1983 (2)

THE ZIMBABWE LAW REPORTS 1983 [PART 2]

S v NCUBE & ANOTHER 1983 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Gubbay AJA

10 June & 4 July 1983

Flynote

Criminal law - assault with intent to do grievous bodily harm - constructive intent - accused must have known that there was a risk of grievous bodily harm resulting and have been reckless whether or not that result ensued - evidence - medical evidence - improper and misleading for doctor to present complaint by patient as his finding.

Headnote

On a charge of assault with intent to do grievous bodily harm, the test as to whether that intent is present is whether the accused, when he perpetrated the assault, knew that there was a risk of grievous bodily harm resulting and was reckless whether or not that result ensued. As to whether the accused can be said to have known, the modern trend in Roman-Dutch Law towards the subjective approach to *mens rea* has led to the formulation that the accused "must have known and therefore did know" that the risk was present. This phrase does not import an objective approach; it means that in all the circumstances the risk was so patently obvious that when the accused says he did not appreciate the risk he cannot possibly be speaking the truth.

When a medical report from a doctor is produced, it is entirely proper for the report to set out the patient's history and his complaint and for the doctor to comment thereon following the examination. It is however improper and most misleading when a complaint given by the complainant himself appears on the doctor's report as his own finding.

Cases cited:

R v Edwards 1957 R & N 107;

S v Moyana 1980 ZLR 460;

R v Dhlamayo 1948 (2) SA 677 (AD).

J B Colegrave, for the appellant.

M T O'Meara, for the respondent.

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Judgment

Baron ACJ: The appellants were convicted of assault with intent to cause grievous bodily harm, and were sentenced to 12 months' imprisonment with labour of which 7 months were suspended for 4 years on conditions; they have appealed against both conviction and sentence.

BARON ACJ

On 15 February 1982 at about 7 pm the complainant, a young man, was at the Sakubva Market Place in Mutare; he saw a young girl and, as he put it, proposed love to her. She moved away and sat with three women, who proved to be the wives of the second appellant; it seems that they were sitting in a small enclosure formed by some of the second appellant's furniture. The complainant followed the young girl and continued to press his suit. The appellants arrived in a municipal car. It seems clear that the second appellant became angry - perhaps because the complainant had trespassed into his enclosure - and grabbed the complainant round the throat; the appellants then pushed the complainant into the vehicle, saying that they were going to take him to the police. In fact they did not do so; instead they drove the complainant to a point on the Vumba Road some 4 kilometres or so from Mutare where they pulled him from the car and forced him down a slope at the side of the road.

Thus far the facts cannot seriously be disputed. The appellants denied driving the complainant out of Mutare and said that the complainant must have received his injuries in some other way, but Mr *Colegrave* very properly conceded that their evidence on this point cannot be accepted.

However, the complainant's version of what happened on the Vumba Road equally cannot be accepted and in one vital respect the magistrate did not in fact accept it. The complainant said he was ordered to run down a steep slope and when he refused he was slapped; he saw what he thought was the barrel of a firearm protruding from the first appellant's hip. He started to run down the slope when he heard what he thought was a bullet whizzing past his face, grazing him above his left eye, and assumed he had been shot. He fell and rolled down the slope. He sustained a compound fracture of the left wrist and he also injured a big toe. He later made his way back to Mutare and sought help from a security guard at Mutare Board and Paper Mills to whom he reported that he had been shot at and wounded by people driving a municipal vehicle.

The magistrate considered with care the evidence supporting the allegation that a gun was used. He observed that no cartridge case was recovered and that neither appellant was later found with a gun or was proved to possess one. The doctor who originally examined the complainant and certified that his injuries were likely to have been caused by a gunshot later changed this opinion and said that they were *not* likely to have been caused by a gunshot; it emerged from the doctor's evidence that his original certificate was simply a record of what the complainant had reported to the nursing sister, and I have to say in passing that it is unfortunate to

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BARON ACJ

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say the least that the doctor should have made the assumption that this report was true and have given it as his opinion. Frequently a medical report sets out a patient's history and his complaint, and this is entirely proper. But it is not proper and indeed most misleading when a complaint given by the patient himself appears on the doctor's report as his own finding.

The magistrate referred also to the general improbabilities and presumably had in mind the extreme improbability that the wound on the inside of the complainant's left wrist was caused by the same bullet which was alleged to have grazed the complainant's head; the complainant suggested that this was because he was swinging his arms as he was running.

The magistrate - clearly correctly - held that no gun was used. However, he regarded the complainant as generally an honest witness, but in this I think he was unduly generous. The allegation concerning the gun was not some minor or peripheral item of evidence; it was a crucial feature of the complainant's original report to the police and of his evidence in court, and it is significant that he made this report initially to the security guard and then again to the nursing sister at the hospital. I cannot accept that the complainant honestly believed he had been shot; he sustained a compound fracture of the left wrist and he must in my view have been aware that he sustained this injury when he fell and not while he was running. It seems plain to me that the complainant, who was understandably very angry at the treatment he had received at the hands of the appellants and was undoubtedly in considerable pain, set about painting as black a picture as he possibly could, and indeed he succeeded to the extent that the appellants were originally charged with attempted murder. In my view, the magistrate should have approached the complainant's evidence on the basis not necessarily that it was fabricated in its essential features but that, in the light of the allegation concerning the firearm, there was a danger that there were also other exaggerations. The complainant's evidence that he heard a bullet whizzing past his face cannot be separated from the implication behind his evidence that he was struck by a missile of some kind, which was the conclusion the magistrate drew; particularly, therefore, having regard to the improbability that the complainant was struck above the left eye by something thrown by one of the appellants while he was running away from them, it was in my view unsafe for the magistrate to assume that the injury to the complainant's head was sustained while he was running away. In my view the probabilities are strong that the injury above the complainant's left eye (which is how he himself described it at two points in his evidence) was sustained in his fall.

BARON ACJ

Mr *Colegrave's* argument took the following form: He submitted first that there was insufficient evidence that the appellants had forced the complainant down the slope; he submitted that there was a possibility that the complainant fell and sustained his injuries while taking a short cut back to Mutare. I have to say that I regard this possibility as extremely fanciful and, in the light of the appellants' denial that they were ever at the spot at all and notwithstanding the caution with which I think the complainant's evidence must be viewed, I see no basis on which this Court can interfere with the magistrate's finding that the complainant fell as a direct result of the conduct of the appellants. Mr *Colegrave* submitted in the alternative that even on the basis that the appellants had indeed forced the complainant to run down the slope there was totally

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insufficient evidence to support a conviction of assault with intent to do grievous bodily harm.

Mr *O'Meara*, although he was reluctant positively to concede that no gun was used, accepted that the magistrate's finding in this regard cannot be disturbed; and he consequently accepted that what really happened in this case was that the appellants decided to teach the complainant a lesson, that they drove him some distance out of town, forced him out of the car, and ordered him to run down a slope at the side of the road. The question for determination is whether on the evidence on record this conduct supports a verdict of assault with intent to do grievous bodily harm.

The magistrate referred to *R v Edwards* 1957 R & N 107 and cited the head-note which reads:

> "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 as to whether or not such harm resulted. In this relation, grievous bodily harm means such bodily harm as seriously interferes with health."

However, as this Court pointed out in *S v Moyana* 1980 ZLR 460 at 463, this head-note does not correctly reflect the judgment. In fact BEADLE J (as he then was) in *Edwards'* case, *supra*, said at 112 that it was sufficient to prove that the accused knew that his act was likely to cause grievous bodily harm *and* that he was reckless and careless as to whether or not such harm resulted; the difference between the requirements being conjunctive or in the alternative is very material indeed. But this Court in *Moyana's* case, *supra*, held that it was overstating the position to say that an accused must know that his act was *likely* to cause grievous bodily harm, and LEWIS JP reformulated the test in these terms:

BARON ACJ

> ". . . whether (the) accused, when he perpetrated the assault, knew that there was a risk of grievous bodily harm resulting and was reckless whether or not that result ensued."

This formulation is clearly in accordance with a number of authoritative decisions in South Africa and must now be regarded as correctly reflecting the law in Zimbabwe.

The next question is the extent of the *onus* on the State to prove that an accused knew that there was a risk of grievous bodily harm. The modern trend in Roman-Dutch law towards the subjective approach to *mens rea* has led to the formulation, in this and other areas where it is sufficient to prove a constructive intent, that the accused "must have known and therefore did know" that the risk was present. The problem which might appear to arise is that the expression "must have known" seems to suggest an objective approach; but I think that the phrase as a whole, leading to the conclusion that the accused did know, can only mean that in all the circumstances the risk was so patently obvious that the accused, when he says that he did not appreciate the risk, cannot possibly be speaking the truth.

The magistrate said that "ordering a person to run down a steep slope is in itself a very dangerous thing. It shows an intent to cause grievous bodily harm even indirectly". However, apart from the use of the word "steep" at one point in the complainant's evidence, there is nothing in the record to suggest how steep the slope was. Words of this kind are obviously

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comparative and imprecise; a gradient of 10º may be regarded by one person as steep and by another as comparatively gentle. It Is perhaps unfortunate, as Mr *O'Meara* was the first to concede, that everybody at the trial appeared to be familiar with the general locality and that as a result the record does not contain the kind of description of the locality which would be of assistance to an appellate court. But the absence of sufficient evidence must not prejudice the appellants. In addition the record discloses that the complainant was unable to lead the police to the precise spot where this incident occurred, which makes it even more dangerous for the trial court to make assumptions as to the steepness of the slope. The position might have been otherwise if there had been evidence that the slope down which the complainant was forced to run, whatever its gradient, was rocky; speaking for myself, if the prosecution had established that the appellants had forced the complainant to run in the dark down a rocky slope, even quite a gentle slope, I would have regarded it as extremely difficult for the appellants to say that they did not appreciate the risk that the complainant might fall and, for instance, bang his head against

BARON ACJ

a rock and sustain serious injury. But there is no evidence that the terrain was rocky; on the contrary the complainant described the place as "having stones".

In my view, therefore, there is inadequate evidence to show that the appellants "must have known and therefore did know" that in forcing the complainant to run down the slope there was a risk that he would fall and suffer grievous bodily harm. I am consequently satisfied that Mr *Colegrave's* alternative submission must be upheld and that the convictions must be set aside and in their places convictions for common assault substituted.

I cannot, however, accept Mr *Colegrave's* submission that the assault was really a trivial matter. It seems clear that the complainant was making a nuisance of himself, but this does not justify the kind of officious conduct of which the appellants were clearly guilty. They abducted the complainant, drove him some kilometres out of town and, accepting that their intention was no more than to make him walk back, they assaulted him physically in the process.

The first appellant is a senior municipal officer aged 42 and the second appellant is aged 40 with three wives and very considerable family commitments; the appellants are described as brothers. Mature and responsible men of this kind, notwithstanding that the complainant was making a nuisance of himself, must not imagine that they can take the law into their own hands. They were fully entitled to take reasonable steps to protect the young girl from being molested by the complainant; but their conduct far exceeded what was required for her protection.

I would set aside the sentences of imprisonment and substitute fines of $100 or, in default of payment, one month's imprisonment with labour.

Georges JA: I agree with the conclusion reached by the learned ACTING CHIEF JUSTICE. I would not, however, have interfered with the magistrate's finding that there was an intent to do grievous bodily harm. Specifically I accept the formulation by LEWIS JP of the test for determining whether there was intent on a charge of assault with intent to cause grievous bodily

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harm.

On the facts there can be no doubt that the complainant was in a state of great fear. In that condition he was forced to run down what has been described as a steep and stony slope in lighting conditions which were poor.

GEORGES JA

I see no reason to speculate on the exact gradient of the slope since the appellants have chosen not to say anything on the issue. They deny having done anything of the sort. Had they said that the gradient was such that they merely anticipated some bruises and no more then the situation would have been different. In fact the complainant fell, rolled and broke his wrist.

On these facts the magistrate inferred that there was an intent to cause grievous bodily harm. There has been no misdirection on the facts and, as was said by DAVIS AJA in *R v Dhlamayo* 1948 (2)SA 677 (AD) at 706, where there has been no misdirection on fact by the trial judge the presumption is that his conclusion is correct. An appellate court should reverse only where it its convinced that the trial court was wrong. Where the appellate court is left in doubt as to the correctness of the conclusion it will uphold it.

Even if the conviction had been upheld I would not have thought a prison sentence appropriate. While it is indisputable that a prison sentence is the most usual punishment for such an offence the facts of this case are unusual. There was no direct violence, no brutality - features commonly found in cases of direct assault. The injury, though grievous, leaves no permanent disability. The appellants are first offenders on whom the effects of a prison sentence would be catastrophic - particularly the first appellant who would lose his responsible position in the municipality.

The sentence proposed by my lord the ACTING CHIEF JUSTICE seems entirely appropriate and I respectfully concur with it.

Gubbay AJA: I am in respectful agreement with the learned ACTING CHIEF JUSTICE that the convictions must be altered to common assault and the sentences reduced as proposed by him.

As I understand the magistrate's judgment his conclusion that the appellants entertained a constructive intent to cause the complainant grievous bodily harm was not based solely upon the order to run down the slope at the side of the road. He also found that the appellants had induce the complainant to hasten his descent by their action in hurling a projectile which struck him above the left eye. If this finding were justified I would have had difficulty in disagreeing with the inference of intention drawn by the magistrate. But, as pointed out by the learned ACTING CHIEF JUSTICE, it was not so justified. One is left, therefore, with a situation in which the complainant, having been forced out of the car at night, was

GUBBAY AJA

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commanded to run down a stony slope, the exact gradient of which was not established. The order was not followed by pursuit or a threat of pursuit. True that complainant must have been in considerable fear and anxious to escape the further attention of the appellants. Nonetheless I do not think it is a necessary implication from the circumstances in which the order was given that the appellants must have foreseen that the complainant would sacrifice caution and safety for speed. The pace at which he descended the slope remained within his discretion and control. What the appellants must have appreciated was the real possibility of the complainant suffering some slight injury in making his retreat. I am not satisfied, however, that they must have appreciated any more than that. It does not, of course, follow that because a victim sustains serious bodily harm that his assailant necessarily intended such a consequence to ensue. This is particularly so - as in this case - where the injury suffered was not the result of the use of any direct force.

Honey & Blanckenburg, appellant's legal representatives.

S v DE LANGE 1983 (2) ZLR 9 (SC)

Supreme Court, Harare

Baron ACJ, Georges JA & Gubbay AJA

14 June & 4 July 1983

Flynote

Evidence - prosecutor interviewing State witnesses together before trial - such an irregularity - effect of - criminal procedure - sentence - criminal injuria - verbal insult - only in very rare cases is imprisonment justified for first offender - assault - pointing of pistol with intent to intimidate - short period of imprisonment appropriate.

Headnote

It is highly improper for a prosecutor to refresh the memory of witnesses from their police statements while they are all assembled together. The reason is that a witness may well be misled, even unconsciously, into accepting the recollection of another witness as his own. Such an impropriety does not, however, mean that there is a real risk of prejudice to the accused and that any conviction must be quashed; whatever the irregularity, it is for the court to determine whether, in the final analysis, it appears that a substantial miscarriage of justice has in fact resulted. The issue is whether an appeal court considers on the evidence and on the findings regarding credibility, if any, unaffected by the irregularity that there is proof of guilt beyond a reasonable doubt. If it does so consider, then there is no resultant miscarriage of justice.

On a conviction of criminal *injuria* arising out of verbal insults, such as calling a black man a "kaffir", it is only in the rarest of cases that a peremptory period of imprisonment should be considered as an appropriate punishment for a first offender. A fine should normally be the appropriate penalty, with a wholly suspended period of imprisonment.

Where the appellant was convicted of common assault which involved, *inter alia*, the pointing of

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a firearm at the complainant with intent to intimidate him, it was held that this kind of aggressive conduct was properly punished by short sharp period of imprisonment and an effective sentence of two months' imprisonment was upheld.

Case cited:

Chandler v Horne (1842)2 Mood & Rob 423.

A P de Bourbon, for the appellant, cited: *S v Cillier* AD 69/74, *S v Underwood* AD 64/74, *S v Dziva* 1971 (1) RLR 202; 1971 (4) SA 185 (R); *R v Edjourian* AD 135/69.

GEORGES JA

M J Gillespie, for the respondent

Judgment

Georges JA: The appellant was convicted of two charges; firstly, *crimen injuria*, the allegation being that he had shouted to Clements Makwera, a census supervisor, and referring to him and two other census officials, that he "cannot be enumerated by kaffirs" and "I am going to kill you, you idiot kaffir"; and secondly, common assault, the allegation being that he had grabbed the said Clements Makwera by the shirt collar, punched him on the forehead with a clenched fist and threatened to shoot him with a revolver which he pointed at Makwera causing him to believe that the appellant had the means to carry out the threat. The prosecution withdrew a charge against the appellant for obstructing authorised officers in the carrying out of the census and that charge was dismissed. An alternative charge of contravening s 40 of the Firearms Act was also dismissed, the appellant having been convicted on the main charge of assault. The two charges were treated as one for purposes of sentence. The appellant was sentenced to four months' imprisonment, two months of which were suspended for five years on condition that the appellant was not convicted of any offence of which an assault or *crimen injuria* was an element.

Before dealing with the facts it is necessary to deal with a development which took place at the commencement of the trial.

Mr *de Bourbon*, who appeared for the defence, having outlined his defence, told the magistrate that for approximately forty minutes that morning the public prosecutor had interviewed all the State witnesses at the same time in the privacy of his own office. The public prosecutor stated that he had interviewed the witnesses but could not comment on the period of forty minutes alleged. Mr *de Bourbon* objected to this unacceptable behaviour. There was the undoubted possibility that the witnesses would know what each other would say and that the accused would be prejudiced at his trial. The trial magistrate asked the public prosecutor what the conference was about. The prosecutor replied that he was "precognizing" his witnesses.

The magistrate made no further reference to the matter. The witnesses were questioned as to what had happened in the public prosecutor's office. Clements Makwera, the complainant, a headmaster, denied that the prosecutor had discussed the case with him. He was evasive

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when asked what the prosecutor had talked about with him, replying that the pro-

GEORGES JA

secutor would know. He said that the prosecutor had checked on the witnesses' presence and their statements. Jesman Ruka agreed that he was in the prosecutor's office from 8.30 am to 9.00 am and that the prosecutor was calling their names. He denied that there had been any discussion. The other witnesses, Ottilia Makwera, the complainant's wife, Oliver Isa and All Robert, were not questioned on the issue.

"Precognition" appears to be a term of art in Scots Law. It does not appear in Bell's *South African Legal Dictionary, Words and Phrases Legally Defined* (2 ed) or Stroud's *Judicial Dictionary* (3 ed). Wharton's *Law Lexicon* defines it as follows:

> "in Scotland, is the 'proof' of a witness committed to writing for use upon his examination. In criminal cases, the preliminary examination of witnesses usually conducted under the superintendency of the procurator fiscal."

The Shorter Oxford Dictionary defines it in the context of Scots Law and adds another meaning:

> "Antecedent cognition or knowledge; foreknowledge".

In my view, the prosecutor's use of the term was inappropriate. It is unfortunate that the trial magistrate did not seek an explanation from the prosecutor as to precisely what he had been doing. The witnesses who were questioned on the issue have clearly been unsatisfactory. The likelihood is that the prosecutor was refreshing the memory of the witnesses from the statements they had given the police and that he was doing this while all were assembled together. Such conduct is highly improper and a prosecutor should realise that this is so. A witness may well be misled into accepting the recollection of another witness as his own without consciously realising what has happened. A witness may be allowed to refresh his mind from a statement he has made to the police at a date closer to the date of the incident about which he is to testify. If the witness is unable to read, the statement may be read to him but this should not be done in the presence of other witnesses. Admittedly the public prosecutor was guilty of improper conduct and the effect of this on the trial must be determined.

A somewhat analogous situation arises where a witness remains in court after the magistrate has ordered witnesses who are to be called to testify in a matter to leave the court and remain out until they are called to testify. Such a witness hears the evidence given by other witnesses and his recollection may be influenced in the same way as that of a witness who has heard the statements of other witnesses read in his presence. I have not been able to trace any reported case in this jurisdiction or in South Africa where this has been the subject of comment, but the situation has arisen in

GEORGES JA

England. It was submitted that such a witness should not be allowed to testify but the principle

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was eventually established that the witness should be allowed to testify.

In *Chandler v Horne* (1842) 2 Mood and Rob 423 ERSKINE J stated that it was then settled that judges had no right to exclude such a witness and "it was a matter of remark on the value of his testimony that he has wilfully disobeyed the order (to leave the Court)". Such an approach seems to me well grounded in commonsense and best geared to serve the ends of justice.

I understood Mr *de Bourbon* to argue that once, as a result of the improper conduct of the prosecutor, there was a possibility that a witness's recollection may have been influenced by what he had learnt of the statement of another witness, there was a real risk of prejudice to the accused person and any conviction obtained should be quashed. He was unable to cite any authority in support of this argument and I would with respect think that it cannot be supported. Whatever may be the irregularity it is for the Court in the final analysis to determine whether it appears, in the words of s 11(2) of the Supreme Court act, "that a substantial miscarriage of justice has in fact resulted". Put simply the issue is whether the court hearing the appeal considers on the evidence (and credibility findings if any), unaffected by the irregularity that there is proof of guilt beyond a reasonable doubt. If it does so consider then there is no resultant miscarriage of justice. It is not disputed, and I accept, that it is the State which must satisfy the Court that there has been no such miscarriage.

Although very strenuously contested, the facts of this case fall within a narrow ambit. Angered by a report which he received from his mother about the complainant's behaviour towards her, the appellant set off in his car in pursuit of the complainant who was also driving. He drew up behind the complainant's car just as the complainant stopped in front of his house. The appellant got out of his car and went up to the complainant before the complainant could leave his car.

The appellant's case is that he grabbed the complainant by the shirt and told him that if he ever came to the yard again and called the appellant's mother a liar he would knock his head off. His intention was to inform the complainant that if he repeated that performance he would come to grievous bodily harm. The complainant grabbed the appellant's right arm and denied having called the appellant's mother a liar. Both men were then outside the complainant's car. The appellant let the complainant go, walked back to his car and drove off.

GEORGES JA

The State case was that after the appellant grabbed the complainant he punched him on the forehead, called him a kaffir, then drew a revolver which he had in a holster at his side, pointed it at him saying "I am killing you, you idiot I cannot be enumerated by kaffirs". The complainant held on to the hand with the revolver twisting it so that the revolver would not be pointed at him. He managed to push the appellant and so got out of his car and went into his house.

In the course of the hearing it appears to have emerged there was some difference between the evidence given in chief by Jesman Ruka and his statement to the police. The prosecution produced the statement. It was not recorded there that he had said that the appellant had punched the complainant after having grabbed him. Jesman Ruka maintained that he had

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mentioned this to the police. Although the trial magistrate summarised the evidence of each witness at length he made no specific comments in relation to demeanour or credibility. He was silent also as to the effect, if any, which he thought the reading of the State's witnesses' statements to each of them in the presence of the others may have had on the weight to be given to their evidence. These are clearly deficiencies. He concluded, however, correctly in my view, that he could not accept that all the witnesses had conspired to incriminate the appellant in the matter. Essentially, that had been the thrust of the defence. The magistrate concluded that it was only logical against the background of the incident that the appellant would have produced his revolver to drive his point home.

An appraisal of the probabilities inherent in the story given by a witness is an essential part of the evaluation of the truth of that story. If on appraisal it can be concluded that a story is inherently probable and there is in addition corroboration of it, then very good reason indeed must exist for not accepting it.

The appellant's anger in this case is established by his own evidence - his hot pursuit of the complainant, his dash from his car to the complainant's car, and his grabbing of the complainant by the shirt. The appellant disputes that he punched the complainant but medical evidence establishes that the complainant suffered from a tender spot on the forehead. That is consistent with the complainant's evidence that the appellant struck him there with a clenched fist. The appellant's version cannot account for it. The appellant admitted in cross examination that he intended to inform the complainant that if he ever repeated that performance he would come to grievous bodily harm. The appellant had at that time a revolver in a holster on his hip. What more telling manner to drive home that warning than to point the revolver and so dramatise the grievous

GEORGES JA

bodily harm that could be expected? Clearly the appellant did not intend his warning to be merely a matter of words, for he had grabbed the complainant as he sat in his car. He did this, he said, in order to immobilise him. Since the complainant was then seated in his car there could be no likelihood of his moving off before the warning had been given.

The complainant stated that he had held and twisted the appellant's right arm which held the gun in order to prevent it being pointed at him. The appellant complained of scratches on that arm. While the injuries are consistent with the appellant's version that the struggle took place as the appellant attempted to free himself they are also consistent with the complainant's version.

Logically the only answer to the State's case was that the witnesses had conspired to embellish the incident by adding the punch and the revolver. As I have indicated there is a medical report consistent with the complainant being punched. The overwhelming likelihood is that the appellant, in his more sober mood, would seek to play down conduct which on his own account was quite unjustifiable.

Mr *de Bourbon* contended that the complainant was plainly an unreliable witness as he would not admit that he had said or done anything to irritate the appellant's mother. This must have

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been untrue as otherwise the entire incident would be inexplicable. His lack of candour on that issue should cast doubt on his general credibility. While the complainant denied calling the appellant's mother a liar he appears to have made it clear that he thought that they were being unco-operative on the issue of the census. He stated positively that though the appellant said he was going to see about a fire on the next farm there was in fact no fire. This would have caused resentment. The appellant's mother did not think it necessary to go out herself to talk to the complainant; she sent her maid and then her shopkeeper. It was only when the complainant insisted on seeing her that she went out and threatened him with calling the police if he did not leave the premises. That Mrs de Lange would have concluded that the complainant was accusing her of lying is as understandable as the complainant concluding that she was being obstructive. In the particular circumstances of this case an assessment of the credibility of the witnesses on the earlier incident would not be of help in evaluating the evidence on the follow up near the complainant's house.

Both Mr *Gillespie* for the State and Mr *de Bourbon* for the appellant were agreed that the Court should look at the statements made to the police by the witnesses other than the complainant and his wife in order to

evaluate to what extent the evidence of the witnesses may have been affected by their recollection of what they may have heard in statements other than their own. The purpose was to establish points of difference rather than to seek to reinforce the case for the prosecution by noting points of identity.

The statements of Oliver Isa and Ali Robert contained no reference to the appellant having called the complainant a kaffir. Both these witnesses were illiterate and neither understood English. Isa's statement in this regard records that the appellant was shouting to the complainant in English which he did not understand. Ali Robert's statement is to the effect that the appellant was shouting in English which he could not understand but the pitch of his voice was such that he had an impression that something was going to happen. In the witness-box both witnesses stated that they had heard the word "kaffir" used. Ruka's statement, which was tendered at the hearing, mentions that the appellant used the word "kaffir". The possibility exists that because of the pre-trial exercise conducted by the prosecutor, Isa and Robert may have been led to remember that that word had been used and that they had no independent recollection of it.

Had the magistrate evaluated the evidence on this issue, giving due weight to the pre-trial conference, and had he concluded on the evidence of the complainant, his wife and Ruka that the word "kaffir" had been used, it may well have been possible to support that decision. But he did not do this. At this stage, on the record, I cannot say that a conviction would have been inevitable. I would accordingly allow the appeal in respect of the conviction on that count.

Mr *de Bourbon* argued that had these witnesses been cross-examined on that difference between their statements and their evidence they may have been completely discredited so that their evidence may have been valueless. For reasons already discussed this is fanciful. The

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inherent probability of the case for the prosecution, buttressed as it is by the medical testimony and the defence itself, enables me to state with certainty that there could be no miscarriage of justice as a result of the prosecutor's "pre-trial" conference in relation to the conviction for assault in regard to all the particulars set out therein. The appeal against conviction on the charge of assault should, therefore, be dismissed.

In passing sentence the trial magistrate quite properly treated all counts as one, arising as they did from a single incident. Since the appeal on the count of *crimen injuria* has been allowed this Court is at large on that issue.

GEORGES JA

A fair reading of the magistrate's comments on sentence leads to the inherence that he considered the charge of *crimen injuria* as the gravest aspect of the matter. In this he erred. In so concluding I am not unmindful of the history of the word "kaffir" and the resentment which it evokes. I agree also that its use is harmful to the spirit of reconciliation and that it should be made plain that the courts will not countenance it. When all this has been said, however, it is only in the rarest of cases that a peremptory period of imprisonment should be considered as an appropriate punishment for a first offender on a conviction for any verbal insult. A fine should normally be the appropriate penalty with a wholly suspended period of imprisonment. This is more likely to facilitate reconciliation while emphasising the grave view which courts take of the offence.

The conduct on the part of the appellant which in my view called for the severest censure is the threat with the pointed gun. In the ensuing struggle the gun may well have been fired with real risk to life of the appellant, the complainant and bystanders. The use of guns must be sternly discouraged. The view which the Legislature takes of the matter has been recently made clear. Sections 39 and 40 of the Firearms Act [*Chapter 308*] were repealed by the Firearms Amendment Act No 37 of 1981. The penalty for knowingly and without lawful excuse pointing a firearm at any other person was increased tenfold from a fine not exceeding $100 or to imprisonment for a period not exceeding 6 months to a fine not exceeding $1 000 and a period of imprisonment not exceeding 5 years.

Mr *de Bourbon* properly points out that a fine had been provided as well as imprisonment so that the Legislature did contemplate that there might be circumstances in which a fine might be adequate. The point is well taken. But there are gradations of moral blameworthiness. A gun may be pointed in circumstances in which it is evident that no harm is meant. In this case there was an intention to intimidate. That type of aggressive conduct is properly punished by a short sharp period of imprisonment.

A sentence of four months' imprisonment two months of which are suspended meets the justice of the case. Accordingly the appeal against sentence should be dismissed.

Baron ACJ: I agree.

Gubbay AJA: I agree.

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Stumbles & Rowe, appellant's legal representatives.

ELLIS & ANOTHER v MACEYS STORES LTD 1983 (2) ZLR 17 (SC)

Court **Supreme Court, Harare**

Georges CJ, Gubbay AJA & Pittman AJA

4 July 1983

Flynote

Practice and procedure - appeal - Supreme Court Rules - Rule 30(a) - appeal to be noted "within twenty-one days" - includes non-business days - appeal noted out of time - condonation - judgment appealed against acted on before appeal noted - a fact or to be taken into account in deciding whether to grant condonation.

Headnote

The respondent company had wished to enter into a scheme of arrangement in terms of which, *inter alia*, the minority shareholders would surrender their shareholding and be paid out 30 cents per share, which was about twice what they could have obtained for them on the Stock Exchange. The majority of the shareholders agreed to the scheme and an application for sanction of the scheme was heard by SQUIRES J on 3 February 1983. On 16 February 1983 he gave judgment, approving the scheme. No request was then made by the minority shareholders to withhold action pending an appeal; indeed, no indication was given that they intended to appeal. The respondent proceeded forthwith to register the scheme and implement it. It was only a week later, by which time the implementation was well under way, that the appellant's legal representatives indicated that an appeal was being considered; but notice of appeal was not lodged until the 17 March 1983.

The respondent took the point *in limine* that the notice of appeal was out of time, being served 29 days after the judgment; and that the way to treat the appeal would be as if it were an application for an extension of time within which to note an appeal. In this regard, it was argued, among other things, that the appellants had allowed the situation to arise in which it was impossible now to "unscramble the scheme"; and that, in any case, there was no real prospect of success on appeal.

Held, that the provisions of Rule 30(a) of the Rules of the Supreme Court are clear. That Rule provides that an appeal must be noted "within twenty-one days of the day of the judgment appealed against". That period clearly includes "non-business" days -

(1) on the ordinary meaning of the word "days";

(2) because of the provisions of s 28 of the Interpretation Act [*Chapter 1*], which does not provide that non-business days are to be excluded in the calculation of time;

(3) because Rule 3 of the Rules, which provides that any act required to be done by or on

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a date which is a Sunday or a public holiday shall be valid and effective

GUBBAY AJA

if done on the next succeeding business day, would be unnecessary if non-business days were to fall outside the period.

Held, further, dealing with the application for condonation, that -

(1) the delay in noting the appeal was not inordinate and the explanation for it was reasonable;

(2) the implementation of the scheme and the resultant difficulty of restoring the *status quo* and the consequent prejudice to the respondent was a factor to be taken into account in deciding whether to grant the appeal;

(3) on the facts, there was no discernable ground on which to differ from the trial judge.

Cases cited:

Re Alabama New Orleans, Texas & Pacific Junction Railway [1891] 1 Ch D 213 (CA).

A P de Bourbon, for the appellants

L H Cook, for the respondent

Judgment

Gubbay AJA: At the inception of the hearing Mr *Cook*, who appeared for the respondent, took a point *in limine*. It was that the notice of appeal against the judgment delivered by SQUIRES J on 16 February 1983 had not been served within the prescribed twenty-one days and accordingly was out of time and of no force and effect. This submission was opposed by Mr *de Bourbon* on behalf of the appellants. He contended that in computing the requisite number of days Saturdays, Sundays and public holidays are to be excluded and as the notice of appeal had been served on 17 March 1983 (the last day) it was not out of time.

Section 34(3) of the Supreme Court of Zimbabwe Act, 1981, provides that any rules of court made in terms of the High Court Act which immediately before the fixed date (28 August 1981) regulated appeals and applications in connection with such appeals from any court or tribunal to the Appellate Division shall, *mutatis mutandis*, continue in force as though rules of court made in respect of the Supreme Court until amended or repealed. The Rules of the Appellate Division (now called the Supreme Court Rules) were made under s 51(1) of the High Court Act, 1964, and are therefore presently in force.

Rule 30(a) lays down that where leave to appeal is not necessary, as in this case, an appeal is properly entered by serving notice of appeal "within twenty-one days of the day of the judgment appealed against". Does the period include "non-business" days? There is no doubt that it does: First, the ordinary meaning of the word "days" embraces both business and non-business days.

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If it were intended to exclude non-business days it would have been a simple matter to have used the expression "twenty-one business days". In the second place, s 28 of the Interpretation

GUBBAY AJA

Act [*Cap 1*] provides that in the computation of time the first day is excluded and the last day included. It does not provide that non-business days are to be excluded in the calculation. Finally, Rule 3 provides that any act required to be done by or on a date which is a Sunday or a public holiday shall be valid and effective if done on the next succeeding business day. Such a rule would be unnecessary if non-business days were to fall outside the period.

Mr *de Bourbon* argued that as Rule 30 does not expressly specify the nature of the twenty-one days there is an omission in the Rules and so in terms of Rule 58(1) the practice and procedure of the High Court must be followed. Consequently by virtue of Rule 4A of the High Court Rules, in calculating the twenty-one days within which an appeal is to be noted to the Supreme Court, non-business days are to be excluded. The argument is untenable. Rule 58(1) applies where there is a total omission in the Supreme Court Rules. There is certainly no omission in relation to the calculation of days. There is a provision and it differs from that in the High Court Rules.

It follows that the notice of appeal was eight days out of time.

Mr *Cook* accepted that if it be found that notice of appeal had been given out of time, it would be proper in the circumstances for this Court not to strike the appeal from the roll, but to treat it as if it were an application for an extension of time within which to note an appeal.

The general principles which govern an application for condonation have been frequently stated. The factors to be taken into account are first, the extent of the delay in noting the appeal; secondly, whether a reasonable explanation for the delay has been satisfactorily established by the applicant; and thirdly, whether there is a reasonable prospect of success in an appeal against the decision of the court *a quo*. Mr *Cook* submitted that in addition it was essential to have regard to the fact that the respondent was not at fault in having implemented the judgment, which in the result makes it impossible to restore the *status quo*.

The extent of the delay of eight days is by no means inordinate and the explanation for it is reasonable. Rule 30 was simply misinterpreted and the mistake, which was influenced by the position under the High Court Rules, is easily understandable.

What is now to be considered is Mr *Cook's* submission that the conse-

GUBBAY AJA

quence of the judgment having been acted upon in good faith by the respondent is of relevance in deciding whether the indulgence of condonation should be granted.

The factual background is this: On 1 December 1982 the respondent petitioned the High Court for an order summoning a meeting of its members, other than those of Maceys Consolidated

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(Private) Limited (MCPL), to consider and approve, if deemed fit, a scheme of arrangement. What was proposed was that the shares held by the minority 22% of the shareholders be cancelled and the issued share capital of the respondent be reduced *pro tanto*; the sum of $472 104 by which the share capital would then be reduced would be placed in the capital reserve fund which would not be available to shareholders except in terms of s 59 of the Companies Act. MCPL would pay the respondent a sufficient sum of money for it to pay 30 cents per share to the minority shareholders against the surrender of their share certificates. The order sought was duly granted.

At the meeting which followed on 30 December 1982, the proposed scheme was approved by 133 shareholders representing 295 925 shares to 35 shareholders representing 91 000 shares - a majority of 76,5% of those present and voting, whether in person or by proxy.

The application for the sanction of the scheme was heard on 3 February 1983 and was opposed. The Court *a quo* was urged to treat the matter as one of urgency because if the scheme was to be sanctioned it was desirable that trading in the shares should cease as soon as possible. It was also apparent from the scheme documents filed of record that in the event of the scheme being sanctioned it was intended to take immediate steps to register it.

Judgment was delivered on 16 February 1983. Simultaneously with the issue of the order sanctioning the scheme a reduction of the respondent's capital, for which a *rule nisi* was pending, was approved. The respondent's legal practitioners were not requested to withhold action upon the judgment as an appeal was being considered. Nor was the learned Judge asked to suspend the execution of the judgment pending the noting of an appeal. Not surprisingly the respondent proceeded forthwith to register the scheme and the reduction in capital. On 18 February 1983 the respondent was de-listed from the Zimbabwe Stock Exchange. On 22 February 1983 notices were dispatched to shareholders inviting them to submit their share certificates so that payment could be made. It was only on 23 February 1983 that the respondent's legal practitioners were telephonically advised

GUBBAY AJA

that an appeal was under consideration. By then the share capital of the respondent had been reduced and that portion which was to be paid to shareholders cancelled. At the date the notice of appeal was lodged (17 March 1983) the respondent had made payment to 83,7% of the minority shareholders.

Mr *Cook* argued strongly that the appellants had brought about a situation in which it was impossible to "unscramble the scheme". Despite the clearest indications that it was proposed to implement the judgment immediately, they had taken no steps to prevent that from being done, either by advising that they intended to appeal, by seeking a suspension of the judgment, or by expeditiously filing a notice of appeal. They had allowed seven days to elapse before intimating that an appeal was being considered. Thus, said Mr *Cook*, the respondent will be prejudiced if the application for condonation be granted and the appeal allowed.

Mr *de Bourbon* contended that prejudice had not been caused the respondent by the late noting

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of the appeal because all the steps to implement the judgment had been taken within the twenty-one day period. The respondent was at fault in not waiting for that period to expire.

I am unable to accept this submission. It is true that if the appeal had been noted on the twenty-first day the respondent could not have opposed it on the ground of pre-emption. Strictly speaking, the appellants would have been within their rights in holding their hand until the last day, however misleading and undesirable in the circumstances of this case such conduct would have been. In a sense, therefore, the respondent took a chance in proceeding immediately to give effect to the judgment. But that chance paid off because an appeal was *not* noted in time. Consequently the appellants are in no worse position than if the respondent had waited and only implemented the judgment subsequent to the expiry of the twenty-one days. It is not open to them to complain. I am satisfied, therefore, that the implementation of the judgment, with the resultant difficulty of restoring the *status quo*, is a factor to be taken into account in deciding whether condonation should be granted.

I turn now to the prospects of success. SQUIRES J gave a thorough and careful judgment. He satisfied himself that the provisions of the Companies Act had been complied with and that there was no question of the scheme being one in which the majority shareholders, having interests which clashed with those of the minority, were seeking to coerce the latter. He then proceeded "to look at the scheme and see whether it is one

GUBBAY AJA

as to which persons acting honestly viewing the scheme laid down before them in the interests of those whom they represent, take a view which can reasonably be taken by business men" (see *Re Alabama, New Orleans, Texas Pacific Junction Railway* [1891] 1 Ch D 213 (CA) at 239). It was not argued by Mr *de Bourbon* that this was an incorrect approach to adopt; merely that the learned Judge had erred in applying if to the facts. In particular, that in considering whether the price of 30 cents per share offered to shareholders was fair and one which a reasonable businessman would approve, the learned Judge should have taken account of the assets of the respondent and the loan of $709 000 which was owed to it by MCPL.

In reaching the conclusion that what was to be looked at was the market value at the shares and not 50 cents, being the approximate net asset value of the respondent when divided by the numbed of shares, the learned Judge relied on three features:

In the first place, there was what he aptly described as "the credible and even compelling evidence" from three impartial deponents experienced in share valuation, to the effect that the net asset value of a share bears no relation to its market value . He then went on to say:

> ". . . a moment's reflection show that this must be true. The total assets of a company may indeed look impressive on paper, but the value of the share of company depends on many other intruding factors. If, for example, those assets are not being properly managed, the consequence value of the shares is obviously not a reflection of such assets' figure. Such shares find their relative value to the company, to other shares and indeed to other negotiable securities generally, as a result of the many factors which have a bearing on their attractiveness to other persons who may wish to acquire them. And it seems to me unavoidable that the true reflection of that value is the price they fetch in the market place. For if a business man is contemplating the purchases of shares in a company he will base the price he is prepared to pay on the return such share is likely to yield him, or its possible appreciation

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> in value if he has to realize it. It will not be on the net asset value if that value is appreciably higher than its market value. If the net asset value has any relevance to such a purchase, it will be in other directions and more likely to he considered in relation to factors such as the company's present and potential loan indebtedness, the market or directors' valuation of assets, and so forth."

Secondly, the learned Judge was satisfied that there was no possibility of the shareholders' interests in the shares ever reflecting the net asset value because the majority shareholder was adamant that the respondent would carry on trading. There was no likelihood of a voluntary liquidation in which the minority shareholders could participate in the value of all the realised assets, and in any event if the respondent were wound up as a result of the action of a creditor it was most improbable that the shareholders would achieve anything like the balance-sheet value of the assets.

GUBBAY AJA

Thirdly, the evidence before the learned Judge was to the effect that in the Stock Exchange trading of today most shares are being sold at about half their net asset value.

This reasoning is impressive.

With respect to the loan of $709 000 to MCPL it emerges clearly from the papers that this asset was included in the valuation of 50 cents and that its existence was not concealed from the minority shareholders. Indeed the scheme documents drew their attention to the availability of the audited accounts of the respondent for the last five financial years. Like all other assets the loan was not a relevant factor in considering the fairness of the offer.

The learned Judge accurately summed up the position as follows:

> "In the circumstances of this case, it is to be reiterated that there was no realistic basis on which the minority shareholders could ever realize the value of their shares on the net asset worth of the petitioner. On the contrary, and as also already stated, the only avenue by which those shares could be turned to account is the open market and the value of such shares in that forum has been an average price of 18 cents a share over the last three years. In those circumstances, the net asset value of the shares is really of academic interest only and no purpose would be served by having it discussed further in view of the firm intention of MCPL to offer no more than 30 cents per share. . .
>
> . . . the offered price is some 66% more than the shareholders could obtain for their shares on the average price of 18 cents over the last three years by offering them elsewhere.

And later:

> "It seems to me, then, when all these aspects are considered, that a Court would be justified in holding itself content that this scheme is a fair one. It seems to me that the minority shareholders, if this scheme is sanctioned, will obtain an advantage that they do not now have, and are not likely to obtain, in the foreseeable future - namely, the disposal of their shares at a price well in excess of the current or foreseeable market price. Not only will it be substantially in excess of the present market price of the shares, but it represents a price earnings ratio of 1:10, well above the 1:2 or 3 that generally prevails at present. Furthermore, they will be relieved of their impotent situation as minority shareholders in a company which is unlikely to trade as profitable as its early promise hoped, and of being unable to do anything effective about it. As against that. if the scheme is not sanctioned the shareholders will revert to the position of being able to turn those shares to account only at a price well below the present offer - even as little as half as much, and to continue to receive an exiguous dividend, if any is received at

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all, on which they will also have to pay a dividend tax."

There is no discernible ground upon which to differ from the learned Judge. He looked at the problem from every conceivable angle and in the

GUBBAY AJA

end arrived at the cogent conclusion that the will of the majority had to prevail.

Having regard then both to the prejudice factor and to the lack of any real prospect of success on appeal, we were satisfied at the conclusion of the hearing that the application for condonation had to be refused with costs. It was ordered accordingly.

Georges CJ: I agree.

Pittman AJA: I agree.

Coghlan, Welsh & Guest, appellants' legal representatives.

Atherstone & Cook, respondent's legal representatives.

S v GORORO 1983 (2) ZLR 25 (HC)

Court **High Court, Bulawayo**

Reynolds AJ

8 July 1983

Flynote

Criminal law - assault with intent to do grievous bodily harm - constructive intent - necessity to investigate fully whether facts justify conclusion that such intent established.

Headnote

It is perfectly proper on a charge of assault with intent to do grievous bodily harm, for a court to find that such intent was legal or constructive rather than actual. However, particularly whether the accused pleads guilty to the offence and the facts do not indicate an actual intent, the court should be at pains to make clear to him what the notion of constructive intent is, that is -

(a) the knowledge or belief by the accused that his acts may possibly cause some serious harm to the complainant; and, in addition,

(b) a complete lack of care, or recklessness, whether such harm ensures or not.

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Apart from attempting to ascertain legal intention by putting these requirements to the accused, there is another avenue of enquiry which should be explored. This involves looking to the facts of the case itself and to the nature of the offence and trying to project oneself mentally into the position of the accused at the time.

Cases cited:

S v Mbelu 1966 (1) PH H 176;

R v Edwards 1957 (2) R & N 107;

S v Mini 1963 (3) SA 188 (AD);

S v Mutadza HC-H-86-83 (not reported);

S v Taimoni HC-H-164-83 (not reported).

Judgment

Reynolds AJ: The accused in this case was charged with an assault with intent to do grievous bodily harm. He pleaded guilty to this charge.

He is 26 years of age and is employed in the Ministry of Youth, Sport and Recreation.

The agreed facts were to the effect that a group of young girls were at the offices where the accused is employed when one of the group found

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REYNOLDS AJ

that $20,80 of hers had been stolen. The accused investigated the matter and the complainant was pointed out as the suspect. The accused then assaulted the complainant, who is 14, by striking her with what is described as a "thick stick" on her arm and leg, causing what the doctor records as a "swelling" on each limb. Another member of the group joined in and struck the complainant on the left ear, causing a laceration. The accused said that he had assaulted the complainant in this way because he was the only grown-up person there and he had wanted to investigate and recover the missing money.

In explaining the elements of the crime charged to the accused the following exchange between the magistrate and the accused took place:

". By using a thick stick did you intend to do her grievous bodily harm?

A. No.

Q. Were you reckless as to whether or not you caused grievous bodily harm when you used a thick stick?

A. Yes, I was - that is where I went wrong.

Q. Are you admitting that you had a reckless disregard as to whether or not you seriously caused injury?

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A. Yes, I do admit that."

On these facts the magistrate convicted the accused as charged and sentenced him to eight months' imprisonment with labour of which five months' imprisonment with labour was suspended on appropriate conditions.

The first aspect requiring examination is whether the charge of assault with intent to commit grievous bodily harm has been substantiated. Much has been written as to what *is* "grievous bodily harm", but the one word that almost invariably finds its way into the expression ultimately adopted is the word "serious". It is an essential ingredient of the crime that the accused knew or foresaw that his actions could cause the complainant a really *serious* injury. As MILLER J put it in *S v Mbelu* 1966(1) PH H176, "There must be an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure in a serious respect."

In the present case the magistrate has not purported to find that the accused had an actual intent to cause a serious injury to the complainant, but that the accused had a legal or constructive intention to do so. This is a perfectly proper approach (see *R v Edwards* 1957(2) R & N 107 at 112), but the magistrate's explanation of this legal nicety to the accused falls short of what is required. Whereas it is obvious that a magistrate would not be expected to attempt to give a full and erudite explanation

REYNOLDS AJ

to the accused appearing before him regarding any complex legal subject, he should at least put to him the basic elements concerning that subject. The basic element of legal intention, so far as assault with intent to do grievous bodily harm is concerned, consist of:

(a) the knowledge or belief by the accused that his act may possibly cause some serious harm to the complainant; and in addition,

(b) a complete lack of care or recklessness whether such harm ensues or not (See *R v Edwards*, supra).

The concept of constructive intention as applicable here then has two distinct parts: knowledge or foresight of a risk, and a reckless persistence in the dangerous act despite that risk. It is clear, on this basis, that the magistrate in the present matter did not explain this satisfactorily to the accused.

But apart from attempting to ascertain legal intention by putting the above requirements to the accused, there is another avenue of enquiry which should be explored when there is some doubt whether the accused did, in fact, have such an intention and this involves looking to the facts of the case itself and to the nature of the offence. It must be borne in mind that the intention of the accused - his 'legal' intention - is judged subjectively; ie the accused himself must have known of the danger involved, or at least have foreseen the possible consequences of his act and yet, nevertheless, despite such knowledge or foresight, have carried out the act. Thus, when examining the facts of the case as a whole, it is often possible to decide whether

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the accused did indeed know or foresee that the harmful act was a possibility. For example, in the instant case, when looking at all the circumstances, it seems obvious that the accused was merely attempting to recover the stolen money and his motive in striking the complainant with a stick was to persuade her to confess, or to disgorge the money if she was indeed the thief. He did not wish to do her any serious physical harm. From this and from the accused's own words, it was clear that the accused had no *actual* intention to commit grievous bodily harm. But it was, or should have been, equally clear that his legal intention was also, in all probability, ascertainable from an examination of these same facts. At best, as far as the State was concerned, it could only be argued that the accused must have known, and therefore by inference did know, that there was a risk of serious harm to the complainant when he struck her as he did. As WILLIAMSON JA expressed it in *S v Mini* 1963(3) SA 188 (AD):

> "In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time, it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time."

REYNOLDS AJ

Had the magistrate in the instant case projected himself into the position of the accused when the offence was committed, I believe that he would have found that it was highly unlikely that the accused foresaw, or must have known, that his blows could have caused the complainant a really serious injury. It is clear that, from the injuries sustained, he did not strike the girl hard; had he done so, more serious injuries would have been expected.

It seems to me, therefore, that while the magistrate was quite correct in investigating the accused's intentions in striking the girl, both actual and legal, he did not pursue the enquiry adequately (see *S v Mutadza* HC-H-86-83, and *S v Taimoni,* HC-H-164-83).

In the result, and on the facts, the conviction for assault with intent to commit grievous bodily harm cannot stand and it is hereby set aside. It is clear, however, that the accused committed an assault and he admitted this. The lesser verdict is substituted accordingly.

The sentence imposed by the magistrate for the nature of the offence committed induces in me a sense of shock. The accused is a young man in gainful employment as a civil servant. The serious aspect of this offence is his abuse of authority coupled with the delivery of blows with a thick stick to this young girl. Such conduct undoubtedly merits a substantial penalty, but the justice of the case would be amply met by the imposition of a fine commensurate with the means of the accused. The sentence imposed by the trial court is set aside, and the magistrate is directed to re-open the proceedings and, after due inquiry as to the accused's personal circumstances and his means, to impose sentence afresh in the light of this judgment.

McNally J agrees.

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29 (HC)

Court **High Court, Harare**

Pittman J

30 June & 13 July 1983

Flynote

Statutes - interpretation of - regulations on similar subject material made in terms of two different statutes - later regulations impliedly repealing earlier ones if reconciliation of their provisions not possible, unless enabling Act is to contrary - Minimum Wages Act - section 5(b) - regulation "made" in terms of an enactment - means "already made" and does not include future regulations.

Headnote

In terms of either the Industrial Conciliation Act [*Chapter 267*] or the Minimum Wages Act No 4 of 1980 the Minister of Labour may promulgate regulations dealing with similar subject material, that is, with the wages to be paid to employees in particular undertakings, industries, trades or occupations. Where such regulations have been made under both Acts but they appear incapable of reconciliation, then, in the absence of a protective provision in either Act, the normal rule of interpretation must apply, that is, that the later regulations take precedence over the earlier by impliedly repealing them. Section 5(b) of the Minimum Wages Act, which provides that any regulations "made" in terms of any other enactment should be construed in such a way as to bring it into conformity with a notice made in terms of section 3 of the Act, is not such a protective provision. "Made" means "already made" and does not refer to future regulations, so the normal presumption of law prevails. Any later regulations under the Industrial Conciliation Act which are contrary to such a notice would, therefore, override it.

Cases cited:

New Modderfontein Gold Mining Co. v Transvaal Provincial Administration 1919 AD 367;

Durban Corporation & Another v Rex 1946 NPD 109.

G Lock, for the applicant.

C S Grossman, for the second respondent.

PITTMAN J

Judgment

Pittman J: The applicant in this case, Mr Kanera, is the representative of the workers employed at the Stapleford Sawmill in Penhalonga by the second respondent, the Forestry Commission. The first respondent is the Minister of Labour and Social Services. He has been a passive participant in this case, and I shall refer to him simply as "the Minister".

The dispute between the applicant and the second respondent concerns the correct nature of

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the minimum wages which have had to be paid to the Stapleford Sawmill employees since 1 January 1982.

There are two Acts which authorize the Minister to publish wage regulations for sawmill employees. One is the Industrial Conciliation Act [*Chapter 267*]. Under that Act, the Agricultural Industry Employment Regulations 1979 (SI 917 of 1979) were promulgated with effect from 1 January 1980. Those regulations were the subject of several amendments, also issued under the Industrial Conciliation Act, the last of which was SI 164 of 1983, promulgated on 25 March 1983. All those regulations have been repealed and substituted by a further set of regulations, SI 300 of 1983, also promulgated by the Minister under the Industrial Conciliation Act, and with effect from 10 June 1983.

The other Act which authorises the Minister to promulgate wage regulations for sawmill employees is the Minimum Wages Act, No 4 of 1980. Under that Act, the Minister has promulgated a number of notices dealing with sawmill employees. Of these the only one presently relevant is the Minimum Wages (Specification of Minimum Wages) Notice, SI 925B of 1981. That notice came into operation on 1 January 1982.

The applicant claims that the regulations published before 1 January 1982, under the Industrial Conciliation Act, were superseded by that notice, SI 925B of 1981, and that all the subsequent regulations under that Act have not affected the operation of that notice. He therefore claims that since 1 January 1982 the wages of the Stapleford Sawmill employees have been determined exclusively by SI 925B of 1981.

The second respondent maintains that the Minister can use either Act to promulgate regulations or notices relating to sawmill employees, which supersede any existing regulation or notice. It therefore claims that the first regulation promulgated in terms of the Industrial Conciliation Act since 1 January 1982 and relating to sawmill employees, superseded SI 925B of 1981, and that the subsequent regulations under that Act and of the same kind have successively superseded their predecessors in so far as the Stapleford Sawmill employees are concerned.

PITTMAN J

To determine which claim is justified, this Court must examine the relevant portions of the Industrial Conciliation Act and the Minimum Wages Act, and decide whether either Act provides that the regulations promulgated under it shall not be affected by regulations promulgated under the other Act. It is clear, as was pointed out by Mr *Grossman* for the second respondent, that if there is no such protective provision in either Act the normal rule must prevail, namely, that if laws are incapable of reconciliation, it must be accepted that the later one becomes of force over the earlier by impliedly repealing it. See, for example, *New Modderfontein Gold Mining Co. v Transvaal Provincial Administration* 1919 AD 367 at 396, and *Durban Corporation & Another v Rex* 1946 NPD 109 at 114. Hereafter I shall refer to this rule as "the normal presumption of law".

All the regulations promulgated under the Industrial Conciliation Act were authorised by either s 36 or s 37 of that Act, as amended by Act 23 of 1981. Their relevant portions read as follows:

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"36. (1) After considering any objections lodged in terms of section *thirty-three*, the Minister may make regulations in terms of this section in regard to the conditions of employment which have been the subject of investigation in the undertaking, industry, trade or occupation concerned.

(2) Subject to the provisions of Part VII A, regulations made under this section as to the minimum rate at which remuneration shall be paid by any employer to each of his employees ...

(3) ...

(4) Any notice embodying regulations under this section shall state that from such date and until further notice or for such period as may be specified in the notice the said regulations shall, within the area or areas defined in the regulations, be binding upon all employers and employees in the undertaking, industry, trade or occupation stated or defined in the regulations or such employers and such employees in such undertaking, industry, trade or occupation as may be specified in the regulations.

(5) any regulations made under this section shall prevail over the provisions of any regulations made under any other enactment in so far as the employees and employers upon whom such regulations are binding under this Act are concerned."

Section 37 reads:

"37. The Minister may extend the period or area of application of or amend any regulations made by him under section *thirty-six*..."

Part VII A is irrelevant and need not be quoted.

It is clear that there is nothing in these relevant portions of the Industrial Conciliation Act which prevents any regulations promulgated under them from overruling any prior enactment relating to the wages of sawmill

PITTMAN J

employees or from being overruled by any future enactment relating to the wages of such employees. In other words, the normal presumption of law applies to enactments under the Industrial Conciliation Act.

I understood this to be agreed to by Mr *Lock*, who was obliged to argue that the same presumption does not apply to enactments under the Minimum Wages Act, because that Act contains a provision which prevents notices under it being affected by notices under the Industrial Conciliation Act.

I turn now to set out the relevant portions of the Minimum Wages Act.

The first relevant portion of that Act is the definition of "Minimum wage notice" in s 2. It reads:

"'Minimum wage notice' means a notice made in terms of section *three*."

The relevant portions of s 3 read:

"3. The Minister may by notice in the *Gazette* -

(a) direct the payment of such minimum wages to such classes of employees as may be specified in the

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notice without any discrimination on the grounds of race, sex or age;

(b) ....

(c) ....

(d) give such other direction or make such other provision as he may deem necessary or desirable to ensure the payment of a minimum wage to any class of employee."

It is clear that these provisions do not affect the normal presumption of law. In this regard, Mr *Lock*, for the applicant, therefore relied upon s 5, of which the relevant portions are:

"5. Where the Minister has made a minimum wage notice -

(a) ...

(b) every contract and every agreement, determination or regulation made in terms of any enactment relating to the employment of an employee to whom such minimum wage notice relates shall be construed with such modifications, qualifications, adaptations and exceptions as may be necessary to bring it into conformity with such notice;".

Mr *Lock's* heads of argument concluded with a submission that the minimum wage notice, SI 925B of 1981, must be given effect to, and that the Agricultural Industry Employment Regulations must be construed so as to bring them into conformity with that minimum wage notice, for the following reasons:

"1. Section 5(b) of the Minimum Wages Act (Act 4 of 1980) specifically, clearly and unambiguously provides that every regulation relating to the employment of an employee to whom a minimum wage notice relates shall be read subject to such

PITTMAN J

notice. There is no equivalent provision in the Industrial Conciliation Act [*Cap 267*] as amended.

2. This interpretation is in accordance with the cardinal principle of the interpretation of statutes which is applied in Zimbabwe, namely, that where the words of a statute are clear and unambiguous they must be given their ordinary and natural meaning (See *Venter v R* 1907 TS 910).

3. There is no indication from the statute in question that the words used do not conform with the intention of Parliament nor does a literal construction of the words used result in repugnance or manifest absurdity as would justify a departure from the literal meaning (see *R v Takawira & Others* 1965 RLR 162)".

In effect, he argued that the normal presumption of law does not apply to notices under the Minimum Wages Act, but does apply to notices under the Industrial Conciliation Act.

Accordingly, the submitted that the wages of the Stapleford Sawmill employees have been determined by Statutory Instrument 925B of 1981 with effect from 1 January 1982.

In my opinion, for subs 5(b) to justify Mr *Lock's* submission, the provision in it that every regulation "made" in terms of the kind of enactment specified refers not only to every such regulation "already made" but also to every such regulation "to be made in the future". If s 5 (b) does not refer to such future regulations as well as existing regulations, the normal presumption

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of law must and will prevail.

In my opinion, there is simply no justification for holding that the word "made" means "already made or to be made in the future". It clearly means only "already made" because that is the only possible meaning of the word "make" in its unelaborated passive mood form, "made". If the intention of the legislature had been to include in addition the meaning "or to be made" in subs 5(b), it would have had to expressly include that elaboration in the subsection. It did not do so, and Therefor the word "made" in the subsection means only "already made."

In my opinion therefore it must be accepted that any Agricultural Industry Employment Regulation relating to Stapleford Sawmill employees made after 1 January 1982 and contrary to the minimum wage notice, SI 925B of 1981, must be regarded as overriding that notice. I have not been requested to specify which of those regulations are of that kind, but

it was common cause that there are some. Therefore I must dismiss the application, as containing an unacceptable generalization. Mr *Grossman* told me that no order as to costs was sought by the two respondents. Consequently, I make the following order:

The application is dismissed, with no order as to costs.

Higham Seirlis de Lewis, legal practitioners for the applicant.

Coghlan Welsh & Guest, legal practitioners for the second respondent.

LAMIN v DULY & CO LTD 1983 (2) ZLR 35 (HC)

Court **High Court, Harare**

Pittman J

12 & 14 July 1983

Flynote

Practice and procedure - defendant's plea - amendment of - application made on date of trial - facts alleged by defendant which would be complete answer to plaintiff's claim - not previously pleaded because both parties until then labouring under same misapprehension of facts - new allegations common cause - application granted.

Headnote

The plaintiff claimed against the defendant company for the repayment of the cost of a motor vehicle he claimed to have bought from the defendant. He alleged that the vehicle had become defective and that warranties included in the contract of sale had been breached, thus causing

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him damages. He claimed that he had returned the vehicle to the defendant but had not been reimbursed the purchase price.

The claim was defended on the basis that the sale had included no warranties; other issues were the correctness of the allegations relating to damages sustained and to the return of the vehicle. The matter was set down for trial on the 11 July. By consent it was postponed until the following day, when the defendant applied to amend its plea. Affidavits submitted in support of the application showed that the vehicle had not been sold to the plaintiff by the defendant. It had actually been sold by the defendant to Scotrho Finance Ltd, which had in turn sold it to the plaintiff's company under a hire purchase deal.

It was accepted between the parties that until the application was made both sides were labouring under the same *bona fide* misapprehension as to the facts. It was agreed that the new facts would provide an unassailable defence and that for the plaintiff to persist in his claim he would have to rely on allegations that were now accepted as being untrue.

Held, that the application should be granted. The wording of Rule 132 of the High Court Rules was in itself sufficient authority for the court to grant the application; and not to grant the application would be contrary to the object of the court, which is to do justice between the parties without regard to technicalities.

Cases cited:

Horne v Hine 1947 SR 123; 1947 (4) SA 757 (SR);

Levenstein v Levenstein 1955 SR 91; 1955 (3) SA 615 (SR);

Reuben v Meyers 1957 R & N 616; 1957 (4) SA 57 (SR);

GMF Kontrakteurs (Edms) Bpk v Pretoria City Council 1978 (2) SA 219 (T);

PITTMAN J

Whittaker v Roos & Another 1911 TPD 1092.

J B Colegrave, for the plaintiff

M T O'Meara, for the defendant

Judgment

Pittman J: The plaintiff in this case is Mr J W Lamin, in his personal capacity. The defendant is a company named Duly & Company Limited. The plaintiff's summons and declaration were served on the defendant's legal practitioners in Mutare on 26 July 1982. In paragraph 3 of the declaration, the plaintiff alleged:

> "3. During May 1980, at the premises of Defendant in Mutare, Plaintiff orally purchased from Defendant, represented by its duly authorised agent DENHAM, a secondhand Volkswagon Kombi motor vehicle Registration No. 249485D for the price of $5 500,00 which sum, together with sales tax thereon of $550,00, Plaintiff duly paid

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to Defendant."

The declaration continued with allegations that the contract of sale included certain warranties by the defendant, which during April 1982 the plaintiff ascertained had been breached and which had caused him damages totalling $574,28. Paragraph 7 of the declaration read:

"7. Plaintiff immediately returned the said vehicle to Defendant in repudiation of the contract.",

and it concluded with the allegation that, despite demand by the plaintiff on 26 April 1982, the defendant refused to reimburse plaintiff with the purchase price and to pay the damages. The plaintiff therefore claimed repayment of $6 050 and payment of $574,28, and costs.

The defendant's plea was filed on 30 August 1982. In it, it alleged that paragraph 3 was admitted. It denied the alleged warranties, and in reply to paragraph 7 stated that the vehicle had been delivered to the defendant so that the defendant should sell it on behalf of the plaintiff. There was no repudiation of the contract of sale between them.

Plaintiff's replication, filed on 27 September 1982, was a simple denial of the defendant's allegations contrary to the declaration.

On 28 October 1982, Mr White, the defendant's manager, filed a discovery affidavit. In a schedule of the documents which would be used in evidence at the trial, the first item read:

"1. Copy invoice Defendant to Scotrho Finance 20.5.1980."

In the plaintiff's discovery affidavit, filed on 29 November 1982, he concluded as item 4:

PITTMAN J

"20.5.80 Hire Purchase agreement with Scotrho."

The parties' pre-trial conference was held in Mutare on 26 January 1983. The plaintiff attended it in person with one of his legal practitioners, and the defendant was represented only by one of its legal practitioners. It was agreed that one of the issues was whether the statements alleged by the plaintiff to have been made by the defendant or its agents were so made and amounted to warranties. Other issues were the correctness of the plaintiff's allegations relating to the damages sustained by him and to his return of the vehicle to the defendant in repudiation of the contract.

The case was set down for trial on 11 July. On that day, by consent, Mr *Colegrave*, for the plaintiff, and Mr *O'Meara*, for the defendant, were granted a postponement to the following day, because certain affidavits were then to be filed for the defendant. On 12 July Mr *O'Meara* submitted an application to the Court for amendment of the defendant's plea. The amendment was to delete the defendant's admission that it had sold the vehicle to the plaintiff personally. Instead, the seller was Scotrho Finance Limited, and the purchaser was a company named J W Lamin (Private) Limited, ie not Mr Lamin personally, and no warranties had been given by the seller or on its behalf.

The application for the amendment was supported by an affidavit by the defendant's manager,

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Mr White. In it Mr White referred to a letter by the plaintiff, dated 26 April 1982, to the defendant, in which the plaintiff had referred to his purchase of the vehicle as being from the defendant as purchaser, and had complained of defects in the vehicle. Mr White testified that for reasons stated by him he had mistakenly accepted that the defendant had been the seller, and had advised the defendant's legal representatives accordingly, after the plaintiff's declaration had been filed on 22 July 1982. It was only about the end of June 1983 that he had been told by his legal representative that the relevant hire purchase agreement indicated that the vehicle had in fact been sold not by the defendant but by Scotrho Finance Limited to Mr Lamin's company, J W Lamin (Private) Limited, and not to him personally. Mr Chadder, a member of the firm of the defendant's legal representatives, also submitted an affidavit in support of the defendant's application, in which he stated in effect that at the time of his instructions concerning its plea by the defendant in July 1982, he was of the belief that the plaintiff was the purchaser of the vehicle, and the defendant the seller. Although the plaintiff's discovery affidavit, containing the reference to the hire purchase agreement with Scotrho, had been filed in November 1982, he did not examine

PITTMAN J

the documents therein disclosed until, when preparing for trial on 22 June 1982, he had obtained copies of some of them from the plaintiff's legal practitioners, in which it was revealed that the plaintiff had not purchased and defendant had not sold the vehicle.

The plaintiff did not file an affidavit in reply to those of Mr White and Mr Chadder. Instead, it was agreed between the parties' representatives that the true seller of the vehicle was not the defendant but Scotrho Finance Limited, and that the true purchaser was not the plaintiff, but his company, J W Lamin (Private) Limited.

In the course of the arguments by counsel it was also agreed between them that both the defendant and the plaintiff had genuinely been mistaken about the identities of the parties to the sale when filing their pleadings, and that no *mala fides* had actuated either of them. Instead, there was perhaps negligence, or, as both counsel preferred to call it, some kind of oversight on both sides, which had caused them to misidentify the true seller and purchaser. In effect, therefore, the truth of both the affidavits for the defendant was accepted by the plaintiff.

Before discussing the arguments advanced by counsel with regard to the application to amend the plea, I must mention three other points of importance agreed by counsel. First, if the amendments to the defendant's plea were to be granted, the plaintiff would have to withdraw his case, because he could not deny that he and the defendant were not parties to the sale, and that he would therefore have no claim for damages against the defendant. Secondly, if his company, J W Lamin (Private) Limited, were to institute a new claim for damages against Scotrho Finance Limited, it would presumably not succeed even if the latter had breached warranties, because by reason of section 14(d) of the Prescription Act, No 31 of 1975, that claim would have become prescribed within three years of the date of the sale, which occurred on 20 May 1980. Thirdly, if Scotrho Finance Limited were to be the defendant, it would raise a second unshakable defence, because it could also plead successfully that its hire purchase

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agreement contained a claim declaring that no warranties were included in the contract of sale.

In Beck's *Theory and Principles of Pleadings in Civil* Actions, 5 ed para 83, it was said *inter alia* as follows:

"(a) It may be stated as a general rule that an amendment will be granted unless the application to amend is *mala fide* or would cause prejudice to the other side which

cannot be compensated by a postponement or by an order for costs or both.

(b) In general, however, application for amendment should be made timeously, i.e. without unreasonable delay. In considering whether there has been unreasonable delay all the relevant circumstances must be taken into consideration.

(c) The court will refuse an amendment at the trial where a party has deliberately failed to plead a cause of action or defence of which he was well aware, because of the fact that he desired to have witnesses cross-examined before the issue was pleaded.

(d) A delay only is not fatal to an amendment where such amendment would facilitate the proper ventilation of the dispute between the parties."

With these *dicta* in mind, and no doubt others, in his opening argument for the defendant as applicant, Mr *O'Meara* concentrated on establishing on the facts revealed in the papers that although both parties were at fault in allowing the case to reach its present extraordinary situation, the fault of the plaintiff was greater than that of the defendant, because throughout he had had in his possession the hire purchase agreement with Scotrho, whereas for reasons explained in the affidavits of Mr White and Mr Chadder, the defendant had only become guilty of oversight far later. Mr *O'Meara* did not discuss in detail the nature of the prejudice that would be suffered by the plaintiff if the amendment were to be granted, or whether he could be compensated by some order for costs.

At the conclusion of Mr *O'Meara's* argument I invited both counsel to consider the effect on the course of the trial from the point of view of the trial judge if the amendment were refused. Mr *Colegrave* argued that in that event the case would have to be determined on the fictional basis that the present pleadings reflect the true factual position between the parties. He did not cite any authority for such a means of deciding the case and neither he nor Mr *O'Meara* developed any detailed argument on the point I raised. This did not surprise me because the situation in this case, so far as I am aware, has had no precedent in any law reports. For this reason, I have decided that it is unnecessary to set out in this judgment the rest of the carefully prepared arguments of either counsel. I shall simply address myself to the question whether the amendment to its plea sought by the defendant should be granted in view of the fact that it is common cause that the allegations in the amendment are the truth, and would provide an unassailable defence, and that the contrary allegation, now agreed to be untrue, will still have to be relied upon by the plaintiff in the trial, if he is to succeed in it.

The first matter to be noted is the wording of Rule 132 of the High Court Rules. It reads:

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PITTMAN J

> "Failing consent by all parties the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

In *Horne v Hine* 1947 SR 123, TREDGOLD J (as he then was) said:

> ". . . I am enjoined to make any amendment which shall be necessary for determining the real question or issue raised by, or depending upon the proceedings."

In the present case the real issue now raised is whether the plaintiff and the defendant were parties to the sale.

In *Levenstein v Levenstein* 1955 SR 91, QUENET J, as he then was, said that the rule "is designed to ensure that the issues which the parties seek to have decided should be brought before the Court" Obviously, "the issues" in this context really means "any issue" and "the parties" means "any party", because it is not envisaged in the rule that the parties are in agreement on the question of an amendment. See the opening words "Failing consent of all parties . . .".

Finally, I refer to the judgment of MURRAY CJ in *Reuben v Meyers* 1957 R & N 616 at 620A. He said:

> "Naturally, the Court will have regard, in considering any application to amend, to questions of prejudice to the opposite party and to questions of appropriate orders as to costs."

The word "prejudice" in a similar kind of context was referred to as follows:

> "The fact that the allowing of an amendment to a plea might be to defeat the plaintiff's claim is not what is meant by 'prejudice' which cannot be remedied by an appropriate order as to costs."

See *GMF Kontrakteurs (Edms) Bpk v Pretoria City Council* 1978 (2) SA 219 (T) at 222F.

In view of the agreement between the parties that there has been no *mala fides* on the part of the defendant, and that both parties have been guilty of oversight in bringing about the inaccurate allegations in the pleadings, I would say that the wording of Rule 132 is in these circumstances probably sufficient authority for the granting of the application without further points being needed.

But what in my opinion puts the matter beyond doubt is the fact that the parties have agreed that the amendment as regards the identity of the

PITTMAN J

parties to the sale is the truth. Because of this agreement, the following extract from the well-known judgment of WESSELS J in *Whittaker v Roos & Another* 1911 TED 1092 at 1102-3, must be considered:

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> "This Court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the Court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of the pen, or error of judgment, or the misreading of a paragraph in pleadings by counsel, litigants were to be mulcted in heavy costs. That would be a gross scandal. Therefore, the Court will not look to technicalities, but will see what the real position is between the parties."

Another matter to be taken into account is what will be the dishonesty of the plaintiff and his legal practitioner, if he persists in claiming damages from a defendant whom they know is not really liable to pay them. It is unnecessary to quote authority for the self evident proposition that this behaviour is unethical and must be stamped down by the Court. It may, however, be of interest to quote the following rule of conduct enforced by the Canadian Bar Association:

> "Notwithstanding the partisan nature of the advocate, these are several duties which he owes to the court, including the duty not to engage in the following:
> 1. knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon false or deceptive affidavit, suppressing what ought to be disclosed, or otherwise assisting in any fraud crime or illegal conduct."

See *Studies in Civil Procedure*, edited by Eric Gertner, of the Ontario Bar. Similar rules, although unwritten, obviously apply to legal practitioners in Zimbabwe. Also, the plaintiff will commit perjury during the trial if he denies the true identities of the parties to the sale of the vehicle. Since the argument, I have been referred to *Phipson on Evidence*, 12 ed, para 43, in which cases are cited as indicating that the defendant will be bound by his admission that he was a party to the sale, unless he obtains special leave to override it. I presume that this reference is intended to support Mr *Colegrave's* argument that the Court can decide the case on a fictional basis.

It is unnecessary to discuss the obtaining of such special leave during cross-examination of the plaintiff, because during such cross-examination the defendant's legal practitioner will have no difficulty in forcing the plain-

tiff to admit his action has been misconceived. That can be done by asking him to identify and explain the existence of the hire purchase agreement between Scotrho and his company, and the copy of the invoice from the defendant to Scotrho. He will have to answer those questions truthfully, and in doing so will nullify his claim against the defendant. It was for this reason that I invited counsel to discuss the conduct of the trial in their arguments. I received no valid argument from Mr *Colegrave* and have been unable to find any such argument that has persuaded me that I would be wrong in granting an amendment which it is common cause is the truth.

I shall therefore grant the application, and as the plaintiff erred in opposing it and wrongly caused the defendant to incur unnecessary costs in preparing and presenting it, those costs

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must be paid by the plaintiff.

The Court Orders:

1. The defendant's application to amend its plea is granted as follows:

    (i) in paragraph 1 of the plea by the deletion of the word and figure "and 3" so that this paragraph reads -

    "Paragraph 1 and 2 of Plaintiff's Declaration are admitted."

    (ii) By the insertion of the following new paragraph in the plea as paragraph 2A -

    "2A. Save as to the date, the details of the vehicle, the purchase price and the sales tax thereon, Defendant denies paragraph 3 of the plea and avers -

    (a) the said vehicle was sold by Scotrho Finance Limited to J W Lamin Private) Limited, trading as Lamin and Son, on or about 20th May 1980 in terms of a written hire purchase agreement;

    (b) the purchaser examined, inspected and was satisfied with the condition of the said vehicle before entering into the said agreement and no representation or warranty was given by the seller, or on its behalf, as to the history, date of manufacture or date of first registration in Zimbabwe or as to the state or quality of the said vehicle, and the purchaser concluded the agreement on those terms."

    (iii) By the insertion before paragraph 2 of the word "Alternatively".

2. The Plaintiff shall pay the defendant's costs of this application.

Higham Seirlis & Lewis, legal practitioners for the plaintiff.

Condy Chadwick & Elliot, for *Gargan Brothers & Chadder*, Mutare, legal practitioners for the defendant.

S v NYAMAPFUKUDZA 1983 (2) ZLR 43 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Gubbay AJA

27 June & 15 July 1983

Flynote

Statutes - by-laws made under - when ultra vires on grounds of unreasonableness - necessity for evidence as to operation in concrete circumstances, unless unreasonableness apparent ex facie the by-law.

Headnote

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By-laws and other examples of subsidiary legislation may be declared invalid on the grounds of unreasonableness. Grounds on which a by-law may be held to be unreasonable include partiality and unequality of operation between different classes of people; manifest unjustness; bad faith; or such oppressive or gratuitous interference with the rights of those persons subject to the by-laws as could not be reasonably justified.

Unless such unreasonableness is obvious from the wording of the by-law itself, it would hardly ever be possible to conclude *a priori* that a by-law is unreasonable without evidence as to its operation in concrete circumstances.

Cases cited:

Kruse v Johnson [1898]2 QB 91; [1895-9] All ER Rep 105;

Sinovich v Hercules Municipal Council 1946 AD 783.

P Chinamasa, for the appellant, cited:

Kruse v Johnson (supra);

R v Abdurahman 1950 (3) SA 136 (AD);

Minister of Posts and Telegraphs v Rasool 1934 AD 167;

Natal Organic Industries (Pvt) Ltd v Union Government 1935 NPD 701;

Kharwa v Inspector of Police, Durban 1931 NPD 197;

R v Campbell (Pvt) Ltd 1956 (2) SA 476 (FSC); 1956 R & N 84;

R v Amoils 1948 (2) SA 869 (T);

R v Seedat & Another 1957 (1) SA 27 (N);

Arlidge v Islington Corporation [1909] 2 KB 127.

M J Gillespie, for the respondent: A statutory instrument ought to be held to be unreasonable only if it is partial or unequal in its operation between classes; is manifestly unjust; discloses bad faith; or involves

GEORGES JA

such interference with rights that no justification therefore can be found in the minds of reasonable men: *Kruse v Johnson* (*supra*). It is true that the provisions of the instrument might affect more harshly persons who suffer greater expense in obtaining the specified commodity but this does not render partial or unequal the operation of the law. It can be said of all laws that they affect some persons or classes of persons more or more harshly than others.

It is accordingly submitted that this effect cannot be called unreasonable, that is, that the subordinate authority acted in a manner that could not have been intended by the delegating authority: *R v Humphreys* 1939 OPD 161.

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Judgment

Georges JA: The Control of Goods (Retail Maize-Meal Prices) Order No 751A of 1982 fixes the maximum price at which various types of maize meal may be sold or exposed for sale, depending on the mass. In the case of roller meal the prices are $1.47 for a 10 kg mass, $2.89 for a 20 kg mass and $6.99 for a 50 kg mass. In the case of super refined meal the prices are $5.79 for a 20 kg mass and $13.60 for a 50 kg mass.

The appellant owns a retail outlet at Mount Darwin - the Luxury Supermarket - and is the director manager of another - Makakudza Enterprises. On 26 January 1983 the police visited these outlets. At Luxury Supermarket they found 50 kg roller meal packs and 50 kg super refined meal packs exposed for sale at $8.99 and $13.99 instead of $6.99 and $13.60. 20 kg packs of roller meal and 20 kg packs of super refined meal were exposed for sale at $4.25 and $7.99 instead of $2.89 and $5.79 and 10 kg packs of roller meal were exposed for sale at $2.25 instead of $1.47. At Makakudza Enterprises 20 kg packs of roller meal were exposed at $4.25 instead of $2.89 and 10 kg packs at $2.25 instead of $1.47. As a result 5 counts of contravention of the order were laid against the appellant.

There was a sixth count for a contravention of section 3 of the Control of Goods (Display of Price) Order 1980 SI No 743 of 1980 in relation to the display of plastic jugs without the cash price or the unit price of the commodity legibly displayed.

The appellant appeared in person and pleaded not guilty and the state outline was read. When asked to outline his defence he stated that the blame lay squarely with his manager who did everything in the shop. He only visited. A short question and answer colloquy then followed between the magistrate and the appellant resulting in the appellant agreeing that he was guilty on all counts. He was then remanded.

At the resumed hearing the appellant was represented by a legal practi-

tioner who called him as a witness in mitigation. He stated that he added the cost of transport from Harare which he had to pay. Questioned by the court he said a truck load cost somewhat under $350 from Harare to Mount Darwin.

The legal practitioner on his behalf contended that there was very little moral blameworthiness and that it was unreasonable of Government to limit businessmen to the same price wherever they may operate in Zimbabwe.

The magistrate convicted the appellant and fined him, on the five counts in respect of the contravention of the Retail Maize Meal Prices Order, a total of $500, or 5 weeks' imprisonment with labour in default of payment. For the contravention of the Display of Price Order he imposed a fine of $30 or 5 days' imprisonment with labour.

This appeal relates only to the convictions on the counts for contravention of the Retail Maize Meal Prices Order.

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In effect two submissions have been made - first that the statutory instrument is *ultra vires* of the enabling Act and secondly that it is unreasonable.

There is no merit in the first submission. The statute which enables the making of subsidiary legislation for the control of prices of goods is the Control of Goods Act [*Chapter 280*] passed in 1954. Section 3(1) reads in part:

> "Whenever it appears to the President necessary or expedient to control -
>
> (a) .....
>
> (b) the distribution, disposal, purchase and sale, or the wholesale or retail prices of any commodity or animal and the charges which may be made -
>
> (i) for services relating to the distribution, disposal, purchase and sale of the commodity or animal as the case may be; and
>
> (ii) for delivery of any commodity or animal, the wholesale or retail prices of which are controlled under this section;
>
> he may make such regulations as appear to him to be necessary or expedient for such purposes. "

The principal regulations are contained in Federal Government Notice 255 of 1954, section 7 of which reads -

> "The minister may, by order -

GEORGES JA

> (a) fix a maximum price, a minimum price or a specified price for the sale of any commodity by persons generally, by any specified person or by any person of a specified class or group to either persons generally or to a specified person or to a person of a specified class or group;
>
> (b) prohibit any person, any specified person or any person of a specified class or group from increasing the price charged by him for any commodity sold by him above the price ordinarily charged by him on a specified date or during a specified period for similar goods sold under similar conditions regarding delivery or payment;
>
> (c) fix the maximum, minimum or specified charge that may be made by any person for the delivery of any commodity."

These sections appear to me to fall squarely within the power conferred by the enabling Act - namely the power to control "the wholesale or retail prices of any commodity."

The second argument was the more strongly pressed - that the regulation was unreasonable.

There was no dispute as to the proper test to be applied. It is that laid down in *Kruse v Johnson* [1898] 2 QB 91 at 99; [1895-9] All ER Rep 105 at 110:

> ". . . I do not mean to say that there may not be cases in which it would be duty of the Court to condemn by-laws, made under such authority as these were made, as invalid, because unreasonable. But unreasonable in what sense? If for instance, they were found to be partial and unequal in their operation between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the eyes of reasonable men, the Court

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> might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.' But it is in this sense, and this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there."

The *onus* is on the person challenging a regulation as unreasonable to show that this is so.

Some discussion centred on whether or not proof that the maximum price fixed by the order would inevitably compel rural retailers to sell at a loss would of itself establish that the order was unreasonable and consequently invalid. The question does not, however, need to be decided since Mr *Chinamasa* concedes that the evidence led in mitigation did not so prove.

He contended that the mere fact that a single price had been flexed for

the whole country necessarily resulted in partiality and inequality. This does not follow. As was mentioned in the course of argument, a businessman in an outlying district may have lower overhead costs for some outgoings such as rent which may partially offset the cost of transportation. The desirability of fixing a uniform price for a basic commodity such as mealie meal is a legitimate consideration to be weighed against the understandable claim of businessmen in the more distant parts of the country to make the same amount of profit on goods as their urban counterparts. It may not be unreasonable to give greater weight to that consideration.

In any event it would hardly ever be possible to conclude *a priori* that a by-law is unreasonable without evidence as to its operation in concrete circumstances. Although it was a dissenting judgment (and for that reason more favourable to the appellant in this matter) the approach of SCHREINER JA in *Sinovich v Hercules Municipal Council* 1946 AD 783 is illustrative. The by-law there being challenged was one prohibiting the keeping of pigs in the municipality. SCHREINER JA stated at 802:

> "In investigating an issue of unreasonableness one would, on this view, ask one's self at the outset whether in the light of the proved facts the by-law is unreasonable in the sense of being manifestly unjust or highly oppressive."

He continues at 811:

> "Turning now to the consideration of the present by-law in the light of the evidence, it may be remarked that the evidence is in some respects unduly meagre. One can gather from the plan to which I have referred, and from the oral evidence, that part of the municipal area is semi-rural for the appellant has a farm of substantial proportions considering its situation. There is moreover a dam some 200 yards wide between the appellant's farm buildings and the nearest residences other than his own. But the record does not disclose the size of the municipal area as a whole or the extent of the farming and residential portions. Nevertheless there is sufficient material from which to form, as I have formed, the clear opinion that the by-law in question was not reasonably necessary to protect the health or comfort of the inhabitants of Hercules."

There is no evidence in this matter on which to make such an evaluation of unreasonableness. Where the issue is one as to whether the by-law falls within the power conferred by the enabling act, it is as a matter of interpretation possible to arrive at a conclusion without

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evidence. In this case where the issue is one of unreasonableness in the sense of partial and unequal application this is not possible. As Mr *Gillespie* contended most laws cause greater hardship on some section of the citizenry than on others. In deciding on reasonableness it is necessary to know the degree of hardship and the factors advanced as justification for the inequality of treatment. In what can only be described as a vacuum in relation to evidence

GEORGES JA

the appeal must be dismissed.

Baron ACJ: I agree.

Gubbay AJA: I agree.

S v NDIWENI 1983 (2) ZLR 49 (HC)

Court **High Court, Bulawayo**

Reynolds AJ

15 July 1983

Flynote

Criminal law - Law and Order (Maintenance) Act [Chapter 65] - s 37(1) - unlawful possession of an offensive weapon - "possession" - meaning of.

Headnote

The word "possession" can be used in either a wide or a narrow sense. In the wide sense, it comprehends the possessor's intention to hold the object in question on his own behalf or on behalf of another. In the narrow sense it means that the possessor intended to hold it on his own behalf only. In either case it connotes a compound of a physical situation and a mental element or *animus*. The mental element consists of an intention on the part of the accused to exercise control over the article, the element of *animus* which is comprised in the concept of possession or custody. This element should be distinguished from the additional factor that the onus is on the State in any criminal case to establish *mens rea* (unless this requirement has been excluded by the enactment under consideration).

In respect of contraventions of s 37(1) of the Law and Order (Maintenance) Act [*Chapter 65*], "possession" will only be established if the State proves -

(1) that the offensive weapon or material was in the custody or detention of the accused;

(2) the mental element of *animus*, as explained above;

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(3) *mens rea* is respect of both these elements of the offence.

With regard to "custody" or "detention", the cases and ordinary meanings of the words denote the concept of "physical control". Accordingly, an innocent onlooker to another's crime would not himself have control of the article unlawfully possessed. Indeed, it has never been part of our law - with the exception of certain statutes - that a person is criminally liable if he happens to observe a crime being committed and omits to take any action about it.

Cases cited:

S v Masson 1982 (1) ZLR 216; 1982 (4) SA 416 (ZSC);

Solomon v Visser & Anor 1972 (2) SA 327 (C);

Scholtz v Faifer 1910 TPD 243;

S v Smith 1965 (4) SA 166 (C);

R v Sibanda (No. 1) 1963 R & N 593;

Moosa v Constantia Motors 1958 (2) SA 334 (E);

REYNOLDS AJ

R v Binns & Anor 1961 (2) SA 104 (T);

R v Ndema 1954 (4) SA 25 (E);

R v Fume 1940 OPD 208.

Judgment

Reynolds AJ: The accused was charged in the Regional Magistrate's Court with contravening s 37(1) of the Law and Order (Maintenance) Act [*Chapter 65*] in that he was in unlawful possession of an offensive weapon. He pleaded not guilty to this charge, but was convicted and sentenced to 15 months' imprisonment with labour, all of which was suspended on conditions.

The facts of the case are that in May 1980 the accused was a taxi driver and in this capacity he had been hired by an unknown person to convey him to a certain township. On the way this person ordered the accused to turn off the main road. They proceeded to a bush area where the accused was told to stop. This person then dug a hole under a nearby rock and buried the pistol in this hole. He then covered it with another rock. This person warned the accused not to report this incident, not to remove the pistol and he threatened that if he was disobeyed the accused would be hunted down and killed. The accused then drove this person to his destination and they parted company.

The section which the accused allegedly contravened provides as follows:

> "Any person who, without lawful authority or reasonable excuse the proof whereof lies on him, has in his possession or in or upon any premises occupied by him any offensive weapon or any offensive material shall be

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guilty of an offence."

It appeared to me to be difficult to understand how the facts proved could establish that the accused was 'in possession' of the pistol concerned. In answer to a query in this regard the Regional Magistrate has relied on the construction placed on the words of this same section in *S v Masson,* 1982 (1) ZLR 216; 1982 (4) SA 416 (ZSC) when it was held that the "ordinary meaning" should be given to the term "has in his possession", namely that the appellant had "mere custody or detention of the arms, provided that he knew what they were and that he had custody." The Regional Magistrate argued that -

" . . . although the accused did not actually bury the firearm he was aware of its exact location. The location was well concealed and only known to the accused and this other person. It is my submission, therefore, that the accused had control over the firearm and in fact custody."

Many decisions indicate that the term "possession" can be used in either a wide or a narrow sense and a distinction is made on the basis that in

REYNOLDS AJ

the wide sense it comprehends the possessor's intention to hold the object in question either on his own behalf *or* on behalf of another whereas in the narrow sense it means that the possessor intends to hold the object on his own behalf only. See *Solomon v Visser & Another,* 1972 (2) SA 327(C), Claassen's *Dictionary of Words and Phrases* Vol 3, and *S v R* 1971(3) SA 787(C).

In *S v Masson supra* the wide or extended meaning is adopted. Whether the wide or the narrow meaning applies, however, it has been conclusively established in many cases that the word "possession" connotes a compound of a physical situation and a mental element (*animus*) (*Scholtz v Faifer* 1910 TPD 243 at 247). This mental element consists of the intention of the accused to exercise control over that article - the element of *animus* which is comprised in the concept of possession or custody. This element should be distinguished from the *additional* factor that the *onus* is on the State in any criminal case to establish *mens rea* unless this requirement has been excluded by the enactment under consideration: *S v Smith* 1965 (4) SA 166 (C). The requirement of *mens rea*, and not *animus* is dealt with in *Sibanda v R* (No 1) 1963 R & N 593 at 596:

"The books abound with authority dealing with the question of the proof of *mens rea* in statutory offences where the unlawful 'possession' of certain articles is forbidden. In all these cases it has always been held that the *onus* is on the Crown to prove *mens rea*."

"Possession", therefore, as it applies to contraventions of s 37(1) of the Law and Order (Maintenance) Act, will, in my view, only be established if the State proves:

(1) that the offensive weapon or material was in the custody or detention of the accused;

(2) the mental element of *animus* as explained above; and

(3) *mens rea* in respect of both the above elements of the offence.

In the present case, as it happens, the mental element of "possession" referred to above and

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the *mens rea* requirement overlap and no distinction is necessary.

The words "custody" and "detention" as used in *S v Masson supra* both convey in their normal meaning the physical keeping or control of an object. The Shorter Oxford Dictionary defines "detention" as "holding in one's possession or control." In *Moosa v Constantia Motors* 1958(2) SA 334(E) at 337, DE VILLIERS JP states:

REYNOLDS AJ

> "If I get permission from some person to park my car on his premises and do so, he does not thereby get physical control or the 'detentio' of my car."

In *S v R supra detentio* was held to mean "physical control of a corporeal thing."

"Custody" is defined in the Shorter Oxford Dictionary as "safekeeping; protection; charge; care; guardianship", and in Webster as "guarding, keeping; act or duty of guarding and preserving; safekeeping, protection, care, maintenance". In *R v Binns and Another* 1961(2) SA 104(T), the word "custody" is examined in depth and the meaning ascribed ultimately is "physical control". In *R v Ndema* 1954(4) SA 25(E), the ordinary or wide meaning of "custody" was held to include the accused's physical "holding of a shotgun against all-comers for and on behalf of his father". Finally, in *R v Fume* 1940 OPD 208, DE BEER J expressed his understanding of the word as:

> "To my mind it means the right or duty to exercise physical detention."

In applying these references to the instant case, I cannot see how the accused's actions, or omissions, could possibly fall within the meanings as expressed above. There was nothing to show he did anything or intended to do anything to exercise any physical control of the firearm.

When considering any legal problem it is often of value to question whether one's proposed solution or interpretation is in accord with one's sense of justice and with common sense. If not, it will generally be found that the construction being considered for adoption is incorrect. Whereas "law" and "justice" are not necessarily interchangeable terms - indeed, at times the most appalling instances of injustice are perpetrated in the name of the law - generally speaking the law aims at keeping peace and order in the community in which we live, within the scale of values accepted by the people, and such laws are usually just and necessary. Where there are no conflicts of values, restrictions on liberty or other obviously contentious areas, the law under consideration generally accords with equity and good government. It is in regard to such "unobjectionable" laws that an unjust solution to a legal problem will usually prove to be an incorrect solution as well.

It is a well-known canon of construction that where the language of a statute is capable of more than one interpretation, the court should adopt the interpretation which leads to a reasonable result. See Craies on *Statute Law* 7 ed p 98; Maxwell on *Interpretation of Statutes* 12 ed p 203.

REYNOLDS AJ

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Thus, when examining the facts of the present case, had the regional magistrate adopted this approach he would surely have regarded it as being both unjust and unreasonable that an innocent onlooker should be liable for another's unlawful act. It has never been part of our law, other than for certain specific exceptions, or unless there is express provision made in a particular enactment, that a person is criminally liable if he happens to observe a crime being committed and omits to take any action about it.

I can find no basis for upholding the conviction in this case, and with the agreement of my brother McNALLY, the conviction and sentence are, accordingly, set aside.

HARARE MUNICIPALITY v ARBOR ACRES (PVT) LTD 1983 (2) ZLR 54 (HC)

Court **High Court, Harare**

Waddington J

7 & 20 July 1983

Flynote

Practice and procedure - prescription - when debt due - supply of electricity by municipality to consumer - erroneously sending accounts for amounts less than actually consumed - such accounts paid - subsequently claiming for balance in terms of regulation (3)(g) of section 6 of Part II of Salisbury Municipal Electricity Supply Regulations 1941 (incorporated into contract under which electricity supplied) - debt in respect of outstanding amounts not due until arrival of date for payment specified in account.

Headnote

The respondent company entered into a contract in 1973 in terms of which the then Salisbury Municipality undertook to supply it with electricity. Meters were installed; these were read by servants of the Municipality and monthly accounts tendered to the respondent. These were duly paid. It later emerged that during the period January 1975 to September 1981 the metres had been consistently misread, resulting in the respondent being billed for one-tenth of the electricity it had actually consumed. The Municipality, on discovering this fact, claimed the shortfall of some $80 000. The respondent agreed to pay some of the amount, but claimed, in respect of the accounts relating to the period 1976 to 1979, that the Municipality was prescribed from recovering them.

In terms of the contract - a standard one - the supply of electricity by the Municipality was governed *inter alia* by the Salisbury Municipal Electricity Supply Regulations 1941, reg(3)(g) of s 6 of Part II of which reserved the right to the Municipality, if any error was discovered in the consumer's account, to amend the account. Regulation (14) of s 3 provided that accounts became due and payable on the date stated therein.

Held, that in terms of s 15(1) of the Prescription Act No 31 of 1975, prescription commenced to run as soon as a debt was due. In terms of the Regulations, a debt for the supply of electricity was due on the date given in the account; if no account were presented, no debt would be due.

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Similar considerations applied to amounts incorrectly expressed: the only debt due was that expressed in the account. Thus, the outstanding amount became due only on the arrival of the date expressed in an account in respect of those amounts. To hold otherwise would be to disregard two cardinal principles of interpretation: the first, that the Court must give effect to all the words in the legislation; the second,

WADDINGTON J

that, in the absence of a clear intention to the contrary, the legislature is presumed to intend to advance the public good, sometimes as here at the expense of private rights.

Cases cited:

Sadomba v Farai Uzumba (Pvt) Ltd & Another 1982 (2) ZLR 142;

Attorney-General, Transvaal v Additional Magistrate, Johannesburg 1924 AD 421;

Stellenbosch Divisional Council v Myburgh (1887) 5 SC 8;

Cape Provincial Administration v Honiball 1942 AD 1;

Belinco (Pty) Ltd v Belville Municipality & Another 1970 (4) SA 589 (AD).

F C Blackie SC, for the applicant.

A P de Bourbon, for the respondent.

Judgment

Waddington J: The applicant, Harare Municipality (to which I shall refer as Harare), seeks payment by the respondent company, Arbor Acres (Pvt) Ltd, of a total of $80 015,38. Arbor Acres admits liability for $36 810,17. In dispute therefore is the liability to pay the sum of $43 205,21. There is no dispute on the facts giving rise to the claim. The only question which falls for decision is whether Harare's disputed claim has become prescribed by the effluxion of time. Arbor Acres in its replying affidavit has raised a defence analogous to a plea in bar to the proceedings instituted on behalf of Harare by notice of motion.

Almost ten years ago to the day Harare contracted in writing with Arbor Acres to supply low voltage electricity to the latter's farm. It was necessary to give effect to the agreement to install two electricity measuring meters at the farm. These meters started operating on 29 January 1975 and accounts were subsequently tendered monthly by Harare in respect of the electricity consumed by Arbor Acres.

Under the contract Harare or Arbor Acres would read the meters to ascertain the information on which Harare would raise the regular monthly supply charges. From 29 January 1975 to 16 September 1981 the servants of one or other of the parties consistently misread the meters. As a result, during the period concerned the value of only one tenth of the electricity actually consumed was charged against Arbor Acres. The mistakes "arose from a failure to pay regard

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to a nought which had been added to the dials of the meter" (founding affidavit para (6)).

In due course the errors which became cumulatively more serious in effect were discovered. Harare invited Arbor Acres to pay the accumulated shortfall of $80 015,38. After some understandable resistance, Arbor Acres partially capitulated to the claim, as already indicated in this judgment. Resistance is maintained on the basis of prescription, however, in respect

WADDINGTON J

of all the accounts rendered by Harare for the period 1976 to 1979 inclusive. It is the total of these accounts that constitutes the sum of $43 205,21 which Arbor Acres maintains is not now payable, the debts having been extinguished by operation of s 13(1) of the Prescription Act, 1975 (Act No 31 of 1975). None of the debts which arose during 1975 is the subject of these proceedings because, presumably, the law relating to prescription was changed on 1 January 1976, when the Prescription Act, 1975, came into effect. Those debts which arose after 11 January 1983 are not in contention either because it was on that date that the present proceedings were instituted, thereby interrupting the prescriptive process. In the result, liability is admitted by Arbor Acres in respect of those debts which arose in 1975, 1980 and 1981 and which total $36 810,17.

It was not disputed in argument that if prescription is a good defence at all in this case, the prescriptive period is three years (s 14(d) of the Prescription Act, 1975).

So much for the general background to the case.

A standard form of contract was used by the parties to govern the supply of power by Harare (founding affidavit annexure "A"). General Condition (7) of the contract reads - where relevant - as follows:

> "The supply of electricity under this agreement is subject to these General Conditions, to ... the Salisbury Municipal Electricity Supply Regulations, 1941 (henceforth referred to as the 'regulations'), and any other statutes, by-laws, and regulations affecting the supply of electricity, as amended from time to time, and, further, this Agreement shall not be deemed to limit or derogate from the rights of the Supply Authority. ..."

Regulation (3)(g) of s 6 of Part II of the Regulations reads as follows:

> "The Supply Authority(ie Harare) reserves the right, should any error be discovered either in the accounting, reading or metering, respecting any account rendered to a consumer, to amend or rectify such account by including such amendment or rectification in any or all subsequent accounts rendered to him."

Regulation (14) of s 3 of Part II of the Regulations reads as follows:

> "All accounts are due and payable on the date stated therein, and rendition of the account shall constitute notice that the supply of electricity shall be cut off if payment is not made on or before such date."

Mr *de Bourbon*, who represented Arbor Acres, argued that in respect of each monthly account rendered during the period 1976-1979 inclusive, prescription started to run from the date referred to in reg (14) of s 3 of Part II. This submission was, incidentally, different from Arbor Acres'

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WADDINGTON J

replying affidavit where it is said in para 8 that in respect of each of the amounts claimed the debt thereby created became due upon the date on which the meter reading was taken. Mr *de Bourbon* did not rely on this argument, however. Mr *Blackie,* who represented Harare, agreed with the argument relied on by Mr *de Bourbon.* But there was no agreement between counsel after that point in the problem. It was contended on behalf of Arbor Acres that when prescription began to run it ran thenceforth not in respect only of the amount actually stated in each individual monthly account but in respect of the *full amount* which, unbeknownst to the parties at the time, should correctly have been charged against Arbor Acres (it will be remembered that in each account the amount stated was only one tenth of what it ought to have been). Mr *Blackie* sharply disagreed, maintaining that only the amount stated in any particular account became due and payable on the date specified in reg (14) of s 3. As prescription only begins to run when a debt is due and as Arbor Acres' electricity debts were only due when accounts were rendered, prescription did not begin to run *vis-a-vis* the amounts undercharged until accounts were rendered to Arbor Acres in respect of those particular amounts.

Section 15(1) of the Prescription Act, 1975 provides *inter alia* that -

> ". . . prescription shall commence to run as soon as a debt is due."

In terms of reg (14) of the Regulations which by reference formed part of the contract, accounts for electricity consumed are due and payable on the date given in the account. In this context the expression "account" must in my view be taken as referring to a debt owed in respect of electricity consumed. It can mean nothing else. Until an account is rendered, therefore, there can be no date for payment and the debt cannot be due either. Thus, if Harare were to omit to render an electricity account altogether as a result of an error in accounting, reading or metering, for example, prescription would not begin to run at all if the plain meanings of regulations (3)(g) and (14) of the Regulations are to be given effect. It is quite true that such a debt may have arisen before the date on which an account in respect thereof is rendered, but that is not the criterion specified in s 15(1) of the Act, which governs the commencement of the running of prescription. The Prescription Act makes a clear distinction between debts arising and the recoverability of debts (see, for example, ss 12 and 15 of the *Act and Sadomba v Farayi Uzumba (Pvt) Ltd and Anor* 1982 (2) ZLR 142).

Whereas Arbor Acres may under its contract with Harare have incurred debts in respect of electricity consumed at any stage between the ac-

WADDINGTON J

tual consumption of the power and the rendering of the relevant accounts, it seems quite clear that the debt (the account) would not fall due or be payable until the arrival of the payment date specified in the account.

If it is true that the whole of an electricity debt incurred by Arbor Acres would not under the

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contract fall due at all unless and until a date for payment were to be specified in an account duly rendered, it must follow in my view that the same principles must apply in respect of part of an electricity debt for which an account is not rendered - *maius continet minus.* When an electricity account correctly expresses the amount due it is that amount obviously which is payable on due date and no other amount. If that amount be not paid on due date, supplies may be cut off in terms of reg (14) of s 3 of the Regulations. On the other hand, when an electricity account incorrectly expresses the amount due by understating the true debts it could not have been intended in my view that the debtor somehow would be expected to pay the whole true unexpressed amount on due date and that failing such payment could risk termination of his supplies. It may be that a consumer could calculate his own indebtedness each month but I can find nothing in the regulations or in the contract which casts a responsibility upon the consumer to ascertain and pay the correct amount owing on pain of losing his supply of electricity. Had the intention behind reg (14) been to permit a supply authority to terminate supplies to a consumer who timeously pays the amount expressly demanded of him, the statutory instrument in question would be in my opinion both unreasonable and unjust in its effect and probably *ultra vires*.

