the matter in an article entitled *Act of State in English Law: Its Relations with International Law*, published in *The British Year Book of International Law*, Vol 15 (1943) at pp 98-103. In particular, at p 101, he says:

'The subject receives full treatment in Keir and Lawson, *Cases in Constitutional Law*, where the distinction between what may be called the external and the internal powers of the prerogative is emphasized:

"At municipal law and in the eyes of municipal courts the Crown is absolute

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in relation to foreign affairs. Therefore it may act towards foreign states and their subjects outside the realm in a perfectly arbitrary fashion; towards them the Crown has no duties, but only powers. Such powers are not strictly speaking a part of the Prerogative . . .' citing WARRINGTON LJ in *In re Ferdinand, Ex - Tsar of Bulgaria*."

The passage continues:

'The acts of the Crown in foreign affairs are called acts of state - *nowadays they are the only acts of state* - and their validity cannot be questioned in any British court.'

Later, at p 103, he continues:

'Act of state means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the

allegiance of the Crown."

In *Salaman v Secretary of State for India* [1906] 1 KB 613; (1906) 75 LJKB 418 (reported in Hood Phillips, *Leading Cases in Constitutional Law*, 3 ed p 74), FLETCHER MOULTON LJ is reported as saying:

"An act of State is essentially an exercise of sovereign power, and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it as it is without question."

The nature of the premises in this case was too important a question to leave only half answered or incorrectly answered. In matters of this sort the State cannot speak, it has been said, with two voices, the Judiciary saying one thing and the Executive another. (See the speech of LORD ATKIN in *The Arantzazu Mendi* [1939] 1 All ER 719 at 721 and *Duff Development Company Limited v Kelantan Government & Another* [1924] All ER 1 at 6 per VISCOUNT CAVE). The Minister's certificate which is of conclusive effect (see *Madzimbamuto's case supra*, at 803) makes plain something not made plain in the company's application, ie the purpose to which the building was put by the Government from mid-1980. There is no doubt in my mind that the Zimbabwe Government would not have recognised the building as a High Commission had it not been used as a High Commission by the Government from the date given in the Minister's certificate.

The certificate also constitutes conclusive evidence that no other premises have been recognised as the High Commission of the Government at any time.

It is necessary now to consider briefly what the law is concerning the immunity from suit of foreign States within this jurisdiction. I am not aware of any relevant decisions on the subject emanating from this jurisdiction. In the *Kaffraria* case (*supra*) ECKSTEEN J traced the development and application of the principles of international law governing the sovereign immunity enjoyed by foreign States in the jurisdiction of

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the South African Courts. The general principle is that international comity induces every sovereign State absolutely to decline to exercise through its Courts any jurisdiction over the representatives and property of other sovereign States. To put it another way, the principle was that under public international law the Courts of a country would not by their process make a sovereign State party to legal proceedings against its will (*De Howorth v SS "India"* 1921 CPD 451; *Parkin v Government of the Republique Democratique du Congo & Another* 1971 (1) SA 259 (W); *Leibowitz & Ors v Schwartz & Ors* 1974 (2) SA 661 (T); *Lendlease Finance Co (Pvt) Ltd v Corporation de Mercadeo Agricola & Ors* 1975 (4) SA 397 (C) at 402-4)) Were only that general principle to apply in Zimbabwe to-day, it would not be possible, it was conceded by Mr Grossman, for the company to succeed in its present application.

But Mr Grossman has argued that the Court should follow the modern trend in international law and in particular the decision in the *Kaffraria* case (*supra*). It was there stated by ECKSTEEN J following the decision of MARGO J (with whom FRANKLIN and PREISS J J concurred) in *Inter -*

Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique
1980 (2) SA 111 (T) at 124F that-

"... it must be accepted that the rule of international law on sovereign immunity which prevails today is that reflected in the restrictive doctrine, and that, in the application of that doctrine, there is no longer any justification for distinguishing, in the case of commercial transactions, between claims *in rem* and claims *in personam*. That conclusion is based on the overwhelming weight of modern authority. It is also in accord with logic and with the requirements of justice.

The legal question which now arises is whether we are free to apply the restrictive doctrine in the present case. We are not bound by any of the earlier South African decisions on the point, although we ought to follow them unless there are convincing reasons for not doing so."

Under the restrictive doctrine of international law, adopted and applied as the law of South Africa in the *Kaffraria* case (page 715A), as opposed to the absolute doctrine, a foreign sovereign State enjoys immunity in respect of *acta jure imperii*, that is, the exercise of a public sovereign act of State arising out of public or governmental actions. It does not enjoy similar immunity in respect of *acta jure gestionis*, that is, acts directed towards purely commercial or trading objectives (*ibid*, and see *Inter - Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique (supra)*).

Mr *Grossman's* principal argument was that the company has shown that there is at least a possibility that the government purchased the premises for commercial purposes and that therefore the application for directions

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should succeed. The company should be permitted to serve process; the Government would then, if it wishes, be able to raise State immunity as a defence. If the facts show *prima facie* that the Government purchased the building not primarily for public or governmental purposes but for commercial purposes, there would be merit in his argument. If the converse were to be the case, the application must fail.

I have no doubt that the general principle of absolute State immunity from action was part of the Law of Zimbabwe. I will assume for the purpose of this application that the modern restrictive doctrine of sovereign immunity also applies in Zimbabwe to-day as it does in South Africa, the United Kingdom and many other modern and sophisticated States. Indeed, it is more than probable that the restrictive doctrine forms part of our law. I will also assume furthermore that the applicant has a *prima facie* cause of action.

The question is what do the available facts disclose as to the nature of the Government's transaction with the applicant? First and foremost, it is now known that the building has been the Government's High Commission in Zimbabwe since 24 June 1980. It is known that before the Government purchased the building the company was in occupation of part of it for its own trading purposes. It is clear that the Government did not itself actually enter into any contractual relationship with the company. The Government succeeded, at most, to the lease agreement. The Government's rights as owner were, so far as the company was concerned, diminished by the company's existing leasehold rights. What was the Government's motive when it purchased

the building? To establish an embassy or High Commission or to purchase the building so that it could reap financial rewards by leasing portions of it to the company?

From as early as 9 December 1980, the Government's obvious attitude towards its acquisition was not that of a willing lessor for gain. The Government repeatedly indicated that it did not want the company occupying a portion of what had been its High Commission from the middle of 1980.

It was a remarkable situation that existed. There, operating from the High Commission of a foreign sovereign State in Zimbabwe, was a local advertising agency. In terms of Article 22 of the Vienna Convention on Diplomatic Relations of 1963, which forms part of Zimbabwean Law (see s 3 of the Privileges and Immunities Act [Chapter 28] as read with the First Schedule to that Act), the premises, as an Embassy or High Commission, should have been "inviolable". Not even the agents of the receiving State (Zimbabwe) may enter them without the consent of the

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head of the Kenyan Mission. Under Art 22(2) it is Zimbabwe's duty to take "appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent ... impairment of its dignity." It is understandable in the circumstances that the Government was not anxious to perpetuate the uneasy and no doubt inconvenient arrangement which then existed. It seems to me, having regard to the Government's attitude and in view of the fact that the premises were recognized as the Government's High Commission from as long ago as the 24 June 1980, which must have been about the time that the Government purchased the building, that the Government's true motive was to acquire the building and use it as a High Commission. That the company enjoyed leasehold rights at the time was clearly an embarrassment to the Government. The Government consistently voiced its opposition to the arrangement. although the Government seems to have accepted the presence of the company for some time, I am satisfied on the information before me, that the Government regarded the company's occupation as merely incidental to the real purpose for which the building was acquired.

The true motive in purchasing the building, I have no doubt, was to set up a High Commission. This is supported by the recognition of the building as such by the Government of Zimbabwe. When a foreign State established a diplomatic mission in Zimbabwe for the first time, its purchase of property to establish an embassy must, in my view, constitute the example *par excellence* of an act *jure imperii* in Zimbabwe. That was the position in this case. The motive of the Government in suffering the presence of the company possibly could have arisen from a desire not to antagonize the company and other members of the business community in Harare. There is no real evidence of this. It most certainly, in my view, has not been shown to have been due to a genuine desire to enter into commercial dealings with the company. Whether the general principle of immunity or the restrictive doctrine is applied, therefore the application cannot succeed.

In view of the conclusion reached above, it is unnecessary to consider the effect of Art 31 of the Vienna Convention (*supra*) which McNALLY J cited in the Chamber Book application as

authority for the proposition that service on an ambassador or member of his staff cannot be effected.

One cannot but help feel some sympathy for the loss which the company has sustained. It is to be hoped that the payment of some form or just compensation will be taken up on behalf of the company by an appropriate Zimbabwe authority.

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WADDINGTON J

The application is dismissed.

On the question of costs there is no reason why the normal rule that costs follow the result should not apply. And despite the fact that the Government of Kenya was represented once (on the 24 February 1983) in Court to apply for a postponement to enable it to consider its position, not even the costs incurred on that occasion can be awarded to the company. The Government should logically in my view enjoy the same immunity in relation to these as in relation to the principal application. There will be no order as to costs.

Winterton Holmes & Hill, legal practitioners for the applicant.

Sawyer & Mkushi, legal practitioners for the Government of Kenya.

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HEWLETT v CHIPUNZA 1983 (1) ZLR 148 (HC)

Court High Court, Harare

McNally J

7, 8, & 16 March, 1983

Flynote

Contract - for sale of goods at price in excess of controlled price - price said to include items price of which not controlled - whether intention thereby to evade regulations makes contract void - Control of Goods (Wholesale Beef Prices) Order, 1980 (SI 644A of 1980) - s 3(1).

Headnote

The plaintiff, a rancher, supplied beef to the defendant butcher over a period. The original price agreed between them was \$1 a kilogram, which was later reduced to 95 cents a kilogram. The defendant did not pay for all the beef supplied and, when sued for the outstanding balance, counter claimed on the grounds that he had overpaid.

The trial court *mero motu* (but not the defendant) raised the question of whether the contract

itself was void, as there was in existence at the time the control of Goods (Wholesale Beef Prices) Order, 1980 (SI 644A of 1980), in terms of which the maximum price at which a "carcass", as defined, could not lawfully be sold at a price in excess of a figure ranging from 51 to 80 cents a kilogram. The figure depended on the quality of the carcass. The Plaintiff had first alluded to this order in his replication, and there claimed that the price he charged the defendant included the offal, the price of which was not controlled under the order. This would have made the value of the offal some \$56 per beast, whereas the evidence was that offal was actually worth between \$12 and \$40 a beast.

Held, that the contract was *prima facie* illegal, being in contravention of the Order; but as to whether it was in fact a disguised transaction, one could only come to that conclusion if it could be shown that the buyer was not paying the controlled price for the beef and the balance for the offal. To find this, the Court would have to conclude that the price of the uncontrolled item in the package of two products was such that no reasonable man would pay it. On the evidence, it was not possible to reach that conclusion, and the contract would be upheld.

Cases cited:

Dadoo Ltd & Others v Krugersdorp Municipal Council 1920 AD 530;

Myaka v Havemann & Another 1948(3) SA 457 (AD);

Zandberg v van Zyl 1910 AD 302;

Comninos & Frangs v Couvaras & Others 1940 OPD 54;

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Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd 1941 AD 369;

Bird v Lawclaims (Pty) Ltd 1976 (4) SA 726 (D).

E W W Morris, for the Plaintiff

A A Chiwara, for the defendant

Judgment

McNally J: The plaintiff, a rancher, sues the defendant, a butcher, for \$1 782,15, being the balance due on a running account for meat sold and delivered.

The defendant counterclaims for \$2 662,37. Far from underpaying, he says, he has overpaid And so the lines of battle were drawn.

It is common cause that the defendant bought meat from the Plaintiff between October and December 1980, when meat was rationed and the wholesale price of beef was controlled in terms set out in Statutory Instrument 644 A of 1980. It is common cause that in all 63 carcasses, plus the offal or "fifth quarter" pertaining to each carcass, or at least so much of it as was not condemned on veterinary grounds, were delivered by the Plaintiff to the defendant at the Kwe

Kwe Abattoirs, the details and weights being as set out in paragraph 2 of the defendant's claim in reconversion. It is also common cause that defendant paid into Plaintiff's bank account the sums set out in paragraph 2 of the Defendant's Request for Further and Better Particulars filed of record on 1 July 1981.

The Plaintiff says he sold the meat, including the offal, to the defendant at a price they agreed at a meeting at the Kwe Kwe Hotel. This price was \$1 per kilogram of meat, later reduced to 95 cents per kilogram. The offal was not weighed. Initially he asked for payment in advance (based on an estimate) but after the first two payments the defendant slipped back to payment soon after delivery and later he had to be pursued actively by telephone before he would pay. Eventually, because he was in arrears, the Plaintiff ceased to supply him. They had a further meeting at which the defendant agreed to pay off the outstanding balance at \$200 per month. Two payments were made and then nothing more was heard from the defendant.

The pattern and the arithmetic of the payments bear out this version.

The first two payments were in round figures - \$1 000 each. The next payment of \$1 392 was made well after the third delivery, when the total weight delivered to that point in time was 3 392 kilograms. So it was obviously a payment to round off at \$1 per kilogram precisely. The fourth

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McNALLY J

delivery was 1 461 kilograms and on the 15th December 1980 \$1 461 was paid. Then on or about the 10th October 1980 1 292 kilograms were delivered and on the 4th December 1980 \$1 292 was paid. Thereafter the price went down and two deliveries of 1 104 and 1 251 kilograms were paid for by payments of \$1 048,80 and \$1 188,45. The final two deliveries were not paid for save to the extent of the two payments of \$200 each.

Against this the defendant put up a version of events which does not stand up to scrutiny. He says that the agreement was to buy at the maximum controlled price laid down by the Statutory Instrument. The officials were thrown in free by the Plaintiff. (This arrangement would, of course, have made it necessary to record the grade and weight of each individual carcass and this was not done.)

The payments, he said, were not payments for meat, but advances or loans made by him at the request of the Plaintiff, to keep him financially liquid and enable him to buy cattle to sell to the defendant. One wonders why the defendant did not buy the cattle himself.

It was put to him that it was extraordinary that his payments coincided so exactly with the weights at the prices alleged by the Plaintiff. He was unable to explain this save to say that if he had the money he was happy to advance whatever the Plaintiff asked for. If the Plaintiff wanted an advance of \$1 188,45 or \$1 048,80 or \$1 461, he was happy to advance that sum. This seems to me to be quite breath-takingly improbable.

The defendant was evasive and his habit of not answering questions directly was disturbing. He made statements and later contradicted them. For instance, he said he bought cattle, not beef, and that he paid the slaughter fees by leaving the hides with the abattoir. Yet later he said this

was wrong, he bought the meat, and the hides were the property of the Plaintiff. Mr Collins's evidence showed clearly that the defendant did not deny owing the Plaintiff money in March 1981.

I have not the slightest hesitation in rejecting the defendant's version and accepting that of the Plaintiff. Indeed, the very fact that the defendant, in his claim in reconversion, is unable accurately to calculate the price he had to pay, is further evidence against the probability of his version.

Unhappily, the matter does not end there because on the face of it the price agreed for the meat is far in excess of the maximum price allowed under the Statutory Instrument. I asked the Plaintiff whether this did not

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McNALLY J

make the agreement an unlawful one. The Court may take such a point *mere motu* - see Cheshire & Fifoot's *Law of Contract* 9 ed at p 363.

The Plaintiff replied that it was not illegal. He said that both he and the defendant well knew of the existence of the Statutory Instrument. The agreement, as set out in his replication, was designed to circumvent the regulations because the difference between the controlled price and the price charged was to be allocated as a charge for the offal or fifth quarter. There was no controlled price for offal.

It is necessary now to consider the wording of Statutory Instrument 644 A of 1980, which is the control of Goods (Wholesale Beef Prices) Order, 1980, published on 3 October 1980.

In s 2 "carcass" is defined as meaning-

"a cattle carcass which has been graded in one of the graders specified in the First Schedule, and includes a side of such a carcass."

It is apparent from Exhibits 2-11 that the carcasses in question were graded on slaughter at the Kwe Kwe Abattoir, but, as the Plaintiff explained in his evidence, the grades used the old grading nomenclature and not the one used in the First Schedule of the Statutory Instrument. He said that grades "S" and "O" were "Super", "E" was "Choice", and "N" "B" "X" and "J" were now called "1" "2" "3" and "4" respectively.

It was also accepted by the parties that a carcass is graded after the offal is removed, in other words offal is not included in the definition of "carcass".

Section 3(1) of the Statutory Instrument then goes on to provide-

"The maximum price per kilogram at which a carcass may be sold to any butcher during any month specified in the First Schedule shall be the price specified therein in relation to that month for the grade of the carcass."

Then follows the Schedule which I set out below-

"MAXIMUM PRICE PER KILOGRAM OF CARCASSES

<u>Grade</u>	<u>Maximum Price in Cents per kg</u>		
	October 1980	November 1980	December 1980
Super	72	77	80
Choice	69	73	75
1	63	65	67
2	61	63	65
3	56	58	58
4	51	52	52 "

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McNALLY J

An analysis of Exhibits 2 to 11 reveals that of the 63 carcasses involved the vast majority (56) were in grades 2 and 3 and thus their maximum permitted selling price ranged between 56 and 65 cents per kilogram. If one assumes, favourably for the Plaintiff, that he would have been paid on average 65 cents per kilogram for all 63 beasts, and that in fact he sold them at either \$1 or 95 cents per kilogram, then one can calculate the cost of the offal as follows:

A total of 10 797 kilograms of meat was sold. At an extra charge of 30 or 35 cents per kilogram, the total extra charge was \$3 546,35. Divide that among 63 beasts and it comes to \$56,29 per carcass. That is, on average and at the very least, the charge for the offal from each animal.

Now the evidence, inexpert though it was, was that the value of the offal was somewhere between \$12 and \$40 per beast. This suggests that a premium was being paid on the offal to offset the control on the price of meat. However, the Plaintiff said that his evidence was no more than a guess, and I have rejected the defendant's evidence as unreliable. So I really have no reliable evidence at all on this very crucial point.

Another point which must be made is that on the method of compensation used, the price for the offal from a lower grade animal would be higher than the price for the offal from a higher grade animal. The answer to this may be that it was convenient to average it out. For what it is worth, however, it does suggest that the pricing mechanism was designed to circumvent the regulations.

Yet a further indication is the fact that no account was taken of the condemnation of some of the offal at the abattoir. In other words, the price of the offal was unaffected by the fact that on some occasions not all the lungs or livers, for example, were sold to the defendant. He paid the full price regardless of how much offal he received. Perhaps again one should bear in mind that it was a sellers' market.

The question is what effect does all this have on the lawfulness of the agreement?

I look first to the contract as pleaded. In his declaration the Plaintiff claims in respect of "meat to the value of \$1 132,40" and "meat to the value of \$1 049,75." In further particulars filed on 17 June 1981, in paragraphs (d) and (f), the Plaintiff asserts that the agreed price per kilogram was 95 cents. It should be noted that the weights referred to in the pleadings

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McNALLY J

are, it is common cause, weights which do not include the weight of the offal.

It was only in his replication, filed of record on 13 October 1981, after the defendant had referred to the Statutory Instrument (though without pleading illegality), that the Plaintiff for the first time referred to the offal. He alleged

"that the agreement between himself and Defendant was that he was to supply beef carcasses plus all the offal, including tripes, spleens, bybels, intestines, lungs, heart, tongue, liver, head, feet, tails and thick skirts. The price per carcass plus offal was initially \$1 per kilo but this was reduced to 95c per kilo during the relevant period. Of this sum the price for the carcass would be as laid down in the order and the balance would be allocated to the offal."

It seems clear to me that the contract as expressed before 13 October 1981 was *prima facie* illegal, as being in contravention of the Statutory Instrument. Is it then legalized by the clarification and alteration of the terms as expressed on that later date? And to what extent should I be suspicious of the fact that it was only when the Statutory Instrument was mentioned that the Plaintiff altered his statement as to the terms of the contract? It may be noted in passing that it is incorrect to make such an amendment in a replication. It should have been done by way of amendment to the declaration.

The legal principles involved in this inquiry are set out in the cases and textbooks, but, rather to my surprise, I have not found any relevant cases under Price or Rent control Regulations. There must be many cases where a car, for example, whose maximum controlled price is \$3 000, is sold together with a car radio (worth \$100) for \$5 000; or a flat, whose rental is controlled at \$50 per month, is let "furnished" (with one chair) at \$100. Such authorities would be helpful in determining how to apply the principles. The principles themselves are reasonably clear, and I turn to consider them.

I begin with *Dadoo Ltd & Others v Krugersdorp Municipal Council* 1920 AD 530, the case which decided that a company had no race. Thus, an Asian-owned company was entitled to buy a house in Krugersdorp though it was against the law for Asians to own property in Krugersdorp. In that case INNES CJ set out two criteria for resolving the problem. The problem itself is usefully described in Christie *Law of Contract* p 340, as follows:

"A different question arises when the parties, fully conscious of the statutory provision, have designed their contract in such a way as to achieve their object (which may be the very mischief at which the statute is aimed) without contravening the statute. The question is whether their contract so designed must be declared void as being *in fraudem legis*."

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McNALLY J

The two statements of INNES CJ are these-

1. "An examination of the authorities therefore leads me to the conclusion that a transaction is *in fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions. Thus stated, the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things . . .". (at p 547).
2. "But an Act thus construed (ie construed so as to defeat all attempts to do or avoid in an indirect or circuitous manner that which it has prohibited or enjoined) may nevertheless be evaded; parties may genuinely arrange their transactions so as to remain outside its provisions. Such a procedure is, in the nature of things, perfectly legitimate.

There is nothing in the authorities, as I understand them, to forbid it. Nor can it be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law, and that the selected course is as convenient in its result as another which would have brought them within it."

One can at once make two comments about the present contract. First of all, is it a disguised transaction? To answer that question one must look at the facts. It will be a disguised transaction if one can come to the conclusion that it is not true that the purchaser was paying the controlled price for the meat and the balance for the offal. For we are dealing here with a composite price (as to which see *Myaka v Havemann & Another* 1948 (3) SA 457 (AD) at 462) for a package of two products, one of which has a controlled price. The composite price is not a controlled price. Therefore one moves to the second point. If one is to hold that there was an intention to evade the provisions of the Statutory Instrument, one must come to the conclusion that the uncontrolled item in the package is priced so unreasonably that no reasonable man would pay that price. Thus one must be forced to the conclusion that the purchaser is in fact paying a premium for the controlled item.

It is easier to come to this conclusion when the uncontrolled item is readily available at a fixed price. To revert to the earlier example of the car and the radio, let us assume that the radio is freely available in the shops at around \$100. If someone then buys a car (whose controlled price is \$3 000) plus the radio, for \$5 000, one is entitled to say, "No sane person pays \$2 000 for a \$100 radio. You are in fact paying \$4900 for the car." It is not so simple when one is considering the price of offal in a sellers' market. Can one say it was ridiculous, on the evidence in this case, to pay \$56 or more for a fifth quarter at the end of 1980? On the evidence before me I do not think I could come to that conclusion. The evidence was, of course, scanty, largely because the defendant did not raise this defence or call expert and reliable evidence after I raised the question.

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McNALLY J

The plaintiff was not cross-examined to any great extent on this aspect. He said, and I believe him, that that was the agreement. It follows that the defendant was willing to pay that price. I do not think it is for the Court to assume that he was in reality paying a premium on the beef. It was for the defendant, a butcher of many years' experience, to satisfy me in that regard - see per SOLOMON J in *Zandberg v van Zyl* 1910 AD 302 at 314.

Alternatively, since it was indeed not the defendant but the Court who raised the issue, I adopt with respect the approach of VAN DEN HEEVER J as he then was, in *Comminos & Frangs v Couvaras & Others* 1940 OPD 54 at 62-63, that "the presumption of legality would prevail unless the informer succeeds in putting before the Court material sufficient to rebut the presumption."

The effect of this finding is that I cannot conclude on the evidence that this was a disguised transaction. There are very suspicious features, as I have pointed out earlier, but I do not consider they are enough in the circumstances to outweigh the plaintiff's assertion that he considered the agreement lawful. One may apply the dictum of WATERMEYER JA in *Commissioner of Customs & Excise v Randles, Brothers & Hudson Ltd* 1941 AD 369 at 396, where he said-

"Of course, before the Court can find that a transaction is *in fraudem legis* in the above sense, it must be satisfied that there is some unexpressed agreement or tacit understanding between the parties. If this were not so, it could not find that the ostensible agreement is a pretence. The blurring of this distinction between an honest transaction devised to avoid the provisions of a statute and a transaction falling within the prohibitory or taxing provisions of a statute but disguised to make it appear as if it does not, gives rise to much of the confusion which sometimes appears to accompany attempts to apply the maxim quoted above."

See also *Bird v Lawclaims (Pty) Ltd* 1976 (4) SA 726 at 728C-729G.

There is another way, it seems to me, of coming to the same conclusion. Statutory Instrument 644A of 1980 is in very bald terms. I have quoted its relevant parts. Other statutory instruments in similar fields have been much more detailed. Take, for example, Statutory Instrument 578 of 1981 relating to the controlled price of motor vehicles. Section 5 of that Instrument specifically provides for the prices of accessories, presumably in order to prevent the very transaction which I have used as an example earlier in this judgment.

Then again, Statutory Instrument 626 of 1982, the Rent Regulations,

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McNALLY J

has a clause 40 which prohibits any evasion of the regulations, and a clause 42 which makes such evasion a criminal offence.

It is clear therefore that it has been found necessary in subordinate legislation to spell out the situations in which evasion is not permitted. Thus one may say that where it is not spelt out, parties are entitled to enter into agreements which avoid the Regulations provided that such agreements are not shown to be dishonest. Only when it is clear that the parties are saying one thing and meaning another, and that other is illegal, will the Court decide that their agreement is *in fraudem legis*. On the facts of this case, and on the evidence before me, I cannot make a finding that the contract testified to by the plaintiff was an illegal and unenforceable contract.

It remains only therefore to say that having rejected the defendant's evidence and accepted that of the plaintiff and his witness, there being no dispute about the figures involved, I grant judgment for the plaintiff in the sum of \$1 782,15, with interest and costs as prayed. The claim in

reconversion is dismissed with costs.

Morris Beale & Collins, legal practitioners for the plaintiff.

A A Chiwara, legal practitioner for the defendant.

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"R" LTD & ANOTHER v COMMISSIONER OF TAXES 1983 (1) ZLR 157 (HC)

Court High Court, Harare

Squires J

15-18 November 1982 & 23 March 1983

Flynote

Income Tax - Income Tax Act [Chapter 181] - s 8(1)(i)(iii)C - disposal of property otherwise than by way of sale or exchange - whether a "sheep lease" contract is such a disposal - paragraph 14 of Second Schedule - when a "business" can be said to have been disposed of - tax avoidance scheme - genuine commercial transaction, chosen method of carrying out of which involved lesser tax liability than other method - not necessarily a tax avoidance scheme - fact that motive may have been to avoid tax does not make a scheme a tax avoidance scheme, if taxpayer seeks to reduce tax liability in a way in which Act permits.

Headnote

The two appellant companies carried on farming operations. Though both were controlled by the same external conglomerate, they were separate in function, having separate management, book-keeping, assets and (apart from the holding company) separate shareholders. The minority shareholders held about 5% of the issued shares in both companies. Due to the unsatisfactory nature of the companies' profitability, the holding company conceived a scheme whereby the operations of the two companies would be merged. Of the two appellant companies involved, R Ltd had never traded profitably and therefore had a substantial assessed loss. K Ltd did produce profits, but well below the anticipated returns in its asset base. The scheme required that K Ltd the second appellant, would cease its farming operations and lease to R Ltd its farm and its livestock. The lease of the livestock was what is known in South Africa as a "sheep-lease", which provides for the lessee to use the animals as his own and at the end of the lease to return an equivalent number of animals; it is the same, in effect, as a contract of *mutuum*.

The Commissioner viewed this transaction as a disposal by K of its livestock otherwise than by sale or exchange and included an amount equal to the value of the stock in K's gross income. He also was of the opinion that the scheme was one which had as its sole object or one of its main objects the avoidance or reduction of tax, and assessed the amount that it would have realized if sold in the ordinary course of business. He took the view, too, that the livestock acquired by R had to be brought to account in

R's books, at R's standard values, adding to R's gross income some \$900 000; some deductions were allowed against this sum.

The appellants argued that the arrangement was not a "disposal" of the livestock in terms of the section, since the animals had to be returned; and that the arrangement, while having the effect of reducing the appellants' tax liability, was a legitimate one and not a tax avoidance scheme.

Held, that it is not correct to treat what is borrowed or hired as a "receipt", within the meaning of gross income. The reason for this is that from the moment the borrower enters upon it, there arises a co-existent and continuing obligation on him to repay or restore it. Similarly, if it does not accord with ordinary usage to treat what is borrowed as a receipt, it is equally wrong to regard it as a disposal by the lender. Furthermore, the relevant paragraphs of s 8(1) all contemplate an alienation to, or a vesting of trading stock in, someone else on a basis that is final and complete. To accept the Commissioner's contention would result in the various further transfers or disposal of the herd attracting tax three times. Finally, if there was any doubt about the meaning of the legislation the *contra fiscum* rule of interpretation would operate against such a construction.

Held, further, that the disposal of K's livestock could not be regarded as a disposal of its "business" in terms of s 8(1)(i)(v), resulting in its gross income being assessed in terms of para 14 of the Second Schedule. It is equally a business purpose to use an asset to lease for rent as to use it to sell and produce a purchase price. They are both facets of the same business.

Held, further, that when a genuine commercial transaction is considered and there are two ways of carrying it out, it is quite wrong to draw the inference, as a necessary consequence, that in adopting the course that involved paying less tax, one of the main objects is to avoid tax. It is manifest from the provisions of the Act that the Legislature contemplates and provides that some particular arrangements of a taxpayer's affairs will either not attract tax at all or allow him to reduce the amount of tax payable. If a taxpayer seeks to reduce his liability in a way allowed by the Act, his method of doing so cannot be said to be a tax avoidance scheme. On the facts of this case, the appellant's scheme was a genuine commercial transaction and not a tax avoidance scheme.

Cases cited:

CIR v Genn & Co (Pty) Ltd 1955 (3) SA 293 (AD);

Commissioner of Taxes v Feldman & Others 1968 (1) RLR 85; 1968 (2) SA 755 (RAD);

SBI v Aveling 1978(1) SA 862 (AD);

IRC v Brebnar [1967] 1 All ER 779 (HL);

War Assets (Pty) Ltd v Federal Commissioner of Taxation (1954) 91 CLR 53; 6 AITR 1;

CIR v King 1947 (2) SA 196 (AD);

Commissioner of Taxes v Ferera 1976 (1) RLR 106; 1976 (2) SA 653 (RAD).

A Swersky SC, with him *I A Donovan*, for the appellants.

R R Horn SC, for the respondent.

Judgment

Squires J: These appeals, which were heard together for the sake of convenience, raise primarily the interesting question of whether the transfer of livestock from the lessor to the lessee under a "sheep lease" constitutes a "disposal" for purposes of inclusion in the taxpayer's gross income. In South Africa it is not a problem because by specific provision in the

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SQUIRES J

First Schedule to the South African Income Tax Act livestock transferred under such an agreement is deemed to be held and not disposed of by the grantor of such lease. But in the Income Tax Act of this country there is no such legislative assistance, probably because of the comparative rarity of the transaction.

The problem arises in this way:

The two appellants, which I will refer to as R and K respectively, are both companies that carried on farming operations. They are also both controlled by one and the same external conglomerate, and apparently constitute the twin arms of the controlling company's agricultural investments in this country. Although controlled by one and the same company, the two appellants were entirely separate in function. They had separate managements, separate book-keeping systems, separate assets, and - apart from the holding company - separate shareholders.

In the case of R the controlling company - which I shall call G Ltd - held 95% of the issued shares. Of the remaining 5% a little over half were held by persons in this country, but rest were scattered over the globe with more than a quarter of them being of unknown address. R owned, and conducted its farming operations on, 56 000 or so acres of land in the eastern half of the country. A little under 10% of this was arable and irrigable, and the remainder was veld grazing. Despite being under G Ltd's management since 1953, some of which, especially in later years, was active and determined, it had never until 1975 made a profit in its entire life of some thirty years. This unrewarding result seems to have been due primarily to the repeated failure of its crop-growing activities. It also endeavoured to make profits out of breeding and raising cattle for slaughter; and although this aspect was slightly more successful and it in fact earned profits, these were more than completely wiped out by losses in other directions. Despite strenuous efforts to redeem the situation, particularly after 1970, it never showed a profit until the 1975 financial year, when it produced a surplus of \$19 000.

As long ago as 1958, the share capital was reduced in a scheme of reconstruction because the shareholders' equity had been lost even by then; and by the end of its financial year of 1974, namely the 31 December, it had an assessed loss for tax purposes of \$1,2M. It had owed G Ltd

a steadily increasing sum provided as loans over the years, upon which no interest had ever been claimed and which had by 1975 stood at \$0,9M. In truth, by that date R was insolvent; and were it not for the fact that

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SQUIRES J

80% of its indebtedness was to the controlling company or other subsidiaries, it would in all probability have been wound up long since.

So far as K is concerned, it was entirely a cattle-ranching enterprise of some 226 000 - odd acres situated about 100 km north of Bulawayo in the western half of the country. G Ltd acquired 94,5% of the issued shares in 1949, and had been responsible for the management since 1950. Although it appears to have been a generally better managed enterprise than R and although it did generate profits, these were far below the return expected and required by its parent company. On a total asset base estimated at \$2M, for example, it realized a total net profit from the 1 July 1968 to the 31 December 1972 of only \$55 000 after tax that is, a yearly average of \$12 000, which gave a derisory return on capital of about 0,6%. Objectively evaluated, its performance was therefore as poor, if not poorer, than R; and the two companies together, with combined total assets of \$2,9M, realized a net total after tax of \$43 000, for about four years from the 1 January 1969 to the 31 December 1972.

As long ago as 1968, the idea of improving this situation by merging the operations of the two appellants was apparently conceived, and a resolution to that effect was actually taken in June of that year by the executive committee of G Ltd. This came to nothing for reasons that are not clear. But after further though unavailing efforts to improve the viability of both companies in the early 1970s, the idea was again resurrected in 1973. This plan involved a scheme of arrangement between R and K and the creditors and shareholders concerned. Since such an operation could well have had some impact on the tax liability of the appellants, particularly R an approach was made to the respondent to see if he would accept such a reconstruction without adversely affecting the tax situation of the companies. The Commissioner's response was discouraging, so the idea was not pursued although inquiries were made to test the validity of the respondent's response. In the meantime fresh attempts were made to improve the profit-producing performance of the two appellants separately. While the outlook for K gave greater hope in view of a potentially rising beef market with better producer prices, the problems of R were more deeply rooted, such as the poorer quality herd, the rising quantity of cattle losses and unpredictable crop failures. The problems of management of R were partly alleviated by importing some of the management personnel from K, and though this helped a little, it was really treating the symptom and not the cause.

Other possibilities of rationalizing the situation by some sort of common

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control were also considered to this end. In 1974 G Ltd acquired the minority interests in R. Pursuant to this idea, it subsequently made an offer to the minority shareholders of K - so the

two appellants could be run as wholly owned subsidiaries, but this latter attempt was emphatically rejected by the minority shareholders of K. The question of running the farming operations together was further complicated by the two different fixed standard values of the cattle owned by the respective companies and the different quality of their herds. This feature was exacerbated by the fact that K, as the concern with the better quality herd, had a lower fixed standard value for its herd than did R - which, though it had a poorer herd, had a higher fixed standard value for the purpose of its trading.

The difficulties of R, particularly, became even more acute when it was decided to eliminate crop production from the company's operations. Although expenditure was reduced, the predictable and potential income from cattle-raising by itself did not justify the employment of more than one manager, and the problems of R were such that a single manager could not do all the work alone.

Against this general background, the question of merging the operations of the two appellants was again considered in 1975, apparently on a different basis; and, notwithstanding the possibility of adverse repercussions from the respondent's office, this time the plan went ahead.

In substance, this project required that K Ltd would cease its farming operations on 1 January 1976 and would lease to R the land owned by it at a rental of \$40 000 *per annum*, plus certain escalations which depended upon an increase in the price of beef. At the same time it also leased to R, by a separate agreement, the livestock with which it had been farming. This was leased at varying rentals, depending on the type of animal, again with a clause providing for an increase in such rent if the beef or mutton price of the producers was increased during any year of lease. The livestock in question consisted of 22 611 cattle, 446 sheep, and a small number of horses that were apparently used for herding. Both these agreements were to run for a period of fifteen years commencing on 1 January 1976 but renewable at R's option for another five years on giving a prerequisite period of written notice.

The lease of the livestock assumes a particular importance in these appeals because it provided for the lessee to use the herd as its own - that is, to slaughter or cull animals, and to return at the end of the lease not the same animals handed out, but an equivalent number of livestock of similar

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breed, type and standard. It was, in other words, a "sheep lease", a term that is better known in South Africa than in this country, but nevertheless a well recognised and accepted contract in Roman-Dutch law that is the same in effect as the contract of *mutuum*.

In calculating a fair and reasonable rent for the lease of both K's land and livestock to R the past profits history and future profits prospects of K were assessed - taking into account the political uncertainties that were by then a factor in any investment equation related to this country; and secondly, the question of an adequate return on the various assets of K was considered in the light of prevailing conditions in farming operations carried on, not only in this country but elsewhere in Southern Africa. The result of these deliberations was that a 5% return

on land and a Ho return on the livestock was considered a fair and reasonable one, and the rental was assessed accordingly. Furthermore, since the plan involved the taking over of K's farming operations by R, the agreement of the minority shareholders in K had to be obtained. After considerable difficulty, this was eventually achieved on the basis that the dividend expectations of this minority were guaranteed by G Ltd on a preferential basis, and the plan was put into operation as for the appellants' financial year that ended on 31 December 1976.

As had been feared by the appellants, and foreshadowed by the Commissioner, this transaction and its implementation did indeed have a profound effect in the field of the companies' tax liability.

The Commissioner viewed this transaction, firstly, as a disposal by K of its livestock otherwise than by sale or exchange or in any of the other ways referred to in paragraph (i) of s 8(1) of the Income Tax Act, and he therefore included an amount equal to the value of such trading stock in K's gross income by virtue of s 8(1)(i)(iii) C. Moreover, because he was of the opinion that such disposal was in pursuance of a transaction that had as its sole, or one of its main objects, the avoidance or reduction of tax, he assessed the amount that it would have realised if sold in the ordinary course of business. This selling price he calculated would be \$1 475 000, and this sum he added, by amended assessment of 20 March 1980, to K's taxable income. He did, on the other hand, allow as deductions the sum of \$473 820, being the fixed standard value of the livestock disposed of, and the sum of \$56 493 as "livestock rented from lease"; but the net result was a substantial increase in the tax liability of K.

