

S v MUCHITA AND OTHERS 1984 (1) ZLR 1 (HC)

Court High Court, Bulawayo

Gubbay J

23 March 1983

Flynote

Criminal law - degrees of participation in a crime - murder - accused intervening in attack after fatal blow struck - whether common purpose shown - facts necessary to show whether accused a co-perpetrator of crime - causal connection needed between conduct of accused and death of deceased - accomplice - necessity for assistance to be given before perpetration of act causing death and with reference to act causing death.

Headnote

Before an accused person can be found guilty of any crime on the ground that he has shown common purpose with the actual perpetrator of the crime, it is necessary that he should have acceded to the common purpose before the act in question was committed. Where he intervened independently and at his own instance after the act had been committed, a common purpose cannot serve as a ground for imputing to him criminal responsibility for that act. In the same way, on a charge of murder, for an accused to be criminally responsible as a co-perpetrator of a crime, his conduct must satisfy all the requirements of the definition of the crime in question; there must be a causal connection between the accused's acts and the death of the deceased. Any subsequent joining in an attack on the deceased after the fatal blow had been struck would thus not be a basis for holding him guilty as a co-perpetrator. As to whether he is guilty as an accomplice, his assistance, coupled with the requisite intent, must have been given before the perpetrator has completed an act which alone causes the death of the deceased. Assistance furnished afterwards can not render the assister liable as an accomplice to murder, whatever else the criminal consequences of his conduct may be.

Cases cited:

R v Masuka and Others 1964 RLR 586; 1965 (2) SA 40 (SR);

S v Thomo and Others 1969 (1) SA 385 (AD);

S v Khoza 1982 (3) SA 1019 (AD);

R v Mgxwiti 1954 (1) SA 370 (AD);

GUBBAY J

R v Chenjera 1960 R & N 67; 1960 (1) SA 473 (FSC);

S v Chimbamba 1977 (4) SA 803 (RAD);

S v Marakiya 1978 (1) SA 594 (RAD);

K Stirling, for the first accused.

J James, for the second and third accused.

J P Haxen, for the State.

Judgment

Gubbay J: The three accused are jointly charged with the murder of Richard Mbawa on 31 May 1982 at the Kezi Business Centre, Kezi. In answer to the charge, each proffered an explanation. The first accused said: "It was not my intention to kill. Whatever happened was not intended by me. The crime was committed but it was not my intention that it be committed." The second accused replied that it was not his intention to commit the offence; and the third accused claimed that he had only assaulted the deceased with his hands. In respect of each accused a plea of not guilty was entered.

[His lordship then examined the evidence and continued:]

On an overall view of the evidence adduced, and having regard to the credibility and reliability of the witnesses as indicated above, and giving the three accused the benefit of every reasonable doubt on the disputed issues of fact, the Court finds that what occurred on the evening in question was substantially as follows:

The three accused arrived at the Kezi Business Centre between 5 and 6 p.m. on 31 May 1982. The second accused purchased a packet of cigarettes. They were then invited by Dezi Nyathi to drink in Ollie's room. Seven packs of Ndlovu beer were purchased and were consumed by the three accused and Dezi. When the packs were finished, Quiet Masuku was given money to purchase beer from the beer hall. He returned with the beer in a bucket and joined the four other occupants in drinking it. He was in their company for about 15 minutes before the deceased arrived. At that stage the three accused and Dezi Nyathi were considerably under the influence of liquor, although they were not so drunk as not to know what they were doing. Either just before the deceased knocked on the door of the room or as he entered, the third accused absented himself to go to the toilet. The deceased adopted an overbearing and high-handed attitude towards the first and second accused, who were sitting in the room peacefully drinking beer. He demanded to know who had permitted them to drink in the room.

1984 (1) ZLR p3

GUBBAY J

He did not reveal that he was a policeman and they considered that he might be a dissident. He said that he was a "criminal man", which they probably took to mean that he was a criminal as

opposed to a peace officer. He ordered the accused to accompany him to the camp. The first accused jumped up and seized hold of the deceased. The second accused followed suit. They pulled him outside. There a scuffle broke out and the probability is that the deceased offered some resistance in the course of which he struck out at the first accused, who sustained an abrasion on the left side of the face and left upper hand. It is also reasonably possible that the second accused received a punch. While this was happening the third accused returned. After entering the room he decided to join the fight. The three accused thereupon proceeded to beat the deceased with their fists and to kick him severely to the body. The assault upon him was protracted. His pleas for mercy were disregarded. He was kicked to the upper body and head. Finally, he was dragged by the first and second accused to the enclosure, pulled under the wire fence and left lying upon the rock-filled pit. The third accused took no part in that. At this stage, if not actually rendered unconscious, the deceased was in an absolutely exhausted and weak condition and utterly helpless. He had lost his shirt in the affray. The third accused left the scene in advance of his two companions. They followed him, going in a southerly direction to their camp. After proceeding a short distance, the second accused remembered that he had left his packet of cigarettes in Ollie's room. He and the first accused turned back. They passed the fenced enclosure. The deceased had recovered to some extent. He was sitting upon a low stone wall. The second accused walked past the enclosure to Ollie's room. The first accused, without any prior agreement with the second accused, entered the enclosure. He approached the deceased and said: "Are you still alive?" He ordered the deceased to stand up. The deceased complied. The first accused then picked up a stone and threw it at the deceased, striking the latter to the right side of the chest. The deceased fell to the ground. The first accused picked up further stones and threw them at the prostrate deceased, striking him upon the head. He was standing close to the deceased. He threw the stones from an angle of about 30 degrees. In the meantime the second accused had retrieved his cigarettes. He saw the deceased on the ground and the first accused throwing stones at him. Without any bidding from the first accused, the second accused entered the fenced enclosure and picked up what he described as half a brick. He threw it at the deceased from a distance of between four to eight paces. It is probable, although not certain, that the deceased was struck. He then armed himself with a smaller stone which fitted into the palm of his right hand. He said that he thought this stone may have struck the deceased. Again it is extremely probable that it

1984 (1) ZLR p4

GUBBAY J

found its mark, though that it did so is not conclusive. Nor has it been proved to our satisfaction that the first accused, who remained within the enclosed area while the second accused stoned the deceased, threw any further stones either simultaneously with the second accused or after the latter had ceased his assault. The two accused left the fenced enclosure together.

It is on these facts then that the Court has to determine what offences the three accused have committed. That each is guilty of unlawful conduct in respect of the deceased is beyond question. I propose to deal with the three accused in reverse order, commencing with the third accused.

Mr *James*, who appears for the third accused, argued that he was guilty of no more than

common assault. He pointed out that the third accused was drunk and so may not have formed the requisite intent to assault his victim really seriously or to cause serious interference with his health. The submission is untenable. The third accused experienced no difficulty in recalling the details of the incident. He was fully aware of what was taking place. He participated in what can only be described as a severe assault. He punched the deceased, and on his own admission, delivered four kicks to the upper part of the deceased's body when the latter was rolling on the ground. This was nothing short of a gang assault and it is apparent from the post mortem report that in the course of it the deceased was kicked to the head. The assault was protracted and only ceased when the deceased was completely immobilised. In such a situation the Court entertains no doubt whatsoever that the third accused entertained the requisite intent.

Accordingly, he is found guilty of assault with intent to do grievous bodily harm.

I turn now to the position of the second accused's liability. In considering the question the following findings of fact must be borne in mind:

- (1) The cause of deceased's death was a depressed comminuted fracture in the middle of the left temporo-parietal region. This was due to the deceased being struck with a rock or stone and was unrelated to the earlier assault which he sustained with fists and booted feet.

1984 (1) ZLR p5

GUBBAY J

- (2) Subsequent to the initial assault, the first and second accused returned to the scene with the intention of recovering the packet of cigarettes from Ollie's room. There was no agreement by them to renew the assault upon the deceased.
- (3) The first accused, without reference to the second accused, entered the fenced enclosure and proceeded to assault the deceased with stones. The deceased received more than two blows to the head.
- (4) The second accused, having fetched his cigarettes, approached the fenced enclosure. He saw the deceased lying on the ground and the first accused throwing stones at him.
- (5) Without any instruction or persuasion from the first accused, he entered the fenced area and independently joined in the assault upon the deceased by throwing two stones at him.
- (6) The strong probability is that at the moment the second accused joined in the assault, the deceased had already sustained the mortal injury.
- (7) It was not proved that the stones thrown by the second accused actually struck the deceased's body, although it is highly likely that they did. If so, it cannot be found conclusively that they expedited death.
- (8) It was not proved that the first accused threw any further stones at the deceased at any time after the second accused had picked up a stone.

On this version of the facts three legal issues arise in determining whether the second accused can be found guilty of the murder of the deceased. I say "murder" because it is clear beyond doubt that the person responsible for causing the mortal injury, in all probability the first accused, at the very least must have entertained a constructive intent to kill.

The first inquiry is whether the State has proved a common purpose to assault the deceased with rocks and stones. In order to impute the act of a perpetrator to another person on the ground of common purpose, it is generally necessary that the latter should have acceded to the common purpose before the act in question was committed and it matters not that the part played by the accused in assisting his companions was menial. On application to the instant case, it is plain that there is no evidence of this prior to the initial stone attack by the first accused. All that has been shown is that the second accused inter-

1984 (1) ZLR p6

GUBBAY J

vened independently, at his own instance, after the attack had been launched and the deceased struck to the head by the first accused. That situation does not assist the State. At lowest, it is reasonably possible that the deceased had been mortally injured prior to the second accused's intervention, and because it has not been proved that the act of the second accused contributed to and accelerated the deceased's death, a common purpose cannot serve as a ground for imputing to him criminal responsibility for the fatal blow. See *R v Masuka and Others* 1964 RLR 586; 1965 (2) SA 40 (SR); *S v Thomo and Others* 1969 (1) SA 385 (AD) at 399H-400B; *S v Khoza* 1982 (3) SA 1019 (AD). The contrary view as enunciated in such cases as *R v Mgqwiti* 1954 (1) SA 370 (AD) at 382E-F and *R v Chenjera* 1960 R & N 67; 1960 (1) SA 473 (FSC), has not been favourably received by the former Appellate Division of this country. See *S v Chimbamba* 1977 (4) SA 803 (RAD) at 807-808; *S v Marakiya* 1978 (1) SA 594 (RAD) at 596F-H. Textbook writers also disapprove of it. See Joubert *Criminal Law* Vol 6 para 33; Burchell and Hunt, *South African Criminal Law and Procedure* Vol 22 ed at p361. Sitting as a single Judge, I am bound by the law as expressed by YOUNG J in *Masuka's* case unless I am convinced that the learned Judge fell into error. I am not so convinced. On the contrary, I respectfully agree with his interpretation of the law, supported, albeit indirectly, by the highest court of this country. I have instructed my assessors accordingly.

The second enquiry is whether the second accused's participation in the attack upon the deceased, at the stage when he joined in, rendered him a co-perpetrator to the crime of murder.

In *S v Khoza* (*supra*) at 1032E Corbett JA had this to say:

"As was pointed out in *S v Williams en 'n Ander* (*supra* at 63A), in order to be criminally responsible as a co-perpetrator the conduct of the person concerned must satisfy all the requirements of the definition of the crime in question. Murder is the unlawful and intentional causing of the death of another human being. One of the essential ingredients of murder is, therefore, a causal connection between the conduct of the accused and the death of the deceased. The *onus* of proving this, and the other elements of the crime, rests upon the State."

In the present case the State, as already mentioned, has failed to establish any causal connection between the conduct of the second accused and the death of the deceased. It must be assumed that when he joined in the attack upon the deceased and threw the two stones at

GUBBAY J

him - accepting for the moment that honey struck home - the deceased had already received the *coup de grâce* at the hands of the first accused and that the second accused's actions did not hasten or otherwise contribute to his death. At the time of the first accused's attack upon the deceased, the second accused was a passive spectator. He did not participate in that attack. Nor can he be regarded in any sense as having caused or brought about that attack by the first accused, who acted quite independently of him. The second accused's subsequent attack upon the deceased did not contribute causally to the ensuing death. The Court cannot conceive of any basis therefore for holding the second accused to have been a co-perpetrator.

The final enquiry is whether the second accused can be held criminally responsible for the murder of the deceased as an accomplice. The approach which commends itself to me, and upon which I have directed my assessors, is that propounded by CORBETT J A, in *Khoza's* case at p 1035B-E:

" Whether it be a direct causal relationship between the assistance provided by the accomplice and the death of the deceased, or merely a causal relationship between the accomplice's assistance and the commission of the offence generally, or whether a subjective approach, focussing on the intention of the accomplice to assist, taken together with conduct in pursuance of such an intention, be taken as the true test, it seems to me that for an accomplice to be found guilty of murder his assistance must be given before the perpetrator has completed the act which alone causes the death of the deceased. Put negatively, assistance furnished after the perpetrator has completed the act which alone causes the death of the deceased cannot render the assister liable as an accomplice to murder, whatever else the criminal consequences of such conduct may be. And, in my opinion, the fact that the deceased, having suffered the fatal blow at the hands of the perpetrator, is still alive when the accomplice's intervention takes place does not alter the position, provided naturally that the fatal blow remains the sole cause of death."

The learned Judge of Appeal continued at pp 1035H-1036D thus:

"It seems to me that in a case of murder the liability of an accomplice is essentially based upon the assistance given by him to the perpetrator with reference to the *act or acts of the perpetrator* which cause the death of the deceased. Once the act or acts which ultimately cause the death of the deceased have been finally committed by the perpetrator, then, even though the victim may still be alive - and in that sense the crime is incomplete - intervention thereafter by another, with the intention of assisting the perpetrator to achieve his purpose but not having any causal effect on the death of the deceased, cannot in law or in fact be regarded as assisting the perpetrator. At the stage of intervention the perpetrator has done all that is necessary to achieve his object and realisation of that object, viz the death of the

GUBBAY J

deceased, is merely a matter of time. Nothing thereafter done by the intervener (which does not hasten the death of the deceased) can, therefore, be regarded as providing assistance to the perpetrator. Let me illustrate this by a simple, though perhaps extreme, example. X attacks Y with a heavy, blunt instrument. He unlawfully intends to kill Y. He crushes Y's skull with a blow and causes acute brain damage. Y falls to the ground and dies from this injury ten minutes later. After Y has fallen Z, who witnessed the occurrence but does not realise that Y has been fatally injured, intervenes and stabs Y several times with a knife. He does so in order to assist X to kill Y not in pursuance of any prior arrangement with X. None of the stab wounds strikes a vital organ and the medical evidence shows that these wounds in no way contributed to, or hastened the death of, Y. In these circumstances, whatever Z's intentions may have been, in my opinion, he did not assist X to kill Y and he cannot be held criminally responsible

as an accomplice for the murder committed by X. When Z intervened X had completed his *actus reus* and death was inevitable."

When this approach is applied to the present case - on the hypothesis that the first accused inflicted the mortal injury - the Court is satisfied that the second accused cannot be held liable as an accomplice of the first accused for the murder of the deceased.

The outstanding question is whether the second accused, judged on his own conduct, is guilty of the attempted murder of the deceased or of the lesser offence of assault with intent to do him grievous bodily harm. Mr James, who represents him, argued strongly and persuasively that the State had failed to prove the more serious crime. He relied on a number of significant factors, namely: (i) that the second accused was considerably under the influence of liquor; (ii) that he armed himself with the stones more or less on the spur of the moment and acted in a state of excitement; (iii) that there was no reliable evidence as to the force with which he threw the stones at the deceased and that it was not established that they actually struck the deceased and caused an injury; (iv) that it had not been proved that he aimed to strike the deceased at a vulnerable part of the latter's body and (v), that it was reasonably possible that the second accused was unaware that the deceased had already suffered serious injury at the hands of the first accused. The cumulative effect of these features, so the argument ran, left a reasonable doubt as to whether the second accused must have appreciated the risk to life involved in his action of throwing stones at the deceased and was reckless as to whether or not that risk was fulfilled in death.

1984 (1) ZLR p9

GUBBAY J

As against the considerations enumerated by Mr *James*, there are others to be weighed in the balance. The second accused was a party to the perpetration of a severe beating upon the deceased. He was punched and kicked and then dragged to the fenced enclosure and pushed inside like discarded goods. The deceased at that stage, to the knowledge of the second accused, was either comatose or so weak and dazed as to be completely immobilised. Thereafter, and within a fairly short space of time, the second accused observed the deceased on the ground being assaulted with stones by the first accused. He armed himself with a stone the size of half a brick and, from a distance of between four to eight paces, threw it at the prostrate deceased. Not content with that, he threw another but smaller stone at the deceased.

In the opinion of the Court, the situation is somewhat borderline. But the turning point in the second accused's favour is that it has not been shown (i) that he appreciated how severely the deceased had been injured by the first accused's stone attack; (ii) that the two stones he himself threw found their target; and (iii) to what part of the deceased's body the stones were aimed. If it had been established that either stone had struck the deceased to a vulnerable area causing resultant damage, then despite the second accused's intoxicated state, the inference that he appreciated the risk to life involved would have been inescapable.

In the result the Court returns a verdict of guilty of assault with intent to do grievous bodily harm, based on both assaults the second accused perpetrated against the deceased.

It remains to determine the criminal liability of the first accused. This is to be considered in the

light of the following findings:

- (a) When the first accused entered the enclosed area where the deceased was seated on a wall, his action in assaulting the deceased as he did was not in consequence of any prior agreement with the second accused.
- (b) From a close distance of a few paces he hurled a stone at the deceased, striking the latter to the chest and causing him to fall to the ground. Thereafter he threw stones which struck the deceased on the head.
- (c) The strong probability is that it was the first accused who caused the mortal injury, but the possibility that the blow to the middle of the left temporo-parietal region was caused by the stone the size of a half brick which the second accused threw at the de-

1984 (1) ZLR p10

GUBBAY J

ceased, cannot be excluded as merely fanciful.

- (d) It has not been proved to the satisfaction of the Court that the two other lacerations to the head of the deceased contributed to his death.
- (e) It has not been proved that the first accused threw any further stones at the deceased at any time after the second accused had picked up a stone.

Mr *Haxen*, on behalf of the State, sought to argue, albeit with not much conviction, that by virtue of his presence within the enclosed area at the stage when the second accused launched his attack, the first accused gave psychological encouragement and so made common cause with that attack. Accordingly, on the hypothesis that either the first accused had caused the mortal injury or that it had been caused by the second accused, the first accused was guilty of the murder of the deceased. That argument cannot be sustained. The second accused acted independently of the first accused. He was standing further away from the deceased than was the first accused and must have thrown the stones in rapid succession. It is not apparent that the first accused ever became aware of the second accused's intention before the latter joined in the attack. And after it had ceased the first accused took no further action. There is no room for a finding that a common purpose was formulated by the two accused. Indeed, Mr *Haxen*'s submission amounts to this: that by remaining within the enclosed area close to the prostrate body of the deceased, the first accused became liable by ratification for the actions of the second accused. This is not a principle that has been accepted in our law. See *R v Chimbamba* (*supra*) at 807 *in fin* - 808A; *S v Marakiya* (*supra*) at 596F-H. Accordingly, this Court is placed in the unfortunate position of not being able to ascertain with the requisite degree of certainty which of the two accused killed the deceased, though satisfied that he was in fact murdered by one of them. The same result, odd as it may appear to a layman, was reached in *R v Masuka and Others* (*supra*). It must be emphasised that in the absence of proof of common purpose, co-accused cannot be convicted on the basis that one or the other must have committed the act which led to the victim's death, for that basis postulates the innocence of one of them.

Now, it admits of no doubt that in assaulting the deceased in the fenced enclosure in the

manner he did, the first accused at least had a constructive intent to kill his victim. At the time he entered the

1984 (1) ZLR p11

GUBBAY J

enclosure he was well aware that the deceased was at his mercy. The prior assault the deceased had sustained had rendered him incapable of offering any effective resistance. He was in a very weak condition, which is evidenced by the fact that prior to the return of the first accused he did not remove himself from the fenced enclosure - he merely sat on the wall waiting to regain enough strength to leave. Against this background what did the first accused do? From a close distance he armed himself with a stone and threw it with sufficient force that when it struck the deceased upon the chest it felled him to the ground. Thereafter he picked up more than two stones and threw them at the deceased, striking him upon a very vulnerable area. Whether he aimed to hit the deceased on the head with the stones or threw them at him indiscriminately, is speculative. Although it is accepted that the first accused was considerably under the influence of alcohol, it is clear that he knew what he was about. He spoke to the deceased in English, saying: "Are you still alive?" He ordered the deceased to stand up. Thereafter followed a most vicious, cowardly and sustained assault upon a defenceless person. Viewed in the most favourable light, the first accused must have appreciated the risk to the deceased's life involved in stoning him as he lay on the ground from a close distance and was utterly reckless as to whether that risk was fulfilled in death.

Mr *Haxen* submitted that the first accused had been shown to have entertained an actual intent to kill the deceased. There is certainly some foundation for the argument. We consider, however, that if the first accused had positively desired the death of the deceased he would not have thrown stones at him, but would have smashed the deceased's skull with a stone held in the hand. As already indicated, it is not certain that in throwing the stones, the first accused actually aimed to strike the deceased upon the head. Moreover, the deceased was alive at the cessation of the assault. When Patrol Officer Mutswere arrived at the scene some time later, the deceased was still breathing, albeit in a laboured fashion. It is a fair inference therefore that when the first and second accused eventually departed, the first accused was either aware that the deceased was still alive, or did not bother to investigate whether he was or not. If he had intended death to result from his assault, we think it probable that he would have ascertained whether the deceased was still breathing. In the circumstances the Court entertains a doubt as to whether the death of the deceased was desired, and that doubt must of course be accorded to the first accused.

1984 (1) ZLR p12

GUBBAY J

To sum up: the first accused is found guilty of attempted murder of the deceased with a constructive intent to kill. The second and third accused are found guilty of assault with intent to cause the deceased grievous bodily harm.

S v SIBANDA 1984 (1) ZLR 13 (HC)

Court **High Court, Bulawayo**

Korsah J

6 January 1984

Flynote

Criminal procedure - sentence - malicious injury to property - accused taking axe to cattle which were eating roof of his dwelling - provocation and defence of property as factors - appropriate sentence.

Headnote

The accused was asleep in his hut at night, and awoke to find his neighbours' cattle eating the thatch of the roof. He was extremely angry. He armed himself with an axe and lashed out at the cattle, causing injury to five of them. The total number of head involved in the consumption of his roof was unknown. None of the cattle received injuries severe enough to warrant their destruction. The magistrate, on convicting the accused - who pleaded guilty - of two counts of malicious injury to property, sentenced him to three years' imprisonment, of which half was suspended on appropriate conditions.

Held, that the sentence was manifestly excessive. The law recognises the right to self-help in defence of property and it was not possible to say whether the force used by the accused was disproportionate to the evil to be avoided. The situation was one that called for drastic action, quite apart from the provocation received. The act should have been seen as one committed in the heat of passion occasioned by sudden provocation. The sentence would be reduced to one of three months' imprisonment, of which two would be suspended.

Judgment

Korsah J: On a balmy night on 23 October 1983, Cover Sibanda was awakened from peaceful slumber by a movement outside his hut. He went out to investigate and found, to his dismay, cattle calmly stripping his hut of its thatched roof. The time was 2100 hours. Great was his anger. Arming himself with an axe, he thrashed about like some Don Quixote in battle with a windmill. Five head of cattle received injuries from his axe. Three belonged to the first complainant and two to the second complainant. The complainants were not amused. They

KORSAH J

reported the matter to the police who arrested Cover Sibanda and had two counts of malicious injury to property preferred against him - one count in respect of the property of each complainant.

The accused pleaded guilty to both counts and in mitigation said he acted as he did because the complainants' cattle had devoured part of the grass on two of his grass- thatched huts.

Treating both counts as one the accused was sentenced to 36 months' imprisonment with 18 months suspended for three years on the usual conditions. The severity of this sentence induces in me a sense of shock.

Giving his reasons for imposing such a sentence, the learned magistrate said:

"Accused is 31 years old and has no previous convictions.

He found the cattle belonging to the two complainants eating the grass forming part of two grass thatches on his huts.

He might have thought that he was defending his property in this case, but I find that he maimed five head of cattle and the number of valuable cattle to the complainants negatives this defence.

He has three head of cattle and four goats."

It would appear that the learned magistrate overlooked the fact that none of the complainants' cattle was so severely injured as to warrant destruction. Knowledge that all the injured cattle were recovering from their injuries could be elicited from the agreed facts. The damage to the complainants was, therefore, not so great as to merit such a severe punishment.

In all civilized systems of law a man's right of self-help is recognised. But in defence of his person, liberty and property the force used must be proportionate to the evil to be avoided; that is, the mischief sought to be prevented could not be prevented by less violent means. The question to be asked in such a case is: "Was the force proportionate to the evil to be avoided?" This is a question of a value judgment.

The defence by the accused of his house, however humble it may be, against humans as well as animals is sanctioned by law. Unfortunately, the number of head of cattle which assailed the huts of the accused was nowhere stated. The extent of the evil with which the accused had to contend was, therefore, not known. In such circumstances, it is

1984 (1) ZLR p15

KORSAH J

impossible to answer the question whether the force used was proportionate to the evil to be avoided.

Take a hypothetical case of fifty head of cattle descending on a man's hut at midnight and commencing to strip the hut of its thatched roof, in the dark of the night: is he supposed to go with a knobkerrie to dissuade each head in turn from tearing down his roof, or does the situation call for more purposeful action? I am of the opinion that in such circumstances more drastic action on the part of the victim would have been justifiable.

But even if the only cattle that descended on his huts were the five that he took the axe to, considering the extreme provocation of being woken up in the middle of the night to find your roof disappearing from overhead into the bellies of cattle that had no right to be in the environs,

it is a wonder that he killed none of them. His act should have been seen as one committed in the heat of passion occasioned by sudden provocation.

It is not uncommon to come across cases where accused persons charged with malicious injury to property, without any provocation but in a spirit of vengeance, have killed the beast of another, being sentenced to terms ranging between six and 18 months' imprisonment with part of the sentence suspended.

In the instant case, the accused, even though severely tried, did not intend to kill any of the complainants' beasts. He intended to dissuade the beasts from destroying his roof. Incensed by passion, he used force which possibly was more than necessary to avoid the evil threatened. In these circumstances, I am of the view that the sentence imposed was manifestly excessive. The accused has already served one month of the sentence; with the concurrence of my brother MANYARARA J the sentence imposed by the learned trial magistrate is wholly set aside and in its place is substituted a sentence of:

"Three months' imprisonment with labour, two months of which are suspended on condition that the accused does not commit within that period any offence of which malicious injury to property is an element and for which he is sentenced to imprisonment without the option of a fine."

1984 (1) ZLR p16

MAC AND SON COACHBUILDERS (PVT) LTD v MAPFUMO AND ANOTHER 1984 (1) ZLR 16 (HC)

Court High Court, Harare

Pittman J

8 December 1983 and 11 January 1984

Flynote

Contract - in contravention of statutory provision - where contravention vitiates contract - contract to sell road service permits without approval of Minister - offence under s 27(1) as read with s 80 of Road Motor Transportation Act [Chapter 262] - whether contract void - contract induced by fraud - relief available to party misled into entering contract.

Costs - inept conduct of case by legal practitioner - when costs may be awarded de bonis propriis - costs against unsuccessful party on attorney and client basis - when appropriate to order costs against unsuccessful party because of inept handling of case by legal practitioner.

Practice and Procedure - plea - plaintiff entitled to look at plea as filed when deciding how to answer plea.

Statutes - Road Motor Transportation Act [Chapter 262] - s 27 - contract to acquire road service permits without approval of Minister - effect of section.

Headnote

The fact that a legislative provision makes a particular act an offence generally renders void any contract entered into in contravention of that provision. This rule, however, is not universal. The

intention of the legislature, as gleaned from the enactment as a whole, must be ascertained, and it may well be that the legislature would be content with exacting a penalty for the act rather than rescinding a contract entered into in contravention of the enactment. Under s27(1) of the Road Motor Transportation Act [Chapter 262] a person wishing to acquire an existing

1984 (1) ZLR p17

PITTMAN J

road service permit must make written application to the Minister for his approval of such acquisition. It does not provide that the Minister's approval must be sought *before* the acquisition of the permit; indeed, the section deals with the situation where a permit has been acquired and Ministerial approval is forthcoming. Consequently, the mere acquisition of parrots without approval is not an offence and a contract to acquire them is not invalidated simply because the Minister's approval has not been obtained.

The relief in our law that is available to a party to a contract who has been misled by fraud into entering it is threefold. Firstly, he may disregard the contract and raise fraud as a defence if sued for performance of any part of it. Secondly, if he has embarked on the contract, he may cancel it when he discovers the fraud and claim restitution of what he has paid or delivered, together with a claim for damages. Thirdly, he may adhere to the contract and merely claim for any loss due to the fraud. He must choose one course; he cannot approbate and reprobate together.

In answering a defendant's plea, the Plaintiff is entitled to look at the plea as filed. He cannot be expected to answer the plea according to interpretations or different emphasis later placed on it by the defendant's legal adviser.

If a document is annexed to a pleading, there should be nothing in the pleading - whether declaration or plea - which is contradictory of or inconsistent with that annexure, as this may well make the pleading embarrassing and therefore open to exception.

Costs may, in appropriate circumstances, be awarded against a legal practitioner *de bonds propriis* because of his inept conduct of the case. However, there should be an investigation by the court to see where responsibility lies; for where it is muddled thinking that has attracted criticism as opposed to professional negligence or misconduct, then such an award should not be made. The unsuccessful party may have costs awarded against him on an attorney and client basis if his case is ineptly presented, but it would not be appropriate to do so if he is innocent of the incorrect statement of the case.

Cases cited:

Standard Bank v Estate van Rhyn 1925 AD 266;

Bowditch v Peel and Magill 1921 AD 561;

Frost v Leslie 1923 AD 276;

British Diesels Ltd v Jeram and Sons 1958 (3) SA 605 (N);

Nkosi v Caledonian Insurance Co. 1961 (4) SA 649 (N);

A N Eastwood, for the excipient

No appearance for the 1st defendant

C K Mutasa, for the 2nd defendant (respondent)

Judgment

Pittman J: On 17 November 1982 a handwritten agreement was drawn up whereby - so it reads - a company called Kugara - Kunzwana Bus Service (Pvt) Ltd and Mr Leo Gregory Mackolisky sold

1984 (1) ZLR p18

PITTMAN J

four buses and a number of road services permits to the Munatsireyi Bus Services, which seems to be a bus-operating enterprise carried on by the two defendants, presumably in partnership. The four buses, of 76-seat capacity, and seven road service permits - which included the use of the buses for private hire - were all to be sold for \$225 000, payable as follows: \$62 796,03 was paid by cheque on the date of the agreement, with \$60000 to be paid in equal monthly instalments of \$10 000 each commencing on 31 December 1982, with a final payment on 31 May 1983. If, for any reason, those monthly payments were not met in full by 31 May 1983, any outstanding balance would bear interest at the rate of 10% compounded. The balance of the purchase price of \$225 000 was payable by the purchasers taking over the seller's liability to UDC Ltd in the sum of \$102 203,97, and discharging it thenceforth as the substituted purchasers or hirers of the buses from this financial institution. The precise basis of the seller's arrangement with UDC Ltd is not stated but presumably it was known to the defendant. Finally, thrown in as part of the bargain, were five further road service permits for an additional price of \$10 000, which would not be payable, however, until 31 May 1983.

By 6 June 1983, the seller - who by then had changed its name to that set out in these proceedings - seems to have received only one payment of \$10 000, making a balance still owing on that date of \$60 000. It therefore issued summons claiming payment of this sum with interest at 10% and costs of suit, alleging not only that it had delivered the buses sold in terms of the agreement, but tendering transfer of the road service permits as well.

The defendants have plainly disputed any such liability and have successfully resisted an application to have summary judgment entered against them. But since then the progress of the suit has been punctuated by a series of defences wrongly conceived and inadequately expressed on the part of the present defendants. Two of these were dealt with by my brother McNALLY J in his judgment HC-H-379-73, in which he ordered to be struck out the defendant's amended plea - and the latest at that stage - but gave him leave to file another plea and a claim in reconvention in conformity with the Rules of Court by 2 November last. Some of the confusion and muddle in the setting out of the defendants' case is referred to by the learned Judge in that judgment. But it might also usefully be said at this stage that in between and *in tandem* with

these attempts to plead defendants'

1984 (1) ZLR p19

PITTMAN J

defence, there has been a formidable flood of request for particulars, answers to such requests, amendments to pleadings, further pleadings, besides the assorted correspondence that seems to precede and follow these various stages - so that the papers in the case are becoming as unmanageable as their accumulated substance becomes unintelligible.

The present exercise stems from the latest attempt by the defendant Mathonsi to file a plea and counterclaim in consequence of the previous interlocutory judgment referred to. In substance, the defendant claims that the agreement on which the Plaintiff's claim is based is an illegal one, being in contravention of s 27(1) of the Road Motor Transportation Act [Chapter 262]. He says that this section provides that the approval of the Minister of Roads and Road Traffic is required for the acquisition by one person of the road service permits, or public transport business, of another; and that this approval had not been obtained prior to the conclusion of the present agreement.

As an alternative defence, the defendant Mathonsi says, in effect - if not in clear terms - the Plaintiff, through Mackolisky, fraudulently misrepresented to the purchasers that there would be no difficulty about the transfer of the permits, and therefore about the sale; whereas he knew at the time that eight of twelve road service permits were due for cancellation since they had not been used and would never be approved for transfer because of their pending cancellation.

He goes on to allege that the Minister in fact did only approve of the road service permits for that reason.

While he admits delivery of the buses was made and that the amount due under flee agreement has not been paid, the defendant denies any liability to the Plaintiff. On the other hand, and alleged as part of the plea, the defendant, he says, has been paying UDC the sums due to that organization in respect of two of the buses hired or bought from it. Because of the illegality now alleged and referred to above, or the fraudulent misrepresentation of the Plaintiffs agent, the defendant tenders the return of these two buses and claims a refund of half of the sum oil \$72 796,03 which the defendants have paid to the Plaintiff. He claims this amount because there are two defendants and in his assessment each would have a liability for only half of the amount claimed. In those premises the defendant concludes his plea by asking for not only the dismissal oil the Plaintiff's claim, but also for an order for the refund

1984 (1) ZLR p20

PITTMAN J

by the Plaintiff to the defendant of \$36 998 against the return of two buses by himself to the Plaintiff.

Like its predecessor, this plea has also attracted a barrage of critical responses. The Plaintiff excepts to it on the several bases that, first, the defendant's defence based on s 27 of Chapter

262 is wrong in law and affords no grounds for avoiding the agreement; secondly, that the allegations as to fraudulent representation by the Plaintiff's agent do not afford a defence or are contradictory, inconsistent and embarrassing; and thirdly, that the relief claimed by the defendants is bad in law and improperly formulated. In substance, this last complaint is the same as that raised before McNally J, to the broad effect that the defendant is still seeking to approbate and reprobate the agreement in question, and to the extent that he has claimed restitution, he seeks to do so without a proper claim in reconvention. As an alternative, the Plaintiff applies to strike out those paragraphs or portions of paragraphs which offend against the rules of pleading. It concludes with a prayer that the defendant be called on to show why he should not be barred from further pleading in the matter, and judgment entered against him forthwith. It also seeks costs *de bonds propriis* against the defendant's legal practitioner as the author of these substantially defective pleadings, and on an attorney and client scale or at least costs on such scale against the defendant.

Against that résumé - necessarily shortened and simplified because of the length and confusion of what has gone before - of the background circumstances of this case, I turn first to consider the validity of the defendant's allegation that the agreement here concluded was illegal as being entered into in contravention of s 27(1) of the Road Motor Transportation Act.

The essence of the defence pleaded here is that s 80 of the Act makes it an offence for any person to contravene any provision of the Act with which it is his duty to comply. Section 27(1) requires a person wishing to acquire an existing road service permit or permits, or a transport business conducted under such permits, to make written application to the Minister for his approval of such acquisition. The defendant's contention is that when the Legislature penalizes an act, it by implication prohibits that act, and the effect of such prohibition is to render the act null and void even if no declaration of nullity is attached to the legislative provision itself.

1984 (1) ZLR p21

PITTMAN J

However, as was pointed out by SOLOMON JA in *Standard Bank v Estate van Rhyn* 1925 AD 266 at 274-5:

"That (ie the present submission of the defendant), as a general proposition, may be accepted, but it is not a hard and fast rule universally applicable. After all, what we have to get at is the intention of the Legislature, and, if we are satisfied in any case that the Legislature did not intend to render the act invalid, we should not be justified in holding that it was. As Voet (1.3.16) puts it 'but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it.' Then after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.' These remarks are peculiarly applicable to the present case, and I find it difficult to conceive that the Legislature had any intention in enacting the directions referred to in s 166 (1) other than that of punishing the excutor who did not comply with them."

Here too, I do not think that the Legislature did intend the mere entering into of a contract by one person to acquire the road service permit of another, was intended to make the contract in question illegal or void. The purchaser who thereafter uses such a permit without obtaining the Minister's approval may well commit an offence. But merely to acquire the right to claim transfer of the permit or even to accept the handing over of the document containing the right prior to

such approval does not seem to me to be regarded as illegal, or even as an offence. Section 27(1) does not say the Minister's approval must be sought before a road service permit issued to one person is acquired by another. It only requires that if someone else wishes to take over an existing permit, that latter person must apply in writing for approval for such acquisition to be made. It would obviously be prudent to obtain such approval before entering into an agreement to acquire such a permit or a transport business run on such permits, or at least to make the acquisition conditional upon obtaining approval for them - in case such approval was subsequently refused. But it is certainly not required by the language of the legislation. Moreover, the conclusion that s 27(1) does not require such approval before a permit is acquired by another person, seems to receive clear support from the provisions of subs (9) of s 27, which clearly contemplates - to my mind, at any rate - that the mere acquiring of another's permit before approval is obtained is not prohibited. For it provides what shall happen if such a permit has been acquired and Ministerial approval is not thereafter forthcoming.

It only states that every such permit shall be suspended until the Minis-

1984 (1) ZLR p22

PITTMAN J

ter acts under subs (1) or subs (6). I cannot believe that the Legislature would have made such a provision as subs (9) if it intended the mere purchase of another's permits, and its intrinsic rights, prior to obtaining the requisite approval, to be illegal and void. There would be no need for subs (9) if that was the case; and it is axiomatic in the construction of statutory provisions that effect must be given to everything which the Legislature has said or provided.

Consequently it seems to me that Mr *Eastwood* is correct when he describes the defendant's defence in para 3 of the plea as wrong in law and unsustainable. The provisions of s 27(1) of the Road Motor Transportation Act do not, in my view, render void or illegal such an agreement as is here relied upon by the plaintiff. It merely places an obligation on the purchaser to obtain the necessary approval for the transfer of the permits. Whether he does that before or after entering any agreement to purchase or otherwise acquire such permits, is not affected by that provision, as long as he does so before he attempts to use them.

Turning next to the second ground of complaint raised by the Plaintiff, that is to para 4 of the plea, it was stated by Mr *Mutasa* in the, course of argument that this paragraph ought to read that the agreement is voidable and the second defendant sought to void it because of the alleged fraud. In the first place, it may pertinently be remarked that there is no allegation whatever in the plea itself as filed - nor in any of the defendant's previous attempts to file a plea - to the effect that the defendant has by any word or act repudiated or cancelled the agreement in question. And it is the plea as filed to which the Plaintiff is entitled to look when deciding what steps to take in answer to it. But secondly, and even assuming this somewhat late change of emphasis to be correct and acceptable, it seems to me to be at such variance with other facts of the defendant's case that it too, cannot be accepted as a valid defence.

Shortly stated, the relief in our law that is available to a party to a contract who is misled into entering it by the other's fraudulent misrepresentation is threefold. First, he may disregard the contract and, if the representer sues him to make any performance of it, he may raise the fraud

as a defence to any claim so brought. Secondly, if he has embarked on its performance, he may cancel it when he discovers the

1984 (1) ZLR p23

PITTMAN J

fraud and claim restitution of what he has paid or delivered, with or without a claim for damages he may have suffered, in addition. Or, thirdly, he may decide to adhere to the contract notwithstanding any such misrepresentation and content himself with a claim for damages for any loss he may have suffered as a result of being misled. If the representee does decide to cancel the contract and claim restitution, he must do so within a reasonable time of learning of the fraud, otherwise he will be deemed to have elected to abide by the contract, and his only remedy will be a claim for damages. And furthermore, once he has made any such election, he is bound by it, and cannot later change his mind. All this is well settled and clear - see *Bowditch v Peel and Magill* 1921 AD 561 at 572 - 3; *Frost v Leslie* 1923 AD 276 at 279; and *British Diesels Ltd v Jeram and Sons* 1958 (3) SA 605 (N) - but its significance seems to have escaped the defendant's legal adviser.

For, even if the allegations of fraud on the part of the Plaintiff were accurate, which, for present purposes one must accept they are, annexures "C" and "CI" to the plea - which are also part of the basis upon which the present exercise must be determined - import a factual situation that is at substantial variance with the case pleaded and the relief now claimed. For they show, particularly annexure "CI", that the applications by the defendant for transfer of Plaintiffs permits were refused, not for the reason alleged by the defendant as the basis of the fraudulent deception attributed to the Plaintiff, but because the Minister felt that the defendants had not sufficient vehicles to provide the services that those permits embraced. And it is a well - established rule of pleading that if a document is annexed to a particular pleading, whether declaration or plea, there should be nothing in the body of the pleading which is contradictory of or inconsistent with that annexure, as this may well make the pleading embarrassing and therefore open to exception: see Beck's *Theory and Principles of Pleading in Civil Actions*, 5 ed p 63 para 32.

This variance seems to me to be compounded in the present case by at least three additional features. First, as is clear from the defendant's earlier pleadings, the defendant has not previously sought to repudiate the agreement as a whole. On the contrary, his previous attempts to set out a proper defence have all shown, in one way or another, an adherence to the agreement. The annexures to the present plea seem to confirm that this was still his attitude when he filed it, because it

1984 (1) ZLR p24

PITTMAN J

appears - again, from annexure "CI" - that by as late as September 1983 the defendant was taking steps that are clearly indicative of an adherence to the contract. That is to say, he was seeking the approval of the Minister for the transfer of the permits sold to him some three months after the Plaintiff issued summons claiming specific performance and after the

defendant had refused to pay the balance still due under the agreement relied on. Secondly, it appears that the defendant has been keeping up the payments to UDC which were also part of the same agreement. He would not, and should not, have been adhering to the contract in this respect either if he believed he was entitled to repudiate it and had done so.

Nor is the explanation of this by the defendant easily credible, namely that he was only paying these sums to mitigate damages. I am unable to see how this would mitigate any loss by the defendant. If anything, it is increasing the loss he will suffer by reason of such fraud as is alleged on the part of the Plaintiff, for what is paid thereafter to UDC is simply throwing good money after bad if the agreement had already been repudiated. It seems to me that these payments are far more consistent with an attempt to have the best of both situations, that is to say keeping up payments to UDC to keep the two buses leased or bought from that body, but seeking to avoid the obligations due under the rest of the agreement.

The situation in short is that if the defendant had elected to abide by the contract, as the history of the pleadings and his contemporary acts show that he has, he cannot now claim in these same pleadings the repudiation of the claim - even allowing that his argument represents his case and not the plea actually filed. On the other hand, if the defendant has elected to abide by the contract, then his remedy is not only to resist a claim for the full amount alleged by the Plaintiff, but also to bring a claim in reconvention for any damages he has allegedly suffered as a result of the Plaintiff's misrepresentation. In either event, this plea does not properly reflect the defendant's situation, and it either does not disclose a defence, or discloses a defence that at the very least is bad in law or embarrassing and contradictory.

Thirdly, these deficiencies in the defendant's case are further increased by the lack of a proper claim in reconvention as a formal basis for what he claims from the Plaintiff, and as is required by Rule

1984 (1) ZLR p25

PITTMAN J

120 *et seq* of the Rules of Court. In these three important respects, and although there are other allegations in the plea, the essence of the defendant's case is so defective that I do not think the plea should be allowed to stand.

Mr *Mutasa* argued that having survived the Plaintiff's application for summary judgment on the basis that he had an arguable case, the defendant ought not now to be deprived of putting toward his defence. But this seems to confuse the differences between a triable issue on the facts, the existence of which will prevent a claim for summary judgment, and an argument as to whether the defence, as eventually pleaded, can be sustained in law or is properly pleaded. The two questions are wholly different. Nor is an exception taken by the plaintiff an attempt to separate different issues in the case and try them piecemeal. The whole purpose of pleadings is to identify the issues that have to be decided by the Court in order to resolve the dispute between the parties. If, in the setting out and elucidation of those issues, it appears that some claim or defence has been misconceived or badly stated, then the remedy of exception or striking out exists to narrow the issues or even to dispose of an erroneous claim or defence.

That is not trying the dispute piecemeal.

Here, as already indicated, the main planks of the defendant's plea seem to me to be defective, as also is the form of the pleading - if the defendant is in fact seeking the remedy of restitution and damages. There are, as already stated, other allegations in the plea which were also criticized by the plaintiff, but in view of the conclusion I have reached on the principal allegations, I do not think it is necessary to deal with those as well. Furthermore, as the essential substance of the plea seems to me to be excipiable, I think the proper order to make is to strike out the whole plea rather than just those offending paragraphs and the prayer for relief.

That leaves the questions of what order should now be made. Mr *Eastwood* asked that the defendant now be barred from pleading and judgment now be entered for the Plaintiff. He did so on the basis that this was the fourth plea filed by the defendant, and an examination of the previous attempts shows that the respondent has persistently sought to place his case on the same basis and in the same manner as he does in this one; and does so notwithstanding the strictures of McNALLY J in the previous judgment already referred to. Mr *Eastwood*

1984 (1) ZLR p26

PITTMAN J

argues that this can no longer be a matter of oversight, and the respondent's legal practitioner must by now be well aware of the issues he has to face and deal with. In addition, and more pertinently, he argues that the procedure of the Court would be defeated if a defendant can go on and on raising substantially the same plea after it has been struck out or held to be otherwise objectionable.

But even if I had the power to bar the defendant from further pleading, and enter judgment for the Plaintiff here and now - which I have some difficulty in accepting - I do not think this should be a suitable instance to exercise it. For if the defendant believes he and his partners were misled by the Plaintiff, even if not entirely on the lines presently pleaded, and he can establish that such misrepresentation induced the agreement, he may be able to claim damages or a partial restitution of what he has paid. He has never put this forward properly as a defence to the claim, and however tiresome it may be to the Plaintiff I do not think the defendant ought to be excluded from being allowed to do so. Certainly, annexure "CI" casts considerable doubt on the allegation of fraud presently made, but that allegation may not have been properly investigated and sufficiently accurately pleaded. Furthermore, there is also the question of the impact of such a judgment on the other defendant, who might find himself embarrassed by any such situation. And finally, one is always loath to visit the consequences of ineptness on the part of a professional legal adviser on the client who may be unfortunate in more ways than one. I do not think, in the result, that I should accept this argument by the plaintiff.

So far as costs are concerned, the impact of which may in some degree be influenced by the foregoing, it is true, as the plaintiff here claims, that a Court will in appropriate circumstances award costs *de bonis propriis* against a legal practitioner. But it seems to me that there should at least be an investigation of the practitioner's conduct to see where responsibility lies; for where it is muddled thinking that has attracted the criticism as opposed to professional negligence or misconduct, then such an award should not be made. Of *Nkosi v Caledonian*

Insurance Co 1961 (4) SA 649 N Here, there has, of course, been no such an inquiry, although there is much to suggest that the failure to plead a defence properly is due to fault on the part of the defendant's adviser. However, I do not think that the fault should, as presently advised, be visited with an order for costs *de bonis propriis*.

1984 (1) ZLR p27

PITTMAN J

However, that may well be a possible consequence if the matter is not properly dealt with hereafter; for if the present legal practitioner cannot perform the task adequately, the basis exists under our Rules of Court for him to instruct someone else who can.

And even so far as the defendant is concerned, I do not think it is appropriate - certainly at the moment - to inflict an award of costs on his head on an attorney and client basis, for he may be entirely innocent of the incorrect statement of his case that has been contrived on his behalf so far. As the unsuccessful party, he must obviously pay the costs of these proceedings; and as it is the second time he has had to do so, he may well seek an explanation from his adviser of the continuing lack of success and, if he is dissatisfied with that explanation, the remedy lies in his own hands.

In the result the order I make is as follows:

- (1) The exception succeeds and the defendant's plea dated 23 October 1983 is ordered to be struck out.
- (2) The defendant is given leave to file a further and better statement of his defence if so advised, within twelve days from today's date.
- (3) The defendant must pay the costs of these proceedings and the costs of the proceedings that were reserved for decision by order of this Court on 10 November last.

Kantor and Immerman, legal practitioners for the Plaintiff

B Hove and Associates, legal practitioners for the defendant

1984 (1) ZLR p28

MASENDA v ESTATE AGENTS COUNCIL 1984 (1) ZLR 28 (HC)

Court High Court, Harare

Squires J

9 and 11 January 1984

Flynote

Statutes - Estate Agents Act [Chapter 220] - compensation fund established in terms of s 37 - administration

Copyright Juta & Co Ltd

vested in Estate Agents Council - decisions of Council - whether appealable - action seeking order that Council pay compensation - not competent for Court to make such order.

Headnote

In terms of s 37 of the Estate Agents Act [*Chapter 220*], a compensation fund is set up to compensate members of the public who have suffered loss as the result of some dishonest act or omission by an estate agent or his employee. The administration of the fund is vested in the Estate Agents Council, in terms of s 37(2). If the Council is satisfied that the loss and the causative dishonesty and the circumstances thereof have been established, it may order payment of compensation - whether full or partial - out of the fund.

The determination of any claims under the Act is vested solely in the Council. It is clear from the wording of the Act that no other tribunal has any power to order compensation to be paid and there is no appeal provided against a decision of the Council. At most, the High Court may exercise its normal review powers, on the grounds that the Council failed to exercise its discretion properly. However, the High Court has no power to order the Council to accept any claim or to make any payment.

Cases cited:

de Wet v Deetlefs 1928 AD 286;

R v Padsha 1923 AD 281;

Sachs v Minister of Justice;

Diamond v Minister of Justice 1934 AD 11;

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 (HL); [1968] 1 All ER 694.

Judgment

Squires J: When Parliament enacted legislation to provide for the registration of the country's estate agents and the regulation of

1984 (1) ZLR p29

SQUIRES J

their practice as such, it created an Estate Agents Council. This body was clearly intended not only to perform a number of duties and functions for the general purpose of ensuring that the competence and conduct of estate agents were of a high standard, but also to ensure some means of reimbursing members of the public when they had suffered loss through the dishonesty of an estate agent or someone who carried on business as such. To carry out its various functions, that Council was invested with certain powers and charged with a number of duties, such as has been done for the controlling bodies of several other professions or occupations. As part of the broad scheme to cushion the impact of an estate agent's dishonesty on the public, that legislation also established the Estate Agents Compensation Fund, setting out how and in what circumstances it was to be operated. Section 37(1) establishes this fund,

and s 37(2) vests it in the Council, and further provides that it is the Council which is to administer the fund subject to the provisions of the Act.