I am fortified in this conclusion by the consideration that reg (3)(g) of s 6 of Part II of the Regulations confers on the supply authority wide powers to rectify errors "in *any* or all subsequent accounts rendered" (the emphasis is mine). Mr *de Bourbon* argued in effect that these provisions are tautologous because, provided the supply authority acts to recover underchargings before debts are extinguished by prescription, the authority has the right at common law to raise charges to effect rectification of an incorrect account. Unless the regulatory power of rectification had been intended to permit a supply authority to enact corrections in any subsequent account, the provision would be tautologous because, apart from referring to "any" subsequent account, it merely restates rights possessed by any creditor who has inadvertently undercharged for services rendered or for goods supplied and delivered. The question is whether reg (3)(g) in the context of the agreement removes late recoveries of electricity debts from the operation of the law of prescription. Mr *de Bourbon's* argument in my view failed to take into account in this regard two

WADDINGTON J

principles of interpretation which are of importance in determining the meaning of reg (3)(g) and therefore of the contract between Harare and Arbor Acres.

The first principle is that the Court is to give effect to all words appearing in a statute or in subsidiary legislation unless necessity or intractibility of language dictates otherwise. KOTZE JA, for example, in *Attorney-General*, *Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436 is reported in the following terms:

> "A statute ... should be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant ... To hold certain words occurring in a section of an Act of Parliament as insensible, and as having been inserted through inadvertence or error is only permisseble as a last resort."

There was in my view a very good reason for including reg (3)(g) in the regulations and, accordingly, far arriving at the conclusion that the provision was not inserted needlessly as

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suggested in argument.

Sometimes the general rule of interpretation relating to the preservation of private rights in the absence of a clear intention to the contrary may give way to the presumption that the Legislature intends to advance the public good. See, for example, *Stellenbosch Divisional Council v Myburgh* (1887) 5 SC 8 at 13-14; *Cape Provincial Administration v Honiball* 1942 AD 1; and compare *Belinco (Pty) Ltd v Belville Municipality & Anor* 1970 (4) SA 589 (AD) at 597. In the instant case, the clear object of reg (3)(g) is to enable supply authorities to recover outstanding amounts owing on electricity actually consumed by individual consumers. Harare is an organisation financed mainly by the imposition of rates and other similar charges levied upon property owners. Further revenues are raised in a large variety of other ways, including charges for amenity services and for the sale of water and electricity. Harare is not a commercial undertaking in the sense that it was set up for profit-making purposes. Like the Government, it should exist only for the general public good. Its revenue must, however, be sufficient to cover its reasonably necessary overheads and development and maintenance schemes commensurately with the means generally of the inhabitants who contribute to its support. It is not at all unreasonable to suppose in these circumstances that the object of reg (3)(g) is to ensure that no consumer who enjoys the benefit of electric power should be able to profit to the detriment of Harare itself or to the prejudice of other rate-payers generally. I am satisfied for this reason then that reg (3)(g) must be construed as enabling Harare, or any other supply authority for that matter, to recover outstanding electricity

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WADDINGTON J

debts in the circumstances which have arisen in this case. To hold otherwise could result over the years in grave pecuniary loss to public organisations which are intended to function effeciently for the public good. Such organisations are authorized to supply electric power and to do so to many thousands of consumers in cities such as Harare (s 169 of the Urban Councils Act [*Chapter 214*]). Undertakings of a public nature which operate on this vast scale obviously need to be protected against cumulative heavy financial losses which may arise either from human or mechanical error. The presumption that reg (3)(g) was passed to advance the public good is in my view particularly strong in the present case. This is one of the rare instances in my view where private rights were intended to give way to the public good.

For all the reasons above I conclude that the amounts totalling $43 205,21 which should have been included in the accounts rendered between 1976 and 1979 inclusive have not become prescribed. The defence raised on behalf of Arbor Acres therefore fails and the respondent is ordered to pay the sum of $43 205,21 to the applicant, together with interest thereon from the date on which these proceedings were instituted, together with costs.

It is recorded that during argument respondent admitted liability for the balance of applicant's claim, ie $36 810,17, and that respondent's tender thereof was accepted by the applicant together with costs relating to that amount up to the date of filing of respondent's affidavit.

Honey & Blanckenberg, legal practitioners for the applicant.

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Condy Chadwick & Elliott, legal practitioners for the respondent.

GUZUZU v CHINAMASA NO & THE MASTER 1983 (2) ZLR 61 (HC)

Court **High Court, Harare**

McNally J

14 & 20 July 1983

Flynote

Succession - intestate - claiming from estate repayment of all monies paid in course of marriage - necessary to establish at least a tacit universal partnership - customary law - succession to immovable property - African Wills Act [Chapter 240] - s 7 - application of.

Headnote

The applicant was married to the deceased under customary law in 1978, but their marriage was not solemnised in terms of the civil law. In 1981 the deceased died as the result of a motor accident. He died intestate and under customary law his heir was his brother.

The applicant sought relief from the Court on two grounds, the first, that she was entitled to a refund of the amount of her salary which was paid monthly into her late husband's savings account. This totalled $6 756,33. The second ground was that since, as she claimed, immovable property was not governed by the common law, the immovable property in the estate should devolve upon her in terms of the common law relating to intestate succession.

Held, that unless she established a universal partnership or a partnership in a particular venture, there was no basis on which she could claim a refund of her contributions towards the costs incurred during the marriage (*Home v Hine (1)* 1947 SR 123; 1947(4) SA 757 (SR) followed).

Held, further, that the provisions of s 7 of the African Wills Act [*Chapter 240*] were quite clear, and that the heir at customary law succeeded to any immovable property.

Held, further, that in a proper case, where people have moved away from a form of life governed by customary law, the support for a widow provided under that law can be achieved by reliance on the provisions of the Deceased Persons Family Maintenance Act 39 of 1978.

Cases cited:

Horne v Hine (1) 1947 SR 123; 1947(4) SA 757 (SR);

Jirira v Jirira 1976 (1) RLR 7;

Chiromo v Katsidzira 1981 ZLR 418; 1981 (4) SA 746 (ZAD);

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Dokotera v The Master & Others 1957 R & N 697; 1957 (4) SA 468 (SR);

Matambo v Matambo 1969 (2) RLR 154; 1969 (3) SA 717 (RAD);

Mvududu v Mvududu NO & Others 1981 ZLR 397; 1981 (4) SA 458 (Z).

McNALLY J

C L Mercer, for the applicant

P Machaya, for the first respondent

Judgment

McNally J: The applicant's husband died apparently in a motor car accident on 19 May 1981. They had been married by customary law on 8 May 1978. Both parties were school-teachers and dedicated and involved Quakers. In fact, the only reason they had not been marred in terms of the Civil Law was apparently that there was not a Quaker marriage officer available at the time. I will refer to the applicant as Mrs Guzuzu.

The first respondent was appointed executor dative of the intestate estate of the deceased, Lovemore Guzuzu. He (whom I will call the executor) is also the legal adviser of Mr Frank Guzuzu, the deceased's brother and his lawful heir in terms of customary law.

The second respondent, the Master of the High Court, has filed a report correcting the alleged date of the marriage but otherwise indicating that he is willing to abide by the Court's decision.

Mrs Guzuzu lodged a claim against the estate which the executor rejected. She then lodged an objection to the executor's liquidation and distribution account which the Master did not uphold. Accordingly she has come to this Court seeking relief.

The relief that she seeks comes under two headings. She claims first that she is entitled to a refund of the amount of her salary which she paid each month to the deceased's CABS account. This totals $6 756,33.

Secondly, she says that immovable property is not governed by customary law and thus that the immovable property in the estate should devolve on her "in terms of the common law rules of intestate succession".

I will deal with each of these contentions in turn.

REFUND OF CONTRIBUTIONS

I must say that I can see no possible basis for Mrs Guzuzu's claim for a refund of the whole amount of the salary that she paid into her husband's account. It is quite obvious that a significant part both of her salary and his was spent on goods which were consumed in the ordinary course of living. She cannot have her cake and eat it. If any authority is needed for this obvious proposition it is to be found in the case referred to by

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McNALLY J

Mr *Machaya,* namely *Horne v Hine (1)* 1947 SR 123 at 124; 1947 (4) SA 757 at 759, where TREDGOLD J, as he then was, said:

> ". . . she seeks everything that site has put in, regardless of the fact that it is quite clear, on the evidence, that by agreement her monies were freely used for all the common purpose of the parties, for their maintenance and in contributions towards their savings."

He ruled that there was no possibility of success on that basis.

In the present case the same considerations apply. In fact, it appears from the papers that at the death of the deceased there were two CABS accounts, each containing about $300. Leaving aside insurance payments there was nowhere near $6 756,33 in cash in the estate - nor indeed in assets either if one takes their net value.

Appreciating his difficulty, Mr *Mercer* sought, in his address in reply to Mr *Machaya,* to amend his draft order in paragraph 1 by adding as an alternative the following -

> ". . . alternatively that the applicant is declared to be entitled to that proportion of the assets acquired after the parties' marriage as her salary contributions bear to those of her late husband during the time of the marriage."

One does not like to refuse an amendment to a prayer for relief, even at so late a stage, bearing in mind the wide provisions of Rule 235(2). But in my view, to allow it would be to introduce entirely new considerations into the case, which the executor has never had an opportunity to consider. I do not know what the deceased's earnings were, whether he had any other sources of income, or what money or assets either of them brought into the marriage. There is simply no basis, on the evidence, on which to begin to make the relevant financial calculations.

Nor does Mrs Guzuzu anywhere in her founding affidavit or the supporting papers allege either a universal partnership or a partnership in a particular venture. See paragraphs 18-20 on p 4 of the papers and the letter at p 16 of the papers. Indeed, it is of significance that she refers to *Jirira v Jirira* 1976 (1) RLR 7 in her affidavit, because in that case there was a finding that there was no tacit universal partnership. By her reference to that case and to the case of *Chiromo v Katsidzira* 1981 ZLR 418; 1981 (4) SA 746 (ZAD) Mrs Guzuzu clearly shows that she has decided against trying to prove a tacit universal partnership and in favour of trying to establish her claim to a refund of contributions.

In my view a claim based on the amended prayer would have no chance

McNALLY J

of success on the evidence before me, and I therefore follow the example of TREDGOLD J in *Horne v Hine (1)* (*supra)* and refuse the amendment.

In the premises I find against the applicant on the first leg of her argument.

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IMMOVABLE PROPERTY

Mrs Guzuzu next claims that customary law does not apply in respect of immovable property, and therefore under Roman Dutch law the immovable property should devolve upon her. Mr *Mercer* relies for this submission on the provisions of s 3 of the Customary Law and Primary Courts Act, No 6 of 1981. This Act came into effect on 22 May 1981, three days after the death of the deceased. However, it seems to me that the Act applies to these proceedings, and if it does not, then its predecessor, Chapter 237, applies (as amended by Act No 11 of 1977) and is in broadly similar terms.

Mr *Mercer* faces the immediate problem, as he himself acknowledges, of s 7 of the African Wills Act [*Chapter 240*], which provides:

> "The heir at African law of any deceased African shall succeed in his individual capacity to any immovable property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will."

It was held in *Dokotera v The Master and Others* 1957 R & N 697; 1957 (4) SA 468 (SR) that in precisely the same situation that section prevented the widow from relying upon the general provisions of the law relating to intestate succession. That was a decision of the then Chief Justice, MURRAY CJ, and it was concurred in by two other judges, QUENET and HATHORN JJ. It is therefore binding upon me, quite apart from the fact that I have no doubt that it is correct.

Mr *Mercer* submits that the section I have quoted has been misinterpreted. It means, he says, no more than this: "If a person is entitled to succeed to immovable property, he shall succeed in his individual capacity rather than in his representative capacity." Therefore, he says, the section leaves it free to the Court to determine who is the person entitled to succeed. In the present case the person entitled to succeed is the widow, in terms of the Deceased Estates Succession Act [*Chapter 302*] as amended by Act 18 of 1977.

It seems to me that this is the same argument as was raised in *Dokotera's*

McNALLY J

case (*supra)* in a slightly different guise. I reject it for the same reasons as were adopted by MURRAY CJ in that case. It may be noted that in *Matambo v Matambo* 1969 (3) SA 717 (RAD) at 719B, BEADLE CJ said that he would be prepared to paraphrase the section as follows:

> "The person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property ...".

That paraphrase also effectively disposes of Mr *Mercer's* argument. See also *Mvadudu v Mvududu No & Ors* 1981 ZLR 397; 1981 (4) SA 458 (Z) at 462A-B and 465H. If one reads Chapter 240 as a whole, and especially if one reads s 7 with s 6, it is quite apparent that the Act is defining who shall succeed and not just the capacity in which a person succeeds.

Accordingly, I find that the position is governed by the decision in *Dokotera's* case and thus it is

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unnecessary to go into the question of the life style of Mr and Mrs Lovemore Guzuzu.

The result of this conclusion is not in this particular case as harsh as might at first appear. The reason for this is that the heir, Mr Frank Guzuzu, has, by deed of donation *inter vivos*, donated the whole of his late brother's estate to the children of his late brother who are in the applicant's custody. This means in practice that she will live in the former matrimonial home, now bond-free thanks to the insurance, as custodian of the children. Moreover, the money involved will be held in the Guardian's Fund to be disbursed according to the needs of the children. Although Mrs Guzuzu has expressed certain fears as to the future conduct of Mr Frank Guzuzu, I can only say that *prima facie* he has behaved with complete propriety, and indeed, generosity.

If this had not been the case the position of Mrs Guzuzu might well have been most unfortunate. The former CHIEF JUSTICE has already commented, in *Chiromo's* case (*supra)* on the need for legislative intervention in this area of the law.

It may well be that, in a proper case, the provisions of the Deceased Persons Family Maintenance Act, No 39 of 1978, are applicable. The customary law provision for a widow is essentially, as I understand it, that she is maintained by her deceased husband's brother who inherits as it were both the estate and the responsibility for the widow. He accepts that latter responsibility in a practical way by taking her as his wife.

For people who have moved away from a form of life governed by

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customary law, it would seem that the same result could be achieved, without the necessity for the enforced marriage, by reliance on the provisions of the Deceased Persons Family Maintenance Act, 1978.

As far as the costs of this application are concerned, I have a certain sympathy with the applicant who has suffered both in the sense that she may well have contributed to her husband's estate amounts which are now lost to her and also in the sense that her husband may well have intended to provide for her in his will, and been prevented by his untimely death from doing so.

Bearing in mind that the heir has generously made over the estate to the children of the applicant and the deceased, and that therefore she will, albeit indirectly, benefit from the estate, I think it would be fair, in the peculiar circumstances of this case, to direct that the costs be paid from the estate, even though I must say that I think her application had little prospect of success.

Accordingly, the application is dismissed but the costs of both parties are to be met from the assets of the estate.

Gollop & Blank, legal practitioners for the applicant.

P Chinamasa, legal practitioner for the 1st respondent.

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S v MUGADZA 1983 (2) ZLR 67 (HC)

Court **High Court, Harare**

Pittman J & Manyarara AJ

18 & 20 July 1983

Flynote

Criminal law - sentence - Road Traffic Act 48 of 1976 - s 45(1) - prohibition from driving an omnibus during lifetime following conviction for driving with excess blood/alcohol level - special circumstances why such prohibition should not be imposed - whether fact that no fare-paying passengers carried is a special circumstance.

Headnote

The appellant, a bus-driver, began a return journey in his bus from Murewa to Harare at night. There were no passengers awaiting transport and the only other persons aboard were two fellow-employees, the conductor and a loader. In the expectation that there would be no passengers anywhere along the route, the appellant stopped the bus at Juru township, some 30 km from Harare and there drank sufficient beer for his blood alcohol level to be 122mg alcohol/100 ml of blood when he was stopped later in Harare. He was prosecuted for driving while his blood-alcohol level was over 80 mg/100 ml and convicted. He was fined $250 and, in terms of s 45 of the Road Traffic Act, prohibited from driving an omnibus during his lifetime. The main argument in the appeal was on whether the fact that no fare-paying passengers were carried constituted "special circumstances" which would justify the Court in declining to impose the life-long prohibition against driving omnibuses. *Held,* that since the appellant was driving on a scheduled route, since it was fortuitous that no passengers presented themselves between Juru and Harare and since the appellant was carrying passengers in the form of his fellow-employees, special circumstances did not exist. It is possible that in other situations they might exist, such as on an unscheduled journey with an empty bus; but the purpose of the legislation was to protect any number of passengers in a bus, whether fare-paying or not.

Held, further that the fine was excessive in all the circumstances and should be reduced to $75.

Case cited:

S v Sabuneti G-S-4-81 (not reported).

M J Gillespie for the appellant.

Miss *M Werrett* for the respondent.

Judgment

Pittman J: This is an appeal against the sentence imposed upon the

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PITTMAN J

appellant for his contravention of section 45(1) of the Road Traffic Act, No 48 of 1976. That subsection makes it an offence for a person to drive a vehicle on a road while the concentration of alcohol in his blood is not less than eighty milligrams per one hundred millilitres. Section 45 goes on to provide that if the accused was driving an omnibus, the Court on conviction shall prohibit him from driving an omnibus during his lifetime, but may decline to do so if it considers that there are special circumstances in the case which justify it in so declining. The section ends with the following paragraph:

> "'special circumstances' means special circumstances surrounding the commission of the offence concerned, but does not include special circumstances peculiar to the offender."

In s 1 of the Road Traffic Act, the word "omnibus" is defined as meaning:

> "a motor vehicle having -
>
> (a) a net mass exceeding two thousand Free hundred kilograms; and
>
> (b) seating accommodation for eight or more passengers."

The trial magistrate sentenced the appellant to a fine of $250 or 3 months' IWL, and he also prohibited him from driving any class of vehicle other than an omnibus for a period of 6 months. In addition, he decided that there were no special circumstances surrounding the commission of the offence, which would enable him to decline to prohibit the appellant from driving an omnibus during his lifetime. Accordingly, he also imposed such a life-long prohibition.

The appellant has appealed against the amount of the fine of $250, and against the magistrate's refusal to decline to prohibit him from driving an omnibus during his lifetime.

The major question in the appeal is whether the magistrate should have found that special circumstances existed surrounding the commission of the offence.

On the day in question, 30 April 1982, a Friday the appellant had driven an omnibus from Harare to Murewa, with two fellow-employees, the conductor and a loader, and with a full load of passengers. He began the return journey to Harare during the night with the conductor and the loader, and although it was a scheduled journey it became accepted that no persons would present themselves as passengers, apparently because it was a Friday evening. Because of this situation, the appellant stopped the bus at Juru Township, some 30 km from Harare, and consumed some

PITTMAN J

beer. He then continued the journey with only the conductor and loader with him, and at 11.15 pm he was driving the bus along Kenneth Kaunda Avenue in Harare. He was observed by a policeman to be travelling there at between 60 and 70 km/h, and swerving from side to side. He was stopped at the intersection of Kenneth Kaunda Avenue and Julius Nyerere Way, and taken

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to Harare Central Hospital for a blood-alcohol test. He was found to have a concentration of 122 mg of alcohol per 100 ml of blood.

In his argument for the appellant relating to the question whether there were special circumstances surrounding the commission of the offence, Mr *Gillespie* could and did rely only upon the absence of any paying passengers in the bus when the appellant was stopped from driving it, and upon the fact that when he consumed the alcohol there was a probability that there would be no paying passengers during the rest of the journey.

Mr *Gillespie* contended that other types of heavy vehicle, for example, petrol tankers, cattle trucks, and big lorries with trailers, could cause just as much harm to other persons involved in accidents, because their drivers had consumed alcohol, as would omnibus drivers. The fact that the Legislature had confined the punishment of a life-long driving prohibition to onmibus drivers was a clear indication that in prescribing that punishment it had been concerned mainly with the protection of the passengers in omnibuses. Consequently, it would be right to treat the absence of passengers in any omnibus in which the driver was contravening s 45 as a special circumstance surrounding the commission of his offence, especially if the driver did not expect to have any passengers.

In reply to this argument, Miss *Werrett* for the respondent conceded that if a driver, with an illegal alcohol content in his blood, was to enter an omnibus and drive it along some unscheduled route, for example to a service station for a mechanical repair, with absolutely no possibility that any passenger would enter the omnibus on such a route, it may be that the absence of any passengers would constitute a special circumstance. But that was not the situation in the present case. It was possible that some persons would present themselves as passengers on the scheduled route between Juru Township and Harare, and the fact that none did so did not constitute a special circumstance for the appellant's driving in contravention of s 45 on that route. It had also to be borne in mind that throughout that part of the return journey to Harare there were two other persons in the omnibus. The conductor and loader were persons whom the Legislature had sought to protect just as much as fare-paying passengers.

PITTMAN J

I consider that Miss *Werrett's* argument must be accepted as valid by this Court. It is true that the definition of "omnibus" refers to a heavy motor vehicle having seating accommodation for eight or more passengers. But it would be patently unacceptable to argue that if there were no allow employees of the driver in an omnibus and only, say, two fare-paying passengers, the lack of eight such passengers would justify a decision that special circumstances exist.

In my opinion, by prescribing the life-long prohibition as a punishment for omnibus drivers, the Legislature must have intended to protect any number of passengers in an omnibus, whether such passengers were fare-payers or fellow-employees of the driver. It is unnecessary for this Court to decide whether a special circumstance would exist if the driver is absolutely alone in the omnibus and was driving on an unscheduled route on which it was absolutely certain that he would not pick up any passengers.

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The facts of this case are such that the presence of the conductor and the loader in the omnibus and the possibility, albeit remote, that fare-paying passengers might enter the omnibus obliged the driver to realise that he was ignoring the intention of the Legislature to protect omnibus passengers of any kind. There were no special circumstances upon which he could rely to ignore that intention.

Consequently, I think it must be held that the appeal must be dismissed, in so far as it concerns the magistrate's refusal to recognize the existence of special circumstances enabling him to decline to impose the life-long prohibition of omnibus driving on the appellant.

As regards the appeal against the amount of the fine of $250, it was conceded by Miss *Werrett* that that fine was excessive. In a review judgment, *S v Sabuneti* G-S-4-81, where the accused was convicted of contravening s 45(1), I dealt as follows with the fine of $300 imposed on him:

> "In this regard; it is noteworthy that despite invoking the assistance of the Attorney- General's office; I have been unable to trace any case in which a contravention of s 45(1) has led to a fine greater than $150."

In the present case, the speed and manner in which the appellant drove an omnibus and the place in which he did so, did justify a heavy fine. But he had a fairly low blood-alcohol content, was a first offender aged 57 years of age, and had been an omnibus driver since 1948. With the fact that he is now to be prohibited from driving an omnibus for the rest

of his life, a fine of $75, or 1 month's IWL, is adequate.

Consequently, it is now ordered, with the agreement of MANYARARA AJ, that the appeal is allowed in that the fine of $250 or 3 months' IWL is altered to be a fine of $75 or 1 month's IWL, but for the rest the sentence is confirmed and the appeal dismissed.

Manyarara AJ: I agree.

N H Franco & Co, legal practitioners for the appellant.

Attorney-General, legal practitioners for the respondent.

BARKER McCORMAC (PVT) LTD v GOVERNMENT OF KENYA 1983 (2) ZLR 72 (SC)

Court **Supreme Court, Harare**

Baron ACJ, Georges JA & Beck JA

1 June & 22 July 1983

Flynote

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Constitutional law - doctrine of sovereign immunity - no longer absolute but restricted to sovereign acts jure imperii - acts jure gestionis such as commercial transactions not covered by doctrine - commercial transactions for purposes falling within public domain - whether acts jure gestionis - application for leave for substituted service of summons - whether court should mero motu raise question of sovereign immunity.

Headnote

The appellant company was leasing premises in Harare from which it conducted its business. The lease expired on the 31 March 1981, with an option to renew for a further 3 years at increased rental. The owner of the premises sold them to the Government of Kenya in mid 1980; that Government wanted the premises for use as its High Commission in Zimbabwe. When the lease expired, the appellant attempted to exercise the option to renew the lease but the Kenyan Government refused to allow it to do so on security grounds. The appellant was thus forced to move to other premises at a higher rental. It sought to claim from the Kenyan Government the difference over the period of the lease. An attempt by the Sheriff to serve a summons in the normal way was unsuccessful, the High Commission declining to accept service, and the appellant applied for substituted service under Order 6 Rule 46(1). The matter was heard by WADDINGTON J, who held that a foreign government could not be sued here for the relief claimed and so dismissed the application.

The major question to be decided in the appeal was that of the nature of the immunity of a foreign government from the jurisdiction of the municipal courts. The appellant also argued that the judge *a quo* should not have raised *mero motu* the question of sovereign immunity but should have ruled on it only if the defendant Government itself claimed immunity.

Held, that international law is part of the law of Zimbabwe, unless it conflicts with the common law or legislation of Zimbabwe. Under international law, historically, foreign sovereigns and governments enjoyed absolute immunity from the jurisdiction of municipal courts. However, this notion of absolute immunity has in recent years been eroded, one reason being the tendency for making the sovereign liable to be sued in his own courts and

the undesirability of giving to foreign sovereign an immunity not granted to the local one. The courts of England and South Africa have, however, come to accept what has been accepted in other countries, namely, that the most that can be said of sovereign immunity is that the foreign sovereign may claim immunity only in respect of governmental activity or property (acts *iure imperii*) but not acts *iure gestionis* such as purely commercial transactions. This approach should be accepted as being the law of Zimbabwe.

Held, further, that it was not necessary at this stage to decide whether the purpose for which an act is performed affects the nature of the act. It was at least arguable that the claim in this case was one in regard to which immunity could not be raised and the plaintiff should have been granted leave for substituted service of the summons.

Held, further, that it was also unnecessary to rule definitively or the question of whether the judge *a quo* ought to have raised the issue of sovereignty *mero motu*.

Cases cited:

Nduli & Another v Minister of Justice & Others 1978 (1) SA 893 (AD);

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Chung Phi Cheung v R [1938] 4 All ER 786 (PC);

The Cristina [1938] 1 All ER 719 (HL);

The Parlement Belge (1880) 5 PD 197; [1874-801] All ER Rep 104;

Rahimtoola v Nizem of Hyderabad [1958] AC 397; [1957] 3 All ER 441 (HL);

Thai Europe Tapioca Service Ltd v Government of Pakistan & Others [1975] 3 All ER 961 (CA);

The Phillipine Admiral v Wallem Shipping (Hong Kong) Ltd & Others [1976] 1 All ER 78 (PC);

I Congresso de Partido [1981] 2 All ER 1064 (HL);

Inter-Science Research & Development Service (Pvt) Ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T);

Government of the Democratic Republic of the Congo v Veene (1971) 22 DLR (3d) 669;

Claim against the Empire of Iran (1963) 45 ILR 57;

Prentice Shaw & Schiess Inc v Government of Bolivia 1978 (3) SA 938 (T);

Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia 1980 (2) SA 709 (E).

C S Grossman, for the appellant: It is submitted that it was procedurally wrong for the judge in Chambers to raise *mero motu* the question of sovereign immunity. The defence of sovereign immunity is one which may be pleaded by a foreign government or may not, depending on its inclination. The Court may only grant immunity where asked to do so by the foreign government: *Rahimtoola v Nizam of Hyderabad (supra)*; *Thai-Europe Tapioca Service Ltd v Government of Pakistan, supra* at 966. The Court *a quo* erred in relying on the cases of *Prentice, Shaw and Schiess Inc v Government of Bolivia, supra*, and *Kaffraria Property Co (Pty) Ltd v Government of Republic of Zambia, supra*, for the proposition that it was obliged to act *mero motu*.

The historical development of the courts' attitude to defences of sovereign immunity is conveniently set out in (1980) 97 SALJ 357 by John Dugard. In summary the position is as follows: under international law

of the pre-World War II period a sovereign was immune from the jurisdiction of foreign municipal courts in respect of his person, agents, property and activities - whatever form they might take. A doctrine of absolute immunity prevailed. The advent of the socialist state and the emergence of state owned trading corporations in states with a predominantly capitalist economy have, however, altered the situation and today many states support a doctrine of restricted or qualified immunity, according to which immunity from the jurisdiction of municipal courts will be granted in respect of acts *jure imperii* (that is, broadly, governmental public activities) and not in respect of acts *jure gestionis* (that is commercial activities). The reason for this change in attitude is that

> "A foreign government which enters into ordinary commercial transactions with a trader must honour its obligations like other traders and if it fails to do so it should be subjected to the same laws and amenable to the

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same tribunals as they": *Thai-Europe Tapioca Service* case, *supra*.

The restrictive approach to sovereign immunity has gained wide support in treaties, domestic legislation and above all the decisions of foreign tribunals. The two most notable adherents to the absolute approach have been the Soviet Union and England. The Soviet Union and other socialist states not surprisingly insist that state commercial operations constitute an important aspect of governmental activity and deny any distinction between acts *jure imperii* and acts *jure gestionis* in respect of immunity. England, perhaps because of its conservative nature, failed to move with the times until 1976. Prior to this a series of decisions commencing in the 19th century, before the advent of state trading, affirmed the absolute approach in England. It was not until the case of *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 All ER 881 (CA) that the position was reversed; it was held there that international law is part of English law and that the doctrine of precedent could not prevent a Court from taking cognizance of changes in international law and that it was therefore obliged to adopt the restrictive approach to sovereign immunity. This case was re-affirmed in the *I Congresso Del Partido* case [1978] 1 QB 500 at 518; [1978] 1 All ER 1169; though dissented from *Uganda Co (Holdings) Ltd v The Government of Uganda* [1979] 1 Lloyds Rep 481, it was followed in *Mercantil S A v Central Bank of Nigeria* [1979] 2 Lloyds Rep 277 (CA). The doctrine propounded by LORD DENNING in the *Trendtex* case received further support in *Planmount Ltd v Republic of Zaire* [1981] 1 All ER 1110 (per LLOYD J). Finally in the *I Congresso del Partido* case [1981] 2 All ER 1064 the House of Lords stamped its *imprimatur* on the distinction between acts *iure imperii* and *iure gestionis*. It appears that in South Africa the courts have

always followed, somewhat slavishly, the English approach to sovereign immunity, much as they do to other aspects of international law. In 1957, in *Lendalease Finance Co (Pty) Ltd v Corporacion de Mercadeo Agricola* 1975 (4) SA 397 (C) a Cape Court granted immunity to a Venezuelan state owned trading corporation on the basis of an English decision, *Baccus SRA v Servicio Nacional del Trigo* [1975] 1 QB 438 (CA); [1956] 3 All ER 715 (which has now been over-ruled in effect by the *Trendtex* case) and ignored contemporary developments in international law outside England favouring the restrictive approach. However the position in South African law was changed in the case of *Inter-Science Research and Development Services (Pty) Ltd v Republics Popular de Mocambique, supra*, where MARGO J reviewed all the case law in South Africa starting from *de Howorth v The SS India* 1921 CPD 451 to *Lendalease* (*supra)*. He stated that there was good reason to believe that the rule of sovereign immunity in international law had undergone an important change and that the old doctrine of absolute immunity had yielded to the restrictive doctrine. In order to demonstrate this change in international law the judge examined the movement away from the absolute approach in English law, the adoption of the restrictive approach in the United States by the Courts, by Congress and the State Department and by courts in Canada, Germany and other countries. He also found support for the restrictive view on the part of modern writers in South Africa and abroad. He then went on to deal with the application of the restrictive doctrine in South Africa, holding that international law forms part of our law; that the restrictive doctrine is established as a general rule of international law; and that there is no statute or principle of South African law in conflict with the doctrine.

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Hard on the heels of this case is the decision in *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia, supra*. This case specifically approved the *Inter- Science* case and departed from the earlier South African decisions. Although the Appellate Division in South Africa has not at dealt with the matter it seems fair to assume, as in the case of England, that the restrictive approach to sovereign immunity is now part of the law of South Africa. For the aforegoing reasons it is submitted that the Court *a quo* correctly decided that the law in Zimbabwe was the same as that in England, South Africa and indeed most of the rest of the world. As to whether the act complained of was *iure imperii* or *iure gestionis*, *Prentice, Shaw and Schiess, supra*, on which the court *a quo* relied, was decided before the distinction was clarified between acts *jure imperii* and *jure gestionis*.

The action of the respondent in acquiring the property and then

GEORGES JA

breaching its obligations was in the nature of a private or commercial act and was not done in the exercise of its sovereign authority.

No appearance for the respondent.

Judgment

Georges JA: The appellant in this matter seeks to claim damages against the Government of Kenya for wrongful and unlawful repudiation of a lease. The appellant assets that prior to the acquisition by the Government of Kenya in or about May or June 1980 of premises at 95 Park Lane Harare the premises were owned by a company which had leased a portion thereof to the appellant for a tend of 5 years ending on 31 March 1981 with an option to renew for a period of 3 years at an increased rent. The appellant further asserts that it had duly exercised its option under the lease but that the Government of Kenya had refused to allow it to continue in occupation of the leased premises. The Government of Kenya used the premises as its High Commission in Zimbabwe and the applicant's occupation of part of these premises created what the Government of Kenya considered unacceptable security problems. The upshot was that the appellant claimed it was forced to move to other premises at a higher rental. It sought to claim from the Government of Kenya the difference over the period of the lease.

The Sheriff made attempts to serve the summons and declaration. He was not allowed on the premises at 95 Park Lane. A person identified as a Deputy Secretary declined at the gate to accept service and advised that an approach should be made to the Ministry of Foreign Affairs, Consular Division. Thereupon the appellant applied for substituted service under Order 6 Rule 46 (1), by affixing the summons and declaration to the gate of the premises. The application came before McNALLY J who granted the appellant leave to set the matter down for argument, though he was of the view that a foreign state could not be sued here for the relief claimed. WADDINGTON J who heard full argument was of the same view and the application was accordingly dismissed. The Ministry of Foreign Affairs certified that the Government of Zimbabwe recognized the premises at 95 Park Lane ad being the High Commission of the Government of Kenya, and that such recognition commenced on 24 June 1980.

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It is, of course, undisputed that the Government of Kenya is a foreign sovereign government recognised by the Government of Zimbabwe. It can, as such, be immune from the jurisdiction of the courts of Zimbabwe. The issue to be decided relates to the nature of this immunity. There is also

GEORGES JA

the question as to whether a court in an application such as this can of its own accord raise this defence of immunity of foreign sovereign government.

The major issue as to the nature of the doctrine of sovereign immunity is a question of international law. Although there appear to be no pronouncements on the matter in our courts until now, there is no doubt that international law is part of the law of this country. In so far as the common law of Zimbabwe is Roman Dutch there is support for the proposition in *Nduli and Anor v Minister of Justice and Ors* 1978 (1) SA 893 (AD). RUMPFF CJ at 905 quoted with apparent approval from Hahlo and Khan *South African Legal System and its Background* at 113:

> "English and South African Legislatures and courts have always held that the law of nations exists. The courts will normally apply it (taking judicial cognizance of its rules) in appropriate cases unless it conflicts with South African legislation or common law."

So far as English law is concerned the position was stated by LORD ATKIN in *Chang Chi Cheung v R* [1938] 4 All ER 786 at 790:

> "It must always be remembered that, so far, at any rate, as the courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept among themselves. On any judicial issue, they seek to ascertain the relevant rule, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."

International law does accord to foreign sovereigns and the governments of foreign states immunity from the jurisdiction of municipal courts. Historically this immunity was absolute irrespective of the circumstances of the subject matter. This doctrine is lucidly stated by LORD ATKIN in *The Cristina* [1938] 1 All ER 719 (HL) at 720:

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted on to our domestic law which seem to me to be well established and beyond dispute. The first is that the courts of a country will not implead a foreign sovereign. That is, they will not by their process make him against his will a party to legal proceedings, whether the legal proceedings involve process against his person or seek to recover from him specific property or damages. The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his, or of which he is in possession or control. There has been some difference in the practice of nations as to the possible limitations of this second principle, as to whether it extends to property used only for the commercial purposes of the sovereign or to personal

GEORGES JA

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private property. In this country, it is, in my opinion, well-settled that it applies to both."

The theory underlying this immunity was defined by BRETT LJ in *The Parlement Belge* (1880) 5 PD 197 at 214:

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

Each of these theories - independence, dignity and comity - can be shown to be unsatisfactory as a basis for immunity. In *Rahimtoola v Nizam of Hyderabad* [1958] AC 379 at 418; [1957] 3 All ER 441 at 461 LORD DENNING pithily summarised the weakness of these theories:

> "It is more in keeping with the dignity of a foreign sovereign to submit himself to the rule of law than to claim to be above it, and his independence is better ensured by accepting the decisions of courts of acknowledged impartiality than by arbitrarily rejecting their jurisdiction. In all civilized countries there has been a progressive tendency towards making the sovereign liable to be sued in his own courts ... foreign sovereigns should not be in any different position. There is no reason why we should grant to the departments or agencies of foreign governments an immunity which we do not grant our own, provided always that the matter in dispute arises within the jurisdiction of our courts and is properly cognizable by them."

Although the other Law Lords delivering speeches in that case made it clear that they were not to be taken as approving in any way LORD DENNING'S approach it has in time become the accepted position.

LORD DENNING himself in *Thai Europe Tapioca Service Ltd v Government of Pakistan and Others* [1975] 3 All ER 961 (CA), remarking that he had taken particular pains over the *Rahimtoola* case, *supra*, emphasised that he adhered to the position he had taken in that case and particularly to his formulation of principle in the passage quoted above.

In *The Phillipine Admiral v Wallem Shipping (Hong Kong) Ltd and Others* [1976] 1 All ER 78 at 93 the Privy Council stated:

> "According to a list compiled by reference to the various text books on international law and put before their Lordships by agreement between the parties there are comparatively few countries outside the Commonwealth which can be counted as adherents of the absolute theory."

GEORGES JA

As far as judicial law-making is concerned the position was finally settled by the House of Lords in I *Congresso de Partido* [1981] 2 All ER 1064.

LORD WILBERFORCE, having reviewed the authorities, concluded at 1070:

> "On the basis of these cases I have no doubt that the restrictive doctrine should be applied to this case though the relevant events chronologically preceded both *The Phillipine Admiral* and *Trendtex*. Indeed this was not disputed by either side in these appeals."

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The position in South Africa is the same. Until comparatively recent times the doctrine of absolute immunity was consistently applied. The cases have been reviewed by MARGO J in *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) at 119-20. MARGO J then reviewed the more recent English authorities, considered the position in the United States of America and Canada and concluded:

> "In my view 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 in 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 the requirements of justice."

Apart from the views expressed by the municipal courts of these countries writers on international law are agreed on the demise of the absolute doctrine of sovereign immunity. In O'Connell *International Law* (2 ed) (1970) at 844 this passage occurs:

> "At the present time only English and perhaps Russian law reflects to any extent the traditional doctrine. The United States within the past twenty years has virtually rejected it and there is some evidence that the English courts will be tempted to follow in a cautious manner. It is clear from this practise that the absolute view is not sanctioned by international law."

One can only add from the decisions of the last five years that the English courts have been enthusiastic rather than cautious in accepting the restrictive doctrine.

I am completely satisfied therefore that the doctrine of sovereign immunity generally applied in international law is that of restrictive immunity. There are no decisions of courts of this country and no legislation inconsistent with that doctrine and it should be incorporated as part of our law.

In the *I Congresso del Partido case*, *supra*, LORD WILBERFORCE, having concluded that the doctrine applicable in England was the restrictive doctrine, went on to say at 1070:

GEORGES JA

> ". . . merely to state that the restrictive doctrine applies is to say little more than that a state has no absolute immunity as regards commercial or trading transactions, but where immunity begins and ends is yet to be stated."

In his work International Law *supra*, O'Connell states at 845:

> "According to this view the most that can be said of sovereign immunity is that the foreign sovereign may arrest suit or resist execution only in respect of governmental activity or property. It is usually put in the form that immunity covers acts *jure imperii* and not acts *jure gestionis*. At bottom the distinction reflects the municipal law division into public law and private law, but as each municipal system makes the division on somewhat arbitrary premises the distinction in international law may well prove to be elusive. "

In *Rahimtoola v Nizam of Hyderabad supra* LORD DENNING went on to propound a test for deciding in which cases the doctrine should apply. He said at 422:

> "Applying the principle it seems to me that at the present time sovereign immunity should not depend on whether a foreign government is impleaded directly or indirectly but rather on the nature of the dispute. Not on whether conflicting rights have to be decided but on the nature of the conflict. Is it properly cognizable by our courts or not?

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> If the dispute brings into question, for instance, the legislative or international transactions of a foreign government, or the policy of its executive, the court should grant immunity if asked to do so, because it does offend the dignity of a foreign sovereign to have the meets of such a dispute canvassed in the domestic courts of another country: but if the dispute concerns for instance the commercial transactions of a foreign government (whether carried on by its own independent agencies or by setting up separate legal entities) and it arises properly within the territorial jurisdiction of our courts, there is no ground for granting immunity."

This formulation clearly accords with the distinction between the public law domain and the private law domain propounded in *O'Connell supra*. Legislative acts of governments, then, international transactions and the policies of their governments fall clearly into the public law domain and fall clearly within the category of *jure imperii.*

The issue is whether the purpose for which an act is performed affects the nature of an act. The purchase of a building is in its nature a transaction in private law. Does its nature change if the purpose of the purchase is the accommodation of a chancery or the housing of an ambassador or a high commissioner? Conflicting answers have been given to that question in the cases which have been brought to my notice.

In *Government of the Democratic Republic of the Congo v Veene* (1971) 22 DLR (3d) 669 the transaction involved was the commissioning of an architect through duly accredited diplomatic representatives and a representative of the Department of Foreign Affairs of the Congo to draw plans

for the construction of its national pavilion at "Expo 67" in Montreal. The Supreme Court of Canada held (LASKIN and HALL JJ dissenting) that this involved a public sovereign act of State on behalf of the Congo and commissioning of the architect was a step taken in the performance of that sovereign act.

RITCHIE J delivering the judgment of the majority stated at 673:

> "Considered from the point of view of the architect, it may well be that contract was a purely commercial one, but even if the theory of restrictive sovereignty were applicable, the question to be determined would not be whether the contractor was engaged in a private act of commerce but whether or not the Government of the Congo, acting as a visiting sovereign state, through its duly accredited diplomatic representatives was engaged in the performance of a sovereign act of State."

That formulation accepts that a transaction may be characterised differently depending on whether it is viewed from the standpoint of one or other of the parties concerned. This seems undesirable.

The Federal Court of the German Federal Republic stated in *Claim against the Empire of Iran* (1963) 45 TIER 57 at 78-80, quoted in *I Congresso del Partido supra* at 1072:

> "The distinction between sovereign and non-sovereign State activities cannot be drawn according to the purpose of the State transaction and whether it stands in a recognizable relation to the Sovereign duties of the State. For, ultimately, activities of the State, if not wholly then to the widest degree, serve sovereign purposes and duties, and stand in a still recognizable relationship to them.

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The claim in that case was for the cost of repairs to the heating system of the Iranian Embassy and the Court held that there should be no immunity.

O'Connell (*op cit* p 845) documents the cleavage of opinion. A United States court has held that a contract for the purchase of army boots was a sovereign act. The decision was in 1918 when adherence to the doctrine of absolute immunity was largely unchallenged. The approach is in keeping with the French view as stated in O'Connell (*loc cit*) that "the private law form of the contract is irrelevant and the test is whether the functions it envisages are governmental."

Against that background it appears to me at least arguable that on an application of the restrictive doctrine the claim might not be regarded as one in regard to which immunity could successfully be raised. The plaintiff should therefore have been granted leave to serve the summons and

declaration and the issue of the right to immunity fully canvassed if it was raised.

Mr *Grossman* contended also that in any event the Court *a quo* should not on its own initiative have raised the issue of sovereign immunity. The learned judge stated that "this supine attitude would have been wrong", and cited two South African cases in support of his view - *Prentice Shaw & Schiess Inc v Government of Bolivia* 1978 (3) SA 938 (T) and *Kaffraria Property Co (Pty) Ltd v Government of the Republic of Zambia* 1980 (2) SA 709 (E). Support can also be found in *Inter-Science Research v Republica de Mocambique, supra*. Mr *Grossman* distinguished these cases on the basis that the applications there were for edictal citations under the equivalent of Order 6 Rule 44 of our Rules rather than an application for substituted service under Order 6 Rule 46.

Where leave is sought for an edictal citation the applicant must set out the facts upon which the cause of action is based and the grounds upon which the court has jurisdiction to entertain the claim. The issue of jurisdiction is squarely raised.

Where leave is sought for substituted service the applicant's statement does not have to deal with the issue of jurisdiction. He must set out the facts on which the cause of action is based, the reason why service cannot be effected in any of the ways provided in Order 5 and sufficient relevant facts to indicate the best manner in which service may be effected.

It should also be noted that in all three cases there was an application to attach property in order to confirm or found jurisdiction. The court would therefore have had no jurisdiction unless property was attached. An order for substituted service raises no such issues.

In the view which I take of this matter it is unnecessary to rule on that issue. It can be argued that a municipal court has jurisdiction over a claim by reason of the nature of the claim and that such jurisdiction is barred only when the defendant raises the issue of sovereign immunity. On the other hand it can be argued that the jurisdiction is barred once it appears on the record that the defendant can raise the issue of sovereign immunity and that the court should not proceed unless satisfied that the defendant consents or that the claim does not fall within the category of

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claims in regard to which sovereign immunity can be raised. Without further detailed argument on these issues it seems to me imprudent to rule definitively.

GEORGES JA

In the result I would allow the appeal and order substituted service of the summons and declaration by the despatch of copies by registered mail to the proposed defendant at 95 Park Lane, Harare.

Costs will be costs in the cause.

Baron ACJ: I agree.

Beck JA: I agree.

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

Sawyer & Mkushi, respondent's legal representatives.

S v CHIWEDZA 1983 (2) ZLR 84 (HC)

Court **High Court, Harare**

Dumbutshena JP, McNally & Sandura JJ

14 February, 11 April & 27 July 1983

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - s341(1) - award of compensation under - awards on individual counts, amounting in aggregate to over $1 000 - such award proper.

Headnote

The appellant was convicted on 22 counts of theft by conversion from his employer. On each occasion he stole a sum of between $100 and $300. The total sum stolen was $4 304,40. At the conclusion of the trial, the prosecutor applied, in terms of s 341(1) of the Criminal Procedure and Evidence Act [*Chapter 59*], for an award of compensation. He did not actually state that compensation was asked for on each count but it could be assumed that this was what he intended, since a claim for compensation in a sum exceeding $1 000 would be incompetent. In the event, the magistrate awarded compensation in the aggregate sum of $4 304,40. The question arose on appeal whether it was competent for an injured party to make claims of compensation when their total exceeded $1 000, even if each individual claim was for a lesser sum.

Held (DUMBUTSHENA JP dissenting), that there was nothing artificial in speaking of 22 claims

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being made; the accused had stolen on 22 occasions. If he had been subjected to 22 trials, there would have been no question but that 22 compensation awards would have been competent. The fact that, in terms of s 131 of the Code, the counts could be tried jointly for convenience did not mean that all claims became one. On the wording of the section, compensation of up to $1 000 can be awarded in respect of each offence on which a person is convicted.

Cases cited:

R v Gamiet 1929 CPD 540;

R v Takawira & Another 1955 SR 26; 1955(3) SA 45 (SR);

Gishbina Tshesi & Others v R 1933 NDP 322;

S v Gwarada 1981 ZLR 17; 1981 (2) SA 531 (ZAD);

S v Julius G-S-269-80 (not reported);

S v Wakiri 1981 ZLR 51; 1981 (2) SA 527 (ZAD);

R v Freddy 1963 R & N 119; 1963 (2) SA 128 (SR);

S v Sacramente HC-H-204-82 (not reported);

S v Mugwizi HC-H-6-83 (not reported);

Natal Hatters v Manci 1938 NPD 316;

McNALLY CJ

R v Oddy [1974] 2 All ER 666;

R v Godfrey AD 44/69.

B Gwati, subsequently *M J Gillespie*, for the appellant

P Haxen, subsequently *P J Batty,* for the respondent

Judgment

McNally J: The appellant was convicted on 22 counts of theft by conversion in the Magistrate Court, Kwe Kwe. He was employed by the Redcliff Municipality as a Beerhall Supervisor. Over a period of some 20 months he stole from his employer sums ranging between $100 and $300 on each of the 22 occasions.

The matter initially came before myself and the learned ACTING JUDGE PRESIDENT (as he then was) by way of an appeal against sentence only. The sentence was one of 2 months' IWL on each of the counts involving more than $200 and 1 month on each count involving less than $200. Of the total of 30 months, 12 were suspended for 5 years on conditions, leaving an

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effective sentence of 18 months' IWL. In addition, the appellant was ordered to pay compensation to the Redcliff Municipality in the sum of $4 304,40 in terms of s 341 (1) of the Criminal Procedure & Evidence Act [*Chapter 59*].

In principle we had no difficulty in coming to the conclusion that 30 months, 12 suspended, was a proper sentence. This was a serious breach of trust committed over a long period and involving a substantial total sum of money. However, the compensation order was a different matter, and it was decided to invite argument before a Bench of three Judges on the question whether a magistrate can, in terms of s 341(1), award compensation in excess of $1 000 if he splits the amount between a number of counts so that the award on each count is less than $1 000.

We are indebted to Mr *Gillespie* and Mr *Batty* for their helpful submissions.

Section 341(1) of the Code reads as follows:

> "When any person is convicted by any court with jurisdiction in civil cases or the court of a regional magistrate of an offence which has caused damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party or of the person conducting the prosecution acting on the instructions of such party, forthwith award him compensation for such damage or loss:
>
> Provided that no such award shall be made by any court if the compensation claimed exceeds one thousand dollars."

McNALLY J

In the present case it is recorded simply that the prosecutor "applies for compensation in terms of Section 341 of the C P & E Act". The magistrate awarded the globular sum of $4 304,40 and, when the point was raised on appeal, he said:

> "Although on the face of it, it appears that I have exceeded my jurisdiction, I submit that this is a result of the cumulative effect of the various amounts stolen by the appellant. I submit that in respect of each count I had jurisdiction to award the compensation awarded."

It is clear from the way that the application was worded that the prosecutor must be deemed to have been acting on the instructions of the Redcliff Municipality and that those instructions were to claim compensation in terms of the Act. A claim for compensation in the sum of $4 304,40 would not be a competent claim in terms of the Act, so one must assume that the claim was in reality 22 claims, each for a sum of under $300. The question then becomes whether it is competent for an injured party to make such claims when their total exceeds the limit.

It is of some assistance first to consider the history of the legislation. The section first passed through Parliament as s 316 of Act 19 of 1926. The limits imposed then were $200 for the High Court and $50 for inferior courts with civil jurisdiction.

By s 39 of Act 10 of 1960 the limit for any court was set at $200.

In 1965 the Regional Magistrates Courts were created, without civil jurisdiction, and an amendment was necessitated to give them the same power of compensation as courts with

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jurisdiction in civil cases.

In RGN 1116 of 1970 the limit was raised to $400 and in section 38 of Act 37 of 1975 to $1 000.

When the civil jurisdiction of magistrates was raised in 1981 to $2 000 this section was not altered.

It seems clear from this brief history that the jurisdictional limit of the court, though obviously of some relevance, was not the determining factor. The amount of the award generally could not exceed the jurisdiction, but it was often limited to less than the jurisdiction as it is now, both in the Magistrates Court and, of course, in the High Court, whose jurisdiction is unlimited. Even this generalization must be qualified because a Regional Court can award compensation of $1 000 although it has no civil jurisdiction at all.

McNALLY J

The obvious reason why the civil jurisdiction of the court concerned had to be a limiting factor was the provision in s 341(7) for the award to be made a civil judgment of the Court concerned. But even this problem could be circumvented, as it was in the case of Regional Magistrates by the introduction of s 341(8). I conclude therefore that the civil jurisdictional limit of the Court was not a major consideration. The major consideration, to my mind, was clearly that in such summary proceedings it would be dangerous to allow major sums of money to be disposed of. There are obvious weaknesses in the procedure - complainants in theft cases, for instance, have been known to overstate the amount stolen, or the value of the goods stolen. These weaknesses may be outweighed by the advantage of speed and convenience, but as the amount involved increases, so the balance shifts away from summary awards and in favour of proper civil trial proceedings.

Even where small amounts are involved it may be desirable to leave the parties to their civil remedies - see s 345 (2) of the Code and *R v Gamiet* 1929 CPD 540.

There is a further instance of an award of compensation being unrelated to jurisdiction, and it is to be found in s 341(2), a section which I suspect was introduced to place beyond doubt the ruling in *R v Takawira & Another* 1955 SR 26. It reads as follows:

> "The powers conferred by subsection (1) may be exercised by any court notwithstanding the fact that the person convicted and the injured party are both Africans and the court would not otherwise have jurisdiction in civil cases between them."

That section, anomalous though it is in the present times, shows again that an award of compensation may be made where there is no civil jurisdiction.

It does not seem to me therefore that arguments based on the limits of civil jurisdiction are of much assistance. Mr *Batty* pointed to the provisions of s 13(1)(d) of the Magistrates Court Act [*Chapter 18*] to show that -

> "if two or more claims, each based upon a different cause of action, are combined in one summons, the court shall

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have the same jurisdiction to decide each such claim as it would have had if each claim formed the sole subject of a separate action;"

Mr *Gillespie* countered this by saying that that was only so because the law expressly provided for it to be so. Without such provision it might not be so.

McNALLY J

Similarly, where a magistrate is given a criminal jurisdiction limited as to the size of the fine or the length of the term of imprisonment he can impose, the law allows him to go to the maximum on each count. Thus, a junior magistrate with 12 months' jurisdiction can send a man to prison for 10 years by imposing a sentence of 12 months on each of 10 counts.

"That may be so", says Mr *Gillespie*, "but it is only because s 131 of the Code permits joinder of counts." I am not sure, however, that that answer does not beg the question, because if joinder of counts were not permitted the accused in this case would have undergone 22 trials, and clearly could have been ordered in each trial to pay up to $1000 compensation.

Mr *Gillespie* next contended that despite the multiplicity of counts there was only one claim before the Court, in the sense that one single *persona* (the Municipality) was claiming one single amount ($4 304,40) from the one single person (the accused).

I have already said that on the record the prosecutor purported to claim "compensation in terms of s 341". The amount (or amounts) was (or were) nowhere specified. Accordingly, therefore, one must assume that the claimant intended to claim in terms of and in accordance with the law. He must be deemed to have made 22 claims.

I see nothing artificial in speaking of 22 claims. The appellant stole money on 22 occasions. On each occasion he committed an offence - theft. If he had been tried on 22 separate occasions by 22 separate magistrates, as in theory he might have been, no one could have questioned 22 separate awards. Because of the provisions of s 131 of the Code, the counts could all be heard together, but at the same time be treated as separate charges. I see no reason why, just because of that section, 22 claims should become one claim.

Nor does it seem to me to make sense that where there are a number of complainants each with a claim, they may be awarded up to $1 000 each (see *Cishbina Tshesi & Others v R* 1933 NPD 322), but where a single complainant has a number of claims his claims must be aggregated into one.

In the final analysis the important word in the section is "offence". One can summarize the section thus -

"When any person is convicted of an offence which has. caused loss of property

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> to some other person, the court may award compensation for such loss."

The appellant in this case has been convicted of 22 offences. In respect of each one of them the court may award compensation, subject always to the maximum in each case.

One must also look at the wording of the proviso. If the word "total" had been introduced so that the proviso reads:

> "Provided that no such award shall be made by any court if the *total* compensation claimed exceeds one thousand dollars"

then the position would have been different. But as it stands "the compensation" relates back to the "damage or loss" caused by "the offence" in respect of which the court has recorded "the conviction". Thus several offences and several convictions cause several sets of damage or loss and entitle the complainant, in my view, to several separate awards of compensation. The proviso, in other words, relates separately to each award in respect of each conviction for each offence.

I am strengthened in this view by reference to the English law. The Criminal Justice Act, 1972, is worded differently from our law. It reads, in s 1(1) -

> "Subject to the provisions of this part of the Act, a court by or before which a person is convicted of any offence... may, on application or otherwise, make an order .... requiring him to pay compensation for any personal injury loss or damage resulting from that offence or any other offence which is taken into consideration by the court in determining a sentence."

In *R v Oddy* [1974] 2 All ER 666, a case in the Court of Appeal, Criminal Division, LAWTON LJ said at 669j:

> "It seems to us that it is clear from the wording of the Act that any order for compensation *must be related to a specific offence,* whether that offence be in the indictment or it be an offence taken into consideration." (The underlining is mine).

The situation may well be different where, for instance, a man breaks into a house and steals $1 500 from a cash-box. If the evidence is that of that money $750 belongs to A and $750 to B, and if the accused is charged in one count (as he may properly be) with theft of $1 500 from A and B, then it is arguable that the Court should not award $750 to each complainant. There has been only one offence and it may be that the $1 000 maximum applies overall. It would however not be appropriate to make a ruling in this judgment on such as situation, because it does not arise on the facts of this case. It may well be that by analogy the decision in such a case would be governed by the ruling of the Appellate Division

in *R v Godfrey* AD 44/1969, where there was only one count of theft by conversion involving fourteen separate transactions. There the court set aside a global award of compensation in a sum exceeding the maximum. On my understanding of the law, the Court had no choice but to do so. Had the appellant been charged on 14 separate counts the position would, I think have

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been different.

I conclude therefore that where an accused person is charged in separate counts with separate offences he may be ordered to pay compensation up to the maximum in respect of each offence.

There is some indication on the record that the appellant may be able to get his job back and pay off the amount involved; he has four head of cattle and a car worth $3 200, and the amounts involved are not likely to be open to dispute. All in all therefore, this would seem to be a proper case for the magistrate to have exercised the discretion which he is expressly given in s 345(2) in favour of making 22 orders of compensation.

There is one final matter of detail before concluding. Annexure A to the charge sheet is mistyped so that count 11 is exactly the same as count 5. The amount is the same, the date is the same, the receipt number is the same. This is obviously an error. Moreover, the amount shown is $175,20; yet the magistrate imposed a sentence of 2 months' IWL on count 11, which is the sentence he imposed where more than $200 was involved. He must therefore have had the correct figure before him. I have confirmed with the prosecutor that count 11 involved $241,40 (receipt number 14 718) and the total was $4 277,70 and not $4 304,40. I propose simply to amend the amount in count 11 to $241,40.

I would accordingly confirm the convictions and sentences, but I would delete the compensation order in the sum of $4 304,40 and substitute the following:

"The accused is ordered to pay compensation to the Redcliff Municipality in the following sums:

In respect of count 1	$132,40
In respect of count 2	$159,20
In respect of count 3	$228,00
In respect of count 4	$143,80
In respect of count 5	$175,20
In respect of count 6	$184,00
In respect of count 7	$181,90
In respect of count 8	$265,40
In respect of count 9	$180,30
In respect of count 10	$208,50

DUMBUTSHENA JP

In respect of count 11	$241,40
In respect of count 12	$171,90
In respect of count 13	$177,50
In respect of count 14	$274,50
In respect of count 15	$221,20
In respect of count 16	$186,80
In respect of count 17	$186,20
In respect of count 18	$219,20
In respect of count 19	$191,60
In respect of count 20	$185,70
In respect of count 21	$111,90

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In respect of count 22	$251,10."

It is so ordered.

Sandura J: I agree.

Dumbutshena JP: The appellant was convicted on his own plea of guilty of 22 counts of theft by conversion. On counts 1, 2, 4, 5, 6, 7, 9, 12, 13, 16, 17, 19, 20 and 21 he was sentenced to 1 month's IWL on each of count, and 2 months' IWL on each of counts 3, 8, 10, 11, 14, 15, 18 and 22. Altogether he was sentenced to 30 months' IWL, 12 months of which were suspended on appropriate conditions. He is to serve an effective term of 18 months. The magistrate, in terms of s 341 of the Criminal Procedure and Evidence Act [*Chapter 59*] ordered him to pay compensation to the Redcliff Municipality in the sum of $4 304,40.

The facts of the case are as follows: the appellant was employed by the Redcliff Municipality. As an employee of Redcliff Municipality he received commission money from Duke Box Music (Pvt) Ltd. In his capacity as beerhall supervisor, the appellant banked money. This was supposed to be done on the day the money was received. He, however, did not bank the money listed in the schedule attached to the charge sheet. When he was questioned about the missing money, he made a warned and cautioned statement, admitting stealing $2 445,70. Further investigations were carried out. Police found 10 receipts with money amounting to $1 858,70. That money had also not been banked. The appellant admitted stealing it. The total amount of money stolen between 24 March 1981 and 16 November 1982 amounted to $4 304,40.

When the charge was put to the appellant, he pleaded guilty. The magistrate then proceeded in terms of s 255(2)(b) of the Code. He did not conduct the inquiries pertaining to putting the elements of the offence to an accused person; He did not find out from the accused whether he

agreed with the facts. Mr *Gwati*, who appeared for the appellant at his trial and on appeal, indicated to the Court that he had explained the elements of the offence and the fact to the appellant in terms of the proviso to s 255(2) of the Code. He argued that the magistrate had erred when he imposed a sentence of imprisonment without the option of a fine on a first offender. Mr *Gwati* submitted that the appellant, as a first offender, should have been sentenced to a fine because a sentence of a fine is as good a deterrent as a sentence of imprisonment. He relied, without citing any passages from those cases, on what was said in *S v Gwarada* 1981 ZLR 17; 1981 (2) SA 531 (ZAD) and *S v Julius* G-S-269-80 (not reported). In *Gwarada's* case (*Supra*) FIELDSEND CJ said at 533C-E of the South African report:

> "The first is a general aspect. As the population as a whole, and particularly the urban population, becomes more and more attuned to a money economy, so the deterrent effect of fines becomes greater, and sufficiently substantial fines can be imposed to provide a proper punishment. In a somewhat different context, his Lordship MR JUSTICE DUMBUTSHENA in *S v Julius* (G-S-269-80) recently stressed the merits of a fine as a punishment, and the desirability of the courts resorting more frequently to fines than they leave done in the past. I should like to say that I fully endorse all he said in that judgment. A fine is a particularly suitable punishment for many offences of dishonesty, particularly when it can be combined with some form of compensatory order, as it has the effect of depriving the offender of any benefit of his unlawful conduct. This, of course, is not a suitable case for a

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compensatory order, but it is in my view a suitable case for the imposition of a fine."

In *Gwarada's* case (*supra)*, the appellant had associated with people who devised the scheme and made away with the proceeds of the theft. The theft was of 300 bags of fertilizer valued at $2 125. The part played by Gwarada in that theft was very minimal and his share of the ill-gotten money was only $20. The sentence of a fine as it related to his participation in the crime was, therefore, justified.

The appellant committed a serious offence. He took advantage of the trust his employer placed in him and the position of responsibility he occupied to plan and to execute the thefts during a period of two years. See *S v Wakiri* 1981 ZLR 51 - ; 1981 (2) SA 527 (ZAD) at 529A.

This offence was also serious because it deprived the Municipality, a public body, of the means of providing much needed social and other services to its residents, a deprivation which is equal to, in such circumstances, economic sabotage within the organisation. As a general rule those involved in crimes of this nature should expect, regard being had to the personal circumstances of each accused person, to receive heavy sentences

DUMBUTSHENA JP

of imprisonment - sentences which emphasize in no small way the serious nature of these offences.

Mr *Gwati* did not, while criticizing in a general way, point out any misdirections. Of course, on appeal the sentence will be altered if it is of such undue severity that it induces a sense of shock. This sentence does not induce in me a sense of shock. If anything, the sentence is more on the lenient side.

Once the magistrate decided to exercise his discretion in favour of imposing a sentence of imprisonment and his decision was the right one, it is not the duty of a Court of appeal to substitute its own discretion for that of the magistrate unless it can be said that the magistrate excercised his discretion improperly. See Lansdown and Campbell *South African Criminal Law & Procedure,* vol 5 pp 595-6, where the learned authors say:

> "As the determination of an appropriate sentence is pre-eminently a matter calling for the exercise of discretion by the trial judge, the ambit of interference by an appeal court with the exercise of such discretion is relatively limited. Hence rules have been laid down that there will not be interference unless it can be shown that the court *a quo* exercised its discretion on a wrong basis. This question is answered affirmatively if the sentence is vitiated by irregularity or misdirection or, failing such, if it is disturbingly inappropriate. The latter is not an exclusive test, but it is often applied by the court.
>
> A discretion is improperly exercised where the trial court passing sentence misdirects itself on the facts. In *R v Freddy* YOUNG ACJ quoted the following passage from the judgement of CLAYDEN CJ in *Walisko v The Queen*:
>
> > 'It is one of the essential elements in the proper administration of the criminal law that there should be a discretion as to sentence in the judicial officer who tries the case. It is because of this discretion that courts of appeal when they are asked to interfere with a sentence are slow to do so. They are interfering in a discretionary matter if they alter the sentence. And so it is that rules have been laid down that there will not be interference unless it can be shown that the discretion has been exercised on a wrong basis, or unless the sentence is shown to be so severe that it causes a sense of shock. The latter is the same as saying

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> that the sentence is so unreasonable that, again, it cannot be said to have been passed in a proper exercise of the discretion. If the discretion has been exercised on a wrong basis the court of appeal is free to fix a sentence that it considers appropriate.' "

It is clear from that passage that the trial Court is allowed a reasonably wide latitude. It could not be said that the trial Court in the instant case exercised its discretion improperly. We therefore had no hesitation in dismissing the appeal against sentence.

It is the question of compensation that has exercised our minds. Mr

* The judgment referred to was in fact that of HATHORN ACJ - Editor.

DUMBUTSHENA JP

Gwati argued that the magistrate had no jurisdiction, in terms of s 341 of the Code, to order compensation in the sum of $4 304,40 because his jurisdiction is limited to a maximum of $1 000 by s 341. Section 341 (1) reads:

> "341. (1) When any person is convicted by any court with jurisdiction in civil cases or the court of a regional magistrate of an offence which has caused damage to or loss of property belonging to some other person, the court trying the case may, after recording the conviction and upon the application of the injured party or of the person conducting the prosecution acting on the instructions of such party, forthwith award him compensation for such damage or loss:
>
> Provided that no such award shall be made by any court if the compensation claimed exceeds one thousands dollars."

Mr *Haxen*, who first appeared for the State, conceded that an order of compensation awarding $4 304,40 was not competent in that it exceeded the maximum amount of $1 000 provided for in s 341 of the Code.

When my brother McNALLY and I failed to agree as to the appropriate order to be made, we invited SANDURA J to sit with us and invited further argument on the effect of s 341 of the Code. The Court invited Mr *Gillespie* to argue the matter on behalf of the appellant. The Court is indebted to Mr *Gillespie* and to Mr *Batty*, who appeared for the State, for their well-reasoned arguments and their considered opinions on the effect of s 341.

The history of s 341 has been effectively dealt with by McNALLY J in his judgment.

Mr *Batty* relied for his submission in support of awards of compensation being based on each count on the provisions of s 13(1)(d) of the Magistrates Court Act [*Chapter 18*], which are to this effect:

> "(d) if two or more claims, each based upon a different cause of action, are combined in one summons, the court shall have the same jurisdiction to decide each such claim as it would have had if each claim had formed the sole subject of a separate action;".

I do not believe that this section is relevant to the point in issue. Section 341 of the Code gives limited jurisdiction to magistrates and judges of the High Court alike. Its interpretation is not aided by making reference to s 13(1)(d) of the Magistrates Court Act.

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In *S v Sacramente* HC-H-204-82, a case in which the appellant, a receptionist at a motel, defrauded his employer on 203 separate occasions of $3 925,22, the magistrate ordered compensation, one presumes because

DUMBUTSHENA JP

the judgment does not mention the amount of compensation, in the sum of $3 925,22. McNALLY J said at p 2:

> "Secondly, he has made an order for compensation which is incompetent in terms of the proviso to s 341(1) of the Criminal Procedure & Evidence Act [*Chapter 59*], since it exceeds the sum of one thousand dollars."

SMITH JP agreed with the conclusions arrived at in the judgment. In those cases there was no consideration given to the splitting of the portions of the amount awarded into different counts. More recently I had accession to deal in *S v Mugwizi* HC-H-6-83 with a similar case. In that case the accused pleaded guilty to eight counts of theft by conversion. He used to receive money from his employer's clients. He issued receipts and prepared bank deposit slips for depositing money in the bank account of his employers, Fawcett Security Organization. At various times and on divers dates the accused converted sums of money to the total amount of $3 064,50 to his own use. The magistrate awarded compensation in the sum of $3 064,50 and realized afterwards that he had no jurisdiction to award compensation in excess of $1 000. I did not consider that apportioning the sum of $3 064,50 to 8 counts would be a competent award of compensation. Although in keeping with my thinking in the present case, *Mugwizi's* case does not give reasons for arriving at the decision I took. In my judgment, the words of the proviso to s 341(1) of the Code are clear and unambiguous in their ordinary meaning. In other words, they mean what they say:

> ". . . no such award shall be made by any court if the compensation claimed exceeds one thousand dollars."

This, in my opinion, includes cases where an accused person has been convicted of more than one count. I set aside the magistrate's award and substituted one of $1 000. My brother SQUIRES agreed with that judgment.

I derive support for the view I hold from what was said by HATHORN AJP in *Natal Hatters v Manci* 1938 NPD 316, a civil case in which the learned judge made references to an award made in a criminal trial by a magistrate before the complainant filed a civil claim for the balance of the loss not awarded at the criminal trial. Although it is not clear whether there were two counts, it seems to me two applications were made for compensation. The learned judge did not come to a firm decision because he was not concerned with that aspect of it, but he did say this at 318-9:

> "It is obvious that in deciding an application under s 363 the magistrate must make an award of a specific amount before either subs 6, or subs 7 can operate. And I emphasise, too, the limit of jurisdiction. The magistrate in the criminal case, as I have

DUMBUTSHENA JP

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already said, has no jurisdiction to make an award if the compensation claimed exceeded £50. It is perfectly clear in my opinion that the complainant has no right to make two applications for compensation. The section only contemplates one application, and it is to be gathered from the note in the record, and the evidence given in the present case, that the prosecutor, acting for the complainant, desired to obtain payment of £30 18s. 3d, being the cash which was in the possession of the clerk of the court and had been obtained from the accused when he was arrested, and that he also desired to obtain payment of £50, which belonged to the accused and was in a savings bank, and he moved accordingly. Sub-section 6 applied the first sum, but not to the second. Exactly what happened in the criminal court at this stage of the proceedings is not very clear. There may have been two separate applications, or only one, but if there were two the second must have been made immediately after the first. Without deciding the point, I shall assume in favour of the respondent that two applications were made, and I will also assume in his favour that the second application was made after the first had been disposed of, and the order directing that £30 18s. 3d be paid to the complainant had been made. Even on these assumptions, it is clear, in my opinion, that the magistrate had no jurisdiction to make any award of compensation at all because, though there were in form two applications, in substance there was only one, and the total amount claimed was in excess of £50. When the second application was made, the magistrate's duty was to recall his order as to the £30 19s. 3d and he should have regarded the two applications as one, and he should have declined to make an award for lack of jurisdiction."

Although on the facts the above passage can to some extent be distinguished from the facts in the instant case, it seems to me that two applications for awards based on two counts or more cannot be made at one and the same trial. In my opinion there is no room, as the law is now, for a complainant to make an application for an award of compensation on each count of the indictment so as to enable him to recover, as in this case, all the amount of the damage he suffered. It appears clear to me that the complainant is entitled to make a single application, and the Court on the strength of that application makes one award, taking all the counts as one for the purpose of making that award.

It seems to me that the Legislature did not intend to enable a complainant who suffered damage in the sum of $4 000 or any such figure from a number of thefts, as in this case, to recover a sum in excess or substantially in excess of $1 000 while restricting an award of compensation for the same or similar damage suffered by a complainant whose loss was suffered through one act of theft. The proposition I am making is better illustrated by the following two situations. A employs a book-keeper who in the course of his work steals $1 000 every week-end and is discovered and arrested after four thefts totalling in money terms $4 000. B employs a book-keeper who steals $4 000 in one fell swoop. He gets arrested. The two employees are convicted. A makes four applications for an award of compensation and recovers all his money because his employee is con-

victed of four counts of theft. B makes one application for an award of compensation because his employee is charged with one count of theft. He is awarded in terms of the section $1 000 because the Court's jurisdiction, in cases where there is one count, is limited to $1 000.

It must be remembered that the award is a civil judgment made in circumstances in which an accused person has been convicted of a criminal offence without proffering defences and counter-claims which, if successful, would entitle him to pay a lesser amount than that claimed by the complainant or in which he may, if his counter-claim succeeds, be paid more than the amount of damage suffered by the complainant. He would, so to speak, be at a disadvantage

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were the court to award more than the statutory limit set out by s 341. I do not believe that the Legislature intended to be generous to a complainant whose loss was suffered by a series of thefts while restricting the amount of an award granted to a complainant whose loss came by way of one theft.

In the circumstances I am of the view that the justice of the case would have been met by making the following order:

1. The award of compensation is set aside.

2. The matter is remitted to the Magistrates Court for making further inquiries about the appellant's ability to make restitution and to make, if possible, an order of restitution.

3. If the complainant still seeks an award in terms of s 341, bearing in mind that he will be required to waive his right to the balance over $1 000, the magistrate should make a competent award in terms of the section.

Gurajena-Gwati & Partners, legal practitioners for the appellant.

Attorney-General, legal practitioner for the respondent.

S v MANYANI 1983 (2) ZLR 98 (HC)

Court **High Court, Harare**

McNally J

27 July 1983

Flynote

Criminal procedure - plea of guilty - plea of guilty to possessing uncut emeralds - appraiser's report showed stones not emeralds and of no value - necessity to clarify plea.

Headnote

The accused pleaded guilty to possessing uncut emeralds, a contravention of s 3 of the Precious tones Trade Act 1978. An evaluation report showed that the stones were not emeralds at all but rough fuchsite quartz. The magistrate did not clarify whether the accused believed the stones to be emeralds.

Held, setting aside the conviction, that while in a proper case it may be possible to convict the accused of an attempt to commit the offence, there was no indication here what the accused's belief was regarding the stones. He was not asked whether he believed they were emeralds. His answer may have made the matter clear, but without such clarification his plea of guilty was at least equivocal and at worst meaningless.

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Case cited:

S v Mabhena 1982 (1) ZLR 6.

Judgment

McNally J: The accused pleaded guilty to possessing 14 uncut emeralds in contravention of s 3 of Act No 8 of 1978 as amended by Act No 1 of 1982.

The magistrate found him guilty and noted that the appraiser's report showed the stones to be of no commercial value. He commented that the legislation provided for a mandatory minimum sentence of three years and "my hands are tied as far as sentence is concerned". He went on to say that, given a free hand, he would have fined him not more than $100.

The magistrate has made a number of mistakes. First, the "evaluation report" should be in affidavit form. It is not. Second, it is wrong for him to include in his judgment a plea to the reviewing judge "to bear in mind that the stones are valueless". The duty of the reviewing judge is to correct

McNALLY J

errors. If the fact that the stones are valueless is a relevant fact then the magistrate should have acted on it to the appropriate extent. If it is not relevant then it is of no interest to the reviewing judge.

Thirdly, the magistrate is wrong to say his hands are tied. The section requires him to investigate whether there are "special reasons" for not imposing the minimum sentence. He has not done so. He simply asked whether the accused had anything to say in mitigation. It is the magistrate's duty to inquire carefully into the question of special reasons, because clearly an unsophisticated accused person will not know what is relevant in this context.

But fourthly, and most importantly, the magistrate has overlooked the fact that the evaluation report shows these stones were not emeralds at all. They are described as "14 loose Rough Fuchsite Quartz". Rough fuchsite quartz does not fall within the definition of precious stones.

In a proper case it may be possible to convict a person in such circumstances of attempting to possess emeralds. See *S v Mabhena* 1982 (1) ZLR 6. But there is no evidence at all on the record which would suggest that the present accused believed or even suspected the stones were emeralds.

Mabhena's case contains an extract from the opinion of the Attorney-General in the following words:

> ". . . it is legally possible for an accused to attempt to possess an uncut emerald when that stone is not, in fact, an emerald, *provided of course he believes it is an emerald*." (My underlining).

In this case there is no indication one way or the other whether the accused believed these were emeralds. True, in his plea of guilty he admitted possessing 14 emeralds, and in his

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recorded reply when the elements of the offence were put to him he said: "I admit that I was found in possession of the emeralds." But once one realizes that these admissions were based on the false premise that the stones were emeralds, it becomes apparent that such statements are at least equivocal, and at worst meaningless.

If the elements of the offence had been put to him fully he should have been asked, "did you know or believe that these stones were emeralds as opposed to mere semi-precious or non-precious stones?". His answer to that question might have made it clear whether he could have been con-

victed of an attempt. But the question was not put.

Indeed, I doubt very much whether in Shona or Sindebele there are words which distinguish between "emeralds"' and "Fuchsite Quartz", or between "precious" as used in the Act as a term of art, and "valuable". One wonders, in short, how the charge was put in the vernacular to the accused. How does one translate "a precious stone of no commercial value?"

It is entirely possible therefore that the accused's admission meant no more than if he had said, "I admit that I possessed those stones which you say are called emeralds and which you allege are valuable." In those circumstances the accused cannot, in my view, be said to have been proved beyond a reasonable doubt to have been guilty of an attempt.

With the concurrence of SQUIRES J the conviction and sentence are set aside.

KWEKWE MUNICIPALITY v IMPRECON (PVT) LTD 1983 (2) ZLR 101 (SC)

Court **Supreme Court, Harare**

Georges CJ, Gubbay AJA & Pittman AJA

8 July & 2 August 1983

Flynote

Contract - interpretation of - building contract - clause providing for arbitration in event of a dispute - later clause providing for immediate expulsion of builder from worksite on the occurrence of certain events - dispute over those events need not be settled before expulsion allowed.

Headnote

The appellant municipality in 1981 entered into a contract with Imprecon for the installation of certain pipelines. The date for completion of the contract was April, 1982 but this was extended to October 1982. By April 1983 the work was still uncompleted and the municipality sought to expel Imprecon from the work site in terms of the contract. Imprecon refused to vacate it. The

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Municipality filed notice of motion which was rejected by WADDINGTON J pending arbitration of the dispute as to whether notice of expulsion was validly given under the contract.

The contract was a standard building contract. The relevant clauses dealt with, firstly, the settlement of disputes and secondly, expulsion from the building site. The clause dealing with the settlement of disputes provided for reference of a dispute, firstly, to the engineer; the parties would have to give effect to the engineer's decision whether or not either was dissatisfied with it. The dissatisfied party could refer the issue to a mediator and finally to an arbitrator. Clause 65, which dealt with the expulsion of the contractor from the work site, provided that on the occurrence of certain events, such as -

(a) the sequestration (whether provisional or final) of the contractor's estate;

(b) the liquidation (whether provisional or final) of the contractor, if it were a company;

(c) a certificate from the engineer that the contractor had, for example -

(i) abandoned the contract; or

(ii) failed to proceed with the works with due diligence;

Expulsion could be sought after notice to the contractors. In the present case the engineer had certified that the contractor had failed to proceed with the work with due diligence or in accordance with the contract.

The contractor disputed the engineer's conclusion, attributing the delays to factors beyond its control, and argued that since there was a dispute it had to be arbitrated upon and a finding made in favour of the municipality before expulsion could take place.

Held, that the task before the Court was to interpret the contract, having regard not only to the particular clauses under consideration but also to the overriding purpose of the contract.

Held, further, that the overriding purpose of the contract was to ensure the expeditious completion of the work, The contractor's position was protected, in that if it were later held that it was expelled improperly, it would be entitled to damages. To hold otherwise would necessarily lead to stalemate, with the contractor in possession unable to insist on being paid and the municipality out of possession unable to make arrangements for the completion of the works. Accordingly, the appeal would be allowed and eviction would be ordered.

Cases cited:

London Borough of Hounslow v Twickenham Garden Development Ltd [1970] 3 All ER 326;

Mayfield Holdings v Moana Reef [1973] 1 NZLR 309.

FC Blackie SC, with him *C S Grossman*, for the appellant. The real issue in this appeal is whether notwithstanding the respondent's right to submit the engineer's certificate to arbitration, the appellant may nevertheless expel the respondent from the site and complete the works itself. It is submitted that the right to expel the respondent from the site is not subject to or dependent upon the result of the arbitration. The issue of possession is not a matter for

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arbitration. See Keating *Building Contracts* 4 Ed page 121; Hudsons *Building and Engineering Contracts* 10 Ed pp 681, 701, 708, and 710-714; Mackenzie *Building Contracts and Arbitration in South Africa* 40-41.

Another way of testing the matter is to look at the consequences to both parties. The employer is given the remedy of expulsion; the contractor is given the right to early arbitration. If the right to expulsion is subject to arbitration, the contractor could in effect delay indefinitely the right of the employer to get someone to either remedy the defects or continue the work. In the first place the contractor has 28 days to make his decision. Thereafter the consequences and programme set out in Clause 69 (3) must follow and inevitably it could take 6 months to get the matter to arbitration, let alone the time taken up for the arbitration which is notoriously long in building and engineering matters. The effect of this is to render nugatory the employer's right (specially preserved after cancellation) in terms of Clause 65 (1) to complete the works. The contractor on the other hand is adequately protected by his right to early arbitration and to damages. It is submitted that this court should not follow the judgment in the *Hounslow* case (*supra)* because -

(a) it is the decision of a single judge (though a distinguished one) sitting at first instance. It has not been tested on appeal;

(b) it has not been followed in other jurisdictions. See *Mayfield Holdings v Moana Reef* (*supra*);

GEORGES CJ

(c) it was decided on the technical rules relating to obtaining an injuction in England at that time and probably does not represent the law in that country today;

(d) in any event, it is distinguishable in that the contract in that case did not contain an express expulsion clause.

Such authority as does exist in this jurisdiction tends to support the submission that the employer has the right to expel the contractor in terms of Clause 65 (1) even though the issue of the certificate is hotly contested. See *Rhodesia Electricity Supply Commission v Joelson Brothers and Bardone* 1977(4) SA 639.

Expulsion duly took place in that case and it was never claimed or suggested that the contractor had the right to remain on site.

R Hove for the respondent.

Judgment

Georges CJ: On 13 February 1981 the Municipality of Kwekwe (to which I will refer as the Employer) entered into a contract with Imprecon (Private) Limited (to which I will refer as the Contractor) for the installation of pipelines as part of the Employer's Sebakwe Augmentation Scheme. The date for the completion of the contract, subject perhaps to a qualification which is not material for the purposes of this dispute, was 22 April 1982. As a result of circumstances over which it could be said that the Contractor had little control this date was extended to the

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end of October 1982.

By 29 April 1983 the work had, however, not yet been completed. Purporting to act under powers conferred on it in the contract, the Employer gave notice to the Contractor on that day that it proposed to enter the site and expel the Contractor therefrom after 6 May 1983. The Contractor refused to vacate despite this demand and a notice of motion was accordingly filed on 12 May 1983. The matter came before WADDINGTON J who on 8 June 1983 in effect refused the application for eviction and stayed the application pending arbitration of the dispute as to whether the notice of expulsion was validly given under the contract.

The contract between the parties was in accordance with that set out in the General Conditions of Contract for use in connection with Works of Civil Engineering Construction 3 ed (1976).

Clause 69 thereof provides for the settlement of disputes. Any dispute between the Employer or the Engineer and the contractor first thus be

GEORGES CJ

referred to the engineer who must state his decision in writing and give notice of the same to the Employer and the contractor. The Employer and the contractor are enjoined forthwith to give effect to that decision and the Contractor is further enjoined to "proceed with the Works with all due diligence whether or not notice of dissatisfaction is given by him or by the Employer". If either the Employer or the Contractor is dissatisfied with the decision of the Engineer the dissatisfied party is enjoined to refer the issue to a Mediator within 28 days of the handing down of the decision. The Mediator must within a reasonable period give his written opinion on the matter and that opinion will be binding unless either party within 28 days refers the dispute to arbitration.

In serving the notice of expulsion on the Contractor Employer purported to act under clause 65 of the contract. This provides:

> "65. (1) If the estate of the Contractor shall be sequestrated, whether provisionally or finally, or if the Contractor shall publish a notice of surrender or present a petition for the acceptance of the surrender of his estate as insolvent or shall make an arrangement with or assignment in favour of his creditors or shall agree to carry out the Contract under a committee of inspection of his creditors or (being a company) shall go into liquidation, whether provisionally or finally (other than a voluntary liquidation for the purposes of amalgamation or reconstruction) or shall have an execution levied on his goods or if the Engineer shall certify in writing to the Employer that in his opinion the Contractor:
>
> (a) has abandoned the Contract, or
>
> (b) without reasonable excuse has failed to commence the Works in terms of Clause 41 hereof or has suspended the progress of the Works for 14 days after receiving from the Engineer written notice to proceed, or
>
> (c) has failed to proceed with the Works with due diligence, or
>
> (d) has failed to remove materials from the Site or to pull down and replace work for 14 days after receiving from the Engineer written notice that the said materials or work have been condemned and rejected by the Engineer under these conditions, or

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(e) is not executing the Works in accordance with the Contract or is persistently or flagrantly neglecting to carry out his obligations under the Contract, or

(f) has, to the detriment of good workmanship or in defiance of the Engineer's instructions to the contrary, sub-let any part of the Contract, or

(g) has assigned the Contract or any part thereof without the consent in writing of the Employer,

then the Employer may, after giving 7 days' notice in writing to the Contractor and to the Sureties, enter upon the Site and the Works and expel the Contractor therefrom without thereby voiding the Contract or releasing the Contractor from any of his obligations or liabilities under the Contract or affecting the rights and powers conferred on the Employer or the Engineer by the Contract and may arrange with the Sureties to or may himself complete the Works or may employ any other contractor or persons to complete the Works and the Sureties, the Employer or such other contractor or persons may use for such completion so much of the Constructional Plant, Temporary Works and materials on the Site which have been deemed to become the property of

GEORGES CJ

the Employer under Sub-Clause 55(2) hereof as he or they may think proper and the Employer may at any time sell any of the said Constructional Plant Temporary Works and unused materials and apply the proceeds of sale in or towards the satisfaction of any sums due or which may become due to him from the Contractor under the Contract."

WADDINGTON J found, and that finding has not been disputed, that after a series of delays in the execution of the work the Engineer engaged by the Municipality to supervise the construction of the pipeline did issue a certificate in terms of that clause to the effect that the Contractor had failed to proceed with the work with due diligence and or in accordance with the contract.

The Contractor challenges the assessment of the Engineer that it was guilty of undue delay or of improper performance of the contract. It places the blame for the additional delay beyond October 1982 on various defaults by the Employer in the supply of materials and on omissions in the plans provided by the Engineer which necessitated the relaying of pipes already put down.

The contention on behalf of the Contractor is that the dispute as to whether it has unduly delayed or improperly performed the work is a dispute arising under the contract in terms of clause 69 and that the dispute must be arbitrated and a finding made in favour of the Employer before the right to expel under clause 65 can be exercised.

For the Employer it is contended that the right to expel can be exercised immediately on the issue of the certificate by the Engineer. The dispute as to whether or not the basis for the issue of such a certificate does exist can be arbitrated after the Contractor has left the site; if it be found that there was no proper basis the Contractor will be compensated by damages.

One of the provisions of clause 69 dealing with the settlement of disputes is that where the dispute or difference between the Employer and the Contractor relates to the exercise of the Engineer's power in giving a certificate under sub-clause 65(1) that dispute or difference shall not be subject to mediation before being referred to arbitration but shall be immediately referred to arbitration. This provision is clearly intended to shorten the period between the dispute arising

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and its final settlement.

In finding for the Contractor WADDINGTON J held that it was inconceivable that a contractor would agree to a provision conferring an unimpeachable right of expulsion on an employer following the issue of a certificate which might have been granted out of spite or on an erroneous

application of the facts. He stressed the fact that mediation had been excluded as a step in the process of dispute settlement where dispute related to the issue of a engineer's certificate under the clause 65 and concluded that this was done in order to speed up the process and enable a quicker decision to be made on the question as to whether expulsion should take place or not. He was accordingly satisfied the the Contractor was entitled to arbitration before he could be expelled from the site as provided under clause 65.

Very shortly put, WADDINGTON J's approach to the problem was that the right to expulsion arose not merely on the issue of the certificate but rather on the issue of a certificate which was accepted by the Contractor or which could be shown to be based on proven facts. Unless such facts had been proved the Employer could not exercise that right to expel.

There is some support for this approach in the decision of MEGARRY J in *London Borough of Hounslow v Twickenham Garden Developments Ltd* [1970] 3 All ER 326. In that case the contract between the Borough and the contractor incorporated the RIBA conditions which are substantially similar to those governing contracts in this country. One condition of the contract provided that if the contractor failed to proceed regularly and diligently with the work the architect might give him notice specifying the default and if the default continued for 14 days the Borough might by notice determine the contractor's employment. Acting under that clause the Borough gave notice to the contractor that it had failed to proceed with the work regularly and diligently and terminated the contractor's employment. The contractor refused to accept this repudiation of the contract and elected to proceed with the work in accordance with the contract. The Borough issued a writ claiming damages for trespass and failure to vacate the site, and an injunction from trespassing on the site. MEGARRY J held, among other matters, that the validity of the notice depended on disputed matters of fact, that is, whether or not the work had been regularly and diligently proceeded with, and before granting injunctions which would be partly mandatory in effect the court should feel a high degree of assurance that the dispute would at the trial of the action be resolved in favour of the Borough and as the court felt no such assurance the injunction would not be granted.

In arriving at that conclusion MEGARRY J examined the nature of the licence granted in such cases by the employer to the contractor to remain upon the employer's land and the right of the employer to determine such a licence. He summed up his conclusions in four propositions at 343:

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> "(1) A licence to enter land is a contractual licence if it is conferred by a Contract; it is immaterial whether the right to enter the land is the primary purpose of the contract or is merely secondary.
>
> (2) A contractual licence is not an entity distinct from the contract which brings it into being, but merely one of the provisions of that contract.
>
> (3) The willingness of the court to grant equitable remedies in order to enforce or support a contractual licence depends on whether or not the licence is specifically enforceable.
>
> (4) But even if a contractual licence is not specifically enforceable, the court will not grant equitable remedies in order to procure or aid a breach of the licence."

In this jurisdiction, of course, one is not concerned with equitable remedies as such since the history of the common law of Zimbabwe in this regard is significantly different from that of the common law in England. But nonetheless remedies such as an interdict or an order for specific performance are available and broadly speaking are subject to general principles applicable to equitable remedies in England.

In my view the most important of the propositions set out by MEGARRY J is the second principle, namely, that a contractual licence is not an entity distinct from the contract which brings it into being but merely one of the provisions of the contract.

The task in this case accordingly is to interpret the contract into which the parties entered, having regard not only to the particular clause under consideration but also to the over-riding purpose which the contract was intended to achieve.

Under clause 65 a notice of expulsion may be given on the occurrence of events totally unconnected with the performance of the contract. The Employer, for example, may, after giving 7 days' notice to the Contractor and the Sureties, enter upon the land and expel the Contractor therefrom if execution is levied on the goods of the Contractor. The circumstances may well be that the execution is invalid because the judgment in respect of which it was issued was imperfect and could be set aside. The dispute as to whether the execution was valid or not would not, however, be a dispute or difference arising between the Employer or the Engineer or the Contractor. It would be a dispute between the Contractor and the party levying execution. It could not be referred to the Engineer for his ruling under clause 69. The Contractor would certainly inform the Employer of the existence of the dispute over the validity of the execution. The Employer may be prepared to delay for some time the issue of the notice of expulsion under clause 65. He would not, however, be under any obligation to wait until the dispute as to the validity of the execution was resolved before doing so. The fact that execution had been levied

would be indisputable and the right to give the notice could be exercised irrespective of the issue of the validity of the execution.

The Employer is also entitled to exercise the right to expel if the estate of the Contractor is

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provisionally sequestrated. No final order to sequestrate may follow and the provisional order may be held to have been erroneously made. Nonetheless it appears to me that the right of the Employer to give notice of expulsion would not thereby be vitiated.

The terms of clause 69 make it clear that the decisions of the Engineer are to be immediately carried out while steps relating to its challenge follow. This clause reads in part:

> "If any dispute or difference of any kind whatsoever shall arise between the Employer or the Engineer and the Contractor . . . it shall be referred to and settled by the Engineer who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Such decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor *and shall forthwith be given effect to by the Contractor who shall proceed with the Works with an due diligence, whether or not notice of dissatisfaction is given by him or by the Employer as hereinafter provided.*" (Emphasis supplied).

When notice of dissatisfaction has been given either by the Employer or the Contractor the matter is referred in the first place to the Mediator and then finally to arbitration.

The Contractor could, for example, perform some part of the Works in a manner which he contends fulfils completely the specifications prescribed. The Employer contends otherwise and seeks the Engineer's ruling. The Engineer rules that the Works as performed do not comply to specifications and orders the Contractor to demolish and reconstruct in terms of his ruling. Clause 69 makes it plain that the Contractor must *forthwith* proceed to demolish and reconstruct. The Contractor is, of course; entitled to refer the matter to mediation if he wishes but he must proceed to comply with the ruling. If the Mediator and later the Arbitrator, should the matter go that far, agree with the Contractor's contention, the Contractor will be compensated in money for the materials and labour expended in complying with the Engineer's ruling.

Clause 69 does not contemplate that pending the determination of the challenge to the Engineer's ruling there should be a pause in the execution of the Works. I see no reason in logic or as a matter of practical good sense why the same procedure should not apply in relation to a certificate under section 65 certifying that the Contractor has failed to proceed with the work with due diligence or is not executing the work in accordance with the Contract or to the detriment of good workmanship or, in defiance of the Engineer's instructions to the contrary, has sub-let any par of the work. The Contractor must comply with the notice to quit. He is entitled to challenge the correctness of the certificate in arbitration proceedings. If he is proved to be correct he will be entitled to receive damages for the loss he has suffered, just as he would have been entitled to receive payment for work which he had performed in compliance with the Engineer's ruling which in the event it was established he ought not to have been called upon to perform.

unable to move his plant from the site thus affecting his capacity to carry on other work until such time as that particular contract has been completed. The fact is, however, that the Contractor can be compensated in damages should it, in the final result, have been shown that there was no proper basis for the expulsion. On the other hand if it is shown that there was such a basis and that the expulsion was proper the fact that the Employer can use material on site to

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complete the contract would certainly help to expedite the completion of the contract and so mitigate the damages which the Contractor might be called upon to pay.

It does not appear to me that there is much strength in the argument that omitting the step of mediation from the process of settlement was intended to achieve a speedy determination of the issue as to whether or not expulsion was proper. It can as convincingly be argued that it was intended to speed up the process of determining whether or not the Contractor was entitled to damages. The Contractor's right to damages is as important an issue as the determination of the validity of the expulsion.

But perhaps in the final analysis the overriding reason for concluding that the contract intended an immediate termination of the licence and a subsequent investigation as to the existence of the facts on which a certificate was based is that the alternative approach necessarily leads to stalemate, with the Contractor in possession unable to insist on being paid and the Employer out of possession unable to make arrangements for the completion of the works. This point was made in a note on the *Hounslow* case, *supra*, in 87 LQR at 311.

The contract is based on the premise that the Engineer is the professional and independent decision - maker of first instance, making judgments as to whether the work is being properly performed or not and certifying payments. Once he has certified that the Contractor is not carrying on worth the work with due diligence or has failed properly to execute it, his role as the independent decision-maker of first recourse would become impossible. The Employer would clearly no longer accept any work done by the Contractor and the Contractor would cease to receive any payment. In those circumstances he might himself be unable to carry on with the performance of the contract and the work might well remain in a state of suspension until the arbitration process is complete. The expeditious completion, therefore, of the contract would have been effectively frustrated.

On the other hand if the site is at once made available the Employer

can proceed to ask the Sureties to carry on the work or in the event of their refusing so to do secure the services of another contractor and press on with the execution of the work while the issue in dispute is being arbitrated. After all, from the Contractor's point of view it would be better to claim for unpaid work to date and loss of profit since its only object is completion at a profit, while the Employer's object is to secure completion in compliance with the contract.

In the first supplement to the 10 ed of *Hudson's Building and Engineering Contracts* at 712 reference is made to the *Hounslow v Twickenham Garden* case, *supra*, and to a New Zealand case *Mayfield Holdings* v *Moana Reef* [1973] 1 NZLR 309. In that case the Supreme Court of New Zealand refused to follow the decision of MEGARRY J in the *Hounslow* case, *supra*. This report is unfortunately not available but the short summary of it set out in the text seems to me totally persuasive.

Accordingly, I would allow the appeal, set aside the order made by WADDINGTON J and order that the Contractor be evicted from the site works as defined in clause 74 of the contract

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W/29/1980.

The respondent must pay the costs of this appeal and in the Court *a quo*.

Gubbay AJA: I agree.

Pittman AJA: I agree.

Bowles, Brighton & Cole Bowen, appellant's legal representatives.

Hove, Mutasa & Associates, respondent's legal representatives.

S v NCUBE 1983 (2) ZLR 111 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Dumbutshena AJA

2 August 1983

Flynote

Criminal law - mens rea - aberratio ictus as a form of - not part of our law - accused's means rea vis-á-vis his actual victim must be determined.

Headnote

It was held in *R v Mabena* 1968 (1) RLR 1; 1968 (2) SA 28 (RAD) that "if A attacks B in circumstances which show that he *must* have realised that what he did was likely to kill B but by mistake kills C instead in circumstances which show that he *ought* to have realized that what he did was likely to cause serious injury to C, he is guilty of the murder of C " This statement of the law lends qualified approval to the proposition that an *aberratio ictus* affords no defence to the author of the blow that went astray. Before *Mabena's* case the courts of this country had, with one exception, looked to the *mens rea* of the author of an *aberratio ictus vis-à-vis* his actual victim, rather than that *vis-à-vis* his intended victim. This approach was the correct one, as recent decisions in South Africa demonstrate. The courts there have insisted on subjective foresight as the cornerstone of *dolus* and moved away from the idea that *aberratio ictus* is sufficient. There is no juridical or social need for the *aberratio ictus* rule in our law; the principles of our law are adequate to punish the execution of reprehensible intent without having to resort to such devices. The decision in *R v Mabena* was, therefore, wrong and should not be followed.

Cases cited:

R v Mabena (supra);

S v Mtshiza 1970 (3) SA 747 (AD);

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S v Songo 1971 (1) PH H51 (R);

R v Mabena 1967 RLR 148; 1967 (3) SA 525 (R);

R v Chikokonya 1938 SR 122;

R v Ncetendaba 1982 SR 45; 1952 (2) SA 647 (SR);

James v R 1960 R & N 159;

S v Sigwahla 1967 (4) SA 566 (A);

S v van der Mescht 1962 (1) SA 521 (A);

S v Bernardus 1965 (3) SA 287 (A);

R v Kuzwayo 1949 (3) SA 761 (A);

R v Koza 1949 (4) SA 555 (A);

S v Mavhungu 1981 (13 SA 56 (A);

BECK JA

S v Tissen 1979 (4) SA 293 (T);

S v Raisa 1979 (4) SA 541 (O);

S v Moyo (2) 1978 RLR 469; 1979 (1) SA 1024 (R).

J B Colegrave, for the appellant.

A R Chigovera, for the respondent.

Judgment

Beck JA: The appellant was charged with, pleaded guilty to and was convicted of, assault with intent to do grievous bodily harm to Miller Ncube by stabbing him with a spear. Miller Ncube is the appellant's brother.

The agreed facts were that the appellant aimed a blow with a spear at his uncle, intending to injure him grievously, but the appellant's brother, Miller, stepped forward at the critical moment and accidentally received, in the face, the spear thrust that the appellant intended for the uncle.

The judge before whom the matter was placed for review queried with the Attorney-General the correctness of the conviction, and the Attorney-General suggested in response that leave to appeal should be given to the appellant so that the matter could receive the consideration of the Supreme Court. That suggestion was acted upon by me and counsel was appointed to argue the appeal *pro Deo* for the appellant. The Court is indebted to Mr *Colegrave* for his assistance.

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Both Mr *Colegrave* and Mr *Chigovera*, who appeared for State, attacked the judgment of the Rhodesian Appellate Division in *R v Mabena* 1968 (1) RLR 1; 1968 (2) SA 28 (RAD) and submitted that it should not be followed.

In *Mabena's* case *supra* it was held that "if A attacks B in circumstances which show that he *must* have realised that what he did was likely to kill B but by mistake kills C instead in circumstances which show that he *ought* to have realised that what he did was likely to cause serious injury to C, he is guilty of the murder of C" *per* BEADLE CJ at 11 G-H).

That statement of the law lends qualified approval to the proposition that an *aberratio ictus* ("a convenient Latin expression descriptive of the situation where a blow aimed at A misses him and lands on B" - (*per* HOLMES JA in *S v Mtshiza* 1970 (3) SA 747 (AD) at 751D) affords no defence to the author of the blow that went astray. The qualification that was attached to the court's approval of this proposition stems from the fact that the court was dealing with a situation in which the author of

the deflected blow was found to have been negligent in relation to the person on whom the blow actually fell. As is apparent from the passage at p 3 B-E of the report, the court expressly refrained from dealing with the position of the author of a "deflected" blow of whom it could not be said that he ought reasonably to have foreseen that the blow might miss the intended victim and fall harmfully elsewhere.

This decision of the Appellate Division was followed, as it had to be, by GREENFIELD J in *S v Songo* 1971 (1) PH H 51. I am not aware of any other occasion subsequent to the decision on appeal in *Mabena's* case, *supra*, when the situation to which an *aberratio ictus* gives rise has received consideration in the courts of this country.

Prior to the decision of YOUNG J in the court of first instance in *R v Mabena* 1967 RLR 148; 1967 (3) SA 525 (R) there appear to be only three reported decisions of our courts in relation to situations in which there was an *aberratio ictus*. One of those decisions (*R v Chikokonya* 1938 SR 122) was based squarely on the English doctrine of "transferred malice", which is a doctrine that fictionally visits the unintended result that has materialised with the transferred "malice" (*mens rea*) with which the intended but unachieved purpose was attempted. Since it is no part of this doctrine that, for guilt to attach, the unintended result must at least have been accompanied by *mens rea* in the form of *culpa* towards the actual victim of the accused's conduct, it goes further than the Rhodesian Appellate Division was prepared to go. Indeed, at page 81 of *Mabena's* case, *supra*, BEADLE CJ said of *Chikokonya's* case, *supra*, that

> "BLAKEWAY J based his decision on the English law; but English law is, I think, unreliable authority on this aspect of Roman-Dutch law. *Chikokonya's* case, therefore, I find of little help."

I do not know of any other judicial attempt in this country to introduce into our law the English doctrine of transferred malice.

The other two cases were ones in which the courts were careful to examine the *mens rea* of the

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accused in relation to the actual result that his *aberratio ictus* achieved (and with which he was charged) and to determine his guilt or innocence according to that *mens rea* only, and no other. Thus, in *R v Ncetendaba* 1952 SR 45; 1952 (2) SA 647(SR) a court consisting of THOMAS, MORTON and BEADLE JJ held that the accused had been convicted erroneously by a magistrate of malicious injury to property. The facts were that the accused, wishing to kill birds, put poison in puddles of water near a cattle drinking trough. The complainant's cow drank at the puddles and died, and the accused were charged with malicious injury

BECK JA

to property in respect of the cow. BEADLE J (as he then was) delivered the judgment and said, at p 652 E-G:

> "I do not think that the Crown has proved that the accused knew or must have known that the cow would be likely to drink from the puddles in which the poison was placed. The case for the Crown is not strong enough for such an inference necessarily to be drawn. It may have been grossly negligent to place poison in water in these circumstances, but this is as much as I think the Crown has established in this case, and this is not sufficient to establish the legal intent required. The Crown therefore has failed to establish either an actual intent to injure the cow . . or a legal intent."