On the other side of the coin, the Commissioner took the view that the

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livestock acquired by R under the agreement with K had to be brought to account in R's books at the latter's fixed standard values, which were - as already stated - higher than K's. On this basis there was added to R's gross income the sum of \$907 948. At first, the respondent hit R with a second barrel by disallowing the deduction it had claimed as rent for the leased livestock and thereby added the sum of \$56 493 to R's taxable income, but by a later amended assessment he allowed this deduction. On the other hand, and as in the case of K Ltd he also permitted a deduction of the closing value of the livestock, but because he was of the opinion that K's livestock had been acquired by R otherwise than in the normal course of trade, for the purposes of s 15(2)(x) of the Act, the proviso to this sub-section restricted the deduction of R's hands to the fixed standard value of the livestock as used by K Ltd. In the result, he only permitted a deduction of \$473 820. In consequence of all this, R's assessed loss was reduced by the sum of \$430 691 without any trading profit being earned.

Both appellants objected to these amended assessments, and the substance of their objections, and subsequent appeals - as I understand them - are as follows.

So far as K is concerned it basically complains that the sum of \$1,475M included in its taxable income was not in any way an amount that was in fact received by, or which accrued to, it; nor can it be deemed to have been so received. Consequently, there just is no such sum that can

properly be included in the appellant's gross income and consequently its taxable income. The only amount it has received in respect of such transfer of its herd and land is the rentals payable in terms of the overall agreement.

More particularly, however, it claims that the Commissioner is wrong to regard the handing over of its livestock - to use a neutral description - under the sheep lease as being within the meaning of the words "disposed of" in s 8(1)(i)(iii)C of the Act. In the circumstances of the instant case, the appellant K alleges that the herd should still be regarded as being held by it as is achieved by para 3(3) of the First Schedule to the South African Tax Act, 101 of 1973. In that situation the livestock would be valued at K's fixed standard value for the purposes of assessing K to tax.

It is argued in the alternative, however, that if the effect of the sheep lease is that the appellant K did dispose of its herd, then the amount to be included in its gross income is not determinable by reference to s 8(1)(i)(iii)C of the Act and para 12 of the Second Schedule. It is claimed that if the livestock was disposed of in terms of s 8(1)(i), then it was disposed

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of either by an exchange or in pursuance by K of the disposal of its business, so that para 12 does not apply. And in any event, it is claimed in addition, even if there was a disposal of the livestock within the ambit of s 8(1)(i)(iii)C, and para 12 of the Second Schedule is the proper basis of determining the value to be included in the gross income, then it was not a disposal, operation or scheme which had the avoidance of tax as its purpose or even one of its main purposes. The respondent was therefore wrong to include in the appellant's gross income a figure equal to the sale value of the livestock as if sold in the ordinary course of trade.

So far as R is concerned, the main issue is really the obverse effect of the sheep lease, from the recipient's point of view. Can it be said that the legal consequence of the sheep lease is that R acquired this livestock as its own, and the value thereof - at R's fixed standard value of \$907 948 - was properly included in its gross income as part of its trading stock? The appellant's case is that the herd in question was simply leased to it on a basis that constituted a contract of *mutuum*; and while it might have become the owner of the animals because the subject of the agreement was fungible, it coincidentally attracted a corresponding and continuing liability to thereafter return such a herd to the lessor or lender. On that basis it is said that R did not receive the K herd as contemplated by s 8(1) of the Act.

If that is not accepted, the appellant R argues in the alternative, and if it is held that the sheep lease does have the effect of bringing K's herd into R's trading stock, then the corresponding deduction that should be allowed to R is the fair market value of the herd at the date of acquisition instead of only the fixed standard value of the animals as reflected in K's trading.

There was a further alternative claim which also proceeds upon the premise that if the appellant R is held to have acquired the herd from K so that it becomes part of R's trading stock, then because R also acquired in the same year of assessment an obligation to return the same quantity, quality and therefore value, of animals to K when the lease terminated for whatever

reason, this liability constituted "expenditure" incurred by the appellant R for the purposes of its trade or in the production of its income. And it is therefore entitled to claim a deduction in that sum, that is the value of the herd, by reason of s 15(2)(a) of the Act. In the event, this particular ground of appeal was not persisted in, so no more need be said about it.

To revert to the main problem, then, it was common cause between

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the parties that the sheep lease here in question constituted a contract of *mutuum*, so that dominium in the leased livestock vested in R as the lessee. It was on the strength of this consequence that the Commissioner took the view that there had been a "disposal" of the herd, which transaction fell under sub-para (iii)C of s 8(1)(i) for the purposes of fixing the value of the livestock that was to be brought into the lessor's gross income.

Mr *Horn*, in support of the Commissioner's conclusion relied, first, on the point that the authors of Gunn's *Commonwealth Income Tax Law & Practice*, para 1004 of the 6th edition and para 1118 in the 7th edition of that work, in considering the lease of livestock under s 36(1) of the Australian Income Tax Act as a "disposition", were of the opinion that if such lease amounted to a contract of *mutuum* then there was a disposal in terms of that section. The learned authors accept, on the other hand, that if such lease was only a bailment, where the goods leased were to be redelivered on expiry of the trust in their original or altered form, then it was not such a disposal.

Secondly, and of even greater cogency, argued Mr *Horn*, was the fact that in South Africa, which, if not the home of the sheep lease, was probably the country where it was most frequently used, the legislature had intervened to effectively prevent the transfer of livestock, in a similar scheme of tax legislation, from being regarded as a disposal. The obvious inference from this, he said, is that but for such special provision it would be regarded as a "disposal" of livestock for purposes of calculating a trader's, and particularly a farmer's, gross income.

The effect of the appellants' argument, said Mr *Horn*, was to invite the Court to restrict the ambit of the word "disposal" in s 8(1)(i) to a "gratuitous disposal" so that only a disposal for no consideration fell into gross income. But a gratuitous disposal was specifically dealt with in s 8(1)(i)(iii)B, and disposals other than gratuitous ones were also clearly included in the section.

The appellants' case, however, as I understood Mr *Swersky*, did not seek to limit the word "disposal" to "gratuitous disposal". It went significantly further than that and essentially disputed that there was a "disposal" here as contemplated by the section, despite the lease agreement having the effect of a contract of *mutuum*.

In this argument he placed strong reliance on the decision of *CIR v Genn & Co (Pty) Ltd* 1955 (3) SA 293 (AD), particularly the passage at 301B-G

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where SCHREINER JA discussed the question whether a borrowed article, been a fungible or not, could be said to be "received by" or "accrued too, the borrower taxpayer:

"I have grave doubts whether this argument does not fail at the outset on the ground that borrowed money is not received nor does it accrue within the meaning either of the definition of 'gross income' or of s 12(f). It is difficult to see how money obtained on loan can, even for the purposes of the wide definition of 'gross income', be part of the income of the borrower, any more than the value of the tractor which a farmer borrows is to be regarded as being income received otherwise than in cash. Though a borrowing for use differs from a borrowing for consumption in that the borrower in the former case does not become the owner of the thing borrowed and must return it *in specie*, while in the latter case he does become the owner and is only obliged to return what is similar, for present purposes there would seem to be no difference between the two cases. Nor would it seem to make any difference whether or not hire is paid for the use of the tractor or interest for the use of the money. Neither in the case of the borrowed or hired tractor nor in the case of the borrowed or 'hired' money does it seem to accord with ordinary usage to treat what is borrowed or hired as a receipt within the meaning of the definition of 'gross income', or to treat what is paid as rent or interest as paid in respect of something received within the meaning of s 12(f). It certainly is not every obtaining of physical control over money or money's worth that constitutes a receipt for the purposes of these provisions. If, for instance, money is obtained and banked by someone as agent or trustee for another, the former has not received it as his income. At the same moment that the borrower is given possession he falls under an obligation to repay. What is borrowed does not become his, except in the sense, irrelevant for present purposes, that if what is borrowed is consumable there is in law a change of ownership in the actual things borrowed."

The significance of this analysis is, of course, that whether a borrowed article or fungible does or does not become the property of the borrower, it is not correct to treat what is borrowed or hired as a "receipt" within the meaning of gross income. Jurisprudentially, the reason for this seems to be that what is borrowed does not become the borrower's, since from the moment he borrows it there arises a co-existent and continuing delegation on him to repay or restore it. And even if such goods, whether hired or borrowed, are consumables and the dominium of them vests in the borrower, this makes no difference when considered for the purpose of calculating gross income.

To the extent that the judgment describes it as making no difference to the fact of "receipt" or "accrual", even if the borrower or lessor is to become the new owner - in other words, not even in the case of a contract of *mutuum* - it seems to be *prima facie* contrary to the view of the authors of *Gunn*. If it does not accord with ordinary usage to treat what is borrowed or hired as a receipt in the hands of the borrower, it can only with equal difficulty be regarded as a disposal in the hands of the lender.

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Although that authority deals with the more primary net or concept of "gross income", it focuses

attention on the obligation of the borrower to restore what he has acquired, and the impact and effect of this obligation on the nature of the transaction. The problem in the present cases, of course, stems from one of the extended or deemed meanings of "gross income" as provided in s 8(1)(i), where a trader's gross income is concerned, but it also imports the same difficulty in deciding whether there is a "disposal" in terms of s 8(1)(i) or not.

Now, the Commissioner seems to me to be correct in one sense when he says this sheep lease constitute a disposal, because ownership of the livestock vests in the lessee; and such herd has been "bestowed on" or "made over" to the lessee, which is the normal meaning of "disposal". But I do not think that view of the matter gives adequate or indeed any recognition to the effect of the corresponding obligation on the lessee and co-existent right of the lessor to the return of the herd. In the first place, and in terms of *Genn's* case, the lessee is not receiving the livestock in the sense required to constitute gross income.

But in the second place, and equally important, I do not think that such a transaction, that is with the reversionary right and obligation respectively, to receive back and restore K's trading stock, is one that is contemplated by s 8(1)(i). If one examines the situations provided for in sub-paragraphs (ii), (iii) A, B and C, (iv) and (v) of s 8(1)(i), they all seem to me to contemplate an alienation to, or a vesting of the trading stock in, someone else on a basis that is final and complete. In other words, the use of such trading stock as a taxable entity comes to an end because it has irreversibly passed out of the trader's hands. Only that step is regarded by the Legislature as the realization of such trading stock and the moment at which it must be taxed at its proper value.

But in an arrangement such as the present one K, as the lessor, has the right to have its trading stock restored to it as soon as the lease terminates, whether by reason of breach of its terms by R, or by effluxion of time, and it would then to all intents and purposes presumably continue trading with it.

When one also considers the wider scheme of the Income Tax Act, it seems to me to reinforce the conclusion that the Legislature did not contemplate that trading stock dealt with as here would attract tax. While a farmer has a herd of livestock he is, of course, allowed to value that

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for purposes of assessing him to tax at the fixed standard value selected or agreed. When he sells it or otherwise disposes of it in terms of s 8(1)(i) he is taxed on the sale price or the value as calculated in the Second Schedule. But that only happens where it is thus realized. It does not seem to me that the Legislature requires the transfer - to use a neutral word - of a herd in this way to attract tax three times, as it would if the present sheep lease is held to be a disposal within the meaning of s 8(1)(i). It will be taxed as now claimed by the Commissioner in K's hands when it is transferred to R; it will be taxed a second time when, having become part of R's stock-in-trade, R returns it to him in terms of the lease and so makes another disposal. And then finally, it will be taxed when K brings it to account by selling it as part of its ordinary profit-earning business in the fullness of time. Only the third occasion will be a true disposal as part of a profit-earning activity. The others will be notional tax. And as BEADLE CJ pointed out

in *Commissioner of Taxes v Feldman & Others* 1968 (1) RLR 85 at 94; 1968 (2) SA 755 (RAD) at 761, while Income Tax Acts sometimes do strange things, and taxing a notional profit is by no means unknown, the language of the Act should clearly indicate that that will be done. Here no amount other than the rental paid by R for the hire of the herd has been received by, or accrued to, K; and as the learned CHIEF JUSTICE said in the case cited:

"To attempt to fix a notional value on an 'amount' not received or accrued, so as to make it attract tax is not, I hope, the general purpose of the Act."

Moreover, considered by the touchstone of the rules of statutory interpretation and construction, namely the *ejusdem generis* rule and the *contra fiscum* rule, I think this result is confirmed. The ordinary meaning of "dispose" is simply to "make over" or "bestow upon", which is really an act of a neutral mental intent. To "dispose" of stock could cover a distinct alienation so as to achieve an intended and lasting change of ownership, or a transaction such as an ordinary lease or a loan of *commodatum*. The former is manifestly covered in s 8(1)(i) of the extended meanings of "gross income"; the latter equally clearly is not. For the reasons already given, I think "disposal" in s 8(1)(i)(iii)C takes its meaning from the other sub-paragraphs, which all indicate an alienation like a "sale", a donation or an "attachment" in pursuit of a creditor's claim; a transaction that is final. It does not contemplate and include a transfer that is temporary in principle, however long it may be in time to achieve. That is only a matter of degree.

Similarly, if one is left in genuine doubt as to the intended meaning of "disposal", because of the general approach against the imposition

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of notional tax unless it is clearly provided for, I think the issue has to be resolved against the *fiscus*. I do not entertain such doubt here, but if there is a true doubt, then application of the *contra fiscum* rule leads to the same conclusion.

In short, therefore, I do not think that either the general scheme of the Act, as applied to the circumstances of a farmer dealing with his trading stock or the language used intends to tax a lease of livestock, even on the basis of a *mutuum*, and more particularly I do not think the provisions of s 8(1)(i)(iii)C include, as a "disposal", a transaction of this nature.

While one hesitates to take a different view from that expressed by the authors of so well known a work as *Gunn*, not only do they advance no authority for their conclusion that a contract of *mutuum* would be a "disposal" under s 36(1) of the Australian Act, but it seems to me that the language of s 36(1) might also well attract the application of the *ejusdem generis* rule of construction, and limit it to transactions like a "sale of a gift", whereby the alienation of the trading stock is irreversible, and represents the true end of "trading with such stock". Nor do I think one can safely infer that the reason for the presence of para 3(3) of the First Schedule in the South African Income Tax Act is because a sheep lease would otherwise achieve a disposal that would be taxable, even if notionally. It may equally well have been inserted originally for greater clarity and to avoid possible contention since not all sheep leases or "similar

agreements" are in identical terms as appears from the cases cited in argument. The particular terms in a particular lease might give rise to disputes of this nature, whereas others might not. If this sort of agreement were the subject of such extensive use in this country as it appears to be in South Africa, then no doubt our legislation would also have acted to clarify the matter, one way or the other - to specifically deem the stock to be held by the lessor, or to specifically include it as a disposal in s 8(1)(i).

On the first and important point, therefore, I think the appeal must succeed.

That conclusion really disposes of the present dispute, since the appellant's further arguments were based on the premise that its main objection might not be successful.

But in case I am wrong in that conclusion, and in the event that the matter goes further, and in any event out of deference to the arguments presented by Counsel, I have proceeded to consider them, albeit the

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reasoning process is not set out at such length or in such detail.

The first such alternative was that if K's livestock had indeed been disposed of, then it had been disposed of by K in pursuance of the disposal of its business under sub-para (v) of s 8(1)(i) and the amount to be included in its gross income would be regulated by para 14 of the Second Schedule. Despite the persuasive argument that was put forward by the appellant in this respect, I am unable to conclude that it is a sound one. Mr Swersky's main point was that although the appellant K could now be said to be carrying on some sort of business, it was a different business to its previous income earning activity: and the word "business" in this context meant the income producing operation. K's income-producing operation was now simply the lease of its land and livestock, and it had no present intention to continue cattle ranching.

Quite apart from the fact that even the mere earning of income from letting of a farm constitutes one a "farmer" for purposes of the Income Tax Act, there was no evidence that I can recall to the effect that K had permanently given up the ranching of cattle or other livestock. All the situation shows is that K, as part of a plan to improve the economic viability of G Ltd's agricultural interests, discontinued farming with its livestock for its own account. It did not, to my mind at any rate, cease using that livestock as trading assets. It is equally a business purpose to use an asset to lease for rent, as to use it to sell and produce a purchase price. The fact that it is a different type of business to the farming it carried on previously does not alter the situation. Cf *SBI v Aveling* 1978 (1) SA 862 (AD) at 882G-H. Apart from the receipt of rental over the period of the lease, when it expires K will receive back a herd of equivalent quality or quantity and continue its business in the original aspect. They are simply different facets of the same business and it was manifestly not disposed of.

Nor do I think the appellant's next point could succeed either. This was the argument that what had occurred here was an "exchange", so that the "disposal" did not fall into s 8(1)(i)(iii)C by reason of exemption II.

The appellant's argument here was that just as a "lease" can be considered to be a "sale" in a very wide sense, so the concept of "exchange" was wide enough to include the contract of *mutuum*. In exchange for its herd in 1976, the appellant received a right to a similar herd when the lease terminated, and would receive such a herd at that moment. The *quid pro quo* did not have to be contemporaneous. Moreover, it was said, by also invoking the support of several authorities, that by operation of the *ejusdem*

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generis rule of statutory construction, and the *contra fiscum* rule of interpretation, it could be held that the word "exchange" did not have the same connotation as "disposed of" or "given away", that is, an alienation without value. It merely meant that something had to come back to the party transferring, and that was happening here.

This argument I confess to finding somewhat laboured in that it seems to wholly ignore the context in which the word "exchange" occurs (and the intention which can be gleaned from it). In abstract the word "exchange" might be capable of the extended meaning contended for, but as Mr *Horn* for the Commissioner said, here it is coupled with the word "sale" - so that a disposition other than by "sale or exchange" falls into the ambit of s 8(1)(i)(iii) C and thus into the taxpayer's gross income. In view of the conceptual similarity between sale and barter, that coupling seems to be no coincidence and I have no doubt that the legislature intended the words to bear their usual meaning. So that just as a "sale" of trading stock would result in an accretion of income, so would the commodity that is received if the transaction is one of "exchange" rather than "sale". The money's worth of such commodity is plainly what was intended to be included in the gross income. It must also have to take place more or less contemporaneously or the matter could not be assessed within a particular annual period of assessment, as the Act obviously contemplates it will be.

In my view this point is without substance.

I turn next to the question of whether the Commissioner was justified in viewing the merger of operations and the disposal of K's livestock as a transaction, operation or scheme which had as one of its main purposes, or its only purpose, the avoidance of tax. Again, this is not really necessary in view of my conclusion on the main issue; but this dispute, particularly, is substantially one of fact and one for determination by the tribunal of first instance. In case the matter should go further, I have attempted to resolve this as if it were the main or even the only matter in dispute.

The proviso to sub-para (b) of para 12 of the Second Schedule provides that if the Commissioner is of the opinion that the farm trading stock in question has been disposed of pursuant to a transaction, operation or scheme which has as its sole purpose, or one of its main purposes the avoidance, or postponement of liability or the reduction of any tax, he must determine the amount which he considers such farm trading stock would have realized if it had been disposed of in the ordinary course of trade; and that amount is to be included in the gross income of the farmer

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disposing of such trading stock. That, of course, is the basis upon which the Commissioner included \$1,475M in the gross income of K for the tax year in question.

It should be borne in mind, however, that the application of this provision does not also require, as does s 81, that the transaction, scheme or operation be carried out by means which would not normally be employed, or created rights and obligations that would not normally be created between persons dealing at arm's length in an operation or transaction of that sort. Nor does it require that the transaction actually effects a reduction in the tax due or payable. It may well be that the presence or absence of these features could have a bearing on the purpose behind the scheme or operation in an inquiry under this provision, but as it stands the only decisive criterion is whether tax avoidance was its sole, or one of its main purposes.

In considering this issue it must be recalled that as long ago as 1968 thought was given to some form of merger of the trading operations of the two appellant companies, by the then controlling manager of G Ltd's interest in that direction. It is true that he contemplated K hiring R's trading assets, but the principle was considered, and the reason was the same as later, namely to give R a better chance to achieve profitability.

As already stated, it is not known why that idea was not then pursued, but the fact is that it was not. Instead, renewed efforts, and under new management, were made to improve the profitability of the companies, particularly R. The person responsible to G Ltd for the management of the two appellants from 1970 onwards was one C, a highly qualified and well experienced agriculturist, who is presently a managing director of one of G Ltd's subsidiaries in South Africa. He played a pivotal role in the events under discussion in these appeals and was hearty to, or consulted on, all the major decisions. He was the only witness called by the appellants, and I ought perhaps at this stage to give my impressions of him. I was nothing short of very impressed by C when giving evidence, both as to the quality of his recollection - albeit that he was aided by contemporaneous documents - the care with which he answered questions and the entirely candid nature of his replies. I assessed him as a completely truthful and reliable witness.

Despite these renewed efforts and some improvement in K's performance, it was still not possible to turn the corner of profitability for R, particularly after an initially promising, but eventually poor, crop season in 1972-1973. This really made it clear to C that the cattle and crops activities of R would

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have to be changed to a more concentrated cattle enterprise. But to do cattle only on R would be very difficult since the income potential from its relatively poor herd would only justify one manager, and its problems of stock control were much more than one man could cope with without back up management from other sources. It was in this unpromising situation that the

idea of merging operations was again raised.

On this occasion, however, it seems to have embraced a more radical idea that involved restructuring the appellant companies as well as a transfer of assets. It was this idea that was put to the Commissioner in 1973 or so, and which prompted him to say that he would regard it as a tax avoidance scheme, and invoke his powers under the Act to negate it. Quite apart from that difficulty, it also required the co-operation of the minority shareholders in K, who, as already stated, vigorously opposed any such move. So, while that idea was not pursued, thought continued to be given to the question of a merger, at least of operations on a basis that would best increase the profitability of G Ltd's investment.

The reasons given by C, as a farmer, for the merger of operations are set out in Exhibit 1. Substantially they seem to amount to the fact that while R's herd and its grazing were inferior to K's, R's other facilities included the river irrigation potential to grow fodder crops for intensive fattening of stock for slaughter. Such fattening for R's herd as its aim would not have been economical since the herd was too small; but with the greatly increased, and eventually improving, herd, that would be achieved by using K's as well, this offered distinct advantages. K had the better herd and better management, but lacked the irrigation potential to grow crops for feed. Dry land fodder growing had not been successful. It therefore made sense to make that facility of R available to K, as it did to make K's herd and expertise available to R. And while R's land would be used for the fattening process since it was cheaper to move cattle than to purchase and move feed, having the two ranches available in different parts of the country provided a useful reserve for movement in the event of drought in one side of the country or the other.

There were other possible advantages arising from the combined management of the two appellants, but the foregoing were essentially the reasons for thinking that the poor financial results of the past could be considerably improved, especially on a rising price to beef producers.

To a layman these arguments sound sufficiently cogent, but C's evidence was to the effect that, as the person most concerned to turn the situation

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to a more profitable one for G Ltd through the more successful operations of the two appellant companies, he thought some form of merger was essential and he would have urged or striven for such a result even without there being any tax advantage in achieving it by one means rather than another. Furthermore, it must be borne in mind in this respect that there was no cross-examination directed to C which cast doubt on any of what may be called the economic reasons he put forward as justifying the merger of operations.

It was not immediately, however, that the merger took place; for, following the Commissioner's reaction to the amalgamation plan, matters were left in abeyance. By mid- 1975, though, the idea had revived again, and this time the concept was put into effect on the basis of the sheep lease already discussed, as the means whereby K's assets were transferred to R. But the same

factors were still present, perhaps even more cogently than before, because of the looming war situation after the independence of Mocambique.

Mr *Horn*, in defending the Commissioner's conclusion that the main object of the transaction was the avoidance, reduction or postponement of tax, pointed to a number of features which he said established this.

First, he said there was the fact that the appellants, and G Ltd's management particularly, were aware of the advantages of the assessed loss to R particularly as a means of G Ltd beginning to reap some tangible profit from its investment or even some or all of its lean claims. Secondly, they took advice from an eminent tax consultant on their plan or hope not to lose this advantage. Thirdly, that on C's evidence the agricultural advantages of the merger could have been achieved just as successfully if K had taken over R's herd and land instead of the way it was done. And fourthly, that in the way it was done, less tax from the two companies would be chargeable and therefore payable to the *fiscus*. In other words, that what tax had been paid hitherto by K would no longer be paid and the assessed loss in R would avoid the paying of tax until such loss was eliminated by profitable trading.

Parenthetically, and to deal with this last point first, I think it may be doubted that if K had taken over R's assets the *fiscus* would have been better off. In the first place, there was evidence that where the results of the two appellants were amalgamated, the overall organization made a loss. Secondly by taking over R's livestock, K could have written the value thereof down to its own f.s.v. and this would certainly have reduced the

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gross income of K. And thirdly, the figures given for K's profits in the years preceding the merger were sufficiently small to be regarded as greatly disappointing to the controlling company G Ltd. If, notwithstanding those small profits, it also had to pay rentals to R for the hire of its land and livestock, it would make the eventual existence of profits a highly conjectural guess. In fact, and despite C's admission to that effect, with the rentals from R exceeding K's past profits, and with greatly reduced expenditure, K is likely to be paying more tax than before.

It may also at this point be opportune to deal with another aspect of the respondent's argument on this issue.

Mr *Horn*, in arguing to uphold the Commissioner's conclusion on this aspect, also criticized the failure of the appellants to call the financial director of G Ltd who, if not the author of the arrangement to carry out the merger in the way it was done, was probably as familiar with the reasons as anyone else; and asked me to draw an inference adverse to the appellants as a result.

This, I think, is really a criticism of form rather than substance. In the first place, the reasons for proceeding in the way that was eventually adopted appear fully from a number of documents that were put in evidence, so there is very little, if anything, that the financial director could have added verbally in this direction. In the second place, the evidence which discussed the reasons and rationale of the decision to merge the operations of the appellants, which is the most

important aspect of this inquiry, was covered in the evidence of C. As I have already indicated, C impressed me very favourably as a witness, and the appellants may well have thought, without being in any way unduly sanguine, that his evidence would be enough to discharge the *onus* on them, particularly as it was unlikely that the respondent would call evidence. Mr *Horn* did not suggest that the financial director might have contradicted C; and in those circumstances a party is entitled to take the risk of offering less than all the evidence available to him, if he thinks that what he has led will be sufficient to discharge the *onus* on him.

However that may be, the essential reason for the Commissioner's conclusion in this respect, as I understand it, is the attempt to utilize the existing assessed loss in R, and to arrange the merger of operations in such a way as to afford R the greatest opportunity of earning profits, which, because of the assessed loss, would escape tax until that was wiped off. Such profits could then be distributed by way of dividends or repayment of its loans to G Ltd although C said this latter means of receiving money from a subsidiary had not, in his experience, been done before by G Ltd.

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The short question on this issue, then, is whether in seeking and arranging the merger of operations on that basis amounts to an operation, scheme or transaction in which the main or one of the main purposes was the avoidance of tax.

The answer to this seems to me to be twofold. First, there is compelling authority, both in the United Kingdom and in Australia, to the effect that when a genuine commercial transaction is considered and there are two ways of carrying it out, one that involves paying more tax than the other, it is quite wrong to draw the inference, as a necessary consequence, that in adopting the course which involves paying less tax, one of the main objects is to avoid tax: see *IRC v Brebner* [1967] 1 All ER 779 at 784 (HL); and *War Assets (Pty) Ltd v Federal Commissioner of Taxation* (1954) 91 CLR 53; 6 AITR 1 at 33 (full court).

In the present case it seems to me that, for the reasons already set out, there was a genuine commercially inspired decision to merge the operations of the two appellants; one that, as C said, he would have urged and tried to achieve even if there was no question of any tax advantage. The local management and agricultural experts, having felt that the commercial or economic merits of the situation required a merger or concurrence of operations of some sort for the better profitability of G Ltd's investments, the possibility was again raised with the controlling company. The steps whereby this might be achieved were thereafter considered and decided upon by what C referred to as the "financial boffins". In choosing the means whereby the merger could be effected, they selected the course that involved paying less tax.

It is quite true, as Mr *Horn* said, that G Ltd's management, including C, were aware of, and alive to the tax situation as this proposal possibly impinged on it. But as C said he was always mindful of the tax consequences of any action that was part of future planning or a factor to be considered in the assessment of profitability. I would not, however, describe that as an ongoing perpetual commitment to tax avoidance so much as a necessary factor in, and aspect of, any competent management in the discharge of its ordinary functions. Similarly, the advice sought

by G Ltd's financial advisers of the tax consultant does no more than show that G Ltd's management were concerned to go about the merger in a manner that would not imperil the assessed loss in R. They were not seeking ways of avoiding tax. That opportunity already existed. They simply wanted to make sure they would do nothing to forfeit the possibility of benefiting from the advantage. That too, in my view, does not show a desire to avoid paying

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tax that would otherwise be payable.

I think, with respect to the Commissioner, that because the appellants' management opted for the alternative cause that relieved R of paying tax on its profits until the trading loss was wiped off, and because of the concern shown by G Ltd's advisers that the assessed loss be used, he has concluded that tax avoidance was the main purpose of the scheme. Having heard the evidence of C in the light of the contemporary documents to which he referred, and in view of the previous history of the matter, I am satisfied that the commercial reasons for the merger of operations were considered, and, albeit in principle, were decided on first and they are the real and genuine reasons for such transaction. While the form which it eventually took obviously had regard to the preservation and use of R's assessed loss, that was not one of the main objects of the scheme, and even if it was I do not think, for reasons which follow, that to use an assessed loss which a taxpayer has already incurred amounts to tax avoidance or reduction in terms of this paragraph of the Second Schedule.

These reasons, and the second part of the answer on this issue, are as follows:

As already pointed out, this provision - on the face of it - allows the Commissioner to ignore the intended result of a disposal of the type described here, and tax the disposing farmer as if he had sold the trading stock at the market price, if the Commissioner believes that one of the main purposes of such disposal was the avoidance of paying tax. Although the range of transactions affected by the instant provision is very much less in ambit, the requirements for their impeachment are not dissimilar to the provisions of s 90 in the old South Africa Income Tax Act of 1941, and which was the subject of discussion and analysis in *CIR v King* 1947 (2) SA 196 (AD). For the same reason as prompted the learned CHIEF JUSTICE in *King's* case to hold that the provision was ambiguous, does it seem to me that the requirement in sub-para (b) of para 12 of the Second Schedule is also ambiguous? Does it mean that any disposal of the kind prescribed can be ignored and the farmer taxed as if it had not taken place as long as the motive is to avoid or reduce a liability to tax?

I do not think that it can. For, despite the altruism with which the whole process of paying tax seems to be invested by the decision in *Commissioner of Taxes v Ferera* 1976 (1) RLR 106; 1976 (2) SA 653 (RAD), it is manifest from the provisions of the Act itself that the Legislature contemplates and provides that some particular arrangements of a taxpayer's affairs will

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not attract tax at all, or which allow him to reduce the amount of tax payable to an adjustable extent. Indeed, it may be said that the Act contains some positive incentives, intended and used no doubt as instruments of fiscal or economic policy, to invest capital in some way whereby the return on it is either completely exempt from tax or the amount of tax may be reduced, as required or rendered possible by the circumstances. If one arranged one's affairs to take advantage of such an incentive, that would be an operation or scheme and it would clearly be aimed at reducing or avoiding tax. But it can hardly be regarded as attracting a penalty to do what the Act specifically allows and encourages in the direction of tax relief. Equally, it would be strange if Parliament intended to tax a farmer who disposes of his trading stock by lease in order to reduce his activities, say because of ill-health, but at a nominal rental. That will avoid paying tax, and his purpose may be to do so because he wants to reduce all his liabilities. But I think it would be an unintended result if that farmer were to be taxed on the full market value so as to tax him as if he had an income which he does not.

Similarly, the Act clearly provides that an assessed loss, the result of trading losses sustained in previous years of assessment, may be deducted from the income of a taxpayer to determine his taxable income. Such relief is only forfeited in the circumstances set out in s 15(3), none of which apply in the instant case. Can it then be regarded as attracting a penalty for a taxpayer to avail himself of the assistance which the Act specifically allows him? In other words, is it avoidance of tax to arrange one's affairs in a way that will allow one to use an assessed loss as contemplated by the Act? I do not think that can possibly be so; and it seems to me that the provisions of the proviso to sub-para (b) of para 12 of the Second Schedule must apply, as *King's* case identifies, to those situations where a tax would have been payable but because of the arrangements or scheme entered into it will not be incurred. They do not apply, in my opinion, to a situation where a taxpayer is seeking to reduce his tax liability in a way which the Act permits.

Tested by another approach, I think the Commissioner's conclusion, if here upheld, would mean that R would have to go on trading in a way that would mean it could never avail itself of its assessed loss, and the investment sunk in it could never be recovered and would have to be regarded as lost. For it could only improve its profitability by improving its cattle selling potential, and it can only do that by acquiring more and better livestock and sufficient space, management and whatever else was necessary. It could not afford to buy these, so had to acquire them by some other

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means. The accruing of an assessed loss entitled a taxpayer to relief from tax while that loss is recouped; and whether on the law or the facts of the case I am unable to agree that by arranging his affairs to take advantage of his own accrued loss, a taxpayer's purpose is to avoid or reduce his tax liability in terms of para 12 of the Second Schedule.

For those reasons the appellants have satisfied me that the Commissioner's conclusion on this issue was wrong.

There remains a residue of lesser issues. The first of these is the appellant R's remaining

alternative claim that if the acquisition by it of K's livestock was in truth a disposal in terms of s 8(1)(i)(iii)C of the Act by K, then R was entitled to a deduction of the market price, and not a deduction equivalent only to its own standard values. It seems to me, however, that the Commissioner's claim that this acquisition falls under s 15(2)(x) is unanswerable. The acquisition of this livestock was not, in my view, in the ordinary course of business; and since it is plainly not an inheritance, the Commissioner has no option but to allow only a deduction that did not exceed the deduction allowed to the person from whom it was acquired.

Finally, it should be said that the last issue raised by the appellant K, namely, the fair market price of the livestock leased to R - in case such lease was held to be a disposal and the value to be included in the disposer's gross income in the market value and upon which considerable evidence was led - the amount which this should be, was eventually settled by agreement of the parties.

In the net result, however, and by reason of my conclusion on the first and main ground of appeal, the appeal must be allowed, and the matters remitted to the respondent for assessment on the basis that the lease of livestock by K to R was not a disposal in terms of s 8(1)(i)(iii)C of the Act.

Atherstone & Cook, legal practitioners for the appellants.

State Attorney, legal practitioner for the respondent.

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HICKMAN & ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER 1983 (1) ZLR 180 (HC)

Court **High Court, Harare**

Pittman J

17, 22 & 25 March 1983

Flynote

Statutes - Emergency Powers (Maintenance of Law and Order) Regulations, 1980 - section 34(1) - detainee's case to be reviewed "forthwith" - meaning of - reasonableness of Review Tribunal's failure to hear cases.

Headnote

The petitioners were detained in mid - January 1983 by a police officer acting in terms of section 49(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1980, and on the 12 February the respondent Minister issued a new detention order under section 17(1) of the Regulations. In spite of efforts by the petitioner's legal practitioners to secure a hearing of their case by the Detainees' Review Tribunal, no hearing of the case had been arranged by the 17 March although the Secretary to the Tribunal intimated that it would be possible to hear the matter on the 29 April. The case had first been referred to the Tribunal on the 12 February, and, in terms of section 34(1)(a) of the Regulations, the Tribunal was then charged to "review the

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case forthwith".

The present application was brought, claiming that the second respondent, the chairman of the Tribunal, had wrongfully failed to ensure compliance with the Regulations. The second respondent claimed that it was not possible to arrange to hear the petitioner's cases earlier than the 29 April, for 4 main reasons:

- (1) there were already 11 other cases they had to deal with which had greater priority;
- (2) the difficulty of arranging a time-table for the hearings;
- (3) the inability of the Tribunal to sit more than once a week, because of the inability of its members to do so;
- (4) the non-availability of a suitable venue more than once a week.

Held, dismissing the application, that the meaning of the word "forthwith" was "as soon

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as reasonably possible in the circumstances". It was necessary to examine the second respondent's reasons to see if there was reasonable cause for a failure to review the petitioner's cases earlier. The first reason given was reasonable but there was insufficient evidence to support the second. As regards the third, the inability of individual members to sit more than once a week was not reasonable, since, in terms of sections 27 and 28 of the Regulations, substitute members may be appointed and indeed one or more additional tribunals may be appointed. It was possible to take judicial notice of the fact that there were numerous qualified persons in the country who could be appointed to such tribunals. The fourth reason given could not, however, be ignored as there was no evidence to contradict it and it would have to be accepted that the Tribunal was, for that reason, unable to hear the petitioners' cases earlier than the 17 March.

Case cited:

R v West & Wild 1953 SR 199; 1953 (2) SA 675 (SR).

J B Colegrave, for the petitioners

S Mucchechete, for the respondents

Judgment

Pittman J: The first and second petitioners in this matter are respectively John Selwyn Varcoe Hickman and Peter Thompson McDonald. The first respondent is the Minister of Home Affairs and the second respondent is the Chairman of the Detention Review Tribunal.

The second petitioner was arrested and detained by a police officer on 14 January 1983 under section 49(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1980. The first petitioner was likewise arrested and detained on 15 January 1983. On 18 January, the petitioners were informed of the reasons for their detention in the following identical terms:

"The following reliable information has been received by the Police:

- '(a) You have made several visits to farmers and businessmen at which you have addressed secret meetings.
- (b) At the meetings you have mentioned that an attack by South Africa is imminent to remove the present Zimbabwe Government from power and you expressed pleasure to see that happen.
- (c) At the meetings your aim was to undermine the confidence of those present in the Government of Zimbabwe and to lose all faith in the Prime Minister Comrade Robert Mugabe, whom you despise.' "

On the 21 January the petitioners made a joint statement to the Police denying these allegations, and ever since then they have persisted in their denials.

The Police Officer was empowered by s 49(1) of the Regulations to detain each petitioner for a period not exceeding thirty days. Presumably because this period was approaching its end, on 12 February the first respondent

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issued a new detention order under s 17(1) of the Regulations against each petitioner, and on that same day he complied with s 17(1a) of the Regulations by informing them, in effect, that his reasons for their renewed detentions were the same as had been given previously by the police officer. Also on that day the first respondent submitted the petitioners' case to the Review Tribunal for review in accordance with s 34 (1)(a) of the Regulations, which reads as follows:

"34. (1) Where a person is detained in terms of Part II, the Minister shall-

- (a) not later than thirty days after the commencement of the detention submit his case for review by the Review Tribunal and the Review Tribunal shall review the case forthwith . . ."

Section 17 is a portion of Part II of the Regulations. It is clear that the origin of s 34(1)(a) was derived from para 2(1)(b) of Schedule 2 of the Constitution of Zimbabwe, which in part reads:

"2. (1) Where a person is detained under any law providing for preventive detention -

.....

- (b) his case shall be submitted not later than fourteen days (or during a period of emergency thirty days) after the commencement of the detention for review by a tribunal established under sub-paragraph (4), and shall be reviewed by such tribunal forthwith . . .".