Amongst those provisions is s 39, which sets out the basis on which compensation may be paid to a member of the public from this fund. It says that where such a client or customer has suffered loss as the result of some dishonest act or omission by an estate agent or his employee, or even by a person carrying on the business of an estate agent, in the course of that person's practice as such, that aggrieved client may be recompensed from this fund. There are a few other provisions which do not have any apparent bearing on the present case, but the section makes it clear that the loss and the causative dishonesty, together with the permitted circumstances in which compensation can be paid, must be proved to the satisfaction of the Council; and it is the Council that is given authority - if so satisfied - to then make a grant to the aggrieved person out of the fund, to relieve or make good the loss he has suffered.

The Plaintiff in the present case has issued process out of this Court against the Estate Agents Council, claiming payment of the sum of \$10 000 with interest and costs. The basis of her claim is that in early 1980 she paid \$10 000 to a person who was carrying on business as an estate agent. This was due, so it is alleged, to be repaid to the Plaintiff in terms of her arrangement with this estate agent; but at the beginning of April of that same year the estate agent dishonestly failed to make such repayment. On 8 September the Plaintiff lodged a claim with the defendant under s 39 of the Act, but by letter dated 15 February 1982

1984 (1) ZLR p30

SQUIRES J

the defendant Council indicated that they had declined to pay the sum claimed. It will be observed from this that the nature of the Plaintiff's present claim is one based on the alleged dishonesty of an estate agent for payment of the loss suffered by the Council from this fund. It is not a claim for a review of its decision by the Estate Agents Council and it is not in any way, or in any sense, an appeal against its decision. It is process issued out of the Court claiming that the Court order the Council to make payment of the sum suffered as a loss to Plaintiff by the alleged dishonesty of this estate agent.

The defendant Council has met this claim with a special plea in abatement, in which it resists the proceedings now brought, and seeks the dismissal of the claim with costs. It does so on the grounds that this Court has no jurisdiction to entertain such a claim. The determination of all such claims, the Council says, is by s 39 of the Act, a duty vested solely in the Council.

Now, of course, it is nothing new that Parliament has conferred an administrative or even a judicial discretionary power on some person or body that is created by statute in order to decide questions referred to it by that law, and which arise out of the implementation of that legislation. And, *pro tanto*, that investiture is to the exclusion of any other body including the ordinary Courts of law. There are many decisions of even the highest Courts which acknowledge and accept this, requiring only that the conferring of such powers be clearly stated, for it will not be lightly inferred. See *de Wet v Deetlefs* 1928 AD 286; *R v Padsha* 1923 AD 281 at 304; *Sachs v Minister of Justice*; *Diamond v Minister of Justice* 1934 AD 11 at 37. It is, after all, entirely a

question of the intention of Parliament.

Gathering that intention from the words used here, I am left in no doubt that where a member of the public wishes to make a claim on the Compensation Fund following a monetary loss in consequence of some alleged dishonesty on the part of an estate agent, or his employee, it is the Estate Agents Council that has to decide it. Section 39(1) says in terms that where a loss caused by the dishonesty of an agent or employee in the circumstances postulated is alleged, it must be proved to the satisfaction of the Council. If it is so established, then it is the Council which may make a grant to that victim, and which can decide whether to recompense him in full or only in part. The language used is quite clear, and it does not seem to me to admit of any valid dispute.

1984 (1) ZLR p31

SQUIRES J

In defence of the present claim, Mr *Gillespie* argued that the proper interpretation of the Statute showed that the right intended to be given to an aggrieved member of the public is one that is enforceable against the Council, and therefore an action against the Council is not precluded. Comparison with the equivalent legislation in South Africa, he said, showed that claims could be brought against the Council in such a situation. He did accept, however, that the wording of the South African legislation was very materially different to that in the Act presently under consideration; and very properly drew attention to the fact that on the same wording in the English Solicitors Act of 1974 as appears in s 39(1) of the Act here considered, it is clear that awards of compensation to an aggrieved member of the public are wholly in the discretion of the Law Society Council - see Halsbury Vol 44, para 343.

From a comparison of the legislation provided in other countries, it would seem that our Legislature decided to follow the wording of the English Solicitors Act - existing as it did before it was re-enacted in 1974 - rather than the South African Estate Agents Act; and there can be no question to the language used in s 39(1) that only the Council may decide such a question, as equally there can be no doubt under the South African equivalent that a court has jurisdiction to hear such a claim. It seems, therefore, as said above, to depend on the intention of the Legislature in each case. For the reasons already given, it is quite clear that our Legislature intended the Council only to decide such claims.

To the extent that it expressly vests such decisions in the Council, the Legislature obviously intended to exclude any other body. Nor is there any avenue of relief provided by way of an appeal from any such decision of the Council such as there is to the Administrative Court against the Council's decisions taken under ss 26, 27 and 28. The most that may be said is that the High Court's powers of review are not excluded and that a decision taken by the Council has to be taken within the bounds of the exercise of discretion by a body vested with such a task. Of *Padfield v Minister of Agriculture, Fisheries and Food*[1968] AC 997 (HL); and failing such a proper exercise of discretion, the decision can be taken on review. For the High Court has an inherent power of review - enshrined at present in the High Court Act - over all the decisions of any inferior tribunal or Court.

SQUIRES J

But the present proceedings, as already stated, do not purport to seek a review of the Council's refusal of the Plaintiffs claim. It is an action claiming an order that the Council pay the Plaintiff \$10 000, presumably from the Compensation Fund, for the loss caused by the alleged dishonesty of the estate agent in question. For the reasons already given, the decision whether to accept such a claim and make good any such alleged loss, is one to be made by the Council. It has apparently decided against paying the Plaintiff anything. No other body can make such order, or even consider and adjudicate on such a claim.

I therefore think the point raised by the Council is well taken and that this claim must be dismissed with costs.

Sawyer and Mkushi, legal practitioners for the Plaintiff

Atherstone and Cook, legal practitioners for the defendant

S v MANZINI 1984 (1) ZLR 33 (HC)

Court High Court, Harare

Waddington J

18 January 1984

Flynote

Criminal procedure - sentence - suspended sentence - sentence suspended on condition accused compensates complainant - not reasonably capable of fulfilment - impropriety of imposing condition - duty of court to give accused opportunity of addressing argument on merits of proposed course.

Headnote

While it is proper to suspend portion of a sentence conditional upon the payment of compensation to the complainant, the conditions must be such as are reasonably capable of fulfilment, for otherwise the object of the conditions, namely, to keep the accused out of prison or to reduce the length of the prison term served and to compensate the complainant, could be defeated. In a case where the accused is desirous of compensating the complainant but does not have the means of doing so, it is difficult in the extreme to see what justification there is for the imposition of a condition of suspension of portion of a prison sentence which from the outset must constitute an impossible hurdle for the accused. In any event, if the court contemplates such a course, it should give the accused the opportunity of addressing argument to it on the merits of that course. The accused then might state the reasonably obvious, namely, that he would be unable to comply with such a condition.

Cases cited:

R v Lamb 1969 (2) RLR 193; 1969 (3) SA 149 (R);

S v Zumbika 1978 (3) SA 155 (R); 1978 RLR 192;

R v Bidi 1969 (2) SA 55 (R); 1969 (1) RLR 75;

R v Ndhlovu 1970 (1) SA 381 (R); 1969 (2) RLR 517;

S v Magkise 1973 (2) SA 493 (O);

S v Mugabe HC-H-223-82;

R v Mazyofa HC-H-142-82.

1984 (1) ZLR p34

WADDINGTON J

Judgment

Waddington J: The accused in this case was charged before a magistrate at Kwekwe with the crime of arson. To this offence he pleaded guilty. The magistrate then decided to proceed under s 255(2)(b) of the Criminal Procedure and Evidence Act. In due course, the accused was correctly convicted and a sentence of 10 months' imprisonment with labour was imposed. Four months' imprisonment with labour of the sentence was suspended for two years on condition, so it would seem that "the accused is not convicted of an offence involving violence on other people's property". A further four months' imprisonment with labour was suspended on condition that the accused repays the sum of \$885 to Cleopas Mancitshani, the owner of the hut which the accused burned down, within three months of his release from custody.

This was a case in which the Attorney-General had specifically directed that the accused be charged with the crime of arson rather than with the crime of attempted murder. The Attorney-General's instructions were duly complied with and when the sentence which has been described above was imposed, the prosecutor concerned referred the matter back to the Attorney-General for further consideration because he felt that the sentence was manifestly inadequate.

The Attorney-General, however, is more concerned with another problem which arises out of the suspension of the two distinct periods of four months' imprisonment with labour. I shall return to this subject later. A secondary point of concern to the Attorney-General is the fact that one of the periods of four months' imprisonment with labour has been suspended on condition that the accused repays \$885 to Cleopas Mancitshani. The Attorney-General feels that this was a misdirection on the part of the magistrate because the damage suffered by Cleopas Mancitshani in the conflagration caused by the accused amounted to \$871 only. The balance of \$14 was the value of the property owned by one Kula Ngwenya, who happened to be sleeping in the hut unbeknownst to the accused at the time he set fire to it. The Attorney-General has requested that I exercise my review powers for the purpose of correcting the condition which requires the accused to repay the sum of \$885 to Cleopas Mancitshani, as a condition

precedent to the suspension of four months' imprisonment with labour.

The major point of concern to the Attorney-General is that, in his view, it is unlikely that the accused in this case will be able to pay the

1984 (1) ZLR p35

WADDINGTON J

compensation of \$885. This view seems completely justified in view of what the accused said in mitigation of sentence at his trial. Although he stated that after serving his sentence he intended to compensate the complainant in full in order to "make peace with him", the accused also said that he possessed no savings, only one head of cattle and that he is unemployed. The sentence imposed by the magistrate means that the accused will serve a period of two months in prison less any period of remission which he may earn. Thereafter, he will be set at liberty for a period of three months, at the end of which period he must have compensated the complainant in full if he is to avoid being returned to prison to serve a further period of four months' imprisonment with labour. As the accused has no savings, and possesses only one head of cattle which cannot be worth much more than \$100 - 200, and has little prospect of employment since he was unemployed at the time of the commission of this offence, it seems to me that the Attorney-General is more than justified in saying that there is little likelihood that the accused will be able to fulfil the condition in question.

The Attorney-General does not, however, request that that portion of the order relating to the suspension of four months' imprisonment with labour on condition that the accused pays compensation, be set aside. The reason for this is clear. The deletion of that portion of the order would result in a substantial increase in severity of the effective sentence to be served by the accused. A judge of the High Court does not enjoy the power to substitute a sentence which is more severe than imposed by the inferior Court or tribunal on review, save in certain exceptional circumstances which do not apply in this case (see s 29(2)(b), proviso (ii), of the High Court of Zimbabwe Act, 1981). The Attorney-General states therefore, that despite the fact that the accused is most unlikely to be able to comply with the condition in question, it would not be proper to set aside that portion of the order under consideration. The effect of this approach would be to accept the inevitability of the accused, through no fault of his own, having served two months' imprisonment with labour, being returned to custody three months later to serve the balance of his sentence.

In the view I take of the matter, the propriety of the magistrate suspending four months' imprisonment with labour, on condition that the accused repays a sum which he clearly will never be able to repay, is open to the most serious doubt. It has been held on a number of

1984 (1) ZLR p36

WADDINGTON J

occasions that there must be a real likelihood that this type of condition is reasonably capable of fulfilment for otherwise the object of the condition, namely, to keep the accused out of prison or to reduce the length of the prison term imposed and to compensate the complainant, could be defeated. In *R v Lamb* 1969(2) RLR 193 at 196A - C; 1969(3) SA 149(R) at 151 QUENET ACJ

said:

"When a Court considers that part of a sentence of imprisonment should be suspended, subject to stated conditions, it does so in the hope and expectation that the conditions will be fulfilled. If it is reasonably clear that the conditions are incapable of fulfillment, there is no point in granting a suspended sentence. In a word, one must not ask the impossible of a person in whose favour a suspended sentence is granted, just as one must not, when imposing a fine, impose a fine of such severity that it cannot be paid. In such circumstances, the condition is wholly unrealistic, and bears no relation to the desire - the sincere desire, possibly - of the offender to comply with the condition. The condition must be reasonably capable of fulfilment. If it is not, then it is not the kind of condition which should be made a condition of suspension."

These sentiments were echoed some years later by GUBBAY J (as he then was) in *S v Zumbika* 1978 (3) SA 155 at 156D-F. The learned judge there observed:

"The objects of a condition of this type were considered by CILLIE JP in *S v Tshondeni*; *S v Vilakazi* 1971 (4) SA 79 (T) at 82H - 83F and were stated to be: (a) to prevent the offender serving a sentence of imprisonment (either in its entirety or in part); (b) to cause the offender to appreciate fully the consequences of his irresponsible criminal conduct; and (c) to compensate the injured party for the loss suffered.

The condition must be reasonably capable of fulfilment. If it is reasonably clear that it will not be met, there is no point in granting a suspended sentence, for the first and third objects of the condition will be frustrated and also the second to a great extent. The offender will then serve imprisonment on account of his poverty and not because of any *mala fides* or negligence on his part. See *R v Lamb* 1969 (3) SA 149 (PW) at 151A - C; *S v Magkise* 1973 (2) SA 493 (O) at 494D - F "

In the present case, having regard to the exiguous assets of the accused and his miserable employment prospects, it is difficult in the extreme to see what justification there was for the imposition of a condition which from the outset must have constituted an impossible hurdle for the accused. Properly advised, in my view the trial magistrate should not have imposed the condition.

There is another aspect to be considered. Although the accused did state, as I have observed above, that he wished to compensate the

1984 (1) ZLR p37

WADDINGTON J

complainant, it has been held in the past that the court should give the accused an opportunity of addressing argument to the court on the merits of the course proposed. See: *R v Bidi* 1969 (2) SA 55(R); *R v Ndhlovu* 1970(1) SA 381 (R); *S v Magkise* 1973 (2) SA 493 (O) at 495A-B.

The accused in the instant case was not apprised of the magistrate's proposal to suspend four months of the sentence of imprisonment on condition that within a period of five months from the date of conviction the accused should repay the very large sum of \$885. Had the magistrate afforded the accused the opportunity of considering the proposal and of addressing the court, it is possible that the accused would have stated the reasonably obvious, namely that he would be unable to comply with such a condition.

In these circumstances, the condition cannot, in my view, be allowed to stand at all. However, bearing in mind what the Attorney-General has, in my view, correctly submitted is the position, namely that the accused should not be penalized by the loss of the suspension of the second

period of four months' imprisonment with labour, and that, in any event, a judge on review does not possess power to increase the sentence of an inferior court in this way, it is my view that I should follow the course adopted in *S v Mugabe* HC-H-223- &2 and *S v Maziyofa* HC-H-142-82, where, in similar situations, the effective sentences which had been passed were left, in effect, untouched. I am aware that this will result in an inadequate sentence but in my view the lesser of the two evils is to be preferred.

The sentence imposed upon the accused by the trial magistrate is accordingly set aside and is substituted by the following:

10 months' IWL, of which 8 months' IWL is suspended for 2 years on condition that the accused is not convicted of an offence committed during that period involving the malicious damaging of immovable property.

The effect of this sentence will be to require the accused to undergo no greater period of imprisonment in effect than originally was the case. The complainants, who suffered injury in the conflagration, will still possess their ordinary civil remedies against the accused.

Smith J agrees.

1984 (1) ZLR p38

S v JONES AND ANOTHER 1984 (1) ZLR 38 (HC)

Court High Court, Harare

Pittman and Waddington JJ

16 and 25 January 1984

Flynote

Criminal procedure - sentence - female accused - convicted of same offence as male co-accused - whether distinction in sentence justified.

Headnote

The two appellants, both women, were employed at a clothing shop in Kwekwe. They arranged with two men to steal clothing valued at \$1 995, 65 from the shop. The crime was detected soon after its commission and the clothing was recovered. No particular one of the four accused was the instigator of the theft and they planned to share the proceeds equally. Each was sentenced to 18 months' imprisonment, of which half was conditionally suspended. On appeal it was argued that the difference between the sexes of the four accused should be taken into account in favour of the female appellants.

Held, that while the trend in the past certainly was to make a sharp distinction between men and women in the matter of sentence, women have in recent years begun to receive similar conditions of employment to those enjoyed by men and that change now makes it positively unfair to give women the comparatively lenient treatment they would have received in the past.

In the present case, it would have been quite unfair to distinguish between the four accused solely because of the difference between their sexes.

Case cited:

R v Harvey 1967 RLR 203.

V Ferrao, for the appellants

Miss M Werrett, for the respondent

1984 (1) ZLR p39

PITTMAN J

Judgment

Pittman J: This is an appeal against sentences imposed by a magistrate. The two appellants are females who were employed in a clothing shop in Kwekwe with two men. The four of them arranged together to steal a quantity of clothing valued at \$1 955,65 from the shop. They removed it from the shop, but after doing so they were detected and it was all recovered. Each of the four accused was sentenced to 18 months' imprisonment with labour, of which nine months were suspended for four years, on condition that he or she does not within that period commit any offence involving dishonesty for which he or she is sentenced to imprisonment without the option of a fine.

The first appellant is aged 31 years and is a widow with two children. She was employed as the manageress at the shop at a salary of \$250 per month, and was in charge of the other three accused. The second appellant is aged 25 years and is married with two children. She earned \$150 per month as a saleslady. The two men were aged 20 and 30 years, with salaries of \$135 and \$150 per month respectively.

The evidence established that no particular one of the four accused was the instigator of theft, and that they were going to share the stolen goods equally between themselves.

In his heads of argument, Mr *Ferrao* referred to the personal circumstances and qualities of the two appellants. He said they were first offenders who had apparently rendered faithful service. There was nothing to indicate that they had shown some special mitigating factors as employees. They were simply employees, and the first appellant was in a special position of trust. It was also contended that they submitted to sudden temptation, the crime being committed on the spur of the moment. This contention is unacceptable because the accused took fairly elaborate steps to arrange the removal of the goods from the shop. The goods were all recovered, but not in any circumstances which reduced the moral blameworthiness of the thieves. Mr *Ferrao* also urged that the appellants were manifestly contrite. There was nothing to show the reason why they regretted committing the crime. It may have simply been because they were detected in doing so. In imposing the sentence of 18 months' imprisonment with labour, with nine of them suspended, the magistrate clearly decided that the difference between the sexes of the four accused should not be

PITTMAN J

taken into account in favour of the appellants. This was the main point relied upon by Mr *Ferrao* in his argument. He pointed out that *R v Harvey* 1967 RLR 203 at 205, MACDONALD AJP, as he then was, said:

"All courts should, and usually do, make a sharp distinction between men and women in the matter of sentence. While this may be due partly to the instinctive tendency of men to deal more gently with the opposite sex, there are cogent practical reasons for treating the sexes differently in the matter of sentence. Although the population is made up of almost equal numbers of men and women, offences involving dishonesty committed by men greatly outnumber those committed by women and it rarely happens that a woman is convicted for a second time of such an offence. Recidivists are almost invariably men. These differences in the pattern of crime are very properly reflected in the sentences imposed for a first conviction for a crime of dishonesty. It is not, in general, considered desirable in the case of a woman who is a first offender to impose an unconditional prison sentence. There may, of course, be aggravating or special circumstances which make such a sentence desirable. Generally speaking, however, in the case of a female accused person it has been found sufficient in the public interest as well as in the interest of the accused to impose on a first conviction for a crime of dishonesty a fine and/or a suspended sentence of imprisonment."

These remarks were written in 1967, but since that time women have begun to receive similar conditions of employment as men receive, and that change now makes it positively unfair to give women as criminals the comparatively lenient treatment described by MACDONALD AJP. I think that in the circumstances of the present case, for example, it would have been quite unfair for the magistrate to impose on the two appellants more lenient sentences than those imposed on their co-accused, solely because of the difference between their sexes.

In my opinion, therefore, the main question to be decided is whether the magistrate erred in imposing on each of the four employees an effective sentence of nine months' imprisonment with labour for their joint theft from their employer of goods worth \$1 955, 65. I regard the sentence as severe, but not so excessive as to induce a sense of shock, and consequently I would dismiss the appeal.

Waddington J: I agree.

E C Moffitt and Pratt, Kwekwe, and *Winterton Holmes and Hill*, Harare, legal practitioners for the appellants.

Attorney-General, legal practitioner for the State.

EBRAHIM v CONTROLLER OF CUSTOMS AND EXCISE 1984 (1) ZLR 41 (HC)

Court High Court, Harare

McNally J

23 and 25 January 1984

Flynote

Statutes - Customs and Excise Act [Chapter 177] - s 178(2) - requirement that notice be given to Controller setting out "cause of action brought against him" - meaning of "cause of action" - summons based on vindicatory action - not enough merely to set out that controller in possession of plaintiffs goods - real issues must be canvassed

Headnote

In terms of s 178(1) of the Customs and Excise Act [Chapter 177], it is necessary, before a writ or summons may be issued against the Controller of Customs and Excise, for at least one month's notice in writing to be given of the intention to serve the writ or summons. The notice must, in terms of subs (2), clearly and explicitly contain the "cause of the action". The meaning of "cause of action" is the entire set of facts which give rise to an enforceable claim; this includes every fact which is material to be proved to entitle a Plaintiff to succeed in his claim. Where the Controller has seized goods which were admittedly imported into Zimbabwe, the real issue is not simply that the Controller has possession of the plaintiff's goods, but such matters as where and at what price the goods were obtained; whether the plaintiff had any proof of ownership before the importation; whether the ownership was *bona fide*; and whether duty was paid. Merely to rely on a vindicatory action is not enough and notice which refers to a vindicatory action and nothing else is not proper notice in terms of the Act.

Cases cited:

Controller of Customs and Excise v Guiffre 1971 (1) RLR 91; 1971 (2) SA 81 (R);

Read v Brown (1888) 22 QBD 128;

Cooke v Gill (1873) LR 8 CP 1077

Lyon v SAR and H 1930 CPD 276;

Abrahamse and Sons v SAR and H 1933 CPD 626;

Gray NO v Assistant Master of the High Court and Another 1979 RLR 160; 1979 (3) SA 427 (R)

1984 (1) ZLR p42

McNALLY J

A N H Eastwood, for the Plaintiff

I A Donovan, the defendant

Judgment

McNally J: The Plaintiff issued summons and declaration against the Controller seeking to vindicate a certain BMW motor car. The declaration, in classic vindicatory form, sets out merely that the plaintiff is the owner and the defendant is in possession.

The Controller filed a plea in abatement in which he alleges that the Plaintiff has failed to comply with requirements of s 178(2) of the Customs and Excise Act [Chapter 177],

Copyright Juta & Co Ltd

alternatively that if his legal advisers' letter of 11 October 1982 purports to comply with the section it does not do so because it has failed to specify the cause of action.

The letter in question is before the Court by way of further particulars to the Plea in Abatement and so no evidence was necessary.

It will be convenient if I set out the requirements of the section and then the contents of the letter. The section reads:

" 178. (1) No writ or summons shall be issued against nor a copy of any process served upon the Controller or any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him or left at his usual place of abode by the person or his attorney who intends to issue such writ, summons or process.

(2) In the notice shall be clearly and explicitly contained the cause of the action, the name and place of abode of the person who is to bring the action and the name and address for service of his attorney, if any.

(3) No evidence shall be adduced at the trial of the action by the plaintiff except as to causes thereof stated in the notice, and judgment shall not be given for the plaintiff unless he proves that the notice was given. In default of proof of notice by the plaintiff, the defendant shall be entitled in such action to judgment in his favour and costs.

(4) (Not relevant)."

The body of the letter reads:

"We act for Mr Gulam Ebrahim who is the owner of a BMW 728 Sedan, engine number 712062, chassis number 5712068 which was seized by your Department in terms of Notice of seizure number 28517C on the 17th September 1982.

1984 (1) ZLR p43

McNALLY J

You are hereby advised in terms of section 178 of the Customs and Excise Act [*Chapter 177*] that it is our client's intention to issue summons for the recovery of the vehicle.

The basis of our client's action will be a vindicatory action. In terms of sub section (2) of section 178 you are advised that our client's name is Gulam Ebrahim and his place of abode is 3Y Spurn Road, Ardbennie, Harare and his legal practitioners' address is as stated on this letterhead.

We point out that our client's vehicle was customs cleared in terms of Customs Clearance Certificate for Motor Vehicle number 290955, serial number 00 252 dated the 18th March 1982."

The plaintiff's case is fundamentally a simple one. His cause of action is that he is the owner and defendant is the possessor of the motor vehicle. An action claiming the return of property on this basis is a vindicatory action. The letter of 11 October 1982 explicitly contains the allegations of ownership by the plaintiff, possession by the defendant and that the action is a vindicatory one. Therefore the letter complies with the requirements of the section.

One can, of course, put the case another way, as Mr *Eastwood* chose to do in reply to Mr *Donovan's* submissions. One can say that the question of s 178 simply does not arise because the plaintiff has not referred in his pleadings to any importation or to any purported right of the Controller under the Act. Plaintiff has chosen the procedure of vindication, and has thus alleged no more than that the Controller "is in possession of," the vehicle. He is not therefore suing the

Controller "for anything done by him under this Act or any other law relating to customs or excise."

Mr *Donovan's* submission was in essence that this matter has already been decided in *Controller of Customs and Excise v Guiffre* 1971 (1) RLR 91. In that case also a man sought to vindicate his motor cars from the Controller and was met with an objection of premature service and failure to disclose a cause of action. Although the Controller in that case brought the proceedings by way of Notice of Motion, it seems to me that the argument is the same. The conclusion of BECK J (as he then was) in that case was that the summons was premature. In coming to the conclusion he considered himself entitled to look not only at the summons but also at the preceding correspondence. He decided that the cause of action lacked the averment that

1984 (1) ZLR p44

McNALLY J

the vehicles became the property of the respondent before he immigrated to this country.

In coming to this conclusion the learned Judge clearly went behind the mere allegations of ownership and possession. In this it seems to me with respect that he was clearly right. Whereas it might technically be correct to argue that ownership by the plaintiff and possession by the defendant of the thing in issue constitute "the cause of action" in a vindicatory action, this is only because the rules of procedure provide that there is an *onus* on the defendant in such cases to justify his possession. There are undoubtedly sound practical reasons for the imposition of this *onus*, but the fact is that the real issue in such cases is whether the defendant has a right to retain the thing as against the owner. If he has, then the owner has no cause of action.

By looking at the problem in this way, one can see that the incidence of the *onus* clouds the proper perception of what is the cause of action in a case of vindication.

If one looks at LORD ESHER'S "definition" in *Read v Brown* (1888) 22 QBD 128 at 131, one can see that he was not addressing his mind to the problem of *onus* when he approved the "definition" in *Cooke v Gill* (1873) LR 8 CP 107, namely "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment of the Court." In any event that definition was inclusive, not exclusive, as was made clear in the same case by LOPES LJ when he said at 133:

"I agree with the definition given by the Master of the Rolls of a cause of action, and that it includes (my emphasis) every fact which it would be necessary to prove, if traversed, in order to enable a plaintiff to sustain his action."

Many of the other definitions show that the concept is in fact wider than LORD ESHER'S words might suggest. If one looks at the various definitions in the article at p 102 of (1970) 87 SALJ, one sees many which are wider. Thus the author (JBS Roets) quotes WATERMEYER J in *Lyon v BAR and H* 1930 CPD 276 at 285 as saying:

"After considerable difference of opinion, it was decided in England that the expression 'cause of action' in the Common Law Procedure Act meant 'that particular act on the part of the defendant which gives the plaintiff his

McNALLY J

I would have preferred to call it the final act on the part of the defendant which completes the plaintiff's cause of action and gives a light to invoke the aid of the Court."

Another quotation from WATERMEYER J is -

"The proper legal meaning of the expression 'cause of action' is the entire set of facts which gives rise to an enforceable claim and includes every fact which is material to be proved to entitle a plaintiff to succeed in his claim."

(*Abrahamse and Sons v SA Railways and Harbours* 1933 CPD 626 at 637).

And, later, from *Halsbury's Laws of England* 3 ed I [1952] para 9 p 6, comes the definition -

"Strictly speaking, every fact which is material to be proved to entitle the plaintiff to succeed, *every fact which the defendant would have a right to traverse.*" (The emphasis is mine).

I conclude the reference to previous definitions by referring finally to vol 37 of the Fourth Edition of *Halsbury*, para 20 p 27 where this appears:

" 'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular act on the part of defendant which gives the plaintiff his cause of complaint, or the subject matter or grievance founding the action, not merely the technical cause of action. "

I am satisfied therefore that the meaning of "the cause of the action" in s 178(2) is in fact wider than the definition given by LORD ESHER because he did not intend his definition to be an exclusive one. It seems to me with respect that BECK J came to the same conclusion, despite the fact that he cited LORD ESHER'S definition without commenting that it was only intended to be a partial definition.

Mr *Eastwood* has argued that if the definition is taken to include "every fact which the defendant would have a right to traverse", the plaintiff would be put in an impossible position. He would then, in his letter, have to deal with every possible theoretical problem which the

McNALLY J

Controller might have, without necessarily knowing what those problems were.

I agree with Mr *Donovan* that these difficulties are fanciful. In this case, and in every such case, the plaintiff knows that the goods have been seized by the Controller in terms of the Act. The first paragraph of the letter in this case makes it clear that the plaintiff knew this. He must know therefore that the Controller is alleging a right to seize the goods in terms of the Act. The plaintiff must also know, because the knowledge is peculiar to him, where and how and when he

acquired the goods. He must also know that the Controller takes issue with him over some or all of these points, and in particular is concerned about the legality of the importation of goods. That the plaintiff knows this is relevant is evident from the last paragraph of the letter, referring to a Customs Clearance Certificate.

In these circumstances "the cause of action" will be more than simply "I own it; you possess it." It will inevitably cover the questions - when and where and at what price did you acquire it; what proof of ownership prior to importation can you produce; is your ownership *bona fide*? (See s176(3) of the Act). These will obviously be the real issues in the trial and these are obviously factual allegations of which the Controller requires advance notice. If the plaintiff is an immigrant his rights are spelt in s 71 of the Regulations, Statutory Instrument 310 of 1980, and the cause of the action will no doubt lie somewhere in those provisions.

There is no difficulty for an honest Plaintiff in setting out briefly the facts as to his acquisition and importation of the vehicle in question. He cannot be faulted for setting out what he knows and omitting what he does not know. He must say, "These are the facts about my acquiring the vehicle; that is all I know about it; in the light of those facts I deny that the Controller had any right to seize it."

Failure to set out these facts is in my view failure to give proper notice as to the cause of the action. To put it another way, the cause of the action lies in the Controller's right (or otherwise) to seize the vehicle, and the notice should contain allegations of fact relevant to that alleged right.

1984 (1) ZLR p47

McNALLY J

There are to my mind other weaknesses in the plaintiff's argument. He seeks to rely on the technical submission that in a vindicatory action the *onus* to justify his possession lies on the defendant. That may normally be so, but to my mind the provisions of s 186(1) of the Act have fundamentally altered the position, so that the *onus* is on the plaintiff. Thus, even on the more limited definition of LORD ESHER, the issues as to payment of duty, lawful importation, *bona fides*, etc. are on the plaintiff and thus require to be traversed as part of the cause of the action.

Secondly, the plaintiff seeks to rely on the fact that his summons and declaration make no reference to the Act or to the seizure of the vehicle. The technicality of this submission is shown up when one asks, "Why then did you write the letter of 11 October? Did you not clearly do so because you well knew that the Controller's possession of the vehicle was the result of seizure by him 'under this Act'?"

All of this to my mind indicates the extreme technicality of the plaintiff's contention. Moreover, I do not see that the plaintiff's case is advanced by reliance upon *Gray NO v Assistant Master of the High Court and Another* 1979 RLR 160. In that case BEADLE AJ held that before s 186(1) of the Act came into operation, the Controller had to prove that the goods involved were imported into Zimbabwe. In this case, apart from the fact that as a matter of common knowledge BMW motor vehicles are not manufactured or assembled here, there is a reference in the plaintiff's letter to a Customs Clearance Certificate, indicating importation.

One cannot help feeling that this piece of legislation is a trap for the unwary. It is most unfortunate that an Act which so closely affects members of the public should not only impose unusual and unexpected requirements in the way of notices and time limits, but also present problems of interpretation. None the less, it has been interpreted before by the Court in a reported judgment, and I must apply the law as it stands. I find that the plaintiff has not given proper notice in terms of the Act.

It is specifically provided in s 178(3) of the Act that "in default of proof of notice by the plaintiff, the defendant shall be entitled in such action to judgment in his favour and costs."

1984 (1) ZLR p48

McNALLY J

Accordingly the plaintiff's claim is dismissed and there will be judgment for the defendant with costs.

Kantor and Immerman, legal practitioners for the Plaintiff.

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

1984 (1) ZLR p49

BLUEBELL INC v LENNARD CLOTHING MANUFACTURERS (PVT) LTD 1984 (1) ZLR 49 (HC)

Court **High Court, Harare**

McNally J

24 and 25 January 1984

Flynote

Practice and procedure - ex parte petition for interdict - should only be brought where matter one of urgency or irreparable harm may be done to petitioner - criteria on which interdict may be granted.

Trade marks - action for infringement of trade mark - must be brought by notice of motion - Trade Marks Act [Chapter 203] - s 72(1) - criteria for infringement - likelihood of deception or confusion.

Passing off - petitioner's reputation - necessity to show that petitioner has traded in Zimbabwe or has acquired goodwill here.

Headnote

For an action for an interdict to be brought by way of an *ex parte* petition without notice, it is necessary that the matter be one of urgency or in which irreparable harm may be done to the petitioner. The criteria for the granting of an interdict are well established and are -

- (a) a clear right;

- (b) injury actually committed or reasonably apprehended; and
- (c) the absence of similar protection by any other ordinary remedy.

Where the right is not clear, though *prima facie* established, the interdict will be granted only where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant. Where the risk of harm is not apparent, there is no ground for granting an interdict, as the applicant can, if he does suffer harm as the result of the respondent's actions and if those actions are unlawful, sue for damages.

1984 (1) ZLR p50

McNALLY J

The criteria for infringement of a registered trade mark are set out in s 8(1) of the Trade Marks Act [Chapter 203]. To constitute infringement, it must be shown that there has been use of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion. The confusion must be among a substantial section of the public. There cannot be confusion among a substantial section of the public between two types of an article when only one of them is available for purchase in the country.

The common law action for passing-off is available to anyone who can show that another person is representing that his business or his goods or both are the business or goods of the plaintiff. An applicant for an interdict who has never traded in Zimbabwe and has acquired no goodwill here has not established a reputation within the meaning of that word as used in passing-off actions and accordingly has no right to the relief sought.

Cases cited:

Ex p Weir 1956 R & N 350; 1956 (3) SA 36 (SR);

Republic Motors v Lyttor Road Service Station 1971 (1) RLR 129; 1971 (2) SA 516 (R);

Setlogelo v Setlogelo 1914 AD 221;

Greatermans Stores Ltd v Marks and Spencer (SR) Ltd 1962 R & N 755; 1963 (2) SA 58 (FSC);

Policansky Bros v L and H Policansky 1935 AD 89;

Pick-'n-Pay Stores v Pick-'n - Pay Superette 1973 (1) RLR (1) 244; 1973 (3) SA 564 (R).

G Seirlis, for the petitioner

C Jordaan, for the respondent

Judgment

McNally J: On 11 January and by urgent petition *ex parte*, the petitioner, a *peregrinus*, sought and obtained an order from this Court temporarily interdicting the respondent from selling jeans or other articles of clothing bearing RANGER labels and/or the trademark RANGER as applied to clothing. A rule *nisi* was issued calling upon the respondent to show cause on 1 February

1984 why that temporary interdict should not be made permanent, why the offending labels should not be handed over for destruction and why costs should not be payable by the respondent.

The respondent has, without objection, anticipated the return day and the matter was argued before me on 24 January. It appears that the clothing industry was closed down for its year-end recess until Monday, 23 January, and accordingly no harm has been done to the respondent's business. The matter is now, however, from the respon-

1984 (1) ZLR p51

McNALLY J

dent's point of view, urgent. The attention of practitioners is drawn once again to the provisions of Practice Note No 1 of 1983 and to the decisions in *Ex parte Weir* 1956 R & N 350, and *Republic Motors v Lytton Road Service Station* 1971(1) RLR 129.

It is now apparent that -

- (a) the petitioner's jeans have not been on sale in this country for some years owing to exchange control difficulties and import control;
- (b) the respondent's jeans, shirts and trousers have been produced and sold in this country under the name RANGER since 1975;
- (c) the petitioner has for some time been actively aware of, and has formally opposed, the application by the respondent for registration of the trade mark "RANGER". The proceedings are currently in the midst of a two-month extension, requested by the petitioner itself, to enable it to obtain instructions.

It is evident from these facts, some of which were not before the Court which granted the temporary interdict, that the matter is and was not one of urgency or irreparable harm (except perhaps to the respondent) and should not have been brought by way of petition without notice.

There is another reason why Notice of Motion procedure should have been followed, and it is to be found in s 72(1) of the Trade Marks Act [Chapter 203], which provides -

"Any action or legal proceedings relating to the infringement of a trade mark shall be brought in the High Court on Notice of Motion."

The petitioner has specifically, in para 13(a) at p 9 of the papers, alleged an infringement of its registered trade mark. It should, therefore, in compliance with the statute, have proceeded by Notice of Motion.

I turn now to summarize briefly the facts of the case. The petitioner, a company incorporated in North Carolina, USA, is a large-scale manufacturer of jeans under the trade name WRANGLER. This name is registered in Zimbabwe as a trademark in three separate forms. It has a world-wide reputation. Nevertheless, currency and

1984 (1) ZLR p52

McNALLY J

import restrictions have prevented the importing of the jeans in recent years, though teenage or young holiday-makers often buy them abroad. They are also advertised in magazines sold in Zimbabwe and thus have a reputation here (though not necessarily a reputation in the sense in which that word is used in passing-off actions).

The respondent, a Bulawayo company, has been producing jeans, shirts and trousers under the name RANGER since 1975. The jeans have certain features which resemble or bring to mind the WRANGLER jeans. These features are set out by the petitioner as follows:

1. The name RANGER itself is both phonetically and in appearance similar to WRANGLER (page 17 of the papers).
2. The cardboard label attached to the RANGER jeans is patently designed to resemble closely the WRANGLER label and to give the impression that the jeans are of United States origin. (Paragraphs 9-10, pages 6-7 of the papers).
3. The leather label permanently stitched to the back pocket of the WRANGLER jeans has been copied to a considerable degree in the cardboard label on the RANGER jeans, though this cardboard label contains details of the size, waist, cut, etc, and is obviously torn off and destroyed before the jeans are worn.

On the basis of these allegations the petitioner claims that the respondent-

- (a) is infringing the registered trade mark WRANGLER;
- (b) is passing off RANGER jeans as WRANGLER jeans;
- (c) is breaching the petitioner's copyright in its WRANGLER labels;
- (d) is contravening s 3 as read with s 6 of the Merchandise Marks Act [*Chapter 290*].

On these grounds the petitioner seeks to have the respondent permanently interdicted from selling any of its products, whether jeans, trousers or shirts, bearing RANGER labels or the trade mark RANGER as applied to clothing.

It may be noted that the respondent employs 500 people at its factory and in 1983 produced 4 000 shirts, 500 jeans and 500 pairs of

1984 (1) ZLR p53

McNALLY J

trousers per day, worth half a million dollars a month. Eighty *per cent* of this production is under the RANGER label.

It seems to me, even before entering the intellectual mine-field of trade marks, copyright infringements and passing-off actions, that this application is misconceived.

An interdict is a discretionary remedy. The criteria for determining whether or not to grant an

interdict are well established, and are set out in *Setlogelo v Setlogelo* 1914 AD 221 at 227 by INNES JA as follows-

- a., a clear right,
- b., injury actually committed or reasonably apprehended, and
- c., the absence of similar protection by any other ordinary remedy.

The learned judge later makes the point that where the right is not clear but open to some doubt, *prima facie* established, the interdict will be granted only where the continuance of the thing against which an interdict is sought would cause irreparable injury to the applicant.

In the present case the petitioner's right is far from clear. In particular its objection to the registration of the trade mark RANGER is pursuing a somewhat leisurely course in proceedings before the Registrar of Trade Marks and it is by no means clear whether or not the objection will be upheld. I see no reason to pre-empt the Registrar's decision. Secondly, the threat of harm is to my mind remote, since the petitioner does not sell its jeans here and has no immediate prospect of doing so. No harm can occur, in a financial sense, until the petitioner's jeans can be sold on the local market. Thirdly, as far as the balance of inconvenience is concerned, the respondent is faced with immediate and large-scale disruption of its production at a time when the clothing industry in Bulawayo is in a depressed state. The petitioner, on the other hand, will for the foreseeable future suffer nothing, as far as I can see, if the rule is discharged. Indeed, I find it difficult to envisage what it will gain in the foreseeable future if the rule is confirmed. As to the availability of an alternative remedy, it seems to me that if the petitioner does suffer any damage

1984 (1) ZLR p54

McNALLY J

as a result of the respondent's actions, and can show the actions were wrongful, it can sue for damages.

I should mention at this point that the respondent has accepted the similarity between the two cardboard labels referred to in pp 6-7 of the papers and Annexure "G", and has submitted to an order prohibiting the further use by it of this cardboard label. I agree that they are very similar and that it seems beyond dispute that the respondent's label has been designed deliberately to resemble the petitioner's label very closely.

The final point of similarity, namely that between the permanent leather label on the back pocket of the WRANGLER jeans and the cardboard "throw away" label on the RANGER jeans, seems to me to be of minor importance. However, I think I should express no firm conclusion on this, since I have indicated that the petitioner is free to institute an action for damages if so advised and I have no wish to prejudge any such action.

In my view, what I have said so far provides sufficient basis for discharging the rule save to the extent of the respondent's concession. But it seems to me that I should comment on some of the points made by Mr *Jordaan* for the respondent because they are further reasons for coming

to the same conclusion.

He makes the point initially that the petitioner claims only to sell jeans and wishes only to protect jeans. There is no room, therefore, in a claim for a protective interdict, for a prayer to interdict the sale of other things such as shirts and trousers. I think this argument has more validity in relation to a passing-off action than in relation to an action based on infringement of a trade mark - see the *Adidas* case 1976 (1) SA 530 at 535D. I do not need, however, to decide the question.

I will deal with the other aspects under the headings of complaint set out in the petition at para 13.

1. INFRINGEMENT OF REGISTERED TRADE MARK

Assuming that the petitioner's trade marks are registered, the criteria for infringement are those set out in section 8(1) of the Trade

1984 (1) ZLR p55

McNALLY

Marks Act [*Chapter 203*]. It is for the petitioner to show that there has been an infringement. And to constitute infringement it must be shown that there has been "use of a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion". These are the words of the section, and they are explained in *Gretermans Stores Ltd v Marks and Spencers (SR) Ltd* 1963 (2) SA 58 (FSC) as referring to confusion among "a substantial section of the public". I need only say that on the papers before me there is not the slightest evidence that anyone has been confused. Indeed, the eager purchase abroad of the genuine article by the youth of the country (who are in their way a particularly discerning group of buyers when it comes to clothing) would seem to suggest the contrary, namely that there is no confusion. In any event, I do not think there can be confusion among a substantial section of the public between two types of jeans when only one of them is available for purchase in this country.

2. PASSING-OFF

The common law action for passing-off is available to anyone who can show that another person is representing that his business or his goods or both are the business or goods of the plaintiff (per WESSELS ACJ in *Policansky Bros v L and H Policansky* 1935 AD 89 at 97).

It is clear, however, from the decision in *Pick-'n - Pay Stores Ltd v Pick-'n - Pay Superette* 1973 (3) SA 564 (R) that an applicant for an interdict who has never traded in Zimbabwe and has acquired no goodwill here has not established a reputation within the meaning of that word as used in passing-off actions, and accordingly has no right to the relief sought.

On the evidence before me it seems that the petitioner may at one time have traded in this country. But it does not do so now, nor are its goods sold here by anyone else. There is no evidence to suggest that the public or any section of it thinks that RANGER jeans are imported. I can see no reason for not applying the *Pick-'n - Pay* principle. Mr Seirlis has suggested that the *Pick-'n - Pay* case can be distinguished because they did not have a registered trade mark

in this country. But passing-off is concerned with trade, not with trade marks. The registration of the mark does not seem to me to have any bearing on the question.

1984 (1) ZLR p56

McNALLY

I find that the petitioner has not established a right to an interdict on the basis of passing-off.

3. BREACH OF COPYRIGHT

I understood Mr *Seirlis* to abandon this contention because it seems to be common cause that the United States of America is not one of those countries proclaimed in a Statutory Instrument as a country to which protection is extended in Zimbabwe by our legislation. Accordingly this question falls away.

4. CONTRAVENTION OF THE MERCHANDISE MARKS ACT [CHAPTER 290]

This allegation was not really elaborated by Mr *Seirlis*, and I can only assume that he is alleging that the respondent is applying a false trade description to its goods in contravention of s 3(1) as read with s 2(4) of the Act.

There has been no prosecution of the respondent in this regard, and it seems to me that the allegation presupposes a finding adverse to the respondent in respect of the earlier allegations of passing-off or infringement. Since I have not come to any such adverse finding, the allegation must fall away. In any event, it relates mainly to the offending label, Annexure "G", as to which a concession has been made.

I conclude, therefore, that the rule *nisi* must be discharged, save in respect of the label which the respondent has agreed should be interdicted.

As far as costs are concerned, it is true that as a result of a concession by the respondent the petitioner has partially succeeded. On the other hand, the petitioner has to a greater extent failed and moreover has followed the wrong procedure and has failed to justify the use of the certificate of urgency. The costs of the hearing on 24 January would not have been incurred if the petitioner had accepted the concession made by the respondent. In the premises I propose to order that the petitioner bear the costs of the respondent incurred in respect of the hearing on the anticipated return day, and that otherwise each party is to bear its own costs.

1984 (1) ZLR p57

McNALLY J

Accordingly, the following order is made:

It is ordered that:

1. The respondent be and it is hereby interdicted and restrained from selling jeans bearing the RANGER guarantee label a copy of which is annexed to the petition as Annexure "G".

2. Save as above the rule nisi issued on 11 January 1984 be and it is hereby discharged.
3. The petitioner is to bear the costs of the respondent incurred in respect of the hearing on the anticipated return day. For the rest, each party is to bear its own costs.

George Seirlis and Associates, legal practitioners for the petitioner.

Lazarus and Sarif, Bulawayo, and *Gill, Godlonton and Gerrans*, Harare, legal practitioners for the respondent.

1984 (1) ZLR p58

C v COMMISSIONER OF TAXES 1984 (1) ZLR 58 (HC)

Court **Supreme Court, Harare**

Dumbutshena ACJ, Beck JA and Gubbay JA

16 & 31 January 1984

Flynote

Income tax - Income Tax Act [Chapter 181] - s 8(1) - gross income - receipts of a capital nature - loans - moneys received by supplier of fuel from customers before supply of fuel on credit - whether loans or payments in advance - intention of supplier.

Headnote

The appellant company sold fuel in the industrial area of Harare. It enjoyed the patronage of a number of customers who owned fleets of vehicles. These customers always used to buy their fuel on credit, paying the appellant on receipt of an invoice. However, the wholesale suppliers of fuel insisted in recent years on being paid in cash for fuel by retail outlets such as the appellant. This meant that the appellant had to insist on the customers also paying in cash, otherwise it would not have sufficient cash itself to pay the bulk supplier. To prevent such an inconvenience to its customers, the appellant considered a bank loan, then decided that each customer would be told of the problem and offered the alternative of paying a deposit equal to one-twelfth of his annual expenditure on fuel, or paying cash.

The moneys received were placed in the appellant's bank account, and used for the appellant's normal activities, including the purchase of fuel, but the amounts were recorded against each customer's account and stayed so recorded until the customer closed its credit account facility. The credit remained irrespective of how much fuel was subsequently purchased on account and was not set off against purchases, nor did it feature as an ongoing credit in monthly statements.

The Commissioner of Taxes regarded these sums as gross income and simply payments in advance for fuel, which would be taxable. His contention was upheld on appeal to the Special Court of Income Tax Appeals.

Held, that money obtained on loan is not usually received by the borrower. As to whether money

received is of a capital nature (a loan) within the meaning of the definition of gross income or not, much depends on the intention of the recipient.

1984 (1) ZLR p59

GUBBAY J

In this case, the evidence was that the money would make it possible for the appellant to purchase fuel and allow its customers to go on buying on credit. The purchase of fuel by the customer was not off-set against the money advanced, which could be recalled at any time. The fact that there was no specified time in which to return the money was irrelevant. Although no interest was paid by the appellant to the customers, the customers did receive the benefit of supply on credit and not having to pay interest on the value of their purchases for thirty days. The money received was thus "working capital" and not part of the ordinary revenue income of the business.

Cases cited:

Commissioner for Inland Revenue v Genn and Co (Pty) Ltd.

1955 (3) SA 293 (AD);

Commissioner of Taxes v G 1981 (4) SA 167; 1981 ZLR 275;

Overseas Trust Corporation Ltd v Commissioner for Inland Revenue 1926 AD 444.

A P de Bourbon, for the appellant, cited the following authorities: *CIR v Genn and Co*, (*supra*); *Silke on South African Income Tax* 9 ed p101; "Payments in Advance" 9 *Income Tax Reporter* 198-9; *Commissioner of Taxes v C* 1981 ZLR 275; 1981 (2) SA 298 (ZAD); ITC 675 (1949) 16 SATC 238.

I A Donovan, for the respondent, referred to the following: *Brookes Lemos Ltd v CIR* 1947 (2) SA 976 (AD); *Greases SA Ltd v CIR* 1951 (3) SA 518 (AD); ITC 707 (1950) 17 SATC 224; ITC 1346 (1981) 44 SATC 31; *Wille Principles of SA Law* 7 ed p 441; *Lee and Honoré Law of Obligations* 2 ed p 128.

Judgment

Gubbay JA: This is an appeal from the decision of the President of the Income Tax Appeals Special Court disallowing the objection of the appellant to the inclusion in its gross income for the years ended 31 March 1980, 1981 and 1982, of the sums of \$14 695, \$1 530 and \$47 721 respectively.

The appellant company carries on business as a fuel selling and service station in the industrial area of Harare. By reason of the location of its premises it has always enjoyed the patronage of a number of customers who own fleets of heavy and light motor vehicles. They purchase their requirements of the various fuels, mostly petrol, from the appellant.