In *James v Regina* 1960 R & N 159, HATHORN J with whom MACDONALD J, (as he then was) concurred, set aside a conviction of *crimen injuria* where the allegations in the charge, which were proved, were that the accused had sent a letter addressed to Judith Hughes containing a photograph of a naked woman with indecent words written on it, and sent with indecent intent and with the intent to injure Judith, whereas in fact it injured and insulted Judith's mother who intercepted and opened the letter. At p 161H-162A HATHORN J said:

> "In the present case there was no recklessness on the part of the Appellant. His intention was to injure Judith and *no one else*. He took all the precautions he could to ensure that the photograph reached Judith because he sent the envelope to her by post properly addressed. In the result Judith did not receive it and was not injured. For these reasons I conclude that the facts of the charge do not constitute the offence alleged." (The added emphasis is mine)

The approach of YOUNG J at the trial stage in the case of *Mabena supra* was in conformity with the approach in the above mentioned decisions of *R v Ncetendaba supra* and *James* v *R supra*. He rejected the submission that the doctrine of transferred malice could be relied upon by the State to establish the necessary *mens rea* against the deceased upon whom the deflected blow had actually fallen. He said at p 152A:

> "In regard to the intent to kill: as the intent to kill Ranga cannot be transferred to the deceased, the question is whether, *vis-a-vis* the deceased, there was *dolus eventualis* on the part of the accused. In other words, can it be affirmed, with the necessary degree of certainty, that the accused knew of the danger to the lives of others present in the hut, in his attack on Ranga; that he was reckless as to the probable consequences of his action to the lives of these other persons?"

He went on to find that no such subjective foresight had been proved against the accused, but that, objectively considered, the accused acted with *culpa* towards the deceased in that he ought to have foreseen the risk of serious injury to the deceased and was therefore, on the strength of that *mens rea* towards the unforeseen victim of the deflected blow, guilty of culpable

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homicide.

Prior to the Appellate Division decision in *Mabena's* case *supra*,

BECK JA

therefore, the courts of this country (except for *Chikokonya's* case *supra* which has not been followed) looked to the *mens rea* of the author of an *aberratio ictus vis-á-vis* his actual victim, and not *vis-a-vis* the victim that he primarily intended, in order to determine his guilt on a charge relating to the actual victim.

Any other approach would not be in conformity with the basic principles of our criminal law, as recent South African decisions demonstrate. The insistence on subjective foresight as the cornerstone of *dolus* (eg *S* v *Sigwahla* 1967 (4) SA 566 (A) at 570 B-E), and the *quietus* administered to the *versari in re illicita* doctrine (*S v van der Mescht* 1962 (1) SA 521 (A); *S v Bernardus* 1965 (3) SA 287 (A)), have caused the courts in South Africa to move away from the position reflected in *R v Kuzwayo* 1949 (3) SA 761 (A) (assuming that the *ratio decidendi* of that case was not *dolus eventualis*) and in *R v Koza* 1949 (4) SA 555 (A). This last-mentioned decision, in particular, weighed heavily with BEADLE CJ in support of the conclusion he reached in *Mabena's* case *supra*.

Thus, at p 752H of *S v Mtshiza, supra*, HOLMES JA said:

> "The ratio *Koza's* case is strongly criticised in De Wet and Swanepoel *Die Suid-Afrikaanse Strafreg* 2 Ed at p 134. Similarly, the Rhodesian Appellate Division case of *R v Mabena* ... which follows *Koza's* case, is criticised by the writer of an article published in Volume 85 of *The South African Law Journal* 115 at pp 120 to 122. In my respectful opinion the rejection of *versari in re illicita* in *Bernardus'* case and the formulation of *dolus eventualis* in *S v Malinga* (1963 (1) SA 692 (A)), render the foregoing criticisms valid."

Most recently the South African Appellate Division said of these *dicta* that -

> "Although (they) appear in (a) minority judgment(s) in the sense that the other judges concerned pursued different approaches, I think that those *dicta* relating to *aberratio ictus* accord with modern thought and the trend of recent decisions of this Court generally on the need for the abovementioned subjective test to be always satisfied before any accused can be convicted of murder" (*per* TROLLIP JA in *S v Mavhungu* 1981 (1) SA 56 (A) at 67H).

See too the judgments of MARGO J in *S v Tissen* 1979 (4) SA 293 (T), and FLEMMING J in *S v Raisa* 1979 (4) SA 541 (O).

We have not had the benefit of argument in support of the decision on appeal in *Mabena's* case, *supra*, since both counsel, as I have said, made common cause in attacking it, but I have paid regard to the spirited support given to the notion of *aberratio ictus* as an incriminating rule (of *S v Raisa supra* at p 543B) by the author of an article titled "*Aberratio Ictus: A Comedy of Errors - and Deflection*" in (1978) 95 SALJ.

* See also the article attacking the decision in *Mabhena's* entitled "The Deflected Blow - Aberratio Ictus" by Paula Boothby in 1968 RLJ 19. - ED

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BECK JA

However, I share the view expressed by FLEMMING J at p 543 D-F of *Raisa's* case, *supra*, that in our law -

> ". . . where attempt is a criminal offence and is generally punishable with the same penalty as the permissible punishment for the crime itself, there appears to be no juridical or social need for the *aberratio ictus* rule. Non-recognition thereof does not imply impunity in regard to execution of a criminal intent but confines criminal liability to punishment of the offender for those acts in respect of which he did legally have *mens rea*. A legal system may well need doctrines such as the *versari in re illicita* doctrine and the *aberratio ictus* rule to extend liability where attempt is not punishable or punishable only within certain limits which render the relevant principles inadequate to punish execution of reprehensible intent adequately."

I am, with respect, satisfied that the decision of the Appellate Division in *Mabena's* case, *supra*, must now be held to be wrong. There is no need for such a rule, qualified though it was, which, contrary to principle, permits conviction for an offence for which the requisite *mens rea* is lacking. Mabena did not have towards Machiki, the man he accidentally killed, *dolus* in any form, and could not therefore, properly be held to have been guilty of murdering Machiki. His conduct constituted an attempt to murder Ranga, the man he intended to stab, and with regard to whom he had the necessary *dolus* for murder; and it also constituted culpable homicide in respect of Machiki, towards whom he had *mens rea* in the form of *culpa*. No other offence was established on the facts that were found.

In the instant case it was accepted by Mr *Chigovera* that the State did not prove that the appellant in fact foresaw that Miller Ncube might intrude his body into the path of the spear thrust that was aimed at the appellant's uncle, but nevertheless persisted in delivering that thrust, reckless whether it injured Miller or not. Since there was no *dolus* of any kind sufficient to support a conviction of assaulting Miller Ncube with the intention of doing him grievous bodily harm, the conviction by the magistrate for that offence was wrong. No offence of any kind *vis a vis* Miller Ncube is revealed by the facts that are on record.

On behalf of the appellant, however, Mr *Colegrave* said that there would have been no prejudice whatsoever if the magistrate had amended and reduced the charge by substituting the name of the appellant's uncle for that of Miller Ncube and by alleging an attempt to assault the uncle with the intention of doing him grievous bodily harm, pursuant to the appellant's admission, when the charge was explained to him, that he aimed the spear thrust at his uncle with the intention of grievously injuring him; and Mr *Colegrave* consented to such an amendment being effected now. But for that consent it may have been necessary to consider more closely

BECK JA

whether the alteration in question is such as might properly be described as an "amendment" within the meaning of section 191(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] (of *S v Moyo (2)* 1978 RLR 469). Be that as it may, what has fairly been consented to certainly accords with the reality of the situation and it enables justice to be done. Accordingly, at the conclusion of argument we allowed the amendment, set aside the conviction that the magistrate entered and substituted a conviction of attempted assault with intent to do grievous bodily harm,

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and reduced the sentence that was imposed to one of 9 months' imprisonment with labour of which 6 months will be suspended for 3 years on condition that the appellant is not convicted of having committed, during the period of suspension, any offence involving an assault for which he is sentenced to imprisonment without the option of a fine.

Georges CJ: I agree.

Dumbutshena AJA: I agree.

Pro Deo

S v MPOFU 1983 (2) ZLR 118 (HC)

Court **High Court, Bulawayo**

Korsah J

10 August 1983

Flynote

Criminal procedure - plea - prosecutor accepting plea to a lesser offence than that disclosed by facts - impropriety of.

Headnote

In appropriate cases, where, in the opinion of the prosecutor, the admitted facts do not, or the evidence available does not, support the offence charged but do support a lesser offence, it is open to the prosecutor, as *dominus litis*, to accept a plea of guilty to that lesser offence. This does not, however, permit prosecutors to make admissions of fact which are not only wrong but unjustified, simply to get rid of a case expeditiously or in order to avoid a mandatory punishments appropriate to the more serious offence.

Cases cited:

S v Chakanetsa 1981 ZLR 48;

S v Chiromo AD 143/76.

Judgment

Korsah J: On or about the 29 January 1983, at Irrigation Road Bridge, Umgusa, near Bulawayo, the accused while driving motor vehicle registration No 65-805K went off the road and hit a guard rail on the bridge. A breathalyzer test conducted by the police confirmed their suspicion that he was drunk. The test showed that the accused had an alcohol concentration of 156 mg of alcohol per 100 ml of blood. These were the agreed facts. The accused was charged with contravening s 46(1) of the Road Traffic Act 48 of 1976.

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At his trial, the prosecutor appears to have accepted a plea of guilty to a lesser offence under s 45(1) of the Act and the trial magistrate sentenced the accused thus:

> "$200 or in default 15 days' imprisonment with labour. Accused's driver's licence is to be endorsed with the particulars of this conviction on sentence".

The scrutinizing magistrate has expressed his dissatisfaction, firstly with

the prosecutor for accepting a plea to a less grave offence, and secondly with the court for giving its blessing to such procedure and also for awarding 15 days as an alternative to the fine of $200. He is of opinion that there has been a miscarriage of justice, and has refused to grant his certificate to the proceedings.

The trial magistrate's explanation was that the prosecutor, being *dominus litis,* accepted a plea to a lesser offence because the blood alcohol reading was not much higher than the level at which the statutory presumption of incapacity is raised by s 46(2) of the Act. And the court condoned the plea to a lesser offence because of the difficulty in getting the witnesses to attend court as well as the want of any serious injury to anyone.

As regards the punishment imposed, the trial magistrate's reason is even more obscure. He said he was of opinion that for a man earning $325 per month 15 days was a reasonable alternative to a fine of $250.

In appropriate cases, where, in the opinion of a prosecutor, the admitted facts do not, or the evidence available does not, support the offence charged, but supports a lesser offence, it is open to the prosecutor to accept a plea of guilty to that lesser offence. After all he is *dominus litis*. But in *S v Chakanetsa* 1981 ZLR 48 LEWIS JP, quoting a comment by BEADLE CJ in *S* v *Chiromo* AD 143/76 (unreported) admonishes prosecutors who, for the sole reason of getting rid of a case expeditiously, "willy-nilly make admissions of fact which are not only wrong, but also unjustified".

To begin with, the excuse that the witnesses were not attending court is untenable. Every magistrate's court is imbued with power to compel the attendance of witnesses who should appear and testify either for the State or for the accused. And if persons are not prepared to live up to their civic duties that power must be invoked.

At first blush, it seemed to me that the use of the word "shall" in s 46(2) of the Act imposed what, for want of a better phrase, I would call a mandatory presumption where the blood alcohol is not less than 150 mg per 100 ml of blood, and that it was not open to a prosecutor or the court in a prosecution under s 46(1) to circumvent the presumption by accepting a plea to s 45(1) of Act 48 of 1976. If that were so, the court would have lacked jurisdiction to accept a plea to s 45(1) of the Act and the whole trial would have been a nullity. But a prosecutor is *dominus litis*. He may, for reasons best known to himself, withdraw one charge

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and substitute another before the accused pleads to it. Even though there is no fresh charge sheet in the court file, it would appear that this is what occurred. In the circumstances, much as I regret that the proceedings were not in accord with true and substantial justice there is nothing that can be done.

I also agree with the scrutinizing magistrate that 15 days as an alternative to a fine of $200, in the light of the custom of the courts in awarding alternative sentences, is too low. The scrutinizing magistrate, considering the whole conduct of the case, was right in withholding his certificate. And I do likewise refuse to confirm the conviction and sentence as being in accordance with true and substantial justice.

Gubbay J agrees.

1983 (2) ZLR p121

GOMWE v CHIMBWA 1983 (2) ZLR 121 (SC)

Court **Supreme Court, Harare**

Georges CJ & Beck JA

25 July & 16 August 1983

Flynote

Practice and procedure - community courts - whether to apply general law or customary law - Customary Law and Primary Courts Act 1981 - s 3 - evidence - of seduction - whether corroboration required in case where customary law applied.

Headnote

In a case heard in the community courts, customary law should apply unless it appears from the nature of the case and the surrounding circumstances that it is not just and proper that such law should apply. The surrounding circumstances include such factors as the mode of life of the parties, and the fact that it is urban and commercial would tend to support a contention that the case should be determined according to the general law of Zimbabwe. However, in a case of seduction, brought by the father of the girl, where the essence of the claim is the wrong done to him by the reduction in value of *roora* caused by her loss of virginity, customary law ought to apply.

When customary law is applied in a case of seduction, corroboration of the girl's testimony is not essential, nor is evidence excluded merely because it is hearsay. Indeed, hearsay evidence can, in appropriate circumstances, provide corroboration.

Cases cited:

Masembura v Yawo 1972 AAC 28.

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C Greenland, for the appellant.

The respondent in person.

Judgment

Beck JA: The appellant was sued in a community court for damages in the sum of $250 for seducing the respondent's unmarried daughter of 18. The respondent's claim was more successful than might have been expected, for the presiding officer, having found the seduction to have been proved, added $100 to it by way of "penal damages", and awarded a total of $350. An appeal to the district court failed to overturn the finding that seduction was established, but succeeded in setting aside the award of penal damages and also in reducing the award by a further $150 to

BECK JA

an amount of $100. In appealing further to this Court the appellant makes no complaint about the lower quantum of damages fixed by the district court, but takes issue with the finding that seduction was proved.

The first submission in Mr *Greenland's* well presented argument was that, in terms of s 3(1)(b) of the Customary Law and Primary Courts Act, 1981, the general law of Zimbabwe should be applied to this case and not the customary law because - so he contended - it does *not* appeal just and proper that the customary law should apply, having regard to the nature of the case and the surrounding circumstances (see s 3(1)(a)(iii) of the Act). Mr *Greenland* pointed to the fact that the parties both live in Dombotombo, Marondera, and that the respondent's daughter worked for the appellant who owns a shop. Mr *Greenland* described the surrounding circumstances of the case therefore as both "urban" and "commercial" and argued that they call for the application of the general law of Zimbabwe rather than customary law.

Sub-section (2) of s 3 of the Act includes within the meaning of "surrounding circumstances" factors such as the mode of life of the parties, the subject matter of the case, the understanding by the parties of the applicable provisions of customary law or of the general law, and the relative closeness of the case and the parties to customary law and to the general law.

Bearing in mind that it is the girl's father, and not the girl herself, who is one of the parties to the case, there is hardly anything on the record to show that he fits into the "urban" and "commercial" background that Mr *Greenland* has pointed to, other than the fact that he presently lives in Dombotombo. Moreover it seems to have been implicitly accepted by the parties that customary, and not the general law should apply, for the whole case was conceived, opposed and conducted on that basis, the essence of the claim being the wrong done to the girl's father by the reduction in value of the traditional "*roora*" caused by her loss of virginity. I do not consider therefore that either the community court or the district court can be faulted for having applied customary law in the trial of this dispute.

The purpose of Mr *Greenland's* submission that the general law of Zimbabwe should be applied to this case lies in his further submission that, in that event, corroboration of the girl's allegation

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would necessarily be required as a matter of law. In view of what I have said in the preceding paragraph this further submission does not arise for decision, but if it had

BECK JA

arisen it is to be doubted whether it would have been upheld, having regard to the recent decision in *Mayer v Williams* 1981 (3) SA 348 (AD), to which Mr *Greenland* very properly drew our attention.

In so far as customary law is concerned Mr *Greenland* accepted as correct the statement in *Paul Masembura v Juawo Yawo* 1972 AAC 28, that there is no tribe in this country "which includes recognition of a need for corroboration in seduction cases amongst its judicial practices," He says however that in the instant case there are real dangers of a fabricated allegation having been made by the girl, and that as a matter of salutary practice and caution corroboration of her evidence should be insisted upon. Moreover, he says that her evidence is not only uncorroborated but is also devoid of detail, and he draws attention to passages at pp 85 and 224 of JF Hollerman's work "Shona Customary Law", which refer to the readiness with which the woman's evidence is accepted in cases of disputed allegations of seduction or of adultery, if it be detailed as to the times and places of the alleged acts of intercourse. That is not a factor which is specifically mentioned in the more recent work of Goldin and Gelfand, "African Law and Custom in Rhodesia", and I do not think that more should be read into it than the ordinary requirement that any witness who claims to have direct knowledge of a disputed event is expected to be able to give as much detail of it as would be normal in the particular circumstances, so that an inability to do so would undermine the credibility of the assertion.

I turn firstly to the alleged lack of corroboration, and I do so with full acceptance of the cogency of Mr *Greenland's* submission that this is a case where caution in accepting the girl's testimony had to be observed. The social restraints which, in a rural community that faithfully observes the traditional culture of the people, militate so strongly against an allegation of this nature being made falsely and maliciously, and which lie at the root of the customary law approach that dispenses with the need for corroboration, may well have operated much less stringently in the urban atmosphere of Dombotombo and in the mind of a girl who was earning her living for a wage in the appellant's shop. Furthermore, there is evidence of ill-feeling between the girl and the appellant, who had accused her of stealing money from his shop, and it is, of course, trite that sexual complaints by women are more easily made than refuted.

It must be borne in mind that in terms of s 15(7) of the Community Court (Civil) Rules, 1951, evidence shall not be excluded merely because it is hearsay. The respondent's evidence contained a number of unrefuted

BECK JA

passages of hearsay evidence which were corroboration of the girl's direct testimony of seduction. Thus the respondent said that the appellant's wife actually came to complain to the respondent that her relationship with her husband, the appellant, was no longer good for the

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reason that the respondent's daughter and the appellant "had love affairs" with each other. As a consequence of that complaint there was, so the respondent testified, a meeting of a number of people at the appellant's wife's home where it was said that the respondent's daughter was loved by the appellant, and the appellant's wife was told that the respondent could not now take his daughter back home "because she is now someone's wife." The respondent further testified that the appellant's wife told him that the appellant had twice beaten the girl because she had "love affairs" with someone else. He went on to say that he went to see a friend of the appellant who told him that it was not true that the girl was being beaten, and that the appellant wanted to marry her. Finally he said that the girl herself told him that the appellant had told her that she was his wife.

Much of this hearsay evidence is in satisfactory conformity with the following extract from the girl's testimony:

> "Defendant is my husband. I said that because defendant said to people in Murehwa that he wanted to marry me that is why I am calling him my husband. He said this in August 1982 I started to work for him in January 1982. He was giving me $20 per month. Defendant forced me to seduce me in August, 1982, and he told me that he want to marry me. I wanted to report the matter to the police but his father told me not to because he wanted to marry. At that time I was a virgin. I came out blood and it pained me for two days. After that time we were having sex as husband and wife. He was coming every weekend. I told defendant's wife that her husband had seduced me and he promised to marry me. After that his wife beat me and she went to collect her younger sister that she can be married by defendant. From there defendant was so jealous to me he did not want me to talk to anybody else. He always beat me. When defendant send a message that he is coming to beat me, I was afraid I then decided to run away from the house."

In conclusion, it is to be noted that, with regard to the evidence that he had beaten the girl, the appellant himself made the following significant admission in his evidence:

> "I do admit that I beat plaintiff's daughter there is some reasons she told me that she is 18 years old. I have beaten her because she had some other people whom I did not know I do admit that I did wrong by beating her in the morning of that day."

Turning next to the lack of detail in the girl's evidence, it is true that she does not give times and places of each act of intercourse, but it seems clear in the first place that these alleged acts were not by any means isolated ones. They appear rather to have been part of a course of conduct during which the appellant was using the girl at his home every week-end from

August 1982 onwards as his wife, and it might well have seemed to her unnecessary to volunteer any further details of each separate act. In the second place, and in any event, it does not seem as if she was ever asked to "dot the I's and cross the T's" in this regard, except in one instance which appears to relate only to the initial act of seduction in relation to which the appellant asked her "Where did I seduce you?" to which she replied "In bush". The matter was left there and it cannot be assumed that, either in relation to that first act of intercourse, or in relation to any of the later ones, she would have been unable to give further details if required to do so.

It seems to me therefore that no adverse inference as to her credibility falls to be drawn from the

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somewhat bald state in which her testimony was allowed to remain, nor that her testimony is devoid of corroboration in view of the admissibility of the hearsay evidence. Accordingly I cannot accept Mr *Greenland's* submission that her evidence is no more than her own *ipse dixit* and that the presiding officer in the community court "arbitrarily" took sides in the matter by accepting it. He had the advantages that a trial court always has in assessing matters of credibility in relation to the people it sees before it, and a sufficient basis for interfering on appeal with the facts found proved has not been made out.

I must mention in conclusion that Mr *Greenland* also referred to the issue raised in the notices of appeal that the appellant was not afforded the opportunity to call witnesses to say that the girl had stolen from him, so as to lend support to the suggestion that it was this trouble between them that led to her false allegations against him. There is absolutely nothing on the record to indicate that the appellant did attempt to call such witnesses but was not allowed to do so. Moreover, he himself did not think to give a word of evidence to the effect that she had stolen from him, which renders rather hollow the suggestion that this was a matter of great importance in the case. Despite the appellant's own silence however, the allegation was squarely mentioned in the girl's evidence. She told the presiding officer of the community court that the appellant accused her of having "stolen some money and goods worth $1 800." It was also mentioned by the girl's father, the respondent, who said that the appellant "reported my daughter that she had stolen some money in his shop at Murehwa yet it is not true". The presiding officer was therefore fully aware of the existence of the allegation and could hardly have been blind to the contention that it furnished a possible motive for the girl's accusation against the appellant.

In the result therefore I am not persuaded that the presiding officer er-

red in finding that the seduction was sufficiently proved. Accordingly I would dismiss the appeal with costs.

Georges CJ: I agree.

Stumbles & Rowe, appellant's legal representatives.

S v BHOWA 1983 (2) ZLR 127 (HC)

Court **High Court, Harare**

Reynolds & Manyarara AJJ

1 & 17 August 1983.

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Flynote

Criminal procedure - sentence - culpable homicide - bus drivers racing each other - whether recklessness disclosed - whether contributory negligence of other driver mitigating - when custodial sentence appropriate.

Headnote

The appellant was convicted of culpable homicide. He was a bus driver and on the day in question he and another driver who worked for another concern were vying with each other to get the maximum number of passengers possible. They were racing each other from one bus stop to another. At one stop, the other driver stopped his bus in the middle of the road to prevent the appellant from passing; but when he drew near the appellant attempted to pass. The other driver immediately pulled away to thwart the appellant, dislodging a passenger who was trying to embark. She sustained serious injuries. The deceased, who had been near the entrance to the bus, took fright at what was going on and tried to run away. In so doing he ran directly into the path of the appellant's bus and sustained fatal injuries.

The trial magistrate found the appellant's conduct to be "grossly negligent or reckless". He sentenced the appellant to a fine of $200 and prohibited him from driving an omnibus again during his lifetime. The appellant was also prohibited from driving any other vehicles for 6 months.

The appellant contended that the sentence was excessive; that the degree of negligence disclosed was no more than moderate and that insufficient weight was given to the equal negligence of the other driver, who was not prosecuted.

Held, dismissing the appeal, that gross negligence or recklessness consists of no more than the driving of a vehicle with a complete disregard for the safety of other persons on the road. The manner of driving of both drivers could only be categorised as reckless. They must have been fully aware of the risks involved in driving the way they did, yet persisted in this conduct without caring whether any harm befell others.

Held, further, that consideration had to be given to the negligence of other drivers; account must be taken of their joint negligence and to the consequences of their negligence. Here the appellant's negligence standing alone was not as great as that of both men together.

1983 (2) ZLR p128

REYNOLDS AJ

Held, further, that the appellant's conduct and its consequences were such that he was very lucky not to have been sentenced to a term of imprisonment, for such a sentence would have been entirely fitting.

Cases cited:

R v Greenland 1961 R & N 738; 1962 (1) SA 51 (R);

S v Van Zyl 1969 (1) SA 553 (AD);

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S v Ephraim 1971 (1) RLR 14; 1971 (4) SA 398 (RAD);

Hudston v Viney [1921] 1 Ch 98;

S v Shupikai 1973 (1) RLR 13; 1973 (2) SA 471 (RAD);

S v Hamilton AD 87/80;

R v Davidson 1944 (2) PH 013;

S v Snygans 1975 (3) SA 928 (O);

S v Ngcobo 1962 (2) SA 333 (N);

R v Barnado 1960 (3) SA 552 (AD);

S v Bengesa 1979 RLR 351;

R v Mahametsa 1941 AD 83;

R v Roopsingh 1986 (4) SA 509 (AD);

R v Bredell 1960 (3) SA 558 (AD);

S v Naidoo 1962 (1) PH 016;

R v Ezekiel AD 100/69;

S v Chivanga 1983 (1) ZLR 297;

S v Chimanga AD 130/70;

S v Mpofu AD 255/76.

J S Sayce, for the appellant

A R Chigovera, for the respondent

Judgment

Reynolds AJ: The appellant in this case was convicted of the crime of culpable homicide in the Magistrates Court. It was alleged that he had driven an omnibus recklessly, and in so doing had killed a pedestrian. He was sentenced to pay a fine of $200 or, in default of payment, to undergo 100 days' IWL. In addition, he was prohibited from driving any omnibus again during his lifetime, and his Class 1 driver's licence was cancelled. He was also prohibited from driving all other classes of motor vehicle for a period of 6 months.

This appeal is against the sentence imposed on the grounds that it "is not in accordance with real and substantial justice, is excessive and induces a sense of shock."

The facts that gave rise to the charge were that the appellant and another omnibus driver named David Menga were both driving their buses in the same direction on the day in question, and along the same bus route. The two buses belonged to different bus companies, and the

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two drivers were vying with each other in order to get the maximum number of passengers possible. The trial magistrate came to a finding that they were racing each

REYNOLDS AJ

other from one bus stop to the next. Mr *Sayce*, for the appellants conceded that the drivers were vying with each other for passengers, but contended that the magistrate was in error in concluding that the men were racing each other. In the context of the present case, this seems to me to be a distinction without a difference; whether they were "vying with" or "racing" each other, the fact is that they were in competition with each other to get to the next bus-stop first.

There was some dispute as to some of the facts found by the magistrate to have been proved, but the evidence of the appellant was so contradictory and so unsatisfactory that little or no reliance can be placed on it. The facts as stated by the magistrate are accepted by this Court.

It was common cause that on approaching a bus-stop known as Kadziramwanda, the driver David Menga was in the lead. He came to a halt in the middle of the road at this bus-stop, no doubt adopting this position in an attempt to prevent the appellant from overtaking him and preceding him to the next bus-stop. When the appellant arrived, there were four people at this bus-stop, at least two of whom were in the vicinity of the entrance to Menga's bus. As is normal, this entrance was on the left-hand side of the bus towards its front. The appellant decided that he had sufficient room to pass Menga's bus on its left-hand side, and he proceeded accordingly. It appears that Menga observed the appellant's stratagem, and he immediately pulled his bus away, presumably in an attempt to thwart the appellant's efforts to regain the lead. In so doing, Menga dislodged an adult woman named Hilda Musavengane from the steps of the entrance way to his bus, and the rear wheels of the bus ran over her legs, causing injuries. At the same time the deceased, who had also been near to the bus entrance way, appeared to take fright at these events, and he ran back towards the road verge, directly into the path of the appellant's bus. A collision ensued and the deceased was fatally injured.

In his judgment the trial magistrate found that the appellant had been "grossly negligent or reckless". That this term "gross negligence" is included in the ordinary meaning of the word "reckless" has been long accepted in our Courts. For example, in *R v Greenland* 1961 R & N 738; 1962(1) SA 51 (R), BEADLE CJ said that the word "recklessly" as used in driving offences "meant no more than a gross or aggravated form of negligence." (See, too, the discussion of the subject and the authorities referred to in *S v Van Zyl* 1969 (1) SA 553 (AD) and Cooper's *Motor Law,* Vol 1 at p 508).

The magistrate's finding that the appellant was guilty of gross negligence

REYNOLDS AJ

or recklessness is challenged by the defence on the basis that the evidence disclosed no more than ordinary or moderate negligence.

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There is a plethora of authority on the meaning to be ascribed to the various degrees of negligence in motor vehicle cases, and to the term "reckless driving". In the context of the present case, where "gross negligence or recklessness" is the issue, the terminology used in *S v Ephraim* 1971 (4) SA 398 (RAD) at 402 is pertinent. In that case it was said:

> ". . . where the driving shows a complete or wilful disregard for the safety as well as the rights of other road-users, it amounts to gross negligence or recklessness."

In the language of EVE J in *Hudston v Viney* [1921] 1 Ch 98 at 104, recklessness was said to connote an attitude of "mental indifference to obvious risks."

In the leading case of *S v Van Zyl supra* recklessness was described as follows:

> "Where a driver's realisation of danger or possible danger which he is creating on the road is coupled with an indifferent acceptance thereof and a continuation of his behaviour, his conduct must pass as recklessness in the sense of a commission or omission with awareness of the risk."

Whatever the actual expression employed, however, it is clear that gross negligence or recklessness in our law consists of no more than the driving of a vehicle with a complete disregard for the safety of other persons on the road. See *S v Shupikai* 1973(1) RLR 13; 1973 (2) SA 471 (RAD).

In the instant case, the appellant was, on his own admission, competing with David Menga for passengers. It seems to me that in these circumstances, the spirit of rivalry and contest engendered would probably lead to both drivers increasing speeds and taking greater risks in order to maintain priority of position on the road. Each driver would, in effect, spur the other on to greater efforts. That this was so is evident from the manner in which the two men drove their vehicles. The appellant overtook a stationary bus on its left-hand side at speed, and when there were people at the entrance to the bus. This was obviously an attempt on his part to regain the lead. As soon as Menga became aware of this manoeuvre on the appellant's part, he immediately, and without regard for the safety of the persons at or near his bus, drove off in an effort to foil the appellant's plan.

In my view there can be no doubt that the manner of driving of both these men can only be categorized as reckless. They must both have been

fully aware of the risks involved in driving in the way they did, and yet they persisted in this conduct without caring whether any harm befell those present.

The appellant freely admitted that he had seen people near to the entrance door of Menga's bus. Despite this knowledge, however, he deliberately drove close to them at speed. His conduct was entirely consistent with an attitude of "mental indifference to obvious risks." Both drivers, in fact, were behaving most irresponsibly, and with a complete disregard for the safety and rights of the persons in the vicinity.

Mr *Sayce*, for the appellant, contended that, in assessing sentence, the magistrate had not

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taken sufficient account of the fact that both men were equally negligent. Although the magistrate did not specifically mention Menga's negligence in his judgment, it is common cause, as I understand it, that Menga was indeed negligent in that he drove off as the appellant approached. This action not only caused the injury to Hilda Musavengane, but also caused the deceased to take fright and to run into the path of the appellant's bus. As was the position in the case of *S v Hamilton* AD 87/80, the present case, too, was "one of those cases where it must have been very debatable which of the drivers should have been prosecuted." In my view it was certainly possible for either or both of the men in the present matter to have been prosecuted.

The question calling for a decision is whether contributory negligence has a place in the criminal law insofar as the assessment of sentence is concerned. It seems to have been accepted in *Hamilton's* case, *supra*, and in *Davidson v R* 1944 (2) PH 013, that another person's negligence which contributes towards the accident *is* a factor relevant to sentence, although this is not specifically stated.

In *S v Snygans* 1975 (3) SA 928 (O), it was held by KUMLEBEN J that contributory negligence "could never *per se* diminish the appellant's degree of negligence, nor be a mitigating factor." It seems to me, with respect, that the first part of this opinion is correct, but the second part may be open to question. If by a "mitigating factor" is meant a circumstance that calls for the moderation or reduction of the severity of a sentence, then it is my opinion that joint or contributory negligence is, with reservations, a factor which must be considered in assessing sentence in a criminal case. In the present case, for example, had David Menga not contributed to this unfortunate accident at all, it would have been appropriate for the appellant to have been sentenced to a more severe penalty than

he was. If this were not so, the appellant would be liable to be punished for both acts of negligence.

The appellant's negligence alone may not have brought about any accident at all: it was the combined effect of the two bus drivers that led to the tragic result. It would, in these circumstances, be wrong to put the entire blame on the appellant's shoulders for this fact. This latter aspect does, of course, introduce the consequences of the combined negligence as a consideration, and it is necessary to view with caution the question of meting out punishment for the consequences of an accident. As MILLER J said in *S v Ngcobo* 1962 (2) SA 333 (N) at 336:

> "... the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of the accused's crime or culpability. Whatever the result of the negligent act or omission, the fact remains that what the accused person in such case is guilty of is negligence - the failure to take reasonable and proper care in given circumstances. His negligence may be slight and yet may have the most calamitous consequences, or it may be gross and yet be almost providentially harmless in the result . . . the basic measure for determining punishment for a negligent motorist must be the degree of his culpability or blameworthiness."

Despite this factor, however, it is undoubtedly true that in some circumstances the consequences of an accident are properly taken into account in the assessment of an

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appropriate sentence. In a culpable homicide case, for example, the fact of death requires that a more severe penalty be imposed. In the well-known words of SCHREINER JA in *R v Barnado* 1960 (3) SA 552 (AD) at 557 -

> "Culpable homicide may often seem to operate hardly upon a person who has caused another's death since no greater moral blameworthiness arises from the fact that the negligent act caused death. Nevertheless the sanctity of human life requires to be emphasised whenever a person is unlawfully killed, and drivers of motor vehicles must again and again be reminded that they are in control of an instrument that takes a dreadful toll of life on our highways. Although, therefore, if regard is paid only to the circumstances of the appellant himself it might be reasonable to accede to his counsel's submission that the whole of the sentence should be suspended, this should not in my view be done."

In the result the appellant in that case was imprisoned for two months. (See, too, *S v Bengesa* 1979 RLR 351).

Regard must also be had to the deterrent and retributive aspects of punishment. If, for instance, the momentary inattention of a truck driver results in his truck ploughing into and killing eight young children, a small fine commensurate only with the degree of negligence established would not only be inappropriate, but would also, in all likelihood, be roundly

condemned by the community as a whole as being outrageously unsuitable.

The sentence passed in the present case, therefore, should not have been assessed solely on the basis of the appellant's actual degree of negligence, the potential danger he caused and his personal circumstances, but also by taking account of the joint negligence of the appellant and Menga, and having regard to the consequences of their negligence. In other words, the appellant standing alone was not as blameworthy as were the two men together. Needless to say, it may well be that circumstances may show that the one man is just as liable for the other's negligent act as he is for his own. This was the position to an extent in the present case, with each man inciting the other, as it were, to greater acts of recklessness.

In *Hamilton's* case, *supra*, the accused had negligently turned across the face of an oncoming car driven by one Lennox, and a serious collision resulted. Lennox, it was established, was also negligent in that he was driving too fast and without keeping a proper look-out. Although the reasons for the decision were not stated, the appeal court held that the trial magistrate had not given sufficient consideration to the negligence of Lennox, and the sentence was reduced accordingly.

Even if the learned judge in *Snygans'* case, *supra*, was quite correct, however, and the magistrate in this case should not have taken into account Menga's negligence, then his sentence would obviously be more severe than it would be if contributory negligence is indeed a mitigating factor. But whichever approach the magistrate adopted, I do not consider that the sentence he imposed was in any way too severe. Indeed, it is my view that the sentence errs on the side of leniency, even if the magistrate paid no regard to Menga's negligence.

Once an accused person has been found guilty of recklessness or a high degree of negligence,

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it is often appropriate for a sentence of imprisonment to be imposed. This is particularly so when the accused's conduct has resulted in the loss of a life. (*R v Mahametsa* 1941 AD 83; *R v Roopsingh* 1956 (4) SA 509 (AD); *R v Bredell* 1960 (3) SA 558 (AD); *S v Naidoo* 1962 (1) PH 016; *R v Ezekiel* AD 100/69, and *S v Chivanga* AD 1983 (1) ZLR 297). The sentence imposed in *Chivanga's* case for what was described as negligence "of a high order" was 8 months' IWL, coupled with a prohibition from driving any omnibus for 5 years, and from driving other vehicles for 6 months. In the instant case, the appellant's conduct has already been described as irresponsible. It was also foolhardy and dangerous in the extreme. He may consider himself to be extremely for-

tunate that he was not sentenced to a substantial term of imprisonment. Had such a custodial sentence been imposed, I, for one, would have considered it to be entirely fitting. The appellant is responsible for the loss of a life by his reckless driving. As a bus driver he owed a very high duty of care towards his passengers and towards all other road-users. This special duty of care that is required of drivers of public service vehicles is emphazed in such cases as *S v Chimanga* AD 130/70, and *S v Chivanga supra*. Of particular relevance to the present case in this regard were the remarks of LEWIS AJP (as he then was) in *S v Mpofu* AD 255/76, where he said:

> "As regards sentence, it seems to me again one must approach sentence on the basis of the correctness of the magistrate's finding that this was gross negligence. Whatever label one gives to it, it was very serious negligence. The driver of a bus, which is a large, somewhat unwieldy vehicle, and which carries a number of passengers whose lives are entrusted to the driver, is obliged to exercise a high degree of care."

The present appellant was guilty of a serious breach of this duty of care.

A case that was similar to the present one in that bus drivers were racing each other is *S v Chimanga, supra.* In that case the trial magistrate's remark that "there is doubt whether the accused is fit to drive a public service vehicle" was approved of by the Appeal Court as being entirely justified. This comment applies with even greater force to the present appellant, for his negligence brought about the untimely death of the deceased.

It is, of course, the cumulative effect of the two penalties imposed in this case, as well as the individual sentences, which is of concern to this Court. Whereas the prohibition from driving omnibuses for life is a severe sentence indeed for one who, like the appellant, earns his living in this way, I do not consider that the cumulative effect of the sentences passed in this case is too severe.

The appeal against sentence is dismissed.

Manyarara AJ: I agree.

Stumbles & Rowe, legal practitioners for the appellant.

Attorney-General, legal practitioner for the respondent.

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S v NARE 1983 (2) ZLR 135 (HC)

Court **High Court, Bulawayo**

Gubbay & Korsah JJ

10 & 19 August 1983

Flynote

Criminal procedure - sentence - Criminal Law Amendment Act [Chapter 58] - s 3(a) - unlawful carnal knowledge of girl under 16 years of age - factors affecting sentence.

Headnote

The *rationale* behind punishing carnal knowledge of girls aged under 16 years is the protection of immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility of mental or physical injury. The offence is mitigated where, for example -

(i) the complainant is of loose morals; or

(ii) she enticed the accused to have intercourse; or

(iii) the accused and complainant were genuinely in love with one another; or

(iv) she was nearly 16 years old; or

(v) the accused is a simple and unsophisticated person from a community in which this law is not well known; or

(vi) he is a youth; or

(vii) he *bona fide* believed the complainant to be of age.

The offence is on the other hand, aggravated where -

(i) the accused is much older and more mature than the complainant; or

(ii) she is only just above the legal age of consent; or

(iii) the accused has relevant previous convictions.

Other factors to consider in determining the seriousness of the offence are the age, appearance and character of the complainant, the age of the accused and the circumstances in which the offence was committed.

In appropriate circumstances, a fine should be imposed, even when the offence is other than a

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technical one.

Cases cited:

R v Kam Chan 1921 EDL 327;

R v Sava 1967 RLR 367 (GD);

R v Seferino 1958 (1) PH H117 (SR);

R v Sithole 1967 RLR 403 (GD);

S v Dziko H-B-47-82 (not reported);

Henstock v Rex 1950 SR 252.

GUBBAY J

C W Jordaan for the appellant

B N Sigidi for the State.

Judgment

Gubbay J: The appellant was charged in the Court of the Regional Magistrate with contravening s 3(a) of the Criminal Law Amendment Act [*Cap 58*], in that he had carnal knowledge of a girl under the age of 16 years. He pleaded guilty. The prosecutor verbally outlined the agreed facts and produced a report upon the complainant's condition deposed to by the doctor who examined her. The appellant was duly convicted. He was sentenced to 18 months' imprisonment with labour of which period six months was conditionally suspended for five years. He now appeals to this Court against the severity of that sentence.

The appellant is 22 years of age and is a captain in the National Army of Zimbabwe. During the latter part of last year he was a member of a unit assigned to the district of Nkayi to protect the lives and property of the inhabitants from marauding dissidents. On the afternoon of 2 December 1982 the appellant - while on duty, attired in camouflage uniform and armed - encountered the complainant near the home of her father in the Zenka area. The complainant was in her fifteenth year and a total stranger to the appellant. They engaged in conversation and the complainant agreed to sexual intercourse. They proceeded into the nearby bush where intimacy occurred. That was not the first occasion for the complainant. The offence came to light almost immediately and the appellant was arrested.

The following day the complainant was examined by a doctor. His report reveals that she suffered no injuries. The vagina admitted one finger and the examination was easy. Apart from the comment that the complainant had last menstruated on 11 November 1982, there is no indication as to her physical development. Her height and weight are not given, nor the size of her breasts.

In assessing punishment the Regional Magistrate took into account the mitigating features

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urged upon him by the appellant's legal representative. These were that the appellant was a young first offender who had evinced some measure of contrition; that as a captain in the Army he was in receipt of a net salary of $620 per month and would suffer dismissal if visited with effective imprisonment; that he had been in custody awaiting trial from 2 December 1982 until 17 March 1983, when admitted to bail; that the complainant was not a virgin, though in all probability not sexually

GUBBAY J

active. Notwithstanding he regarded the appellant's moral blameworthiness to be of a high degree. He was particularly influenced by the fact that the offence had been committed in a dissident infested area and that the appellant, as a member of the Army, had been sent there to protect the inhabitants against dissident activity. He considered that the local populace would have been outraged by the appellant's behaviour. He remarked that it was not "unfair to ask how can local inhabitants have any confidence in the Army as their protector, when a captain behaves in this disgraceful manner, just as the dissidents do?" He concluded with the comment that:

> ". . . I have a duty to make it clear that in the current disturbed security situation, in this part of the country, the public demands a high standard of conduct from its army officers; and not behaviour like this. You are a disgrace to the army and I am quite satisfied this is not a case for a fine."

Mr *Jordaan* argued strongly that the Regional Magistrate had attached too much weight to the background against which the offence had been committed, and that in comparing the action of the appellant to those of dissidents, had virtually elevated the crime to that of rape.

I have no difficulty in agreeing with the Regional Magistrate that the offence constituted a breach by the appellant of his duty to protect the communal dwellers of the area. That was an aggravating feature and one less easily tolerated in a person who, by virtue of his authority, is required to set an example of discipline and good conduct to his men. Nonetheless, I think that the Regional Magistrate over-emphasized this aspect. Though the offence is usually termed "statutory rape", that is a misnomer. It does not contemplate non-consensual intercourse. Lacking as it does the elements of violence, terror or duress, I do not consider that it falls into the catalogue of misdeeds for which dissidents are renowned. By equating the appellant's behaviour to that of a dissident the Regional Magistrate over-stated his moral culpability and, in consequence, so it seems to me, imposed a manifestly onerous penalty. This is especially so in view of the lengthy period of incarceration the appellant had undergone before the trial and the financial loss attended upon a gaol sentence. I am satisfied therefore that this Court is free to assess punishment afresh.

The *rationale* of this offence is to protect immature females from voluntarily engaging in sexual intercourse on account of a lack of capacity to appreciate the implications involved and the possibility that psychic or physical injury may be suffered. That protection is achieved not by punishing the female, but rather the male partner, who in effect is assumed to have been responsible for inducing her to engage in sexual relations.

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GUBBAY J

Without intending to formulate an exhaustive list of the factors relevant to sentence, the offence is mitigated where for instance:

(i) the complainant, though nor a prostitute, was a girl of loose morals when the accused met up with her - see *R v Kam Cham* 1921 EDL 327 at 330;

(ii) the complainant enticed the accused to have intercourse with him - see *R v Sava* 1967 RLR 367 (GD) at 369A;

(iii) the complainant and the accused were genuinely in love with on another - see *R v Sava* supra, at 369A;

(iv) the complainant was nearly 16 years old - see *R v Seferino* 1958(1) PH H117 (SR); *R v Sithole* 1967 RLR 403(GD) at 140G;

(v) the accused is a simple unsophisticated person from a community in which this law is not well known;

(vi) the accused is a youth;

(vii) the accused *bona fide* believed that the complainant was of age though unable to establish reasonable cause for such a belief.

On the other hand it is aggravated where:

(i) the accused is a much older and more mature person than the complainant;

(ii) the complainant is only just above the age of consent - see *S v Dziko* H-B-47-82 (unreported);

(iii) the accused has relevant previous convictions.

In *R v Sava, supra*, BEADLE CJ at 368 I suggested a general but nonetheless useful guide in the determination of the seriousness of this offence. It is to have regard to (a) the age, appearance and character of the complainant; (b) the age of the accused; and (c) the circumstances under which the offence was committed.

The complainant's date of birth was not established and Mr *Sigidi*, who appeared for the State, fairly accepted that she should be taken as being nearly 15 years old. Nor was there any evidence of her appearance. The medical report was of no assistance in this respect and the Regional Magistrate did not request sight of the complainant. I think he should have done so. She may have had an appearance of a girl of 16 years or thereabouts, or that of a frail and undeveloped teen-ager. Such an important matter should not be left to speculation. Here again, the appellant must be given the most favourable assumption. So far as the complainant's character is concerned, while there is no reason to believe she is of loose morals, she was no stranger to sex. Certainly it cannot conclusively be said that the appellant took advantage of an

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innocent child. The comparative youth of the appellant is not a particularly mitigating feature. He is a captain in the Army and obviously a mature individual; he knew that what he proposed, and subsequently did, was manifestly wrong. The circumstances under which the offence was committed were undoubtedly aggravating. The appellant was in the area to ensure that the complai-

GUBBAY J

nant came to no harm. His association with her was fleeting. He felt no affection for her but he satisfied a purely physical urge.

Mr *Jordaan* did not seek to under-play the gravity of the offence and conceded that but for the length of the appellant's incarceration pending trial a custodial sentence would be appropriate. That concession was properly made. If the appellant had been admitted to bail shortly upon his arrest I would have altered his sentence to 12 months' imprisonment with half that term suspended.

But I consider that the period of three-and-a-half months spent in prison will have had a salutary effect upon the appellant. It was a punishment in itself and the justice of the case can now be met by the imposition of a very substantial fine. After all, in providing for a monetary penalty as high as $1 000 the Legislature has made it clear that that option is not reserved for technical offences. See *Henstock v Rex* 1950 SR 252. Such a course will leave the appellant free to pursue what appears to be a promising career in the National Army and avoid the economic hardship resulting from dismissal.

Accordingly, I would allow the appeal and substitute for the sentence imposed, a fine of $750, or in default of payment, 5 months' imprisonment with labour.

We were advised that on 8 June 1983 the appellant was admitted to bail pending appeal. He had by then undergone about three weeks of the term of imprisonment ordered by the Regional Magistrate. That period will serve, *pro rata*, to reduce the sentence now imposed.

The warrant of committal will be suspended until 31 August 1983.

Korsah J agrees.

S v NDLOVU 1983 (2) ZLR 140 (HC)

Court **High Court, Bulawayo**

Gubbay & Korsah JJ

10 & 19 August 1983

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Flynote

Criminal procedure - sentence - Precious Stones Trade Act 1978 - s 3 - "special reasons" not to impose minimum sentence - unusual hardship affecting numerous people - cannot be categorised as extraordinary in case of one individual

Headnote

"Special reasons" not to impose the mandatory minimum sentence provided by s 3 of the Precious Stones Trade Act 1978 mean reasons arising out of the offence or peculiar to the offender, as long as they are out of the ordinary. They may be found in one factor alone or in a combination of factors, but they must still be out of the ordinary. A natural calamity such as prolonged drought may itself be out of the ordinary, but the widespread hardship it causes cannot be categorised as extraordinary in the case of one person alone unless together with other circumstances the cumulative effect is such as to render the reasons out of the ordinary with regard to him.

Cases cited:

S v Chisiwa 1981 ZLR 666;

S v Vera 1976 (2) RLR 228;

S v Chidziva SC 96/82.

J James for the appellant

B N Sigidi for the State

Judgment

Korsah J: On 11 March 1983, Gold Section Details at Northend, Bulawayo, searched the appellant and found him in possession of 13 uncut emeralds. He was not a licensed dealer or person otherwise authorised in terms of the Precious Stones Trade Act, 1978, to deal in or possess precious stones. He was charged with, and pleaded guilty to, contravening s 3(1)(a) as read with s 3(2) of the Act. The trial court found no special reasons for imposing any punishment less severe than the mandatory minimum period of three years' imprisonment.

KORSAH J

The appellant is aggrieved and dissatisfied with this sentence and appeals to this Court for redress. His complaint is that the learned trial magistrate misdirected himself in declining to hold that there were special reasons why the mandatory minimum sentence should not be imposed.

Mr *James,* before proceeding with his submissions on behalf of the appellant, drew the Court's attention to the judicial interpretation which the term "special reasons" has received in respect of the section of the Act under consideration. He said special reasons were those reasons "arising either out of the commission of the offence or peculiar to the offender as long as they are out of the ordinary". See *S v Chisiwa* 1981 ZLR 666. This interpretation has been approved in other

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cases and was not challenged by Mr *Sigidi* for the respondent.

A special reason urged upon the trial court, and by Mr *James* in this appeal, was that the value of the emeralds in their rough and uncut state was stated by the appraiser to be only $35; and that having regard to their value the sentence of three years' imprisonment was harsh. It is true that in offences such as theft, the value of the property taken often influences the court with regard to the sentence meted out. Rightly or wrongly, it is generally assumed that a person who steals property of great value is motivated by greed and deserves a severe sentence than a person who steals an object of little value as, for example, a loaf of bread. Such a person receives a light sentence because he is regarded as having committed the offence out of need.

In my view, such considerations are wholly inapplicable to an offence under s 3(1)(a) of the Precious Stones Trade Act. Offenders under this section acquire the rough uncut emeralds without knowledge of their true value; they assume that what they have is of great value. Ascertainment of the true value is the result of an independent act by the valuer which takes place after the commission of the offence. While the value of the stones may be pleaded in mitigation of sentence it clearly falls outside the judicial interpretation of special reasons.

Mr *James*, however, rightly submitted that whereas one factor by itself may not impel a court to hold that there is a special reason why the mandatory minimum sentence should not be imposed, the cumulative effect of a number of factors may be considered as sufficient ground for not imposing the mandatory minimum penalty. See the *dictum* of MACDONALD ACJ in *S v Vera* 1976 (2) RLR 228 at 232 and approved in *S v Chidziva* SC 96/82.

KORSAH J

Mr *James*, therefore, further submitted that the appellant was a farmer who had been adversely affected by the prevailing drought. He could no longer derive sustenance from farming. His income per month from practice as a herbalist amounted to no more than $10. For a man with three wives, eleven children - all of whom are attending school - and a mother and grandmother dependent upon him, he had extraordinarily heavy commitments. And that it was the economic pressure, and not greed, that prevailed upon him to commit the offence.

Mr *James* was quick to point out that all the features highlighted above are mitigatory only, but argued that so compelling are they that they almost amount to a defence of necessity. This submission does not find favour with me.

Admittedly the appellant was under a duty to provide for his dependents, but a defence of necessity cannot succeed where the evil could have been averted by anything short of the commission of the offence. The appellant was the owner of some eight herd of cattle. The evil of starvation could have been averted by slaughtering or selling one beast to feed the family. Viewed in this light, the appellant clearly did more harm than was necessary to avert the evil that threatened him and his family, and a defence of necessity would not have availed him. But although a defence of necessity would not have been open to the appellant, was the learned trial magistrate justified in holding that no special reasons existed for imposing anything less than the mandatory minimum sentence?

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By the judicial interpretation which counsel adopted, "special reasons" must be those out of the ordinary. It may be contended, as indeed it was, that the drought which has affected the country is out of the ordinary, but it cannot be accepted that its effects are peculiar to the appellant alone or even to a handful of communal farmers. I think judicial notice may be taken of the fact that so widespread has been the effect of the drought that the Government has set up agencies in an attempt to alleviate the hardship which communal farmers are experiencing because of it. Hardship so widespread cannot be categorised as extraordinary in the case of one person alone unless together with other circumstances the cumulative effect is such as to render the reasons out of the ordinary with regard to him.

As I have mentioned, the appellant was the owner of eight herd of cattle. It has been contended on his behalf that the communal farmer prizes his cattle above all else and would not part with them for any reason. I am of the view that the whole purpose of the acquisition of wealth is to

provide sustenance and comfort for the acquirer and his dependents, and it cannot be a reasonable excuse for criminal conduct that the offender was constrained to commit the offence because he did not want to part with any portion of his wealth. Practice, however strong, cannot, in my opinion, be regarded as a special reason unless it is based on reasonable grounds.

Finally, both in the court of first instance and on appeal, the appellant was not unrepresented. It would appear that either he has money of his own or third parties have rallied to his assistance. Whichever be the case, the impression is created that the alleged starvation which the appellant sought to avoid, though probable, was not otherwise inevitable. Like many other communal farmers with large families there was no circumstance peculiar to the appellant or to the commission of the offence which was out of the ordinary.

On the facts of this case, I am of the view that the learned trial magistrate did not misdirect himself when he held that no special reasons existed for imposing anything less than the mandatory minimum sentence.

Accordingly, the appeal against sentence should, in my view, be dismissed.

Gubbay J: I agree and it is so ordered.

S v SLATTER & OTHERS 1983 (2) ZLR 144 (HC)

Court **High Court, Harare**

Dumbutshena JP

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23-27, 31-31 May, 1-3, 6-10, 13-17, 20-24, 27-30 June,

1, 4-8, 11-15, 18-22 July, 31 August 1983

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - ss 101 and 105C - confirmation proceedings - denial of access to accused's lawyers - when such will vitiate confirmation proceedings - Constitution of Zimbabwe 1980 - s 13(3) and s 2(1)(a) of Second Schedule - conduct of confirmation proceedings - effect of failure to investigate issues raised by accused - effect of presence of police outside court and knowledge by accused that he is to be returned to their custody - effect of accused reading their own statements instead of the statements being read to them - undue influence - interrogation by police as an undue influence - denial of access to lawyer - whether an undue influence - effect of failure to observe Judge's Rules or other administrative rules.

Headnote

On the 25 July 1982 saboteurs entered the Thornhill Air Force Base at Gweru and by means of explosives destroyed or damaged a number of aircraft, buildings and other equipment. The loss sustained was estimated at over $7 million. The saboteurs were never apprehended and their identity was never established. The six accused were at the time serving officers in the Air Force, Slatter being an Air Vice-Marshal and the Chief of Staff of the Air Force. They were all arrested after the sabotage and were eventually charged under s 50 of the Law and Order (Maintenance) Act [*Chapter 65*], the allegations being that they aided, abetted, incited or procured the sabotage that admittedly took place.

There was no evidence at all that implicated any of the accused in the commission of the offence with which they were charged and such evidence as was led could do no more than supply corroboration to certain aspects of warned and cautioned statements made by the accused. The State case stood or fell on the statements made. The statements, which had been confirmed by magistrates in various centres around Zimbabwe, were produced by the prosecutor in terms of s 242(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The defence attacked the statements on two bases: firstly, that the

confirmation proceedings were themselves invalid because the accused had all been denied access to their lawyers, in contravention of both the Criminal Procedure and Evidence Act and the Constitution; and secondly that the statements were in any event inadmissible because of the undue influence that had induced the accused to make them.

During the lengthy trial, considerable evidence was led for both sides on these two issues and the Court found the following to be proved. The accused all persistently sought access to lawyers and were persistently denied such access. Their lawyers as well persistently sought access to the accused and were deliberately twarted by the police who moved the accused (who were at no stage together) from one remote police station to another. When each of the accused was finally brought before a magistrate for confirmation of his statement, there had been press publicity given to the fact that the lawyers had been taking action in the High Court in order to gain access to their clients, but none of the magistrates asked the accused about this. At the confirmation proceedings, two of the accused gave replies which implied that there

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had been an inducement offered for them to make statements; both said they had been given to understand that they would be released if they made statements. In neither case did the confirming magistrate attempt to clarify the situation. One of the accused read his statement himself; it was not read out aloud to him. In respect of all the accused, there was such maltreatment as being hooded, being handcuffed, being kept in isolation, humiliation such as being stripped, assaults, threats of shooting or indefinite detention, torture with electric shocks, and other acts of physical violence. Two of the accused said that they had not raised these matters at the confirmation proceedings because they knew they would be returned to police custody.

Held, that as far as the confirmation proceedings were concerned, ss 101 and 105C of the Criminal Procedure and Evidence Act made clear the right of access to an accused person at confirmation proceedings by his legal practitioner. There were also provisions in the Constitution (s 13(3) and s 2(1)(a) of the Second Schedule) which made clear that an accused person has a right of access to a lawyer. The fact that the accused did not, at the confirmation proceedings, request access to lawyers was not the end of the matter. Many accused persons cannot afford to engage legal practitioners or are ignorant of their existence. Where, however, a lawyer is seeking access to the accused and is being denied access by the police, then, whether or not the accused is aware of the matter, the confirmation proceedings are vitiated because of non-compliance with s 105C.

Held, further, that denial of access prior to and during confirmation proceedings is unconstitutional and affects the individual rights of the accused. To hold that an accused person should himself ask the presiding magistrate for access would be to hold that an accused person, unaware of his constitutional right, is deprived of that right because he is unaware of it.

Held, further, that if the magistrates were aware (as on the probabilities they must have been) that lawyers were seeking access to the accused, they were duty-bound to inform the accused of that and any other material fact likely to be of use to him.

Held, further, that the realization that the police are outside waiting for the accused would inhibit him from speaking out freely about his complaints. Sending the accused back into police custody would make a mockery of the protection the confirmation proceedings are meant to afford.

Held, further, that in respect of the accused whose answers to the magistrates implied that they had been offered an inducement to confess, the magistrates should have questioned the accused to clarify what the accused had said and whether they had in fact been improperly induced. Failure to do so itself made the confirmation improper and invalid.

1983 (2) ZLR p146

DUMBUTSHENA JP

Held, further, that if the accused reads and understands his statement in the presence of the magistrate, it matters not that the magistrate did not read it out aloud to him. The real point is whether the accused understands the statement and if he has any queries he should be afforded the opportunity to put them to the magistrate.

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Held, further, that once the confirmation proceedings severe ruled to be invalid, the *onus* with regard to the admissibility of the statements shifted to the prosecution, which had to establish their admissibility beyond reasonable doubt.

Held, further, that the obtaining of confessions from suspects is a necessary step in the judicial process and not all enquiries made of a suspect by the police are improper. Since effectively criminal justice begins at the point when the police interrogate a person in their custody, attempts by the police to obtain confessions must be within the limits laid down by the law.

Held, further, that denial of access to a lawyer and continuation of interrogation despite request for such access constitutes an undue influence; the denial of access is in itself a form of psychological coercion and inducement. However, if the accused has no legal representative and cannot afford one, such psychological pressures are absent. Conversely, even if the accused does not seek a lawyer but his relatives instruct one who is denied access, denial of access militates against the admission of a statement. This does not mean that all interrogation and questioning of suspects should be in the presence of a legal practitioner.

Held, further, that in any event the evidence of maltreatment was such that the treatment would itself make the statements inadmissible.

Held, further, that even if the confirmation proceedings had been valid, and the *onus* had been on the accused to show that the statements were not made freely and voluntarily, they had discharged that *onus*.

Cases cited:

Minister of Home Affairs & Others v Dabengwa & Another 1982 (1) ZLR 236; 1982(4) SA 301 (ZSC);

S v Munukwa & Others 1982 (1) ZLR 30;

S v Boutanquoi & Others High Court, S-171-1982 (not reported);

S v Gwaze & Another 1978 RLR 13;

Miranda v State of Arizona (1966) 384 US 478; 86 SC 1602;

R v Kuzwayo 1949 (3) SA 761 (AD);

Haynes v Washington 373 US 514; 83 SC 1343;

S v Ndlovu 1983 (4) SA 507 (ZS).

S v Kokot High Court, 1978 (not reported);

R v Rennie [1982] All ER 385;

R v Hackwell & Others 1965 RLR 1; 1965 (2) SA 388 (SRAD).

H P Mkushi, with him *I Chatikobo*, for the State

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H Ognall QC, with him *I A Donovan*, for the accused.

Judgment

Dumbutshena JP: The six accused are charged with the contravention of s 50(1) as read with para (c) of subs (3) of s 50 of the Law & Order (Maintenance) Act [*Chapter 65*]. The State alleges that during the period extending from 1 November 1981 to 24 July 1982 and at Thornhill Air Base, Gweru, the accused did all and each or one or more of them wrongfully, unlawfully and with intent to endanger the maintenance of

DUMBUTSHENA JP

law and order in Zimbabwe or any part of Zimbabwe, aid, abet, incite, instigate or procure certain persons to the prosecutor unknown to commit an act of terrorism or sabotage, that is to say, the burning of military aircraft, ground equipment and squadron hangars in the Thornhill Air Base.

Section 50 (1)(3)(c) reads as follows:

> "50. (1) .....
>
> (2) .....
>
> (3) Any person who -
>
> (a) .....
>
> (b) .....
>
> (c) aids, abets, incites, instigates, commands or procures any other person to commit:
>
> an offence in terms of subsection (1) shall be guilty of an offence in terms of that subsection, and the provisions of this section shall, *mutatis mutandis* apply in this case."

All the accused denied the charge put to them.

Briefly, the case for the prosecution is as follows.

All the accused were serving members of the Zimbabwe Air Force between January 1980 and August 1982. 202 Squadron is housed at Thornhill. At the material time Squadron Leader John Danger Ncube was the Officer Commanding 202 Squadron. The Squadron consisted of fire-fighting men, dog-handlers, provost defence section and administrative staff. Squadron Leader Ncube noticed that from about February or March 1982 manpower in his squadron was being reduced on the orders of accused Cox, Ncube's Officer Commanding. Ncube is said to have queried him, who appeared not to care about the Base's security because, according to him, there was no need to worry since the country was at peace. There was a continued reduction of manpower. Many members of 202 Squadron had been moved away prior to 25 July 1982. They were to return to Base on 27 August 1982. As a result there was only one dog-handler on duty on the night of the sabotage. Apart from the reduction in manpower, the State believes that a document prepared by accused Lloyd at the request of Squadron Leader

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Ncube, headed "An Appreciation on Exercise Sabotage" and which was signed by Ncube, was in preparation of the sabotage.

On 25 July 1982 at about 0310 hours, a series of explosive and incendiary devices placed in the aircraft at the Base, began to detonate. As a result of these explosions, the following damage was sustained:

DUMBUTSHENA JP

(a) *Aircraft destroyed:*

7 Hunters

1 Hawk

1 Cessna 337

(b) *Aircraft damaged but repairable:*

1 Hunter

3 Hawks

(c) *Buildings damaged:*

1 Squadron Hangar - gutted by fire

1 Squadron Office - heat damaged

2 Squadron Hangars and Offices - minor damage

(d) *Ground Equipment:*

Numerous items of Hunter ground equipment were destroyed.

(e) *Vehicles:*

1 Land Rover damaged during fire-fighting operations.

The total loss sustained as a result of the sabotage damage was estimated at $7 180 000,00. All this property belonged to the Government of the Republic of Zimbabwe.

It is common cause that there was on 25 July 1982 sabotage at Thornhill Air Base. The amount of damage caused is not disputed. The accused deny that they aided, abetted, incited, instigated or procured the saboteurs to commit the said sabotage. They say they had no hand in it. They did not bring the saboteurs into the Base, they did not hide them and they did not drive them away after the deed was done. It is the State case, however, that the accused aided, abetted, incited, instigated or procured the saboteurs to commit the sabotage. It is important to understand that the accused are not charged with committing an act of sabotage.

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There were no eye-witnesses to the sabotage. Nobody saw the three saboteurs who are alleged to have committed the offence.

Because the State relies on the warned and cautioned statements made by the accused, the admissibility of which has been challenged, it would be wrong to summarize the contents of those statements as part of the State case. The evidence contained in those statements stands or falls on the relative merits of the defence challenge or the credibility of the State witnesses on the issue of the voluntariness. A reference to the matters raised in those statements would, in my view, mislead the Court and the public. The assessment of challenged evidence can only be made after it has been admitted in evidence.

Mr Leonard Tendayi Nhari, the Forensic Scientist attached to the

DUMBUTSHENA JP

Criminal Investigation Department of the Zimbabwe Republic Police, deposed in his affidavit, Exhibit 12, that he collected from Thornhill Air Base on 25 July 1982, the following items:

> Remnants of six watches, battery remnants, assorted fragments and a piece of security fence wire.

Most of Mr Nhari's evidence was not challenged. It transpired, however, during cross-examination that he knew little of the matters he had been called upon to examine and to speak in evidence.

Squadron Leader Ncube, Commanding Officer of 202 Squadron at Thornhill Base, was in charge of security. He had two people under him - accused Lloyd, in charge of security, and Air Lieutenant Lewis-Walker, Defence Commander, 202 Squadron. Ncube was the top man, who gave us the impression that he understood little of his duties as Squadron Leader. He wondered why he had ever been promoted to that rank. While he gave evidence about the reduction of security at the Base, he did not complain to his superiors about it. As the top man in control of his men, he was responsible for the reduction of security and any laxity in security resulting therefrom. Yet he blamed his subordinates - the men to whom he had assigned duties. He blamed Lloyd and Lewis-Walker. Ncube was detained and assaulted, so we have treated his evidence with caution. His evidence requires corroboration because he is a man with an interest of his own to serve.

The State called other witnesses in addition to Ncube and Nhari. They were Group Captain Jones, Manyanda, Constables Kanengoni and Chimbande. The evidence of Jones supports the defence case and clearly corroborates Lloyd's evidence on his attempts to improve security at the Base. Nhari's evidence in some way supports the defence case. Constables Kanengoni and Chimbande gave evidence of an oral confession allegedly made to them by accused Lloyd when, after cutting his wrist, he is reported to have said he had committed a serious offence. There was no mention of the offence committed nor did the constables warn and caution him nor record the confession. The evidence of Manyanda, the two constables and, indeed, Ncube, does not in any way come near to establishing the guilt of the accused. We did not understand the prosecution to suggest that or to seek to establish the guilt of the accused by that evidence. What one suspects is that such evidence as was led by the State through some of these

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witnesses, was meant to corroborate the warned and cautioned statements of the accused. If the statements are not admitted, there will be no evidence to corroborate.

DUMBUTSHENA JP

The reduction of security at the Base, "An Appreciation of Exercise Sabotage", Exhibit 11, prepared by Lloyd and Lewis-Walker at the request of Ncube and signed by Ncube and all matters flowing from that, can only acquire evidential value as corroborative material.

We have read the evidence gathered by the Board of Inquiry appointed by Air Marshal Walsh after the sabotage. We have also read its preliminary findings. It, too, would only be useful as supplying corroboration to warned and cautioned statements. If our understanding of Mr *Mkushi's* submissions is correct, the State case stands or falls on the warned and cautioned statements as corroborated by other evidence led by the State.

Should I find that accused's statements are admissible I shall examine in detail the corroborative character of the evidence referred to above.

The State relies for the conviction of the six accused on warned and cautioned statements made by the accused. There is very little evidence apart from these warned and cautioned statements which tends to incriminate the accused. There is no witness who testified to the involvement of the accused in the crime for which they were tried. The detailed opening address so ably made by Mr *Mkushi*, who appeared for the State, consists of extracts from accuseds' warned and cautioned statements. In his closing remarks, Mr *Mkushi* wished to make it clear that the accused were not ill-treated as they alleged. Mr *Ognall*, on the other hand, in outlining the defence case, said:

> "In so far as his warned and cautioned statement, relied upon by the State, admits any involvement at any stage in the sabotage, each accused will allege that the statement is false and was not obtained freely and voluntarily, or without undue influence. The validity of the proceedings held to confirm the warned and cautioned statement by each accused will be challenged on the basis that in contravention of ss 101 and 105(c) of the Criminal Procedure & Evidence Act [*Chapter 59*] the accused were denied access to their respective legal practitioners at all material times prior to and during the recording of the statements. The accused will also rely on s 2(1)(a) of the Second Schedule to the Constitution of Zimbabwe."

Because the State relies on these warned and cautioned statements to secure the conviction of each accused and the accused allege that they were not obtained freely and voluntarily or without undue influence, much of the evidence adduced relates to the admissibility or otherwise of accuseds' warned and cautioned statements

These statements were confirmed by magistrates in terms of s 105C of the Criminal Procedure & Evidence Act [*Chapter 59*]. At the onset of the

DUMBUTSHENA JP

trial, Mr *Mkushi* indicated that he wished to produce the warned and cautioned statements made by the six accused in terms of s 242(1)(a) of the Criminal Procedure & Evidence Act. Because

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Mr *Ognall* raised matters relating to the effect of s 105C, it is incumbent upon me to set down the provisions of that section so that the force and effect of counsel's submissions may be better appreciated. Section 105C reads:

"105C. (1) Where an accused has been brought before a magistrate, the prosecutor may apply to the magistrate for the confirmation of any statement alleged to have been made by the accused whether in writing or orally and reduced to writing.

(2) In an application in terms of sub-section (1) -

(a) the prosecutor shall produce the statement referred to in subsection (1) by handing it to the magistrate and shall inform the magistrate of the details when, where and to whom it was made; and

(b) the statement produced in terms of paragraph (a) shall be read over to the accused and the accused shall be informed of the details provided in accordance with that paragraph; and

(c) the magistrate shall ask the accused whether -

(i) he made the statement; and

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

and shall explain to him the provisions of subsection (3) and of subsection (1a) of *section two hundred and forty-two.*

(3) If the accused -

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

(b) admits that -

(i) he made the statement, and

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

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

(4) If the accused alleges that -

(a) he did not make the statement; or

(b) the statement was not made freely and voluntarily without his having been unduly influenced thereto;

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

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

(6) The provisions of subsection (2), (3) and (4) of section *sixty-one* and sections *sixty-three, sixty-four* and *one hundred and one* shall, *mutatis mutandis*, apply to proceedings in terms of this Part as if they were the proceedings of a preparatory examination.

(7) The provisions of sections *sixty-seven* to *seventy* shall, *mutatis mutandis*, apply in respect of the production of evidence of the statement in terms of subsection (2)."

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Section 101(1) of the Criminal Procedure & Evidence Act is con-

DUMBUTSHENA JP

cess to an accused person by his legal representatives and relatives "subject to the provisions of any enactment relating to the management of Prisons." The more important provision in relation to access is found in subs (2) of s 101, which is to this effect:

> "101. (2) An accused person, while the preparatory examination is being held, shall be entitled to the assistance of his legal representatives."

It was Mr *Ognall's* submission that while s 101(2) purports only to be concerned with preparatory examinations, s 105C imports the rights afforded by s 101 into confirmation proceedings. It means, therefore, that confirmation proceedings are encompassed by the provisions of subs (6) of s 105C.

The meaning of the subsection is to me unambiguous. The right of access to an accused person at confirmation proceedings by his legal practitioner is, by that section, made clear. Put more simply, if an accused person asks for access to a lawyer before or during confirmation proceedings or, without his knowledge, his relatives instruct a lawyer on his behalf, the accused is entitled to have his lawyer at the confirmation proceedings. It must be made clear, however, that an accused person who has not engaged the services of a legal practitioner or whose relatives have not instructed a legal practitioner or who does not desire the presence of a legal practitioner is not entitled to a lawyer.

In the instant case the accused persistently sought for lawyers and were persistently denied access to them. Their lawyers persistently sought access to them and were deliberately refused, by one clever device or another, access to their clients. There is substance in Mr *Ognall's* submission that the "request is a continuing one and it is perfectly legitimate to import it into the actual confirmation proceedings although the man hasn't, so to speak, put up his hand and said to the magistrate, 'Please may I have a lawyer.' If he has asked for it over and over again and been denied, then in terms of the spirit . . . of this Penal Section, there has been a non-compliance with it."

Before I deal with the requests of each of the accused or the attempts by their lawyers to gain access to them, I feel reference should be made to s 2 of the Second Schedule to the Constitution, as it relates to the right of access. Section 2(1)(a) of the Second Schedule to the Constitution seems to refer to the absolute and unfettered right of any citizen of Zimbabwe or any person detained under its laws, to have access without delay to a legal representative of his own choice. Section 2(1)(a) is in these words:

DUMBUTSHENA JP

> "2. (1) Where a person is detained under any law providing for preventive detention -
>
> (a) he shall be informed as soon as reasonably practicable after the commencement of the detention,

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> and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him;".

Besides the provisions of s 2 of the Second Schedule, the right of an accused to access to his lawyer is also spelt out in subs (3) of s 13 of the Constitution. It is in these terms:

> "(3) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him."

In *Minister of Home Affairs & Others v Dabengwa & Another* 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC), FIELDSEND CJ commented at 305B-C of the SA report on both ss 2(1)(a) of the Second Schedule and 13(3) of the Constitution as follows:

> "It is clear that the 'arrest or detention' referred to in subs (3) can only be arrest or detention of the types referred to in subs (2), because those are the only cases in which a person may lawfully be deprived of his liberty. It follows that the power given by s 25 to derogate from certain provisions of the Declaration of Rights is not a power to derogate from s 13(3). Furthermore the power to make provisions for a period of public emergency is specifically required to be exercised in accordance with Schedule 2.
>
> As we have seen, para 2 of Schedule 2 specifically gives a detainee the right to instruct and consult with a legal representative of his choice. This was necessary in order to ensure that, notwithstanding the derogation from subs (1) and (2) of s 13 allowed by s 25, a detainee should have the separate and distinct right of access to his legal representative."

It appears, then, that the accused's right of access to a lawyer which is enshrined in ss101 (2) and 105(b) of the Criminal Procedure & Evidence Act [*Chapter 59*], s 2 of the Second Schedule to the Constitution and s 13(3) of the Constitution, is distinct, because the provisions of the Constitution are overriding.

In this case the denial of access to legal representatives was at the behest of the police, as will become clear when evidence of refusal of access is considered. I would like to repeat what was said by FIELDSEND CJ in *Minister of Home Affairs & Ors v Dabengwa & Anor (supra)* at 307C-D:

> "But in my view the structure of the Constitution is so clear as to leave no room for ambiguity. In addition it is comforting to know that this conclusion coincides with equity and common sense. It is contrary to any true concept of justice that at the discretion of a police officer a detained person should be unable to obtain legal advice and consult with his legal representative. As McNALLY J rightly pointed out, this right is a special one, of value only to people whose rights have been suspended in an emergency situation.

DUMBUTSHENA JP

> To allow that right in turn to be suspended when there is a state of emergency would be to render it entirely nugatory."

It must be remembered, however, that the CHIEF JUSTICE was not there dealing, when considering the refusal of access, with confirmation proceedings and the admissibility of statements. In a general way, what he there said applied to the denial by the police of access by legal practitioners to their clients, the accused in this case. The question to be answered is

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whether a denial of access to clients deliberately made and perpetuated until after confirmation proceedings, vitiates those confirmation proceedings as is contended by Mr *Ognall*. Has an application for access to a lawyer to be made by an accused person appearing before a magistrate at confirmation proceedings before denial of access can be said to vitiate those proceedings, as was submitted by Mr *Mkushi*? The State says, in effect, that none of the accused asked for legal representation at the confirmation proceedings, and the question of allowing legal representation did not even arise and none of the accused were refused legal representation by any of the confirming magistrates because, according to Mr *Mkushi*, s 101 as read with s 105C (6) of the Code relates to legal representation at the confirmation proceedings. That submission has much to commend it. In this country a preponderance of confirmation proceedings is carried out in the absence of lawyers because the overwhelming number of accused persons who appear at these proceedings cannot afford to engage the services of a legal practitioner or are ignorant of their existence. It seems to me, therefore, that when such an accused person appears before a magistrate at confirmation proceedings and does not ask for a legal practitioner, it cannot be said the presiding magistrate has refused him access to a lawyer and therefore the confirmation proceedings are vitiated. I believe that an accused person whose lawyer is seeking access to him who, without knowledge of his lawyer's efforts, and who appears before a confirming magistrate and willingly goes through the confirmation proceedings without mentioning his need for a lawyer, cannot be said to have waived his right of access to a lawyer for purposes of validating those confirmation proceedings. Where, also, an accused person has asked the police for legal representation and the police have denied him the opportunity to see his lawyer, and where at the same time the lawyers are continually asking the police for access to him and the police are deliberately putting them off in order to record a statement, and put him through confirmation proceedings before his lawyers see him, the same considerations apply. In a case like that, refusal by the police to grant access before confirmation proceedings to a lawyer who has been instructed by the accused's relatives and who the police know is seeking access to his client, vitiates

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DUMBUTSHENA JP

confirmation proceedings, and is in my view not in compliance with the provisions of s 105C of the Code. In circumstances referred to above, the main purpose for denial of the access sought by legal practitioners before the making and confirmation of accused's statements is to frustrate the accused's desire to be represented and to be advised by legal practitioners. The fact that access is granted subsequent to the recording of warned and cautioned statements and their confirmation *underlines* the motive behind denial of access. Each individual case of denial of access can only be considered by taking account of surrounding circumstances. In my judgment, where an accused person has been tortured and threatened by the police and has been living within the police interrogation environment without access to his lawyers or the outside world in general, in an attempt to defeat the ends of justice, such an accused cannot be said not to have asked for his legal representatives at the confirmation proceedings because, in my view, the circumstances surrounding his custody, interrogation, torture and threats, are overwhelmingly oppressive and intimidating. Such circumstances are overbearing and vitiate confirmation proceedings in spite of an accused person's silence.

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Mr *Mkushi* submitted that confirmation proceedings are judicial proceedings which can only be held to be irregular if the Court finds that there was an irregularity attributable to the magistrate who presided over the proceedings. According to Mr *Mkushi*, it is wrong to hold that confirmation proceedings are invalid on account of any improper conduct attributable to people unconnected with the proceedings themselves. He submitted that:

> "To hold that confirmation proceedings are invalid because accused persons were denied legal access by the police is in our view tantamount to alleging that the magistrates misdirected themselves in ... failing to take cognisance of what they did not know, namely that the persons whose statement they were confirming had been denied access to the lawyers. The denial of access, if it happened, was a matter which the accused, and only the accused, knew and it was up to them to complain to the magistrate about it."

I have given my reasons for holding that denial of legal access by the police, in the circumstances already outlined, vitiates the confirmation proceedings. I find it difficult to believe that both the police in whose custody the accused were and the magistrates who presided over confirmation proceedings, were unaware that their lawyers were seeking access to them and that none of them read *The Herald* of 11 September 1982, Exhibit 4, in which the High Court proceedings were prominently reported at p 1 of that newspaper. I do not find acceptable the suggestion proffered by the State that even if the magistrates knew "that the accused persons' lawyers were looking for them there would have been no duty upon them

to suggest that fact to the accused or to refuse to confirm the statements on that account." I hold the view that courts are duty bound to inform, if not directly then certainly through the prosecution, the accused of any material fact which is likely to be of assistance to him. Certainly, in the case of Air Vice-Marshal Slatter, Air Commodore Pile and Wing Commander Briscoe, whose names appeared in the article referred to, the magistrates who confirmed their statements should have asked before proceeding with further confirmation whether those accused had seen their lawyers or not. In saying this, I am aware of the fact that some of the magistrates said they were not aware of the High Court proceedings - a most unlikely thing.

Having given my general reactions to the principles affecting the impropriety or otherwise of confirmation proceedings, I now turn to the evidence upon which a ruling on this aspect can be made.

I would like to begin with the evidence of Accused No 1, Slatter. He did not ask the magistrate for access to a lawyer because, according to him, he had already asked on two occasions for a lawyer without success, and he therefore saw no merit in continuing with the request. On 8 September, Slatter asked Inspector Chaminuka at Mkoba for access to his lawyer, and on Saturday, 11 September, at Mvuma he asked Muchekeni for access to his lawyer. Muchekeni said he had no need for a lawyer if he had done nothing wrong. When he appeared before the confirming magistrate, he did not know that his lawyers were seeking access to him. In the state of mind in which he was, could it be said that his failure to ask the presiding magistrate for access to a lawyer did not invalidate confirmation proceedings? I think not. He had asked twice before and had been refused access to his lawyer; he had been in the custody of the police for some time, closed to the outside world, and, I cannot put it higher than that, it is most probable

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that the presiding magistrate knew that Slatter's application for a writ of *habeas corpus* and for an order of access to his lawyer were before the High Court, and that the High Court had made orders to that effect. And if the magistrate did know that, as he should have known, but decided to remain silent when the accused appeared before him at confirmation proceedings, then in my opinion whether the accused asked or did not ask the magistrate for access to his lawyer makes no difference to the earlier refusal which the accused appreciated. In the extraordinary circumstances under which he was moved from police station to police station in order to frustrate his lawyer and under which his lawyer was refused access to him until after confirmation proceedings, justify in my judgment the invalidation of those confirmation

DUMBUTSHENA JP

proceedings. I find support for the view I take in the fact that initially the accused were detained under the Emergency Powers (Maintenance of Law & Order) Regulations, 1980, which permit a detained person to obtain and instruct without delay a legal practitioner I do not believe that the mere fact that an accused person who has been refused access to his lawyer by the police, remains silent and does not ask during the currency of confirmation proceedings for his lawyer, can be said to be a waiver of his right to access to his lawyer. The psychological effects of lengthy interrogations by the Police or incommunicado incarceration and the torture suffered by him at the hands of the police are overbearing and drive an accused person into a state of hopelessness *vis-a-vis* the imposing presence of the police outside the court-room and the knowledge that after the confirmation of his statement he will be back in the custody of the police.

Mr *Ognall* argued in his submission that prior denial of access to legal representatives before and during the confirmation proceedings is fatal to their validity. He relied for his submission on s 2(1)(a) of the Second Schedule of the Constitution. The Constitution there gives the accused legal rights which are capable of enforcement in a court of law. See *Minister of Home Affairs & Ors v Dabengwa & Anor (supra)* at 306F-G.

During argument on the question of the propriety or otherwise of the present confirmation proceedings, I was of the view that denial of access had to be during the currency of the confirmation proceedings. I am now convinced that denial of access prior to and during confirmation proceedings is unconstitutional and affects the individual rights of the accused. As stated above, the Court should, where such denial is proved, declare confirmation proceedings invalid. I am more than encouraged to take this view by s 101(2), which is to this effect:

> "101. (2) An accused person, while the preparatory examination is being held, shall be entitled to the assistance of his legal representative."

"Preparatory examination" in s 101(2) includes in terms of s 105C(6) confirmation proceedings.

To hold that an accused person should himself ask the presiding magistrate for access to his lawyer is, in my opinion, to hold that an accused person, unaware of his constitutional right, is deprived of that right because he is ignorant of it. I do not therefore agree with Mr *Mkushi's* powerful submission that:

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"To hold that the confirmation proceedings are invalid because the accused persons

DUMBUTSHENA JP

denied legal access by the police, is in our view tantamount to alleging that the magistrates misdirected themselves in failing to take cognisance of what they did not know, namely that the persons whose statements they were confirming had been denied access to their lawyers. The denial of access, if it happened, was a matter which the accused, and only the accused, knew, and it was up to them to complain to then magistrates about it."

That submission is only tenable where the accused has not been tortured or induced by the police to make a statement and where there is no fear of further contact with the accused's interrogators. But where the police are waiting for the accused, albeit outside the confirming magistrate's court-room, fear of a repetition of the torture or threats of torture cannot easily be wiped out of an accused's memory.

In the case of Accused No 1, there is nothing on the face of the record to show impropriety in the confirmation of his warned and cautioned statement. His statement was confirmed at Murewa on 14 September 1982. He said in evidence, when he was asked whether he had made the states merit freely and voluntarily, he kept quiet but mumbled a reply when asked for the second time. The magistrate said he looked normal and he answered all the questions without hesitation. He had access to his lawyer on 15 September 1982 at Harare Remand Prison, that is after his warned and cautioned statement had been confirmed. I have formed the view that he was moved from Gweru to Mvuma and then to Murewa in order to avoid his legal representative, who was pressing for access to him. In his case, as well as in the case of all the other accused, the invalidity of his confirmation proceedings turns on the proper construction of the provisions of the Constitution, the Second Schedule to the Constitution and s 101(2) of the Criminal Procedure & Evidence Act, as read with s 105C (6) of the Act, which is to this effect that, while the confirmation proceedings are being held, accused persons shall be entitled to the assistance of their legal representatives. If they have no legal representatives instructed either by themselves or their relatives, that in my view is a different matter. In the case of accused Slatter, the confirmation proceedings are invalidated because of the overriding provisions of the Constitution as far as the accused's individual rights of access to his legal representative are concerned.

Accused Pile's record of confirmation proceedings, attached to his warned and cautioned statement, Exhibit 6, has errors which the confirming magistrate, Mr Huggins, admitted under cross-examination. In answer to the question:

"Has any member of the police force or any other persons howsoever held out any promises or other inducements to you or to any other persons either in connection

DUMBUTSHENA JP

with your or anyone else's release from custody, trial, sentence, or in regard to any other matter whatsoever, to make this statement?",

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he replied,

> "Yes."

Mr Huggins investigated the issue. The accused responded as follows:

> "I made the statement freely and voluntarily - not forced. I believed I would be detained until I made the statement in response to allegations made against me. I believed I would be held in custody until I made a free response to those allegations. I was encouraged to respond to the allegations so that proceedings be finalised. I was made to believe that proceedings would go ahead as soon as I made statement. I made it in order that things could go ahead. No wounds or injuries. It seemed we were beating around the bush. My interpretation was that unless I made the statement I would be detained."

The magistrate should have asked the many questions that arise from his reply:

> "Who induced the belief? What did he or they say that made you entertain those beliefs?",

and many other such questions. The magistrate did not probe the many issues that were raised by Pile's replies. He did not ask him to elucidate his replies. He failed to elicit from the accused the contradiction between making his statement freely and voluntarily and the inducements proffered which are apparent in the replies he made. Under cross-examination, Mr Huggins conceded that with hindsight he should have investigated what or who had induced the belief in the accused that he would be held in custody until he made a statement. Besides, Pile was denied access to his legal practitioner until after the confirmation proceedings on 15th September 1982. For these reasons I have come to the conclusion that the confirmation of his warned and cautioned statement was improper and not valid.

As far as accused Briscoe is concerned, I agree with Mr *Mkushi's* submission that:

> "There is nothing in the evidence to allege any impropriety on the part of the magistrate."

On the face of the record, there is nothing improper, questions were asked and answered in proper form. However, Briscoe - like all the other accused - was denied access to his lawyers until after his warned and cautioned statement was recorded and confirmed on 13 September 1982 at Mutoko. His lawyer was until 15 September 1982 denied access to him. On 30 August 1982, Briscoe asked Mr Ganjani to see his lawyer, Mr MacDonald. He

was promised his lawyer would come and see him. He never did. He was detained at Mvuma from 24 August to 9 September, a total of 16 days. On 7 September he asked the member in charge of Mvuma Police Station, Inspector Chingosho, for access to his lawyer, and was told that only CIO could authorize access to a lawyer. He was moved from Mvuma to Murewa on 9 September, the very day his lawyers advised the High Court that an application for a writ of *habeas corpus* and an order of access were to be presented on his behalf the next morning. He was not informed of this. The CIO did not even tell him that his lawyers were seeking access to him through CIO.

It is clear from the time-table of his movements from Mvuma, where he had spent sixteen days

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in police cells, to Murewa and then to Mutoko and back to Murewa, that the police were trying to make it impossible for his lawyers to find out where he was lodged. Because he was denied access to his lawyers, the confirmation of his warned and cautioned statement is invalid.

Accused Cox's warned and cautioned statement was confirmed on 6 September at Marondera. There is nothing on the face of the record which calls for comment. The right questions were asked and the right answers were given. The accused gave a detailed catalogue of sustained torture. He however, did not tell the magistrate of it. When asked by his counsel why he made the replies he did, he said this:

> "I was, first of all, I was terrified of going back, with the CID, for more torture. I also knew that I was going back with the CID, who were outside, because they told me that they were taking me to Harare. I also firmly believed that if I'd made any complaints at that time, I would've just been, the statement would not have been confirmed and I would've been back to the CID. I didn't see that I would be taken anywhere else. And lastly, I wanted to get back to Harare to see my wife and I really thought that at some future stage I'd be able to tell my story to somebody who would believe me.

This statement expresses the many fears entertained by accused persons who find themselves in similar situations. FIELDSEND CJ, when concurring with the judgment of GEORGES JA, (now the Chief Justice of this country) in *S v Munukwa & Ors* 1982 (1) ZLR 30, remarked:

> "Indeed, whenever possible persons whose statements have been confirmed should be remanded to prison: this should become an accepted and known procedure."

Indeed, many an accused person would shudder at the thought of complaining of torture in the full knowledge that his interrogators and torturers were waiting outside the court-room for him. The very presence outside the court-room during confirmation proceedings where the accused

before the magistrate made a warned and cautioned statement as a result of torture or undue influence, is sufficiently intimidating in itself as to render confirmation proceedings nugatory. Furthermore, the realization that the police are outside waiting for the accused inhibits the accused from speaking out freely his complaints and allegations of torture, if any. That this is so clearly illustrated by the extract from the evidence of the accused Cox. The accused's fears were justified. There was no application by the prosecutor to remand the accused into the custody of the prison services. He was taken and driven away by the police after the proceedings.

Besides, Cox was, like all other accused in this case, denied access to his lawyers. His lawyer, Mr Kantor, through his own efforts and those of his agents in Gweru, failed to see his client. It was only possible to see him after he had made a warned and cautioned statement, and even then only after its confirmation. In my judgment the confirmation proceedings were invalidated by reason of the matters referred to above.

Let me deal now with the confirmation of the warned and cautioned statement of accused Weir, Exhibit 10. He was driven from Gweru to Kadoma for confirmation proceedings. When the statement was confirmed, he was returned into police custody and taken to Gweru, where he

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was remanded into prison custody. The magistrate, Mr Palframan, who knew that the accused was going back into police custody, conceded that sending an accused whose statement had been confirmed, into police custody, was undesirable and made a mockery of the protection the confirmation procedure was meant to afford. My remarks on Cox's remand equally apply to Weir.

Besides, Mr Palframan used an old *pro forma* form which did not take into account the newprocedure laid down in *Munukwa's* case (*supra)*. There was therefore no thorough probing and questioning of the circumstances under which his warned and cautioned statement was recorded. He, too, was - after he had initially been allowed access to his lawyer - later refused that access. Thereafter his lawyer, Mr Vosloo, could not see him until after his warned and cautioned statement was recorded on 31 August and later confirmed on 1 September. Weir said his statement was not read out aloud to him in Court in the presence and hearing of himself and the magistrate. If, however, in the presence of the magistrate the accused reads his own statement and understands it, it matters not that the magistrate did not read it out aloud to him. In *S v Boutanquoi and Ors* a criminal judgment of this Court delivered by SQUIRES J on 25 and 26 March 1982, the magistrate left the court-room while the statement

DUMBUTSHENA JP

was being read to the accused by the interpreter to whom the magistrate had delegated his authority - an improper thing to do. SQUIRES J said at p21:

> "Section 105C(2)(b) requires in such proceedings that the statement in question be read to the accused person. Because these proceedings have to be held before a magistrate and because there must be a thorough investigation by him, it seems plain to me that it is the magistrate's responsibility to see that this is done and he cannot do so if he withdraws from the proceedings and leaves it to the interpreter to see that it is done. It matters not, in my view, that the statement is in fact read through to the accused. That is not the point. Validity of procedure depends, not on what actually was done but on what might appear to be done, and nothing must be done which creates even a suspicion that there has been an improper interference with the normal course of criminal proceedings."

So the reading of the statement by the accused is not the point - the point is that the accused understands the statement, and if he has any queries he should be afforded the opportunity to put them across to the presiding magistrate. In this case the accused are educated and intelligent people whose statements were written by themselves in their own language. I can find no impropriety in their having read their own statements at the confirmation proceedings.

However, because of the other matters already referred to, I hold that confirmation proceedings in relation to Weir were invalid.

I come now to accused Lloyd. In reply to the question whether he had made his statement freely and voluntarily, without having been unduly influenced thereto, he replied: "I did make a statement freely." That reply was incomplete and should have been investigated by the magistrate. When asked whether any member of the police, etc, had held out any promises or other inducements, his reply is recorded as follows:

> "They said if I gave a statement they would use me as a witness."

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There is implied in that reply an inducement. The magistrate did not follow up the suggestion of inducement allegedly proffered by the police. In his evidence in chief, the magistrate, Mr Chibamu, said in reply to a question that he did not think that the accused had made the statement because of inducement. He said under cross-examination he did not regard the fact that if accused "gave a statement they would use me as a witness", as inducement. He did not understand it was inducement. He said if he had recognized it as an inducement he would have proceeded asking further questions, and would not have confirmed the statement. Mr Chibamu, it appears, did not ask whether the accused had wounds or injuries, although he says in evidence that he did. No replies to that and subsequent questions were recorded.

DUMBUTSHENA JP

Five minutes after confirmation of his warned and cautioned statement, the accused was brought before the magistrate for remand. He complained to the magistrate of denial of access (see Exhibit 64), and it was his evidence that he had on 27 July asked Chief Inspector Garamukanwa and on 19 August Chief Superintendent Muremba, for access to a lawyer, all to no avail. He continued asking to see a lawyer up to 9 September, when the prosecutor asked Mr Vosloo to see him at Court. He also alleged assault on him by his interrogators. Mr *Mkushi*, properly in my view, conceded the impropriety of Lloyd's confirmation proceedings. Those confirmation proceedings were clearly invalid.

In the result all confirmation proceedings are invalid. What, then, are the consequences of my finding? Section 242(1a) of the Criminal Procedure and Evidence Act reads as follows:

> "(1a) A confession or statement confirmed in terms of subsection (3) of section *one hundred and five C* shall be received in evidence before any court upon its mere production by the prosecutor without further proof:
>
> Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose."

It is clear from the section that once the statements have been confirmed it is up to the accused to prove that the statements are for some reason or other inadmissible. But they must be duly and properly confirmed. Once confirmed, the statements are admissible on their mere production. The accused, however, retains the right to challenge their admissibility. The *onus* of proof is on the accused to prove on a balance of probabilities that the statements are inadmissible. See *S v Gwaze & Anor* 1978 RLR 13 at 18D-H.

Commenting on this shifting of *onus* of proof, GEORGES JA (as he then was) said this in *S v Munukwa & Others supra*:

> "The shifting of the *onus* of proof in relation to a confirmed statement is justified on the ground that there has been a thorough investigation before confirmation by a 'judicial officer'. This appears to me to be a sound approach to the interpretation of the section."

In the instant case all the statements were confirmed by magistrates. I admitted them on their mere production in spite of the powerful submissions made by Mr *Ognall* against admitting

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them. I preferred a rolled-up attack embracing both the improprieties of the confirmation of the

DUMBUTSHENA JP

statements and the issue of their admissibility, because I hold that the *onus* is on the accused challenging the validity of the confirmation proceedings to prove irregularities patent on the face of the record or any contravention of both the provisions of the Constitution and the Criminal Procedure and Evidence Act. After hearing evidence, I ruled that the confirmation proceedings were invalid, among other things, because on the evidence the accused were denied access to their lawyers. I came to this view is spite of Mr *Mkushi's* submission that the invalidating of the proceedings because "accused persons were denied legal access by the police . . . is tantamount to alleging that the magistrates misdirected themselves in failing to take cognisance of what they did not know, namely that the persons whose statements they were confirming had been denied access to their lawyers."

However, after the accused had adduced evidence challenging the propriety of the confirmation proceedings and the admissibility of their statements, the prosecution re-opened its case in terms of the proviso to s 242(1a) of the Code.

Having found that the proceedings were invalid, the *onus* of proof now shifts to the State to prove beyond reasonable doubt that the statements were made freely and voluntarily and without any undue influence having been brought to bear on the accused and are admissible in evidence.

The question of interrogations conducted by the police and the resultant recording of accused's statements is an important segment of our judicial process. Therefore, it is not part of that process that all inquiries made of the accused by the police are improper because confessions are an important element of our law enforcement. In *Miranda v State of Arizona* (1966) 384 US 478, 86, SC 1602, WARREN CJ, commenting on police investigations, said what I consider to be, in a general way, the attitude of the Courts to police investigations of a crime and to confessions obtained as a result of such investigations, viz:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at the trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissable. Confessions remain a proper element in law enforcement.

DUMBUTSHENA JP

> Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person

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who calls the police to offer a confession or other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding to-day."

In this country the obtaining of confessions from suspects or accused persons is a necessary step in our judicial process. And what CHIEF JUSTICE WARREN said in *Miranda v The State of Arizona (supra)* applies equally to this country. Our Criminal Procedure and Evidence Act lays down the circumstances under which confessions are admissible or inadmissible, and the Constitution has provisions which entitle the suspect or detained person the right of access to a lawyer of his own choice. The police, in their attempts to obtain confessions from suspects of detainees, must do so within the limits laid down by the law. This is important because criminal justice begins at the point when the police interrogate a person in their custody. The person may make a false confession and land himself in prison or he may truthfully confess and gladly be punished justly for the crime he has committed. In this regard CHIEF JUSTICE WARREN said in somewhat different circumstances in *Miranda v The State of Arizona* (*supra)* at 1629 words that aptly reveal what I am trying to put across:

"The principles announced to-day deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognised in some countries. Under the system of warnings we delineate to-day or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point."

The reason why those safeguards or the principles that go into making a statement one that has been freely and voluntarily made and therefore admissible, come into play at that time - that is, at the time the police interrogate a suspect in their custody. That point, I would like to emphasize, is the commencement of the trial. It may be that after a confession which is admissible has been made, all that the trial court does is to convict the accused because the trial commenced at the interrogation stage and his guilt was sealed at that point in time. Section 255B of the Criminal Procedure and Evidence Act says:

"Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

DUMBUTSHENA JP

Provided that the offence has, by competent evidence other than such confession, been provided to have been actually committed."

The danger of convicting innocent people who have made confessions to the police is excluded by the requirement in s 242(1) of the Act that the statement must be "proved to have been freely and voluntarily made by an accused person without his having been unduly influenced thereto." By these requirements the commencement of the trial through police investigations is, in most cases, brought within the requirements laid down in our law.

But that does not happen that way every time. In some cases confessions are extorted from the accused by bringing to bear on the confessor's will improper external impulses such as are alleged by the accused in this case. It is with this realization in mine that I now consider

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evidence relating to the admissibility or otherwise of the statements made by the accused and the submissions of counsel.

Let me first deal with the denial of access. Mr *Mkushi* did not deal in his submission with denial of access as in itself an exercise of undue influence. I take it that he concedes that denial of access is an exercise of undue influence and that it is an external impulse which is improperly brought to bear upon the accused's will and which is calculated to negative the apparent freedom of volition like all other such impulses as are referred to by VAN DEN HEEVER JA in *R v Kuzwayo* 1949 (3) SA 761 (AD) at 768, There the learned JUDGE OF APPEAL said:

> "Whether the 'Judges' Rules' have observed or not, the question remains one of fact: has it been established in the particular instance that the alleged confession was voluntary; is it clear that the confessor's will was not swayed by external impulses, improperly brought to bear upon it, which are calculated to negative the apparent freedom of volition? In answering this question the circumstances of each individual case will have to be taken into consideration; in one instance the fact that an administrative rule has been transgressed may have a most important bearing on the question whether the confession was voluntary; in another set of circumstances it may be neutral."

It is the defence case that a constitutional right of access to a lawyer, a right which is also enshrined in the Criminal Procedure and Evidence Act, has been transgressed and because of that transgression the statements made by the accused are inadmissible. Mr *Ognall* has submitted that ". . . denial of access therefore constitutes in itself a factor capable of rendering all the statements inadmissible by reason of undue influence, further, if corroboration is still sought, it is probative of want of voluntariness." In my judgment, if an accused person wants a legal practitioner before, or during, interrogations, the police investigators must stop their investigations and only resume after the accused has had consultations with his legal practitioner or failed to instruct a lawyer. If the police, in

spite of the accused's request to have his lawyer present, continue with their interrogations thus denying him the protection of his constitutional rights and professional advice, it cannot be said the police have not brought to bear upon the will of the accused by external impulses undue influence. The denial of access to a lawyer is in itself a form of psychological coercion and inducement which is brought to bear on the will of the accused.

Of course, if an accused person has no legal representative, and cannot afford one, these psychological pressures are absent. In the totality of such circumstances there is no denial of access to a lawyer and the absence of a lawyer is not a bar to the making of a warned and cautioned statement. An accused person who does not make a pre-interrogation request for a lawyer but whose relatives have instructed a lawyer on his behalf and whose lawyer is being denied access to him by the police is in a different class. If such is the situation, then denial of access under such circumstances militates against the admission of a statement by him.

It does not mean, and no one would like to be seen to suggest, that all interrogation and questioning of suspects by police should be in the presence of a legal practitioner; that is not our law. I believe the Courts of this country recognize that the detention and solution of crime is a difficult task. I would like to repeat here what an American Judge, MR JUSTICE GOLDBERG,

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stated in *Haynes v Washington* 373 US at 514, 83 SC at 1343:

> "Of course, detection and solution of crime is at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducements on the mind and will of an accused."

(Cited in *Miranda v (Arizona (supra)* at 1642).

Having said that, it is common cause that in the case of Slatter, Pile and Briscoe their statements were recorded and confirmed after proceedings by way of *habeas corpus* and by petition seeking rights of access had been commenced in the High Court on 9 and 10 September 1982. The accused were moved from place to place as their lawyers increased pressure on the police in their attempts to gain access to their clients. We have found

that the police were not honest with the Court when they said the accused were moved from police station to police station for security reasons. We are of the view that the accused were moved about in order to put off their lawyers until after statements had been obtained and confirmed. In this regard we prefer the evidence of legal practitioners to that of the police officers. We are strengthened in our view by the fact that the State does not rely on the evidence of Chief Superintendent Muremba, the officer who was in charge of investigations. Furthermore, the police kept the Attorney-General ignorant of the movements of the accused. He could not assist legal practitioners seeking access.

Besides, I find that the accused so moved found themselves in unfamiliar surroundings, at dead of night, surrounded by their interrogators or, in a few cases, persons they could not recognize because they were hooded, handcuffed and in some cases leg-ironed. Under this totally antagonistic environment, the techniques of torture described by the accused were applied while the accused were being compelled to admit. The interrogation setting was one of isolation in an unusual environment and in the circumstances frightening and intimidators. Confessions extorted under such an environment I hold to be inadmissible.