The Review Tribunal thus became charged on 12 February with an obligation to review the cases of the petitioners "forthwith". Before the meaning of "forthwith" in this context is analysed, it is desirable for the subsequent history of the matter to be recorded as objectively as possible.

On 7 March, each petitioner wrote a lengthy letter to the first respondent setting out in detail why the allegations against him were unfounded, and requesting his immediate release. The first respondent apparently did not reply to these letters, and on 10 and 11 March the petitioners' joint legal practitioner, Mr Willsmer, had discussions with Mr N C Wild, the Secretary of the Tribunal, in an attempt to speed up the hearing of the petitioners' reviews. Mr Wild said that the reviews might perhaps not be heard for another two months. In a letter dated 11 March, Mr

Willsmer told Mr Wild that the reviews should have already been handled, and that if an immediate hearing was not arranged, the petitioners would take legal steps to ensure that that would be done.

There was no response to this letter, and so on 17 March, in an urgent *ex parte* application, the petitioners instituted the present proceedings against the respondents, claiming that the second respondent, who is obliged in terms of s 31(1) to ensure compliance with the Regulations, and with para

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2 of Schedule 2 of the Constitution, had wrongfully failed, after the submission of the cases to the Tribunal on 12 February, to arrange that they would be reviewed by it "forthwith", that is, before 17 March, or, alternatively, within two days after 17 March.

At the hearing on 17 March, the case was postponed by consent to 22 March. On that latter day a separate affidavit by Mr Wild, dated 21 March, filed by him on behalf of the respondent, was before the Court. In it Mr Wild gave an explanation for the failure of the Tribunal to hear the reviews before 29 April. That explanation read:

"3 *Ad Annexure 'G' of the Petition.*

(c) *Paragraphs 4 to 18 thereof*

(i)

The Petitioners' case were submitted for review by the First Respondent in accordance with the provisions of section 34(1)(a) of the Emergency Powers (Maintenance of Law and Order) Regulations 1980 (hereinafter referred to as 'the Regulations') on the 12th February, 1983.

(ii) In accordance with my usual administrative procedure I entered the case details of the Petitioners in the register I maintain in order to ensure that a proper sequence of cases is maintained. The Petitioner's cases were entered 12th and 13th respectively. In this way I ensure that no detainee is disadvantaged in having his case reviewed out of sequence.

(iii) I currently have 17 cases which have been submitted for review.

(iv) Before I ask for the second Respondent's directive in terms of section 36(1) of the Regulations, 1, in terms of section 35(1) of the Regulations, examine the case file to ensure that the necessary documentation for the review of the case is complete. Only when I am satisfied of this will I ask the Second Respondent to fix a date for the review of the case. In many cases, at the direction of the Second Respondent, I ask for further information from the detaining authority in accordance with the provisions of section 35(2) of the Regulations.

(v) Generally it is not possible to set an immediate date for review because of the following reasons:-

(1) The backlog of cases - as stated above there are currently 17 cases to be reviewed and the *Petitioner's* cases are 12th and 13th on the list respectively.

(2) *The composition of the Tribunal*

The Tribunal is presently composed of members who are part time and as such it can only manage to sit at

the most once or twice a week.

(3) *Postponements and adjournments*

From time to time at the request of a detainee or counsel for the State it becomes necessary to postpone or adjourn cases, and in these circumstances it is not always possible to arrange a firm time-table in order to hear and dispose of all pending review cases.

- (4) The cases submitted for review are all of a security nature and have to be heard in secret. Arrangement have therefore to be made for a secure place for their hearing. At present the only place which qualifies is the Harare Magistrate's Court and this venue and ancillary services are only available to the Tribunal on Fridays through the courtesy and co-operation of the Ministry of Justice and the Provincial Magistrate.

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- (5) The fact that further information might be required in accordance with the provisions of section 35(2) of the Regulations would also delay the fixing of an immediate date for review.
- (vi) For the convenience of all the (sic) and after consultation with the Second Respondent; I negotiate with the detainee or his legal representative with a view to finding a suitable date for the hearing of the case.
- (vii) When the cases involving the Petitioners were received I registered them. I then examined the case files and found it necessary to seek further information from the First Respondent. As I anticipated some delay in the furnishing of the information, I was of the opinion that it was premature to ask the Second Respondent for a hearing date to be fixed, and accordingly I requested Mr Willsmer to come and discuss his clients' cases with me.
- (viii) Mr Willsmer and I had discussions on the 10th and 11th March, 1983 during which I advised him of the constraints the Tribunal found itself in fixing an immediate date for the review of his clients' cases in view of the fact that there were eleven (11) pending review cases which had been registered prior to the receipt of his clients' cases. I admit that I advised him that as matters stood at present it may well be that his clients' cases could be heard in about two months. I also told him that I had asked for further information from the First Respondent and that after receiving the same I would consult the Second Respondent for a date for review and would thereafter communicate with him. I also admit that I advised Mr Willsmer that representations could be made for an expedite hearing of a case where special circumstances so warranted. I admit that I received annexure 'F' to Petition and on the 14th March, 1983 I wrote to the Second Respondent asking for directions. I attach a copy of the letter I wrote marked Annexure '1'. Following this I had discussions with the Second Respondent and he directed in terms of section 36(1) that the dates for review of the Petitioners' cases be set down for hearing on the 29th April, 1983. I attach a copy of a letter marked Annexure '2' dated the 17th March, 1983 which I have sent to the Petitioners' legal representatives and other parties concerned.
- (ix) The Second Respondent fixed the above date after stressing the importance he attaches to the maintenance of strict impartiality in observing the rule that all cases submitted for review should be heard in the sequence they were submitted to the Tribunal. The Second Respondent gave his opinion that the word 'forthwith' as contained in section 34(1)(a) of the Regulations must be considered within the context of the Regulations, regard being heard to the provisions of sections 35 and 36 of the Regulations. In these circumstances the proper construction that should be placed on the word 'forthwith' is that the said word means 'as soon as possible'. Accordingly it is submitted that - where a Tribunal receives a detainee's case for review the Tribunal is enjoined to hear the detainee's case as soon as possible without undue delay."

The letter dated 17 March referred to in sub-paragraph (viii) contained the following paragraph

4:

"I placed your appeal for an immediate hearing of your clients' cases before the Chairman of the Tribunal. The set down date given above is the earliest he feels he can offer, given the circumstances the Tribunal finds itself limited by; that is the current backlog of cases to hand and the Tribunals' inability to meet as a rule, more than once a week."

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It must therefore be accepted that the respondents possibly claim that for four reasons they were justified in not reviewing the petitioners' cases, either before the 17th March or even the 29th April, firstly, because of the eleven other pending reviews with higher priority, secondly, the difficulty of arranging a firm time-table for them, and thirdly and fourthly, the inability of the Tribunal to sit more than once a week because of their personal inability to do so, and because of the non-availability of a suitable venue more than once a week also.

At the hearing of 22 March, it was rightly agreed between Mr *Colegrave*, for the petitioners, and Mr *Muchechedere*, for the respondents, that the word "forthwith" in s 34(1)(a) of the Regulations and para 2(1)(a) of the Second Schedule to the Constitution must be interpreted not as "immediately" but as "as soon as reasonably possible in the circumstances". It is unnecessary to refer to authority for this trite point of law beyond, for example, BEADLE J's judgment in *R v West and Wild* 1953 SR 199; 1953 (2) SA 675 (SR) at 677-8.

The first question to be decided, therefore, is whether the Tribunal's failure to review the petitioners' cases on or before 17 March, that is, thirty-three days after they had been submitted to it, was a failure to review them as soon as reasonably possible in the circumstances.

An important consideration in dealing with this question is that the Regulations control the liberty of subjects, and must therefore be applied without any indulgence as regards the members of the Tribunal. Bearing this consideration in mind, I turn to examine whether any of the four possible causes for the delay already mentioned can be regarded as reasonable. If any was reasonable the Tribunal's failure to review the cases before 17 March because of it was not a failure to review the cases "forthwith", that is, as soon as reasonably possible in the circumstances. But if any cause was unreasonable, the respondents cannot rely upon it as a justification for the Tribunal's failure to review the cases within the period claimed as unreasonably by the petitioners.

In assessing the reasonableness of these causes, it must be borne in mind that, under s 27(3) of the Regulations, if any member of the Tribunal is unable for any cause to act, some other person may be appointed to act in his place. Furthermore, under s 28, one or more additional Tribunals can be established "whether for a specific or an indefinite period and whether for a specified case or class of cases or otherwise".

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As a matter of judicial notice, it is safe to assume that during the relevant period many qualified

persons were available to act as members, because of the nature of the necessary qualifications. In my opinion the administration's failure to exercise the power to establish extra Tribunals for the accumulating cases was unreasonable. Furthermore, I consider that the appointment of the members of the present Tribunal, who are able to sit only once a week, was also unreasonable. If any present member is absolutely unable to sit more than once a week, he should never have been appointed at all, or at least have been substituted now and then, to ensure a rapid series of reviews. There is nothing in the papers to suggest that it was impossible to find sufficient persons with appropriate qualifications to act as substitutes or as members of extra Tribunals and, as I have already said, I think that as a matter of judicial notice it is safe to assume the contrary. Hence I reject as reasonable causes for the Tribunal's failure to review the petitioners' cases before 17 March, the excuses that the members of the Tribunal were part-time and that there was a backlog of prior cases. These excuses cannot assist the Tribunal in the Court's decision whether it failed to review the petitioners' cases forthwith.

Although I have referred to it as one of the four causes of delay possibly mentioned by Mr Wild, the inability to arrange a firm time-table was not stated sufficiently clearly to have influenced the speed at which the petitioners' cases could be reviewed, and hence it must be ignored now.

As regards the availability of the Harare Magistrates Court alone, and only once a week, as the venue for reviews, I think on the contrary that this factor cannot be ignored in deciding whether the Tribunal has failed to review the petitioners' cases forthwith. I must accept, in the absence of any evidence to the contrary, that that has been the only suitable venue available. I cannot assert, by reliance on judicial notice or otherwise, that any other venue has been available, and I must therefore now calculate whether, despite that circumstances, the petitioners' cases could have been reviewed before 17 March.

There were thirty-two days between 12 February and 17 March. I think it is reasonable to subtract from that total all the Saturdays and Sundays and, if there were such, any other general non-working days during that period, in order to decide what number of days was reasonably available for the hearing of the petitioners' cases, and also the prior ones, in the chosen venue. The answer appears to be that at most only twenty-three such days were available, and I do not think that it is wrong, especially

1983 (1) ZLR p187

PITTMAN J

with erratic set-down dates, for the respondents to claim that the availability of only one venue for the hearing of thirteen cases during twenty-three days did not make it unreasonable for the Tribunal to fail to complete the hearing of the petitioners' cases within that time, that is, by 17 March. In addition, if it is accepted, as I think it must be in the absence of contrary evidence, that this venue was available only on Fridays, it must be said that only four days were available for the hearing of the prior cases and the petitioners' by 17 March.

In my opinion, therefore, the petitioners have failed to establish that the Tribunal failed to review their cases forthwith in view of their failure to hear them prior to 17 March.

If the petitioners had produced a credible assertion that there were other suitable venues

available between 12 February and 17 March, I would have found that the Tribunal did fail to review their cases forthwith. But the absence of such an assertion prevents me from doing so. For the same reason, even although there is a longer period up to 29 April, I am unable to say on the available evidence that there must be some day between 17 March and 29 April by which the petitioners' reviews could be heard. Consequently, I am unable to give effect to the alternative order sought by the petitioners, which was that the Court should order the review to be held within two days of the hearing of the case on 22 March.

The petition is therefore dismissed. I make no order as to costs, as that issue was not raised for the respondents, either in the papers or during the proceedings.

In conclusion, I venture to express the hope that the persons responsible for doing so will rapidly make every effort to ensure that detentions will be reviewed by the Tribunal more quickly than they are at present. In particular, I hope that the Minister of Justice will be able to make extra suitable venues available.

Surgey Pittman & Kerswell, legal practitioners for the petitioners.

Attorney-General, legal practitioners for the respondents.

1983 (1) ZLR p188

S v CHINGANI & OTHERS 1983 (1) ZLR 188 (HC)

Court **High Court, Bulawayo**

Gubbay J

25 March 1983

Flynote

Statutes - Parks and Wild Life Act. No. 14 of 1975 - section 115(3) - increased penalty for second or subsequent conviction - accused only liable to such on second conviction for same offence.

Headnote

Section 115(3) of the Parks and Wild Life Act No. 14 of 1975 provides for increased penalties in the event of "a second or subsequent conviction". This means, in that Act, that he must previously have been convicted of the same offence, not merely of any of the other offences listed in section 115(3). Thus, where the accused had a previous conviction under section 80 of the Act, it was not competent to impose the increased penalties by section 115(3)(b) when he was subsequently convicted of a contravention of section 74.

Case cited:

S v Mutero 1976 (1) RLR 228 (GD).

Judgment

Gubbay J: The three accused were jointly charged on three counts. First, with contravening s 5 of the Trapping of Animals (Control) Act [Cap 134], in that they unlawfully used 23 Class I traps at or near the Deka river for the purpose of trapping animals, and trapped a female kudu, one female and one male impala, a female waterbuck, two warthogs and a baboon; secondly, with contravening s 74(3) of the Parks and Wild Life Act 1975 in that they unlawfully fished, without a permit, in waters other than those specified by the Minister, to wit, in the Deka river; and thirdly, with contravening s 80(2) of the Parks and Wild Life Act, in that they were in unlawful possession of six fishing nets. They pleaded guilty and were convicted.

The first accused had relevant previous convictions under the Parks and Wild Life Act. Three for the illegal possession of fishing nets in contravention of s 80(2) and another for fishing without a permit in contravention of

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GUBBAY J

s 74(3). Both the second and third accused had been recently convicted of contravening s 80(2).

The magistrate took the three offences as one and sentenced each accused to 12 months' imprisonment with labour. He ordered them to pay compensation jointly and severally to the appropriate authority in an amount of \$250.

The globular sentence of 12 months' imprisonment was clearly competent in respect of the contravention of s 5 of the Trapping of Animals (Control) Act, for in terms of s 30(1) a period not exceeding two years' imprisonment may be imposed on a first conviction for that offence. But with respect to the contraventions of ss 74(3) and 80(2) of the Parks and Wild Life Act, different criteria applied.

Section 115(3) of the Parks and Wild Life Act provides, *inter alia*, that a person found guilty of contravening s 74(3) or s 80(2) shall be liable -

- "(a) on a first conviction, to a fine not exceeding five hundred dollars or to imprisonment for a period not exceeding nine months or to both such fine and such imprisonment;
- (b) on a second or subsequent conviction, to a fine not exceeding one thousand dollars or to imprisonment for a period not exceeding eighteen months or to both such fine and such imprisonment."

As the first accused had been convicted previously of contravening both s 74(3) and s 80(2), he fell within para (b) of s 115(3). He was therefore liable to imprisonment for a period not exceeding two years for the offence under the Trapping of Animals (Control) Act, and to imprisonment for a period not exceeding 18 months for each offence under the Parks and Wild Life Act. Thus the globular sentence of 12 months' imprisonment did not exceed the relevant penalty provision under either Act. His conviction and sentence are accordingly confirmed.

A different position, however, pertained to the second and third accused. Each had been convicted in the past of contravening s 80(2) of the Parks and Wild Life Act, but not of contravening s 74(3) of that Act. So whereas for the offence under s 80 the second and third accused were liable to imprisonment for a period not exceeding 18 months, they were only

liable to the same period of imprisonment for the offence under s 74, if by virtue of their previous conviction under s 80 the contravention of s 74 was a "second conviction" within the meaning of s 115(3)(b) of the Act. In other words, the question that arises is whether under s 115(3) an offender who has been convicted of contravening, say, s 19(2) of the Act, becomes a

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GUBBAY J

second offender liable to increased penalties if convicted thereafter of any of the remaining 23 offences specified in s 115(3). Or must he be convicted of exactly the *same* offence?

A variety of illegal activities come within the ambit of s 115(3), for example:

- (a) Contravening s 19(2) - the introduction of any plant into a botanical reserve or a botanical garden or the picking of any plant in such reserve or garden;
- (b) contravening s 42(3) - the selling of any specifically protected indigenous plant;
- (c) contravening s 53(3) - the conducting of safaris without permission; (d) contravening s 58(1) the failure to produce authority to hunt when requested to do so by a lawful hunter;
- (e) contravening s 100 - the use of foul, abusive or insulting language, or the making of any foul, abusive or insulting sign, at an officer, inspector or employee exercising his duties under the Act.

The only feature the above offences have in common is that they fall under s 115(3). It would be incongruous if a person who had been convicted of contravening s 100 did not come within para (a) of s 115(3) if subsequently convicted of contravening s 80(2) of the act. Moreover, it cannot be suggested that such person ought to appreciate all the varying offences specified in s 115(3) and that he would render himself liable to the increased penalties by a breach of any one of them.

In my view the correct interpretation to be placed on s 115(3)(b) is that a person is to be regarded as having a second conviction only if he has been convicted previously of the same offence and not of any of the other offences mentioned.

The magistrate has contended that a person falls within para (b) of s 115(3) if he has a previous conviction for an offence therein specified which is similar to that of which he has been presently convicted. For example, a previous conviction for the illegal possession of fishing nets is of a similar nature to a current conviction for fishing without a permit. But if the lawmaker intended

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GUBBAY J

that interpretation to obtain it would have said so. I need only point to ss 44(3)(b), 45(3)(b) and 46(4)(b) of the Road Traffic Act, 1976, which specifically make provision for a person who has previously been convicted of a "similar offence" and define the phrase "similar offence". There is no such provision in the Parks and Wild Life Act, and the omission must be taken to have been deliberate. This does not mean, however, that in assessing an appropriate sentence for a contravention of one of the offences specified in s 115(3), the court cannot take into account the previous commission of a similar offence; merely that it must ensure that the penalties provided for in pare (a) are not exceeded.

It follows that the magistrate erred in failing to regard the second and third accused's contravention of s 74(3) of the Act as a "first conviction" in terms of para (a) of s 115(3). The maximum period of imprisonment open to him was nine months. Consequently the globular sentence imposed on these two accused was incompetent, for it exceeded the court's jurisdiction on the second count. See *S v Mutero* 1976 (1) RLR 228 (GD).

The convictions of the second and third accused are confirmed but the sentence imposed upon each is set aside. Taking the three offences together, a sentence of nine months' imprisonment with labour is substituted. That reduction I consider to be justified for an additional reason. The first accused's record of relevant previous convictions was much worse than that of his co-accused. Despite that feature, the magistrate did not differentiate in their sentences. I think he should have done so. The second and third accused had a single previous conviction which in each case attracted a relatively low fine. So it seems to me that in any event they deserved to be treated more leniently than the first accused.

One matter remains. In calculating the compensation payable jointly and severally by the accused, the magistrate omitted to take into account the value of the baboon ("any other animal") \$50 (count 1) and 25 kg of dried fish at \$1,50 per kilogramme (count 2). The award is therefore increased to \$337,50.

Waddington J concurs.

1983 (1) ZLR p192

STANDARD TRUST LID NO v MASTER OF THE HIGH COURT 1983 (1) ZLR 192 (HC)

Court High Court, Harare

Grossman AJ

17 & 30 March 1983

Flynote

Succession - two persons dying in single incident - whether one can be said to "survive" the other - Estate Duty Act [Chapter 178] - s 5(n).

Headnote

Where two persons die in the same incident, it is only in the rarest of circumstances that one would find that they had died simultaneously, in the sense of the same instant in time. Unless there is some cataclysmic event such as an aircraft accident there is no reason to suppose that even in a single incident two people would necessarily die at the same moment. The court would be entitled to look at all the probabilities, including such matters as the physical fitness of the persons. If it were found that it was probable that one had lived longer than the other, the former could be said to have "survived" the latter, in terms of section 5(n) of the Estate Duty Act [Chapter 178].

Cases cited:

Greyling NO v Greyling NO & Others 1978(2) SA 114(T);

Re Rowland [1963] Ch 1; [1962] 2 All ER 837 (CA).

F C Blackie SC, for the applicant

M T O'Meara, for the respondent

Judgment

Grossman AJ: A terrible tragedy occurred in the turbulent waters of the Zambezi River in the early afternoon of 8 November 1981.

Mr and Mrs Hunter Coetzee were fishing from a boat on the Zambezi River near Chirundu with their friends, Mr and Mrs Nel. Shortly after lunch, Mr Nel went for a swim in the river and immediately got into difficulties. Mr Coetzee, who was a strong swimmer, jumped into the water to assist and he, too, got into difficulties. Mr Coetzee called to his wife to hold out a fishing-rod to which he could cling and pull himself into the boat. Mrs Coetzee held out the fishing-rod and Mr Coetzee and Mr Nel grabbed hold of it in such a way that Mrs Coetzee was accidentally

1983 (1) ZLR p193

GROSSMAN AJ

pulled into the river. Mrs Nel entered the water to try to assist the other three who were struggling, but was unable to do so and eventually she was rescued by a passing boat on a sandbank downstream.

A search was launched for the missing people about an hour later and the body of Mrs Coetzee was soon found floating in the middle of the river about two and a half kilometres from where she had fallen in. Mr Nel's body was never recovered although it was rumoured that fishermen on the Zambian side of the Zambezi River had seen the body near Mana Pools. Mr Coetzee's body was located on 11 November 1981 in the river near Mana Pools.

In calculating the estate duty payable by the community estate of the late Mr and Mrs Coetzee, the respondent has refused to allow a deduction which is claimed by the applicant as executor of the community estate of the deceased in terms of s 5(n) of the Estate Duty Act [Chapter 178].

This section provides that the dutiable amount of an estate shall be determined by deducting from the total value of all property in the estate, where the deceased is survived by his or her spouse, so much of the dutiable proceeds of insurance policies as does not exceed \$20 000.

It appears that in this estate the deaths of both the Coetzees gave rise separately to dutiable proceeds of insurance policies.

The respondent having ruled accordingly, the applicant caused an objection to be lodged in terms of s 27(1) of the Estate Duty Act, and in terms of s 27(2) of the same Act the respondent has disallowed the objection. The applicant has thus appealed to this Court in terms of s 28(1). In terms of s 26(2) this Court is not entitled to vary or set aside any decision of the Master unless the applicant shows that that decision was wrong.

Mr *Blackie*, who appeared for the applicant, has argued that the respondent has misconstrued the approach to be adopted in determining whether or not Mr or Mrs Coetzee survived the other; and that therefore I am at large in the matter and do not have to make a positive finding that the Master was wrong.

In the view I take of the matter, it is not strictly necessary to investigate the Master's approach to see whether or not he understood his functions properly. What I am required to do is to determine on a balance of probabilities whether or not either Mr or Mrs Coetzee survived the other, and if I am satisfied that one or the other did, then the respondent's decision may be set aside.

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GROSSMAN AJ

The question therefore is: did one of them survive the other? It is common cause that they both died from drowning. I have referred to the law concerning *commorientes* which is conveniently - I think accurately - set out in the article of L Roeleveld in 1970 *Acta Juridica* p 31. See also *Greyling NO v Greyling NO & Ors* 1978 (2) SA 114 (T). However, it seems to me that this matter is one which must be determined on fact, and, having regard to the facts, I must decide if one party survived the other.

The word "survive" and its derivatives ordinarily refer to the longest in duration of lives running concurrently. There is no rule of construction of which I am aware as to the period to which survivorship refers. The question must in every case be answered by applying ordinary principles of construction to the particular language used in the Statute and having regard to any relevant surrounding circumstances.

In this case it is alleged that the probabilities favour the view that Mr Hunter Coetzee died some time after his wife. Statements made by the sole survivor, Mrs Nel, and by the Coetzees' son, point to the fact that Mr Coetzee was a very fit man and a strong swimmer, whereas Mrs Coetzee was unfit and overweight. An affidavit is also attached to the papers from a Dr Maurice Paul Weinbren who is a pathologist who is impressively qualified and experienced. He did not know Mr Coetzee, but on the facts that were given to him has proffered the view that Mr Coetzee would have survived longer in the water than Mrs Coetzee. He relies on the following

facts:

- "a) Mr Coetzee was in a fitter physical condition than his wife, and accordingly he would have been able to sustain a greater oxygen debt, or shortage. Consequently even if he and his wife had been sucked under water simultaneously he would have survived longer than her before drowning.
- b) the fact that Mr Coetzee was a much better and more experienced swimmer than his wife implies that he was more practised in holding his breath when in water, including holding his breath when he had little air in his lungs. The probability is, therefore, that if he and his wife were both dragged under water at the same time, he would have been able to hold his breath longer in the water than his wife and thereby survive longer. Moreover, she being a less experienced swimmer was more likely to panic in the water and this would have resulted in her breathing in water into her lungs, thereby accelerating her drowning. Accordingly, even if they had both been sucked under water at the time when he happened to have little air in his lungs while she had much more, he would probably have been able to survive longer than she.
- 3) If two people are simultaneously dragged under water and held there until they drown, the time of death of those two persons will invariably differ. The main factor affecting the time taken by each of those persons to drown is the extent

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GROSSMAN AJ

to which that person's lungs are aerated at the time he is immersed under water. If at that time the one person has drawn breath while the other has exhaled breath the death of the latter will usually occur before the former. There are other factors which have a bearing on how soon death occurs, namely: the degree of fitness of the individual, since fitness affects the degree of oxygen debt; the previous experience of the individual in holding his breath under water; the extent to which the individual panics and as a result breathes water into his lungs; and the individual's experience of ability in remaining under water at a time when he has taken no, or very little, air into his lungs. Accordingly, because of these variable factors, two persons who drown in the same tragedy, even if dragged under water at the same time, will die at slightly different times. The possibility of simultaneous deaths in such circumstances is extremely remote."

I would add that, as a matter of probability, only in the rarest of circumstances would one find that two persons had died simultaneously in the sense of the same instant in time. This might occur where an aeroplane explodes in mid-air or a bomb falls on an air-raid shelter, but in the absence of this type of cataclysmic event there is no reason to suppose that even in a single incident two people would necessarily die at the same precise moment. See *Re Rowland* [1963] Ch 1.

Mr O'Meara has argued that the word "survive" in the context in which it is used in the Estate Duty Act, means to survive for a period in which one could enjoy the fruits of survival. However, in my view there is no reason to strain the plain meaning of the word "survive" in the Statute, and all that I am required to do is to determine whether as a matter of probability one of the parties lived longer than the other.

On the papers before me it seems more than likely that Mr Hunter Coetzee died after his wife and in any event and conversely it seems to me highly improbable indeed that the Coetzees died instantaneously.

Accordingly, I am satisfied that the Master's decision was wrong and I make the following order:

1. The late HUNTER COETZEE is declared to have survived the late LYDIA COETZEE.
2. The decision made by the respondent in terms of s 27(2) of the Estate Duty Act [Chapter 128] in the estate of the late HUNTER COETZEE and LYDIA COETZEE be and is hereby set aside.
3. The costs of this application be payable by the said estate.

Honey & Blanckenberg, legal practitioners for the applicant.

State Attorney, legal practitioners for the respondent.

1983 (1) ZLR p196

LERM v HAMANDISHE NO & ANOTHER 1983 (1) ZLR 196 (HC)

Court High Court, Bulawayo

Grossman AJ

5 April 1983

Flynote

Practice and procedure - costs - respondent presiding officer at community court who had sworn false affidavit - costs awarded *de bonds propriis*.

Headnote

The applicant had, at the instance of the second respondent, been summoned to appear before the first respondent, who was the presiding officer at a community court. His legal practitioner had challenged the jurisdiction of the court but was overruled by the first respondent. The application to the High Court to have the proceedings set aside for lack of jurisdiction was supported by an affidavit from the legal practitioner. This affidavit was contradicted by a replying affidavit from the first respondent. It was accepted by counsel for the first respondent that his affidavit was false but he argued that the falsity of the affidavit was irrelevant, as the lack of jurisdiction was obviously established.

Held, costs *de bonis propriis* are only awarded against officials in the most exceptional circumstances; but because the first respondent, as a judicial officer, perversely swore a false affidavit and, indeed, cast quite unwarranted aspersions on a member of the legal profession costs *de bonds propriis* would be awarded against him. Indeed, had the first respondent's counsel not made the concessions he did, the Court would *mere motu* have awarded costs *de bonis propriis* on the attorney and client scale, to mark its disapproval of the first respondent's behaviour.

Cases cited:

Nonyake v Die Assistant Landdros Bloemfontein en die Staat 1964 (3) SA 672 (O);

Regional Magistrate du Preez v Walter 1976 (4) SA 849 (AD).

C W Jordaan for the Applicant.

J James for the 1st Respondent.

J P Oberholzer for the 2nd Respondent.

Judgment

Grossman AJ: The applicant in this matter was summoned at the instance of the second respondent to appear before the Community Court

1983 (1) ZLR p197

GROSSMAN AJ

in Mberengwa on 23 April 1982. From what can be inferred from the summons the allegation against the applicant by the second respondent was that the applicant had defamed the second respondent or had maliciously caused the second respondent to be prosecuted.

The applicant was found to be liable in damages to the second respondent and was ordered to pay a sum to him. It is not necessary to investigate the details of the case as counsel for the first respondent and second respondent have conceded that the award by the first respondent who was the presiding officer of the community court should be set aside. They have also accepted that this Court should order that the community court had no jurisdiction to try the matter. The second respondent has accepted his liability to pay costs because of the wrong decision of the first respondent and the necessity to have the decision set aside. Mr *James* has appeared for the first respondent in his personal and official capacities and contests the order of costs which is sought against the first respondent in conjunction with the order against the second respondent.

The application against the first respondent is for costs *de bonis propriis* or, alternatively, *nomine officii*. The dispute, therefore, relates only to the question of costs and against whom they should be awarded. The argument relating to costs turns upon an affidavit which was submitted to this Court by the first respondent. The background to that affidavit is as follows: The applicant was represented before the community court by Mr Bisset. Mr Bisset submitted an affidavit in which he attacked the first respondent's handling of the matter. One matter which was of major importance was whether or not the question of jurisdiction had been raised prior to the hearing. Mr Bisset deposed to the fact that he had filed heads of argument in which the prime matter was an averment that the community court did not have jurisdiction to try the matter for various reasons. He also maintained in his affidavit that he had raised the matter at the outset as he was required to do in terms of the Customary Law and Primary Courts Act 1981. However, his representations in this regard were not accepted by the first respondent who proceeded to hear the matter. Other allegations were also made by Mr Bisset but for the purposes of the order I intend to make it seems to me they are not of relevance and I will not burden this judgment by referring to them.

The first respondent chose to file a replying affidavit, as I have said, and in this affidavit he

disputed certain of the factual allegations made by Mr Bisset. In particular he denied that Mr Bisset had raised the question of jurisdiction before the matter started and maintained it had only been

1983 (1) ZLR p198

GROSSMAN AJ

raised by Mr Bisset after he, the first respondent, had given judgment. This is the major factor in dispute.

It seems to me overwhelmingly probable that Mr Bisset was correct; indeed, Mr *James* has quite rightly accepted this. Because of Mr *James*'s concession it is not necessary for me to analyse the reasons why Mr Bisset's version is to be preferred. Mr *James* has said that whilst he does not concede that the first respondent deliberately lied in his affidavit nevertheless he was not correct in what he stated and he was grossly negligent, if not reckless. These concessions are well made.

I have to decide, therefore, on the basis that there was a false affidavit presented to this Court by the first respondent whether or not costs should be awarded against him *de bonis propriis*.

Mr *James* has made the point that the falsity of the affidavit did not affect the proceedings in this matter. In other words, whether or not the first respondent had chosen to try and mislead this Court the application would still have succeeded, because the lack of jurisdiction on the part of the community court was obviously established and the falsity of the affidavit - that is, denying the allegation of Mr Bisset - did not affect the proceedings in any way.

Costs *de bonis propriis* are only awarded in the most exceptional circumstances and I have had regard to the following cases: *Nonyake v Die Assistant Landdros, Bloemfontein en die Staat* 1964(3) SA 672 (O) and the *Regional Magistrate du Preez v Walker* 1976(4) SA 849 (AD). See also Cillier on Costs at p 206.

The Courts in this country are entitled to expect a high degree of integrity from judicial officers. The degree of integrity which is expected has nothing whatsoever to do with their expertise in the field of law. Mr *James* has rightly said the requirements of legal knowledge for those presiding in community courts and village Courts is not high at all and the Act gives them the widest discretion in applying the law and the procedure to be adopted before it. The criticism of the judicial officer in this matter is that he has attempted to mislead this Court. The criticism has nothing to do with his lack of judicial expertise and it is not intended to penalize him because of this want.

I intend to award costs against him *de bonis propriis* because of his perversity in swearing a false affidavit and, indeed, casting quite unwarranted

1983 (1) ZLR p199

GROSSMAN AJ

aspersions on a member of the legal profession. A false affidavit at any time is bad enough, but

when it is presented in a judicial matter in order to mislead the Court then it is quite inexcusable. Had Mr *James* not made the concession today that he has (that is, that the application should be granted and that the affidavit is false) I would *mero motu* have awarded costs on the attorney and client scale to mark the Court's disapproval of the first respondent's behaviour. However, I will attribute to him the attitude of his counsel and assume that he adopts the same attitude as his counsel has and, for that reason, I do not award costs on the attorney and client scale.

I trust the Primary Courts Inspectorate will be made aware of this judgment and take whatever proceedings they see fit.

I therefore make the following order which is sought by the applicant:

1. Judgment of the first respondent in the community court, *Caleb Buuwe v Lerm Brothers Construction* Case No. 43/82 handed down in the Community Court, Mberengwa, on 23 April 1982, be, and it is hereby, set aside.
2. It is hereby declared that the action instituted by the second respondent in the Community Court, Mberengwa, is not one which is triable according to customary law.
3. Costs be paid by the first respondent *de bonis propriis* and second respondent, jointly and severally, the one paying the other to be absolved.

1983 (1) ZLR p200

S v NCUBE 1983 (1) ZLR 200 (HC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Beck JA

6 April 1983

Flynote

Criminal law - bribery - can only be committed in respect of State officials, not other persons.

Headnote

The common law crime of bribery can only be committed in respect of State Officials. If the person from whom the accused solicits a breach of duty is not a State official, the appropriate charge will be one of contravening section 3(b) of the Prevention of Corruption Act [Cap 70].

S K M Sibanda, for the appellant.

Y Omerjee, for the respondent.

Judgment

Georges JA: The appellant was charged with bribery and theft. It was alleged on the charge of bribery that the appellant had wrongfully, unlawfully and corruptly offered to one Moosa Ahmed Jogee, a cashier employed at Advance Wholesalers, payment of money amounting to \$60 "as a fee, gift or reward to influence the said Moosa Ahmed Jogee in the exercise of his official functions" by inducing him to abstain from charging ten 50 kilogram bags of sugar belonging to Advance Wholesalers. On the charge of theft it was alleged that he had stolen the same ten 50 kilogram bags of sugar.

It appears that the record of the case was at one stage misplaced. The charge sheet was not among the papers when the record was later found. A charge sheet was reconstructed and this shows that the appellant was found guilty without specific reference to either charge and a sentence of 'six months' imprisonment with labour imposed on him. The magistrate has explained that the appellant was in fact found guilty on both charges but that they were treated as one for the purpose of sentence. This appeal

1983 (1) ZLR p201

GEORGES JA

is against both convictions and the sentence.

Mr *Omerjee*, for the State, quite correctly does not support the conviction on the bribery charge. As laid it clearly alleges an offence at common law.

This offence is thus defined in Hunt's *South African Criminal Law and Procedure* Vol II (Ed Milton) at p 219:

"Bribery (as a briber) consists in unlawfully and intentionally offering to or agreeing with a *State official* to give any consideration in return for action or inaction by him in an *official capacity*" (emphasis added).

At p 222 the following statement is made:

"Common-law bribery can be committed only in respect of State officials. If the person from whom X solicits a breach of duty is not a State official, X's conduct must be charged under the Prevention of Corruption Act or some other statutory provision."

The relevant statutory provision in Zimbabwe is s 3(b) of the Prevention of Corruption Act [Cap 70]. Had an amendment been sought below it would have been quite proper to grant it since the case being put forward by the State was properly understood by the defence and there would have been no element of surprise. The appellant has, however, been convicted of an offence an essential element of which could not be proved. The appeal as regards the bribery charge must be allowed and the conviction quashed.

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

Baron A C J: I agree.

Beck J A: I agree.

1983 (1) ZLR p202

S v MAKINA 1983 (1) ZLR 202 (HC)

Court High Court, Harare

McNally J

6 April 1983

Flynote

Criminal procedure - sentence - principles of sentencing - offences of dishonesty - quantum of fine - basic principles is that accused should not benefit by his wrongdoing.

Headnote

When sentencing accused persons in cases of dishonesty, there is no principle that says that any fine imposed should not be less than the value involved. There are often circumstances where a fine of less than the value of the property would be entirely proper. The real principle is simple: a man should not be allowed to benefit by his wrongdoing to the extent that he is better off after being punished than he was before he offended.

Judgment

McNally J: The accused, aged 21, was convicted of fraud. What he did was to get a job by using someone else's qualifications. He worked in the job for two and half months and was paid \$501,60 in salary. Without those qualifications he would not have been engaged. He was fined \$500 or in default of payment 5 months' IWL.

I queried this sentence because the accused had said in mitigation that he had no job and \$100 in savings and no assets. I also made the point that he had given *some* value for money by working for the two and a half months.

In reply the magistrate advises, as I had expected, that the accused has not paid the fine but is serving the sentence of imprisonment.

The magistrate goes on to say this -

"However, I find it of interest that the Learned Reviewing Judge finds my fine of \$500,00 high.

When I was in Gweru I was often criticised by the Reviewing Regional Magistrates

1983 (1) ZLR p203

McNALLY J

for fining accused less than the value of the property involved on the ground that such a sentence has no deterrent effect as an accused would appear to be benefiting from his/her dishonesty activities.

I argued and still believe that certain accused can still be effectively punished and deterred even where the fine is less than the value involved.

The Regional Magistrates insisted my line of reasoning would not meet the ends of justice. As a compromise we

both agreed to put a suspended sentence where a lower fine than the value involved is imposed.

At the end of the day it would seem I was being told that the fine must never be below the value involved unless you include a suspended sentence.

In the instant case the prejudice was \$501.00. I fined the accused \$500.00 or 5 months i.w.l.

Would the Learned Reviewing Judge kindly enlighten me in view of what I have said for my future guidance."

The flaw in this reasoning, as it applies to the facts of this case, is that the magistrate is assuming that the prejudice was \$501. It was not. The accused gave 2 and a half months labour in exchange for that money. His labour was not worth \$501. But it was worth something. To that extent the prejudice was considerably less than \$501.

Accordingly it is wrong, at least in a criminal context, to say that the moral blameworthiness of the accused in this case is as great as that of a person who stole and got away with \$501. The principle raised by the magistrate is not applicable to the facts of this case.