It seems that for the past few years it has become necessary for retail suppliers of fuel to pay

cash to their supplier when bulk deliveries are

1984 (1) ZLR p60

GUBBAY J

made from the storage depots to the retailers' tanks. Upon the withdrawal of the credit facility formerly granted it by the supplier, the appellant was obliged to consider whether in turn it should require its customers to pay cash for their purchases so that it would always remain in funds to order future bulk supplies when needed. It was appreciated that such a demand would inconvenience its valued customers, particularly the fleet owners, for it meant their having substantial sums of cash continually on hand. But the continuation of the practice of allowing the customer to sign an invoice for the purchase of fuel - usually by the authorised driver so doing - and paying for the total purchased at the end of each month would have left the appellant with insufficient cash to meet its own orders from the bulk supplier. So the appellant sought the advice of its accountant as to where such capital could be raised. Obtaining a loan from a bank was debated but rejected because of the high rate of interest that it would have attracted as against the minimal profit return from the sale of fuel. In the event it was decided that each customer would be informed of the difficulty and offered the alternative of making the appellant a deposit payment equal to one-twelfth of his annual expenditure upon fuel, or paying cash for fuel purchases.

Most of the appellant's regular customers chose to make the deposit payment suggested to them. The moneys thus received by the appellant in each of the three years, that is \$14 695, \$1 530 and \$47 721 - which are the subject of the challenge to the assessments in question - were placed into appellant's one and only banking account. A corresponding credit in the individual amount paid was entered in its books of account in the name of each contributing customer. Save for a few isolated instances in which the appellant set off the credit against an overdue debt for fuel sold, the credit remained so recorded until the customer closed its credit account facility. In other words, the credit remained despite purchases of fuel made after the deposit payment had been furnished. It was not used in reduction of what was owing in either the first or any subsequent statements of account, nor was it shown as an ongoing credit in any monthly statement. Credit customers made their purchases of fuel and paid for them at the end of the month as before.

At the close of each financial year, the sum of these deposits was brought to account as "Creditors" in the appellant's balance sheet

1984 (1) ZLR p61

GUBBAY J

under the general category of "Current Liabilities". And indebtedness to a customer was readily acknowledged by the appellant if the auditors of any customer wished to have documentary proof of such payment made to the appellant for the purposes of framing their client's accounts.

The appellant utilised the moneys in its general banking account, including the deposit payments, for the purchase of fuel as well as for the purchase of spare parts and in payment of

wages, rentals and the other overheads of its business.

The learned President came to the conclusion that the appellant had failed to prove that the money received by it as deposits constituted loans for consumption in its hands and as such was income of a capital nature not liable to tax. While appreciating that the payments and their consequences had many features common to loans, he reasoned that they fell within the taxable net. He took the view that, in the first place, the payments made by the customers were not the result of a request by the appellant for a loan but in order to secure the facility of purchasing fuel on credit; secondly, that the appellant was not obliged to make repayment at a specified future date nor after reasonable notice upon demand; and thirdly, no interest was payable by the appellant or receivable by the customers on the moneys.

An alternative argument that if the deposit payments were rightly identified as income, the appellant was entitled to a deduction under s 15(2)(hh) of the Income Tax Act [*Chapter 181*] was also rejected by the learned President.

Mr *de Bourbon*, who appeared for the appellant, contended that the Special Court had erred in finding that the appellant had not shown that the deposit payments were loans. I did not understand Mr *Donovan*, for the respondent, to strongly contest the related submission that money obtained on loan is not usually received by the borrower within the meaning of the definition of gross income in s 8(1) of the Act. See the remarks of SCHREINER JA in *Commissioner for Inland Revenue v Genn and Co (Pty) Ltd* 1955 (3) SA 293 (AD) at 301B-G, cited with approval in *Commissioner of Taxes v G* 1981 (4) SA 167 (ZAD) at 170 G; 1981 ZLR 275.

1984 (1) ZLR p62

GUBBAY J

Mr *de Bourbon* rightly stressed that a factor of much importance in the determination of whether the receipt of the moneys was of a capital nature or not was the intention of the appellant at the time of the receipt.

The appellant's accountant testified that in making the proposal to its customers the appellant's intention was that any money so advanced to it would be in the nature of a loan. That such was indeed the intention is supported by the prior thought given to whether the funds necessary to enable the appellant to purchase its fuel from the supplier for cash should be raised by way of overdraft. In the appellant's mind Therefore the provision of funds by its customers was equated with the borrowing of money from the bank.

Moreover, the manner in which the appellant dealt with the moneys furnished to it by its customers in m, opinion tends to confirm its expressed intention. Although deposited into the appellant's banking account together with the other receipts of the business, the appellant entered a credit in its books of account against the name of each customer in the amount of the deposit payment made, the level of the credit remaining unaltered by the subsequent purchases of fuel from the appellant. Consistently, the monthly statements of account issued to customers merely reflected the liability for fuel purchased during the proceeding 30-day period. The deposit payment was not shown as an ongoing credit.

These features accord far more with the moneys being treated by the appellant as loans rather than in the nature of payments received in advance for fuel to be supplied. Nor did the customers treat their payments any differently. They regarded the appellant as indebted to them for the full amount of the money provided, which would become due for payment immediately upon the termination of the credit facility.

Mr *Donovan* relied on the three features mentioned by the learned President in support of his submission that the payments were not in reality in the nature of loans. I shall deal with each in turn.

(1) I do not think it completely accurate to say that the customers made the payments in order to secure the facility of purchasing fuel on

1984 (1) ZLR p63

GUBBAY J

credit. They made the funds available to the appellant to finance its purchase of fuel from the supplier so that the convenient facility of obtaining their fuel on credit would continue to be available.

(2) It is true that the appellant was not obliged to return the money at a specified future date. But the fact remains that a customer who terminated the credit arrangement was entitled at any time to demand repayment of the deposit. And the appellant was obliged to meet that demand. The consequence of the loss to the customer of the credit facility upon repayment is clearly comparable to the loss to the conventional lender of the right to receive interest on his moneys.

(3) Finally, it is accepted that the absence of a liability to pay interest on moneys advanced in a commercial context between a borrower and lender operating at arm's length is an indication that the transaction may be something different from a loan. But that was not the position which existed between the appellant and its credit customers, for the latter secured the benefit of not paying any interest on the value of their purchases of fuel for a period of thirty days.

In the result I am satisfied that in receiving the deposit payments in each of the three years of assessment, the appellant was not engaging in "an operation of business in carrying out a scheme of profit-making" - see *Overseas Trust Corporation Ltd v Commissioner for Inland Revenue* 1926 AD 444 at 453. The money was "working capital", just as it would have been if its source had been a bank. It did not constitute ordinary revenue income of the business.

This conclusion makes it unnecessary to consider whether or not the learned President was correct in upholding the respondent's contention to the alternative argument that the appellant was not entitled to a deduction under s 15(2)(hh) of the Act.

Accordingly the appeal is allowed and the three assessments are set aside. The appellant is to be reassessed on the basis that the sums of \$14 695, \$1 530 and \$47 721 are excluded from its

taxable income in the years 1980, 1981 and 1982 respectively. In terms of s 15(2)(gg) of the Income Tax Act it is directed that the costs incurred by the appellant be allowed as a deduction in the assessment of its taxable income.

1984 (1) ZLR p64

GUBBAY J

Dumbutshena ACJ: I agree.

Beck JA: I agree.

N H Franco and Co, appellant's legal representatives.

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

1984 (1) ZLR p65

S v NARAN 1984 (1) ZLR 65 (HC)

Court **High Court, Harare**

Waddington and Ebrahim JJ

23 January & 1 February 1984

Flynote

Criminal procedure - sentence - Gold Trade Act - [Chapter 164] - s 24(1) cancellation of trading licences of persons convicted of dealing in gold - judicial discretion to be exercised in ordering suspension of provisions of s 24(1) - entrapment as a mitigating feature.

Headnote

In terms of s 24(1) of the Gold Trade Act -[*Chapter 164*], when a person is convicted, *inter alia*, of dealing in gold, any trading licences held by him are automatically cancelled unless the court for any reason, which it must record, thinks fit to order otherwise. In deciding whether reasons exist for ordering the suspension of the effects of s 24(1), the Court must include such considerations as whether the offence was brought about by entrapment and the circumstances of the entrapment. The fact that the police activities have resulted in criminal conduct on the part of a person who was not seeking to become engaged in such conduct is mitigating.

The court's decision involves the exercise of a judicial discretion and should not be made capriciously or without taking into account all relevant factors concerning both the commission of the offence and the personal circumstances of the offender, including the consequences to him of not ordering the suspension of the provisions of s 24(1).

Cases cited:

R v Small 1968 (2) RLR 4; 1968 (3) SA 561 (RAD);

R v Naran 1967 RLR 213;

S v Chamboko 1983 (1) ZLR 292.

C N Greenland, for the appellant

Miss M Werrett, for the respondent

Judgment

Waddington J: The appellant was convicted in the Magistrates Court at Kwekwe on a charge of illegally dealing in gold in contraven-

1984 (1) ZLR p66

WADDINGTON J

tion of s 3(1) of the Gold Trade Act [*Chapter 164*] and secondly on a charge of theft, the stolen articles consisting of 146 new pairs of shoes worth about \$800. Two pieces of gold were involved in the first count and they were worth \$474.

The appellant pleaded guilty at his trial to both counts. Upon his conviction, he admitted several previous convictions recorded so long ago that the magistrate properly disregarded them and treated the appellant as a first offender. In 1958 the appellant was fined £20 for stealing from a motor vehicle; in 1965 he was fined £100 for receiving 27 stolen dresses and in 1966 he underwent 20 months' imprisonment for illegally possessing gold. These convictions are relevant, of course, in a sense, to the appellant's latest convictions because they are similar. The trial magistrate correctly, however, has given the appellant full credit for the effort he clearly made over the years not to transgress the law.

On count 1 the sentence of \$500 or two months' imprisonment with labour is not attacked. The sole ground of complaint is that the magistrate failed to exercise his discretion in favour of the appellant by not suspending the automatic operation of s 24(1) of Chapter 164. In terms of that provision, when a person is convicted *inter alia* of dealing in gold, any trading licences held by the person convicted are thereby cancelled unless the magistrate for good reason sees fit to order otherwise. The appellant suffered this form of penalty in 1960 on his first conviction under Chapter 164 when he was twenty years younger. In the present case the magistrate rather baldly stated that in his opinion no good reason existed which persuaded him to make an order in favour of the accused. This finding is of considerable importance to the appellant as he is now a middle-aged general dealer with no other form of livelihood on which to fall back in the event of being prohibited from trading.

On count 2 the appellant was sentenced to undergo imprisonment for eight months. Of this, five months' imprisonment with labour were suspended for three years on certain conditions. Mr Greenland, who represented the appellant, argued persuasively that the sentence imposed was excessive in the circumstances, the trial magistrate having failed to accord sufficient weight to the mitigating features present.

WADDINGTON J

When regard is had to the circumstances in which both offences which are the subject of this appeal were committed and to the personal circumstances of the appellant, the sentences in my view may be seen as harsh. Let me first recount the appellant's personal circumstances briefly. He is fifty years old but he has aged prematurely. He suffers from hypertension and hereditary diabetes. He also has angina pectoris and has sustained a myocardial infarct resulting in damage to the heart muscles; there is diabetic nephropathy, an enlarged liver and a high cholesterol level. His arrest by the police caused a physical collapse that necessitated hospitalization until his nervous tension, chest tightness, sweating and tachycardia were brought under control. With these permanent unsatisfactory physical and nervous features to worry him, it is remarkable that the appellant, instead of continuing to lead his quietly law-abiding life of the past 17 years, foolishly allowed himself to be led into a spell of unlawful, irresponsible and stressful misbehaviour, unbecoming a man of his maturity. The appellant is married with two dependent children of schoolgoing age. He conducts his own business as a shop-keeper. He has no other means of support and has passed the watershed in his working life. He believes probably with justification, that he is now beyond starting a new career. It is thus obvious that imprisonment and the loss of his right to trade for profit would constitute a particularly heavy form of retribution in his case.

The appellant did not set out to deal in gold. Temptation was placed in his way. In mid-1982 a police trap made his acquaintance and indicated that he had an uncle who could sell gold. Other meetings followed and when, after five persistent months it was felt that the appellant was interested, the usual police trap was arranged. The appellant capitulated to the unfortunate overtures to which he had been subjected and purchased the gold. Realizing after amateurishly endeavouring to weigh the gold on his kitchen scales, that discovery was nigh, he threw the gold over the garden fence. His efforts to escape were of no avail for the police investigator detected these attempts to dissemble. Tragically the good of the past 17 years quite suddenly was undone.

In imposing a fine for this offence the magistrate recognized the well-established principle that offenders who have been trapped are less morally blameworthy than others.

WADDINGTON J

The basis for this distinction was well stated by MACDONALD AJP (as he then was) in *R v Small* 1968 (2) RLR 4 at SF-6A. The report reads:

"The purpose of setting traps is to prevent crime by apprehending persons who, prior to the traps being set, are already engaged in, or are seeking the opportunity to engage in, the criminal activity which it is sought to prevent. The police, however, cannot be sure that traps set by them will always catch such a person. The inherent danger of trapping is that, from time to time, a person innocent of prior criminal activity or intent will fall to the temptation offered by the bait. To recognize this inherent danger implies no criticism or condemnation of the police, who, by trapping in gold cases, are adopting a method of crime detection and prevention sanctioned by the Courts. Where, however, in any particular case, the unhappy and unintended result of trapping has been to foster a crime by tempting a person who had hitherto not been engaged in that kind of criminal conduct, and who was not, prior to

the trapping activities, seeking the opportunity to embark upon it, the Courts have a clear duty to take this result into account in arriving at the appropriate sentence. In such a case, it will usually be quite inappropriate to pass a prison sentence without the option of a fine of the remarks in the judgments in the case of *R v Clever* 1967 (4) SA 256; see, too, *Papadakis v R* 1963 R and N 495). In particular, a prison sentence without the option of a fine will usually be inappropriate in such a case if the accused is a first offender."

In my view it is necessary for a Court to include the considerations mentioned by the learned judge in its deliberations when deciding whether good reasons exist for ordering the suspension of s 24(1). The decision involves the exercise of a judicial discretion and should not be made capriciously or without taking into account relevant factors concerning both the commission of the offence and the personal circumstances of the offender. Section 24(1) of the Gold Trade Act reads as follows:

" 24. (1) If a person who is the holder of any licence to carry on any trade, business or occupation under any enactment other than this Act is convicted of any offence under this Act, the conviction shall have the effect of cancelling such licence, unless the convicting Court for any reason (which it shall record) thinks fit to order otherwise."

In *R v Naran* 1967 RLR 213 at 215-F QUÈNET JP made the following remarks about the approach to be adopted when a Court considers suspending the operation of s 24(1):

"As to the question whether there was any reason to order that the licence should not be cancelled, the magistrate correctly directed himself. The words 'for any reason' are unqualified and would include any reason affecting the appellant him-

1984 (1) ZLR p69

WADDINGTON J

self or the circumstances in which the offences was committed. A capacious or frivolous reason would not be sufficient. It would have to be a reason which commended itself to a person properly exercising the judicial discretion entrusted to him. The magistrate so regarded the matter and I can see no basis for considering that he exercised his discretion improperly."

The appellant had been deprived of his trading licence in 1966, following an act of illegal gold dealing of a voluntary nature for which the appellant had shown enthusiasm. He was much younger and obviously more resilient in the face of adversity than he is today. (See *Naran's* case and the facts outlined in the report at 125G). Having regard to these factors, to the fact that the appellant held out against temptation for nearly six months before succumbing to it and bearing in mind the appellant's age, his efforts to reform over 17 years and his present physical infirmities and family commitments, it is very difficult to understand the magistrate's finding that "no good and sufficient reason" existed for the Court to suspend the operation of s 24(1). In my view, inadequate weight, if any, was accorded by the magistrate to the pronounced features of mitigation which exist and to the extremely serious consequences for the appellant which must ensue if the appellant is prohibited from trading. There is little evidence that the magistrate exercised his discretion judicially. The overall punishment would be undesirably disproportionate to the appellant's moral blameworthiness as a middle-aged, infirm offender, if he is to be treated as a first offender. An order should therefore have been made in the appellant's favour.

The appellant's foolhardy behaviour on count 1 was matched by his conduct on count 2. This

was another instance, so it would seem, of trouble calling round on the appellant again four months later. On 12 March 1983 a part of the younger criminal element of Kwekwe broke into a shoe-shop and stole seventy pairs of shoes of a popular local make. An acquaintance of equally suspect scruples was prevailed upon to dispose of the stolen goods. He in turn sent a vehicle to collect the appellant the very next day - a Sunday - so that the wares could be displayed to him in a room of undisclosed character. It was accepted by the prosecutor - naively, as Miss *Werrett*, who appeared for the State in this case, would have it - that the appellant innocently agreed to purchase a number of the shoes. He subsequently collected the shoes in his own vehicle and only then became suspicious of the proceedings. He attempted to return the shoes to the middleman whose persuasiveness induced the appellant to retain them. The appellant's knowledge

1984 (1) ZLR p70

WADDINGTON J

concerning the shoes changed from innocent to guilty and he dumped them in the bush three weeks later. When interviewed by the police he at first denied any complicity in the affair but ultimately accepted the inevitable and confessed his part in the theft. The stolen shoes were all recovered. The appellant made no profit from them. Whatever one may think of this recital, it is what was included in the agreed statement of facts and it was on these facts that the appellant's moral blameworthiness fell to be evaluated for the purposes of sentence.

It must be accepted that the appellant did not deliberately set out to steal. It must even be accepted that he originally entered upon the transaction innocently. When he did eventually become suspicious he weakly allowed himself to be persuaded to retain the shoes. He was already in possession of the shoes when as a result of his knowledge, his erstwhile innocent possession was later transformed into theft to which he candidly pleaded guilty. The circumstances of the offence must be accepted therefore as being of an unusual nature, in my view.

Considering all the mitigating personal circumstances described earlier in this judgment and the fact that but for a fateful choice made by the middleman to select the appellant (at that stage, innocent) as an outlet for stolen property, this offence would not have been committed. In these circumstances, the moral turpitude displayed by the appellant was not as high as it could have been. The object of the penalty imposed upon the appellant should have been primarily to dissuade an ageing, nervous, first offender from repeating his foolish and ill-judged conduct. AS KORSAN J expressed it in *S v Chamboko* 1983 (1) ZLR 292 at 294A:

"What is the least punishment that is likely to dissuade men in this situation from behaving like this?"

The Courts always try to keep first offenders, especially very young and older first offenders, out of prison. In all the circumstances this was not a case that called for imprisonment, in my view. A heavy fine plus a suspended period of imprisonment would have sufficed.

I would therefore make the following order:

Count 1: The presence of mitigating features referred to in this judgment constitutes reason

for not cancelling the appel-

1984 (1) ZLR p71

WADDINGTON J

lant's trading licence. The automatic effects of s 24 (1) of the Gold Trade Act shall not apply to the appellant in this case.

Count 2: The sentence imposed by the magistrate is set aside and is substituted by the following:

\$500 or in default of payment 6 weeks, imprisonment with labour. In addition to this sentence, the accused is sentenced to undergo a further 6 weeks' imprisonment with labour, the whole of which is suspended for five years on condition that the accused is not convicted of any offence involving dishonesty committed during that period.

Ebrahim J: I agree.

Waddington J: It is so ordered.

Ali Ebrahim, legal practitioner for the appellant.

Attorney-General, legal practitioner for the respondent.

1984 (1) ZLR p72

S v KUDYAKUNOROODZA 1984 (1) ZLR 72 (HC)

Court **High Court, Harare**

McNally J

1 February 1984

Flynote

Statutes - Road Traffic Act 1976 - s 55 - conviction for culpable homicide subsequent to conviction for negligent driving - cancellation of driver's licence not competent unless prohibition from driving in excess of 12 months also ordered.

Headnote

In terms of s 43 of the Road Traffic Act 1976, cancellation of a driver's licence is mandatory on second convictions for negligent driving or for culpable homicide arising out of the negligent driving of a motor vehicle. It is also mandatory in the case of a conviction for negligent driving if

Copyright Juta & Co Ltd

the convicted person has a previous conviction for culpable homicide arising out of the negligent driving of a motor vehicle.

However, because of an anomaly in the Act, the reverse situation does not apply. There is no provision in s 55(1) for the cancellation of a driver's licence following a conviction for culpable homicide even if the convicted person has a previous conviction for negligent driving, unless the Court at the same time prohibits the convicted person from driving for more than 12 months.

Judgment

McNally J: The accused was properly convicted of culpable homicide arising from the negligent driving of a bus, in the course of which he killed a cyclist.

He had a previous conviction for negligent driving in 1982. The magistrate sentenced him to a fine of \$200 or two months' imprisonment with labour. In addition he prohibited him from driving all classes of vehicles for eight months, and cancelled his driver's licence.

A regional magistrate queried this cancellation.

Now, if you are convicted of negligent driving twice - then on the second occasion your licence must, in the absence of special cir-

1984 (1) ZLR p73

McNALLY J

cumstances, be cancelled - see s 43(3)(b) of the Road Traffic Act, 1976.

And if you are convicted of culpable homicide twice, arising out of the negligent driving of a vehicle, then on the second occasion your licence must, in the absence of special reasons, be cancelled - see s 55(2) as read with s 56(2)(a).

And if you are convicted of negligent driving and you have a previous conviction for culpable homicide arising out of negligent driving, then your licence must, in the absence of special circumstances, be cancelled - see s 43(3)(b).

But if you are convicted of culpable homicide, as in this case, and you have a previous conviction for negligent driving, there is no provision for the cancellation of your driver's licence, unless the Court has prohibited you from driving for more than 12 months, under s 55(1) - but such a prohibition is discretionary, not mandatory.

This anomalous situation has prompted a further comment from the Attorney-General, to whom I referred the papers. He says-

" For completeness perhaps it should be pointed out that had the conviction for culpable homicide been erroneous for some reason, such as a *novus actus interveniens* breaking the causal link between the negligent running down of the cyclist and his death, your Lordship could alter the conviction to a contravention of subs 43(1) of the Act in terms of the powers conferred in s 29(2)(i) of the High Court of Zimbabwe Act (Act 29 of 1981). Then it would be mandatory in terms of s 43(3)(b) of the Act to cancel the licence."

I understand that my comments on this unsatisfactory situation have been passed to those

responsible for drafting amendments. Mean while, however, the magistrate's order for cancellation of the accused's driver's licence must be and is hereby set aside.

Scott J: agrees.

1984 (1) ZLR p74

S v MOYO 1984 (1) ZLR 74 (HC)

Court **High Court, Harare**

Reynolds J

1 February 1984

Flynote

Criminal procedure - sentence - principles of sentencing - female offenders - in most cases should be treated differently from male offender - reasons therefor - equality of treatment - meaning of - necessity for individualization in sentencing exercise - fines if fine deemed appropriate, duty of Court to inquire into accused's means.

Headnote

The accused, a 23-year-old unmarried woman, was convicted of the theft of clothing and other goods valued at some \$165. She stole them from a friend. She pleaded guilty. She had no savings or assets and was unemployed. She also had a two-year-old child. The magistrate sentenced her to a fine of \$250, in default of payment, four months' imprisonment, together with a further period of imprisonment suspended on conditions. In passing sentence, he remarked that the time was approaching when the Courts would treat female offenders as seriously as males.

Held, on review, that it was true that there had been a notable change in the role and status of women in modern society and that female criminality had increased. This did not mean that the practical reasons for treating the sexes differently in the matter of sentence did not still hold good. These are-

- (a) that offences involving dishonesty committed by men outnumber those committed by women;
- (b) that the incidence of recidivism amongst women is comparatively rare;
- (c) that it often happens that the female offender has young children requiring care.

Bearing those objects in mind, in most cases the basic objects of punishment will differ, depending on whether the accused is male or female, although there may be circumstances where a female accused will lose any claim to preferential treatment over her male co-accused.

1984 (1) ZLR p75

REYNOLDS J

Held, further, that the principle of uniformity of sentence means no more than that each should be given his due, not that everyone should be given the same treatment. To treat all alike would be the height of injustice.

Held, further, that there should be individualization in punishment; the needs of the individual and the interests of society should be balanced with care and understanding.

Held, further, that where the Court has decided that a fine is an appropriate punishment, it should make a purposeful enquiry into the accused's means and circumstances to make a proper assessment of what an appropriate fine should be. If the accused has no means, it may be appropriate to impose a fine commensurate with the rough average earnings of a person in a similar position to the accused.

Cases cited:

R v Harvey 1967 RLR 203;

S v Jones and Another 1984 (1) ZLR 38;

Zgili v McLeod (1904) 21 SC150;

S v Scheepers 1977 (2) SA 154 (AD);

S v Manwere 1972 (2) ZLR 139;1972 (4) SA 425(RAD);

S v Zinn 1969 (2) SA 537 (AD);

S v V 1972(3) SA 611(AD);

S v Rabie 1975 (4) SA 855 (AD);

S v Sithole and Another 1979 (2) SA 67 (AD);

S v Nyathi 1972 (2) ZLR 215;1973 (1) SA 553(R);

R v Rice 1958 R &N 690;1959(1) SA 138 (SR).

Judgment

Reynolds J: The accused in this case is 23 years of age, and is the unmarried mother of a two-year-old child. She was charged with and pleaded guilty to stealing clothing and other property belonging to a friend of hers which was valued at \$165.

The facts that gave rise to the charge were that she had gone to stay with the complainant, who was the friend mentioned. After some period of time she left the complainant's house, taking with her a suitcase containing the property in question. The trial magistrate questioned her as to her intentions in taking this property, and she said that she had just taken it without much thought, and then she had left it with another friend of hers as she had become confused, and did not know what to do next. She accepted, however, that she knew she had done wrong.

Having duly convicted the accused, the magistrate ascertained from her that she had no savings and no assests, and was unemployed. He then proceeded to sentence her to a fine of \$250 or four months'

1984 (1) ZLR p76

REYNOLDS J

imprisonment with labour, and, in addition, to a further three months' imprisonment with labour, all of which was suspended on conditions.

In the course of his judgment, the magistrate said, "I think the time is fast approaching when these Courts will not deal more leniently with female offenders, and will treat them as seriously as they treat males."

In so far as punishment for female offenders is concerned, it is true that there has been a notable change in the role and status of women in contemporary society. In addition, there is some evidence that female criminality has increased in recent years (see Carney's *Introduction to Correctional Science* 2 ed p 189). But it is not certain whether there is any correlation between these two facts and, in any event, this does not necessarily mean that any equality of the sexes requires equality of treatment in criminal cases. The position is, as I see it, that the "practical reasons for treating the sexes differently in the matter of sentence" referred to in *R v Harvey* 1967 RLR 203, still hold good to-day, though with some qualifications. (See *S v Jones and Another* 1984 (1) ZLR 38) These "practical reasons" may be enumerated as-

- (a) offences involving dishonesty committed by men outnumber those committed by women;
- (b) the incidence of recidivism amongst women is comparatively rare;
- (c) it often happens that the female offender has young children requiring care.

Bearing these factors in mind, in most cases the basic objects of punishment will differ, depending upon whether a male or female offender is under consideration. If, as in the *Jones* situation (*supra*), the female offender is not only jointly charged with male co - accused, but instigated the commission of the crime as well, she will almost inevitably, and quite properly, have lost any claim to differential treatment.

It has often been stated that uniformity of sentence in like cases is desirable in the interests of justice. In expressing this principle eighty years ago, LORD DE VILLIERS said, ". . . and it makes no difference whether the individual occupies a palace or a hut" (*Zgili v McLeod* 14 (1904) 21 SC 150 at 152). Justice is blind to social distinctions, disparity

1984 (1) ZLR p77

REYNOLDS J

in wealth or power, and differences in race, colour or creed. But it must be remembered that this ideal of uniform treatment applies to persons of the same class or condition. In this regard,

Hahlo and Khan's *South African Legal System* at p 35 contains the following:

" Equality means equal treatment for persons in equal condition-it does not mean absolute equality for everyone. To treat alike, ignoring their differences, adult and child, the sane and the insane would be the height of injustice. *Suum cuique tribuere* implies that everyone should be given his due, not that everyone should be given the same."

The learned authors may well have included "male and female" in the categories they chose to distinguish above.

The necessity for "individualisation" in the sentencing exercise is summarized in the headnote to *S v Scheepers* 1977 (2) SA 154 (AD), as follows:

" It is an established principle of our law that, in regard to punishment, there should be individualisation. Not only must the nature of the offence be taken into account and the interests of the public protected, but the interests of the offender should also be cared for. In the process of individualisation sociological circumstances, punishment, experience factors, the prospects of rehabilitation and other relevant circumstances which surround the individual cannot be lost sight of. However desirable uniformity might otherwise be, the observance of these factors must necessarily encroach thereupon."

As a matter of general comment, it is most important that magistrates should equip themselves with sufficient information in any particular case to enable them to assess sentence humanely and meaningfully, and to reach a decision based on fairness and proportion. The needs of the individual and the interests of society should be balanced with care and understanding. It is difficult to single out any particular cases that might be of particular value to magistrates, but very useful guidelines are contained in cases such as *S v Manwere* 1972 (2) RLR 139; *S v Zinn* 1969 (2) SA 537 (AD); *S v V* 1972 (3) SA 611 (AD) and *S v Rabie* 1975 (4) SA 855 (AD).

It is not suggested that the magistrate in the present matter was particularly at fault in any of these areas, but it was, nonetheless, obvious that there was no prospect of the accused meeting the very substantial fine that was assessed by the magistrate, and that she would, accordingly, have to serve the alternative sentence of four months' imprisonment with labour. The Court's duty in this regard is clearly stated in

1984 (1) ZLR p78

REYNOLDS J

cases such as *S v Manwere* (*supra*) and *S v Sithole and Another* 1979 (2) SA 67 (AD). The headnote in the latter case reads:

"When a court has decided that a convicted person ought to be afforded the opportunity of staying out of gaol by giving him the option of paying a fine, it should not impose a fine which to its knowledge or belief is utterly beyond the means of such person to pay.

When it has been decided to give the convicted person the option of paying a fine, there should be some purposeful enquiry into his means in order to enable the Court to make a proper assessment of what an appropriate fine, in the particular circumstances, would be."

(See, too, *S v Nyathi* 1972 (2) RLR 215; 1973 (1) SA 553 (R)).

The magistrate in this case did not have regard to either of these principles. In an overall view, it seems to me that he has imposed a sentence that is disturbingly inappropriate for this

particular offence. It is, in normal circumstances, desirable for a review Court faced with this situation to set aside the sentence imposed, and to direct that the matter be remitted to the magistrate concerned in order that he may ascertain such further facts as to the accused's financial circumstances as may be possible, and thereafter reconsider the whole question of sentence. If it happens that the accused is completely without means, or that there is no hope of his meeting a monetary penalty, it may be considered proper to impose a fine commensurate with the rough average earnings of persons in a similar position to the accused (*R v Rice* 1959 (1) SA 138 (SR); 1958 R & N 690).

But in the present case, as it happens, the accused has already served a substantial portion of the alternative sentence passed, and any further delays will result in an extended period of unwarranted incarceration. In the result, and with the concurrence of WADDINGTON J the sentence imposed by the magistrate is hereby set aside and the following substituted:

"Fined \$100 or, in default of payment, to undergo two months' imprisonment with labour. In addition, three months' imprisonment with labour which will be suspended for a period of four years on condition that the accused does not commit, within that period, any offence involving dishonesty for which a sentence of imprisonment without the option of a fine is imposed."

1984 (1) ZLR p79

REYNOLDS J

This means that if the accused has earned ordinary remission she should be entitled to her immediate release.

1984 (1) ZLR p80

S v MUGANGAVARI 1984 (1) ZLR 80 (SC)

Court **Supreme Court, Harare**

Dumbutshena ACJ, Beck JA and Gubbay JA

19 January & 7 February 1984

Flynote

Criminal procedure - sentence - Precious Stones Trade Act 1978 - s 3(1) - unlawful possession of precious stones - special reasons not to impose minimum sentence - low value of stones not per se a special reason.

Headnote

The fact that the precious stones dealt with or possessed in contravention of s 3(1) of the Precious Stones Trade Act 1978 are of minimal value is not *per se* a special reason not to impose the mandatory minimum sentence provided in the Act. Most people dealing with stones unlawfully are doing so in the hope that the stones are of great value. The value is almost always ascertained independently by a gemmologist after the commission of the offence. It is only where the accused knows the value of the stones and intends to use them for some

relatively harmless reason that the low value might amount to a special reason. The fact that the stones are of low value will, of course, be a mitigating factor which will be weighed together with the other mitigating and aggravating factors to see if, cumulatively, special reasons exist.

Cases cited:

S v Noach HC-H-395-83;

S v Chisiwa 1981 ZLR 666;

S v Chidziwa SC 96/82;

S v Ndloru 1983 (2) ZLR 140;

S v Dube HC-H-430-83;

S v Shoko H-B-135-83;

S v Dube and Another H-B-131-83;

S v Saidi 1980 ZLR 341; 1981 (1) SA 83 (ZAD).

M T O'Meara, for the appellant

P J Batty, for the respondent

1984 (1) ZLR p81

Judgment

Gubbay JA: The appellant was convicted in the magistrate's Court of the unlawful possession of fifteen rough uncut emeralds in contravention of s 3(1) of the Precious Stones Trade Act, 1978. While accepting the evidence of an expert gemmologist that the stones had no commercial value, the trial magistrate decided that no special reasons existed for not imposing the mandatory minimum sentence provided by s 3(2) of the Act. He accordingly ordered the appellant to undergo three years' imprisonment with labour.

The appellant applied to this Court for leave to prosecute an appeal in person against both conviction and sentence. Although the conviction seemed unassailable, a certificate was nonetheless granted, at the suggestion of the Attorney-General, in order that the principle expounded in the case of *S v Noach* HC-H-395-83 could be debated. Mr O'Meara was requested to argue the appeal on the appellant's behalf, and the Court is indebted to him for his assistance.

Mr O'Meara confessed himself unable to advance any submissions against the propriety of the conviction. His attitude is understandable. The evidence for the prosecution was overwhelming. It disclosed that the appellant had journeyed from Zvishavane to Mberengwa with the specific object of purchasing uncut emeralds. He made contact with the seller recommended to him, whose price for fifteen stones was \$800. The appellant was permitted to purchase on credit and returned to Zvishavane with the stones. They remained in his possession until recovered a

few days later by the Police from a suitcase in his house.

The point which arises on sentence is simply whether the absence of commercial value of the emeralds possessed by the appellant was of itself a factor so out of the ordinary as to constitute "special reasons", thereby relieving the magistrate of the obligation to impose the mandatory penalty.

The manner in which a Court is to consider the issue of whether there are "special reasons" in the particular case is set out with admirable clarity by SQUIRES J in *S v Chisiwa* 1981 ZLR 666, in these words:

"... the Court may have regard to factors arising either out of commission of the offence or peculiar to the offender, as long as they are out of the ordinary. This will involve the making of a value judgment, since the question whether such reasons exist will often be a matter of degree. And, furthermore, by use of the plural

1984 (1) ZLR p82

GUBBAY JA

'reasons, it should be borne in mind that the Legislature clearly allowed for the cumulative effect of a number of reasons to be taken into account by the Court in arriving at its decision.'

(See also *S v Chidziva* Supreme Court Judgment No 96/82 at p 3 per GEORGES JA).

The magistrate adopted that approach. He looked carefully at the circumstances peculiar to the offender and at the factors arising out of the commission of the offence. He then concluded that there were no special reasons for not imposing the mandatory minimum sentence.

The decision of the magistrate was given before a number of relevant judgments were delivered in the High Court. These reveal a marked difference of opinion between judges based in Harare and their brethren in Bulawayo as to whether the fact that rough and uncut emeralds are of no commercial value, or of negligible value, *per se* amounts to special reasons.

KORSAH J was the first to express his view of the matter, albeit obiter, in *S v Ndlovu* 1983 (2) ZLR 140 at 141 C-G. I agreed with his observations, which were as follows:

"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 severer 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."

Two months later the judgment in *S v Noach, supra*, was given. In that case, the appellant, while drinking in the bar of an hotel, met a stranger

GUBBAY JA

to whom he offered to sell rough emeralds at a price of \$600. The man feigned interest and the appellant departed to fetch the stones. In his absence the would-be purchaser telephoned the Police. On his return to the hotel the appellant was apprehended in possession of the emeralds. It transpired that they were of very poor quality, for their "rough" value was assessed by a gemmologist to be \$4,50. The appellant was aware that the stones were practically worthless when he sought to sell them at an exorbitant price. He had a long record of petty crime.

In allowing an appeal against the mandatory minimum sentence McNALLY J, with whom SCOTT J concurred, said that the object of the lawgiver in enacting the minimum sentence was to protect the emerald industry and so the economy of the country - "to prevent the stealing and for illegal exportation of valuable emeralds." He went on:

"I appreciate that great damage can be done to the emerald-mining industry if every day scores of men are stealing small quantities of emeralds from the mine or mines. But it is clear also that emeralds of no commercial value are of no interest at all to the mining industry. As the law stands, people who possess such emeralds commit a crime, but it is hard to believe that the minimum sentence of three years' imprisonment is intended for them. They cannot by any stretch of the imagination be regarded as economic saboteurs.

One may put it another way. These stones are 'emeralds' in the technical, chemical or mineralogical sense of the word. But they are not precious stones in any meaningful sense, in the sense in which the jewellery trade speaks of emeralds. They are 'suited only to cabochons and beads', as Mrs Anderson puts it."

After pointing out that a special reason exists where the economic purpose for which the legislation was introduced is not being debated, the learned judge, in applying that principle to the case before him, continued:

". . . the fact that the rough value of the stones was \$4,50 (which is a negligible sum), together with the fact of minimal quality of the emeralds, means that the possession of or dealing with those emeralds was of no significance to the economy of the country or the economic well-being of the emerald industry.

Since damage to the economy or the industry is the very evil at which the minimum penalty is aimed, its absence must be and is a special reason for not imposing the minimum penalty. In so far as the magistrate found otherwise - though he was acting on slightly different facts - I consider that he misdirected himself.

GUBBAY JA

The Court is therefore at large on the question of sentence."

There were no other mitigatory factors present. On the contrary, many aggravating features were attendant upon the offence. It is apparent therefore that the principle which emerges from the judgment is that where the value of emeralds in possession of an accused person and their quality are so low that the offence would have little or no impact upon the economy of the country and the emerald industry itself, that factor stands as a special reason. Its efficacy is not affected by a belief entertained by the accused that the stones are valuable or by an intention

to dispose of them profitably.

This *ratio decidendi* was applied by WADDINGTON J in the review case of *S v Dube* HC-H-430-83. The facts were these: The accused possessed no fewer than fifty rough uncut emeralds. He confessed that he intended to sell them so as to raise money for his family. The value of the stones in their rough and uncut state was \$1 and their quality correspondingly poor. It was held that the trial magistrate had misdirected himself in coming to the conclusion that no special reasons were present, by a failure to take account of the fact that the offence was not calculated to prejudice either the emerald industry or the economy of Zimbabwe. McNALLY J not surprisingly, concurred in the judgment.

No reference was made in these two judgments to the earlier remarks of KORSAN J in *Ndlovu's* case, *supra*.

In *S v Shoko* H-B-135-83 KORSAN J although not expressly saying so, declined to follow the Harare judgments. In that case, which came on review, the trial magistrate had based the presence of special reasons upon the fact that the nineteen uncut emeralds, which the accused had found by chance at a bus stop and intended to sell, had a rough value of only \$2,50. The learned judge refused to confirm as being in accordance with real and substantial justice a fine of \$200, conjoined with eight months' imprisonment conditionally suspended. He held that the mandatory minimum sentence should have been imposed, and amplified his earlier remarks that the single factor of value cannot be used to defeat the imposition of the obligatory punishment. This is what he said:

"Most of the people who indulge in illegal trafficking of precious stones are ordinary people who do not know the value of the stones that they acquire. They

1984 (1) ZLR p85

GUBBAY JA

accept the stones willy-nilly in the hope that they may be of great value. So that it is not the actual value of the stones that is pertinent at the time of commission of the offence, but some imaginary or unascertained value which the offender hopes will make him rich. Obviously, if a person knew that a stone offered him is valued at \$2 he is not likely to take it and seek a market for it. Ascertainment of the true value is the result of an independent act by the gemmologist which takes place after the commission of the offence; it does not arise out of the commission of the offence. And the offender's ignorance as to the actual value is a circumstance so common to most people as not to be extraordinary. In my view, the value *alone* of the stones clearly falls outside the judicial interpretation which the term 'special reasons' has received and with which the Legislature was conversant. *Other circumstances together with the value may amount to special reasons, but not value by itself.* " The emphasis is mine.

Finally, in *S v Dube and Moyo* H-B-131-83 the appellants had purchased two rough uncut emeralds for \$100 from a seller in Hwange. They intended to make a profit on the resale of the stones but it seems they were searched by the Police at a road-block on the return journey to Bulawayo and the stones discovered in their possession. MANYARARA J (with whom KORSAN J agreed) rejected the submission that the negligible value of the emeralds, being \$10, justified a finding of special reasons and dismissed the appeal. In the course of his judgment he cited an example where value should be regarded as sufficiently out of the ordinary as to constitute special reasons:

"'X', an unlicensed person, requests and is given or has sold to him by an unlicensed friend an emerald genuinely worth \$10. 'X' intends to have the emerald mounted on his wife's dress ring. 'X' is in unlawful possession, but on conviction, *the value of the emerald, coupled with the manner he acquired it and his intended use of the emerald, should be regarded as special reasons.*"

Again the emphasis is mine.

The approach adopted in the Bulawayo judgments has much to commend it.

It cannot be doubted that on 12 June 1981, the President passed the Emergency Powers (Maintenance of Law and Order) (Amendment) Regulations, 1981 (SI 291/81) because of the widespread, even endemic, extent to which the illicit possession of or dealing in emeralds - whether valuable or not - had proliferated. In an effort to halt the mischief and deter the commission of these offences the Regulations removed the Court's discretion to impose any sentence less than three years for a contravention of s 3 (1) of the Act. That draconian measure

1984 (1) ZLR p86

GUBBAY JA

was ameliorated by the Precious Stones Trade Amendment Act 1982, which came into operation on 19 March 1982. Under it a Court is permitted to pass a sentence less than the obligatory minimum one if the offender is able to show the existence of special reasons why such a sentence should not be imposed.

The concept of "special reasons" was not novel. It had been resorted to previously by the law - maker, who must have been aware of judicial pronouncements in respect of both the meaning of the phrase and the approach followed by the Court in making the decision. But, more importantly, the law - maker would also have known of authoritative dicta to the effect that in assessing sentence the weight to be attached to the non-commercial value of the stones is not to be exaggerated even though the offence has no impact upon the economy of the country. So, for instance in *S v Saidi* 1980 ZLR 341 at 343; 1981 (1) SA 83 (Z AD) at 85 D-F LEWIS JP said:

"It seems to me, therefore, that, unless one knows that the accused is a person who possesses expert knowledge on the value of stones in their rough, uncut state and can assess what they are worth or are likely to be worth when they are cut, one can generally assume that people such as the appellant in this case who deal in these stones are largely doing so in the dark. They may be handling something extremely valuable, or they may be handling something which is virtually worthless, as in the instant case. This feature was recognised by the former CHIEF JUSTICE in *Nkomo's case* (1976 (4) SA 800 (RA)) where he said at P 802 of the report:

'Per contra, it by no means follows that, because the stones were worthless, the appellant should not receive a fairly severe sentence. Cases are quite common where the accused believes apatite, a worthless mineral, to be an emerald and sells it in the bona fide belief that it is an emerald. In such a case the accused is convicted of an attempt, but even such an attempt is a relatively serious offence because it shows a deliberate intention to contravene the Act, and the accused must have known that to contravene the Act is a serious offence.'"

This reasoning strongly suggests that the non-commercial value of the minimal value of rough uncut emeralds is not of itself a feature which is out of the ordinary. It is nothing more than a general circumstance.

I think that if the Legislature had been minded to adopt a different approach and to elevate the

importance attaching to the value of the emeralds from an ordinary mitigatory feature to an extraordinary one, it would have said so. There would have been no difficulty in casting s 3 (2) to read:

1984 (1) ZLR p87

GUBBAY JA

"... unless the convicted person satisfies the Court that there are special reasons in the particular case, which shall be found to exist where the precious stones are of no commercial value or of minimal value, which reasons shall be recorded by the Court. . . ."

It seems to me therefore that for a Court to rely solely upon the lack of significant value as a factor would amount to judicial amendment - a danger warned against by GEORGES JA in *S v Chidziva supra*.

In argument Mr O'Meara conceded that the lack of commercial value or the minimal value of the stones does not of itself amount to a special reason. He submitted, however, correctly in my view, that a distinction can be made between persons who unlawfully possess or deal in valueless emeralds believing them to be of value, and those who know they are worthless. In the latter instance the blameworthiness of the offender would be low. It was, I consider, to avoid the application of the minimum penalty to such a situation that the Legislature left an escape route by means of the provision of special reasons.

There is one further observation to be made in regard to the judgment in *Noach's case, supra*. McNALLY J expressed the view that an aggravating feature does not cancel out a finding of special reasons but goes only to the quantum of punishment which the Court in its discretion imposes. With respect, that proposition may be misleading. The Court must weigh the mitigating features, included in which will be the non-commercial value or minimal value of the stones, against the aggravating features, included in which will be the offender's expectation of value, the motive for his illicit possession and his criminal record. If it considers that the cumulative effect of the mitigating factors is out of the ordinary it will then bring in a finding of special reasons.

So in a sense, the mitigating feature of the non-commercial value of the stones standing alone will be effectively neutralised where their possessor had an expectation of value and was seeking to profit by their sale.

In the result, therefore, I am of the opinion that the decision of KORSAH J in *S v Shoko supra* was correct and should be followed in future by all courts.

1984 (1) ZLR p88

GUBBAY JA

To revert to the instant case, the appellant obtained possession of the emeralds he believed to be of considerable value as part of a deliberate scheme to deal in them. The fortuitous fact that they were shown to be worthless does not, as the magistrate found, amount to a special reason.

The appeal against conviction and sentence is accordingly dismissed.

Dumbutshena ACJ: I agree.

Beck JA: I agree.

Pro Deo

1984 (1) ZLR p89

S v LANCASHIRE STEEL (PVT) LTD 1984 (1) ZLR 89 (SC)

Court **Supreme Court, Harare**

Dumbutshena ACT, Beck JA & Gubbay JA

26 January & 7 February 1984

Flynote

Criminal law - statutory offences - mens rea in - Employment Act 1980 - s 8(1) - dismissal of employee in bona fide but mistaken belief that employee guilty of misconduct - necessity for belief to be based on reasonable grounds - misconduct - intoxication as an example of - degree of intoxication required.

Headnote

On a charge of unlawfully dismissing an employee in contravention of s 8(1) of the Employment Act 1980, it is a defence for the accused employer to show that the employee is guilty of misconduct. Even if investigation afterwards shows that the employee was not in fact guilty of such misconduct, the employer can escape conviction if he shows that he did not have the necessary *mens rea* to commit the offence. This he can do if he shows that his mistaken belief that the employee was guilty of misconduct was *bona fide* and based on reasonable grounds.

Intoxication is a form of misconduct, the issue being whether the employee was intoxicated to the extent that his ability to perform the tasks entrusted to him was adversely affected. The more exacting the task, the less the degree of intoxication which will justify dismissal.

Cases cited:

Law v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All E R 285 (CA);

S v Zemura 1973 (2) RLR 357; 1974 (1) SA 584 (RAD);

S v Appleton 1982 (1) ZLR 113; 1982 (4) SA 829 (ZSC);

S v Rhotan (Pat) Ltd 1982 (2) ZLR 137.

I A Donovan, for the appellant

P J Batty, for the respondent

GUBBAY JA

Judgment

Gubbay JA: Robert Vivian Ward, in his capacity as a representative of Lancashire Steel (Private) Limited and cited in terms of s 357(2) of the Criminal Procedure and Evidence Act [Chapter 59], was charged in the magistrate's Court with contravening s 8(1) of the Employment Act, 1980 (No 13 of 1980). The summons alleged that -

"... upon or about the 26th day of February 1983 ... a servant of the said Company, acting with the permission of the Director of the said Company in the performance of his duties as a servant of the Company, did wrongfully and unlawfully summarily dismiss Lameck Macala, an employee thereof".

The appellant company was convicted and sentenced to pay a fine of \$500. It now appeals against both conviction and sentence.

Section 8(1) of the Act provides:

"Except where it has otherwise been provided for in the contract concerned or in any relevant enactment, including any regulation made in terms of this Act, or in any agreement or determination made or given effect to in terms of any enactment, an employer shall not dismiss an employee summarily except- ...".

Thereafter follow grounds (a) to (e) upon which an employee may be dismissed, the relevant ground being (a), which reads:

"(a) where an employee is guilty of misconduct, whether in the course of his duties or not, inconsistent with the fulfilment of the expressed or implied conditions of his contract;"

The definition of "contract" in s 3 of the Act is -

"... a contract of employment, whether oral or in writing and whether expressed or implied, by which an employee enters the service of an employer."

During the course of the trial the defence produced a document entitled "Disciplinary Code and Grievance Procedure" which pertains to the management and the employees of Lancashire Steel (Private) Limited. It deals essentially with the rights of both parties, the composition of an investigation committee into allegations of misconduct and the procedure to be adopted. The various forms of misconduct and the penalties attaching thereto are set out in descending order of seriousness in four schedules. The Fourth Schedule provides for summary dismissal in respect of nine breaches of conduct, one of which is "Proven drunkenness on duty or under the influence of drugs certified by a Medical Officer".

GUBBAY JA

Although it seems clear that the Disciplinary Code forms part of the "contract" between the Company and its employees, it was not the *State* case that it fell within the first exception specified in s 8(1) of the Act; that is, that the Company was only empowered to dismiss an employee summarily on one or other of the stated grounds in the Disciplinary Code and

provided always the preliminary procedures had been properly earned out.

The dispute between the State and the defence centred on whether the dismissal was justified under para (a) of s 8(1) of the Act. It follows that if this Court were now to uphold the conviction on the basis of a failure to comply with the Disciplinary Code the appellant could well be prejudiced; for it is readily conceivable that, if at the trial the appellant had been forewarned that the State relied on the terms of that document, he might have adduced evidence on the issue. Indeed at the conclusion of his argument I understood Mr *Batty*, who appeared for the respondent, to acknowledge that the propriety of the conviction was to be considered without reference to the grounds for summary dismissal contained in the Disciplinary Code.

The facts of the case are relatively uncomplicated. The employee, Lameck Macala, was a block-miner to whom was enjoined the task of monitoring the operation of the electrical system of the Company's factory works, which is protected by a series of alarms. He was to pay close attention to these alarms as well as to certain baths containing liquid zinc. If an alarm were sounded more than twice he was to report immediately to the engineer, for a failure to do so could result in the town of Kwekwe being plunged into darkness. If he noticed a leakage of zinc he was to report immediately to the manager, for if the leakage was not blocked it could put part of the works out of commission, thereby causing the Company heavy financial loss. In short, it was required of Macala to be alert and watchful throughout his entire shift.