Accused Slatter says with regard to torture that he arrived at Mutoko during the night of 12 September 1982. He was questioned by Mr Mawire and Mr Zvidzai for about thirty minute to an hour. He was returned to his cell. He was again taken out. When outside the car, his wrists were held behind his back, one handcuff was taken off and a cloth was wound one wrist and the handcuff was then replaced. The same thing happened to the other wrist. He heard the sound of someone urinating close to him. He feared petrol was being poured close to him. He became extremely anxious. He was made to lie down on the seat of a vehicle, face down, with his head out of one door and his feet out of the other door. Someone called Comrade Moyo to bring the pistol. And someone called, "Bring the little axe". He thought someone was going to take his feet off. Someone sat on his thighs. His shirt was lifted and he felt two little pricks, one at the top of his back and the other at the base of his back. Electric current was fed through his back in

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increasing strength and his back went into spasms. He was questioned and if he denied more electric currents were passed through. He says it was extremely painful. Muscles of the back were sent into spasms and the whole body jumped around the back seat. At some point he admitted.

Accused Briscoe was questioned by five CIO men on 7 September. He

was questioned from early evening to 3 am of the following day. He was made to sit on the floor with legs stretched straight in front, arms were spread out with fingers touching the floor. A man pulled a chair behind him and another man pulled a chair over his outstretched legs. They both assaulted him with rabbit punches. Then he was told to get up and do press-ups - first in the normal way and then with clenched fists, using knuckles. If he failed to do this, he was assaulted. He was then made to strip and ordered to do squats with arms outstretched. If he failed in this, he was assaulted. Meanwhile, he was naked.

On 8 September he was taken from his cell at Mvuma at about 6 or 7 am and questioned up to 3 pm. The questioning was resumed after dark at 8.30 or 9 pm and went on until 3.30 am. There were two teams - one used the hard approach and subjected him to minor assaults, and the other team used the soft approach and did not assault him.

He was made to read a statement allegedly made by Cox. On 9 September he wrote a statement detailing his life in the past eighteen months. He was not asked to sign it.

On 9 September he left Mvuma and was told that he was going to Fifth Brigade Headquarters. A hood was placed over his head. He was then taken away by Chief Inspector Mawire and DSO Zvidzai. They arrived at Murewa at midnight. On 10 September he was interrogated by Mawire, Zvidzai and one CIO man. Sometime during the night wadding was placed over his wrists and he was handcuffed with his hands at his back. He was hooded. He was told by Mawire that he was to be taken to Fifth Brigade. He says he was terrified. He said they travelled for about-fifteen minutes. He was removed from the motor vehicle and another hood was placed over the first hood. It was more difficult for him to breathe. He was told to lie on the ground. Somebody lowered his collar and something was put on his neck and shoulder-blade. His trousers were lowered and an object was placed at the back of his spine. Someone sat on his lower thighs and held his legs whilst another person held his shoulders down. He felt burning needles on his back. If he denied questions put to him, electric current was increased. He continued to make denials. He was told to stand up and the electrode previously placed at the base of his spine was taken off. His trousers were lowered and an electrode was placed below the belly-button. Someone hugged him from the front. Some more electricity was inducted into his body. He said the degree of pain was very severe and sometimes he felt on the verge of passing out. Small currents were applied while he was standing unsupported. He hopped around. He

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DUMBUTSHENA JP

was then told to get back into the motor vehicle and informed that he was to be taken to Nyamapanda and Inyanga. He was told that unless he wanted worse treatment he should made a statement. He agreed to make one and was then driven back to Murewa. On 11 September he wrote his statement.

Accused Cox said he was interrogated at Mvuma and Shurugwe on 20 and 27 August 1982. On 19 August he was questioned by Mawire and Zvidzai for two and a half hours in the morning and for some specified hours after lunch. He, like others, was subjected to long hours of interrogations Mawire was aggressive in his questioning. He made the accused sit down and told him to maintain a press-up position whilst he questioned him. When he collapsed, he was beaten with a fingerprint board which was one foot long and four inches wide. This went on for between fifteen and twenty minutes. He says when he denied he was pushed around the room and hit about the head and body with an open hand. Mawire also grabbed his hair a couple of times. He was shown photocopies of typed statement, with the writers' names blacked out. He read them. After two hours of interrogation in the afternoon, he was sent back to his cell at about 4 pm

At about a quarter past seven in the evening, he was collected from his cell, handcuffed and hooded. He says Chief Superintendent Muremba's voice asked him whether he was prepared to make a statement. When he said he was not prepared to do so, the voice ordered him to be taken away. He got into a motor vehicle and was driven away. He left Murewa Police Station. The motor vehicle stopped after travelling for about fifteen to twenty minutes. He was now in the bush. He got out of the motor vehicle and was taken some ten to fifteen metres, guided by some people to a spot in the bush. When he refused to make a statement, he was told to lie on the ground, face downwards. Some people held him on the upper part of the body and others lifted his legs. Someone else kept the hood in place.

Sharp objects were pushed into his heels - into the skin covering his heels. He shouted and screamed. An object was placed between his buttocks after his track suit has been pulled down, which he described as a red-hot wire brush. He said it was extremely painful and he screamed. He found it difficult to breathe because the hood he wore was held down. The application of the object to the buttocks was repeated six to eight times for about ten minutes. He struggled. The handcuffs were removed and he was handcuffed with his hands, behind his back. When he refused

to make a statement, he received what appears to have been an electric shock, which carried on for some time in spasms. This was applied in short or long bursts. He received electric shocks for some ten minutes. He was extremely frightened and he had difficulty in breathing. His torturers threatened to shoot him and they started the electricity induction once again. After ten minutes he agreed to make a statement.

The police witnesses deny assaulting the accused or inducting electricity into any of them. I

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have, however, given in detail the torture alleged by the three accused because it occurred in the Murewa-Mutoko area. The incidents described happened at night in the bush, and in each case electricity was inducted into the bodies of the victims. The stories told by the accused are corroborative of each other and they have a ring of truth about them.

Besides, the evidence of Slatter and Briscoe is corroborated by that of Mr Hartmann, Mr Gardener, Mr Patrikios and Dr James. We would have hesitated in accepting the evidence of Mr Hartmann because he was emotionally involved in the affairs of his client and carried that personal involvement into the witness-box, but his evidence is corroborated by that of Mr Gardener and Mr Patrikios and is amply supportive of the opinions advanced by both Dr James and Dr Chitiyo, two very distinguished medical specialists. They expressed different opinions on petechial haemorrhages and subcutaneous haemorrhages, but for our purposes their evidence, after appreciating the speciality of each of them, is supportive of the accuseds' assertions of some injury having been inflicted on the bodies of the two accused.

Now I turn to the evidence of torture and threats relating to Pile. There is no doubt that Pile was threatened with indefinite detention. He referred to it at the confirmation proceedings. He was induced to make a statement because he was made to believe that the detention or whatsoever would come to an end. On 12 September he was hooded, removed from his cell and driven into the bush where he was threatened. On 15 September, in Chief Superintendent Muremba's office, he asked for a lawyer. They laughed at him and told him plenty of lawyers were waiting for him in Harare, and that as soon as he made a statement he would be free to go home and see them and would be released, as others had been released. He was, like all the other accused, interrogated over long periods of time. In his case the cumulative effect of denial of access to his lawyer, inducements and long periods of interrogation, make his statement inadmissible.

DUMBUTSHENA JP

Accused Lloyd was moved to Mvuma on 17 August. He was placed in solitary confinement and there were bugs in his cell. The cell was dirty. This made him depressed. He said he had sadza with occasional vegetables and sometimes meat to eat. The effect of eating sadza made him vomit. It should be noted that all accused ate sadza, but none of them except Lloyd vomited. This had a debilitating effect on him. When moved to Mvuma he asked DSO Kaurai for access to a lawyer. There was no response to this. He then asked Chief Superintendent Muremba for access to a lawyer but again there was no response. He made four requests per day for a lawyer but he never got one. He was assaulted by DSO Kaurai with clenched fists.

On 19 August, Chief Superintendent Muremba offered him, with the approval of the Prime Minister, $5 000 cash in foreign currency, air tickets for himself and his family to wherever he wanted to travels free subsequent transport of his furniture to such place, a reference signed by the Prime Minister, and if he wanted to go to Zaire he would get guaranteed high-level employment. Before that, on 18 August, he had been approached by Deputy Commissioner Mhora and Chief Superintendant Muremba in Gweru Central Prison, and was told that if he turned State evidence he would be looked after. He had lengthy interrogations coupled with threats at Shurugwe on 21 August. DSO Kaurai assaulted him with clenched fists. Apparently

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he did not respond to this. He was then made to believe that unless he co-operated, his scheduled adoption proceedings would not go through. He was then taken to Police Headquarters to see Deputy Commissioner Mhora and the Commissioner of Police in order to make a statement. He says the whole of that day he had only a slice of bread and jam and had been awake for twenty-seven hours. On 20 August he had for a meal and slice of bread and a cup of tea at 7.15 am. Having been taken to Mvuma, he was, on 21 August, taken from the cells before breakfast and driven to Shurugwe Police Station, and was returned to the cells at Gweru Central Police Station between 10.30 pm and 11 pm. He was interrogated at Shurugwe by two teams of CID personnel, who changed duties. DSO Kaurai was violent. They threatened to send him to the Fifth Brigade to be dealt with by them. DSO Kaurai conveyed him up a metal staircase and put hoods over his head. The outer one was pulled tight. He could not see. His right hand was put behind his back, wrapped with something resembling hessian stripping, and when the same thing had been done to his left arm he was handcuffed. In a room somebody attempted to put office pins beneath his finger-nails. He reacted violently. He was seated on the floor with his legs outstretched in front of him. He was then threatened by a voice which said, "I am the Fifth Brigade. You are not

DUMBUTSHENA JP

going to bugger me around". When he refused to make a statement the zipper of his track suit was undone, the vest was pulled away from the back of his right shoulder and he felt as if two injection pins had been inserted into the joint of his arm and shoulder, and a second was located close to the base of his neck. His right shoulder went into convulsions. Electric shocks continued for about fifteen minutes; the switching on and off of the current brought about agony. First he refused to confess. Then another session started, lasting forty-five minutes to an hour. After the first session one of the points was removed to the right chest muscle, then to the top of his stomach on the right-hand side; his genitals were tried but this did not work, and then the point was moved to the base of his right thigh muscle and thence to the top of his right-hand big toe. He had convulsions and pains. When the intensity of shocks were increased, he urinated, and then further electric currents and beatings were applied. The accused was in much pain and was not taking notice of what was happening. At the end of this treatment, he gave a verbal confession. A warned and cautioned statement was typed and signed on 22 August 1982 and was confirmed in Kadoma on 26 August 1982.

I now come to consider allegations of torture made by the accused Weir. He was interrogated, like all the others, by both the CIO and the CID. Lloyd and Weir had at the beginning an opportunity to consult with their lawyers, but as the police pressed on they, too, were denied the privilege of access to lawyers. Weir said in evidence that he was made to strip and sit on the floor whilst being interrogated. In the process he was assaulted. He was also made to adopt press-ups and if he faltered he was assaulted. He complained of long periods of interrogation, sometimes going up to twelve hours. He was at the crucial time - that is towards the breaking point - interrogated at Senga Police Station, but was taken back to Mkoba Police Station after interrogation. He was kept in leg-irons connected to a ring embedded on the floor. A blanket was placed over his head and he tried to wriggle out under a table. Someone grabbed him, put his fingers on his stomach and stretched him in the front of his stomach. He went to the other

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side of the table and was hit on his shoulders and his head. The assault was violent and lasted for ten minutes. He had no blankets, no bed and no footwear. On 27 August he felt cold, tired and frustrated. On that day he was taken back to Senga. He was interrogated for up to twelve hours. Leg-irons remained on until 29 August. The routine of interrogation and assaults was repeated. By 5 pm he agreed to confess. On 31 August, his warned and cautioned statement, Exhibit 10, was typed and he signed it.

DUMBUTSHENA JP

The police deny all these nasty, cruel and degrading and sometimes inhuman acts the accused alleged they had experienced. It is easy for the policy to deny such things. They are professional witnesses who have had allegations of assault and torture made against them many times over. I have had the benefit of consulting my colleagues on the question of credibility of witnesses. We are satisfied that the legal practitioners who gave evidence were honest and truthful witnesses. Mr Kantor, Mr Hartmann, Mr Gardener, Mr Vosloo and Mr d'Enis kept notes of their conversations with the various police officers from whom they tried to obtain access to their clients. Some of them met the Attorney-General or exchanged letters with him, all concerned with access to their clients. Only Mr MacDonald kept no such notes, but we believe his testimony.

The police kept no records - by which I mean personal records of the interrogations they conducted and the times they interrogated the suspects. They had no record of their dealings with the accused and their legal practitioners. It was therefore easy for them to contradict themselves in material respects when under cross-examination as and when their attention was drawn to evidence in their sworn affidavits in case No HC 1991/82. We found Chief Superintendent Muremba a difficult witness to believe. We are in this respect at one with the prosecution who, in a manner of speaking, disowned his evidence. On the question of access to lawyers, Deputy Commissioner Mhora's evidence was more than suspect.

The *onus* of proof is on the prosecution because, as I held earlier on, the confirmation proceedings in respect of each accused were invalid. For the avoidance of any doubt, even if I had found that the warned and cautioned statements were properly confirmed and that the *onus* was on the accused to show on a balance of probabilities that their statements were not freely and voluntarily made, I would have held that they had discharged that *onus* because, as BARON JA said in *S v Ndlovu* 1983 4 SA 507 (ZS):

> "To establish a case or an issue on a balance of probabilities requires no more than that the court come to the conclusion that the party's version of the events is probably true. Obviously this is a lower *onus* than establishing the matter beyond reasonable doubt. In particular, it is essential not to fall into the assumption that the court must believe the version in question. It is well established that in situations where the test is whether an accused's story might reasonably be true it is not required that the court believe that story; equally here, for the court to conclude that a story is probably true does not require that the court necessarily believe it. If an accused person puts forward an explanation showing how he came to make the challenged statement, and the court comes to the conclusion, notwithstanding certain reservations, that he is probably telling the truth, then he has discharged his *onus*."

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DUMBUTSHENA JP

I would have then held that the prosecution had failed to prove beyond reasonable doubt that the statements were freely and voluntarily made.

Section 242 of the Criminal Procedure & Evidence Act lays down conditions of admissibility of a statement or confessions. It has to be "freely and voluntarily made by an accused person without his having been duly influenced thereto." In this case, two legal obstacles stand in the way of the prosecution -

(1) The individual right of access to a legal representative granted by the Constitution and the Criminal Procedure and Evidence Act, already referred to.

(2) The allegations of torture, inducement and undue influence deposed to by the accused.

Let me dress up the first point with legal respectability. In *S v Kokot,* a judgment of this Court delivered on 6 April 1978, BECK J, as he then was, said at pages 1 to 2 in a case in which the accused had alleged that the police had denied him access to a lawyer:

> "I was unable to reject the accused's evidence that before he made his warned and cautioned statement he repeatedly requested to be allowed access to a lawyer, and that these requests were steadfastly refused. While disputing that the accused ever asked him to be given access to a lawyer, the investigating officer accepts that he instructed that the accused was not to be allowed any contact with the outside world while he was detained for interrogation. The accused was aware of those instructions, and, in fact, was kept in detention for more than 48 hours without being brought before a court and without contact with anyone other than the police until after he had made his warned and cautioned statement.
>
> The police had no reason for suspecting that their investigations would be improperly hampered if the accused was allowed access to his lawyer. If this refusal occurred as a result of Detective Inspector Hughes's general instruction that the accused be kept incommunicado, as I think it may have done, it was a most improper invasion of his rights, and it would probably have impressed itself upon the accused's mind as a sinister and telling indication of the overbearing attitudes that the police were seemingly prepared to adopt in order to secure his co-operation willy-nilly."

What the learned Judge said above in regard to access to a lawyer was less compelling because the right of access to a legal representative was not enshrined in the Constitution as it is now.

On the sole ground of denial of access to their legal representatives, I would have held that the statements made by the accused were inadmissible in evidence because the denial of access standing by itself is, in my judgement, both an inducement and an undue influence.

The accused have, however, alleged the many matters and factors mentioned above - allegations of torture, assaults, inducements and undue

influence which negatived voluntariness. In coming to this view, sight must not be lost of the evidence material to the issue of voluntariness. Both the evidence adduced by the police and the accused must be examined, and a liberal interpretation or assessment of its evidential value made. A too restrictive interpretation of s 242 may lead to the exclusion of confessions made by

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accused persons with motives to confess or tell all to the police for their own purposes. In this regard LORD LANE CJ aptly stated what I have tried to express above. He put it this in *R v Rennie* [1982] 1 All ER 385 at 388h-j:

> "Often the motives of an accused are mixed and include a hope that an early admission may lead to an earlier release or a lighter sentence. If it were the law that the mere presence of such a motive, even if prompted by something of such a motive, even if prompted by something said or done by a person in authority, led inexorably to the exclusion of a confession, nearly every confession would be renderes inadimissibly. This is not the law. In some cases the hope may be self-generated. If so, it is irrelevant, even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority. More commonly the presence of such a hope will, in part at least, owe its origin to something said or done by such a person. There can be few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession."

I get further guidance from the many authorities on this part of the law. Let me give local authenticity to what I said earlier in my judgement on the question of the conduct police interrogations should not take. In *R v Hackwell & Ors* 1965 RLR 1; 1965 (2) SA 388 (SR, AD), MACDONALD AJA (as he then was) observed as follows at 400E-H:

> "A study of the English and South African Rules reveals that the Judges in both countries regard as 'undue' any practice which, if introduced into a court of law, would be repugnant to the principles upon which the criminal law is based. They are designed to ensure as far as possible that the fair and impartial treatment received by an accused person in court is extended to him at all times before he reaches court. Compliance with the Rules ensures that the role of the Police Force is limited to investigation. Non-compliance not infrequently results in the Police embarking upon an informal and irregular 'trial' of the accused, designed to establish his guilt or innocence. When this happens, the courts of this country sit in judgement, not upon the guilt or innocence of the accused (although, of course, in theory this is what they are doing), but upon the merits or demerits of a 'trial' conducted by the Police in the course of which the 'guilt' of the accused has already been determined. This development, if it were to get out of hand, would undermine our system of justice. It need hardly be stressed that a farcical situation arises if the Courts, while insisting upon the maintenance of the highest standards in their procedure, accept and endorse the result of 'trials' conducted in an informal and irregular way by members of the Police Force. If a stage has been reached when it has become desirable in the interest of justice to subject persons suspected of crimes to interrogation *designed to establish their guilt*, it is desirable that this power should be exercised in open Court, and it is undesirable

DUMBUTSHENA JP

> that the power should be exercised by the Police in private."

In this case there is evidence that all the accused at first denied any involvement in the sabotage. Some wrote statements denying any involvement whatsoever. Those statements are not before us. Subsequently, following upon various forms of inducements and undue influences, all the accused made warned and cautioned statements which were self-incriminating. It is those statements that the accused challenged as not having been made freely and voluntarily. In the view I have taken of this matter and after considering the totality of the evidence before me, the *onus* resting on the State has not been discharged. I must therefore rule, for the reasons referred to in my judgement, that all the warned and cautioned statements made by all the accused are inadmissible in evidence.

Having come to this conclusion, it is unnecessary for us to consider the question of the

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genuineness of the statements made by the accused, because such consideration only becomes necessary when the statements or confessions are admitted in evidence. In the result, all the accused are found not guilty and are acquitted.

Attorney-General, legal practitioner for the State.

Gill Godlonton & Gerrans, legal practitioners for the accused.

S v MATHE 1983 (2) ZLR 178 (HC)

Court **High Court, Bulawayo**

Gubbay J

9 September 1983

Flynote

Criminal procedure - sentence - corporal punishment - juveniles - circumstances in which maximum number of cuts may be imposed - Criminal Procedure and Evidence Act [Chapter 59] - s 330.

Headnote

It should not for a moment be thought that a moderate correction of corporal punishment imposed on a juvenile is anything but a severe sentence. It can in no way be compared to the administration of corporal chastisement by a father in the exercise of his parental duty or the caning by a schoolmaster of a disobedient pupil. The maximum number of strokes allowed by s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*] is ten, and every few crimes would demand a juvenile being visited with such a degree of judicial barbarism. Offences of unprovoked and extreme violence or of bestial or wanton cruelty to the person of another might qualify. Ordinarily, no more than eight strokes should be ordered.

Cases cited:

S v C; S v F 1979 RLR 7;

S v du Chattlier 1973 (2) RLR 339;

S v Joggie and Another G-S-156-81.

Judgment

Gubbay J: The sentence imposed in this case has caused me deep concern.

The accused is 18 years of age and a first offender. On 13 July 1983, he proceeded from his kraal in the Matshetshe Communal Land to Insindi Farm in the Gwanda district in order to hunt wild animals. He was armed with a spear and an axe. His 13 year old brother accompanied him. Soon after entering upon the farm, he noticed a herd of cattle grazing in a paddock and selected

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a heifer to slaughter. He attacked the animal with the spear and axe. Having killed it, he skinned the carcass and cut it up with the aid of his brother. The meat was carried to a nearby tree and the accused arranged for his mother and a relative to assist him to convey it from there

GUBBAY J

to the kraal. He represented to them that it was the meat of a wild animal. He was later arrested and the meat recovered. The beast was valued by the complainant at $150. Plainly the accused was moved to steal the animal because of the considerable deprivation suffered by himself and his family.

The accused was duly convicted, on a plea of guilty, of the theft of the bovine. He was sentenced to receive ten cuts with a light cane and to 18 months' imprisonment with labour the whole of which was suspended for four years.

I do not question the propriety of ordering the accused to receive a moderate correction cojoined with a period of conditional imprisonment. After all, he committed a serious offence and one which is particularly prevalent in the Gwanda area. But the number of cuts inflicted was grossly excessive. Ten cuts is the maximum that may be imposed on a juvenile in terms of s 330(1) of the Criminal Procedure and Evidence Act [*Chapter 59*]. I venture to think that very few crimes would demand a juvenile being visited with such a degree of judicial barbarism. Perhaps offences of unprovoked and extreme violence or of bestial or wanton cruelty *to the person of another* might qualify. The present offence certainly does not.

It must not for a moment be thought that a moderate correction is anything but a severe sentence (see *S v C; S v F,* 1979 RLR 7). It can in no way be compared to the administration of corporal chastisement by a father in the exercise of his parental duty or the caning by a schoolmaster of a disobedient pupil. As pointed out by BECK J (as he then was) in *S v du Chattlier* 1973 (2) RLR 339 at 341C, to inflict eight strokes on an adult becomes senselessly repressive and this limit should also be observed in ordering juvenile cuts (see also *S v Joggie and Another* G-S-156-81).

The magistrate has sought to justify his stand on the ground that the manner in which the accused slaughtered the animal reveals a brutal and callous nature, and that his further actions in skinning it, cutting up the carcass and enlisting assistance to carry the meat to his communal home, were those of a "hardened criminal". Even if all that were true, my sense of shock would still remain. But in my view the accused's moral culpability has been gravely overstated. In the first place there is no reason to infer that the heifer must have suffered an agonizing death. There is no evidence of the extent to which the weapons were used by the accused. As far as one knows the first blow may have rendered the beast comatose. Thereafter death could have followed swiftly. Secondly, the accused's further actions were merely a logical extension of the theft and the decision to obtain meat

GUBBAY J

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for the family. To liken him to a hardened criminal is an unwarranted disparagement.

Most unfortunately the cuts have already been inflicted. That was in accordance with the accused's wish and so was not irregular. Considering as I do that he should not have been sentenced to more than six cuts together with the suspended imprisonment the magistrate imposed, I am satisfied that the period of 18 months' conditional imprisonment must be reduced. This is the only way in which the manifestly excessive punishment can be ameliorated.

The conviction is confirmed. With the agreement of my brother KORSAH the period of the suspended imprisonment is altered to nine months.

S v JECHA & OTHERS 1983 (2) ZLR 181 (HC)

Court **High Court, Harare**

Squires J

14 September 1983

Flynote

Criminal law-housebreaking with intent to steal - nature of premises broken into - caravan broken into - whether offence committed.

Headnote

The accused climbed the wall of the complainant's garden one night and broke into his caravan which was parked there. The caravan was not being lived in at the time. The property stolen was camping equipment or other articles that would be used on a camping holiday. There was no other evidence about the normal or present use of the caravan.

The accused were charged with housebreaking with intent to steal and theft, and pleaded guilty to this charge. In spite of their plea, the magistrate convicted them of theft only, as he doubted whether, in the circumstances of this case, the caravan constituted "premises" for the purpose of the definition of the crime of housebreaking.

Held, that the test in our law is whether the structure or premises broken into is such as is, or might ordinarily be, used for human habitation, or for the housing or storage of property of some kind. There must be some degree of permanence about such purpose for which the structure is used. If the structure is not designed for human habitation but is so used, it would meet the test; but if the very nature of the premises is not decisive of the question of the use to which it is put, further evidence may be necessary to resolve the matter. In the present case, the necessary evidence was lacking, although in appropriate cases a caravan might well be regarded as "premises" for the purposes of the offence.

Cases cited:

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R v Johannes & Another 1918 CPD 488;

R v Fourie 1907 ORC 58;

R v Thompson 1905 ORC 127;

R v Lawrence 1954 (2) SA 408 (C).

Judgment

Squires J: The three accused in this case were charged with the offence of housebreaking with intent to steal and theft. Such facts as were put before the magistrate established that they climbed the wall of the complainant's garden at night and broke into his caravan, which was parked at some point in the grounds. The caravan was not being lived in by anyone

SQUIRES J

at the time, and though it contained property of the complainant, this property was, judging from the description of the items stolen, as set out in the charge, camping equipment or articles of clothing or bedding that would be used on a camping holiday. Apart from that, nothing whatever was put before the Court about the normal or the present use of this vehicle.

The three accused all pleaded guilty as charged. But the magistrate entertained some doubt as to whether the caravan was, in the circumstances of this case, a "premises" for the purpose of the definition of the offence of housebreaking, and he consequently convicted them of theft. It may properly be said at this point that he did so only after anxious consideration of the problem, which included consultation of the views of a number of his brother magistrates. He sentenced each accused to 24 months' IWL, of which he suspended 8 months on appropriate conditions as to future good behaviour. That sentence seems to reflect a view that even though the offence of which the accused were convicted was only theft, the fact that the culprits broke into the caravan to do so was taken into account in aggravation of sentence.

The Attorney-General, to whom the papers were referred, has urged the argument in the course of a helpful memorandum, that the magistrate was wrong in his decision. In substance, this argument is that as a caravan is "a mobile home", it would constitute premises for the purposes of this offence whether or not it was being lived in at the time - no less than a normal house would be premises even though unoccupied when broken into. A holiday cottage home, so this view argues, was no less premises while not being used by the owner than when it was. If a thief broke into such a home while it was unoccupied, it would clearly be housebreaking. Similarly, the fact that this caravan was not being lived in at the time, did not make it any less "premises". It was designed and owned to be lived in when needed, just as the more usual immovable dwelling.

Now, as the learned authors of *South African Criminal Law & Procedure* vol 2 point out, when discussing this offence, the word "house" in the offence of "housebreaking" is a term of art that covers many types of premises or structures that would not, in normal parlance, be called such. This elasticity of definition probably stems from the mixed parentage of this offence in our law,

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deriving as it seems to do, from both Roman-Dutch and English law sources.

In Roman-Dutch law most of the old authorities seem to regard

SQUIRES J

housebreaking with intent to steal, coupled with theft, as merely an aggravated form of theft. See *R v Johannes & Anor* 1918 CPD 488 and *R* v *Fourie*: *R v Louw* 1907 ORC 58. So the form of the premises or structure broken into does not assume critical importance. One who does, however, identify housebreaking as a separate offence is Matehaeus *De Criminibus: de vi bonorum raptorum* 1:1, and he says the applicability of the offence is determined not by the nature of the house or structure, but by the purpose to which it is put, it being the intention of the law to protect not only the mansions of the rich but the cabins of the poor. And if a structure was permanently lived in, or normally used for habitation, forcible entry would be housebreaking, whether it was a normal house, a miller in his mill or a sailor in his boat. On the strength of that authority, the Court in *R* v *Thompson* 1905 OCR 127, upheld a conviction for housebreaking with intent to steal where the accused had broken into a tent in which the owners of that tent were then living as their home.

English law, on the other hand, began by limiting housebreaking or burglary - as it is there called - to wrongful entry into a permanent structure only. But; the ambit of the offence was extended by various statutes to embrace a far wider range of premises, and it was probably while in this extended condition in the early years of this century that English law had its greatest impact on the law in South Africa. In English law the Theft Act has now swept all this away and extends the offence of burglary to all buildings. But, no doubt to meet a considerable social need, this legislation also specifically includes "mobile homes", provided they are inhabited. But for that special extension, one assumes that such structures would not be included in the offence of burglary if broken into.

The test that seems to emerge from the various judgments on the subject in our law is whether the structure or premises broken into is such as is, or might ordinarily be, used for human habitation, or for the housing or storage of property of some kind. And underlying that test, and part of it, is the requirement outlined by the authors of *South African Criminal Law & Procedure* vol 2 at p 712, that there must be some degree of permanence about such purpose for which the structure is used. In *R v Lawrence* 1954 (2) SA 408 (C), OGILVIE THOMPSON J (as he then was) applied this test when he upheld a conviction for housebreaking into a ship's cabin on the basis that it was ordinarily used for human habitation, and on the facts of that case was being so used by a ship's officer when so broken into.

On that test one can say that a house, even though unoccupied, would

SQUIRES J

be premises for this purpose, because a house is ordinarily meant and used for human habitation on a more or less permanent basis. Similarly, a tent will be premises if the facts show

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that it is being used at the time for human habitation, or for the storage of property. In other words, it depends on the nature of the structure and its present or ordinary use. Where it is designed for human habitation, like a house, then the test is met. Where it is not normally designed for human habitation and not being ordinarily used for that purpose, then it does not meet the test. On that basis it may well be that once a house is deserted and no longer to be used for habitation, a breaking into it would not be housebreaking for purposes of this offence. If the very nature of the premises broken into is not decisive of the question of the use to which it is put, then further evidence may be necessary to resolve the matter to show what it is in fact used for or for what it might ordinarily be used.

Applying that test to the facts of the present case, what should the answer be? Such scanty evidence as there was put before the magistrate regarding this caravan was only that it was not being used at the time for human habitation. There was also nothing to indicate that it had ever been so used or would in future be so used. And assuming from the nature of the property that was stolen that it had been used for a camping holiday, or was going to be so used, there is still nothing to establish, to the standard necessary for a criminal charge, that such storage was its ordinary use. That fact, such as it was, is as consistent with the camping gear being put there the day before, and for a more limited purpose than the ordinary one of storage. The prosecution here really failed to clear up these areas of doubt. Had there been any evidence that the caravan was used periodically as a house even for holiday camping purposes, or ordinarily used to keep the camping gear in it, that would have been enough, it seems, to establish it as a structure, which, if broken into, would be regarded as a premises for purposes of our law of housebreaking. But a magistrate is not allowed to infer the case best for the State, nor should he make the State case for it.

In the result, therefore, while the meaning and ambit of "premises" in the offence of housebreaking with intent to commit some offence is wide enough to cover a caravan that is lived in permanently and even one that is lived in from time to time if living in it is the ordinary purpose to which it is put, I think on the facts of this case - and I stress that limited area of application - the magistrate was right in holding that housebreaking was not established.

The conviction and sentence are accordingly confirmed. And though

SQUIRES J

the concurrence of another judge is not required if a conviction or sentence is not altered on review, because of the magistrate's uncertainty and the Attorney-General's argument to the contrary, I have obtained the concurrence of WADDINGTON J with this conclusion.

S v HARTMANN & ANOTHER 1983 (2) ZLR 186 (SC)

Court **Supreme Court, Harare**

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Georges CJ, Beck JA & Gubbay JA

22 July & 16 September 1983

Flynote

Criminal law - contempt of court - statements made publicly concerning a pending case - test of contempt is whether there is a real risk that what was said was calculated to prejudice a fair hearing - Constitution of Zimbabwe, 1980 - s20 - test of "tendency to prejudice" contrary to right of freedom of expression.

Headnote

The appellants, both legal practitioners in Harare, were retained towards the end of August 1982 to represent two senior officers of the Air Force of Zimbabwe. The two officers had been detained on 24 and 31 August, respectively, on suspicion of having been involved in a serious act of sabotage at the Thornhill Air Base, Gweru. The appellants ought court orders granting them access to their clients, but by the time the orders were granted on 15 September the detained officers had both made statements to the police which were confirmed before magistrates. Although the appellants had asked to be present at the confirmation proceedings, they were not informed that the proceedings were taking place. Where they saw their clients, the appellants received instructions from them as a result of which on 20 September they held a press conference. At the conference they told the press that their clients had been interrogated under conditions of extreme duress including the use of torture; that there was medical evidence to corroborate that allegation; that the detained officers had made statements; and that the officers protested their loyalty and innocence. In answer to questions, the appellants gave no further details of the torture. Mr Hartmann said that they were not making general accusations against the Government or members of any of the forces of law and order. Mr Gardener said, with regard to the statements made by the officers, that he would make no comment on them; the time to challenge them would be at a trial.

As a result of this conference, the appellants were charged with contempt of court, convicted and fined $100 each. The magistrate convicted them on the basis that all that was required to establish the offence was that the publication should tend to interfere with or prejudice the course of justice, even if it was most unlikely to influence the trial judge. He considered that the appellants had, subjectively, foreseen that their acts would be a contempt of court and were reckless as to the result.

Held, that it was important, at the outset, to bear in mind the provisions of s 20 of the

GEORGES CJ

Constitution of Zimbabwe, 1980, which protects freedom of speech. Although this freedom may be limited, in terms of s 20(2)(b)(iii), for the purpose of maintaining the authority and independence of the courts, this inroad into the right of freedom of speech should not be wider or deeper than is required for the achievement of the declared objective.

Held, further, that the test applied in South African cases (of a tendency to prejudice or interfere with the administration of justice) would make too great an inroad with the right of freedom of

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expression set out in the Declaration of Rights.

Held, further, that the test applied in the English courts should be applied here: this is whether there was a real risk, as opposed to a remote possibility, that the publication was calculated to prejudice a fair hearing of the action discussed.

Held, further, that on the facts of this case there was no such risk and the appeal must succeed.

Held, further, that conduct which is legally permissible may be neither wise nor judicious and there should be no doubts about the wisdom of the well-established custom of lawyers not discussing in public outside of court matters concerning cases in which they are involved.

Cases cited:

S v van Niekerk 1972 (3) SA 711 (AD);

Tennant & Another v Bisset & Another 1932 CPD 124;

In re *Norrie v Consani* 1932 CPD 313;

Delbert-Evans v Davis & Watson [1945] 2 All ER 167;

R v Duffy [1960] 2 All ER 891;

Vine Products Ltd & Others v Mackenzie & Co Ltd & Others [1965] 3 All ER 58;

Hunt v Clark (1889) 58 LJQB 490;

Attorney-General v Times Newspapers Ltd [1912] 3 All ER 1136; [1973] 1 All ER 815; [1973] 3 All ER 54;

Attorney-General v Weekend Television [1972] 3 All ER 1146.

A P de Bourbon, for the appellants.

F S Chambakare, for the respondent.

Judgment

Georges CJ: The appellants are legal practitioners and partners in a legal practice in Harare. They were retained towards the end of August 1982 to represent Air-Vice Marshal Hugh Slatter and Wing Commander Peter Briscoe then senior officers in the Zimbabwe Air Force who had been detained on suspicion of being implicated in a serious act of sabotage which had resulted in considerable damage to military aircraft at the Thornhill Air Station in Gweru. Briscoe had been detained on 24 August and Slatter on 31 August. On 9 September the appellants filed applications for an order for access to Slatter and on 10 September a similar application was filed in relation to Briscoe.

Orders for access were made on 15 September and very shortly thereafter the appellants were allowed to see their clients. By that date, however, both clients had made statements to the police which had been confirmed on 14 September at the Magistrates Courts at Murewa and

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GEORGES CJ

which Slatter and Briscoe had been taken for remand. The appellants were not present at these hearings. They had not been informed though they had asked that they should be.

When the appellants saw their clients on 15 September they received instructions from them as a result of which they held a press conference on 20 September which was attended by 15 to 20 journalists, mostly representing overseas media.

The Conference began with a statement by the appellants. The opening paragraphs read:

> "1. The following statement is made by Michael Hartmann, and Rhett Gardener, Attorneys of record for Air Vice-Marshal Hugh Slatter, and Wing Commander Pear Briscoe and is made on their instruction.
>
> 2. In the knowledge that Zimbabwe is a democratic society where the rule of law is enshrined and in the belief that certain personnel may have acted in a totally unauthorised but nevertheless cruel and inhuman manner, we are constrained to make public certain aspects arising out of our clients' recent arrest and detention."

The statement then details the history of the arrest of their clients and the applications for access and continues:

> "6. After these applications were filed and argument had been heard in Open Court (but before a Final Order of access was granted), the 2 men were then interrogated under conditions of extreme duress including the use of torture.
>
> 7. Two of the men, Air Vice-Marshal Slatter and Wing Commander Briscoe have been medically examined. There is medical evidence to corroborate their allegations in this regard.
>
> 8. The men have made statements."

Paragraphs 9 and 10 recounted the confirmation of these statements and the fact that the legal representatives had not been present and had not been informed though they had asked that they should be.

The final paragraph reads:

> "Finally, and notwithstanding the cruel and inhuman treatment to which they have been subjected, we are instructed by the men that they still protest their innocence in the strongest possible terms and pledge their loyalty to the duly constituted Government of Zimbabwe which loyalty has been sure and without blemish since Independence."

A question and answer session followed the release of the statement. The appellants stated that the Law Society was aware that the statement was to be made but as far as they were aware had expressed no opinion on it. The appellants refused to be drawn into giving details of the torture

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but stated that it was psychological as well as physical. They disclosed that their clients had been examined by doctors and that the doctors' report corroborated their clients' allegations. Mr Hartmann who had first seen the clients stated that it appeared that they had undergone an ordeal. Mr Gardener stated that they had both examined the men but that -

> ". . . it would be improper at this stage to disclose what our own observations have been because that will obviously be given in evidence in a tribunal in due course."

They pointed out that they would not have invited their clients to undergo medical examinations unless they had felt that there was cause for disturbing a doctor or a surgeon. Asked whether there was reason to believe that there had been further abuse of their clients since they had seen them last on Wednesday, Mr Gardener replied that there most certainly had not. They could not say who was carrying out the interrogation or torture or from which department they came because it would not be proper for them to say at that stage.

Mr Gardener stated that they were quite satisfied that their clients were being properly looked after at this stage and they had no reason to fear that they would not be properly looked after in the future.

Mr Hartmann emphasised that they were not making a general accusation against the Government or members of any Law and Order Force in the country. In his own words:

> "We are in a society where law and order, and by that I mean the rule of law, is honoured and adhered to and we feel as officers of the Court that if it comes to our notice that certain personnel have used torture to elicit untruthful, or what our clients say are untruthful, confessions then we are honour bound to bring that to your notice."

Pressed as to whether he was saying that his clients had made confessions Mr Hartmann stated that he had not said that and was sorry if he had, what he was saying was that they had made statements after duress. He was not using the word "confessions" because he had not had an opportunity to study the statements and he could make no comments. Mr Gardener added:

> "And any way it would be improper to do so because the time to challenge the statements would be at the trial and we are not making any comments in relation to the statements at this time, their truth or otherwise because that will be the subject of a court hearing in due course and we cannot comment."

Their clients had simply instructed them to make a statement protesting their innocence of the charges and their continuing loyalty to the Government.

On the basis of the statement and interview the appellants were charged as follows: that they did

> "Wrongfully and unlawfully in the course of a press conference called by them utter the words set out in the annexures marked as 'A' and 'B' [which were a copy of the statement and a transcript of the ensuing question and answer session] for publication to international news media, with intent to impair the dignity, repute or authority of

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a judicial body or to interfere with the administration of Justice in the matters of the State v Peter Richard Briscoe and Hugh Slatter matters pending before it, and did thereby commit the crime of Contempt of Court."

The case for the State rested on the production of the annexures "A" and "B". Both appellants gave evidence.

Mr Hartmann stated that he did have grave private doubts as to the future treatment which his clients might receive, though he did not think that anything might have been served by airing the possibility that the mere statement might itself have been effective. His evidence conveys the impression that this was one of the purposes of the statement. He insisted that though two facts were mentioned at the press conference, namely that their clients had been tortured and that their clients had made statements; these facts were specifically severed the one from the other. They had not said that the statements had been made because of the duress. He pointed out that the legal challenge they planned to make on behalf of their clients was with respect to the confirmation proceedings and not with regard to the statements.

Mr Gardener stated positively that his intention in calling the conference was to prevent a further recurrence of the kind of behaviour which had been perpetrated on their clients and to avoid the possibility of the same behaviour being meted out to other suspects who were then under arrest or were likely to be arrested. The clients also wanted a public affirmation of their side of the story as the Press had already published reports of their arrest and allegations relating to that arrest. He agreed that by the time of the Press conference torture had stopped. Their clients had, however, expressed the gravest worry and concern that they would be removed from prison by their interrogators and subjected again to torture and undue harrassment. Mr Hartmann and himself had sought assurances from the Director of Prisons that their clients would not be removed from prison without his knowledge. Because of this he had no reason to fear that his clients would not be properly looked after in future.

He stated that his observations corroborated his clients' allegations and his evidence concluded with the statement that, if he gave that evidence - ie evidence of the use of physical and psychological torture on his clients - and he was believed, he would sincerely hope that the Court would not accept those statements.

GEORGES CJ

Having reviewed the evidence the trial magistrate concluded, correctly in my view, that the statement and answers dealt with three matters - (1) allegations of intensive and prolonged interrogation and extreme duress, including the use of torture; (2) the fact that their clients had made statements which had been confirmed in Court without the appellants being present to represent them; and (3) protestations of the innocence of their clients. He concluded also, again in my view correctly, that these three areas were inter-locked and could not be dealt with in isolation.

The trial magistrate then considered the elements of the offence with which the appellants were charged. He concluded after referring to Hunt, *South African Criminal Law and Procedure - Common Law Crimes* 2 ed Vol II at p 199, that proof of actual prejudice was not required. All that was required was proof that the publication should tend to interfere with or prejudice the

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administration of justice and that in the application of that test it mattered not that the publication was most unlikely to influence the Judge who was to conduct the trial. There is clear support for that approach in the case of *S v van Niekerk* 1972 (3) SA 711 (AD) at 724H, to which the trial magistrate referred. He was satisfied that the statements made by the appellants tended to prejudice or to interfere with the administration of justice on the basis that of the facts contained in the statement were accepted by the tribunal hearing the case they would tend to influence the tribunal.

The trial magistrate then considered whether the requisite intent had been proved. Again referring to Hunt *op cit* at p 189, he concluded that it was sufficient if the appellants subjectively foresaw that their acts would be a contempt of Court and were reckless as to the result. He found that the appellants were trained lawyers well aware that their clients were on remand and well aware that their clients would shortly be appearing in Court when there would be ample opportunity to complain about their treatment. Indeed, the appellants had already initiated legal proceedings to challenge the confirmation of the statements. He held accordingly that the appellants should have foreseen that these statements may have interfered with the administration of justice and, despite this, persisted in making them. He considered and rejected a submission that the circumstances under which the statements were made rendered them lawful on the grounds of vital public importance. In the result he convicted the appellants and imposed a fine of $100.

The heads of argument filed on behalf of the appellants accepted that

constructive intent sufficed for a conviction for contempt of court but contended that the three requisites for establishing such an intent had not been established.

When the matter came up for argument the Court requested further heads of argument as to whether the test laid down in *S v Van Niekerk supra* is correct.

In response to this request additional heads were filed on behalf of the appellants contending that that test is wrong. The State in reply accepted that the test is wrong but contended that on application of the correct test the convictions could still be supported.

Although both sides agree that the test in *S v Van Niekerk supra* is wrong and should not be used, it is proper to examine the argument with care. No decided cases in this jurisdiction on the principles applicable in the area of contempt of court were cited in argument. English and South African cases were analysed and there was some discussion of the *Sunday Times* Case in the European Court of Human Rights. The South African law of contempt of court has itself been significantly influenced by decisions of the English courts.

It seems to me important to bear in mind that the Constitution of Zimbabwe now contains a Declaration of Rights which specifically protects freedom of expression. Section 20 (1) reads:

> "Except with his own consent, or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and import ideas and information

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without interference and freedom from interference with his correspondence."

Subsection 20(2)(b)(iii) sets out a relevant reservation:

"Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision -

(b) for the purpose of -

(iii) maintaining the authority and independence of the courts or tribunals, the Senate and the House of Assembly."

It is permissible therefore to make an inroad into the protected right of freedom of speech in order to maintain the authority and independence of the courts, but that inroad should not be wider or deeper than is required for the achievement of the declared objective.

Reviewing the authorities in *S v Van Niekerk supra* OGILVIE THOMPSON

GEORGES CJ

CJ concluded at 723 that in non-jury trials English courts adopt a less strict attitude towards contempt than that which had been adopted in the Courts of South Africa. In both jurisdictions it is clear that the actual effect which the publication might have on the tribunal is not relevant. In *Tennant & Anor v Bisset & Anor* 1932 CPD 124 WATERMEYER AJP stated at 126:

"In England there are cases which seem to lay down the rule that any publication commenting upon pending proceedings is a contempt of Court and Courts in South Africa have on a number of occasions adopted the English rule... I am not however prepared to hold that any public comment upon a pending civil suit would constitute contempt of Court; it seems to me that the comment must be of such a nature that it tends to interfere with the administration of justice."

In that case the publication had discussed the merits of a pending civil dispute and had abused one of the parties and accused that party of conduct which was legally and morally wrong. The Court held that a publication of such a nature had always been regarded as a contempt of Court. Abuse of a party was likely to cause prejudice. The judge stated:

"In criminal matters it might affect the minds of the jury; in civil matters it might deter a plaintiff from proceeding or induce a defendant to compromise. In all cases it might affect the willingness of witnesses to come forward with evidence."

In *In re Norrie v Consani* 1932 CPD 313 the test of tending to interfere with the administration of justice was accepted. In that case what amounted to a character reference in favour of a witness whose credibility had been attacked in a suit then in the course of being heard was published. Matters not mentioned at the hearing were included. Having adopted the tendency test, GARDINER JP added:

"It is contended, and rightly so, that the Judge would not be influenced by this letter even if it came to his notice. But it seems to me that one cannot enquire in each case whether the document would or would not be likely to influence the Judge's mind. The question to my mind, is this, if the facts set forth in the document were accepted by the tribunal would this influence the case."

These cases were all reviewed in *S v van Niekerk supra* and the conclusion reached that the

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proper test was:

> ". . . whether the statement or documents in issue tends to prejudice or interfere with the administration of justice in a pending proceeding."

I am satisfied that this test would make too great an inroad into the right of freedom of expression set out in the Declaration of Rights - more so if understood as meaning as GARDINER JP stated in *Norrie v Consani supra* that the question is whether, if the facts set forth in the statement were accepted as true, they would influence the case. Courts of justice can certainly be credited with being somewhat more critical than to ac-

GEORGES CJ

cept as true whatever may appear in periodical publications (see generally, Professor Dugard's pungent criticism of the 'tendency test' in South African Law Journal Vol 89 (1972) at pp 278-280).

The change in approach of the English Courts is illustrated clearly in two cases - *Delbert Evans v Davies and Watson* [1945] 2 All ER 167 and *R* v *Duffy* [1960] 2 All ER 891.

In *Delbert Evans supra* an article had appeared vilifying an accused person who had been convicted but was in the course of appealing against conviction on grounds of law to the Court of Criminal Appeal. HUMPHREYS J (with whom OLIVER J concurred) put the matter thus at 171H-172A:

> "I think it is a fallacy to assume that the only object of punishment for contempt of court in a criminal case is to prevent a juror from reading matter which he ought not to know anything about, that is, a juror who is a particular person. There is the judge to be considered, and while I am not saying for a moment that any person sitting in a judicial capacity, who may, be it remembered, not be a High Court judge at all, but a chairman of quarter sessions, who may or may not be a lawyer, or a recorder, or may of course be one of the judges of the Kings Bench Division, would be affected. I think it is a fallacy to say or to assume that the presiding judge is a person who cannot be affected by outside information. He is a human being, and while I am not saying for a moment that it is likely that any judge would give a decision which he would not have given but for information which had been improperly conveyed to him, it is embarrassing to the judge that he should be told matters that he would rather not hear and which make it much more difficult for him to do what is his duty . . "

In *R v Duffy, supra*, parts of this passage were quoted by LORD PARKER CJ who commented at 896 E-F: -

> "It is by no means clear what the judges in that case intended to convey by the word 'embarrassed'. If, in its context, the word means no more than this, namely, that the article had put on the judge, quite unnecessarily, the task of dismissing the offending matter from his mind, then we think that the dicta we quoted go too far. Embarrassment which has no effect on impartiality is not necessarily contempt of court. The question always is whether a judge would be so influenced by the article that his impartiality might well be consciously, or even unconsciously, affected. In other words, was there a real risk, as opposed to a remote possibility, that the article was calculated to prejudice a fair hearing?"

This "real risk" test was also applied by BUCKLEY J in *Vine Products Ltd & Ors v Mackenzie & Co Ltd & Ors* [1965] 3 All ER 58. In that case the offending article had discussed in detail the issues in a pending action in Chancery in which a declaration was being sought that the plaintiffs were entitled to describe their product as "British sherry" and that the word "sherry"

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should not be understood as meaning only a particular type of wine produced in Jerez, Spain. The learned judge quoted the views

GEORGES CJ

of COTTON LJ in *Hunt v Clark* (1889) 58 LJ QB 490 to the effect that any discussion in a paper of the rights of a case on the evidence to be given could be a very serious attempt to interfere with the administration of justice and commented at 63E-H:

> "I think, however, that it must be remembered that the case in which that was said, was one dealing with comment on an action which was to be tried by a jury...
>
> I do not think that it is right to take that statement out of its context and say that anything which happens to amount to or be equivalent to a discussion of the rights of some party's case in an action is thereby automatically a contempt, even if only a technical contempt. The test must always be in my judgment, whether or not, in the circumstances of the particular case what has happened is something which is likely to prejudice the fair trial of the action and the risk that it will prejudice the fair trial of the action must be a real risk."

The same test was applied by the Divisional Court of the Queens Bench in *Attorney-General v Times Newspapers Limited* [1972] 3 All ER 1136 at 1145a and in the associated case of *Attorney-General v Weekend Television* [1972] 3 All ER 1146 at 1149h-1150a. The first mentioned case went on appeal where the view was taken that there must be a real or substantial risk of interference with the due administration of justice (see [1973] 1 All ER 815 at 822a). In the further appeal, however, the House of Lords unanimously adopted the concept of a technical contempt ([1973] 3 All ER 54). That decision was in turn disapproved of by the European Court of Human Rights (1979) 2 EHRR 245. And it did not find favour with the Phillimore Committee whose report led to the passing of the Contempt of Court Act 1981. Under the provisions of that Act the "real risk" test now governs this aspect of the law of contempt of court in England.

I am satisfied that this is the proper test to be applied in deciding whether or not a publication is a contempt of court. It must be examined objectively to determine whether there can be said to be a real risk that it was likely to prejudice the fair trial of the action discussed.

As has been mentioned the trial magistrate found that the statement and the ensuing press conference dealt with three matters - allegations of intensive and prolonged interrogation and extreme duress including the use of torture; the fact that statements had been made by the appellant's clients which had been confirmed in Court without the appellants being present to represent them; and protestations of their clients' innocence.

The charges on which the appellants' clients were to be prosecuted would have been heard by a judge of the High Court and two assessors. The admissibility of the statements made by the appellants' clients would have

GEORGES CJ

been a matter of law to be determined by the judge alone. No details were given of the evidence

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to be led to establish the allegation of duress including the use of torture. It seems to me highly unlikely that a judge of the High Court or the assessors sitting with him would be so influenced by the making of such allegations as to create a real risk that the trial of the cases would be prejudiced. Indeed I do not understand Mr *Chambakare* so to argue. The allegations in my view could not possibly affect the attitude of the Attorney-General in deciding whether or not he should proceed with the prosecution nor could it affect the willingness of witnesses for the State or for the defence in coming forward to testify.

Mr *Chambakare's* argument, as I understand it, was that the publication of the statement and interview might have led to a response denying the allegations there made so that in the event "trial by newspaper" could have resulted. This appears to be speculation. There is nothing on the record to support the contention. Indeed when one bears in mind that the conduct of the prosecution was in the hands of the Attorney-General it seems unlikely in the extreme that any steps would have been taken to respond to what had been said. In any event it seems to me not a proper approach to determine whether there is a real risk that a publication will interfere with the due administration of justice by attempting to forecast the responses it could provoke from other persons.

I am accordingly satisfied that applying the test formulated there was no real risk that anything said by the appellants was likely to interfere with the due administration of justice. For that reason the appeal must be allowed and the need does not arise to discuss the issue of intent originally canvassed.

I would wish to end on a note of caution. This judgment has been concerned with defining the extent to which the protected right of freedom of speech must be limited to ensure the due administration of justice. The limits have been narrowly defined. Conduct which is legally permissible may, however, be neither wise nor judicious, as many a lawyer in the course of his practice will have advised his clients. Nothing in this judgment should therefore be taken as casting any doubt on the wisdom of the well-established and long-established custom of lawyers not to discuss in public outside the courts matters concerning cases in which they are involved. This restraint serves as a useful model to others less knowledgeable or less concerned with the limits of the legally permissible and is in keeping with the spirit which has imbued the practice of the profession and has

earned for the administration of justice such respect as it enjoys.

Beck JA: I agree.

Gubbay JA: I agree.

Atherstone & Cook, appellant's legal representatives.

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MANYIKA v MANYIKA 1983 (2) ZLR 198 (HC)

Court **High Court, Harare**

Squires J

15 & 21 September 1983

Flynote

Statutes - Justices of the Peace and Commissioners of Oaths (General) Regulations, 1975 - s 2(1) - matter in which he has any "interest" - meaning of - effect of attestation by disqualifed Commissioner of Oaths.

Headnote

The applicant's legal practitioner, a professional assistant in a firm of legal practitioners, attested the affidavits made in support of her motion, as well as appearing for the applicant in court. The question arose whether she had an "interest" in the matter and was, by virtue of the provisions of s 2(1) of the Justices of the Peace and Commissioners of Oaths (General) Regulations, 1975 (RGN 1205 of 1975) precluded from attesting the affidavits. The second question to be decided was the effect of attestation by a disqualified commissioner.

Held, that the "interest" that excludes a Commissioner of Oaths from attesting an affidavit is some participation in those proceedings as to advantage or responsibility. A legal practitioner, even if acting *pro amico* or *Pro Deo*, has an interest in any matter in which he is professionally involved. The reason for the rule is, historically, that it is the duty of a Commissioner of Oaths, before he administers the oath, to satisfy himself that the witness thoroughly understands what he is about to swear to and this duty is not likely to be effectively discharged by the person who prepared the affidavit, who may well explain it in the sense he himself attached to it.

Held, further, that attestation by a disqualified Commissioner of Oaths made the affidavits invalid and meant, in this case, that there was no basis on which the applicant could proceed.

Cases cited:

Tambay & Others v Hawa & Others 1946 CPD 866;

Royal Hotel (Dundee) & Others v Liquor Licensing Board 1966(2) SA 661 (N);

Bowke v Davis (1899) 44 Ch 110;

Foster v Harvey (1863) 2 NR 443;

Tombs v Tombs 1939 SR 205;

Jones v Jones 1938 SR 117;

Louw v Riekert 1957 (3) SA 106 (T);

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SQUIRES J

The Master v Benjamin NO 1955 (4) SA 14(T).

F Ziumbe, for the applicant

G M Chirimuuta, for the respondent

Judgment

Squires J: This is an application by the estranged wife in a married couple for maintenance *pendente lite*, and a contribution towards the costs of the divorce action she has presently launched. The papers in the case reveal, however, a procedural problem of considerable potential difficulty; and since it involves a matter of practice - which daily experience indicates is not uncommon in this jurisdiction - it is perhaps as well that this aspect be dealt with first.

The affidavits in support of the applicant's notice of motion were attested by her legal practitioner, who, apart from attesting these also, argued the applicant's case at the hearing and, it seems, has acted for the applicant throughout. Section 2(1) of the Justices of Peace and Commissioners of Oaths (General) Regulations, published in RGN 1205 of 1975, provides:

> "No justice of the peace of commissioner of oaths shall attest any affidavit relating to a matter in which he has any interest."

Subsection (2) lists a number of exemptions from this provision, but none of these are applicable to the present case. By way of further description of the ambit of the present difficulty, it should be said that the applicant's legal practitioner who attested the affidavits is not a partner in the firm of legal practitioners who are the applicant's representatives, but only a professional assistant who is obviously paid at least a basic salary for the services she performs.

The first question that arises then is whether such a legal practitioner has an interest in the proceedings within the meaning of s 2 (1) of the Regulations that govern the matter.

Mrs *Ziumbe* sought to justify her attesting of the applicant's affidavits on the basis that she was merely a professional assistant in the employ of the practitioners who were engaged by the applicant, and received only a salary for the services she provided her employers. This salary was not increased or decreased by the work she did in the sense that the fees charged to the applicant were received by the partners in the firm who employed her, and she simply received her salary from the partners each month. She said she therefore had no financial interest in the present proceedings and that this entitled her to attest the affidavits.

I have no doubt whatever that this is too restricted a view of the effect of these Regulations. In the first place, I do not think it correct to say

SQUIRES J

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that a professional assistant has no financial interest in the proceedings he conducts, because if he does not conduct such proceedings there will be no fees paid by the client, and if there are no fees paid by the client there will be no salary for the assistant. So, while the financial interest is less direct than that of a partner, it is nevertheless very tangible and present in the situation of an employee. But, more important, and in the second place, it is not only a financial interest that affects the attesting of oaths in legal proceedings, as Mrs *Ziumbe* seemed to think. The subsection prohibits the attesting of an affidavit in proceedings in which the commissioner of oaths has any interest - financial or other pertinent kind.

I say "pertinent kind" of interest advisedly, because it is clear that the word "interest" has different shades of meaning and can be used in several senses. And, as was considered by HERBSTEIN AJ (as he then was) in *Tambay & Ors v Hawa & Ors* 1946 CPD 866, while it may perhaps be limiting the words too much to say that they cover only a direct financial interest, it is equally clear that they should not be extended to cover every more remote and indirect interest such a social interest, or even such interest as an ordinary non-professional employee of an attorneys' firm may have.

Having regard to the Act and the Regulations, to the legislation which it replaces and the ancestors of such legislation, and to the construction put on the same provision by other Courts, it seems to me beyond argument clear that the interest that here excludes a commissioner of oaths from attesting an affidavit is some participation in those proceedings as to advantage or responsibility. Of course, the Act and its Regulations cover many situations other than proceedings at law. But, so far as litigation and proceedings before a Court are concerned, a commissioner of oaths who cannot attest an affidavit for use in such proceedings would certainly include a legal practitioner or his clerk who might be involved in them. As was put by CANEY J in the judgment in *Royal Hotel (Dundee) & Ors v The Liquor Licencing Board* 1966 (2) SA 661 (N) at 669G-H:

> ". . . it appears to me that, approaching the matter upon a realistic basis, it is not possible to hold that he has not an interest in the matter. An attorney practises his profession for gain; he carries on his practice to make a living, albeit he submits to and is bound by professional rules of conduct. In the course of carrying on his practice, he has an interest to earn fees and in each matter to which he gives attention, that is an interest attributable to him. In addition, and even where he acts *pro Deo* or *pro amico,* he has an interest to improve, increase and consolidate his goodwill, which is a valuable thing; it is to his interest in this respect to bring his client's affairs, whether litigious or otherwise, to a successful conclusion - 'success breeds success.' Not only, consequently, has he these financial interests in any matter in which he is acting, but because it is to his interest to bring his client's affairs to a successful con-

> clusion, he cannot be impartial and unbiased; if he functions as a commissioner of oaths in the matter he is not independent."

In English law, though it was there a rule of evidence, affidavits sworn before a commissioner of oaths who served the attorneys of the litigant, and who intended to use such affidavits, have not been admissible as evidence for over two hundred years. The reason for the rule was stated by KAY J in *Bourke v Davis* (1899) 44 Ch 110 at 126 to be as follows:

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> "The commissioner's duty before he administers the oath is to satisfy himself that the witness does thoroughly understand what he is going to swear to; and he should not be satisfied on this point by any one but the witness himself. For this reason it has been the rule since the time of LORD HARDWICKE that the Court does not accept an affidavit sworn before the solicitor in the cause, nor his clerk, although he may be a commissioner; *Re Hogan*, 3 Atk 813; *Wood v Harpur* 3 Beav 290; *Hopkin v Hopkin* 10 Hare App ii; *Duke of Northumberland v Todd* 7 Ch D 770, 780. The Court requires the security of an independent commissioner, and it is obvious that it ought not to take only the statement of a solicitor in the cause that the witness knows what is in the affidavit."

It has also been stated as a reason for the rule that it could well serve to protect the deponent. In *Foster v Harvey* (1863) 2 NR 443, the Court *a quo* remarked as follows:

> "It naturally fell to the solicitor in the cause to prepare the affidavits; it was the duty of the person who administered the oath to explain the meaning of the affidavit to the witness; and this duty was not likely to be very effectually discharged by the person who prepared the affidavit, who would, of course, explain it in the sense which he himself attached to it."

The same rule which led to these pronouncements is in effect the legislation we have to-day, which has come from English law to South Africa and from thence to this country. That such a prohibition applies to a legal practitioner who attests affidavits in this country in causes which he is conducting, also appears clearly from the two decisions of HUDSON J (as he then was) in *Tombs v Tombs* 1939 SR 205 and *Jones v Jones* 1938 SR 117. The same approach has been applied in South Africa - see, for example, *Louw v Riekert* 1957 (3) SA 106 (T), *The Master v Benjamin NO* 1955 (4) SA 14 (T) and *The Royal Hotel* case, *supra*.

In the result, I have no doubt that the legal practitioner who here acted for the applicant and attested her affidavits in these proceedings, was disqualified from doing so.

That being so, what is the effect of such attestation by a disqualified commissioner of oaths? There is considerable authority, to say

SQUIRES J

the least, that a prohibition couched in a negative form is to be regarded as peremptory rather than directory, particularly when reinforced, as is the case here, by the use of the word "shall" in the prohibition in question. These considerations apply exactly to the words and effect of this Regulation, and as a result the affidavits supporting the applicant's notice of motion must be regarded as invalid.

There is consequently no basis on which I can make the order sought by the applicant. For that reason I have not given any consideration to the merits of her claims nor the respondent's defences, though it may be of some guidance to the parties if I said that on the papers and arguments addressed to me there might have been substance in part of the applicant's claim for maintenance, but there was no proper basis at all laid in the affidavits on which the Court could award the contribution to costs which the applicant sought.

That leaves the question of costs. This has caused me considerable difficulty, for although the applicant cannot succeed that is the result of a technical point raised by the Court which does not affect the merits or demerits of the application. It is true that Mr *Chirimuuta* said he had intended to rely on the argument, but if that is the intention of the party in a situation like this, I

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think notice should be given beforehand to the other side so that re-attestation of the affidavits can be effected, if necessary. But I think legal practioners who are commissioners of oaths should bear in mind the consequences of a disregard of the applicable Regulations where it might result in extra costs for a litigant. In the cases of *Tombs* and *Jones* referred to earlier, HUDSON J ordered the offending attorney concerned to himself bear the additional costs occasioned by his disregard of his duty as a commissioner of oaths. If these Regulations are carelessly ignored in future, the Court may well have to consider making a similar order as to costs.

In the result, the present application must be dismissed, but there will be no order as to costs.

Scanlen & Holderness, legal practitioners for the applicant.

Chirunda Chihambakwe & Partners, legal practitioners for the respondent.

HOLDT v TRINITY ENGINEERING (PVT) LTD & ANOR 1983 (2) ZLR 203 (HC)

Court **High Court, Harare**

Squires J

15 & 29 September 1983

Flynote

Negotiable instruments - cheque - post-dated cheque negotiated to third party for value in spite of undertaking not to do so - cheque not met on presentation - whether holder in due course entitled to summary judgment - Bills of Exchange Act [Chapter 227] - s 29(2) - "fraud" - meaning of.

Headnote

The plaintiff received for value from one Momsen a post-dated cheque for $30 000 drawn in Momsen's favour by the first defendant. The defendants alleged that the cheque was given to Momsen as security for a loan made by him to them and that he had agreed not to present it for payment. The plaintiff was unaware of this and when he presented the cheque for payment it was dishonored. He accordingly sued for summary judgment in the sum of $30 000.

Held, that if the defendant's claim were true - that Momsen had given an undertaking not to negotiate the cheque - that this would have been an improper dealing with it and therefore a "fraud" within the meaning of s 29(2) of the Bills of Exchange Act [*Chapter 277*]. In that event, the burden of proof would, in terms of the subsection, shift to the claimant who would have to show that he gave value for the cheque in good faith, after the alleged fraud took place.

Cases cited:

Ben Baron & Partners v Henderson 1958 R & N 542; 1958 (4) SA 270 (SR).

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M T O'Meara, for the plaintiff

C L Mercer, for the defendants

Judgment

Squires J: The facts of this case as gleaned from the pleadings and affidavits are as follows.

The first defendant is a company whose business - for present purposes, anyway - is the manufacture or assembly of vehicle trailers; and the second defendant is either the managing director or the holder of some equivalent executive post in it.

SQUIRES J

In or about the middle of May 1983 the defendants were apparently approached by one Momsen to supply him with a quantity of trailers for resale. The first defendant was unable to accept the order since it did not have the cash resources to obtain the raw materials for the quantity of trailers required. According to the defendants, Momsen then suggested that in order to meet this difficulty he would lend the first defendant $30 000, which would be sufficient to manufacture eight of the trailers he ordered. One assumes that this order would thereafter be enough to generate sufficient profit for the first defendant to obtain further materials from its own resources. However that may be, it was further suggested by Momsen, again according to the defendants, that as security for this loan the first defendant provide him with a post-dated cheque in a sum which would include interest on the capital amount lent at the prevailing bank rate.

A cheque for $33 000 was therefore drawn by the first defendant on the signature of the second defendant and post-dated to the 4th July 1983. It was also specifically endorsed, at Momsen's request, by the second defendant as surety and co-principal debtor. It was further agreed that any adjustments up or down on the score of interest would be settled when it was known more precisely what was owed to the lender for that reason - the defendants further claiming that repayment by 4 July was also a flexible arrangement.

It is the defendants' case that Momsen specifically agreed that he would not present the cheque for payment at all but would merely hold it by way of security against the possibility of default by the defendants in repaying the loan. Both parties were confident, on this version of the facts, that buyers for the trailers would readily be found, and the indebtedness repaid within a short while.

As a matter of further historical narrative, it remains to say that on or about 15 June the cheque was negotiated to the plaintiff by Momsen for value, the plaintiff apparently supplying goods to that value for the cheque. On 21 July the plaintiff presented the cheque for payment, when it was dishonoured and marked with the fateful words "Refer to drawer". The plaintiff thereupon issued summons against the defendants, claiming payment of the sum due on the face of the cheque. Though not clearly alleged until he provided further particulars to his claim, it was apparent eventually that the plaintiff seeks judgment on the basis that he is a holder in due

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course of the instrument in question - it being complete and regular

SQUIRES J

on the face of it, and alleged to have been taken in good faith and for value before it was overdue, and without notice of any defect in the title of Momsen. The defendants entered appearance to defend the claim and requested a number of further particulars to the claim annexed to the summons. This request was duly replied to, and a request for further and better particulars was also made. But, before answering this second request, the plaintiff gave notice of his intention to apply for summary judgment, and these proceedings are that application.

The essential dispute seems to lie within a narrow compass. It is accepted by Mr *Mercer*, who appeared for the defendant, and correctly accepted in my view, that if the plaintiff establishes that he is the holder in due course of the cheque in question, then he would be entitled to summary judgment in the sum due on the face of it. But, by operation of s 29(2) of the Bills of Exchange Act [*Chapter 277*], Mr *Mercer* argued that if there was evidence to suggest that the acceptance, issue or negotiation of a bill was affected by fraud, then the burden of proof otherwise discharged by section 29(2), shifted to the claimant; and that the claimant then had to show that he gave value for the cheque in good faith, after the alleged fraud took place.

In the circumstances of the present case Mr *Mercer* argued that breach of his undertaking by Momsen not to negotiate the cheque amounted to fraud which affected its negotiation; and, as in the case of *Ben Baron & Partners v Henderson* 1958 R & N 542, this could prevent the plaintiff from succeeding and, in any event, was sufficient to preclude any question of summary judgment being entered for the plaintiff since the defendants had at least raised a triable issue. Apart from that aspect, it was argued that the plaintiff's difficulty was compounded by its replies to the first request for further particulars, because on those allegations it was not clear that value in good faith for the bill was not given subsequent to the alleged fraud. It might conceivably have been given before.

The main question then is whether, if the defendants' allegation is true, Momsen's negotiating of the cheque to plaintiff in breach of his alleged undertaking that he would simply hold it as his own security for repayment of his loan, can be said to amount to fraud for purposes of s 29(2). Upon the fullest reflection I can give to the problem, I think it can at least arguably be said that it does.

For if defendants' allegation is true, then in negotiating this cheque Momsen at least impliedly represented to the plaintiff not only that he

SQUIRES J

had good title to the cheque but that he was acting within his rights in negotiating it. That would be a material representation, and if the defendants' version of events is correct, it was a false representation by Momsen and one that was obviously acted on by the plaintiff. Moreover, it was a representation which caused at least potential prejudice to both the plaintiff and the

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defendants. Those facts can be said to constitute a fraud. But, in any event, as was pointed out by BEADLE J (as he then was) in the *Ben Baron & Partners v Henderson* case at 552*,* there need not have been fraud on either of the other parties*.* It is enough if, in the words of the subsection, the negotiation of the cheque is "affected with fraud". That simply means that fraud need be shown only in connection with the bill before it reached the holder's hands.

Moreover, I think Mr *Mercer* is also correct when he says that the word "fraud" here is of a wide implication. Willis, in his *Law of Negotiable Securities* at p144, describes any "improper dealing" with the cheque in any of these transactions, as being sufficient to attract the consequences provided by the Act. That view of the matter seems to me to be borne out by the language of s 28(2) of the Act, which makes it clear that the title of a person who negotiates a bill is defective within the meaning of the Act, amongst other situations, when he negotiates it in breach of faith. If the payee here did negotiate this bill notwithstanding a promise not to do so, then it could well affect the validity of the claim by the plaintiff to be a holder in due course.

If such a possibility is arguable, then the *onus* might shift back to the plaintiff to establish his claim to be a holder in due course. To re-establish this status, he has then to prove that he gave value in good faith for the bill after this alleged fraud by the payee. On the facts presently before me, it is not clear that he did so. While he says the cheque was negotiated to him on or about 15 June 1983, the goods delivered to Momsen as value therefore were only delivered "... in or about June 1983". That is vague enough to be before or after the 15th.

In my view, in the result, the defendants have raised a triable issue in these proceedings and, that being so, the application for summary judgment cannot succeed.

So far as the costs of the application are concerned, however, it is important to bear in mind that the point raised by Mr *Mercer* was not the defence adverted to in the defendants' affidavit in which they gave notice of opposition to the application. The argument put forward by Mr *Mercer*

was, apparently, only advised to the plaintiff shortly before this hearing, and before he had time to consider the implications. Moreover, the factual basis upon which the defendants' claim rests may not be established at any trial of the matter since there may well be an issue of credibility which may not be resolved in the defendants' favour.

In the circumstances, I think the fairest order would be to order that the costs of this application are to be costs in the cause. If the defendants' contentions are vindicated, they will not have to pay the costs of these proceedings; but if they do not establish their claim, then they will have to pay them; and it would be right that they do so because their defence should not have succeeded.

The application for summary judgment is therefore dismissed but the costs of the application will be costs in the cause.

Byron Venturas & Travlos, legal practitioners for the plaintiff

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Gollop & Blank, legal practitioners for the defendant.

NOTT v ZIMBABWE AFRICAN NATIONAL UNION (PATRIOTIC FRONT) 1983 (2) ZLR 208 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

12 September & 18 October 1983

Flynote

Delict - vicarious liability for delicts committed by servant - servant having embarked on conduct within his duty deviating from such course - when deviation such that servant can be said to have acted outside course of employment.

Headnote

The appellant's motor vehicle was involved in a collision with a vehicle driven by one Maburutse. The collision was admittedly due to the negligence of Maburutse and the quantum of damages was agreed. Maburutse was at the time a servant of the respondent political party. He and the vehicle had been put at the disposal of one Matanga, at the time a member of the ZANLA High Command. On the morning of the accident, a man staying with Matanga was injured and Matanga gave Maburutse permission to take him to a clinic some 4 km away. He also told Maburutse to fetch a lawnmower from a garage near the clinic on the way back. Maburutse was told to return quickly, as the vehicle was needed by Matanga to go to Mutoko. Maburutse went off with the injured man and collected the lawnmower on the way to the clinic. On the way back from the clinic Maburutse deviated to collect some personal papers. This excursion added some 7-8 km to the return journey, and during it the collision occurred. The question was whether this deviation was of such a nature that when the collision happened Maburutse was no longer driving the vehicle in the course of his employment.

Held, that no rigid test can be formulated for satisfactorily determining in all situations whether a servant has, or has not, stepped outside the course of his employment. The decided cases stress that it is the degree of the servant's deviation from the execution of his master's work or, conversely, the degree of his retention of the execution of his master's work that is the determining factor. One formula has been whether the deviation is of such a character as not to have been reasonably foreseeable; another is whether it leads to the conclusion that the servant had completely divested himself of his functions as a servant. A third is whether the servants' digression is so great in respect of space and time that it cannot reasonably be held that he is still exercising the functions to which he was appointed.

BECK JA

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Held, further, that in the instant case - though not necessarily in all cases - considerations of space and time would be the best touchstone. The deviation Maburutse took did not seriously interfere with the exercise of his functions and could not be considered major in respect of time. Accordingly, it was not such as to lead to the conclusion that he had abandoned his master's work.

Cases cited:

South British Insurance Co v du Toit 1952 SR 239; 1952 (4) SA 313;

Mkize v Martens 1914 AD 382;

Feldman (Pty) Ltd v Mall 1945 AD 556;

Union Government v Hawkins 1944 AD 556;

African Guarantee & Indemnity Co Ltd v Minister of Justice 1989 (2) SA 437 (AD).

I A Donovan, for the appellant

J B Colegrave, for the respondent

Judgment

Beck JA: This is an appeal against a judgment of absolution from the instance in an action brought in the High Court by the appellant against the respondent for damages. The claim arose from the destruction of the appellant's motor-car in a collision with a vehicle driven by one Benjamin Maburutse. It is common cause that the collision was caused by Maburutse's negligence, and that the *quantum* of the appellant's damages is $3 660. It is also common cause that on 20 January 1981, the date when the collision occurred, Maburutse was a servant of the respondent, employed to drive the vehicle that collided with the appellant's car. What is disputed is whether Maburutse was acting within the course of his employment at the moment of the collision, so as to make the respondent vicariously liable to the appellant for the consequences of Maburutse's negligence.

The relevant facts are not in dispute and are the following: the vehicle in question, and the services of Maburutse as its driver, had been put by the respondent at the disposal of Comrade (now Brigadier) Matanga, who was then a member of the ZANLA High Command. Maburutse was accommodated at Brigadier Matanga's house in Northwood where the vehicle was kept, and he was to obey the Brigadier. On the morning of 20 January 1981, a man called Bogasi injured his leg and Brigadier Matanga gave Maburutse permission to drive Bogasi to the Mount Pleasant Clinic, some four kilometers away, for treatment. It is not clear just who Bogasi was, but he was described as a "colleague" of Maburutse's and it seems likely that he was one of three young men to whom Brigadier Matanga referred as having been part of his staff at that time. Brigadier Matanga also instructed Maburutse to collect, on his way back from the clinic, a lawnmower of which the respondent had the use and which had been sent for repair to a garage not very far from the clinic. Maburutse was also told

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to return "chop chop" - meaning, presumably, without unnecessary delay - because Brigadier Matanga needed the vehicle for a journey to Mutoko. Maburutse drove to the clinic with Bogasi, both men taking AK rifles with them which was said to be the normal thing for them to do while they were on duty, and they collected the lawn-mower on the way to the clinic. As soon as Bogasi had been treated, Maburutse, instead of driving back to Northwood by the shortest route, decided to return via a house in Marlborough in order to collect some papers there that he needed for his own personal purposes. This would have added seven or eight kilometres to the return journey, but while on his way to the house in Marlborough at which he wished to call, Maburutse negligently caused the accident that gave rise to these proceedings.

The approach of the learned judge in the Court *a quo* was that the whole journey to the clinic and back, from start to finish, lay outside the course of Maburutse's employment. However, both counsel were agreed, correctly in my view, that the evidence established that the journey to the clinic and back, with such detour and was necessary in order to collect the lawn-mower, was indeed a journey undertaken by Maburutse in the course of his employment, so that the sole issue for decision is whether the deviation to Marlborough for Maburutse's personal ends was of such a nature that it should be held that when the collision happened Maburutse was no longer driving the vehicle in the course of his employment.

The doctrine of vicarious liability of a master for such delictual acts of his servant as are committed in the course of the servant's employment is part of our law. In *South British Insurance Company v Du Toit* 1952 SR 239; 1952 (4) SA 313 (SR) TREDGOLD CJ, at 315 G-H, accepted that "The general principle upon which the liability of a master for the delicts of his servants" is, as was stated in *Mkize v Martens* 1914 AD 382 at 390,

> "... that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment. Such an act cannot be said to have taken place 'in the exercise of the functions to which he (the servant) is appointed.' "

The application of that general principle to the facts in the *South British Insurance Company* case, *supra*, gave rise to no difficulty. The servant negligently caused loss to the plaintiff while making an unauthorised use of the master's premises for a purpose - possibly illicit - that was entirely his own, and he was in no sense whatsoever exercising the functions

to which he was appointed in doing so. Accordingly the learned CHIEF JUSTICE had no hesitation in holding that the servant had not acted in the course of his employment.

It can on occasion, however, be a nice question as to whether a servant has acted in the course of his employment when, having embarked on conduct which it is within his province as a servant to perform in the furtherance of his master's affairs, he has, for purposes of his own, deviated from what he set out to do and, in the course of such deviation, has committed the delictual act that has damnified the plaintiff. There appear to be no reported decisions in which

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our own courts have considered situations of that sort, but the problem has engaged the attention of the South African Appellate Division from time to time, as well as the courts of countries with common law jurisdictions which recognise the doctrine of vacarious liability of a master for such delictual act of his servant as are committed in the course of the servant's employment. While on the one hand considerations of public policy and social justice favour the doctrine and militate against attempts to confine its operation within too narrow a compass, on the other hand it is usually contrary to legal principle to visit liability on a party who was not himself at fault in relation to the injury suffered. In view of the opposing influences of these considerations it is not surprising that a flexible approach has been adopted towards the question of what is, and what is not, an act done by a servant "in the course of his employment". That question is perhaps not entirely a question of fact only (as Atiyah, *Vicarious Liability,* p 179, points out), but it is largely so, and since facts can assume an infinite variety of combinations flexibility of approach is essential. No rigid test can be formulated for satisfactorily determining in all situations whether a servant has, or has not, stepped outside the course of his employment.

The leading South African decision in which extensive consideration was given to the problem that is presented by the servant's delictual act committed when he has diverted from the immediate furtherance of his master's affairs; is the case of *Feldman (Pty) Ltd v Mall* 1945 AD 733. Two of the judgments in that case stress that it is the degree of the servant's deviation from the execution of his master's work, or, looked at conversely, the degree of the servant's retention of his master's work, that is the determining factor. WATERMEYER CJ at 742 said:

> "If he does not abandon his master's work entirely but continues partially to do it and at the same time to devote his attention to his own affairs, then the master is legally responsible for harm caused to a third party which may fairly, in a substantial degree, be attributed to an improper execution by the servant of his master's work,

BECK JA

> and not entirely to an improper management by the servant of his own affairs."

TINDALL JA put the matter this way at 756:

> "In my view the test to be applied is whether the circumstances of the particular case show that the servant's digression is so great in respect of space and time it cannot reasonably be held that he is still exercising the functions to which he was appointed; if this is the case the master is not liable. It seems to me not practicable to formulate the test in more precise terms; I can see no escape from the conclusion that ultimately the question resolves itself into one of degree and in each particular case a matter of degree will determine whether the servant can be said to have ceased to exercise the functions to which he was appointed."

In the earlier case of *Union Government v Hawkins* 1944 AD 556 the South African Appellate Division had adopted the same approach. In a judgment in which all concurred, CENTLIVRES JA (as he then was) said at 563:

> "Even when a servant makes a deviation solely for his own purposes the master may remain liable for any negligence committed by the servant while he is on that deviation. In each case it is a question of degree..."

The learned judge went on to discuss the extent of the particular deviation under consideration and concluded this passage in his judgment by saying that the deviation "was not such a

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complete relinquishment or abandonment of his master's business in favour of some activity of his own as to relieve his master from liability for any damages caused by the negligent driving".

DAVIS AJA, at 784 of *Feldman's* case, *supra*, was also of the view that the degree of the deviation is a determining factor, but only "for the purpose of determining its character. The master is liable whenever that deviation is one which is of such a character as to be a natural or likely consequence of his employment of the servant". The learned judge explained that what he meant by this was that the "deviation from the scope of his employment must be of such a character that it might reasonably have been foreseen". A somewhat similar test appears to be proposed by Atiyah, *op cit,* at 183. Contending that the decisions of English courts are not always easy to reconcile with the much quoted and favoured test propounded by Salmond that "a master . . . is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them", Atiyah suggests that it would be preferable to hold as a principle of substantive law that, for a master to be vicariously liable, there must be "a substantial risk that, in doing what he has been authorised to do, the servant will commit torts of the kind

BECK JA

which he has in fact committed". The judgment of DAVIS AJA to which I have referred, may well have provided the source for this suggestion, although that judgment emphasises that it is not the kind of tort that was committed to which the risk must relate, but the character of the deviation in the course of which the tort was committed.

The suggestion did not find favour with GREENBERG JA who discussed and rejected it at 775-6 of *Feldman's* case, *supra.* That distinguished judge, in a judgment in which he dissented from the conclusion of the majority that the master was liable, said, at 780, that "It is therefore a question in each case whether the servant's deviation for his own purposes is of such a degree as to make it a separate journey". In the application of that test he came to a conclusion on the facts that favoured the master.

The assertion that it is the degree of the servant's deviation that lies at the heart of the question of the master's liability is therefore common to all the judgments in *Feldman's* case, *supra.* In conformity with the general trend of English decision up to that time GREENBERG JA adopted an approach which suggested that the degree of variation would not need to be very great in order to take a servant outside the course of his employment. The other judgments required a higher degree of deviation in order that it might be held, in the judgment of DAVIS AJA, to be deviation of such a character as not to have been reasonably foreseeable; or, in the judgments of WATERMEYER CJ and TINDALL JA, to lead to the conclusion that the servant had completely divested himself of his functions as a servant.

In the case of *African Guarantee and Indemnity Co Ltd v Minister of Justice* 1959 (2) SA 437 (AD) the tests enunciated by WATERMEYER CJ and by TINDALL JA were said by RAMSBOTTOM JA to reveal no important differences and were followed. In particular, the reference in TINDALL JA's judgment to the respects of "space and time" when assessing the

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degree of a deviation was considered helpful in relation to the facts of *African Guarantee* case, *supra*, and I think that in relation to the facts of the instant case as well, these considerations of space and time form a useful yardstick by which to assess the degree of Maburutse's deviations from his appointed functions. Indeed, considerations of space and time will in most instances be the respects that will most helpfully indicate whether a servant's deviation is of such a degree as to suffice to exonerate his master from liability, but it should not be thought that considerations of space and time will necessarily be the best touchstones in every case. In the course of his judgment in *Feldman's* case, *supra,* DAVIS AJA, gave

an example, at p 785, where a deviation can be of such a nature that the master might escape liability even though the deviation involves neither space nor time, namely, where -

> "A servant, who is not employed as a chauffeur, is directed to go with a message from A to B by the shortest route and within a given time, decides to use his master's car for the purpose without his master's knowledge or consent and in the course of his journey he is negligent."

In conformity with the approach outlined by WATERMEYER CJ and by TINDALL JA in *Feldman's* case, *supra,* I turn to consider whether the circumstances of Maburutse's deviation from the strict performance of the functions to which he was appointed generally, and on that morning in particular, was of such a degree that it cannot *reasonably* be said that he was still exercising some of those functions when he negligently caused the plaintiff damage. I have stressed the word "reasonably" in order to emphasize that the court should not, in my opinion, adopt an approach to the facts which would tend towards too jealous a restriction of the above-stated principle of the vicarious liability of a master for the conduct of his servant.

The facts of the present case seem to me to show no more than Maburutse, while on an authorised journey, undertook an errand of his own that did not seriously interfere with the exercise of his functions to return the vehicle and the lawn-mower to Brigadier Matanga's house, and to do so with sufficient expedition to enable the Brigadier to proceed to Mutoko without unnecessary delay. Clearly there was a measure of elasticity in respect of the time that might be required to perform the functions that were entrusted to Maburutse that morning, especially in view of the fact that one of those functions was to obtain treatment for Bogasi at a clinic that would, one presumes, have been expected to have other patients in need of treatment as well. The few minutes it would have taken Maburutse to drive an extra seven or eight kilometres to pick up some papers cannot reasonably be considered in the circumstances to have been a major deviation in respect of time from the continuing exercise of his functions. The additional kilometres involved are mainly relevant to the time it would have taken to drive them, and I cannot accept that the deviation was such that it represented what may reasonably be considered to have been so serious a departure from obedience to the instruction to return with the vehicle "chop chop", not forgetting the added injuction to interrupt the return journey by collecting the lawn-mower, as to lead to the conclusion that Maburutse had abandoned his master's work when the accident happened.

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BECK JA

Accordingly it is my conclusion that the appellant succeeded in proving that the accident was negligently caused by Maburutse when he was driving the vehicle in the course of his employment as the respondent's servant. I would therefore allow the appeal with costs and alter the judgment of the Court *a quo* to judgment for the plaintiff in the sum of $3 660 with costs of suit.

Georges CJ: I agree.

Gubbay JA: I agree.

Atherstone & Cook, appellant's legal representatives.

Scanlen & Holderness, respondent's legal representatives.

S v NDEBELE 1983 (2) ZLR 216 (SC)

Court **Supreme Court, Harare**

Georges CJ & Beck JA

12 October & 1 November 1983

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - s105C - confirmation of extra curial statements - not essential to warn accused of proviso to s 242 (1a).

Headnote

When confirming extra-curial statements in terms of s 105C of the Criminal Procedure and Evidence Act [*Chapter 59*], the magistrate must explain to the accused the provisions of s 242 (1a). This section provides that a confession or statement confirmed in terms of s 105C (3) shall be received in evidence before any court upon its mere production by the prosecutor. The proviso provides that the statement shall not be used in evidence if the accused proves that it was not made freely and voluntarily without his having been unduly influenced thereto. However, the accused is not prejudiced if he is not told of the terms of the proviso and it is not necessary to attempt to explain to him that the *onus* of proof would shift to him. It is enough if he knows that the prosecutor's *onus* will have been discharged.

S K M Sibanda, for the appellant

M Werrett, for the respondent

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Judgment

GEORGES CJ: The appellant was charged with two counts of stock theft. It was alleged firstly that during a period extending from 1 November 1982 to 30 November 1982 at or near Loundon Farm he stole 10 head of cattle the property of Ivor Wilkenson, and secondly that on or about 5 December 1982 at the same place he stole 14 head of cattle the property of the said Ivor Wilkenson. He was convicted on both counts. On the first he was sentenced to 3 years' imprisonment with labour and on the second to 4 years' imprisonment with labour. Of the total of 7 years' imprisonment with labour 3 years were suspended for a period of 5 years on condition that he was not again convicted of any offence involving stock theft or dishonesty for which he was sentenced to imprisonment without the option of a fine.

1983 (2) ZLR p217

GEORGES CJ

It appears to be undisputed that the appellant is an employee of one Elif Ndebele who owns a farm called Dunlop Farm which abuts Wilkenson's farm - Loundon - from which the cattle were stolen.

On the first count the only evidence linking the appellant with the alleged offence was a confirmed warned and cautioned statement. At the hearing he challenged this on the ground that he had been forced to make it. On the second count the evidence consisted of a confirmed warned and cautioned statement also challenged on the same ground and the testimony of a fourteen year old boy, Ndaba Sibanda, who gave an eye witness account of the appellant and another man, Alexio Nkomo, driving a number of cattle from Wilkenson's farm towards Elif Ndebele's farm.

Mr *Sibanda,* for the appellant, contended that there was not sufficient evidence, particularly in relation to the first count that 10 head of cattle had been stolen from the Wilkenson farm.

The record shows that Wilkenson, in examination-in-chief, sought to give a historical background to his more recent losses of cattle beginning in 1974. As he reached 1979 the prosecutor interrupted with the remark that all this was not relevant and asked directly:

> "Now according to the docket you specifically had cattle missing in November last year and December last year?"

Wilkenson replied that that was correct. The prosecutor continued:

> "And according to the docket you had - could you just confirm this - you had ten head missing in November and fourteen head missing in December last year?"

To this Mr Wilkenson replied "Yes".

The answer thus came in reply to questions which were flagrantly leading. The appellant was unrepresented and the presiding magistrate should have intervened to prevent such an abuse of proper procedures.

Nonetheless the fact that cattle had been stolen, though by no means admitted, was certainly not challenged. The outline of defence made it clear that the appellant was denying that he was

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in any way involved in any theft which may have taken place. There is every reason to conclude that Wilkenson would have given the very same evidence had he been properly led. Indeed his historical introduction indicates, if anything, his wish to establish the accuracy of his figures in relation to the losses which formed the subject matter of the counts.

I am satisfied, therefore, that there was adequate evidence of the loss alleged in the charge.

GEORGES CJ

As has been mentioned, the appellant's challenged statement was the only evidence linking him with the theft alleged in count 1. The statement reads:

> "I have understood the caution. I do agree to the charge. We drove ten cattle from Loundon Farm. I was with Ali Nkomo. I did this because I was sent by Ndebele the owner of Dunlop Farm where I am residing. At home with these cattle I was again asked to drive them into the vehicle of another man who was said to be from Bulawayo, and they were taken away. Ndebele was also present. That's all."

This statement was confirmed by a magistrate. The form shows that the magistrate drew to the appellant's attention all the information therein set out. The appellant agreed that he had made the statement voluntarily and without being unduly influenced. He said he had no wounds and that no inducements had been held out to him.

The trial magistrate nonetheless held that the confirmation was invalid because the *pro forma*:

> "... makes no mention at all of the important proviso to this section, namely that the accused will have to bear the *onus* of disproving the admissibility of the statement once it has been confirmed."

He stated that -

> "An accused person who has been informed in terms of the *pro forma* will merely know that the warned and cautioned statement will be produced in evidence without the calling of further proof".

He will not know that the *onus* of showing that the statement has not been made freely and voluntarily will have been shifted to him.

The trial magistrate in my view erred in reaching the conclusion that the confirmation proceedings had been invalidated for the reasons given.

Section 105C of the Criminal Procedure and Evidence Act [*Chapter 59*] reads:

> "In an application in terms of subsection (1) - [ie an application for confirmation of a warned and cautioned statement]
>
> (c) the magistrate shall ask the accused whether -
>
> (i) he made the statement; and
>
> (ii) he did so freely and voluntarily without his having been unduly influenced thereto;
>
> and shall explain to him the provisions of subsection (3) and of subsection (1a) of section *two hundred and forty-two.*"

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Section 105C (3) deals with circumstances in which the confession may be confirmed.

GEORGES CJ

Section 242 (1a) reads:

> "A confession or statement confirmed in terms of subsection (3) of section *one hundred and five C* shall be received in evidence before any court upon its mere production by the prosecutor without further proof:
>
> Provided that the confession or statement shall not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without his having been unduly influenced thereto, and if, after the accused has presented his defence to the indictment, summons or charge, the prosecutor considers it necessary to adduce further evidence in relation to the making of such confession or statement, he may re-open his case for that purpose."

The vital effect of s 242(1a) is that of making a confirmed statement admissible on production without further proof. The proviso allows the accused person what may be described as a second bite at the cherry. Even though the statement is received in evidence it will not be used as evidence against the accused if he proves that the statement was not made by him or was not made freely and voluntarily without undue influence. The purpose of bringing an accused person before a magistrate to have his statement confirmed is clearly to afford him an early opportunity to state his objections to having the statement received in evidence. If stress is laid on the right to challenge the statement at the trial the accused may well not appreciate the importance of an early complaint which will prevent the statement being admitted to evidence without further proof. The likelihood is even stronger in cases where the accused may have fears of continued police pressure if he fails to say before the confirming magistrate that the statement was freely and voluntarily made.

As I see it, the opening sentence of s 242(1 a) sets out the maximum disadvantage which the accused person will suffer if he behaves in such a manner as to allow his statement to be confirmed. Once he is aware of that then he is not prejudiced if he is not told that in certain circumstances he may not suffer the maximum disadvantage which is possible.

In any event, it is in my view, unwise to seek to explain the issue to an accused person in terms of shifting the *onus* of proof - a somewhat complex legal concept. A person familiar with the concept who is told that a statement he has made will be admitted on production without further proof will understand that the prosecutor has been relieved of the *onus* of proving it. The confirmation proceedings serve to discharge the prosecutor's burden of proof. The proviso allows the accused person despite this to raise a challenge. The accused is not prejudiced if he is not told of this. It is enough if he knows that the prosecution's *onus* will have been discharged.

GEORGES CJ

Although concluding that the confirmation proceedings were invalid, the trial magistrate held that the statements were admissible because the State had affirmatively established that they had been made freely and voluntarily. Mr *Sibanda* contended that there was enough evidence

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even if the *onus* of proving voluntariness rested on the appellant to establish on the balance of probabilities that the statements were not voluntary. The issue is not free from difficulty.

[His Lordship considered the evidence and concluded:]

I would accordingly hold that on the balance of probabilities the appellant has not established that the statements were not freely and voluntarily given.

An issue was also raised as to whether the appellant could understand and speak Shona. There was abundant evidence that he could. His witness, Alexio Nkomo, stated that the appellant could understand someone who spoke Shona though he doubted whether he could write it. Another witness, Mbewe, stated that when the police arrived at the farm one of them spoke to the appellant in Shona and he replied in Shona.

Once the statements are admitted there is enough evidence to support the conviction of the appellant on both counts. On the second count there is the supporting testimony of Ndaba Sibanda which reads well and which the trial magistrate found to be creditworthy. In one regard - the manner in which the fencing on Loundon Farm was breached to let the cattle through - he is supported by the evidence of Wilkenson as to what he saw in the area. Admittedly the cross-examination of Ndaba Sibanda was cursory. Mr *Sibanda* argued that this was the result of lack of knowledge and experience but it could quite well have been caused by the accuracy of his account which left little room for challenge. The appellant never put directly to the witness that he was lying.

In the result the appeal against conviction on both counts must be dismissed.

On the issue of sentence the trial magistrate appears to have omitted an important consideration - that the appellant was an employee carrying out the instructions of his employer, Elif Ndebele. The confessions make that clear and there was no evidence to the contrary. Indeed there were suggestions that Elif Ndebele had paid $200 to the appellant and Alexio Nkomo for their assistance in the matter. The value of the stolen cattle

GEORGES CJ

was $2 000. Nowhere in the magistrate's remarks on sentence is that important circumstance mentioned and the tenor of his remarks indicate that the magistrate treated the appellant as a principal acting on his own behalf.

Miss *Werrett*, for the State, concedes that in such circumstances are too severe.

Accordingly, the sentences are quashed and the following sentences substituted:

On Count 1 eighteen months' imprisonment with labour: On Count 2 two years' imprisonment with labour; of the total of three-and-a-half years eighteen months are suspended for a period of five years on condition that the appellant is not convicted of any offence involving dishonesty or stock theft committed during the said period for which he is sentenced to imprisonment without the option of a fine.

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Beck JA: I agree

Gwati and Partners, appellant's legal representatives.

S v KANYAMULA 1983 (2) ZLR 222 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

17 October & 8 November 1983

Flynote

Criminal procedure - jurisdiction - accused a foreign national in transit through Harare Airport - in possession of dangerous drugs - subject to jurisdiction of Zimbabwean courts - suspended sentence - accused likely to be deported on completion of his sentence - suspended portion of sentence deleted.

Headnote

The appellant, a citizen and resident of Malawi arrived at Harare Airport at 16:30 on 9 October 1982 intending to catch a flight overseas at 22:55. He was not cleared through customs and immigration as a visitor to Zimbabwe but in a security check at the transit lounge he was found to be in possession of 23.7 kg of dagga. He was arrested, prosecuted under the Dangerous Drugs Act and sentenced to 5 years' imprisonment of which 2 years was suspended on conditions.

He contended on appeal that as a non-resident of Zimbabwe who was merely passing through as a transit passenger he was not subject to the laws of Zimbabwe in relation to the possession of dangerous drugs. He had no intention of dealing with them in Zimbabwe. He contended that his actions would have been detrimental to the peace, security and good order of Zimbabwe only if they caused physical damage to persons or goods or created a nuisance to persons nearby.

Held, that any action which contravenes on Zimbabwe soil laws in force in Zimbabwe is detrimental to the peace, security and good order of the country; and the transit lounge at Harare Airport is as much a part of Zimbabwe as any other part of the country. The laws of Zimbabwe are as applicable there as they are in any other part of the country. Nor was this a case where another authority might claim jurisdiction, as where an offence is committed aboard a foreign-registered vessel.

Held, further, that in view of the massive quantity of dagga and the other circumstances of the offence, an effective sentence of three years' imprisonment was not excessive. However, because the appellant was neither a citizen nor a resident of Zimbabwe and would undoubtedly be deported on completion of his sentence, there was no reason for imposing a suspended sentence as well.

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Cases cited:

Wildenhus Case (1887) 120 US 1.

GEORGES CJ

The appellant in person.

Miss *M Werret*, for the respondent, referred *inter alia* to the following authorities: J G Starke, *Introduction to International Law; Companhia Naviera Vascongado v SS "Christina"* [1938] AC 485; [1938] 1 All ER 719; *R v Vickers* [1975] 2 All ER 945; *The Wildenhus case supra*; *R v Godfrey* [1932] 1 KB 24; [1922] All ER Rep 266.

Judgment

GEORGES CJ: The appellant, a citizen of Malawi, was on 9 October 1982 a transit passenger en route by air from Blantyre, Malawi, to Heathrow, England. He arrived at Harare International Airport at 4.30 pm and was scheduled to leave by a British Airways flight at 22.55. In his appearance before us on appeal the appellant stated that as he was walking towards the transit lounge he was stopped and the contents of two large baskets which he was carrying were examined. The agreed statement of facts tendered at the hearing in the court *a quo* states that the appellant had to go through security checks before boarding the British Airways flight to London and at that time the Security Officer became suspicious of two large baskets he was carrying and examined them.

On examination they were found to contain four parcels wrapped in khaki paper, each containing prepared Indian hemp which had been tightly packed. The hemp weighed 23 700 grams. The appellant was charged with contravening s 9(b) as read with s 19 of the Dangerous Drugs Act in that at Harare Airport on 9 October 1982 he wrongfully and unlawfully had in his possession 23 700 grams of prepared Indian hemp. He pleaded not guilty but was found guilty and sentenced to 5 years' imprisonment with labour 2 years of which were suspended for 3 years on conditions.

The appellant's basic contention is that as a Malawian citizen not resident in Zimbabwe but merely passing through as an in-transit passenger he was not subject to the laws of Zimbabwe in relation to the possession of dangerous drugs. He contends that he had not gone through immigration or customs control and would not have been in contact with any Zimbabwean national outside the terminal buildings. He had no intention of dealing in the drugs in Zimbabwe.

He contended before the court *a quo* and before this Court that his case should have been treated administratively in one of three ways -

(a) he could have been returned to Malawi by the first available plane;

(b) the drugs could have been seized and he could have been allowed to proceed with his journey; or

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(c) he could have been allowed to proceed with the drugs and the police at his port of destination alerted.

Though not a lawyer, the appellant argued his case with some skill and great determination. He cannot, however, succeed. The transit lounge at the Harare International Airport is as much part of Zimbabwe as any other part of the country. The laws of Zimbabwe are applicable there as they are in any other part of the country.

The appellant contends that as a transit passenger he had the right of innocent passage and such passage was not detrimental to the peace, security and good order of the country. He contends that actions are detrimental to peace, security and good order only when such actions cause physical damage to persons or goods or create a nuisance to persons nearby.

In the first place, the appellant's passage was by no means innocent. He was in possession of dangerous drugs. Secondly, any action which contravenes on Zimbabwean soil laws in force in Zimbabwe is detrimental to the peace, security and good order of the country.

This case is much clearer than the *Wildenhus Case* (1887) 120 US 1. In that case the offence - killing a fellow seaman - had taken place on board a Belgian ship moored in an American port. The Belgians there claimed jurisdiction because the offence had taken place on a Belgian ship over which Belgium had jurisdiction. The Court held that by comity all matters of discipline and all things done on board a foreign ship in a local port which affect only the vessel or those belonging to her and do not involve the peace or dignity of the country or the tranquillity of the port are left by the local government to be dealt with by the authorities of the nation to which the vessel belongs; but if crimes are committed on board which are of such a character as to disturb the peace, neither comity nor usage entitles the offenders to any exemption from the operation of local laws for their punishment if the local tribunals see fit to assert their authority.

It is to be noted that it is only by comity and usage that territorial jurisdiction is not exercised when thought fit in favour of another authority which can assert jurisdiction by virtue of some other consideration such as the flag under which a vessel sails.

In this case there are no competing authorities. Indeed as the appellant himself concedes if territorial jurisdiction is waived he will have to be

transported to some other jurisdiction before any action can be taken.

Issues were raised as to whether or not the Geneva Convention for the Suppression of the Illicit Drug Traffic has any application in this case on the assumption that it applied. I find it unnecessary to deal with this since the arguments in favour of territorial jurisdiction are overwhelming.

The appeal against conviction must accordingly be dismissed.

The appellant has appealed against sentence. He urges that Zimbabwe could have suffered no

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harm in this case since he had no intention of disposing of the drugs in this country. This may be so. His contention that for that reason the quantity of drugs in his possession is immaterial in considering sentence does not, however, follow. Whether or not Zimbabwe is a party to the Geneva Convention for the Suppression of the Illicit Drug Traffic, its laws demonstrate that it is vitally interested in eradicating, as far as possible, the use of drugs in this country. It should also be made plain that it takes a serious view of the use of its territory as a transit point for the conveyance of drugs to other friendly countries. In this regard the quantity here being conveyed - 23.7 kilograms - can properly be described as massive.

Taking into full account the loss and degradation that the appellant has suffered by reason of the conviction an effective sentence of 3 years' imprisonment with labour cannot be said to be excessive.

The appellant is neither a citizen nor a resident of Zimbabwe and I see no reason for imposing a suspended sentence of imprisonment as well. The appellant will undoubtedly be returned to Malawi at the end of his sentence. Thereafter, if need be, he can be denied entry into Zimbabwe. Accordingly I would vary the sentence by quashing the suspended sentence of 2 years' imprisonment with labour.

The appellant, in the course of his argument, has complained that he has been deemed a prohibited immigrant and has challenged the propriety of that order. This is not a matter which this Court can deal with in these proceedings.

Beck JA: I agree.

Gubbay JA: I agree.

MAFUYA & OTHERS v CITY COUNCIL OF MUTARE 1983 (2) ZLR 226 (HC)

Court **High Court, Harare**

Dumbutshena JP

20 October & 9 November 1983

Flynote

Administrative law - refusal of council to renew hawkers' licences - merits of applications not considered and no reasons given for refusal - duty of council to act fairly - includes duty to hear applicants and give reasons for refusal - principles of natural justice apply - Urban Councils (Model) (Hawkers and Street Vendors) By-laws, 1976 - s 13 - distinction between renewal of licence and issue of a new licence.