Even if the principle did apply, I would still say the fine is too high, simply because the evidence showed no basis for hoping the accused or his friends and relatives could raise it. He was not asked if he had friends or relatives who might be willing to help. But then the solution would be, not to lower the fine to some attainable but inappropriate figure, but to decide against imposing a fine. There are many cases where one would like to keep a man out of prison by fining him; but he has no money or not enough money to pay a meaningful fine. In such cases one is obliged to abandon the idea of imposing a fine. He must be sentenced to a term of imprisonment. The mind of the presiding officer is then to be directed to a different line of inquiry, namely whether the accused should be kept out of prison by suspending all or some of the sentence of imprisonment.

One must be careful about so-called "principles" of sentencing. They are often not immutable principles but only guidelines. Sometimes one guideline will clash with another.

In this context it is worth examining the "principle" that a man should not be fined less than the value of the property involved.

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McNALLY J

Take the classic case. A man steals \$100 from a person unknown. If he is fined \$50, one can say, with more or less certainty, that he has benefited from his crime. Next time he needs \$100 he must remember to steal \$200, of which \$100 will be for the Court and \$100 for himself.

This, however, is an argument based on the optimum case, an argument by *reductio ad absurdum*. It does not show that the "principle" is to be applied always and in all cases.

Take the next case. A man steals \$100 and it is almost immediately recovered. If he is fined \$50 is that a breach of the principle? No, one may say, because he has not then benefited from his wrongdoing. He is \$50 worse off than when he started. So one has to re-write the principle thus:

A man should not be fined less than the value of the property involved where the property is not recovered.

Does that "principle" stand up to examination? Take a few other sets of facts:

1. A man steals a necklace worth \$100 and sells it for \$20. It is not recovered. Is it wrong to fine him \$75 even if circumstances are very mitigating?
2. A man steals \$100 and at his trial he says, "I have \$150 only. I am willing to pay back the complainant whatever is left after I have paid my fine." Is it wrong to fine him \$50 and impose a sentence of imprisonment suspended on condition that he repays \$100 to the complainant?
3. A man steals \$100 from his employers, and they have already issued summons against him, and have security for their claim in the form of leave pay due and pension rights accrued. Is it wrong to fine him less than \$100?

An analysis of these situations suggests that the "principle" even as amended has been wrongly stated. One manifestation of the principle has been elevated undeservedly to the status of principle.

The real principle is a simple and obvious one - that a man should not be allowed to benefit by his wrongdoing to the extent that he is better off after being punished than he was before he offended. Juveniles, of course, often do benefit, but that is because the Courts have a limited

1983 (1) ZLR p205

McNALLY J

ability to punish juveniles. The "principle" of keeping them out of prison overrides the other "principle" that crime should be seen not to pay.

I return then to the facts of this case. I conclude that a fine lower than \$500 would not have conflicted with the principle properly stated. A lower fine would have been appropriate. However, even a fine of \$350 or \$400 would not have been realistic because the accused could not have paid it. I would have considered imposing such a fine and suspending part of it, had the case come before me at first instance. A young first offender should, generally, have part of his punishment suspended even where it is a fine.

Events, however, have marched on, and it is now almost two months since the sentence was imposed. In my view, the justice of the case would be met by confirming the conviction, but I will set aside the sentence for the reasons stated and substitute the following:

"5 months' IWL of which 2 months are suspended for 3 years on condition the accused is not convicted of an offence committed during that period of which dishonesty is an element and for which he is sentenced to a term of imprisonment without the option of a fine."

Provided the accused has earned the usual remission in prison, this alteration means that the accused is entitled to his immediate release.

MINISTER OF DEFENCE v REDGMENT 1983 (1) ZLR 206 (SC)

Court Supreme Court, Harare

Baron ACJ, Georges JA & Beck JA

28 March & 7 April 1983

Flynote

Statutes - Constitution of Zimbabwe Rhodesia 1979 - Pensions and Other Benefits Act 1979 - s 35 - member of Army or Air Force "as defined in" Regulations - meaning of.

Headnote

The respondent had joined the then Rhodesian Army as a medical cadet in 1977 and in due course qualified as a medical practitioner. In June 1982 he gave notice of his intention to retire early, in terms of s 37(1) of the Pensions and Other Benefits Act 1979, which Act was included in Part IV of the Third Schedule of the Constitution of Zimbabwe - Rhodesia 1979 and remained in force as part of the Constitution of Zimbabwe.

He had complied with all the relevant provisions of s 35 of the Act and the sole issue was whether he was, on the 1 October 1978, a member of the Regular Force of the Army "as defined in the Defence (Regular Force) (European Members) Regulations", RGN 100/1976. "Member" was there defined as - "A European male non-commissioned officer or soldier attested in the Regular Force other than the Guard Force".

The Minister had advised that the Act did not apply to the respondent as a medical officer cadet and declined to accept his notice of early retirement. The present proceedings ensued. In the High Court SQUIRES J ruled in the respondent's favour.

The Minister appealed, arguing that in the context the words "as defined in" were ambiguous and ought to be interpreted as adopting the definition in the Regulations as it is employed for the purpose of those Regulations.

Held, that while it is correct to interpret words by reference to their context, one cannot simply ignore the plain or ordinary meaning. The context to be considered was that in which s 35 appears; and in that context the words mean what they say. The definition incorporated by reference must be read with s 35 as if repeated verbatim therein, and there were no grounds for giving the words anything other than their ordinary meaning.

Decision of SQUIRES J confirmed.

Cases cited:

Attorney-General v HRH Prince Augustus [1957] All ER 49 (HL);

Nestel v National and Grindlays Bank Ltd 1962 (2) SA 390 (AD);

In re Woods Estate (1886) 31 Ch D 607;

R v Patel 1952 (3) SA 463 (N).

M J Gillespie, for the appellant

1983 (1) ZLR p207

BARON ACJ

I A Donovan, for the respondent

Judgment

Baron ACJ: This is an appeal from a decision of the High Court declaring that the respondent (the applicant below and to whom I will refer hereafter for convenience as Redgmt) was entitled to retire early from the Army in terms of s 37(1) of the Pensions and Other Benefits Act 1979 ("the Act"). Part IV of the Third Schedule of the Constitution of Zimbabwe - Rhodesia 1979, in which s 37 and s 35 both fall, remained in force after Independence (midnight on 18 April 1980) by virtue of the Zimbabwe Constitution (Transitional Supplementary and Consequential Provisions) Order 1980 as part of the Act.

Redgmt joined the then Rhodesian Army as a Medical Officer Cadet in February 1977. He was paid a salary whilst he trained as a medical practitioner and out of that salary he was required to support himself and pay the University fees and charges for his medical training. In addition 7 and a half per cent of his salary was payable as a pension contribution. A condition of the engagement was that upon successful completion of his studies Redgmt would be appointed to commissioned rank as a Second Lieutenant and upon completion of his year of housemanship and enrolment as a medical practitioner he would be promoted to the rank of Captain. Thereafter the agreement provided that he would serve in the Army as a Medical Officer for at least four years.

Redgmt duly qualified as a medical practitioner and was registered as such on 1 January 1982. However, on 28 June 1982 he gave notice of his intention to retire early from the Army in terms of s 37(1) of the Act. The appellant was advised by the Government law officers that Part IV of the Act did not apply to Redgmt as a Medical Officer Cadet and that consequently he was not entitled to take advantage of the provisions concerning early retirement; the appellant consequently declined to accept Redgmt's notice of early retirement, and these proceedings followed.

Section 35 of the Act reads, so far as is relevant:

"(2) The provisions of this Part shall apply to any member of the Regular Force of the Army or Air Force who has had continuous service as a contributor since before the 1st October, 1978, and who -

- (a) at that date was an officer as defined in the Defence (Regular Force) (Officers) Regulations, 1976, or a member as defined in the Defence (Regular Force) (European Members) Regulations, 1976, or the

The facts are common cause. It is not disputed that, if they apply to

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BARON ACJ

him, Redgment has complied with all the relevant provisions, and the sole issue is whether he was on 1 October 1978 a member of the Regular Force of the Army within the definition of "member" contained in the Defence (Regular Force) (European Members) Regulations, RGN 100/1976 (to which I will refer hereafter as the "European Members Regulations"). "Member" in these Regulations means -

"A European male non-commissioned officer or soldier attested in the Regular Force other than the Guard Force".

Mr *Gillespie*, on behalf of the appellant, conceded that if the proper construction of the words "as defined in" as used in s 35(2)(a) of the Act was the same as if one simply repeated the words of the definition without any reference to the Regulations from which it came his case would be unarguable. He conceded also that, read by themselves, the words appear to have what he described as an easy meaning. But, he says, the words must be considered in their context, and that when one examines that context the words become ambiguous, and ought to be interpreted as adopting the definition in the European Members Regulations as *it is employed for the purposes of those Regulations* and not as adopting the words employed in that definition without consideration of their scope in those Regulations. In other words, Mr *Gillespie* submits that in their context, as my brother GEORGES put it succinctly during the argument, the words "as defined in" should be construed as meaning "as governed by" or "as regulated by".

Mr *Gillespie* argued in the alternative that the general terms of the earlier European Members Regulations must be held to have been modified by the specific terms of the later Defence (Regular Force) (Medical and Dental Officer Cadets) Regulations RGN 388/1976 (to which I will refer as the "Cadets Regulations"). However, this argument was not seriously pursued; it cannot be sustained unless it can be said that the earlier Regulations cannot stand with the later. It cannot in any event be sustained in the light of the concession that the appellant's case is unarguable if "as defined in" means that the words of the earlier definition are simply read into s 35(2)(a) of the Act. And finally, it overlooks the legislative history, with which I will deal in more detail in a moment; if the Cadets Regulations of 1976 modified the earlier European Members Regulations of the same year the Cadets Regulations of 1969 equally modified the European Members Regulations of 1966; yet the Legislature has re-enacted the definition of "member" in all the European Members Regulations promulgated after 1969.

Mr *Gillespie* is clearly correct when he submits that one cannot arrive

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at the meaning of any word or phrase save by reference to its context. I need only refer to the famous speech of VISCOUNT SIMONDS in *A-G v H R H Prince Augustus* [1957] 1 All ER 49 (HL) where the learned LAW LORD said at p 53 that words "cannot be read in isolation; their

colour and content are derived from their context", and he used "context" in its widest sense as including *inter alia* -

" . . . not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *part materia*, and the mischief . . . that the statute was intended to remedy."

But having said that, I must stress that one cannot simply ignore the plain or ordinary meaning of the words; this meaning must of necessity be used as a starting point, as a working hypothesis, and will only give way, so to speak, to the context if such context dictates or requires a different meaning. Thus VISCOUNT SIMONDS in the *Prince Augustus* case (*supra*), at p 55b, having repeated that "it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context", warned against "creating or imagining an ambiguity in order to bring in the aid of the preamble"; he stressed that one does not depart from the ordinary meaning of words unless there is a compelling reason to do so, which is another way of saying that the context must dictate or require a different meaning.

I proceed then to consider the context in which the words "as defined in" have been used, and I begin by considering the legislative history so far as it is relevant. There were Defence (Regular Force) (European Members) Regulations as long ago as 1966 (see RGN 886 of 1966) and "member" was defined in those Regulations in precisely the same terms as in the Regulations now under consideration, save that the words "other than the Guard Force" did not then appear; those Regulations contained provisions relating to medical officers and dental officers, but not cadets. Provisions for Medical Cadets appears to have been made for the first time in 1969 by the Defence (Regular Force) (Medical Officer Cadets) Regulations, RGN 86 of 1969, which expressly excluded the European Members Regulations of 1966 from applying to Medical Officer Cadets save for certain unimportant (for our purpose) provisions corresponding to those set out in section 4 of the present Cadets Regulations. This pattern has been maintained ever since through numerous amendments, repeals and replacements of both Regulations. Mr *Gillespie* is probably right - and I will assume that he is - when he submits that the Cadets Regulations form a self-contained set of rules which, to the exclusion of the European Members Regulations, govern the conditions of service of cadets. But this

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BARON ACJ

is not the context in which the words "as defined in" are used; they are used in s 35(2)(a) of the Act, and herein lies the fallacy in Mr *Gillespie's* argument. The context we should be considering is that in which that section, and indeed the Act as a whole, appears. Mr *Gillespie* argued that the Act conferred an unusual privilege and should therefore be restrictively construed, that it should not be construed so as to allow persons to avoid their contractual obligations, that the absence of specific mention of persons covered by the Cadets Regulations and the Defence (Guard Force) Regulations 1976 tends to show that such persons were not intended to be recipients of special benefits, and that the interpretation urged by Redgment leads to injustice and partiality of treatment between persons of different races which could not have been intended. It is convenient to deal at once with the last of these arguments.

Mr *Gillespie* accepted the remarks of the learned trial judge as to the intention of the legislature

in enacting special benefits for members of the uniformed services. The learned trial judge said this:*(1)

"To the perspective of the legislation already foreshadowed in the judgment in *Pretorius v Minister of Defence* 1981 (1) SA 1174 (ZSC) at 1177D, there may validly be added, and for the purposes of the present situation, the premise that the Legislature accepted that service under a majority rule government after the 30 April 1979 might well be radically different to what it was before. That meant that the basis upon which all existing public servants and members of the Police, Defence Forces and Prison Services had joined and embarked upon a career in those capacities, would therefore no longer exist; and might even assume a considerably different aspect. It was hoped that it would not, and that fears entertained by the prospect of majority rule would prove unfounded. To retain such skills as these persons represented, there was established on the one hand incentives to stay and continue to serve under the new political order - particularly over the first few crucial years. These incentives took the form of the gradually improving pension benefits that would flow from continued service after the effective date even if the officer concerned was not by then entitled to any benefits from his pensions regulations. But on the other hand, and in recognition of the fact that events might make such continued service unattractive, an opportunity was given for early retirement after at least one year's service from the 30 April 1979."

It is thus clear that the Legislature could well - to put it at its lowest - have intended partiality of treatment between persons of different races. Once that is accepted it follows that the Legislature did indeed intend to confer an unusual privilege on European Medical and Dental Officer Cadets.

But, as the learned trial judge pointed out, if there were any doubt as to the intention to include Medical and Dental Officer Cadets as recipients of these special benefits it is removed by the failure of the Legislature to reproduce a limitation on early retirement such as appears in s 28(2)(c) for public servants.

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BARON ACJ

I agree also with the learned trial judge's reasons for rejecting the argument, based on *Nestel v National and Grindlays Bank Ltd* 1962 (2) SA 390 (AD), that legislation should not be interpreted so as to afford a basis for avoiding contractual obligations. The whole purpose of the legislation in question here is to provide for precisely that; the only question is whether European Medical Officer Cadets are entitled to take advantage of it.

Mr Gillespie cited two cases which seem to me to be against him. In *In re Woods Estate* (1886) 31 ChD 607 LORD ESHER said at p 615:

"Now what is the legal effect of the 9th section of the Act of 1855, which brings into that Act those sections of the former Act? It is to put them into the Act of 1855, just as if they had been written into it for the first time. If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and, the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all."

In *R v Patel* 1952 (3) SA 463 (NPD) certain definitions were incorporated by reference from a War Measure which had already lapsed. The case is distinguishable on this ground; but the dictum of BROOME JP at p 465 is pertinent:

"The framers of the *Government Notice* might have set out therein the relevant definitions contained in the War Measure. That is in effect what they have done. Instead of repeating them verbatim they have incorporated them

by reference."

In my view the words "as defined in" mean what they say; they cannot and do not, in the context of the legislation under consideration, mean "as governed by" or "as regulated by". The definition incorporated by reference must be read into section 35 of the Act as if it had been repeated verbatim therein. This is the ordinary meaning of "as defined in", and I can see nothing in the context which dictates or requires a different meaning.

In my view this appeal should be dismissed with costs.

Georges JA: I agree.

Beck JA: I agree.

Director of the Civil Division of the Attorney-General's Office, appellant's legal representative.

Scanlen & Holderness, respondent's legal representatives.

1983 (1) ZLR p212

B v K 1983 (1) ZLR 212 (HC)

Court **High Court, Bulawayo**

Grossman AJ

5 & 8 April 1983

Flynote

Parent and child - custody following divorce - upbringing of children? left to custodian father - mother applying for custody of girls during adolescent period - undesirable to have children shuttling between parents depending on momentary phases of their lives.

Headnote

Once the court has exercised its discretion, in its capacity as the upper guardian of minor children, to allow one parent the sacred responsibility of rearing the children of a broken marriage, the court will not interfere with that situation unless it is clearly shown, at the time of the application, that the circumstances now indicate that the welfare of the child will be improved if custody is entrusted to the other parent. Transient difficulties or "phases" such as adolescence should not in themselves suffice to have the *status quo* altered, otherwise the ridiculous and quite undesirable situation would arise that children would be shuttled back and forth between parents depending on the needs of the moment.

Cases cited:

Bailey v Bailey 1979 (3) SA 128 (AD).

C W Jordaan for the Applicant

Judgment

Grossman AJ: On 2 August 1978 the applicant divorced the respondent and agreed that the respondent should have custody of the three children, namely G who was born on 1 October 1964, T born on 2 November 1970 and L born on 6 December 1975. G is the applicant's son and was adopted by the respondent after the parties were married. Since the divorce the applicant has re-married and G is now a trainee pilot in the Air Force of Zimbabwe and is stationed at Gweru. The respondent has not re-married.

The applicant has now brought this application to vary the order of

1983 (1) ZLR p213

GROSSMAN AJ

court given at the time of divorce in that she wishes to be granted custody of her two daughters T and L

The applicant's case is that as T is going through puberty and encountering the delicate problems of that age it would be far better for the child to have her mother close at hand to counsel and advise her. Naturally, she says, if she is to have custody of T then she should have L too. Indeed, and quite rightly, neither party has suggested that the two sisters should be separated. The Applicant also goes on to say that it would be advantageous to the children to have her as custodian parent as the children will then be raised in a two-parent environment which would be beneficial to them and, furthermore, the applicant would only work in the mornings and would be able to devote the afternoons to the care of the children. On the other side of the coin the applicant maintains that respondent is overstrict in his discipline of T. Furthermore he cannot cope properly with T's problems associated with puberty and generally he does not care for the girls as well as the applicant says she would. She is supported in the application by her husband and also by G who has filed an affidavit.

Both parties, sadly, have gone out of their way to denigrate the other and they have both dragged the children into the maelstrom of the dispute.

The applicant at the time of divorce left the respondent with the task of bringing up the children. She now wishes to alter that *status quo* and she must therefore show good cause why the Court should grant her this relief. See *Bailey v Bailey* 1979(3) SA 128 (AD). In approaching cases of this kind the courts in this country have never adopted an over-technical approach to onus. The approach of the Court is to concern itself primarily with the welfare of the children. Their welfare is not the only consideration but certainly it is the fundamental one. The difficult decision as to who should have custody must, however, be determined in the long-term interests of the children. All children go through phases of one kind or another, depending on their age, sex and general disposition. It may be that during a given phase it can be said that a child needs the help of guidance of the non-custodian parent and would be better off during his or her problems under the constant supervision of the other parent. It would, in my view, however, be quite wrong to succumb to the temptation to vary custody on this kind of *ad hoc* basis.

Once the Court has exercised its discretion in its capacity as upper guardian of minor children to allow one parent the sacred responsibility of rearing the children the Court will not interfere with this situation unless it is clearly

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GROSSMAN AJ

shown at the time of the application that circumstances now indicate that the welfare of the children will be improved if custody is entrusted to the other parent.

Transient difficulties relating to the general blossoming into adulthood of children should not *per se* suffice to have the *states quo* altered, otherwise the ridiculous and quite undesirable situation would arise that children would be shuttled back and forth between Elicits depending on the adolescent needs of the moment.

Adopting this approach I turn to deal with the problem of whether or not the applicant should now be awarded custody of the two children.

As I have said, the applicant's main concern at the moment is T and the problems which she encounters with puberty. The applicant maintains that T needs maternal care and guidance at this stage of her life. The respondent, however, maintains that he is coping very well with T and T herself has come to accept the changes which are taking place. He has had frank discussions with her and she does not appear to be encountering any real difficulties.

T's problems are no different from those which any young girl encounters and happily she will have her mother close at hand because the applicant and her husband are to move to Harare from Bulawayo within the next few weeks. In any event, the problem is not one which is anticipated but is one which has been extant for some time and all the indications are that no great difficulties have been encountered by T or the respondent. Certainly I see no justification on this ground for depriving the respondent of his custody of the two girls.

The next point made by the applicant is that the children will have the benefit of a two- parent home. It is not my intention to delve into the causes of the break-up of the marriage as there are irreconcilable conflicts on the papers and the cause of the divorce is not directly relevant to the present enquiry. However, it is common cause that applicant left the matrimonial home to set up house with her present husband with whom she had been having an affair during her marriage to the respondent. She married her present husband a few months after her divorce from the respondent. Having walked out of the respondent's home she left him with the extremely difficult task of bringing up two girls of tender years and a teenage son. It is grossly unfair to the respondent and indeed it is manifestly cynical of the applicant to contend that this regularized liaison now, out of the blue, provides a

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GROSSMAN AJ

better environment for the children than that provided by the respondent, and to the custodial exclusion of the respondent. Whether or not the children would be marginally better off in this

type of two-parent home, there is no doubt in my mind that it would be quite indefensible to take the children from their father for this reason.

The applicant has also maintained that she will work mornings only and look after the children in the afternoons. This is certainly a factor which would probably be beneficial to the children but standing alone would not justify a variation in the custody situation.

The main attack launched by Mr *Jordaan* on the respondent relates to his alleged harshness in disciplining T and L and turns in the main upon two incidents in which the respondent slapped T and pushed or punched her on the shoulder and made her cry. G in his affidavit has also detailed examples of the respondent's strict discipline towards him. The parental power allows a very wide latitude to parents in the upbringing and disciplining of their children. There can obviously be no guide lines to parents as to how they should bring up their children and the courts will only step in when by any standards the punishments which is administered is excessive and detrimental to the welfare of the children. Certainly in this case I am not prepared to say that the mode of disciplining T which is complained of is outside the accepted parameters of parental discipline and I am not prepared even to comment adversely upon it. The other attacks against the respondent's fitness to exercise custody are trivial and I do not intend to comment upon them.

Looked at from the respondent's point of view there is no doubt that the children are doing well at school and appear to have a lot of friends and I am satisfied that their home environment is a happy and healthy one. The respondent's affidavit contains testimonials to the respondent's integrity and qualities as a father from an impressive array of businessmen and women in Harare.

In the circumstances, therefore, it seems to me that the applicant has failed to show any good reason why I should vary the award of custody that was made by the court in August 1978. The complaints against the respondent I find unconvincing and I am by no means satisfied that the applicant could provide a home environment as beneficial to the children as their present one and indeed I am a long way from satisfied that a transfer of custody would be to the benefit of the children. Accordingly, the application must fail.

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GROSSMAN AJ

Both parties asked for costs in the event of their being successful. It is unusual in this country in matters involving the welfare of children to award costs against the unsuccessful party where both parties are *bona fide*. Costs are normally only awarded where one of the parties has been unreasonable either in the application or in opposition to the application. Although the application has failed I have no doubt that it was motivated by what the applicant genuinely felt was the best interests of the children. Furthermore, when there is the unfortunate degree of bitterness which obviously exists in this matter it does no harm to air opposing grievances and I feel it has done the respondent no harm at all to have been made aware of the criticisms which the applicant and, indeed, G have of his behaviour. Insofar as the respondent's actions or behaviour may be criticised I hope that this application, although unsuccessful, will have a

salutary effect on him. For these reasons I have decided not to award costs in this case.

Before concluding it is necessary to say a word or two about the behaviour of the parties towards each other. On the one hand I am satisfied that both parties have a very deep and genuine love for the children and are motivated solely by what they consider to be the best interests of the children. However, it is to the credit of neither parent that they have leaped into the arena accompanied by the children. The children have a difficult time as it is adjusting to a divorce situation without having the trauma of having to choose sides and either making accusations or rebutting them. The applicant and her husband are shortly to move to Harare and I gather will be living not too far from the respondent and the two girls. If both parties are really motivated solely by what is in the interests of the children I sincerely trust they will make every effort to discard the bitterness which they harbour towards each other and to compose their difference where possible. These children, who are obviously bright and talented, will develop far more effectively under a benign and harmonious relationship between their parents, albeit divorced. They need to be shielded from the legacy of bitterness which exists.

In an endeavour to encourage co-operation between the parties I intend to give the applicant the most generous access to the children in the hope that this will foster a better relationship all round.

My order, therefore, is as follows:

1. The application is dismissed.
2. There will be no order as to costs.

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GROSSMAN AJ

3. (a) The applicant will have rights of access to the minor children T and L at all reasonable times.
- (b) Without derogating from the generality of the above the applicant will have access to the two children on alternative school holidays save that neither party shall have the children for two consecutive Christmas holidays. The respondent will have the children for the school holidays beginning in April 1983.
- (c) The applicant shall have custody of the two minor children on alternate weekends and alternate long weekends.
- (d) These arrangements may be varied by mutual consent between the parties.

1983 (1) ZLR p218

S v JAKARASI 1983 (1) ZLR 218 (SC)

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Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Beck JA

22 March & 12 April 1983

Flynote

Evidence - Criminal Procedure and Evidence Act [Chapter 59] - s 264(2) - banker's document - "comes immediately from" custody or control of bank - meaning of - criminal law - fraud - presentation of a cheque implies belief that cheque will be honoured - procedure - prosecutor being unjustifiably offensive and oppressive - impropriety of - duty of court to protect witness.

Headnote

The provision in s 264(2) of the Criminal Procedure and Evidence Act [*Chapter 59*] which allows the production of bankers documents on proof that the document "comes immediately from" the custody of the bank is not intended to prevent the document from passing through some intermediate custodians such as police investigators. If the defence is that the document has been tampered with, the Court will hear evidence on the matter and make a finding.

The *obiter* suggestion by BRIGGS FJ in *R v Blackmore* 1959 (4) SA 486 (FSC); 1959(2) R & N 215 that no implied representation arises from the issue and delivery of a negotiable instrument, even if immediately payable, is not a correct statement of the law; a man who goes into a store and buys goods and tenders in payment an immediately payable cheque clearly implies that he believes that if the cheque is presented in the ordinary course it will be honoured. To hold otherwise would be to strike at the very root of ordinary commercial practice.

Prosecutors should remember that they are officers of the court. Their function does not give them licence to be offensive and oppressive. Witnesses, including accused persons, are entitled to the same courtesy from prosecutors as prosecutors are entitled to expect from witnesses. Judicial officers should remember that witnesses are entitled to the protection of the court if they are subjected to offensive and oppressive questioning, and should not be slow to stop practitioners who exceed the bounds of propriety and courtesy.

Cases cited:

R v Kuraza 1967 RLR 225;

R v Blackmore (supra);

S v Copley 1973 (4) SA 111 (RAD); 1973 (1) RLR 235

1983 (1) ZLR p219

BARON ACJ

M T O'Meara, for the appellant

M J Gillespie, for the respondent

Judgment

Baron ACJ: The appellant was convicted in the magistrate's court on four counts of fraud; it was alleged that he gave out and pretended to various employees at the stores in question that certain cheques were good and available cheques and that there were funds at his bank to meet the said cheques and that the said cheques would be honoured on presentation, whereas when he so gave out and pretended he well knew that the said cheques were not good and available cheques, that there were no funds at his bank to meet them and that the cheques would not be met on presentation. The four cheques in question were drawn between April 1982 and May 1982 and were respectively drawn in the sums of \$50, \$32, \$605 and \$70,55: the first two in point of time were dishonoured by being referred to the drawer; and the third and fourth were returned marked "account closed".

Mr *O'Meara* on behalf of the appellant submitted, and Mr *Gillespie* on behalf of the State conceded, that the charges were defective in the allegations of prejudice; it was alleged in all the charges that the persons who had been prejudiced were named employees of the stores in question. Mr *Gillespie* consequently applied to amend the charges so as to allege prejudice to the proprietors of the stores. Mr *O'Meara* opposed the application but conceded very frankly that he was unable, in view of the appellant's defence and the manner in which the case had been conducted, to suggest what prejudice the appellant might have suffered as a result of the wrong persons being named. Clearly there was in fact no prejudice and for this reason Mr *Gillespie's* application was granted and the charges amended accordingly.

Mr *O'Meara* submitted also that Exhibit 1, the appellant's ledger sheet which was produced by the accountant at the appellant's bank, was not properly before the Court. He drew attention to s 264(2) of the Criminal Procedure and Evidence Act [Cap 59] which reads:

"(2) Any bankers document shall be admissible as *prima facie* evidence of the matters or transactions recorded therein or endorsed thereon on proof being given by the affidavit in writing of one of the directors, managers or officers of the bank concerned or by other evidence that such document-

- (a) has been received or executed and kept by the bank in the usual and ordinary course of business, and
- (b) is in, or comes immediately from, the custody or control of the bank."

Mr *O'Meara* submitted that this being a statutory derogation from the

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best evidence rule the provisions of this section must be strictly construed and applied, particularly where, as here, the court was dealing with an unrepresented accused; and he submitted that there was no evidence that the documents came immediately from the custody and control of the bank as required by paragraph (b) above.

The document was not a photostat copy of the ledger sheet in question; as was explained by the witness who had been the manager of the branch until very shortly before these various cheques were presented, the document before the court was the original ledger sheet and what were sent to customers as bank statements were photostat copies. It is clear from the evidence

that the document had come from the custody or control of the bank and the only challenged Mr O'Meara could mount was based on the words "or comes *immediately* from". I confess that I have great difficulty in envisaging the kind of circumstances which this phrase was intended to cover, and it may be of some significance to observe that the corresponding words were omitted from the corresponding South African section when it was amended in 1977. Nor have I been able to find any case in which the words have been judicially interpreted. I do not, however, propose, since for the purposes of this case it is unnecessary to do so, to suggest what kind of situation the words were intended to cover; it is sufficient to say that I accept Mr Gillespie's submission that the words cannot possibly have been intended to cover the kind of situation which obtains in the present case.

It is not clear from the evidence whether the investigating officer actually took the ledger sheet away from the custody of the bank for the purposes of his investigation or whether he merely examined it on the bank's premises; it may well be that the accountant brought the document to court with him and handed it to the prosecutor for the purpose of it being presented as an exhibit in the ordinary way. But even if it had been taken away by the police investigator I do not think it can be said that the document had passed through some intermediate hands and that the provisions of s 264, which Mr O'Meara submits were designed to eliminate the possibility of tampering with the document, had not been complied with. It seems to me that if this ledger sheet was removed from the bank by a police investigator for the purpose of analysis the position would be no different in principle from a case in which police officers uncover documents in the course of a lawful search of a suspect's premises, take them away for further examination and thereafter present them in evidence; in such a case if an allegation of tampering - or indeed of planting - is made the court will hear the evidence on both sides and make a finding. Of course, no allegation

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of tampering was made in the present case; but had it been the matter would have been resolved by the court hearing evidence and examining the document itself and making a finding that it was or was not satisfied that the document had not been tampered with. I am satisfied that if the words "or comes immediately from" are intended to exclude the document in question having come from the possession of some intermediate custodian; this cannot have been intended to cover the case of police investigators. I am consequently satisfied that Exhibit 1 was properly before the court, that the magistrate was entitled to have regard to it and that this Court equally is entitled to have regard to it and to draw such inferences as may be proper from its contents.

Mr O'Meara submitted also that the appellant had not received a fair trial for two reasons: first, because the magistrate had declined to grant the appellant an adjournment in order to secure legal representation; and second, because the magistrate had declined to call the various complainants to give evidence. As to the first, the record shows that the magistrate made every effort to accommodate the appellant in his expressed desire to obtain legal representation. It is clear from the face of the record that the legal representative who appeared at the initial hearing withdrew from the case - and this emerges from what the appellant himself said to the court -

because the appellant was at that stage saying something different to his representative from what he had said during earlier consultations. It is clear therefore that the appellant was not speaking the truth when he said that he had contacted another lawyer who had promised to come and defend him; the appellant did not, until he was actually in court, have any reason to approach another lawyer.

In addition, as I have said, the magistrate made every effort to accommodate the appellant, and the prosecutor made telephone calls to the firm mentioned by the appellant in an effort to ascertain the position. The case was adjourned after the prosecution evidence had been led to enable the appellant to obtain legal representation, and it had earlier been made clear to the appellant that if at that stage the defence applied for the recall of either of the prosecution witnesses this application would be granted. In the event the lawyer whom the appellant named was telephoned and informed the prosecutor that he did not intend to appear. Finally the appellant obtained the services of a practitioner who came into the matter for the purpose of the closing addresses.

Mr O'Meara referred us to the remarks of BEADLE CJ in *R v Kuraza* 1967 RLR 225 at 226 F-H. I am satisfied that the magistrate in no way

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derogated from the appellant's right to legal representation.

Mr O'Meara submitted also that the magistrate exercised his discretion improperly in not calling the various complainants, who apparently had been summoned to court but whom the prosecutor chose not to call. The appellant, during the course of more than one of his lengthy statements at the trial, asked for these complainants to be called and, as Mr Gillespie conceded, I think the prosecutor should have called them if only to give the appellant the opportunity to question them for whatever purpose he had in mind. The magistrate, however, when he was asked to call them tried to elicit from the appellant what he expected these complainants to say, and it transpired that what the appellant was really concerned with was for the complainants to be called into court so that the magistrate would himself witness that the appellant was willing to make reparation to them and had the funds to do so. In these circumstances, and if this was the only purpose for which the appellant wished the complainants to be called, I do not think it can be said that the magistrate exercised his discretion improperly in declining to do so.

Be that as it may, even if the failure to call the complainants was an irregularity I am satisfied that the evidence against the appellant was quite overwhelming and that the proviso must be applied. The appellant's defence was based on two main allegations, although there was a degree of overlap between them. He alleged that at the time he drew the cheques in question he was expecting money due to him from the sale of a business to be paid into his bank account by the purchaser, and he said that with this knowledge he made arrangements with the various stores not to present his cheques immediately. The second allegation was that he had arranged with the bank manager for the grant of overdraft facilities and once again the money

which was due to him from the sale of his business was the basis of these facilities.

The first of these allegations really does not bear examination. It is clear from the evidence of the purchaser of the appellant's business, one Geza, that he had been paying instalments direct to the appellant and was only asked at the end of April to pay into the bank; the payment in question was to be made on the 21 May, but when he attended at the bank for this purpose he was told the account had been closed. In these circumstances it seems to me impossible to accept that the various stores agreed not to present the cheques in question; with one exception the amounts were by comparison small and I find it inconceivable that the stores would have agreed to supply goods and wait several weeks before presenting their

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cheques. That they did not in fact so agree seems to me to be proved conclusively by the fact that all of them presented the cheques immediately.

The second of the appellant's defences is equally unacceptable. The bank manager at the relevant time was called by the prosecution to give evidence and was cross-examined closely on the basis that he had granted overdraft facilities. It is clear that the appellant must have asked for an overdraft but the manager was adamant, and he was believed by the magistrate, that he had made no such agreement. At one point the appellant actually mentioned an amount of \$1 500 as the facility that he had been granted. The manager pointed out that had such facility been granted it would have been noted on the ledger sheet and it is clear that no such notation appears. Furthermore the manager pointed out that he could not have considered overdraft facilities without security, and the document put before him by the appellant was quite inadequate as such security; furthermore the conduct of the account had been unsatisfactory and letters had been written to the appellant warning that unless the conduct of the account was regularised it would be closed.

But perhaps the most damning evidence in this regard is that of the appellant himself and the ledger sheet, Exhibit 1. The appellant admitted that he knew that in addition to the four cheques the subject of the charges a number of his cheques - 11 in all - had been dishonoured. He denied having received correspondence from the bank concerning the unsatisfactory conduct of his account, but obviously the bank manager himself knew of the dishonoured cheques and the letters, and it is inconceivable that the appellant could be speaking the truth when he alleged that, notwithstanding these dishonoured cheques and the letters, the manager had granted the appellant overdraft facilities.

Furthermore, on the question of credibility the appellant was clearly untruthful when he adamantly asserted that the dishonoured cheques were subsequently re-presented and honoured; the ledger sheet shows that not one of the dishonoured cheques was ever re-presented, far less honoured. The truth of the matter seems to me to emerge from the appellant's own allegation that on the dishonour of the various cheques he went to the stores concerned and paid them the corresponding amounts in cash; he quite clearly thought that this was a perfectly ordinary way of conducting business and that, provided he actually paid the amounts when the cheques were dishonoured, the conduct was not such as should be the

subject of criminal proceedings.

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This brings me to a submission made by Mr *O'Meara*, namely that no implied representation arises from the issue and delivery of a negotiable instrument even if immediately payable, and he cited as authority *R v Blackmore* 1959 (4) SA 486 (FSC) at p 494 G-H; 1959 (2) R & N 215. However, Mr *O'Meara* very properly informed the Court that there was South African authority to the contrary. In *Blackmore's* case (*supra*) BRIGGS FJ said at p 494G:

"I would, for myself, reject the suggestion that any particular implied representation arises by presumption of law from the issue and delivery of a negotiable instrument, even if immediately payable. Inferences of fact may, of course, arise therefrom."

This dictum was *obiter*, and the court left open "whether the true nature of fraud in our law is that it includes, at least in criminal cases, the exception that an expression of present intention or belief as to a matter *in futuro* cannot be such a false representation as will support a criminal conviction". I have no hesitation in saying that it is. I need only refer to *S v Copley* 1973 (4) SA 111 (RAD); 1973 (1) RLR 235 where BEADLE CJ cites passages from Hunt *South African Criminal Law and Procedure* Vol 2 at p 721 and 722 and particularly that "the criminal law is not there to punish people who break promises - only those who make promises at a time when they have no intention of performing". I must therefore with respect differ from BRIGGS FJ if he intended to suggest that where a man goes into a store and buys goods and tenders in payment an immediately payable cheque there is no implied representation; it seems to me that such a man clearly implies that he believes that if the cheque is presented in the ordinary course it will be honoured.

Particularly in this country where bank cards and other types of credit cards are not yet in popular use and where a tremendous amount of ordinary day-to-day household purchasing is done by way of cheques, it would I think strike at the very root of ordinary commercial practice if the only sanction against presenting cheques which the drawer did not honestly believe would be met on presentation in the ordinary course were a civil remedy; the position would then indeed be that which the appellant in the present case seemed to think was unexceptionable, namely that he could quite happily write cheques knowing that they would not be met or not caring whether or not they would be met and that, provided he subsequently redeemed them, all would be well. I think very few store-keepers would be prepared to accept cheques if they were aware that all that would face the purchaser on the cheque being dishonoured was a civil action on the cheque.

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BARON ACJ

In the result I am satisfied that the ingredients for a charge of fraud in our law were properly alleged and that on the facts they were proved beyond any doubt. I would dismiss the appeals against conviction. Mr *O'Meara* advanced no argument against sentence and I would dismiss

these appeals also.