During the afternoon and early evening of Saturday, 26 February 1983 and while at leisure, Macala consumed a quantity of beer. At 9.55 pm he entered the premises of the Company through the main security gate. From there he proceeded to what is called the "clock-room gate". He found that the security guards who were supposed to be on duty there were absent. The door to the clock-room was locked. Macala waited outside the clock-room for some thirty minutes, but on ascer-

1984 (1) ZLR p92

GUBBAY JA

taining that security guards were in the employees' compound, went in search of them. He climbed over the high security fence and made his way to the compound. The security guards were there, quarrelling heatedly with one another. Both were drunk. Macala informed them that he had been waiting to clock-in since 10 pm. After alleging that he was drunk, the security guards went to the clock-room and stamped his ticket with the time "10.35 pm". Some five minutes later they had second thoughts, and cancelled his ticket. They accused him of smoking dagga in addition to being drunk. This he denied. A police officer, Sgt Katanda, was summoned and Macala was searched. No drugs were found on his person and he left the works to return home.

Sgt Katanda confirmed in evidence that the two security guards were drunk and aggressive. He formed the impression that Macala, though he had obviously consumed liquor, was not drunk.

The following Monday the two security guards laid a complaint that Macala had been drunk on duty on the Saturday evening. In consequence an enquiry by the Company's personnel manager and industrial relations officer was held. They questioned the two security guards, a

member of the workers' committee who had witnessed part of the incident in the compound a night-watchman and Macala himself. Somewhat surprisingly, Sgt Katanda was not interviewed. Macala admitted to having consumed two to three pints of beer until early evening, but denied that he was drunk at 10 pm. For reasons best known to himself he did not think fit to mention that the two security guards were drunk.

Acting upon the information obtained, and with particular regard to the averments of the two security guards, the Company officials found that Macala had been drunk and so summarily dismissed him. It was not until three days later that they learned that the two security guards, upon whose evidence the most reliance had been placed, had been drunk themselves.

The magistrate understood the issue to be whether Macala had or had not been "drunk" when he reported for duty, and concluded on the evidence that he had not. Mr *Donovan*, who appeared for the appellant, submitted that this approach was erroneous. The real issue was whether the employee was intoxicated to the extent that his ability

1984 (1) ZLR p93

GUBBAY JA

to perform the tasks entrusted to him was adversely affected; the more exacting and responsible the task, the less the degree of intoxication which will justify dismissal. In support of his submission, the correctness of which I accept, counsel referred to Halsbury, *Laws of England* 4 ed vol 16 para 642. See also *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 (CA) at 287G-288B per EVERSHED MR; Scoble, *The Law of Master and Servant in South Africa*, at p 150.

Upon that premise, the argument advanced was that the circumstantial evidence proved on a balance of probabilities that Macala's judgment was affected by alcohol to such a degree as to cause inefficiency in or neglect of the work entrusted to him: In the first place, he had climbed the security fence to find the missing security guards for the purpose of having himself clocked-in. That action, so it was urged, constituted a serious neglect of his duties that was quite unnecessary since he had been observed entering the main gate just before 10 pm by the security guard on duty there. Secondly, he chose to climb over a high security fence rather than walk the short extra distance involved in exiting from the main gate. Thirdly, he had untruthfully denied that he had consumed any alcohol whatsoever on 26 February.

In my opinion the inference which Mr *Donovan* seeks to draw from these factors, taken cumulatively, is not warranted. I find Macala's desire to clock-in understandable. He wished to be able to furnish documentary proof that he had arrived on time for the 10 pm shift, and not to have to rely on the *ipse dixit* of the security guard at the main gate who might or might not remember him entering the premises. It is true that the importance of his duties required that he remain at his post, but it seems that the compound was only a short distance away and that there was no reason for him to anticipate that his search for the security guards would take any length of time. Nor do I regard the decision to climb over the security fence as indicative of irrational behaviour. It might be said that in doing so Macala was reducing the period it would take him to reach the compound. But of greater significance is the fact that he was obviously sober enough to perform the feat without injury to himself. Finally, Macala's denial at the trial of

having consumed any liquor does not point to his being intoxicated to a culpable degree. It is not obvious why he lied, for on the two earlier occasions when questioned by Sgt Katanda and the persons conducting the enquiry, he had confessed to drinking two to three pints of beer.

1984 (1) ZLR p94

GUBBAY JA

The fact of the matter is that there was simply no credible evidence that Macala was intoxicated to any material extent. Sgt Katanda, described by the magistrate as totally trustworthy, testified that although Macala's breath smelt of beer, "his eyes were not bloodshot, he was not staggering and his conduct was good".

Accordingly I am satisfied that the appellant failed to prove that Macala was guilty of misconduct inconsistent with the fulfilment of the conditions of his employment on the evening of 26 February 1983.

Mr *Donovan* submitted in the alternative that the magistrate had erred in not finding that in all the circumstances the mistaken belief that the employee was guilty of misconduct justifying summary dismissal, was reasonable.

The magistrate appreciated that the offence fell into the "intermediate group" in which the Company could escape liability by proving on a balance of probabilities that it did not have the mental element necessary for the offence; see *S v Zemura* 1973 (2) RLR 357; 1974 (1) SA 584 (BRAD) at 586 D-E.

To discharge that onus it was necessary for the appellant to show that the Company's personnel manager and industrial relations officer - and therefore the Company itself - *bona fide* and upon reasonable grounds mistakenly believed that on the evening in question Macala was so intoxicated that his ability to perform the work required of him was adversely affected: see *S v Appleton* 1982 (1) ZLR 113; 1982 (4) SA 829 (ZSC); *S v Rhotan (Private) Limited* 1982 (2) ZLR 137.

The magistrate proceeded to investigate whether the *decision* to dismiss the employee summarily had been made *bona fide* and reasonably, and held that though not made *mala fide*, it was precipitate and thus unreasonable. The proper question to pose was, of course, whether the Company's *mistaken belief* was entertained *bona fide* and upon reasonable grounds.

It was readily conceded by Mr *Batty* that the mistaken belief was *bona fide* held. But was it reasonable as well? In my view it was.

1984 (1) ZLR p95

GUBBAY JA

An enquiry was held in which the security guards alleged that Macala had been drunk. The latter admitted that he had consumed some alcohol, but disputed that he was intoxicated when he came on duty. He omitted to make it known that the security guards were themselves drunk and thus had good reason to falsely incriminate him. Sgt Katanda, who would have

corroborated Macala, was not interviewed, probably because the Company's representatives did not realise he had attended the incident. In any event, there is no suggestion that it was known, or even suspected, that the police officer had found the security guards drunk and Macala sober. In the result it is not surprising that upon the virtually uncontraverted allegations of the two security guards an unfavourable finding was made against Macala. Such a finding cannot in my opinion be characterised as unreasonable.

It follows that the appellant's alternative defence ought to have succeeded before the magistrate. The appeal is accordingly allowed and the conviction and sentence set aside.

Dumbutshena ACJ: I agree.

Beck JA: I agree.

Gill, Godlonton and Gerrans, appellant's legal representatives.

1984 (1) ZLR p96

S v BANDA 1984 (1) ZLR 96 (HC)

Court **High Court, Harare**

Waddington J

8 February 1984

Flynote

Criminal procedure - sentence - principles of sentencing - multiplicity of counts - not proper to beat earlier counts on same basis as previous convictions and increase sentence on subsequent counts - counts treated as one for sentence - correct approach to assessment of sentence - theft - value of property stolen - relevance to sentence.

Headnote

It is incorrect for a Court, when sentencing an accused person who has been convicted on a multiplicity of counts, to treat each subsequent count more seriously than its predecessor by reason of mere numerical or chronological progression. To do so effectively means that each count is being given the status of a previous conviction in relation to succeeding counts, which is clearly incorrect as no act can have the effect of a previous conviction unless it has been adjudicated upon by a Court. To adopt this incorrect approach could lead to such problems as an inappropriate sentence on a later count if earlier counts are quashed on review or appeal or the magistrate apparently having insufficient jurisdiction if there is a large number of counts.

It is also incorrect to take earlier counts into account in aggravation of sentence on later counts, because this involves taking into account in aggravation of sentence something which is not the subject of the charge on which the accused has been convicted. One count may usually only be taken into account in aggravation of sentence on another count when both these counts have

been treated as one for sentence.

Before counts are treated as one for sentence, there should be some relationship between them. It is wrong to treat as one for sentence counts which are separated in time and place. It is also wrong to impose inappropriate sentences on individual counts in order to arrive at an appropriate aggregate sentence. Each count should

1984 (1) ZLR p97

WADDINGTON J

be treated separately on its own merits. If the cumulative sentence is excessive, then the Court may order some sentences to run concurrently or suspend portion of the total sentence.

When sentencing on several counts of theft, there should not necessarily be any mathematical relationship between the value of goods stolen and the sentence passed. In some cases, the value of the goods is irrelevant to the accused's moral blameworthiness. It is only in assessing moral blameworthiness that the value must be taken into account.

Cases cited:

S v Shamu HC-H-401-82;

R v Pasimpamire 1969 (3) SA 723 (R); 1969 RLR 162;

S v Razaro 1979 RLR 353; 1979 (4) SA 450 (ZR);

S v David and Alfred 1964 RLR 2.

Judgment

Waddington J: The accused was properly convicted on his pleas of guilty of four counts of housebreaking with intent to steal and theft. Each offence was possibly committed on a date different from the dates of commission of the other offences. The sentences imposed by the trial magistrate in respect of each count became progressively more severe despite the fact that, with one exception, the value of the property alleged to have been stolen became smaller in each succeeding count. The following table demonstrates what occurred:

<i>Count</i>	<i>Value stolen</i>	<i>Sentence</i>
1	\$8,50	4 months' IWL
2	\$80,00	8 months' IWL
3	\$5,39	9 months' IWL
4	\$4,62	9 months' IWL

As it was not apparent how, for example, a sentence of nine months' imprisonment with labour for breaking accompanied by the theft of goods worth \$4,62 (count 4) could be justified when a sentence of 4 months' imprisonment with labour was imposed for a similar offence where the

goods were worth \$8,50 (count 1), I requested the magistrate to explain his reasons for sentence in more detail. The following reply was received:

"In assessing sentence I firstly looked at all four offences accumulatively [sic] to decide what would be a proper overall sentence. I then took each offence separately and looked at the accused's state of moral blameworthiness at each point in time when he committed the thefts. I thus had to weigh up the value of property stolen and also had to take into account, his increasing degree of blameworthiness as he repeated his offence.

1984 (1) ZLR p98

WADDINGTON J

I felt that if I increased the sentence with each subsequent offence I would then be placing too much emphasis on degree of blameworthiness and not enough on the value stolen. In other words I would be unposted a sentence of six months on count two for a value of \$80 stolen and perhaps twelve months for a value of \$4,62 stolen.

On reflecting though, I could perhaps have imposed a sentence of seven months on count two and one of ten months on count four. This would have given my sentence more balanced look.

Finally the sentence imposed on count three and four are much greater than that imposed on count one (even though the amount stolen is less) because the accused's degree of moral blameworthiness was that much higher for those two counts."

The magistrate's approach to sentence is a novel one which has not been considered before, so far as the Attorney-General and I have been able to ascertain by reference to the decided cases. I must state at this point that I am grateful to the Attorney-General for his industrious assistance in this case.

As I understand the magistrate's explanation, the following is the method he used to arrive at what he considered to be appropriate sentences. First, he viewed all counts together to assess an appropriate overall sentence. In other words, he appears to have done exactly what he would have done had he wished to treat all counts as one for the purposes of sentence. The magistrate could not, however, have imposed this sentence had he wished to treat all counts as one for sentence and had it been proper to do so because his jurisdiction would have been limited to the jurisdiction he possessed in respect of one count only, which at the time he passed sentence was 24 months. (See *S v Shamu* HC-H-401-82). Having decided on an aggregate sentence of 30 months' imprisonment with labour the magistrate then proceeded to apportion the 30 months' imprisonment with labour between the four counts, having regard to the value of the goods stolen and to the accused's "moral blameworthiness at each point in time when he committed the thefts." Each time the accused repeated an offence the magistrate apparently thought that the accused's moral blameworthiness became higher. The sentence on count 4 was Therefore higher than the sentence on count 2. In my view the magistrate's approach was incorrect.

1984 (1) ZLR p99

WADDINGTON J

The magistrate assumed that the offence described in each succeeding count in the charge sheet was committed after its predecessors listed in the charge sheet. It was on this assumption that the magistrate's view was based that the accused's blameworthiness increased with each

new offence committed. But when the charge sheet is examined carefully it can be seen that count 4 was committed sometime between 1 and 14 July 1983. Count 3 was committed on 12 July 1983, while count 2 was committed sometime between 5 June 1983 and 14 July 1983. It is possible, therefore, as the precise dates on which the offences were committed were not established in evidence, that both counts 2 and 3 were committed after count 4. Once that possibility is admitted, the entire basis for treating, for example, count 4 as the most serious offence because it was committed last in point of time, falls away. Consequently, even if the magistrate's approach were correct, the sentences on counts 2, 3 and 4 were all assessed by him on an assumption, that could very easily have been wrong. It was Therefore wrong to impose progressively more severe sentences for the reason relied on by the magistrate.

There are other difficulties in addition to this basic flaw in the magistrate's reasoning. If each subsequent count is accorded more blameworthiness than its predecessor by reason of mere numerical progression, it follows that each count must be given the standing of a previous conviction in relation to succeeding counts. This is clearly incorrect because no act can or should have the effect of a previous conviction unless it has been adjudicated upon by a Court. That was not the position in the instant case and can never be the position.

The difficulties which may arise if this incorrect approach is adopted may be illustrated. The accused is convicted on three identical counts. He is sentenced in respect thereof to three months' imprisonment with labour, six months' imprisonment with labour and 12 months' imprisonment with labour respectively. He appeals against conviction on all counts. He succeeds on counts 1 and 2 but fails on count 3. The sentence on count 3 was assessed as if counts 1 and 2 were previous convictions. The assessment of sentence on count 3 must clearly be incorrect.

Another example illustrates the problems that may arise using the approach adopted by the magistrate. The accused is convicted on, say,

1984 (1) ZLR p100

WADDINGTON J

forty similar counts committed one after the other on different dates. On the magistrate's approach, the accused's blameworthiness must increase at least by the same amount with each succeeding count. By the time the magistrate comes to assess sentence on the fortieth count one wonders whether his jurisdiction would be sufficient to pass what, on the trial magistrate's approach, would be an appropriately severe penalty and, if not, what device the magistrate would have to resort to in order to provide an answer.

It could also be said that the magistrate in this case took into account in aggravation of sentence on counts 3 and 4 the fact that the accused had been convicted on the two preceding counts. Similarly the sentence on count 2 was aggravated by the conviction on count 1. This is also an incorrect approach because it involves taking into account in aggravation of sentence something which is not the subject of the charge on which the accused has been convicted. One count may usually only be taken into account in aggravation of sentence on another count when those counts have been treated as one for sentence. In *R v Pasimpamire* 1969 RLR;

1969 (3) SA 723 at 724 C-G, BEADLE CJ said:

"I return now to the sentences on counts one and two. In the normal course, had counts one stood singly, I would have imposed a fine for a conviction on this count, but *it seems to me that counts one and two are so closely interrelated that this is one of those cases where the two counts might properly be taken together for sentence, and each one may be regarded as aggravating the other. This is not a case of taking into account in aggravation something which is not the subject of the charge on which the accused has been convicted*; here the elements of aggravation have each been charged and proved as separate offences, so it is quite proper, if the two convictions are treated as one, to take each one into account as a circumstance aggravating the aggregate offence committed by the accused. In other words, to impose a sentence on the two convictions taken together which might be greater than a sentence imposed on one alone if that conviction had stood singly." (The emphasis is mine)."

The magistrate also decided, as I have already said, as a first step that 30 months' imprisonment with labour would be an appropriate aggregate sentence. This was tantamount to treating all four counts as one for sentence. This was a wrong approach because the four offences were separated in time and place and were not proved to have been interrelated by any common denominator (see *Pasimpamire's case, supra*). Also, as indicated earlier in this judgment, the magistrate, *had he properly been able to treat all counts as one for sentence* and impose a single globular penalty, would have been limited to his jurisdiction on one count, namely, 24 months' imprisonment with labour. When

1984 (1) ZLR p101

WADDINGTON J

there is a multiplicity of counts, the overall sentence arrived at should be the same whether all counts are treated as one for sentence or whether they are treated separately. In *S v Razaro* 1979 RLR 353 at 354 C-G, BEADLE AJ (as he had by then become) said the following of this situation:

"This is an incorrect approach when sentencing an accused who is charged on a number of counts of similar offences which could in the circumstances be all treated together as one count. The recognized approach to cases of this sort is this. One approach is to treat each individual count on its merits and sentence the accused on that count as if it was the only count. If, as a result of this, the aggregate sentence on all the counts taken together is too severe, as in many circumstances it very well might be, the appropriate approach is to make the sentences on some counts run concurrently with others, so that the effective sentence which the accused actually serves on all counts is appropriate. An alternative approach is to treat all the counts together as one for sentence and then impose a sentence which the judicial officer considers appropriate. This sentence should in the result be the same as a sentence which would have been imposed had the counts been treated separately and some made to run concurrently with others. A judicial officer should not do what the magistrate did in this case, treat the counts as individual, separate counts and give inappropriate sentences for each individual count so that the total punishment on all counts is what he considers appropriate."

In the instant case therefore not only did the magistrate impose inappropriate sentences on certain individual counts in order to reach what he considered to be an appropriate aggregate but, had this case been a proper one in which to assess a single globular sentence - which it was not, he would have been limited to his jurisdiction on one count, ie 24 months. The globular assessment of 30 months' imprisonment with labour was Therefore jurisdictionally excessive.

In the circumstances, the magistrate should have dealt with each count separately, applying his mind to each count separately on its merits and then sentencing the accused separately on each count on its own merits. If then the magistrate had considered that the cumulative effect of

the sentence was excessive, he could have ordered the sentences on some counts to run concurrently with the sentences on others or he could have suspended part of the total sentence to ameliorate the overall sentence.

All in all, I am satisfied, for the reasons given above, that the magistrate has misdirected himself on sentence and am therefore free to substitute appropriate sentences where necessary.

1984 (1) ZLR p102

WADDINGTON J

The accused is not a first offender. He is only 19 years old. In 1979 he was committed to the Gatooma (Kadoma) Training Institute, having been convicted on two counts of theft. In 1981 the passing of sentence was postponed for three years for convictions on two counts of housebreaking with intent to steal and theft. Later in the same year he was sentenced to undergo three months' imprisonment with labour for a similar offence and four months' imprisonment with labour was imposed in respect of the offence committed earlier that year. Then in 1982 he was sentenced to 12 months' imprisonment with labour again for housebreaking and theft. The accused has not had the benefit of a partially suspended sentence and should be given that final chance to reform, in my opinion.

In the light of the accused's previous convictions, I consider that the sentences passed in respect of counts 1 and 2 are appropriate. The sentences on counts 3 and 4 are plainly excessive and must be altered, however. The accused's moral blameworthiness on these two counts is about the same as on count 1, having regard to the value of the property stolen. The small difference in the value of the property is not sufficient to merit any distinction being made in the level of sentence. In this regard it might be useful to repeat the remarks of BEADLE CJ in *R v David and Alfred* 1964 RLR 2 at 5 E-H:

"I believe magistrates would welcome some guide as to the extent to which value should be taken into account, but I am afraid I think it would be dangerous to attempt to give any mathematical formula, as such a formula might in itself have the effect of fettering judicial discretion. I would suggest, however, that where the value of the thing stolen in one case is £1 and in another case as much as £20, the difference in value should have some bearing on the sentence, all other things being equal. I would not, however, consider that a difference of a few pounds in the value of the thing stolen would necessarily have any bearing at all. Each case must, however, depend on its own circumstances. I can conceive of many cases where a theft of an article worth £1 would be more serious than the theft of another worth £1 and I must emphasise that it is only in assessing moral blameworthiness that the value of the article stolen must be taken into account. There may be cases where the value of the thing stolen is irrelevant where, for example, the accused does not know the value of the thing stolen, or intends to steal all he can get. A pick-pocket, for example, who steals a wallet intends to steal everything that is in it, and his moral blameworthiness is not affected by the amount of money, if any, that happens to be in the wallet at the time."

1984 (1) ZLR p103

WADDINGTON J

The sentences imposed by the trial magistrate on counts 3 and 4 are set aside and the following sentences are substituted:

Count 3: 4 months' imprisonment with labour

Count 4: 4 months' imprisonment with labour

Of the total sentence of 20 months' imprisonment with labour, eight months' imprisonment with labour is suspended for five years on condition that the accused is not convicted of any offence involving dishonesty committed during that period.

his conclusion is consistent with the views of the Attorney-General.

Smith J agrees.

1984 (1) ZLR p104

S v MANYERE 1984 (1) ZLR 104 (HC)

Court High Court, Harare

McNally & Smith JJ

13 & 15 February 1984

Flynote

Criminal law - theft - unauthorised borrowing - of money - theft committed - sentence - theft - unauthorised borrowing of money by Court official - appropriate sentence.

Headnote

The unauthorized borrowing of an article with the intention of returning it is not theft, unless an article borrowed is money or some other fungible. In that case, theft is committed. However, theft committed in such circumstances will usually be less morally blameworthy than where the thief attempts to conceal his identity.

Theft committed by a civil servant who is also an official of Court undermines the very fabric of justice. No one in such a position could honestly believe he is entitled to borrow public funds, and Court officials who help themselves to public funds can expect to go to prison, even where there are such mitigatory features as a plea of guilty and repayment of the sum stolen.

Cases cited:

S v Hockley 1973(2) RLR 202; 1974 (1) SA 183 (RAD);

R v Sibiya 1955(4) SA 247 (AD);

R v Albertyn 1931 OPD 178;

R v Jones 1934 NED 45;

R v Milne and Erleigh 1951 (1) SA 791 (AD);

R v Graham 1975 (3) SA 569 (AD);

S v Tinarwo HC-H-370-82;

S v Pfidza HC-H-80-83.

F TMuchena, for the appellant

P. J Haxen, for the respondent

Judgment

McNally J: The appellant was charged before a magistrate with theft by conversion. He pleaded guilty. He was an employee of the

1984 (1) ZLR p105

McNALLY J

Ministry of Justice at Seke Community Court and he stole \$595 from the cash box.

When he pleaded guilty his plea was accepted in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act, and immediately the prosecutor put in as evidence a statement of agreed facts. In that document there appears the following:

"The accused when he took the money, he left a note in the cash box and stated that he was going to pay the money back on the end of August 1983."

He was convicted on the evidence before the Court, and in mitigation he said he had been earning \$274 per month, that he had already repaid about \$250 and that the balance could be recovered from the pension refunds due to him.

He was sentenced to 12 months' imprisonment with labour, of which four months' imprisonment with labour was suspended on the usual conditions.

The appellant lodged a largely meaningless Notice of Appeal against both conviction and sentence but this was overtaken by a Notice of Appeal against sentence only, which was lodged by his legal advisers.

This Notice of Appeal did not allege any misdirection on the part of the magistrate. It simply alleged that the sentence was manifestly excessive for a number of reasons. One at least of those reasons is not founded in the record. It reads:

"Appellant has a stable job with the Murewa Kubatana District Council Education Department as an Executive Officer earning \$727,00 per month."

Practitioners are reminded that a Notice of Appeal is not to be used as a vehicle for introducing fresh evidence. If further evidence is to be introduced at an appeal, it must be introduced in terms of the Rules or by consent. The same observation applies to Heads of Argument. They must be based squarely on the Record and on the Notice of Appeal.

I have already remarked on the fact that the Notice of Appeal does not allege any misdirection.

I would quote, on this point, the words of

1984 (1) ZLR p106

McNALLY J

MACDONALD JP, as he then was, in the Appellate Division of the Court in the case of *S v Hockley* 1973 (2) RLR 202; 1974 (1) SA 183 at 185:

" . . . it will only be in exceptional circumstances that a failure to value a factor correctly, a failure to weigh a factor correctly or to attach due importance to it, will constitute a misdirection . . .

That being so, this Court is not at large in considering the question of sentence in this case. Not being at large, this Court may only interfere if it considers that the sentence is manifestly excessive."

Now, the factors referred to in the Notice of Appeal were all obvious factors which the Court either expressly took into consideration or could not have failed to take into consideration; I deal with them in the order in which they are set out in the Notice of Appeal -

"a. *The amount involved is only \$500.*"

To begin with, this statement is wrong. The amount is \$595. But, more importantly, it cannot possibly be said that the magistrate was unaware of the correct figure when he sentenced the appellant. If it is suggested that a judicial officer who sends a civil servant to prison for stealing a "mere" \$595 is wrong, then I reject the submission with all the force I can muster.

"b. *Applicant showed contrition.*

c. *Applicant is a first offender.*"

Both these factors were expressly taken into account by the magistrate, who mentions them in his reasons for sentence.

"d. *Applicant is married with 4 dependant children.*"

There is no reason to suppose the magistrate ignored this fact, which was placed before him. He said in his judgment, "The accused's personal circumstances have not been ignored by the Court. . ."

I have ignored (e) which is the ground of appeal not appearing from the record, to which I have referred earlier.

1984 (1) ZLR p107

McNALLY J

" f. *Appellant is willing and able to compensate complainant in the full amount of \$500 (sic).*"

This was dealt with, and treated with some understandable scepticism by the magistrate in his reasons for sentence. He did not specifically advert to the fact that some \$250 had already been repaid, but I have no reason to suppose that he was not aware of the fact.

On these facts the sentence was entirely appropriate.

On the basis of the Notice of Appeal, therefore, I was satisfied that this appeal had no merit. But I was surprised that neither the magistrate nor the appellant's legal adviser had apparently given any thought to the passage in the agreed facts which I quoted at the beginning of this judgment, where it is made clear that the case is to be approached on the basis that the accused left a written acknowledgment of debt in the cash box from which he took the money.

In the first place, does unauthorised borrowing amount to theft? I would like to think that the magistrate and the appellant's legal adviser considered the effect of the decision in *R v Sibiyi* 1955 (4) SA 247 (AD), namely that unauthorised taking with the intention of returning the article taken is not theft. I would hope that they then considered the principle set out in *R v Albertyn* 1931 OPD 178, *R v Jones* 1934 NED 45 and *R v Milne and Erleigh* 1951 (1) SA 791(AD) at 865 D-H, and summarised in *R v Graham* 1975 (3) SA 569 (AD) at 575 E-G, namely that where the thing taken is money or a fungible, so that what is to be returned is not the same thing but its equivalent, then the offence of theft is committed.

But even if it be assumed that the magistrate and the legal adviser reached this conclusion, I am surprised that no thought was given by either of them to the question of its relevance to sentence. It seems to me to be relevant, when considering the appellant's moral blameworthiness, to know that he made no attempt at all to conceal his identity. When I brought this to the attention of Mr *Muchena*, who appeared for the appellant, he applied to amend his Notice of Appeal to rely on this failure by the magistrate as a misdirection. After hearing Mr *Haxen*, who complained quite rightly of the irregularity but did not in the circumstances oppose the application, we allowed the amendment.

1984 (1) ZLR p108

McNALLY J

It must be noted that applications of this nature will not normally be allowed, for the very good reason that the magistrate is thereby deprived of an opportunity of commenting on the new ground of appeal - an opportunity to which he is entitled by virtue of the provisions of s 35 of Statutory Instrument 504 of 1979. Only where the Court is satisfied, as we were in this case, that the magistrate, if asked, could not usefully add anything, will we allow such an application to add to the grounds of appeal.

I am satisfied that it was a significant misdirection by the magistrate that he paid no attention at all to the most unusual fact that the appellant made no attempt to hide either his identity or the amount he "borrowed". In the absence of any investigation by the magistrate or cross-examination by the public prosecutor, we must accept that the appellant did leave a note setting out his name and the amount he had "borrowed" and that he did intend to repay it by the end of August 1983. He was, it seems, arrested on 14 July 1983, the day after he had "borrowed" it so that it no doubt became impossible to carry out the intention.

It is now agreed before us that the full amount stolen has been repaid.

This Court being now at large to consider sentence, I turn to consider whether it is necessary to imprison this first offender for this offence.

In favour of the appellant are all factors mentioned at his trial, plus the fact that he made no

attempt to hide his identity, plus the fact that he has repaid all the money.

Against him, however, is a formidable array of factors. He was a civil servant in a position of trust. He was not just a civil servant but an employee of the Ministry of Justice, an official of a Community Court. Wrongdoing by such officials in the course of their duties undermines the very fabric of the administration of justice. Moreover, no one in such a position can honestly believe that he is entitled to borrow public funds. The note can only have been some sort of attempt at playing for time, an effort perhaps to persuade those who discovered the shortfall (if it was to be discovered) to treat the matter as a civil rather than a criminal case.

1984 (1) ZLR p109

McNALLY J

Finally, there are the cases involving peculation by officials of the Ministry. I need refer only to two of them.

In *S v Tinarwo* HC-C-370-82, PITTMAN J dealt with a Clerk of the Community Court, Masvingo, who stole money in his custody amounting to some \$500. In the course of the trial evidence was given of eleven similar cases in the magistrates Court during the previous years, that is during 1981 and 1982. The sentence of 18 months' imprisonment with labour, nine suspended, was regarded as lenient. The judgment dated November 1982, was marked "Distributable" in the hope, said PITTMAN J that as many Court officials as possible would read it.

Again, in *S v Pfidza* HC-H-80-83, dated 9 March 1983, SQUIRES J criticised as manifestly inadequate a sentence of 18 months' imprisonment with labour, 12 suspended, passed on an Accounts Clerk in the Ministry of Justice who stole some \$2 750 of public funds from May to November 1982.

In these and many other cases this Court has spelt out the same simple message. Court officials who help themselves to public funds will go to prison. I do not consider that that message should be blurred by the decision in this case. It is mitigatory that the appellant left a note, and has repaid what he stole. It is a matter for regret that the appellant may lose the well-paid job he seems to have secured since leaving his Court employment. Despite this, I consider that an effective prison sentence is proper in this case. Because of the features which the magistrate failed to take into account, and because total repayment has now taken place, I would impose a slightly lower sentence than the magistrate did.

I would reduce the sentence to nine months' imprisonment with labour, of which three months' imprisonment with labour is suspended for five years on condition that the appellant is not convicted of an offence committed during that period involving theft or dishonesty and for which he is sentenced to imprisonment without the option of fine.

Smith J: I agree.

McNally J: The appeal is allowed to the extent indicated.

Sawyer and Mkushi, legal practitioners for the appellant.

S v NARAN (2) 1984 (1) ZLR 110 (HC)

Court **High Court, Harare**

McNally & Smith JJ

13 & 29 February 1984

Flynote

Criminal procedure - sentence - Exchange control Act [Chapter 170] and Regulations - Possession of foreign currency - Whether imprisonment appropriate

Headnote

Save in those instances where a term of imprisonment was mandatory, the only cases involving contraventions of the Exchange control Act [*Chapter 170*] and regulations made thereunder where a sentence of imprisonment has been imposed are those where the Court has found that the case involved a gross breach of trust and of a privileged position on the part of the convicted person, or where a large amount of foreign currency was lost to the country, or cases involving both elements. Mere possession of a large amount of foreign currency has not, in the past, attracted a prison sentence, but in view of the state of the country's economy and the serious shortage of foreign currency, it is imperative that residents of Zimbabwe who do possess foreign currency should offer it for sale to an authorized dealer as soon as possible. Particularly where the amount of currency involved is substantial, prison sentences may well be imposed in the future for possession of foreign currency without offering it for sale to an authorized dealer.

Cases cited:

S v Baker 1978 RLR 89;

S v Haritakis AD 204/72;

S v Colyvas AD 65/76;

S v Horowitz 1976 (1) RLR 238;

S v Ralston AD 173/74;

S v Levy AD 100/74;

S v Ridley AD 142/74;

S v Deel AD 8/75;

Attorney-General v Smith 1978 RLR 158;

S v Fusaro 1972 (1) RLR 219; 1972(3) SA 218 (RAD);

S v dos Santos AD 271/77.

1984 (1) ZLR p111

SMITH J

A P de Bourbon, for the appellant

J P Haven, for the respondent

Judgment

Smith J: The appellant pleaded guilty to two contraventions of the Exchange Control Act [Chapter 170] and the Exchange control Regulations, 1977, and was duly convicted.

On the first count, which concerned the attempted unlawful exportation from Zimbabwe of various amounts of foreign currency equivalent in value to Z\$5 273, he was sentenced to a fine of \$10 000 or, in default of payment, six months' imprisonment with labour, and the foreign currency was declared forfeit to the State. On the second count, which concerned the possession of R36 020 (equivalent in value to Z\$32 781) and the failure to offer such foreign currency for sale to an authorized dealer within a reasonable period, he was sentenced to a fine of \$33 000 or, in default of payment, 12 months' imprisonment with labour, the foreign currency was declared forfeit to the State and, in addition, he was sentenced to undergo six months' imprisonment with labour.

The appellant appealed against the sentence of six months' imprisonment with labour on various grounds. Subsequently, at the hearing of the appeal, Mr *de Bourbon*, for the appellant, applied for leave to amend the Notice of Appeal and as there was no objection from the State, leave was granted. The appeal against the sentence of six months' imprisonment with labour imposed on the second count was based on two grounds:

- (a) the sentence of imprisonment was manifestly excessive, induced a sense of shock and was neither necessary nor desirable in the interests of justice;
- (b) the totality of the sentence imposed was such that a sentence of imprisonment ought not to have been imposed.

Mr *de Bourbon* argued strenuously that the second offence, although it involved a greater amount of foreign currency, was less serious than the first because the appellant had made no effort to export the currency or deal with it in an unlawful manner. He merely wished to keep the money and there was no basis to suppose that he had obtained it unlawfully or that he intended to use or deal with it in an unlawful manner. As Mr *Haxen*, for the State, pointed out, how-

1984 (1) ZLR p112

SMITH J

ever, it is difficult to believe that the appellant had kept this substantial amount of foreign

currency for a period of three years, during which it would not have been earning interest and had, moreover, depreciated considerably in value, merely because he wished to possess the foreign currency. It is only human nature that he must have believed that ultimately he would have benefited to a greater extent, one way or another, by using the foreign currency for his own purposes rather than offering it for sale to an authorized dealer. Any such use would, of course, have been in contravention of the law.

The magistrate, in sentencing the appellant, said that the Courts have issued warnings regarding the gravity of this offence in the recent past and severe penalties have been imposed for similar offences. He felt that an exemplary sentence should be imposed in order to deter persons from contravening the Exchange control laws and he warned persons who might be tempted to export currency unlawfully to realize that the Courts would not hesitate to impose rigorous sentences.

Mr *de Bourbon* pointed out that he could find no instance where a sentence of imprisonment had been imposed or a warning thereof given in respect of an offence relating to the possession of foreign currency and failure to offer it for sale to an authorised dealer. Mr Haxen, likewise, could not find any such case.

The Exchange control Act [*Chapter 170*] requires the Courts to impose a sentence of imprisonment on a convicted person in certain cases. These are where the offence involves a failure to furnish information or produce books, etc; where the person has previously been convicted of an offence in terms of s 5(1) of the Act; and where the person, having been convicted of an offence involving the unlawful export or acquisition outside Zimbabwe of gold, currency, etc. exceeding \$200 in value, does not satisfy the Court that an equivalent amount in foreign currency or the exported article has been returned to Zimbabwe.

I have analysed many cases involving contraventions of the Exchange control Act [*Chapter 170*] or regulations made thereunder. Save in those instances where a term of imprisonment was mandatory, the only cases where a sentence of imprisonment has been imposed are those where the Court has found that the case involved a gross breach

1984 (1) ZLR p113

SMITH J

of trust and of a privileged position on the part of convicted persons and/or a large amount of foreign exchange was lost to the country - see *S v Baker* 1978 RLR 89 and the cases involving *Geddes and Wright* and also *Mooney* referred to at p 97 of *Baker's* case. In *S v Haritakis* AD 204/72, where the accused had attempted to export the equivalent of \$79,13 and had a previous conviction, the Court held that, as the State had suffered no actual prejudice and the money had been forfeited, the sentence of four months' imprisonment Path labour, three of which were suspended, should be amended so that the entire four months were suspended, and the fine of \$100 was confirmed.

In *S v Colyvas* AD 65/76, the accused was convicted on two counts of unlawfully buying foreign currency equivalent to approximately \$11000 at a premium of 20%. He was fined \$15 me. MacDONALD ACJ said that such offences had a more serious effect on the economy of the

country than exporting currency, and also in such cases the State could not bring pressure to bear on the convicted person to repatriate the foreign currency.

In *S v Horowitz* 1976 (1) RLR 238, the accused had been convicted on three counts of unlawfully buying or borrowing foreign currency amounting to R31 500 and had six previous convictions in 1971. As to his sentence of five months' imprisonment with labour, MacDONALD ACJ held that the term was manifestly excessive as no currency had left the country and the offences in question were not as serious as those punished by a fine in *S v Ralston* AD 173/74 and *S v Levy* AD 100/74. He said that no doubt a prison sentence would not have been imposed if the accused had been convicted of the present and the earlier offences in the same trial. He therefore substituted a sentence of eight months' imprisonment with labour, of which six were suspended. In *Ralston's* case, *supra*, BEADLE CJ said at p 3 of the cyclostyled judgment:

"Of all the Exchange control cases which have come before me, leaving aside the *quantum* of currency involved, there is no case which I can remember where the moral blameworthiness of the accused was greater than in this case. He resorted to forgery and fraud and he consistently misled the Exchange control Department into inducing them, to give the authority for which he asked."

Whilst BEADLE CJ said that, had the State moved the Court to increase the penalty, which was a fine of \$2 000, he would have given

1984 (1) ZLR p114

SMITH J

grave consideration to the application, he gave no indication that he would have imposed a term of imprisonment.

Other cases where fines but no sentence of imprisonment were imposed are *S v Ridley* AD 142/74, *S v Deel* AD 8/75, *AG v Smith* 1978 RLR 158 and *S v Fusaro* 1972(1) RLR 219; 1972 (33 SA 218. In the last-mentioned case, where the convicted person was in possession of R100 and other foreign currency equivalent to \$980, he was fined \$100 and the R100 was confiscated but not the other foreign currency. In *S v Dos Santos* AD 271M7, the accused was convicted of unlawfully exporting \$3 800 and was given three months in which to repatriate it. On his failure to do so, a prison sentence became mandatory and he was sentenced to six months' imprisonment with labour, of which four were suspended, and a fine of \$3 000. On appeal, DAVIES JA accepted that the convicted person was contrite and co-operated with the authorities, the amount of money involved was not particularly great and approximately \$1 750 had been repatriated, and then suspended the whole of the sentence of imprisonment and increased the fine to \$6 000. At p 5 of the cyclostyled judgment, he said:

"This Court cannot shut its eyes to the fact that many currency offenders who have indulged in conduct far more serious than the appellant's conduct in this particular instance have been punished by substantial fines but have not been sent to prison."

In the light of the above, considering that the appellant has been sentenced to fines totalling \$43 000 and, in addition, has lost foreign currency equivalent to \$38 054 which has been confiscated (ie a total of \$81 054), the imposition of an additional effective sentence of six months' imprisonment with labour does induce a sense of shock when it is considered that there

was no breach of trust on the part of the appellant or loss of foreign currency to the country. I consider that in this case the sentence of imprisonment should be suspended, although it is accepted that if the appellant is again convicted of an offence in terms of s 5(1) of the Exchange control Act [*Chapter 170*], a sentence of imprisonment will be mandatory.

In view of the present state of the economy of Zimbabwe and the serious shortage of foreign currency, it is imperative that those residents of this country who do possess foreign currency here should offer it for sale to an authorized dealer as soon as possible. Accordingly, I would warn residents who possess foreign currency in Zimbabwe and

1984 (1) ZLR p115

SMITH J

fail to comply with this requirement of the Exchange control Regulations, 1977, hereafter that they may well be sentenced to a term of imprisonment in addition to a fine, particularly if the amount involved is substantial.

I would accordingly allow the appeal to the extent that I would suspend the sentence of six months' imprisonment with labour imposed in respect of count 2 for a period of five years on condition that the appellant is not convicted of any offence in terms of s 5(1) of the Exchange control Act [*Chapter 170*] committed within that period, for which he is sentenced to a term of imprisonment without the option of a fine.

McNally J: I agree, and the appeal is allowed accordingly to the extent indicated.

Ali Ebrahim, legal practitioner for the appellant.

Attorney-General, legal practitioner for the respondent.

1984 (1) ZLR p116

THOMAS v THOMAS 1984 (1) ZLR 116 (HC)

Court High Court, Harare

McNally J

23 & 29 February 1984

Flynote

Family law - husband and wife - action for divorce - disposal of joint assets by wife - whether husband can obtain interdict restraining wife from disposing of assets.

Headnote

In appropriate circumstances, a husband or wife who has brought a matrimonial action may be protected by interdict against unlawful action by the other spouse. There is no limit to the number or shape of such interdicts restraining the other party from dealing with the assets of the

Copyright Juta & Co Ltd

joint estate pending action; but the party seeking the interdict must show that there has been an unlawful dealing with the assets of the estate by the other party or that he (or she) apprehends such dealing.

Case cited:

Petersen v Petersen 1974 (1) PH B 5.

A N B Masterson, for the appellant.

C Greenland, for the respondent.

Judgment

McNally J: The parties have been to Court before. An order for maintenance *pendente lite* and a contribution towards costs was made by PITTMAN J in July 1982 in Judgment HC-H-229-82. The matter of the divorce has still not been finalised.

Mr Thomas has now come to Court to complain about certain aspects of his wife's conduct and to seek a remedy. There is some substance in the complaints, but the Court has had some difficulty about the remedies.

1984 (1) ZLR p117

McNALLY J

The history of the relationship may be gleaned from the earlier judgment, up to mid-1982. The applicant has made a number of allegations about her behaviour since then. I propose first to deal with those allegations which relate to the relief which he seeks, and then to deal briefly with other allegations which do not so relate.

His first prayer is that she should repay £3 000 to their joint account in a bank in England. He says, and she admits, that she withdrew this money without his knowledge, and it seems she has placed it in a bank account in France operated by her parents. She says French Exchange Control will not permit her to remove it from France.

She claims she removed the first £1 500 to pay for a visit to France by herself and her children, which did not come off; and the second £1 500 to pay for a visit by her parents to Zimbabwe which also did not come off. She does not suggest that she tried then to replace the money in the English Bank. She simply says it is not possible.

Despite the well-known danger of trying to assess the credibility of pieces of paper, I have little doubt that her explanation is less than candid. There are other instances in the papers of equivocation on her part, which fortify my conclusion in this regard.

I was concerned, however, about the legal position of a person who is a signatory to a joint bank account. I asked Mr Masterson for his detailed submissions on the relevant law. His answer was in effect that whatever the law might be, she was not playing the game. I observe in passing that Mrs Thomas is a Frenchwoman, and that Frenchwomen are notoriously

unschooled in the rules of cricket.

It seems to me to be important to determine whether what she did was unlawful or not. In speaking about joint accounts, Lord Chorley, in his *Law of Banking* 6 ed at pp 194-5, says that bankers usually require their customers to give them a mandate as to what signatures are to be acceptable.

"Such a mandate should of course be given in writing and be signed by all the parties to the account in order that it may be binding on them. Its terms will vary with circumstances, but in a typical case of a joint account of two persons it will authorise the banker to pay cheques on the signature of either party. As a safeguard to the customers this may be confined to cheques drawn 'on their behalf' "

1984 (1) ZLR p118

McNALLY J

Mr Thomas does not say what mandate was given to the English bankers, but one can assume that either he or she, acting alone, could withdraw or transfer funds. She exercised that right. Her action was *prime facie* not unlawful. I can see no basis on which I can order her to undo what she has lawfully done. If her right to withdraw was in some way contractually restricted in terms of the mandate, I know nothing of that. If she has upset the financial balance between them, that is a problem to be resolved in the trial, when the proprietary rights of the parties are to be determined in terms of the marriage contract annexed to the papers. If she has broken the law of France or of England, then Mr Thomas' remedy lies in the Courts of those countries.

If what Mrs Thomas says about French Exchange control is correct, she cannot return the money to England even if I order her to do so. But even if she is not correct in this assertion I can see no basis upon which I can make such an order.

The next prayer requires her to furnish him with "a list of all property held in the house at Shangani Road, Northwood, which does or may belong to the Applicant or jointly to the Applicant and Respondent". This arises out of the fact that she and the children are living in the family home whereas he has moved out. He suspected she was disposing of property. He called to take an inventory. He found the deep freezer missing. She said it was being repaired. He did not believe her. She now concedes she sold it for \$450, "to buy household necessities". He suspects she has also sold a silver cutlery set (a gift from her family) but she denies it. She says she will willingly provide the inventory of assets. Mr *Greenland*, however, says she cannot be ordered to do so.

I must say I can see no purpose in ordering the supply of an inventory. He knows what should be in the house. If something has been sold, an inventory will not bring it back. If she decides to sell something in the future, an inventory will not prevent her from doing so. In these circumstances, I am not prepared to make an order. She has offered to prepare an inventory and I hope she will honour that undertaking. Indeed, she has undertaken to have it ready before this judgment is delivered. But I will not compel her to supply it under pain of law.

The third prayer is a prayer for an account of "all property sold or removed by her from the aforesaid Northwood house particularly the deep freezer and the silver cutlery set." It is clearly to be inferred from

McNALLY J

her affidavit that she has not sold anything of the household contents except the deep freezer and the car (which she has exchanged for a smaller one). Accordingly, I see no point in asking her to account further.

The fourth prayer is that "pending compliance with the requirements of paragraphs 1, 2 and 3 of this Order, applicant shall be entitled to withhold all further payments of maintenance." One might say simply that this prayer falls away once I decide not to grant prayers 1, 2 or 3. But even had I granted those prayers or one or more of them, I would not have made this order. The reason is simply this. The Court has already in July 1982 ordered him to pay maintenance to her for herself *and the three children*. This present application is not an application for the variation of that maintenance order. It does not attack either the principle that maintenance should be paid or the *quantum* ordered. What this application says in effect is this: "She has wrongfully helped herself to £3 000 and to \$450 from the sale of the deep freezer. The Court should regard these sums as forced prepayments of maintenance, and Therefore should allow Mr Thomas to set off future maintenance payments against the sums of £3 000 and \$450."

Now, in the first place, even had I concluded that the taking of the £3 000 was unlawful, it is clear that Mrs Thomas has not treated that sum as income but as capital. She has removed a capital asset from joint control to her personal control. It cannot therefore be treated as maintenance and set off against future maintenance payments because there is no indication that she used it as maintenance or intends to do so. Nor, for that matter, was Mr Thomas intending to use it to pay maintenance. And finally, of course, if the French Government insists on keeping the money in France, it cannot be used to maintain a household in Zimbabwe.

As for the \$450, Mrs Thomas says her husband has kept her short of funds and that the cost of living and his salary have both gone up since mid-1982, when the order was made. He declines to increase her maintenance, and she says she has been compelled to sell an asset, of which she had the use, to buy household necessities.

That she has such a right is, I think, clear, both in the Roman-Dutch common law and in terms of their Ante-Nuptial Contract, which reads

McNALLY J

in translation at the foot of p 21 of the papers as follows:

"However they will show solidarity with every debt contracted by one of them for housekeeping or children's education according to the Point 220 of the Code Civil. " (The translation is not mine).

On the papers before me I cannot say whether or not Mrs Thomas should have managed on the maintenance she was getting. I know, of course, that the cost of living has risen sharply since July 1982. I cannot say she was not Justified in disposing of a deep freezer for household necessities. I Therefore find no basis for penalising her (far less the children) by allowing Mr

Thomas to deduct \$450 from his next maintenance payment.

I have stressed that this application is not an application to vary the *quantum* of maintenance. Mr *Masterson* has addressed a great deal of his argument to questions such as her alleged misconduct and her refusal to seek better employment. In my view, these considerations are not relevant to this inquiry. I do not propose to deal with them. It is, however, undoubtedly correct that Mrs Thomas has been evasive in her statements on oath on some of these matters.

The next prayer is "that Respondent be and is hereby restrained from disposing of any further assets which may be owned by the Applicant or jointly with the Applicant wherever they may be situate, without the prior knowledge and written consent of the Applicant." In principle it seems to me that an order of this nature may, in a proper case, be made. *Hahlo South African Law of Husband and Wife* 4 ed at p 526, has this to say:

"In appropriate circumstances a husband or wife who has brought or is about to bring a matrimonial action or who is the defendant in such an action may be protected by an interdict against unlawful action by the other spouse ... There is no limit to the number or shape of such interdicts ... The Court... may restrain one of the spouses from disposing, pending suit, of money, shares, jewellery, furniture, land, a bank deposit or a business ... The Court may grant the wife an interdict restraining the husband from dealing with assets of the joint estate pending action. The mere fact that an action for divorce or judicial separation is pending, or that the husband has been disposing or intends to dispose of assets of the joint estate is not sufficient for the wife to obtain an interdict. She must show either that there has been an unlawful dealing with the assets of the joint estate by the husband or that she reasonably apprehends such dealing."

1984 (1) ZLR p121

McNALLY J

I draw particular attention to the last part of this quotation beginning with the words "The mere fact ...". If one reverses the words "husband" and "wife", the passage is to my mind peculiarly apposite to the facts of this case.

I am not prepared to say that it was unlawful for the wife to decide that the needs of herself and her children were better catered for by doing without a deep freezer for the sake of its cash equivalent. (Compare *Petersen v Petersen* 1974 (1) PH B5 in which it was held that a spouse (wife) who removes some of the furniture from the matrimonial home cannot be treated as a spoliator). I am not prepared to conclude that her actions indicate a vindictive determination to deprive her husband of assets, or to fritter them away in an unlawful manner. Nor do I think there is any basis for concluding that the £3 000 in France will be disposed of in the sense of being alienated. As I have said, it seems clear she wants it as a capital asset, or possibly to bring her parents out to this country to visit her.

On the other hand, she has said in her affidavit (without making a formal application) that she needs a further \$100 a month by way of maintenance. He denies it. It seems, however, that he would prefer to pay her more, if such is justified, rather than agree to her disposing of assets. I am inclined to accept that he has a right to that choice. In other words he has a right to say, "If you are entitled to more maintenance, which I deny, I would rather pay it monthly in cash than that you should sell our assets in order to meet the alleged deficit."

It seems to me that the justice of the case can be met by granting a temporary interdict

restraining her from alienating or disposing of assets without giving him notice in writing of her intention to do so on the grounds of necessity. This will enable him either to take the matter to court or to negotiate an increase in maintenance so as to render the sale unnecessary. I do not propose to make his consent a prerequisite.

His final prayer - which he omitted originally to include in his draft order - is for an order compelling discovery. He is entitled to such an order, which is usually sought through the Chamber Book. She has expressed her willingness to lodge her affidavit of discovery.