Headnote

The applicants were all individuals living in Mutare who for a number of years had earned their livelihood as hawkers, for which each had held the appropriate licence issued by the City Council. At the end of 1982 they all duly applied for renewal of their licences. Their licences

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were not renewed as expected, and enquiries failed to solicit any answer save that they were not among those whose licences the Council had renewed. After legal practitioners had on behalf of the applicants pressed the Council for an answer to the applicants' queries, they were, after much procrastination on the part of the Council, informed that the Council had decided to grant no more than 300 hawkers' licences for the year in question. The Council had not considered any application on its merits but had simply granted the 300 licences to the first 300 applicants. There were some 500 applications.

In their founding affidavits, the applicants also alleged that they had been given to understand that licences were now only being issued to active members of the ruling party. Their affidavits were unanswered on various aspects of these allegations. *Held*, setting aside the Council's refusal, that the Council, in deciding to issue licences to those who applied first and to refuse to issue them to the rest of the applicants, had a duty to act fairly. By acting as they did and failing to give reasons for so acting, they acted unfairly. In the circumstances - where the applicants were effectively being deprived of their livelihood - the general principle is that an administrative action should not be taken without the person affected being given an opportunity of being heard.

Held, further, that although s 13 of the Urban Councils (Model) (Hawkers and Street Vendors) By-laws, 1976, does not distinguish between the grant of a new licence and the renewal of an existing one, there was good ground for treating the non-renewal of an existing

DUMBUTSHENA JP

licence more seriously than the refusal to grant a new one.

Held, further, that when the respondent decided to limit the number of hawkers' licences, it should, as part of its duty to act fairly, have called the holders of such licences to a meeting to hear those whose interests were affected by their decision.

Held, further, that if the Council were now only issuing licences to members of a particular political party, that was an indication of bias, and the Council could not properly exercise its discretion where bias was present.

Held, further, that the failure by the Council to give reasons for its refusal was evidence of *mala fides* and it could easily be assumed that they had no reason to refuse the renewal.

Cases cited:

Breen v Amalgamated Engineering Union & Others [1971] 2 QB 171 (CA); [1971] 1 All ER 1148;

Schmidt & Another v Secretary of State for Home Affairs [1969] 2 Ch 149; [1968] 3 All ER 795;

Schoonwinkel NO & Another v Fouche NO & Another 1954(4) SA 92 (O);

Re Liverpool Taxi Owners' Association [1972] 2 All ER 589 (CA);

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Pretoria North Town Council v A I Ice-Cream Factory (Pty) Ltd 1953 (3) SA 1 (AD);

R v Wandswouth Justices, ex p Read [1942] 1 KB 56; [1942] 1 All ER 56.

J S Sayce, for the applicants

M T O'Meara, for the respondent

Judgment

Dumbutshena JP: The applicants desire the Court to review and set aside, under its review powers exercised both at common law and in terms of s 26 of the High Court Act, No 29 of 1981, the decisions of the City Council of Mutare, taken under the Urban Councils (Model)(Hawkers and Street Vendors) By-laws, 1976, refusing the applicants the renewal of their hawkers' licences. The respondent admits that the following people made applications for hawkers' licences and that they have not been granted licences:

Watson Mafuya

Tenson Ngwagwazi

Caiphas Mlambo

Alfred Sifiso

Josiah Sithole

Chuma

Israel Mapungwana

Aaron Muzoaka

Nicholas Dzwifu

The respondent says, however, that Nicholas Dzwifu's wife was issued with a licence.

The applicants' founding affidavit was sworn by Dzaramba Watson

DUMBUTSHENA JP

Mafuya, in a representative capacity. Some of the applicants held hawkers' licences for 25 years. Generally, all the applicants held hawkers' licences issued by the respondent for the area of Sakubva Township, Mutare.

On or about 31 December 1982, the applicants applied for the renewal of their licences but were told by respondent's clerks at the Civil Centre to wait before paying for the renewal of their licences. In February 1983, applicants went to the Civic Centre to find out what was happening. They were told by respondent's employees that the City Council was not yet ready to deal with

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the matter of the renewal of licences.

The applicants went to the Civic Centre in March 1983 in response to an invitation sent to them by the respondent. A list of persons to be granted new licences and renewed licences was read out to all applicants from the Mutare area.

Applicants' names were not among those read out. They say when they queried the omission they were told to go to the Director of Sakubva Township for information. They met the Director, a Mr Ncube, the Deputy director, Mr Rugaya, and the Township Administrator, Mr Madimba. They did not get satisfaction but they were told to come back the following Friday. On that day Mr Ncube refused to answer questions about the non-renewal of their licences.

Respondent's replying affidavits contain matters which in many material respects support applicants' assertions that they were refused the renewal of their licences without any reasons being furnished to them. Eric Christopher Foxton, the Chief Hygiene and Administrative Officer of the respondent Council, whose department is responsible for the issuing and control of street vending and hawking, said in his affidavit that the respondent made a decision in January 1983 to limit the number of hawkers' licences to be issued in 1983 to 300. He said applications received for 1983 licences were referred to the Director of Community Services and thereafter submitted to him. If health requirements were satisfied, the applicant was granted a licence to trade. This is in direct conflict with what Mr Ncube deposed to in this regard.

Mr Dean Ncube, who carried out consideration of the 900 applications received by the respondent, said in paragraphs 5, 6 and 7 of his affidavit at p 15 of the papers:

> "5. Before such consideration members of my staff had firstly noted on each application a serial number indicating the order in which the applications had been

> received and secondly had interviewed all applicants to ensure that application forms were completed and correct.
>
> 6. After receipt of the applications from my staff and in February/March 1983 I considered them having satisfied myself that all applications had been correctly completed and investigated and then adopted the attitude that I would recommend the issue of a licence to the applicants in the order in which they were lodged.
>
> 7. No other considerations affected my decision."

It appears from the above paragraphs that Mr Ncube recommended the issuing of licences according to the date the applications were received. He said "No other considerations affected my decisions." He denied the allegation made by the applicants that refusal of licences was largely due to overtrading.

On 31 March 1983, applicants' legal practitioners wrote to the respondent a letter, Annexure "A", in these terms:

> "We have been consulted by representatives of a group of some 20 former holders of hawkers' licences issued by

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your Council for the Sakubva area.

We are instructed that every member of this group was refused renewal of his hawkers' licences with effect from the 1st January, 1983 despite the fact that many of the group had held their licences for a considerable period of time and have always complied with the relevant by-laws governing holders.

We are further instructed that the members of the group (whose names we understand are known to you) have made enquiries as to the reasons for the refusal by your Council to renew their licences but that they have received no satisfactory reply. Accordingly, as a first step to advising them as to rights we shall be grateful if you will kindly inform us of the reasons for your Council's decision.

Your prompt reply would be appreciated."

By letter dated 10 May 1983 (Annexure "B"), respondent replied to the request for reasons for refusal to renew licences as follows:

"We refer to your previous correspondence relative to the above matter and hereby advise as follows:

Previously, the Council has had 200 licences allotted to various suburbs but due to increased unemployment in the city, Council received 500 applications for Hawkers' Licences in January, 1983. Obviously the Council had to grant more than the 200 licences.

It is not correct to say that all the hawkers holding licences have abided by the relevant by-laws governing them in the past. Almost all of those previous holders had not been complying with the concept of hawking as stipulated in the Council By-laws. In cases there have been hawkers who have set up mini-shops near licenced premises, thereby interfering with licenced shop holders and the Chamber of Commerce and Industry have contacted the Council with regard to this matter. Be that as it may, it would be appreciated if you would advise at this stage, the names of the 20 people referred to in your letter."

It is interesting to note that the total number of applications considered

was 500 and not 900. One of the reasons given for refusal of licences to applicants is their non-compliance "with the concept of hawking as stipulated in the Council By-laws." None of the respondent's deponents mentions non-compliance with By-laws as reason for not renewing applicants' licences. However, on 31 May applicants' legal practitioners sent respondent a list of persons who were refused licences. In that letter applicants denied that they had failed to comply with any relevant By-laws. Because the respondent had no good reason to refuse them the renewal of their licences, they intimated their desire to get redress through the Courts. There was no reply to that letter.

In a telephone conversation with Miss Odinga, the Acting Town Clerk, of the respondent Council, Mr *Sayce*, legal practitioner for the applicants, was informed that the Council intended to interview the applicants. The contents of that conversation are recorded in a letter dated 23 June 1983 (Annexure "D") written by applicants' legal practitioners to the respondent Council. There was no reply to the two letters. In the course of time applicants' legal practitioners wrote another letter dated 28 June 1983 (Annexure "E"). The letter is in these words:

"We refer to our letter dated the 23rd instant since when we have consulted with our clients' representative.

We understand that our clients will be prepared to speak to Council representatives about the refusal to renew

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their licences but we have been instructed that none of them have been approached yet.

Since it has been going on for several months now and since, in some cases their very livelihoods are at stake, our clients view this matter as one of pressing urgency.

We fail to understand why, instead of simply furnishing us with the reasons for its refusal to renew these licences (which are, presumably, readily available from your records), your Council now wishes to interview our clients. What is the reason for these interviews?

It is our view that once reasons are furnished the whole issue will become clear. Indeed, there may even be scope for an amicable settlement. As it is, however, the position is highly unsatisfactory from our clients' point of view and so they have instructed us to write and inform you, as we hereby do, that unless the requested reasons are furnished to us within 10 days of the date of this letter our clients will regard themselves as being at liberty to take whatever steps they may deem fit to protect their interests, including, if necessary, resorting to litigation.

We sincerely trust that it will not prove necessary to refer this matter to the Courts although our clients are fully prepared to do so and so we urge you to furnish us with the requested reasons without further delay. We feel sure that it will be in the best interests of all parties if you do."

Because the matter of the refusal of licences to applicants is the nub of this application, the letter dated 14 July 1983 (Annexure "F"), written by the respondent to applicants' legal practitioners, assumes more importance. It not only shows the delay caused by the respondent in replying

to letters from applicants' legal practitioners, it also, more importantly, shows a lack of appreciation of the matters raised on behalf of the applicants by their legal practitioners. I shall come back to examine what it is the applicants wanted and what it was that the respondent failed to comprehend.

The delays caused by the correspondence between the parties resulted in the late lodging of this application. Rule 259 of Order 33 of the High Court Rules requires that:

"259. Any proceedings by way of review shall be instituted within eight weeks of the termination of the suit, action or proceeding in which the irregularity or illegality complained of is alleged to have occurred:

Provided that the court may for good cause shown extend the time."

The decision of the respondent was communicated to the applicants in March 1983. The application instituting the proceedings for the review of the respondent's decision was lodged in the High Court Registry on 23 August 1983, long after the expiry of the eight weeks stipulated by Rule 259.

Mr *Sayce*, in applying for condonation, argued that failure to lodge the notice of motion was caused not by the applicants' lack of diligence. Letters were written on their behalf by their legal practitioners to the respondent. There was no diligence on the part of the respondent. Letters were not replied to in time. It was also submitted that the nature of the case warranted condonation because the applicants' livelihood was dependent on operating the business of hawking goods. And, finally, Mr *Sayce* submitted that an allegation of bad faith made by applicants against the respondent was a sufficient ground upon which to condone the late filing

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of the notice of motion. There was no opposition to the application for condonation. There is no doubt that a considerable time was wasted because the respondent did not reply to letters timeously. It appears also that the contents of respondent's letters made the applicants believe that the City Council was going to do something about the renewal of their licences. It was indicated that applicants would be interviewed. Because, in my view, the respondent did not suffer any prejudice and in the absence of opposition to this preliminary application, I condoned the late instituting of the proceedings.

Mr *Sayce* contended that the respondent failed to exercise its discretion. It decided arbitrarily to refuse to renew applicants' licences without considering the merits of those applications, the time that the applicants had spent as holders of hawkers' licences in Sakubva Township, and many

DUMBUTSHENA JP

other relevant issues. There is no doubt that there was an improper exercise of respondent's discretion. The applications were listed in chronological order and Mr Ncube, following the directive he had been given, counted from number one on the list of applicants to number 300 and issued hawkers' licences to the first 300 applicants.

The respondent, in deciding to issue licences to those whose applications were lodged first and to refuse to issue licences to the rest of the applicants, has a duty to act fairly. In reaching its decisions, the respondent, in my judgment, acted unfairly. These men were holders of hawkers' licences. I understand some were in the business of hawking goods for 25 years. Yet when renewal of their licences was refused, the respondent did not furnish them with reasons for refusal. They were turned down as if they had no interest in the renewal of their licences - the sources of their livelihood.

In *Breen v Amalgamated Engineering Union and Others* [1971] 2 QB 171 (CA), LORD DENNNG MR, commenting on circumstances of fairness influencing a statutory or domestic body to give reasons for its decision or to give a person concerned a chance of being heard, said at 190H-191C:

> "Then comes the problem: ought such a body, statutory or domestic, to give reasons for its decision or to give the person concerned a chance of being heard? Not always, but sometimes. It all depends on what is fair in the circumstances. If a man seeks a privilege to which he has no particular claim - such as an appointment to some post or other - then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 170-171. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard. I go further. If he is a man who has some right or interest, or some legitimate expectation, of which it would not be fair to deprive him without a hearing, or reasons given, then these should be afforded him, according as the case may demand. The giving of reasons is one of the fundamentals of good administration. Again take *Padfield's* case [1968] AC 997. The dairy farmers had no right to have their complaint referred to a committee of investigation, but they had a legitimate expectation that it would be. The House made it clear that if the Minister rejected their request without reason, the court might infer that he had no good reason: and, that if he gave a bad reason, it might vitiate his decision."

The applicants had all the attributes entitling them to be given reasons and to be heard. Yet they were neither given reasons for refusal to renew their licences nor were they heard by the

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respondent before renewal was refused. Where a public officer has power to deprive a person of his property or livelihood, "the general principle is that it is not to be done without his being given an opportunity of being heard and of making representations on his own behalf. " See *Schmidt and Anor v Secretary of State for Home*

DUMBUTSHENA JP

Affairs [1969] 2 Ch 149 (CA) at 170C, and *Schoonwinkel NO and Anor v Fouché NO and Anor* 1954 (4) SA 92 (O) (headnote).

S A de Smith (*Judicial Review of Administrative Action*, 3 ed) in a passage in which he cites the two English cases mentioned above, emphasizes, when discussing the position of local authorities who regulate a wide range of trades and occupations often under powers conferred on them by Acts of Parliament and sometimes in circumstances where no duty to conduct any kind of hearing is expressly imposed - as seems to be the case under the Urban Councils (Model) (Hawkers and Street Vendors) By-laws 1976, Government Notice No 902 of 1976 - that in such cases a duty to give an opportunity to be heard and to disclose the reasons for refusal (as in this case) should be implied.

De Smith says on non-renewal at 197:

> "Non-renewal of an existing licence is usually a more serious matter than refusal to grant a licence in the first place. Unless the licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the licence.
>
> To equate a decision summarily to revoke a licence with a decision not to grant a licence in the first instance may be still more unrealistic Here the 'privilege' concept may be peculiarly inapposite, and its aptness has not been enhanced by the manner in which it has been employed in some modern cases. There ought to be a strong presumption that prior notice and opportunity to be heard should be given before a licence can be revoked. It should be especially strong where revocation causes deprivation of livelihood or serious pecuniary loss, or is dependent on a finding of misconduct."

One of the important decisions taken by the respondent in January 1983 was that the number of hawkers' licences to be issued in 1983 was to be restricted to 300. This is a decision which must have been taken by the respondent at a meeting. The decision was communicated to Mr Ncube, who says in his affidavit that from "1983 and in contrast to previous years, the responsibility for examining and screening applications for hawkers licences and recommending their issue by the Department of Health was allocated to me by Respondent." He says in paragraph 3:

> "It was my instruction from Respondent that the total of hawkers licences to be issued in 1983 was to be restricted to 300, as I verily believe, because of the Respondent's concern for static businesses and the dangers of overtrading."

In my judgment, the respondent, when it decided to limit the number of hawkers' licences to 300, should have called the holders of hawkers' licences to their meeting. The duty to act fairly

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requires that the respon-

DUMBUTSHENA JP

dent should be ready and prepared to hear persons whose interests were affected by their decision or resolution. The then current holders of hawkers' licences were such people. The respondent acted wrongly when a decision was taken in January 1983 limiting the number of licences to 300 without giving licence-holders the opportunity to be heard.

In *Re Liverpool Taxi Owners' Association* [1972] 2 All ER 589 (CA), the Liverpool Corporation as licensing authority decided to increase the total number of licences for taxicabs within its area. The resolution was taken without giving the Taxi Owners' Association an opportunity to be heard. The number of taxicabs was increased from 300 to 350 from 1 January to July 1972, and to 400 from 1 July 1972; and after 1 April the number was unlimited. LORD DENNING MR said this at 594a-d:

> "First I would say this: when the corporation consider applications for licences under the town Police Clauses Act 1847 they are under a duty to act fairly. This means that they should be ready to hear, not only the particular applicant, but also any other persons or bodies whose interests are affected. In *R v Brighton Corpn, ex parte Thomas Tilling Ltd* SANKEY J said:
>
> > 'Persons who are called upon to exercise the functions of granting licences for carriages and omnibuses are, to a great extent, exercising judicial functions; and although they are not bound by the strict rules of evidence and procedure observed in a Court of law, they are bound to act judicially. It is their duty to hear and determine according to law, and they must bring to that task a fair and unbiased mind.'
>
> It is perhaps putting it a little high to say they are exercising judicial functions. They may be said to be exercising an administrative function. But even so, in our modern approach, they must act fairly; and the court will see that they do so.
>
> To apply that principle here: suppose the corporation proposed to reduce the number of taxi cabs from 300 to 200, it would be their duty to hear the taxi owner's association, because their members would be greatly affected. They would certainly be persons aggrieved. Likewise suppose the corporation propose to increase the number of taxi cabs from 300 to 350 or 400 or more; it is the duty of the corporation to hear those affected before coming to a decision adverse to their interests."

In the instant case the number of licences was limited to 300. It does not matter whether the number of licences is increased or reduced, the fact is the *audi alteram partem* principle is breached if "the judge" - in this case the City Council of Mutare - does not hear both sides. The applicants were not given the opportunity to state their case when respondent resolved to limit the number of licences to 300. There was no fairness - the rule of natural justice that any person who may be affected by an administrative decision has a right to his "day in court " is an essential characteristic of any legal or quasi-judicial process. See Garner *Administrative Law*, 4 ed, pp 115-117.

Although s 13 of the Urban Councils (Model) (Hawkers and Street

DUMBUTSHENA JP

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Vendors) By-laws, 1976, does not, as was properly submitted by Mr *O'Meara*, distinguish between new and existing licence holders, there is more justification for following the English cases which treat the non-renewal of an existing licence as requiring a more serious approach for reasons already given in this judgment.

Mr *O'Meara* also sought support for the view that he contended was the correct one, in *Pretoria North Town Council v A I Ice-cream Factory (Pty) Ltd* 1953 (3) SA 1 (AD) at 12D, where SCHREINER JA said:

> "No doubt the claim to a renewal will often be morally stronger than that of a new licence. This is not infrequently recognised in statutes. But, in the absence of statutory provision, the distinction seems to me to be one of degree rather than kind. The claim of one who has held a licence for a long time is *prima facie* stronger than that of one who has held it for only a short time, just as a trader who has sunk considerable capital in his business has *prima facie* a stronger claim than one who has not. But in the absence of differential statutory treatment (of which there is none in relation to hawkers under the Ordinance), there is no vital distinction between a new licence and a renewal."

I find more logic in the view that special consideration should be given to applicants for renewal when a local authority is in the process of determining the granting of licences to existing licence-holders and to new applicants. Considering them on an equal footing ignores factors of prior involvement in the business concerned and the existing licence-holders' dependence on hawking goods for their livelihood, as in the present case.

I do not agree with Mr *O'Meara's* final submission which, if I understood him well, is to this effect - that the Council in its discretion decided that only 300 licences would be issued and was *bona fide* in implementing that decision, and in the process applicants' licences were not renewed. By adopting this first come first served attitude, the Council, he submitted, resolved a difficult problem in a fair way.

Did the respondent resolve a difficult problem in a fair way? The respondent took a decision to grant licences according to a chronological order. It never communicated its decision to the applicants. And, having taken that decision, I can assume that the merit of the individual applications was no more of any consequence. That, in my view, does not appear to be fair to the applicants, at least those who fell below the figure of 300.

Besides, applicants' founding affidavit alleges that they were refused licences "because licences were now only being given to those people who are active members of the ruling party ZANU (PF)." Applicants believed that directions to that effect had come from Harare. They said that Mr

DUMBUTSHENA JP

Madimba partially confirmed this and advised applicants to join ZANU (PF) in order to get licences. They said the Township Superintendent, Mr Mudewe, also told them the same thing. Mr Mudewe and Mr Ncube denied this. But there still remains unanswered the allegation made against Mr Madimba, the Township Administrator. It is also alleged by the applicants that one Tenson Dube, a member of their group, went to a local party cell in Sakubva Township seeking endorsement by the party of his application. He was referred to a local party branch which, after

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considering his application, declared him a stooge and refused to endorse his application for a licence. In this regard Mr *Sayce* argued that the respondent showed *mala fides* and, in refusing renewal of licences, had improper political motives. The Court has before it evidence deposed to by way of affidavits. If some of the allegations made by the applicants remain unanswered, the applicants' assertion that there has been a denial of natural justice, coupled with an improper exercise of discretion because among other reasons the respondent was influenced by improper political considerations, becomes a valid ground. There was bias and the respondent cannot exercise its discretion properly where bias is present. The Court is made aware of the existence of bias and the denial of natural justice by means of evidence brought before it by way of affidavit.

> ". . . the court for that reason is entitled - and, indeed, is bound, if justice is to be done - to look at the affidavit, just as it would look at an affidavit if it were an ordinary case of excess of jurisdiction. Notwithstanding the argument of counsel for the respondents, which I understood to be that an affidavit is not necessary even in a case of want of jurisdiction, I am clearly of opinion that in such a case an affidavit can be looked at, and also in this case, which is not a case of want of jurisdiction but is analogous to it, the court will look at the affidavit to see what the facts are, and, if there has been a denial of natural justice, then I think that the court is in a position to interfere and say that the conviction, in those circumstances, is not to stand."

R v Wandsworth JJ, Ex parse Read [1942] 1 KB 56 at 57G-H. What was there said by VISCOUNT CALDECOTE LCJ in a case where there had been a denial of natural justice in a criminal matter which had been dealt with by a court of summary jurisdiction, applies equally to the consideration of a denial of justice in the circumstances of this case.

Section 13 of the Urban Councils (Model) (Hawkers and Street Vendors) By-laws, 1976, lays down the conditions under which the Council may refuse to issue or renew a licence. They are as follows:

> "13. The council may refuse to issue or renew a licence if -
>
> (a) the applicant has, within two years preceding the making of the relevant application, been convicted of -
>
> (i) any offence under these by-laws or any by-laws which were repealed on adoption of these by-laws; or

DUMBUTSHENA JP

> (ii) any offence under the Trade Measures Act [*Chapter 298*]; or
>
> (iii) any offence which involves carelessness concerning, or a disregard for, cleanliness, hygiene, public health or public nuisance; or
>
> (iv) any offence involving dishonesty;
>
> and has been sentenced therefore to imprisonment without the option of a fine whether or not the sentence has been suspended;
>
> (b) in the opinion of the council -
>
> (i) the issue or renewal would adversely affect any existing trade or business carried on in the area or jurisdiction of the council; or
>
> (ii) the goods sought to be dealt in ought not to be dealt in in the interests or public health, public safety

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of public morality; or

(iii) any vehicle, container, stall, storage-premises, clothing or equipment used, or to be used, in connection with the business for which the licence is required is unsuitable in the interests of public health; or

(iv) there are sufficient hawkers or street vendors dealing in the goods in respect of which the applicant requires the licence."

There is nowhere in respondent's affidavit where it is suggested respondent informed any or all of the applicants that they had breached conditions specifically contained in section 13.

Mr *O'Meara* conceded that there was failure by the respondent to consider each application. He is right because on the papers there is no such evidence. That might be the reason why the respondent was unable to give reasons for refusal. The refusal to give reasons is in itself evidence of bad faith. It is my duty to draw an adverse inference from the refusal to furnish reasons for non-renewal of licences. In the circumstances of this case, of course, bearing in mind the method used to select successful applicants, it can easily be assumed that respondent had no reason to refuse the renewal of applicants' licences. In *Pretoria North Town Council v A I Ice-cream Factory (Pty) Ltd* (*supra)*, SCHREINER JA remarked, in what I consider to be appropriate to the circumstances of this case - at 13G-H:

> "Assuming, as I do, that the council was not obliged to furnish the reasons for its refusal of the certificates, it seems to me, nevertheless, that if it was in possession of any private information which might found an objection to the grant of any certificate it was obliged to disclose such information to the applicant and give him an opportunity of dealing therewith (*Lexton's* case, *supra*)."

For the reasons I have given I am satisfied that this application should succeed. The refusal to grant renewal of licences is set aside and the applications are remitted to the City Council of Mutare for proper consideration, including the hearing of such evidence as the applicants might wish to lead. The costs of this review will be borne by the respondent.

Stumbles & Rowe, legal practitioners for the applicants.

Gargan Brothers & Chadder, Mutare, and *Condy Chadwick & Elliott*, Harare, legal practitioners for the respondent.

MOUNTAIN LODGE HOTEL (1979) (PVT) LTD v McLOUGHLIN 1983 (2) ZLR 238 (SC)

Court **Supreme Court, Harare**

Georges CJ & Beck JA

14 October & 10 November 1983

Flynote

Practice and procedure - prescription Prescription Act No 31 of 1975 - s 18(1) - counter-claim by means of defence of set-off - such a "process" in terms of section, whereby defendant claims payment of debt - contract

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- cession of right to receive payment under contract of insurance - consent of debtor required if only a portion of debt to be ceded.

Headnote

Where, in his defence to a claim against him, a defendant raises a plea of set-off, that plea can, for the purposes of s 18 (1) of the Prescription Act No 31 of 1975, be described as a claim by him, as creditor, for payment of a debt. It is thus a "process" in terms of the section and interrupts the running of prescription in respect of that claim. An amendment to the pleadings to recast the defence of set-off as a counter-claim would not, therefore, be prescribed and the plaintiff would suffer no prejudice if the amendment were allowed.

The cession of claims due under a policy of insurance is, like the cession of any other debt, subject to the rule that the consent of the debtor is required when a portion only of a debt is ceded. Accordingly, where there are a number of beneficiaries under a single claim, the consent of the insurers would be required if one of those beneficiaries wished to cede its rights under the policy.

Cases cited:

Garrett v Lea Hobbs Milton & Co 1979 (4) SA 922 (W);

Spies v Hansford and Hansford Ltd 1940 TPD 1.

C L Mercer, for the appellant

M T O'Meara, for the respondents

company leased the hotel together with the movables listed in an attached inventory to the Mitchells for one year from 1 June 1976 with an option to renew for a further 12 months upon the same terms and conditions

Witnesses to the lease were the respondents, Joyce McLoughlin and John McLoughlin. Mrs Mitchell and Mrs McLoughlin entered into a partnership trading as Mountain Lodge Hotel to operate the hotel. Mr McLoughlin was not employed by the partnership but did odd jobs and lived without charge at the hotel.

One of the terms of the lease was that the lessees would agree to take out such insurance in the name of the lessor as might be recommended by the lessor's insurance brokers as being necessary to protect the lessor's interests. A policy was taken out on the advice of JH Minet Blackmore 1971 (Private) Limited.

Some time in 1978 Mr Samuel George, an entrepreneur, conceived a liking for and decided to purchase Mountain Lodge Hotel. He made an offer to the Directors which was accepted. He formed a company to effect the purchase - the appellant company - whose name differed from that of the vendor company only by the addition of the year "1979". A legal practitioner, Nicholas William Ross Collins, of Morris, Beale and Collins acted as trustee for the company to be formed in concluding the agreement with the vendor company. The draft agreement was prepared on 9 March 1979 and signed on 25 April 1979 by Mr Collins on behalf of the appellant company and a Mr Rogers described as a director authorised to act by virtue of a special

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resolution of the vendor company. The sale included the property called Mountain Lodge and movable property referred to in an annexure. This annexure was a photostatic copy of the annexure attached to the deed of lease signed by Mountain Lodge Hotel (Private) Limited and the Mitchells. The agreement made no mention of existing insurance policies.

On 8 February 1979 armed robbers broke into the hotel, removed a considerable amount of property and set fire to some of the staff quarters. The lease to the Mitchells still ran at that date and the hotel was being operated by the partnership between Mrs Mitchell and Mrs McLoughlin. Mrs McLoughlin submitted a claim to the Insurers.

GEORGES CJ

A survey report was prepared for ther insurers on 6 June 1979. The date for occupation by the appellant company was 1 June 1979.

In the report the loss is set out under 3 heads - articles allegedly stolen from Mr and Mrs McLoughlin, articles stated to be the property of Mr and Mrs Mitchell, and hotel property. The policy has not been tendered in evidence but it seems reasonable to infer from the surveyor's categories that it did not cover merely loss suffered by the lessors of the hotel - The Mountain Lodge Hotel (Private) Limited - but also loss suffered by the partnership, the partners as individuals and persons living at the hotel. The assessor obtained agreements of loss after allowing for reasonable depreciation in the following sums -

> Mountain Lodge Hotel (Private) Limited - $1 250 (including $420 Rhodesian currency stolen),
>
> Mr and Mrs McLoughlin - $1653, and
>
> Mr and Mrs Mitchell - $665.

Cheques in those sums were forwarded to Mountain Lodge on 18 June 1979.

Among the items set out in the loss claim forwarded by Mrs McLoughlin were 9 plates for which no estimate of value was given. They were said to be priceless being antiques. In the list of Mountain Lodge Hotel property set out by the assessor the plates are not mentioned and it would seem that not payment was made in respect of them. The payment was made by the Insurers on the understanding that all articles recovered would become the property of the Insurers.

On taking over the hotel on 1 June, Mr George, who controlled the appellant company, decided to keep on the McLoughlins to manage the hotel. He did not live in the country but merely paid short visits periodically. It appears that a subsidy was payable in relation to the hotel which guaranteed a small profit and the sum he had spent to purchase it - some $25 000 - was not significant in relation to his other assets in England and in Switzerland.

His evidence was that he did not carry out a check of the movables listed in the annexure. He trusted the McLoughlins who, in any event, appeared to have been running the place. A day or two after the takeover he saw Mrs Mitchell. He arrived at the hotel and he became aware that she was a person with an interest in it though the McLoughlins appeared to be in charge. he

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paid Mrs Mitchell $1 000 for a number of items which she asserted were hers and did not belong to the hotel. There is controversy

GEORGES CJ

as to whether this included curtains. He was aware of the robbery and the claim which had been lodged with the Insurers and his evidence is that he told Mrs McLoughlin that he did not wish items replaced as he did not like the decor but wished to have the cheque in satisfaction of the claim lodged in the appellant's account. The cheque was not lodged in that account. It was lodged in an account operated by the partnership in the name of Mountain Lodge in the same bank.

Mrs McLoughlin's evidence was that on becoming an employee of the appellant company, Mr George asked for a loan of $5 000. Mr George denies this. His position is that he had all the money he needed and a loan was not necessary. Be that as it may Mrs McLoughlin did advance $5 000 to the company with interest at the rate of 10 per cent per annum. The sum was to be a first charge on the assets of the Company and should the McLoughlins' service be satisfactory they were entitled at the completion of one year's service to $5 000 worth of shares in the Company at $0.75 per share.

Mr George's evidence was that early in September 1980 he became aware that Mrs McLoughlin had not deposited the cheque in satisfaction of the insurance claim in the appellant's account. He charged Mr McLoughlin with converting the cheque. This led to a physical confrontation. The men exchanged fistcuffs and Mrs McLoughlin came to her husband's aid. Mr George thereupon dismissed them from his employment. Later he sought to change that decision but the McLoughlins preferred to leave. Thereupon they sued for the return of the $5 000.

In reply to that claim Mr George pleaded by way of set off the sum of $1 250 which he alleged that the McLoughlins had converted. In the course of the trial it became clear that the whole sum could not be claimed. Part of it was cash and part consumables which belonged to the partnership. The sum was in due course reduced to $500 and interest. The debt itself was admitted and the issue litigated was the right to set off.

The court *a quo*, having examined the evidence, held that there had been no cession of the insurance policy by Mountain Lodge Hotel (Private) Limited to the appellant and that even if there had been such cession the defence by way of set off was bad in law.

The appellant appealed, challenging both findings. Very shortly before the hearing, however, an application was filed on behalf of the appellant seeking to amend the pleadings to include, apart from the defence of set

GEORGES CJ

off, a counter-claim for the sum pleaded by way of set off and a prayer that execution of the

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judgment on the claim for $5 000 be stayed until determination of the counter-claim.

Mr *O'Meara*, for the respondents, opposed the granting of the amendment. He agreed that the proposed amendment raised no new issues which had not been thoroughly canvassed at the hearing in the court *a quo* so that in that regard the respondents would not be prejudiced if it were granted. He contended, however, that the counter-claim was prescribed. It was a claim in delict and as such under s 14(d) of the Prescription Act No 31 of 1975 (the Act) the period of prescription would be 3 years. Time would have begun to run at the latest from September 1980 when Mr George became aware of the conversion The application for amendment had been made more than 3 years thereafter.

The issue for resolution is whether s 18(1) of the Act is applicable with the result that there would be a judicial interruption of the period of prescription. The section reads:

> "The running of prescription shall, subject to the provisions of subsection (2), be interrupted by the service on the debtor of any process whereby the creditor claims payment of the debt."

The provisions of subs (2) referred to are not relevant but the definition of "process" in subs (6) is. This reads:

> "In this section -
>
> 'process' includes -
>
> "(a) a petition;
>
> (b) notice of motion;
>
> (c) a rule *nisi*;
>
> (d) a pleading in reconvention;
>
> (e) a third party notice referred to in any rule of court;
>
> (f) any document whereby legal proceedings are commenced."

Mr *Mercer* contends that the statement of defence filed by the appellant is a "process whereby the creditor claims payment of a debt". Mr *O'Meara* points out that the definition of "process" makes it clear that the intention is to include only documents which initiate a claim. A set off, he argues, is in terms of jurisprudential classification a plea of payment and not a claim that a debt is due.

The argument is not without its merits but I do not think that it should succeed. The definition of "process" in subsection (6) is not exclusive in its scope. The section merely enumerates some documents which fall within the ambit of the word. It clearly contemplates that other documents may

fall within that ambit. Indeed the fact that "process" *includes* "any document whereby legal proceedings are commenced" would indicate that it encompasses something wider than that

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category of document and could include a document which does not commence legal proceedings. If the intention had been otherwise the draughtsman would have said that "process" *meant* any document whereby legal proceedings were commenced and included the specific documents listed in (a) to (e).

Since "process" can include a document other than a document whereby legal proceedings are commenced then it appears to me that a pleading can be included in the term.

In *Garrett v Lea Hobbs Milton & Co* 1979 (4) SA 922(W) at 924H NICHOLAS J notes that -

> "Process of court', in its limited sense, connotes a mandate, summons or writ by which a person or thing is brought in to Court for litigation."

This is the sense implicit in the instances listed in subs (6). In its wide sense, however, it may connote any document employed in the process of litigation. In my view the term "process" in s 18(1) is to be understood in its wide sense and in this case includes a statement of defence.

In that defence a plea of set off was raised and the issue arises whether in terms of s 18(1) that plea can be described as a claim by the creditor for the payment of a debt. While, as has been mentioned, it can be contended that a plea of set off alleges payment by the defendant of part of the sum claimed by the creditor by reason of a settling of accounts it would be artificial to ignore that that process of settlement inherently acknowledges the existence of a debt due to the defendant by the creditor. It is because the debt exists that the defendant claims that he has made part payment. I would hold, therefore, that a plea of set off is a claim for payment within the meaning of s 18(1).

It is of interest to note that under the English Limitation Act 1939 s 2 any claim by way of set off or counter-claim is deemed to be a separate action and to have commenced on the same date as the action in which the counter-claim or set off is pleaded. This acknowledges the essentially identical character of a set off and a counter-claim as claims for payment. It is reasonable and fair that this should be so and an interpretation of the Prescription Act which achieves this result seems eminently desirable.

I would hold, therefore, that the raising of the defence of set off inter-

rupted the running of the period of prescription under the Act. It follows that the amendment recasting the claim as a counter-claim would not be prescribed. The respondents would not on that ground suffer any prejudice. It has not been urged that they would suffer any other prejudice. Accordingly I would grant the amendment prayed.

Having granted the amendment there is no need to consider the interesting arguments raised as to whether the appellant's claim could properly be pleaded as set off - whether for example there was an identity of parties or whether the claim could be said to be liquidated. The important remaining issue is that of cession.

It was argued that cession of the insurance policy could be implied in the fact of sale of the

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property. I did not understand this argument to have been strongly pressed and it seems to me unacceptable. It must be borne in mind that cession is rather more than an agreement. It is an act of transfer of the debt and the right to sue for its recovery. Nothing in the deed of sale or the transfer of the property sold necessarily leads to the inference that claims under the policy must have been transferred. The vendor would be under an obligation to transfer the movable and immovable property as described in the deed of sale. Had any part of that been missing or destroyed he would have had to replace it in order to perform the contract. This could be achieved without cession of the claim under the policy. The fact that the respondents accepted by their conduct that the appellant would have been entitled to be paid out of the proceeds of the policy for property not reinstated after the theft does not support an inference of cession. It merely establishes that as the custodians in effect of the property at the date of the sale they understood that the appellant was entitled to get what he bargained for or be paid its value.

Various passages in the evidence have been referred to as evidence of express cession. Mr George, in his evidence-in-chief, stated that after the robbery he had dealings with Mr Rogers and Mr Rogers told him that -

> ". . . the benefits arising out of Mountain Lodge 1979 - Mountain Lodge (Private) Limited would come to my company Mountain Lodge 1979 (Private) Limited, the company that I would be beneficiary of . . .".

At another point he stated that Mr Rogers had said that he would "automatically get the benefit" of the insurance policy. He also stated that about the time the agreement was signed he had a discussion with Mr Rogers who mentioned that certain items would be missing which were subject to a claim on the insurance and that if the claim had not come

to hand before 1 June they would have the benefit of it.

I do not think away of these statements amount to a cession of claims due under the policy. They amount to no more than a promise to make good the value of such items as may be missing on the takeover from the proceeds of the claims made under the insurance policy.

The pleadings as finally amended stated as follows:

> "4. On the 24th May, 1979, First Plaintiff agreed with Rhonat that the loss caused by a burglary at the hotel on the 8th February, 1979, to property covered by the aforesaid policy, was in respect of -
>
> | | |
> |---|---|
> | Fittings and stock trade | 830.00 |
> | Cash | 420.00 |
> | | 1,250.00 |
>
> 5. On the 25th May, 1979, the said Collins, acting in his aforesaid capacity, verbally accepted cession from one AC Rogers of Messrs Peat, Marwick and Mitchell, Chartered Accountants, Salisbury, acting for and on behalf of the former owner and duly authorised thereto in his capacity as a Director/Secretary of the former owner, of all benefit, right, title and interest in the said policy".

Evidence in support of paragraph 5 was given by Mr Collins who, as has been mentioned, had acted as trustee of the appellant in the course of formation in transacting the purchase of the hotel. He stated that he spoke to Mr Rogers on the telephone and made a contemporaneous

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note of the conversation. This read:

> "T/C to Rogers he confirms that license (*sic*) has been renewed and that claim for stolen property being handled by Minets in Umtali and that benefit from insurance payment will go to the purchaser".

This note was dated "25/5/80". The "80" was crossed out and "79" substituted. The client was noted "Mountain". That was crossed out and "S George" substituted.

The trial magistrate looked with suspicion on this note because of these alterations. He also thought that the figure "5" in the date had itself been superimposed on what had originally been "1" or "3". This is by no means clear.

The trial magistrate rejected this note as unsatisfactory. He made no adverse findings on Mr Collins' demeanour as a witness. Mr Collins is a legal practitioner. The magistrate's finding is tantamount to a finding of fraud on his part - forgery of the exhibit. Mr Collins was not pressed in cross-examination on the issue and the alterations could easily have been

absent-minded errors in recording the gist of the conversation as he spoke. In any event had a forgery been intended it would have been simple indeed to prepare a memorandum without any obvious defects. I am satisfied that the magistrate erred in his evaluation of the note.

The magistrate also refused to admit into evidence details of the conversation between Mr Collins and Mr Rogers. The objection was that it breached the hearsay rule. I am satisfied that it did not. Mr Collins was acting as an agent of Mountain Lodge Hotel (Private) Limited - the vendor. The appellant was asserting that there had been a cession - a transaction which could only have taken place between the two companies through their agents. Evidence as to what took place between them is necessarily the best evidence and does not fall within the hearsay rule.

Giving the appellant the full benefit of the note prepared as a result of the telephone conversation, I am not satisfied that cession has been established. The claim under the policy involved a number of separate interests - property belonging to Mr and Mrs Mitchell, property belonging to Mr and Mrs McLoughlin, property belonging to the partnership trading as Mountain Lodge Hotel and property belonging to the vendor, Mountain Lodge Hotel (Private) Limited. It could hardly have been the intention to cede the whole claim to the appellant and to leave it to the appellant to disburse among the various claimants. The correspondence makes it clear that whatever benefit was to pass to the appellant was such benefit as would accrue to the vendor, Mountain Lodge Hotel (Private) Limited. Only a portion of the debt which would have been due under the policy could, therefore, have been intended to be ceded. It is well established that the consent of the debtor is needed when portion of a debt only is ceded - Wille's *Principles of South African Law* (7 ed) by J T R GIBSON pp 374-5; a proposition fully supported by the judgment of SCHREINER J (as he then was) in *Spies v Hansford & Hansford, Ltd* 1940 TPD 1. There is no evidence that the Insurers were ever notified of the alleged cession, still less of their consent having been sought.

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The earliest letter on the issue among the exhibits is dated 7 June 1979. This was less than two weeks after the telephone conversation between Mr Collins and Mr Rogers. It is addressed to Mrs McLoughlin and written by Mr Collins. It refers only to 9 plates listed in the claim as antiques and notes:

> "you will apprecite that the 9 plates were amongst the assets purchased by our Client and therefore when the Insurance Company pays out on the claim the monies will have to be paid to our Client Company's Bank Account at Barclays Bank in Umtali.

> It would be appreciated if you could take all the necessary steps to ensure that this is done."

There is no assertion in this letter that the debt due from the Insurers to Mountain Lodge Hotel (Private) Limited has been ceded to the appellant. Rather the assertion is that assets purchased will not be delivered and will have to be made good from the proceeds of the insurance.

The letter from J H Minet Blackmore Manicaland (Private) Limited, the insurance brokers, reinforces this conclusion. The brokers had been handed the letter of 7 June 1979 written to Mrs McLoughlin. They confirm that the cheques in settlement of the claims had already been for warded and continue:

> "We understand that the monies due on the nine plates referred to will be deposited to your clients Company's Bank account in the near future."

In fact the plates were not antique. They were not priceless: and as has been mentioned no money was paid by the Insurers in respect of that loss. Replacements were provided by Mr McLoughlin.

In the circumstances I would conclude that there was no cession of the proceeds of the claim under the policy by Mountain Lodge Hotel (Private) Limited.

Accordingly the appeal must be dismissed with costs.

Judgment

Beck JA: I agree.

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

Gargan Brothers & Chadder, respondents legal representatives.

MINISTER OF HOME AFFAIRS v BADENHORST 1983 (2) ZLR 248 (SC)

Court **Supreme Court, Harare**

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Georges CJ, Beck JA & Gubbay JA

18 October & 10 November 1983

Flynote

Statutes - Police Act [Chapter 98] - s 76 - prescription applicable to suits instituted in respect of acts done under the Act - s 8 - duties imposed on members of Police Force - includes duties imposed in terms of other legislation - "under this Act" - meaning of - negligent act done in the course of duty - whether actor performing duty.

Headnote

In November 1981 the respondent, while under arrest pending the investigation of certain offences, was being conveyed in a police vehicle from one police station to another. The vehicle, because of the negligence of the police driver, was involved in a collision and the respondent was injured. However, he delayed in instituting an action for damages until a period of well over six months of the date of the accident had elapsed. He was thereupon met with a special defence that by virture of s 76 of the Police Act [*Chapter 98*] the action was barred for a failure to commence it within six months.

It was argued on his behalf that s 76 referred only to acts done "under this Act" and that, as what happened to him was not done in terms of the Police Act but rather in terms of the Criminal Procedure and Evidence Act [*Chapter 59*] or the Constitution, the action was not prescribed.

Held, that in view of the wording of s 8 of the Police Act, which enjoins all members of the Force to perform "such duties as are by law conferred or imposed" on him, the provision of all other enactments which give powers to the Police and define their duties are effectively incorporated into the Police Act. To hold otherwise would be to impose too severe a restriction on the Act; the intention of s 76 was to impose an effective limitation of actions brought against the State in respect of powers or duties proper to the Police Force.

Held, further, that the alternative approach of the judge *a quo* - that because the police officer had been negligent, he could not have been performing a duty under the Act - was untenable. The mere fact that the act complained of was wrongful does not itself denote that it was not pursuant to the performance of a legal duty. Indeed, it is only the negligent or improper performance of a duty which gives rise to a cause of action to which s 76 applies; if the act were lawful, no protection would be needed.

1983 (2) ZLR p249

GUBBAY JA

Cases cited:

Thorne v Union Government 1929 TPD 156;

E Rosenberg (Pty) Ltd v Union Government (Minister of Justice) 1945 TPD 225;

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Khoza v Minister of Justice 1965 (4) SA 286 (W);

Hattingh v Hlabaki 1926 CPD 220;

Woodiwiss v Union Government 1937 NPD 101;

Dineka & Another v van der Merwe & Others 1962 (3) SA 220 (T);

Board of Fire Commissioners (NSW) v Ardouin (1963-4) 109 CLR 105.

M J Gillespie, for the appellant

J B Colegrave for the respondent *in forma pauperis*

Judgment

Gubbay JA: This is an appeal from a decision of the High Court (McNALLY J) upholding the contention of the respondent (the plaintiff that s 76 of the Police Act [*Chapter 98*] did not prescribe his cause of action against the appellant (the defendant).

The cause of action arose in this way: The plaintiff was under arrest and in the custody of the Police in Bulawayo. On 13 November 1981 he was being driven in a Police motor vehicle from the Donnington Police Station to the Bulawayo Central Police Station when the vehicle came into collision with a truck. The accident was entirely due to the negligence of the Police driver and resulted in the plaintiff sustaining an injury to the spine. These facts were common cause at the trial. It was also not disputed that in conveying the plaintiff to the Bulawayo Central Police Station, where he was required for questioning in connection with a crime under investigation, the Police driver was acting for the purposes of the detection of crime and the apprehension of offenders - duties imposed upon the Police Force by s 93(1) of the Constitution - and that he was obeying a lawful direction in respect of the execution of his office given him by a superior officer.

The plaintiff, however, delayed in instituting an action for damages against the State until a period well in excess of six months of the date of the accident had elapsed. He was thereupon met with the special defence that by virtue of s 76 of the Police Act the action was barred not only for a failure to commence it within six months but also on the ground that notice in writing has not been given as required.

Section 76 reads:

> "Any civil action instituted against the State or a member in respect of anything done or omitted to be done under this Act shall be commenced within six months after the cause of action has arisen, and notice in writing of any civil action and the cause thereof shall be given to be defendant one month at least before the commencement of such action."

GUBBAY JA

The phrase "anything done or omitted to be done under this Act" necessitates a referral to s 8. That section was repealed by Statutory Instrument 793 of 1979 together with ss 7 and 9, but

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one week later Statutory Instrument 813 of 1979 reinstated s 8 and repealed s 10 instead. Section 8(1) reads:

> "Every Regular Force member shall exercise such powers and perform such duties as are by law conferred or imposed on a Regular Force member and shall, subject to the provisions of such law, obey all lawful directions in respect of the execution of his office which he may from time to time receive."

Mr *Gillespie* argued, both in the Court *a quo* and in this Court, that the effect of s 8(1) is to incorporate into the Police Act the provisions of all other enactments which give powers to the Police and define their duties - in particular s 93(1) of the Constitution and Parts V and VI of the Criminal Procedure and Evidence Act [*Chapter 591*]. It imposes upon every member of the Force the obligation to perform the duties as are by law imposed. Any such duty, when performed, meets the requirements of s 8(1) and constitutes something done "under this Act". Consequently, as the Police officer in transporting the plaintiff to the Bulawayo Central Police Station was performing an action bound up with and incidental to the duty imposed upon him by s 931) of the Constitution, that of investigating crime, and was in addition obeying a lawful direction in respect of the execution of his office, the action instituted against his employer, the State, is in respect of something done under the Police Act.

The learned judge rejected this argument. He held that s 8(1) is concerned not with the definition of the member's powers or duties but merely with his obligation to exercise such powers and perform such duties, and that what the powers and duties are is immaterial. He reasoned therefrom that the protection afforded by s 76 only applies to something done or omitted to be done under the Police Act alone - for instance where the State is sued because a Police officer is alleged to have acted wrongfully under s 8(2). But where the State is sued for something done or omitted to be done by a Police officer under the Criminal Code or the Constitution the protection is not available to it. In other words, the phrase "under this Act" means under the Police Act and cannot be extended to include what was done under the Constitution, the Criminal Code or any other statute. The further view was expressed that the plaintiff was injured not because the member of the Police Force was obeying a lawful order but because he had driven negligently and a negligent act is not something done under the Act. The Police Act did not give the member any authority to be negligent.

GUBBAY JA

In support of his argument Mr *Gillespie* cited a passage from the judgement of GREENBERG J (as he then was) in *Thorne v Union Government* 1929 TPD 156. In that case the court was concerned with whether an action for damages resulting from the negligent driving by a policeman of a mule-drawn trolley was prescribed by s 30 of the Police Act, No 14 of 1912. The section, where relevant, reads -

> "For the protection of persons acting in the execution of this Act every civil action against any person in respect of anything done in pursuance of this Act or the regulations, shall be commenced within . . ."

The learned judge looked to s 7(1) of the Act to ascertain what were the powers and duties of the members of the Police Force and said this at 158:

> "Section 7 of the Act deals with the powers and duties of members of the police force, and anything falling within

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these powers and duties would be done in pursuance of the Act or the regulations. The powers and duties referred to in s 7 are those contained in the Act and in any other law. Thus Act 31 of 1917, (the Criminal Procedure and Evidence Act) ss 25 to 27, 41 to 45, 49 to 52, 54, 332, 381 (3), and Act 32 of 1917, (the Magistrates Court Act) s 14, and Order 2, rule 3, confer powers or impose duties on members of the police force."

Clearly s 7(1) equates materially in its language to s 8(1) of Chapter 98. Nor do I consider that the words "in pursuance of this Act" in s 30 connote a meaning different from "under this Act" in its counterpart, s 76. In the context of their sections both phrases are synonymous and mean "in conformity with" or "in terms of".

It is my view therefore that the *dictum* in *Thorne's* case, *supra*, coming as it does from so eminent a judge, is a most persuasive pointer in favour of the defendant's contention. Moreover its correctness has never been doubted. It was approved by MALAN J in *E Rosenberg (Pty) Ltd v Union Government (Minister of Justice)* 1945 TPD 225 at 228, and twenty years later was re-stated by CLAYDEN J in *Khoza v Minister of Justice* 1965 (4) SA 286 (W) at 292B, in these words:

". . . it can only be that a thing is done in pursuance of that Act if the Act itself *or some other enactment* lays down that thing as a function of the police constable." (the emphasis is mine).

The cases of *Thorne* and *Rosenberg*, *supra*, are distinguishable from the present in that on the facts it was there held that the respective activities of the policemen, in driving the mule-drawn trolley and in going on patrol, at the time when they committed the acts complained of, were not being conducted pursuant to the Police Act or any other law. It therefore followed that the acts of negligence done in the process of driv-

ing the trolley and patrolling could not be "anything done in pursuance of this Act". The position changes, however, once there is a course of conduct admittedly under the Act and while following that course an unlawful act is committed.

The facts in *Hattingh v Hlabaki* 1926 CPD 220 are apposite and the judgment instructive. The plaintiff claimed damages in the magistrate's court for malicious arrest and assault against three Police constables who had arrested him upon a charge under the Stock Theft Act. The defendants objected that the plaintiff had given no notice of the intended action nor had the action been commenced within four months as required by s 30 of the Police Act. The magistrate dismissed the objection. An appeal against that order was allowed. BENJAMIN J (with whom LOUWRENS J concurred) said at 222-223:

"Now, I have already read s 30 of the Act, which affords this protection to police constables when doing anything in pursuance of the Act. In order to ascertain what may be done in pursuance of this Act, one has to turn back to s 7(1), which says ... Now, it is clear from the pleadings and from the evidence, that the three defendants were acting as police constables, and that they were acting in pursuance of lawful instructions given by a superior officer. They were instructed to go out and make investigations in connection with stock thefts, and, in pursuance of this duty, they arrested the plaintiff. They were in plain clothes at the time they arrested the plaintiff, and they were without a warrant. They were justified in arresting him without a warrant while in plain clothes by reason of the provision of the Stock Theft Act (s 6(1), Act No 26 of 1923). It is true that in arresting the plaintiff in this way, they were acting by virtue of the powers conferred upon them by this particular section of the Stock Theft Act, but,

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> nevertheless, they were also acting under and by virtue of the provisions of s 7(1) of the Act of 1912. They were carrying out lawful instructions given to them by a superior officer, and therefore, if in committing the alleged assault upon the plaintiff, they were acting in pursuance of the arrest, then I think clearly they fell under s 30 of the Act of 1912, and were entitled to enjoy ad the benefits conferred by that section, and that any proceedings intended should have been brought within the period prescribed and after due notice has been given."

But the force of these authorities apart, the interpretation adopted by the learned judge in the court below leads to the startling consequence that the only actions falling within the protection of s 76 are essentially those dealt with under ss 8 (2) and (3) of the Act, litigation in respect of which is not readily conceivable. I can discern no apparent reason for so restricted a limitation of actions. It could hardly have been the intention of the lawmaker to afford the State or a member of the Police Force protection only in respect of the comparatively trivial powers and duties specified in ss 8(2) and (3). To the contrary, it seems to me that the intention in enacting s 76 was to impose an effective limitation of actions brought against the State in respect of anything done in the exercise of

powers or duties proper to the Police Force. It would be unreasonable in the extreme to expect a member of the Police Force to answer a cause of action alleged to arise, for instance, from the execution of his power of arrest or search if there were no limit of time in which such actions were to be brought. I respectfully endorse the observations of BENJAMIN J in *Hattingh* v *Hlabaki, supra*, at 223E that -

> "A police constable may have to deal with a great number of cases, the details of which would probably be evanescent, and if a plaintiff was not under an obligation to bring an action within a period, recollection of the proceedings would probably vanish from the mind, or become obscure; therefore, these provisions of s 30 seem to be only reasonable."

Mr *Colegrave*, who appeared for the plaintiff, was constrained to concede that prior to the repeal of s 7 of the Act the plaintiff's cause of action would have been prescribed under s 76. He sought to argue, however, that by its repeal the carpet had been pulled from underneath s 76. With this submission I cannot agree. The repeal was effected because the Constitution of Zimbabwe Rhodesia (Act No 12 of 1979) contained a similar provision in s 98(1) (now s 93(1) of the present Constitution). It was therefore unnecessary to have the general duties of the Police Force repeated in two enactments. But it is more than probable that the Legislature considered that notwithstanding the excision of s 7 from the Act, the ambit of s 8(1) remained sufficiently wide to afford the State or a member the protection hitherto enjoyed. Certainly it is not unfair to suppose that the extent of the protection held to obtain under the former South African Police Act of 1912, which had no equivalent provision to s 7, was known and appreciated. It is inconceivable therefore that the intention was to emasculate an existing and necessary protection.

Mr *Colegrave*, quite correctly in my opinion, did not rely on the alternative approach of the learned judge that because the Police officer had driven negligently he could not have been performing a duty under the Act. The theory that a servant acting in the course of his employment has no authority to act negligently or improperly was exploded very many years ago. The mere fact that the act complained of was wrongful does not in itself denote that it was

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not pursuant to the performance of a legal duty. The plaintiff cannot say in one breath that the State is liable because the Police officer drove the motor vehicle in the course of his employment and in the next the opposite, that the Police officer could not have been acting under the Act because the Act gives him no authority to perform his duties negligently or improperly. See *Woodiwiss v Union Government* 1937 NPD 101 at 104. It is only the negligent or improper performance of a duty which will give rise to a cause of action to which s 76 applies,

GUBBAY JA

for if that provision were confined regular or lawful actions there would be no need for it. It is obvious that where anybody does a lawful act under the Act he needs no protection and no action lies against him whether brought within six months or not. See *Dineka and Another v van der Merwe and Others* 1962 (3) SA 220 (T) at 223A-B.

Finally the Australian case of *Board of Fire Commissioners (NSW) v Ardouin* (1963-1964) 109 CLR 105, referred to by Mr *Colegrave* does not seem to me to be in point. The section of the Act there considered did not fall to be interpreted in the light of any provision similar to s 8(1) of the Police Act.

In the result I ant satisfied that the view of the learned judge *a quo*, that the delict of the Police officer did not enjoy the protection and benefit of s 76 of the Police Act, was ill-founded.

There remains the question of costs. Although there is no principle which precludes a court from awarding costs against an unsuccessful plaintiff who has sued *in forma pauperis*, the grant of such an order is not usual. This is especially so where, as is the case here, the particular proceeding was not vexatious and the conduct of the pauper in no way improper. A further relevant factor is that the plaintiff suffered injury as a result of the admitted negligence of the Police and only failed to recover compensation because of a procedural bar. Taking account of these matters, I do not consider it appropriate to saddle the plaintiff with the defendant's costs.

The appeal will be allowed and the judgment altered to read: "The plaintiff's claim is dismissed."

Georges CJ: I agree.

Beck JA: I agree.

Civil Division of the Attorney-General Office, legal practitioners for the appellant.

Coghlan, Welsh & Guest, legal practitioners for the respondent.

MACEYS STORES LTD v TANGANDA TEA CO LTD 1983 (2) ZLR 255 (SC)

Court **Supreme Court, Harare**

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Georges CJ, Beck JA & Gubbay JA

6 October & 14 November 1983

Flynote

Contract - verbal contract subsequently reduced to writing - terms of written contract subsequently accepted by conduct - parol evidence rule applies - implied terms in contract - contract in terms of which goods sold at discount - no implied term that seller bound to accept all orders from buyer - notice of termination of agreement - when notice reasonable.

Headnote

In 1972 directors of the appellant company and of the respondent company held discussions regarding the supply to the appellant by the respondent of goods at a discount. Following the discussions, the respondent sent the appellant a letter summarising the terms of the agreement reached; and by their subsequent conduct the appellant impliedly accepted the terms of the letter. One of the terms of the letter was that there should, in addition to the various discounts set out in the letter, be an overriding discount. In October 1982 a representative of the respondent verbally informed the appellant's chairman, Mr Levy, that they intended to withdraw the over-riding discount. Mr Levy challenged their right to do so; the respondent replied, on the 10 November 1982, with a letter effectively terminating Maceys' right to buy at a discount, with effect from 1 January 1983. Maceys' continued contention that the respondent was not free to withdraw the discounts was met with a further letter, dated 9 December 1982, stating that they would not accept any orders at all from Maceys, again with effect from 1 January 1983.

Maceys sought an order that the respondent should accept and supply promptly all orders placed by Maceys and grant the discounts set out in the letter of 1972. They argued that the agreement between them was an oral one and that the evidence established an implied term that the respondent would accept and execute all orders placed by Maceys. Although the respondent could unilaterally terminate the agreement, they could only do so on reasonable notice given; and in the circumstances the notice was not reasonable. The trial judge refused to grant the order sought and Maceys appealed.

Held, dismissing the appeal with costs, that in so far as the letter contained proposals that had not already been agreed upon, but which were tacitly accepted after the letter was received, those proposals were subject to the parol evidence rule; and in so far as it contained written confirmation of matter that had earlier been verbally agreed upon,

BECK JA

it set out in writing the terms of the contract. The contract was thus one in writing which could not be varied by oral testimony.

Held, further, that the agreement was expressly directed only to the terms that would govern such transactions as might take place between the parties and was not directed to the entirely separate question as to whether the respondent was obliged to accept whatever orders Maceys might place. One could not be satisfied that the respondent would have unhesitatingly have

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said, had it been asked, that it was willing to bind itself to meet every order Maceys might submit. There were numerous considerations which militated against such a willingness. Moreover, an obligation to accept any orders placed by Maceys would have made the respondent the offeror to sell and Maceys the acceptor, a situation that was the reverse of the roles that the law, for good reasons, assigns to the contracting parties in such situations.

Semble: that the letter of the 10 November 1982, being notice of termination that was substantially longer than a calender month, was *prima facie* a reasonable notice having regard to the nature and the terms of the agreement.

Cases cited:

Harlin Properties Ltd & Another v Los Angeles Hotel Ltd 1962 (3) SA 143 (AD);

Cohn v Rand Rietfontein Estates Ltd 1937 TPD 334;

National Board (Pretoria) (Pty) Ltd & Another v Estate Swanepoel 1975 (3) SA 16 (AD).

JC Krieger SC with him *FC Blackie SC*, for the appellant

IA Donovan, for the respondent

Judgment

Beck JA: By way of Notice of Motion in the High Court the appellant unsuccessfully sought an order that:

> "1. The respondent shall accept and shall supply promptly all orders placed with the Respondent by the Applicant in respect of all tea and coffee products and 'Cerebos' products offered by the Respondent either directly, or indirectly through its subsidiaries, to the public.
>
> 2. The Respondent shall, in respect of such orders, grant the discounts set out in the letter dated 18th May 1972 from Tanrose (Pvt) Ltd to the Applicant."

The appellant owns a chain of supermarkets and the respondent is a wholesale supplier of tea and other commodities. Prior to May 1972 the appellant purchased at a discount from Tanrose (Pvt) Ltd, a wholly owned subsidiary of the respondent, but a dispute arose over the discounts and the appellant stopped buying the respondent's products.

Wishing to win back the appellant's custom, the then General Manager of Tanrose, a Mr Lotz, together with a Director of Tanrose, a Mr Gawith, called on Mr Levy, the Chairman of the appellant's Board, and made certain proposals to him concerning discounts. Pursuant to their discussion the following letter was sent to the appellant by Tanrose on 18 May 1972. The contents of this letter lie at the heart of the present dispute. It reads as follows:

BECK JA

> *"Quantity Discounts*
>
> Further to our letter dated 1st May, 1972 and our subsequent discussions, we wish now to confirm that the

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maximum quantity discount being granted by this Company on all of its products will at all times apply to all purchases of these products made by your Organisation. This maximum discount will apply irrespective of the quantity purchased by your Group at any one time.

There are two further points which should be clarified. Firstly, since the above arrangement is effective from 1st May, 1972, which is the date of introduction of our new discount structure, we finest confirm that your Organisation also qualified for all maximum discounts, irrespective of quantity, on all purchases made prior to that date. This point is made in view of various invoicing anomalies that have arisen recently.

Secondly, it is confirmed that your Group will continue to qualify for all over-riders and other special rebates which have applied to date. According to our records, the 'special allowances' in operation at present are as follows:

(a) 2c per pound rebate on purchases in excess of basic target of all 'Tanganda' products;

(b) 2 1/2% over-rider on net value of all 'Five Roses' tea and coffee products;

(c) 2 1/2% over-rider on net value of all 'Cerebos' products.

Net value in (b) and (c) above means value after deduction of maximum quantity discounts.

The above summarises the situation as it exists now. To streamline the position and to provide an added incentive for the distribution of our products, we would like to replace the present system with an 'across the board' over-riding discount of 3 1/2% on the net value of all purchases made by your Group. Like the maximum quantity discount referred to previously, this confidential rebate will apply at all times to all purchases made by your Organisation. It is also suggested that this over-rider be paid to your Company on a quarterly basis and be retrospective to 1st May, 1972. We trust you will find this proposal acceptable and look forward to receiving your agreement so that the arrangement may be instituted without delay.

Finally, we would like to thank you for the opportunity of discussing the overall situation with you and have pleasure in enclosing a copy of our current price list which also shows the discounts in force at present."

It is common cause that, by conduct, the appellant accepted all the terms of this letter without alteration, and from that time on until October 1982 the appellant was given all the discounts that are stated in the letter in respect of every purchase that it made from the respondent. For the sake of clarification I should say that throughout these proceedings the respondent has accepted that it is not merely Tanrose (Pvt) Ltd, from whom the letter emanated, that was bound by its terms, but the respondent as well; Tanrose was merely the marketing company for the respondent's products.

Although the submission was not really necessary for the structure of his argument on the appellant's behalf, Mr *Kriegler* nevertheless suggested that the learned judge *a quo* (McNALLY J) erred in approaching the matter on the basis that the contract was a written one embodied in the above-mentioned letter so that the so-called "parol evidence rule" and the rules

of construction of written contracts applied to it. Mr *Kriegler* contended that a proper categorisation of the contract is that it was concluded orally as to part of it at the meeting between Gawith, Lotz and Levy; and by conduct as to the remaining part of it which was not mooted at that meeting, but which was first proposed in the letter and tacitly accepted thereafter.

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It is factually correct that the letter contains matter that was agreed upon at two different stages and in two different ways, but it is not suggested that the parties expressly agreed in addition upon any matter that is not contained in the letter. In so far as the letter contained proposals that had not already been agreed upon, but which were tacitly accepted after the letter was received, those proposals are subject to the parol evidence rule. In *Harlin Properties Ltd and Anor v Los Angeles Hotel Ltd* 1962 (3) SA 143 (AD) the court accepted, at 149H, the statement in Wessels' *Law of Contract* 2 ed vol 1 para 1797 that:

> "If there is a proposal in writing and it is accepted *simpliciter*, the entire agreement is considered to be in writing, and no evidence is admissible to add to, diminish or vary the written proposal . . .".

And in so far as the letter contained written confirmation of matter that had earlier been verbally agreed upon, the situation is no different from that which arose in *Cohn v Rand Ritefontein Estates Ltd* 1937 TPD 334 and with regard to which TINDALL J (as he then was) said at 336:

> "It will be observed that in the particulars these words occur: 'The agreement was verbal. Such agreement was confirmed by the defendant under letter of the 20th June, 1933, copy whereof is annexed hereto.' It seems to me that we cannot construe these words to mean that all that was confined was entered into. It seems to me that the plain meaning of the words is that the terms of agreement were confirmed by the defendant under letter of 20th June, 1933, of which a copy is attached. The meaning of the word 'confirm' is clear; it means to make certain: and it seems to me that the only interpretation to put on these words is that the terms of the agreement were made certain in the letter in question. There is nothing on the pleadings to show that the terms contained in the letter were repudiated or that they were objected to. On the other hand, the paragraph which I have quoted from the particulars leads to the inference that those terms were agreed upon. If that is so, the principles referred to in the case of *Union Government v Chatwin* (1931 TPD 317) apply. Although the letter is a unilateral document, *prima facie* on the pleadings it was accepted by the plaintiff as containing the terms of the contract, and that being so it sets out in writing the terms of the contract and it constitutes a contract in writing, and cannot be varied by oral testimony."

Everything that the letter contains is therefore subject to the parol evidence rule. Indeed, the effect of the letter has been to integrate both parts of the agreement that the parties concluded. In *National Board*

BECK JA

(Pretoria) (Pty) Ltd and Anor v Estate Swanepoel 1975 (3) SA 16 (AD) at 26C the following statement from *Wigmore on Evidence* 3 ed Vol 9 para 2425 was approved:

> "This process of embodying the terms of a jural act in a single memorial may be termed the *Intergration* of the act, ie, its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts in their former and inchoate shape, do not have any jural effect; they are replaced by a single embodiment of the act.
>
> "In other words: *When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act*."

Having rejected Mr *Kriegler's* submission that the learned judge in the Court below erred in his approach to the categorisation of the contract embodied in the letter, I must now further recount the history of the dispute that gave rise to these proceedings.

In October 1982 a representative of the respondent company verbally informed Mr Levy that the

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respondent intended to withdraw the over-riding discount that it had allowed the appellant over the previous ten years. Mr Levy challenged the respondent's right to withdraw this discount, but the respondent persisted in its attitude and addressed a letter to the appellant on 10 November 1982 advising that -

> "As you know, we at Tanganda now seek to vary the basis on which Tanganda would be agreeable to continuing our supplier/customer relationship with Maceys and we, therefore, give notice that the over-riding special rebate of 3,5% on sales and any other special discounts which Maceys have hitherto enjoyed will be withdrawn with effect from 31 December 1982. Our terms of supply to Maceys with effect from 01 January 1983 will be in precise accordance with our published price list and trade discount structure applicable to the retail trade and no special rebates of whatsoever nature will be paid.
>
> Orders received from Maceys on and after 01 January 1983 will only be executed on this basis, prior to which we require to receive your written acceptance of the terms of supply as set out in the preceding paragraph."

The appellant still persisted in its contention that the respondent was not free to withdraw any of the discounts that it had allowed the appellant since 1972. This attitude was met by a letter dated 9 December 1982, written by the respondent's legal practitioners, which said:

> "The letter of 18 May 1972 is not a contract to supply and sell, but is simply an agreement to give certain quantity discounts to your Client in respect of orders for purchases made by it if our Client does supply and sell to your Client. This is the whole tenor of the letter and the heading to the letter states this.
>
> Our Client has now decided that it will not accept orders for purchases from and will not supply and sell to your Client from the 1st January 1983."

Mr *Kriegler* accepted that the discount agreement did not bind the

respondent for ever and a day but could be unilaterally terminated by the respondent upon reasonable notice. He submitted, however, that in order to give business efficacy to that agreement it is necessary to imply a term that, while the agreement remained in force, the respondent could not refuse to accept orders from the appellant; and that the Court can be satisfied that the parties themselves would both have replied without hesitation that the respondent could not so refuse had this question been specifically asked of them when concluded the agreement. Mr *Kriegler* urged that without such an implied term it was open to the respondent to have rendered the agreement nugatory from its very inception.

The submission has its appeal, and Mr *Donovan* was somewhat hesitant in countering the contention that the agreement was ineffective in a business sense if the respondent was free to reject any orders given to it by the appellant the very next day after the parties had agreed on the discounts that the appellant would enjoy. Nevertheless, I consider that McNALLY J was correct in refusing to read such an implied term into the contract. It may be accepted that both parties would naturally have assumed that, at the outset at least, the respondent was hardly likely to reject offers that it received from the appellant for its products. Indeed, the very purpose of the agreement was to woo back for the respondent the custom that the appellant had withdrawn. The learned judge *a quo* pointed out, however, that "there is a world of difference between assuming a continuing state of affairs and guaranteeing or warranting its

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continuation".

In the context of the facts of this case I think that this is an accurate observation. The agreement was expressly directed only to the terms that would govern such transactions as might take place between the parties, and was not directed to the entirely separate question concerning the respondent's obligation to accept whatever orders the appellant might place. Mr *Donovan* appears to me to be correct when he contends that one cannot be satisfied that the respondent would unhesitatingly have said, had the question been asked, that it was willing to bind itself to meet every order that the appellant would submit. Considerations such as, for example, the quantity and timing of any such orders; the requirements of other large customers and the respondent's capacity to meet all such requirements without undue difficulty; any temporary changes in the trading climate with regard to the respondent's products or to the appellant's popularity in the retail market, would seem to militate against a willingness on the respondent's part to be bound to accept from the appellant every order it might make. I do not think that this difficulty can be avoided by saying that it was always open to the respondent to terminate the whole agreement

BECK JA

upon reasonable notice. Reasons could well arise for refusing to accept one or more particular orders, or a series of orders for a limited period, while not wishing to terminate the agreement itself.

Indeed it may be said that if the term that is contended for were to be implied, it would in turn become necessary, for the preservation of business efficacy, to imply an uncertain number of further terms that would serve to relieve the respondent, in a particular situation, from its obligation of having to accept the appellant's orders.

I reiterate that the commercial realities of the situation were such that, having regard to the respondent's desire in 1972 to regain the appellant's custom, and to the respondent's initiative in devising the incentive that it afforded the appellant to buy the respondent's products, there was really no risk that the orders that the discount agreement was calculated to generate would not in fact be met, and that was a situation that would have been expected to prevail for an appreciable time. In a practical sense therefore an implied obligation on the respondent to accept every order from the appellant, whatever the circumstances, was unnecessary. Moreover such an obligation would be tantamount to making the respondent the offeror to sell to the appellant whatever quantity of its products the appellant wished to have at the prices advertised for those products in the respondent's published price list, less the discounts stated in the letter, and to making the appellant the acceptor of such offer, able to convert it into a concluded contract every time it placed an order, a situation that is the reverse of the roles that the law assigns, for good reason, to the contracting parties in situations of this kind. (A J Kerr: *The Principles of the Law of Contract* 3 ed at 40, 41).

This conclusion is fatal to the relief that was asked for by the appellant which specifically sought to compel the respondent to accept and meet all orders placed by the appellant and to

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grant, in respect of all such orders, the discounts agreed upon in the letter of 18 May 1972.

It is therefore strictly not necessary to debate Mr *Kriegler's* further submission that, although the respondent has the right to terminate unilaterally the agreement (with the implied term contended for) upon giving reasonable notice of termination, the letter dated 9 December 1982 could not reasonably serve to terminate as soon as 31 December 1982 an agreement of this nature which had endured for more than ten years. Mr *Kriegler* went on to submit that there is insufficient evidence on the papers to discharge the respondent's *onus* of establishing what a reasonable period

of notice would be under the circumstances, and he asked that the appeal should therefore be allowed and the orders asked for in the Notice of Motion granted, leaving it to the respondent to give afresh a notice of termination - should it so wish - that would be reasonable; alternatively, he suggested that, although the appeal must succeed, the matter could be remitted for the Court *a quo* to determine, on such further evidence as the parties might wish to place before it, whether reasonable notice of termination was in fact given.

The letter of 9 December 1982 was not merely a refutation of the respondent's supposed obligation under the agreement to accept any and every order placed by the appellant. It went further and stated a settled intention to cease permanently to trade at all with the appellant after the end of December, thereby necessarily affirming that the 1972 agreement would terminate on that date. That was not, however, the first notice of termination that the appellant was given. The earlier letter of 10 November 1982, which has already been referred to, gave formal notice of termination of the 1972 agreement on 31 December. In the absence of any evidence to suggest otherwise it would seem to me that a notice of termination that was substantially longer than a calender month is, *prima facie*, a reasonable notice having regard to the nature and the terms of the agreement in question, but, as I have said, it is not necessary to decide this aspect of the matter.

For the reasons that I have stated I would accordingly dismiss the appeal with costs.

Georges CJ: I agree.

Gubbay JA: I agree.

Atherstone & Cook, appellant's legal representatives.

Scanlen & Holderness, respondent's legal representatives.

S v NDLOVU 1983 (2) ZLR 263 (SC)

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Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

17 October & 14 November 1983

Flynote

Evidence - judicial notice - what facts court may take judicial notice of - existence of camps in South Africa for purpose of training persons to commit sabotage in Zimbabwe - not fact of which judicial notice can be taken - appeal - remittal of matter to trial court for further evidence - principles governing - criminal law - Emergency Powers (Maintenance of Law and Order) Regulations, 1980 - s 41 - doing acts preparatory to undergoing courses of training - evidence necessary to establish offence.

Headnote

Courts may take judicial notice of facts which are either so notorious as not to be the subject of reasonable dispute or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy. A fact cannot be said to be notorious just because the judge, as an individual, is well aware of it, whether from his judicial experience or otherwise. Thus, it would be unexceptionable for a court to take judicial notice of the fact that a large number of persons in Zimbabwe believe that there are camps in South Africa maintained for the purpose of committing acts of sabotage in Zimbabwe. To take judicial notice of the existence of such camps is another matter and one on which evidence is required.

An appellate tribunal will itself hear evidence or remit a case for the hearing of further evidence only in exceptional cases. A pre-requisite for the exercise of that power is that the party seeking leave to introduce such evidence must show that it could not have been produced at the trial. The fact that the parties at the trial or their representatives, through an error of judgment, did not call the evidence would not, except in a very strong case, be reason enough to remit the matter for further evidence.

In terms of s 41 of the Emergency Powers (Maintainance of Law and Order) Regulations, 1980, it is an offence to do any act whatever with the intention of, or preparatory to, undergoing any course of training referred to in s 24(1) of the Law and Order (Maintance) Act [*Chapter 65*]. The course of training there referred to is one undertaken for the purpose of "furthering a political object by the use of physical force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means within Zimbabwe".

GEORGES CJ

This section was tailored to meet the very specific conditions which prevailed when it was first enacted in 1977, that is, the war then prevailing in Rhodesia. Anyone leaving the country to join the guerilla forces could have had no object other than the liberation of the country by any possible means, an activity then considered subversive and unlawful. Even if the existence in South Africa of camps for the purpose of training persons to commit acts of sabotage in Zimbabwe can be presumed, it cannot be said to be the only inference to be drawn from an unlawful exit from Zimbabwe that the person concerned was going for training at such a camp.

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Nor can it be said that the offer of a job in the security apparatus of South Africa necessarily involves the furthering of a political object in Zimbabwe.

Cases cited:

S v Ncube & Anor High Court, 1982 (not reported);

R v van Heerden & Anor 1956 (1) SA 366 (AD);

R v Muruven 1953 (2) SA 779 (N);

S v Kudangirana & Others 1976 (1) RLR 147; 1976 (3) SA 563 (RAD).

The appellant in person

M Werrett, for the respondent

Judgment

Georges CJ: The appellant appeared to answer two charges: The first was that of contravening s 339 of the Criminal Procedure and Evidence Act [*Chapter 59*] as read with s 24(2) of the Law and Order (Maintenance) Act [*Chapter 65*] in that upon dates unknown in November 1981 and at Beitbridge he wrongfully and unlawfully attempted to attend any course or undergo any training outside Zimbabwe, namely in the Republic of South Africa, for the purpose of furthering a political object by the use of force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means within Zimbabwe. In the second count the appellant was charged in the alternative with doing an act preparatory to attending or undergoing a course of training outside of Zimbabwe, namely in the Republic of South Africa, for the purpose above mentioned. The appellant was convicted on the alternative count and sentenced to three-and-a-half years' imprisonment with labour.

The appellant pleaded not guilty. The evidence for the State consisted principally a warned and cautioned statement which he did not challenge. The gist of the statement was as follows.

The appellant had, prior to Independence, been a member of the Special Branch. After Independence he continued in Government Service as member of the Central Intelligence Organisation. In November 1981, shortly before he was due for a month's leave, he met in a Bulawayo hotel a Mr Branfield who had been a member of Special Branch. Branfield bought him a beer and asked him whether he was in a position to go to

see how South Africa stood. Just after the 1980 elections Branfield had warned him that he would be in trouble because of his Special Branch activities. He informed Branfield that he was going on leave for a month shortly and on his return he would be writing an accelerated examination.

Branfield gave the appellant $100 and a route was arranged by which the appellant would cross

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over from Zimbabwe to the Republic of South Africa on 10 November without going through a proper border crossing. The appellant did cross as agreed and met two males in a Peugeot 404 pick-up. He joined them and was driven for the whole night. At dawn they paused, slept for a while and then continued to Johannesburg where he telephoned Branfield. He was booked in at the Fontana Inn, as were the two men who had accompanied him, but in separate rooms.

The appellant expected Branfield to visit him but this did not happen. He remained at the Inn for five days, not moving around because he had been warned not to do so.

After five days the men who had brought the appellant to the Inn took him in a car and they all drove off. They paused at a small river for 30-45 minutes. A European in a car stopped and the appellant's companions spoke to him. Shortly after he saw the Peugeot 404 pick-up in which he had been driven from the border. It was being driven by Peter Ncube who spoke to one of his companions and told him they were needed at the farm.

Thereafter his companions drove off with him in the car, made a U-turn and then travelled for about one kilometre - going towards Johannesburg. They came to a farm where he saw many young men who were ex-members of the Security Force Auxiliaries. He realised that they had driven him past the farm on the drive to Johannesburg but he did not ask about this. They dropped off right inside the farm in a security fence. He greeted the boys whom he knew from Zimbabwe.

Branfield then arrived and took him, Peter Ncube and one of his companions on the drive to an office where they met a Mr Nel. Mr Nel asked him when he was coming to join them but did not mention what job they wanted him to do. They asked him how much he was earning and told him he could get more. Branfield asked him to put in his ticket for 30 January 1982 and join them. Accommodation was discussed and he was told that if he did not wish to live in a hostel they were in a position to build six houses for married men.

At this stage the appellant was given cigarettes, food and $300 and Ncube

and one of his driving companions took him to town. He was under the impression that they had been deliberately instructed to stay with him.

At the farm he saw no weapons nor did he see any training.

An arrangement was made for him to return to the farm on 26 November but that failed. On the 27th Mr Branfield and two others took him in a vehicle towards the Zimbabwe border. They reached Messina between 5.00 pm and 5.30 pm. Branfield said it was too late to go over the border so Branfield booked in at the Messina Hotel and he and the two others were given money to stay in the location. Meanwhile one of his companions had received word that one of his relatives was ill in Belingwe and he was given permission to go and see that relative.

The following morning they drove to where Branfield had been staying and met Branfield who asked them to return at noon, which they did. Branfield then drove to the western farming area

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and stated that he was expecting a plane at 3.00 pm. He drove slowly until they reached an airstrip.

About 3.00 pm the appellant saw a plane approaching from the south. It circled the airfield and then landed. Branfield approached the plane. He then called them to it and on Bransfield's instruction they removed two black trunks from the plane and took some small cardboard boxes from the car and put them in the plane. He and the companion who was to visit the sick relative in Belingwe then boarded the plane. There were two Europeans in the plane - the pilot being the smaller of the two. As they left Branfield reminded him to make sure he put his ticket in.

The plane landed at a farm near the Victoria Falls Road. He and his companion were driven in a Landrover and dropped in King's Avenue. He was not prepared to accept Branfield's offer so he did not put in his ticket and he never saw Branfield or his companions again.

The appellant gave evidence at his trial. This did not add anything of significance to his statement. The magistrate commented on the fact that the appellant had failed to mention the job offer by Branfield in his Defence Outline and gave no satisfactory explanation for that. The omission does not appear to me significant. The job offer was mentioned clearly in the appellant's warned and cautioned statement and it was plain that he was adhering to that statement as his defence.

The magistrate concluded that the appellant had not told the truth that

GEORGES CJ

he was going to South Africa on an innocent holiday as the guest of Branfield. He then asked if that was what was the purpose, bearing in mind the method by which the appellant had crossed the border on each occasion. He then continued:

> "The whole tenor of his visit is sinister and having said that, one asks the question what could be the reason for his visit to South Africa. I think the Court can take judicial notice of the fact that there are training camps on the South African side of the Limpopo River, where persons are trained for committing acts of sabotage and generally disrupting the law and order of this country and I say this bearing in mind that I myself have dealt with cases where persons have been tried and convicted by me in this court, for having come illegally into this country having been trained in South Africa."

Hoffmann, in his *Law of Evidence* (2 ed) at 291, sets out the basic principle underlying the concept of judicial notice:

> "A court takes judicial notice of a fact when it accepts it as established, although there is no evidence on the point. Generally speaking, judicial notice will be taken of facts which are either so notorious as not to be the subject of reasonable dispute, or which are capable of immediate and accurate demonstration by resort to sources of indisputable accuracy. The date of Christmas would fall within the first category, while the date of Easter in a particular year would be an example of the second."

While the principles are simple enough to state, the results of their application might well occasion surprise to the layman who may be inclined to accept as indisputable matters which are quite liable to being successfully disputed. For example, the layman may immediately assert that if the robot shows green for travellers on one of two intersecting roads it would show red

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on the other. But plainly this is so only if the robot is working properly. If it is not it may show green on both roads and a motorist could not be convicted merely by proving that he entered one road in the intersection while the light on the other road was showing green. Particularly in criminal cases in which proof beyond a reasonable doubt is required assumptions of notoriety can only be made in cases in which a dispute seems impossible.

It must also be borne in mind that a fact cannot be said to be notorious merely because the judge is well aware of it as an individual. The trial magistrate in considering that he could take judicial notice of the existence of the camps relied on the fact that he had himself tried people who had entered the country illegally having trained in South Africa. Reliance on such knowledge is clearly wrong. Judicial notice can be taken of a fact because it is well known - not because the particular judge is well aware of it. It is vital to keep the distinction clear, otherwise whether or not judicial notice is taken of a fact will depend on the judge before whom the case is tried. If a judge happens to have tried several cases of a certain

type before he will take judicial notice of facts proved in these cases whereas if he has not he will require proof - clearly an undesirable situation.

The difficulty arises because in the conduct of our daily lives we constantly accept as a basis for action facts for which courts necessarily require proof if they are to be satisfied beyond a reasonable doubt of the guilt of an accused person on trial. It would, for example, in my view be unexceptionable for a court to take judicial notice of the feet that a very large number of people in Zimbabwe and elsewhere believe that there are camps in South Africa maintained for the purpose stated by the magistrate. To take judicial notice of the existence of the camps is, however, another matter.

Indeed in the course of her argument Miss *Werrett* quoted from a case - *S v Ncube and Anor* High Court Case No CRB 16767/82 - in which the State called a member of the CIO to confirm the existence of training facilities in South Africa which were used by Zimbabwe nationals.

The appellant in this case was not admitting the existence of any such camps and in my view the State should have led such evidence. The appellant would then have had an opportunity to challenge it or he may well have been content merely to have put the State to proof.

Miss *Werrett* then asked that in the event it was held that judicial notice could not be taken of the existence of such camps taken the matter should be remitted to the trial magistrate for proof of that fact. She did not appear to press this application vigorously and for good reason.

An appellate tribunal will itself hear evidence or remit a case for the hearing of further evidence only in exceptional cases. A pre-requisite for the exercise of that power is that the party seeking leave to introduce it must show that it could not have been produced at the trial. In *R v van Heerden and Anor* 1956 (1) SA 366 at 371G to 372A CENTLIVRES CJ stated:

> "The mere fact that a miscarriage of justice may have taken place is not sufficient to justify the admission of fresh evidence for, in cases where the evidence was available at the trial,

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> 'there must be some possible explanation based on allegations that may be true why the evidence was not put before the Court'.

(per GREENBERG J in *R v Foley* 1926 TPD 168 at 171 and see *R v Carr* 1949 (2) SA 693 at 699). I am drawing attention to this factor because the sole criterion in an application for leave to lead further evidence on appeal is not whether a miscarriage of

> justice may have taken place. However strongly the further evidence may indicate that there may have been a miscarriage of justice, the Courts will not allow it to be led unless the appellant satisfies the requirement laid down in the decided cases."

No reason was advanced for the failure to call evidence in the court *a quo* of the existence of training camps. The reasonable inference is that it was an error of judgment; no-one thought of it.

In *R v Muruven* 1953 (2) SA 779 (N) the accused was convicted of assault with intent to do grievous bodily harm. He appealed and applied for leave to set aside the conviction and to remit the case for the hearing of further evidence. It was conceded that the evidence which was proposed to be led would be material in deciding on the guilt or innocence of the accused. The accused had been defended by an articled clerk who was necessarily inexperienced in court procedure. The two witnesses whom it was intended to call had been available at the trial and indeed one had been actually in court. Failure to call them had been an error of judgment. The prosecutor had in no way contributed to that error. BROOME JP, with whom HOLMES J (as he then was) concurred, stated at 780 E-F:

> "Now the general rule is that a litigant is bound by what is done by his representative. I do not say that this rule is entirely inflexible, but it is clear that a very strong case must be made before a decided case can be re-opened on the ground of an error of judgment on the part of the legal representative. But for that, there would be a lack of finality about court judgments which be entirely against the public interest."

The applications to remit the matter for the hearing of further evidence must be refused.

I did not understand Miss *Werrett* to press very strongly that the conviction could be sustained if judicial notice could not be taken of the existence of training camps. I have nonetheless considered various inferences which could be drawn from the evidence without taking that finding into account.

The alternative count with which the appellant was charged was tailored to meet very specific conditions which then existed. In *S v Kudangirana and Ors* 1976 (1) RLR 147; 1976 (3) SA 563 MACDONALD JP (as he then was) (LEWIS JA concurring) had decided that the actions of certain students at a seminary who had left the seminary intending to go to Mozambique for guerilla training did not amount to an attempt to undergo such training. On their way they paused at the Outward Bound School in the Chimanimani area for food and water and were detained there.

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GEORGES CJ

There had been no prior arrangement with any recruiting agent that they should leave. The Court held that what had taken place could not be said with certainty to have progressed beyond preparation.

The Emergency Powers (Maintenance of Law and Order) Regulations No 405 of 1977 contained for the first time a section (s 43) making it an offence to do any act whatever with the intention of, or preparatory to, undergoing any course of training referred to in s 24(1) of the Law and order (maintenance) Act [*Cap 65*]. The course of training there referred to is a course undertaken for the purpose of "furthering a political object by the use of physical force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means within Zimbabwe." This has been repeated as s 41 of the Emergency Powers (Maintenance of Law and Order) Regulations No 441 of 1980 under which the appellant was charged.

The trial magistrate found that the appellant went to South Africa knowing well that he had been offered a job there. He disbelieved the appellant when he asserted that it was merely a holiday. If judicial notice cannot be taken of the fact that there exist camps set up for the purpose of training people for committing acts of sabotage in Zimbabwe then the inference that the appellant was going for training at such a camp cannot be safely drawn. Indeed there might be serious difficulties in concluding that that is the only reasonable inference even if the existence of such camps is presumed.

Since Branfield was concerned with intelligence gathering in Zimbabwe and was attempting to recruit the appellant whom he knew to be an intelligence officer, it would be proper to infer that he planned to offer him a job in the security apparatus in South Africa and that the appellant was well aware of that. The offence, however, involves undergoing training and there is no compelling reason to infer that there would be need for such training. Even if the inference was drawn that induction into the security services of a country of a person trained in another country would require some re-orientation which could be said to be training there is no compelling reason to infer that the purpose would be the furthering in Zimbabwe of a political object by the use of physical force, violence, sabotage, intimidation, civil disobedience, resistance to law or other unlawful means. One can take judicial notice of the fact that the security services of South Africa are concerned with at least intelligence gathering in many countries other than Zimbabwe. A recruit inducted into those services could be used in Botswana, Zambia or Lesotho, to mention but a few.

GEORGES CJ

The difficulties I have discussed would obviously not have arisen in the circumstances with which the section was constructed to deal. Anyone leaving Zimbabwe to join the liberation movement could have had no objective but the liberation of Zimbabwe by any possible means - an activity then considered subversive and unlawful. In the more complex condition of today I am satisfied that inferences cannot be so conclusively drawn.

I agree that the offence has not been properly proved and accordingly the appeal must be

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allowed.

Beck JA: I agree.

Gubbay JA: I agree.

ARBOR ACRES (PVT) LTD v HARARE MUNICIPALITY 1983 (2) ZLR 272 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

2 & 14 November 1983

Flynote

Practice and procedure - prescription - Prescription Act 1975 - s 15(1) - runs from when a debt is due - "due" - meaning of - Salisbury Municipal Electricity Supply Regulation 1941 - regulation (14).

Headnote

The respondent municipality in 1975 entered into a contract with the appellant company in terms of which it supplied electricity to the appellant. The contract, a standard one, was subject to the provisions of the Salisbury Municipal Electricity Supply Regulation 1941, one of the provisions of which stipulated that "All accounts are due and payable on the date stated therein..." No other terms of the contract fixed the time for performance by the consumer of his obligation to pay for all electricity consumed.

During the period January 1975 to September 1981 the appellants' electricity meters were consistently misread with the result that the appellant was charged only one-tenth of what it should have been. On discovery of the shortfall, the municipality rendered an account to the appellant for the shortfall, some $80 000, demanding payment by 19 November 1981. The appellant paid $36 810.17 of this, but resisted payment of the balance ($43 205.21) on the ground that the debt in respect of this sum had become prescribed in terms of s 14(d) of the Prescription Act 1975.

Held, dismissing the appeal, that in terms of the contract the consumer was under no obligation to pay until the date stated in the account rendered by the municipality, and what became due and payable was simply the sum reflected in the account. That sum might or might not be co-extensive with the amount of electricity actually consumed. All that is made due by an account is what the account itself demands, and nothing else. The sum of $80 000 demanded by the municipality was thus due only on the 19 November 1981 and since, in terms of s 15(1) of the Prescription Act, prescription began to run when the debt was "due", the claim was not prescribed.

AP de Bourbon, for the appellant

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FC Blackie SC, for the respondent

Judgment

Beck JA: The respondent, to which I will refer as the municipality, has supplied low voltage electricity to the appellant company since 29 January

BECK JA

1975. From that date until 16 September 1981 two meters that measured the electricity that the appellant consumed were consistently mis-read because regard was not paid to a nought on the dials of the meters. This prolonged failure to read the meters correctly resulted in only one tenth of the electricity that the appellant had in fact consumed being reflected and charged for in the monthly accounts that the municipality rendered to the appellant.

When the error, of which the appellant company had been as much unaware as the municipality itself, was finally discovered it was established that the appellant had been under-charged in the considerable sum of $80 015,38. Amended accounts were then rendered to the appellant demanding payment of this sum by 19 November 1981, but the demand was resisted on the grounds that, according to the appellant,: (a) the debt was, as to some of it, prescribed; and (b) the municipality was in any event estopped from enforcing payment of any part of it.

Attempts to resolve the dispute came to nothing and eventually the municipality applied to the High Court on 11 January 1983 by notice of motion for an order directing the appellant company to pay to it the sum of $80 015,38 and for ancillary relief. In resisting the application the appellant company did not seek to rely on any estoppel, but it did persist in the contention that part of the debt had become prescribed, being hit by the three-year period of extinctive prescription provided for in s 14(d) of the Prescription Act 1975, which Act came into operation on 1 January 1976. The portion of the municipality's claim that was not prescribed, according to the appellant, was: (a) the indebtedness for electricity consumed, but not paid for, between 29 January 1975 and 31 December 1975, because that period is governed by the provisions of the former Prescription Amendment Act [*Cap 50*] in terms of which a debt of this nature was subjected to a prescriptive period of eight years the running of which was interrupted on 11 January 1983 when the present proceedings were instituted; and (b) the indebtedness for electricity consumed, but not paid for, between 12 January 1980 and 16 September 1981 (when the erroneous readings of the meters ceased), because this period, which is governed by the new Prescription Act 1975, is within three years of 11 January 1983, when the institution of these proceedings interrupted the running of prescription.

The total indebtedness under (a) and (b) above for which the protection of prescription was not claimed amounts to $36 810,17 and the appellant admitted liability to the Municipality in this amount and tendered payment of it, which tender was accepted in the Court below.

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BECK JA

The remainder of the municipality's claim totals $43 205,21 and relates to electricity consumed but not paid for between 1 January 1976 and 11 January 1980. The learned judge *a quo* (WADDINGTON J) rejected the appellant's contention that this portion of the appellant's indebtedness was prescribed in terms of s 13(1) as read with s 14(d) of the Prescription Act 975 and it is against that decision that this appeal has been brought.

The point that is in issue is an extremely narrow one. It is simply this: When did the debt of $43 205,21 first become due?

If none of it became due until after 11 January 1980 the appellant must fail, because s 15(1) of the Prescription Act 1975 stipulates that (subject to certain provisions that are not relevant to the instant case) "prescription shall commence to run as soon as a debt is due".

To ascertain when this debt first became due, regard must be had to the terms of the contract between the parties. It is in writing and was concluded on the standard printed form that is used by the municipality in such matters. One of the printed conditions on that form makes the contract subject to the provisions of, *inter alia*, the Salisbury Municipal Electricity Supply Regulations 1941 and one of the provisions of those Regulations stipulates that: "All accounts are due and payable on the date stated therein ..." [Part II, Section 3, Regulation (14)].

There is no other term of the contract which fixes the time for performance by the consumer of his obligation to pay for all electricity consumed. The position therefore is that the consumption of electricity creates a contractual liability and makes of the consumer a debtor, but the creditor municipality cannot demand performance by the debtor (viz payment) until the time agreed upon arrives: *dies cedit sed nondum venit*; and the time agreed upon in terms of the contract for performance by the debtor is the date stated in each account that is periodically rendered by the municipality.

The next question that arises is the extent of the obligation that falls due for performance by the consumer on the date stated in each account, and it is around this point that the argument has centred.

For the appellant Mr *de Bourbon* argued that what becomes due and payable on the date stated in the account is not the sum that is owed for the quantity of electricity *reflected in the account* as having been consumed, unless the account is factually correct, but is the sum owed for the quan-

BECK JA

tity of electricity that has *in fact been consumed* during the period covered by the account, even though the account fails to reflect that quantity. He contends, in consequence, that each of the omitted charges between 1 January 1976 and 11 January 1980, that together make up the sum of $43 205,21 that is in dispute, actually fell due for payment on the date stated in the particular account in which, but for the wrong meter readings, such omitted charge would have been included; and that prescription therefore commenced to run in respect of every such omission

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on the various dates stated in the respective accounts in which each omission should have been included.

For the respondent municipality Mr *Blackie* has submitted that what becomes due and payable on the date stated in the account is simply the sum that is owed for the quantity of electricity reflected in the account as having been consumed, no more and no less. That sum, which the account makes due for payment, may or may not be co-extensive with the consumer's actual liability to pay (when required to do so) for all electricity actually consumed during the period covered by the account. Since the appellant was not required to pay for the $43 205,21 worth of electricity actually consumed between 1 January 1976 and 11 January 1980 until accounts were eventually rendered to the appellant demanding payment of $80 015,38 (which, of course, included the amount of $43 205,21) by 19 November 1981 the liability only fell due on this last-mentioned date in accordance with Regulation (14) that was a term of the contract. Therefore prescription did not commence to run in respect of this liability before 19 November 1981 when this liability first became due for discharge (*dies venit*), although it was in existence long before then (*dies cedit*).

In common with the learned judge *a quo* I find Mr *Blackie's* argument to be the more persuasive. His argument correctly emphasises that the rendering of an account is the only condition upon which the time for the fulfilment by the debtor of his obligation to pay is made to depend, so that where no account is sent at all no payment is due at all, even though electricity has been consumed, and no payment whatsoever will become due until an account is sent. If that is so, and Mr *de Bourbon's* argument accepts that it is so, there is no reason why the same result should not follow when there is a failure, not in relation to making due the whole liability by omitting to send an account, but in relation to making due part of the liability by excluding it from an account. In other words, and in accordance with what common sense would suggest, all that is made due by the account is the obligation to pay for that electricity consump-

lion that is reflected in the account, and not the obligation to pay for any other electricity consumption that, for whatever reason, has not yet been made the subject of an account.

There are other terms of the contract to be found in the Regulations that support this view. For instance, Regulation (14), to which I have already referred, goes on to provide that the "rendition of the account shall constitute notice that the supply of electricity may be cut off if payment is not made on or before such date". Clearly, it can only be a failure to pay timeously what is shown in the account to be due that entitles the municipality to cut off the supply; it is unthinkable that the municipality could cut off the supply for non-payment of electricity consumption for which it has not yet demanded payment, and I agree with the observation of the learned judge *a quo* that -

> "Had the intention behind regulation (14) been to permit a supply authority to terminate supplies to a consumer who timeously pays the amount expressly demanded at him, the statutory instrument in question would be in my opinion both unreasonable and unjust in its effect and probably *ultra vires*."

The strong indication in Regulation (14) itself is therefore that all that is made due by an

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account is what the account itself demands, and nothing else.

That indication is further fortified by the concluding portion of Regulation (15) which reads: "In the event of a consumer disputing an account as rendered, payment cannot be deferred pending settlement of the dispute". Such a provision distinguishes between the extent of the consumer's actual liability towards the supplier and the extent of his obligation to effect performance of what has been made due.

Similarly, the contract contains a term which expressly reserves for the municipality the right to make due and payable such liability as was erroneously not made due and payable earlier. In s 6, Part II of the Regulations, Regulation (3) (g) provides that -

> "The Supply Authority reserves the right should any error be discovered either in the accounting, reading or metering, respecting any account rendered to a consumer, to amend or rectify such account by including such amendment or rectification in any or all subsequent accounts rendered to him."

It was in terms of this provision that the municipality acted when it rendered its corrected accounts demanding payment of the shortfall of $80 015,38 by 19 November 1981, and the effect of sending those accounts was, as the learned judge *a quo* correctly held, to mace due for the first

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BECK JA

time, in accordance with the aforementioned Regulation (14), the obligation to pay the whole of the existing liability of $80 015,38 of which no part had yet been made due by incorporation in previous accounts.

Mr *de Bourbon* suggested that the situation that arose is no different in principle from that which would obtain if A, having lent to B $100 repayable on demand, demands repayment but erroneously refers in his demand to the amount of the loan as having been $10 instead of $100. I agree that in such a situation the demand would have the effect of making repayment due of the whole loan, and not just $10, if, despite the error, it is nevertheless clear that the demand was intended to relate to the whole of the loan and not just to part of it. The suggested analogy is not helpful therefore, because it begs the question. Mr de *Bourbon's* argument can only succeed if the demand for payment that is constituted by each electricity account must be understood to be a demand by the municipality for payment, by the date specified in the account, not merely of the amount expressly claimed in that account, but also of any further amount that could have been claimed in it but has been omitted. Those portions of the Regulations to which I have referred militate against any such contention.

I would accordingly dismiss the appeal with costs.

Georges CJ: I agree.

Gubbay JA: I agree.

Candy, Chadwick & Elliot, appellant's legal representatives.

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Honey & Blanckenberg, respondent's legal representatives.

S v LAMPRECHT 1983 (2) ZLR 278 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

14 November 1983

Flynote

Criminal law - Prevention of Cruelty to Animals Act [Chapter 71] - s 3(1)(a) - Killing "cruelly" - mens rea required.

Headnote

The word "cruelly" in s 3(1)(a) of the Prevention of Cruelty to Animals Act [*Chapter 71*] clearly imports the element of *mens rea* into the offence. Where a person does an act to an animal which he knows must in the ordinary way produce pain, and he does that act neither accidentally nor under circumstances negativing intent, then he does the act intentionally and wilfully. Unless that knowledge exists, he cannot be said to have acted "cruelly".

Case cited:

R v Sibeko 1951 (2) SA 41 (E).

A N B Masterson, for the appellant.

M Werret, for the respondent.

Judgment

Georges CJ: The appellant was charged with malicious injury to property in that on 8 June 1983 at Wallasey Farm, Featherstone, he wrongfully and unlawfully with a wrecht clamp trapped and killed an Angus bull, the property of Nicholas Breakspear (the complainant) with intent to injure the complainant in his property. In the alternative he was charged with a contravention of s 3(1)(a) of the Prevention of Cruelty to Animals Act [*Chapter 71*] in wrongfully, unlawfully and cruelly killing an Angus bull by placing it in a wrecht clamp and beating it about the body.

The appellant was acquitted on the main charge, the magistrate holding correctly that from the facts proved the appellant had no intention to injure the complainant in his property. He was, however, convicted on the alternative charge and ordered to pay a fine of $75 or in default undergo 15 days' imprisonment with labour.

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GEORGES CJ

The appellant appealed. The State, in its heads of argument, conceded that the magistrate had misdirected himself and did not support the conviction. Since this concession appeared to be sound the appeal was allowed at the hearing and the conviction and sentence were quashed. Reasons now follow.