I must make one final observation. The record reveals a most disturbing line of cross-examination by the prosecutor, not only of the appellant himself but also of the witness, Geza, who on the face of the record was patently not concerned with the outcome of the prosecution against the appellant and who was also in my view patently honest. The prosecutor throughout adopted a most offensive, not to say oppressive, attitude, repeatedly calling both the appellant and Geza liars, repeatedly asserting that prosecution witnesses had said that the appellant was a liar when in fact they had said no such thing, and concluded his cross-examination of Geza with this remark: "Just one final question Mr Geza. Why did you come to court and perjure yourself like this?" It is unnecessary to recount the evidence; it is sufficient for me to say that there was no justification whatever for this kind of attack. I trust that prosecutors will remember that they are officers of the Court, that their function does not give them licence to be offensive and oppressive and that witnesses, including accused persons, are entitled to the same courtesy from them as they are entitled to expect from the witnesses. And I think it would not be out of place to remind the magistrate, who in all other respect conducted the case with the utmost fairness and indeed, as I have said, went out of his way to assist the appellant, that witnesses, including accused persons, are entitled to the protection of the court from the kind of cross-examination to which they were subjected in this case. Magistrates should not be slow to stop practitioners on either side if they exceed the bounds of propriety and courtesy; it is true that the magistrate did somewhat belatedly question the relevance of the line of the prosecutor's cross-examination of Geza, but not before the witness had been subjected to what can only be called an offensive cross-examination.

Georges JA: I agree.

Beck JA: I agree.

E C Moffit & Pratt, appellant's legal representatives.

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S v THOMSEN 1983 (1) ZLR 226 (HC)

Court **High Court, Harare**

McNally & Sandura J J

8 & 13 April 1983

Flynote

Criminal procedure - sentence - Dangerous Drugs Act - cultivation of a large amount of dagga - accused a foreigner and unaware of illegality - indications that such cultivation lawful in his country - no proof of intention to supply - custodial sentence set aside.

Headnote

The appellant, a young Dane who had been in Zimbabwe for some 20 months, was convicted

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of contravening the Dangerous Drugs Act. He had cultivated 36 dagga plants. The magistrate sentenced him to 20 months' imprisonment, of which 12 were suspended. He had said, in mitigation, that the dagga was for his own use. He had consistently averred that he did not know, in any case, that what he did was unlawful, because it was not unlawful in Denmark. He appealed against the sentence.

Held, that, all other things being equal, the sentence was not out of the ordinary for a person convicted of cultivation as many as 36 plants.

Held, further, that while it may be proper to infer, from the amount of dagga involved, that it was cultivated in order to supply others, it was a misdirection, in the absence of anything to contradict the appellant's unchallenged statement that it was for his own use, to draw the inference of an intent to supply or even that of likelihood of supply against this particular appellant.

Held, further, that the appellant's ignorance of the law of Zimbabwe on the matter was not entirely excusable, involving as it did, a degree of diligence in ignorance.

Held, further, that in all the circumstances a prison sentence was not called for.

Cases cited:

S v Isaac & Others G-S-167-72 (not reported);

S v Kendeni AD 137/76 (not reported);

S v Sibanda G-B-71-77 (not reported);

S v Goremusendu AD 130/77 (not reported);

AG v Moyo AD 64/79 (not reported);

S v Masunda HC-H-153-82 (not reported);

S v Gondo HC-S-122-82 (not reported);

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McNALLY J

S v Katsidzira HC-H-250-82 (not reported);

S v Sharawakanda 1981 ZLR 239;

S v de Blom 1977 (3) SA 513 (AD);

R v Goodchild [1977] 2 All ER 163 (CA);

R v Mitchell [1977] 2 All ER 168 (CA).

M Gillespie, for the appellant.

Mrs A Eleftheriades, for the State.

Judgment

McNally J: The appellant was convicted by the Magistrate, Harare, of contravening the Dangerous Drugs Regulations as read with the Dangerous Drugs Act [*Chapter 319*], in that he cultivated 36 dagga plants. He was sentenced to 20 months IWL of which 12 were suspended.

The appellant was not legally represented at his trial and pleaded guilty. He was then represented for the purpose of a plea in mitigation. There was some misunderstanding and consequent delay about the noting of an appeal against sentence and an application had to be made for leave to note the appeal out of time. This explains why the sentence was imposed as long ago as 29 November 1982. The appellant has been on bail.

It can be said at once that, other things being equal, a sentence of this magnitude is not at all out of the ordinary for persons convicted of cultivating as many as 36 plants.

Simply for comparison, I set out in schedule form a number of similar cases, as follows:

Accused	Reference	Quantity	Sentence	Suspended
1. Isaac & Ors	G-S-167-72	19 plants	18 months	6 months
		44 plants	24 months	9 months
2. Kendeni	AD 137/76	38 plants	24 months	6 months
3. Sibanda	G-B-71-77	56 plants	24 months	6 months
		+ 500 grams		
4. Goremusendu	AD 130/77	84 plants	24 months	12 months
5. Moyo	AD 64/79	7 plants	15 months	7 months
6. Masunda	HC-H-153-82	9 plants	15 months	7 months
7. Gondo	HC-S-122-82	25 plants	15 months	10 months
8. Katsidzira	HC-H-250-82	25 plants	30 months	15 months
		+ 1,7kgs		

Mr *Gillespie* has, however, argued that the magistrate was wrong in treating

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this like any other case, and in particular, that he misdirected himself in two important respect-

1. as to the appellants motive for cultivation;
2. as to the appellants moral blameworthiness based on his alleged ignorance of the law.

THE MOTIVE - PERSONAL USE OF SUPPLY TO OTHERS?

If an accused person satisfies the court that the dagga he possesses is for his personal use he will be punished less severely than if he possesses it for the purpose of sale or supply to others.

The most convincing evidence in determining his state of mind is the quantities involved. If a man has one twist, a court is unlikely to dispute his evidence that he possesses it for consumption. If he is growing thousands of plants, such a claim is likely to fall on deaf ears.

In the extreme examples I have given, the decision is easy. But in between there is a grey area, and in that area the accused's evidence is important. If that evidence is not challenged, and might be true, it is difficult for the court to conclude by inference alone, that the evidence should be ignored. It becomes a question whether the inference of intention to supply is the only reasonable inference to be drawn in the circumstances.

It must also be borne in mind that possession of large quantities makes it probable that the accused will supply others, whether his original intention may be. This is what was referred to by Baron JA in *S v Sharawakanda* 1981 ZLR 239 where he said:

"The possession of such a large quantity of dagga carries with it its own potential danger. It may well be that the appellant intended it for his own use and did not intend to supply others; but the potential for supply is inherent in the mere possession of such a quantity, and that danger is still a serious matter even though the supply might have been to relatives or friends without payment."

In that case the appellant was in possession of one & one third kilograms of prepared dagga.

In assessing sentence, therefore, it is my view that the larger the amount possessed the more closely will the court scrutinize the accused contention that the dagga is for his own personal use. And even if that contention is accepted it will not necessarily be mitigatory, where large quantities are

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involved, if the court concludes that it is likely, human nature being what it is, that the accused will be prevailed upon to sell it to others or share it with his friends.

Now the facts of the present case are very unusual. The appellant is a Dane aged 23 who had been in this country only 20 months at the time of his trial. He speaks very limited English. He said, in answer to a question by the Court, that he intended smoking the dagga. The prosecutor did not ask leave to cross-examine him on this point. The Court's finding was then expressed in

this way -

"You have also told this Court that you grew this dagga for your own consumption. One would understand if you had grown, say, one or two plants, but to cultivate 36 plants which were between 3-4 feet high for your own consumption is taking the matter a bit too far."

It will be seen, therefore, that the court has drawn an inference, from the quantity of the plants, that the appellant intended to supply others, even though no-one challenged the accused's statement to the contrary. And the reason one has to be careful here is that, if challenged, he might have come out with a wholly convincing explanation. He might have said, for example, "I did not know, as a foreigner, how big the plants grew or how many were likely to survive to maturity. So I just got some seeds and planted them. I would have destroyed any excess over my own needs". He was not given the chance to put forward some such explanation. Nor is the quantity involved so large that one can say "no explanation could possibly satisfy me that these were for your personal consumption only".

Another point is that he is a foreigner and a stranger and thus less likely to supply his neighbours than a peasant farmer would be. With the kind of income he earns he is less likely than a peasant farmer to have planted it as a cash crop.

In all these circumstances I conclude the magistrate was wrong to draw the inference of intention to supply or even the inference of likelihood of supply. This was a significant misdirection as to sentence.

IGNORANCE OF THE LAW

Mr *Gillespie* specifically disavowed any intention to argue that his client's ignorance of the law should have resulted in his acquittal along the lines of the decisions in *S v Blom* 1977 (3) SA 513 (AD). The facts are that, right from the beginning of the trial, the appellant said he did not know it was illegal in Denmark. The Court offered to

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to alter the plea for his reason to one of not guilty, but the prosecutor said ignorance of the law was no excuse but was merely mitigatory and so the plea of guilty was allowed to stand. The Court then asked him -

"Well did you try to find out whether in this country this was an offence to grow dagga? - No, I didn't".

"Why not? - I never thought about it."

On this basis he was convicted.

Subsequently, and during the prosecutor's address on sentence, the prosecutor produced, without objection, a telex message purporting to come from the Danish Ministry of the Interior. The message, translated by the Royal Danish Embassy, is to an important extent ambiguous. It reads, in its relevant part, as follows -

"In Denmark it is legal to grow hemp for industrial purposes, to cultivate it in the wilderness, and to grow it as

ornamental plants etc., but it is a criminal offence to make use of the euphorising effect of the plant. The criminal offence, if occasion should arise, consists in a hemp grower being caught in drying the top shoots of the plant".

This is no way to lead evidence as to the law of a foreign state. See *Hoffman & Zeffert South African Law of Evidence* 3 ed p 90. The evidence should have been led through an expert witness. And nowhere in that quoted extract is it said that cultivation of dagga is an offence. Accordingly it must be assumed, in favour of the appellant, that the law of Denmark may not prohibit the actual cultivation of the dagga plant. It may be noted in passing that the law of England concerning cannabis is or was recently in a state of confusion. See *R v Goodchild and R v Mitchell*, reported in [1977] 2 All ER (CA) at 163 and 168 respectively.

The Magistrate said on the question of sentence -

"Accused says he was not aware that growing dagga in Zimbabwe was an offence because in his home country Denmark this was not an offence. However the prosecutor took the matter a step further. A letter was sent to Denmark and the reply was that although it was not an offence in your country to cultivate dagga, but as soon as that dagga was reaped or dried it became an offence. It should have become apparent to you as you cultivated the 36 plants in this case, that once you dried them even in Denmark itself this was going to be an offence, and you have been in Zimbabwe for 20 months. You should have taken trouble to find out what the law says about the cultivation of dagga in this country, and your reply to my question as to why you did not find out was that you did not think of it".

The logic of this comment is hard to follow. The dagga in this case was not reaped or dried. So there was no reason, on the basis of the alleged

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law of Denmark, for the appellant to think he was committing an offence.

In so far as the Magistrate then goes on to argue that the appellant should have taken steps to find out the law, he is on sounder ground. It does seem to me that there is here a degree of "diligence in ignorance", to put it at its best for the appellant. Anyone who has travelled, as he has, must know that different countries have different laws about cannabis. If he chose not to find out what the law of Zimbabwe was, he must pay the price.

It is clear however that in regard to this aspect of the case, two things distinguish this appellant from the ordinary run of dagga cultivators. First, coming from a different country, he cannot be deemed to know what even the simplest local peasant almost certainly knows, that it is against the law to grow dagga. Second, coming from a more sophisticated and perhaps more permissive country, he may not have realised how seriously this country regards the cultivation of dagga. Bearing in mind that, because of the misdirection, this Court is free to impose its own sentence, and bearing in mind that we are dealing with cultivation for personal use (on the evidence) and with a case involving a degree of ignorance of the law of Zimbabwe, it is my view that an effective prison sentence is not called for.

The appeal against sentence is allowed. The sentence imposed by the magistrate is set aside and in its place the appellant is sentenced as follows:

"A fine of \$750 or in default of payment six weeks imprisonment with labour. In addition 6 months imprisonment

with labour wholly suspended for 3 years on condition that the accused is not convicted of an offence, committed during that period, of which the cultivation, possession or supply of dagga is an element, and for which he is sentenced to a term of imprisonment without the option of a fine."

Sandura J: I agree.

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MASUKUSA v NATIONAL FOODS LTD & ANOTHER 1983 (1) ZLR 232 (HC)

Court **High Court, Harare**

McNally J

30 March & 16 April 1983

Flynote

Practice and procedure - institution of proceedings - whether to be by notice of motion or summons - principles affecting - when court may condone incorrect use of motion proceedings.

Headnote

Proceedings should not be initiated by notice of motion when there is likely to be a conflict in the evidence or where the claim is illiquid, as in a claim for damages. Nevertheless, even if notice of motion proceedings are wrongly used, the courts will take a robust view of conflicts of fact, where they think they can solve the issue despite apparent conflicts in evidence. They will also seek to save further wasting of costs by referring the matter for oral evidence, or ordering the application to stand as a summons, or ordering the papers to stand as pleadings. They will not, however, allow oral evidence to prove facts which the affidavits themselves should have presented, nor will they automatically and *mero motu* allow a matter to go to evidence where counsel advocates the procedure only as a fall-back position in the event that an application is not granted.

Where the facts are in dispute, the Court has a discretion as to whether to dismiss the application or allow the matter to go to evidence. The first course is appropriate where an applicant should, when launching his application, have realised that a serious dispute of fact was inevitable.

Cases cited:

Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd 1982 (1) SA 398 (AD);

Miller v Roussot 1975 (1) RLR 324; 1975 (3) SA 876 (R);

Joosab & Others v Shah 1972 (1) RLR 137; 1972 (4) SA 298 (R);

Lalla v Spafford NO & Others 1973 (2) RLR 241; 1974 (1) SA 191 (R);

Smit v Smit 1980 (3) SA 1010 (O);

Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd 1981 (4) SA 175 (N);

Joh - Air (Pty) Ltd v Rudman 1980 (2) SA 420 (T);

Di Meo v Capri Restaurant 1961 (4) SA 614 (N);

Room Hire Co (Pvt) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T);

Atlas Organic Fertilizers v Pikkewyn Ghwano 1978 (4) SA 696 (T);

Adbro Investment Co Ltd v Minister of the Interior 1956 (3) SA 345(AD).

S Moyo, for the Applicant

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McNALLY J

N M R Gardener, for the respondents

Judgment

McNally J: When should practitioners institute proceedings by notice of motion instead of by summons? What should the Court do if the wrong procedure is followed? These questions are raised by the present application.

The applicant used to work for the first respondent. He was dismissed. He says he was wrongfully dismissed. He claims damages.

The second respondent, a deputy messenger of court, attempted to serve process on the applicant. He says that in the course of carrying out his duties he was abused by the applicant who, in the course of his tirade, made remarks of a political nature. The second respondent called upon the police to escort him back to the applicant because the applicant had refused to accept service of the papers. The police did escort the second respondent, who served the papers on the applicant in their presence. They then, as a result of information given to them by the second respondent, arrested or detained the applicant and held him for six days before releasing him. He claims damages from the second respondent for allegedly causing his arrest or detention by making false statements to the police as to what he had said.

The link between the case against the first respondent and the case against the second respondent is this. The ground of the applicant's dismissal was apparently misconduct (See s 8(1) (a) of Act 13 of 1980). One of the alleged occasions of this misconduct is the occasion when the second respondent served the papers referred to.

The link is a tenuous one because:

- a. The misconduct alleged on that occasion was only one of two occasions of alleged misconduct, linked to a previous history of alleged misconduct, which were relied on by the first respondent;
- b. The statements of a political nature allegedly made by the applicant were only part of

the complaint of misconduct on that occasion. They have, one would think, little to do with the contractual relations between employer and employee. The real basis for the first respondent's complaint was the allegation as to the applicant's conduct towards his fellow employees on that occasion.

- c. In fact the allegations of a political nature were, on the affidavits, made in an interview between the applicant and the second respondent some time before the second respondent returned and

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saw the applicant. It was on this latter occasion that the alleged misconduct took place. The two events are separated, albeit briefly, both as to time and place.

After initially contending otherwise, Mr *Moyo* eventually conceded that the matter could not be resolved on the affidavits as they stood. In this concession he was undoubtedly right.

The issue therefore became one as to whether I should refer the matter to trial, with costs to follow the event, or whether I should dismiss the application with costs.

It is pertinent to say that as soon as the notice of motion was served on them, the legal representatives of the respondent wrote to say that it was in their view clearly wrong to proceed by notice of motion because of the fundamental conflict of evidence. This conflict is indeed apparent on the applicant's own papers, since he annexes documents drawn by the first respondent and contends that the allegations therein are untrue.

The applicant's legal adviser however wrote back disputing this claim. By insisting on proceeding he brings himself within the scope of the dictum of MILLER JA in *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (AD) at 430 G-H where the learned JUDGE OF APPEAL says:

"A litigant is entitled to seek relief by way of Notice of Motion. If he has reason to believe that facts essential to the success of his claim will probably be disputed, he chooses that procedural form at his peril, for the Court in the exercise of its discretion, might decide neither to refer the matter for trial nor to direct that oral evidence on the disputed facts be placed before it, but to dismiss the application".

In a slightly different context the warning of BEADLE ACJ in *Miller v Roussot* 1975 (1) RLR 324; 1975 (3) SA 876 (R) may be noted.

There is nothing in Order 32 of the Rules of the High Court to indicate what matters should or should not be brought by way of notice of motion. But text books and the law reports are full of cases on the point and the principles are clear.

One may begin by referring to pp 60 - 66 and 90 *et seq* of Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed (I may say in passing that this edition was published in 1979, and I should not have been invited by counsel to refer to the Second Edition). The principles set out there are clear and I need not repeat them.

McNALLY J

However, reference to some of the cases cited is illuminating. A court will take a robust view of conflicts of fact where it thinks it can solve the issue despite the apparent conflicts - see for instance *Joosab and others v Shah* 1972(1) RLR 137; 1972 (4) SA 298 (R) and *Lalla v Spafford NO and Others* 1973 (2) RLR 241; 1974 (1) SA 191 (R). This happens every week, for example, in applications for maintenance *pendente lite*. Even where the conflicts cannot be resolved without evidence the Courts will not take the attitude that they must punish the applicant for following the wrong procedure. They will seek to save further wasting of costs by referring the matter for oral evidence or ordering the application to stand as summons, or ordering the papers to stand as pleadings, depending on the circumstances. See *Smit v Smit* 1980 (3) SA 1010 (O) at 1015 B-E. But there are limits. For instance the Court will not allow oral evidence to prove facts which the affidavits themselves should have presented - *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179F. Nor will the Court automatically and *mero motu* allow the matter to go to evidence where counsel advocates the procedure only as a fall-back position in the event that this application is not granted: see *Joh - Air (Pty) Ltd v Rudman* 1980 (2) SA 420 (T) at 428 *et seq*, citing *Di Meo v Capri Restaurant* 1961 (4) SA 614 (N).

In his submission Mr Moyo cited one authority only. That "authority" was an article by a distinguished Pretoria advocate, Mr George Findlay KC at p 20 of the 1951 South African Law Journal. It is apparent that Mr Findlay favoured wider use of the procedure of notice of motion. But even Mr Findlay seems to concede that certain matters are not (or were not when he wrote) considered suitable for that procedure. At p 24 of the Journal he writes:

"In the decisions I have cited two kinds of Judgments are said to be excluded altogether from procedure by way of application. They are divorce orders and awards of unliquidated damages. In the battle between the rival procedures of application and trial these then are two supposed bastions of the trial action from which it cannot be ousted. That undoubtedly is the position as it stands today, but I have grave doubts as to how long these two exceptions will hold out - that is, as a matter of legal evolution."

It seems to me, with respect, that they have held out. Certainly as far as unliquidated damages are concerned, the original and oft quoted judgement of MURRAY AJP in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 11 55(T) has been referred to with approval in the Transvaal as recently as 1978 on this point, where ELOFF J said in *Atlas Organic Fertilisers v Pikkewyn Ghwano* 1978 (4) SA 696 (T) at 699 B:

McNALLY J

"Motion proceedings are in my opinion inappropriate for claims for damages."

I then referred to the passage in the judgment of MURRAY AJP in the *Room Hire* case (*supra*) where he said:

"There are on the other hand certain classes of cases (the instances given by DOWLING J are matrimonial causes and illiquid claims for damages) in which motion proceedings are not permissible at all."

This approach is specifically endorsed at p 61 of Herbstein and van Winsen *op cit*, where it is said:

"with these modifications . . . the statements of MURRAY AJP in the *Room Hire* case would seem to be acceptable as reflecting the practice of all the divisions."

It should also be mentioned that the article by Mr Findlay did not seem to affect the judgment of CENTLIVRES CJ when he said, in *Adbro Investment Co Ltd v Minister of the Interior* 1956 (3) SA 345 (AD) at 350 A:

"Where the facts are in dispute the Fourth as a discretion as to the future course of the proceedings. It may dismiss the application with costs or order the parties to go to trial or order oral evidence in terms of any Rule of Court. The first course may be adopted when the applicant should have realised when launching his application that a serious dispute of fact was bound to develop".

The words are almost identical to those of MILLER JA quoted earlier. Thus, over a period of some 26 years the attitude of the Appellate Division remained unchanged.

Now, in the present case I have not the slightest doubt that the applicant should have realised that a serious dispute of fact was bound to develop as between himself and both respondents. Should I, nevertheless, in the interests of saving costs and generally getting on with the matter condone the wrong procedural approach? In my view it would be wrong to do so. There are a number of reasons. In the first place this is a very clear example of the wrong use of the procedure. The conflicts of fact were glaring and obvious and were in fact referred to in the applicant's affidavit. In the second place the claims for damages were clearly illiquid and would patently need examination by way of evidence.

My third reason is a more general one. Procedure by way of notice of motion, though often convenient, is far less disciplined than procedure by action. A good novelist can write a series of exciting affidavits and at the end claim large sums of money. It takes a lawyer to draw a declaration.

To draw a declaration it is necessary to analyse your claim and decide

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McNALLY J

exactly what you have to prove. It is not desirable that I should spell out the questions of fact and law which arise in these claims. It is enough to say that there are a number of aspects of both claims which would be better dealt with in a declaration.

The final question is that of misjoinder. It seems to me that the link between the two cases is a very tenuous one. I have set out some of the reasons for saying so earlier in this judgment. It is for consideration (I say no more than that at this stage) whether these should not be two separate summonses. The Plaintiff may wish to consider the relevance of Rule 85 of the High Court Rules. If these are two summonses it will of course be open to the parties later to seek consolidation in terms of Rule 92.

In the exercise of my discretion therefore I decline to refer this matter to trial in one or other of the ways open to me. I consider that it is undesirable to deal with this issues involved in the

form in which they have been raised.

Accordingly, the application is dismissed with costs.

Scanlen & Holderness, applicant's legal practitioners.

Cantor & Immerman, respondents' legal practitioners.

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MOLL v COMMISSIONER OF POLICE & OTHERS 1983 (1) ZLR 238 (HC)

Court **High Court, Bulawayo**

Gubbay J

13 & 19 April 1983

Flynote

Statutes - Emergency Powers (Maintenance of Law and Order) Regulations 1980 - s 49(1) - arrest and detention in terms of - police officer who arrests and detains a person must himself reasonably suspect that arrested person, by virtue of his conduct, falls within para (a) or (b) of s 49(1) - not enough merely to act on instructions.

Headnote

Before an arrest and detention may lawfully be made in terms of s 49(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1980, it is necessary that the police officer effecting the arrest and detention should *himself* reasonably suspect that the person arrested and detained, by virtue of his conduct, falls within para (a) or (b) of the subsection. The wording of the subsection is quite clear: it does not permit a police officer lawfully to arrest and detain a person merely on the instructions of another policeman. The fact that this interpretation of the subsection may lead to anomalies does not detract from the clearly expressed wording and does not render it impossible to implement the provision.

Cases cited:

Holland v Commissioner of Police 1982 (2) ZLR 29;

Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd 1947 (2) SA 1269 (AD);

Read v SA Medical & Dental Council 1949 (3) SA 997 (T);

Birch v Johannesburg City Council 1949 (1) SA 231 (T);

Manjra v Desai & Another 1968 (2) SA 249 (N);

Bhyat v Commissioner for Immigration 1932 AD 125;

Ex p Slater, Walker Securities (SA) Ltd 1974 (4) SA 657 (W).

H I Bisset for the applicant

W Jordaan for the respondents

Judgment

Gubbay J: This is an application for a writ of habeas corpus, more correctly known as an *interdictum de homine libero exhibendo*.

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GUBBAY J

The applicant is employed by the National Railways of Zimbabwe as a station foreman and until 3 January 1983 performed his duties at Artesia in Botswana. On that day he arrived in Bulawayo as requested by Railway management, and was arrested and detained in terms of s 49(1) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1980 ("the Regulations"). It was alleged that in Botswana he had made derogatory and disparaging remarks concerning both the President and the Prime Minister of Zimbabwe. He was held at the Central Police Station until 28 January 1983, when the Minister of Home Affairs certified that it was likely that public security would be prejudiced were he to be admitted to bail. On 31 January 1983, the applicant was charged in the magistrates Court with contravening s 41 of the Law and Order (Maintenance) Act [Cap 65] ("the Act"). He was remanded in custody to 2 February 1983 at which appearance an objection was taken on his behalf to the jurisdiction of the Court. In the event the prosecutor advised the magistrate that the Attorney-General had directed that the applicant should be prosecuted for contravening ss 49(1)(a) and 44(21)(d) of the Act. The trial commenced on 1 March 1983. The applicant pleaded not guilty to both charges. In addition he entered a special plea to the jurisdiction of the court in support of which he testified that at the date when it was alleged he had committed the offences he was neither resident nor domiciled in Zimbabwe. Before the magistrate gave a ruling the prosecutor requested that the trial be stopped in terms of s 58(1) of the Magistrates Court act [Cap 18]. The applicant was remanded in custody for 14 days pending the directions of the Attorney-General. On 15 March 1983, and because the Attorney-General had not reached a decision in the matter, the applicant was remanded from day to day until eventually, at noon on 18 March 1983, the magistrate refused a further remand and issued a warrant for the applicant's release. In the meantime at about 10.30 am that day Detective Inspector Jambawu (the third respondent), who is the member-in-charge of the Law and Order Section at Bulawayo Central Police Station, had received an instruction from the Officer Commanding CID in Zimbabwe, Senior Assistant Commissioner Jakeyo (the fourth respondent), to arrest and detain the applicant in terms of s 49(1) of the Regulations. He was informed that this was necessary because Jakeyo suspected, on reliable information obtained, that the applicant had associated and collaborated with dissidents at Dukwe Camp in Botswana. Jambawu believed that there was no urgency to act upon the instruction as the applicant was in custody. When, however, at 12.10 pm he learned from the applicants legal representative, Perry, that the magistrate had ordered the release of the applicant, Jambawu carried out his instruction by dispatching two

police officers to the

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magistrates court to arrest the applicant forthwith. This they did. The applicant was brought to the Central Police Station and there detained. On 22 March 1983, the State withdrew the criminal charges against the applicant and the magistrate returned a verdict of not guilty thereon.

Against this review of the facts I turn to consider the principal and most formidable argument advanced on behalf of the applicant by Mr *Bisset*. It is that the police officer who physically arrests and thereafter detains a person under s 49(1) of the Regulations must *himself* reasonably suspect i such person, by virtue of his conduct, falls within pares (a) or (b) of the subsection; or, stated differently, the police officer who effects the arrest and detention is not empowered to do so merely upon the instruction of another police officer and in consequence of the latter's reasonable suspicion about the behaviour of the person in question. He must act *mero motu*. He must himself harbour the requisite suspicion before embarking upon the arrest and detention.

If the construction contended for by Mr *Bisset* is correct then it is not open to doubt that the applicant's arrest and subsequent detention are unlawful. The two police officers who physically arrested him acted solely in abeyance to the instruction from Jambawu. Neither addressed his mind to the suspected activity of the applicant, for they were not informed of it. This much was conceded by Mr *Jordaan*, who appeared for the respondents.

In support of his argument Mr *Bisset* relied heavily on the judgment of PITTMAN J in *Holland v Commissioner of the Zimbabwe Republic Police*, HC-H-228-82 (as yet unreported). *(2) In that case the applicant had been detained in terms of s 21(1) of the Regulations. The order had been issued by Superintendent Oberholzer who, in doing so, had simply obeyed the instruction of Senior Assistant Commissioner Mkunu. Oberholzer had not applied his own mind as to whether there were grounds justifying the detention under s 17 of the Regulations. At p 8 of the cyclostyled copy of the judgment, the learned Judge said this:

" . . . I think it is beyond question that Superintendent Oberholzer had no right to issue the detention order in terms of s 21(1), unless he had himself come to the conclusion that he had reason to believe that there were grounds which would justify the Minister in detaining the applicant under s 17. The express language of s 21(1) excludes any possibility that Superintendent Oberholzer could say that he had reason to believe that there were grounds justifying the applicant's detention, simply because some superior had told him to issue the detention order. In such a case, he would be acting not upon a reason that he had for such a belief, but upon a reason for such a belief that his superior had. Mr *Muchechete* was unable to argue that there was

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anything in the papers to establish that Superintendent Oberholzer had had reasons to believe and had in fact believed that there were grounds justifying the applicant's detention under s 17. On the contrary, it was quite clear that he simply obeyed SAC Mkunu's instruction that he must issue the detention order. Consequently, I hold that

the order was issued illegally."

It is true that the relevant wording of s 21(1) differs from that in s 49(1), but the difference between the phrases "any person in respect of whom he has reason to believe" and "any person if he reasonably suspects", does not seem to me to afford an adequate ground upon which to distinguish the reasoning of PITTMAN J. Mr *Jordaan* submitted that it had not been argued before the learned Judge that Senior Assistant Commissioner Mkunu, who gave the instruction to Oberholzer, had himself reason to believe that there were grounds justifying the detention and that accordingly he was in fact the police officer who detained Holland, albeit through the agency of Oberholzer. However that may be, it is apparent that PITTMAN J was alive to the point. He stressed that the detention could only be justified if Oberholzer had applied his own mind in carrying out Mkunu's instruction and said in terms that in obeying Mkunu's instruction to effect the detention of Holland, it was necessary for Oberholzer to have been informed by Mkunu of all the relevant information and for him to have applied his mind and reached the same conclusion that Mkunu had come to. That Mkunu had applied his mind is clear from the passage of his affidavit quoted by the learned Judge.

I respectfully associate myself with the interpretation accorded to s 21 (1) by PITTMAN J and, in my view, it is wholly applicable to s 49(1).

The phrase "if he reasonably suspects" in s 49(1) is to be contrasted with the phrases "as to which there are reasonable grounds for believing" and "where it is believed, on reasonable grounds" appearing in the very next section of the Regulations. Section 50 is clearly wider in its scope than are ss 49(1) and 21(1), and allows a police officer to act thereunder provided, objectively, there are reasonable grounds for the belief prescribed, whether such belief is harboured by him personally or by another. It matters not that the police officer who stops and searches the person concerned has not applied his mind to the matter, as long as his instructor has reasonable grounds for believing that such person is in possession of something which will afford evidence as to the commission of an offence. To cite an example: Superintendent A has reasonable grounds for believing that B is in physical possession of a military plan to overthrow the government of the day by force. He instructs Section Officer C to stop and search B for such possession.

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GUBBAY J

It is unnecessary for A to convey his information to C, or for C himself to believe that such search will afford evidence as to the commission of an offence. Why did the lawmaker adopt a marked difference in the wording of the two sections? There seems to be no reason why the phrase "where it is believed (or suspected) on reasonable grounds" was not used in both sections. There is a deliberate change of wording and such change *prima facie* connotes a change of intention on the part of the Legislature. See *Port Elizabeth Municipal Council v Port Elizabeth Electric Tramway Co Ltd* 1947 (2) SA 1269 (AD) at 1279; *Read v SA Medical and Dental Council* 1949 (3) SA 997 (T) at 1008.

Moreover, it is noteworthy that a similar difference in expression is to be found in certain of the provisions relating to arrests without warrant in the Criminal Procedure and Evidence Act [*Cap*

59]. Section 29(1)(b) of that Act allows a peace officer to arrest "every person *whom he has reasonable grounds to suspect*" of having committed any of the offences mentioned in the First Schedule. Section 29(2)(j) permits him to arrest "any person *reasonably suspected* of being or having been in unlawful possession of stock or produce . . .". See also s 29(2)(b), (d), (e), (g) and (h). Here again the Legislature has used different phraseology.

Lansdown and Campbell, in their work *SA Criminal Law and Procedure* Vol 5 at p 276, comment upon s 40(1)(b) of the South African Criminal Procedure and Evidence Act, 1977 (which section equates to s 29(1)(b) of Cap 59), as follows:

"The reasonable belief must be held by the peace officer effecting the arrest. Where such officer acts merely as an agent for another person and in ignorance that an offence has been committed the arrest cannot be justified under section 40(1)(b)."

(See also, to the same effect, Joubert *The Law of South Africa* Vol 5 para 521). There is a passage at p 54 in Swift's *Law of Criminal Procedure* 2 ed dealing with the provision which reads:

"If the peace officer does not know of the offence but is merely acting on instructions he acts as the agent of the instructor and not *mero motu*. Thus the section does not apply in these circumstances (*Mathuka v R* 1952 (2) PH 131 (T)), and the lawfulness of the arrest will depend on the power of the instructor lawfully to obtain the arrest (*Birch v Johannesburg City Council* 1949 (1) SA 231 (T)). It is submitted that this decision is to be applied only to a situation where the acts (including the terms of his request) of the instructor are not sufficient to establish in the mind of the peace officer making the arrest reasonable grounds for suspecting that an offence has been committed."

I do not think the learned author means that a peace officer who does not himself reasonably suspect a person of having committed a First Schedule

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offence, may nonetheless arrest him without warrant if he is acting upon the instructions of another peace officer who harbours such suspicion. Rather, that it is necessary for the grounds upon which the instructor entertains his suspicion to be conveyed to the agent so that the latter before making the arrest himself reasonably suspects upon such grounds that a prescribed offence has been committed - failing which the lawfulness of the arrest will depend on whether the instructor had the power to effect it under another provision of the Act. Certainly, the judgment of LUCAS AJ in *Birch's* case (*supra*) does not support the proposition that a peace officer who has not directed his mind at all to whether the person has committed an offence mentioned in the First Schedule may lawfully arrest him without warrant provided the peace officer who instructs him to do so himself holds a reasonable suspicion. The two constables who arrested Birch acted on the instruction of Victor, the tram-car inspector, who considered that Birch had committed not a First Schedule offence, but a petty contravention of a municipal by-law. If Victor had been a peace officer, which he was not, the arrest effected as a result of his instruction would have been justified on the ground that an offence had been committed in the presence of Victor and the offender arrested by his agents (see p 238 of the report); an arrest that Victor himself would have been empowered to make.

If the text-book writers are correct in placing a restrictive interpretation upon s 40(1)(b) of the South African Criminal Code, as I consider them to be, then taking account of the similar wording, such interpretation is a persuasive indication as to the manner in which s 49(1) of the Regulations is to be construed.

Mr *Jordaan* drew attention to s 29(3) of the Criminal Code, which reads:

"Whenever it is provided in any enactment that the arrest of any person may be made by a police officer or other official without warrant, subject to conditions or to the existence of circumstances in that enactment set forth, an arrest by any peace officer, without warrant or order, may be made of such person, subject to those conditions or the existence of those circumstances."

He contended that the provision was applicable to the Regulations. I am in some doubt as to whether the Legislature intended s 29(3) to relate to an enactment which empowers a police officer to arrest a person whose action or action falls short of constituting a crime. But assuming the provision's applicability to s 49(1) of the Regulations, it affords no justification to construe the phrase "if he reasonably suspects" upon wider lines. It merely allows, for instance, a headman or an inspector of mines

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GUBBAY J

(see the definition of "peace officer" in s 2 of the Criminal Code) to effect the arrest "*subject to the condition*" that *he* reasonably suspects the proposed arrester.

Mr *Jordaan* further submitted that to require the police officer himself to harbour the reasonable suspicion before effecting the arrest could lead to anomalous consequences. It would mean that if the Commissioner of Police in Harare were to reasonably suspect that a resident of Mphoengs was about to act in a manner prejudicial to the public safety of the country he would have to travel to Mphoengs to effect the arrest himself; or alternatively, convey information which might be of a critically confidential nature to an officer of low rank so that the latter could bring his own mind to bear on the facts and decide whether he suspected the person or not. It might be totally undesirable to trust the subordinate with such information And what if he were to refuse to effect the arrest because he was not able independently to entertain the necessary suspicion? - (but such an occurrence in a highly disciplined force is remote in the extreme.)

To my mind the anomaly referred to does not detract from the clearly expressed wording of s 49(1) of the Regulations. It does not render it impossible to implement the provision and so does not warrant the substitution of an objective for a subjective criterion by construing the words "if he is reasonably suspects" as "if it is reasonably suspected". I respectfully agree with what MILNE JP said in *Manjra v Desai and Another* 1968 (2) SA 249 (N) at 254B:

"... where the words of a statute are plain, mere anomalies would not justify a departure from their literal meaning unless they are such as to demonstrate that their literal meaning is not the meaning which the Legislature intended them to have."

See also *Bhyat v Commissioner for Immigration* 1932 AD 125 at 129. It is not for the Courts to legislate or to attempt to improve on a situation achieved by the lawmaker in the language it has chosen in its enactment. Effect must be given to what the language says, not what it ought to

have said. See *Ex parse Slater, Walker Securities (SA) Ltd* 1974 (4) SA 657 (W) at 662G-H.

It follows that in my judgment the arrest of the applicant by the two police officers on 18 March 1983 failed to comply with the strict letter of s 49(1) of the Regulations. It was made solely on instructions and without any consideration being given by them to whether they reasonably suspected the applicant to have associated or collaborated with dissidents at Dukwe Camp.

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GUBBAY J

It is unnecessary to examine in any detail the further arguments advanced by Mr *Bisset*. There were that that the arrest and detention of the applicant was *mala fide* in that Jakeyo did not in fact suspect him of associating and collaborating with dissidents, but had used the power to punish the applicant for the derogatory remarks he was believed to have made of the President and the Prime Minister; alternatively, that Jakeyo's suspicion of the applicant's involvement with dissidents in Botswana was not founded upon reasonable grounds. Suffice it to say that on the facts as presented in the affidavits my *prima facie* view is that both contentions face considerable difficulty.

The applicant has been successful and is entitled to recover his costs from the first respondent, but it remains to decide whether that order is to include the wasted costs of the postponements on 31 March and 11 April 1983. I agree with Mr *Bisset* that both postponements were occasioned by the fault of the respondents: the first, because Perry was not given access to his client on Friday, 25 March 1983, as he ought to have been, with the result that the founding affidavit to the notice of motion could only be attested to on the following Monday and the opposing affidavits filed on the day the application was set down for hearing; and the second, because of the failure to file Jakeyo's affidavit within a period of 11 days before 11 April. It was only filed and served on 12 April 1983.