1984 (1) ZLR p122

McNALLY J

As far as costs are concerned, the applicant has been largely unsuccessful but partly successful. I do not propose to penalize him for adding what would normally be a Chamber Book application on to a Notice of Motion - I agree that it is simpler to deal with all the matters together. I think in the circumstances the question of costs should be reserved.

In all the circumstances I make the following order:

1. The prayers in paragraphs 1, 2, 3 and 4 of the draft order are dismissed.
2. The respondent is ordered, in relation to Case No HC 962/82, to make discovery on oath of all documents referred to in Rule 160 of the High Court Rules within seven days of the date of this order, failing compliance with which the applicant may apply to this Honourable Court to strike out her claim and her defence to the claim in reconvention.
3. The respondent is hereby interdicted and restrained from making any disposition adverse to the applicant of any of the assets in or pertaining to the family home in Northwood, Harare, or of any other assets of the applicant or of the parties jointly, without first giving the applicant two weeks' notice in writing of the proposal.
4. The question of costs is reserved.

Coghlan Welsh and Guest, legal practitioners for the applicant.

Honey and Blanckenberg, legal practitioners for the respondent.

1984 (1) ZLR p123

ATTORNEY-GENERAL v MUTEA 1984 (1) ZLR 123 (SC)

Court Supreme Court, Harare

Dumbutshena ACJ, Beck JA & Gubbay JA

14 February & 1 March 1984

Flynote

Copyright Juta & Co Ltd

Criminal procedure - sentence - Criminal Law Amendment Act [Chapter 58] - s 3(a) - unlawful carnal knowledge of girl under 16 years of age - intention on part of man to marry girl - lobola paid - appropriate sentence.

Headnote

The respondent was a school teacher who had intercourse on a number of occasions with a girl of under 16 years of age. She was a pupil at his school. At his trial he expressed his love for the girl and his intention to marry her. That that was his real intention was shown by payment of part of the lobola necessary, together with damages for his having seduced the girl.

Held, that the respondent has abused his position of trust by exploiting the inexperience, immaturity and dependence of a girl who was a pupil at his school. Normally such a situation would demand a more severe sentence than the effective sentence of three months' imprisonment imposed on him. However, Courts should not impose too severe a sentence where it is the genuine intention of the offender to marry the girl, with her agreement and with the consent of her parents, and accordingly the sentence in this case could not be said to be inappropriate.

Cases cited:

S v M 1975 (1) SA 424 (AD);

Snyders v R 1949 (1) PH H16 (C).

Miss M Werrett, for the appellant.

No appearance for the respondent.

Judgment

Dumbutshena ACJ: This is an appeal by the Attorney-General in terms of s 70(1)(b)(i) of the Magistrates Court act [*Chapter 18*] as amended and as read with Rule 15 of the Appellate Division (Magistrates Court) (Criminal Appeals) Rules 1979. The Appeal is

1984 (1) ZLR p123

DUMBUTSHENA ACJ

against the sentence imposed on the respondent by the Magistrate's Court sitting at Mbare.

The respondent was charged with having intercourse with a girl under 16 years of age in contravention of s 3(a) of the Criminal Law Amendment Act [*Chapter 58*]. He pleaded guilty and was sentenced to nine months' imprisonment with labour. Six months of that sentence were suspended for five years on appropriate conditions.

The respondent was a school teacher at Glen View (4) Government School. The girl was a Grade 5 pupil at the same school.

The respondent was seen by the girl's brother having sexual intercourse with her in his motor vehicle. He and the girl ran away. When the respondent was arrested he informed the police of

his intention to marry the girl. He also told the police that he had had sexual intercourse with the girl on four separate occasions.

The respondent filed grounds of appeal against both conviction and sentence before the Attorney-General applied for leave to appeal against sentence. I granted the Attorney-General leave to appeal because it seemed to me the sentence was inadequate.

The respondent did not appear to argue against the Attorney-General's appeal. Miss *Werrett*, who appeared for the appellant, submitted that the sentence was disturbingly inadequate. She pointed to the aggravating factors: that the respondent was a professional man who knew the age of the girl; he was more than double her age with three children of his own, and was not an unworldly person. Miss *Werrett* argued further that there was nothing mitigating the moral blameworthiness of the respondent. It was her contention that a teacher should set the moral standards of the community.

There is no doubt that this is a serious case because the offence was committed by a teacher upon a girl of 14 years of age who was a pupil at his school. She was one of the pupils trusted to his care. See *S v M* 1975 (1) SA 424 (AD) at 425A.

I agree with Miss *Werrett* that the respondent abused his position of trust. He exploited the inexperience, immaturity and dependence of a

1984 (1) ZLR p125

DUMBUTSHENA ACJ

girl who was a pupil at the school. Where, therefore, a teacher or any man abuses his superior age, experience or position of special responsibility he deserves a more severe sentence than that imposed on the respondent. The matter does not, however, end there. There are circumstances in this case which call for a different approach.

In assessing sentence the trial magistrate had regard to the fact that the respondent intended to marry the girl and that his prospective parents-in-law had submitted a schedule showing that the respondent had paid part of the lobola. It is not clear, however, whether he considered that factor as a mitigating one. The fact that an accused person is in love with a girl and intends to marry her is one of the mitigating circumstances to be taken into account in offences of this nature. See Hunt *South African Criminal Law and Procedure* Vol II, 2 ed p 457.

In *Snyders v Rex* 1949 (1) PH H16 (C) the appellant, who had had carnal intercourse with a girl under 16 years of age on various occasions, challenged a sentence of three months' imprisonment with hard labour of which two months were suspended subject to good behaviour. The appeal Court suspended the sentence of three months because the parties were in love with one another and at that time contemplated marriage and the appellant was supporting a child born as a result of the intercourse.

In the instant case not only did the respondent profess love for the girl, he also expressed his intention to marry and fulfilled that intention by paying part of the lobola and damages for seducing the girl. The girl's parents who received the lobola did not seek his prosecution. At the conclusion of her argument Miss *Werrett* conceded that these factors would make a sentence

of nine months' imprisonment with labour with six months of that sentence suspended, an appropriate one. In my view the concession was well made.

It is my view that despite the intrinsic seriousness of the offence, Courts should not impose too severe a sentence where it is the genuine intention of the offender to marry the girl with her agreement and with the consent of her parents. In the instant case a customary marriage was contracted and in the light of the attitude of the parents of the girl it cannot be said that a sentence of nine months' imprisonment of which six months are suspended on appropriate conditions is inappropriate.

1984 (1) ZLR p126

DUMBUTSHENA ACJ

Accordingly I would dismiss the appeal against sentence.

Beck JA: I agree

Gubbay JA: I agree

1984 (1) ZLR p127

BON MARCHÉ (PVT) LTD v BRAZIER AND ANOTHER 1984 (1) ZLR 127 (HC)

Court **High Court, Harare**

Waddington J

23 February & 14 March 1984

Flynote

Delict - passing-off - trade names - businesses with closely similar names - confusion in minds of public - businesses of different sizes and nature and situated in different towns - no real likelihood of confusion.

Headnote

The applicant company operated in Harare and had done so for some 14 years. Its business consisted of large-service supermarkets, of which it operated five, four under the name of "Bon Marché". Its regular customers included some coming from centres outside Harare but not from as far afield as Bulawayo. The respondents, who were sisters, had started a small business in a suburban shopping centre in Bulawayo in 1980. Unaware of the existence of the applicant's business, they gave their shop the name of "Le Bon Marche". The name was chosen for sentimental reasons, as their father had run a small haberdashery and babies' wear shop in Britain for nearly 60 years using that name. The business conducted by the respondents was of much the same type as their father's had been and enjoyed only a modest turnover.

The applicant became aware of the respondents' business only when it received an account from one of its suppliers, who had also supplied goods to the respondents. The account was for

goods supplied to the respondents. On becoming aware of the respondents' existence, the applicants sought an order restraining the respondents from using the name "Le Bon Marché". It claimed that the respondents' operation constituted an infringement of goodwill associated with its name, and that such goodwill could be prejudiced if another business in Zimbabwe endeavoured to pass itself off as the applicant. It alleged that the name chosen by the respondent was so close to its own that it would certainly cause confusion in the minds of the public.

Held, that what had to be determined was whether the applicant enjoyed goodwill in the name of "Bon Marché (Pvt) Ltd" and whether there was a reasonable likelihood that members of the public might be confused into believing that the business of the respondents was, or was connected with, the business of the applicant. This

1984 (1) ZLR p128

WADDINGTON J

involved having regard to all the surrounding circumstances, such as the nature of the businesses in question and the goods dealt with, the clientele and the conditions under which the businesses operated.

Held, further, that having regard to these features in the present case and, in addition, the geographical situations of the two businesses, there was no evidence of any confusion and, as long as the respondents restricted their business activities to what they were, there was no reasonable likelihood of injurious confusion while the applicant traded with the public in Harare only.

Cases cited:

Capital Estate and Others v Holiday Inns Inc and Others 1977 (2) SA 916 (AD); *Pick 'n Pay Stores Ltd v Pick 'n Pay Superette* 1973 (1) RLR 244; 1973 (3) SA 564 (R);

Slenderella Systems Inc of America v Hawkins and Another 1959 (1) SA RLR 519 (W);

Miriam Click Trading (Pty) Ltd v Clicks Stores (Transvaal) (Pty) Ltd and Others 1979 (2) SA 290 (T).

A N Eastwood, for the applicant.

I A Donovan, for the respondents.

Judgment

Waddington J: The applicant is a registered company which has conducted retail businesses in Harare under the name of "Bon Marché" for some 14 1/2 years. The two respondents who are sisters have, since the beginning of 1980, conducted a partnership business at the Retreat Shopping Centre, near Bulawayo, for almost four years under the style of "Le Bon Marché". At first a third sister was also involved in the business. She was originally cited as one of the respondents but it has now been established that she is no longer concerned in the trading activities of her two sisters. The respondents' business description is, as indicated already, "Le

Bon Marché". When the signwriter painted the sign above their small shop, he rendered the name as "La Bon Marché". The respondents have never bothered to correct the error.

The applicant remained completely unaware of the existence of the respondents' business in Bulawayo until towards the end of 1983, when one of the applicant's suppliers inadvertently despatched to the applicant an invoice which referred to and was addressed to the respondents' business. Purchases by the respondents reflected in the invoice concerned were inadvertently debited to the applicant.

The applicant immediately caused its legal advisers to write to the respondents alleging that damages had been suffered by the applicant

1984 (1) ZLR p129

DUMBUTSHENA ACJ

arising out of respondents' "unlawful use of the name" and requiring the respondents to stop using the name immediately. This information was accompanied by the threat that failing compliance with the applicant's request, application would be made to the High Court for an interdict coupled with a claim or damages. The respondents' legal advisers replied shortly afterwards on 10 October 1983, explaining the history of the respondents' business, maintaining that respondents were not concerned with passing their business off as the applicant's and maintaining that their continued operation under the name of their choice would continue to cause no injury to the applicant. The applicant was not disposed to let the matter rest, and notice of motion proceedings were instituted in which the applicant seeks an order that the respondents be restrained from using the trade name "Le Bon Marché" or any name similar to that of the applicant, and that respondents pay the costs of the application. Affidavits have been filed by both the applicant and the respondents.

Earlier indications to the contrary notwithstanding, no claim for damages is made by the applicant against the respondents. The applicant in effect alleges that the respondents are guilty of the delict known as "passing off". It is averred that the respondents' operations constitute an infringement of the goodwill associated with the name which the applicant has built up over the past 141/2 years. It is also alleged that the goodwill in the applicant's name could be prejudiced if another business in Zimbabwe endeavoured to pass itself off as the applicant.

Finally it is alleged that the name "Le Bon Marché" is so close to the name used by the applicant - ie, Bon Marché (Pvt) Ltd - that it would certainly cause confusion in the minds of the public.

RABIE JA (as he then was), in *Capital Estate and Ors v Holiday Inns Inc and Ors* 1977 (2) SA 916 (AD) at 929C-E described the delict in question in the following terms:

"The wrong known as passing-off consists in a representation by one person that his business (or merchandise, as the case may be) is that of another, or that it is associated with that of another, and, in order to determine whether a representation amounts to a passing-off, one enquires whether there is a reasonable likelihood that members of the public may be confused into believing that the business of the one is, or is connected with, that of another. (See, eg, *Policansky Bros Ltd v L and H Policansky*, 1935 AD 89 at 97 and 113; *Truck and Car Co Ltd v Kar - N-Truck Auctions supra* at 557 and 559.) Whether there is a reasonable likelihood of such

DUMBUTSHENA ACJ

confusion arising is, of course, a question of fact which will have to be determined in the light of the circumstances of each case."

DAVIES J (as he then was) in *Pick 'n Pay Stores Ltd v Pick 'n Pay Superette* 1973 (1) RLR 244 at 247; 1973 (3) SA 564 at 566 *et seq* echoed these views in approving the remarks of WILLIAMSON J in *Slenderella Systems Incorporated of America v Hawkins and Another* 1959 (1) SA 519W at 521, namely where WILLIAMSON J said:

"The action for 'passing-off' in our law is based on a type of delict which consists of a representation that the defendants' or respondents' business or his goods, or both, are that of the Plaintiff; per WESSELS ACJ in *Policansky Bros v L and Policansky* 1935 AD 89 at 97. The Court will protect the right of property existing in another in regard to the name or good-will enjoyed by that other in respect of a trade or goods."

I shall approach the inquiry in the present case in order to determine whether the applicant enjoys goodwill in the name of "Bon Marché (Pvt) Ltd" built up over the years, and whether there is a reasonable likelihood that members of the public might be confused into believing that the business of the respondents is, or is connected with, the business of the applicant. In conducting this inquiry, the remarks of ELOFF J in *Miriam Click Trading (Pty) Ltd v Clicks Stores (Transvaal) (Pty) Ltd and Ors* 197'9 (2) SA 290(T) at 295B, appear to me to be apposite and of importance:

"In such an enquiry the trade names must be considered from the visual, phonetic and ideological points of view. They must be considered not side by side, but as a member of the public would see them, one after the other, with a time lapse in between and having regard to the likelihood of imperfect recollection. In passing off they must be considered not in abstract but in the form and under the circumstances in which they are used. This involves having regard to all the surrounding circumstances such as the nature of the businesses in question and the goods to which they relate, the types of persons who constitute potential clients of such businesses and the conditions under which such businesses are conducted. The criteria is not that of a very careful or a very careless purchaser but an ordinary purchaser of the types comprising the potential clients (see *Chowles and Webster South African Law of Trade Marks* 2 ed at 311-312 read with 79)."

It is necessary to consider the evidence which has been placed before me in some detail. According to its founding affidavit the applicant operates five separate branches in Harare in different suburbs. Four of them operate under the trading name "Bon Marché". The most recently established branch was opened in October 1978. Applicant

DUMBUTSHENA ACJ

also, in view of its very large size quite clearly, operates a central warehouse for the purpose of distributing goods to its branches. It possesses a fleet of trucks on which the legend "Bon Marché centres" is painted in large letters. The trucks are used to transfer goods from the warehouse to the branches and between the branches. The applicant has dealt with customers from as far afield as the Midlands and it is alleged that customers come from considerable distances from outside Harare "to do their monthly shopping". The chain of supermarkets since its inception has operated, as indicated already in this judgment, for some 14 1/2 years, and apparently enjoys a reputation not only in Harare but in those areas whence its customers

come. The applicant admits that it has no regular customers from Bulawayo but it deals with a large number of suppliers and other firms in Bulawayo. Mr *Donovan*, who appeared for the respondents, specifically did not adopt as an argument that the applicant possesses no trading reputation in Bulawayo. This attitude was dictated by an acceptance that the applicant does in fact possess the reputation or goodwill it claims in respect of its Bulawayo suppliers.

The applicant accepts the respondents' allegation that the applicant "operates a large chain of supermarkets in Harare". The applicant admits that the respondent's trading operations by comparison with its own are insignificant. The applicant also accepts that the only form of confusion which has actually occurred in the years during which respondents' business has been in operation was the confusion over the invoice which the supplier's clerk inadvertently addressed to the applicant. No other instance of confusion is referred to in any of the affidavits. When the invoice in question is examined, it may be seen that the respondents' address is clearly stated upon it and that clerical negligence must have accounted for the incorrect debiting to the applicant of the debt due by respondents to the suppliers concerned. The applicant obviously possesses substantial goodwill and in proper circumstances would be entitled to its protection and the protection of its name which is associated with its goodwill.

No other affidavit was produced by any person who had come forward to say that he had patronised the respondents shop in the belief that it was the applicant's or that it was connected with the applicant's Harare chain of supermarkets.

1984 (1) ZLR p132

DUMBUTSHENA ACJ

The respondents' replying affidavit discloses the following facts, which do not appear to be in dispute. As indicated earlier, the two respondents are sisters. They and the third sister, a Mrs Reynolds, who is now no longer concerned in the business, decided to start a small business in their present premises as a form of occupation and to "earn some pocket money". This shop was opened in the middle of 1980. The name "Le Bon Marché" was adopted for sentimental reasons. Their father had run a small haberdashery and babies' wear shop in Britain for about 58 years under the name "Bon Marché". The respondents would have adopted the same name but for the fact that they were aware that in Gweru a café of the same name existed. In order to distinguish their business from the café business in Gweru, they added the article "Le" to the name. They only learned of the applicant's business in Harare some time later. The two respondents hoped that the difference between the names of businesses would provide a sufficient distinction to avoid confusion.

Le Bon Marché is situated ten kilometres from the centre of Bulawayo on the Matopos Road. It forms part of the Retreat Shopping Centre which consists of a filling station and about ten shops altogether, all apparently of about the same size and design. Le Bon Marché consists of a door, a large display window, one room which constitutes the shop, and, through an archway, a small office-cum-store-room with sink and electrical facilities. Photographs of the interior and exterior of Le Bon Marché are attached to respondents' affidavit. It is plain, judging from them, that the shop itself could not be wider than 15 feet or so. It is obviously an exceedingly modest enterprise, minuscule by comparison with the description of applicant's various branches contained in the founding affidavit. The stock consists of some items of haberdashery, hand-

knitted or crocheted baby clothes and soft woollen toys for babies, wool and knitting and sewing materials, greetings cards, fancy wrapping-paper and the like. Postage stamps are also sold and the respondents are agents for dry cleaners and the State Lotteries. Occasionally second-hand clothes are sold. The value of the stock at any time is about \$3 500 and the monthly turnover of the business is between \$900 and \$1 000. Apart from one occasion a year ago, the respondents have not advertised. They do not possess headed stationery or inscribed order forms. The two sisters close the shop on Wednesday afternoons and visit their suppliers to shop personally for stock as and when required. They do not run a central

1984 (1) ZLR p133

DUMBUTSHENA ACJ

warehouse or delivery lorries. Their cash sales slips are inscribed with the name and address of the business. Epitomizing the nature of the business, each cash sales slip is inscribed with a small pictorial motif of two dolls and a sitting dog. No staff is employed. The two respondents service the shop personally. Ninety-five per cent of the customers are domestic workers from the surrounding residences and persons passing to and from the Communal Lands which lie to the south-west of the city of Bulawayo.

The respondents contest the suggestion that their operations under the name of "Le Bon Marché" are reasonably likely to infringe the goodwill enjoyed by Bon Marché (Pvt) Ltd of Harare, which they do not contest.

There is, of course, a distinct similarity between the name "Le Bon Marché" and "Bon Marché (Pvt) Ltd" and "Bon Marché centre". As pointed out by the applicant in its affidavit, there may even be a visual similarity of the type of letters which are employed to describe the names of the respective firms, but there in my view most of the resemblance in the "business get-up" of the two concerns ends. The applicant clearly conducts a very extensive chain of self-service supermarkets with fleets of vehicles and a central warehouse to assist in their large-scale operations. While it may fairly be argued that the goods which are sold by the respondents may be found in similar shape and form in the applicant's various branches, it is obvious from the papers that the applicant's wares must be far more extensive in choice, variety and quantity than the modest display of the respondents. I consider that I am justified in judicially noticing that supermarket chains by and large sell goods which may be needed in most, if not all, urban dwellers' daily lives, and may therefore be expected to include such items as tools, gardening equipment, pool chemicals, groceries, liquor, green groceries, meat, household hardware, cleaning materials, and so on; the list is endless. I have little doubt that a customer entering the respondents' single, small room, in which he may even find secondhand clothes displayed for sale, would be an unusual man indeed were he to think that he was patronising one of the applicant's branches or that respondents' business premises were in some way connected with the applicant's, assuming that he was aware of the nature of applicant's trading centres.

1984 (1) ZLR p134

DUMBUTSHENA ACJ

The style of business in respondent's premises clearly is very different from the style which can

be expected to be found in general supermarkets. In respondents' shop there would never be more than two ladies serving behind a single counter. There is a complete absence of rows of cash registers, of persons whose task it is to pack large quantities of goods which are wheeled about in wire trolleys on castors, and of capacious freezers and long rows of parallel shelves groaning with an abundance of goods against a background cacophony of pop music and amplified announcements of special offers.

Another factor in the scale which weighs against the possibility of confusion, in my opinion, concerns the geographical situation of the two respective businesses. First, the premises in question are many hundreds of kilometres apart. The applicant's branches are situated in populous urban centres. The respondents' business is situated ten kilometres from the centre of Bulawayo and is a mere cell in collection of cells, whereas the applicant's businesses are situated quite obviously in large, spacious premises.

In the spectrum of shops, if the applicant's business were red, the respondents would very likely be violet. Bearing these differences in mind, the total absence of evidence of any actual confusion by customers becomes important, especially when it is remembered that respondents have traded for almost four years. As pointed out by ELOFF J in the *Miriam Glick Trading case* (*supra*) at 297G-H-298A:

"It is well settled that where there is no evidence of actual confusion the evidence must be 'of the most cogent sort' (per HARMAN J in *Gorray Ltd v Gilroy Ltd* (1952) 69 RPC 99 at 105 and 106.) The basic approach is, I think, also indicated by what NICHOLAS J said in the case of *Adcock - Ingram Products Ltd v Beecham SA (Pty) Ltd* 1977 (4) SA 434 (W) at 439E - H:

'Indeed, the applicant has submitted no evidence as to the likelihood of deception, and I find myself in a position of HARMAN J in *N Saper Ltd v Specter's Ltd and Boxes Ltd* (1953) 70 RPC 173 at 177:

"No member of the public came forward to say that he or she either was or had been or would be deceived. This case, of all the passing-off actions I have ever tried, is absolutely devoid of that innocent person who says that he or she was walking down such and such a road and, wanting to buy the Plaintiff's goods, found himself buying the defendant's goods, or of any person who, being brought into the witness-box, has the defendant's article put before him and says in a clear voice: 'Why, that is the Plaintiff's article'. No evidence of that sort was called at all, and the likelihood of confusion was something I was simply

1984 (1) ZLR p135

DUMBUTSHENA ACJ

asked to infer by looking myself at the boxes (remembering, of course, as I must, that I should not have to see them, if I were the public, both together, but one in one shop and one in another or one on one day and one the next) simply by the evidence of my own eyes and by the evidence of certain of the Plaintiffs wholesale customers who said that, sitting in the Plaintiff's of lice and seeing two of these boxes end on, one on top of the other, they did not see that there was any difference between them until they got up to look closely." " "

In this case I have been asked to infer the likelihood of confusion only from a similarity in names and a small variety of goods sold by both applicant and respondents.

Perhaps it is not surprising that customer evidence has not been called in this case. According to the evidence placed before me by the respondents, a preponderance of customers who patronise Le Bon Marché at Retreat in Bulawayo are probably persons who live and work some

500 kilometres from the nearest retail branch of Bon Marché Ltd Harare, and who probably have not even heard of the applicant or any of its various shopping centres, just as the applicant had not, until recently, heard of the respondents' business in far-away Bulawayo.

Under all these circumstances, I have come to the conclusion that so long as the respondents restrict their business activities to what they now are, there is no reasonable likelihood of injurious confusion while applicant trades with the public in Harare only I also conclude that there has been no confusion in the past of the same type which has resulted in the diversion of some of applicant's actual or prospective customers from applicant's shops to the respondents' shop.

The application is accordingly dismissed with costs.

Kantor and Immerman, legal practitioners for the applicant.

Calderwood Bryce Hendrie and Partners, Bulawayo, and *Gill Godlonton and Gerrans*, Harare, legal practitioners for the respondents.

1984 (1) ZLR p136

S v DZVATU 1984 (1) ZLR 136 (HC)

Court **High Court, Harare**

McNally J

14 March 1984

Flynote

Criminal procedure - sentence - road traffic cases - culpable homicide - necessity for Court to make precise findings on degree of negligence and/or intoxication.

Headnote

It is quite possible, in a road traffic case, for a lighter sentence to be received on conviction for culpable homicide than would be imposed on a conviction for reckless or drunken driving arising out of the same facts. This may arise because an accused person may be willing to plead guilty to culpable homicide, for which a prohibition from driving is not mandatory, but not so willing in respect of a charge under the Road Traffic Act for which a prohibition from driving is mandatory. The result is that the trial Court may not, in a case of culpable homicide, make precise findings on the degree of negligence or intoxication involved, resulting in the accused receiving an unwarrantably light sentence.

Cases cited:

S v Lusenge AD 138/81;

S v Miller AD 85/81.

Judgment

McNally J: Does it pay to kill?

It is a curious and unfortunate fact that it sometimes benefits an accused to be charged with culpable homicide arising out of a driving accident rather than to be charged with reckless or drunken driving under the Road Traffic Act.

Since it is horrifying to think that a person should be punished less for killing someone than for not killing someone, it is salutary to analyze the reasons why this should happen.

1984 (1) ZLR p137

McNALLY J

What often happens is this. A man is charged with culpable homicide arising out of a traffic accident. He knows it was his fault. He knows the victim is dead. He has no real choice but to plead guilty.

Because of his plea the prosecutor relies. He does not summon the witnesses. He draws up an agreed statement of facts. Perhaps the accused challenges the wording in one or two places. The prosecutor agrees to amend. After all, if he argues, he will have to postpone the case and call his witnesses back.

The magistrate then convicts the accused on the basis of the agreed statement. But because of the procedure followed there has been no close analysis of the accused's conduct. In particular, the wording is seldom clear enough to determine whether the accused was reckless or grossly negligent, or under the influence of alcohol to such an extent as to be incapable of having proper control of the vehicle.

In the event, therefore, the magistrate will often give the accused the benefit of the doubt and sentence him on the basis that he was ordinarily negligent.

On the other hand, where an accused is charged with contravening s 44 of the Road Traffic Act (reckless driving) or s 46 (drunken driving), he will normally plead not guilty, claiming either complete innocence or that he was merely negligent or merely had a prohibited concentration of alcohol in his blood. In such a case the issue is squarely before the Court. Was he reckless or grossly negligent or merely ordinarily negligent? Was he incapable (s 46) or merely driving with too much alcohol in his blood (s 45)? The evidence is led in full and carefully analyzed. The magistrate's whole attention is focused on the correct issue. In a proper case the accused will be convicted of reckless or drunken driving. The sentence in such a case will usually be at least as severe as, if not more severe than, in the case of culpable homicide. After all, the moral blameworthiness of a reckless or drunken driver is high. The moral blameworthiness of a driver who was merely negligent but had the misfortune to kill someone, is lower. There is an element of bad luck about it.

Thus it is theoretically possible to find two people committing exactly the same act of reckless driving. One kills a man, the other does

McNALLY J

not. By the process I have outlined the killer is found guilty of culpable homicide on the basis of negligence and fined \$250. The other is found guilty of reckless driving and fined \$300.

There is a further irony. A person convicted under s 44 (reckless driving) or s 46 (drunken driving) must, in the absence of special circumstances, be prohibited from driving for a period. But a person convicted of culpable homicide only *may* (not must) be so prohibited (s 55).

What I have said is not mere fantasy or abstract speculation. It is prompted by the facts of the present case.

The accused was driving an Army truck late at night. He came out of a side road governed by a "Give Way" sign intending to turn right. He hit a police Land Rover travelling along the main road and killed two policemen. It was a T-junction and the police vehicle was travelling quite lawfully. The accused was fined \$250.

The case does not fall exactly into the pattern I have described because the accused, who was charged with culpable homicide, alternatively reckless driving, pleaded not guilty and the facts were examined. Nevertheless, because the magistrate found him guilty of culpable homicide, it was not strictly necessary, for purposes of conviction, for him to make a precise finding on the degree of recklessness or negligence and he did not do so, though it seems that he found that the accused was negligent. He also made the finding that alcohol played a part in the accident though he could not be sure of the extent.

To my mind, anyone who drives straight through a "Give Way" sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly negligent. When it also seems that that person is to an unspecified degree under the influence of alcohol, then that belief is confirmed. In view of the current increase in the number of tragedies on our roads, such conduct warrants a prison sentence. In principle that has always been the position - see *S v Lusenge* AD 138/81.

I referred this matter to the Attorney-General and he agrees that a prison sentence and a prohibition from driving would have been ap-

McNALLY J

propriate. At the very least a suspended prison sentence was called for - compare *S v Miller* AD 85/81 - as well as a prohibition from driving.

I can however do no more than decline to certify the proceedings as being in accordance with real and substantial justice.

S v SVONDO 1984 (1) ZLR 140 (HC)

Court High Court, Harare

McNally J

14 March 1984

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - s 255(3) - explanation of elements of offence on plea of guilty - elements as explained must be set out in record - s341 - order for compensation' - order requested by prosecutor - not proper for magistrate to refuse order and instead make compensation a condition of suspension of sentence.

Headnote

When an accused person pleads guilty and the trial magistrate proceeds in accordance with s 255(3) of the Criminal Procedure and Evidence Act [Chapter 59], it is not sufficient for him to note on the record "elements explained". He should set out in the record the elements of the offence as explained to the accused, so that a reviewing judge may know if they have been adequately explained.

Where the prosecutor seeks an order for compensation in terms of s 341 of the Criminal Procedure and Evidence Act, the magistrate, if he intends to compel the accused to pay the debt, should make the order prayed. It is a wrong exercise of his discretion for him to say, in effect "I would prefer to do it the other way, by making the payment a condition of suspension of sentence."

Cases referred to:

R v Shikiraveo 1955 (4) SA 177 (SR);

S v Gombarume 1975 (1) RLR 300.

Judgment

McNally J: The accused defrauded CABS of \$638,59 by falsifying entries in his pass-book and making four separate withdrawals totalling \$685 when he had only \$46,41 to his credit. His conviction is in order, as is the magistrate's decision to treat all counts as one for the purpose of sentence.

1984 (1) ZLR p141

McNALLY J

I would make two important but relatively minor points before going on to the main reason for this review judgment.

First, the magistrate ordered the accused to repay CABS the sum of \$658,59. The correct

figure is \$638,59.

Secondly, it is essential, in order to comply with s 255(3) of the Code that the magistrate should set out the elements of the offence on the record instead of merely recording "elements explained". It is not possible, when that is done, for the reviewing judge to know if they have been adequately explained.

The main problem, however, is the nature of the sentence imposed by the magistrate. He first imposed a fine of \$500 or, in default of payment 10 months' imprisonment with labour, of which \$200 or four months' imprisonment with labour was suspended on condition of repayment to CABS of \$658,59 (sic) by 31 July 1984. He then imposed a further sentence of four months' imprisonment with labour, of which two months were suspended on the usual conditions.

It is quite unusual to impose a fine and an effective sentence of imprisonment unless there are special reasons for doing so. These reasons often apply in the case of statutory offences where the penalty section provides for a maximum fine and a maximum prison term "or both such fine and such imprisonment".

It is, however, competent for a magistrate to do this, even in the case of common law crimes, and it is specifically provided for in s 54(7) of the Magistrates Court act [Chapter 18]. See *R v Shikiraveo* 1955 (4) SA 177 (SR). I would not therefore interfere on this ground alone although I have reservations about this type of sentence.

I am more concerned about the suspension of the \$200 fine on condition that CABS is repaid. On the record, the prosecutor applied for compensation on behalf of CABS. Presumably this was sought in terms of s 341 of the Code. Yet the magistrate did not make an order of compensation under that section. He made the repayment a condition of suspension.

These two orders are quite different from each other. The courts have often stressed that they should not be conjoined, that is to say the

1984 (1) ZLR p142

McNALLY J

Court should not order compensation under s 341 and make it a condition of suspension that the money be paid. This is effectively to grant a civil judgment with a criminal sanction, as was pointed out in *S v Gombarume* 1975 (1) RLR 300 at 301E-G.

It seems to me that if the prosecutor, acting on behalf of the complainant, asks for an order under s 341, then it is a wrong exercise of discretion for the magistrate to say, in effect, "I would prefer to do it the other way, by making the payment a condition of suspension." He should make the order prayed.

Since it is clear that the magistrate intended to compel the accused to pay the debt to CABS, it is clear that he would, if he had properly directed himself, have made an order of compensation as prayed. Accordingly, on review, and in terms of the powers given me by s 29(2)(b)(iii) of the High Court of Zimbabwe Act, 1981, I can "make such order as the inferior Court ... ought in terms of any law to have ... made."

I propose to substitute a sentence which approximates as closely as possible to the sentence imposed by the magistrate. Although I am not, as indicated earlier, particularly happy about the combination of fine and imprisonment, I cannot say it is wrong. It is established that the accused has a motor car worth \$1 300. If he is prepared to sell it to avoid going to prison for a long time, it is not unreasonable to give him that choice. If the magistrate nonetheless felt that for such a crime there should also be a short effective prison sentence, I would accept that as a reasonable exercise of his discretion.

Accordingly, I would order as follows:

1. The convictions are confirmed.
2. The sentence on all counts taken as one is set aside and the following substituted:

"All counts taken as one for sentence. The accused is sentenced to a fine of \$300 or in default of payment six months' imprisonment with labour, and in addition to four months' imprisonment with labour. Of this term of imprisonment two months' imprisonment with labour are suspended for five years on condition that

1984 (1) ZLR p143

McNALLY J

the accused is not convicted of an offence committed during that period of which theft or dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine."

The effective sentence is Therefore a fine of \$300 or in default of payment six months' imprisonment with labour and two months' imprisonment with labour.

3. Compensation is awarded to the Central Africa Building Society (CABS) in the sum of \$638,59.

Reynolds J: agrees.

1984 (1) ZLR p144

S v STOUYANNIDES 1984 (1) ZLR 144 (SC)

Court **Supreme Court, Harare**

Dumbutshena ACJ, Beck JA & Gubbay JA

22 February & 16 March 1984

Flynote

Criminal law - statutory offences - mens rea in - Exchange control Act [Chapter 170] - s 5(1) (a)(i) - Exchange control Regulations ss 7& 8 - mens rea required - not offences creating strict liability - if accused's conduct falls within section, onus on him to establish that transgression innocent.

Criminal procedure - sentence - Exchange control Act - s 5 - orders declaring moneys forfeit to State - special

reasons not to order forfeiture - absence of prejudice to the State - whether a special reason.

Headnote

In terms ss 7 and 8 of the Exchange control Regulations, 1977, it is an offence *inter alia* for a person in Zimbabwe to make a payment to or for the credit of a foreign resident or to do any act which involves or is in association with the incurring of any obligation to make any payment outside Zimbabwe. If a statutory provision contains a prohibition which is unqualified in its language, although not construed by the Court as creating absolute liability, the State is not required to prove the existence of *mens rea*. *Prima facie* the enactment is satisfied when the objective conduct of the accused person is brought within its literal terms, and the *onus* is then thrust on him to establish on a preponderance of probability that the contravention was accidental or innocent. The Exchange Control Regulations fall within this category of legislation. Once the accused was shown to have breached them, then the *onus* would fall on him to establish that he genuinely and reasonably believed that he was not violating the regulations.

In terms of s 7 of the Exchange control Act [Chapter 170], the Court convicting a person of a contravention of the Act shall, where the offence was committed in respect of money, order the money which is the subject of the charge to be forfeited to the State unless the accused shows that "special reasons" exist why such an order should not be made. Such special reasons relate to the appropriateness or other

1984 (1) ZLR p145

GUBBAY J

wise of an order of forfeiture. The absence of prejudice to the State may be a special reason, but is not necessarily one. Where the absence of prejudice was fortuitous, it would not amount to a special reason. Where, on the other hand, the accused him self was instrumental in no prejudice being caused, then special reasons could be said to exist.

Cases cited:

S v Zemura 1973 (2) RLR 357; 1974 (1) SA 584 (HAD);

R v Stainer 1956 R & N 199; 1956 (3) SA 498 (FSC);

R v Wallendorf & Others 1920 AD 383;

R v H 1944 AD 121;

R v Moyage & Ors 1958 (3) SA 400 (AD);

S v Mdhuli 1968 (2) SA 710 (N);

S v Banet 1973 (1) RLR 335; 1973 (4) SA 430 (RAD);

S v Holmes 1982 (2) ZLR 267;

Attorney-General v Nurmahomed 1982 (2) ZLR 194;

S v Mills 1980 ZLR 227; 1980 (4) SA 223 (ZAD).

F C Blackie S C with him / *A Donovan*, for the appellant

P J Batty, for the respondent

Judgment

Gubbay JA: The appellant was convicted in the Court of the Regional Magistrate on one count of contravening s 7(1)(a) of the Exchange control Regulations 1977 ("the Regulations") as read with s 5 (1)(a)(i) of the Exchange control Act [*Chapter 170*] ("the Act"), in that between 19 August and 16 December 1982, and in Zimbabwe, he made payments to or for the credit of foreign residents in the sum equivalent to Z\$10 385,26; and on a second count of contravening s 8(1)(a)(ii) of the Regulations as read with s 5(1)(a)(i) of the Act, in that being a resident of Zimbabwe, he did acts which involved the incurring of obligations to make payments outside Zimbabwe, that is, during the period aforementioned, he contracted with various foreign resident artistes to pay them an amount equivalent to Z\$11 803,94 outside Zimbabwe.

No finding of special reasons was made in terms of either s 5(3a) or s 7(1) of the Act. In consequence the appellant was sentenced to fines of \$10 386 and \$11 804 - being the respective values of the currency concerned in each count - with the alternative of twelve months' imprisonment with labour, and the currency forming the subject of each offence was declared forfeit to the State, that involved in the first count having been repatriated.

1984 (1) ZLR p146

GUBBAY JA

An appeal was noted against the conviction, sentence and forfeiture order on each count.

The appellant is an entrepreneur. In 1979 he opened a night club in Harare, known as Archipelago. Soon it acquired the reputation of being a high class establishment, with patrons being entertained regularly by foreign artistes of renown. To meet the not inconsiderable cost involved in engaging such talent, the Reserve Bank of Zimbabwe granted the appellant an annual foreign currency allocation. Early in 1982 he was advised that foreign currency to the value of Z\$50 000 was the allocation granted him for that year and that, as in the past, he was required to submit half-yearly returns particularising the break-down of moneys expended during the previous six months.

Under cover of a letter dated 19 August 1982 the appellant submitted his returns of expenditure in respect of visiting entertainers up to 16 July 1982, which totalled Z\$47 585 and included a fairly accurate assessment of the locally incurred costs of accommodating, feeding and transporting them. He requested that his allocation for that year be increased to \$90 000 and gave as the reason the ever-rising costs of bringing well-known entertainers to the country. He intimated that if the application for a greater allocation was not favourably considered, the Archipelago Nite Club (*sic*) would no longer be economically viable and would have to cease its operation.

The appellant's entreaty met with partial success for on 3 September 1982 the Reserve Bank

wrote to inform him that a further \$10 000 worth of foreign currency was being made available, making the total \$60 000 for the current year; and that -

"... this allocation will represent the foreign exchange portion of any contract and will include the total wages or fees due to an artiste and travel on a foreign airline but will not include local payments or fares relating to travel on Air Zimbabwe."

The letter also requested an undertaking from the appellant that he would not exceed the total of \$60 000 and warned that should he do so legal action, in the implied sense of criminal proceedings, would be taken against him.

In his reply of 15 September 1982 the appellant stated that as soon as he ascertained from Sabena Airlines the proportion of fares paid it in

1984 (1) ZLR p147

GUBBAY JA

1982 which had been utilised on Air Zimbabwe, he would provide the undertaking sought of him. Thereafter, and for the remainder of that year, foreign artistes continued to perform at the Archipelago, some engaged on long term, others on short term contracts.

On 16 December 1982 the appellant wrote to the Reserve Bank, advising that after deducting the local expenses from the original figure of \$47 585 the expenditure for the first half of the year was \$37 685. The letter went on to detail how that figure was arrived at and set out the expenses incurred in engaging the remaining artistes for 1982, reflecting an amount of \$10 385 as overspent. A request was made for the excess to be deducted from the following year's allocation and ended with an apology couched in these terms:

"We accordingly ask you, for the very last time, that you 'excuse' the undersigned and our Organisation from having acted in a manner which may be considered by your Authorities as being totally irresponsible and irregular and advise that in the future we will unfailingly 'slink' to the allocation you issue us from time to time."

The reaction of the Reserve Bank was to summon the appellant to attend an interview, which was ultimately held on 30 December 1982. It there emerged that the appellant had committed himself to remunerate five artistes who had appeared at the Club during November and December in the further amount of \$11803,94. The Reserve Bank declined to grant the additional foreign currency to meet the appellant's liability to these five artistes and at its direction he paid the sums due into blocked bank accounts in their names.

The appellant's defence was that he had been negligent in failing to keep within the increased allocation for 1982 and that the transgression had been entirely unintentional. He alleged that as a result of the changed position he had estimated that \$12 000 to \$13 000 was deductible from his allocation spending of \$47 585. To this, of course, was to be added the extra \$10 000. He believed, therefore, that he would have sufficient foreign currency to meet the expenses of other artistes for the remainder of the year.

The appellant explained that because of his involvement in the management of another company, which was in the midst of a financial crisis, he was unable to direct his attention to the affairs of the

GUBBAY JA

Archipelago Nite Club. There was no one to whom he could have delegated his duties. He found time, however, to personally accompany each artiste to whom he was indebted to his commercial bank in order to arrange that payment be made in foreign currency.

The appellant said further that he was frequently absent from the country on overseas business trips during the latter part of 1982. So it was only on 15 December that he was able to spare a day to calculate the extent to which his permitted allocation had been utilised. Upon ascertaining that it had been exceeded he had written immediately to the Reserve Bank.

Under cross-examination the appellant admitted that he had requested an additional \$40 000 for 1982 as he thought he would require this amount to meet the expenses of the foreign artistes who were to be engaged for the remainder of the year. He claimed that although substantial sums were being paid to them, it had not occurred to him that he might be overreaching his allocation. Despite devoting his energies almost exclusively to the waning fortunes of the other business in an effort to ensure its financial survival, he confessed to attending at the Archipelago Nite Club for a couple of hours every week night and for five to six hours over each week-end.

The appellant said that he formulated a budget each year in respect of the engagement of foreign artistes and kept a schedule which contained all relevant information about them. He accepted that it would have been a most simple procedure to have maintained a record of foreign currency expenditure, which would have revealed at a glance how much had been spent and what was still available to him. He could give no reason for not having done so. He conceded further that he could have asked his commercial bank to inform him at regular intervals of the balance of the allocation remaining to be utilised.

The Regional Magistrate inclined to the view that the offences with which the appellant was charged fell into what was called by BEADLE CJ in *S v Zemura* 1973(2) RLR 357; 1974 (1) SA 584 (RAD) at 586 D, as the "intermediate group", thereby casting the evidential burden upon the appellant of proving his innocent mind on a balance of probabilities. But he preferred to approach the issue on the basis that the offences fell within the 'positive proof,' category, leaving the *onus*

GUBBAY JA

upon the State to prove the essential element of *mens rea*. In a well-constructed and closely-reasoned judgment he came to the conclusion that a conspectus of the facts disclosed that long before 15 December 1982 the appellant must have foreseen and hence, by inference, did foresee, the possibility that he would be unable to keep within the limit of his allocation, and yet nonetheless had continued to engage foreign artistes in the hope that he would be allowed to set off any currency overspent against the following year's allocation. Accordingly he found that the appellant had contravened the enactments with a constructive as opposed to an actual

intent.

The first submission advanced by Mr *Blackie* was that the relevant provisions of the Regulations under which the appellant was charged required the State to prove the ingredient of *mens rea*.

It was accepted by Mr *Batty*, who appeared for the respondent, and properly so, in my opinion, that the offences in question do not fall within the "strict liability" group - where the State has to do no more than establish that the accused person committed the acts which are prohibited, notwithstanding that when so doing he had no *mens rea*.

The point to examine, therefore, is whether, as Mr *Batty* contended, this is one of those cases in which the principle enunciated in *R v Stainer* 1956 R & N 199; 1956 (3) SA 498 (FSC) applies - whether the accused person escapes criminal responsibility upon proof that he genuinely and reasonably believed that he was not violating the enactment, thus negating the inference of *mens rea* which would otherwise be drawn from the proven facts.

I entertain no doubt that Mr *Batty* is correct. It is to be observed that s 7(1) and s 8(1)(a) of the Regulations contain specific and unambiguous prohibitions. They read, where relevant, as follows:

" 7. (1) no person shall, in Zimbabwe-

- (a) make any payment to or for the credit of a foreign resident; or
- (b) make any payment to or for the credit of a Zimbabwean resident by order or on behalf of a foreign resident; or
- (c) place any sum to the credit of a foreign resident:

Provided that."

1984 (1) ZLR p150

GUBBAY JA

and:

"8 (1) ...

- (a) no Zimbabwean resident shall do any act which involves or is association with -
 - (i) the making of any payment outside Zimbabwe; or
 - (ii) the incurring of any obligation to make any payment outside Zimbabwe;"

Under the law of this country (though no longer it seems, in South Africa - *vide* Hoffmann and Zeffert *South African Law of Evidence* 3 ed at 401) the traditional approach still holds good. If a statutory provision contains a prohibition which is unqualified in its language, though not construed by the Court as creating absolute liability, the State is not required to prove the existence of *mens rea*. *Prima facie* the enactment is satisfied when the objective conduct of the accused person is brought within its literal terms, and the onus is then thrust upon him to establish on a preponderance of probability that the contravention was accidental or innocent. See, for instance, *R v Wallendorf and Ors* 1920 AD 383 at 401; *S v H* 1944 AD 121 at 127; *R v*

Stainer, supra, 9 at 501B - F; *R v Moyage and Ors* 1958 (3) SA 400 (AD) at 414G - 415A; *S v Mdhluli* 1968 (2) SA 710 (N) at 711 in fine; *S v Zemura, supra*, at 587H - 588D. These authorities in my view, provide a complete answer to Mr *Blackie's* submission.

Counsel next argued that if it were held that the offences fell within the intermediate group, the appellant had shown that his mistake in exceeding the allocation was both *bona fide* and reasonable. He relied on two factors: first, the confusion introduced into the amount of the 1982 allocation of foreign currency by the retrospective effect of the Reserve Bank's letter of 3 September; and secondly, the difficulties which the appellant was encountering with the other company at the relevant time.

I consider the argument untenable. The appellant was well aware that he was not to exceed the allocation and, in the light of the warning given him, that he would be liable to prosecution were he to do so. He maintained no proper records to enable him to ascertain the level of his foreign currency expenditure at any given time; nor did he adopt the alternative method of arranging for his commercial bank to inform him upon request of the state of his foreign currency account. He was alive to the prospect of overspending, as is evident from his letter of 19 August 1982 when he asked that the quota be increased by \$40 000.

1984 (1) ZLR p151

GUBBAY JA

Though permitted to make certain deductions as a result of the Reserve Bank's letter of 3 September, this related basically to 14 return air fares between Nairobi and Harare, the cost of which was easily obtainable upon enquiry from Sabena Airways. The total of the other local expenses which were deductible had been assessed by 19 August 1982. It is a misnomer, therefore, to categorise the conditions upon which the allocation was retrospectively increased as creating "confusion".

Accepting that the appellant was heavily engaged in the complicated affairs of the other business and that they were a source of worry to him, the significant fact remains that he still devoted time during week nights and over week-ends at the Archipelago, and was able to attend personally to the payment of the artistes. He made no attempt to delegate his duties to a member of his staff or to engage more personnel, but simply let matters ride until mid - December. By then he had exceeded the authorised limit by over \$22 000.

I agree entirely with the Regional Magistrate's summation that the necessity of adhering strictly to his allocation was a matter of little or no concern to the appellant. He continued to engage foreign artistes at a time when he must have appreciated the real possibility that he had exhausted the foreign currency allowed him. In short, he was reckless as to whether he exceeded the \$60 000 limit or not.

It follows that the appellant's mistake was so unreasonable in degree as to cast grave suspicion on whether it was genuinely made. See *S v Banet* 1973(1) RL R 335; 1973(4) SA 430 (R. A D) at 434B.

It was submitted by Mr *Blackie* that in imposing the mandatory minimum fines the Regional Magistrate had underrated the mitigatory effect of certain factors which individually and

cumulatively constituted special reasons. These were that the appellant had been reckless and not deliberate in breaching the law; that his heavy involvement in the financial affairs of the other company was partly the cause of the omission to explore the position of the night club as he should have; and that he had openly disclosed his transgressions in the letter of 16 December 1982.

Each of these factors was analysed by the Regional Magistrate and placed in its proper perspective. He pointed out that the constructive

1984 (1) ZLR p152

GUBBAY JA

nature of the appellant's intention was counter-balanced not only by the high value of the overspending but because it was in breach of an unequivocal warning that should the allocation of \$60 000 be exceeded prosecution would follow. The alleged pressure put upon the appellant by his other business lost much of its conviction since he was nonetheless able to devote time each day to attend personally at the premises of the Archipelago Nite Club. And, of course, if elementary checks had been instituted timeously either by the appellant, or by an agent, the allocation would not have been exceeded. Finally, the Regional Magistrate did not overlook that while the disclosure of the overspending stood to the appellant's credit, that information was required to be submitted in any event by 31 January 1983. In consequence, the appellant had not confessed to crimes which might otherwise have gone undetected.

Where a finding on whether special reasons exist or not is left by the law-maker to the opinion of the trial Court, in the absence of a misdirection on the facts upon which that opinion is based, the power of an appeal Court to overrule it is curtailed. It will only interfere with the opinion of the trial Court if satisfied that the facts do not reasonably justify it. It will not interfere merely because it might have formed a different opinion on the facts.

In the present case there is no question of the Regional Magistrate misdirecting himself on the facts. Nor can it be said that having regard to those facts, considered either singly or cumulatively, the opinion he expressed is an unreasonable one. Speaking for myself, if I had presided at the trial of the appellant my opinion would have been no different. There is no ground therefore upon which to set aside the prescribed fines levied upon the appellant.

It remains to deal with the question of whether the orders declaring the moneys forfeit to the State were justifiably made.

At the outset I respectfully associate myself with the observations of PITTMAN J in *S v Holmes* 1982 (2) ZLR 267, that-

" Whilst 'special reasons' in s 5(3a) ... involve an inquiry whether the facts of the case reveal that the moral blameworthiness of the convicted person is less than normal for reasons extraordinary in nature or degree, and thus justify a reduction of

1984 (1) ZLR p153

GUBBAY JA

normal punishment, the same words in s 7(1) involve an inquiry whether there are special reasons why an order of forfeiture should not be made. Such special reasons relate to the appropriateness of an order of non-forfeiture, and not necessarily to whether the moral blameworthiness of the connoted person is less than normal."