The facts are not seriously in dispute. The appellant testified that it was a common occurrence for the complainant's bull to stray onto his farm and interfere with his heifers. On 7 June 1983 he saw the bull among the heifers and sent a note by an employee to the complainant asking him to try to keep the animal away and he drove the bull back.

The next day, the 8th, he saw the bull again serving one of his heifers. He took the bull to the dip kraal and closed the gate. As he was leaving he saw the bull breaking out. He put the bull in a crash pen, caught him in a neck clamp and placed three poles behind him. The appellant left for another section, passed the spot on his return about 5 pm and saw the bull standing clamped as it had been left. He then called at the complainant's house and told him that the bull had been placed in the clamp. The complainant clearly did not treat the situation as one needing urgent attention. He said he would send someone to move it in the morning. The men had a drink.

The next day at about 7 am the appellant passed the spot where the bull had been clamped and found it dead, lying on its stomach, legs apart and with a little blood appearing to come from its nose. He drove at once to the complainant's house to inform him.

Fanuel Urayayi, who was given the head of the beast and skinned it, noted a fracture of the right jaw which appeared fresh. Anderson Wallace who pulled the bull out saw no injuries but after skinning noticed some marks on the back which might have been caused by someone poking it with a stick. Isaac Urayayi, who led the party sent to move the carcass, saw on the back what appeared to have been clots indicating that the bull had been beaten. The complainant's evidence was that when he saw the carcass it appeared that the bull had been badly beaten on its back.

While the cause of death was not scientifically established the general view was that somehow the bull had been strangled in the clamp.

Quite properly the magistrate held that the evidence did not establish that the appellant had beaten the bull or had been responsible for the break-

GEORGES CJ

ing of its jaw. He then held that by clamping the bull and by placing three poles at its back the appellant had cruelly ill-treated the animal for the hour before he informed the complainant.

The State did not allege that merely placing the bull in the clamp was cruelty. What was alleged as cruelty was placing the animal in a clamp and beating it about the body. Indeed the appellant's evidence which was not controverted was that the animal was standing when he

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passed it at 5 pm. It is of significance that the complainant did not seem perturbed when told that the bull had been placed in a clamp. He was prepared to wait until the following day to deal with the matter. This attitude is explicable only on the basis that he did not think that the animal was suffering or likely to be injured.

The word "cruelly" in s 3(1)(a) of the Prevention of Cruelty to Animals Act clearly imports the element of *mens rea* into the offence. In *R v Sibeko* 1951 (2) SA 41 (EDL) REYNOLDS J stated at 43:

> "When, however, a person without any compulsion thereto, of his own free will elects to do something, which he knows must in the ordinary way produce pain and he does that act not accidentally or under circumstances negativing intention to perform that act, then he does that act intentionally and wilfully."

In that case the defendant had ridden a horse for forty miles. When the saddle was removed there were two large open raw sores beneath. An inflamed growth about the thickness of a pencil was sticking out of the sore on the centre of the spine. Both sores were inflamed and suppurating, indicating that they had not been recent. On those facts it was held that *mens rea* had been established.

No such necessary inference can be drawn in this case since, as I have indicated, the complainant himself seemed unperturbed at the report that the bull had been placed in a clamp. There was no realisation that the act would, in the ordinary way, produce pain. Had there been evidence that the appellant had beaten the animal while it was clamped the situation would have been otherwise.

The magistrate did not direct himself properly on the issue of *mens rea*.

Accordingly the appeal was allowed.

Beck JA: I agree.

Gubbay JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives.

C PETTIGREW (PVT) LTD v CONE TEXTILES (PVT) LTD & DEPUTY REGISTRAR 1983 (2) ZLR 281 (HC)

Court **High Court, Harare**

Dumbutshena JP

20 October & 16 November 1983

Flynote

Practice and procedure - taxation of counsel's fees - principles - fees assessed on basis of counsel of reasonable competence and average skill - consultation with other members of Bar - whether permissible -

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arbitration case - not necessarily comparable to civil trial involving equal number of court days.

Headnote

When assessing a bill of costs, there is nothing wrong with a taxing officer consulting members of the Bar with regard to the current level of fees. However, when doing so, it is necessary to appraise the persons consulted fully of the nature and complexity of the case and not put vague hypotheses to them. On the other hand, it is not necessary to inform them of who counsel in the case war or what was actually charged, since the determination of counsel's fees can only be done on the basis of a senior or junior counsel (as the case may be) of reasonable competence and average skill.

Arbitration proceedings are not necessarily comparable to a civil trial of equal length. There may well be other factors which make them far more complex and difficult than a civil trial, such as the number and nature of the issues in dispute and the amount of documents and other papers that have to be read and mastered.

Cases cited:

Scott & Anor v Poupard & Anor 1972 (1) SA 686 (AD);

Reef Lefebvre (Pty) Ltd v SA Railways & Harbours 1978 (4) SA 961 (WLD);

Majola v Union & South West Africa Insurance Co Ltd 1978 (2) SA 154 (SECLD)

Bertish v Standard Bank of SA Ltd 1956 (4) SA 9 (CPD);

Wellworths Bazaars Ltd v Chandlers Ltd & Ors 1947 (4) SA 453 (TPD);

Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd 1977 (3) SA 383 (C).

A P de Bourbon, for the applicant

M T O'Meara, for the 1st respondent

Judgment

Dumbutshena JP: This is a review of taxation in terms of Rule 314 of the High Court Rules. The bill of costs was drawn up by applicant's legal practitioners reflecting fees in the sum of $22 800 paid to senior and junior counsel. The fees paid to senior and junior counsel were $15 200

and $7 600 respectively. The overall fee allowed by the taxing master was $13 800. The senior counsel was allowed $9 200 and junior counsel $4 600.

The applicant for review is C Pettigrew (Pvt) Ltd and the first respondent is Cone Textiles (Pvt) Ltd. The second respondent is the Deputy Registrar of the High Court - the Taxing Officer.

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Briefly, during November and December of 1981 the applicant and the first respondent were locked up in the resolution of a dispute by arbitration. The applicant was applicant in the arbitration proceedings and the present first respondent was the respondent. The arbitration proceedings were presided over by Messrs John Redgment and Douglas Sandison. he applicant and the first respondent entered into a written contract dated 29 May 1974. The applicant pursuant to that contract constructed certain buildings for the respondent at Seke. A dispute arose between the parties because the architect's failure to issue a final certificate in terms of the contract. This is the dispute that the parties referred to arbitration.

At the end of the hearings the arbitrator made the following award:

> "*IN THE RESULT* we award the sum of $92 860,51 to Applicant with interest at the rate of 6& *per annum* save on the amount of $42 144,20 in the retention fund, such interest to run from the 1st January 1977, and we award costs on the High Court scale to the Applicant, including the cost of three legal practitioners."

The first respondent applied to this Court for a review of the decision of the Arbitrators. The review was argued on 7, 8 and 9 June, 1982, before McNALLY J The learned Judge's decision is in Judgment No HC-H-186-82. That judgment was handed down on 30 June 1982. First respondent's application was dismissed with costs. First respondent appealed against the decision of McNALLY J The appeal was heard by the Supreme Court in February 1983, Judgment No SC 25/83.*(1) The appeal was dismissed with costs.

Following upon the dismissal of that appeal applicant's legal practitioners prepared a bill of costs for taxation. The second respondent in his capacity of Taxing Officer heard the taxation on 24 and 27 June 1983. The taxation of the bill of costs was completed on 27 June 1983.

This review is concerned with the fees paid to senior and junior counsel in respect of professional services rendered during arbitration proceedings and the reduction of first-day fees by the Taxing Officer. From the $15 200 paid to senior counsel by applicant, the second respondent taxed

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off $6 000. And from a fee of $7 600 paid to junior counsel $3 000 was taxed off.

The applicant now wants this Court to review the second respondent's decision in order to restore the taxed-off amounts.

The short history of the dispute is as follows:

The construction of a factory at Seke by the applicant was completed in 1975 and 1976. In April 1976 there were differences between the parties because first respondent's architect refused to issue a further Certificate - the penultimate Certificate. The dispute was referred to arbitration.

The arbitration presided over by Mr Ayers got under way in October 1978 and the Award was to the effect that the architect had erred in refusing to issue the Certificate and that the applicant was entitled to further payment. This award was handed down on 11 April 1979. The record of

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this arbitration was transcribed and consisted of 22 volumes containing 2 212 pages.

The dispute between the parties can be described as a battle of wills as is clear from the number of times the dispute has been before arbitrators and before the High Court and the Supreme Court.

The arbitration, Mr Ayers's Award, was challenged by first respondent by way of an application to the High Court for a review. It ended in the then Appellate Division of the High Court where in Judgment No 102/80 Ayers's Award was set aside.

In or about September 1980 applicant called upon first respondent's architect to issue a final certificate. The applicant says in its founding affidavit that on 4 February the architect issued a document purporting to be such a certificate. It showed an alleged indebtedness by the applicant to the first respondent in a sum in excess of $500 000. Relying on this certificate, first respondent issued a provisional sentence summons out of the High Court against applicant. The claim was dismissed by PITTMAN J in case No GD 416/81.

The dispute ended with the matter being referred to arbitration. This is the arbitration about which the Court is now concerned - but con-

corned not with the award itself but with the bill of costs taxed by the Taxing Officer.

Before the proceedings in the second arbitration were held, there were five pre-trial hearings. It is said by the applicant that issues between the parties were debated at some length. The first respondent produced at these pre-trial hearings a list of thirty-six defects in the construction work or in the materials used by the applicant. As a result the actual number of issues, factual and legal, to be determined and which were determined by the arbitrators was forty-five. In the arbitrators' Award all these issues were dealt with and determined in accordance with the evidence placed before the arbitrators. The applicant says in its founding affidavit that all the issues canvassed at the previous arbitration remained issues at the second arbitration.

Although applicant undertook to place before the Court in advance of the hearing a copy of the index and a bundle of documents, these documents were not before the Court at the hearing nor are they before me at the time of writing this judgment.

What then was before the arbitrators? It is said in the applicant's founding affidavit that besides the minutes of pre-trial hearings there were also:

"(a) the pleadings in the Arbitration before Mr Ayers;

(b) the complete record of that Arbitration; and

(c) the Judgments of Court in the Cases numbered GD 978/79 and AD 102/80." (ie Judgments Nos G-S-16-80 and AD 102/80.

Counsel had to read the record of the previous arbitration - a record of twenty-two volumes containing 2 212 pages - because of the decision taken by the parties at the pre-trial conference

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held on 28 September 1981 to the effect that that record had to stand as evidence in the second arbitration subject to the right of parties, should they so wish, to re-examine witnesses.

Finally, the complexity of the arbitration was compounded, so says the applicant, by the actual time it took to hear evidence in the arbitration. The hearings were on 23 and 27 November 1971, 4, 7, 8, 9, 10, 14, 15, 16, 17, 18, 21 and 22 December 1981. It is said counsel for applicant made their submissions which were supported by lengthy written arguments, immediately after the evidence was taken.

While the first respondent agrees with the matters relied upon by the applicant to prove the complex nature of the matters dealt with at the se-

DUMBUTSHENA JP

cond arbitration, it is not accepted that all the issues in the previous arbitration remained issued at the second arbitration. What is, however, important to the Court is the number of issues whether new or old that were dealt with at the second arbitration. The first respondent does not dispute that there were forty-five issues.

The main thrust of Mr *de Bourbon's* attack on the Taxing Officer's taxing off of Counsel's fees was that the second respondent failed to appreciate that the arbitration proceedings were long and complex and called for complex and lengthy considerations of fact and legal arguments.

Mr *de Bourbon*, who appeared for the applicant, contended that the Taxing Officer had applied a wrong principle when, in his attempt to be better informed, he approached counsel seeking advice on the level of fees charged by counsel. He was not open to counsel because he came to counsel with vague inquiries on normal fees, whereas the case by its very nature required a full explanation.

In his report the Taxing Officer said in regard to the allegation made above:

> "I deny that I consulted three members of the local Bar in connection with the fee charged in this case if by this it is meant that I looked to those members for advice as to the decision that I took in this matter. What I did was to consult with the leader of the local Bar Mr Grossman and a Senior Counsel in practice Mr Blackie as to the general level of fees currently being charged by Senior Counsel in High Court trial actions. I believe the affidavit lodged from Mr Grossman makes this clear. Mr Grossman confirms in paragraph 11 that I did not advise him of the case that I was dealing with and the actual fee was only mentioned by me because it differed so markedly from the figures given by Mr Grossman as stated in paragraph 8. It was virtually impossible to speak about the fees being charged by Senior Counsel without referring to Mr Andersen by name as I believe Mr Grossman's affidavit indicates. I will give my reasons for approaching Counsel to ascertain the current level of fees later in this report.
>
> In regard to the affidavit from Mr Grossman I do not recollect Mr Grossman giving as stated in paragraph 9 figures of $3 000 to $4 000. My impression is that he merely stated that the fees for a very difficult case would be very substantially more than the fee of $1 000 referred to in paragraph 8.
>
> Mr Grossman states in paragraph 11 of his affidavit that he is aware of the nature of the case and of the quite exceptional amount of work that was involved. Having dealt with the taxation of the first arbitrator's bill of costs which was the subject of a judgment of this Court (No 174/82) I also consider that I have a much greater awareness of the work that was involved in this case than a taxing officer approaching a matter for the first time

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would normally have."

The fees the Taxing Officer was inquiring of senior counsel are broken down as follows:

DUMBUTSHENA JP

	Senior Counsel	Junior Counsel
	$	$
Conferences	200,00	100,00
1st day fee	9 000,00	4 500,00
2nd to 16th days	6 000,00	3 000,00
	$15 200,00	$7 600,00

The Taxing Master allowed fees charged for conferences and refreshers for the 2nd to 16th days of the hearing. He adjudged that the fees paid for the first day to both senior and junior counsel were grossly excessive.

Two questions arise from this taxation and the objections raised on the taxed-off amounts. Did the Taxing Master have experience in taxing cases of this complexity and magnitude? Did he, in his attempt to seek the advice of senior counsel at the Bar, reveal to those from whom he sought information the very nature of the cause he was dealing with?

The second respondent himself, referred to also as the Taxing Officer, says in his report:

> "Taxing Officers in this Court rarely tax bills of costs in which Senior Counsel are involved. In this country it is rare to find more than two Senior Counsel practising at the Bar and there are times such as now when there is only one Senior Counsel practising at the Bar. The schedule of minimum fees published in the Rules of the Bar of Zimbabwe in 1982 gives only minimum fees and indicates a minimum fee for a Senior for a brief on trial of $150. Clearly this is of no help in arriving at the general standard of fees being charged. Reference to the general standard of fees being charged in South Africa is again of little use since it is clear from the judgment of BECK J in *Cohen v Cohen* GD 765/79 that fees allowed to Counsel in South Africa are greatly in excess of the level of fees charged in this country. In any event reference to *The Law of Attorneys Costs and Taxation Thereof* by Jacobs and Eckles at page 103, paragraph 116, under the heading of 'Quantum of Counsel's fees in the Appellate Division' records that the taxing master in South Africa allowed a first day fee of R3 000 to Senior Counsel. When this was brought on review in *Scott and Another v Poupal and Another*, 1972 (1) SA 686 the judge commented -
>
> > 'the R8 000 allowed in this case (R3 000 1st day fee R2 000 refresher for senior counsel and R2 000 1st day fee and R1 000 refresher junior counsel) makes it plain that the taxing master must have found this case to be very high on the scale of complexity and bulk'
>
> However the judge in his judgment disagreed with the taxing matter's views regarding the complexity of the appeal and by using 'the general standard of fees that are charged and have been allowed by the Taxing Master without objection by way of review in a variety of cases' reduced the composite fee of R8 000 as allowed by the Taxing Master to an amount of R5 000 as between party and party."

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DUMBUTSHENA JP

Although the second respondent says in his report that because of the difficulties mentioned above it has become his practice "as senior taxing officer to approach senior counsel from time to time to ascertain from them the general level of fees being charged by them", there is no doubt that apart from the instant case he has not dealt with bills of costs relating to arbitration proceedings as complex and time consuming as this one. He did not have this experience so he regarded, in his approach to taxation, this arbitration as an ordinary complex High Court commercial case lasting the same length of time.

In my view, the starting point in the assessment of the complexity of these arbitration proceedings is the recognition that the proceedings were in a class of their own and not comparable or equivalent to "a High Court opposed civil commercial trial lasting for the same number of days in which the cost of two Counsel were allowed", as was stated by the Taxing Officer in his report. These arbitration proceedings were a new experience involving a lot of documents - minutes from five pre-trial conferences, forty-five issues and two previous judgments of this Court. Its complexity, in the context of this country, was in a class of its own. Having referred to the "exceptional number and volume of documents that had to be studied by Counsel", in my judgment the Taxing Officer adopted the wrong approach when he, in assessing the complexity of the arbitration proceedings, equated them with opposed civil commercial trials in this Court lasting the same number of days.

It is not clear on the papers whether the Taxing Officer, when consulting Mr Grossman, then leader of the Harare Bar, Mr Blackie SC and Mr Horn SC, put to them the nature of the case for which he was seeking advice on the level of fees currently being charged in the High Court trial actions by senior counsel. Mr Grossman says in his affidavit that the Taxing Officer asked him what he thought Mr Andersen SC would charge for a very difficult case. After expressing some doubt as to whether he was given more details about the hypothetical length or complexity of the case, Mr Grossman continued in paragraph 9 of his affidavit:

> "I am certain however that I was not appraised of the fact that this was a commercial arbitration or of the full extent of the work that was involved. I said hesitantly that I thought it could go up to $3 000 or $4 000 for the first day. My recollection is uncertain of the figure I gave but I think it was in that region."

He then said that he was certain that he "was not appraised of the case in which Mr Andersen had charged $9 000 nor was I told it was an arbitration and the full extent of the work that had to be done."

DUMBUTSHENA JP

There is nothing wrong in a Taxing Master consulting members of the Bar on the current level of fees. In the ordinary run of things a Taxing Officer in the course of his work acquires a vast amount of knowledge on current and past levels of fees charged by counsel. It is important, however, to be appraised of the general standard of fees charged because this is an important consideration when assessing fees. See *Scott & Anor v Poupard & Anor* 1972 (1) SA 686 (AD) at 692H. I have no doubt that the second respondent was right when he sought to establish the general level of fees charged by consulting senior counsel. He, however, erred in two respects.

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In his consultations, at least with Mr Grossman, who is the only one who has sworn an affidavit on what happened during consultations, the second respondent failed to appraise them fully of the nature and extreme complexity of the case for which he needed the information. In the inquiry it was not necessary to mention that the case in question had been done by Mr Andersen and even the fee that he had charged, because this was not necessary for the objective assessment of counsel's fees.

Useful assistance is gained by following the comments of COETZEE J in *Reef Lefebvre (Pty) Ltd v SA Railways & Harbours* 1978 (4) SA 961 (WLD) at 963H-964C:

> "Perhaps more so than in other professions, skills at the Bar vary enormously over a wide spectrum; from fumbling apprenticeship to sheer artistry. And so do the fees. Particularly is this so at the junior Bar. There is only a rough correlation between skill and seniority, possibly a closer one in respect of the experience component of skill. But in the objective determination of a reasonable fee, this fact of professional life is not taken into account, nor the standing of counsel. Only the two categories of seniors and juniors are relevant, and a senior or junior of reasonable competence and average standing is assumed. Whilst the actual time spent by counsel on any task is of paramount importance, it is not the only decisive criterion as GALGUT J pointed out in *City Deep Ltd v Johannesburg City Council* 1973 (2) SA 109 (W) at 114. Apart from the matters alluded to by GALGUT J, there is a further rather elusive element which influences the fee. This is an amalgam of abstract thought, concern, responsibility and commitment, which is bound up with the complexity and gravity of the brief. This element may cause particular individuals to spend more time on a brief than is warranted, objectively speaking, and in determining the reasonableness of a fee, one should strive for balance and not allow this aspect to produce odd results which was apparently the case in *Scott and Another v Poupard and Another* 1972 (1) SA 686 (A) at 690, where JANSEN JA said that the time actually spent should not displace an objective assessment of a proper fee for that work."

In the assessment of fees second respondent correctly disregarded any outstanding skills that counsel, who appeared for the applicant, might have had. He was aware of the fact that the determination of counsel's fees can only be done on the basis of a senior or junior counsel of reasonable competence and average skill.

DUMBUTSHENA JP

Mr *O'Meara*, who appeared for the first respondent, argued that the second respondent acted, when he disallowed part of the fees charged by senior and junior counsel for the first day, on clear principles expressed so clearly and settled in *Majola v Union & South West Africa Insurance Co Ltd* 1978 (2) SA 154 (SECLD) at 155C-E:

> "The three relevant principles here which are referred to by the Taxing Master in his report are:
>
> (a) The approach approved in *Openshaw v Russell* 1967 (4) SA 344 (E) namely that 'While it is true that a successful party should have a full indemnity in respect of costs, it is equally important to litigants who are unsuccessful that they should not be oppressed by having to pay an excessive amount of costs.'
>
> (b) The successful party is not entitled to costs and the unsuccessful party should not be mulcted in costs occassioned by undue care or caution of the successful party's legal adviser; such additional costs are attorney and client costs which it is proper that the successful party should himself pay for the anxious care which his adviser has devoted to his affairs. See, for example, the cases referred to in *Engel v Engel and Another* 1975 (1) SA 879 (SWA)
>
> (c) The Taxing Master exercises a discretion which will not lightly be disturbed unless, for example, he has applied the wrong principle or has misdirected himself on the facts or law; that is so, even if the Court

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might itself have given a decision different from that of the Taxing Master. *Paton v Santam Insurance Co Ltd* 1967 (1) SA 98 (13) at 100-101; *Engel's* case *supra*; *Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd* 1977 (3) SA 383 (C)."

I have considered the authorities and cases relied upon by Mr *O'Meara* when he contended that the second respondent had properly exercised his discretion and had not misdirected himself. He especially relied on *Bertish v Standard Bank of SA Ltd* 1956 (4) SA 9 (CPD) at 13B-D, where HERBSTEIN J said:

"Even if the Court should consider that if it had had to give the decision it might have allowed more, this would not justify an interference with the Taxing Master's decision on *quantum*, which is

'a matter primarily for the discretion of the Taxing Master with which the Court interferes only with reluctance, and I think I may add, in extreme cases'.

(per MILLIN J in the *Wellworths Bazaars*' case, *supra* at p 459).

In *Freitas v Rechtman* 1921 CPD 853, GARDINER J said practically the same.

'Where the question is one of the amount of counsel's fees or of technical details of taxation of which the Taxing Officer has special knowledge the Court would be reluctant to interfere with his decision and would only do so in strong grounds.'

The Court will not interfere merely where it concludes that had it been seized of the enquiry to determine the amount to be allowed it would have allowed more or less than did the Taxing Officer."

I more than appreciate that the question of the *quantum* of counsel's

DUMBUTSHENA JP

fees is a matter primarily for the discretion of the Taxing Officer and that the Court interferes reluctantly with his discretion in extreme cases. See *Wellworths Bazaars Ltd v Chandlers Ltd & Ore* 1947 (4) SA 453 (TPD) at 459. This, in the context of cases of a somewhat similar nature that are heard in the High Court, is a case extreme in its nature and complexity. There has been no case like it in the country. Hence the difficulty attending the assessing of reasonable fees. Those twenty-two volumes are full of figures and calculations of a complex nature and which are not ordinarily found in a commercial case of the same length. The natures of the disputes as revealed in the forty-five issues considered by the arbitrators, requires - though not in ever issue in dispute - a great deal of concentrated study and a capacity to master numerous matters of fact. Because the case, though not unique, is in a class of its own, a class without a general average of fees charged by counsel and a class with which the Taxing Officer is not familiar, it was not easy for the Taxing Officer to be guided by past experience. I have already held that he erred at least in two respects. The Court is, therefore, at large and can interfere. I have decided to set aside the taxed-off amounts because they are unusually large deductions and because the second respondent did not exercise his discretion properly.

There is one other point I would like to mention before I come to consider the right *quantum* of counsel's fees. It is my view that a reduction or taxing off of more than half of the fee marked by counsel for the first day is not only wrong in principle but tends to suggest that counsel has arbitrarily marked his brief. I would like to believe, indeed I do know, that counsel take pains and

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a great deal of time to consider the right fee before marking their briefs. Besides, by taxing off $6 000 from $9 000, the fee for the first day for senior counsel, the successful litigant did not obtain the advantage of a full indemnity for costs. See *Horseshoe Caterers (Green Point) (Pty) Ltd v Burnkloof Caterers (Pty) Ltd* 1977 (3) SA 383 (C) at 387D.

However, the fees marked by senior and junior counsel do not strike me as reasonable, having regard to all the circumstances referred to in my judgment. For this reason, I have decided to make smaller deductions than those made by the second respondent. Although the second respondent believes that he gave the necessary consideration to the *quantum* of fees which I have decided to set aside, I have now to assess from the factors I have considered above and from my experience in my own practice, what I consider to be a reasonable fee for the first day for senior counsel, in a case in which counsel must have spent an extraordinary or

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DUMBUTSHENA JP

considerable amount of time preparing for the first day of arbitration proceedings. In assessing a reasonable fee, I bear in mind that the applicant has had the services of eminent counsel. The applicant must, however, pay for that extra skill for which he engaged the services of eminent counsel. I also bear in mind that assessment of fees depends so much upon the particular facts of a particular case and the assessment is discretionary. I have, therefore, come to the conclusion that $3 000 should be taxed off from senior counsel's first day fee of $9 000. Since junior counsel's fee for that first day is half the fee of senior counsel, the reduction in equal proportion will flow from my decision. The result will be as follows:

	$
Senior counsel - first day	6 000,00
2nd to 16th days - refreshers	6 000,00
Conferences	200,00
	$12 200,00

	$
Junior counsel - first day	3 000,00
2nd to 16th days - refreshers	3 000,00
Conferences	100,00
	$ 6 100,00

There will be no order as to costs.

Gill Godlonton & Gerrans, legal practitioners for the applicant.

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Byron Ventures & Partners, legal practitioners for the 1st respondent.

MURPHY v TENGENDE 1983 (2) ZLR 292 (HC)

Court **High Court, Harare**

Squires J

2, 3, & 16 November 1983

Flynote

Delict - in pari delicto maxim - to what extent may be a defence to a delictual claim - when court may grant relief - public policy as a factor.

Headnote

The plaintiff, a motor-car dealer, was deceived by the defendant and two other men into parting with $20 000 in cash, being the plaintiff's performance in a transaction to sell him $10 000 sterling. The money was placed in the boot of the defendant's motor car and was never recovered. The sale of the foreign currency would have been a serious contravention of the Exchange Control Regulations and Act. When the defendant and his colleagues were prosecuted for the theft of the $30 000, the Attorney-General granted to the plaintiff immunity from prosecution for his part in the affair.

The plaintiff in due course sued the defendant for the return of the money. His claim was resisted on two grounds, one factual and the other based on the maxim *in pari delicto potior est conditio possidentis*. The plaintiff argued that the maxim was not rigid but was capable of relaxation. He sought relief on the basis that it would be unjust to allow the defendant, a confidence trickster, to benefit from his deception and theft; and it would promote public policy to see that such a state of affairs was not permitted.

Held, that the basis for the relaxation of the *par delictum* rule was that, where public policy was not foreseeably affected by a grant or refusal of the relief claimed, a court might well decide in favour of doing justice between the individuals concerned. However the approach to any such question must be tempered with caution. Not only is this a very uncertain and unpredictable basis on which to grant relief at law; but sight must not be lost of the law's reluctance to aid a plaintiff whose claim arises *ex turpi causa*.

Held, further, that here the plaintiff handed over his money as part of a transaction which he knew to be illegal and a breach of the criminal law. In spite of that, because of the exercise of the Attorney-General's discretion, he had not been visited with any punishment. Breaches of the Exchange Control legislation of the magnitude here concerned are regarded as very serious and are of considerable moral turpitude. It was difficult, indeed, to say which conduct was more reprehensible: to cheat an individual of $20 000 or to deprive the national pool of $20 000 worth of foreign currency for personal gain. If the plaintiff were to be granted the relief he sought, he

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would effectively cock a snook at the law, which would certainly be contrary to public policy. Accordingly, the claim should be refused.

SQUIRES J

Cases cited:

Jajbhay v Cassim 1939 AD 537;

Holman v Johnson (1775) 1 Cowp 341; [1775-1802] All ER Rep 98.

J B Colegrave, for the plaintiff.

T K Scott, for the defendant.

Judgment

Squires J: The plaintiff in this matter is a business man, whose main business when these events occurred was that of a dealer in motor cars, principally used or secondhand vehicles. In August 1981 he instituted proceedings against the defendant and two other persons, claiming from them on a joint and several basis the sum of $20 000 which he alleged they had stolen from him. It appears that all three defendants entered appearance to defend the claims, but the second and third defendants, Robson Sithole and Joseph Sibanda respectively, were duly barred for lack of plea and judgment was granted to the plaintiff against them in default. The present defendant, Tengende, however, not only disputed the claim but applied for, and was granted, leave to defend it *in forma pauperis*. His defence was, in the first place, a denial that he stole anything from the plaintiff, whether acting in concert with the other two persons or alone; but secondly, and in the alternative, he pleaded that in the event of it being held that he was a party to any theft of the plaintiff's money, that money was paid to the three defendants in pursuance of a contravention by the plaintiff of the Exchange Control Regulations as read with their parent Act. The present exercise therefore concerns the plaintiff's claim against the first defendant only, and the substance of the case alleged by him against the defendant is that, acting in concert with the other two, they perpetrated a confidence trick on him, taking the sum of $20 000 in the process and as the object of the exercise.

Stated as shortly as is consistent with intelligibility, the sequence of events revealed by the plaintiff's case, as given by the plaintiff himself and one Sulam, was as follows.

On the afternoon of 23 March 1981, Sulam, who was a friend of the plaintiff, was approached at his place of business by Robson Sithole. The burden of that communication was that Robson had foreign currency to sell, in the form of British pounds. Sulam was not able to avail himself of the invitation but thought that the plaintiff might. He therefore passed the inquiry on to the plaintiff, who was indeed interested in exploring the possibility. By arrangement made at the time, the plaintiff later went to Sulam's business premises, at about 5.30 that afternoon. After a short

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SQUIRES J

delay they saw, from within the shop which Sulam managed, not only Robson Sithole but the other two defendants as well coming towards them from the adjacent car park. This was something of a surprise, particularly as Sulam recognised the present defendant, who enjoyed some local publicity at that stage as a professional wrestler. But on inviting the present defendant only into Sulam's office, the defendant also stated that he had "English pounds" to sell. After some preliminary inquiries about the quantity he had for sale, and so on, the plaintiff agreed to purchase $10 000 for the sum of $20 000. As the plaintiff had that amount in cash in his office safe elsewhere in the town, he suggested that the party follow him there, for by then Sithole and Sibanda had been admitted to the office. This they did in different motor cars, with the plaintiff actually conveying Joseph Sibanda in his vehicle. On arrival, and eventual collection of the main actors in the plaintiff's office, $20 000 was counted out from the cash in the plaintiff's safe, and, at the suggestion or request of the defendant, was wrapped in newspaper. The defendant then said that the plaintiff should follow him in order to effect the reciprocal handover of pounds for dollars. They left the plaintiff's business premises to do so and there then occurred over the next two hours or so a series of events varying from the comic opera to the bizarre, but in the course of which the plaintiff's $20 000 disappeared.

After proceeding into the street adjacent to the plaintiff's premises, the plaintiff lost sight of the defendant's car, but on the suggestion of Joseph Sibanda the plaintiff proceeded to Manica Road, where at a spot opposite Meikles departmental store, the defendant's motor vehicle was seen already parked. The party eventually re-formed at that spot, and according to the plaintiff the defendant then suggested that both $20 000 and a brief case which the defendant had in his possession and which presumably was intended to be thought contained the British currency, be placed in the boot of the defendant's distinctive-looking vehicle, a BMW motor car. In order that the transaction be achieved with the minimum outward sign of attention attracting activity, only the plaintiff and Joseph Sibanda were to effect it. These two therefore drove off in the defendant's motor car, looking for a suitable place at which to consummate the transaction. After some minutes of irresolute meandering about, punctuated by argument as to where to go, the plaintiff told Sibanda, who was driving, to make for a place near a centrally situated school. There they emerged from the car, but found that the key available to Sibanda would not open the boot of the vehicle. After several unsuccessful attempts to do so, the plaintiff demanded that they go back to Manica Road to obtain the proper key, since he was sure that the defendant had locked it with a different set of

keys. On their return, they found only Sulam at the scene and no immediate sign of the defendant and his other collegues. These appeared some five to ten minutes later, when the plaintiff demanded the proper key. He said that at this point the defendant also tried to open the boot, but professed to be unable to do so. Also at this point, according to the plaintiff, he told the defendant that it was clear that the defendant was trying to deceive him, but the defendant said that he had a friend who lived at the Prime Minister's residence - no less - who would be able to pick the lock or otherwise successfully open the boot of this vehicle. Construing this as

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an invitation to proceed there for this purpose, the plaintiff followed the defendant's motor car to the gates of that residence, again with Sibanda in his car. After a brief exchange between Sibanda and a guard at the gate, the entourage did a U-turn and proceeded to the main gate of State House. At that point Sibanda apparently left the plaintiff's car, went to the defendant's BMW and said he would drive it through the gates into the grounds in order to find the man whose skills could unlock the boot. The plaintiff says he agreed to this, and the vehicle containing his $20 000 was accordingly driven off into the grounds of State House. After an interval of some ten minutes, the plaintiff said, Sibanda returned to report the depressing news that a political commissar had confiscated the money.

The plaintiff, by this time thoroughly angry, said he was going to call the Police, but this was forestalled by the first defendant saying he would go into State House grounds to see if he could retrieve the situation. He was absent for another twenty minutes or so, but on his return confessed to failure in his attempt to persuade the alleged political commissar to change his mind.

The gathering then appears to have dispersed, but it remains to say that the Plaintiff did report the loss of his cash to the Police that very night. He saw a CID detail the same evening who came in response to a telephoned report, and another officer on the next two succeeding days. He admitted that on the first two of these encounters, he did not tell the Police detail the full truth of the matter, but said that his $20 000 had been stolen in the selling of a motor vehicle.

It should perhaps be inserted at this point, and as a matter of historical narrative, that the present defendant and the two others cited by the plaintiff, were prosecuted for their part in this episode, together with charges on two other allegedly allied offences. All three were charged with three counts of theft of various sums from two other people besides the present plaintiff, with an alternative charge in each case of contravening s 3 (1)(a)(i)

SQUIRES J

of the Exchange Control Regulations as read with s 5(1)(a) of the Act, that is to say unlawfully selling foreign currency to a person other than an authorized dealer. The first charge against the second and third defendants was withdrawn during their trial, and the present defendant was acquitted on that same count. But all three were found guilty on the other two main charges of thefts including that which depended on the facts of the present case. The defendant was in consequence sentenced to imprisonment for a period of five years, of which two and a half years were suspended on conditions, and he is presently serving that sentence, as are the other two. The plaintiff and Sulam both gave evidence for the State, being regarded as accomplices in the alternative count. They were apparently given the usual warning by the Court as required by the Code, with the concomitant prospect of immunity from prosecution if they answered questions put to them in a satisfactory manner.

It was no doubt on the strength of that conclusion by the criminal court that the plaintiff in this case framed his cause of action on the basis simply that the defendants had stolen the money from him; and it was presumably on that basis that the default judgment was granted in October 1981 by PITTMAN J in the plaintiff's favour against the former second and third defendants. But,

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as already stated, the present defendant's plea, apart from denying involvement in the theft, raises the *par delictum* rule as a basis to prevent the plaintiff claiming his money back, even if the defendant had the $20 000, which he claimed he did not.

Notwithstanding the formal lack of a replication when the case was called, the parties appear to have both understood the plaintiff's claim to rest, in the event, on the possible relaxation of the *par delictum* rule that is acknowledged as existing in our law, where public policy does not prohibit the restoration of money paid pursuant to an illegal contract or where simple justice between man and man requires it. During the course of the trial the plaintiff filed a replication in which it raised this basis of claim, to which the defendant's response had been to join issue.

The matters in dispute therefore are, first, whether it has been established that the defendant, acting in concert with the other two or alone, can be said to have stolen or to have been a party to the theft of the plaintiff's money; and, secondly, even if he was so implicated, whether the resulting situation is one that would justify the Court coming to the relief of the plaintiff.

In view of the conclusion to which I have eventually come on the defen-

SQUIRES J

dant's alternative defence, it is not really necessary to reach a decision on the first issue. Suffice it to say that even assuming the defendant to have been responsible for the theft of plaintiff's money, as the plaintiff claims, I do not think the plaintiff is entitled to claim a relaxation of the *par delictum* rule in his favour. However, in case that conclusion is challenged on appeal and the defendant also wishes to challenge the finding that he was party to the theft of plaintiff's money, I have also reached a conclusion on this first issue, and set out my reasons for so doing.

The defendant's version of events then, while essentially devolving round the same objectively ascertainable facts as that of the plaintiff, places a different complexion on those facts.

[His lordship then considered the evidence for both parties and continued:]

In the result, I am satisfied on a balance of probabilities that the defendant and his original two co-defendants, acting in concert, did deceive the plaintiff into parting with his $20 000 as the plaintiff's performance in a transaction to sell him $10 000 sterling. and that this sum was placed, and last seen, in the boot of the defendant's BMW motor car. That car was then driven off by Sibanda and the money has not since been seen, much less recovered.

That then raises the second issue - namely, the alternative defence put forward by the defendant to the plaintiff's claim. As already stated, he alleges that the plaintiff handed this money over in pursuance of an illegal and forbidden transaction - the purchasing of foreign currency by a resident of Zimbabwe inside the country and other than from an authorized dealer. The defendant says, in effect, that the parties are in equal guilt, and that being so the principle expressed in the maxim *in pari delicto potior est conditio possidentis* applies to defeat the plaintiff's claim. The plaintiff admits that the money was paid by him with a view to committing an act that is prohibited by statute, and that it was an unlawful agreement for him to

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enter into. But as already intimated he bases his claim for the return of his $20 000 on a relaxation of the *par delictum* rule. He seeks such relief from the Court on the basis that it would be unjust if the defendant were wrongly enriched by being allowed to keep the $20 000 or his share of it, particularly as this amounts to allowing a confidence trickster to benefit from his deception and theft. It would be promoting public policy, the plaintiff's case claims, to see that such a state of affairs was not permitted.

SQUIRES J

The basis for relaxation of the *par delictum* rule in our law is the decision of the Appellate Division of the Supreme Court of South Africa in *Jajbhay v Cassim* 1939 AD 537. In reaching the conclusion there that the maxim *in pari delicto potior est conditio defendentis* (*possidentis*) admitted of exceptions, the learned CHIEF JUSTICE (STRATFORD CJ) held that an examination of other modern systems of law showed that the maxim had "not . . . been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract." In particular, at pp 544-545 he went on to say:

> ". . . Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy as not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."

In applying that, I think two matters of caution need to be borne in mind. In the first place, it may not be out of place to point out that the decision has been the subject of trenchant criticism as importing and postulating far too uncertain and unpredictable a basis for determining whether relief should be granted or not where two persons are in equal guilt - see de Wet & Yeast *Kontraktereg en Handelsreg* 4 ed pp 81-82. And secondly, the principle which underlines and inspires the maxim, and by which the learned CHIEF JUSTICE said the Court must be guided, is that in cases where the parties are in equal guilt, the advantage lies with the defendant, as is also the case in English law. It was said by LORD MANSFIELD to *Holman v Johnson* (1775) 1 Cowp 341; [1775-1802] All ER Rep 98 - and not, with respect, tangibly improved on since - that the rule is based on considerations of public policy.

> "The objection, that a contract is immoral or illegal as between plaintiff and defendants, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which defendant has the advantage of contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this: *ex dole malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating or otherwise the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were

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SQUIRES J

to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; where both are equally in fault, *potior est conditio defendentis*."

With those cautionary remarks in mind and applying the approach suggested by STRATFORD CJ, what is the position here?

The defendant and his colleagues perpetrated a trick on the plaintiff intending to obtain his money. They in effect stole the $20 000 by false pretences. They did so under the guise of carrying out a transaction that is prohibited by statutory law, and the breach of which is visited by severe penalties. They have been prosecuted and convicted for their part in so stealing the plaintiff's money and are presently serving a sentence in prison in expiation of it. On the other hand, the plaintiff handed over his $20 000 as part of a transaction which he knew to be illegal and a breach of the criminal law. He was not prosecuted because he was the beneficiary of the Attorney-General's decision to use him as State witness, for which he can claim a consequent immunity to prosecution. That was a quite fortuitous sequel as being one dependent on the Attorney-General's discretion; but the fact remains, when considering the deterrent punishment that the criminal law might also have provided, that the plaintiff has suffered not at all for his selfish, deliberate and by no means trivial, breach of the law.

Moreover, when considering both the aspect of the various degrees of turpitude and the wider question of public policy, it is clear that breaches of the Exchange Control Regulations and Act assume a materially significant effect. If the Legislature can be taken as the mouthpiece of the community and the provisions of its various statutes as an indication of the public concern over the appropriate aspects of community activity, then the community clearly regards the preservation of the country's resources of foreign exchange as of very great importance. Conduct not normally regarded as culpable by the criminal law is specifically extended by this legislation to constitute an offence for the purposes of securing this need; and severe penalties are provided for contraventions - including as an additional punishment to a fine or imprisonment, and where there are no special circumstances in the case, the forfeiture of any money or other article used in the commission of the offence. If those features are any guide, then it seems apparent that the community, and therefore public policy, regards breaches of these laws as being of considerable turpitude. Certainly, and for what it is worth as a yardstick of comparison, the punishment provided for breaches of the Exchange Control laws is poten-

SQUIRES J

tially more serious than for a common law theft.

So, if one is asked, on that basis, what is the more morally reprehensible - a confidence trick to cheat an individual out of $20 000 or an attempt to deprive the national pool of $20 000 of foreign currency for personal ends, the answer - at least to my mind - is by no means clear. And it is in the last resort only if, as the learned CHIEF JUSTICE says, public policy is not

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foreseeably affected by the granting of the relief claimed, that relief can be granted.

In the light of the foregoing considerations, it seems to me that public policy, so far as the preservation of foreign exchange is concerned, will be adversely affected if I grant the plaintiff the relief he seeks. In fact, not to put too fine a point on it, the plaintiff will effectively cook a snook at it; because it will mean that he has willfully flouted the law in defiance of that policy and emerged from doing so with no scars to show. That cannot be conducive to upholding public policy, which it is the Court's function to do.

That being so, there is no room or basis for consideration of whether justice should be done between man and man so as to prevent an unjust enrichment. Even if there was, I am by no means sure that the Court ought to come to the assistance of the plaintiff, for to do so would certainly be increasing the punishment of the defendant and lessening that of the plaintiff. However that may be, because in my view considerations of public policy prevent the relaxation of the *par delictum* rule in the circumstances of this case, I am unable to grant the plaintiff's claim for restoration of his $20 000.

The plaintiff's claim must therefore be dismissed with costs.

Coghlan Welsh & Guest, legal practitioners for the plaintiff.

Surgey, Pittman & Kerswell, legal practitioners for the defendant.

BENNETT NO v LE ROUX 1983 (2) ZLR 301 (HC)

Court **High Court, Harare**

Pittman J

3 & 16 November 1983

Flynote

Property - joint ownership - property incapable of sub-division - orders which court may make in event of joint owners failing to agree on manner of disposal of property.

Headnote

The applicant was administrator of the estate of the late Mrs van Zyl, formerly le Roux. One of the assets in her estate was a piece of land in Harare on which was built a dwelling house. As she died intestate, she had a half-share in this property, the other half being divided equally between her six children. One of these children was the respondent. For practical purposes the property could not be subdivided. In order to meet the administration expenses of Mrs van Zyl's estate, the applicant wished to sell the property and with the consent of all the co-owners except the respondent entered into a deed of sale of the property to a Mr Chingeya. The purchase price was to be $8 000 and the sale was conditional upon -

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(a) the seller obtaining a court order authorising the sale of the respondent's share of the property; and

(b) the buyer obtaining a mortgage loan.

The respondent refused to agree to the sale, arguing that he should be allowed to buy the property and stating that he was willing and able to do so for $8 200. The applicant argued that it would be inequitable to allow the respondent to do as he wished, because of the conditional sale to Mr Chingeya and the possibility of a claim for damages against the estate and co-owners.

Held, that the Court had a wide discretion in the matter and could make such an order as the justice or the equity of the case might require. Because the sale to Mr Chingeya was conditional only, because the respondent was able to offer a higher price and because it was more equitable for co-owner to acquire the property than for a stranger to do so, the application would be refused and sale to the respondent would be ordered.

Cases cited:

Ex p Sewpaul & Anor: in re Jumanee & Ors 1947 (3) SA 299 (D&CLD);

Est Rother v Est Sandig 1943 AD 47.

P Sack, for the applicant

M J Gillespie, for the respondent

PITTMAN J

Judgment

PITTMAN J: The applicant is Mr J H Bennett, in his capacity as the administrator of the estate of the late Mrs W van Zyl, formerly Mrs le Roux, who died intestate an 1981. One of the assets in her estate is a one-half share of a property in Harare called Stand 104 of Prospect, inherited from her previously deceased husband, Mr A F le Roux. The remaining half share is equally divided between their six children, so each of them owns an undivided one-twelfth share of the property. One of these children is the respondent, Mr A J v d M le Roux.

The property is 1,9699 hectares or 4,8568 acres, in extent. It has a dwelling-house built upon it, which, with its lean-tos, has a gross superficial area of approximately 169,32 square metres. Although the property is nearly five acres in extent, it as not sub-divisible into the shares of the co-owners, because the Municipality requires the sewers and septic tanks needed there to be established on at least one acre. For the present dispute, I understand it to be agreed that the property must be regarded as not sub-divisible at all.

The municipal valuation of the property is irrelevant in the present dispute because it is based on the position in 1975. Instead there is a valuation of $7 500 recently obtained from a firm of

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valuators.

This dispute has arisen because the applicant decided to sell the property so that sufficient cash would be available to meet the administration expenses of Mrs van Zyl's estate. With the consent of all the other co-owners except the respondent, the applicant entered into a deed of sale of the property with a Mr E T Chingeya for a purchase price of $8 000. The deed of sale contains the following paragraph:

> "12. The sale of the property is conditional upon: -
>
> (a) The Seller obtaining a Court order enabling the sale of Albertus Johannes van Der Merwe le Roux's share of the property.
>
> (b) The Purchaser obtaining a mortgage loan for the purchase of the property within 30 days from the date of sale."

I understand the final words "date of sale" to refer to the date of the obtaining of the Court Order referred to in sub-paragraph (a). There is no indication in the papers whether it is certain that Mr Chingeya will be able to obtain the mortage loan referred to.

As the respondent persisted in refusing to agree to the sale of the property to Mr Chingeya, the applicant launched the present application for an order by the Court that the property be sold to Mr Chingeya.

In reply, the respondent has taken the attitude that he should be en-

titled to buy the property. He claimed in his replying affidavit that he is willing and able to pay $8 200 for the property, and he introduced a supporting affidavit in which a friend of his, Mr Kok, stated he had agreed to advance that sum to the respondent to enable him to purchase the property "and would be prepared to make this sum available to the Executor (ie, the applicant) in cash against transfer of the property into the name of the Respondent." In his answering affidavit, the applicant quoted a later letter from the respondent's legal practitioners to his own in which it was said that Mr Kok would prefer to buy the property himself, rather than to enable it to be transferred into the respondent's name and then to be mortaged in his favour. However, during the argument Mr *Gillespie*, for the respondent, assured the Court that both offers by Mr Kok are still available, and Mr *Sack,* for the applicant, stated that he consented to the Court having the power to make an order of sale to the respondent, but he opposed such an order on its merits in comparison with the sale to Mr Chingeya. In his answering affidavit the applicant said:

> "As the property has already been sold conditionally to Mr Chingeya, it would be inequitable to order a subdivision and thus lay the estate and other co-owners open to a claim for damages."

The task of the Court is to decide how the property should be sold, and in doing that it is being guided by the following passage in Oosthuizen's *The Law of Property* on p 63:

> "If the joint owners are unable to agree upon the manner in which the property is to be divided, any one of them

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may approach the court for relief by instituting the *actio communi dividendo*. The court has a wide discretion in regard to the partition and may make such order as appears to be fair and equitable in the circumstances. It may, for example, order one joint owner to pay a certain sum to each of the others in order to equalize the division; alternatively, if the property is indivisible, the court may award it to one of the joint owners subject to the payment of compensation to the others; or it may order the property to be sold by public auction and the proceeds to be divided among the joint owners in accordance with their shares . . .".

Furthermore, in *Ex parte Sewpaul & Another: In re Jumanee & Others* 1947 (3) SA 299 (D&CLD) at 302, HENOCHSBERG AJ said:

"In partition proceedings the Court is bound to consider the equities of the case, *Motala v Estate Lockat and Another* 1945 NPD 351 . Where it is impracticable or inequitable to allow a partition, the Court will make such an order as justice of the equities of the case may require. The discretion of the Court is a wide one. Estate *Rother v Estate Sandig* 1943 AD 47."

At p 53 of the *Estate Rother* case it was said:

"Various authorities were quoted to us on the principles to be followed in making

PITTMAN J

a division of joint property. It seems to me that the effect of these authorities is fairly summed up by DE VILLERS CJ in *Dickson v Stagg* (1384) 3 SC 115, as follows:

> 'It is quite true that under the ordinary law one or two or more co-proprietors is entitled to claim a partition of the land, but that rule is subject to exceptions, one of these exceptions being that where it was impracticable or inequitable to allow such a partition, the Court would in such a case make such an order as the justice or the equity of the case might require.'

The discretion of the Court is a wide one and one of the recognised modes of division is a sale by public auction."

Since the two offers of sale already made exceed the value of the property assessed by a firm of valuators, there is no good purpose to be served in ordering a sale by public auction. The Court is therefore left to choose between the sale to Mr Chingeya and the sale to the respondent. The respondent offers $200 more than the price arranged with Mr Chingeya. More importantly, the sale to Mr Chingeya is only conditional, with no proof as to his ability to fulfil the condition relating to a mortage. Furthermore, it seems to me to be more equitable for one of the co-owners to become the purchaser, if he wants that, than for a stranger to do so. Finally, there will be no question of inequity as regards the applicant because of his relationship with Mr Chingeya, because there will not possibly be a liability for damages to be owed by him to Mr Chingeya. He has persisted in maintaining the sale with Mr Chingeya and cannot be held responsible by the latter for the failure of condition 12(a) of their sale to be fulfilled.

Having had regard to the equities of the matter, I accordingly now make the following order:

1. Approval of the sale of Stand 104 of Prospect to Mr E T Chingeya is refused.
2. The said Stand is ordered to be sold to the respondent for the price of $8 200, payable immediately upon registration of transfer to him.
3. The applicant shall pay the respondent's costs.

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Scalen & Holderness, legal practitioners for the applicant.

Byron Venturas & Travlos, legal practitioners for the respondent.

S v BEATRICE 1983 (2) ZLR 305 (HC)

Court **High Court, Harare**

Waddington J

16 November 1983

Flynote

Criminal procedure - sentence - record of trial - irregular for trial court to sentence accused on basis of facts which do not appear in record.

Headnote

It is irregular and highly undesirable for a trial court to sentence an accused person on the basis of facts which do not appear on the record. To do so makes it exceedingly difficult for an appeal court or reviewing judge to consider the matter properly. Appeal courts and reviewing judges must be confident that when they consider any particular case they have all the relevant facts before them; they must not be made to feel that their opinions must be regarded as provisional because further facts, not on the record, may come to light. All relevant facts led in evidence should be recorded by a magistrate conducting a trial.

Judgment

Waddington J: The accused in this case, a woman of 32 years of age, pleaded guilty to a charge involving the burning down of a hut belonging to Caston Magodoro. She was convicted of arson and sentenced to undergo 6 months' IWL, the whole of which was suspended for 5 years on certain conditions.

When the case was scrutinized by a Regional Magistrate, he was of the view that the penalty imposed was manifestly inadequate. The case had proceeded on an agreed statement of facts and it was on that agreed statement that the Magistrate assessed his sentence - or so it would appear from the record. The agreed statement of facts reads as follows:

> "1. The accused is a female adult and resident on Village Muwiwii, Chief Munyikwa in the Gutu Communal Land, she is not employed and is thirty two years of age.
>
> 3. The complainant CASTON MAGODORO is employed by the Ministry of Education and Culture as a teacher at Ndisengeyi School, Gutu Communal Land, he is forty one years of age.

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WADDINGTON J

4. Sometime in January, 1983 the accused left with her two and a half years son Magura with Ngonidzashe Chigome aged seven years when the accused was going back to her parent's home.

5. On her return the accused found that her son Magura was missing from the place she had left him. She later discovered that her son was taken by the complainant's wife (Fadzai Magodoro) who took the kid to his father who is the accused's husband.

6. The complainant got annoyed with the action which was taken by his wife (complainant) of leaving the child alone.

7. This kept on worrying the accused's husband and sometime in February, 1983 the accused got divorced and went to her parents. This annoyed the accused because of the action taken by the complainant's wife who caused accused to be divorced.

8. On the 10th September, 1983 the accused left her parents' home and went to the complainant's home where she set fire to the kitchen hut by lighting with a stick of matches.

9. The state may produce a warned and cautioned statement made by the accused before the court.

10. Property destroyed by fire is worth one hundred and fourty two dollars ($142)" (*sic*).

When the matter was referred by the Regional Magistrate for review, although I found myself somewhat confused by the outline of the State case, I was in agreement with the Regional Magistrate that the sentence seemed to be too lenient. I therefore requested the Regional Magistrate to obtain the trial Magistrate's further comments on the sentence which had been passed. That request has elicited the following reply from the trial Provincial Magistrate:

> "It is regretted that the statement of agreed facts produced as exhibit 1 in this case does not clearly reveal the relationships between, the accused, the complainant and the woman Fadzi Magodoro. The position is that the complainant Caston Magodoro (is) was married to two wives - the accused and Fadzai. The complainant's relationship with the accused became strained and this resulted in the accused leaving the child alone presumably in protest against her husband.
>
> The second wife Fadzai took the child to the complainant. The accused was not happy about this and suspected Fadzai was colluding with the complainant and that she contributed to her being divorced by the complainant. It was in these circumstances the accused set on fire the complainant's kitchen hut.
>
> In assessing sentence, therefore, I took into account the domestic nature of the circumstances under which the offence was committed. This was in addition to the other reasons for sentence stated in the record. It was my view that an effective prison sentence was not desirable and that the justice of the case would be met by imposing a wholly suspended prison sentence."

The trial Provincial Magistrate is guilty of understatement when he says that the statement of agreed facts did not clearly reveal the relationship

between the accused, the complainant and Fadzai Magororo. The record of facts proved at the trial bears only a slight resemblance to what the magistrate now states is the true and full story.

It is irregular and highly undesirable for a trial Court to sentence an accused person on the

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basis of facts which do not appear on the record. This practice makes it exceedingly difficult for an appeal court or a reviewing judge to consider the assessment of sentence by the trial court. Appeal courts and reviewing judges must be confident that when they consider any particular case they have all the relevant facts before them. They must not be made to feel that their opinions must always be regarded as provisional because facts which do not emerge from the record may at any time subsequently come to light. Justice cannot function in this *ad hoc* fashion. All relevant facts led in evidence should be recorded by a magistrate conducting a trial.

On the evidence recorded by the trial Provincial Magistrate it was my original view that the sentence imposed was manifestly inadequate in this case. On the version of the facts which he has now described, the sentence might be more appropriate. The problem is to know what to do about the undesirable state of affairs which has been reached in this case.

Fortunately, in a way, another error in the proceedings provides the answer. When the accused pleaded guilty, the trial Provincial Magistrate decided to proceed in terms of section 255(2)(b) of the Criminal Procedure Evidence Act [*Chapter 59*]. He recorded that the accused accepted the agreed statement of facts. The trial then took the following course:

"Elements of the offence.

Q. Do you sct hut on fire?

A. Yes.

Q. Did you have any right?

A. No.

Q. Did you intend to injure him in his property?

A. Yes.

Q. Do you have any defence to the charge?

A. Yes.

Verdict: Guilty.

Speaking for myself, I find the positive answer "Yes" to the question "Do you have a defence to the charge?" quite unequivocal. I am of the view that the Magistrate should, despite the accused's answers to his earlier questions, have pursued the matter further to ascertain what defence it was that the accused wished to rely upon. It is not a satisfactory state of affairs that the accused, having stated that she did have a defence, was

promptly found guilty, presumably on the strength of her replies to the earlier questions, without her defence being investigated.

The conviction cannot in these circumstances be allowed to stand and the trial must be

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commenced *de novo*.

With the concurrence of my brother SQUIRES, the conviction and sentence are set aside and the case is remitted for trial *de novo* before a different magistrate. At the new trial pains must be taken to ensure that the full facts are placed before the Court after it is ascertained what defence the accused relies upon, if she wishes to raise a defence. As the facts contained in the trial magistrate's latest letter appear to be uncontested, as do the facts relied upon by the State, the accused, should she be convicted again, should not in she light of those facts be sentenced to any penalty greater than the sentence imposed upon her by the original trial Provincial Magistrate.

S v NCUBE 1983 (2) ZLR 309 (HC)

Court **High Court, Bulawayo**

Korsah and Manyarara JJ

18 November 1983

Flynote

Criminal procedure - sentence - Law and Order (Maintenance) Act [Chapter 65) - s 51(1) - failing to report dissidents - female accused - factors affecting sentence.

Headnote

Save in exceptional circumstances, it was not the practice of the Attorney-General to prosecute women for failing to report to the authorities the presence of terrorists or dissidents. Even if a women were to be prosecuted, it has been the policy of law to treat female offenders more leniently then males, firstly, because recidivism is less likely and, secondly, because of the undesirability of imposing long sentences on women who have young children to care for. The circumstances would have to be most unusual for a woman offender to receive a sentence the same as or greater than that imposed on a male co-accused.

Cases cited:

S v Kohlo AD 178/77;

S v Kawambana & Others AD 141/76;

S v Mutururе & Others AD 194/77;

S v Godo & Others AD 193/77.

H I Bisset for the appellant.

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B N Sigidi for the respondent.

Judgment

Korsah J: This an appeal against the sentence of five years' imprisonment of which two were suspended on appropriate conditions imposed for a contravention of s 51(1) of the Law and Order (Maintenance) Act [*Chapter 65*]. The appeal is noted on three grounds:

(a) that the sentence is manifestly excessive;

(b) that insufficient weight was given to the appellant's sex; and

(c) that insufficient weight was given to the security situation prevailing in the area of the offence at the time it was committed.

The appellant was the principal of a school in the Tsholotsho area. On

KORSAH J

2 December 1982, she was informed by one Abel Jango Dube, a male teacher at Sasedza School, where they were both employed, that dissidents had called him into the bush to enquire what the army personnel who called at the school on 30 November 1982 and 1 December 1982 wanted.

At about 10 am the same day, the appellant boarded a bus to Tsholotsho on school business. She called at the District Council Office in Tsholotsho, which is approximately 100 metres from the police station, but did not go to inform the police about the report which had been made to her about dissident presence in her school area. The appellant herself never spoke to the dissidents nor saw them.

At about 12 noon on the same day, army personnel again visited Sasedza School and Abel Jango Dube spoke to some members of the team and supplied them with dagga without making a report to them about the presence of the dissidents and/or his meeting with them at 7 am that day.

When the army was on its way back to Tsholotsho it was ambushed by the dissidents. Some members of the army were killed and others were wounded; in addition two FN rifles were stolen by the dissidents.

In imposing sentence, the learned magistrate relied for guidance on authorities established during the civil war, in which the effective sentences imposed varied between two to six years. The cases referred to were: *S v Kohlo* AD 178/77; *S v Kawambana and Others* AD 141/76; *S v Maturure and Others* AD 194/77; and *S v Godo and Others* AD 193/77. In them all the appellants were male.

In imposing sentences, the trial court sentenced the male teacher who actually saw and spoke to the dissidents, to an effective term of 21/2 years while, as stated above, the appellant, who as herself only informed of the dissident presence, received an effective term of three years,

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because as head teacher she was a person in authority.

Dube, by way of a plea in mitigation, told the Court that the dissidents had threatened him with the direst consequences if he reported their presence to either the police or army and that he had related this threat to the appellant. It would appear that this threat operated as well on the mind of the appellant; for she also put it forward as a mitigatory factor.

It is conceded that the appellant was in a position of authority, but in assessing blameworthiness in such cases, emphasis has always been laid

KORSAH J

on the opportunity to make a report. Dube, who actually saw and spoke to the dissidents and had firsthand information of the arms they carried, had occasion to converse again with the team of army personnel, who were soon thereafter ambushed, without warning them of the danger which threatened them.

It is true that had the appellant also made a report of the information she had received to the police at Tsholotsho, a wireless message may have been sent to the team of soldiers at the school to warn them of the presence of dissidents. But she did not even know that the soldiers were again visiting the school and could not have known that they were in imminent danger. It appears to me, therefore, that it was Dube who had a golden opportunity to make a report of the dissident presence and to save the lives of the soldiers who were ambushed. He did not have to go and seek out the authority to report to. They came to him. He knew of the danger to the soldiers, yet he failed to put them on their guard. His moral blameworthiness, in my view, was much higher than that of the appellant. Why then should the appellant receive the more severe punishment just because she was in a position of authority?

The Tsholotsho area is notorious for dissident activity. Many persons who have reported dissident presence have suffered reprisals. The security situation existing in the area has, therefore, not encouraged the reporting of dissidents to the appropriate authorities. I do not say that persons in such an area should be excused the failure to report of such presence. I think it is clear that a person secure in the belief of the protection he is accorded will more readily inform the authorities of dissident presence than one who is aware of the inadequacy of the security offered him. The moral blameworthiness of the latter cannot be equated to that of the former in parallel situations. To a woman with four children, living in the Tsholotsho area, the threat of dire consequences by dissidents must have been very real indeed.

Finally, the appellant is of the gentle sex. In *S v Kawambana* AD 141/76, where thirteen appellants were all convicted of failing to report the presence of terrorists and appealed against sentence, MACDONALD JP noted that

> "Save in exceptional circumstances it has not, for obvious reasons, been the practice of the Attorney-General to authorize the prosecution of women for failing to report".

The appellant was informed of the presence of dissidents in the area. Unlike Dube, she did not know that soldiers had returned to the area and were in imminent danger. There was, therefore,

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nothing exceptional about

KORSAH J

her failing to report. Had she known of the possibility of the soldiers being ambushed that would have made the circumstances exceptional.

It has been the policy of the law to treat female offenders more leniently than males, because recidivism among females is much lower than in males. And courts are chary of imposing long prison sentences on women offenders especially where they have young children to care for.

In all the circumstances of this case I am persuaded to the view that the sentence imposed was manifestly excessive. The appellant has already served eleven months of the term imposed.

With the concurrence of my brother MANYARARA the prison sentence is reduced to the period of imprisonment served.

Accordingly, it is ordered that the appellant be released from prison immediately.

S v MANYARA & OTHERS 1983 (2) ZLR 313 (HC)

Court **High Court, Harare**

McNally & Scott JJ

21 November 1983

Flynote

Criminal procedure - sentence - Parks and Wildlife Act 14 of 1973 - hunting of animals - distinction between snaring and hunting by other means.

Headnote

It is clear from the authorities that, when it comes to the question of sentence on a charge of unlawful hunting under the Parks and Wildlife Act 14 of 1973, a distinction should be drawn between cases involving the snaring of animals and those involving hunting by other means. In the latter cases, the principle is that the Court will first consider whether a fine, together with a suspended sentence of imprisonment, would be appropriate. Only where there are aggravating features will an effective sentence of imprisonment be imposed.

Cases cited:

S v Mutiza HC-S-48-82;

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S v Mangandi & Another AD 175/77.

Mrs *S Jarvis*, for the appellants.

P Haxen, for the State.

Judgment

McNally J: These five appellants were charged and convicted before the Magistrate in Kadoma, on the 8 August 1983 of contravening s 47(2) (a) of the Parks and Wildlife Act No 14 of 1973. They all pleaded guilty to the offence which involved hunting with guns on a ranch resettlement area. At the end of that hunt they were found in possession of two male kudus, one duiker, one wart-hog and one blue wildebeest.

They were convicted under subs (a) of the section in relation to all these animals and were sentenced accordingly. However, it has been pointed out on appeal by Mrs *Jarvis* and not disputed by Mr *Haxen* for the State that in the agreed statement of facts, it is alleged that the blue wildebeest

McNALLY J

was already dead when they found it and was stuck in some mud in a dam. It must be accepted that that is the true state of affairs and therefore it is clear that the accused were wrongly convicted in respect of that animal. They should have been convicted, in respect of the blue wildebeest, of a contravention of s 47(2) (b) of the Act.

The notice of amendment introducing this point was apparently served on the magistrate and we were advised that the magistrate's reasons in relation to the amendment had been forwarded to the Registrar of this Court. We have not seen them. In the circumstances, however, it does not appear to us that they are of any relevance because there is very little that the magistrate can say in relation to the facts that I have just enumerated. It is clear that they must be accepted as facts; it is clear that he has overlooked this point and therefore we are prepared to condone the fact that there are no reasons of the magistrate before us in relation to this aspect of the argument.

While dealing with technical points we should also add that the compensation payable will have to be amended because compensation is not payable in terms of the Act, resulting from an offence against s 47(2)(b). Therefore, the compensation awarded in respect of the wildebeest will have to be struck out. The compensation in respect of the remaining animals comes to a total of $440, ie $400 in respect of the two male kudu, $25 in respect of the wart-hog and $15 in respect of the duiker.

I come finally to the main point of the submission put before this Court by Mrs *Jarvis*, which was that the accuseds should have been given the option of a fine. As a result of the factor relating to the blue wildebeest to which I have already referred, this Court is at large in relation to sentence. The cases to which Mrs *Jarvis* has referred the Court seem to me to make it clear that in general where the hunting and killing of animals involves the use of dogs, spears or

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guns, the principle to be applied is that the Court will first consider whether a sentence of a fine coupled with a suspended sentence of imprisonment would be appropriate and only where there are aggravating features will the Court determine upon an effective sentence of imprisonment.

The cases cited as authority by Mr *Haxen* are undoubtedly more recent in that they are 1983 cases, by and large, but they are decisions on review and in many of them at any rate - I refer particularly to the 1983 decisions - the magistrate imposed a sentence of imprisonment and the matter of sentence was simply not dealt with on review. The review deals,

McNALLY J

in other words, with other aspects of the cases. Naturally, the Court will be guided, and indeed bound, more by appeal decisions where the matter has been considered and where the Court has had the benefit of argument as is the case for example in *S v Mutiza,* HC-S-48-82 and *S v Mangandi and Another* AD 175/77.

It seems to me therefore, looking at the authorities, that we are bound by the approach set out in *Mutiza's* case and *Mangandi's* case and that is not the approach that was followed by the magistrate. It seems clear that there is a distinction drawn between snaring of animals on the one hand and hunting of animals by other means on the other hand. Whether this is due to the element of cruelty involved in the snaring or whether it is due to the wastefulness, as Mrs *Jarvis* suggests, of the method of snaring, or a combination of those two factors, I do not know, but I think it must be accepted that the Courts have a different approach to sentencing in relation to cases on the one hand involving snaring and on the other hand involving the other means that I have mentioned.

Taking these factors into consideration and bearing in mind that we are at large, it is my view that this is a case in which a sentence of a fine coupled with a sentence of a suspended sentence of imprisonment would be sufficient to meet the needs of the case. I bear in mind that the persons concerned are persons of standing in their community, although not necessarily persons of wealth because it does not appear to be a wealthy community. They are people who are councillors and headmasters and civil servants. Only one of them is unemployed. The Court must take a serious view when persons like these set a bad example for others, but in view of the factors to which I have referred, we are satisfied that this seriousness can be adequately recognised by the imposition of fines.

We have given some thought to the question of the differentiation of fines as between the five persons involved. None of them, as I have indicated, appears to be wealthy. The first appellant seems to have done almost all the shooting with his .303. He is a councillor and a shop-owner but in a drought year like this a rural shop-owner need not necessarily be a very wealthy person. The second appellant shot one of the smaller animals with his .22 rifle but he is an elderly man of 65 and he is apparently unemployed. The third appellant was the driver of the vehicle and was a senior clerk in the civil service. The fourth and fifth appellants were primary school headmasters who do not appear to have taken any positive part apart presumably from helping

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to load the animals on to the vehicle.

Both Counsel take the view that it would not be fair on the appellants

McNALLY J

to make any distinction between them on the basis of who took what part in this joint expedition, although we have been urged to give special consideration to the elderly and unemployed person who is the second appellant. In view of that approach, I think it reasonable to treat them all the same, except for the second appellant, who, as I have said is unemployed, and who says that he has savings of $100 together with eight head of cattle. I bear in mind too that he is married with seven children.

In these circumstances I would allow the appeal and set aside the sentences of imprisonment on all the accused. I would sentence them instead, with the exception of the second accused to a fine of $200 each, together with a sentence of 4 months imprisonment with labour, suspended for three years on condition in each case that the appellant is not convicted of contravening s 47 of the Parks and Wildlife Act, or of any offence involving the hunting of animals, committed during that period, for which he is sentenced to a term of imprisonment without the option of a fine.

In regard to the second appellant, that is Mhukayesango Mandizvidza, the fine will be $150 and he is also sentenced to 4 months imprisonment with labour suspended on the same conditions.

In respect of all the accuseds and at the request of Mrs *Jarvis* they will be given time to pay and the warrant will be suspended until 2 January 1984. The order of forfeiture in relation to the weapons will stand and it is further ordered in respect of compensation that the Appellants should pay compensation to the appropriate authority for Mulota Ranch, Battle fields in the sum of $440, jointly and severally, one paying the others to be absolved.

Scott J: I agree.

BANK OF CREDIT & COMMERCE ZIMBABWE LTD v JANI INVESTMENTS (PVT) LTD 1983 (2) ZLR 317 (HC)

Court **High Court, Harare**

Squires J

17 & 23 November 1983

Flynote

Practice and procedure - application for summary judgment - necessity for summons to comply with Rules 11 (c) and 64 of High Court Rules - necessity in claim for summary judgment for claim to comply strictly with

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Rules.

Headnote

It is true that summary procedure is the principal means by which unscupulous litigants, seeking only to delay a just claim by entering appearance to defence, are thwarted. It is thus of the greatest importance that the efficacy of the procedure should not be impared by technical formalism. However, this does not mean that one can ignore those requirements of the High Court Rules affecting the basic validity of a summons, which are a prerequisite for the granting of summary judgment, and claim the relief on the basis that too much formalism should not be allowed to defeat a just claim. Summary judgment, which in effect departs from the *andi alteram partem* rule, must be granted with caution and is hedged about with procedural safeguards to prevent its possible abuse. Accordingly, claims should be strictly in compliance with the Rules.

Cases cited:

Beresord Land Plan (Pvt) Ltd v Urquhart 1975 (1) RLR 260 (AD); 1975 (3) SA 619;

Hugo Franco (Pvt) Ltd v Gordon 1956 R & N 448; 1956 (4) SA 482 (SR);

Art Printing Workd Ltd v The Citizen (Pvt) Ltd 1957 R & N 62; 1957 (2) SA 95 (SR);

Maclaurin v Horne 1965 RLR 639; 1966 (1) SA 553 (SR);

Shingadia v Shingadia 1966 RLR 285; 1966 (3) SA 24 (R);

Cold Storage Commission v Gey van Pittius GD Bulawayo 21/173 (nor reported).

C L Mercer, for the plaintiff

J B Colegrave, for the defendant

Judgment

Squires J: The applicant plaintiff in this matter issued a summons out of this Court on 17 October last which, after citing the parties in the usual way, states that the plaintiff claims as follows:

"(a) $9 876,24

(b) Interest thereon at the rate of 17 per centum per annum calculated from the 5th day of February 1983

SQUIRES J

(c) $18 874,26

(d) Interest thereon at the rate of 17 per centum per annum calculated from the 16th day of February 1983

(e) Costs of suit."

This was duly served on the defendant, together with a copy of the plaintiff's declaration, which

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alleged in substance that the plaintiff had granted the defendant overdraft facilities by accommodating two cheques drawn on the plaintiff when the defendant had no funds to its credit, in the total sum of $28 750,50. This sum carried, so it was alleged, an agreed or implied or customary rate of interest and was one that was repayable on demand. Demand had been made, but payment had not.

In response to the service of these papers, the defendant entered appearance to defend, which in turn has prompted this application for summary judgment.

It will be immediately realized, of course, even by someone who runs very quickly as he reads, that the summons is wholly invalid since it discloses no cause of action whatever. Any exception to such a summons can only have succeeded instantly and completely.

Obviously realizing this difficulty, Mr *Mercer*, for the plaintiff, applied to amend the summons by adding the following phrase at the end of the recital of claims:

> ". . . on the grounds set out in the plaintiff's particulars of claim annexed hereto."

To supplement that, he applied to delete the description of the plaintiff's declaration as such, and to identify it, by appropriate alteration, as "Particulars of claim".

If that were allowed, the amended summons would be supplemented by the allegations of the declaration, being now read as particulars of claim. That would supply the missing cause of action that the Rules of Court require every summons to contain. There would be no prejudice to the defendant, he said, since it had always known the basis of the plaintiff's claim, having received the declaration which set out the claim at the same time as the defective summons was served upon it. Moreover, the present Rules of Court do not require the endorsing of a summons as a prerequisite to a claim for summary judgment as do the old Rules. Furthermore, when one had regard to the defendant's defence on the merits, as indicated in the opposing affidavit, it was clear that it did not raise a triable issue. Even accepting what the defendant said, Mr *Mercer* argued

SQUIRES J

that its defence was merely that the plaintiff promised to consider the defendant's representations as to how it could effect repayment. There was no firm agreement alleged to the effect that the plaintiff would not take proceedings to recover the debt or give the defendant time to repay.

Mr *Mercer* drove the argument home on the back of the attitude expressed by MACDONALD ACJ in *Beresford Land Plan (Pvt) Ltd v Urquhart* 1975 (1) RLR 260 (AD); 1975 (3) SA 619 to the broad effect that summary judgment procedure was the principal means by which unscrupulous litigants seeking only to delay a just claim by entering appearance to defence, are thwarted; and that it is of the greatest importance that the efficacy of the procedure should not be impaired by technical formalism.

That approach, however, was not directed to overlooking such serious deficiencies as the

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plaintiff's summons here represents. In the *Beresford Land Plan* case, the plaintiff had applied for summary judgment, filing an affidavit which went beyond - and well beyond - the bare requirements of the appropriate Rules of Court, which stipulated only the verifying of the cause of action. She gave a fairly full recital of the events that prompted her to institute proceedings to recover her money and she annexed other documents which further explained matters. She also did not specifically recite the formula of the Rule that she believed the defendant had no *bona fide* defence to her claim. But she made other statements which in effect set out the same thing. The defendant sought to defeat her claim for summary judgment by claiming that she had not complied with the Rules of Court.

The magistrate who heard the application for summary judgment was not impressed by such a defence and, when the defendant appealed, nor was the Appeal Court. It held that the plaintiff's supporting affidavit in an application for summary judgment could, on the strength of the English decisions which had more relevance to our Rules than their South African counterparts, properly contain other matter of evidential detail. Particularly was this the case regarding documentary evidence. If this went further than the bare requirements of the Rule, then as long as such additional matter showed that the defence was merely for purposes of delay, and did not degenerate into prolixity, then it should not defeat a claim for summary judgment. If it were held that such additional information filed by a plaintiff for summary judgment did defeat a claim for that relief, the Court held that that would be taking formality and technical requirements to lengths which caused injustice, and it was therefore to be deprecated.

SQUIRES J

But that is a far cry from the present situation, and I entertain no doubt that the judgment does not mean that one can ignore the requirements of the Rules affecting the basic validity of a summons, which in turn are a prerequisite for the granting of summary judgment, seek to put that all right by an amendment after objection has been taken, and still claim the relief on the basis that too much formalism should not be allowed to frustrate a just claim. One might as well dispense with the Rules of Court altogether, since that would be a logical extension of such an approach.

Summary judgment procedure is an unusual advantage granted to a particular class of plaintiff. It is indeed designed to avoid delays to certain types of claims caused by unscrupulous defendants who enter appearance to defend merely for the purpose of gaining more time. But its very expeditiousness causes the law to exercise caution in granting it because, amongst other things, it is really a departure from the *audi alteram partem* rule. Where that can happen, as in other fields of law, the administration of justice tends to balance the possible harm which the exercise of such a right may do by hedging it about with procedural safeguards as a check on its possible abuse.

Now, before summary judgment can be granted in our courts, Rule 64 of the High Court Rules requires a summons claiming payment of a debt or a liquidated demand, and Rule 11(c) requires that such summons shall contain a general statement of the nature of each claim made and relief or remedies sought. This summons does not comply with either Rule and there are numerous judgments of this Court which hold that part of the requirements of a plaintiff

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desirous of claiming summary judgment is to ensure that his claim is strictly in compliance with the Rules by which he can claim such relief; see *Hugo Franco (Pvt) Ltd v Gordon* 1956 (4) SA 482 (SR); *Art Printing Works Ltd v The Citizen (Pvt) Ltd* 1957 (2) SA 95 (SR); *Maclaurin v Horne* 1966 (1) SA 553 (SR); *Shingadia v Shingadia* 1966 (3) SA 24 (R). For that reason, amendments to a summons of a far less essential kind than is here sought have been refused where the plaintiff wished to do so in order to claim summary judgment. In *Cold Storage Commission v Gey van Pittius GD Bulawayo* 21/1973 (unreported) DAVIES J (as he then was), said:

> "I have always understood the position to be that, in applications for summary judgment, the summons must be completely in order, and there is no room for any amendment of the summons. Possibly in a completely irrelevant and immaterial detail a court may be disposed to grant an amendment, but where there has been, as here, a wrong citation of the defendant it seems to me that these authorities and the general prin-

> ciples applicable to applications for summary judgment do preclude such an amendment being made."

None of this, in my view, is affected by the *Beresford Land Plan* decision, and those requirements and the omission to comply with them is fatal to the plaintiff's claim for summary judgment.

Mr *Mercer* urged that it would not avail the defendant if I were to refuse summary judgment in the present proceedings because of the defective summons, because with an amended summons the plaintiff would simply pursue the claim for a fresh application. That seems to be an erroneous belief under which to proceed, since Rule 65 of the High Court Rules requires the giving of notice to claim summary judgment within twelve days of the entry of appearance to defend. Twelve days have long since passed the defendant here entered appearance, and any such further application for summary judgment would be unsuccesful for at least that reason.

Finally, it remains to say that although Mr *Colegrave* did not argue the merits, I am not sure that Mr *Mercer* is correct when he says that the defendant has no answer and raises no triable issue. Whether or not an agreement to give the defendant time to repay can be inferred from correspondence, seems to at least admit for evidence as to the surrounding circumstances. However that may be, for the reasons already given the plaintiff is not, in my judgment, entitled to summary judgment.

Its application must therefore be dismissed with costs.

Gollop & Bank, legal practitioners for the plaintiff.

Atherstone & Cook, legal practitioners for the defendant.

SAYPRINT TEXTILE (PVT) LTD & ANOTHER v GIRDLESTONE 1983 (2) ZLR 322 (HC)

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Court **High Court, Harare**

Squires J

17 & 23 November 1983

Flynote

Practice and procedure - variation of interlocutory order of court - circumstances in which order may be varied - when appeal a more proper course.

Headnote

While a court has power to vary one of its own interlocutory orders, the power to do so is somewhat circumscribed. Variation is allowed when the object of the original order would be achieved by making the change and the variation touches on an incidental question, such as one of procedure, the variation of which would have no effect on the final judgment. The existence of fresh or altered facts is also usually necessary. If the effect of variation would be to alter the original order substantially, the proper course would be for the party against whom the order was made to appeal against the order, rather than seek a variation of it.

Cases cited:

Bell v Bell 1908 TS 887;

Meyer v Meyer 1948 (1) SA 484 (T);

Attorney-General v Birmingham, Tame and Rea District Drainage Board [1912] AC 788; [1911-13] All ER Rep 926;

Sandell & Others v Jacobs & Another 1970 (4) SA 630 (SWA).

J B Colegrave, for the applicants

A P de Bourbon, for the respondent

Judgment

Squires J: In proceedings heard by MRS JUSTICE SCOTT on 29 September last, the present respondent claimed against the present applicants an interdict *pendente lite* - pending the institution and determination of an action for damages, debate of an account, cancellation of an agreement, and other heads of relief. The interdict she sought was to restrain the present applicants from distributing, selling, producing or in any way dealing, in Zimbabwe, in skirts or garments manufactured or produced according

to a particular technique or process perfected by the respondent and any designs or patterns

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she had evolved, all of which skills she had supplied to the applicants in terms of an agreement between them.

The circumstances out of which the agreement came to be entered originally, and the facts which led to the present prevailing dispute between the parties and the issues between them, are set out and canvassed by the learned judge in her judgment No HC-H-363-83. It is not necessary to repeat these here, particularly as the applicants ask the present application to proceed on the basis that the original papers and judgment are regarded as part of these proceedings. Suffice it to say, so that the present exercise can be rendered intelligible, that the original agreement between the applicants and the respondent provided that the applicants would manufacture skirts or dresses using the respondent's techniques and processes; that the applicants would be entitled to exploit the export market in these garments subject to the payment of 10% to the respondent for the franchise; and the respondent would have the sole right to sell the garments so manufactured in the local internal market. In return for that the respondent not only made her staff available to the applicants but herself spent several months training applicants' staff in the methods and techniques she had developed and perfected in producing her skirts. Earlier this year it was discovered by the respondent that the applicants were disregarding the terms of their agreement by selling skirts manufactured under this agreement on the local market. This was partially admitted by the applicants, who said that these were only rejects that were not being sold in the usual trade. The flutter of apprehension that was caused by this discovery was calmed by meetings between the parties and their legal advisers at which the previous divisions of the market were adhered to, and the copyright in the processes and techniques of the cutting and pleating and the essential artwork in the designs was reaffirmed as being in the respondent.

Despite this, it again came to the respondent's notice that the applicants intended selling on the local market, under a different trade name, skirts which they produced by using the respondent's techniques and patterns, but without the art motifs that are characteristic of the respondent's products. It was this discovery that led to the application by the respondent for the interim interdict referred to earlier. And upon that basis and in those circumstances, the learned judge exercised her discretion in respondent's favour, granting her an interdict *pendente lite* ". . . restraining [applicants] from distributing, selling, producing or in any way dealing in

SQUIRES J

Zimbabwe in skirts or garments manufactured or produced according to the [respondent's] art-work, designs, patterns, techniques and processes of tie-dyeing and screen-printing as supplied by the [respondent] to the [applicants]."

The learned judge also put the present respondent on terms to institute the action she intended to bring, and she also ordered the present applicants to pay the costs at these proceedings. The judgment and the order to this effect were handed down on 5 October last.

The applicants have now brought the present application, over a month later, seeking initially a variation of SCOTT J's order in the previous case in two respects. The first was a variation by deleting the words "producing" from the contents and therefore the ambit of the interdict

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pendente lite; and the second was the deletion of the learned judge's previous order as to costs, with the substitution of an order reserving the question of costs pending the outcome of the action launched by the respondent. Not surprisingly, in view of the limited scope for varying even an interlocutory order of a Court, which I will attempt to discuss later, the second claim was not persisted in at the hearing, so that no more need be said about it, save that its inclusion might throw some light on the possible confusion in the applicants' mind as to what can be ordered in the variation of a court order by the same court, as compared with what can be ordered by a court of appeal when the judgment of a lower court is sought to be varied by that process.

The reasons advanced for the variation in the present proceedings are that the applicants has export orders worth considerable money for which the garments must be made urgent if those orders are to be fulfilled. It was argued that the original agreement between the parties recognised the applicants as having sole rights to the export market, from the proceeds of which the respondent would receive 10%. The interdict which prevented the applicants producing any of these garments at all meant they could not produce for this export market either. To vary the order by deleting the word "producing" from its provisions, would therefore accomplish what the original agreement allowed and what the parties originally intended. Some emphasis in this respect was laid by the applicants on the fact that in the first proceedings, case No 2004/83, the relief originally claimed by the present respondent did not seek to stop the applicants from producing these garments for the export market. It was said that the whole thrust of the respondent's initial complaint in applying for the interdict had been to protect her position in the internal

SQUIRES J

market. The more radical dimension of the relief she eventually obtained was only added by way of an amendment to her draft order towards the end of that hearing. This showed, so it was said, that the respondent was not really concerned about the manufacture for export only, which is what the applicants wished to do. Furthermore, it was urged that tat vary the rule to the extent sought would not only achieve what the parties originally intended but would benefit the respondent, whereas to leave it as it stood, would cause serious prejudice to the applicants.

While no one seems to have ever described the outer limits of a Court's power to vary one of its interlocutory orders, such decisions as were referred to by counsel ale seemed to approach the matter on the basis that such a power is at best a circumscribed one. Mr *de Bourbon*, in arguing that the variation here sought was well beyond the Court's powers to vary one of its own orders, pointed to Rule 449 of the High Court Rules as indicative of such limits. But I think that the Rule contemplates final orders and reflects the common law attitude to judgments of that nature. The problem here involves an interlocutory order, and the Roman-Dutch law has always apparently recognized a distinction between the two - see *Bell v Bell* 1908 TS 887.

In *Bell's* case - which seems to be the bench mark decision taken for guidance in later years - variation of an interlocutory order was allowed where the object of the original interlocutory order would be achieved by making such change. In *Meyer v Meyer* 1948 (1) SA 484 (T), an interlocutory order in the form of temporary interdict was varied by the discharge of that interdict

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where altered circumstances since it was ordered made it no longer necessary. That was also the reason in the English Court of Appeal decision in *Attorney-General v Birmingham, Tame, and Rea District Drainage Board* [1912] AC 788, that is referred to in *Meyer's* case.

In *Sandell & Others v Jacobs & Another* 1970 (4) SA 630 (SWA) proceedings had been instituted by the applicants on notice of motion for certain relief *pendente lite*. Interlocutory orders had been obtained on that basis for not only a temporary interdict but also for the oral examination of the two respondents. On the return day of the rule *nisi*, HOEXTER J (as he then was) was asked by the respondent's counsel to discharge the order for oral examination of the respondents and to vary the interlocutory order accordingly. The learned judge did so, albeit with considerable diffidence. He seems to have done so for the reason that the proceedings were by notice of motion and only for relief *pendent lite*. Such proceedings were not designed for extensive oral examination and cross-examination, nor

SQUIRES J

did that particular case lend itself readily to such a course. The affidavits themselves had by the time of the return day reached voluminous proportions and the congested state of the Court's roll precluded the luxury of another trial within the existing proceedings. But the leaned judge varied the order without discussion or consideration of the basis upon, or the extent to which, a Court's power rests or extends to vary one of its own orders.

In *Bell's* case, *supra*, which seems to contain such guidance as there is, INNES CJ said at 894:

> "Courts will not lightly vary their own orders, even though they may be of an interlocutory character. And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous."

There were such fresh facts in *Bell's* case and in *Meyer's* case. There were not in *Sandell's* case. But in all three the common denominator seems to be that the variation touched on an incidental question, usually - but not invariably - of procedure, the variation of which would have no effect on the final judgment. As the CHIEF JUSTICE put it in *Bell's* case:

> "The time fixed by the Court for doing something in connection with the matter, having in itself no direct hearing on the ultimate order, has *per incuriam* been allowed to lapse."

In *Meyer's* case, where as already indicated the variation related to the discharge of an interdict, it was not a question of procedure; but the Court, CLAYDEN J, discharged the interdict because on the facts as altered the interdict had become irrelevant. As the learned judge put it:

> "The present case, a case where an interdict is granted to protect the right of the plaintiff, and where that right is subsequently lost by the plaintiff, seems to me to be the type of case where the Court should act to remove a restriction which it has imposed, which is no longer needed, and which could not on the present facts have been granted."

The present situation does not seem to me to fall into such an ambit. There are no new or altered facts which bear on the terms of the order. And it does not seem to me that it can be said that to make the order sought will not have an effect on the final judgment. For even accepting, as the applicants say, that most of the debate before SCOTT J was over the alleged breach of confidence or trust, and even accepting that the present respondent did not initially

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include in her draft order for relief an interdict on the applicant's producing these garments; and accepting, too, that the respondent may have seemed more concerned about the internal market than the external, the unmistakable tenor of the respondent's complaint was that the present applicants had acted in breach of their agreement with her. As a result of that breach, she wishes to terminate the basis on

which the applicants have been allowed to use her designs, techniques, patterns or processes, and her initial claim for temporary relief was to stop further performance while she instituted action for the main relief and had that complaint determined.

Indeed, if the present applicants did not think MRS JUSTICE SCOTT should have made the order interdicting them from further "producing" respondent's work, because it was not justified on the facts or the law applicable in the case, it is surprising that they did not appeal and have the order reduced in impact accordingly. In my view, it must have been clear that the respondent wanted not only to freeze or sustain the present operation of the agreement, but wanted to do so as a prelude to severing her contractual tie with the applicants because of their treatment of her.

The final judgment which the respondent seeks will, in my view, most certainly be affected if the applicants are now allowed to go on producing her designs and using her techniques. They will be doing what she is seeking to be stopped and avoiding the effect that such a judgment will have if she succeeds.

In my assessment therefore I think the relief here claimed by the applicants is too radical or material to the main issue to be achieved by means of a variation of an order of the Court. It is an order of relief that would more properly be obtained on appeal. Indeed, I think that such relief must have been present to the mind of the applicants in also asking, as they originally did, for a virtual reversal of SCOTT J's order as to costs. I think some further indication of this confusion was given when the applicants explained, through Mr *Colegrave*, that they brought proceedings to seek a variation of the order rather than noting an appeal against it, to avoid the effects which a notice of appeal would have - that is to say, that the learned judge's order would have been suspended pending the hearing of an appeal which would have allowed the applicants to continue producing. I think it may be said at once that noting an appeal by the applicants would not have been likely to affect the position, even accepting this exhibition of generosity by the applicants as being true. For, if the applicants had applied for leave to appeal - as they would have had to do, it being an interlocutory order they were seeking to alter or reverse - as Mr *de Bourbon* was quick to point out, the respondent would almost certainly have applied in response, for an order that the interdict remain operative while an appeal was pending. So far as one can gather from the tone of MRS JUSTICE SCOTT'S judgment, it is in the highest degree likely that she would have acceded to such a request by the respondent.

Be that as it may, however, I am of the view that the relief here sought

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SQUIRES J

should properly have been the subject of an appeal. It is not of a type that can be granted as a variation of the Court's order made on 5 October.

In my judgment, the application must be dismissed with costs.

Coghlan Welsh & Guest, legal practitioners for the applicants.

Winterton Holmes & Hill, legal practitioners for the respondent.

ATTORNEY-GENERAL v CHINYERERE & ANOTHER 1983 (2) ZLR 329 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

1 & 25 November 1983

Flynote

Criminal procedure - sentence - Prevention of Corruption Act 1983 - s 3(a) - civil servant taking a bribe - appropriate sentence.

Headnote

Corruption in the Public Service must necessarily attract heavier penalties than corruption elsewhere. Members of the public have no option but to transact business with public officials and the integrity of such officials must be a matter of public concern. It would be correct to approach such cases on the basis that the proper punishment should be a term of imprisonment unless there are circumstances which indicate that this would be inappropriate. Sentences should, however, be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings; on the other hand, the consideration of mercy should not indicate a condonation or minimization of serious crime.

Cases cited:

S v Mutuma HC-H-185-82 (not reported)

Attorney-General v Mantwana & Anor SC 20/82 (not reported);

S v Lezar & Anor 1982 (1) ZLR 113;

S v Van der Westhuizen 1974 (4) SA 61 (C);

S v Makandigona 1981 ZLR 408.

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P J Batty for the appellant

The respondents in person

Judgment

Georges CJ: The respondents were clerks at the Passport Office, Harare. There is no evidence as to the positions they occupied in the hierarchy but the male respondent earned $217 per month and the female respondent $204 per month. The proceedings do not indicate at all the nature of the duties of the male respondent. The female respondent, it would appear, wrote out passports and issued them.

At the beginning of August 1983 an applicant for a passport, Anthony

GEORGES CJ

Fredrik Sandberg, approached the male respondent and told him that he urgently needed a passport for which he had already submitted an application. He promised to pay the male respondent $100 if he could get the passport quickly.

The male respondent approached the female respondent, told her what had transpired and it would seem sought her help in return for part of the money to be paid. The female respondent prepared the passport and took it to someone described as "the writer" who was charged as an accomplice but pleaded not guilty. She signed as the person collecting the passport and handed it to the male respondent. He kept a rendezvous with the applicant in a nearby park, handed over the passport and received the $100.

Policemen had been tipped off and were trailing the male respondent. He was arrested and searched as was the applicant. A passport was found on the applicant and $100 on the male respondent.

As a result the respondents were both charged with a contravention of s 3(a) of the Prevention of Corruption Act 1983, the allegation being that being persons employed by the Ministry of Home Affairs as clerks at the Passport Office they wrongfully and corruptly received for themselves from Sandberg as an inducement for having done an act in relation to their principal's affairs the sum of $100.

They pleaded guilty. Each was fined $200 or, in default of payment, three months' imprisonment with labour and in addition three months' imprisonment with labour suspended for five years on condition that neither was convicted of any offence contrary to s 3(a) of the Prevention of Corruption Act or any offence of which dishonesty was an element committed within the said period of five years and for which a sentence of imprisonment without the option of a fine was imposed.

In his remarks on sentence the magistrate pointed out that such behaviour on the part of Government officials could not be considered lightly. The respondents had abused positions of trust. It was essential that public confidence in the Civil Service should not be undermined. Courts should be at pains to preserve the integrity of the Civil Service by passing deterrent

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sentences. He noted that corruption in the Civil Service was becoming rife and that it should be nipped in the bud. He referred to the maximum sentence fixed by the section - a fine of $1 000 or two years' imprisonment or both.

GEORGES CJ

The Attorney-General appeals against the sentences, contending that they were manifestly inadequate. The notice of appeal conceded that the trial magistrate had taken the aggravating features of the offence into account in assessing sentence but contended that he had erred in not attaching sufficient weight to these factors. It was urged that the courts had in the past taken a serious attitude to crimes of dishonesty committed by civil servants and that the trial magistrate had not had sufficient regard to the decided cases.

I do not find the decided cases referred to very helpful in supporting the appellant's case. In all of them the circumstances of aggravation were far more serious.

In *S v Mutuma* HC-H-185-82 the appellant was employed to conduct physical examinations of female passengers who were passing into the transit lounge preparatory to boarding flights from Harare. She was to ensure that no weapons were taken on board. On seven occassions between 30 April 1981 and 24 March 1982 she stole money from the purses of people being searched, the total sum involved being $133,40. She was twenty years old and the mother of a one year old son. She was sentenced to eight months' imprisonment of which half was suspended and that was confirmed on appeal. This was a calculated course of conduct pursued over a long period and plainly can be categorised as more blameworthy than the conduct in this case.

In *Attorney-General v Mantwana and Anor* Supreme Court Judgment 20/82 the respondents, by adding the names of fictitious employees to a mine payroll, defrauded the company of over $7 700 in the space of ten months. A sentence of $300 with a wholly suspended sentence of six months' imprisonment was declared manifestly inadequate. The appropriate sentence should have been three years' imprisonment with half suspended.

Perhaps closest to this case on the facts is *S v Lezar and Anor* 1982 (1) ZLR 113. In that case the appellants had taken a bribe from a person who wanted a motor car without having to wait on the list of those who had ordered new cars. The period of waiting could be as long as two years. The car which had been delivered was one which had come into the appellants' control in unusual circumstances which took it outside the list priority system for new cars sold by the firm. A sentence of seven months' imprisonment with labour was altered to a fine of $600 with a term of three months' imprisonment in default of payment and in addition a three

GEORGES CJ

month term of imprisonment wholly suspended.

The case for the respondent is in my view somewhat more serious in that corruption in the

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Public Service must necessarily attract heavier penalties than corruption elsewhere. Members of the public have no option but to transact business with public officials and the integrity of such officials must be a matter of public concern.

A review of the cases does, in my view, establish, however, that in terms of moral blameworthiness there is an absence of persistence and calculated planning or premeditation in the conduct of the respondents in the present case which is an important point of distinction. If, as has been contended, a short sharp period of imprisonment is required in this case then it difficult to imagine any proven case of corruption in which imprisonment would not be the only appropriate sentence. I do think it is wise to prescribe such a principle.

Certainly it is correct to approach such cases on the basis that the proper punishment should be a terms of imprisonment unless there are circumstances which indicate that tis would be inappropriate. Nothing in the magistrate's remarks on sentence would indicate that this was not his approach.

I respectfuly agree with the remarks of BAKER J in *S v Van der Westhuizen 1974 (4) SA 61 (C) at 65G:*

> "The third factor which the Courts have to consider in assessing a penalty is the interests of society. I have already indicated that [bribery] is a most serious crime. In many cases of bribery of officials in the past even first offenders have been sent to gaol for their offence, without the option of a fine. Society does not tolerate dishonest officials in its public administration; it cannot afford to for, as soon as public administration falls into the hands of dishonest and dishonourable men, the complete corruption of the community starts to develop. For this reason society demands exemplary punishment of public servants who take bribes in connection with the exercise of their public duties. In this connection Mr *Mendelow* submitted that society does not demand that the accused should be sent to gaol. The answer to this is that society requires severe deterrent sentences for the discouragement of bribery. It is crime which almost always involves premeditation, and often involves persistence in the conduct constituting the crime."

Nonetheless it was pointed out at 66E:

> "...justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation ...But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crimes."

GEORGES CJ

Deciding not to impose a prison sentence in this case does not in my view indicate a condonation or minimisation of serious crime. The male respondent was confronted by a temptation to which he succumbed. There was no evidence of persistence or premeditation. A passport was not issued to someone who was not entitled to it as contrasted with the case of *S v Makandigona* 1981 ZLR 408 where a certificate of competency was issued to a woman who had not taken a driving test. Particularly in the case of the female respondent there was the circumstance that as a young woman of nineteen, undoubtedly in a junior capacity, she was asked by a workmate to assist in the enterprise. Indeed, had she been sent to prison the sentence would have induced a sense of shock and it would, in my view, have been out of line

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with the decided cases.

I am satisfied, however, that the fines are too low, representing less than one month's earnings of each of the respondents.

I would accordingly allow the appeal to the extent of altering the fine in the case of the male respondent, Dominic Chinyerere, to one of $400 or, in default of payment, six months' imprisonment with labour, and in the case of the female respondent, Florence Ngandu, to one of $300 or, in default of payment, four-and-a-half months' imprisonment with labour. The wholly suspended sentences of three months' imprisonment on each of the respondents are allowed until 30 November to pay the difference between the fines originally imposed and the present fines.

Beck JA: I agree.

Gubbay JA: I agree.

S v ROSEN 1983 (2) ZLR 334 (SC)

Court **Supreme Court, Bulawayo**

Georges CJ & Beck JA

1 December 1983

Flynote

Criminal law - statutes - Parks and Wild Life Act 14 of 1975 - s 47(4)(c) - appropriate authority for land may "issue a permit" to hunt - written document must be produced - criminal procedure - sentence - hunting - with firearms - whether custodial sentence justified.

Headnote

In terms of s 47(4)(c) of the Parks and Wild Life Act 14 of 1975, the "appropriate authority" in respect of land may "issue a permit" to any person to hunt any animal on the land. The phrase, "issue a permit", requires the existence of a physical object, so a written document must exist. Oral permission is not enough. The mechanism of control is indeed made more effective by the fact of documentation. No significant hardships flow from requiring a written document and much is gained in certainty.

On a charge of unlawful hunting under the Act, the Courts take a far more serious view of poaching by means of snares than by poaching by means of hunting with guns and dogs. Snares kill and maim cruelly and indiscriminately, whereas hunting with a gun is comparatively skilled. Poachers who use snares are almost routinely sentenced to terms of imprisonment but the same does not apply to poachers who use guns unless there are other considerations such as massive destruction of game for commercial gain. In appropriate circumstances a fine would

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be an adequate punishment.

Cases cited:

S v Staves G-S-165-80;

Jackson Stansfield & Sons v Butterworth [1948] 2 All ER 558;

S v Julius G-S-269-80.

S K M Sibanda, for the appellant

P J Batty, for the respondent

Judgment

Georges CJ: The appellant was charged with having unlawfully and without permission of the appropriate authority hunted and killed on Mambo Ranch two female kudus, one female impala, one female duiker and one male steenbok. He was found guilty in respect of the two kudus

GEORGES CJ

and the impala. He was sentenced to seven months' imprisonment of which three months were suspended for five years on condition that he was not convicted of any offence contrary to s 47(a) of the Parks and Wild Life Act (the Act) committed during the said period for which he was sentenced to a term of imprisonment without the option of a fine. He was also ordered to pay compensation in the sum of $170 to the owners of Mambo Ranch.

The appellant had been arrested on 12 December 1982 on a ranch adjoining Mambo Ranch called Shemer's Ranch. He had in his possession five carcases of the game specified in the charge. A section manager of Mambo Ranch, Jack Robinson, testified that he could not tell on which ranch the appellant had killed the game but all the spoor was on Mambo Ranch.

The appellant's case was that his parents were in the process of buying Shemer's Ranch and that they did not know that they were not allowed to shoot animals. He had gone to shoot on that ranch and had not realised that he had strayed on to Mambo Ranch. He admitted having killed the two kudus and the impala on Mambo Ranch and the magistrate convicted him in respect of those.

In his brief judgment at the close of the evidence the magistrate made no reference to the appellant's evidence that he had permission to hunt on Shemer's Ranch and had strayed on to Mambo Ranch. Clearly he did not give effect to the defence because he did not convict him except in respect of the animals which he admitted having killed on Mambo Ranch.

Mr *Sibanda* contended that the conviction was bad because the magistrate did not consider whether there had been a genuine error on the appellant's part in straying on to Mambo Ranch. Mr *Batty* argues that that defence is in any event unavailing since the appellant did not have permission to hunt on Shemer's Ranch and once that was so he could not successfully advance

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genuine error in having strayed on to Mambo Ranch. The determination of the issue requires an examination of parts of the Act.

Section 47 provides:

"(2) Subject to the provision of subsection (4), no person shall -

(a) hunt any animal on any land; or

(b) remove any animal or any part of an animal from any land;

except in terms of a permit issued in terms of paragraph (c) of subsection (4).

(4) Subject to the provisions of this Act, the appropriate authority for any land may -

(a) hunt any animal on the land; or

GEORGES CJ

(b) remove any animal or any part of an animal from the land; or
(c) issue a permit to any person to hunt any animal on the land or to remove any part of an animal from the land;".

"Appropriate authority" is defined as follows in s 2 of the Act:

"(a) . . .

(i) in the case of alienated land -

A. the owner thereof; or

B. where the land is held under an agreement of purchase or lease, the purchaser or lessee unless the agreement otherwise provides;

and includes any person appointed to be an appropriate authority for the land by such owner, purchaser or lessee, as the case may be;".

Mr *Sibanda* contended that the appropriate authority for Shemer's Ranch could be said under s 2(a)(i)(B) above to have been the appellant's father. I do not think the appellant's evidence comes anywhere near establishing the proposition that his parents "held" the Ranch under an agreement of purchase or lease. He said no more than that his parents were buying the Ranch which could mean no more than that they were negotiating a purchase. He does not indicate that his parents were in possession of the Ranch.

Even if this point is resolved in the appellant's favour I am satisfied that on a proper interpretation of the Act the appellant did not have a permit from the appropriate authority to hunt on the land.