Consequently, I make the following order:

1. The arrest of the applicant on 18 March 1983 and his subsequent detention are void and of no force and effect.
2. The applicant is to be released forthwith from custody.
3. The first respondent is to pay the applicant's costs.

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S v TAMI & OTHERS 1983 (1) ZLR 246 (HC)

Court High Court, Harare

McNally J

11 May 1983

Flynote

Criminal procedure - compensation orders - Criminal Procedure and Evidence Act [Chapter 59] - ss 341 and 342 - principles to follow - Trapping of Animals (Control) Act [Chapter 134] and Parks and Wild Life Act 14 of 1975 - necessity to specify accurately the legal persona to whom compensation award must be made.

Headnote

Where magistrates award compensation in terms of s 341 of the Criminal Procedure and Evidence Act [Chapter 59], they should remember

- (1.) that the award must not be made *mere motu* The injured party must apply, either personally or through the prosecutor;
- (2.) to make it clear to the injured party what the maximum compensation claimable is and that if the loss exceeds that amount he cannot claim the balance in other proceedings;
- (3.) where necessary to establish the value of the claim;
- (4.) in appropriate circumstances to query the sum claimed.

Where compensation is awarded in terms of the Trapping of Animals (Control) Act [Chapter 134] or the Parks and Wild Life Act 14 of 1975, the award must be made to a specific legal *persona*. If necessary enquiries should be made to discover who is the correct *persona*. Vague terms like "the complainant" should not be used in the compensation order.

Judgment

McNally J: Awards of compensation may be made by magistrates in criminal cases, either in terms of s 341 of the Criminal Procedure & Evidence Act [Chapter 59] or in terms of s 342 of that Act.

There is also provision in the Trapping of Animals (Control) Act [Chapter 134] and the Parks & Wild Life Act 14 of 1975 in terms of which magistrates must (not may) order payments in the nature of compensation to be made, although the word "compensation" is used in those Acts only where they deal with domestic animals.

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McNALLY J

Recently there have been a number of queries as to the proper application and interpretation of these provisions, and it is convenient to collect these together in one judgment, as follows:

Section 341 of the Code:

1. It is essential to note that the Court may not make an award under this section of its own accord, or *mero motu*. The Act requires expressly that the court may award compensation "upon the application of the injured party or of the person conducting the prosecution acting on the instructions of such party".

2. One magistrate has said that he acts *mere motu* because of the inexperience of the prosecutor who appear

before him. In so doing he is doing the wrong thing for the right motive. It is perfectly proper for a magistrate to ask a prosecutor if he has instructions from the injured party to apply for compensation; if the prosecutor has none, it is quite proper for the magistrate to adjourn the proceedings briefly to enable the prosecutor to take instructions. It is *wrong* for the magistrate to act otherwise than at the request of one or other of these parties, and it is *wrong* for the prosecutor to ask for compensation unless he is so instructed by the injured party.

3. An injured party may, in ignorance, ask for compensation when the amount of his damage or loss is in excess of the maximum awardable in terms of the section. It is then the duty of the magistrate to ensure that the injured party knows that he cannot claim more than the maximum and that if he claims the maximum, the balance is not claimable in other proceedings, by reason of the provisions of s 341(11).

4. In one of the cases under review the magistrate awarded a complainant \$200 after convicting the accused of stock theft on a plea of guilty. First of all there was no application for compensation. I have dealt with that aspect already. Secondly it was not clear who the complainant was. I will deal with that aspect presently. Thirdly there was no evidence as to the value of the beast stolen save that the state outline put the value at \$200.

5. It is imperative for a court to remember that when it gives a civil judgment the amount of the judgment should be correct. Thus where the claim is illiquid, ie for a sum of money which has to be calculated, the court should if necessary make use of the provisions of s 341 (4) of the

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McNALLY J

Code, and hear evidence as to the value of the thing stolen.

6. Even where the claim is liquid, eg for \$200 stolen from the complainants pocket, or for \$100 being the purchase price of 10 bags of maize stolen from the complainants store, the court should take a little care. Complaints have been known to exaggerate the amount stolen, or to give as the value of the goods stolen from their shop the retail and not the wholesale value. So courts should not blindly award the amount claimed. If for example the accused pleads guilty to stealing a lesser sum the court may prefer to say to the injured party "I will make a compensation order in the lesser sum if you wish. On the other hand if you want to insist on the full amount you claim then in the exercise of my discretion I will decline to make a compensation order and leave you to follow your civil remedies."

7. Where money is found on the accused the court may, as well as making an award of compensation, order that that money be used in satisfaction or part satisfaction of the award - s 341(10).

Section 342 of the Code.

This is very little used section of the Code. It provides for the situation where A steals a cow from B and sells it to C for, say, \$50. A is then arrested and the cow is recovered and returned to its rightful owner B. We all tend to forget about the unfortunate C, and often a magistrate will note, as a mitigatory feature, "property all recovered." He forgets that as a result of A's theft he is \$50 better off and C has lost \$50. This section enables the magistrate, on application, to order the money found on A at his arrest, up to the amount of C's loss, to be paid to C.

Trapping of Animals (Control) Act;

Parks & Wild Life Act.

There are two problems which arise in awards made under these Acts.

1. It has already been noted that awards under these Acts *must* be made on conviction. There is no discretion. There is no requirement that an applicant must be made. Even where the offender is a juvenile the order must be made, though if there are several offenders the court may apportion the amount payable between them.

2. In the second place, the person to whom the award is made should be clearly specified in the magistrates order. This is important, because

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if the magistrate does not make a clear order in favour of a named legal person, the clerk of court may be in difficulty when the "person" to whom the award is made comes to claim his money. A simple example will make this clear. Many poaching offences take place in Chiredzi at a place known as Mkwesine Estates. The poachers are caught by Government game scouts, or by security guards employed on Mkwesine Estates, or by, let us say, Mr Dube, the section manager of one of the sections into which Mkwesine is apparently divided. The accused are convicted, let us say, of setting wire snares and catching one male impala.

In such a situation an award of \$30 must be made. But to whom? In a number of cases (not all, I should say, from Chiredzi) the award has been made to "the complainant" or to "Mkwesine Estates" or to "Mr Dube, Section Manager". None of these is adequate.

The Acts require that, in the case of wild animals or private land, the payment be made to "the appropriate authority for the land" and in the case of domestic animals to "the owner" (note that "appropriate authority" is defined in each of the Acts). In each case, therefore, a legal persona should be named, and the court should if necessary make enquiries to discover who is the correct *persona*. "Mkwesine Estates" is not a legal *persona*. The company owning the estate should be named. I do not know the name of that company. It may be "Mkwesine Estates (Private) Limited"; it may be something entirely different.

Returning, then, to the three cases in question, I make the following orders:

1. *S v Dittos Tami*

The order of compensation is set aside, but otherwise the proceedings are confirmed.

2. *S v John Mandava*

The amount of compensation is altered to read "\$50". The magistrate is directed to establish the name of the appropriate authority and insert it in his order in place of the words "the complainant". Otherwise the proceedings are confirmed.

3. *S v Amios Maziva*

The order of compensation is set aside, but otherwise the proceedings are confirmed.

Waddington J agrees.

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S v MAPFUMO & OTHERS 1983 (1) ZLR 250 (SC)

Court Supreme Court, Harare

Baron ACJ, Georges JA & Beck JA

9 March & 3 June 1983

Flynote

Criminal law - compulsion as a defence - on whom onus of proving lies - no onus as such an accused to establish - limits of defence - accused must himself have been in immediate danger of harm if unlawful act not carried out.

Headnote

Compulsion is a defence to a charge of murder, as it is to any other charge. However, as with other such legal "defences", it is for the prosecution to prove that the accused did not act as he did because of compulsion. There is no *onus* as such on the accused to establish the defence. Once there is some material, whether adduced by the defence or emerging from the prosecution case, suggesting that such a defence may be available, the Court must consider it. Evidence sufficient to raise a defence does not have to be evidence sufficient to establish the factual basis on a balance of probabilities; all the accused must do is raise the defence as a realistic issue by sufficient material evidence, whether it be as part of the State case, in the form of his confession, or in cross-examination of State witnesses or by evidence for the defence.

For the defence of compulsion to succeed, the offence must have been induced by threats, actually believed in, of immediate death or serious bodily harm, which there was no way of avoiding other than by committing the offence. Further, the threats must, in all the circumstances, have been such that the accused could not reasonably be expected to have resisted them. Threats of some future harm will not be sufficient.

Quaere: Whether the defence of compulsion should be available at all to the perpetrator of a murder.

Cases cited:

R v Damascus 1965 RLR 477; 1965 (4) SA 598 (R);

R v Chipesa 1964 RLR 274; 1964 (4) SA 472 (SR AD);

R v Gill [1963] 2 All ER 688; (1963) 47 CAR 166;

R v Steane [1947] KB 997; [1947] 1 All ER 813; (1947) 32 CAR 61;

S v Ndhlovu SC 18/83 (not reported);

S v Mucherechedzo & Others SC 176/81 (not reported);

S v Mujere & Others AD 40/80 (not reported);

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S v Goliath 1972 (3) SA 1 (AD);

S v Peterson en Andere 1980 (1) SA 938 (AD).

D M Foroma, for the appellants.

A R Chigovera, for the respondent.

Judgment

Baron ACJ: The four appellants and a youth named Kenneth Mapfumo, who is related to the first appellant, lived in his house and regarded him as his father, were charged with murder. During the course of the trial the State withdrew the charge against Kenneth and he was acquitted and discharged. The four appellants were convicted of murder with extenuating circumstances; they all appeal against conviction and the first appellant appeals also against sentence.

In April 1980 the first appellant's wife died at their home in Buhera of an ailment believed to have been caused by witchcraft; the first appellant was at that time working in Harare. When he learned of his wife's death he went to his home. He had been there about a month when, he said, a group of four guerillas came to his house; they made him and the other three appellants gather together, and told them they were to go and kill a witch. They said they would come back two days later and if the appellants had not done what they were told they and their families would be killed. They said that the witch had been the cause of the death of the first appellant's wife and also of her own child. That same night the appellants went to the house of the deceased, a woman aged about 47, and set fire to it; the deceased ran out and the second appellant stabbed her, and when she fled the first appellant pursued her and killed her with a blow to the head with a knobkerrie.

The manner in which the deceased was killed was not in dispute; the only issue on the question of conviction was the defence of compulsion. The appellants said they were in mortal fear for themselves and their families; they said that in the climate prevailing at the time the guerillas were the real authority in the area and that it would have been useless to report the matter to the police or to attempt to escape from the area. The learned judge *a quo* discussed the law concerning compulsion and then said this:

"Before going on to consider the facts it is important to determine as a matter of law where the *onus* lies. Is it for the State to prove that the unlawful intent of the accused was not overborne by the compulsion to which they were subjected, or is it for the accused to prove that their motive for the killing was the fear of death if they did not do what they were told to do?

It is quite clear that the former is the position. The State must prove that the accused have not acted out of necessity. Authority for this proposition is to be found in *S v Alfeus* 1979 (3) SA 145 (AD) at 155D....

But having said that, it seems to me clear that it is for the defence, on a balance

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of probabilities, to satisfy the Court that the events took place on which the contention is to be based. In the words of MacDONALD J in *Damascus's* case [1965 (4) SA 598] at 603G:

'the persuasive onus rests upon the Crown; the evidential *onus* upon the accused.'

The learned judge then analysed the relevant evidence and said:

"The net result of this is that the only corroboration of the accuseds' story about compulsion is to be found in their own subsequent statements, which is no corroboration at all. It is necessary, therefore, to examine the accuseds' own stories to see if they are in themselves credible enough to discharge the onus of proof on a balance of probabilities."

He then set out five aspects of the appellants' evidence which the Court found not to be credible, and concluded:

"Accordingly we conclude that we cannot accept the unsupported assertion of the accused that they were under compulsion. We do not accept the factual allegations and accordingly no question of compulsion arises."

The learned judge was clearly right when he said that it was for the State to prove that the appellants had not acted out of necessity. But he erred when he said that it was for the defence to satisfy the Court on a balance of probabilities that "the events took place on which the [defence of compulsion] is to be based". It is, of course, clear that a Court is not required to consider a defence unless there is some evidence to support it; but once there is some material, whether adduced by the defence or emerging from the prosecution case, suggesting that a defence may be available the Court must consider it. Such material has in England frequently been described as "evidence fit to be left to a jury"; only if the material is insufficient to meet this test is a Court entitled to ignore the defence.

But evidence sufficient to raise a defence, or "fit to be left to a jury", does not have to be evidence sufficient to establish the factual basis on a balance of probabilities; *Damascus's* case (*supra*), relied upon by the learned judge *quo*, does not say this. In that case MacDONALD J (as he then was) said that "the persuasive *onus* rests upon the Crown; the evidential *onus* upon the accused", and he referred to *R v Cheapest* 1964 (4) SA 472 (SR AD) and *R v Gill* (1963) 47 CAR 166 at 173. The learned judge did not suggest that the *extent* of what he called the evidential onus was on a balance of probabilities, and a perusal of *Chipesa's* case (*supra*) and *Gill's* case (*supra*) shows that this is not the extent of the *onus*. In *Chipesa's* case (*supra*) BEADLE CJ said at p 474:

"There is not a great deal of authority dealing with the precise limits of the defence of compulsion.

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For the sake of convenience, I call this a 'defence', although there is no *onus* on an accused to establish it, as it is clear from the authorities that once there is evidence to show that his mind was overborne by compulsion at the time he committed the offence the *onus* is on the Crown to prove the *mens rea* to establish the crime in the normal

Away. There is no *onus* on an accused to establish, once the foundation is laid, that his mind was overborne by compulsion (See *R v Gill (supra)*).

Gill's case (supra) is highly instructive. At p 171 the Court said:

"The issue of duress was nevertheless left to the jury in the present case, and that may well have been the prudent course. Having been left, did the burden rest upon the Crown conclusively to destroy this defence, in the same way as it is required to destroy such other defences as provocation or self-defence? Or was the accused required to establish it, on the balance of probabilities?"

The Court then considered the judgment of LORD GODDARD in *R v Steane* (1947) 32 CAR 61 at 68, which appeared to support the latter view, and continued at the foot of p 171:

"In our judgment, the law on this matter is to be found correctly stated in Dr Glanville Williams' *Criminal Law* (2 ed p 762) in this way: '... although it is convenient to call duress a "defence", this does not mean that the ultimate (persuasive) burden of proving it is on the accused.... But the accused must raise the defence by sufficient evidence to go to the jury; in other words, the evidential burden is on him.' The Crown are not called upon to anticipate such a defence and destroy it in advance. The accused, either by the cross-examination of the prosecution witnesses or by evidence called on his behalf, or by a combination of the two, must place before the court such material as makes duress a live issue fit and proper to be left to the jury. But, once he has succeeded in doing this, it is then for the Crown to destroy that defence in such a manner as to leave in the jury's minds no reasonable doubt that the accused cannot be absolved on the grounds of the alleged compulsion."

I have to say with great respect that I have reservations concerning the value of expressions such as "persuasive onus" and "evidential onus" in this context, and particularly in regard to the latter expression. There is, in fact, as both *Gill's case (supra)* and *Chipesa's case (supra)* make clear, no *onus* on an accused person; all that is required is that there emerge from the evidence, whether adduced by the prosecution or the defence, material sufficient to raise the issue in question as a realistic issue, and to speak of this as an *onus* resting upon an accused, quite apart from its extent, can be misleading.

In the present case the issue was clearly raised. The appellants said that they had alleged at the time of their arrest that they had acted under compulsion, and it appeared to be a strong point against them that their confirmed statements made no mention of this allegation. But it emerged during the evidence of a police constable who had been present during

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the recording of three of the statements that each of those three appellants had alleged compulsion but that the Sergeant recording the statements had declined to record that allegation; when the constable asked why it was not recorded, the Sergeant had replied "Perhaps we will amend it later". (Needless to say, this is a very serious disclosure; if the constable's evidence was the truth the Sergeant had not only behaved in a highly improper manner at the time he took the statements, but he also committed perjury in Court.) In the light of this evidence the Court *a quo* very properly concluded that it could place no reliance on the confirmed statements and accepted that at the time of their arrest, some twenty months after the deceased was killed, the appellants were relying on the defence of compulsion. In Court they again relied on that defence. Clearly the issue was sufficiently raised; a jury might have rejected the defence, but manifestly a judge trying this case with a jury would not have been

entitled to withdraw the issue of compulsion from them. His proper course would have been to direct them that it was for them to decide three questions: first, whether the alleged threats had in fact been made; second, if so, whether the appellants had in fact been overborne by them; and third, even if their conclusions on these first two questions were favourable to the appellants, whether on all the evidence the defence of compulsion was available to them. And, of course, a court consisting of a judge alone, or a judge and assessors, is called upon to decide the same questions. The Court *a quo* appears to have considered the first two questions as one, albeit in the context of whether the issue of compulsion was sufficiently raised, and to have come to a conclusion adverse to the appellants. But it misdirected itself as to the *onus*, and this Court must therefore consider the whole matter afresh, applying the proper tests.

I will deal very shortly with the first two questions. The proper test is whether there was a reasonable possibility that the appellants were speaking the truth, even though the Court might have reservations as to their truthfulness (see *S v Ndlovu Supreme Court Judgment 18/83*). In addition to the evidence of the appellants and that of the constable to which I have already referred, the fifth accused, Kenneth, said that the appellants spoke of the compulsion shortly after the killing. Although, therefore, I certainly have reservations, particularly as to whether the appellants were in as much fear as they alleged, I do not think the evidence on record is so strong that it can safely be said that there is no reasonable possibility that the appellants were speaking the truth. Consequently it is necessary to proceed on the assumption that their evidence was true, and to consider whether on that basis the defence of compulsion was available.

This Court has recently had occasion to consider duress, or compulsion,

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in *S v Mucherechedzo and Anor* Supreme Court Judgment 176/81. We left open the question whether duress can ever be available as a defence to the actual perpetrator of a murder. FIELDSEND CJ continued at p 3 of the cyclostyled judgment:

"Assuming that duress is a valid defence the evidence in the present case is such that (the defence) could never have succeeded.... At the very least the offence must have been induced by threats, actually believed in, of immediate death or serious bodily harm, which there was no way of avoiding other than by committing the offence. And in all the circumstances the threats must have been such that the appellants could not reasonably have been expected to have resisted them."

In *R v Damascus and Ors* (*supra*) MacDONALD J (as he then was) said at p 601:

"It should in my opinion be accepted in these Courts as it has been accepted elsewhere . . . that it is only the fear of immediate or imminent harm which founds the defence of compulsion. When a threat relates to the future the person threatened should seek the protection of the law. The one course he may not take in order to rid himself of the fear of future harm to himself is to harm an innocent third person."

In *Mujere arid Ors* Appellate Division Judgment 40/80 MacDONALD CJ said

". . . I agree with the trial court's dictum that the failure to escape would not be excused by the fear that he might suffer 'harm at some future date'. Obviously a person faced with the prospect of being coerced to participate in a murder must take advantage of every possible avenue of escape and supine behaviour cannot possibly be

excused."

And in *S v Sibanda and Anor* Appellate Division Judgment 201/79 Davies JA put the matter most succinctly:

"In my view, that requirement" (ie that the threat of harm must be immediate) "means what it says, that is to say, it means that immediately upon the disobeying of the order the threat is likely to be carried out; in other words, that there is no chance whatsoever for the person threatened to avert the threatened harm."

I would wish to add only this: In *Damascus'* case (*supra*) MacDONALD J used the expression "immediate or imminent harm"; in all the other cases I have cited, including in particular the latest case of *Mucherechedzo* (*supra*), the courts have spoken only of "immediate" harm. If MacDONALD J intended "imminent" to imply something further in the future than "immediate" then he does not appear so to have been understood, nor would I be prepared to accept such a qualification. I prefer simply "immediate", and I adopt the *dictum* of DAVIES JA in *Sibanda's* case (*supra*) as to what the requirement means.

In my view the appellants must fail on this test alone. On their own evidence the guerillas intended to return after two days; it cannot be said

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that, if they had refrained from killing the deceased and sought to make their escape with their families, or sought some other way of avoiding having to carry out the guerillas' orders, such as reporting the matter to the elders or seeking to make contact with a senior guerilla commander, there was "no chance whatsoever to avert the threatened harm".

But the matter goes further. *Mucherechedzo's* case (*supra*) lays down an additional requirement. In all the circumstances the threats must have been such that the appellants could not reasonably have been expected to resist them. The appellants had two days grace, yet they committed the offence that very night without making any attempt to find a way to avoid having to commit it; to that extent they most assuredly could have been expected to resist the threats.

MacDONALD J in *Damascus'* case (*supra*) cited the following passage from Sir James Stephen's *History of the Criminal Law of England* Vol 2 pp 107-8:

"It is, of course, a misfortune for a man that he should be placed between two fires, but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands."

I respectfully agree. I am far from convinced that duress should be recognised as a defence available to the perpetrator of a murder, as it has been in South Africa (see *S v Goliath* 1972 (3) SA 1 (AD); *S v Peterson* 1980 (1) SA 938 (AD)); but if we in Zimbabwe are to move in that direction I think the defence should be available only in the most extreme cases. The present case was not such a case. In my view the appeals against conviction must be dismissed.

As to sentence, the Court *a quo* found as an extenuating circumstance that all four appellants believed in witchcraft. The first appellant was sentenced to twelve years' imprisonment with labour, the second and third appellants to nine years, and the fourth appellant to six years. Only

the first appellant appeals against sentence, the submission being that there was no basis for differentiating between the first and second appellants and that the sentence of the first appellant should be reduced to nine years. The basis for this submission is incorrect. It is clear from his reasons for the various sentences that the learned judge *a quo* regarded the first appellant as having played the leading role in the murder, and he pointed out that it was the first appellant who thought he had a reason for the killing, namely the death of his wife. There is no ground for interfering with the sentence

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imposed on the first appellant; his appeal against sentence must be dismissed.

Georges JA: I agree.

Beck JA: I agree.

Pro Deo

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S v YOUNG 1983 (1) ZLR 258 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Beck JA

19 May & 3 June 1983

Flynote

Criminal law - s37(2) (a) of Law and Order (Maintenance) Act [Chapter 65] - unlawful possession of ammunition - accused had forgotten that he had the ammunition - possession nevertheless established - mens rea not dependent on fluctuations of memory - sentence - moral blameworthiness low - totally suspended sentence appropriate.

Headnote

The appellant was convicted of contravening s 37(2) (a) of the Law and Order (Maintenance) Act, Chapter 65, the charge being that he had unlawfully possessed 3 loaded FN magazines and 25 rounds of 7.62 mm ammunition. He was sentenced to one month's imprisonment.

He had originally come into possession of the ammunition during the war, together with a rifle and magazines. He had surrendered the rifle and most of the ammunition but had not surrendered the ammunition forming the subject of the charge because it was in a cabinet, covered with papers, and he had forgotten its existence. On appeal, it was argued that if he had forgotten that he had control of the prohibited article he could not be said to have necessary *mens rea* to constitute the offence. It was also argued that the sentence was in the

circumstances manifestly excessive.

Held, that the appellant had control over the ammunition and when he placed it in the cabinet he had also the intention to exercise control. That intention need not at all stages be conscious in order to constitute possession.

Held, further, that it is unacceptable that *mens rea* should depend on fluctuations of memory. The appellant was not mistaken as to the nature of the items nor could he contend that he was unaware that possession of them was unlawful.

Held, further, that although the section did not allow the imposition of fine, the mitigating features in the case were strong and the appellant's moral blameworthiness was negligible since he had genuinely forgotten that the ammunition was in the Cabinet. Accordingly a totally suspended sentence was appropriate.

Cases cited:

S v Cleminshaw 1981 (3) SA 685 (C);

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

S v Smith 1965 (4) SA 166 (C);

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S v Dracos SC 100/82 (not reported);

S v Vickery HC-H-353-82 (not reported);

S v Hawke H-B-85-82 (not reported).

J B Colegrave, for the appellant

M J Gillespie, for the respondent

Judgment

Georges J A: The appellant was charged with contraventions of s 37(2) (a) of the Law and Order (Maintenance) Act and of s 5(2) (a) of the Firearms Act. He pleaded guilty to the contravention of the Firearms Act, was convicted of the offence and fined. There has been no appeal from that conviction.

He was found guilty of the contravention of the Law and Order (Maintenance) Act. This charge alleged that wrongfully and without lawful authority or reasonable excuse he had in his possession on or about 23 October 1982 offensive weapons of war, namely three loaded FN magazines, twenty-five rounds of 7.62mm ammunition and a Mills 36 hand grenade. He was found guilty only in respect of the FN magazines and the 7.62 mm ammunition, the magistrate having held that the "grenade" was a mere casing without a detonator or explosive and therefore not an offensive weapon. He was sentenced to one month's imprisonment with labour

and now appeals against both conviction and sentence.

The facts are basically not disputed. The magazines and ammunition were found by the police in a gun cabinet which the appellant controlled. He admitted having placed them there. He had been in the army from 1974-1978 and during that period had had in his possession as army issue an FN rifle and 5 magazines of ammunition when he was discharged from the army he had handed in the rifle and some of the ammunition. He joined the Reserve Police in 1978 and was then issued with another FN rifle and 4 magazines of ammunition. During the war he had kept the rifle and some ammunition constantly with him. At some stage, it is not clear precisely when, he had surrendered the rifle. He had also given to Mrs Marchussen, the wife of the owner of the farm on which he worked and lived, some 300 rounds of loose 7.62 mm ammunition to hand in to the authorities. The ammunition found in the cabinet he had put there when he was in the army and he had forgotten all about it. It had remained covered by papers and he had never noticed it, though he did open the cabinet once every two months or so in connection with papers he had kept there.

When he had first decided to keep the ammunition he had done so because

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he thought he might have needed it for protection but then he had forgotten all about it.

The trial magistrate found this defence unavailing. In the penultimate paragraph of his judgement he stated:

"The accused knew he had placed the ammunition in his cabinet. A faulty memory in my opinion cannot negative *mens rea*."

In his remark on sentencing he stated:

"The Court will accept that although the accused had the actual intention to keep the ammunition initially when he still had an FN rifle his later possession was more of negligence or indifference to the accused (*sic*) to hand over weapons."

I do not understand this to mean that the trial magistrate was holding that negligence was enough to constitute *mens rea* in a charge of contravention of s 37(2)(a) of the Law and Order (Maintenance) Act. What he was saying was that once there was awareness of possession at one stage lapse of memory at a later stage would not alter the fact of possession.

The trial magistrate's conclusion is very much supported by the observations of VAN DEN HEEVER J in *S v Clemshaw* 1981 (3) SA 685 (C). The appellant was there charged with unlawfully possessing two publications which were prohibited under relevant legislation. The learned judge stated at p 690:

"I accept that possession for a contravention of the section, must be 'witting' in the sense that the possessor must be aware of what he possesses. I also have no quarrel with those cases where a person, on whose premises a publication was found, testified that he was unaware of their presence and how they got there, and was then acquitted. *Animus possidendi* was not proved in such cases. But I cannot accept that one must import into the concept of 'witting' the notion that the *animus possidendi* must be a continuous and conscious awareness that one has the relevant object under one's control. No one possesses so jealously. 'Witting' possession does not

become 'unwitting' because the possessor has a faulty memory."

If this is a correct statement of the law then the magistrate's decision is clearly correct. Although it seems to me to be supported both by logic and commonsense, Mr *Colegrave* contended that it conflicted with a basic tenet of our law, that an accused person should not be convicted of an offense unless he had a "guilty mind". If the accused person had forgotten that he had control of the prohibited article then he could not be said to have a "guilty mind" which was a prerequisite for conviction for crimes not of strict liability. It is undisputed that s 37(2) (a) of the Law and Order (Maintenance) Act does not create an offense of strict liability. *Mens rea* must be proved - *R v Sibanda* 1964 (1) SA 311 (SR) where s 33(1) of

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the Law and Order (Maintenance) Act 33 of 1960, the predecessor of the present section, was under discussion.

In *S v Smith* 1965 (4) SA 166 (C) CORBETT J pointed out that this element of *mens rea* should not be confused with and must not be identified with the mental element which must be proved in order to establish the act of possession. He stated at p 171:

"The weight of this authority [*R v Sibanda* (supra)] is undoubtedly in favour of the general proposition that, where a person is charged with the contravention of a statutory provision which prohibits the possession of certain articles except under authority of a permit, *mens rea* in the sense of the accused person knowing that he has in his custody or under his control the forbidden article, is normally an essential ingredient of the offence and the onus of establishing such *mens rea* lies upon the State.

With the greatest deference I would venture to suggest that in a number of cases establishing this proposition the Court has failed to distinguish clearly between the mental element necessary to establish custody or possession, as the case may be, and the mental element constituting *mens rea*. The concepts of custody or possession comprise two main elements: they are, firstly, the physical element of *corpus*, ie physical custody or control over the res question, exercised either mediately or immediately, and the mental element of *animus*, ie the intention to exercise control over the thing.... At the same time there is a general rule that, ordinarily speaking, a crime is not committed if the mind of the person doing the act in question is innocent: *actus non facit ream nisi mens sit rea*."

He develops the concept further at p 172 in these words:

"In principle it seems to me that the mental element, or *animus*, necessary to give a person custody or possession of an article is distinct from the guilty state of mind constituting *mens rea*,"

Three typical situations may be examined to test the distinction. In case 1 an assistant packing a brief-case places in it among the owner's belongings a prohibited article knowing that his associate at the end of his journey will have access to the briefcase and remove the article. While the owner clearly had physical custody of the prohibited article he had no intention of exercising control over it. The mental element which is needed to constitute possession would be absent. The fact of possession would not have been proved. It follows of course that he would not have the guilty mind necessary to establish any offence.

Case 2 arises in the situation in which a person is handed an object to convey from one place to another. He is, however, unaware of the nature of the object which he is conveying. It may be a

bag of sparkling stones which he is assured are zircons but which in fact are diamonds.

Case 3 arises where the person is aware of exactly the nature of the object

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but is unaware that possession of such an object prohibited by law. It may, for example, be a publication which it was legal to possess at the time it was purchased but which has subsequently been put on a prohibited list which has not come to the possessor's attention.

In cases 2 and 3 it is difficult to contend that the appellant is not in possession of the prohibited article. There is custody and an intention to exercise control - as distinct from case 1 where there was no such intention.

It can be argued that there was no *mens rea* in cases 2 and 3, that is, no guilty mind, either because there was a mistake as to the nature of the article possessed (case 2) or ignorance of the law making such possession unlawful (case 3) where such ignorance is held to constitute a defence. Arguments may arise as to whether the mistakes need be genuine as well as reasonable or whether they need only be genuine, but these questions do not arise here.

Two issues must then be considered. Can the appellant be said no longer to have had possession of the ammunition because he had forgotten that he had it in the gun cabinet? He certainly had control over it and when he placed it there he had also the intention to exercise control. I agree with the *dictum* of VAN DEN HEEVER J quoted earlier that the intention to control need not at all stages be conscious in order to constitute possession. The fact of possession was accordingly proved.

Can it be said that the appellant did not have a guilty mind because he had forgotten that he had the prohibited articles in the cabinet? In my view the answer to this must also be in the negative. Memory can come and go. One may remember at one stage that an article is in a certain part of one's premises, later one may genuinely forget and some time later again recall with effort its presence.

It seems to me unacceptable that "guilty mind" should depend on fluctuations of memory. The appellant did place the ammunition in the gun cabinet and intended to exercise and retain control of it. He was not mistaken as to its nature nor could he contend that he was unaware that possession of the ammunition was unlawful.

Different considerations might, of course, arise if a person having placed an article in his locked cupboard later suffered from amnesia and was incapable of recalling events which had taken place at that period.

Accordingly I would hold that the appeal against conviction should be dismissed.

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GEORGES JA

In relation to sentence, one of the principal contentions was that had the allegation of the possession of a hand grenade not been included, it was unlikely that the appellant would have been charged with a contravention of s 37(1) of the Law and Order (Maintenance) Act. It is far more likely that he would have been charged under the Firearms Act. This is pure speculation. In *S v Dracos* Supreme Court Judgment 100/82 a charge of contravention of the Law and Order (Maintenance) Act was laid in respect of 100 rounds of live AK ammunition and 75 live rounds of FN ammunition retained after demobilisation. It is granted there were other factors in the case. There were charges with respect to being in possession of three unlicensed weapons in contravention of the Firearms Act and of failure to keep weapons securely. Nonetheless the case does indicate that possession of ammunition alone in comparatively small amounts can lead to a charge of contravention of the Law and Order (Maintenance) Act.

It was also contended that the trial magistrate, having found that the appellant was not guilty of possessing a hand grenade, could have convicted him of an offence under the Firearms Act instead of the offence with which he was charged. I am satisfied that the magistrate had no such power. Section 210 of the Criminal Procedure and Evidence Act empowers a magistrate, in cases in which the evidence does not establish the whole offence with which an accused person is charged, to convict that person of any other offence, the definition of which is included in the offence with which the person is charged if the elements of that lesser offence have been established. This is not the case here. Although possession of the hand grenade was not established, proof of possession of the ammunition was sufficient to establish the whole offence charged - a contravention of the Law and Order (Maintenance) Act. The magistrate would have had no authority to convict the appellant of an offence under the Firearms Act unless the prosecutor was willing to accept such a plea which could have been tendered under s 163(a) of the Criminal Procedure and Evidence Act. This Court has no power to substitute such a conviction.

One must consider, therefore, whether the magistrate misdirected himself in any way in deciding on the sentence which he imposed or whether the sentence is so severe as to induce a sense of shock.

It is common cause that it is not within the jurisdiction of the magistrate to impose a fine on conviction for an offence under s 37(2(a) of the Law and Order (Maintenance) Act. He must impose a prison sentence though he may suspend the whole of it.

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GEORGES JA

The record shows that the magistrate gave earnest consideration to the issue of sentence. In favour of the appellant he listed the following circumstances -

1. There was no sinister motive in the appellant's possession.
2. During the amnesty the appellant had taken steps to surrender ammunition to the Mhangura Police Station.
3. Although the appellant did have originally the actual intention to keep the ammunition his retention had later on been due to negligence or indifference, since he had not

checked the cabinet for arms and ammunition.

4. The appellant came from a good family and was a well respected and competent farm manager. The stigma of a prison sentence would affect him adversely.
5. The appellant had been in custody for one month.

Since, however, the option of a fine was not available he considered that these circumstances could only affect the length of the sentence. It does not appear that he considered whether or not a totally suspended prison sentence would be appropriate.

Mr *Gillespie* contends that this case is comparable to *S v Dracos (supra)* to which reference has already been made and that if a sentence of a fine were competent *S v Vickery* HC-H-353-82 and *S v Hawke* H-B-85-82 would be good guides to sentence.

In *Vickery (supra)* the appellant had buried 3 000 rounds of 7.62 ammunition in a remote part of his farm in an effort to dispose of it. A sentence of 12 months' imprisonment 6 months of which were suspended was altered to a fine of \$200 and 3 months' imprisonment with labour, the whole of which was suspended.

In *Hawke (supra)* the appellant had been found guilty of contravening s 5(2) of the Firearms Act in having in his possession a .38 pistol without being the holder of a firearm certificate. The magistrate found special circumstances for not imposing the mandatory minimum prison sentence of 5 years, and imposed a sentence of 18 months 12 of which were suspended. In a note on the sentence the Attorney-General thought that there were powerful mitigating factors - the appellant was seeking to render the pistol safe and the failure to license was due to negligence. The Attorney-General concluded that a substantial fine would meet the justice of the case and

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GEORGES JA

on review the sentence was quashed and a fine of \$300 substituted.

The fact that *Vickery (supra)* and *Hawke (supra)* were concerned with charges under the Firearms Act and not under the Law and Order (Maintenance) Act does not make them less useful as guides. They consider the crucial question as to whether an effective prison sentence was proper or not.

The sentence of 3 months' effective imprisonment imposed in *Dracos (supra)* is not particularly helpful. As I have indicated the appellant there had firearms which were negligently kept and he had been sentenced to a long term of imprisonment in respect of other charges of which he had been convicted. A concurrent sentence of 3 months on the charge under the Law and Order (Maintenance) Act did not affect his total period of imprisonment.

There is force in Mr *Colegrave's* argument that moral blameworthiness is negligible in this case since the magistrate did find that the appellant had genuinely forgotten that the ammunition was in the cabinet.

In these circumstances, having particular regard to the fact that the appellant had spent a month in prison awaiting trial, the magistrate should have considered whether a totally suspended sentence did not meet the circumstances of the case. In my view it does.

Accordingly I would alter the sentence to the extent of suspending the term of 1 month's imprisonment with labour imposed for 3 years on condition that the appellant is not convicted of any offence in relation to firearms for which he is sentenced to a term of imprisonment without the option of a fine.

Baron ACJ: I agree.

BECK JA: I agree.

Byron, Venturas & Travlos, appellant's legal representatives.

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S v CHIKEYA 1983 (1) ZLR 266 (SC)

Court **Supreme Court, Harare**

Georges & Beck JJA

3 June 1983

Flynote

Criminal procedure - sentence - motoring offences - culpable homicide - prohibition from driving not mandatory for first offender - in characterising negligence desirable to follow categories laid down in Road Traffic Act.

Headnote

On a conviction of culpable homicide arising out of a motor accident, prohibition from driving is not mandatory except in the case of a second or subsequent conviction. The circumstances in which and the periods for which an order for prohibition from driving is mandatory are specified in s 44(3) of the Road Traffic Act 48 of 1976; common law offences like culpable homicide are not so specified.

When characterising the negligence of the accused in order properly to assess sentence, it is more useful to follow the categories laid down in the Act rather than invent such nebulous terms as "gross".

N M R Gardener, for the appellant

A R Chigovera, for the respondent

Judgment

Georges JA: The appellant in this matter was charged with culpable homicide, and in the alternative with a contravention of s 43(1)(a) of the Road Traffic Act in that on 9 February 1982

at Harare and along the Harare/Mutoko Road he drove a motor omnibus negligently. He was fined \$350 or, in default of payment, 350 days' imprisonment with labour. He was also prohibited from driving all classes of motor vehicle other than an omnibus for six months and he was prohibited from driving an omnibus during his lifetime. There was also an order for automatic endorsement of his driving licence and for its cancellation.

These charges arose out of an accident which took place on the

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Harare/Murewa Road at the Viceroy Mine turnoff. The deceased was driving a Datsun pick-up along that road and was about to turn right onto a dirt road which led to the mine when the appellant, who was driving an omnibus in the same direction, collided with the back of the Datsun. The Datsun went off the road and hit a gum tree. A bed, which was being carried on the back of the vehicle, was thrown forward and pierced the deceased through his back thus causing his death.

The appellant alleged that the driver of the Datsun, without giving any signal, had braked suddenly intending apparently to turn right. He noticed the application of the brakes and he himself applied brakes. He had, before applying brakes, been travelling at about 60 km/h. The bus went into a skid, swerved right and struck the Datsun.