But I draw attention to the dictum of FIELDSEND CJ in *Attorney-General v Nurmahomed*, 1982 (2) ZLR 194, that where the commodity is currency and there are no special reasons for not imposing the minimum fine it is difficult to envisage how it can be found that there are special reasons for not ordering forfeiture.

I cannot fault the Regional Magistrate's value judgment that there were no special reasons making non-forfeiture of the the sum of \$10385,26 appropriate. Faced with the imposition of a term of imprisonment and being fortunate enough to be able to repatriate the currency illicitly exported, the appellant had little practical option but to do so. The absence of a loss of foreign exchange was not therefore an extraordinary circumstance. So that order must stand.

It seems to me however that with regard to the forfeiture of the moneys with which the second count was concerned, the Regional Magistrate overlooked a factor pertinent to the enquiry under s 7(1) of the Act, though not to that under s 5 (3a). It is that on 16 December 1982, when the appellant notified the Reserve Bank that he had contracted to pay the foreign artistes an amount equivalent to \$11 803,94 outside Zimbabwe, that money was still in his hands. Thereafter it was paid into blocked bank accounts in the names of the artistes pursuant to the directive of the Reserve Bank. Doubtless the motive, which is commendable, was to ensure, so far as it was legally permissible, that the appellant's contractual obligations were fulfilled. That situation having been brought about by the Resene Bank, it would now be inequitable to deprive the artistes of their ownership in the moneys paid to them and compel them to pursue their rights as best they can either under the proviso to s 7(1) or against the appellant.

It is also a fact that no money actually left the country. I am aware that it was said by GOLDIN JA in *S v Mills* 1980 ZLR 227 at 231; 1980 (4) SA 223 (ZAD) at 227 F-G that "the mere absence of prejudice in such circumstances cannot constitute a special reason". But in that case the absence of prejudice was quite fortuitous. The appellant was apprehended before the prejudice was caused. With the present of-

1984 (1) ZLR p154

GUBBAY JA

fence, the appellant made a disclosure to the Reserve Bank prior to obtaining the currency with which to remunerate the artistes and was so instrumental in no prejudice being caused to the country's foreign reserves.

I am satisfied that these two factors taken cumulatively amount to special reasons within the meaning of s 7(1) of the Act.

In the result the order declaring the sum of \$11 803,94 forfeit to the State is set aside. For the rest, the appeal against both conviction and sentence is dismissed.

Dumbutshena ACJ: I agree.

Beck JA: I agree.

D W Aitken & Co, appellant's legal representatives.

1984 (1) ZLR p155

ATTORNEY-GENERAL v MANYARA & OTHERS 1984 (1) ZLR 155 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & Gubbay JA

1 & 20 March 1984

Flynote

Criminal procedure - sentence - Parks and Wild Life Act 1975 - s 47 (2)(a) - hunting with firearms - person of standing in community - prison sentence warranted

Headnote

The five respondents were, with one exception, persons of standing in their community, being either district councillors, senior civil servants or headmasters. They made their way in a truck onto a ranch adjoining the communal land in which they lived and there shot and killed four wild animals. They were caught in *flagrante de licto*.

The magistrate sentenced them to eight months' imprisonment, of which half was suspended. An order for compensation in favour of the appropriate authority of the ranch was made. On appeal to the High Court, the custodial sentences were set aside and fines of \$200 (in the case of the second respondent, \$150) imposed.

The Attorney-General appealed, contending that, in reducing the prison sentences to fines, the High Court had disregarded or paid insufficient attention to a number of past decisions in similar cases and that 'in any case, in view of the aggravating features, an effective sentence of imprisonment was desirable.

Held, that the cases referred to the Court a quo were instructive and provided useful guidelines, deserving far closer attention than was accorded them. Those cases showed that, at the very least, hunting with dogs or guns or spears by a first offender - though not to be equated in seriousness with hunting by means of snares - may well be deserving of a custodial sentence.

Held, further, that the extent to which this particular offence has proliferated in recent times and the toll it is taking of the country's resources are factors which cannot readily be discounted.

1984 (1) ZLR p156

GUBBAY J

Held, further, that the respondents displayed a high degree of moral blameworthiness: they had formed themselves into a hunting party, used a vehicle and sophisticated weaponry to cause

Copyright Juta & Co Ltd

substantial economic damage; they were persons of high standing and set a deplorable example. A prison sentence in the order of seven months, of which four were suspended, would not have been unwarranted.

Cases cited:

S v Chifuva HC-H-359-83;

S v Gangira & Another HC-H-62-83;

S v Ndurumbani & Others HC-S-111-82;

S v Mutirwa HC-S-48-82;

S v Mangandi & Another AD 175/77.

J P Haxen, for the appellant.

No appearance for the respondents.

Judgment

Gubbay JA: The five respondents were convicted in the magistrate's Court of contravening s 47 (2) (a) of the Parks and Wild Life Act, 1975, in that they had unlawfully hunted two male kudu, one duiker, one wart-hog and one blue wildebeest upon Mlota Ranch in the district of Battlefields. Each was sentenced to undergo eight months' imprisonment with labour of which period four months were conditionally suspended for three years. In addition they were ordered to pay compensation to the appropriate authority of the ranch, jointly and severally, in respect of the five animals in an amount of \$605. A .303 rifle and a .22 shotgun used in the commission of the offence were declared forfeit to the State.

The respondents appealed against their custodial sentences to the High Court. They were successful. McNALLY J (with whom SCOTT J concurred) set aside the orders of imprisonment and, save in the case of the second respondent, imposed fines of \$200 together with four months' imprisonment suspended for three years upon appropriate conditions. By reason of his unemployment and advanced years, the second respondent was fined \$150 conjoined with the same conditional prison sentence. The compensation payable by the respondents was reduced by the sum of \$130, being the value of the blue wildebeest as specified in SI 647 of 1982.

The Attorney-General is dissatisfied with the sentences imposed by the Court *a quo*, and so appeals with leave to this Court. He seeks

1984 (1) ZLR p157

GUBBAY JA

merely a declaration in terms of s 11(4)(b) of the Supreme Court of Zimbabwe Act, 1981, as to what sentences should have been imposed. Such a declaration will not Therefore affect the respondents in any way.

The facts of the case are these. The respondents, with the exception of the second of their

Copyright Juta & Co Ltd

number, are persons of standing in the community, being either district councillors, senior civil servants or headmasters. On 24 July 1983 they made their way in a Peugeot truck owned by the third respondent from their homes in the Mondoro Communal Lands to Mlota Ranch. The first respondent was armed with a .303 rifle and the second respondent with a .22 shotgun. The object of the expedition was to hunt wild animals. Once at the ranch the first respondent shot and killed two male kudu and a warthog, and the second respondent a duiker. In the course of the hunt the group came across a dead blue wildebeest that had been trapped in some mud in a dam. Its carcass and those of the four other animals were loaded onto the truck. Fortunately the sound of the firing was heard by the members of anti-poaching police unit on patrol in the area, and led to the respondents being apprehended *in flagrante delicto*.

In assessing punishment the trial magistrate overlooked that the respondents had not hunted the blue wildebeest. This emerges as much from his omission to delete the reference to that animal from the charge sheet or qualify the verdict by its exclusion, as it does from his inclusion of the value of the animal in the compensation payable under s 91 of the Act.

It was on this ground that the Court *a quo* found that the trial magistrate had misdirected himself and that in consequence it was not bound to consider the propriety of the sentences upon the narrow point of whether or not they were disturbingly excessive.

Mr *Haxen*, who appeared for the Attorney-General, submitted that the High Court was itself guilty of a misdirection in holding that the magistrate's misdirection was such as to put it at large in relation to sentence. He argued that the addition of a single animal to the number of four which the respondents had admittedly hunted was not an extraneous factor of such a nature, degree or seriousness as to show that the trial magistrate had not exercised his discretion properly. I do not agree. The trial magistrate assessed sentence upon an incorrect

1984 (1) ZLR p158

GUBBAY JA

premise - that the respondents were guilty of hunting and killing not four animals but five - one of which, the blue wildebeest, was large in size and of not inconsiderable value. I do not see how it can be said that if he had appreciated that the blue wildebeest did not fall within the offence he would inevitably have passed the same sentences.

I would add, however, that if the High Court had not at large there would not have been, in my opinion, any justification to interfere with the sentences.

The Attorney-General's appeal Therefore turns simply on the question of whether the sentences substituted by the High Court were manifestly too lenient.

Mr *Haxen's* first complaint was that, in deciding that imprisonment did not fit the offence, the Court *a quo* brushed aside in cavalier fashion a number of authorities to which it was referred. The relevant passage in the judgment of McNALLY J reads:

" 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, and 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, 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 Mutizwa*, HC-S-48-82 and *S v Mangandi & Another* AD 175/77."

Bearing in mind, as I do, that in the matter of sentence no two cases are identical - there are always some differences in the nature of the offence, the manner of its execution and the motive for its commission - I am nonetheless satisfied that at least three of the review judgments cited to the Court *quo* are instructive and provide useful guidelines. They were delivered subsequent to the decisions in both *Mutizwa* and *Mangandi*, and deserved far closer attention than was accorded them. Each bore the imprimatur of a second judge. I propose Therefore to deal with them.

In *S v Chifava* HC-H-359-83 the accused, a first offender, had entered upon a private ranch and with the aid of a pack of dogs hunted and killed a female impala and a male waterbuck. He was a young

1984 (1) ZLR p159

GUBBAY JA

man, unemployed, with heavy family commitments and no assets. He was sentenced in the lower Court to 12 months' imprisonment with labour of which three months were conditionally suspended for five years. PITTMAN J considered that a sentence of nine months' imprisonment with three months suspended was adequate. The learned judge emphasised the increased need for the punishment of this offence to have a general deterrent effect. SQUIRES J lent his agreement.

In *S v Gangira and Anor* HC-H-62-83 the accused were convicted of hunting two warthogs on a private farm. It was a planned hunting trip with a pack of dogs and weapons, and the magistrate sentenced each of them, being first offenders, to seven months' imprisonment with labour of which he suspended three months for a period of five years on conditions of future abstinence. He omitted, however, to make an order for compensation in favour of the landowner. The defect was cured by SQUIRES J who expressly confirmed the sentence with the concurrence of McNALLY J That confirmation implies that on the facts of the case imprisonment was not considered to be an inappropriate punishment. If it had been the learned judges would not have certified the proceedings as being in accordance with real and substantial justice. The Court *quo* was incorrect Therefore to disregard this decision on the ground that the aspect of sentence was not dealt with.

In *S v Ndurumbani and Ors* HC-H-111-82 the three accused used a pack of dogs with which they hunted one sable and two warthogs on a private ranch. An incompetent sentence of 16 months' imprisonment with labour of which eight months was conditionally suspended was imposed. In reducing the sentence to eight months' imprisonment with labour of which four months was suspended, PITTMAN J did not overlook the reasoning in the cases of *Mutizwa* and *Mangandi*. He held, however, that the mitigating features were of far less importance than the aggravating ones. These were that the complainant ran safari operations, that the animals poached were of considerable value to him and that he had been severely plagued by poachers in the immediate past. In other words, the circumstances were not normal and

imprisonment without the option of a fine was justified.

These decisions indicate, at the very least, that hunting with dogs, or for that matter with guns or spears, by a first offender - though not to be equated in seriousness with hunting by means of snares - may well be deserving of a custodial sentence.

1984 (1) ZLR p160

GUBBAY JA

I do not understand either *S v Mutizwa supra* or *S v Mangandi and Anor supra* or indeed any of the earlier cases referred to in those judgments, to say any more than that *normally* a first offender convicted of hunting with dogs, spears or guns should not be sent to prison. Much will depend, for instance, on the number and value of the animals poached and killed, whether the motive for the hunting was commercial gain as opposed to dire need, and whether the accused hunted alone or was a member of an organised party bent upon the random decimation of game. Moreover the extent to which this particular offence has proliferated in recent times and the toll it is taking of the country's natural resources are factors which cannot be too readily discounted. Certainly, Courts are obliged to view the offence a lot more seriously than they did in the past.

Mr *Haxen* argued that in coming to the conclusion that a sentence of a fine conjoined with a period of suspended imprisonment would suffice to meet the justice of the case, the Court *a quo* had placed undue weight upon the distinguishing feature that the poaching did not involve the setting oil snares. In so doing it had lost sight of several aggravating features which, Mr *Haxen* submitted, make the imposition of effective imprisonment desirable. These are that the respondents formed themselves into a hunting party and used a motor vehicle and sophisticated weaponry to carry out their design, thereby causing substantial economic damage. The venture was well organised, planned and executed by persons held in high repute by the local community. The respondents were not simple peasant folk suffering the effects of poverty and starvation. The example they set was deplorable.

All these points are validly made and reveal a high degree of moral blameworthiness. As against them stands the sole mitigating feature that the respondents were first offenders.

If the Court *a quo* had imposed sentences in the order of seven months' imprisonment with four months suspended I would not have considered such a punishment unwarranted. On the facts of the case the decision not to impose effective imprisonment comes perilously close to amounting to an improper exercise of a judicial discretion. The respondents should consider themselves truly fortunate.

1984 (1) ZLR p161

GUBBAY JA

But although I do not find sufficient justification to declare the for of the punishment to be manifestly inadequate, I am satisfied that the *quantum* of the fines by no means reflects the gravity of the offence. It is my opinion that in the case of each of the respondents the payment

of an additional \$100 was called for.

Accordingly I would allow the appeal and make a declaration to the above effect.

Dumbutshena CJ: I agree

Beck JA: I agree.

1984 (1) ZLR p162

AUTORAMA (PVT) LTD v FARM EQUIPMENT AUCTIONS (PVT) LTD 1984 (1) ZLR 162 (HC)

Court **High Court, Harare**

Annotations [Link to Case Annotations](#)

Samatta J

21 March 1984

Flynote

Delict - negligent misstatement of fact - contract induced by - whether negligent misstatement can give rise to delictual liability - economic loss caused - whether liability can arise for such loss.

Headnote

A delictual action for damages based on negligent misstatements is recognised in our law. Such an action can arise whether within or outside a contractual context, since it fits squarely within the confines of the *lex Aquilia*. The fact that the loss caused was purely economic does not in law constitute a bar to a claim for damages. *(1)

Cases cited:

Herschel v Mrupe 1954 (3) SA 464 (AD);

Hedley Byrne and Co Ltd v Heller and Partners Ltd [1963] 2 All ER 575 (HL);

Administrateur, Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (AD);

Moorgate Mercantile Co Ltd v Twitchings [1977] AC 890; [1976] 2 All ER 64 1 (HL);

African Banking Corp v Goldbard (1897) 4 OR 402;

Kern Trust (Edms) Bpk v Hurter 1981 (3) SA 607 (C);

Pilkington Bros (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners 1983 (2) SA 157 (W);

Combrink Chiropaktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd 1972 (4) SA 185 (T).

A N H Eastwood, for the Plaintiff (respondent)

M J Gillespie, for the defendant (excipient).

1984 (1) ZLR p163

SAMATTA J

Judgment

Samatta J: This is an exception by the defendant to the Plaintiff's particulars of claim on the ground that they disclose no cause of action in law. For the sake of convenience I shall refer to the excipient and the respondent as the defendant and Plaintiff respectively.

For the purpose of determining the exception, the relevant allegations contained in the declaration can, I think, be stated as follows. The Plaintiff is a company carrying on business as motor-car dealers while the defendant carries on business as auctioneers. In March 1982 the Plaintiff purchased a motor vehicle at an auction conducted by the defendant for a price of \$5 500. In paragraphs 4-9 of the Declaration (as amended) the Plaintiff avers as follows:

"4. At the time of the auction aforesaid the Defendant represented to the Plaintiff that it was selling the said motor vehicle on behalf of the owner of the said motor vehicle, in that -

- (a) the Defendant's conditions of sale stated that the Defendant received his information about goods sold from the owner and these conditions were displayed openly in the premises of the Defendant, visible to members of the public, prior to and during the auction aforesaid;
- (b) the Defendant did not state that it was selling the said motor vehicle on behalf of any person other than the owner.

5. The aforesaid representations were false in that -

- (a) the owner of the said motor vehicle was the Fincor Finance Company, which was at all material times selling the said motor vehicle to one Rawstrone under a Hire - Purchase Agreement;
- (b) the Defendant was in fact selling the said motor vehicle on behalf of the said Rawstrone;
- (c) the Defendant received its information about the goods sold from the said Rawstrone and not from the owner.

6. By reason of the following circumstances the Defendant was under a duty of care to take reasonable steps to ensure that its representations aforesaid were true-

- (a) the Defendant was and is a professional auctioneer;
- (b) it is readily and easily established in Zimbabwe by whom a particular motor vehicle is owned;
- (c) checks on the ownership of motor vehicles to be put on sale are a usual and customary practice in the business of professional auctioneers;
- (d) within the knowledge of the Defendant persons in Zimbabwe regularly attempt to sell motor vehicles which are subject to hire-purchase agreements with a view to leaving Zimbabwe and thereby perpetrating frauds

1984 (1) ZLR p164

SAMATTA J

upon the purchasers or prospective purchasers of such motor vehicles;

- (e) the said Rawstrone left Zimbabwe permanently at about the time of the auction conducted by the Defendant aforesaid, and the Defendant knew or suspected that the said Rawstrone had so left or was about to leave Zimbabwe.
- 7. The representations made by the Defendant aforesaid were made negligently in that the Defendant failed to take reasonable steps or any steps to ensure that the said representations were true, more particularly
 - (a) the Defendant failed to check who was the owner of the said motor vehicle;
 - (b) the Defendant failed to check as to whether the said motor vehicle was the subject of a Hire - Purchase Agreement.
- 8. The Defendant's representations aforesaid were material to the purchase by the Plaintiff of the said motor vehicle and relying upon the truth of the said representations the Plaintiff duly purchased the said motor vehicle and paid the sum of \$5 500 to the Defendant, who accepted the same on behalf of the said Rawstrone.
- 9. In order to acquire the right to dispose of the said motor vehicle, the Plaintiff was obliged to pay to the said Fincor Finance Company, the owner of the said motor vehicle, the balance outstanding under the said Hire - Purchase Agreement, being the sum of \$2 737,60 ...".

It is an elementary proposition of law that, to give a cause of action, negligence must be the neglect of some duty. A person cannot be held liable for negligence in the air. Does an auctioneer owe any duty of care towards a prospective bidder not to make careless mis-statements concerning goods which are the subject matter of sale? On behalf of the defendant, Mr *Gillespie* urged me to answer that question in the negative. In support of his attractive argument - if I may respectfully so describe it - he cited a number of authorities, including *Herschel v Mrupe* 1954 (3) SA 464 (AD); *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1963] 2 All ER 575 and *Administrateur, Natal v Trust Bank van Africa Bpk* 1979 (3) SA 824 (AD). Iair Eastwood, counsel for the Plaintiff, on other hand, submitted that the modern authorities, including those cited by Mr Gillespie, require this Court to give an affirmative answer to the question. I desire to make it abundantly clear that in endeavouring to answer the question, I bear in mind, inter alia, what LORD EDMUND-DAVIES observed in *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 at 919H:

"In most situations it is better to be careful than careless, but it is quite another thing to elevate all carelessness into a tort."

1984 (1) ZLR p165

SAMATTA J

Until recently, following the decision in *African Banking Corp v Goldbard* (1897) 4 OR 402, courts in South Africa held that no damages could be awarded for an innocent (ie, non-fraudulent) misrepresentation. This stand was departed from following the decision of the House of Lords in the well-known case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd* [1963] 2 All ER 575. In *Administrateur, Natal v Trust Bank van Africa Bpk (supra)*, the Appellate Division recognized the existence in the law of that jurisdiction of a delictual action for damages based on negligent mis-statements, outside the contractual field. Two years later - in *Kern*

Trust (Edms) Bpk v Hurter 1981 (3) SA 607-the Cape Provincial Division was called upon to decide whether an action for damages at the instance of a party who claims to have been induced to enter into a contract by a negligent mis-statement made by the other party to the transaction is competent. Briefly, the facts in that case were as follows. The Plaintiff had entered into an agreement with the defendant and one Du Toit whereby it bought from the two men the entire issued capital of two companies as well as the two men's loan accounts in the said companies. The Plaintiff averred that during the negotiations which preceded the conclusion of the contract the defendant made some assurances to it regarding the soundness of the businesses bought, among other things. These representations turned out to be false. The Plaintiff further averred that as a result of its relying on the representations, it had incurred some loss. FRIEDMAN J reviewed authorities from several jurisdictions, including those from England and Australia, and arrived at the conclusion that delictual liability for negligent mis-statements could arise within a contractual context. In the course of his judgment the learned judge said:

"In my view, in the light of the clear recognition by the Appellate Division in the *Administrateur, Natal* case of an action for damages for negligent misstatements outside the contractual field, no sound reason based either in principle or logic [exists], why an action for negligent misstatements inducing a contract should not receive similar recognition. Such an action fits squarely within the confines of the *lex Aquilia* and, although the precise scope of the action will require definition the existence of the action itself must, in principle, be acknowledged."

If I may respectfully say so, the reasoning in the judgment of FRIEDMAN J appeals to such intellect as I possess. It is not without significance to observe that the existence of a delictual action for damages based on negligent mis-statements was also recognised by the Witwatersrand Local Division: see *Pilkington Brothers (SA) (Pty) Ltd*

1984 (1) ZLR p166

SAMATTA J

v Lillicrap, Wassenaar and Partners 1983 (2) SA 157. Guided by the two decisions, I hold that the law of this country recognises liability for negligent mis-statements.

Mr *Gillespie* had, however, two strings to his bow. If I understood him aright, as I hope did, he also contended that even if it is a correct proposition to say that the law recognises liability for negligent misstatements, the delict would not cover a situation in which the injury suffered is purely economic. The learned advocate cited, in support of that submission, *Combrink Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 (4) SA 185(T). With respect, I am not inclined to think that that case is an authority for Mr Gillespie's contention. The facts of the case are accurately given in the head note as follows:

"[The] plaintiff had leased a new Datsun sedan from a leasing company which had acquired it from a garage for the specific purpose of letting it to the Plaintiff. In terms of [the] Plaintiff's contract with the leasing company [the] Plaintiff was responsible for any repairs, the lessor made no representations or warranties, and [the] Plaintiff recorded in its contract with the lessor that it had carefully inspected the vehicle and was satisfied with its condition. Thereafter [the] Plaintiff had discovered various defects (not discoverable on ordinary inspection) which had involved expensive repairs and a long period of loss of use of the vehicle. [The] Plaintiff sued the manufacturer for its financial loss, averring that the defects were due to negligence on the part of the manufacturer or its servants in the course of their employment. The defendant, with which the Plaintiff had no contract, averred that it owed no duty of care to the Plaintiff as a member of the public which would purchase or hire the vehicle, and excepted to the Plaintiff's summons as disclosing no cause of action under the *Lex Aquilia*. Such exception

having been upheld in a magistrate's Court, in an appeal it was contended that the *Lex Aquilia* should be extended to include the course of action as alleged."

MYBURGH and HUMAN JJ dismissed the appeal, holding that, although the defects constituted positive acts in the sense required in the law of delict, it could not be said that the manufacturer ought to have foreseen that the second or probably third successor in title after the first purchaser (the garage) would waive its common law remedies to claim from its predecessor for the alleged defects. In the course of his judgment, with which HUMAN J concurred, MYBURGH J said at 192H:

"It has been suggested that the *Lex Aquilia* should be extended to include all instances of financial or patrimonial loss unlawfully and negligently caused giving the concepts of unlawfulness and negligence their respective meanings as formu-

1984 (1) ZLR p167

SAMATTA J

lated in the law of delict. In my view such a wide delictual remedy would lead to unnecessary duplication or multiplicity of actions so that more harm than good would be done by such an extension."

With the best will in the world, I am unable to understand that passage as demonstrating that MYBURGH J had closed the door to any extension of the *Lex Aquilia*. The Court in that case was dealing with very peculiar facts, and the judgment delivered should be read in the context thereof. It is not of little significance in this connection to point out that immediately after using the words I have quoted above, MYBURGH J said:

"No cogent reason has been suggested to extend the scope of the *Lex Aquilia* so as to include the claim for damages as framed in the instant case." (the latter emphasis is supplied),

Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners (supra), a case which both counsel referred to in the course of their arguments, appears to me to be a very strong authority on which to base the rejection of Mr Gillespie's argument. Stated with biblical simplicity, the facts in that case were as follows. The Plaintiff was a manufacturer of glass which it sold. It hired the defendant, a firm of consulting and structural engineers, to carry out the investigation as to the suitability of an area on which it (the Plaintiff) wanted to construct a civil engineering and building works for a float glass plant, and to design and supervise the construction of the said works, due regard being had to the results of the soil investigation and to the Plaintiff's specific requirements for the works. It was averred by the Plaintiff that the defendant executed the contract negligently and that, as a result of that negligence, it (the Plaintiff) incurred some financial loss. The defendant excepted to the Plaintiff's summons on the ground, among others, that it disclosed no cause of action under the *Lex Aquilia* because the loss allegedly suffered was purely economic. The exception was dismissed. MARGO J held, *inter alia*, that the fact that the alleged loss was economic could not in law constitute a bar to the claim. In the course of his judgment, the learned judge said at 164C - D:

"There is no longer any room for doubt that Aquilian liability can arise for pure economic loss resulting from negligent misstatement. Such liability has been recognised in a series of recent decisions, among which, in chronological order, are *Suid-Afrikaanse BantoeTrust v Ross en Jacobsz* 1977(3) SA 184 (T); *Administrator, Natal v Bijo* 1978 (2) SA 256 (N) (the *Bijo* case); *Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd*

SAMATTA J

Ltd v Franklin 1979 (2) SA 702 (E); and, most importantly, *Administrateur, Natal v Trust Bank van Africa Bpk* (*supra*) (the Trust Bank case), which was the appeal from the *Bijo* case, *supra*..."

I am satisfied, upon the authorities, that Mr *Gillespie's* contention is not well-founded in law.

The question as to how far delictual liability for negligent mis-statements should extend is, I own, a difficult one. There certainly is a need to appreciate the fact that "there should be some difference between responsibility for careless words and careless actions." Be that as it may, it can be stated with confidence that the duty of care not to make negligent statements would arise in "all those relationships where it is plain that the party seeking information ... was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information ... when he knew or ought to have known that the enquirer was relying on him." See *Hedley Byrne and Co Ltd v Heller and Partners Ltd* (, *supra*), per LORD REID. According to the particulars of claim in the instant case, the defendant carries on business as auctioneers. It has been averred by the Plaintiff, and admitted? for the purposes of the exception, by the defendant, that "it is readily and easily established in Zimbabwe by whom a particular motor vehicle is owned", and that "checks on the ownership of motor vehicles to be put on sale are a usual and customary practice in the business of professional auctioneers". Bearing this fact in mind, I cannot see how I can uphold the exception. The question whether or not the fact that the Plaintiff carries on business as motor car dealers should have some impact on the outcome of the suit can, in my view, properly be answered only after all the evidence has been laid in the scales.

The defendant also filed a special plea in abatement. I think this plea can speedily be disposed of. The additional averments on which the plea was grounded were not admitted by the Plaintiff. On the contrary, the Plaintiff disputes the truthfulness of those averments. In the circumstances, the special plea must stand over for decision at the trial.

I have sufficiently demonstrated, I hope, why I am of the view that the exception in this case cannot be upheld. Since I can think of no

SAMATTA J

reason why I should deprive the Plaintiff of its costs, I dismiss the exception with the usual consequences.

Kantor and Immerman, legal practitioners for Plaintiff (respondent).

Winterton Holmes and Hill, legal practitioners for the defendant (excipient).

S v SIKARAMA & ANOTHER 1984 (1) ZLR 170 (HC)

Court High Court, Harare

Reynolds J

21 March 1984

Flynote

Criminal procedure - charge - necessity to ensure that accused understands nature of charge he is facing - Criminal Procedure and Evidence Act [Chapter 59] - ss 133(1), 155(2), 191 and 191A

Headnote

It happens with disturbing frequency that charge sheets produced at magistrates Court trials contain lists of articles that are either inadequately described or are so badly described that the article is completely unidentifiable. It is not desirable to use trade names when describing articles in the charge as the accused may not understand what is being referred to. The wording of s 133(1) of the Criminal Procedure and Evidence Act [Chapter 59] makes it clear that it is the accused who is to be properly informed of the charge and all its particulars and magistrates should ensure that the accused understands the nature of the charge he is facing. If the charge is incomprehensible, it should be amended.

Cases referred to:

Ex p Minister of Justice: in re R v Masow and Anor. 1940 AD 75;

R v Wantenuar 1940 SR 174;

R v September 1954 (1) SA 574 (O);

R v Chinowaita & Others 1967 RLR s4;

Pole & Another v R 1946 (1) PH H64 (T)

R v Radebe 1954 (3) SA 785 (O);

R v Mangure 1962 (1) SA 869 (SR).

Judgment

Reynolds J: It happens with disturbing frequency that charge sheets produced at Magistrates Court trials contain lists of articles that are either inadequately described, or are so badly described that the article is completely unidentifiable. It is a common failing for the craftsmen of such charge sheets to use the brand-name, instead of describing the nature of the article itself. For example, the charge sheet may refer to "one Lifebuoy", instead of the proper description of

1984 (1) ZLR p171

REYNOLDS J

"one bar of soap", or "one bar of Lifebuoy soap". Some further examples extracted from the above two cases, recently submitted for purposes of review, include the following:

"1 packet surf; 1 bottle comfort; 1 case tonic nips; 1 long childs cord tan; 1 cartoon everest; 1 cartoon 10-madson."

The magistrate presiding at the trial in which the accused Lemson Sikarama was charged with stealing the "1 long childs cord tan" explains that this means 'lone brown child's pair of trousers'. It is of interest to note that in the interpretation the "long child" has been transformed into a "brown child".

No doubt the manufacturer of the articles in question would be pleased to learn that the name of his product is considered by the craftsman of the charge to be such a household word that no further particulars are necessary. But the draftsman's opinion is not in point. The important aspect is whether the accused understands what is being referred to. It is also necessary that a review or appeal Court understands what has been charged, as well. Section 133(1) of the Criminal Code reads as follows:

"133. (1) Subject to the provisions of this Act and any other enactment, each count of the indictment, summons or charge must set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge."

The requirements embodied in this provision are, in essence, that (a) the offence with which the accused is charged, and (b) the material facts constituting the offence, are both set out with sufficient clarity for the accused to be properly informed of the case which he has to meet (*Ex p Minister of Justice: in re R v Masow and Another*, 1940 AD 75; *R v Wantenauar* 1940 SR 174).

It is emphasised that the section requires that it is the *accused* who is to be properly informed of the charge and all its particulars. It is, therefore, incumbent upon magistrates to ensure that the charge as set out has indeed been fully understood by the accused and to make any

1984 (1) ZLR p172

REYNOLDS J

necessary amendments. As was stated by HORWITZ J in *R v September* 1954 (1) SA 574(O):

"A charge should be framed with reasonable clarity and certainty before an accused person is called upon to plead thereto."

Magistrates should, therefore, be at pains to examine every charge before it is put to an accused person in order to remedy any defects, as contemplated by section 191 of the Code, and to, clarify any obscure points.

There are instances where the construction of the charge has suffered as a result of the draftsman's personal inexperience or incapacity, and yet the meaning is nonetheless, perfectly clear. For example, in other review matters recently considered, various charges contained the following articles:

" 9 hark saws: 2 shavels; a peak; gent west coat; and one ambullera."

It seemed to me that the accused in those cases would have understood without difficulty what the items were meant to be, and would have suffered no prejudice as a result of the misspellings. The proceedings were, accordingly, confirmed. Ideally, however, the magistrate should have corrected the charge sheet before the accused pleaded to it. It is not in respect of this type of obvious and easily identifiable error that I am concerned, but rather in respect of mis-descriptions or errors that could leave the accused in genuine doubt as to what is meant.

In such areas it is sometimes said that the accused may always request an explanation if he is in any doubt about the charge. In my view, however, this is not sufficient. It is for the Court, in the proper exercise of its function, to ensure that the accused understands the nature of the charge he is facing. (See *R v Chinowaita and Others* 1967 RLR 54 and *Pole & Another v R* 1946 (1) PH H64(T), as to the duties of the Interpreter). In *R v Radebe* 1954 (3) SA 785(O), a passage in a judgment of HORWITZ J is cited. A rough translation of this reference is as follows:

"The attention of judicial officers and other people concerned in the hearing of criminal matters against accused persons, particularly when the accused is not represented by a legal practitioner, is hereby drawn to the essential necessity to examine closely the charge sheet before the accused is called on to plead thereto."

1984 (1) ZLR p173

REYNOLDS J

The omission of necessary averments can, in this way, be timeously put right, at a stage when amendments can lawfully be allowed, and it will in many cases avoid difficulties and time wasting at later stages."

It has been suggested that the provisions of s 155 (2) of the Code do not allow the Court to act in this way, ie to clarify and amend a charge, and that it is for the accused to object to anything defective in a charge. Section 155(2) is to the effect that an objection to a formal defect in a charge must be taken before the accused has pleaded, and the accused may not, at any later stage, rely on such a defect to nullify the charge. In other words, the remedy open to the accused is lost if he does not object before pleading (see *R v Mangure* 1962 (1) SA 869(SR)). But the accused must first be able to understand the charge before he can object to it, and it is here that the principle enunciated above applies. In any event, in my view, s 191 and 191A of the Code limit and qualify the effect of s 155 to a considerable extent.

It has also been submitted that it is the Attorney-General who has framed the charge, and it is the function of the Court to decide, at the conclusion of the State case, whether or not that charge has, *prima facie*, been proved. In other words, it is not for the Court to reframe the charge, or to plug loopholes left by the prosecution. Once again, in my opinion, this is not strictly germane to the issue. Section 154 of the Code requires that the accused "be informed in open Court of the offence with which he is charged as set forth in the indictment, summons or charge". In ensuring that this requirement is fulfilled, it seems to me to be essential that the information conveyed must be explicit and intelligible. If, at the end of the day the charge sheet, in its comprehensible form, is still defective, then that is another matter.

In the present two cases, it is my view that in the first matter, *S v Lemson Sikarama*, the descriptions which may not have been "reasonably sufficient to inform the accused of the nature

of the charge" are: "1 bootle comfort, 1 case tonic nips, and 1 long child's cord tan". These items must be deleted from the charge.

The effect of this order will not require any reduction of the sentence imposed by the magistrate, as there were numerous other articles stolen by the accused having a total value of \$228. The items deleted would not materially alter the overall value of the property stolen. In all other respects, accordingly, the proceedings are confirmed.

1984 (1) ZLR p174

REYNOLDS J

In the second case of *S v Enock Dehwe*, the accused pleaded guilty to the charge of breaking into a tuck-shop and stealing the articles named, valued at \$14,58. The word "cartoon" is obviously a misspelling of "carton", and the accused would undoubtedly have understood it as such. The brand-names used are relatively well-known as cigarette brands, but, most importantly, and in this particular case, would obviously have been known to the accused to refer to the cigarettes that he admitted having stolen. I am, therefore, satisfied that the accused would have been in no doubt as to the nature of the articles referred to in this charge. With a different plea, however, or a different set of circumstances, it is likely that a reference to a brand-name of this sort would not be considered to an adequate description. The proceedings in *S v Enock Dehwe* are confirmed.

Smith J agrees with these orders.

1984 (1) ZLR p175

S v NDHLOVU 1984 (1) ZLR 175 (SC)

Court **Supreme Court, Harare**

Beck ACJ, Gubbay JA & Waddington AJA

6 & 22 March 1984

Flynote

Criminal procedure - charge - defects in - averments missing from - Criminal Procedure and Evidence Act [Chapter 59] - s 191A - purpose and scope of - where defect in charge is cured by evidences unnecessary to amend charge.

Headnote

The appellant was charged with contravening s 3 of the the Witchcraft Suppression Act [Chapter 73]. The charge alleged that he and his co-accused "did impute or indicate to [the complainants] the use of non-natural means in causing the possession by magic birds of ... a child, that is to say, did name or indicate [the complainant] as being a witch." The charge did not specifically allege that he had imputed to the complainant the use of non-natural means in causing "any disease in any person", as is required by the section. The defect in the charge was

not brought to the notice of the trial magistrate. The evidence led at the trial established that the child named in the charge was regarded as being ill; and that the appellant had accused the complainant of having caused the child's illness. He also made admissions in cross-examination which tended to support the State's allegations.

In these circumstances, counsel for the State, relying on s191A of the Criminal Code, argued that, while the charge was defective, the defect was cured by evidence at the trial proving what should have been alleged in the charge.

Held, that the provisions of s191A could be applied to this case. The section was designed to cure an indictment lacking essential averments, but not a poorly drawn indictment which leaves the accused in doubt as to the substantive offence which he is alleged to have committed. In the present case, the charge, though defective, disclosed a recognisable offence, and the appellant could not have been left under any illusions as to the substantive offence with which he was charged.

Cases cited:

S v Mbiri 1982 (1) ZLR 44;

S v Mayongo 1968 (1) SA 443 (E).

1984 (1) ZLR p176

WADDINGTON AJA

MT O'Meara, for the appellant.

PJ Batty, for the respondent.

Judgment

Waddington AJA: The appellant was charged with a co-accused in a magistrate's Court with the offence of what is commonly described as "naming another as a witch" in contravention of s 3 of the Witchcraft Suppression Act [*Chapter 73*]. He pleaded not guilty but was convicted with his co-accused and sentenced to pay a fine of \$100 or in default of payment to undergo two months' imprisonment with labour. The appellant appealed against his conviction. His co-accused has not appealed. The grounds of appeal are, first, that the charge was defective in that it did not reveal a contravention of s 3 of Chapter 73 and second, that on a proper consideration of the evidence the learned magistrate ought not to have found that the appellant had imputed to any person the use of non-natural means in causing disease or injury to any person.

Section 3 of Chapter 73 reads as follows:

"3. Whoever imputes to any other person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any person or property, that is to say, whoever names or indicates any other person as being a wizard or witch shall be guilty of an offence and liable to a fine not exceeding two hundred dollars or to imprisonment for a period not exceeding three years or to a whipping not exceeding twenty strokes or to any two or more of such punishments."

Mr *Batty* who represented the State conceded that the charge was defective because it did not include the essential averment that the appellant had imputed to the complainant the use of non-natural means in causing "any disease in any person". Although the charge did include the averment that the appellant had named the complainant Edward Mugati as a "witch" (wizard would have been more appropriate), the inclusion of that allegation in the charge, which was badly drawn by the prosecutor, did not cure the defect because, as FIELDSEND CJ said in *S v Mbiri* 1982 (1) ZLR 44:

"... it is clear from the decision of TREDGOLD J in *S v Ntozonke* 1947 SR 59 that the *gravamen* of a s 3 offence is imputing to another person the use of non-natural means in causing any disease in any person or animal or in causing any injury to any

1984 (1) ZLR p177

WADDINGTON AJA

person or property. The words which follow in the section, that is, 'whoever names or indicates any person as being a wizard or witch' are merely descriptive words and are not in themselves the words which constitute the offence. It is necessary in a charge under this section to make the allegation that the person imputed used a non-natural means to cause disease or injury to a person or property."

Mr *Batty* submitted, however, that satisfactory evidence was led at the trial and that this evidence proved beyond reasonable doubt that the appellant had imputed to the complainant Edward Mugati the use of non-natural means in causing an illness in a girl named Nokhutula Borerwa and that in consequence the provisions of s 191A of the Criminal Procedure and Evidence Act [*Chapter 59*] may properly be called in aid of his argument that the Court should dismiss the appeal.

Section 191A of the Code reads as follows:

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

There is nothing on record which suggests that the want of the averment that the appellant, by non-natural means had caused a disease in any person, had been brought to the notice of the magistrate before judgment. If Mr *Batty's* argument is to succeed, therefore, the question which must be answered affirmatively is whether satisfactory evidence was led which proved the presence of the subject of the missing averment. Mr *O'Meara*, who represented the appellant, eventually conceded that evidence had been led at the trial which was capable of curing the defect in the charge. He took a firm stand, however, in submitting that despite the presence of such evidence the charge and the State outline were so vague that the appellant must have been prejudiced in his defence.

In my view, this submission is not sound. The provisions of s 191A are quite clear. A defect "*shall* be cured by evidence at the trial" proving the presence of the subject of the missing averment. One factor which would defeat the operation of the provision would be the Court becoming aware of the omission before judgment. That factor does not, as I have already said, exist in this case. Another situation in which the provision would fail would be if the charge

WADDINGTON AJA

offence at all or if it left the person to whom it was addressed in doubt as to the substantive offence he is alleged to have committed. Dealing with s 179 *bis* of the Criminal Procedure Act, 1955 (now s 88 of the Criminal Procedure Act, 1977 of South Africa) which is the same as s 191A of our own Code, KOTZE J in *S v Mayongo* 1968 (1) SA 443 (E) at 444 E - H said:

"The charge as framed seems to me to be a most embarrassing document. It is not clear whether the charge is laid under s 27 (a) or under s 27 (b). Mr *Beale*, who appeared for the State, realised this and contended that the evidence substantiates a contravention of s 27(b). Even though, so he argued, the charge as framed does not fully aver all the ingredients of that statutory offence the defects should be regarded as cured in terms of s 179 *bis* of the Criminal Procedure Act, 56 of 1955, and that the conviction should accordingly be sustained. This contention should in my view not be upheld. Section 179 *bis* is designed to authorise a conviction on a defective indictment provided the missing averments are supplied by the evidence led at the trial. The section should not be invoked where, as here, a charge is framed in an embarrassing fashion under two statutory enactments without clearly indicating which offence is intended to be charged. Section 179 *bis* cures an indictment lacking essential averments, not a poorly drawn indictment which leaves the person to whom it is addressed in doubt as to the substantive offence which he is alleged to have contravened. Whereas it may not be embarrassing to charge a person in the alternative with more than one offence, it certainly is if he is presented with an accumulation of averments extracted from more than one substantive offence."

I agree, with respect, with this approach to determine the purpose and scope of s 191A of the Code.

In my view, however, it cannot be said in this case that the appellant was embarrassed or left in doubt as to the substantive offence he faced when called on to plead or at any stage thereafter. Although the framing of the charge leaves much to be desired, the offence is correctly described in the preamble to the charge as a contravention of s 3 of the Witchcraft Suppression Act [Chapter 73]. In addition, the remaining essential ingredients of the offence are specifically enumerated in the charge which I now set out below for convenience sake:

"In that upon or about the 13th day of July, 1983 and at or near Gunde Primary School, Chiwundura Communal Land, Gweru, in the said Province, the said REMNANT REGISTER NDLOVU and the said ENOS TARWIREI TAVENGWA did each or other or both of them wrongfully and unlawfully impute or indicate to EDWARD MUGATI and MARY MUGATI a male there residing, the use of non-natural means in causing the possession by magic birds of NOKHUTULA BORERWA a child there residing, that is to say, did name or indicate the said EDWARD MUGATI as being a witch."

WADDINGTON AJA

Although the charge does not aver in specific terms that the appellant imputed the use of non-natural means in causing Nokhutula to suffer an illness or injury, her "possession by magic birds" suggests that as a result of the appellant's activities she exhibited an abnormal physical or mental state.

I should add that s 191A of the Code differs in an important respect from s 191(1) which provides for the amendment of a charge by a Court where there are discrepancies between the

charge and the evidence led. The latter provision may only be resorted to if the Court is satisfied that the accused will suffer no prejudice in his defence, the question of prejudice being specifically referred to in the provision. There is no reference to prejudice as such in s 191A but I have assumed that Mr O'Meara's submission that the appellant "would be prejudiced" were s 191A to apply to this case was intended to embrace the type of circumstances referred to in this judgment which would preclude the operation of the provision in question.

In all the circumstances I am satisfied that the appellant could not have been under any illusions as to the substantive offence with which he was charged. That being so, if satisfactory evidence was led which proved that the appellant imputed to Edward Mugati the use of non-natural means *in causing an illness* in Nokhutula at least, the appeal would necessarily fail.

Mr O'Meara's concession that the evidence led was in fact capable of curing the defect was well-made in my view. The evidence accepted by the trial magistrate disclosed as a whole that Nokhutula was regarded as being ill by all concerned in this case; Edward Mugati stated that the appellant had accused him of bewitching students; Marita Mugati specifically said in her evidence that the appellant in public had accused Edward Mugati of having caused the illness by the use of magic birds. She was not cross-examined by the appellant on this important evidence. In his own evidence the appellant conceded that he had believed that Nokhutula was suffering from a non-natural illness. He agreed that he had suspended Edward Mugati from the school of which the appellant was headmaster because "the situation was no longer right at the school". He also agreed that he had called a meeting of the local populace to discuss the illness and that he had mentioned four names in connection with the illness. He admitted mentioning

1984 (1) ZLR p180

WADDINGTON AJA

Edward's name. The trial magistrate found that both Edward and Marita Mugati were dependable witnesses. When their evidence is considered in conjunction with the damaging admissions made by the appellant under cross-examination there can be no doubt in my view that the evidence led establishes that the appellant imputed to Edward the use of non-natural means in causing an illness at least in Nokhutula's case. That being so the defect in the charge was cured and no amendment of the charge is now necessary.

I would Therefore dismiss the appeal.

Beck ACJ: I agree.

Gubbay JA: I agree.

Danzinger and Partners, appellant's legal representatives

1984 (1) ZLR p181

S v NDLOVU 1984 (1) ZLR 181 (HC)

Copyright Juta & Co Ltd

Court **High Court, Bulawayo**

Korsah and Manyarara JJ

23 March 1984

Flynote

Criminal law - defences excluding unlawfulness - necessity as a defence - culpable homicide and driving without a licence - accused driving seriously ill person to hospital and having an accident - defence of necessity succeeding.

Headnote

The accused was called on one evening for assistance as a man at his village fell seriously ill and had to be rushed to hospital in his, the accused's, car. On the way some cattle crossed the road in front of the accused's car. The accused lost control of the car. An accident occurred. The sick man received fatal injuries. The accused was convicted on his plea of guilty to culpable homicide and driving without a licence. The accused did not raise the defence of necessity as excusing his acts, but the defence appeared from the outline of the State case.

Held, that although the accused had not himself raised the defence, the trial Court was under a duty to examine the defence. The defence of necessity could succeed if it was shown that-

- (a) a legal interest is endangered, such as there being danger of death;
- (b) the threat must have commenced or been imminent;
- (c) the threat was not caused through any fault of the accused's;
- (d) it was necessary for the accused to act to avoid the danger; and
- (e) the means used by the accused to avert the danger must be reasonable in the circumstances.

In this case, all five elements applied to the accused and the defence succeeded.

Judgment

Korsah J: On March 1984, I ordered that the accused herein be immediately released from prison. I now proceed to give my reasons for making that order.

1984 (1) ZLR p182

KORSAH J

The accused was convicted on his own plea of guilty to two counts, namely: culpable homicide and driving without a licence contrary to s 6(1)(a) of the Road Traffic Act, 1976.

He was sentenced to ten months' imprisonment with labour on the first count, and on the second ordered to pay a fine of \$100 or in default of payment to serve a term of 60 days in prison.

The circumstances leading up to the preferment of the charges against the accused are pathetic. The accused was not the holder of a licence of any description whatsoever. On 14 September 1983, Sizwanqokwele Maseko's husband fell ill. It would appear the illness was serious enough to warrant him being rushed to Gwanda Hospital. Sizwanqokwele Maseko approached the accused for assistance.

It was seven in the evening. A man needed urgent medical attention. The request for help had come from his mother-in-law. A request from a woman distracted by the sudden serious illness of her husband is not easy to decline, even if she is not one's mother-in-law. This was an emergency. The accused agreed to convey the sick man to Gwanda Hospital in his car.

Speaking for myself, I would be eternally grateful to any man who, in similar circumstances, would accede to a request to drive me to the hospital although he does not possess a driving licence.

Four people accompanied the sick man. At or near the 109,5 km peg on the Bulawayo/Gwanda Road some cattle crossed the path of the accused. The car went off the road and there was an accident. All the passengers, including the sick man - Jubeki Maseko - were injured. They all received medical treatment. On the same day, Jubeki Maseko was reported critically ill and was rushed to Mpilo Hospital "for advanced medical attention". He died on 16 September 1983. The cause of death was stated to be: "subarachnoid haemorrhage with fractured ribs".

Thus Jubeki Maseko died not of the illness for which he was being rushed to hospital, but of the injuries sustained as a result of the accident.

1984 (1) ZLR p183

KORSAH J

I think, in any case where it is alleged that circumstances have prevailed upon a person to act in breach of the law, the question to ask is: Was there any justification or excuse for the accused to do the forbidden act? If the act of the accused was justified by the necessity of the occasion then a verdict of not guilty must be returned. As Professor Glanville Williams points out in his book "*Textbooks of Criminal Law*" 1 ed at p 39:

"A verdict of 'not guilty' does not necessarily mean that the defendant did not do the forbidden act. It may mean that he did not have the requisite mental state, or other fault element, or else had some justification or excuse".

For the defence of justification by the necessity of the occasion to succeed, the evil averted must be a greater evil than the offence committed to avert it, and the evil could not have been averted by anything short of the commission of that offence. To my mind it is a lesser evil, in attempt to save life, to drive without being the possessor of a valid driving licence than, being capable of driving, watching a man die because one does not possess a valid driving licence.

It is true that the *onus* is on the accused to introduce into evidence and prove the defence of necessity, but if the introduction of evidence of necessity is contained in the outline of the State's case, with which the accused is in absolute agreement, the Court is under a duty to examine that defence.

In his reasons for sentence this was all that the learned trial magistrate had to say:

"In passing sentence on the accused, the Court shall take into account that the accused was highly negligent on the day in question. There have been several cases of persons like the accused who have been convicted in the local Courts for similar offences and the trend followed was one of imposing severe penalties. It must also be borne in mind that the accused's conduct led to the loss of a person's life.

On Court (1) the accused is sentenced to 10 months with labour.

On Court (2) the accused is sentenced to a fine of \$100 or in default of payment 60 days' imprisonment with labour.

It is obvious that the trial Court failed to give any consideration whatsoever to the element of necessity introduced in evidence by the State.

1984 (1) ZLR p184

KORSAH J

Thus the trial Court misdirected itself by not directing its attention to the possible defence raised by the evidence before it.

For the defence of necessity to bite, Burchell and Hunt in *South African Criminal Law and Procedure* 1 ed Vol 1 pp 284, suggest five requirements:

- (a) that a legal interest is endangered; they state under this head that "danger of death or serious bodily injury may justify an act done in circumstances of necessity" (p 285).

In the instant case, the danger of death was not personal to the accused, but that makes his action all the more laudable.