Mr *Sibanda* contended that oral permission from the appropriate authority would be enough and where as here the person hunting was the son of the appropriate authority his certainty that the appropriate authority would, if asked, have granted permission is sufficient under the Act. Mr *Sibanda's* argument was spread even wider. Not only could sons and daughters hunt and remove animals but so could nieces and nephews and grandchildren and grandparents. I find

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such an interpretation unacceptable. Clearly if the appropriate authority did not wish to have someone who was hunting on his or her land prosecuted it would be most unlikely that a prosecution could be mounted since the authorities charged with the protection of game would not know that an infringement had taken place. But this is not a relevant consideration in interpretation of the Act.

Section 47(4)(c) speaks of the "issue" of a "permit". The use of the word "issue" can only denote the existence of a physical object. One does not "issue" oral permission. One *gives* oral permission. The use of the word "issue" indicates that a written document must exist.

GEORGES CJ

In a review judgment *S v Staves* G-S-165-80 BEADLE AJ stated:

> "In the instant case the facts appear that the accused genuinely believed that he had permission from an employee of the farm on which he shot the impala to shoot the impala and that the employee was authorised by the occupier of the land to give such permission. The permission was, however, given orally and the accused was not in possession of any permit. To that extent, therefore, he contravened the law."

There was no argument on the point but the proposition seems to me sound. In a matter decided in the Court of Appeal in England - *Jackson Stansfield and Sons v Butterworth* [1948] 2 All ER 558 the word to be interpreted was "licence", a word close enough to "permit" to allow of application by analogy. In that case a regulation made certain types of building work unlawful -

> "... except in so far as there is in force in respect thereof a licence granted by the Minister".

SCOTT LJ (with whom ASQUITH LJ agreed) held that the expression: -

> "... a 'licence' contemplates a concrete thing, ie, a document. Had oral permission been the intended condition, different language would have been used."

In much the same way, the word "permit" connotes a concrete thing. Had oral permission been adequate the craftsman, instead of using the words "issue a permit", could have said "give permission".

The entire mechanism of control is also made more effective by the fact of documentation. If stopped and questioned a hunter can produce his document. The permit may be limited to hunting a particular type of animal and to a particular time. I see no significant hardships which could flow from requiring a written document and I am satisfied that much would be gained in certainty, always a useful characteristic of criminal law.

If a written permit is required to fall within the exception provided in sub s 47(4), then the appellant's defence could not succeed. If he had been lawfully hunting on Shemer's Ranch then one could consider whether he had accidentally strayed on to Mambo Ranch. If his hunting activities there were not lawful then there is no basis for a defence of mistake in straying on to Mambo Ranch.

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Accordingly I would dismiss the appeal against conviction.

Mr *Batty* conceded that the magistrate misdirected himself on the question of sentence when he said that it appeared that the appellant had travelled from Bulawayo to the ranch for poaching. I agree that this is so. If

the magistrate meant Mambo Ranch there is no evidence that that was so. If he meant Shemer's Ranch the remark was not relevant to sentence since the appellant had not been convicted in respect of the animals shot there, and is was accepted that the appellant wrongly thought that he was authorised to hunt game there. Mr *Batty* properly concedes that this was a grave misdirection and that this Court is as a result at large in assessing the sentence.

It is not disputed that the courts take a far more serious view of poaching by means of snare than of poaching by means of hunting with guns and dogs. Snares kill and maim without discrimination. Usually they can cause more pain than does the comparatively skilled huntsman with his gun. Different considerations would obviously apply it the accused persons formed part of a large hunting party, heavily armed and obviously bent on massive destruction of game for commercial gain.

It is also fair to say that poachers using snares are almost routinely sentenced to a term of imprisonment if prosecuted to conviction. The issue was whether in this case a sentence other than a custodial sentence could be justified.

The determining factor in the decision was the fact that the appellant was well employed and had been for many years as a Haulage Overseer with the Bulawayo City Council. If he had had to serve a prison sentence he would have lost his job. There is nothing to indicate that the jaunt which led to this contravention of the law was other than an isolated incident springing from the fact that his parents were at least negotiating to purchase Shemer's Ranch. On the other hand the appellant killed two kudus and one impala, having already killed a steenbok and a duiker on Shemer's Ranch. In that sense the contravention can fairly be described as grave and not trifling.

In the final analysis it appeared to us that justice would best be done in this case by a heavy fine which, as was said in *S v Julius* G-S-269-80, can be an effective penalty, yet one which preserves the appellant's job.

Accordingly the appeal against sentence was allowed, the sentence of imprisonment was quashed and there was substituted a fine of $300 or, in default of payment, six weeks' imprisonment with labour. The warrant of committal was suspended until 15 December 1983. The order for compensation was confirmed.

Beck JA: I agree.

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ATTORNEY-GENERAL v MATEWERE & ANOTHER 1983 (2) ZLR 339 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

15 November & 5 December 1983

Flynote

Criminal procedure - remand - application for - whether magistrate entitled to have regard to merits of prosecution's case against accused - Criminal Procedure and Evidence Act [Chapter 59] - s 151 - "trial. . . pending" - meaning of.

Headnote

In terms of s 151 of the Criminal Procedure and Evidence Act [*Chapter 59*], any court before which "a criminal trial is pending" may postpone that trial if it is "necessary or expedient" to do so. It is in terms of this section that magistrates have the power to remand accused persons even though the offence is *prime facie* one which is beyond the jurisdiction of the magistrates court. This is because although a trial as such may not be pending, proceedings certainly are and those proceedings may in various ways be turned into a trial.

The section empowers the court to postpone the trial if it is "necessary or expedient" to do so. The meaning of this phrase is that a postponement either must be necessary in order that justice be done or could be of advantage in the doing of justice. This requires balancing the interests of the State against the right of an individual to a speedy trial. In arriving at a decision in the matter, the principal factors to be assessed are the seriousness of the charge, the delay in beginning the trial and the reasons for the delay. The strength of the case against the accused can be taken into account but is not pivotal. This does not entitle the magistrate to go in to the merits of the prosecution case; he can only accept what is stated by the prosecutor. He is not empowered to decide that what he has heard does not amount to a ground for reasonable suspicion. However, where the State has been given time for further investigation and the facts disclosed indicate that there is very little to connect the accused with the offence, the magistrate would be justified in concluding that it was neither necessary nor in the interests of justice to grant a further adjournment.

M Werrett, for the appellant.

K J van Huyssteen, for the first respondent.

K Terry, for the second respondent.

Judgment

Georges CJ: The respondents in this matter appeared before a

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GEORGES CJ

magistrate in Harare on 14 June 1983, for remand on an allegation that they had committed murder. I use this somewhat unusual language to describe the situation because on the documents presented to this Court it does not seem possible to say that a charge had yet been laid. The name of the person allegedly murdered is not disclosed nor is the date nor the place of the commission of the alleged murder. The documents do not disclose how the respondents came to be in custody but it is clear that they had not been arrested without warrant under s 36 of the Criminal Procedure and Evidence Act (the Act). The indications are that they were arrested under s 21 of the Emergency Powers (Maintenance of Law and Order) Regulations SI 441 of 1980.

The respondents had appeared before a magistrate prior to 14 June 1983. On that date the magistrate had before him two documents. One was headed "Remand Form" and stated that on 5 May 1983 at Harare the respondents appeared at Harare on a charge of murder. There were spaces in which could be noted the date to which the respondents had been remanded and whether on bail or not but no notations appeared.

The second document was headed "Request for Remand". In spaces provided it contained the names, ages, residential addresses, business addresses and telephone numbers of the respondents. In the space opposite "Offence (s)" was written "murder." Under the heading "Short summary of facts (NB in violence cases mention weapon used, injuries and provocation)" appeared the following "Deceased was found with gun shot wounds on 24/3/83, on the vlei between Samora Machel Avenue and Enterprise Road, Harare." It was stated the police investigations should be complete in two weeks, and that there were ten witnesses. Reasons for remand were noted as "Pending completion of Investigations and outstanding accused". Opposite the heading "Bail" was the statement "Strongly opposed on grounds that they are likely to abscond (b) Are likely to interfere with evidence, both are aliens with passports". The form is dated 5/5/83 and is signed by a Detective Section Officer. A space is provided to note the result of the request - the date, time, place and Court to which the case was remanded, the movement of the docket and the bail conditions. It was agreed by all legal practitioners appearing that this form had no statutory basis in the Act. Though found in the magistrate's papers it seems clearly intended to be an internal police memorandum directed from the Investigation Officer to the Prosecutor, though, as mentioned later, it contains some of the information which s 37 prescribes as required on an application to a magistrate for an order for further detention.

The magistrate on 14 June 1983 had before him "Notes on Remand"

GEORGES CJ

made by a magistrate at an earlier hearing on 5 May 1983. Under the heading "Brief allegation of Charge" there appeared the following:

> "Deceased was taken by accused to their house and was later found shot with gunshot wound on vlei between

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Samora Machel Avenue and Enterprise Road Harare."

On 14 June 1983 the respondents were represented by Mr *Terry* and Mr *van Huyssteen*. They objected to the remand and the magistrate asked for further facts which he noted as follows:

"A1 had meeting at Tafara - briefed party members that on 23 - when D arrived Zimbabwe airport - they meet him.

24th March - at Park Lane noted A1 present - ± 100 m from where shooting took place.

5th May A1 confessed to a witness that he present when D killed at Park Lane Hotel.

Politically-motivated case - involves external investigations - Security matter.

A2 Muhango - On information [taken] was by 2 Malawi SB between August 1 and September. A2 [taken to] Malawi arrested and interrogated - alleged Muhango assigned by Malawi Government to exterminate all who opposed Banda Government.

24th March 83 Muhango and D and 2 others unknown together drinking at Park Lane.

A2 resides 50 m from where shooting took place."

Mr *Terry* stated that there was no basis for remanding the second respondent on the facts given by the Investigating Officer. Mr *van Huyssteen* said that the same applied to his client. The public prosecutor added that the crime was politically motivated.

The magistrate thereupon refused to remand the respondents and the result was that they were no longer kept in custody.

The Attorney-General thereafter noted an appeal in terms of s 69 of the Magistrates Court Act as read with s 5(1) of the High Court (Appellate Division) (Miscellaneous Appeals and References) Rules 1975. Five grounds of appeal were noted four of which were struck out as being too vague in a judgment delivered in this Court on 4 October 1983. One ground was considered sufficiently particularised for consideration and a question was formulated for consideration in these terms:

"Is a magistrate entitled in law when considering an application for a remand to have regard to the merits of the prosecution's case against the accused?"

The proceedings were sent to the magistrate for his comments. He replied that he accepted that he was not entitled in law when considering an application for remand to have regard to the merits of the prosecution's case against the accused. He denied having done this. Section 151 of the Act gave him a discretion to remand an accused person "if it is necessary or expedient". In exercising that discretion the court, in his view, should have

regard to s 13(2)(e) of the Constitution, which made lawful the arrest of persons on reasonable suspicion of their having committed an offence, and s 13(4)(b) of the Constitution, which established the right to a speedy trial. In his view a remand was justified only if, accepting the facts stated by the prosecutor at face value, it was shown not only that a crime had been

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committed but that the accused had been involved in its commission. The court had to be the tester as to whether there was reasonable suspicion for the arrest in terms of s 13(2)(e) of the Constitution. The State had alleged that the respondents had been present at the Park Lane Hotel and in his view this amounted to no suspicion whatsoever. Accordingly he had exercised his discretion in favour of the accused persons and had refused the remand.

The magistrate's letter may in a sense have made superfluous any reply to the question posed in terms of the Attorney-General's ground of appeal. Nonetheless since there was clearly an area of confusion surrounding the process of remand and the discretion of magistrates in exercising powers of remand it seemed proper to listen to the arguments advanced and to attempt clarification.

Section 36 of the Act requires (subject to certain rules as to calculation of the period which are not relevant) that a person arrested without a warrant shall as soon as possible be brought to a police station or charge office and if not released by reason that no charge is to be brought against him may be detained for a period not exceeding forty-eight hours unless he is brought before a judge or magistrate upon a charge for any offence and his further detention is ordered by that judge or magistrate or a warrant for his further detention is obtained in terms of s 37.

Section 37 empowers a magistrate to make an order for the further detention of a person arrested without a warrant on a written application subscribed by the Attorney-General or by the local public prosecutor or a police officer who is of or above the rank of inspector or a police officer in charge of a police station who is of or above the rank of section officer setting forth the offence alleged to have been committed, and stating that "from information available to him, he has reasonable grounds of suspicion against that person." A statement from the officials named above suffices. Where any other person provides the information it is to be on oath if the magistrate is to issue the warrant. Miss *Werrett* contended that this section did not apply. She was willing to concede that it may be applicable on the first appearance before the magistrate. In any event the section does not seem to require the magistrate to make any enquiries

before ordering the issue of the warrant or the further detention. A written statement by the appropriate official, who clearly need not be present, that there are reasonable grounds for suspicion on information available to him will suffice. It may be that the form "Request for Remand" is modelled in part to fulfill the requirements of s 37, but clearly it falls short. Nowhere does it state that there are reasonable grounds of suspicion against the respondents named therein nor does it appear to be signed by a person specified in the section.

Section 151 of the Code deals with postponement of pending case. It reads:

> "...any court before which a criminal trial is pending may, if it is necessary or expedient, postpone the trial until such time and to such place and upon such terms as to such court may seem proper . . ."

There was, however, considerable uncertainty as to whether in the circumstances of this case there was any "trial" "pending". The charge was one of murder - an offence beyond the jurisdiction of a magistrate to try. For that reason it could be contended that no trial was pending

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before the magistrate empowering him to exercise his power to postpone.

Section 125 of the Act provides that as soon as the indictment in any criminal case brought in the High Court has been duly lodged with the Registrar of that Court, such case shall be deemed to be pending in that Court. No indictment had yet been filed in this case and consequently it could not be said to be pending in that Court.

The magistrate could, of course, have been directed to carry out a preparatory examination into the charge. No specific power to remand in the case of the conduct of a preparatory examination is provided for except in s 66 of the Act. This states that the magistrate may remand the accused when it appears that the accused may have been misled by any variance between the summons or warrant setting out the charge and the evidence advanced at the examination - clearly to enable the accused to deal with the variances.

In the final analysis, Miss *Werrett*, Mr *Terry* and Mr *van Huyssteen* were agreed that there was no provision in the Act which covered specifically the situation under discussion.

In these circumstances I am satisfied that the provisions of s 151 are the most apt to offer guidance. Although a trial as such may not be pending, proceedings certainly are. They may be converted to a trial if, as

GEORGES CJ

can happen, a charge, other than murder, which falls within the jurisdiction of the magistrate is substituted. A full scale preparatory examination may be directed or under s 105(1) and (2) of the Act the magistrate may, on notice from the Attorney-General of his intention to indict the accused, commit the accused for trial before the High Court. While a decision is being made as to which of these courses is to be followed the matter is pending before the magistrate and he may be asked to exercise his power to postpone.

One of the connotations of the word "expedient" is "politic rather than just". It can, however, also mean "advantageous, suitable" - *Concise Oxford Dictionary*. It appears to me that it is in the latter sense that the word is used here and that the end towards which it must be suitable is the doing of justice. Accordingly in deciding on an adjournment it is the duty of the magistrate to decide whether such an adjournment would be necessary in order that justice should be done or could be of advantage in the doing of justice. This requires balancing the interests of the State in preserving public peace and order by prosecuting those who may have committed crimes to conviction and the right of the individual to a fair and speedy trial once he has been charged.

In arriving at this decision the principal matters to be assessed are the seriousness of the charge against the accused person and the reasons advanced for asking for the postponement. While the strength of the case against the accused can be taken into account it should not in my view be pivotal. The principal factors are the seriousness of the charge and the delay in beginning the trial or ordering the committal. Delay become much more important of course where the accused is in custody and is denied bail. No time scales can be prescribed though plainly more time will be given where the charge is very serious since clearly the public interest

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to be protected will be more vital.

As has been mentioned, there was general agreement that the magistrate was not empowered at that stage of the proceedings to go into the merits of the case for the prosecution. He can only accept what has been stated. As I understand the scheme of the Act he is not empowered to decide that what he has heard does not in his view amount to a ground for reasonable suspicion. I have already indicated that even under s 37 the magistrate can make an order for further detention on a statement from an appropriate official that, on information in his possession, that official has grounds for reasonable suspicion. In cases, however, where some time has been given to permit further investigation and these facts disclosed indicate

that there is very little to connect the accused person with the offence the magistrate would be justified in concluding that it was neither necessary nor expedient in the interests of justice to grant a further adjournment.

In this instance it appears to me that the magistrate erred in considering the merits of the case though he said he did not do so. Although he accepted the facts put forward by the prosecution he drew inferences from the facts (with which I do not necessarily agree) and concluded that there were no grounds for suspecting that the respondents were connected with the offence. The facts disclosed can be used only to the extent that they indicate that, having regard to the time already granted, the progress of the investigations seems so far from approaching completion that further delay would not be in the interests of justice.

I would accordingly answer the question posed by stating that the magistrate is not entitled on a remand to consider the merits of the case for the prosecution, that in assessing the facts as he did to determine that there was no ground for suspicion against the respondents he did in fact consider the merits and that he erred in so doing.

Beck JA: I agree.

Gubbay JA: I agree.

Sawyer & Mkushi, first respondent's legal representatives.

Stumbles & Rowe, second respondent's legal representatives.

MINISTER OF HOME AFFAIRS AND ANOTHER v DABENGWA 1983 (2) ZLR 346 (SC)

Court **Supreme Court, Harare**

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Georges CJ, Beck JA & Gubbay JA

16 November & 7 December 1983

Flynote

Statutes - Constitution of Zimbabwe 1980 - Schedule 2 - s 2(1)(b) - detainee - case not reviewed by detention tribunal "forthwith" - effect of such failure - whether detention order thereby void - remedies available to detainee - practice and procedure - appeal - whether appeal lies against granting of interdictum de homine libero exhibendo.

Headnote

The respondent was detained by the appellant Minister on the 24 May 1983, in terms of s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations 1980). He was served with written reasons for his detention. The Minister submitted the respondent's case to the Detainees' Review Tribunal within the period required by s 2(1)(b) of Schedule 2 of the Constitution of Zimbabwe, 1980, but by mid October 1983 the matter had still not been considered by the Tribunal. Proceedings were accordingly launched in the High Court to secure the respondent's release from detention. In an opposing affidavit, the secretary to the Tribunal stated that the case had been set down for hearing for the 4 November. He explained that this was the earliest date on which the matter could be heard. The reasons for not hearing the case earlier were said to be the number of other cases with which the Tribunal had to deal, the availability of members of the Tribunal, who could act only on a part time basis, and the difficulty of arranging a venue that was suitable in respect of secrecy and security.

The matter was not in fact heard on the 4 November, because of the proceedings pending in the High Court. These proceedings resulted in the judge (PITMAN J) mating an order on the 8 November, declaring the detention to be illegal and ordering the respondent's release. The reasons for the order were that the detention was not reviewed as soon as was reasonably possible in the circumstances and that such failure to review the proceedings made the continued detention of the respondent unlawful. The Minister appealed. It was argued on his behalf that the failure to review the case was a failure by the Tribunal and not by the Minister, who had submitted the case timeously. A distinction should be drawn between failures by the detaining authority (ie the Minister) to observe the requirements imposed by the Constitution and Regulations and failures by other persons. In the latter case, the only remedy would be a writ of *mandamus.*

The respondent took the point *in limine* that the Court had no jurisdiction to hear the appeal. His argument was based on the rule, formerly obtaining in England and applied in other Commonwealth countries, that orders of *habeas corpus* were final and not subject to appeal. With regard to the merits of the appeal it was argued that all the safeguards with which preventive detention is hedged about by the Constitution are mandatory and failure to observe those safeguards necessarily made the detention invalid.

Held, that the point raised *in limine* must fail. The rule in England that an order for *habeas*

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corpus was not appealable was based on peculiarities in the English law of procedure. It had in any case since 1960 been rationalised there. The rule had no application in Roman-Dutch law.

Held, further, that the learned judge *a quo* was correct in holding that the respondents' case had not been reviewed "forthwith", as required by the Constitution.

Held, further, that the cases indicate that a distinction should be drawn between failures which go to the legality of the detention order itself and those which go to the obligations that must thereafter be discharged, whether by the detaining authority or by anyone else, towards a person held under the authority of a lawfully made order. The breach of mandatory safeguards does not necessarily result in the illegality of the original order, and may more properly be remedied by an order compelling compliance. Such an approach would be best fitted for a case such as the present: it would make effective such protection as the constitutional safeguards lend against the inroads upon the right to personal liberty that may lawfully be made for the purposes of preventive detention, while also taking into account the grave duty of the State to protect the interests of defence, public safety or public order. To extend the availability of the writ *de homine libero exhibendo* to every instance of non-compliance with mandatory safeguards would be against the interests of the State and of the detainee.

Held, further, that the remedy for the infringement of the mandatory protections to which a person, who has been validly detained *ab initio,* is entitled during his detention must be by way of *mandamus*. Failure to comply with such an order would call into question the *bona fides* of the continued detention and an order for release could properly follow.

Cases cited:

Minister of the Interior v Farmer 1914 TPD 130:

Principal Immigration Officer and Anor v Narayansamy 1916 TPD 274;

Minister of Information, Immigration and Tourism v Mackeson 1980 ZLR 76; 1980 (2) SA 747 (RAD);

Minister of Home Affairs v York & Anor 1982 (2) ZLR 48; 1982 (4) SA 496 (ZSC);

Minister of Home Affairs v Dabengwa & Anor 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC);

In reó Laighléis [1960] IR 93 (SC);

R v Attorney General & Anor, ex p Green & Anor (1976) 23 WIR 136;

Re Benn (1964) 6 WIR 500;

Attorney-General v Chipango 1971 ZR 1;

Greene v Secretary of State for Home Affairs [1941] 3 All ER 388;

Uganda v Commissioner of Prisons, ex p Matovu (1966) EA 514;

In re Alice Lenshina Mulenga 1973 ZR 243;

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Brayhead (Ascot) Ltd v Berkshire County Council [1964] 1 All ER 149.

L Blom-Cooper QC, for the appellant.

BECK JA

A P de Bourbon, for the respondent.

Judgment

Beck JA: This is an appeal against an order granted in the High Court in notice of motion proceedings declaring illegal the detention of the respondent under s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations and directing his immediate release.

When the matter came before us Mr *de Bourbon*, for the respondent, took a point *in limine.* He submitted that the Supreme Court has no jurisdiction to entertain the appeal. This submission is based on the proposition that the *interdictum de homine libero exhibendo* in Roman-Dutch law is subject to the same rules of procedure that have governed the common law writ of *habeas corpus* in England.

Prior to 1960 there was no appeal in England against the granting of a writ of *habeas corpus*, and it may well be, as Mr *de Bourbon* contended, that the rule regarding the finality of orders made in *habeas corpus* matters has been accepted in many Commonwealth countries. The cases cited by him indicate that the rule has been applied at least in Zambia, Ireland, Australia and British Columbia.

The question, however, is whether this rule has ever been accepted in Roman-Dutch law. Mr *de Bourbon* has not cited to us any cases in which this rule has been applied either here or in South Africa. On the contrary, in *Minister of the Interior v Farmer* 1914 TPD 130, the respondent Minister appealed to a full Bench against an order made by MASON J releasing a person detained as a prohibited immigrant and it was not suggested that no appeal lay. Nor was it suggested in a later case that no appeal lay against an order declaring illegal an arrest under a warrant in terms of the South African Immigrants Regulation Act, 22 of 1913 (*Principal Immigration Officer and Minister of the Interior v Narayansamy* 1916 TED 274). In this jurisdiction also, in the cases of *Minister of Information, Immigration & Tourism & Another v Mackeson* 1980 (2) SA 747 (RAD) and *Minister of Home Affairs v York and Anor* 1982 (4) SA 496 (ZSC); 1982 (2) ZLR 48, appeals were entertained from the granting of an *interdictum de homine libero exhibendo* and no challenge was made to the jurisdiction of this Court to entertain the appeal.

The mere fact that the point does not seem to have been raised up to now does not necessarily mean that it is to be rejected. However, I should be surprised to learn that this English rule was accepted in any Roman-Dutch law jurisdiction, for it originated from circumstances peculiar to

BECK JA

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the development of English procedure and it does not reflect any essential principle from which the protection of personal liberty has been derived that is afforded by the English writ of *habeas corpus*, or the similar Roman-Dutch law writ of *de libero homine exhibendo*. In an article called "*Habeas Corpus Procedure in South Africa*" (1962) 79 South African Law Journal 283 the author (S Kentridge) pointed out, at 291:

> "As Lord Goddard demonstrated in the article above referred to, ("*A Note on Habeas Corpus*" (1949) 65 The Law Quarterly Review 30 at 35-6) the reason for this rule was not merely the law's anxiety to protect the liberty of the subject but 'quite another and highly technical reason.'
>
> > 'The real reason for the finality of an order of discharge appears to be that there was never any method of appeal from the judgment of a superior court, until the Common Law Procedure Acts and Judicature Act gave one, except by means of proceedings in Error; and Error did not lie in the case of a prerogative writ.'"

The rule no longer applies in England, for s 15 of the Administration of Justice Act 1960 has ended it. In a sense the English procedure relating to *habeas corpus* has been rationalised. It is no longer possible, as it was in the past, to go from court to court on the same facts in search of a judge willing to order the release, a procedure that has not been known either here or in South Africa.

Since 1960 the situation in England has been that a person whose application for the writ is denied has a right to appeal and similarly, when the writ has been granted, the respondent also has the right to appeal and challenge the correctness of the order of release. I am satisfied that this has always been the procedure that has been followed in South Africa and in this country, and that the anomalous earlier English procedure that stemmed historically from a situation that never prevailed in Southern Africa has not been adopted as part of our law, and would not have been adopted if the point had been raised earlier. I agree entirely with Mr Kentridge's comment, at 287-8 of the article referred to, that despite the "clear parallelism between the Roman-Dutch and the English remedy... (and) although the similarities between *habeas corpus* and the equivalent (Roman-Dutch) remedy have long been recognised, and although our courts have derived assistance from the English authorities, these technicalities (concerning appealability) form no part of our law". I can think of no good reason why such a technicality of procedure, now abandoned in England, should at this stage be incorporated into our law. The protection that our writ affords to the liberty of the individual is not diminished by providing an appeal against both the refusal and the grant of the writ.

Mr *de Bourbon* drew our attention to a passage in Voet's *Commen-*

taries, XLIII, 29, dealing with the interdict as to production of free persons, where it is stated that the aim of this interdict was to secure the production of the free person into the public eye, and an opportunity afforded for seeing and touching the person "or otherwise at the value of the suit being made good". The following statement then follows:

> "*May be sought more than once*. - So far is this so that, though he has once already made good such value, he can after investigation of the cause be sued again and again through this interdict either by the same or by another person, until at last he has actually made the production in disgust at having to pay the value of the suit

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over and over again, when it is clear that in ill fraud he prefers to shoulder the value of the suit rather than to produce."

Mr *de Bourbon* contended that this indicates that the anomalous English procedure of applying to judge after judge until eventually one might be found who would order the release may have had some parallel in Roman-Dutch law. I disagree. The passage is not concerned with the consequences of an application for the interdict being denied, but with the consequences of an application for the interdict that has been granted not being obeyed by the production of the victim, in which event the defendant could be made to pay over and over again the "value of the suit" for as long as he chose not to obey the order of production. I do not think that this passage can be related in any analogous way to the English rule of non-appealability. Accordingly the point *in limine* fails.

I turn now to the merits of the appeal.

On 24 May 1983 the respondent has served with a detention order in terms of s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations. Together with the detention order he was served with written reasons for his detention, which he alleges were identical to allegations made by the State at his trial on charges of high treason which took place in the High Court between 7 February 1983 and 27 April 1983 and which resulted in his acquittal.

When the respondent signed his founding affidavit on 12 October 1983 he had not yet appeared before a Review Tribunal. He stated in this affidavit that he could find no justifiable reason for the delay. Accordingly he contended that there had been a failure by the Minister of Home Affairs to ensure that his detention was reviewed by the Tribunal "forthwith" after the expiry of thirty days detention in contravention of s 2(1)(b) of Schedule 2 of the Constitution of Zimbabwe 1979, and that his continued detention was therefore illegal.

The persons cited in the notice of motion as respondents were the

BECK JA

Minister of Home Affairs and the Director of Prisons. An opposing affidavit was filed by the Minister on 2 November 1983 and in his affidavit he asserted that the allegations on which the detention order had been based were more than those that had been alleged by the State at the trial, although those were included. He also stated that he had timeously submitted the detention to the Review Tribunal as is required of him and that he had lust been informed by the Chairman of the Tribunal by letter dated 1 November 1983 that the case had been set down for hearing by the Tribunal on 4 November 1983. The Minister referred with approval to an affidavit filed by a Mr Zigora, the Secretary of the Detention Review Tribunal, which gave reasons for the delay, and the Minister confirmed that to case the backlog of cases a number of persons had recently been nominated as alternate members of the Tribunal. He denied that he had failed to submit the respondent's case for review before the Tribunal as alleged and submitted that where there is an undue delay in reviewing a detention order the proper remedy which the detainee should seek is that of a *mandamus* ordering the Tribunal to conduct the review, and not a *habeas corpus* order for his summary release.

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Mr Zigora, in his affidavit, stated that after the respondent's detention had been submitted for review by the Minister he had, in accordance with his usual administrative procedure, entered the case details in a register which he maintains in order to ensure that a proper sequence of cases is always followed. The respondent's case was entered as No 70A. There had been applications submitted with respect to each of the other persons who had been criminally tried with the respondent and thereafter detained and a decision had been made to deal with those reviews in an ascending order of seniority. To date the detention of each of the other persons in the group had been reviewed and the respondent's case alone remained to be heard.

Mr Zigora pointed out that the Tribunal is composed of members who can only act part time so that it sits at most once or twice a week. Problems sometimes arose when applications for adjournment were made on behalf of the detainee or on behalf of the State and there were difficulties in fixing an agreed date. There were also problems in relation to the venue at which these matters could be heard. It was said that up to the present only the Magistrate's Court in Harare qualified in relation to all the demands of secrecy and security which are necessary and that venue was available only on Fridays. In recent weeks however an additional venue had been provided at Chikurubi Prison.

Mr Zigora stated that the difficulties being encountered by the Tribunal

BECK JA

had been reported to the Minister and that he had been informed that measures are in hand to have some of these resolved.

Mr Zigora concluded by urging that the word "forthwith" in the Regulations which defines the period within which the Tribunal must review a detention order should be interpreted to mean "as soon as possible" and that so interpreted it should be held that the Tribunal had done the best which it could under the prevailing circumstances, so that the prescriptions of the Constitution had been fulfilled.

In the Court *a quo* the learned judge accepted the argument that if there was a breach of Schedule 2 annexed to the Constitution by reason of the failure to review the respondent's case "forthwith" in breach of s 2 (b) of Schedule 2 to the Constitution his continued detention would be unlawful. He accepted that there had been such a breach and he held that the Court not only had no power to allow the unlawful detention to continue but that it was under an obligation to order it to be terminated immediately. Accordingly he granted the application with costs and made the orders that are now appealed against.

The starting point is s 2 of the Second Schedule to the Constitution which deals with preventive detention. It provides as follows:

> "2. (1) Where a person is detained under any law providing for preventive detention -
>
> (a) he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without

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delay a legal representative of his own choice and to hold communication with him;

(b) his case shall be submitted not later than fourteen days (or during a period of public emergency thirty days) after the commencement of the detention for review by a tribunal established under subparagraph (4) and shall be reviewed by such tribunal forthwith; and thereafter his case shall be reviewed by such tribunal at intervals of thirty days (or during a period of public emergency one hundred and eighty days) from the date on which his case was last reviewed."

The parts of s 2 quoted above, as well as ss 2(1)(c), 2(1)(d), 2(2) and 2(3), clearly constitute a scheme providing safeguards for persons who have been detained under a law providing for preventive detention. I approach the question of their interpretation and application on the basis that the safeguards should be made as effective as possible in achieving the ends to which they are directed.

The crucial issue for decision is the result which should follow on a

failure to treat the detained person in accordance with any one of the requirements of the sections quoted above.

In *Minister of Home Affairs v Dabengwa and Anor* 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC) the respondents, who had been in detention, had applied to be allowed access to their lawyers to instruct them and to hold communication with them. They had, until the date of their application, been denied such access. Although one of the rights guaranteed to a detained person is that he should be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him, the fact that the respondents had been denied this right does not seem to have raised in the mind of the Court the issue as to whether or not their detention had become invalid by reason of that failure.

In *Minister of Home Affairs v York and Anor*, *supra*, FIELDSEND CJ stated at 501H-502A:

"For example in *Dabengwa and Masuku* (*supra*) the applicants established that para 2(1)(c) of the Schedule was being breached because they were not allowed access to their legal advisers. They did not seek release because of that breach; they sought and obtained access to their legal advisers. Whether or not they could have obtained release for that breach at that stage is not a question which it was or is necessary to decide. I would only say that it may not have been a breach which went to the root of their detention. But even if it did I can see no reason why they should not be entitled to claim as they did lesser relief."

The CHIEF JUSTICE went on to pose another situation (502 B-E):

"Assume a person served with a detention order who was not provided with reasons for his detention within seven days as required by para 2(1)(a), and who wants those reasons to prepare his case for the tribunal which he knows will be heard shortly. He is confident that he will succeed before the tribunal. He seeks an order that he be provided with reasons rather than release, because if he is successful and is released as a result of the tribunal's recommendation he knows that by virtue of para 2(3) of the Schedule he cannot be re-detained on the same grounds until after 180 days from his release. The detaining authority could not be heard to say 'you are not entitled to reasons because our failure to give them within seven days has nullified the original order'. It is true that, if that were the detaining authority's stance, the detainee would be entitled to his immediate release, and to damages for the period from when the failure to give reasons commenced, but he would, on the Attorney-General's argument, if he were re-detained suffer other prejudice. This would be so because, if he were

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re-detained within 30 days, the contention is that his case would have to be submitted to a tribunal within 30 days of the second order, and the detention was illegal. Thus the provisions of para 2(6) of the Schedule set out earlier would be avoided."

The question as to the effect which the failure to submit the applicant's case to the tribunal would have had on the validity of the detention order

BECK JA

did not have to be decided by this Court in *Minister of Home Affairs v York and Anor, supra.* It was considered by DUMBUTSHENA J (as he then was) in the Court below, who held that the failure to submit the applicants' case before the tribunal resulted in the detention order becoming invalid and the applicants being entitled to their release. Before this Court, however, the point was not argued because the Attorney-General conceded it and did not challenge the judgment of the Court *a quo* on that issue. Rather he used it as the basis for an extended argument, contending that, in the light of the fact that the detention was invalid, time did not run for the purpose of calculating the thirty days within which the case had to be submitted to the Review Tribunal by the Minister since during the period of illegal detention, the applicants had not been detained under a law providing for preventive detention. At 501G-H the learned CHIEF JUSTICE rejected that contention and in the course of so doing expressed the view that the detaining authority cannot rely on the detention order to justify further detention, event though a failure to comply with certain requirements of the law under which a person was detained does not necessarily result in the order being a nullity.

While therefore, it may appear to be implicit in the decision of the Court in *Minister of Home Affairs v York and Anor supra* that a failure to submit a case to the Tribunal within thirty days results in the original detention order becoming invalid, it cannot be asserted that the point was specifically decided in the absence of any issue or argument in relation to it.

In the matter now before us the point that has been raised is what result should follow, not from a failure by the Minister to submit a case timeously to the Tribunal, but from a failure by the Tribunal to review "forthwith" a case that the Minister has properly submitted.

It is the submission of Mr *Blom-Cooper*, for the appellants, that a distinction is to be drawn between failures by the detaining authority to observe requirements cast upon it by the Constitution and/or the Regulations, and failures by persons other than the detaining authority to observe requirements cast upon them by the Constitution and/or the Regulations. He urged that to do otherwise would in effect be punishing the Executive for the failures of persons not subject to Executive control. Accordingly should there have been a failure to deliver reasons or a failure to submit the case to the Tribunal within thirty days then the effect of this could well be to invalidate the detention order and to require the release of the detainee, since these are obligations, Mr *Blom-Cooper* says, that are cast upon the detaining authority. On the other hand, if the failure was a failure

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of the Tribunal to review the detention "forthwith", then the approve late remedy is not the summary release of the detainee, who has been lawfully detained by the detaining authority, but a writ of *mandamus* compelling the Tribunal to perform without delay the functions vested in it, and to the proper performance of which the lawfully detained detainee is entitled.

Mr *Blom-Cooper* contends that the Constitution and the Regulations envisage and create a dichotomy between the obligations cast upon the detaining authority and obligations cast elsewhere, and that the difference in the remedies to which, in his submission, such a dichotomy gives rise does not conflict with any previous decision of this Court and falls within principles which appear to be adumbrated in cases decided in Ireland and in the West Indies.

In the case of *In Re Ó Laighléis* [1960] IR 93 (Supreme Court) the facts were these: the detainee had been arrested under the Offences Against the State (Amendment) Act 1940. Certain arguments were advanced relating to the circumstances of his arrest since, at the time of his being taken into custody under the Offences Against the State (Amendment) Act, he was already in custody pursuant to other provisions. These arguments, however, are not relevant to the circumstances now under consideration. Having been detained under that Act the applicant then sought to have the matter of his detention considered by the commissions set up by the Government under the provisions of s 8 of the Act of 1940. From pp 120-1 of the report it appears that there existed in the Irish Act a scheme fairly similar in its effects to that contained in Schedule 2 of our Constitution and the Regulations. The applicant duly appeared before the commission, represented by solicitor and counsel, and as a result of arguments advanced there the commission made certain rulings as to the conduct of proceedings with which the applicant's advisers disagreed. Because of this they alleged that the hearing before the commission would in fact not be effective since the applicant would be prejudiced in the presentation fit his case. Accordingly they sought a writ of *habeas corpus* to declare his detention, invalid.

At p 109 of the report the following passage occurs in the judgment of the President of the High Court:

> "Counsel for the applicant that certain rulings of the commission . . . amounted in effect to a refusal to discharge its duty under s 8 of the Act of 1940 and deprived the applicant of his only safeguard against the consequences of a wrong decision by the Minister. It seems to us that the ruling of the commission as far as the present applicant is concerned are *nihil ad rem* and are irrelevant and immaterial. Once the

> applicant has been properly arrested and detained under a valid warrant of the Minister nothing that the commission can do or leave undone can suffice to render the warrant invalid. The commission can, in effect, by their report secure the applicant's release; but such a report cannot legally impugn the warrant which, until his release consequent upon the report, continues as a sufficient justification for his detention . . . If the commission did refuse to discharge their duties under the Statute there is, no doubt, an appropriate way of compelling them to discharge them."

The matter thereafter went on appeal to the Supreme Court. MAGUIRE CJ stated at pp 131-2:

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"It remains to consider the applicant's last ground of appeal, namely that the commission set up under s 8 of the Act of 1940 having failed and neglected properly to discharge its function in a number of matters materially affecting the applicant's rights, the applicant is now deprived of his only safeguard against indeterminate imprisonment and accordingly is not detained in accordance with law and is entitled to his liberty. Having regard to our decision that the appellant is lawfully detained under the warrant of the Minister, and that this warrant is lawful and valid, it is difficult to see how the matters relied upon in support of this ground of appeal can be raised in an application for an order of *habeas corpus*."

At p 133 he went on to say:

"The application is still before the commission. The commission has not yet inquired into the grounds of his detention. So far the commission has concerned itself only with procedural matters, and even if it were to be shown that the commission's rulings on those questions were wrong that would not render the applicant's detention unlawful. The applicant is not detained by virtue of anything the commission has done but under the Minister's warrant and the applicant's challenge to the validity of the warrant has not been sustained."

In *R v Attorney-General and Brigadier Green ex Parte Olivia Green and Eric Brown* (1976) 23 WIR 136 the applicants had been served with a detention order and taken into custody. At the time when this occurred no tribunal had yet been set up to review the cases of persons taken into detention. The applicants therefore contended that their detention was unlawful since it was their right under the relevant legislation to present their case for review to a tribunal at any time after their detention. The Court stated at p 143:

"It was contended that the continued denial of the right of the applicants to be heard by the tribunal renders their detention unlawful, being in breach of the Constitution. It was said that the requests of the applicants to be heard have still not been satisfied and that expedition is of the utmost importance. It was submitted that the tribunal is under a constitutional duty to sit when a request is made, and if they do not sit promptly to deal with the request the detention, though originally lawful, becomes unlawful . . .

The Regulations have not fixed any time limits, but reg 39(9) provides that the Minister shall, as soon as practicable after an order is made, furnish the person against whom such order was made with the necessary particulars to enable him to present his case

BECK JA

to the tribunal. Though the words 'at any time' in s 15(6) allows a detainee to make a request as soon as he is detained, in my judgment his right to have his case reviewed is not violated if the tribunal sits to review it within a reasonable time after the detainee's request is made. When the applications before me were heard it was then just short of 14 days since the applicants made their request. I find that this is not an unreasonably long time in all the circumstances and, therefore, hold the applicants' detention is not unlawful on this account. But even if I am wrong and the applicants are entitled to have their requests dealt with promptly, as contended, this would not, in my judgment, invalidate the detention orders made against them. Those orders are, *ex facie*, good and valid. As I have said, the question of the validity of the proclamation apart, their validity has not been disputed. They, therefore, justify the applicants' detention. It should not be forgotten that the Constitution, which gives them the rights which it is said have been violated, does not give them the right to have the detention orders revoked, or to be otherwise released from detention, if the tribunal's recommendations after review of their cases are favourable to them. Section 15(7) expressly provides that the authority responsible for their detention shall not be obliged to act in accordance with the tribunal's recommendations. In other words, the detention orders remain valid in spite of favourable recommendations, if the recommendations are not accepted. In my view, a detainee is not without remedy if a tribunal refuses or neglects, within a reasonable time, to review his case upon request. I see no reason why, in those circumstances, he could not obtain an order of *mandamus* compelling the tribunal to act."

The language in *Re Benn* (1964) 6 WIR 500 is, with respect, not easy to construe. Having

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quoted s 15(1) of the Guiana Constitution, which provides that a tribunal shall review the case of any person lawfully detained who requires at any time during the period of his detention, and not earlier than six months after he last made such a request, that his case shall be reviewed, LUCKHOO CJ said at p 504:

> "The legality of a detention order is a matter quite distinct and apart from the question of the establishment of a tribunal. The order speaks from the time it is made though it may not be executed for some time thereafter. Once it is validly made it does not change its character even though subsequently the detention of the subject thereunder may perhaps later be rendered illegal by some intervening circumstance. A subject detained may never require a review of his case or he may only require a review after some time has elapsed since the commencement of his detention. There is no suggestion in the present application that the subject has required a review or even that he desires a review of his case and indeed a tribunal was established on June 15, 1964 . . . and its personnel named on June 16, 1964. Counsel laid stress on the words requires at any time during the period of detention' in art 15(1) of the Constitution and argued that the subject detained was thereby entitled to make application for a review of his case immediately after the commencement of his detention. Granted that this is so, it does not have the effect of rendering the making of the detention order in valid. Once it is shown that the 'parent' provision under which the detention order was made is *intra vires* and it is conceded that the detention order is not bad on the face of it, *habeas corpus* proceedings can only succeed if the detention order itself is not validly made. As I have already stated it may be that a detention lawful in the inception might become unlawful in certain circumstances. Possibly, it may be urged that a lawful detention becomes unlawful if the subject requires a review of his case."

BECK JA

To these Irish and West Indian cases may be added two decisions referred to by DOYLE CJ in the Zambian case of *Attorney-General v William Muzala Chipango* 1971 ZR 1. In *Greene v Secretary of State for Home Affairs* [1941] 3 All ER 388 the advisory committee to which the appellant, who had been detained under the United Kingdom Defence (General) Regulations, 1939, had made objection mistakenly failed to properly discharge its statutory duty of giving to the appellant the reasons for his detention. At p 397 LORD MACMILLAN, having castigated the mistake of the advisory committee, said:

> "I have to point out, however, that what is before your Lordships is an application for a writ of *habeas corpus*, and that the appellant's complaint is that he had been, and is being, detained without any legal warrant. The mistake . . . does not in any way affect the validity of the detention order which is the answer to the appellant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention. Consequently, the mistake affords no ground for invalidating the detention order, and does not help the appellant in his present application."

The other decision was that of the High Court of Uganda in *Uganda v Commissioner of Prisons, ex parte Matovu* (1966) EA 514. Section 13(1)(a) of the Uganda Constitution required that a person detained under emergency legislation be served with a statement of the grounds for his detention. The detained person was not properly so served. The Court held that the failure did not render the detention unlawful, saying at 546:

> "Insufficiency of the statement of the grounds of detention served on the applicant is a mere matter of procedure. It is not a condition precedent but a condition subsequent. We hold therefore that it is not fatal to the order of detention made by the Minister. It is curable because the High Court, under Art 32(2) of the Constitution, has the power to give such directions as it may consider proper for the purpose of enforcing or securing the enforcement of any of the provisions of Arts 17 to 29 inclusive, or cl (1) of Art 31 of the Constitution."

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Reference should also be made to the Zambian case of *In Re Alice Lenshina Mulenga* 1973 ZR 243. Among the complaints raised in a *habeas corpus* application were (a) that the petitioner had been denied a detainee's constitutional right of review by a tribunal after one year's detention in that the President had not appointed any members of the tribunal, so that no tribunal had yet been constituted; and (b) her detention was illegal in that she was not detained in a place authorised by the President in terms of the Preservation of Public Security Regulations.

With regard to the first-mentioned of these complaints CULLINAN J said at 249:

BECK JA

> "It is her constitutional right to make a request any time after one year's detention. It is the Executive's duty to see that the matter is placed before a tribunal immediately . . . I consider it as a constitutional right of review arises upon the making of a request after one year's detention that it would then be incumbent upon the Executive to show good cause as to why a delay had taken place, or (why) a further delay was likely to occur in placing the matter before a tribunal. If good cause is not shown then it seems to be that the *bona fides* of continued detention is immediately called in question."

He went on to say at 251:

> "As matters stand a review cannot take place until the members of the tribunal have been appointed. Although I consider that an unreasonable delay has occurred it seems to me that the proper remedy does not lie in a writ of *habeas corpus*. If other remedies fail, meanwhile, to secure the constitution of a tribunal and the review of the applicant's detention requested by her then the writ may be the eventual remedy."

With regard to the second complaint, however, the learned judge held that, as the applicant had *ab initio* been detained in a place that was not authorised as a place of detention, she had never been in lawful custody and a writ of *habeas corpus* was accordingly granted.

These cases indicate that it is not any and every failure to afford in a proper manner to a detained person the legislative safeguards to which he is entitled that will justify a writ of *habeas corpus*, even where the safeguards are enshrined in a Constitution. However, I think that the judgments do not necessarily support the dichotomy contended for by Mr *Blom-Cooper* between, on the one hand, a failure by the detaining authority to discharge properly an obligation it owes to the detainee, and, on the other hand, a failure by a reviewing authority, over which the detaining authority has no control, to discharge an obligation that the reviewing authority owes to the detainee. The distinction that these cases indicate appears to me rather to be one between failures that go to the legality of the detention order itself and those which go to the obligations that must thereafter be discharged (whether by the detaining authority or by any other body) towards a person held under the authority of a lawfully made detention order.

There are cases, however, notably in India, which hold that a failure to provide the detainee with a safeguard attaching to the continuation of his detention renders the detention unlawful and requires his immediate release. The Indian decisions were referred to in the Zambian case of *Attorney-General v Chipango, supra*. In that case it was held that the failure to publish the detention order in the Gazette within a month after the commencement of detention, as well as the failure to furnish grounds

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BECK JA

for the detention order within fourteen days, in contravention of paragraphs 26A(1) (a) and (b) of the Constitution, was not something that related to mere procedural steps in the furtherance of consideration of a detainee's case, but that those failures went vitally to the fact of detention. It is or interest to note that the Court was inclined to the view that the various safeguards in the Constitution were in some sort of descending order of importance, so that some of them might not be mandatory.

For the respondent it is Mr *de Bourbon's* submission that all the safeguards with which preventive detention is hedged by the Constitution are mandatory safeguards, and that the failure to observe *any* such safeguards necessarily results in the invalidation of the detention and requires the Court to order the summary release of the detainee.

I agree that the safeguards are mandatory, but I do not agree that it follows that the breach of any safeguard, even though it is mandatory, necessarily attracts the result for which Mr *de Bourbon* contends.

In *Brayhead (Ascot), Ltd v Berkshire County Council and Anor* [1964] 1 All ER 149 the effect of not observing a mandatory condition was considered by a Divisional Court, made up of LORD PARKER CJ, and WINN and FENTON ATKINSON JJ. In that case Article 5(9)(a) of the Town and Country Planning General Development Order 1950 required an authority, giving notice of planning permission being granted subject to conditions, to state in writing reasons for imposing the conditions. On 18 February 1957 the appellants were granted on behalf of the respondents planning permission for the erection of a factory subject to a condition that the premises should not be used in contravention of certain parts of the Town and Country Planning Uses Order and should be limited to light industrial use. The notice of this decision did not, however, state any reason for the imposition of the condition. An enforcement notice was served upon the appellants alleging that they had contravened the conditions. The appellants appealed to the Minister and the Minister, stating his reasons, dismissed the appeal. The appellants however contended that the enforcement notice was invalid because it was based on breach of a condition that had not existed as a valid condition because of the omission of reasons from the notice of planning permission.

The court stated at 153:

> "As a matter of construction it seems clear that art 5(9)(a) requires (A) that the notice of decision be in writing; (B) the reasons be stated in writing; (C) that the notice be accompanied by a notification in the prescribed form; these requirements can be

BECK JA

> satisfied by a single document or by three physically separate documents. Should requirement (A) not be complied with, disputes might well arise as to the calculation of the time limit for appeal to the Minister fixed by s 16(1) of the Act of 1947; should requirement (C) not be satisfied an applicant might be left in ignorance of his rights. Each of those requirements is, therefore, essential to the statutory purposes. The interposition of

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> requirement (B) militates strongly against any view that it can be regarded as merely directory; all three requirements appear to be mandatory. It does not follow necessarily that non-compliance with any one of them will render the notice null in law, still less that the decision of which notice purports to be given is itself of no legal effect. The court is not concerned in the instant case with any non-compliance with requirement (A) or requirement (C); the effect of non-compliance with requirement (B) must be decided. No doubt such a non-compliance may be and often will be in convenient for an applicant; he may find it necessary to give notice of appeal to the Minister before he knows the strength or weakness of the case which he will have to meet. However, he could undoubtedly demand, as of right, a statement of reasons and by threat or effect of an order of *mandamus* secure them and it would be strange if the Minister did not adjourn his appeal until the reasons had been delivered and considered. In the sense that there is a duty to state the reason in writing requirement (B) is undoubtedly mandatory."

The decision, although it relates to a matter that is not at all *in pari materia*, nevertheless serves to illustrate that although a provision may be mandatory the effect of non-compliance with it may more properly be remedied by an order compelling compliance, rather than by summarily visiting with nullity the transaction to which that provision is related.

There would thus appear to be three approaches to the problem:

(1) that a failure to provide the detainee with any one of the specified safeguards would immediately make either the initial detention or the continued detention invalid, and would summarily require his release;

(2) that the violation of a safeguard relating to continued detention subsequent to the making of the order would not, without more, invalidate the detention, but must, initially, be remedied by way of an order to ensure that the safeguard in question is afforded to the detainee;

(3) the submission made by Mr *Blom-Cooper*, that the failure to provide a particular safeguard would be fatal to the validity of the detention only if it lay at the door of the Minister as the detaining authority, but that it would not, without more, be fatal to the validity of the detention if it lay at the door of some other agency over which the Minister had no control.

In my opinion the second of these approaches is the one to be preferred. It is an approach that is consisted with the previously-mentioned cases

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BECK JA

on which Mr *Blom-Cooper* has relied, and which I find persuasive. It is an approach that does not, I think, conflict with any previous decision of this Court, although it differs from the *obiter dictum* to which I have already drawn attention in the *York* case, *supra*, at 501H. Most important of all, it seems to me to be the approach that is best fitted to make effective such protection as the constitutional safeguards lend against the inroads upon the right to personal liberty that may lawfully be made for purposes of preventive detention, while also taking account of the grave duty of the State to protect the interests of defence, public safety or public order.

In elaboration of the last-mentioned observation, I mention again Mr *Blom-Cooper's* submission that to order the release of a detained person for a failure by the reviewing authority to observe

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an obligation cast on it would be to punish the Executive for the sins of a body over which it has no control. One is not, of course, intent upon so-called "punishment" of the Executive or of any other body. One is only intent upon giving proper and meaningful effect to the checks and balances enshrined in the Constitution and intended to keep the scales as evenly weighted as is possible between the sometimes competing interests of personal liberty on the one hand and of State security on the other.

Experience has shown that the qualified right to personal liberty has not effectively enjoyed the protection ostensibly given to it when summary release has been ordered by reason of a failure to comply with one or another of the protective provisions of the Constitution and the Regulations. The Executive authorities, no doubt motivated by what appear to be the demands of public security, and which are of over-riding importance, have usually met such orders of release by immediately issuing another detention order, and the detainee may in some respects be worse off than before. It is possible, of course, that claims for damages for false imprisonment for the period of wrongful detention could be advanced in consequence of such orders, but this overlooks the Emergency Powers (Security Forces Indemnity) Regulations, SI 487/1982, which prevents the institution or continuance of a suit for damages for, *inter alia*, wrongful detention, save with the permission of the Minister of Defence.

It seems therefore to be in the interests both of the detained person and of the State *not* to broaden unnecessarily the area with regard to which a failure to observe a protective provision will lead undesirably, as far as the State is concerned, to a person being let loose who is responsibly considered to be a continuing threat to public security, and, as far as the

BECK JA

detainee is concerned, to the hollow result that his release is evanescent only, being immediately overtaken by a new order of detention. To extend the availability of the writ of *de homine libero exhibendo* to instances of non-compliance with any and every mandatory provision, even those that do *not* govern the making of a valid order of detention *ab initio* but only govern the rights to which a validly detained person is thereafter entitled, is to broaden that area unnecessarily and, indeed, incorrectly, for a valid warrant of arrest or detention has always been a good answer to an application for the writ.

The remedy for the infringement of the mandatory protections to which a person, who has been validly detained *ab initio*, is thereafter entitled during his detention, must be by way of *mandamus* directed against the offender, be the offender the detaining authority, or any other person or body independent of the detaining authority. By means of this remedy the Court can act, whenever the remedy is timeously applied for, to ensure that the steps prescribed for the protection of detainees are indeed carried out as closely as possible in the manner and at the time constitutionally provided for. The offender can, of course, and will whenever it is appropriate to do so, be put to such terms as are reasonable in the circumstances to comply with his constitutional obligations. Whereas a State authority can assert with some justification that it cannot allow negligence or inefficiency to imperil State security, that refuge would not be available after enough time is allowed to rectify misfeasance or non-feasance originating from such causes and no rectification had been made. A contumacious refusal to rectify would, in the

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words of CULLINAN J in the *Mulenga* case, *supra*, call into question the *bona fides* of continued detention, and an order for release could properly follow. If, which is unthinkable, an order for release made at such a stage were to be ignored, the Executive would have put itself beyond the bounds of enshrined Constitutional safeguards.

It was suggested that the need to seek orders of *mandamus* will bear more heavily on detainees without financial resources, but I do not consider that the suggestion is sound. There seems to be no reason for thinking that an application for the writ *de homine libero exhibendo* would be any less costly than an application for a *mandamus*. And, as I have indicated, a writ *de homine* may very well result only in immediate re-detention, whereas a *mandamus* is calculated to result in that due and proper enjoyment of the constitutional protections that are designed to lead to the review which is the door to liberation without fear of immediate re-detention.

BECK JA

In the result therefore it is my view that the order that was granted by the Court *a quo*, which was the writ *de homine libero exhibendo*, should not have been granted, since the remedy that this writ affords should be confined to cases where pre-requisite to the making of a valid order of preventive detention *ab initio* has not been observed, as happened for example in the *York* case, *supra,* where there was a failure to deliver or tender to the detainees the detention order, and a failure to insert in that order matter that it must contain.

In the present case the failure complained of does not, of course, go to the making of a valid order, but to the rights of the detainee thereafter. In view of the fact that the respondent's case is now about to be reviewed, and would indeed have been reviewed on 4 November but for the order made the preceding day and for this appeal thereafter, no *mandamus* is now called for. But I am far from criticising the learned judge *a quo* for having taken the view that the respondent's constitutional right to have his detention reviewed "forthwith" was indeed infringed. A period of four months had elapsed when the notice of motion was filed on 25 October 1983 and having regard to the time intervals set out in the Constitution and the Regulations I have no doubt that what was done was not done "forthwith" within the meaning of the statutes. I take into account Mr *Blom-Cooper's* argument that the Minister has no control over the working of the Tribunal. It is to be noted however that Mr Zigora, the Secretary to the Tribunal, testified that he reported to the Minister the difficulties being encoutered with regard to the composition of the Tribunal and with regard to the lack of suitable venues, and he said that he was "informed that measures are in hand to have some of these resolved."

Although different authorities are charged with the performance of functions under the Regulations and the Second Schedule of the Constitution, the reality is that it is the Executive which, acting through these authorities, is responsible for the observance of all safeguards attached to preventive detention and no matter where the responsibility may immediately lie for the failure to provide the means for ensuring reasonably prompt review, the duty in the final result rests on the Executive to take measures to remedy the situation.

For these reasons we allowed the appeal as we announced on 21 November. It was not contended that there should be an order for costs in the appellants' favour, and accordingly we

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made no order as to costs.

Georges CJ: I agree.

BECK JA

Gubbay JA: I agree.

Civil Division of the Attorney-General's Office, appellant's legal representatives.

Scanlen & Holderness, respondent's legal representatives.

KWEKWE MUNICIPALITY v SPACE AGE INVESTMENTS (PVT) LTD 1983 (2) ZLR 366 (HC)

Court **High Court, Harare**

Pittman J

28 & 29 November, 7 December 1983

Flynote

Contract - unjust enrichment - condicto indebiti - mistake of law - when a bar to recovery of sum paid.

Headnote

The defendant company owned a piece of land in Kwekwe on which it paid rates in accordance with the rates laid down in RGN 493 of 1969. During 1974 the Municipality *bona fide* but erroneously decided that it could impose a higher tax on the property and demanded such tax from the company. The company, acting under the same mistake of law, accepted that it was liable to pay those rates and paid them. During the period 1 July 1973 to 30 June 1978 it paid a total of $13 887,25 in excess of the maximum allowable in terms of the legislation. From 1 July 1978 the Municipality was, by virtue of RGN 830 of 1978, entitled to impose a new rate on the property. During the period 1 July 1978 to 31 December 1980 the company became indebted to the Municipality in the sum of $13 595 for rent that it had failed to pay.

When the Municipality claimed this sum, the company issued a claim in reconvention in respect of the overpayments it had made from 1973 to 1978. The issue was whether the general rule applied in this case, namely, that a person cannot succeed in a claim for the recovery of unowed money if it was paid as a result of a mistake of law on his part.

Held, that the equities of the matter called very clearly for an order upholding the defendant's claim in reconvention. The authorities were not unanimous and could support either approach. It would, however, be a travesty of justice to dismiss else company's claim on the ground that some legal authorities have stated in unqualified form that a *condictio indebiti* must fail if it is

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based on a mistake of law. Where both parties have made the same mistake and would not have entered into the contract had they known of the correct position; where one party was induced by the other to make the mistake; and where, as here, one party acted *ultra vires*; then it was possible to hold that ignorance of the law was not a bar to a claim based on a *condictio indebiti*. (*Cranborne Road Council v Derbyshire Estates Ltd* 1966 RLR 609; 1967 (1) SA 8 (R) dissented from).

Cases cited:

Cranborne Road Council v Derbyshire Estates Ltd supra;

Rooth v The State (1888) 2 SAR 259;

Barker v Bentley 1978 (4) SA 204 (N).

A P de Bourbon, for the plaintiff

PITTMAN J

I A Donovan, for the defendant

Judgment

Pittman J: The plaintiff in this case is the Municipality of Kwekwe, and I shall refer to it as "the Municipality". The defendant is a private company named Space Age Investments (Pvt) Ltd, which is the owner of Stand 89 Chicago Township 8, in Kwekwe. This stand was incorporated within the Municipal area by RGN 492/69. The rates imposable upon the unimproved portion of the stand were fixed by RGN 493/69. These rates were described as a unit tax not in excess of $35 a year, and were imposed by the Municipality and paid for by the defendant until 30 June 1973. During 1974 the Municipality erroneously decided that it could impose, and it did impose, a rate higher than the unit tax on the unimproved portion of Stand 89, which I shall hereinafter refer to as "the property". The new rate was levied from 1 July 1973 until 30 June 1978. As a result of that erroneous imposition, the defendant paid a total amount of $13 887, 25 in excess of the maximum amount correctly payable in respect of the property during that period.

By RGN 830/78, the Municipality became properly entitled to impose a new rate upon the property, and it is now common cause that that new rate has made the defendant indebted to the Municipality in the total sum of $13 595 for the period 1 July 1978 to 31 December 1980. The Municipality has become the plaintiff in this action by issuing summons for that amount of $13 595.

The defendant in its plea claimed as a defence that it is entitled to set off the amount of its excess rate payments, that is, $13 887, 25, against the Municipality's claim, and it issued a claim in reconvention accordingly.

It is now common cause that in demanding the excess rates, the Municipality acted in a *bona fide* error of its rights.

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The real issue in this case arises from what is accepted as a general rule, namely, that a person cannot succeed in a *condictio indebiti*, that is, a claim for recovery of unowed money, if the money was paid due to a mistake of law on his part. Mr *Donovan*, for the defendant, contends that this general rule has become the subject of criticism by certain legal writers. He also cited certain judicial *dicta* to the effect that it remains an open question whether a *condictio indebiti* may succeed if it is based not only on mistake or ignorance of law, and if other factors induced the claimant to make the payments.

Mr *Donovan* also argued that certain of these other factors were pre-

PITTMAN J

sent in this case, and that this Court should accordingly regard as napplicable those cases in which the absolute rule refusing relief to a person claiming a *condictio indebiti* based solely on a mistake of law was followed.

For the Municipality, Mr *de Bourbon* accepted the validity of Mr *Donovan's* submission that there are authorities which indicate that certain exceptions to the absolute rule have been recognised. But he argued that such exceptions do not apply to the present case. He conceded that the Municipality acted *ultra vires* in imposing the excessive rates, but submitted that that of itself does not permit the *condictio indebiti* to succeed in the present case. He referred to the decision of FIELDSEND J, as he then was, in *Cranborne Road Council v Derbyshire Estates Ltd* 1966 RLR 609; 1967 (1) SA 8 (R), a case very similar to the present. He suggested that this Court as a court of first instance in Zimbabwe should not regard itself as entitled to depart from the *Cranborne Road Council* case, and from the many others where the rule had been applied without qualification. He concluded that the defendant had been at fault, like the Municipality, in treating the latter's excessive demand for rates as valid.

Both Counsel presented very careful and elaborate arguments to the Court; and between them at least a couple of dozen authorities were cited dealing with the validity of a *condictio indebiti* based on an error of law.

It was common cause that the defendant had laboured under an error of law. Mr *Donovan* argued that it was a reasonable error, but Mr *de Bourbon* argued that the defendant was negligent in not consulting a lawyer about the validity of the increase in rates from July 1973. As regards the Municipality's error, Mr *Donovan* admitted that the Municipality's error was genuine and *bona fide*, but he commented that it was the Municipality's fault that the defendant had fallen into its error. He also pointed out that the Municipality had acted *ultra vires* in imposing the excessive rates, and that it ought to have known better since it had been advised by some of its senior officers that it was not entitled to impose them. I am also very conscious of the fact that if the traditional rule is applied by me, the Municipality will be given authority to retain the large sum of $13 887,25. The Court will thus legalize an act of the Municipality which was not within its powers under the Municipal Act, and which caused an unfair loss to the defendant.

The equities of the matter seem to me to call very clearly for an order upholding the defendant's claim in reconvention, if this Court is to be worthy of its description as a court of justice

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However, I am aware that

PITTMAN J

such an order may result in enormous financial embarrassment to the Municipality, because presumably there are many other ratepayers how were similarly wrongly treated by it and who may now take similar action against it.

I see no good purpose being served by merely repeating now the great number of quotations referred to in both counsel's very able arguments. It seems to me that any decision I make could be impressively supported by references to some of those quotations, even although they can be matched by other contradictory ones.

I thinly that the rule about a *condictio indebiti* being futile if based solely upon a mistake of law, would be fundamentally unjust in the circumstances of this case. I am, of course, aware that the case of *Cranborne Road Council v Derbyshire Estates Ltd* (*supra*) is probably based on facts almost exactly similar to those of this case. But with the greatest respect to the very distinguished judge who delivered the judgment, he did not consider what effect should be given to the facts that the Road Council was acting *ultra vires* in imposing the tax, and that it had caused the defendant to make its mistake of law.

I consider that those considerations are very relevant to this case, in that it would be a travesty of justice to dismiss the defendant's claim on the ground that some legal authorities have stated in unqualified form that a *condictio indebiti* must fail if it is based upon a mistake of law.

I note that the great MR JUSTICE WESSELS, who was the unsuccessful Counsel for the plaintiff in the leading case of *Rooth v The State* (1888) 2 SAR 259, was sufficiently dissatisfied with the decision of KOTZE CJ to include the following passage in his work, *The Law of Contract*, in Vol 1, 1 ed, para 992:

> "If both parties have entered into a contract on the supposition that their view of the law is correct and if they would never have entered into the agreement had they known that their view of the law was a wrong one, it cannot be said that in such a case there exists real consent, and therefore the maxim (*ignorantia juris haud excusat*) ought not to apply."

The first edition was issued in 1937 and the Second contained an identical passage in 1951, when re-edited by the gentleman who later became A A Roberts AJ.

I think that this point is also one which, however, arrogantly I may seem to be acting as a minor judge of first instance, justifies my view that I

PITTMAN J

must reluctantly dissent from FIELDSEND J's Judgment in the *Cranborne Road Council* case, and hold that there is authority in the following case cited by Mr *Donovan* to support that view. In *Barker v Bently* 1978 (4) SA 204 (N) at 206D, JAMES JP said with the concurrence of

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HOWARD J:

> "In order to succeed in a case such as the present the plaintiff is obliged to base his claim on a *condictio ndebiti* - on the grounds that the amount of the rent which he now claims back from the defendant as an overpayment was paid to the defendant under the mistaken belief that it was due. See Lee and Honoré *Obligations* para 684.
>
> It has frequently been held in South Africa that money cannot be recovered if it was paid under a mistake of law. See *Rooth v The State* (1888) 2 SAR 259; Wessels *Law of Contract* Vol 1 para 990 and the cases therein quoted.
>
> Nevertheless, although it is clear that ignorance of the law will not by itself afford sufficient grounds for the recovery of moneys it is still, I consider, an open question whether, if ignorance of law does not stand alone and is only one of the factors which induced the claimant to make the payments, there may still be room for claims based on a *condictio indebiti*. See *Benning v Union Government (Minister of Finance)* 1914 AD 420 at 422; Wessels *Contracts* Vol 1 paras 991-1001; *Miller and Others v Bellville Municipality* 1971 (4) SA 544 (C) at 548C-549A in the passage in VAN WINSEN J's judgment running from 546H-549A; and cf *Kiriri Cotton Co Ltd v Dewani* [1960] AC 192 at 204."

In my view the factors to be considered in the present case are not only that the defendant was guilty of a mistake of law, but that the Municipality was also guilty of it, and that the Municipality induced the mistake on the part of the defendant. Finally, I think it is of great importance that the Municipality acted *ultra vires* in levying the rate from the defendant, and I see no good reason why the defiant should be refused repayment because other rate payers may embarrass the Municipality by making similar claims.

In my opinion, I do not, in all humility, feel obliged to follow the *Cranborne Road Council* case, because none of these extra considerations were taken into account in it. Instead, to summarize the matter, the facts that the Municipality acted *ultra vires* and even unlawfully in imposing the rates, that it was its unlawful pressure on the defendant that caused the latter to labour under its mistake and to pay the rates, and that no proper consent existed between the parties as regards the payments, persuade me that I must with respect refuse to follow the *Cranborne Road Council* case and order as follows:

1. Defendant shall pay plaintiff the sum of $13 595, with interest at the rate of 8% *per annum* on the sum of-

   (i) $2 915 from 1 January 1979,

   (ii) $2 845 from 1 July 1979;

   (iii) $2 745 from 1 January 1980;

PITTMAN J

   (iv) $2 545 from 1 July 1980;

   (v) $2 545 from 1 January 1981,

   in each case until date of payment.

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2. Plaintiff shall pay defendant-

(i) the sum of $13 887, 25;

(ii) interest *a tempore morae* thereon;

(iii) costs of suit.

Moffitt & Pratt, Kwekwe, and *Condy Chadwick & Elliott*, Harare, legal practitioners for the plaintiff.

Scanlen & Holderness, legal practitioners for the defendant.

S v CHUMA 1983 (2) ZLR 372 (HC)

Court **High Court, Bulawayo**

Korsah J

9 December 1983

Flynote

Criminal procedure - sentence - CriminLaw Amendment Act [Chapter 58] - s 3(a) - unlawful carnal knowledge of female below age of 16 years - intention of legislature in creating offence - reasons for imposing severe sentence.

Headnote

The intention of the legislature in creating the offence of contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 58*], that is, having unlawful carnal knowledge of a girl aged under 16, is to give statutory protection to young girls even against the consequences of their actual consent. It is because of the behaviour of older men towards young girls under the age of 16 that the legislature drew a ring of protection around girls of that age group. To accept "love" as a mitigatory factor, when the disparity in ages is great and the girl's age is known to the accused, is to break that ring of protection. The frequency of intercourse is not an indication of the genuineness of affection; sometimes it can only be explained by lasciviousness on the part of the man.

In assessing sentence, the important thing is to identify the evil which the legislature intended to avert, then, taking into account the prevalence of the offence and any aggravating or mitigating features, to impose the sort of punishment which the offence merits, having regard to the punishments imposed in like cases. Generally speaking, the younger the complaint is, the more seriously will the offence be viewed. If the accused knows the age of the complainant, then he deliberately sets the law at defiance and is not deserving of leniency.

Cases cited:

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S v Nare 1983 (2) ZLR 135;

S v Julius G-S-269-80.

Judgment

Korsah J: The accused pleaded guilty to, and was convicted of, contravening s 3(a) of the Criminal Law Amendment Act [*Chapter 58*] in that he did unlawfully and carnally know the complainant who was under the age of 16. He was sentenced to pay a fine of $130 or, in default of payment, to serve a term of 65 days' imprisonment.

KORSAH J

The scrutinizing magistrate has expressed the view that this "sentence is manifestly lenient" and is unable to endorse it as being in accord with real and substantial justice.

The agreed facts were that the accused, aged 20, proposed love to the complainant who was 13 years 9 months old. She made, as a condition precedent to her acceptance of the proposal, marriage as the goal. On two separate occasions between 25 May and 16 June, 1983, sexual intercourse took place between the two.

In June 1983, the parents of the complainant discovered that their daughter was pregnant. They instituted proceedings in the Community Court claiming damages from the accused. As the girl was under the age of 16, the Presiding Officer referred the matter to the police and the accused was in due course charged with this offence.

At his trial the accused told the court that he knew the complainant was only 13 and added that:

> "I love the girl. She is my girlfriend. I want to marry her."

But the father of the complainant expressed his disbelief in the honourable intentions professed by the accused. His disbelief, he said, took its origins in the fact that although he reported the transgressions of the accused to his uncle, there has since been no indication from the accused that he was prepared to marry the complainant. And he was surprised to hear the proposal of marriage emitting from the accused under the stress of the trial.

When the trial magistrate was queried about the punishment imposed, he gave as his reasons the following:

> "(a) The accused is aged 20 years and is in gainful employment. He earns $144 per month. If I send the accused to prison he will lose his job and that adds him to the number of unemployed people.
>
> (b) The accused is genuinely in love with the complainant. He indicated to this Court that he wanted to marry the complainant although he had not said the same to the parents of the complainant.
>
> (c) It cannot be said that the accused is a more mature person than the complainant. Sexual intercourse took place on two separate occasions. This to me suggests that the two were genuinely in love with each other. These are strong mitigating features. See *S v Nare* 1983 (2) ZLR 135.
>
> *(d) The tendency of abandoning unwanted babies is prevalent in big cities, eg Bulawayo, Harare, etc. We do not have that problem here in Hwange. To punish the accused for what is happening in big cities*

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appears to be unfair to me.

(e) *In my view the fine of $130 or in default of payment 65 days' imprisonment is almost the accused's monthly salary and with all due respect cannot be described*

KORSAH J

as excessively lenient. A sentence of a fine can have as much a deterrent effect as a custodial sentence. Kindly see *S v Julius* G-S-269-80. The learned judge had this to say:

> 'It is wrong for judicial officers to be firmly committed to sentencing offenders in terms of imprisonment because that has been the practice in the past . . . because as the population becomes more and more attuned to a money economy so the deterrent effect of fines becomes greater.'

I think in dealing with cases of this nature it is well to remember that the intention of the legislature in creating this offence is to give statutory protection to young girls even against the consequences of their actual consent. The proclamations of love by the accused from the dock may or may not have been genuine, but they should have been weighed against his conduct when the complainant's father reported to the uncle of the accused that his nephew had put the complainant in the family way. And, in any case, having regard to the difference in their ages, the love professed by the accused for the complainant is unhealthy, and cannot be considered as a mitigatory factor. It is precisely because of such behaviour by older men towards young girls under the age of 16 that the legislature drew a ring of protection around that age group of girls. To accept love as a mitigatory factor, when the disparity in ages is so great and the complainant, to the knowledge of the accused, not yet 14, is to break that ring of protection imposed by the legislature.

I am unable to accept the proposition that the frequency with which sexual intercourse takes place between a girl and a boy is indicative of the genuineness of the affection of the boy for the girl. I think, when the difference in ages is so marked, such frequency can only be explained by the lasciviousness of the boy.

I think the reference to *S v Nare supra* shows an imperfect appreciation of the reasons for the decision. In that case, the appellant had met the girl for the first time; there was no evidence that he knew the age of the girl; the girl was in fact in her fifteenth year; there was no evidence of how physically mature she was; the court, by not asking to see the complainant, deprived itself of the opportunity of determining whether, having regard to the complainant's development, the appellant could reasonably have believed that she was above the age of 16.

In the instant case, the accused knew the am of the complainant and without any regard for her age proceeded to make her pregnant.

In my view, the problem of baby dumping has nothing to do with the

KORSAH J

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sort of punishment to be imposed in cases of this nature. The important thing is to identify the evil which the legislature intended to avert by creating the offence, which is: to protect young girls from the wiles of men much older than themselves, then, taking into consideration the prevalence of the offence and any aggravating or mitigatory features in the case, to impose the sort of punishment which the offence merits, having regard to punishment imposed in like cases.

Generally speaking, the younger the complainant is, the more seriously will the offence be viewed, and when the age of the complainant is within the knowledge of the accused then the accused has deliberately set the law at defiance and is not deserving of the leniency accorded him by the trial court.

I am in total agreement with the sentiments expressed by DUMBUTSHENA J (as he then was) in *S v Julius, supra* quoted by the learned trial magistrate, but in view of the utter disregard for the age of the complainant and her educational prospects - the complainant was a pupil in Form 1 - a short custodial punishment would have met the justice of the case. In my judgment, if the courts are to give their blessing to paltry fines of $130 for this sort of offence, men with money in their pockets will not be sufficiently deterred from seducing young girls; and the protection accorded them by the law will become a sham.

It must not be overlooked that in *Nare's* case, one of the factors which influenced the Court to impose a fine was that, before and after his trial, *Nare* has been in custody for a total of four months, and it was considered that a heavy fine would, thereafter, be sufficient punishment.

I am in full agreement with the learned scrutinizing magistrate that "this was the type of case where the moral blameworthiness of the accused justified imprisonment."

Consequently, I am unable to certify the sentence imposed as being in accord with real and substantial justice.

Manyarara J agrees.

ZIMBABWE TOWNSHIP DEVELOPERS (PVT) LTD v LOU'S SHOES (PVT) LTD 1983 (2) ZLR 376 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

10 & 11 November & 16 December 1983

Flynote

Statutes - Emergency Powers (Control of Non-residential Rent) Regulations SI 713/82 - s 4 - Constitution of Zimbabwe 1980 - s 16 - whether Regulations contravene s 16 - repeal of Regulations - effect of - Interpretation Act [Chapter 1] - s 15 - Emergency Powers Act [Chapter 83] - ss 4(2) and 5 - interpretation of

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statutes - presumption of constitutionality of laws - scope of presumption.

Headnote

The defendant company was lessee of business premises from the plaintiff company and paid an agreed rent. In October 1982 both agreed that in consideration of renewal of the lease the rent should from 1 January 1983 be increased from $220 to $350 a month. On 19 November 1982 the Emergency Powers (Control of Non-residential Rent) Regulations SI 713 of 1982 were published. The effect of the Regulations was to freeze all rents at their current levels. The defendant accordingly continued to pay $220 a month, even after 1 January 1983. In June 1983 the plaintiff sued for the difference between the amount agreed and the amount paid. The defendant relied on the provisions of the Regulations. The plaintiff then applied to have the matter referred to the Supreme Court, on the ground that the Regulations contravened s 16 of the Constitution, part of the Declaration of Rights, which in broad terms prevented the acquisition of property without compensation.

In terms of SI 520 of 1983 the Regulations were repealed. There were thus the following questions to be decided:

(1) what effect, if any, the repeal of the Regulations had and whether because of the provisions of s 5 of the Emergency Powers Act [*Chapter 83*] the Regulations should be treated as if they had never existed;

(2) the correct approach to the question of the so-called presumption of constitutionality of laws;

(3) whether s 4(a) of the Regulations was actually in contravention of s 16 of the Constitution.

Held, that in terms of s 15 of the Interpretation Act [*Chapter 1*] the repeal of an enactment

GEORGES CJ

does not affect the operation of that enactment during the time it was in force. Although s 5 of the Emergency Powers Act appears to affect the position, the correct interpretation of the section was that its effect - that is, that when emergency regulations amending a law were repealed, the law should have effect as if the amendment had never been made - could only be from the repeal of those regulations. The purpose of s 5 was to revive laws amended by emergency regulations when those regulations were repealed. Actions taken in terms of the regulations, while they were in force, remained valid.

Held, further, that the correct approach to the "presumption of constitutionality" is to interpret the Constitution according to the accepted norms of interpretation and determine its meaning. Thereafter the court should interpret the challenged piece of legislation to arrive at a conclusion as to whether it fits into that meaning or not. If the legislation is capable of more than one interpretation, and one interpretation falls within the meaning of the Constitution while the others do not, the court will presume that the lawmaker intended to act constitutionally and will uphold

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the legislation so interpreted.

Held, further, that because the person alleging unconstitutionality must establish it, a burden may rest on him to establish factually that an act is unconstitutional. For example, he would have to prove that the legislation is not reasonably justifiable in a democratic society; there is no *onus* on the State to prove otherwise. The Court will usually - unless it is clear that the restriction is oppressive of minorities - adopt the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society.

Held, further, that s 4 of the Regulations could be justified in terms of s 16(9) of the Constitution, which provides for a number of circumstances in which property may be acquired without payment of compensation and without infringing the general right enunciated in s 16(1), as it was legislation for the protection of lessees and other persons having rights in or over the property.

Cases cited:

Tattle v Grimwood (1826) 3 Bing 493;

In re Mexican & South American Co (1859) 4 de GJ 544;

Minister of Home Affairs & Others v Dabengwa & Anor 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC);

Minister of Home Affairs & Anor v Fisher & Anor [1979] 3 All ER 21;

Attorney-General of Trinidad & Tobago v Ramesh Mootoo (1974) 28 WIR 304;

Crowell v Benson (1931) 285 US 22;

Attorney-General & Anor v Antigua Times Ltd [1975] 3 All ER 81;

Hewlett v Minister of Finance & Anor 1981 ZLR 571; 1982 (1) SA 490 (ZSC).

A N H Eastwood, for the plaintiff

No appearance for the defendant.

R Acton, for the Attorney-General.

Judgment

Georges CJ: Lou's Shoes (Private) Limited (the defendant) is the tenant of Zimbabwe Township Developers (Private) Limited (the plaintff) in respect of a shop at Strathaven Galleries, Suffolk Road in Harare (the leased premises). During 1979 the agreed rent was $220 per month. In October 1982 it was agreed in consideration of the renewal of the lease

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that the rent from 1 January 1983 would be $350 per month.

On 19 November 1982 the Emergency Powers (Control of Non-residential Rent) Regulations, Statutory Instrument 713 of 1982, (the Regulations) were published. In its terms the Regulations applied to the leased premises. Section 3(1) defined the fixed date as 1 September 1982. Section 4(a) provided:

> "4. The maximum rent which the lessor of non-residential premises may require or permit any lessee to pay in respect of those premises shall be -
>
> (a) if the premises were let on the fixed date, therent at which the premises where let on that date;".

Section 5 provided that any rent in excess of the maximum permitted by s 4 paid in respect of any period during which the Regulations were in effect was to be recoverable by the lessee who had paid it from the lessor to whom it had been paid. Recovery could be by deduction from rent payable. Section 6 made it an offence for a lessor to require or permit a lessee to pay a rent in excess of the maximum permitted by s 4.

The defendants, despite the agreement between them, paid to the plaintiff as from 1 January 1983 only the maximum permitted under s 4 of the Regulations. In June 1983 the plaintiff sued, claiming the difference between the amount paid by the defendant and the amount agreed. The defendant denied that it owed the plaintiff the sum claimed or any lesser sum by virtue of s 4(a) of the Regulations as read with s 3(1).

The plaintiff thereupon filed a document contending that the Regulations were void in that they contravened s 16 of the Declaration of Rights in the Constitution. It requested the court under s 24(2) of the Constitution to refer to the Supreme Court the question as to whether the Regulations did as a matter of law contravene the Declaration of Rights. Section 24(2) provides that it in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of the Declaration of Rights the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Supreme Court unless, in his opinion, the raising of the question is frivolous or vexatious. Since the raising of the question was neither frivolous nor vexatious, the matter was referred to this Court. Thereupon the Attorney-General exercised his right under s 24(6) to be heard by this Court on the issue. The defendant elected not to comment and did not appear.

Heads of argument were filed by the plaintiff and on behalf of the

GEORGES CJ

Attorney-General. In its heads of argument the plaintiff noted that the Regulations had been repealed by Statutory Instrument 520/83 (the Repealing Regulations), but contended that this repeal did not affect the operation of the Regulations during the period they were in effect by reason of the Interpretation Act (s 15(1)(b) and (c)) nor did the repeal revive a right to receive payment of rent otherwise due - s 15(1)(a) of the Interpretation Act.

Section 15(1)(a) and (b) provide:

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"(1) Where an enactment repeals another enactment, the repeal shall not -

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; ...".

Accordingly the plaintiff in its heads contended that the Repealing Regulations did not affect the legal position and the question was still validly before this Court.

In opening his case Mr *Eastwood*, for the plaintiff, pointed out that he had the day before become aware of the provisions of s 5 of the Emergency Powers Act [*Chapter 83*] which could affect the legal position so as to render the question referred academic. If that was indeed the case this Court would have declined jurisdiction. A resolution of the doubts raised by Mr *Eastwood* was therefore imperative.

Section 5 of the Emergency Powers Act provides:

"Where any law has been amended, suspended or modified by a regulation, then, notwithstanding the provisions of section 15 of the Interpretation Act [*Chapter 1*], such law shall, with effect from the expiration or repeal of such regulations, have modification had never been made."

This must be read against the background of s 4(2) which states:

"So far as it appears to the President to be necessary for the purposes of the regulations, regulations may provide for amending any law, for suspending the operation of any law, and for applying any law, with or without modification."

Mr *Eastwood* was concerned with whether the effect of the Repealing Regulations was to wipe out the Regulations so that the Court would have to treat them as though they had never been made and the plaintiff's right to recover the agreed rent had never been affected.

Mr *Acton*, on behalf of the Attorney-General, pointed out that whatever interpretation was placed on s 5 its effect could only be "from the expration of or repeal" of the Regulations. This would therefore be prospective only so that for the period during which the regulations were in force

GEORGES CJ

they be efctve to control non-resdential rents.

I am satisfied that this is the correct interpretation. An examination of the history of s 11 of the English Interpretation Act which is in language very similar to our s 15 confirms this. Prior to that enactment the common law was that if an Act of Parliament which repealed former statutes was itself repeated by an Act which contained nothing indicating that the former laws should continue repealed, the former laws would by implication be revived by the repeal of the repealing statute - *Tattle v Grimwood* (1826) 3 Bing 493 at 496. Further in *In Re Mexican and South American Co* (1859) 4 De G J 544 at 557 it was stated to be clear that where an Act of Parliament was repealed it had to be considered, except as regards transactions past and

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closed, as if it had never existed.

The English Interpretation Act changed that inconvenient situation. Section 5 of the Emergency Powers Act appears to me to do no more than re-enact the original common law position by providing that from the date of the repeal of a regulation made by the President under his emergency powers altering, amending or suspending any law, that law revives as if the repealing law had never existed. Because of this, reference is made to s 15 of the Interpretation Act since s 15(1) specifically provides that repeal of a law shall not revive anything not in force at the time the repeal takes effect. This is the only part of s 15 which is incompatible with s 5 of the Emergency Powers Act. Since that section only operates "with effect from the repeal of such regulation" actions taken under the repealed regulation remain proper and do not become illegal.

As Mr *Acton* pointed out, if the effect of 5 of the emergency Powers Act was to effect a retrospective repeal so that it was as though the regulation had never existed, any action taken under emergency regulations properly promulgated would be challengeable on the repeal of the regulations or the ending of the emergency. This could never have been contemplated or intended and the language of the Act does not compel such an interpretation.

It is plain, and Mr *Acton* does not contend otherwise, that the effect of the Regulations was to make any rent in excess of the permitted maximum irrecoverable and not merely to suspend payment of such rent. It was made an offence to require or permit a lessee to pay rent in excess of the maximum prescribed.

It follows, therefore, that the contentions set out in Mr *Eastwood's* heads

GEORGES CJ

of argument are correct. Mr *Acton* does not contend otherwise. Section 5 of the Emergency Powers Act has no effect on that situation and this reference to the Supreme Court is valid.

Mr *Acton*, however, contends that as framed by the plaintiff the question is altogether too wide in its scope. It raises the issue of the constitutionality of the Regulations as a whole. The defence pleaded by the defendant relies on s 4(a) of the Regulations and it is on the constitutionality of that subsection and that subsection alone that this Court has jurisdiction to pronounce.

The Supreme Court has no jurisdiction to give advisory opinions. Its function is to decide disputes between parties on existing facts. The dispute in this case is whether rent is due or not. A particular subsection of a regulation has been pleaded as a defence and it seems proper to me to do no more than to pronounce on whether or not that defence holds good in the given factual situation Indeed Mr *Eastwood* appeared to accept that had there been no agreement prior to 19 November to raise the rent the effect of s 4(a) would have been validly to fix the maximum rent at the sum at which it stood on 1 September. The question I propose to answer therefore is not whether or not the Regulations are in breach of the Declaraton of Rights but whether in the circumstances of this case s 4(a) does not provide a valid defence because t constitutes an infringement of the Declaration of Rights. Questions of severability do not in my

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view arise. In construing that subsection, however, it is common cause that it is proper to view it in the context of the Regulations as a whole.

Arguments have been advanced as to the correct approach to be adopted in the interpretation of the Constitution as a whole and the Declaration of Rights in particular. I need do no more than state that this Court has as recently as *Minister of Home Affairs and Others v Dabengwa and Anor* 1982 (1) ZLR 236; 1982 (4) SA 301 adopted with approval the approach adumbrated by LORD WILBERFORCE in *Minister of Home Affairs and Anor v Fisher and Anor* [1979] 3 All ER 21. This Court at 306 quoted remarks of LORD WILBERFORCE at 26 of the *Fisher* case, *supra*:

> "Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the constitution commences."

GEORGES CJ

With this approach I am in full agreement.

Arguments have also been addressed at some length on the presumption of constitutionality. It is a phrase which appears to me to be pregnant with the possibilities of misunderstanding. Clearly a litigant who asserts that an Act of Parliament or a Regulation is unconstitutional must show that it is. In such a case the judicial body charged with deciding that issue must interpret the Constitution and determine its meaning and thereafter interpret the challenged piece of legislation to arrive at a conclusion as to whether it falls within that meaning or it does not. The challenged piece of legislation may, however, be capable of more than one meaning. If that is the position then if one possible interpretation falls within the meaning of the Constitution and others do not, then the judicial body will presume that the law makers intended to act constitutionally and uphold the piece of legislation so interpreted. This is one of the senses in which a presumption of constitutionality can be said to arise. One does not interpret the Constitution in a restricted manner in order to accommodate the challenged legislation. The Constitution must be properly interpreted, adopting the approach accepted above. Thereafter the challenged legislation is examined to discover whether it can be interpreted to fit into the framework of the Constitution.

We were referred to the case of *Attorney-General of Trinidad and Tobago v Ramesh Mootoo* (1974) 28 WIR 304 in which the matter was canvassed by HYATALI CJ. He cited from a number of cases which in my view indicates the process plainly. Thus in *Crowell v Benson* (1931) 285 US 22 at 62 HUGHES CJ stated:

> "When the validity of an Act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."

Again in Black on *The Construction and Interpretation of Laws* (1911) p 110 para 41H is cited

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as follows:

> "Every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act. If it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the statute with the Constitution and avoid the consequence of unconstitutionality."

Because the person alleging unconsitutionality must establish it, a burden may rest on that person to establish factually that an act does not fall

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GEORGES CJ

within the ambit of consitutionality. Many neo-Nigerian constitutions permit derogation from the declared rights defined provided that these derogations are, to use the phrase in the Zimbabwean Constitution, "reasonably justifiable in a democratic society". Even where the Constitution does not make it clear where the *onus* lies as the Zimbabwe Constitution does, the *onus* lies on the challenger to prove that the legislation is not reasonably justifiable in a democratic society and not on the State to show that it is. In that sense there is a presumption of constitutionality. As LORD FRASER OF TULLYBELTON stated in *Attorney-General & Anor v Antigua Times Ltd* [1975] 3 All ER 81 at 90:

> "In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required."

In that sense the presumption represents no more than the Court adopting the view that a legislature, elected by universal adult suffrage and liable to be defeated in an election, must be presumed to be a good judge of what is reasonably required or reasonably justifiable in a democratic society. But situations can arise even in such societies in which majorities oppress minorities, and so the Declaration of Rights prescribes limits within which rights may be restricted. It is only in cases where it is clear that the restriction is oppressive that the Court will interfere.

I approach the decision of this matter on the basis that it is in these two senses and these two senses alone that there is a presumption of constitutionality. In the second sense the issue does not arise in this case.

One begins therefore with an interpretation of the appropriate clause of the Constitution. Section 16 reads, in as far as it is relevant -

> "16. (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -
>
> (a) .....
>
> (b) .....
>
> (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;

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.....

(9) nothing in this section shall effect the making or operation of any law in so far as it provides for -

(a) the orderly marketing of any agricultural produce or mineral or any article or thing prepared for market or manufactured therefor in the common interests

GEORGES CJ

of the various persons otherwise entitled to dispose of that property or for the reasonable restriction of the use of any property in the interests of safeguarding the interests of others or the protection of lessees or other persons having rights in or over such property;".

Implicit in the decision in *Hewlett v Minister of Finance and Anor* 1981 ZLR 571; 1982 (1) SA 490 (ZSC) is the proposition that property is the most comprehensive of all terms which can be used and that is the indicative and descriptive of every possible interest which a party can have. With that view I am in respectful agreement.

Mr *Eastwood* then contended that once this proposition was conceded it followed that the effect of s 4(a) was to extinguish the plaintiff's entitlement to extra sums by way of rent for which had accrued due from the end of January 1983 onwards. That extinction amounted to an acquisition for which he had not been compensated and consequently fell foul of s 16.

Mr *Acton's* reply was that it was not every extinction which a mounted to an acquisition. *Hewlett v Minister of Finance and A nor, supra,* is clear authority for that proposition and the issue was whether this was the type of case in which extinction did not amount to acquisition.

It is not, in my view, necessary to decide this difficult question since the issue can be decided on what appears to me a clearer and simpler ground.

Subsection 16(9), which has already been set out, provides for a number of circumstances in which property may be acquired without the payment of compensation and without infringing the general right enunciated in s 16(1). Mr *Eastwood* contended that that subsection did not cover the circumstances of this case. In construing it he divided it into two portions -

(i) the orderly marketing of any agricultural produce or other named property in the common interests of the various persons otherwise entitled to dispose of that property;

(ii) the reasonable restriction of the use of any property in the interests of safeguarding the interests of others and the protection of lessees or other persons having rights in or over such property.

Divided in this way he interpreted the subsection to mean that restriction could be placed on the use of the property in order to secure the protection of tenants and other persons having rights in or over such property. He referred to authorities dealing with the definition of "use" and

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concluded that the legislation in this case could not in any sense be said to be a restriction on the use of the property. This contention may well be correct. Indeed I find it difficult myself to conceive of any restriction on the use of property which could secure the protection of lessees and other persons having rights in or over such property.

In my view the subsection deals not with two but with three matters and subparagraph (ii) above should properly be subdivided into two parts -

(a) the reasonable restriction of the use of any property in the interests of safeguarding the interests of others; and

(b) the protection of lessees and other persons having rights in or over such property.

The Regulations fall squarely within (b) above as they are clearly intended for the protection of lessees. Even if there had been an acquisition of the sums in rent accruing due under the renegotiated lease without compensation therefore such acquisition would be saved by s 16(9)(a).

Accordingly I would hold that s 4(a) does not contravene s 16 of the Constitution of Zimbabwe and is available as a defence to the action from which the reference arises.

There is no order as to costs. The issue to be determined was an important constitutional issue. It was also controversial in the light of the adverse report made by the Senate Legal Committee under s 37(1) of the Constitution. The plaintiff has contributed to the public benefit by helping to clarify the law and should not be penalised because an answer adverse to his contentions has been given.

Beck JA: I agree.

Gubbay JA: I agree.

Kantor & Immerman, plaintiff's legal representatives.

Atherstone & Cook, defendant's legal representatives.

MARUFU v MOYO 1983 (2) ZLR 386 (SC)

Court **Supreme Court, Bulawayo**

Georges CJ & Beck JA

1 & 16 December 1983

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Flynote

Husband and wife - maintenance - variation of maintenance order - inflation - can be a ground for variation - Maintenance Act [Chapter 35] - s 8.

Headnote

Section 8(5) of the Maintenance Act [*Chapter 35*] allows a maintenance court, after holding an enquiry in terms of subs (4), to vary any maintenance order made under the Act, if it is satisfied that the means or circumstances of any of the parties have altered. The effect of inflation on the cost of living is such a circumstance and can be ground for ordering an increase in maintenance, if it can be shown that the income of the party paying maintenance allows room for some increase in spite of the effect of inflation.

Cases cited:

Prophet v Prophet 1948 (4) SA 325 (O).

J James, for the appellant.

The respondent in person.

Judgment

Georges CJ: On 28 August 1981 the appellant (the husband) was ordered to pay the sum of $65 per month for the maintenance of the respondent (the wife) and their two infant children, Memory and Carnege. The sum of $30 was allocated to each of the children and $5 to the wife.

Some time in late 1982 the wife applied for a variation of that order and it was increased on 17 November 1982 to $140 per month, of which sum $20 was for the wife and $60 for each of the two children. The husband was absent and not represented when this order was made and he applied to have it set aside. There is provision for such an application in s 12 of the Maintenance Act [*Chapter 35*] (the Act).

In his affidavit in support of the application the husband stated that

he had asked his legal representatives to apply for an adjournment of the court hearing because a divorce petition to bring the marriage to an end had been fixed in the Bulawayo High Court for 17 December 1982 and he thought that the issues of custody and maintenance of the children would have been then dealt with. As he expected this application to have been granted he did not attend on the date of hearing. He was later informed by his legal representatives that a letter which they had written applying for an adjournment had not reached the court on time with the result that the hearing had proceeded in his absence and the order had been made.

The trial magistrate in the court *a quo* treated the application for rescission of the order of 17 November 1982 as though it had been an application for the variation of that order.

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This, in my opinion, was wrong. He should first of all have considered whether the reason given by the husband for his absence was proper and whether on that basis the order then made should have been rescinded. If he thought that the order should have been rescinded he should have done so and then proceeded to reconsider the application for variation. The *onus* of establishing that a variation was in order would then have rested on the wife. The procedure followed by the magistrate clearly placed the *onus* on the husband who was first called to give evidence.

Section 8 of the Act makes provision for the variation or discharge of any order made under the Act. Subsection (5) reads in part:

> "If the maintenance court holding an inquiry in terms of subsection (4) is satisfied that -
>
> (a) ....
>
> (b) the means or circumstances of any of the parties have altered since the making of the direction or order or any variation thereof, it may vary the direction or order . . . ".

There was an *onus* on the wife therefore to establish some alteration in the means or circumstances of her husband and herself.

The magistrate's judgment does not indicate that he approached the matter in this light. Indeed it would appear that he analysed the figures for expenditure given by the husband and the wife and on that basis confirmed the variation granted in the husband's absence on 17 November 1982. In this he clearly erred.

In her evidence the wife indicated that she based her application largely

on the fact that she was not happy about the original order. She appeared to concede that her husband's earnings had not increased significantly since that order had been made in 1981, but she did refer to the fact that the cost of living had risen considerably since the original order was made.

There is South African authority supporting the proposition that the effect of inflation can be regarded as good cause for variation in South African law. In *Prophet v Prophet* 1948 (4) SA 325 at 329 (O) HORWITZ J said:

> "... accepting that the *onus* rests upon the applicant show good cause for the proposed variation of the order, I am entirely satisfied that she has fully discharged that *onus*, since it is common cause that the cost of living has risen appreciably since the date of the divorce and that (the) respondent's position has become more favourable financially.. . " .

While it is true that inflation affects both the husband and the wife, if it can be shown that the husband's income allows some room for an increase taking into account his reasonable expenditure then it would be justifiable to hold that there has been an alteration in circumstances justifying a variation.

The evidence discloses that the wife receives an income of $118 per month. There would seem

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to be no basis therefore for altering the sum originally made payable to her in the order of August 1981.

Much of the evidence given related to the husband's expenses in relation to dependents other than the woman with whom he was living and their two children. In my view it is not important to examine closely the order of priorities in relation to his dependents. The only basis for variation is the increase in the cost of living since the original order was made, and the husband's ability to pay. I am satisfied on the evidence that he can meet an increase of $10 per child per month to compensate for the rise in the cost of living, and that such an increase is necessary to meet that changed circumstance. Accordingly I would increase the sums payable to each of the two children to $40 per month.

The appeal is therefore allowed and the order made varied to this extent:

> The husband will pay to the wife the sum of $85 per month allocated as follows: To the wife $5 and to each of the two children, Memory and Carnege, $40 per month. This increase will be effective as from 17 November 1982, the date on which the original variation order was granted.

GEORGES CJ

> There will be no order as to the costs of this appeal.

Beck JA: I agree.

Lazarus & Sarif, appellant's legal representatives.

S v MUTANGA 1983 (2) ZLR 390 (SC)

Court **Supreme Court, Bulawayo**

Georges CJ & Beck JA

1 & 16 December 1983

Flynote

Criminal law - theft - general deficiency - duty on accused to give a reasonable explanation for deficiency - Criminal Procedure and Evidence Act [Chapter 59] - s 286 - chairman of district council covered by section.

Headnote

Where a person is charged with theft arising out of a general deficiency, the duty on him, once the deficiency is established, is to give a reasonable explanation for it. Where he flagrantly

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inflates the amount spent by him in order to account for the deficiency, it is not open to the court to speculate as to what may actually have been spent.

A chairman of a district council, while not an employee of the Public Service or the State, falls within the ambit of s 286 of the Criminal Procedure and Evidence Act [*Chapter 59*] if he should be charged with the theft of money received by him in that capacity.

J James, for the appellant

P Batty, for the respondent

Judgment

Georges CJ: At the beginning of 1981 the Binga District Council was formed. Prior to that there had been no District Council for that area. The appellant was elected Chairman of the new Council. It does not appear that the necessary administrative staff were assigned to the new Council from its inception but the provincial authorities did provide by cheque a sum of $20 270 to meet the expenses of the new Council. A meeting of the Council was held and the appellant, as Chairman, Councillor Mukuuli as Vice-Chairman and a third Councillor were named as signatories to draw cheques on the account which had been opened in the Council's name at Barclays Bank. Cheques were duly drawn totalling $10 600 and it is not disputed that the appellant received these monies and made disbursements therefrom.

GEORGES CJ

In due course an internal auditor, Mr van der Merwe, arrived to check on the expenditure of this money and prepare initial accounts. The upshot of his investigation was that a deficiency, calculated by him to be $4 179, was discovered and the appellant was charged with the theft of that sum. He was convicted and sentenced to four years' imprisonment with labour, one year of which was suspended for three years on condition that the appellant was not convicted of any offence involving dishonesty committed within that period for which he was sentenced to a period of imprisonment without the option of a fine and a further one-and-a-half years was suspended for three years on that condition and on the further condition that the appellant repaid the said sum of $4 179 to the Binga District Council by 31 December 1983.

Mr van der Merwe's evidence was that he first saw the appellant in April or May 1981 in the office of the Assistant Secretary, Development, at Binga, Mr Yates. He asked the appellant to produce invoices to cover two cheques he had already drawn. The appellant produced nothing and promised to do so in two weeks time. That period passed but he produced nothing. In June 1981 Mr Aaron Gundu was appointed Executive Officer of the Binga District Council. He found no financial records whatsoever. He mentioned this to Mr Yates.

Shortly after, according to Mr van der Merwe, he met the appellant in Mr Yates' office and told him that now that the Council had a secretary the appellant should produce the books so that the accounts could be started. The appellant failed to produce any books.

Mr van der Merwe said that he again met the appellant in Bulawayo on 17 September. The

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appellant had that day been taken into police custody but released at the request of the Minister for Local Government. The police gave Mr van der Merwe the Councillors' pay sheet book taken from the appellant and the Council cheque book. The appellant was asked to come to the Council's office on the following Monday with money belonging to the Council which he said he had hidden at Binga. On that day, 21 September, he arrived without any money. He said that his brother had the money and was away at a funeral. Mr Gundu's evidence was that this sum of money to be produced was about $3 000. This failure resulted in the appellant being arrested and charged, the deficiency having been calculated at $4 179 from the only document submitted - the Councillors' pay sheet book. Some payments noted in that document were not verified by the signature of the recipients but enquiries established that these payees had received the sums noted opposite their names.

GEORGES CJ

At his trial the appellant testified that he had spent the entire sum of $10 600 which he had withdrawn on the Council's business. Five sums of $600 each had been spent on fuel which he purchased for use in his car when travelling to explain the procedure for electing presiding officers in village courts, to explain how resettlement forms were to be filled, to assess damage caused by elephants, to assess the scale of resettlement programmes needed in the area and to evaluate the sites for growth points and service centres. A further $291 had been spent on fuel used in revisiting areas where there had been crop damage which was not yet ripe for assessment on the original visit; $348 had been spent on purchasing an ox ($100), mealie meal ($100), hotel meals ($48) and hiring a bus ($100) to convey residents to a function to mark the opening of the Council which had been presided over by the then Minister of Home Affairs. $78 had been spent on entertaining a visitor from the Department of Health and driving him around. A further $235 had been spent on fuel for transporting District Councillors to a conference at Gweru, travelling to Chizarira and to Victoria Falls to report the presence of a wounded elephant in the district and payment to two casual workers Jack Muleya and Shadrack, and to Mr A Gundu, the Executive Officer. A sum of $65 was claimed for petrol used in travelling to Victoria Falls to attend a District Councils' conference. It was not disputed that in sum total these expenditures would account for the deficit.