The trial magistrate found that there was adequate evidence - and this finding cannot seriously be challenged - that the appellant was negligent in travelling too fast and not keeping a safe distance behind the Datsun after catching up with it.

Mr *Gardener*, for the appellant, does not now challenge the conviction and seeks to challenge only the sentence. The appellant had no previous convictions for motoring offences.

Reading the magistrate's judgment, it appears to me that he was of the view that he was mandated by law to impose a period of prohibition and could avoid doing so only if there were special circumstances justifying that action. In that I am satisfied he was mistaken.

Section 44(3) of the Road Traffic Act 48 of 1976 specifies the circumstance in which and the periods for which an order for prohibition from driving is mandatory. It states that where a person has been convicted of reckless driving, and has no previous convictions involving the driving of a motor vehicle within ten years immediately preceding the date of the conviction for which he is being sentenced, then if that conviction relates to an omnibus the magistrate shall prohibit the person from driving a motor vehicle for a period of six months and an omnibus during his lifetime. The conviction here was not one for the contravention of s 44(1) and accordingly no question of a mandatory prohibition arises.

The power to prohibit from driving on a conviction for culpable homicide is given under s 55 of the Act, and it is discretionary except on a second or subsequent conviction for an offence at common law, involving killing

GEORGES JA

or injuring or attempting to kill or injure a person by or in connection with the driving of a motor vehicle on a road. Unless there are special circumstances there must be a mandatory order prohibiting driving for twelve months. The appellant had no previous convictions so this was not a case involving a mandatory order for prohibition from driving.

It follows, therefore, that the magistrate erred in his approach to the question of suspension in this case, and this Court would be free to intervene. There has been much argument as to whether the appellant's negligence should be characterised as gross. We have been addressed by both sides on the issue of the exact position of the prohibition line and whether or not its presence affected the results in this case. For my part I am not satisfied that it is a matter of great importance. Mr *Chigovera* contended that the appellant was trying to overtake in clear contravention of a white prohibition line. The evidence does not indicate still less establish this. The appellant makes it clear that he was following the Datsun, suddenly became aware that it was stopping, applied his brakes and skidded.

The magistrate found that his negligence consisted in driving too fast having regard to the road conditions, and failing to keep a safe distance behind the Datsun. These are the particulars of negligence which have been established and the punishment, in my view, must relate to these particulars.

I do not think that there is adequate evidence to support any finding that he was about to overtake and certainly there is no adequate evidence on which the position of the prohibition line can be established beyond a reasonable doubt.

It appears to me that in characterising the negligence of the appellant it might be more useful to follow the categories laid down in the Road Traffic Act rather than to invent terms such as "gross" which are by nature difficult to define. Section 42 of the Road Traffic Act creates the offence of driving without due care and attention; s 43 creates the offence of driving at a speed or in a manner dangerous having regard to the conditions of the road and to the amount of traffic actually on it or which should reasonably be expected to be on it; and s 44 creates the offence of reckless driving.

Mr *Gardener*, quite reasonably, concedes that in this case the negligence found by the magistrate would fall into the category of driving at a speed or in a manner dangerous having regard to the conditions upon the road. This, I think, is its proper categorisation.

GEORGES JA

The fact that this kind of driving caused a death in this case ought not, in my view, to weigh too heavily in the sentencing. Through no problems of causation arise to raise doubt on the issue of guilt itself, clearly there was an element of fortuitousness in the manner in which the death was actually caused.

For the type of negligence described in s 43 prohibition from driving on a first offence is discretionary. But clearly in this case, when account is taken of the fact that the appellant was a bus driver from whom particularly high standards are expected, a period of suspension seems appropriate.

Accordingly, I would alter the sentence by prohibiting the appellant from driving all types of vehicles for six months and prohibiting him from driving motor omnibuses for twelve months. In relation to the driving of motor omnibuses his licence will be cancelled. His licence will, of course, be endorsed.

Having regard to the appellant's earnings of \$120 a month, which the order for cancellation of his omnibus licence is likely to place in jeopardy, it appears to me that the fine of \$350 or, in default of payment, 350 days' imprisonment is unduly severe. I also agree that the alternative of imprisonment imposed in default of payment of the fine of 350 days was clearly excessive. A fine is imposed so as to afford an accused person a realistic chance of paying it and so avoiding imprisonment. There seems little chance on his admitted earnings that the appellant will be able to pay. I would reduce the fine to \$240, the equivalent of two months' earnings, with an alternative of three months' imprisonment with labour in default of payment. The appeal against conviction is, of course, dismissed.

Beck JA: I agree.

A J A Peck, appellant's legal practitioner.

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BAECK v BRIGHTON NO & ANOTHER 1983 (1) ZLR 270 (HC)

Court High Court, Harare

Squires J

22-26, 29 & 30 November, 1 & 2 December 1982, 8 June 1983

Flynote

Succession - wills - invalidity because of mental incapacity of testator - onus of proving invalidity lies on person alleging it - sufficient mental capacity to make a will - what is - costs - when paid out of estate.

Headnote

The Plaintiff, a nephew by marriage of the testator, brought an action to declare invalid the testator's most recent will on the grounds of the testator's mental incapacity at the time of executing the will. In a previous will the testator had left all his estate to the Plaintiff but in his last will he left it all to his younger brother, the second respondent.

Considerable evidence, including medical evidence, was led for the Plaintiff to show that at the time of executing the will the Plaintiff was suffering from senile dementia; and evidence in

rebuttal was led for the respondent.

Among the matters argued, apart from the purely factual issues, were -

- (1) on whom lay the *onus* of proving the invalidity of a challenged will; and
- (2) what constituted sufficient mental capacity to make a will.

Held, that under the law of South Africa, the *onus* of proving the incapacity of the testator rested on the person who alleged it. This approach should be followed here. In the first place, in terms of the Administration of Estates Act [Chapter 301], because of the system of executing, lodging, registering and implementing a will, its validity is achieved *prima facie* by the registration of an apparently valid will. Secondly, the underlying approach of the Roman-Dutch law to the question of insanity is that the state of a person's mind is taken in the first place to be, as it is in the law of nature, normal. Thirdly, as was the position in the present case, the *onus* is fixed by the pleadings.

Held, further, that mental capacity is to be decided on whether the testator had sound and disposing mind and memory, meaning that his mind and memory were sufficiently sound - though by no means perfect - to enable him to know and understand the business in which he was engaged at the time he executed his will. He should understand the extent of his property and the nature of the claims of those whom he is excluding from benefitting.

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Held, further, that where, as here, it was not unreasonable, in view of the evidence available, for the Plaintiff to bring the action he did, the Court will act on the principle that where the litigation has been brought about by the conduct of the testator the costs of the parties should come out of the estate.

Cases cited:

Rapson v Putterill 1913 AD 417;

Kunz v Swart & Others 1924 AD 618;

Tregea v Godart 1939 AD 16;

Banks v Goodfellow (1870) LR 5 QB 549; [1861-73] All ER Rep 47;

Harwood v Baker (1840) 3 Moo PC 282;

Hepner v Roodepoort - Maraisburg Town Council 1962 (4) SA 772 (AD);

Batten Singh v Amir Chand & Others [1948] AC 161;

Lewin v Lewin 1949 (4) SA 241 (T).

A P de Bourbon for the Plaintiff.

No appearance for the 1st defendant.

R R Horn SC for the 2nd defendant.

Judgment

Squires J: In a book called "Proverbs, 20th Century", there is a line of cracker barrel philosophy which says: "Where there's a will there's trouble." - which might well be a suitable subtitle for the present exercise. The will in question is one made by the late Mendel Urbach of this city on 30 October 1979; and the trouble stems from his mental capacity - or the alleged lack of it - at the time he did so.

It appears that Mendel Urbach, or the "testator" as I have called him, made three wills at various times of his life. The first was a joint will made with his wife Eiga on 31 August 1964. That left the estate of the first-dying of them to the other with the further provision that if they died together, or the last-dying thereafter died without making a further will, then, themselves being childless, the estate should go to four substitute heirs in equal shares. These were the present Plaintiff, who was a nephew of Mendel and Eiga, and who lived in what was then Salisbury and who still lives here; secondly a sister of Eiga; and the third and fourth were two of that sister's children. All these latter three heirs then lived in Israel. In further clarification of this aspect, it should be said at this stage that the Plaintiff is the son of another sister of Eiga Urbach.

The second will was made on 2 June 1972. The testator's wife Eiga died suddenly and unexpectedly in May 1972 and within a short time after that event the testator made this second will - signing it on that day - in which he left all his estate in whatever form to the present Plaintiff alone.

The last will, and the one giving rise to the present action, was executed

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SQUIRES J

on 30 October 1979, and it left the testator's entire estate to his younger brother, Aubrey Urbach, the present second defendant.

On the testator's death on 3 November 1980 this third will was sent to the Master of the High Court, and being apparently regular on the face of it was registered and accepted by him on 9 December of that year. The first defendant is the executor appointed in terms of the will in circumstances which will be described later. On 31 July 1981 the Plaintiff issued process against the executor and Aubrey Urbach to have this will declared invalid, and his declaration claims that this should be done because at the time the testator executed the will dated 30 October 1979 he was not in his sound senses, and was incapable of appreciating the nature's contents and consequences of such an act.

The Plaintiff's case in substance is that the testator suffered from senile dementia at the time this third will was executed, possibly aggravated by arteriosclerotic dementia. Senile dementia is a physical disease condition in which there is a steady loss of nerve cells in the brain. For reasons that are apparently not yet fully understood the cells of the *dura mater* begin to die, and because this is the seat of personality this development causes the deterioration, and finally

disintegration, of the personality, commensurately affecting the sufferer's mental capacity to the point of irresponsibility. There are just not the cells any longer for the process of proper cerebration. This is, moreover, an irreversible process, and once begun inevitably ends in death. The prospects of curing it are very limited. The best that can be achieved appears to be a postponement of further deterioration by constant and massive reassurance and reinforcement of familiar things in the patient's circumstances. In 80% of all cases, death will ensue from it in two to five years from its onset.

Its outwardly visible symptoms are agnosia - failure to recognise, or the forgetting of previously familiar people and things; a tendency to become disorientated in time or space - forgetting appointments or arrangements, or where one was if in an unfamiliar place; loss of social judgment - exhibited mainly in a lack of sensitivity or understanding of other people's feelings as being affected by the patient's own behaviour; the neglect of personal habits; changes of emotion; a tendency to stereotyped repetition; difficulty in carrying on a logical conversation; and a tendency to require continual reassurance which may be manifested as a clinging dependence on others.

The Plaintiff called the evidence of a general medical practitioner to

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whom he had taken the testator in October 1977 for an examination, who said that in his opinion, based on the testator's attitude and behaviour in his consulting room during the examination, the latter suffered from senile dementia. This practitioner, Dr Zwonnikoff, actually saw the testator twice, the second time being in December 1977 after certain X- rays and laboratory tests, prescribed at the first examination, had been done. On that occasion the testator, while apparently amenable to being physically examined, even to the point of a rectal inspection, would not answer the questions put to him by Dr Zwonnikoff, or would not answer them intelligently. For most of the time he just reacted with a silly grin. On the second occasion, again despite the taking of a electrocardiogram, the testator still would not answer questions intelligibly or at all; and Dr Zwonnikoff felt that the testator resented the questions being asked. He failed to show up for a third appointment, but as a result of these two encounters Dr Zwonnikoff thought he was suffering from advanced senile dementia to the point where he thought the testator should not be given responsibility for signing any legal forms. His examination of the testator did also reveal the existence of arteriosclerosis, but this was no more than normal in a person of the testator's age and the witness did not think that it contributed to the testator's overall condition - at that stage at any rate.

The bulk of the evidence called in the *Plaintiff's* case was from a number of people, including the Plaintiff himself, who had at one time or another and in one form or another, observed various actions, reactions or behaviour on the part of the testator which could be said to fall into one or more of these outward visible symptoms of senile dementia. This evidence covered the period from the early 1970s to the testator's final admission to the nursing-home where he eventually died while undergoing an emergency operation. And it embraced a wide range of acts or omissions from the most curious, if not aberrant, behaviour to needing accounts and payments being dealt with, to forgetfulness, a personal dishevelment, a failure to recognize old

acquaintances, to losing money, to constant and continual visits to the Plaintiff's offices. On the other hand, and notwithstanding these signs of senility, he also apparently told some of these witnesses that he intended to leave all his estate eventually to the Plaintiff.

This basis of facts was then put to an expert witness, Professor Buchan, the head of the Department of Psychiatry at the Godfrey Huggins School of Medicine. He had considerable experience in the field of geriatric psychiatry as well as many years' work as a specialist psychiatrist in the country's mental institutions; and though he had never seen this testator, he was asked to consider his condition on a case study basis. On the

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description of the testator's habits, actions and behaviour that was available to the Plaintiff, Professor Buchan concluded that the testator would have had a moderately severe case of senile dementia by October 1979, and that in such a condition he would not have been able to understand the nature or consequences of his acts by the time he executed the will which is in dispute.

This was all reinforced, so the Plaintiff's case proceeded, by the fact that this will was, in effect, a disinheriting of the Plaintiff who, it was said, the testator regarded as a son, and to whom he had left everything in the second will. In drawing the third will the testator seems to have forgotten all about this and about the Plaintiff, though he could remember the first will, all of which was further evidence of the impact of senility upon him. Furthermore, in this respect, the will in dispute was an "*inofficiosum*" will and subject to the argument as to the incidence of *onus* in cases like these, its effect was to cast a heavier burden on the person seeking to uphold its validity.

And finally, the evidence of the second defendant was vigorously assailed as being not only unreliable, but in parts - such as the signing of the will - a downright fabrication. It was submitted that the second defendant, assisted by his wife who was formerly a practising attorney, pressured the testator into drawing up the third will; that he, the second defendant, arranged for this to take place, paid for the first dependent's services to do so; and kept the existence of the third will unknown to anyone else until the testator died - all in the face of the testator's long standing intention to leave everything to the Plaintiff. It was also said as further examples of this criticism, that the second defendant tried to paint an exaggerated picture of the testator's dependence upon him, and that he had persuaded himself, and possibly the testator that the sum of \$12 000 given by the testator to the Plaintiff in 1975, originally as a loan but repayment of which was later waived by the testator, still remained owing. Not only was the evidence of the second defendant attacked in this respect, but also that of his witness, Mr da Mota, a former Mozambican who claimed to have been a friend of the testator and of the second defendant for many years. Particularly criticized was da Mota's claim that the testator had indicated to him in the course of their many social encounters, that he intended to leave such property as he had to the second defendant.

Apart from also criticizing the fact that the second defendant's wife was not called to give evidence, the *Plaintiff's* case sought to discount the other evidence led by the second defendant

which showed the testator to

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be apparently capable of exercising a rational, capable mind, as being insufficiently penetrative to really establish that the testator did not suffer from senile dementia. Such a sufferer could understand and react to simple routine things, and it was said that this was all that the evidence of the first defendant, of Mrs Barnes, and the second defendant's book-keeper, showed. The banalities and social trivia that were revealed in the evidence of Mrs Barnes and the book-keeper were on this basis quite consistent with the performance of someone suffering from this affliction.

The first defendant, as the executor of the instant will, it should be said in parenthesis, did file a plea in answer to the declaration only to dispute the allegation that the testator had made the will in question when not of full mental capacity, since he, the first defendant, was the person who took instructions to draw that will. But having done that, the first defendant pronounced himself to have no interest whatever in the outcome of the trial and indicated that he would abide the decision of the Court on the matter.

The second defendant's case, again as broadly stated as is consistent with pointing the issues, was that disregarding, as one ought to, the subjective opinion of the Plaintiff's witnesses as to whether they would have entrusted any legal affairs to the testator or what mental ability they thought he was capable of in view of the behaviour they deposed to, the objective facts show that the testator was perfectly capable of understanding what he was doing, particularly when he executed the will in question, and that is was the result of his deliberate choice. Moreover, the evidence showed that behaviour deposed to by the Plaintiff's witnesses and relied upon by the experts as indicative of symptoms of senile dementia, had been exhibited by the testator long before he could have been suffering from this affliction. The behaviour which the objects of, or spectators thereto, regarded as crude, bizarre or just childish, in fact seems to have been the testator's idea of being funny.

Similarly, it was the second defendant's case that he - the testator - nursed a longstanding antipathy towards doctors, the legacy of an operation which left him with an incisional hernia some two or three fists in size. This upset generated an abnormal antipathy in him towards the medical profession and their collective competence, and he would not willingly go and see one and refused to have one see him, taking the attitude they were a waste of money. On this basis it was the second defendant's case that the testator's attitude to Dr Zwonnikoff, far from being the result of senile dementia, was more likely the testator enjoying himself at the

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doctor's expense by making things as difficult as he could legitimately do, particularly as the testator had not sought the consultation himself, and had in fact been taken there by someone else.

He was undoubtedly lonely, occasionally depressed and unwell, and being an elderly widower did not look after himself as well as a caring wife would have seen to. In these circumstances he had good days, normal days and bad days; and while there may well have been times when he forgot people or lost things or needed an explanation or assistance, there were, equally, times when he managed all these acts with the successful results of a normal person.

Especially was it argued for the second defendant, that the testator's behaviour at times was positively inconsistent with senile dementia. These consequences, according to Professor Buchan, left a person unable to understand abstract concepts, although able to carry out mechanical responses in routine situations. The second defendant's case claimed there were several exhibitions by the testator of an ability to comprehend his financial or other affairs at an abstract level, even towards the last few months of his life. His apparent forgetfulness, need for reassurance, lack of completely regular shaving on occasions or care of his clothes, were rather the results of his lonely circumstances and his increasing age, and not of any substantial impairment of his mind.

While the second defendant had been estranged from his brother until the death of the latter's wife, Eiga, this was only because of the dislike of the second defendant for Eiga. He believed she has been gravely discourteous to him and the testator's mother and she gave equal offence to him by her alleged disregard of family and religious customs, a situation which apparently reached a peak over the affair of their mother's tombstone. He was on civil, if distant, terms with the testator while his estrangement lasted, and according to one of the Plaintiff's witnesses the second defendant even resisted an overture by the testator to heal the breach. Once Eiga died, however, the second defendant moved to repair the fences and from then on the former rift was healed.

Although the second defendant lived on a farm near Banket he had an office and other business interests in town, and whenever these brought him here he would try to see his brother, the testator. He also helped the testator from time to time in the latter's various affairs, and in the last few years he and his wife would take pre-cooked or readily prepared food to the testator to stock up his refrigerator or pantry with the necessary

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foodstuffs to ensure that the testator at least was properly fed. The testator resisted the suggestion that he might move into the Jewish Old Age Home in Bulawayo, as he did the invitation to go and live on the second defendant's farm, apparently expressing the view that he preferred to be, and was therefore happier, living amongst his own familiar household objects.

The drawing of the will in dispute, according to the second defendant, arose out of the express desire by the testator to make all his property over to the second defendant during his lifetime, which seems to have taken place about mid-1979. The second defendant cautioned against this suggestion because he thought the testator would still need his property and the income it provided in order to live on. He also said that the testator expressed concern that he had been asked to sign a document at some time previously to which he had not given much attention, and which he now wondered might be a will. Inquiries were accordingly set afoot by the second

defendant's wife of the first defendant to obtain whatever will the testator had made. The first defendant obtained Exhibit 1 - a copy of the joint will executed in 1964. From there the testator expressed a desire to prepare another will and asked the second defendant's wife to do so for him. She declined to have anything to do with such an act and arising out of her former connection with the first defendant's firm, the desire was expressed to ask the first defendant to draw such a will. That was duly done and in the first defendant's opinion there was nothing to suggest the testator was in anything but full and adequate possession of his mental faculties at the time. Moreover, even after the event and after going into Nazareth House the testator asked the second defendant about various matters which concerned his economic circumstances, on such a basis and in such a way which showed quite clearly a competent knowledge and grasp of his financial affairs and of the means to give the second defendant authority to act for him in that respect.

In such a conflict of factual dispute, and of inferences which might be drawn from such facts, the incidence of onus might assume an important if not vital, proportion, and I turn next to consider that aspect.

In South Africa the situation seems clear beyond argument. While a will is invalid if the testator made it while mentally incapable of appreciating the nature and effect of his act, the burden of proving this rests on the person who alleges it. *Rapson v Putterill* 1913 AD 417 at 420; *Kunz v Swart & Ors* 1924 AD 618 at 681, 692; *Tregea v Godart* 1939 AD 16 at 27 et seq. are only a few of the more authoritative decisions which establish and confirm this.

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In England, and apparently elsewhere in the erstwhile Dominions, the position is different; and there it seems incumbent upon the person relying on a will to uphold that will. While a will which is in the face of it rational, and accords with the required formalities of the law, is presumed, in the absence of any evidence to the contrary, to have been made by a person of competent mental capacity, it is the duty of the executors or any other person who sets it up as valid to show that it is the act of a competent testator. Therefore, when any dispute or doubt arises as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. See *Halsbury* 4 ed vol 17 p 903.

Mr *de Bourbon* argued on behalf of the Plaintiff that as there was no decision of our Courts on this question, and none of the main South African decisions covered a case exactly like the present, I should apply the English principle.

In the first place, however, such a statement seems to me to pay inadequate attention to the residual effect of the common law, or to the effect of the statutory provisions which govern the matter in this country. In the old Roman-Dutch common law a will was valid if it was made and attested in accordance with the law's requirements. These requirements varied according to circumstances, but they were for the most part codified in the old Cape Colony at any rate, by the Wills and Attesting Witnesses Act of 1861. That legislation was a part of the law imported into this country at 10 June 1981 and is still this law in the form of Chapter 306. Once a valid will has been executed in accordance with these formalities, amongst its other effects at common

law is that it revokes all previous wills or testamentary dispositions, if it says so expressly or by implication.

The mechanics by which the will thus executed is translated into effect are thereafter largely the function of the Administration of Estate Act [*Chapter 301*]. This legislation requires as a first step, that anyone who is at the time of death of the maker of any deed purporting to be the last will or codicil or other testamentary instrument of another person in possession of such document, to deliver that document forthwith to the Master or other nominated official. Any such will which is thus sent to him, or which may have been delivered to him prior to death by the maker himself, is registered by the Master; and it is on the strength of that will, unless its validity or legal effect is decided otherwise in a court, that the executor or administrator is appointed and the estate wound up and

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distributed. In the nature of things then the Master can register only one will and because of the law that the execution of a valid will revokes all previous wills or dispositions, in the event of any competition the Registrar will register the latest such document that is valid on the face of it as the will of the testator. If the legal validity of that document is challenged by anyone, that person must obviously take steps to do so in a court, and any question of *onus* or proof will depend on the issues as they emerge from the claim which is brought and contested.

In our system of executing, lodging, registering and implementing a will, therefore, there seems to be no basis on which it can be said that either the executors or beneficiaries who seek to uphold it must establish its validity. That is achieved in the first place and, *prima facie*, by the registration of an apparently valid will.

This situation and conclusion would be, I think, reinforced by the basic approach of the Roman-Dutch law to the question of insanity. The underlying philosophy of that approach is that the state of a person's mind is taken in the first place to be as it is in the law of nature - that is to say normal. If it should be claimed by anyone that such normal state of affairs is displaced by the manifestation of insanity, that claimant must prove it. While the more usual incidence of such a claim is in the criminal law, the same burden of proof would attach to such an allegation in other fields as well. That is not the same as in English law, where the question of sanity is simply a question of fact; and there is no presumption that a testator is sane till the contrary is shown - see *Theobald on Wills* para 91, 12 ed.

But in the second place, and in any event in this dispute, the *onus* seems to me to be fixed by the pleadings. It is the Plaintiff's claim that the will in question, otherwise regular, and valid on the face of it and registered by the Master in terms of the Act, is invalid. He says this invalidity stems from the fact that it was made at a time when the testator was incapable of understanding the nature, content and consequences of such an act. That is denied by the defendants. On the simple basis of "he who asserts must prove" that is fundamental to the incidence of *onus* in our law of procedure and pleadings, the *onus* would be on the Plaintiff to establish the allegation he makes.

For these reasons then, I am unable to accept Mr *de Bourbon*'s argument. In my understanding of the law, the situation is the same as in South Africa and the *onus* of proving that the testator was suffering from such mental

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incapacity as to render this will invalid, is on the plaintiff.

In setting the parameters of the case within which the issue must be decided, the next question is - what is to be accepted as sufficient mental capacity? Here it would seem that the decision in *Banks v Goodfellow* (1870) LR 5 QB 549; [1861-1873] All ER Rep 47, not only has the intrinsic merit of setting out the standard required of a testator clearly and comprehensively, but it has been followed and applied with approval in both England and South Africa. In the light of that judgment, mental capacity is to be decided on the following considerations:

"The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; it may not be able at all times to recollect the names, the persons, or the families of those with whom he has been intimately acquainted; he may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he commits it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

As a gloss to this approach, there must be added the caution pronounced in *Harwood v Baker* (1840) 3 Moo PC 282 in which at p 290 of the report ERSKINE J said the following:

"But their Lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and, therefore, the question which their Lordships propose to decide in this case is not whether Mr Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property."

Mr *de Bourbon* also urged, albeit on the basis that the *onus* was on

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the second defendant to establish the mental capacity of the testator, that this requirement

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should be strictly proved, not only as a matter of law, but because of the suspicion that the second defendant had pressured the testator into making the presently disputed will - particularly since it resulted in an *inofficiosum* will. Because of my conclusion as to the correct incidence of the *onus*, that really falls away: but it should also be stated as part of the guidelines I have adopted that such *onus* as I find to be on the Plaintiff I have taken to be the normal *onus* for a civil case - namely proof on the balance of probabilities. While it has been held in the past that there might be a special onus on a party seeking to show that a testator did not have the necessary testamentary capacity, the law seems to be well settled now that the test is the same as for all civil cases - see *Hepner v Roodepoort- Maraisburg Town Council* 1962 (4) SA 772 (AD).

As a further and final step in this setting of the stage, it is, of course, necessary that I give my impression of the witnesses and the evidence which they gave in this dispute.

[His Lordship examined that evidence and continued:]

Now, weighing up all this evidence for and against the conclusion that Mendel Urbach was mentally incapable of executing a valid will on 30 October 1979, and thinking the matter through as carefully as I can, I am bound to say eventually that I am not persuaded that he was mentally incapable of understanding the nature and consequences of making the will in question.

[His Lordship further discussed the evidence and went on:]

But the evidence which seems to me to militate most clearly against the Plaintiff's claim is that of the first defendant; and in the cross-current of disputes fact and inferences thrown up by the subjective views of the two claimants here, the first defendant's description of what occurred when he took the testator's instructions to draw the will, seems to me to be a wholly dependable rock to which one can hold for guidance. He is an officer of the Court of many years' experience, which experience includes the taking of instructions to draw wills from elderly people and which experience shows that on occasions he has declined to do so because the would-be testator did seem to be mentally incapable of properly understanding the event. He therefore knew what to look for in such a situation and would be more likely to recognise the mentally incompetent person than if he was a total stranger to such a task. While it is true that the second defendant has been a client of his for many years, I would not regard that as affecting the first defendant's impartiality or sense of duty to the Court.

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On that evidence it is quite clear, to my mind at any rate, that the testator knew the first defendant was an attorney, knew that the second defendant's wife had previously worked for a firm in which the first defendant was a partner, knew that attorneys drew wills and that the object of the first defendant's visit was to do just that. He had sufficient knowledge and grasp to proceed to ask if Brighton required a list of all his assets or properties for setting out in the will, to know what an executor was, to resist the suggestion by the second defendant, according to Brighton, that he make the bank his executor, to appreciate attorneys could act as executors and invite the first defendant to accept such an arrangement. In my view, not only does that

evidence show distinct signs of abstract thought but it shows, in the words of COCKBURN CJ in *Banks v Goodfellow* (*supra*) at 568:

" . . . his mind and memory were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will."

Mr *de Bourbon* argued on the strength of decisions such as *Batten Singh & Ors v Amir Chand & Ors* [1948] AC 161, that the complete omission of any reference to the Plaintiff, and the total about-face of previous indications that the testator intended to leave his estate to the Plaintiff, showed that his mind was so deficient in memory that he was oblivious of the claims of the Plaintiff and, if his memory was so deficient as to forget that, and this forgetfulness was an inducing cause of the choice of the second defendant as his heir, then the will was invalid.

I do not think this is a sound argument. In the first place the decision in *Batten Singh's* case was obviously influenced by the fact that the testator appointed strangers to his estate to the exclusion of his relatives who were nephews. In the circumstances of that situation, the choice was otherwise sufficiently inexplicable as to reinforce the impression that his weakened mental state did cause a deficiency of memory so great as to mean that he could not have held the requisite mental capacity.

That is not the case in the instant dispute where the testator appointed a closer relation than the Plaintiff who, in fact, would have been his intestate heir had he died without a valid will. Nor to my mind is that an incredible decision. While the testator seems to have forgotten the existence of the 1972 will, or if he remembered it, he did not mention it, the original 1964 will was available to him and that clearly mentions the Plaintiff as one of the possible heirs to whom he might wish to leave his estate, or some of it. Yet notwithstanding this reminder he instituted the second defendant as the sole heir in the last will. That act seems to me to be, therefore, at

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least as consistent with a changed intention to deliberately exclude the Plaintiff and bestow his property on his brother, as it is with forgetfulness.

But when that evidence is also considered with the other evidence that shows not only that the second defendant and his wife by themselves were playing the major role in looking after the testator, bringing him food, visiting him regularly, helping him in a number of his affairs, pressing him to stay on the farm, but that on the other hand the Plaintiff had already had \$12 000 of the testator's bounty in the form of a loan that he said need not be repaid, that he had an extended right of lease of the testator's property at a very reasonable rental, and that he did not play as great a part in assisting the testator as did the second defendant at that stage, I do not find it at all strange that the testator should decide to exclude the Plaintiff from his bounty, even though he used to regard him with great affection, and institute his reconciled brother as his heir.

Apart from this indication of sufficiently sound understanding to reject the claim that he was mentally incapable, it seems to me there is the other evidence of sufficient grasp of his affairs that reinforces the conclusion that the testator could, and did, understand what he was doing when the will was framed and signed. There is the sale of his Avondale properties in July 1980.

On the face of it this involved consideration of an offer to purchase these properties for \$4 500, acceptance of that offer, and the signing of the power of attorney for the necessary deed of transfer and the acknowledgement of receipt of the purchase price.

While it is no doubt the case, the Plaintiff acted for the testator and paid the proceedings into his Post Office Savings Bank account, I am unable to credit the Plaintiff's evidence that the testator did not really understand what this was all about. Accepting the Plaintiff's somewhat self-righteous claim to be fair and honest by nature, for reasons already given it seems to me at least very surprising that if the testator really could not administer his own affairs, as the Plaintiff in effect says he could not by this stage, that the Plaintiff did not obtain the appointment of a *curator bonis* to act for the testator or even suggest to the rest of the family that this be done if property of the testator was to be alienated. Of course, the Plaintiff could hardly admit, at this stage of events (that is, after making the will in dispute) that the testator was capable of understanding his affairs, so I am inclined to regard the Plaintiff's obtaining of the testator's signature to these documents as indicative of the Plaintiff's feeling at the time that the testator did know what he was doing and could at least follow the fact that the property was being sold. It seems at least highly improbable

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that a professional man, of standing in both his profession and community, would wilfully commit the testator to selling his property if he was not sure that the seller understood what was going on.

But the conclusion that the testator did know what his affairs consisted of seems to be reinforced, on the contrary, by the second defendant's evidence as to the former's desire to hand over control of his affairs to the second defendant after going to live at Nazareth House. To this end he suggested a power of attorney be prepared, and on the second defendant's next visit asked if he had done this, which the second defendant had not. Not only therefore did he know a power of attorney would be required for the second defendant to operate his bank account and to manage his affairs, which was obtained and signed - but he specifically told the second defendant that his Post Office Savings Bank accounts were not to be touched. Now, this is the second defendant's evidence, it is true, but it seems to me to derive corroboration from the fact that the testator did indeed have Post Office Savings Bank accounts which were subsequently handed over to the executor for realization in the estate, and that these must have been the same accounts into which the Plaintiff paid the proceeds of the Avondale properties. I do not think the second defendant had the wit to invent this footnote of evidence to increase his impression of truthfulness, and if it did really happen, as I believe it did, the testator could not have known, of course, that he would never come out of Nazareth House. And being of the nature he apparently was, he would want to secure at least some fund of money against any future need. That evidence shows not only a recollection of the existence of the accounts but an ability to grasp that he might need them and, therefore, that he should tell the second defendant that the power of attorney to manage his affairs excluded that particular aspect.

In the result, therefore, as this exercise began by indicating, I am not satisfied that Mendel Urbach did not have at least the mental capacity described by COCKBURN CJ in *Banks v*

Goodfellow (supra). When he gave the instructions for the drawing of this will his memory might have been imperfect and probably was impaired by age or even disease; he might not at all times have been able to recollect names, persons or families of people with whom he had been acquainted; he may at times have asked questions about simple things and repeated the questions already answered; he may not have been able to understand all the parts of a particular transaction or event, but would still be, and was, capable of bestowing his estate by will. He may well have behaved in a silly and witless manner, and it is not surprising that anyone who knew only this of him may conclude

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that he was mentally defective. But if one knew the rest of him and the explanation for such behaviour, it puts a different perspective upon it and a perspective that adequately accommodates the possibility of being able to make a valid will by knowing full well what he was about in doing so.

So far as Mr *de Bourbon*'s argument goes that this was an *inofficiosum* will and therefore a high burden of proof was cast on the person seeking to uphold it, the answer is primarily afforded, in my view, by the direction I have already acted on as to the *onus* of proof. The onus is on the person seeking to persuade the Court that the testator lacked the necessary mental capacity. An *inofficiosum* will is a phenomenon of Roman law and undoubtedly could be impugned in that system under certain circumstances. I am unaware of any authority, nor was I referred to any, which is a basis for Mr *de Bourbon*'s argument, and it seems to me that at most it may be a factor probative of the claim that a testator did not know what he was doing by disinheriting a person for whom he thought to provide and bequeath the estate to someone else. I have approached the problem on that basis, but notwithstanding the existence of the 1972 will the statements made about "leaving all to Harold" and the reasons therefor, the evidence of the first defendant particularly satisfies me that the testator knew what he was doing and firmly meant to leave his estate to the second defendant.

Then Mr *de Bourbon* also asked that I should draw an inference adverse to the second defendant by reason of his failure to call his wife to give evidence. Before such an inference can be drawn, however, there must be two conceivable explanations of the fact at issue that are "more or less equally open on the evidence" and that neither is more likely than the other. The failure by one party to call a witness who could clarify matters in favour of that party, may, depending on the factors and circumstances of each case, justify the Court in drawing an inference against that party that the witness will not support his case.

But that is not the situation here. On the crucial aspect of the sequence of events leading up to, and the giving of instructions for the drafting of the will, there is the uncontradicted evidence of the first defendant; and on the other aspects of the case pointing to the testator's mental capacity there was other evidence which did not leave the possibility more or less equally open. The second defendant is quite entitled to assess the amount of evidence he thinks necessary to meet the case against him and if that evidence can be said to meet that case sufficiently, there is no need to go on calling witnesses simply for the sake of confirmation.

In the end result and to recapitulate, I do not think it established on

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a balance of probabilities that the testator was suffering from senile dementia at the time he made this third will; or, if he was, that it was sufficiently far advanced to achieve an incapacity to understand the nature and effect of what he did. Although he forgot people's names or failed to recognize others, or sought assistance in dealing with some of his business transactions, there are far too many acts even after the date when he signed the will which show that he was capable of sustained abstract thought, memory recall and an understanding of his financial affairs, to accept that he was mentally incapable of properly making and deciding on the terms of a will. These manifestations of infirmity seem to me to be explained on the basis that the testator was an old man, well into his seventies, who did not look after himself properly, who was lonely and who occasionally at least looked for company, and who would welcome the chance of relief from the tedium of his financial affairs if someone else were agreeable to undertake them for him. Even where he apparently required help to be fetched from strange places and taken home, he at least apparently had wit enough to know that help could be obtained by asking someone to ring the Plaintiff's office so that a message could be given for someone to come and fetch him. Similarly, his extraordinary, and to others apparently asinine behaviour, I do not believe indicates sufficiently positively any diminished sense of social responsibility resulting from senile dementia. Had there not been any previous tendency to such conduct, this factor would obviously have carried considerable weight. But people who knew him over a long period, like Patel, said he was a person who enjoyed that sort of behaviour as the playing of practical jokes, and all that subsequent conduct shows is that the same behaviour inflicted on others who did not know him, and who surprisingly did not see anything funny about it, caused them to think him odd. Without knowing his predilection in that direction, it is not surprising they thought him odd. But in the light of that predilection it does not establish that it was caused by senile dementia.

In further support of this conclusion is the fact that not only did the testator not die of effects of senile dementia, but that a mental deterioration was not even the reason why it was thought desirable to put him into a home. It was his physical condition that eventually prompted his admission as a patient in Nazareth House.

But furthermore and in the second place, even if the testator was suffering from a degree of senile dementia, or some other affliction, which is a concomitant of old age, the evidence of the first defendant satisfies me positively that the testator knew at least very substantially' and adequately enough to meet the requirements of *Banks v Goodfellow (supra)*, what

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was involved in making a will; that he knew what he was doing when he gave his instructions to the first defendant, and that was the will he wanted to leave. It should be reiterated in this respect that I have not overlooked the fact that this third will was a wholly different disposition

from the second will, and excluded the Plaintiff, who had been regarded with affection by the testator in previous years. But the second will was composed before the breach with his brother was repaired, and I see nothing untoward in a man deciding to leave his estate to his brother, his remaining blood relation, rather than the son of a sister of his wife, particularly in the circumstances of the present situation. It was the second defendant who would have been looming far larger as an object of the testator's gratitude by this stage of events for the reasons already canvassed, whereas on the other hand the Plaintiff was beginning to regard the old man as a nuisance, at least to the extent that he thought the second defendant should shoulder some of the burden of dealing with the testator's vagaries. In my view, it is by no means impossible that this impatience was noticed somehow by the testator, or that he thought that, having had \$12 000 and a relatively low rental of his properties for a long time, he had by then given the Plaintiff enough of his bounty.

I am unable therefore to hold that Mendel Urbach was mentally incapacitated when he gave instructions for and subsequently signed the will in question, and that in my judgment the Plaintiff's claim must be dismissed.

So far as costs are concerned, the parties were agreed that in any event the costs of the first defendant should come out of the testator's estate. It was further argued by Mr *de Bourbon*, and accepted by Mr *Horn*, that in view of the medical evidence presented to the Plaintiff and the evidence of the witnesses available to him, it was not unreasonable for him to institute the proceedings to impeach the will. In the circumstances of this case it seems to me to be an appropriate approach to the matter of costs. As was stated by ROPER J in *Lewin v Lewin* 1949 (4) SA 241 at 282 (T):

"Questions of testamentary capacity are notoriously difficult, and the defendant was able to put before the Court a number of medical as well as lay, witnesses who seem to me to have formed an honest, if mistaken, view as to the rationality of the deceased. Opinions might well have differed upon the point, . . .".

and had it not been for the further evidence placed before me by the second defendant and his witnesses, I would probably have arrived at the same conclusion. In questions of testamentary capacity as well as interpretation, there is cogent and ample authority, especially where the issue is the

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deceased's sanity when making the will, that the Courts will often act upon the principle that where the litigation has been brought about by the conduct of the testator the costs of the parties are ordered to come out of the estate. I think I can justifiably accede to that argument.