- (b) that "The threat must have commenced or be imminent." Jubeki Maseko was seriously ill and required urgent medical attention.
- (c) that the threat was not caused by any fault of the accused person.

The sudden illness of Jubeki Maseko was not brought on by the accused.

- (d) that it was "necessary for the accused to avert the danger".

Here, strictly speaking, there is no necessity in the sense that the thing is inevitable or unavoidable. In reality the position is that the accused elects to do the forbidden act rather than permit the occurrence of something which is more unpleasant.

In this sense, the accused chose to drive without being the holder of a driving licence rather than refuse assistance to a seriously sick person.

And finally,

- (e) the means used by the accused to avert the danger must be reasonable in the circumstances (p 288).

I cannot think of a more reasonable method of conveying a sick person to Gwanda Hospital than in a car. Unfortunately, as the ailment of the deceased was not specified, it is difficult to say whether the accused's act in necessity caused more harm than the evil he sought to avert. The evidential burden of proving this was not discharged by the

1984 (1) ZLR p185

KORSAH J

accused for the simple reason that he was unrepresented and he was not aware that there was a possible defence to the charges against him.

In any case even if the facts upon which an accused person relies do not technically constitute the defence of necessity, a Court should take the extremity of the offender's situation into account by reducing the sentence to a nominal penalty.

In the instant case, the accident, which brought about the death of the deceased, ensued as a result of some cattle crossing the path of the accused. Maybe a more experienced driver would have steered his vehicle to safety, maybe not. What is of importance is that the accident occurred because of the activities of cattle on the road. For my part, even if cattle had not created the danger which resulted in the ensuing accident, the extremity of the offender's situation would have been a sufficient mitigatory factor to persuade me to impose a nominal penalty.

Having regard to the circumstances of this case - that the accused did the forbidden act at the request of the wife of the deceased; that he did it in order to confer a benefit on the deceased when he urgently needed medical attention; that the accident was occasioned by the presence of cattle on road; that his action was reasonable in the circumstances I am of the view that the convictions were bad in law.

Accordingly, the convictions on both counts are quashed and the sentences are set aside. A verdict of not guilty is entered and the fine imposed on Court 2, if paid, is to be refunded to the accused.

Manyarara J: I agree.

1984 (1) ZLR p186

BAECK v BRIGHTON NO & ANOTHER 1984 (1) ZLR 186 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & Gubbay JA

16 & 17 February & 26 March 1984

Flynote

Succession - will - validity of - alleged mental incapacity of testator - onus of proving incapacity lies on person

Copyright Juta & Co Ltd

seeking to impeach will - capacity to make will - what constitutes sufficient mental capacity.

Practice and procedure - costs - Interpretation of will - deceased estate - appeal against judgment of High Court - appeal would have benefited appellant only - appeal unsuccessful - costs to follow result.

Headnote

It is beyond doubt that in the Cape of Good Hope, on the 10 June 1891, the onus of proving the unsoundness of mind of a testator lay on the person seeking to impeach a will that was *prima facie* valid. The law of Zimbabwe is that in force on that date in the Cape of Good Hope, as modified by subsequent legislation having in Zimbabwe the force of law. The same practice that applied in the Cape on this point has consistently been followed in Zimbabwe and is similarly crystallised in our legislation governing the administration of deceased estates. It would be wrong to introduce the English approach to *onus* in matters of this sort, where the whole practice relating to probate of wills is so markedly different.

As to what constitutes sufficient mental capacity to make a will, the question can be in essence summed up as: were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will? This is a matter to be determined on the facts of the case.

The costs of an action in respect of a deceased estate may in appropriate cases be paid out of the estate. This is so where the action has been brought about by conduct of the testator, as where the testator's mental capacity was in doubt. However, where the person seeking to challenge a will has had his contention carefully and exhaustively tested in the High Court at the expense of the estate, there is no reason why the costs of an appeal which would benefit him only should be treated in the same way,

1984 (1) ZLR p187

BECK JA

and no reason why the ordinary principle of making costs follow the result should not apply.

Decision of **SQUIRES J** (reported in 1983 (1) ZLR 270) upheld.

Cases cited:

Executors of Cerfonteyn v O'Haire 1873 Buch 47;

Rapson and Others v Putterill and Others 1913 AD 417;

Cloete v Marais 1934 EDL 239;

Tregea and Another v Godart and Another 1939 AD 16;

Kunz v Swart and Others 1924 AD 613;

Woods v The Master and Gwynn NO 1942 SR 159.

A P de Bourbon, for the appellant: It seems quite clear that in a matter such as this in the South African jurisdiction the onus would rest upon the appellant to establish the lack of testamentary

Copyright Juta & Co Ltd

capacity by reason of a mental disorder. See Corbett, Hahlo, Hofmeyer and Kahn *The Law of Succession in South Africa* p 67 and the cases there cited. Steyn on *Wills* p 21 makes a similar point. Regard can also be had to the decision in *Rapson and others v Putterill and others supra* at 420 and *Pheasant v Warne* 1922 AD 481 at 489. See also *Lewin v Lewin* 1949 (4) SA 241 (T) at 276-277. However, Voet in his *Pandects* 27.10.4 does indicate that the onus might be on the respondents. In the English jurisdiction it is equally clear that the onus would rest on the Respondent in the present case. See *Halsbury's Laws of England* (4 ed) Vol 17 para 903. The English rule has been followed in Australia and it is also the rule in Ireland. More recently, this whole approach has been confirmed by the House of Lords in *Wintle v Nye* [1959] 1 All ER 552 (HL) at 554, 560. Notwithstanding the fact that the pleadings place the allegation on the Appellant - more so as he commenced the litigation, the true *onus* in this matter rests on the Second Respondent in seeking to uphold his benefit under the will. This is all the more the case as the will is an inofficious one and departs totally from the previous known testamentary dispositions of the testator. The reasoning given in the English jurisdiction is far more compelling than that in South Africa, which jurisdiction has generally a simplistic approach to onus which in cases such as the instant ought not to be followed.

As to mental capacity, the learned Judge adopted the approach in the American decision of *Stevens v van Cleve* which is cited with approval in *Banks v Goodfellow* (1870) LR 5 QB 549 at 568. This approach has been accepted in South Africa, and no criticism can be

1984 (1) ZLR p188

BECK JA

made for its adoption into the law of Zimbabwe. Likewise, the *dicta* in *Harwood v Baker* (1840) 13ER 117 (PC) at 120 can safely be accepted in this country. The cases were specifically adopted by ROPER J in *Lewin v Lewin*, *supra*, at 278-280. But the approach must not be too narrow, and in examining the judgment in this matter, it is respectfully submitted that there are many aspects of it which are open to criticism [Counsel then proceeded to deal with the judgment].

R R Horn SC, for the respondents, dealt with the facts of the case and continued:

The law governing the question of onus is the law in force in the Cape Colony on 10 June 1891 (ie Roman-Dutch common law and Cape Statute Law) as modified by any statutory enactment having the force of law in Zimbabwe: s 89 of the Constitution of Zimbabwe. The effect of the Roman-Dutch common law and the statute law of the Cape is that the onus of proof of the invalidity of a will lies on the person who challenges the validity of a will and this is reflected in the procedure laid down in the Administration of Estates Act. *Kunz v Swart and Others*, *supra*. As pointed out there the English procedure differs markedly from that employed in Zimbabwe and South Africa. See also the Non - Contentious Probate Rules, 1954 set out at para 2371-2459 of *The Supreme Court Practice* 1976 vol 2 pp 743-783 and Order 76 of the Rules of the Supreme Court set out at pp 1179 to 1187 of vol 1 of *The Supreme Court Practice* 1976. Even in England it seems that in effect the onus of establishing absence of capacity lies upon the person who alleges it and this also appears to apply to other grounds of invalidity: *Executors of Cerfonteyn v O' Haire supra*. At any rate the position seems to vary in England depending on whether a will is attacked on one ground or another. Whatever the position may be in English

Law, the position at the Cape in 1891 and in Zimbabwe since then has been quite clear, logical and consistent, whatever ground of alleged invalidity one is dealing with (and there are several): Corbett *The Law of Succession in South Africa* pp 80-81.

Judgment

Beck JA: This is an appeal from a decision of the High Court (SQUIRES J) dismissing an action to set aside the last will of the late Mendel Urbach on the ground of the testator's alleged lack of the requisite mental capacity to make a valid will at the time it was executed, namely 30 October, 1979. That will left the testator's entire estate to his younger brother, Aubrey Urbach, who is the second re-

1984 (1) ZLR p189

BECK J

spondent, and it constituted as executor the first respondent, a senior legal practitioner to whom the testator gave instructions for the drawing of the will.

The unsuccessful Plaintiff, now the appellant, was the son of the testator's wife's sister. In June 1972, shortly after the death of the testator's wife in May of that year, the testator, when admittedly of sound mind, revoked a joint will that he and his wife had made in 1964, and executed a new will in which the appellant was instituted as the sole heir to his entire estate. Had the appellant's action to annul the 1979 will succeeded, it is this 1972 will that would have revived.

As pleaded, the *onus* of proving the testator's alleged want of mental capacity lay on the appellant. Despite the manner in which the case was pleaded, and while accepting that in South Africa the *onus* of proving the absence of testamentary mental capacity lies on the challenger of a will that is regular and rational on the face of it, Mr *de Bourbon* contended in the Court *a quo*, and again before us, that in Zimbabwe, as in England, the *onus* in such a case is on the propounder of the will and not on the challenger, and should be held in the instant case to rest on the defendants (respondents). That submission was rejected by SQUIRES J

In terms of s 89 of the Constitution of Zimbabwe the law that is to be administered is the law in force on 10 June 1891 in the Cape of Good Hope, as modified by subsequent legislation having in Zimbabwe the force of law. It is beyond doubt that the law on this point that was in force in the Cape of Good Hope is that the *onus* of proving the testator's unsoundness of mind lies on the person who seeks to impeach a will that is *prima facie* valid. (*Executors of Cerfonteyn v O'Haire* 1873 Buch 47; *Rapson and Others v Putterill and Others* 1913 AD 417; *Cloete v Marais* 1934 EDL 239; *Tregea and Another v Godart and Another* 1939 AD 16). In *Kunz v Swart and Others* 1924 AD 618 SOLOMON JA explained at 650 that the practice embodied in the Administration of Estates Act 1913 was founded on the underlying principle "that a will regular on the face of it is presumed to be valid until its invalidity has been established in a Court of law". As appears from p 680 in the separate judgment of KOTZE JA in that case, it was "the presumption of the Civil law, adopted in the Dutch law, that

1984 (1) ZLR p190

BECK J

where a will when produced bears on inspection no sign of any flaw or defect, it is to be regarded as valid, the burden of proving the contrary being on him who disputes the will". The presumption, the learned Judge said, is "still with us", and it is clear that it underlay the practice that later became enshrined in the Administration of Estates Act, regulating the filing of wills and the grant of letters of administration, unless the will could successfully be impeached. That practice, he said, "has been the established practice for many years at the Cape of Good Hope, and it probably dates back to the early Dutch occupation Section 32 of the Administration of Estates Act, 1913, in recognising the above principles, is consequently only of a declaratory nature".

In harmony with the law in force in the Cape of Good Hope in 1891, the same practice has consistently been followed in Zimbabwe and is similarly crystallised in our legislation that governs the administration of deceased estates. Nor is this the first occasion on which the point has arisen in any reported decision in this country. In *Woods v The Master and Gwynn* NO 1942 SR 159, BLAKEWAY J approached the question of the testator's alleged want of mental capacity to make a will on the footing that the burden of proving the invalidity of the will lay on the Plaintiff who sought to impeach it. SQUIRES J was clearly correct in coming to the same conclusion and in rejecting Mr *de Bourbon*'s attempt to introduce the English approach to *onus* in matters of this sort where the whole practice relating to probate of wills is so markedly different.

The appellant has accepted that the approach that the learned Judge *a quo* adopted towards the question of the degree of mental capacity that suffices for the making of a valid will was the correct approach. That approach appears from the following passage in the judgment:

"In setting the parameters of the case within which the issue must be decided, the next question is - what is to be accepted as sufficient mental capacity? Here it would seem that the decision in *Banks v Goodfellow*, (1870) LR 5 QB 549; [1861-1873] All ER Rep 47, not only has the intrinsic merit of setting out the standard required of a testator clearly and comprehensively, but it has been followed and applied with approval in both England and South Africa. In the light of that judgment, mental capacity is to be decided on the following considerations:

'The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree what-

1984 (1) ZLR p191

BECK J

ever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; it may not be able at all times to recollect the names, the persons, or the families or those with whom he has been intimately acquainted; he may at times ask idle questions, and repeat those which had been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he commits it to writing. The question is not so much what was the degree of memory possessed by the testator as this: Had he a disposing memory?

Was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To such up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?

As a gloss to this approach, there must be added the caution pronounced in *Harwood v Baker* (1840) 3 Moo PC 282 in which at page 290 of the report ERSKINE J said the following:

'But their lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property; and that the protection of the law is in no case more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration...".

In considering whether the appellant had discharged the onus of establishing that the 1979 will was executed when the testator's mind and memory were not sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed the will, the learned Judge examined all the evidence with the utmost care and thoroughness. He carefully observed each and every witness and he has made specific findings of credibility with regard to all of them. I am not persuaded with regard to any of these findings that the learned Judge has failed to take account of any "circumstance or probability material to an estimate of the evidence or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself or with

1984 (1) ZLR p192

BECK J

indisputable fact" (*per* SOLOMON JA at 655-6 of *Kunz v Swart and Others supra*). There is not a single respect, in my view, in which it can fairly be said that the learned trial Judge has misdirected himself on the facts. He has overlooked nothing of any substance and his exhaustive and carefully analytical judgment shows him to have been aware of every proper criticism that could be made of the evidence advanced by both sides. It is a judgment on the facts that shows, if I may say so, an admirable balance and complete even-handedness in its treatment of every facet of the evidence, and far from being persuaded that the conclusion that was reached was a wrong conclusion, I find myself in full agreement with the learned trial Judge's findings that despite the degree of impairment of the testator's mind and memory that undoubtedly existed in 1979, there were nevertheless "far too many acts, even after the date when he signed the will, which show that he was capable of sustained abstract thought, memory recall and an understanding of his financial affairs, to accept that he was mentally incapable of properly making and deciding on the terms of a will"; and that "the evidence of the first defendant" - a senior and experienced legal practitioner, as already mentioned, and a wholly independent witness who was joined as a nominal defendant only and who abides the judgment of the Court - "satisfies me positively that the testator knew at least very substantially, and adequately enough to meet the requirements of *Banks v Goodfellow, supra*, what was involved in making a will: that he knew what he was doing when he gave his instructions to the first defendant, and that was the will he wanted to leave."

It was submitted in the Court below by Mr *de Bourbon*, and again before us, that the contention that the testator was not "of sound and disposing mind and memory" at the time derives assistance from the circumstance that the will is allegedly "inofficious" in character. Once again, however, the learned trial Judge paid careful attention to the evidence concerning the testator's affections during the closing years of his life and came to a conclusion in that regard for which there was ample factual support. He emphasised that "I have not overlooked the fact that this third will was a wholly different disposition from the second will, and excluded the Plaintiff who has been regarded with affection by the testator in previous years. But the second will was composed before the breach with his brother" (viz the second respondent) "was repaired, and I see nothing untoward in a man deciding to leave his estate to his brother, his remaining blood relation, rather

1984 (1) ZLR p193

BECK J

than the son of a sister of his wife, particularly in the circumstances of the present situation. It was the second defendant who would have been looming far larger as an object of the testator's gratitude by this stage of events for the reasons already canvassed ..."

In the Court *a quo* the costs of all the parties were ordered to come out of the testator's estate and no complaint is made concerning that order. There is no reason however why the costs occasioned by this appeal should be treated in the same way. The appeal, had it succeeded, would have benefited the appellant only and no-one else. The appellant was afforded the opportunity of having his contention tested in the High Court at the expense of the estate and, as I have said, that contention was most carefully and exhaustively tested and considered. There is therefore no reason why the ordinary principle of making costs follow the result should not apply, and there is no justification for diminishing the value of the successful second respondent's interest in the estate by casting on the estate the burden of the costs of appeal.

Accordingly the appeal is dismissed with costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Kantor and Immerman, appellant's legal representatives.

Bowles, Brighton and Cole Bowen, first respondent's legal representatives.

Honey and Blanckenberg, second respondent's legal representatives.

1984 (1) ZLR p194

GRANGER v MINISTER OF STATE 1984 (1) ZLR 194 (SC)

Court Supreme Court, Harare

Dumbutshena ACJ, Beck JA and Gubbay JA

21 February and March 1984

Flynote

Statutes - Constitution of Zimbabwe 1980 - s 24(2) - reference by High Court to Supreme Court of question of contravention of Declaration of Rights - not an academic one - once reference properly made, Supreme Court must determine question referred.

Headnote

The Plaintiff, a legal practitioner, claimed damages for what he alleged was unlawful and injurious conduct by members of the Central Intelligence Organization. The defendants' pleas averred that the CIO members were peace officers and had arrested the Plaintiff on suspicion of having contravened the Official Secrets Act [Chapter 47]. Thereafter the Minister of Defence issued a certificate in terms of s 4(2) of the Emergency Powers (Security Forces Indemnity) (Amendment) Regulations, 1983, and the defendant Minister amended his plea to aver that by reason of the certificate and the provisions of s 4(1) of the Regulations no liability attached to the CIO members for any damages.

The Plaintiff's replication was that the certificate was of no force or effect by reason of the fact that the Regulations were *ultra vires* s 13(5) of the Constitution and *ultra vires* the Emergency Powers Act [Chapter 83]. An application was accordingly made to the trial judge to refer the constitutional issue to the Supreme Court for decision, in terms of s 24(2) of the Constitution.

When the judges of the Supreme Court became aware that the issue had been referred to then, they expressed the *prima facie* view that the reference was premature since the defendant had raised other defences which might be decisive of the matter. However both parties expressed a desire to present argument to the contrary, and in due course did so.

Held, that, since the issue raised was not an academic one, the matter not having been disposed of in the Court below on other grounds, the issue was a "question [that] arises" in terms of the section. Nor was the question a frivolous or vexatious one and the reference to the Supreme Court was quite proper. Accordingly, the Court was obliged to deal with the matter.

1984 (1) ZLR p195

DUMBUTSHENA ACJ

Cases referred to:

Mandirwhe v Minister of State 1981 (1) SA 759 (ZAD);

Minister of Home Affairs v Bickle and Others 1983 (2) ZLR 400; 1984 (2) SA 439 (ZSC).

FC Blackie SC, for the Plaintiff.

MJ Gillespie, for the defendant.

Judgment

Copyright Juta & Co Ltd

Dumbutshena ACJ: This matter was heard in the High Court before SMITH J on 16 January, 1984. He referred a constitutional issue that arose from the pleadings to this Court. It is well to set out briefly the Plaintiffs claim in order to highlight the constitutional issue which the High Court, on the application of the defendant, referred to this Court.

The Plaintiff, a legal practitioner, alleges that he was subjected to unlawful and injurious conduct by members of the Central Intelligence Organization. The Plaintiff claims damages in the sum of \$10 000,00. The defendant filed a plea averring that the CIO members were peace officers and that they arrested the Plaintiff because they were of the opinion that he had contravened s 3(b) of the Official Secrets Act [*Chapter 47*] by photographing the Government vehicle in which they were travelling. The plea went on to deny that the Plaintiff was assaulted or abused, or that the CIO members intended to impair the Plaintiff's dignity, and it denied that the Plaintiff had suffered damages in the amount alleged or at all.

On 30 December 1983, the Minister of Defence issued a certificate in terms of s 4(2) of the Emergency Powers (Security Forces Indemnity) (Amendment) Regulations, 1983 (No 2) and on 5 January, 1984, the defendant filed an amended plea averring that by reason of this certificate and the provisions of s 4(1) of the aforementioned Regulations no liability for damages arises. In this amended replication the Plaintiff says in paragraphs 2 and 3:

- "2. The Plaintiff denies that the issue of such certificate precludes this Honourable Court from granting the Plaintiff the damages claimed or at all. The Plaintiff states that the issue of such a certificate is merely *prima facie* proof that the Defendant's servants were acting in good faith for the purposes of or in connection with the preservation of security in Zimbabwe.
3. In any event, the Plaintiff states that the issue of such a certificate is of no force and effect by reason of the fact that the Emergency Powers (Security

1984 (1) ZLR p196

DUMBUTSHENA ACJ

Forces Indemnity) Regulations, as amended, are:

- (a) *ultra vires* Section 13(5) of the Constitution as read with Schedule 2 to the Constitution;
- (b) alternatively, and in any event, *ultra vires* the Emergency Powers Act."

Section 4(1)(b) of the aforesaid Regulations grants immunity in certain circumstances to any member of the security forces or any person acting under an authority given by any member of the security forces.

The section provides:

- "4. (1) No liability for damages shall attach to
 - (a) ...
 - (b) any member of the Security Forces or any person acting under the authority of any such member in respect of anything done in good faith by such member or person for the purposes of or in connexion

with the preservation of the security of Zimbabwe.

(2) A certificate in writing under the hand of the Minister stating that any matter or thing referred to therein was done in good faith for the purpose of or in connexion with the preservation of the security of Zimbabwe shall, upon its production by any person, be *prima facie* proof in any Court of law of the fact that such matter or thing was so done."

Because of the matters raised in Plaintiff's replication Mr *Gillespie*, who appears for the defendant, applied in the High Court for the constitutional issue to be referred to the Supreme Court. Mr *Blackie*, who appears for the Plaintiff, did not oppose the application. In the result SMITH J made the following order:

"IT IS ORDERED:

That the issue as to whether the Emergency Powers (Security Forces Indemnity) Regulations are ultra vires section 13 (5) of the Constitution as read with Schedule 2 of the Constitution be and is hereby referred for decision by the Supreme Court in terms of section 24(2) of the Constitution."

Upon becoming aware that the issue had been referred to this Court, we expressed the view to the parties that the reference seemed to be premature and that it would be desirable for the trial to continue in the High Court because the defendant has raised in the pleadings other defences which might be conclusive. Both parties however, were opposed to this *prima facie* view and wished to address argument to us to the effect that the reference was properly and timeously made and

1984 (1) ZLR p197

DUMBUTSHENA ACJ

must be entertained by this Court at this stage. We agreed to hear such argument and have now had the benefit of hearing and considering it.

Subsections (1), (2), (3) and (4) of s 24 of the Constitution provide:

"24.(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect of the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Appellate Division for redress.

(2) If any proceedings in the General Division or in any Court subordinate to the General Division 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 Appellate Division unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the Court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1).

(4) The Appellate Division shall have original jurisdiction-

(a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is

merely frivolous or vexatious; and

- (b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2),

and make such orders, issue writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:

Provided that the Appellate Division may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of this Constitution or under any other law."

Mr *Gillespie* submitted that neither *Mandirwhe v Minister of State* 1981 (1) SA 759 (ZAD) nor *Minister of Home Affairs v Bickle and Ors* 1983 (2) ZLR 400 were authority for declining to hear this matter at the present stage.

In *Mandirwhe v Minister of State supra* the learned trial Judge had dealt with an application for *habeas corpus* in a case in which the Minis-

1984 (1) ZLR p198

DUMBUTSHENA ACJ

ter of State had caused the arrest and the surrender of John Mandirwhe to an official of the Government of Mozambique. His brother brought an application in the High Court for his release. On the extended return day the Minister of State said in his affidavit that it was most unlikely that Mandirwhe would be returned to Zimbabwe by the Mozambican authorities and there was nothing further that he was able to do to enable Mandirwhe to be returned. The learned Judge discharged the *rule nisi*. He then ordered that the "matter be referred to the Appellate Division of the High Court of Zimbabwe to consider whether the provisions of the Declaration of Rights have been contravened by the Minister of State in relation to the said John Mandirwhe and, if so, to determine what measures should be taken to secure the enforcement of the Declaration of Rights in relation to the latter." (See at 761 A)

It was pointed out that although the learned Judge referred the above-stated question to this Court he had already reached a final decision in the *habeas corpus* application by discharging the rule. BARON JA said at 762F:

"The basis on which we declined to entertain this reference was that, since the determination of the question of an alleged contravention of the Declaration of Rights was unnecessary for the purposes of the order the learned Judge had decided to make, it was not competent for him to refer that question to this Court."

And at 764H the learned Judge of Appeal went on to say:

"Since therefore the proceedings must finally be concluded in the Court in which they were commenced, it follows that a reference under ss(2) may be made *mero motu* by the person presiding only if the determination of the question is in his opinion necessary to enable him to reach a decision on the redress sought; unless the answer to the question is sought for this purpose the Court a quo is simply seeking an academic opinion, which is not a proper exercise of the discretion given by the subsection. In the instant case the learned Judge's decision to discharge the rule did not in any way depend on whether the respondent had contravened the Declaration of Rights in relation to Mandirwhe: the question was unnecessary for, and indeed quite irrelevant to, the Court's decision. Thus on this approach also the result is that the reference to this Court was incompetent."

The passage cited above was referred to in *Minister of Home Affairs v Bickle and Ors supra*. In that case the Court a quo was asked by the parties to decide only on the constitutionality of

certain Regulations and not to decide other issues upon which the applicant for relief might

1984 (1) ZLR p199

DUMBUTSHENA ACJ

equally have succeeded in obtaining the relief he was seeking. The learned Judge (KORSAH J, acquiesced in that suggestion and found for the applicant on the constitutional issue and the respondent appealed to this Court against that decision.

The appeal was duly heard and was dismissed. Commenting on the procedure that had been followed in the Court *a quo*, GEORGES CJ said, at p 432 D-F.

"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 wires and reviewability afforded the respondents the redress they were seeking. And in the event of his finding upon either issue in the respondents' favour, he should have left unanswered the constitutional question."

It was pointed out in argument before us that the present matter differs from both the above - mentioned cases. In *Mandirwhe's* case, *supra*, the application for *habeas corpus* having been decided and disposed of in the Court *a quo*, the constitutional issue was no longer a question arising as envisaged by s 24(2) of the Constitution, and the opinion of this Court on the issue could only be of academic interest. In the *Bickle* case, *supra*, the matter came before this Court, not by way of a reference under s 24(2) of the Constitution, but by way of an ordinary appeal, and the *dictum* referred to was concerned only with the undesirability of a Court of first instance eschewing a decision on other issues that could be decisive in order to decide, perhaps unnecessarily, upon a constitutional issue.

In the present matter the issue referred to us has not been rendered academic by the matter having been disposed of in the Court below on other grounds. The issue that has been referred to this Court is a "question that arises" in terms of s 24(2). It arises on the pleadings, and it was I stressed in argument that in referring the question to this Court for decision, the Judge *a quo* did not act *mero motu*, but was requested to

1984 (1) ZLR p200

DUMBUTSHENA ACJ

do so by one of the parties - in fact, by the State itself - and was therefore *obliged* by the section to make the reference, it being obvious that the question is by no means a frivolous or vexatious one. In making this reference therefore, SMITH J has acted quite differently from the procedures followed in the *Mandirwhe* and *Bickle* cases *supra*.

Counsel went on to submit that once a reference pursuant to s 24(2) has properly been made by the High Court, or by any other subordinate Court, the Supreme Court must determine the

question so referred to it.

I accept the correctness of that submission and I agree that in such circumstances this Court is obliged to exercise the jurisdiction that it enjoys in terms of s 24(4) (b) of the Constitution.

I do not consider that the proviso to s 24(4) affords a reason for declining to entertain the reference that has been made. As Mr *Gillespie* says, the wording of the proviso is peculiarly applicable to a person who seeks redress for an infringement of his rights. That is not the case here. The Plaintiff seeks redress for a common law *injuria*, and it is the State that seeks to shelter behind a defence that is said to be unconstitutional. It is not a situation where the allegedly injured Plaintiff may be given his redress by way of a decision on other grounds, thereby avoiding the gravity of a constitutional issue and a ruling that might be adverse to the State. Moreover, in the present case it is the State itself that seeks a ruling from the Court, and Mr *Gillespie* argued that the State should not be precluded from obtaining a determination of a constitutional point from this Court except after completion of a trial and or appeal. He pointed out further that the State was not in the position of seeking redress for a violation of its rights, but desires a determination of a constitutional question that has arisen in terms of s 24(2) because even if the State were eventually to succeed on one of the other defences raised in its plea, the question that has arisen will still remain unanswered and will soon arise again. There are, indeed, said to be some 15 cases pending in which the same question will arise.

In all these circumstances I am satisfied that this Court must determine the question that has been referred to it, and the Assistant Registrar is directed to set the matter down for hearing. By consent the

1984 (1) ZLR p201

DUMBUTSHENA ACJ

costs of arguing this preliminary point will be costs in the cause.

Beck JA: I agree.

Gubbay JA: I agree.

Coghlan, Welsh and Guest, appellant's legal representatives.

Civil Division, Attorney-General's Office, respondent's legal representatives

1984 (1) ZLR p202

COMMISSIONER OF POLICE v RENSFORD AND ANOTHER 1984 (1) ZLR 202 (SC)

Court **Supreme Court, Harare**

Beck ACJ, Gubbay JA and McNally AJA

9 and 26 March 1984

Flynote

Practice and procedure - Magistrate, Court (Civil) Rules 1980 - Order 2 Rule 2 - messenger of Court empowered to call upon Police to render aid - duty of Police when called upon - not merely to protect messenger.

Police - duties of - Constitution of Zimbabwe - s 93(3) - directives from Prime Minister to Commissioner of Police - relate only to prosecutions - no authority for police to disregard other duties - s 93(4) - does not make Commissioner of Police independent of legislature or Courts - must comply with judicial processes.

Headnote

Squatters had in 1980 entered on the land of the respondent, a farmer, and refused to vacate the place despite entreaties. The respondent took legal action and obtained, by default, an order for the eviction of the squatters. When the deputy to the Messenger of Court wished to serve the warrant, he sought the assistance of the Police, in terms of Order 2 Rule 2 of the Magistrates Court (Civil) Rules 1980. The Police refused to help and in the circumstances the deputy decided not to attempt the service alone. When the respondent's legal practitioners asked the Police for an explanation for their attitude, they received a reply which stated that the "Government" had given the Police a directive not to prosecute any squatters without written authority from the Minister of Lands, Resettlement and Rural Development. Since this matter was being dealt with by the Ministry the Police would not act.

The respondent then instituted proceedings for damages arising out of the illegal grazing of the squatters' livestock. A policeman did accompany the messenger to serve the summonses, which was achieved with difficulty. Default judgment was obtained but the Police refused to assist the messenger to serve the warrants of execution.

The Commissioner of Police sought to justify his Force's inaction on three grounds -

- (a) that power given to the messenger of Court amounted to no more than a requirement to protect the messenger;

1984 (1) ZLR p203

GUBBAY JA

- (b) that the directive from the "Government" absolved the Police from rendering aid; and
- (c) that s 93(4) of the Constitution entitled the Commissioner of Police to disregard not only legislative enactments but Court orders as well.

Held, dismissing the appeal, that the rendering of aid in terms of Order 2 Rule 2 of the Magistrates Court (Civil) Rules went beyond merely protecting the messenger against an attack on his person. To hold otherwise would make the Rule meaningless, as well as lead to anarchical results. In any case, it was the duty of the Police in terms of 93(1) of the Constitution to provide such protection.

Held, further, that the granting to the messenger of the power to call upon the police implied a

corresponding duty on the part of the Police to obey.

Held, further, that while s 93(3) of the Constitution empowered the Prime Minister, or any Minister authorised by him, to give the Commissioner of Police general directives of policy, the directive - if indeed there was one - related only to prosecutions of squatters and not to other duties. In any event, the subsection did not vest the Prime Minister with authority to require the Commissioner to ignore or breach the law or to order his Force to refuse to perform a duty imposed upon them under the law.

Held, further, that the purpose of s 93(4) was to make the Commissioner independent of the Executive, but not of the Legislature or the Courts. He was not given the right to override legislative enactments or to authorise his Force to disregard their duties thereunder, nor was he at liberty to ignore judicial process.

Cases cited:

S v van Vuuren 1983 (4) SA 662 (T)

S W Mafara, for the appellant

A P de Bourbon, for the first respondent

No appearance for the second respondent

Judgment

Gubbay JA: This is an appeal against an order of the High Court (WADDINGTON J) directing the appellant, who is the Commissioner of Police, to provide such aid as is necessary to enable the Messenger of Court, Gweru (the second respondent), to effect service and enforcement of a warrant of ejectment against 19 squatters and warrants of execution against the property of 11 of them, issued in favour of Robert Spence Rensford (the first respondent) by the Magistrate's Court, Gweru.

The scenario to the unfortunate impasse between the parties is this: The first respondent is the owner of Little Impala Farm which is

1984 (1) ZLR p204

GUBBAY JA

situated in the district of Shurugwi. During December 1980 a group of people entered upon the farm and, without any right or vestige of authority, proceeded to set up home. There they remained, and repeated entreaties that they should remove themselves and their livestock were met with disdain. His patience sorely tried, the first respondent put in motion the machinery of the law. He instituted an action for the eviction of 19 male squatters and their families. Service of the summons was effected and, there being no entry of appearance, judgment against the squatters was granted by default on 25 June 1982. A warrant of ejectment was issued soon after.

On 22 July 1982 Barry Hertzog Cloete, a Deputy to the Messenger of Court, Gweru, went to

Shurugwi in order to serve the warrant. As instructed, he approached the Member-in - Charge of the Police, and sought his permission to proceed to Little Impala Farm. The latter let it be known that he did not wish the warrant to be served and informed Cloete that the police had been instructed not to involve themselves in civil matters. A request to provide an armed escort was refused. Cloete then approached the District Administrator, but to no avail. He was advised that the squatters were on the farm under a Government resettlement programme and that his personal safety would be in jeopardy were he to go there without police protection. Understandably, Cloete decided not to attempt service of the warrant, acting alone.

The events of that day led the first respondent's legal practitioners to seek written confirmation from the Officer Commanding, Midlands Province, that the Police were not prepared to act. The reply, received after a lapse of two months, contained the following statements:

- "3. The Government directive is that Police are not to prosecute any squatter without written authority from the Minister of Lands, Resettlement and Rural Development. In this case no written authority was produced, therefore the police did not assist.
4. This squatter problem should be dealt with by the Ministry of Resettlement and Rural Development. Any other request written or otherwise for police action will not be acted upon."

Undaunted the first respondent commenced proceedings for damages against 15 of the male squatters arising out of the illegal grazing of their livestock on the farm.

1984 (1) ZLR p205

GUBBAY JA

On 3 January 1983 Cloete contacted the Member-in-Charge, Shurugwi, and was granted permission to proceed to Little Impala Farm in order to serve the summons. It was arranged that a policeman would accompany him there, as it was anticipated that the reaction to the presence of a Court official would be volatile. So the following day Cloete and an armed police officer went onto the farm. Many of the defendant squatters who were identified declined to accept the process tendered and so it was dropped at their feet. But as the exercise continued the mood of the crowd became ugly. When Cloete called out the names of those who were still to be served, the crowd shouted angrily that everyone was involved. Fearing for his safety, Cloete withdrew.

No appearance to defend was entered and on 23 February 1983, after judgment had been obtained, the first respondent caused warrants of execution to be issued against 11 of the defendants. The messenger of Court however refused to serve the warrants without the assistance of the Police - which was not forthcoming. The return of service he rendered to the first respondent contained the explanation that the police authorities were merely prepared "to see that the life of the Messenger of Court will not be in danger, but will NOT TAKE ACTION".

None of this was disputed by the Commissioner of Police in the motion proceedings before the Court *a quo*. He sought to justify the attitude adopted by contending that the law, as embodied in Order 2 Rule 2 of the Magistrates Court (Civil) Rules 1980, requires the Police to do no more than to protect the person of the Messenger (or his Deputy) from any harm that might befall him at the hands of those upon whom service or execution of process is to be effected. The provision does not obligate the Police to render aid to the Messenger in the performance of

those duties; he must be left to fulfil them as best as he can.

WADDINGTON J rejected that contention and Mr *Mafara* submitted that he had erred in so doing. In my opinion the reasoning of the learned judge is unassailable and bears repetition. This is what he said:

"Rule 2 empowers a Messenger to call upon a policeman to render 'aid to himself or his deputy' if he anticipates resistance to the service or execution of process. The plain primary object behind the provision is to ensure that the process of the Court

1984 (1) ZLR p206

GUBBAY JA

will be served or executed. In most cases, the Messenger, in the nature of things, probably experiences little difficulty in giving effect to the orders and process of Court because usually the subject respects the writ of the Court and fears the consequences of not complying with Court orders. It is clear, however, that Rule 2 envisages the possibility that the Messenger may experience resistance and possibly active opposition to his carrying out his duty which is fundamental to any hierarchy of Courts. He may be in no personal physical danger but he may, acting alone, lack the physical resources to evict large numbers of illegal occupants of land in cases where passive resistance is offered, for example. He may equally be hampered by passive resistance to the removal of property and alone he may be unable to give effect to the writ of execution it is his duty to enforce. In my view the rendering of aid by the police in the context of Rule 2 must have been intended to go beyond merely protecting the Messenger against an attack upon his person. The lawgiver could not have intended so futile a system that envisages the making of orders that cannot be enforced. I cannot conceive of the Legislature providing for the protection of the Messenger's person through the strength of a police force yet in the same breath prohibiting that force from assisting the Messenger to carry out the very function which has exposed him to danger in the first place. If the Messenger were not to be entitled to help from the police to give effect to writs and other process of the Courts in cases where he alone cannot do so, it could be quite pointless for an aggrieved citizen or visitor to Zimbabwe to seek the protection of his rights by the State through the medium of the Courts. This kind of situation is calculated to lead to anarchical results. The system which exists in Zimbabwe for the protection of rights does not recognize taking the law into one's own hands. If inadequate machinery existed for the enforcement of proprietary rights, there would be the danger of individuals seeking to protect their own rights by violent and uninhibited means. This cannot possibly have been intended by the lawgiver."

I would make two additional observations.

In the first place, if the lawgiver intended that the "aid" referred to in Rule 2 was to relate *solely* to aid to protect the life or person of the Messenger it would have been unnecessary to have spelt out such an obligation on the part of the police officer. For that obligation exists outside of the ambit of the Rule (see s 93(1) of the Constitution). I agree with the succinct submission made by Mr *de Bourbon*, on behalf of the first respondent, that in construing the Rule what is to be looked to are the circumstances under which the Messenger is given the power to call upon a police officer to render aid. The language is unambiguous. The aid relates to a situation where resistance is met or is reasonably anticipated to the service of execution of the process of the Court.

Secondly, this interpretation of Rule 2 derives support from a passage in the judgment of ACKERMANN J in *S v Van Vuuren* 1983 (4) SA

1984 (1) ZLR p207

GUBBAY JA

662 (T), where at 668C, the virtually identical wording in Rule 8(3) of the South African Magistrates Court Rules, 1968, is considered.

A subsidiary submission advanced by Mr *Mafara* was that although the Messenger is granted the "power" under Rule 2 to "call upon any police officer to render aid to himself or his deputy", the omission of such following words as "which aid shall not be refused" indicates an intention to repose a discretion in the police officer to refuse aid.

The short and conclusive answer to this submission is that the grant of the "power" to the Messenger implies a corresponding duty to obey on the part of the police officer. If this were not so, the power would be useless as being unenforceable. Indeed, there would have been no need to have bestowed the power if it were to be restricted to an ability to request the rendering of aid. Thus, for the lawgiver to have included the words suggested by Mr *Mafara* would have amounted to tautology.

For his next argument Mr *Mafara* sought to rely on the provisions of s 93(3) of the Constitution, which empower the Prime Minister, or any Minister authorised by him, to give the Commissioner of Police general directions of policy with which the Commissioner must comply. He submitted that the existence of such a directive is evidenced from the third paragraph of the letter written by the Officer Commanding, Midlands Province (which I have quoted); and, as that directive of policy conflicted with the legal duty to assist the Messenger or his Deputy to serve the warrants of ejectment and execution against property upon the squatters, the police officers were absolved from rendering such aid.

There is no merit in this point either. Even if the "Government directive" emanated from the Prime Minister or from a Minister authorised by him - which is not so stated in the letter nor alleged by the Commissioner in his affidavit - it relates to the *prosecution* of squatters and not to a refusal to carry out the duty which Order 2 Rule 2 imposes.

But in any event, as WADDINGTON J rightly observed, s 93(3) does not vest the Prime Minister or his appointed representative with authority to require the Commissioner to ignore or breach the law or to order members of his Force to refuse to perform a duty imposed upon

1984 (1) ZLR p208

GUBBAY JA

them under the law. As the learned Judge so aptly put it, "Complying with a policy directive is one thing; complying with the law is another".

Finally, Mr *Mafara* advanced the startling submission that the effect of s 93(4) of the Constitution is to place the Commissioner of Police above the law. It entitles him, so he said, to disregard not only legislative enactments but Court orders as well. The subsection reads as follows:

"(4) Subject to the provisions of subsection (3) and to regulations made under section 96, the Commissioner of Police shall be responsible for the administration of, and determining the use and controlling the operations of, the Police Force and, save as aforesaid, shall not, in his command of the Police Force and in the exercise of his

responsibilities and powers in relation thereto, be subject to the direction or control of any person or authority."

In my view, there is no warrant to construe this provision in the manner urged. Subject to the specific exceptions, its plain purpose is to make the Commissioner independent of the Executive arm of Government. He is a free agent insofar as the administration and command of the Police Force are concerned. In those spheres he brooks no interference and is answerable only to himself. But he is not independent of the Legislature or Judiciary. He is given no right to override legislative enactments or to authorise members of the Police Force to disregard their duties thereunder. Nor is he at liberty to ignore judicial process in whatever form it may take. He must comply with it.

For these reasons I would dismiss the appeal with costs in favour of both the respondents.

Beck ACJ: I agree.

McNally AJA: I agree.

Civil Division, Attorney-General's Office, appellant's legal representatives

Danziger and Partners, respondent's legal representatives

1984 (1) ZLR p209

S v CHIKOPA 1984 (1) ZLR 209 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA and Gubbay JA

16 March and 4 April 1984

Flynote

Criminal procedure - sentence - theft - by a public servant - clerk at Magistrates Court stealing \$80 000 in five months - little supervision of appellant - to what extent such a mitigating feature - appropriate sentence.

Headnote

The appellant was employed at the Magistrates Court Harare in 1979 as a Court recorder. In 1982 he was transferred to the office of the Clerk of the Court as acting senior clerk. He worked in the Fines Office and his duties included receiving money paid as fines or bail. Over the course of five months, by falsifying the receipts retained in the office, he stole a total of \$80 351. He was convicted in the Regional Court but sentenced, in the High Court, to 12 years' imprisonment with labour.

It was argued on appeal, *inter alia*, that because an inexperienced public servant like the appellant worked largely unsupervised, his moral blameworthiness was reduced because the element of temptation would have been minimised.

Held, that there was merit in the contention that it is the duty of experienced public servants to

impart their experience and know-how to inexperienced officers and that where such an officer has not been supervised his moral blameworthiness is reduced. However, this point had been properly considered by the judge *a quo*.

Held, further, that the quantum of the sentence was in line with those passed in similar cases, with the exception that the judge *a quo* had not suspended any portion of the sentence. It would be appropriate, in all the circumstances, to suspend three years of the total sentence on appropriate conditions.

Cases cited:

Attorney-General v Chipisah AD 58/81;

S v Rees 1984 (1) SA 468 (WLD);

S v Nyoni H-B-26-84;

S v Malgas and Another HC-H-40-84;

S v Madzima HC-H-36-84;

S v Mbingo 1984 (1) SA 552 (AD).

1984 (1) ZLR p210

DUMBUTSHENA CJ

P van Oudtshoorn, for the appellant

Y Omerjee, for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted in the Regional Magistrate's Court of theft by conversion. The Magistrate referred the matter to the Attorney-General in terms of s 58(2) of the Magistrates Court act [*Chapter 18*]. The matter was transferred to the High Court for sentence. In the High Court the appellant was sentenced in judgment No HC-H-406-83 to 12 years' imprisonment with labour. It is against that sentence that the appellant has appealed to this Court. The appellant pleaded guilty and the case proceeded in the Regional Magistrate's Court on the basis of an agreed statement of facts.

Briefly the facts are as follows: the appellant is a man aged 30 years. He is married and now has three children. At the time of the trial he had two children and his wife was expecting another. He was earning a gross salary of \$255 per month. He commenced work as a Court recorder at the Magistrates Court, Harare, on 22 October, 1979. He had four 'O' level passes. On 1 April, 1982 he was transferred to the office of the Clerk of Court as acting Senior Clerk. He worked in the Fines Office with three other people. His duty was to receive money paid for fines and bail and he paid out witness expenses from the Imprest Account of the Ministry of Justice. He also received deposit fines paid in by police. At the end of the day he brought all moneys received at the Fines Office to account. He also was responsible for banking the money.

The Clerk of the Court checked all moneys received each day and reflected on the fast copies of the receipt book and reconciled it with the schedule of deposits. He would then certify on the bank slip that the reconciled amount had been banked.

The appellant issued to the police who paid in admission of guilt fines original receipts. He attached the "first copy" of the receipt to the schedule of deposits paid. The "fast copy" remained on the receipt book. The appellant used to place a carbon paper between the original and the first copy of a particular receipt and thus record the correct amount of money received. He did not put a carbon paper between the first copy and the fast copy of the receipt. He, so it seems, put a carbon

1984 (1) ZLR p211

DUMBUTSHENA CJ

paper on top of the fast copy and recorded an amount lower than that actually received by him. He banked the money reflected on the fast copy.

When an internal investigation was conducted the first copies were extracted from filed records and compared with the fast copies of the receipts. It was discovered through this comparison that the appellant had converted to his own use \$80351,500 during a period of five months.

From the facts there is no doubt that this was a very serious offence deserving of a severe sentence. \$80 351,50, a large sum of money, was stolen. And as the learned judge points out in his judgment the appellant was stealing at the rate of over \$750 per working day in a month of 22 working days. The Courts of this country have on frequent occasions warned the public that severe penalties would attend public servants convicted of theft of Government money. The appellant was in a position of trust. He was entrusted with the handling of large sums of money.

However, in determining an appropriate sentence a Court must try its best to balance the interests of society which require severe sentences for those who breach the trust placed in them and the interests of the offender which are opposed to those of the society. The balancing of the two opposing interests is a delicate process because the two interests are irreconcilable. But the Courts must perforce try to reconcile them.

In its attempt to balance the two interests a court has to look closely at society's responsibility towards the prevention of crime. If society by its laxity has created conditions conducive to the commission of thefts or frauds then the Court will, in assessing sentence, consider the interests of an accused less harshly than in a setting in which society has provided strict procedures which are meant to prevent the commission of offences of this magnitude.

And in case such as this one society has, as I have pointed out above, a responsibility of preventing crime by putting its own house in order by not placing people in positions of trust when they are ill fitted by qualification or experience to hold those positions. If such men are

1984 (1) ZLR p212

DUMBUTSHENA CJ

placed in positions of trust which present them with temptation which leads them to commit crimes they would not have committed, members of the society who are responsible for creating such a situation must bear a measure of responsibility. In *Attorney-General v Chipisah* AD 58/81, a case in which a lowly-paid employee was not subjected to any form of control or check during all the months he stole money, LEWIS JP remarked at p 3 as follows:

"The moneys were received by him by way of rentals from the tenants of the Makusa Township under the control of the Selukwe Town Council and he was able to falsify the books in a very simple manner and get away with these large sums of money without the thefts being discovered. The most elementary form of accounting check would have brought the theft to light at the end of the first month, but the most elementary form of accounting check was not employed by the Selukwe Town Council. In these circumstances a large proportion of the blame for the loss of this money must rest with the officials of the Selukwe Town Council. The same point was stressed by this Court in the case of *Gabriel Choga v The State*, Appellate Division Judgment No 169/73 where the appellant in that case was an employee of the Ministry of Internal Affairs employed as a clerk at the civil Court at Gutu. The standing audit procedures laid down by the Ministry of Internal Affairs had not been observed in any way in that particular district, which had made it possible for the appellant, subjected to great temptation, to steal the money entrusted to him. Because of that fact, because of the extreme laxness of the authorities concerned, this Court, took a more lenient view of the matter than it would otherwise have done."

In the instant case there is some merit in Mr *Van Oudtshoorn's* contention that it is the duty of the experienced public servants to impart their experience and know-how to inexperienced officers and that where such an officer has not been supervised his moral blameworthiness is reduced. In *S v Rees* 1984 (1) SA 468 (WLD) a case in which the accused was convicted of 29 counts of fraud involving a sum of R296 500. GOLDSTONE J had this to say at p 469H of society's responsibility in the prevention of crime.

"In the first place, there is the fact that the SACC placed what I consider to have been an unfair responsibility upon the accused. I referred in my judgment to the concept of discretionary funds. I can fully understand that concept in the context of the church community, where it is controlled by a priest or minister. However, I find that its uncontrolled and wholesale extension to a paid official of a national organization, with funds running into millions of Rands, is quite irresponsible. I have already indicated that it is quite unfair to the person invested with that power. Crime prevention should be the responsibility of all caring members of the society and the avoidance of temptation is too often lost sight of as one of the most effective methods of crime prevention. The careless motorist who leaves a tempting parcel

1984 (1) ZLR p213

DUMBUTSHENA CJ

on the seat of his locked motor vehicle should bear at least some of the blame when that vehicle is unlawfully broken into and a robbery committed."

It is apparent from the facts of this case that not much was done to train the appellant in accounting procedures used by the Ministry of Justice.

There was also very little supervision of his work. Supervision was necessary not only because the appellant had very little experience but also because he was handling large sums of money. Had the appellant been closely supervised the element of temptation would have been minimised.

The learned judge considered all features of mitigation which were favourable to the appellant. He took into account the fact that the appellant was a first offender who is married and who has a wife and three children. He considered the contention made on behalf of the appellant by his

counsel both at his trial and before us that it was unfair to give responsibility to an inexperienced person. Mr *Van Oudtshoorn* submitted that the judge *a quo* had misdirected himself when he failed to recognise the appellant's inexperience. That submission appears to have no substance because the learned judge dealt with that point in his judgment. He said this of the appellant and his circumstances:

"It has been contended on your behalf that it was unfair to take an inexperienced Court recorder, one who had not achieved a very high standard of education and to place him in charge of an office where receipts totalled between \$400 000 and \$500 000 a year. The reason advanced for this submission is that you were ill-equipped to handle that sort of responsibility. It is true that you might have been inexperienced and a poor arithmetician. It is true that you may have been unable to balance your books at the end of every day. But the answer to the point raised is that even a man who is inexperienced and ill-trained must display simple honesty in his dealings with money belonging to the State or to other employers.

"It was submitted in this Court and in the Lower Court at your trial that, because the control which was exercised over you could have been more effective your moral blameworthiness must be shared between you and those who were your seniors in the office of the Clerk of Court. This is an unacceptable proposition. Those responsible for designing an accounting system which did not make adequate provision for effective control may be criticised for that. They may also be criticised for controlling an effective system inefficiently. But it would be unfair to condemn as morally blameworthy those who have remained honest and true to their employers when castigating the persistent and unrepentant thief."