The trial magistrate correctly stated that the crisp issue was whether the appellant had given a reasonable explanation for the expenditure of this money. He held that the appellant had not given such an explanation and was therefore satisfied that he had stolen it. Accordingly he convicted him.

[His Lordship analysed the appellant's explanation and continued:]

All of this confirmed the conclusion that the account book had been fabricated for the purpose of explaining away the deficiency.

The magistrate accepted, and there is every reason that he should have, that the appellant promised on 17 September 1981 to produce the money belonging to the Council which he had in his possession. As has been mentioned, he failed to do so, explaining simply that the money was with his brother who had gone to a funeral. That admission reinforces the conclusion that

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the accounts which were produced in court did not exist on that day and had been constructed thereafter.

An explanation which is inherently incredible and which is supported

GEORGES CJ

by clearly fabricated documents cannot be said to be reasonable and the magistrate was correct in rejecting it.

Mr *James* contended with much force, however, that even though the sums claimed by the appellant to have been spent may have been inflated it was both likely and reasonable that he had used his car to travel in the course of duties as claimed and that he had in the process spent money on fuel. There was also the expenditure on entertaining dignitaries when the Council was inaugurated. No doubt the people in the District had been brought together for the celebrations and mealie meal and an ox may well have been purchased, though the claim that the sum of $100 was spent on mealie meal again seems inflated.

Once it was conceded, argued Mr *James*, that some trips may have been made and some money may have been spent on entertainment then the appellant could not be convicted, for his explanation would have been clearly reasonable. That aspect of the matter the magistrate had not considered. The argument is interesting but in my view unacceptable.

The duty resting on the appellant is to give a reasonable explanation for the deficiency. Where he so flagrantly inflates the amounts allegedly spent it is not open to the court to speculate as to what may have actually been spent. The difference would, in any event, remain unexplained and the appellant must necessarily be convicted of theft.

Section 286(2) of the Criminal Procedure and Evidence Act provides that where a person is charged with theft while employed in any capacity in the Public Service or by the State of money which came into his possession by virtue of his employment -

> ". . . it shall not be necessary to prove the theft by the accused of any specific sum of money or specific goods or articles if, on the examination of the books of account . . . or by any other evidence, there is proof of a general deficiency, and if the court is satisfied that the accused stole the deficient money or any part of it or the deficient goods or articles or any part thereof."

Although the appellant cannot be said to be "employed" by the State in any capacity the money came into his possession by virtue of his office as Chairman of the Council. He was under a duty to account for its expenditure and clearly he has failed to account for part of that money in circumstances which leave no doubt that he has stolen it. The conviction is in my opinion proper and must be affirmed.

I am not, however, satisfied that the exact amount stolen has been

GEORGES CJ

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sufficiently satisfactorily established to enable an order for compensation to be made. The State can pursue its civil remedy. Accordingly the sentence imposed is varied to the extent that the condition of suspension relating to the repayment of the sum of $4179 is deleted.

Beck JA: I agree.

MAPONGA v JABANGWE 1983 (2) ZLR 395 (SC)

Court **Supreme Court, Bulawayo**

Annotations Link to Case Annotations

Georges CJ & Beck JA

1 & 19 December 1983

Flynote

Practice and procedure - Community Courts - judgment by consent - cannot be appealed against - may be set aside on other grounds - not a "decision " in terms of s 20 of Customary Law and Primary Courts Act 1981 - jurisdiction of community court to set aside sale in execution

Headnote

A judgment that has been entered by consent is not appealable. It may be set aside or varied on a variety of grounds by summons (if the facts are disputed) or by way of application (if they are not), but because it is not the product of a reasoned decision by the court, it cannot be appealed against. A notice of appeal must state the grounds of appeal and specify the findings of fact or rulings of law appealed against. There are no such findings or rulings where the judgment is by consent. Such a judgment is not therefore a "decision" in terms of s 20 of the Customary Law and Primary Courts Act 1981.

Quatre: whether a community court has in any caseurisdiction to set aside a sale in execution.

Cases cited:

Sookdeyi & Ors v Sahadeo & Ors 1952 (4) SA 568 (AD);

Thambi v Stralka NO & Anor 1946 TPD 297.

J James, for the appellant

No appearance for the respondent

Judgment

Beck JA: A chronological resume of the history of this matter is necessary for a proper

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understanding of the question that is before us.

On 19 January 1982 the present appellant's "right, title and interest in the property known as 7023 Luveve" (a residential property under purchase from the Municipality) was sold in execution by public auction to satisfy a judgment granted against the appellant in favour of one Enock

BECK JA

Ndebele by the Bulawayo Community Court. That right, title, and interest was bought at the execution sale by the present respondent for the sum of $1 700 and it was duly transferred to him.

It seems that the appellant was not made aware that his right to the house was to be sold in execution and that he believes that right to have been worth much more than $1 700. When extra-curial attempts to resolve matters to his satisfaction failed, he sued the respondent in the Bulawayo Community Court for the sale in execution to be set aside as irregular because notice of the attachment and sale was not properly served on the appellant in terms of Order 5, Rule 27 of the Community Court (Civil) Rules 1981. Other than the respondents no one else was cited as defendant or given notice of the action.

That action, which was opposed by the respondent, commenced on 3 August 1982. The appellant was represented by a legal practitioner but the respondent was not. However, the respondent either possesses some knowledge of his own concerning the common law, or he had been given legal advice. It was not alleged against him that he bought the appellant's right with any knowledge of prior irregularities in the attachment and he raised the powerful contention that a completed sale in execution should not be disturbed by the court against a *bona fide* purchaser. For that proposition he enjoys eminent authority - see, for example, *Sookdeyi & Ors v Sahadeo and Ors* 1952 (4) SA 568 (AD) at 571H - 572A. The Bulawayo Community Court was not, however, called on to decide the matter, for at a late stage in the proceedings it was told that the parties had agreed that the sale would stand undisturbed but that the respondent would pay to the appellant a further amount of $1 800 as well as $58 for court costs, and a consent to judgment in those terms was entered. No decision was therefore required, and none was given, concerning the claim for an order setting aside the sale in execution.

The next morning, 4 August 1982, the respondent repaired to the office of the appellant's legal advisers and paid $300 towards the amount that he had undertaken to pay. Three days later, however, he noted an appeal to the Bulawayo District Court against the judgment entered against him on 3 August 1982. There is some dispute as to whether or not he had intimated his intention to note an appeal when the proceedings ended on 3 August, but for present purposes that dispute is irrelevant.

His appeal was entertained and allowed with costs by the District Court, which set aside the judgment that the Community Court had entered by

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BECK JA

consent and ordered that the above-mentioned amount of $300 be repaid to the respondent. The present appeal has been brought against this order of the District Court which the appellant asks to be set aside so that the original consent to judgment may be left undisturbed.

I agree that the relief that the appellant seeks must be granted to him for the simple reason that the District Court should not have entertained the appeal that was made to it. A judgment that has been entered by consent is not appealable. It may be set aside or varied on a variety of grounds by way of summons (if the facts are in dispute) or by way of application (if they are not), but it cannot, in the nature of things, be appealed against, for it is not the product of a reasoned decision by the court. It is not such a "decision" as is contemplated by subsections (3) and (4)(a) of section 20 of the Customary Law and Primary Courts Act 1981, which read:

> "(3) Any person who is dissatisfied with the decision of a community court may, in the time and manner prescribed, appeal against such decision to the district court . . .
>
> (4) On an appeal being made in terms of subsection (3) the district court may -
>
> (a) in the case of a civil case, vary or set aside the decision appealed against or give such judgment or make such order as the community court concerned ought to have given or made, as the case may be;".

In *Thambi v Stralka NO and Anor* 1946 TPD 297 at 300 NESER J, with whom BARRY JP concurred, said:

> "It is impossible to imagine any circumstances in which a party could appeal against a judgment by consent; he might have good grounds for setting aside or varying such a judgment but he would not and could not appeal against it. It is clear too from Rule 47, which sets out the procedure for appeals in civil cases, that no appeal could be noted or prosecuted against a judgment by consent. A notice of appeal must state the ground of appeal, specifying the findings of fact or rulings of law appealed against, and the judicial officer must deliver a statement in writing of the facts he found to be proved and his reasons for any ruling of law appealed against. For a judgment by consent there can be no finding of fact or rulings of law."

The fortification that the South African procedure for civil appeals furnishes for the view that a judgment by consent is not appealable is also to some extent to be found in Rules 5(a) and (b) of the Primary Courts (Appeals to District Courts) Rules 1981, which provide that -

> "5. A notice of appeal shall -
>
> (a) specify the decision appealed against . . . and;
>
> (b) set forth concisely and under distinct heads the grounds of objection to the decision appealed against; . . .".

What the respondent did was, in the guise of an appeal to the District Court, to seek the setting aside of his consent to judgment on the ground

BECK JA

that he had allegedly acted under duress in so consenting. For relief on such a ground,

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however, it was not competent for him to appeal to the District Court. It was a complaint that he should have brought by way of trial or of application in another forum. It was irregular of the Bulawayo District Court to have entertained on appeal such a hotly disputed allegation, not tried in the court below, and to have resolved it without a word of evidence in either court in relation to it, and merely on the strength of impressions formed when listening to the respondent himself in the arguing of his "appeal", and to the submission of the appellant's legal practitioner in resisting it.

It is perhaps not inappropriate to point out that while s 13 of the abovementioned Rules enables a district court to re-open the proceedings in any case under appeal for the taking of any evidence or in relation to any other matter, either before itself, or, should the district court so direct, before the community or village court, this is a power that is ancillary to its function as an appellate court. Section 20 of the Community and Primary Courts Act 1981 has not conferred upon a district court the right upon an appeal made to it to rehear the case, which is a right that s 19 of the Act has expressly given to a community court upon an appeal made to it.

Be that as it may, the Bulawayo District Court in the present instance neither reheard the case, nor re-opened it for the taking of any evidence or in relation to any other matter but simply came to a factual conclusion on a disputed issue that was not canvassed or tested by a single word of sworn testimony in either court, and the order that it made cannot stand.

Accordingly the appeal is allowed with costs and the order of the Bulawayo District Court is set aside. This leaves the judgment by consent of the Bulawayo Community Court undisturbed. If he so wishes the respondent may, of course, bring such proceedings to set aside that consent judgment, and in such manner and before such forum, as he may be advised. The fact that that judgment is left undisturbed is not to be construed as an indication that we accept that the action to have the sale in execution set aside was an action that could properly be brought in that forum, still less that the citation of the respondent as the only defendent was sufficient, having regard to the relief that was sought. The issue was not one that was determinable by customary law nor would it seem to be a matter that could be entertained by the Community Court pursuant to any provision in the Community Court (Civil) Rules 1981, but it has not been necessary in this appeal to decide whether the Community Court had the jurisdictional right to adjudicate upon the issue raised in the summons. In the final result

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BECK JA

it did not, of course, adjudicate on that issue because the suit became the occasion for disposing of the issue by the mutual agreement of the parties and adjudication was avoided. Whether the order that it thereupon made by consent was an order that the Community Court could properly make if it did not have the jurisdiction in the first place to entertain the suit is also a matter upon which we make no decision and it may be that the consequences of the consent to judgment are neither more nor less than those that normally flow from a contract that has not been made an order of court.

Georges CJ: I agree.

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Lazarus & Sarif, appellant's legal representatives.

BICKLE & OTHERS v MINISTER OF HOME AFFAIRS 1983 (2) ZLR 400 (HC)

Editor's Note:(2)

Court **High Court, Bulawayo**

Korsah J

19-21 September & 11 November 1983

and

MINISTER OF HOME AFFAIRS v BICKLE & OTHERS 1983 (2) ZLR 400 (SC)

Court **Supreme Court, Harare**

Georges CJ, Beck JA & Gubbay JA

17 & 18 November & 28 December 1983

Flynote

Statutes - construction of - Constitution of Zimbabwe 1980 - s 16(8)(b) - provision allowing for vesting or administration of property of an "enemy" - Emergency Powers (Forfeiture of Enemy Property) Regulations 1981 SI 925/81 - forfeiture of enemy property - "forfeiture" - meaning of - "enemy" - meaning of - essential that a factual state of war exist between Zimbabwe and another State - whether Regulations confiscatory in nature and therefore ultra vires Constitution - punitive nature of Regulations - severability of provisions of enactment - when provisions severable.

Practice and procedure - relief sought on ground that law contrary to Constitution - correct approach of court in such cases.

Evidence - speech by Minister in Parliament - extent to which court can rely on report of speech in Hansard - Privileges, Immunities and Powers of Parliament Act [Chapter 10] - ss 15 and 16.

Headnote

The first applicant (respondent on appeal) was a citizen of Zimbabwe by birth. The other applicants were his children and his widowed mother. He owned considerable property in Zimbabwe, but by a deed of donation executed on 29 April 1982 he divided his assets equally among his children. The plan for such a division had been made in 1979, when a company had been formed for the purpose of facilitating this division.

In November 1981 the first applicant flew his private aircraft from Zimbabwe to South Africa and

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back. The flight to South Africa was for the purpose of illegally exporting a friend's firearms. The friend also went with him and remained in South Africa. Before leaving South Africa the first applicant was prevailed on to bring back to Zimbabwe two men. He did not land at an airport of entry, but at his farm outside Bulawayo. He also brought 12 bottles of whisky into Zimbabwe. It subsequently turned out that one of the men had been trained by the South African authorities in Namibia (South West Africa) for the purpose of detecting bases of the African National Congress in Namibia and Zimbabwe and was returning to Zimbabwe on leave. It was common cause that the first applicant was unaware of these facts about his passenger.

In February 1982 the first applicant was detained by the Police and the Central Intelligence Organization, held incommunicado for a protracted period, interrogated for 5 weeks and kept in custody until the conclusion of his trial on four counts under the Immigration Act, two under the Customs and Excise Act and one under the Official Secrets Act. The last charge related to the man trained by the South African authorities. He pleaded guilty to the first six charges but denied the seventh, the sole issue on that charge being whether he had actual or constructive knowledge of the identity of his passenger. He was acquitted on that count. On the other he was fined $3 000. He was released from custody on 27 May 1982. On 10 June 1982 he left the country openly and lawfully, fearing that the respondent Minister might detain him in terms of the Emergency Powers (Maintance of Law and Order) Regulations. On 13 July 1982 the Minister made a speech to the House of Assembly which induced in the applicant a fear that he would be detained if he returned to Zimbabwe. On 15 October 1982 the Minister, purporting to act in terms of s 3(1) of the Emergency Powers (Forfeiture of Enemy Property) Regulations SI 925/1981 issued an order declaring the first applicant's property forfeit on the ground that it appeared to him that the first applicant was an enemy of the State. On 8 October the Minister executed a certificate, purportedly in pursuance of s 4(2) of the Regulations, declaring that the donation made on 29 April 1982 was void.

The first applicant brought motion proceedings in the High Court, challenging the validity of the order and the Regulations. When the matter came for hearing on the 28 March 1983, the Minister, through his counsel, told the court that he accepted that the order was invalid for "technical-legal reasons"; that he had revoked it; that the revocation would be published in the *Gazette*; that the property would be restored to the first applicant; and that the first applicant's costs would be paid. None of these undertakings was honoured. Instead, amendments were published to the Regulations by SI 239 of 1983 and on 17 May 1983 the Minister by notice in the *Gazette* ordered the consfication of all the first respondent's property except for a piece of land in Bulawayo. He also issued a certificate again purporting to invalidate the deed of donation of April, 1982. The first respondent again brought proceedings attacking the validity of the order and the certificate.

At the hearing in the High Court, Bulawayo, before KORSAH J, counsel for both parties requested the Court to rule specifically on the constitutionality of the Regulations and the orders made and certificates issued thereunder, irrespective of whether those orders and certificates might be challenged on other grounds. Both sides agreed that if the Regulations were constitutional at all, they would have to be covered by the provi-

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signs of s 1 6(8)(b) of the Constitution, which provides not for expropriation of enemy property, but for its vesting and administration. With regard to the meaning of the word "enemy", counsel for the applicants argued that the word should bear its ordinary meaning: that there should be a state of war, whether declared or otherwise, between Zimbabwe and another State. Counsel for the Minister argued for a wider interpretation, which might even include a national of Zimbabwe. Argument was also advanced on the question of whether the Regulations were confiscatory in nature. If they were not, then they might be consitutional in terms of s 16(4), which allows for the compulsory acquisition of property during a period of public emergency.

A preliminary point was raised as to whether the Court could take any cognizance of a report in *Hansard* of a speech by the respondent Minister which the first applicant said caused in him a profound fear that he would be detained if he returned to Zimbabwe.

Held, that in terms of the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*], evidence of the proceedings in Parliament could not, without the consent of the Speaker of the House of Assembly or the President of the Senate, be admitted in support of a ground of relief in proceedings for judicial relief in respect of something which occurred outside Parliament. However, as these proceedings did not seek to hold the Minister liable for damages or subject him to any penalty, they fell within the provisions of s 16 of the Act, and the speech, as reported in *Hansard*, was admissible for the limited purpose of corroborating the applicant's contention that the speech was what caused him to fear that he would be detained.

Held, further, that s 168(b) of the Constitution allowed for vesting or administration of property, not its expropriation. Section 16 was not one of those whose provisions could, in terms of Schedule 2, be overridden during a period of public emergency. Section 16(4) allowed for a limited form of acquisition of property to take place during a period of public emergency, but even that limited form was subject to express safeguards, such as reasonable notice, opportunity for objection to the Courts, power in the Court to return the property, and compensation. In terms of s 113 of the Constitution, a period of public emergency included war.

Held, further, that in interpreting Constitutions, the court must take as its starting point a recognition of the character and origin of the instrument and be guided by the principle of giving full recognition and effect to the fundamental rights and freedoms en shrined there. It must not seek to attenuate that which the draftman has seen fit to state in broad, general and ringing tones.

Held, further, that if the Regulations were to be brought within the ambit of s 16(8)(b), the word "enemy" has to be given a broad and unnatural meaning. By giving hitherto unknown extensions to the meaning of ordinary words used, the courts would be arrogating to themselves the functions of the legislature. For there to be an "enemy" there must be a state of war between Zimbabwe and another country. There was no declaration of war between South Africa and Zimbabwe; indeed, there were no armed hostilities. Accordingly, it was impossible for the first applicant, even if he were an agent of South Africa, to become an enemy of Zimbabwe by being the agent of a state which is not an enemy. In any event, the word "enemy" refers to nationals of a state at war with Zimbabwe and not to citizens of Zimbabwe.

Held, further, that the Regulations provided for "forfeiture" of property, that is, the loss of *dominium* and interest in the property forfeited. A forfeiture order was, therefore, confiscatory.

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There was no similarity to the vesting of enemy property in time of war; in that situation, the vesting of property is primarily a matter of ensuring its conservation and eventual return rather than its confiscation. In the Regulations under consideration the vesting is a result of something done which is frowned on by the Minister;

in other words, it is a punitive act. Since the Regulations were confiscatory, they offended against the safeguards provided by s 16(4).

Held, further, that despite the wording of s 14 of the Regulations - that every provision of the Regulations was severable from every other - the provisions of the Regulations were so interdependent that all parts had to be read together to give meaning and purpose to the Regulations and in practice they did not lend themselves to severability of their provisions.

Cases cited:

R v Secretary of State for Trade & Others ex p Anderson Strathclyde plc [1983] 2 All ER 233;

Hewlett v Minister of Finance & Another 1981 ZLR 571; 1982 (1) SA 490 (ZSC);

Minister of Home Affairs (Bermuda) v Fisher [1979] 3 All ER 21; [1980] AC 319;

R v Home Secretary ex p Hosenball [1977] 3 All ER 452; [1977] 1 WLR 766;

Attorney-General for Canada v Hallet & Carey Ltd [1952] AC 427;

Janson v Driefontein Consolidated Mines Ltd [1902] AC 484; [1900-3] All ER Rep 426;

S v Hartlebury & Anor CRB 16821/83 (Harare);

R v Britten [1969] 1 WLR 151; [1969] 1 All ER 517 (CA);

R v Sutch [1975] 2 NZR 1;

Leader v Duffey (1888) 13 AC 294.

The Minister appealed, arguing that there was a presumption that the Regulations were constitutional and that the burden was on Mr Bickle to establish their unconstitutionality. In addition, he advanced essentially the same arguments as in the court *a quo* as to the meaning of "enemy" and the interpretation to be given to s 16(8)(b) of the Constitution. Counsel for Mr Bickle argued that the order and certificate were invalid because the Regulations contravened s 16(8)(b) of the Constitution; that even if they were constitutionaly valid, the Regulations were *ultra vires* the Emergency Powers Act; but that even if they were *intra vires* that Act, the Minister had acted *mala fide*.

Held, dismissing the appeal, that irrespective of the wishes of the parties, the judge *a quo* should not have decided the issue of constitutionality without first considering whether the issues of *vires* and reviewability of the Minister's actions on common law grounds would have afforded the applicants the relief they sought. If he found on either issue in their favour, he

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should have left unanswered the constitutional question.

Held, further, that the wording of s 16(8) of the Constitution, read as a whole, made it clear that it was drafted to safeguard specific areas of law of which the draftsman was aware and which he thought might conceivably (though no doubt wrongly) be thought to be infringements of the Constitution. The indications were compelling that the craftsman, when referring to the vesting of property belonging to or used by or on behalf of an enemy, had in mind the Trading with the Enemy Act 17 of 1939.

Held, further, that as "enemy" is not defined in the Constitution, the meaning must be determined by having regard to the canons of interpretation adopted for the interpretation of the Constitution. The presumption of constitutionality of legislation could not justify placing on the Constitution a meaning which it cannot legitimately bear in order to accommodate legislation made purportedly in the exercise of powers conferred by the Constitution. The fact that the Senate Legal Committee had not filed an adverse report on the Regulations in question did not strengthen the presumption of constitutionality. The Senate Legal Committee and the Supreme Court each had their own functions under the Constitution. In the final analysis, the protection afforded by the Declaration of Rights could only hinge on the decisions of the Supreme Court.

Held, further, that on all the authorities, the word "enemy" can only be used in situations

where there is a state of war or of armed conflict which makes it plain that although war has not been formally declared a state of war in fact exists. Even in official secrets legislation, the concept of a state of war is needed. The enemy must be another State; individuals acquire enemy status by reason of association with that State.

Held, further, that whether any particular set of facts could be said to be a state of armed conflict amounting to war, this was a question of fact which the Courts could resolve. If the situation were delicate and the Court's ruling might embarrass the Government, the Court could ask the Government to certify whether a state of armed conflict exists.

Held, further, that as Zimbabwe was not at war with any country, no power would exist to make regulations providing for the vesting of any property belonging to or used by or on behalf of an enemy.

Cases cited:

Mandirwhe v Minister of State 1981 (1) SA 759 (ZAD);

Jangles v Commonwealth of Australia [1936] AC 578; [1936] 2 All ER 1449 (PC);

Zimbabwe Township Developers v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376;

R v Parrott (1913) Cr App R 186;

HM Secretary of State for War v Midland Great Western Railway Co of Ireland [1923] 2 IR 102;

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Hakim v Minister of Interior (1952) 19 ILR 578.

J C Kriegler S C, with him *C W Jordaan,* for the applicants (respondents on appeal): The Regulations should be strictly interpreted. They constitute a radical inroad into the common law rights of the individual, purporting to authorize the confiscation of everything a man owns or may ever own or earn. They constitute a radical departure from the norms protected by the Declaration of Rights and from international norms such as the Universal Declaration of Human Rights (art 17) and the International Convention on the Elimination of all forms of Racial Discrimination 1966 (art 5). As a member State of the United Nations, Zimbabwe is committed both to treaties and to customary law. The only provisions comparable to the Regulations were the measures adopted in Nazi Germany which allowed for the expropriation of the property of such "enemies" as Jews and Communists. On *reviewability*: In any event, for the Minister to act under the Regulations, certain facts must have existed, such as that the person affected must have been an agent of a foreign country or organization. If these facts exist and on them the Minister concludes that a person is an "enemy", he must then consider whether the interests of the public safety of Zimbabwe make it necessary or expedient that an order relating to the subject's *property* be made, bearing in mind the effect of such an order on innocent third parties. He must also specifically consider (s 4(1a)) whether the subject's land is to be included in the property to be forfeited. He is not entitled to issue a certificate under s 4(2) unless a forfeiture order is in existence; and he may only issue such a certificate if the transaction he seeks to void was brought about by "collusion". The Minister lamentably failed to appreciate and exercise his duties under the Regulations. There was not a title of evidence to show that the first applicant was a

foreign agent; the Minister has not considered whether he was an "enemy". He has not considered whether the forfeiture of the first applicant's property was necessary or expedient in the interests of public safety; he clearly regarded the finding of enmity as *per se* warranting a forfeiture order. Far from displaying an awareness of his onerous duties, his attitude is one of vengefulness. He has failed to bring his mind to bear on the jurisdictional facts or evaluation criteria laid down by the Regulations, and such failure vitiates his decisions: *Shidiack v Union Government* 1912 AD 642; *Union Government v Union Steel* 1928 AD 220. When he came to issue the second order, the Minister persisted in errors of fact which were contrary to the evidence and agreed facts. He relied for his attitude on such factors as that Mr Bickle had refused to see him and had gone to South Africa. The Minister could not, on the facts, have applied his mind properly to the true issues and must have been motivated by extrinsic and irrelevant considerations. It is also clear that the Minister rejected what he thought was a wrongful acquittal on the seventh charge and substituted his own judgment of guilty as a basis for a forfeiture order. He also took into account Mr Bickle's "refusal" to return to Zimbabwe as a factor, which was unreasonable and improper. The decisions the Minister came to were ones which no reasonable man could have come to if he applied his mind properly to the facts. On his *ipse dixit*, the Court would be justified in concluding that the Minister was actuated by malice or by the improper, ulterior motive of seeking to punish the first applicant. He also failed to observe the *audi alteram partem* rule, an essential requirement: *Ridge v Baldwin* [1963] 2 All ER 66 (HL). This also contravenes the provisions of s 18 of the Constitution. In a situation where the proceedings import a penal sanction or inflict financial loss, the more necessary it is to act

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judicially: *Lewis v Heffer* [1978] 3 All ER 354 (CA); *Durayappah v Fernando & Others* [1967] 2 All ER 152 (PC). *On whether the Regulations are ultra vires the Act:* The Regulations are *ultra vires* the Emergency Powers Act [*Chapter 83*]. Although the Act, in s 3(4)(b) appears to give the President unfettered legislative power, he is not empowered to make regulations contrary to the specific matters set out in s 3(2). Section 3(1), while allowing for the taking of possession or control of property and the acquisition of property other than land, contemplates in para (j) the payment of compensation. In any case, the President is not empowered to make regulations which offend against ss 16 or 18 of the Constitution. The regulations in question should be interpreted strictly. There is no warrant in the Act for the creation of the status of "Enemy of the State", a truly frightening concept, nor for the forfeiture of a person's property - any property, *in esse* or *in futuro*. The only punitive power contemplated by the Act is in s 3(2). These Regulations provide for the severest fina-

ncial penalty, for no specific offence, on the unilateral decision of a Minister. That is to usurp the function of the legislature: cf *Liyanage v R* [1966] 1 All ER 650; *Madzimbamuto v Lardner-Burke NO* 1968 RLR 203; 1968 (2) SA 284 (RAD) at 424A. There is no authority in the Act for the total disregard of the rules of natural justice that are found in the Regulations, nor is there authority for confiscation without compensation. The Regulations can have permanent effects, but the Act is designed to provide for temporary measures in time of emergency. *On the constitutionality of the Regulations:* a striking feature of the Constitution is the prominence, detail and entrenchment of the Declaration of Rights. Section 16 deals with protection from deprivation from property; subs (4) authorises legislation for the limited purpose of taking possession of property compulsorily during a period of public emergency. Even then procedural safeguards are provided, prompt and adequate compensation must be paid and the authorised taking is temporary only. Subsection 8(b) provides for the creating or administration (but not expropriation) of property belonging to or used by or on behalf of (1) an enemy; or (2) a proscribed organisation. Mr Bickle is not a proscribed organisation. As to whether he is an "enemy", the word postulates a state of war, whether declared or not. It cannot seriously be contended that, in the absence of an "enemy" state in the public international law sense, an individual citizen can be an "enemy" within the meaning of s 16(8)(b). In any case, it is clear that s 16(8)(b) is concerned with custodianship during the subsistence of the state of hostilities; it does not contemplate punitive and permanent expropriation. It is relevant to note that in terms of s 26(2), while existing laws are "saved" from being struck down if inconsistent with the Declaration of Rights, in terms of s 26(3)(a) this saving does not apply to any law relating to the compulsory acquisition of property. Section 18 of the Constitution provides for the protection of the law and a fair hearing or "due process". The regulations contravene the rules of natural justice and for that reason too are unconstitutional.

L J Blom-Cooper QC, with him *F C Blackie SC* (and, on appeal, *R Acton*), for the Minister. *On the admissibility of evidence relating to the Minister's speech in Parliament:* the objection to the admissibility of this evidence is not on the ground that the evidence is used to impugn the *bona fides* of the Minister, but on the grounds of parliamentary privilege, irrespective of the contents of the speech. The Court would inevitably examine and discuss the speech, if not adjudicate on it, and thus would infringe the privileges of parliament. In any case, evidence can only be given of what is said in Parliament if the permission of the Speaker has been obtained, which it has

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not. *On the question of the Constitutionality of the Regulations:* there is a presumption that they are constitutional:

Mootoo v Attorney-General for Trinidad and Tobago [1979] 1 WLR 1334; *Attorney-General for Antigua v Antigua Times* [1976] AC 16; [1975] 3 All ER 81; *Hinds v The Queen* [1977] AC 195; [1976] 1 All ER 353; *Price v Illinois* (1915) 238 US 446; *Maluleke v Minister of Law & Order* 1963(4) SA 206; 1963 R & N 554; *Nkomo v Minister of Justice* 1964 RLR 520; 1965(1) SA 498; *Arzika v Governor, Northern Region* [1961] 1 All NLR 374. In considering the constitutionality of any legislative instrument, the courts will not consider whether an emergency exists or the wisdom or propriety of the regulations. Principles in a constitution should be treated *sui generis*, calling for principles of interpretation of their own. The provisions of a constitution should not be read too literally (austerity of tabulated legalism): *R v Secretary of State for Home Affairs ex p Hosenball (supra).* It follows that in s 16(8)(b) "enemy" may encompass a person other than a national of a state at war with Zimbabwe. A person before a national court may possess enemy status in the absence of state of war; *Cohen-Karsfeld v Pouchard-Stopt* (1956) 23 ILR 758; *Hakim v Minister of Interior* (supra). Because of the demands of national security there should be a less restrictive interpretation of "enemy": *Attorney-General for Canada v Hallet & Carey* [1952] AC 427. Since 1945, because of the renunciation of the use of war under the UN Charter, "enemy" has a modern meaning. Where hostilities falling short of war are conducted, the courts will apply to that situation terms whose original meaning applied to declared war. South Africa's hostility and destabilization policy makes a person assisting it, in certain circumstances, an enemy. In official secrets legislation, "enemy" includes a potential enemy. The word may thus be given a different meaning according to its context. It may embrace persons who are not nationals of States against which the sovereign has declared war: *R v Parrott* (supra); *Secretary of State for War v Midland Great Western Railway Co* [1923] 2 IR 102; *Porter v Freudenberg* [1915] 1 KB 857; [1914-5] All ER Rep 918; *Sovfracht (v/o) v Gebr van Udens Scheepvaart* [1943] AC 203; [1943] 1 All ER 76. "Vesting" has a wider meaning than "compulsory acquisition" and, in the context of public emergency by hostile acts, covers a forfeiture order. It is the extinction of beneficial ownership in the owner and transfer to the custodian of enemy property: *Jewish Colonial Trust v Estate Nathan* 1940 AD 163; *Konya v Viedge Bros (Pty) Ltd & Others* 1961(2) SA 816; *Re Pozot's Settlement Trust* [1952] Ch 427; [1952] 1 All ER 1107. So long as t is not punitive, the State may deprive an individual of property in the interests of public order. The Courts should not assume that the Regulations have an ulterior motive, of punishment: *Reference re Regulations (Chemicals) under War Measures Act* [1943] 1 DLR 248; *Attorney-General for Canada v Hallet & Carey* (*supra*). Chapter III of the Con-

KORSAH J

stitution is in large measure based on the European Convention on Human Rights, which allows derogation from the obligations in the First Protocol thereto where there is grave emergency. Because s 25 of the Constitution does not permit derogation from s 16 even in times of public emergency, ostensibly property owners in Zimbabwe are given greater protection than citizens

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of countries which are parties to the European Convention. Section 16(8)(6) should therefore be construed flexibly. Section 16(4) is a separate and distinct authorization for any legislative or executive act from that authorised by s 16(8). The former deals with such events as flood or drought, while the latter deals with acts directed at the stability of government. It is agreed that s 16(8)(b) is not expropriatory in intent or effect. Vesting and administration of property is the transfer of the enemy's property during the period of emergency with a *spes restitutionis*. The regulations mirror, in cases where there is a state of emergency falling short of declared war, the trading with the enemy legislation. "Forfeiture" in its ordinary meaning refers to the power of the courts to take property connected with a criminal offence, the effect of which is to pass the property absolutely to the State. In terms of the Regulations, it is not related to any offence and specifically does not operate to pass property absolutely to the State. The property, where a forfeiture order has been made, vests in the custodian of enemy property. Although the custodian is a State servant, the property held by him is not state property: *Bank voor Handel en Scheepvaart NV v Administrator of Hungarian Property* [1954] AC 584; [1954] 1 All ER 969. A vesting order transfers legal ownership to him and the former owners have no more than a *spes restitutionis.* Section 5(d) gives the custodian a discretion to transfer property to the Minister, another indication that the property in the hands of the custodian is not state property. The temporary and imperfect transfer of enemy property is implicit in the Regulations, which subsist only as long as there is a declared state of emergency in Zimbabwe. The Regulations thus provide a means for preventing the payment of money to enemies of Zimbabwe and for preserving enemy property in contemplation of the ending of the emergency and the restoring of ordinary relations between Zimbabwe and hostile foreign states or organisations.

Judgment

Korsah J: In this application by way of notice of motion the applicants seek an order declaring to be invalid and of no force and effect either the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981 (as amended) or an order and certificate issued thereafter by the respondent on 20 May 1983 and 17 May 1983 respectively.

The factual background to the making of the order is for the most part undisputed and may be summarised as follows.

KORSAH J

The first applicant is rancher and businessman of Umgusa Valley, Bulawayo. He is a citizen of Zimbabwe by birth and at present resident in South Africa.

The second, third and fourth applicants are the first applicant's major children and the fifth applicant is his widowed mother.

In 1979, the first applicant commenced implementing the transmission to his children of a number of his assets and a company, Bickle Investments (Pvt) Ltd was incorporated *inter alia* to facilitate such donation.

On 28 November 1981, the first applicant flew his private aircraft from Zimbabwe to South Africa and back returning with two men. In February 1982 he was detained by members of the

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Zimbabwe Republic Police and Central Intelligence Organisation under the Emergency Powers (Maintanance of Law and Order) Regulations 1980 (SI 441 of 1980). He was held in communicado for a protracted period, interrogated for five weeks and was thereafter remanded in custody on four counts of contravening the Immigration Act 1979, two counts of contravening the Customs and Excise Act [*Cap 177*] and one count of contravening the Offical Secrets Act [*Cap 97*].

At his trial on the last mentioned charge, it was common cause that he had tricked into flying two men from South Africa into Zimbabwe he having had absolutely no prior knowledge that the two men would be there.

One of the men he flew into Zimbabwe turned out to be person trained by South African authorities in Namibia for the purpose of detecting bases of the African National Congress in Zimbabwe and Namibia and was entering Zimbabwe on rest and recreation. *(3)

The trial court held that the first applicant had neither actual nor constructive knowledge of these facts and acquitted him on that charge. He was released from custody on 27 May 1982.

Prior to his release from custody, the first applicant, on 29 April 1982, in contemplation of a possible sentence of imprisonment on the charges he was then facing, or a possible detention order, perfected the transmission by a deed of donation dividing a number of assets equally among his children.

Shortly after his release on 27 May 1982, inconclusive attempts were made at the instance of the first applicant by his legal representatives to arrange a meeting between the respondent and the first applicant, with a view to ascertaining the respondent's attitude with regard to the issue of a fresh detention order.

KORSAH J

On 10 June 1982 mentally and physically drained by the lengthy period of detention and the strain of the criminal proceedings, the first applicant left Zimbabwe openly and lawfully for a vacation in South Africa, no doubt prompted, as GUBBAY J (as he then was) observed in his judgment No H-B-17-83, in no small measure by a fear that if he remained any longer in the country he might be detained under the Emergency Powers Regulations.

It would appear that on 13 July 1982, the respondent made references to the first applicant in a speech in the House of Assembly which induced in the applicant a profound fear that he would be detained should he return to Zimbabwe.

Mr *Blom-Cooper* for the respondent objected to the introduction in evidence of the respondent's speech on the ground that it sought to impugn the *bona fides* of the respondent in making the order complained of, and that under the Privileges, Immunities and Powers of Parliament Act [*Chapter 10*], the freedom of speech accorded members of Parliament "shall not be liable to be impeached or questioned in any court or place outside Parliament". He submitted further that unless the giving of that evidence regarding the proceedings at the bar of the House and has

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been authorised by the Speaker it is inadmissible in evidence under s 15 of the Act.

Counsel relied for support for these propositions of law on the case of *R v Secretary of State for Trade and Others ex p Anderson Strathclyde plc* [1983] 2 All ER 233. In that case the plaintiff sought leave to introduce as evidence extracts from Hansard which would show that the Minister of Trade was purporting himself to exercise powers that could only be exercised by the Secretary of State and to take full responsibility for the decision, and to establish consequently that the decision was not the decision of the Secretary of State and was null and void.

The court refused the plaintiff's application on the ground that a report in Hansard of what has been said and done in Parliament cannot be used to support a ground of relief in proceedings for judicial relief in respect of something which occurred outside Parliament.

Mr *Kriegler* for the applicant, in answer to this objection, said the speech was being introduced to show the first applicant's state of mind on hearing about the references to him and to demonstrate that his decision to stay in South Africa was as a result of what the Minister said in the House and that he was not a fugitive from justice. The first applicant does not seek to hold the Minister liable for damages or to any penalty for what

KORSAH J

he said. The evidence is tendered for the limited purpose of explaining the first applicant's absence from Zimbabwe.

By s 15 of the Privileges, Immunities and Powers of Parliament Act no member of Parliament is allowed to give evidence elsewhere of any proceedings or examination at the bar of the Senate or the House without the authorisation of the President of the Senate or the Speaker, as the case may be. That is not what the first applicant seeks to do here. He has not requested any member of Parliament or person employed thereat to testify on the proceedings before the House without the authorisation of the Speaker.

Mr *Kriegler* submitted, and I agree with him, that, insofar as they do not seek to hold the Minister liable for damages or subject him to any penalty, they fall squarely under s 16 as read with s 5(3)(b) of the Act. Section 16 provides that:

> "A copy of the journals printed or purporting to be printed by order of the Senate or the House of Assembly shall be admitted as evidence of such journals in all courts and other places without proof being given that the copy was so printed".

All that the first applicant is saying is that "this is what induced in me fear and alarm." He is not even asking the Court to decide whether his reaction to the speech was reasonable. The Court is, therefore, not called upon to examine, discuss and adjudge on a matter which was being considered in Parliament. In my judgment the said speech of the respondent, appearing in journals of the House, is admissible for this limited purpose and no other.

To return to the agreed facts leading up to this application, on 15 October 1982 the respondent, purportedly acting in terms of s 3 (1) of the Emergency Powers (Forfeiture of Enemy Property) Regulations, SI 925 of 1981 (hereinafter referred to as 'the Regulations'), issued the first order

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declaring the first applicant's property forfeited on the ground that it appeared to the Respondent, *inter alia*, that the applicant was an enemy of the State.

Without any notification to any party affected thereby, the respondent on 8 October 1982 executed a certificate, purportedly pursuant to the provisions of s 4(2) of the Regulations, declaring the donations hereinbefore mentioned and made by the first applicant for the benefit of the other applicants herein void and of no effect.

By notice of motion, dated December 1982, the first applicant challenged

KORSAH J

the validity of the order and the Regulations under which the order was made. The respondent took a preliminary point that the applicant was a fugitive from justice and accordingly had no *locus standi* to seek the relief. This preliminary point was rejected both an the High Court and on appeal in the Supreme Court.

When the first application was called for hearing on the merits on 28 March 1983, the respondent's counsel informed the Court:

(a) that the respondent accepted that the first order was invalid for "technical-legal reasons";

(b) that the respondent had revoked such order;

(c) that such revocation would be gazetted in the next copy of the Zimbabwean Government *Gazette*;

(d) that all of the first applicant's property would be restored to him with immediate effect;

(e) that the respondent would pay all of first applicant's party - and party costs of the first application;

(f) that the respondent intended immediately to re-examine the case against first applicant;

(g) that in so doing the respondent would consider the evidence addressed by way of affidavit in the first application; and

(h) that on 24 March 1983, a Tribunal had been appointed pursuant to s 11(1) of the Regulations.

The learned Judge therefore made an order in terms of paragraphs 2 and 3 of the draft order to the effect that -

(1) the order, issued under the aforesaid Regulations in respect of the Applicant on 15

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October 1982, was invalid and of no force and effect; and

(2) that the respondent shall pay the costs of the application.

None of the representations made by counsel to the Court was honoured. At the time the second application came to be heard even the first applicant's party-and-party costs had not yet been paid in full. The amending Regulations were promulgated on 6 May 1983, and on 17 May 1983, the respondent executed the certificate, and in the *Gazette* of 20 May 1983, the order now complained of and the appointment of the Tribunal, were published. And the present application, directed towards setting aside the second order and certificate was launched in July, 1983.

Counsel for both parties addressed a request to the Court that, irrespective of the Court's views with regard to the reviewability on common law

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KORSAH J

grounds of the Minister's decision to make the order and issue the certificate, the Court rule specifically on the constitutionality of the Regulations and the orders made thereunder. Since such be the wish of counsel, I propose to consider first and foremost the constitutional issue.

It seems to me, from the affidavits of the parties and the addresses of counsel that there are two general areas of agreement. The first is that if the Regulations, the order made and the certificate issued thereunder are to be saved at all from unconstitutionality, their salvation lies within the ambit of s 16(8)(b) of the Constitution - read, of course, in its proper context. The second is that subs (8)(b) of s 16 does not provide for expropriation, but for vesting or administration of property.

The section provides that -

> "(8) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases -
>
> (a) .....
>
> (b) by way of the vesting or administration of any property belonging to or used by or on behalf of an enemy or an organisation which is, in the interests of defence, public safety or public order, proscribed or declared by a written law to be an unlawful organisation."

A striking feature of the Constitution of Zimbabwe is the prominence given to, the detail in which is couched, and the depth in which is entrenched, the Declaration of Human Rights. First of all, s 3 of Chapter 1 declares that "This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The Constitution then proceeds in Chapter III to deal with "the Declaration of Rights". The chapter commences with section 11 which lays down a broad statement of policy:

> "11. Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that

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is to say, the right, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedom of others and for the public interests, to each and all of the following, namely -

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his home and other property and from the compulsory acquisition of property without compensation;

and whereas it is the duty of every person to respect and abide by the constitution and the laws of Zimbabwe, the provision of this chapter shall have effect for the pur-

KORSAH J

pose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

The whole of Chapter III then deals with the Declaration of Rights, enumerating them and dealing with each specifically:

s 12 - Protection of right of life;

s 13 - Protection of right to personal liberty;

s 14 - Protection from slavery and forced labour;

s 15 - Protection from inhuman treatment;

s 16 - Protection from deprivation of property;

s 17 - Protection from arbitrary search or entry;

s 18 - Provisions to secure protection of law;

s 24 - Enforcement of protection provisions;

s 25 - Savings in the event of public emergencies; and

s 26 - Interpretation and other savings.

Now s 52, which is concerned with alteration of the Constitution, commences with a provision in subs (1) that Parliament may amend, add to or repeal any of the provisions of this Constitution, provided that no law shall be deemed to amend, add to or repeal any provisions of the Constitution, unless it does so in express terms. By subs (2) a constitutional bill is not to be introduced into the Senate or House of Assembly unless the text has been published in the *Gazette* not less than thirty days before its introduction. Subsection (3) makes provision for certain requisite majorities for constitutional amendments: (a) subject to the provisions of subsection (6) such an amendment at the final vote in the Senate should receive the affirmative votes of two-thirds of the total membership of the Senate; and (b) at the final vote in the House of Assembly, if the Bill is one to which subsections (4) or (5) applies, the votes of all the

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members of the House of Assembly; and in any other case, not less than seventy members of the House.

Subsection (4), which is one of the sections contemplated by subsection (3)(b), provides that this section shall apply to any Constitutional Bill which is introduced into the House of Assembly less than ten years after the appointed day and which, if enacted, would amend, add to or repeal any of the provisions specified in Schedule 5, being provisions relating to the fundamental rights and freedoms of the individual.

Section 16(1), as one of the provisions listed in Schedule 5, is thus one

KORSAH J

of those provisions in the Constitution which for the first ten years after the appointed day would require the unanimous consent of the House of Assembly to amend, add to or repeal.

Another indication of the sacrosanctity of s 16 may be gleaned from s 25 which provides that, notwithstanding the foregoing provisions of this Chapter (ie Chapter III), an Act of Parliament may, in accordance with Schedule 2, derogate from certain provisions of the Declaration of Rights in respect of a period of public emergency or a period when a resolution under s 68(6) is in effect.

If one looks at Schedule 2, one observes that it contains certain savings and then provisions that may temporarily be overlooked during a period of public emergency. Sub paragraph (1) declares that

> "nothing in any law shall be held to be in contravention of sections 13, 17, 20, 21, 22 or 23 to the extent that the law in question provides for the taking during a period of public emergency of action for the purpose of dealing with any situation arising during that period, and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions . . .".

It is to be observed and noted that under Schedule 2 neither s 16, which provides for the protection against expropriation without compensation, and s 18, which provides for the due process of law, can be overridden during a period of public emergency.

The other sections dealing with fundamental rights enumerated under the Schedule may be overridden during a period of public emergency, but not so ss 16 and 18. They remain inviolable.

Turning now to examine s 16 itself against this contextual background, one finds enshrined in subs (1) the general overriding prohibition against compulsory acquisition, followed by a series of qualifications specifying that it must be under the authority of a law that:

(a) requires reasonable notice to be given;

(b) requires that the acquisition should be reasonably necessary in the interests of defence, public safety, public order, etc;

(c) requires the acquiring authority to pay promptly adequate compensation for the

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acquisition;

(d) requires the acquiring authority to submit the matter to a court if the acquisition is contested; and

(e) enables any claimant for compensation to apply to a Court for the determination of a fair compensation;

KORSAH J

so that there is full provision for both the *audi alterem partem* rule and judicial supervision.

Sub-section (10) of s 16 defines "acquiring authority" as "the person or authority compulsorily taking possession of or acquiring the property or the interest or right therein". So that acquisition within the meaning of s 16 means taking possession or taking *dominium*, or an interest or right less than *dominium*.

Mr *Kriegler,* therefore, submitted, rightly in my view, that the wide generality of the language used by the law giver manifests an intention to protect property of the widest possible description and interests or rights therein of the widest category against compulsory acquisition unless such acquisition is subject to reasonable notice, *audi alterem partem* and judicial supervision.

It would appear that the framers of the Constitution, well aware that the possibility of public emergencies, or anticipated public emergencies, may necessitate a derogation from the general prohibition against acquisition, provided for a limited form of acquisition to be permissible in a state of emergency. It is the taking of possession - not expropriation of property - under subs (4) of s 16. And even that limited acquisition is still expressly subjected to safeguards protecting the individual.

The law in question authorizing the taking of possession of property compulsorily under subs (4) must take provision for:

(a) reasonable notice;

(b) opportunity for objection;

(c) timeous submission of objections to the Courts by the acquiring authority;

(d) power in the Court to order the return of the property to its owner unless the taking is reasonably justifiable;

(e) prompt return of property when possession is no longer reasonably justifiable; and

(f) judicial supervision over claims for compensation.

It is clear, therefore, that in an emergency or an anticipated emergency the only derogation from the general prohibition against compulsory acquisition would be taking of possession subject to

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judicial supervision and correction, and subject to prompt return, and subject to compensation.

A period of public emergency is defined in s 113 of the Constitution as -

KORSAH J

"(a) any period when Zimbabwe is engaged in any war and the period immediately following thereon until such date as may be declared by the President, by the proclamation in the *Gazette* as the end of the period of public emergency caused by that war; or

(b) any period when a declaration under section 68(1) is in effect".

So there is no room for the suggestion that the framers of the Constitution when, in subs (4) of s 16, they dealt with a period of public emergency, did not have in their contemplation emergency created by war or the anticipation of it.

Thus, submitted Mr *Kriegler*, if the Constitution were to bear some generalised wide meaning, as suggested by counsel for the Respondent when it talks of "enemy", it is under subs (4) of s 16 that the legislature could have dealt with it. If the legislature is dealing with some sort of a person who acts inimically to the State in a state of war, quasi-war or anticipated war, or low intensity war, it is under the provisions of subs (4) of s 16 that one would expect to find the express provision for the intervention of a radical nature by the executive in respect of the property of that person.

Put tersely, what s 16(4) says is this: if there is a state of public emergency and if the taking of possession of property becomes necessary in that emergency, then the legislature may make statutory provision for it, provided any such statutory instrument would require the taking of such possession to be made subject to reasonable notice, subject to compensation and subject to prompt return at the end of the emergency.

But that is not the end of the matter, for a little confusion is sprung by the introduction of the word "enemy" in subs (8)(b) of s 16 of the Constitution. To put sub-section (8)(b) in its contextual background one must look at the whole of sub-section (8). It provides that -

"Nothing contained in or done under the authority of any law shall be held to be in contravention of sub-section (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases -

(a) for the purpose of administration, care or custody of any property of a deceased person or a person who is unable, by reason of any incapability, to administer it himself, on behalf and for the benefit of the person entitled to the beneficial interest therein;

(b) by way of the vesting or administration of any property belonging to or used by or on behalf of any enemy or an organisation which is, in the interests of defence, public safety or public order, proscribed or declared by a written law to be an unlawful organisation;

(c) by way of the administration of moneys payable or owing to a person outside

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Zimbabwe or to the government of some other country, where restrictions have been placed by law on the transfer of such moneys outside Zimbabwe;

(d) as an incident of -

(i) a composition in insolvency accepted or agreed to by a majority in number of creditors who have proved claims and by a number of creditors whose proved claims represent in value more than fifty per centum of the total value of proved claims; or

(ii) a deed of assignment entered into by a debtor with his creditors;

(e) by way of the acquisition of the shares or a class of shares in a body corporate on terms agreed to by the holders of not less than nine-tenths in value of those shares or that class of shares, or that class thereof".

It is clear to me, and it is agreed by counsel for all parties, that in its context subs (8)(b) is not expropriatory in intent. But whereas Mr *Kriegler* for the applicant contended that the section does not purport to deal in express terms or even by implication with the dispossession or expropriation of citizen of the land, that is to say, it deals with an enemy or an unlawful organisation Mr *Blom-Cooper* asserted that in its context in s 16(8)(b) the word "enemy" extends beyond the situation of a declared war and covers a state of emergency such as existed under s 68(b) of the Constitution, and is capable of embracing a national of Zimbabwe, who is resident in South Africa and is or has been of assistance to the authorities installed by South African Government in Namibia.

To achieve this result, counsel for the respondent argued that regard must be had to four considerations:

(a) the general principles applicable to the interpretation of constitutional instrument;

(b) the presumption of constitutionality;

(c) principles of international law relating to the term "enemy"; and

(d) the context of s 16(8)(b) of the Constitution.

Starting at the beginning with the first consideration, ie principles governing the interpretation of a Constitution, I am guided by the words of FIELDSEND CJ, who in *Hewlett v Minister of Finance and Another* 1981 ZLR 571 ; 1982 (1) SA 490 (ZSC) at 495B to 496F, echoed the wisdom of LORD WILBERFORCE in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319; [1979] 3 All ER 21. The whole of the passage cited by the learned CHIEF JUSTICE is most instructive but to achieve brevity I quote the passage appearing at p 329A - F:

"When therefore it becomes necessary to interpret 'the subsequent provisions of chap I' - in this case s II - the question must inevitably be asked whether the appellant's premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament, is sound.

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KORSAH J

> In their Lordship's view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship. On the particular question this would require the Court to accept as a starting point the general presumption that 'child' means 'legitimate child' but to recognise that this presumption may be more easily displaced. The second would be more radical: it would be lo treat a constitutional instrument such as this as *sui generis*, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.
>
> It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules in interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences".

That is how a constitution such as the Zimbabwean Constitution has been and ought to be interpreted. One must not seek to attenuate that which the craftsman has seen fit to state in broad, general and ringing tones. One must interpret the Instrument as it stands. And when it says that there are fundamental rights that are enshrined and protected, so one interprets it, giving to it a generous interpretation, avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of their fundamental rights.

Counsel for the respondent urged on the Court the case of *R v Home Secretary, ex p Hosenball* [1977] 3 All ER 452; [1977] 1 WLR 766 at 778F-779D; 783H-784C; 786E-F and 787G, and submitted that when national security is at stake even the rules of natural justice may be modified to meet the position. In the *Hosenball* case the court was not dealing with the constitutionality of regulations made under a constitutional provision. It was concerned with an alleged breach of the rules of natural justice and no useful guide is given by that case as to how constitutional provisions ought to be interpreted.

I am not in any doubt that, in terms of national stress or public emergency, the rights of the individual may be subordinated to the general interest, but such subjugation may only be done under regulations which are con-

KORSAH J

stitutionally valid. In determining the validity of the Regulations under consideration, no assistance can be gained from cases arising under legislation whose constitutionality was not impugned.

The first thing to note is that, unlike s 16(4) which stipulates in clear and ringing tones the conditions upon which regulations dealing with the taking of possession of property during a

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period of public emergency may rest, s 16(8) does not even mention a period of public emergency. It would appear, therefore, that regulations for the compulsory acquisition of property during a period of public emergency may not be made under s 16(8) but rather under s 16(4) which authorises the making of such regulations during a period of public emergency.

But counsel for the respondent, in order to bring the Regulations within the ambit of s 16(8), argued that as a flexibility of construction is admissible in regard to constitutional instruments which might be rejected in construing ordinary statutes or *inter partes* documents, the term "enemy" in s 16(8)(b) ought to be understood to be broad enough to encompass a person other than a national of a state at war with Zimbabwe and, indeed, even to encompass a national of Zimbabwe itself. That this is particularly the case when the word "enemy" appears in the phrase "enemy or an organisation which is, in the interest of defence, public safety or public order, proscribed . . ."; and that it indicates that s 16(8)(b) applies specifically to cases involving defence, public safety or public order, and that is why s 16(8)(b) by contrast is not subject to the limitation that the acquisition must be shown to be reasonably justifiable.

Looking at s 16(4), as I observed earlier, it was designed to admit regulations for the compulsory acquisition of property during a period of public emergency. And s 113 of the Constitution defines public emergency as embracing war and its aftermath and a declared state of emergency. So that there is no room for the suggestion after s 16(4) deals with civil commotions in which there are no enemies. It deals with precisely what these Regulations purport to be, namely, emergency powers to be exercised under the Emergency Powers Act, because an emergency - as defined - has proclaimed.

Section 16(4) then is precisely the subsection in which one would seek authority for emergency powers regulations relating to property of subversives or subservise organisations, or property dangerous to the national

KORSAH J

security. And I agree with Mr *Kriegler* when he says that for counsel for the respondent to admit this would be highly inconvenient, because one has to go through the embarrassment of giving reasonable notice, opportunity to object, and apply to the General Division and have a judge interfere with the decision. And, therefore, one has to make words stand on their heads and have a non-war become a war; a non-enemy become an enemy and seek with that linguistic shoe-horn to force the Regulations into s 16(8)(b).

Counsel for the respondent expressed his surprise and remarked that it was extraordinary that this Constitution should afford greater protection to the individual in the enjoyment of his property rights than the European Convention. But looking at the Zimbabwean Constitution in its historical context, it is by no means extraordinary.

The craftsman was designing a Constitution in a reconciliation era after a prolonged civil war and with a view to the accession to power of a post-revolutionary government. And that is why private property and due process of law are not only spelt out in minute detail, but are entrenched by s 52. Once the tempers have cooled a bit and the reconciliation has progressed

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for ten years, then the citizens of Zimbabwe can look again to see whether they still need these protections enshrined.

On the presumption of constitutionality little need to be said as little was said. Counsel for respondent reiterated the theme that s 16(8)(b) calls for a liberal interpretation and that there is no judicial compulsion to adhere to the traditional and highly restrictive concept of the "enemy" established at common law or under statutory provision. And reference was made to the case of *Attorney-General for Canada v Hallet and Carey Ltd* [1952] AC 427 at 450 in which it was held, *inter alia,* that there is no rule of construction that general words in a statute are incapable of interfering with private rights.

It seems to me that cases arising under legislation whose validity is unchallenged can be little or no guidance when the issue before the Court is the constitutionally of the Regulations themselves. Furthermore, the constitutional tradition of countries with Westminister constitutional patterns or backgrounds emanates from the paramouncy of parliament. Parliament can, in a country without a constitution precluding it from doing so, make provision for confiscation, or for the castigation of

KORSAH J

someone, of whom the Minister disapproves, as an enemy of the State. The lawgiver can do so where the lawgiver has free reign. But in Zimbabwe the lawgiver does not have free reign. Here, the rule of law prevails and the rule of law is enshrined in the Constitution.

Counsel for the respondent further contended that because member states like Zimbabwe undertake, by ratifying the United Nations Charter, to renounce the use of war in the solution of their differences, the principles applicable to the declaration and maintenance of war have changed. Undeclared wars have been conducted and in such cases belligerent rights and duties have been asserted, each of the belligerent states treating the other's nationals as its enemies. He gave as examples hostilities in Vietnam, the wars between Israel and her Arab neighbours, and the conflict between India and Pakistan.

He said in other cases the conflict was limited in scope and the parties had expressly disclaimed the existence of a state of war and that this was the case with the Suez intervention in 1956 and the Cuban blockade. In yet other cases, the parties have declared themselves to be acting in self-defence under the United Nations Charter, as was the case with the British action in the Falklands in 1982.

Counsel, therefore, submitted that to confine the term "enemy" to those cases in which there is a declaration of war, or even the conduct of an undeclared war would be impractical and anchronistic; and that the term must be taken to apply to cases in which there is a degree of conflict falling short of declared or undeclared war. He said the statement made by LORD MACNAUGHTEN in *Janson v Driefortein Consolidated Mines* [1902] AC 484 at 497; [1900-3] All ER Rep 426 that

> "The law recognises a state of peace and a state of war but that it knows nothing of an intermediate state which is

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neither the one thing nor the other - neither peace nor war".

requires modifications in the light of contemporary developments.

The Regulations, so the argument went, were made under the Emergency Powers Act [*Chapter 83*] which testifies to the existence of a declared state of public emergency. Section 3 of the Regulations empowers the Minister to make orders for the forfeiture of property if it appears to the Minister that a person is an enemy of the State by reason of the fact that he is or has been acting as the agent of or on behalf of or in the interests of a foreign country or organisation and in a manner prejudicial to public

KORSAH J

safety in Zimbabwe or subversive to the authority of the Government of Zimbabwe.

While there is no armed conflict between Zimbabwe and South Africa, hostile acts have emanated from agencies of the Republic of South Africa designed to destabilise the security and safety of Zimbabwe. This attitude of hostility, so argued counsel, is so grave that a person assisting the South African authorities may properly be described as an enemy if it appears to the Minister that such person is acting as an agent or on behalf of or in the interests of South Africa and in a manner prejudicial to the safety of Zimbabwe.

It seems to me that the problems of the Constitution can best be solved as they emerge by giving effect to the language used. I fear that Courts, by giving hitherto unknown extensions to the meanings of the ordinary words used, would be arrogating to themselves the functions of the legislature and this may endanger the sanctity of the Constitution.

There has been no declaration of war between South Africa and Zimbabwe and, indeed, there are no armed hostilities between the two countries. South Africa itself is not an enemy - see *S v Hartlebury and Another* CRB 16821/83 (Harare) at p 12 where McNALLY J states the proof required by courts that a state is an enemy. The learned judge said:

> "The prosecutor has invited this Court without leading any evidence at all on the subject, to take judicial notice of the fact that South Africa is an enemy. Without clarification, it may seem to persons who are unfamiliar with the law that the court is either so stupid that it does not realise South Africa is an enemy or so perverse that it refused to accept that South Africa is an enemy.
>
> The clear and established legal situation is that the courts acknowledge the superior authority of the executive in this matter and do not take judicial notice of facts which are properly within the sphere of the Executive. It might well embarrass the government of Zimbabwe if a court were to make a finding that one country or another is an enemy. If the prosecutor requires such a finding, the proper procedure is for him to obtain a certificate from the appropriate Minister and place it before the court. Such a certificate will be regarded by the court as conclusive. It is not a matter of evidence. It is not a matter for cross-examination. It is accepted as conclusive".

South African Airways has a booking office in Harare with which one can do business. One can get the phone through the Zimbabwean and South African postal authorities and talk to a person in Johannesburg to transact business or to the South African Trade Commission in Harare without becoming an agent of the enemy. But counsel for the respondent

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KORSAH J

urged the court to accept that by flying a South African spy into Zimbabwe, even though there is no war between the two countries, notwithstanding the absence of a certificate, South Africa and, through it, the first applicant achieved the status of enemies of Zimbabwe.

Even with all the eloquence of counsel for the respondent, I find it difficult to accept that when the craftsman employed the word "enemy" in s 16(8)(b), he had in his contemplation this extended meaning of the term "enemy" - that a person can become an enemy by being the agent of a country which is not an enemy. I must, with all due deference to counsel, reject this extended meaning of the term "enemy" when construing s 16(8)(b) of the Constitution.

In my view the cases of *R v Britten* [1969] 1 WLR 151; [1969] 1 All ER 517 (CA); and *R v Sutch* [1975] 2 NZLR 1, and even *S v Hartlebury supra* are all concerned with information which may be useful to an unspecified enemy. In then the offence is committed if there is the wrongful communication or disclosure of information which may be used against the national or public interest by an enemy as yet unspecified. Section 16(8)(b) contemplates the existence of any enemy who has property in Zimbabwe which for purposes of the security of the State requires administration. The language used in s 16(8)(b) is redolent of that in the Trading with the Enemy legislation and does not encompass a forfeiture order under s 3 of the Regulations.

It seems to me, that the problem resolves itself if it is remembered that a national or public emergency can only have relevance to a citizen of Zimbabwe; for an alien is not primarily concerned with public emergency in another country. So that, when s 16(4) speaks of a period of public emergency, the taking of property thereunder must be understood to refer to the property of citizens of Zimbabwe. And when s 16(8) employs the word "enemy" it must be understood to refer to nationals of a state at war with Zimbabwe and not citizens of Zimbabwe.

I am compelled to conclude that the Regulation cannot be brought within the ambit of s 16(8)(b) of the Constitution and they sin against s 16(4) under which they may have been promulgated.

I now turn to consider whether the Regulations are confiscatory in-

KORSAH J

tent. The Regulations were made pursuant to the Emergency Powers Act [*Chapter 83*]. They were christened the "Emergency Powers (Forfeiture of Enemy Property) Regulations" and counsel for the applicants seized upon this title and said they announce themselves to the world as regulations designed for the forfeiture of enemy property.

A "forfeiture order" is defined in s 2 as an order made in terms of s 3. And s 3 recites that

> "If it appears to the Minister that any person is an enemy of the State by reason of the fact that he is or has been acting -
>
> (a) as the agent of, or in the interest of any foreign country or foreign organisation; and

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(b) in a manner which is prejudicial to the public safety of Zimbabwe, or which is subversive to the authority of the lawfully established Government of Zimbabwe;

and that it is necessary or expedient in the interests of the public safety of Zimbabwe to do so, he may by order in the Gazette and whether or not the person concerned is in or outside Zimbabwe, declare that the property of the person concerned shall be forfeited in terms of these Regulations".

Section 3(2) provides for service of the forfeiture order on the affected person if his whereabouts in Zimbabwe are known. Section 4, read with s 5, provide for the vesting of forfeited property in the custodian of enemy property and the manner of disposal of such property by the custodian, ultimately, under s 5(d), by transferring the remainder of the property to the State.

The first canon of construction in the interpretation of statutes is that one must assume that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and if they have not, then in their ordinary meaning. And there should be no departure from the ordinary meaning of the words used where the language under consideration is susceptible of another meaning, unless adequate grounds are found either in the history or cause of the enactment or in the context or in the consequences which would result in the literal interpretation for concluding that that interpretation does not accord with the real intention of the legislature.

AS LORD HALSBURY said in *Leader v Duffey* (1888) 13 AC 294 at 301:

"All these refinements and nice destinations of words appear to me to be inconsistent with the modern view - which is I think in accordance with reason and common sense - that, whatever the instrument, it must receive a construction according to the plain meaning of the words and sentences therein contained. But I agree that you must look at the whole instrument, and, inasmuch as there may be inaccuracy and inconsis-

KORSAH J

tency, you must, if you can, ascertain what is the meaning of the instrument taken as a whole in order to give effect, if it be possible to do so, to the intention of the framer of it. But it appears to me to be arguing in a vicious circle to begin by assuming an intention apart from the language of the instrument itself and having made that fallacious assumption to bend the language in favour of the assumption so made".

"Forfeiture" and "forfeit" are the express words used in the Regulations. "Forfeiture", according to Wharton's *Law Lexicon*, means "a penalty for an offence or unlawful act, or for some wilful omission of a tenant of property whereby he loses it, together with his title which devolves upon others." In Stroud's *Judicial Dictionary* 4 ed Vol 2 at pp 1080 - 1082, para (2), "forfeiture" means "the loss of all interest" in the property spoken of. And in paragraph (11) it says:

"When a statute provides punishment by 'forfeiture' that means forfeiture to the Crown [in this case to the State]; except when it is imposed for wrongful detention or dispossession, in which case the property goes to the benefit of the party wronged".

All the judicial *dicta* on the meaning of the word "forfeiture" indicate a loss of all interest in the property forfeited. The Shorter Oxford English Dictionary at p 736 also defines forfeiture as "the fact of losing or becoming liable to lose" - for example - "(an estate, goods, life, an office, right,

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etc) in consequence of a crime, offence or breach of engagement".

Interpreting the word "forfeiture" contextually, one immediately observes that the forfeiture is applied to enemy property; so that what is to be lost is to be lost because it is enemy property. And one sees in s 3(1) of the Regulations that the forfeiture is justified by certain blameworthy findings with regard to the owner thereof. So that in its initiation it is a consequence of blameworthy conduct - a punishment for a transgression.

By s 4 of the Regulations the property of the enemy of State vests in the custodian of enemy property who is bound by the regulations to dispose of it in terms of s 5. The custodian of enemy property has no discretion in the matter because "no alienation or disposal of enemy property referred to in paragraph (a) shall take place except in terms of these Regulations". So that the hand of the State is laid on the property for the purpose of disposal, and that disposal is in the nature of a winding up.

Under s 5 which is headed: "Disposal of forfeited property", the costs of liquidation get paid first, for the section provides that the custodian may dispose of the property in the following order:

> "(a) in satisfaction of such costs and expenses to which he may be put in connection with the administration of such property in terms of these regulations;"

KORSAH J

outside creditors get paid second under s 5(b):

> "(b) in satisfaction of any debt or liability, of the person who is the subject of the forfeiture order, which may be established to his (the custodian's) satisfaction;"

maintenance of dependents stand third in the queue:

> "(c) in paying such stuns as he may deem fit in respect of the maintenance of the wife or any other dependent of that person who is the subject of the forfeiture order; and
>
> (d) in transferring the remainder of such property to the State".

Thus, after transferring what is left over to the State the liquidator's task is accomplished - he becomes *functus officio* - because the word "transfer" implies a passing of *dominium*.

One looks at the provisions of the Regulations for some indication that upon the effluxion of time, or the cessation of the emergency, or conceivably a change of heart on the part of this villain, the enemy, for a reversion - a restoration - of his property; and all one finds is a provision in s 12 for revesting upon a revocation of the forfeiture order, subject to a proviso that the validity of anything done by the custodian prior to revocation is not effected by such revocation. So that if the custodian of enemy property has parted with *dominium* that is the end of the matter.

Counsel for the applicants, therefore, submitted that both in its implementation and in its consequences a "forfeiture order" is confiscatory. And as further proof of the expropriatory nature of the Regulations, Mr *Kriegler* submitted that under s 4(2) provision is made for an

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avoiding certificate. The section recites that:

> "Where it appears to the Minister that any transaction relating to any property, whether made before, on or after the date of a forfeiture order, has been made with the intention of avoiding the forfeiture of the property concerned, the Minister may issue a certificate that such transaction is void, and with effect from the date thereof such transaction shall accordingly be void and of no force and effect, and anything purported to have been done in terms of the transaction may be set aside or reclaimed, as the case may be".

Mr *Kriegler* asked: "If the property was not in the possession of the enemy, nor under his control, why must the property be disgorged by third parties to the custodian?" And more importantly: "Why must a third party who has become owner of such affected property deliver it up to the custodian unless the Regulations intend the property of the enemy to be forfeited to the State?" He submitted that if it were not for the the purpose of con-

KORSAH J

fiscating the enemy's property collusion itself would be irrelevant because upon disposal the property is no longer the enemy's.

Counsel contended that this situation is analogous to insolvency, where the insolvent has disposed of his assets to the disadvantage of the general body of creditors and the transactions are investigated and an order is made setting aside the transactions, and calling in such assets to be utilised for the whole body of creditors. Section 4(2), therefore, smacks of, not custodianship or protection, but sequestration.

The effect of a certificate on a third party is that his property vests in the custodian, who uses it in the payment of administration costs, creditors and dependents and then transfers the remainder to the State.

By s 8 of the Regulations he may lodge an objection to the issue of a certificate with a Tribunal who may make recommendations to the Minister for the revocation of the forfeiture order. If such recommendation proves unacceptable to the Minister, he must refer the matter together with the report of the Tribunal to the President, whose word shall be final.

This provision, no doubt, was introduced to provide any person affected by a forfeiture order or certificate an opportunity of contesting the issue. But to an aggrieved person it only brings cold comfort if the 'nth' result is going to be the confiscation of his property. It is like asking a fish whether it wants to be fried in margarine or butter - it is going to be fried anyway. Whether the decision not to revoke emanates from the recommendation of the Tribunal or the direction of the President the effect appears to me to be the same - a forfeiture of property.

The argument by learned counsel for the respondent that the purpose of the Regulations is to replicate in times of national emergency what is done under Trading with the Enemy Act in times of a declared war, does not appear to me to take into account the general tenor of those Acts. I shall return to this theme later.

Counsel for the respondent contended that insofar as the Regulations have both a limited life

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and a limited purpose they cannot be confiscatory in purpose.

True, once the state of emergency ends and s68(1) is no longer in force

KORSAH J

to breathe life into the Emergency Powers Act, the Regulations fall away and are no longer effective. But what happens if, before the end of the emergency, the custodian of enemy property has completed his administration and transferred the remainder of the property over which the power of revocation may be exercised? More importantly, when the period of emergency ends and the Regulations fall away, as suggested, by what authority will the Minister revoke a forfeiture order?

It may have been the intention of the craftsman to produce Regulations which can only be for the duration of an emergency in order to serve the needs of the State in protecting public interest for that duration, but what he wrought appears to me to go beyond mere protection and administration of enemy property such as is encountered in Trading with the Enemy Legislation.

McNair and Watts on the *Legal Effects of War* give an idea of the purport and content of this type of legislation. Reading from p 332 they say:

> "... the wealth of the belligerent State which it may use in furtherance of its war effort comprises not only property and assets within its own territory but also the property and assets abroad of its nationals, since these too might be used, for example, to pay for purchases of war material from neutral countries or for financing propaganda or subversive activities. In modern conditions of war, it is imperative to deny to the enemy the possibility of any such benefit. The result has been the development of a practice recognised as valid in international law whereby private enemy property, while not being seized and the enemy owner deprived of title, is placed under the administrative control of the State so as to prevent its use for the benefit of the enemy."

Reading then from the last paragraph on p 333:

> "The effect of vesting enemy property in the Custodian is to deprive the enemy of all control over and beneficial interest in his property. But the Custodian only acquires certain limited powers in respect of the property, and does not have the beneficial interest vested in him (or in the Crown): consequently the property is in the anomalous situation of being without a beneficial owner.
>
> However, on a transfer of property by the Custodian, the beneficial interest once again attaches to it, in the interest of the transferee. The Custodian is not the agent or trustee of the enemy owner.
>
> ...the property held by him as a Crown servant is not Crown property and income accruing to him upon it is not Crown income".

It would appear that the vesting of enemy property in the Custodian, in Trading with the Enemy legislation, is primarily a matter of ensuring its conservation rather than its confiscation. What is more, the property vests in the Custodian not as a punishment for anything done by its owner

KORSAH J

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but purely as a precautionary measure.

In the Regulations under consideration the vesting of the property in the custodian is as a result of something done which is frowned upon by the Minister. In other words, it is a punitive act. And even learned counsel for the respondent had to concede that the Regulations, to the extent that the custodian of enemy property had very limited discretion in preventing money getting into the hands of third parties and preserving the property, were confiscatory.

I agree with learned counsel for the applicants that "in its terminology, in its expressed purpose, in its execution, in its consequences, and in its irreversibility of forfeiture order is confiscatory and a certificate even more clearly so". In my judgment, then, the Regulations are confiscatory and, inasmuch as they offend s 16(4) of the Constitution, are unconstitutional.

My attention has been drawn to the severability of the provisions in these regulations under s 14, which reads:

> "Every provision of these regulations shall be construed as being severable from the rest of these regulations and every part of a provision of these regulations shall be construed as being severable from the rest of such provisions."

There are obviously some statutes which lend themselves to such severability of their provisions. For example, if a provision were to be introduced into the Criminal Procedure and Evidence Act that a person indicted for a certain crime shall not be heard before conviction and sentence, that provision would clearly offend the provision for due process of law under s 18 of the Constitution. And, as such a provision stands alone, it alone may be declared unconstitutional.

Looking at the Regulations, the provisions are linked up like the segments of a chain; so that if one severs s 3(1) subs (2) becomes means ingress as, indeed, would be the rest of the provisions. And if one mean s 4(1) then a forfeiture order has no effect. If s 4(2) is severed, the provisions of the Regulations do not become the less confiscatory in relation to the owner of property. Even if s 5(d) were severed, in relation to a citizen of Zimbabwe, the Regulations would still offend s 16(4) of the Constitution. Perhaps the only provision that can be severed without rendering the regulations meaningless is the very section providing for severability, but then upon what ground does one do so?

In my view, where the provisions of a statute are so interdependent that

all the parts must be read together to give meaning and purpose to the enactment, the statute does not lend itself to severability of its provisions. And in any event, having come to the conclusion that the Regulations cannot be brought within the ambit of s 16(8)(b) of the Constitution, and that insofar as they sin against s 16(4) they are confiscatory, for the court to interfere with the Regulations would be to usurp the sacred function of Parliament, which is to make laws, I confess myself unable to comply with s 14 of the Regulations.

In the circumstances, I make an order in terms of paragraphs 1, 2, 3 and 4 of the draft order

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filed on behalf of the applicants.

[*The Minister appealed and on the 28 December 1983 the Supreme Court handed down the following judgment.*]

Georges CJ: The appellant in this matter appeals against the judgment of KORSAH J on the basis that the learned judge erred in holding that a forfeiture order made pursuant to the Emergency Powers (Forfeiture of Enemy Property) Regulations 1981 as amended on 6 May 1983 (referred to as "the Regulations") was invalid and of no force and effect on the ground that the Regulations were not authorised by s 16(b) of the Constitution.

In the notice of motion from which this appeal arises the respondents had asked for orders -

(1) that the Regulations be declared invalid;

(2) that the order issued under the aforesaid Regulations in respect of Colin Bickle be declared invalid;

(3) that the certificate issued under the aforesaid Regulations on 17 May 1983 in respect of the Deed of Donation executed by Colin Bickle be declared invalid; and

(4) that the Minister pay the costs of the proceedings.

The learned judge *a quo* granted relief in terms of the orders sought.

The respondents in the Court *a quo* had contended that not only were the Regulations and the forfeiture order made under them invalid by reason of their infringement of s 16(8)(b) of the Constitution, but that even if they were valid, they were *ultra vires* of the Emergency Powers Act under which they were made and even if they were *intra vires* that Act, the Minister had not properly addressed his mind to the issues to be considered in making the forfeiture order and issuing the certificate and had indeed acted *mala fide.*

GEORGES CJ

In his judgment KORSAH J stated that he had been asked to rule specifically on the constitutionality of the Regulations and the orders made thereunder, irrespective of his view of the reviewability of the Minister's decision to make the order and issue the certificate. As result KORSAH J considered the issue of constitutionality and, having found for the respondents on that ground, quite understandably did not go on to consider the other issues.

Mr *Blom-Cooper* at first suggested that if he succeeded on the issue of constitutionality he would wish the matter remitted to KORSAH J for a ruling on the issue of reviewability before the matter again returned to this Court for argument. In the result it was agreed that this course would not be followed, that Mr *Kriegler* would argue both constitutionality and reviewability and that if this Court was against him on constitutionality a date would be fixed for a further hearing to allow Mr *Blom-Cooper* to argue reviewability and a single judgment would be written dealing with all issues.

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It is, of course, unlikely that the peculiar circumstances of this case will again recur; but should they recur it appears to me correct that the trial judge should not, despite the wish of the parties, deal solely with the constitutional issue. Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the Declaration of Rights. See the remarks of BARON JA in *Mandirwhe v Minister of State* 1981 (1) SA 759 (ZAD) at 764H. It follows that the learned judge *a quo* should have proceeded to consider whether the issues of *vires* and reviewability afforded the respondents the redress they were seeking. And in the event of his finding upon either issue in the respondent's favour, he should have left unanswered the constitutional question.

As it transpires we are of the same opinion as was KORSAH J on the issue of constitutionality so the problems which could have arisen in this Court deciding the other issues without the benefit of the view of the Court *a quo* have not in fact arisen.

The basic facts of the case for the purposes of discussing the constitutionality of the Regulations are not in dispute.

The first respondent, Colin Bickle, is a citizen of Zimbabwe by birth

but now resides in South Africa. Prior to 29 April 1982 when by a deed of donation he divided his assets among his children he owned considerable property in Zimbabwe. The plan for such a division had been made in 1979 when a company, Bickle Investments (Private) Limited, had been formed in part to facilitate this division. The second, third and fourth respondents are the first respondent's children who received the donations. The fifth respondent is his mother, a widow.

Although the facts make interesting and instructive reading it is not necessary to set them out since the only issue to be considered in this judgment is that of the constitutional validity of the Regulations.

On 28 November 1981 the first respondent flew his light aircraft from Bulawayo airport to a landing step in South Africa near to the border with Zimbabwe and from that strip back to Zimbabwe, landing at an airstrip on his farm. The flight to South Africa was for the purpose of illegally taking there certain firearms, the property of a friend, MacFarlane. On the return trip he brought into Zimbabwe two men, one of whom had been trained by the South African authorities in Namibia for the purpose of detecting African National Congress bases in Zimbabwe and Namibia and was returning to Zimbabwe on leave. He also brought back into Zimbabwe 12 bottles of whisky.

Subsequently on 12 December he permitted MacFarlane to fly from his airstrip to South Africa.

These activities resulted in his being prosecuted in the magistrate's court on seven charges. Four were charges against the Immigration Act for departing from Zimbabwe from a place which

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was not a port of exit, for conveying MacFarlane out of Zimbabwe from a place which was not a port of exit, for bringing the two men into Zimbabwe and landing them in a place which was not a point of entry and for assisting MacFarlane in leaving Zimbabwe from a place which was not a port of exit. Two charges were against the Customs and Excise Act in relation to the exportation of the firearms and the importation of the whisky. The seventh alleged a contravention of the Official Secrets Act, in that being aware that he had brought two persons into Zimbabwe who were either foreign agents or in communication with foreign agents he had failed to report their presence to the police.

An agreed statement of facts was tendered at the trial setting out the details. This statement conceded that the first respondent had been trick-

GEORGES CJ

ed into bringing the two men into Zimbabwe and that he had no actual knowledge that one of these men had been trained by the South African authorities for the purpose of detecting ANC camps in Zimbabwe and Namibia and was returning on rest and recreation.

On 27 May 1982 the first respondent pleaded guilty on counts 1 - 6 and was fined $3 000 or, in default of payment, 120 days' imprisonment. He pleaded not guilty to the seventh count, the sole issue being whether he had constructive knowledge. He was found not guilty.

He had been in custody from February 1982 in connection with the investigation of his activities and he alleged that he had been held incommunicado for 54 days and then brought to court and remanded in normal custody. He also alleged that the ordeal left him mentally and physically exhausted so he decided to go abroad for a holiday after his release on 27 May. He left Zimbabwe for South Africa on 10 June.

As has been mentioned, the donations to his children were made on 29 April when he was in custody on the charges. He contemplated then the possibility of an extended period of custody which would necessitate the proper ordering of his affairs.

He left Zimbabwe openly, travelling by air from Harare airport, but there is no doubt that he feared that he might have been detained as he had reason to believe that the appellant was dissatisfied with the verdict of acquittal on the seventh charge.

On 15 October 1982 the appellant published in the *Gazette* the order under the Regulations declaring the first respondent's property forfeited. By notice of motion filed for hearing at the High Court, Bulawayo on 18 February 1983 the first respondent challenged the validity of that order. The appellant took the preliminary point that the first respondent could not be heard on his motion because he was a fugitive from justice. This argument was rejected by GUBBAY J (as he then was) and his judgment was affirmed on appeal to this Court. *(4) At the continued hearing before GUBBAY J, as appears in the judgment of KORSAH J, the appellant's counsel informed the Court *inter alia* -

(a) that the appellant accepted that the first order was invalid for technical-legal reasons;

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(b) that the appellant had revoked that order;

(c) that the revocation would be gazetted in the next copy of the

GEORGES CJ

Zimbabwean Government *Gazette;* and

(d) that all of the first respondent's property would be restored to him with immediate effect.

No publication of the revocation in fact appeared in the *Gazette* and the first respondent's property was not restored to him.

Statutory Instrument No 239 of 1983, the Emergency Powers (Forfeiture of Enemy Property) (Amendment) Regulations 1983 (No 1), made certain amendments to the 1981 Regulations. By a notice published in the Zimbabwean Government *Gazette* the appellant ordered the confiscation of the first respondent's property save for a piece of land known as 10 Hussar Road, Kumalo, Bulawayo. The power to exempt land from an order had been conferred by the 1983 amendment. By a letter dated 19 May 1983 the Secretary in the Ministry of Home Affairs informed the first respondent's legal practitioners that the appellant had issued a certificate in effect voiding the transactions of donation dated 29 April 1982.

The first respondent again attacked the validity of the order and the certificate and succeeded before KORSAH J on the basis that the Regulations were an infringement of the Constitution.

Without for the moment examining in detail the language of the Regulations it is appropriate to outline the scheme which it devises.

Section 2 is the interpretation section and does no more than define certain words and phrases in terms of their operation in the scheme. Section 3 reads:

> "(1) If it appears to the Minister that any person is an enemy of the State by reason of the fact that he is, or has been, acting -
>
> (a) as the agent of, or on behalf of, or in the interests of any foreign country or foreign organisation; and
>
> (b) in a manner which is prejudicial to the public safety of Zimbabwe or which is subversive to the authority of the lawfully established Government of Zimbabwe;
>
> and that it is necessary or expedient in the interests of the public safety of Zimbabwe to do so, he may, by order in the *Gazette*, and whether or not the person concerned is in or outside Zimbabwe, declare that the property of the person concerned shall be forfeited in terms of these regulations.
>
> (2) A forfeiture order shall, if the whereabouts in Zimbabwe of the person concerned are known, be served on the person who is the subject of the forfeiture order."

Sections 4(1), (1a), (1b) and (1c) provide that, subject to the Regulations, where a forfeiture order has been made all the property of the person concerned and all the property to which he may become entitled thereafter shall be in the custodian of enemy property. The forfeiture order

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GEORGES CJ

shall not extend to land unless expressly so ordered and the Minister is empowered, where he is of the opinion that it would not be inconsistent with the public safety of Zimbabwe, to exempt from forfeiture any part of the property. An exemption can be granted either when the forfeiture is made or at any time thereafter subject to conditions and may be revoked at any time.

No alienation of forfeited property can take place except in terms of the Regulations and no proceedings to enforce any claim against any such property shall be commenced or continued except in terms of the Regulations.

Section 4(2) empowers the Minister to issue a certificate stating that any transaction relating to property whether made before, on or after the date the forfeiture order is void if it appears to him that the transaction was made with the intention of avoiding the forfeiture of the said property. As far as practicable the Minister shall cause notice of the making of a certificate to be given to any person affected thereby.

Section 5 provides for the disposal of forfeited property. It reads:

> "The custodian of enemy property in whom any property referred to in paragraph (a) of subsection (1) of section 4 has been vested, may dispose of such property in the following order -
>
> (a) in satisfaction of such costs and expenses to which he may be put in connection with the administration of such property in terms of these regulations;
>
> (b) in the satisfaction of any debt or liability, of the person who is the subject of the forfeiture order, which may be established to his satisfaction;
>
> (c) in paying such sums as he may deem fit in respect of the maintenance of the wife or any other dependent of the person who is the subject of the forfeiture order;
>
> (d) in transferring the remainder of such property to the State."

Section 6 empowers the Public Service Commission to appoint an officer of the Public Service as a custodian of enemy property and other necessary supporting staff. No proceedings shall lie or be instituted against the custodian of enemy property or any officer appointed to assist him in carrying out his functions and duties in terms of the Regulations.

Section 7 empowers the Minister to give directions. It reads:

> "The Minister may give directions to the custodian of enemy property relating to -
>
> (a) the manner in which, and extent to which, he may dispose of enemy property vested in him in accordance with the provisions of paragraphs (b) and (c) of section 5;

GEORGES CJ

> (b) the order or priority of payment of debts and liabilities which are to be paid in terms of paragraph (b) or (c) of section 5;

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(c) the keeping of books and accounts, relating to property which has been vested in the custodian of enemy property;

(d) such other matters as the Minister considers necessary or desirable for giving effect to the purposes of these regulations."

Section 8 makes provision for any person aggrieved by a forfeiture order or a certificate to lodge objection thereto within 30 days to a Tribunal established by s 11, and consisting of three persons appointed by the President, one of whom must be a person who is either a judge of the High Court or Supreme Court of Zimbabwe or who has had a judge of either of these Courts or is qualified for such an appointment. The Tribunal may for good cause shown extend the period of 30 days. On receiving the objection the Tribunal must set the matter down for hearing within 14 days of the lodging of the objection and inform the Minister of the date and place of the hearing.

The Tribunal cannot consider an objection unless the objector is present in Zimbabwe on the date set down for the hearing of the objection and attend the hearing, provided that, if the person concerned is a fugitive from justice, the Tribunal may, where it considers it in the interests of justice so to do, grant an exemption from the requirement of presence and attendance.

Section 9 empowers the Tribunal to consider the objection and the representations of the Minister and then report to the Minister within 14 days of the conclusion of the hearing of the objection. The report must contain a recommendation as to whether or not the forfeiture order should be revoked and must be signed by every member. A member may dissent, stating his reasons.

Section 10 provides that the Minister shall forthwith revoke the forfeiture order if the Tribunal so recommends unless he considers that, in the interests of preserving public safety in Zimbabwe, effect should not be given to such a revocation. In such a case he must refer the matter to the President. The President, after considering the matter, shall direct the Minister whether or not to revoke the order and the Minister shall act on such recommendation. Where the President has directed the Minister not to revoke the order the Minister must cause to be published in the Gazette a notice that the President has so directed.

Section 12 provides that where a forfeiture order has been revoked, the

property of the person concerned shall be revested in him with immediate effect and the custodian of enemy property shall take such steps as may be necessary to restore the property to him. There is a proviso which reads:

"Provided that nothing in this section contained shall be construed as affecting the validity of anything done by the custodian of enemy property relating to the property concerned prior to the revocation of the forfeiture order concerned."

Section 13 confers on the Minister power to vary or revolve a forfeiture order or certificate.

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Section 14 states that each provision of the Regulations shall be construed as severable from the rest of the Regulations and each provision from every other provision.

The respondent's contention is that these Regulations contravene the Declaration of Rights in Chapter III of the Constitution and in particular s 16 which protects the individual against the compulsory acquisition of his property save in circumstances which very plainly do not exist in this case.

The appellant's contention is that the Regulations fall within the exceptions provided for in s 16(8)(b) of the Constitution.

Section 16(8) provides:

> "Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision for the acquisition of any property or any interest or right therein in any of the following cases -
>
> (a) for the purpose of the administration, care or custody of any property of a deceased person or a person who is unable, by reason of any incapacity, to administer it himself, on behalf and for the benefit of the person entitled to the beneficial interest therein;
>
> (b) any way of the vesting or administration of any property belonging to or used by or on behalf of an enemy or organization which is, in the interests of defence, public safety or public order, proscribed or declared by a written law to be an unlawful organisation;
>
> (c) any way of the administration of moneys payable or owing to a person outside Zimbabwe or to the government of some other country where restrictions have been placed by law on the transfer of such moneys outside Zimbabwe;".

Subsections (d) and (e) are not cited in full. They deal with things done under the authority of a law providing for the acquisition of property or of any right or interest therein as an incident of a composition in insolvency where certain conditions are fulfilled or as an incident of a deed of assignment entered into by a debtor with his creditor or by way

of acquisition of the shares or class of shares in a body corporate on terms agreed to by the holders of not less than nine-tenths in value of those shares or the class thereof.

Although only part of s 16(8)(b) is directly of relevance in this appeal it seems to me useful to set out the section as a whole in order to appreciate the context in which the relevant portion has been placed.

Subsections (d) and (e) deal with routine commercial situations in which the State is in no way involved save to facilitate the operation of business affairs. Subsections (a) and (c) deal with situations in which a person entitled to the beneficial interest in property is unable to deal with it or manage it and provisions need to be made for administration of the property.

Subsection (b) deals with property belonging to an organisation which has been proscribed and also is unable to deal with property which is held in its name and with property belonging to or

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used by or on behalf of an enemy. It is interesting to note that the Unlawful Organizations Act [*Chapter 91*] makes provision for dealing with the property of such organisations. In effect a liquidator is appointed who can be paid a fee and who proceeds to wind up the organisation. If surplus assets are left after all liabilities are met s 8(6) provides that:

> "... the liquidator shall prepare and submit to the President a scheme for the application of such surplus assets, which scheme may provide for the forfeiture to the State of any weapons, arms or ammunition, articles of uniform or clothing, documents or other property whatever."

Again within the pattern of the section the unlawful organisation is an entity unable to manage its affairs and provisions for the administration of its property need to be made. Subsections (a), (b) and (c) would therefore all seem to deal with the administration of the estate of legal entities which for one reason or another are under an incapacity and are unable to manage their own affairs.

A reading of s 16(8) also leads me to the conclusion that it was drafted to safeguard specific areas of law of which the craftsman was aware and which he thought might conceivably (though no doubt wrongly) be thought to be infringements of the Constitution. Thus s 16(8)(e) relates directly to s 170 of the Companies Act [*Chapter 190*]; s 16(8)(d) relates to Parts

GEORGES CJ

VI and VII of the Insolvency Act [*Chapter 303*]; s 16(8)(a) relates to the whole of the Administration of Estates Act and Part VIII of the Mental Health Act 23 of 1976; and s 16(8)(c) relates to s 25 of the Exchange Control Regulations 1977 RGN 399 of 1977. In relation to s 16(8)(b) I have already referred to the Unlawful Organizations Act [*Chapter 91*]. The indications therefore seem to me compelling that the craftsman had in mind, when referring to the vesting of property belonging to or used by or on behalf of an enemy, the Trading with the Enemy Act No 17 of 1939. There is no doubt that "enemy" as used in that Act is an enemy when there is a state of war.

The word "enemy" is not defined in s 113 - the interpretation section of the Constitution. The meaning must therefore be determined by having regard to the canons of interpretation adopted by this Court for the interpretation of the Constitution.

In this connection the words of LORD WRIGHT in *James v Commonwealth of Australia* [1936] AC 578 at 613 are instructive:

> "The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another."

At p 614 LORD WRIGHT continues:

> "It is true that a Constitution must not be construed in any narrow and pedantic sense. The words used are necessarily general, and their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge. It is not that the meaning of the words changes, but the changing circumstances illustrate and illuminate the full import of that meaning. It has been said that 'in interpreting a constituent or organic statute such as the Act [*ie,* the British North America Act],

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that construction most beneficial to the widest possible amplitude of its powers must be adopted': *British Coal Corporation v The King* [1935] AC 500, 518. But that principle may not be helpful, here the section is, as s 92 may seem to be, a constitutional guarantee of rights. . . The true test must, as always, be the actual language used."

The Constitution of Zimbabwe is, of course, in its infancy. The changes since its adoption have not been dramatic. As the framers carried on their tasks of preparing the Constitution the country for which it was intended was under a state of emergency and the participants would, most of them, have been familiar with the dangers and the advantages of states of emergency.

The attitude is well illustrated in s 16(4) of the Constitution. Powers

KORSAH J

are there given authorizing the compulsory taking into possession of property during "a period of public emergency or in the event of any other emergency or disaster that threatens the life or well being of the community". The situations there contemplated can accurately be described as desperate situations. Nevertheless the following requirements are specified -

(a) prompt giving of reasonable notice of the taking of possession of the property to the owner or person possessing the property;

(b) provision for notice of objection by that person;

(c) application to the High Court or other named court within 30 days of such notice for determination of the entitlement to take possession; and

(d) empowering the court seized of the matter to order the return of the property unless satisfied that the taking of possession was reasonably justifiable.

The property must be promptly returned when possession is no longer justifiable in the condition in which it was when taken and there must be prompt payment of compensation for the taking of possession and for damage suffered.

The restrictions may accurately be described as stringent when regard is had to the fact that the power is to be used in circumstances where the life or well being of the community is under threat. It can reasonably be deduced that for the period during which the right enshrined in s 16 remains immutable the language discloses an intention to give ample protection to the right to property.

Arguments have been addressed to us at some length on the presumption of constitutionality. They were in effect the same arguments advanced in *Zimbabwe Township Developers v Lou's Shoes* Supreme Court Judgment No 145/83.*(5) They were considered in that case and I adhere to the position there adopted. Without citation of authorities I need do no more than restate that the concept cannot be used to justify placing on the Constitution a meaning which it cannot legitimately bear in order to accommodate legislation made purportedly in the exercise of powers conferred by the Constitution. The task of the Court must be to interpret the Constitution, applying the normal canons, then to interpret the challenged legislation and then decide whether a meaning can fairly be placed on that legislation which enables it to fit within

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the already determined constitutional framework.

It was also urged that these Regulations in the normal course of things

GEORGES CJ

would have been considered by the Senate Legal Committee constituted under s 37 of the Constitution. No adverse report was filed alleging any contravention of the Declaration of Rights. The inference from this, it is suggested, is that the Senate Legal Committee considered the Regulations to be constitutional - an opinion which would strengthen the presumption of constitutionality. I can say no more in dealing with this argument than that the Senate Legal Committee has its functions under the Constitution and this Court has its functions. In the final analysis the protection afforded by the Declaration of Rights can only hinge on the decisions of this Court. Whereas it may not be the only protective institution under the Constitution it is the ultimate protector. Where as here, it has had the benefit of detailed and well researched arguments it is certainly much better fitted to decide issues of constitutionality than should be any other body.

Against that background a meaning must be given to the word "enemy". Although the word is not defined its meaning does not appear to me to be in doubt on all the authorities to which we have been referred. Indeed, perhaps because of that, the need for definition did not arise. The word can only be used in situations where there is a state of war or armed conflict which makes plain that although war has not been formally declared a state of war in fact exists.

The word is given its most extended meaning, it appears to me, in legislation dealing with official secrets but even then the concept of a state of war is needed. In *R v Parrott* (1913) 8 Cr App R 186 at 192 the court stated:

> "When the statute uses the word 'enemy' it does not mean necessarily some one with whom this country is at war, but a potential enemy with whom we might some day be at war."

In *H M Secretary of State for War v Midland Great Western Railway Company of Ireland* [1923] 2 IR 102 the issue was whether the defendants as common carriers were liable for the loss of a typewriter consigned to them for delivery and lost when a band of armed men raided the defendant's station at Sligo. DODD J stated at 103:

> "But by 'enemies' is not to be understood thieves and robbers, who are merely private depredators, however much they may in a sense be at war with society, and so rioters and insurgents are not considered public enemies in the sense of the law upon this subject. I adopt Angell's views upon this...
>
> But there must be war. Enemies to the King's peace are not enemies to the King's Government. Local outbursts do not amount to rebellion. The act of rebelling is 'open renunciation of the authority of the government to which one owes obedience, and

GEORGES CJ

> resistance to its officers and laws, either by levying war or aiding others to do so': Webster.

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> The term 'rebellion' is applied to an insurrection of 'large extent, and is usually a war between the legitimate government of a country and portions or provinces of some who seek to throw off their allegiance to it'."

Ne'ima Nasser Hakim v Minister of Interior (1952)19 ILR 587 raised the issue as to whether a citizen of a country could yet be an "enemy". The Israeli Court ruled that such a person could be an enemy. KHESIN J stated:

> "Therefore it is possible that because of his place of residence a citizen of country 'A' is considered technically an enemy of that same country 'A'. LORD READING in the landmark case of *Porter v Freudenberg* [1915] 1KB 857 said, 'A British subject or a citizen of a neutral country who lives of his own free will or who does business or the land of the enemy is considered as a foreign enemy...' ".

Again in that case the status of enemy attached to a person only because of connection with an enemy state. The judge held that Lebanon was an enemy of Israel because she had "behaved toward Israel in the manner of an enemy and conspired with other enemy countries to wipe her out for good". Mr *Blom-Cooper* seemed at first inclined to draw some analogy between the relationship between Lebanon and Israel and that between South Africa and Zimbabwe but he did not when pressed persist in that contention. As the judge in the Court *a quo* pointed out, air traffic flows freely between the two countries. It may be added that Regulations dealing with a trade agreement between the two countries have been published in the Zimbabwe Government *Gazette* as Statutory Instrument 753 of 1982.

None of the cases cited by Mr *Blom-Cooper* casts any doubt on the general proposition that in public international law the term "enemy" can only have meaning in the context of a declared state of war or of armed conflict of a character which can be categorised as a state of war. The enemy must be another State and individuals acquire enemy status by reason of association with that State.

Mr *Blom-Cooper* sought to equate a state of war and a period when a declaration under s 68(1) is in force, the common thread being that they both fall under the definition of a period of public emergency in s 163. On that basis he contends that the term "enemy" should be extended to mean a person who assists or takes any action on behalf of a foreign government which is acting in a way which is hostile to Zimbabwe in a situation where there is a declared state of emergency under s 68 and that state of emergency arises in respect of hostile acts emanating from that State.

GEORGES CJ

While a state of war and declaration under s 68 both bring into effect a period of public emergency I do not think that the two can be equated. A declaration under s 68 can be made because of the consequences of flood, earthquake or other natural disaster. No other State need be involved and consequently no status of enemy can arise.

What seems to me to be the difficulty in Mr *Blom-Cooper's* approach is the attempt to define enemy in s 16(8) without starting from the base of the existence of an enemy State. It one seeks to deduce from his definition of an enemy what would constitute an enemy State it would appear to be a State which is acting in a way which is hostile towards Zimbabwe in a situation where there is a declared state of emergency under s 68 and that state of emergency arises at

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least in part in respect of hostile acts emanating from that State.

As I have indicated, s 16(8) does not deal in any way with periods of public emergency. In as far a reference is made in s 16(8)(b) to "defences public safety or public order" it is merely to define the category of proscribed organisations whose property can be vested by way of administration. I can see no reason for imparting into the definition of "enemy" matters relating to periods of public emergency other than states of war.

Mr *Blom-Cooper* urged that once the concept of state of war was extended to cover states of armed conflict amounting to war it became uncertain and the courts would have difficulty in determining whether any particular set of facts could be said to be a state of armed conflict amounting to war. Courts do have experience in resolving difficult issues of fact. Indeed it is their function. The Court did determine that the state of affairs in Ireland in *H M Secretary of State for War v Midland Great Western Railway, supra*, did exceed mere internal conflict and could be called armed conflict amounting to war. Where the situation is delicate and the Courts sense that a ruling may embarrass the Government in its conduct of foreign relations the Court can ask the proper authorities in the Government to certify whether a state of armed conflict exists between Zimbabwe and any other country. This ensures that the Court will not speak in a voice different from that of the appropriate Governmental authorities.

Mr *Blom-Cooper* complained that the effect of adopting the usual meaning of the word "enemy" instead of the extended meaning for which he contended would be that the protection afforded to property in Zimbabwe would be greater than that afforded it in States who adhere to the European Convention on Human Rights. The argument is that derogation is

allowed in respect of property rights under the Convention where there is a state of emergency whereas no derogation is allowed in the Zimbabwe Constitution. It may be true that no general right of derogation is allowed but a specific right with safeguards is allowed under s 16(4).

It should also be noted that a State which adheres to to European Convention on Human Rights must notify the Secretary General of the fact that it has declared a state of emergency and set out the reasons therefore. Whether or not the declaration of the state of emergency was justified is an issue which can be litigated in the judicial organs of the Organisation. While the State is allowed a margin of appreciation in a decision as to whether it was or was not proper to have declared a state of emergency, it is possible for a ruling to be made that the declaration was unjustified - *The Cyprus Case* referred to in the *Lawless Case* Application 332/57. No such mechanism is available with regard to a state of emergency declared in Zimbabwe. I do not think that the situation can profitably be compared.

I am satisfied that the word "enemy" in s 16(8)(b) of the Constitution means an enemy State with whom Zimbabwe is at war either by reason of a declaration of war or by reason of armed conflict between that State and Zimbabwe of such a scale as to amount to a state of war.

Mr *Blom-Cooper* conceded, and rightly so, that such a conclusion would be fatal to his case. It has not been suggested that in the light of the definition prescribed that Zimbabwe is at war with

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any country and consequently no power would exist to make regulations providing for the vesting of any property belonging to or used by or on behalf of an enemy.

This finding makes it unnecessary to decide whether the Regulations are in their character confiscatory or not.

I would accordingly dismiss the appeal and confirm the orders made by KORSAH J

The appellant will pay the costs of this appeal, certified fit of two legal practitioners.

Beck JA: I agree.

Gubbay JA: I agree.

Civil Division of the Attorney-General's Office, appellant's legal representatives.

Webb, Low & Barry, respondents' legal representatives.

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Endnotes

1 (Popup - Popup)

* See 1938 (1) ZLR 88 - Ed.

2 (Popup - Popup)

Since at both hearings essentially the same matters were covered and the same arguments advanced, it was considered appropriate and convenient to report both judgments together.

3 (Popup - Popup)

cf of facts outlined in *S v Ndlovu* at p266 of this volume. - ED.

4 (Popup - Popup)

See Minister of *Home Affairs v Bickle* 1983(1) ZLR - ED.

5 (Popup - Popup)

* *See p376 of this Volume. - ED.*

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