In the result, the Plaintiff's claim is dismissed, but the costs of all the parties are to be paid out of the testator's estate.

Kantor & Immerman, legal practitioners for the Plaintiff.

Honey & Blanckenberg, legal practitioners for the second defendant.

S v ANDREW 1983 (1) ZLR 289 (HC)

Court **High Court, Harare**

Waddington J

8 June 1983

Flynote

Criminal procedure - sentence - principles of sentencing - aged offenders - correct approach to sentence.

Headnote

As with juvenile offenders, the courts should approach the question of sentence on aged persons with great care. The purpose of the court in such cases should, perhaps, be characterised more by geriatric considerations than by the orthodox theories of punishment. Judicial officers should exercise their discretion to impose lengthy suspended terms of imprisonment in the aged with particularly great care, having regard to the likelihood of such a sentence ever being brought into operation and the undesirability of imprisoning old people near death.

Cases referred to:

S v 2 Juveniles 1982 (2) ZLR 275;

S v Sibindi & Others H-B-96-82;

S v Mandaza & Another H-B-4-83.

Judgment

Waddington J: The accused in this case is 85 years old. He is a first offender. Unfortunately for him, having grown dagga plants for resale, he was trapped into selling part of his fairly substantial stocks to a zealous police drug investigator. The accused, accepting the inevitable no doubt, pleaded guilty at his trial which was held four days after his arrest on the 30th April 1983.

There were three offences involved, viz the sale of 207 grams, the possession of 553 grams and the cultivation of 99 plants of dagga. Each offence was in itself serious. After his conviction, the magistrate imposed a globular sentence in respect of all three counts of 24 months' IWL. Because of the accused's advanced age and his very long blameless record, the magistrate very correctly decided to suspend most of the sentence on the usual conditions one finds in cases of this sort. Twenty months' IWL were suspended for 5 years.

WADDINGTON J

One hesitates to interfere in the exercise of a magistrate's discretion in imposing sentence. In this case the magistrate conducted the proceedings fairly and with sympathy. It is laudable to do so especially when dealing with very old first offenders. There are times, no doubt, when in cases like this the purpose of the Court should perhaps be characterised more by geriatric considerations than by the orthodox theories of punishment. In the present case the aged offender was quite frank with the Court. I agree that his long, clean record deserved a substantial reward when sentence was assessed. In my view, however, a sentence of imprisonment with labour would inevitably bear extremely heavily on an octogenarian well advanced into the ninth decade of his life. I personally would have hesitated to send him to prison at all. A totally suspended sentence and the public condemnation of his actions at his trial would most likely have deterred him sufficiently from committing further offences.

I am also doubtful whether, assuming the accused in this case were to become a recidivist, a Court would order his incarceration for the period of the suspended sentence. Twenty months is a critically long time in the life of someone who is 85 years old. A shorter suspended sentence would have been more meaningful. There should in my view be similarities of approach to sentencing by the courts when considering cases involving the very old and the very young. *S v 2 Juveniles* 1982 (2) ZLR 275, *S v Sibindi & Others* H-B-96-82 and *S v Mandaza & Another* H-B-4-83 were three cases concerning the imposition of suspended sentences of imprisonment on very young offenders. The *ratio* of these cases is that it is undesirable to pass a suspended sentence of imprisonment on extremely young offenders because for several years they would continue to be too young to imprison without the risk of harm being caused to their characters. Thereafter, their long efforts to keep out of trouble would be taken into account in their favour and the suspended sentence would probably not be brought into operation then either. In the converse case of the aged first offender, if the prime reason for suspending most of a sentence of imprisonment is the offender's age and the undesirability of imprisoning old people near death, that consideration with the passing of time becomes a progressively more powerful reason for avoiding imprisonment and not bringing suspended gaol sentences into operation. I should not be taken as saying that in no case should an aged offender be imprisoned or sentenced to a suspended prison term. It would also be unwise to try to define the line of demarcation between middle and old age. Suffice it to say by way of summary that judicial officers should exercise their discretion to impose lengthy suspended terms of imprisonment on the aged with particularly

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WADDINGTON J

great care, having regard to the likelihood of such a sentence ever being brought into operation. Sentences must, after all, be realistic.

In the present case I am satisfied that the accused, having been detained for a month, has been in prison long enough. Also, having regard to the accused's advanced age, I am of the view that the suspended sentence of imprisonment should be shorter. The sentence is accordingly set aside and the following is substituted:

"9 months' IWL, of which 8 months' IWL is suspended for 3 years on condition that the accused is not convicted of any offence committed during that period involving the unlawful possession, sale or cultivation of dagga and for which the accused is sentenced to undergo imprisonment without the option of paying a fine."

The effect of this order is that the accused is entitled to his immediate release.

Dumbutshena JP agrees.

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S v CHAMBOKO 1983 (1) ZLR 292 (HC)

Court **High Court, Harare**

McNally & Korsah JJ

13 & 22 June 1983

Flynote

Criminal procedure - sentence - theft - award of compensation made to complainant in terms of s 341(11) of Criminal Procedure and Evidence Act [Chapter 59] - award insufficient to cover sum stolen - portion of sentence suspended on condition that balance paid.

Headnote

The appellant pleaded guilty to the theft from his employer of \$1 782.52. He was sentenced to a term of imprisonment of which portion was suspended. Compensation in the sum of \$1 000 was awarded in terms of s 341(11) of the Criminal Procedure and Evidence Act [Chapter 59]; the complainant waived any right to an award in excess of \$1 000. The complainant had available to it money due to the appellant totalling \$1 896.63.

Held, that it was not in accordance with the principle of restitution to offer no inducement to an accused who, as here, could make restitution in full. The fact that compensation had been awarded in terms of s 341(11) did not prevent the Court from making an order for a suspension of sentence conditional on making restitution in full or the wrongdoer from offering further reparation. It has never been the policy of the law to sanction the enjoyment of the fruits of crime by the criminal. Accordingly, a further portion of the sentence of imprisonment would be suspended on condition that the appellant repaid the outstanding sum due.

Cases cited:

S v Tinarwo HC-H-370-82;

S v Rionda AD 70/81;

R v Zindoga AD 45/80;

S v Gwashu HC-H-221-82.

K J van Huyssteen, for the appellant

Miss S Ahmed, for the respondent

Judgment

Korsah J: The appellant was employed by Curlings Engineers Company as a sales despatch clerk. As such clerk, his duty was to make out invoices for goods supplied by his employers to customers and to receive

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payment therefor. The invoices are issued in triplicate.

On 15 January 1982, the appellant made out an invoice number 8446 for steel bars to RTO Engineering worth \$19,60. He wrote on the original sheet only, leaving the duplicate and triplicate copies blank. After he had received the moneys for the consignment, he filled in the two copies as having received only \$2,79 for and on behalf of his employers, thus converting \$16,81 to his own use.

This *modus operandi* was employed by the appellant on eighteen other occasions during the period February 1982 to March 1983. And the resulting prejudice to his employers was \$1 728,52.

He pleaded guilty to nineteen counts of theft by conversion and was sentenced to 2 years' IWL, of which 6 months were suspended for 5 years on condition that he is not, during that period, convicted of any offence of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine or to a fine in excess of \$25. Compensation of \$1 000 was awarded to his employers who, in compliance with subs (11) of s 341 of the Criminal Procedure & Evidence Act [Chapter 59] waived all rights to additional monies over and above \$1 000 in a letter dated the 9th March 1983.

At the time of his conviction and sentence the appellant was entitled to annual leave pay of \$1 286,63 from employers who were also holding for his benefit pension contributions amounting to \$610. In accordance with the Court order granting compensation, Curling Engineering satisfied itself out of the funds it held for and on behalf of the appellant.

The appellant now complains that the effective prison sentence of 18 months' imprisonment with labour induces a sense of shock because it overstates the value of money and seriously undervalues human liberty. Further, that it under-estimates the deep and permanent impact of prison conditions on a free individual.

Personal liberty, of course, cannot be evaluated in terms of money. person who offends the law may be punished because of the deterrent effect of the punishment on him as well as the punishment serving as a warning to others to desist from committing such acts. But offenders must be punished in proportion to their guilt or in proportion to the amount of injury they have inflicted.

All that a court can do is to make a rough assessment, having regard

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to all the surrounding circumstances, whether an offence merits a light or a heavy punishment. And in assessing the nature of the punishment to inflict, the paramount consideration is: what is the least punishment that is likely to dissuade men in this situation from behaving like this?

Once the pattern of punishment has been set, like cases must attract like punishment to denote the even-handedness of justice. And a sentence will only be interfered with on appeal when it so departs from the normal pattern that it induces a sense of shock.

Before I turn to the authorities to which the Court was referred I think it important to bring to mind the mitigatory factors which apply in this case. The appellant is a first offender; he is married with three children; he pleaded guilty to the charges preferred against him; he has paid the compensation and he has lost his job.

I propose to consider only those authorities brought to our attention in which the accused was a first offender, the offence was of a like nature, and the accused by virtue of his position of trust was enabled to commit the offence.

In *S v Tinarwo* HC-H-370-82, the appellant, as a clerk of the Community Court, received cash amounting to \$1 535 from various litigants for payment of messengers fees or damages or fees of the Presiding Officers. He stole the whole amount and was brought before the Court on fifty-one counts of theft by conversion.

He was 27 years of age, and had been recently married with a young baby and other members of the family to support. He was sentenced to 18 months' IWL, of which 9 months were conditionally suspended. On appeal, against sentence, the Court declined the invitation to interfere with the sentence, and observed that: "In fact, the effective sentence of 9 months IWL or possibly 13 months' IWL errs on the side of leniency . . .", for the reasons stated in the judgment. I take it that, but for those reasons, the effective term of 9 months' imprisonment is adequate for this type of offence.

In *S v Rionda* AD 70/81, the appellant was convicted of the theft of some \$2 000 from her employers. She was employed to receive moneys from persons paying their rent to the firm of estate agents for whom she worked. She achieved her thefts by altering figures on the duplicate and triplicate receipts on 18 occasions within a period a little short of two months. She was a first offender and married with three children. She was sentenced

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to imprisonment with labour for 12 months, of which 6 months were conditionally suspended.

On appeal, although extraordinary mitigatory factors were urged on her behalf, the Court felt compelled to impose some penalty on the appellant for what it deemed to a "serious and

unfortunately prevalent offence," and refused to interfere with effective sentence imposed.

In *R v Zindoga* AD 45/80, the appellant, while employed as a cashier, stole \$1 686,05 from his employer over a period of five months. He converted money to his own use on 29 occasions during that period and the thefts only ceased when they were discovered in the course of an audit. He was a first offender, married with two children and was earning \$350 per month.

He was sentenced to 2 years' IWL, 9 months of which were conditionally suspended. On appeal, the effective terms of 15 months was further reduced by a suspension of 8 months on condition that the appellant repaid the employer the sum stolen within a certain period.

Finally, in *S v Gwashu* HC-H-221-82, where the appellant's duty was to receive payment of fees for and on behalf of his employer for work done, and he converted to his own use twelve such fees amounting to \$2 146,42 he was sentenced to 37 months' IWL with 18 months' IWL suspended.

On appeal, the Court said of the sentence:

"As regards a possible sense of shock, the Court considers that the sentence, although severe, is not seriously out of the line with, for example, the sentence in the cases of *S v Zindoga* AD 45/80, and *S v Maziyofo* HC-H-142-82."

It would appear that the effective term of imprisonment for this sort of offence ranges from 6 months to 18 months.

In the instant case, the compensation which was awarded to the complainant has been paid. And the appellant still has funds in the hands of his employers which can satisfy the remainder of the loss to them. It does not appear to me to be in accord with the principle of restitution to offer no inducement to an accused who could make restitution in full. A further suspension of portion of the effective term on condition that the appellant repays to his employers the balance of the amount he stole seems to me an order that would meet with the justice of the case.

I am not unaware of the provision in 341(1 l) of the Criminal Procedure & Evidence Act [Chapter 59] that-

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"Any person against whom an award has been made under this section shall not be liable at the suit of the person in whose favour an award has been so made to any other civil proceedings in respect of the injury for which compensation has been awarded. "

But I take it to mean that a person in whose favour compensation is awarded under s 341 is precluded from commencing any civil proceeding in respect of the same injury. The object, I believe, is to stop a person claiming compensation more than once for the same injury. The section does not operate as a fetter on either the power of the Court to make an order for a suspension in sentence conditional upon making restitution in full, or the right of a wrong-doer, smitten by remorse, to offer further reparation after payment of the compensation.

It has never been the policy of the law to sanction the enjoyment of the fruits of crime by the

criminal. And as in this case it is known that the appellant has control of funds out of which full reparation may be made, if he wishes his effective term of imprisonment to be further reduced, I deem it just to offer a further suspension in sentence conditional upon paying the balance of the moneys which he converted to his own use as an inducement to make reparation in full.

The sentence imposed by the magistrate is confirmed with the following addition:

"and a further period of eight months is suspended on the same condition and on the further condition that the appellant repays to his former employers the sum of \$728,52 on or before the 31st July 1983."

McNally J: I agree.

Sawyer & Mkushi, legal practitioners for the appellant

Attorney-General, legal practitioner for the respondent

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S v CHIVANGA 1983 (1) ZLR 297 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Gubbay AJA

14 & 22 June 1983

Flynote

Criminal procedure - sentence - motoring offences - culpable homicide - appellant driver of a bus - although basis of charge is negligence, somewhat heavier sentence justified where death caused - fact that accused driving a bus increases moral blameworthiness - custodial sentence justified.

Headnote

While the basis for a charge of culpable homicide arising from a traffic accident is negligence, a somewhat heavier sentence than would be given for negligence *simpliciter* can be justified on the basis of the sanctity of human life. The main consideration, however, is the moral blameworthiness of the accused, not the number of people killed. The driver of a public service vehicle which is loaded to capacity with passengers owes a high duty of care to his passengers and to drive negligently and thereby cause the death of any of those passengers may merit a custodial sentence.

Cases cited:

S v Mahachi 1976 (2) RLR 95;

R v Barnado 1960 (3) SA 522 (AD);

R v Ezekiel AD 100/69 (not reported).

A A Chiwara, for the appellant.

M J Gillespie, for the respondent.

Judgment

Baron ACJ: The appellant was convicted of culpable homicide. He was sentenced to 12 months' imprisonment with labour of which 4 months were suspended for 5 years on conditions; in addition he was prohibited from driving all classes of motor vehicle for a period of 12 months and from driving an omnibus during his life-time; his driving licence was cancelled.

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The facts, shortly, were that the appellant was driving an omnibus fully laden with about one hundred passengers from Harare to Seke and Chitungwiza along the Prince Edward Dam Road. At the Hunyani Bridge the appellant's left front wheel struck a concrete pillar on the left-hand side of the entrance of the bridge; as a result the appellant lost control of the bus which finally went through the railings on the left or eastern side of the bridge and overturned; ten people died as a result of injuries received in the accident.

The evidence for the prosecution was principally that of a forensic scientist and two passengers in the bus. The passengers told the court that from the time the bus left Harare the appellant was carrying on a conversation with a man who was standing next to him on the steps of the bus and they both said that the conversation was about a job which this man said the appellant could get and in which he would earn a good deal more than he did driving a bus. The evidence of these two witnesses was by no means identical but in its essential features they were consistent; they both said that the passengers on the bus had remonstrated with the appellant for talking to a passenger but that the appellant had paid no attention; one of them said that at one point the appellant was driving with only one hand on the steering wheel. The most serious inconsistency between the evidence of these two witnesses was that one of them said that generally the appellant had driven well up to the time he approached the bridge while the other said that he had on more than one occasion veered on to the wrong side of the road.

The appellant's defence was contained in a long statement he made to an insurance assessor and which was put in as the outline of his defence. In this statement the appellant said that the bus he was supposed to take on the run in question was found to have defective steering and he was given the bus he actually drove. He said that he was familiar with this bus which also had defective steering, and he objected to driving it because he had reported the defect only a few days earlier. He was told that the steering had been repaired and according to him he was threatened with dismissal if he refused to drive the bus. He said he drove it as a result of this threat and found that the steering was still stiff, with the result that when he executed any kind of turn or change of direction he had difficulty in bringing the bus back onto a straight course. He described the events prior to his approach to the Hunyani Bridge. The essence of his defence is contained in the passage in his defence outline which described what happened immediately before he entered the bridge. He said he distinctly remembered hearing a "hard noise" like the sound of a bursting

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bicycle tube; he said that he could not fully remember the exact sequence of events which followed but did remember a violent movement of the bus, a terrible impact noise, and screaming and shouting from the passengers while he was attempting to "correct the direction of the bus and keep it steady".

The appellant's defence was thus that the front left-hand tyre of the bus had burst just as he was about to enter the bridge and that as a result the bus had struck the concrete pillar, overturned and finally plunged over the side of the bridge. The magistrate considered this defence but rejected it; he accepted the evidence of Doctor LT Nhari, a forensic scientist, who told the court that he had examined the wheel, tyre, and tube in question and had come to the firm conclusion that the damage to the tyre and tube was caused as a result of an impact and not by a blow out; he pointed out also that examination of the rim of the wheel and of the tyre and tube revealed none of the "run flat" damage which one found when a tyre had burst. On the basis of this evidence the magistrate found that the bus had struck the pillar prior to, and not as a result of, the bursting of the tyre. Not only is there no possible basis on which this Court could upset this finding, but it seems to me that it is the only possible finding to which the magistrate could have come in the light of the expert's evidence as to his observations and his explanations as to the reasons for his conclusions; furthermore there is no evidence, apart from that the appellant himself, to support a suggestion that had there been a front wheel burst. There was certainly evidence that the steering on this bus was stiff, and as Mr *Gillespie* on behalf of the State conceded this may have contributed to the appellant's inability to control the bus after it had struck the concrete pillar; but the stiff steering was clearly not the cause of that original impact. As to conviction therefore the appeal seems to me Inarguable and must be dismissed.

As to sentence, Mr *Chiwara* submitted that the degree of negligence in this case was not so high as to warrant a custodial sentence without the option of a fine notwithstanding that a number of people had been killed. It can be argued with some force that negligent driving is no more blameworthy if it causes death than if it does not. This matter was considered by this Court in *S v Mahachi* 1976 (2) RLR 95; LEWIS JA (as then was) referred to *R v Barnado* 1960 (3) SA 552 AD where SCHREINER JA justified the imposition of a heavier sentence for culpable homicide on the basis of the sanctity of human life, but he then at 106 urged a note of caution when he said:

"It seems to me, with respect to the trial court, that too great an emphasis has been

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placed on the number of people killed in this unfortunate accident.... The main consideration is the moral blameworthiness of the driver concerned."

I respectfully agree, and would only add that support for the proposition that a somewhat heavier sentence is justified where death has occurred may be drawn from the structure in

which the common law offence of culpable homicide and the statutory offences under the Road Traffic Act 48 of 1976 are to be found. Section 44 of the Act provides that for the offence of reckless driving a custodial sentence of up to ten years may be imposed, and section 43 provides a maximum penalty of five years in the case of negligent driving or dangerous driving. The Legislature must be presumed to have been aware of the common law offence and to have intended that the courts should be at liberty on the facts of any given case to regard culpable homicide more seriously than either of the statutory offences.

I turn then to consider the moral blameworthiness of the appellant in this case. He was driving a fully laden bus, the steering of which he knew to be stiff. The duty of care towards his passengers of the driver of a public service vehicle is, as has been stressed by the Courts over and over again, very high. I think it is worth repeating what was said by BEADLE CJ in *R v Ezekiel* Appellate Division Judgment No 100/69 (not reported):-

"There are a number of cases in which this Court as stated the considerations which should be borne in mind before a person is sentenced to imprisonment for the crime of culpable homicide where the crime arises out of the driving of a motor vehicle and they all lay down that the Court must find that the manner in which the accused drove was reckless or grossly negligent.... The driver of a public service vehicle which is loaded to capacity with passengers owes a high duty of care to his passengers and to drive in the manner in which the appellant drove on this day shows a complete disregard of that high duty of care. He may well have killed a larger number of people than he did kill."

It is clear then that while the fact that a number of people have been killed does not of itself increase the moral blameworthiness of the conduct of the appellant, the fact that he was driving a public service vehicle carrying a large number of people who would be in a danger of serious injury or death if he fell short of his duty of care towards them most certainly increases that moral blameworthiness. In my view the appellant's negligence in this case was of a high order. He was driving after dark along a road with which he was familiar and reached a point where he knew he was approaching a bridge; from the photographs and the plan it is clear that the bridge was wide enough to carry two lanes of traffic, so that there was no question of any kind of difficulty or emergency caused by oncoming traffic. The appellant knew that the steering wheel of his bus was stiff; notwithstanding

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this, and notwithstanding the remonstrations of his passengers, he continued to talk with a man who was standing near the front of the bus. Bearing in mind the high duty of care the appellant had towards his passengers his conduct in this case, which must at best be described as casual in the extreme, fully merits a custodial sentence.

The magistrate imposed a sentence of twelve months' imprisonment and suspended four months on conditions. It is by no means clear to me whether his approach was to consider what the offence itself merited and then to suspend a portion of the sentence on the basis of the mitigating factors such as the fact that the appellant was a first offender, or whether his approach was that he felt the offence merited an effective sentence of eight months' imprisonment and added a further four months as a deterrent. I do not regard the second of these approaches as desirable, but in any event I venture to doubt the effectiveness of the

suspension of a portion of a term of imprisonment in cases of negligent driving.

In addition the magistrate prohibited the appellant from driving all classes of motor vehicle for a period of twelve months and an omnibus during his lifetime. These prohibitions come to me with a sense of shock. The appellant was not charged in the alternative with reckless driving but with negligent driving, and the prohibition from driving an omnibus during his lifetime is a mandatory portion of the sentence only in the former case (see s 44 of the Road Traffic Act 48 of 1976). It must always be borne in mind that prohibition from driving is part of the total sentence and where another part of the sentence is an effective term of imprisonment of eight months the period of suspension should be considered in that light. Mr *Gillespie* very properly conceded that these prohibitions must be regarded as very heavy; and where, as here, we have a man who earns his living by driving it seems to me that he should not be prevented completely from earning his living after he has served his prison sentence.

In the result I would set aside the sentence imposed by the magistrate and substitute the following;

Eight months' imprisonment with labour. The appellant will be prohibited from driving an omnibus for a period of five years; he will be prohibited from driving all other classes of motor vehicle for a period of six months. The appellant's licence to drive an omnibus will be cancelled.

For the avoidance of doubt I should make it clear that the prohibitions from driving will date from the date of this judgment.

Georges JA: I agree.

Gubbay AJA: I agree.

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S v KAMTANDE 1983 (1) ZLR 302 (HC)

Court **High Court, Bulawayo**

Squires J and Reynolds AJ

24 June 1983

Flynote

Criminal procedure - sentence - "special reasons" justifying sentence less than statutory minimum - entrapment - whether and when can amount to a special reason - Precious Stones Trade Act, 1978.

Headnote

In providing in Act I of 1982 the amendment to the Precious Stones Trade Act, 1978 which laid down minimum prison sentences for certain offences under the Act unless the convicted person can show that there are "special reasons" why such a sentence should not be imposed, the legislature must have been aware that most convictions for the offences of unlawfully dealing in

or possessing precious stones result from traps set by the Police. This means that entrapment cannot *per se* be regarded as a "special reason" for a sentence less severe than the specified minimum, but in certain cases it can be so regarded.

The Courts have long distinguished between trapping which is acceptable and trapping which is not, and it can be assumed that this is a recognised basis for distinction as far as the legislature is concerned. For example, if the trapping was such that it promoted the commission of the offence by someone who would not otherwise have committed it, that may be regarded as a special reason.

Whether in any particular case it is to be regarded as a special reason is left by the lawmaker to the opinion of the trial court.

Cases cited:

R v Clever & Another 1967 RLR 245;

S v Nkomo & Others 1976 (4) SA 800 (RAD);

R v da Costa Silva 1956 R & N 369;

S v Chisiwa 1981 ZLR 666;

S v Dube H-B-32-83 (not reported).

H I Bisset for the appellant.

P Batty for the respondent.

Judgment

Squires J: It is, of course, well-known by now that since Act 1 of 1982, and even before that by virtue of the Emergency Powers Regulations,

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the penalties imposed by s 3(2) of the Precious Stones Trade Act of 1978 are imprisonment for an obligatory period of not less than three years unless the convicted person satisfies the Court that there are special reasons in the particular case why such a sentence should not be imposed. And the present appeal raises the interesting question of whether a conviction resulting from a police trap amounts to special reasons within the meaning of s 3(2) of that Act as amended.

The facts of the case show that the appellant was charged with one count of dealing in precious stones - that is to say uncut emeralds, in contravention of s 3(1) of the Act in question; one count of fraud; and another count of possessing a small parcel of uncut emeralds, distinct from the stones that formed the basis of the first charge. He initially pleaded guilty to all three charges, and was actually found guilty on all three. But he subsequently applied to alter his plea on the third charge (that of possessing precious stones) to one of not guilty. This was allowed,

and in the event - somewhat surprisingly, in view of the evidence - he was acquitted of this charge. The evidence led by the State in support of this count was also used by the defence, quite properly, to elicit evidence favourable to the appellant in mitigation of sentence on the first two counts, as well as on the merits of the third charge. The manner in which the evidence was led and the frequent interruptions to its presentation presents a somewhat confused and confusing picture. But the end result was that the appellant claimed to have been approached by a police informer to offer for sale to an interested buyer, not only a parcel of rough emeralds but a bar of gold as well. This approach, he said, was made at about 10 a m on 2 February this year, by the informer who said he had knowledge of a man who was prepared to purchase emeralds, and some emeralds to sell this person. It was arranged that the informer would bring the would-be purchaser to meet the appellant at 1 p m that day, to further discuss the venture. At the appointed hour the informer duly called for the appellant at his place of work, and took him the distance of a few city blocks to a meeting place at the junction of Fort Street and Fifth Avenue. Here he was introduced to the would-be purchaser, who was actually a member of the CID Gold Trade Section, acting in concert with the informer. It was apparently asked by the appellant, through the informer and accepted by this purchaser, that the latter was interested in buying emeralds and gold, for the sums of four thousand and six thousand dollars respectively - the purchaser flashing a roll of currency notes as proof of his intentions, if not his *bona fides*. When that had been established, it was agreed the parties would meet later that day at an appointed spot on a corner of Wilson Street and 6th Avenue, the one to hand over the emeralds and gold and the other

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to hand over \$10 000. The appellant and the informer themselves arranged to meet after work at 5 pm whence they repaired to a city hotel. The appellant was then given the emeralds and a bar of metal in a sheet of newspaper contained in a plastic carrier bag. It was at least at this stage, furthermore, that he was told by the informer that the bar of metal was not in fact gold, but only a fake - hence the reason for the charge of fraud. Fortified by a few beers the appellant and the contact then set forth to keep the appointment with the would-be buyer and they met at the agreed place. The party went some distance from there to the more discreet, if less salubrious, surroundings of a nearby sanitary lane, established that each had what the other wanted, and a parcel containing money was handed over by the purchaser in exchange for the emeralds and the bar of unspecified metal. After turning away as if to examine the genuineness of the stones in a better light, the purchaser revealed himself as a police officer and arrested the appellant.

To this recital of events as they happened must be added the explanation given by the appellant as to his role in this transaction. It is difficult to paraphrase or distil this with any certainty that one can capture the true meaning so it may be best portrayed by quoting exactly what the appellant is recorded as saying. His explanation of his reason for taking the accepted part in the venture was as follows:

"This young man (ie the informer) told me that he had some things; he wanted me to accompany him to this white man (the trap buyer) because he was not sure that he was going to give him the money that he wanted.

Q. So, in essence you were simply there in order to safeguard the interests of the young man? A. Correct."

It is also clear that he knew it was unlawful to sell uncut emeralds; and that before he was told that the gold he was to sell was fake he also knew that for him to sell gold was unlawful. It is also, I think, necessary to bear in mind that it was also revealed by the evidence that the appellant was promised some possible reward and apparently undertook the role he played for this incentive. But, apparently, no definite amount was promised and the question was left for this young man, on whose behalf he did all this, to think this matter over. And finally, it must be stated the appellant said that he would not have become involved in this transaction but for the approach made to him by the informer.

On the basis that both the opportunity to commit this offence, ie of dealing in precious stones, and the means of so doing were put in his way by the police with the temptation of a reward for his participation, Mr *Bisset* argued that this trapping was of such a nature as to constitute a

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"special reason" within the meaning of the penalty section of the Act. The principle he relied on was stated in the decision of *R v Clever and Another* 1967 RLR 245 in passages from the judgment of QUENET JP at p 247A and MacDONALD JA at p 249E-G. The first states the matter in these words:

"Indeed, the use of traps, in my opinion, is justified only where ordinary police methods have proved ineffective and then only in respect of clearly defined offences in respect of which there is a general recognition of the propriety of police and departmental testing."

And the second states the problem thus:

"If the police believe that it is essential in the public interest to resort to trapping, the greatest care should be taken to ensure that the temptation afforded by the trap is no greater than the temptation which normally exists. In this connection regard must be paid to the period of time during which members of the public will be tempted . . . If there is any reasonable possibility that a person caught in a trap is a person who might not otherwise have offended against the law contravened, the appropriate penalty might well be a caution and discharge."

In short, said Mr *Bisset*, there are traps and traps, and trapping should only have no effect on sentence where it was used in the detection and not in the propagation of crime. He accepted, because of the decision in *S v Nkomo and Others* 1976 (4) SA 800 (RAD) as an application of this principle, that there would be nothing to object to about a trap to purchase precious stones already possessed by a would-be seller, because such seller had in the first place almost invariably unlawfully acquired such gems to sell. But in the instant case it could be said that both the emeralds and the 'gold' bar were given to the appellant by the informer, and he was promised a possible reward. This was making the temptation greater than it would otherwise be, and created a real possibility that the appellant was a person who might not otherwise have offended against this law - as the appellant had claimed.

This argument seems to me to raise two problems: one relating to the law and the second relating to the facts of the case.

So far as the first difficulty goes, it stems from the fact that the decisions relied on by Mr *Bisset*,

some of which are referred to above, about the effect on sentence of a conviction obtained by trapping were given before the amendment of the law by Act 1 of 1982 which introduced the mandatory minimum penalty on a conviction for this offence. The mischief at which this amendment was aimed was the widespread, even endemic, extent to which illicit dealings in emeralds had proliferated, resulting in a serious

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and tangible economic loss to the Government and the country's economy. Moreover, as Mr *Batty* pointed out, the Legislature must have realised, as past experience shows, that most convictions for the offence of unlawfully dealing in or possession of precious stones, result from trapping. Any such attempt by the Legislature to deter the commission of these offences must, of course, be implemented by the Courts in their administration of the law as part of carrying out this legislative intention. But the nice question is whether the Legislature intended that merely because a person was convicted through the use of a trap, this fact should be regarded as a "special reason in the case" justifying a penalty other than the mandatory minimum.

I am quite sure, having regard to the reason for the amendment, that it did not intend to enact that any person convicted by means of a trap should be able to claim to have it regarded as a special reason for a sentence less severe than the minimum presented, for such a construction would clearly negate the clear intention to deter the commission of the offence by a more severe penalty. What I am not sure of is whether the Legislature intended that under no circumstances could the fact that a conviction was obtained by means of a trap be urged, or accepted, as a special reason in this case, and so justify a sentence other than the mandatory minimum.

Giving the problem the best consideration of which I am capable, I do not think it can be said to have intended such an exclusive and potentially hard result. In the first place it specifically left open a loophole whereby the mandatory sentence need not be imposed, which must mean it did not intend that such penalty should always be applicable. Secondly, the Legislature was here dealing with the quantum of punishment for this sort of offence, and it knew that the courts had for long taken the view that a provision for "special reasons" or "special circumstances" in such a context and justifying a sentence other than that prescribed, should be interpreted and enforced as "reasons out of the ordinary", whether in their extent or nature; and included any unusual concomitant aspect of the offence which might have the effect of justifying a less severe sentence than the one provided. See, for example, *R v Da Costa Silva* 1956 R & N 369 and *S v Chisiwa* 1981 ZLR 666. And thirdly, while it knew in enacting such legislation that traps were frequently used in securing the arrest and conviction of offenders, I think it must be taken to share the view of the Courts that while trapping may be necessary and unavoidable in the public interest, particularly in certain types of offence where detection is otherwise difficult, the system nevertheless contains many distasteful aspects, particularly the artificial propagation of crime to which it can lend itself. The Courts have long drawn a distinction between trapping which is

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acceptable and trapping which may not be; and in the latter situation a lesser penalty than usual could well be imposed. And by not enacting anything to change or clearly alter this situation, I think the Legislature intended to demonstrate that such a basis for distinction is an acceptable one so far as the Legislature was concerned.

In the result, while I think it clear that the Legislature did not intend that any and every trapping case should constitute *per se* a special reason for the Courts not to impose the minimum penalty, I do not think it intended to enact that in no case could such a means of conviction be accepted as a special reason. If there was something special or abnormal about the method of trapping used, or the sort of offender so convicted, or for some similarly special reason the trapping offended against the acceptable limits of that practice, then its possible acceptance as a special reason is not excluded. For example, and without suggesting that such category may be exhaustive, if the trapping used was such that it promoted the commission of an offence by someone who would not otherwise have committed it, then that may well be regarded as a special reason, since the law as hitherto administered by the Courts has always regarded that as a factor that could be mitigatory of sentence. And being a "reason that is special to the case", it could properly be accepted or relied on under legislation that so permits, to impose a sentence other than the obligatory minimum. On this basis the approach should be as stated by GUBBAY J in *S v Dube* H-B-32-83. The finding as to whether there are special reasons in the case, including in this respect the use of a trap, is left by the lawmaker to the opinion of the trial court. Where that is done the power of an appeal court to overrule that opinion is limited in the absence of a misdirection on the facts upon which such conclusion is reached. The appeal court will only interfere with that opinion if it is satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the same facts.

The second problem arises out of the facts in the present case, and the claim by the appellant that he was put up to the commission of the offence by the informer, and given the means to do so, with the possible promise of some reward. Speaking for myself, I would have thought the appellant's evidence so redolent with improbability as to justify the magistrate rejecting it as false, notwithstanding that the informer was not called to give evidence in rebuttal. To claim that he acted as agent for a principal when the principal himself was present at all stages of their transaction and always intended to be present, and what is more did so for a complete stranger for a vague and unspecified promise of a reward, seems to me to be so unlikely as

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to place an intolerable strain on one's credulity. However, the magistrate accepted this version as the fact of the matter and we are obliged to decide the result on that basis, including the premise that the appellant was tempted into the commission of the offence and given the means to do so, by the informer in conjunction with the police trap.

However, notwithstanding that, and notwithstanding the sometimes confused thinking and the alleged misdirections of the magistrate, I am not persuaded that he was wrong in his eventual conclusion that there were no special reasons here to justify the imposition of a lesser sentence

than the mandatory one. For, despite the fact that temptation was placed in the way of the appellant it does not seem to me that he is the sort of person "who would normally avoid crime and . . . resist ordinary temptations". See *R v Clever and Another*, *supra*, at p 247I. On his version he was asked at about 10 am if he would be party to the sale of the quantity of emeralds alleged. Though it is not clear when he was first asked to also sell the 'gold' it seems that by the time he first met the trap at 1 pm he knew that this was also to be part of the transaction. Yet knowing both these would be illegal and enticed by a vague promise of a reward, so that this was really no more than a possibility, and the reassurance that the informer knew the purchaser so that nothing would really go wrong, he committed himself to the venture. Again, notwithstanding the rest of the afternoon to reflect and to reconsider this proposed breaking of the law, at 5 pm he remained still committed. Thereafter, and despite knowing that the "gold" bar was a fake, and that he was also being asked to perpetrate a substantial fraud on the would-be purchaser, he was still prepared to ally himself with the commission of the offences. In these circumstances the appellant seems to me to be eminently a person ". . . ready and willing to commit crimes should the occasion arise"; and even in jurisdictions like the United States where apparently "entrapment" can even be a defence, the use of trapping to catch such a person is accepted.

In applying the caution of MacDONALD J A in *Clever's* case, this trap was initiated in circumstances which gave the appellant ample opportunity to decline without even beginning the preparation of the acts that constitute the offence, and in circumstances in which only the informer would know he had been approached. Moreover, the period of time during which the temptation was offered seems in no way to be disproportionate to the time that would normally attend the commission of such an offence.

As was the approach by the Court in *S v Dube supra*, though not a trapping case, the longer an accused person has to appreciate, reconsider

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and desist from a proposed course of criminal conduct, the less exculpatory does an innocent or venial beginning to the enterprise become. The same seems to me to apply to a situation like the present.

Applying the approach taken by the Court in *Dube's* case that although it is possible to validly criticize the magistrate's judgment as capable of being more cogently expressed, I do not think he has substantially misdirected himself on the facts. Nor do I agree that he contradicted himself in accepting, on the one hand, the appellant's version of events, and thereafter taking into account, on the other, facts which aggravated the culpability such as that he attended two meetings with five hours between them and did so only with the hope of an uncertain reward: that he did so without any compulsion and with the object of gaining \$10 000 on behalf of the seller: that he further represented that the metal bar was gold and knew that the dealing in both articles was unlawful. I think all the trial court was there doing was balancing the special aggravating features against the special mitigating features in making the value judgment involved in any question of degree that may be implicit in deciding whether there are special

reasons in any case.

Nor do I think having regard to these facts, considered cumulatively, that the conclusion the magistrate reached was an unreasonable one. Indeed, speaking for myself, if I had been presiding at the trial my opinion would not have differed from that of the magistrate.

Mr *Bisset* also argued that as the two offences in question were part and parcel of the same criminal enterprise, the magistrate should have taken both as one for sentence, or at least ordered the sentence on the fraud to run concurrently with the dealing in emeralds. I was initially inclined to think there may be merit in this aspect of the appeal, but on further reflection I am also satisfied that we should not interfere with it. Although the two offences were committed at the same time and as part of the same enterprise they are different in character and in degree of culpability; so that I do not think the magistrate can be faulted for not treating them as one for the purposes of sentence. Moreover, the effective sentence on the conviction for fraud, if it errs at all, errs, in my view, on the side of leniency for a fraud of such subjective culpability. I do not see any basis for valid criticism in the magistrate's decision here, and there is no justification therefore for altering it. It follows in result that, in my view, there is no merit in the appeal and it must be dismissed.

Reynolds AJ: I agree.

Endnotes

1 (Popup - Popup)

See p 5 of this volume. - ED.

2 (Popup - Popup)

See 1982 (2) ZLR 29. - ED.