1984 (1) ZLR p214

DUMBUTSHENA CJ

There was no point favourable to the appellant that the learned judge did not consider. He considered the temptation presented to the appellant by the fact that he found himself in control of large sums of money when his salary was not commensurate with responsibility.

These mitigatory factors were weighed against factors of aggravation which the learned judge categorised as follows:

"Against these possible mitigating factors must be considered those features which are aggravating. They are as follows: Yours was a persistent course of conduct over five months. It reveals a high degree of deliberation. The amount which was stolen in itself discloses great greed on your part. The purpose to which the cash was applied shows that the offence was committed, not because you were poor and in need, but because you apparently wanted to enjoy a more exciting and sybaritic lifestyle."

The learned judge also took into account the prevalence of the offence in the public sector where public officers are expected by society to exhibit the highest standard of honesty and integrity in the day to day functioning of public administration.

There is no doubt that continued dishonesty by public servants tends to undermine the basis upon which good Government depends.

In deciding whether a sentence of 12 years' imprisonment with labour for the theft of \$80 351,50 is an appropriate sentence, a Court must examine several factors. Among such factors will inevitably be the seriousness of the theft; the amount of money stolen; the fact that it was public money; the fact that the offender was in a position of trust and the prevalence of the offence.

It is also important to compare sentences imposed by the Courts in similar offences, always bearing in mind that each case depends on the circumstances peculiar to itself and the personal

circumstances of the offender.

In *S v Nyoni* HB-26-84 MANYARARA J (with whom KORSAN J concurred) had occasion to reduce a sentence of 7½ years' imprisonment with labour of which 17 months had been suspended on condition of future good behaviour and on condition that \$3 000 was repaid to the complainant by a certain date, to six years' imprisonment with labour of which two years were suspended on the same conditions resulting in an effective sentence of four years, for the theft of \$11 720,00.

1984 (1) ZLR p215

DUMBUTSHENA CJ

In *S v Malgas and Maniwa* HC-H-40-84, a case in which the two appellants and another stole on 59 separate occasions from the National Railways of Zimbabwe a total of \$11 783,95, each appellant was sentenced to five years' imprisonment with labour of which two years were suspended on conditions of good behaviour and repayment to the complainant. WADDINGTON J with the concurrence of PITTMAN J dismissed the appeal.

In *S v Madzima* HC-H-36-84 the appellant, who was aged 30 years and married with three children and who was employed as an accountant by the Zimbabwe Republic Police at a salary of \$900 per month, was convicted of four counts of theft of \$10 348,00 and sentenced to a total of eight years' imprisonment with labour. Three years were suspended on two conditions, good behaviour and repayment of the sum unrecovered. On appeal WADDINGTON J with the agreement of PITTMAN J reduced the sentence to six years' imprisonment with labour of which two years' imprisonment with labour were suspended on the two conditions mentioned above.

A consideration of these recent cases seems to suggest that Courts are taking a broad view of the sentences passed and trying as best they can to pass sentences which are generally consistent with sentences passed in similar or more serious cases.

Taking this broad view it cannot be said that a sentence of 12 years' imprisonment with labour for the theft of more than \$80 000,00 is out of line with sentences of six years' imprisonment with labour of which two years were suspended for theft of \$11 720,00; five years' imprisonment with labour with two years suspended for the theft of \$11 783,95 and six years' imprisonment with labour of which two years' imprisonment with labour were suspended. It appears to me that these sentences are broadly consistent with the sentence of 12 years' imprisonment with labour in the instant case.

The only inconsistency in this case, with the trend so displayed in these cases, was the failure by the learned Judge to suspend a portion of the 12 years' imprisonment imposed on the appellant. The appellant is a first offender whose other personal circumstances are that he was ill-equipped to handle large sums of money because he was inexperienced and had just come into the city from a rural environment and

1984 (1) ZLR p216

DUMBUTSHENA CJ

background and was left to handle large sums of money without sufficient supervision. It is my view that these personal circumstances, coupled with the further fact that those who were responsible for supervising him in his duties were to some extent guilty of laxity, entitle him to a suspension of a portion of his sentence. I do not think that a suspension of a portion of the sentence would seriously diminish its deterrent effect or disappoint society's reasonable expectations that severe and proper sentences should be imposed. See *S v Mbingo* 1984 (1) SA 552 (AD) at 556.

In my judgment nine years' incarceration is enough to bring home to the appellant the seriousness of the offence he committed and the three years to be suspended will serve as a further deterrent, thus emphasising further the seriousness of the offence. After serving a long spell in prison the suspended sentence hanging over his head will be a constant reminder to the appellant of the seriousness of the offence and an inducement to him not to commit similar offences in future. I believe that the needs of society that offenders, especially those who commit serious offences, should receive appropriate sentences is met by an effective sentence of nine years' imprisonment while the suspended portion of the sentence keeps the delicate balance between the interests of society and those of the appellant. If no portion of the sentence were to be suspended it seems to me that the sentence would reflect an over-emphasis of the aggravating features and an under-emphasis of the personal circumstances of the appellant.

Accordingly I would allow the appeal and alter the sentence to read:

"12 years' imprisonment with labour of which three years are suspended for three years on condition that the appellant is not convicted of any offence involving dishonesty committed during that period and sentenced to imprisonment without the option of a fine."

Beck JA: I agree.

Gubbay JA: I agree.

D W Aitken and Co, appellant's legal representatives

1984 (1) ZLR p217

S v MAHLUNGE 1984 (1) ZLR 217 (HC)

Court High Court, Harare

Waddington J

4 April 1984

Flynote

Criminal procedure - charge - several offences related in terms of time and place - incorrect to convict of a globular offence which was not specifically charged - Criminal Procedure and Evidence Act [Chapter 59] - s 163(5).

Headnote

The accused was charged with nine counts of housebreaking with intent to steal and theft. It appeared that accused had broken into four groups of premises. The premises broken into in each separate group were, however, separate from one another, even if under the same roof.

The magistrate entered a verdict of "guilty of 4 counts of housebreaking with intent to steal and theft", his reasoning being that, as only four buildings had been broken into, the accused could be convicted of only four counts of housebreaking.

Held, that, in the first place, the law recognises that there may be "premises" within "premises", for the purposes of housebreaking. Each room in a house is capable of being broken into separately.

Held, further, that s 163(5) of the Criminal Procedure and Evidence Act [Chapter 59] obliged the magistrate to return a verdict on each offence with which the accused was charged. There was no provision in the Act for what happened here, which was that the magistrate had convicted the accused of four globular offences with which he was not charged.

Case referred to:

S v Mahaso HC-H-144-84 (not reported).

Judgment

Waddington J: In this case a magistrate tried the accused on nine counts of housebreaking with intent to steal and theft. The accused tendered limited pleas of guilty on counts 1, 2, 4, 6 and 8. Pleas of guilty were tendered on counts 3 and 5.

1984 (1) ZLR p218

WADDINGTON J

On each count in which a limited plea was tendered, the limitation arose in respect of some minor article which the accused denied stealing. Considering the trivial value of the items which the accused denied stealing, it is surprising that the prosecutor refused to accept the limited pleas and insisted on proceeding to trial to prove the charges up to the hilt.

During the course of the trial it became apparent that the premises broken into and which were the subject of counts 1, 5, 6 and 9, were separate rooms under a single roof; that those the subject of counts 7 and 8 were in another building; that those the subject of counts 3 and 4 were in another, while the premises referred to in count 2 were entirely separate premises. There were thus four groups of premises broken into, each group being in a separate building.

The magistrate correctly found on the evidence that breakings and thefts as charged had been committed in respect of counts 1, 6 and 9 (the first group of premises), in respect of counts 7 and 8 (the second group), in respect of count 4 (part of the third group), and in respect of count 2 (the Fourth group). He also correctly found that no breaking and entering or theft had been proved in respect of count 5 (part of the first group). The magistrate incorrectly found that the accused had broken into the room which was the subject of count 3 (part of the third group). On

count 3 the accused had pleaded not guilty and there was no evidence proving that the accused had broken into the room of the complainant or stolen the goods which, she stated in evidence, she had found to be missing.

Having made the findings of fact referred to in the previous paragraph in his judgment, the magistrate then brought in the curious verdict that the accused was "guilty of 4 counts of housebreaking with intent to steal and theft". The magistrate did not specify which counts the conviction referred to and neither did he acquit on the remaining five counts as one would have expected. The reason for the verdict was that, as stated in the judgment, only four houses had been broken into: Therefore the accused could only be convicted of four counts of housebreaking.

The magistrate has overlooked two important aspects of the law. First, the law recognizes that for the purposes of housebreaking there

1984 (1) ZLR p219

WADDINGTON J

may be "premises" within "premises". In other words, each room in a house is capable of being broken into separately. (See Hunt, *SA Criminal Law and Procedure*, 2 ed Vol II p 713 and the cases there cited). Second, s 163(5) of the Criminal Procedure and Evidence Act [*Chapter 59*] which reads as follows:

"Any person who has once been called upon to plead to any indictment, summons or charge shall, save as is specially provided in this Act or in any other enactment, be entitled to demand that he be either acquitted or found guilty.",

obliged him to return a verdict on each and every one of the nine counts with which the accused was charged.

What the magistrate had done in his case could be described in another manner. He has disregarded the charges to which the accused pleaded and has found the accused guilty of four globular offences with which he was not charged. Put that way, the magistrate breached the elementary rule of criminal procedure that an accused may only be convicted of an offence which has been laid to his charge and to which he has pleaded. The Criminal Procedure and Evidence Act [*Chapter 159*] contains no provision which countenances the conviction of a person accused in a criminal trial of committing an offence with which he has not been charged unless the conviction is in respect of an offence which is a competent alternative verdict to the charge actually pleaded to in terms of some statutory provision. (See, for example, ss 195 - 211 of the Criminal Code).

In a recent review decision in the case of *S v Mahaso* HC-H-144-84, the learned reviewing judge considered a similar situation to that which has arisen in the present case. Winnie Mahaso had been charged with one count of theft, two counts of forgery and two counts of uttering. Instead of convicting or acquitting the accused on each and every count laid to the accused's charge, the magistrate, for reasons which need not be repeated in this judgment, but which were wrong, stated that he had "... convicted the accused on a global count of fraud embracing all five counts which I felt were inextricable." Without giving reasons the reviewing

judge decided that what the magistrate had done "was wrong", set aside the conviction and substituted appropriate verdicts on each and every count.

1984 (1) ZLR p220

WADDINGTON J

The verdict returned by the trial magistrate is therefore set aside. In line with the findings of fact made by the magistrate in relation to each count but having regard to the fact that he misdirected himself on the evidence relating to count 3, the following verdicts are substituted:

Courts 1, 2, 4, 6, 7, 8 and 9 - guilty.

Courts 3 and 5 - not guilty and discharged.

The magistrate treated the four putative counts as one for the purposes of sentence. As the accused was a young first offender this was the correct course to follow, in my view. The sentence passed upon the accused is accordingly confirmed.

Smith J agrees.

1984 (1) ZLR p221

BADENHORST v MINISTER OF HOME AFFAIRS 1984 (1) ZLR 221 (HC)

Court High Court, Harare

Mfalila J

16 March and 5 April 1984

Flynote

Statutes - Police Act [Chapter 98] - s 76 - actions against member of Force or Government - must be commenced within six months of cause of action arising - Road Traffic Act 1976 - actions against insurers for injuries caused to third parties - undertaking by Government in terms of s 22(2) - does not make Government an insurer - Government's liability in terms of undertaking only arises if there is legal liability by Government employee concerned.

Headnote

The Plaintiff was injured when he was being carried in a police vehicle. He was in the vehicle for the purposes of investigation of crime. The accident was caused by the admitted negligence of the driver of the police vehicle. The Plaintiff commenced his action against the responsible Minister well over six months after the accident had taken place, and by virtue of the provisions of s 76 of the Police Act [Chapter 98] his action was prescribed.

The Plaintiff then attempted to recover damages on the grounds that, because in RGN 876 of 1972, the Government had given an undertaking in terms of s 22(2) of the Road Traffic Act, Government was in effect an insurer of the police vehicle.

Because it was an insurer, an injured party had, in terms of s 25 of the Act, the right to sue the Government directly, the rights of the injured party being not dependent on his establishing liability against the offending police officer.

Held, that by virtue of the wording of the undertaking, the Government had agreed to indemnify any of its officers in respect of all sums which those officers might become legally liable to pay as if the use of the vehicle was insured under a policy of insurance.

Held, further, that where the Government made an undertaking in terms of s 22, it undertook to place itself in exactly the same position as any other insurer; but if it did so, it placed itself outside the ambit of the provisions of s 25 of the Act, which allow an injured party to proceed directly against an insurer.

Held, further, that the Government was liable to pay in terms of the undertaking only if

1984 (1) ZLR p222

MFALILA J

the legal liability of its servant was established; and in this case, the servant was not liable, because of the provisions of s 76 of the Police Act [*Chapter 98*].

Cases cited:

Minister of Home Affairs v Badenhorst 1983 (2) ZLR 248;

Union Government v Tonkin 1918 AD 533.

JB Colegrave, for the Plaintiff.

MJ Gillespie, for the defendant.

Judgment

Mfalila J: The Plaintiff sued the Minister of Home Affairs, claiming general damages in the sum of \$6 000 for injuries he received when the police vehicle in which he was a passenger on 13 November 1981 was involved in an accident, an accident which he alleged arose from the negligence of the police driver Thomas Ventouris. He stated in his declaration that he was suing the Minister of Home Affairs as insurer of the Police Government vehicle by virtue of s 22 of the Road Traffic Act and that in the premises the Minister is liable to compensate him for damage which he suffered.

In reply the defendant first filed a plea in abatement stating that by virtue of s 76 of the Police Act [*Chapter 98*] no legal liability to pay any sums in respect of the damage alleged attaches to the driver of the vehicle and that accordingly no indemnity exists in terms of s 2 of Rhodesia Government Notice No 876 of 1972. He therefore prayed that the Plaintiff's claim be dismissed.

Secondly, the defendant excepted to the Plaintiff's declaration as bad in law and disclosing no cause of action because the defendant is not in law an insurer for the purposes of Part III of the Road Traffic Act 1976 and that the Plaintiff has no right of action in law against the defendant

qua insurer for the damages alleged.

Expanding on the defendant's plea in abatement during the hearing, Mr *Gillespie* submitted that the Government's vicarious liability to pay damages for the injuries suffered by the Plaintiff in this accident ended or abated with the officer's personal liability when the Plaintiff's claim against him became prescribed under s 76 of the Police Act. Under s 76 of the Act the Plaintiff should have brought this claim within six months of the event giving rise to the cause of action. Since he did not

1984 (1) ZLR p223

MFALILA J

do this, his claim against the officer became prescribed. It is Therefore Mr *Gillespie's* submission that since by reason of this the officer had no legal liability to pay damages to the Plaintiff, the Government, which is only liable through the officer in terms of clause 2 of Rhodesia Government Notice No 876 of 1976, has no liability to pay any damages to the Plaintiff.

On the other hand, Mr *Colegrave*, for the Plaintiff, replied that it was open to the Government, like any other party, to waive its rights of prescription under s 76 of the Police Act, and that in any case a clear distinction should be made between a cause of action founded on vicarious liability and Government's direct liability as an insurer.

I doubt whether, in view of the mandatory wording of s 76, the Government can waive its prescription rights under that section and also that the distinction suggested by Mr *Colegrave* can be made. Section 76 of the Police Act provides as follows:

"76. Any civil action instituted against the State or a member in respect of any thing 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 the defendant one month at least before the commencement of such action" (my emphasis).

Therefore the defendant's plea in abatement cannot fail on these grounds. In the light of the decision of the Supreme Court on this point and between the same parties, Minister of Home Affairs v *Badenhorst* 1983 (2) ZLR 248, and the particular facts of this case that at the time of this accident the Plaintiff was in police custody being conveyed from one police point to another for the purpose of investigation of crimes, the driver was performing his duties under the Police Act and therefore any liability arising out of them was protected under s 76 of the Act, that is to say, any such action had to be brought within six months of the cause of action arising. This action was brought well after six months; it was therefore barred in terms of this section and no action can lie against the police driver. Since, as I will have occasion to explain in more detail later in the course of this judgment, the obligation of the Government to pay to third parties under its insurance undertaking contained in RGN 876 of 1972 only arises after the third party has established the legal liability of the officer to pay, the Plaintiff has not reached a stage where he can recover anything from the

1984 (1) ZLR p224

MFALILA J

Government. It is really a sad situation whereby a subject cannot recover damages purely on a technical bar after admitted negligence by an officer of the State. But this is the law and the duty of this Court is to apply it and allow the defendant's plea in abatement.

I will now turn and consider the defendant's exception to the Plaintiff's declaration. In this connection Mr *Gillespie* submitted that the defendant is not in law an insurer for the purposes of Part III of the Road Traffic Act and Therefore the Plaintiff has no right of action against the defendant *qua* insurer. He added that the Government is not an insurer because it does not give statutory policies or securities under s 23 or 24 - it only gives an undertaking under s 22(2) of the Act; that the wording of subs (2) itself which states that the State may give an undertaking as if it were an insurer shows that it is not an insurer. This, he said, makes the State not bound by s 25, which gives an injured party the right to direct recourse against the insurer. Mr *Gillespie* concluded by saying that the State is also not bound by s 25 because there is a common law presumption that the State is not bound by statute, and this view is reinforced by the fact that s 22 of the Road Traffic Act gives complete discretion to the Government to make the undertaking. He cited the decision in *Union Government v Tonkin* 1918 AD 533, as authority for this proposition.

Replying for the Plaintiff, Mr *Colegrave* conceded that his client cannot use s 25 of the Road Traffic Act to sue the Government directly as insurer, but he submitted that by virtue of wording of RGN 876/72, whereby the Government made an undertaking, it is possible for third parties to sue the Government directly as their rights are not dependent upon their first establishing liability against the offending officer.

Before disposing of the main question - that is to say, whether the Plaintiff has a right of action directly against the defendant as insurer - I will deal with the point raised by Mr *Gillespie* in the course of his argument that the Government is not bound by the Road Traffic Act. He said that there is a presumption in favour of the executive that it is not bound by statutes. In the case which he cited, *Union Government v Tonkin* 1918 AD 533, this principle was affirmed in favour of the Crown by the Appellate Division of the South African Supreme Court at Bloemfontein. After considering previous decisions on the point, INNES CJ stated at 541:

1984 (1) ZLR p225

MFALILA J

"Upon a consideration of these and other expressions of opinion by Judges of high authority, I think we may well adopt the rule as formulated by LORD ALVERSTONE, namely, that the intention that the Crown should be bound, or has agreed to be bound, must clearly appear, either from the language used, or from the nature of the enactment. And in applying the rule, while starting with a presumption in favour of the Crown, we are not, in ascertaining the intention of the legislature, restricted to the language of the enactment, but may look at the surrounding circumstances, and may consider its objects, its mischiefs, and its consequences".

The CHIEF JUSTICE then proceeded to consider the wording of the enactment under consideration and concluded at 545:

"However wide the general language, the onus is always upon him who seeks to bind the Crown to show that the Crown was intended to be bound. In this instance, however, the onus is discharged. For after allowing full weight

to the presumption in favour of the Crown, the intention of the legislature to bind the Crown appears clear from the language used and from the nature of the enactment."

In this case Mr *Gillespie* submitted that the legislature did not intend to bind the Government because s 22 only gives a discretion to the Government to make an undertaking.

The wording of s 22(2) of the Road Traffic Act certainly supports Mr *Gillespie*'s view that as far as the Government is concerned it is not compelled to insure its vehicles against third party risks as every other user of a motor vehicle is required under subs (1) of the same section.

The Government was given an option. It could either insure its vehicles under subs (1) or give an undertaking under subs (2). If it chooses to give an undertaking, then subs (3) requires the Minister of Roads and Road Traffic to publish in the *Gazette* the terms and conditions of, and any amendments to or revocation of, the undertaking made under that subsection. The Minister did this by making an undertaking in RGN 876/72 for the insurance in respect of third party risks in relation to motor vehicles or trailers owned by the Government in all respects as if it were an insurer for the purposes of Part III of the Act. By voluntarily complying with the provisions of the Act, the Government was announcing to the world that it considered itself bound by this Act. It is thus unnecessary to go further and look at the language used or the surrounding circumstances to determine whether this Act binds the Government.

1984 (1) ZLR p226

MFALILA J

In his exception to the Plaintiff's declaration, the defendant averred that the Plaintiff has no right of action in law against him *qua* insurer for the damage alleged because the defendant is not in law an insurer for the purposes of Part III of the Road Traffic Act, 1976.

As already indicated, Mr *Gillespie* supported the exception, saying that the defendant Government is not an insurer for the purposes of Part III of the Act because it does not issue statutory policies under s 23 or statutory securities under s 24; this being so, he said, third parties cannot sue it directly under s 25 and that for this reason the Plaintiffs' direct claim against the Government must fail.

To resolve this question it is necessary to consider in stages the relevant provisions of the legislation. Subsection (1) of s 22 requires everybody not to use a motor vehicle or trailer on a road unless there is in force in relation to the use of that motor vehicle or trailer, a policy of insurance or a security in respect of third party risks. Subs (2) of the same section gives discretion to the Government to undertake the insurance in respect of third party risks in relation to motor vehicles or trailers owned by it in all respects as if it were an insurer for the purposes of Part III, and subs (3) requires the Minister, once the Government has made the undertaking to insure, to publish in the *Gazette* the terms and conditions of, and any amendments to or revocations of, the undertaking referred to in subs (2). Subsection (4) provides that the provisions of subs (1) shall not, while an undertaking referred to in subs (2) is in force, apply to any motor vehicle or trailer owned by the State or a Government designated in terms of subs (2). Section 23 provides for the issue of statutory policies of insurance by persons approved by the Minister and s 24 deals with the issue of statutory securities. Section 25 gives the right of injured parties to proceed directly against insurers. It is clear from these provisions that the Act

sought to divide all motor vehicles and trailers into two groups. The first group consists of all non - Government vehicles. These are required by subs (1) to have in force, in relation to their use on roads, policies of insurance or securities in respect of third party risks. The insurers of such vehicles must issue either policies of insurance under s 23 or securities under s 24, and these insurers can be sued directly under s 25 by injured third parties. The second group consists of all vehicles and trailers owned by the Government. These also must be insured, but the Government has two ways of doing it. It can either

1984 (1) ZLR p227

MFALILA J

insure its vehicles like everybody else under subs (1) or merely undertake the insurance under subs (2), in which event subs (4) makes it clear that once the Government has made the undertaking under subs (2) and it is in force, then the Government will be free from the provisions of subs (1) with regard to all its vehicles. This means that once the provisions of subs (1) are rendered inapplicable to the Government, it undertakes out of its own resources to insure its vehicles against third party risks in the words of the subsection "as if it were an insurer"; in other words, it places itself in exactly the same position as any other insurer with the difference that it is not required to issue policies of insurance or security. This then places it outside the ambit of the provisions of s 25. What then are the rights of third parties with regard to the Government as an insurer of its vehicles? These rights can be found in the language of the undertaking itself. The wording of the relevant undertaking is so important for the determination of this question that it is here below reproduced in full. Rhodesia Government Notice No 876 of 1972 was repealed by SI 607/1983, but it is still in force for the purposes of this claim.

"Third-party Insurance: Government Vehicles

It is hereby notified, in terms of subsection (2) of section 206 of the Roads and Road Traffic Act [Chapter 289], that the Government undertakes the insurance in respect of the third-party risk in relation to any motor vehicle owned by it in all respects as if it were an insurer for the purposes of Part XIV of the said Act, subject to the following terms and conditions:

1. In this undertaking, unless inconsistent with the context -

 'officer' means any person employed by the Government or the President, and includes a Minister and the President;

 'road' means a road as defined in the Roads and Road Traffic Act [Chapter 289];

 'vehicle' means a motor vehicle or trailer owned by the Government.
2. The Government will indemnify an officer in respect of all sums which he shall become legally liable to pay in respect of the death of, or bodily injury to, any person caused by or arising out of the official or private use on a road of a vehicle issued to him or under his lawful control, as if the use of such vehicle by such officer was insured under a policy of insurance complying with the requirements of section 207 of the Act.
3. Notwithstanding anything contained in this undertaking, the Government reserves the right to recover from the officer any sums paid by it in respect of

1984 (1) ZLR p228

MFALILA J

any accident, injury or liability -

- (a) caused or incurred by the gross negligence of the officer; or
 - (b) if, at the time such accident, injury or liability was caused or incurred, the officer was under the influence of intoxicating liquor or drugs; or
 - (c) if, at the time such accident, injury or liability was caused or incurred, the vehicle was being used by such officer on an unauthorized journey or was being driven with the permission of the officer by a person not authorized to drive the vehicle.
4. The Government undertaking published in Rhodesia Government Notice No. 28 of 1956 is hereby cancelled."

In my view the meaning of this notice, like its heading, is very clear - namely that the Government undertakes the insurance in respect of third party risks in relation to any motor vehicle which it owns in all respects as if it were an insurer. This means that within its provisions third parties are as effectively protected against injury or death caused by Government vehicles as they are against similar hazards from other vehicles. Clauses 2 and 3 provide the manner in which the Government can discharge its obligations under its own insurance scheme. In clause 2 the Government undertakes to indemnify any of its officers in respect of all sums which they shall become legally liable to pay in respect of death or bodily injury caused by a Government vehicle in use at the time by the officers as if the use of such vehicle by such officers was insured under a policy of insurance complying with the requirements of the Act.

Clause 3 provides the conditions under which the Government would indemnify its officers found legally liable to pay damages to third parties. I take it to be beyond controversy then that there is no other way outside the provisions of the two clauses of RGN 876/72 by which the State can be made to meet its insurance obligations to third parties - namely that the injured party must first establish the legal liability to pay by the officer who actually caused the injury or damage before the State can make payment to him in full. He cannot proceed against the State directly as he would do against other insurers under s 25. Nor can he in such a claim choose to proceed against the State under the State Liabilities Act [Chapter 54], for after providing for State liability in claims arising or which have arisen out of contract lawfully entered into on behalf of the State or out of any wrong committed by any servant of the State acting in his capacity and within the scope of

1984 (1) ZLR p229

MFALILA J

his authority as such servant, s 2 of the Act goes on to make the following proviso:

"Provided that nothing in this section contained shall be construed as affecting the provisions of any law which limits the liability of the State or any department thereof in respect of any act or omission of its servants or which prescribes specified periods within which a claim shall be made in respect of any such liability or imposes conditions on the institution of any action."

The conditions and procedures under which the Government will meet its insurance obligations are Therefore left intact by this Act, namely that it will only pay after the legal liability of its servant has been established.

In his letter dated 19 March 1984 written with the concurrence of Mr *Gillespie*, Mr *Colegrave* advanced the additional submission that s 2 of RGN 876/1972 is intended to refer only to the situation where the third party chooses to sue the officer rather than the Government. But, as I have already stated, RGN 876/72 gives only one way in which the Government can make payment to third parties, that is to say by first establishing the legal liability of the officer to pay. The third party is not given a choice by this undertaking to sue either the officer or the Government. He must establish the officer's legal liability to pay him before the Government will come forward and pay.

For these reasons I find that the defendant's exception to the Plaintiff's declaration is valid and hold that the Plaintiff has no right of action in law against the defendant, and in the result I dismiss the declaration.

As this claim was filed *in forma pauperis*, Mr *Gillespie* quite properly informed the Court that he would not be asking for costs.

Coghlan Welsh and Guest, legal practitioners for the Plaintiff.

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

1984 (1) ZLR p230

S v MTIZWA 1984 (1) ZLR 230 (HC)

Court **High Court, Harare**

Reynolds J

5 April 1984

Flynote

Criminal law - motoring offences - culpable homicide - recklessness and gross negligence - distinction between - accused driving on wrong side of road - killing motor cyclist coming the other way - prison sentence appropriate.

Headnote

In assessing the appropriate sentence in a case of culpable homicide arising out of a motor accident, it is essential to determine the degree of negligence involved. Normally, it is where recklessness or gross negligence is shown that a prison sentence would be appropriate. However, the terms "recklessness" and "gross negligence" are not synonymous, although they often overlap as they are cognate concepts. A given course of conduct could be both reckless and grossly negligent.

Gross negligence is simply a very serious or aggravated form of ordinary negligence, implying conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves. Recklessness, on the other hand, connotes not only a wilful disregard for the safety and rights of other road users, but also cases of indifference or rashness or inadvertence in which consciousness of consequences plays no part. A Court should not believe that it cannot enter a finding of gross negligence because there is nothing to show that the driver was guilty of some form of wilful or wanton disregard of the rights of others.

In a case of gross negligence, where the driver of a car went onto his wrong side of the road at dusk and killed a motor cyclist, a sentence of a fine only was disturbingly inappropriate. An appropriate sentence would have been one of imprisonment and a prohibition from driving.

Cases cited:

R v Wahl AD 45/67;

S v Ngcobo 1962 (2) SA 333(N);

R v Mahametsa 1941 AD 83;

R v Swanepoel 1945 AD 444;

S v Miller AD 85/81;

1984 (1) ZLR p231

REYNOLDS J

S v van Zyl 1969 (1) SA 553 (AD);

S v Dzvatu 1984 (1) ZLR 136;

R v Chitanda 1968 (1) RLR 47; 1968 (1) SA 427 (RAD);

R v Greenland 1961 R & N 738; 1962 (1) SA 51 (SR);

S v Smith and Others 1973 (3) SA 217 (T);

Drake v Power (1961) 46 MPR 91;

S v Barnard 1965 (3) SA 644(T).

Judgment

Reynolds J: The accused was convicted of culpable homicide following his plea of guilty to that charge, and was sentenced to pay a fine of \$200. He also pleaded guilty to, and was convicted of being in possession of a provisional drivers licence and yet driving without supervision, and driving without "L" plates being displayed. In respect of the second and third counts he was sentenced to appropriate fines, and the proceedings regarding these lesser offences do not concern this judgment, and are confirmed.

The agreed facts that formed the basis of this charge were that the accused and the deceased were proceeding in opposite directions along the main Harare - Beatrice highway, the accused in a small car travelling south, and the deceased on a motor cycle travelling north. The road in question is wide and straight, with a good tarmacadam surface. The centre of the road is demarcated by a broken white line. The two vehicles collided head-on, and the deceased was killed in the impact. It was clear from the photographs and plans produced that the accused's vehicle was on western half of the road - that is his incorrect side of the road - at the time of the collision. He was unable to account for his vehicle being in this position. The actual point of impact appears to have been roughly in the centre of the western half of the road. It was not ascertained exactly what the time was when the accident occurred, but it was at dusk. This must have been an extremely severe impact for the accused's vehicle was extensively damaged to its front, and the wheels virtually collapsed, causing the bottom part of the car itself to plough into the road. The motor cycle of the deceased was thrown off the road, and it caught fire and was destroyed. The accused was injured as a result of collision.

It seemed to me that the sentence imposed was inadequate, and the matter was referred to the Attorney-General. He has replied to the effect that it is his view that the magistrate's sentence, although lenient, is not out of line with the punishments imposed in other similar cases.

1984 (1) ZLR p232

REYNOLDS J

Various cases were referred to in support of this opinion. Those cases are not, however, based on similar facts, and they are, at best, distinguishable from the present case.

It is, perhaps, desirable to reiterate the well-established principles which are normally followed when assessing an appropriate penalty in cases such as this. The first necessity is to determine exactly what occurred, or if this is not possible, to decide what is the only reasonable inference in the circumstances, in order to ascertain the extent of the accused's blameworthiness, and the degree of his negligence thus revealed, if any (*R v Wahl* AD 45/67; *S v Ngcobo* 1962 (2) SA 333(N)). In normal circumstances, it is only if the accused is, in this manner, seen to be guilty of gross negligence or recklessness that a sentence of imprisonment may possibly be appropriate (See *R v Mahametsa* 1941 AD 83 at 86; *R v Swanepoel* 1945 AD 444 at 448, and *S v Miller* AD 85/ 81). If a lesser degree of negligence is shown, or if other factors emerge, then the question of imprisonment will probably not arise at all. The vital issue to be determined in every such case, therefore, is the extent of the accused's negligence, if any.

In applying these rules to the present case, the basic facts have already been noted above. Regrettably, not all the available facts were placed before the trial Court. For example, in his judgment the magistrate assumes "in the accused's favour" that neither of the vehicles had its lights on. In the Traffic Accident Record Book, which is included as part of the record placed before me, it is noted that the motor cycle light switch was on, whereas the light switch of the accused's vehicle was off. It is also recorded that the time of the accident was 6.30 pm. This information was obviously available to the prosecutor, and it should have formed part of the agreed facts. Be that as it may, however, it was agreed that this accident occurred at dusk. It is notorious that visibility is treacherous at this time of day, and the prudent motorist should, accordingly, regulate his speed and his caution proportionately. A higher than usual duty of care

rests on the motorist driving at this time of day. It was also established that the accused was on his incorrect side of the road at the time of the collision.

The rule of the road requiring drivers to keep to the left of the road is said to have its origin in a period of history long before the advent of the "horseless carriage". As the old adage has it -

1984 (1) ZLR p233

REYNOLDS J

"The rule of the road is a paradox quite; if you go right you go wrong, and if you go left you go right."

But whatever the origin of the rule, it is a very important and basic rule of our roads, and if you go wrong, you will, in all probability, go far wrong. In a modern society, when motor vehicles in great numbers are on our roads, and their drivers are travelling at some speed in going about their ordinary affairs, it is of vital necessity that all road users strictly comply with the rules of the road. To fail to comply with this particular rule of the road does not necessarily amount to negligence *per se*, but it does mean that if a vehicle was on its incorrect side of the road at the time of a collision, this is *prima facie* proof of the driver's negligence. To my mind, if a motorist drives on his incorrect side of a main road at dusk, and collides with a perfectly visible motor cyclist coming in the opposite direction, without having seen him at all, right up to the moment of impact, he is *prima facie* grossly negligent (see *S v van Zyl* 1969 (1) SA 553 (AD) and *S v Dzvatu* 1984 (1) ZLR 136.

Our Courts have long held that "recklessness in traffic cases means no more than a gross or aggravated form of negligence", and that "it is only where driving shows a complete or wilful disregard for the safety as well as the rights of other road-users that it amounts to gross negligence or recklessness" (*R v Chitanda* 1968 (1) RLR 47 and *R v Greenland* 1961 R & N 738, 1962 (1) SA 51),.

Following definitions of this kind, much confusion appears to exist as to the precise meaning to be attributed to the terms "recklessness" and "gross negligence". It is sometimes thought that the terms are synonymous, and as recklessness connotes some element of wilfulness, or a conscious appreciation of a risk taken, then gross negligence means the same thing. As I understand our law on the matter, the two terms are in fact distinct from one another, although they often overlap as they are cognate concepts. Thus, conduct may be both reckless and grossly negligent. "Gross negligence" is simply a very serious or aggravated form of ordinary negligence - negligence of a high degree (see *S v Smith and Others* 1973 (3) SA 21 (T). In *Drake v Power* (1961) 46 MPR 91, a Canadian case cited by Saunders Words and Phrases Legally Defined Vol 3 p 332, the expression "gross negligence" is use fully defined as implying "conduct in which there is a marked departure from the standards by which responsible and competent drivers habitually govern themselves."

1984 (1) ZLR p234

REYNOLDS J

"Recklessness", on the other hand, connotes not only a wilful disregard for the safety and rights of other road users, but also "cases of indifference or rashness or inadvertence in which

consciousness of consequences plays no part" (*S v Van Zyl, supra*, at 558). Recklessness may be shown by proof of gross negligence, but proof of gross negligence does not necessarily show recklessness (*R v Greenland, supra*).

In deciding, therefore, whether a motorist's driving may be reckless or grossly negligent, the Court should not, in my view, believe that it cannot enter a finding of gross negligence because there is nothing to show that the driver was guilty of some form of wilful or wanton disregard of the rights of others - that is, that an element of advertence was not present. This is not necessarily part of the concept at all (see *S v Barnard* 1965 (3) SA 644(T)).

As part of the overall exercise in determining degrees of culpability in driving cases, it is also often necessary to decide whether the conduct of the driver consists of "ordinary" or "gross" negligence. The difference is one of degree and in each case the Court must essentially make a value judgment. In Cooper's Motor Law Vol 1, 509, the following helpful test is suggested:

- "(i) Did the accused, judged according to the standard of the reasonable man, drive in a manner which was reasonable in the circumstances?
- (ii) If not, would a reasonable man, aware of all the circumstances, including those circumstances of which the accused was or must have been aware, consider the latter's departure from the accepted norm so great that his driving should be stigmatised as gross negligence?"

In applying the above criteria to the present case, it is my view that the answer to the first question posed in Cooper's test would merit a firm "No", and to the second question an equally positive "Yes".

As in *van Zyl's* case, *supra*, this accused could not have veered completely onto the wrong side of the road as a result of momentary inadvertence or inattention. The magistrate himself said -

"If one is looking, one can see whether one is on the correct or incorrect side of the road. A motor cycle is visible - not the most visible of things perhaps - but it is visible ... It seems that it was probably more than mere momentary inattention on the accused's part."

1984 (1) ZLR p235

REYNOLDS J

From the facts established, it may be seen that it is not possible to come to any definite conclusions as to what actually occurred in view of the fact that the accused could not explain his vehicle being on the incorrect side of the road. Nor could he explain why it was that he did not see the deceased at any time before the collision. In the result, it is necessary to decide what inferences may be drawn from the proved facts. In my view, the only reasonable inferences that may be drawn are that the accused was -

- (a) incapable of controlling his vehicle; or was
- (b) deliberately, for some reason, travelling on the incorrect side of the road in the face of oncoming traffic; or was
- (c) not looking where he was going for an appreciable period of time.

The inference most favourable to the accused is the last possibility, and it is only fair that

neither of the more adverse inferences should be drawn against him.

On this finding, which appears to have been the finding of the trial magistrate as well, it is my opinion that the accused's driving on this evening was grossly negligent. It is also my opinion that the sentence imposed was disturbingly inappropriate. One of the cases cited by the Attorney-General was *S v Dzvatu, supra*, in which McNALLY J introduced the judgment by posing the startling and eye-catching question, "Does it pay to kill?". This judgment, far from supporting the opinion that the magistrate's sentence in this case was appropriate, is most critical of the fact that a fine was imposed in a serious culpable homicide case. At page 3 of the cyclostyled judgment *(2), McNALLY J says -

"To my mind, anyone who drives straight through a 'Give Way' sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly negligent..."

I referred this matter to the Attorney-General and he agrees that a prison sentence and a prohibition from driving would have been appropriate."

The learned judge withheld his certificate in that case; and I have no option but to do the same in the present case, for I do not consider that the sentence imposed is in accordance with real and substantial justice.

1984 (1) ZLR p236

PAWENI v MINISTER OF STATE (SECURITY) AND ANOTHER 1984 (1) ZLR 236

Court High Court, Harare

Smith J

6 and 9 April 1984

Flynote

Statutes - Emergency Powers (Maintenance of Law and Order) Regulations 1983 - s 21 - detainee - right to be advised of reasons for detention vagueness of reasons - necessary for reasons to be sufficiently clear to enable detainee to make representations about propriety of detention - effect of failure to provide reasons - use of detention under Emergency Powers regulations to investigate criminal offence - unlawfulness of.

Detainee - access to by legal practitioner - no right by detaining authorities to restrict - past instances of - future cases may result in costs on legal practitioner and client scale being awarded against State.

Headnote

Section 21 of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983 provides that a person detained under that section must be informed of the reasons for his detention. The reason for this is so that the detained person can make representations concerning the propriety of detention to the detaining authority and to the Review Tribunal. If the reasons given are too vague to enable the detainee to make representations, the section has not been complied with.

Failure to comply with the section does not in itself invalidate the detention. It must, initially, be

Copyright Juta & Co Ltd

remedied by way of an order to ensure that the safeguard provided by the section is afforded to the detainee.

Use of the powers of detention given under the Regulations for reasons other than those provided in the Regulations is unlawful. It would be improper and unlawful for the police to use those powers merely in order to investigate a criminal offence or to prevent a suspect from breaching the conditions of his bail. The right of a detainee to instruct and consult privately with his legal advisers is set out clearly in the Regulations and in the Constitution. There have been numerous cases

1984 (1) ZLR p237

SMITH J

reported which have emphasized this right and it should not be necessary for a detainee to have to bring an action to enforce his rights. The extensive powers given to the CIO carry with them a concomitant obligation to exercise those powers *bona fide*, reasonably, with discretion and within the law. The denial by the CIO of the right of the detainee to access to his legal practitioner will, in future, very likely result in costs being awarded against the State on a legal practitioner and client basis.

Cases cited:

Kapwepwe and Kaenga v The People [1972] Zam LR 248;

State of Bombay v Vaidia AIR 1951 SC 157;

Banda Joyce v Attorney-General [1978] Zam LR 233(SC);

Minister of Home Affairs v Dabengwa 1983 (2) ZLR 346;

Uganda v Commissioner of Prisons ex p Matowu (1966) EA 514;

Minister of Home Affairs and Others v Dabengwa and Another 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC);

Ebrahim v Villet 1917 CPD 442.

I A Donovan, for the petitioner

S Mafara, for the respondents

Judgment

Smith J: The petitioner is in detention in Chikurubi Maximum Security Prison.

He was arrested on 22 March 1984 by members of the Fraud Squad, CID, on allegations of having defrauded the Government of Zimbabwe. The basis of the allegations is that a company, in which he is a shareholder, overcharged a Government Ministry in respect of certain transport contracts to the extent of some \$5 700 000. The petitioner was released on the same day, having deposited \$10 000 as bail. The following day the petitioner was taken before a

magistrate and remanded for two weeks. He was permitted bail in the sum of \$50 000 cash and required to surrender his travel documents. He was released from custody that same morning, having paid the bail money and surrendered his travel documents.

Then, on 27 March 1984, the petitioner was approached at his office by members of the CIO, which organisation falls within the portfolio of the respondent. They questioned him about the same allegations as had given rise to his arrest by members of the Fraud Squad and asked for documents relating to that matter, which the petitioner produced. One of the CIO officers then advised the petitioner that he wanted the petitioner to see "his boss" and gave the petitioner to understand

1984 (1) ZLR p238

SMITH J

that he would be absent from his office for a period of some hours. The petitioner accompanied the CIO officers to the Central Police Station where he was detained in the cells. Later in the day the petitioner was visited by his wife and his legal practitioner. A CIO officer remained within earshot during the twenty-minute conversation between the petitioner and his legal representative, saying that he was required to do so.

The petitioner spent the night of the 27th and most of the 28th in the police cells and at no time was visited by a member of the CIO or any other official in connection with the allegations made against him. In the afternoon of the 28 March the petitioner was moved to Chikurubi Maximum Security Prison, where a detention order was served on him. The petitioner has remained in detention since that date. At no time during that period has any official made any attempt to interrogate him or to discuss either the allegations against him or the matters referred to in the detention order as being the grounds on which the detention order was made.

During his detention at Chikurubi the petitioner has been visited on two occasions by his legal practitioner. On both occasions a CIO officer was present during the consultation and on the second occasion the officer took notes of the discussions. Apparently the legal practitioner was only permitted access to the petitioner on condition that during his consultations a CIO officer was present.

The petitioner avers that his detention is unlawful. There are three grounds for this averment. Firstly, the grounds for his detention as set out in the detention order do not justify his detention "in the interests of public safety or public order". Secondly, the allegation that he intended to flee the country is not a proper ground to justify his detention. If it was believed that the petitioner did intend to flee the country, an application should be made to Court for bail to be withdrawn. Thirdly, the petitioner has been denied full and proper access to his legal practitioner.

The petitioner submitted a certificate of urgency and sought an order declaring his detention to be unlawful and the detention order to be invalid and of no force and effect, ordering his release from custody by 4 pm on 6 April 1984, and awarding him costs of suit.

1984 (1) ZLR p239

SMITH J

The petitioner was detained in terms of s 21 of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983, (SI 458 of 1983), hereinafter referred to as "the Regulations". The relevant provisions of that section read as follows:

"21. (1) Subject to the provisions of section 41, any police officer may without warrant arrest and detain, pending inquiries, any person in respect of whom he has reason to believe there are grounds which would justify his detention under section 17.

(2)

(3) Where a person is detained in terms of this section, he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands, of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him.

....."

The detention order served on the petitioner gives the following as the grounds for detention:

"Intelligence has been received that you, in addition to being involved in allegations of fraud, are also engaged in acts of economic sabotage against the state and people of Zimbabwe.

It is alleged that you have conspired with persons with external connections to defraud the Government of moneys which were to be utilised in the national interest and development of Zimbabwe.

It is further alleged that in association with these external agents, it was your intention thereby to undermine the economy of Zimbabwe under the cover of your normal business activity.

Intelligence indicates that you are in control with these external elements in order to flee from Zimbabwe and thus avoid prosecution and possible embarrassment to your associates.

It is considered that your activities pose a threat to the economic security of Zimbabwe and that it is in the interest of the state and the people that you are detained whilst full investigations are made at both an economic and political level."

Mr *Donovan*, for the petitioner, submitted that the requirements of s 21(3) of the Regulations have not been met. Although the detention order sets out grounds for the detention of the petitioner, they are, he argued, so vague that they do not inform the petitioner adequately of the reasons for his detention as contemplated by the Regulations and s 2 of Schedule 2 to the Constitution.

1984 (1) ZLR p240

SMITH J

The question of vagueness and what test should be applied in deciding the adequacy or otherwise of reasons given for the detention of any person were considered very fully in *Kapwepwe and Kaenga v The People* [1972] Zam LR 248 (CA). Both DOYLE CJ and BARON DCJ cited with approval the passage in the judgment delivered by KANIA CJ in *State of Bombay v Atma Ram Vaidya* AIR 1951 SC 157, which reads as follows:

"What is meant by vague? Vague can be considered as the antonym of 'definite'. If the ground which is supplied is

incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case. It is however improper to contend that a ground is necessarily vague if the only answer of the detained person can be to deny it. That is a matter of detail which has to be examined in the light of the circumstances of each case. If on leading the ground furnished it is capable of being intelligently understood and is sufficiently definite to furnish materials to enable the detained person to make a representation against the order of detention it cannot be called vague."

BARON DCJ, after referring to a number of cases including Indian cases and a West Indian case, said at 262, lines 5-17:

"The tests suggested in these cases seem to me to amount to the same thing. A detainee must be given sufficient information to enable him to know what is alleged against him; if he is not given that amount of information it follows that he will not be able to make 'a representation which on being considered, may give relief' - an expression which could, perhaps, be shortened to 'a meaningful representation'. The State cannot, of course, be required to divulge information the nature or sources of which it would be contrary to the public interest to reveal; but the nature of the information on which the allegations against a detained person are based is quite different from the nature of the allegation itself, which a detainee is entitled to be told. I would state the test in this way: the detainee must be furnished with sufficient information to enable him to know what is alleged against him and to make a meaningful representation."

The wording of the Zambian legislation under consideration differs slightly from that of s 21(3) of the Regulations in that the former requires that detained person be furnished with a statement specifying *in detail* the grounds upon which he is detained. However, I do not think that the absence of the words "in detail" from s 21(1) of the Regulations means - that the test set out above is not applicable to s 21(3). The only purpose for which the detaining authority could be required to give reasons for detention would be so that the detained person could make meaningful representations to the detaining

1984 (1) ZLR p241

SMITH J

authority and the Review Tribunal. He would not be able to do so if the reasons given were, vague.

Mr *Mafara* contended that the reasoning set out above is not applicable in relation to persons detained in terms of s 21 of the Regulations since they are only being detained pending inquiries to ascertain whether or not they should be detained by the Minister under s 17 of the Regulations. He further submitted that the petition was premature since the petitioner could not expect the inquiries to be completed before at least fourteen days had elapsed from the date of his detention. If this submission were to be accepted it would mean that a person detained under s 21 of the Regulations would have to accept passively the fact of his detention and wait patiently until the inquiries had been concluded before he could ascertain the reasons for his detention and attempt to make meaningful representations.

Banda Joyce v Attorney-General [1978] Zam LR 233 (SC) concerned the case of a person, Banda Joyce, who had been detained by a police officer of senior rank because he had reason to believe that there were grounds which would justify her detention under a Presidential detention order. Banda Joyce was released after nine days in custody. The regulations under which she was detained required that grounds for her detention had to be furnished within

fourteen days. She sued for damages for wrongful arrest. The trial Court held that there was no duty to provide her with grounds for her detention, as the fourteen-day period had not elapsed before her release. BARON DCJ, however, rejected this approach. At 237 (lines 27-46) and 238 (lines 1-11), he said:

"In *In re Puta* CULLINAN J, expressed the opinion *obiter* that a detaining authority was under no constitutional obligation to furnish grounds in respect of a detention which had been revoked within fourteen days. *In re Cain* is to the same effect; DOYLE CJ, said (also *obiter*) at p. 77:

'... it is not necessary to furnish grounds for an order which has been revoked before the expiry of the fourteen-day period, but it is necessary that grounds should exist at the time the order is made.'

This dictum highlights the question: necessary for what purpose? It raises in the one sentence the two distinct purposes for which grounds may be necessary. A detention is unlawful *ab initio* if grounds therefor do not exist at the time of such detention (see for instance *Naresh Chandra v State of W B.*); the second time 'necessary' is used in this passage it therefore means necessary for a lawful detention

1984 (1) ZLR p242

SMITH J

ab initio'. But in addition to the necessity for the existence of grounds there is the further necessity to furnish them; *Chipango v Attorney-General* laid down that, notwithstanding that the initial detention may have been lawful, if grounds of detention are not furnished in terms of Art. 27 (1)(a) within fourteen days of its commencement continued detention thereafter is unlawful. The first time 'necessary' is used in the foregoing passage it therefore means 'necessary in order to validate continued detention'. These two necessities stem from completely different bases; the second is an obligation imposed by statute, while the first is imposed by a fundamental principle of the common law whose application is not affected by the specific inroads made by the Regulations or any other law authorising the deprivation of liberty. As I said in *Shipanga v Attorney-General* at p. 241:

'... in the absence of some legal justification for the deprivation of a person's liberty, whether legislative or under the common law, that deprivation is unlawful.'

That proposition is sacrosanct."

With respect, I consider that the reasoning in the above passage applies equally to s 21 of the Regulations. Having regard to this reasoning, and to the tests referred to above, I consider that the reasons for detention that are set out in the detention order are vague and do not enable the petitioner to make meaningful representations concerning the propriety of his detention. There is no indication of the kind of economic sabotage he has been engaged in. Mr Mafara said, in argument, that the first respondent had advised him that the intelligence received by CIO concerned the contract between the petitioner's company and Government which related to the delivery and distribution of foodstuffs in drought-stricken areas. Therefore it fell within the definition of "essential service" (by virtue of para (f) of that definition) in the Emergency Powers Act [Chapter 83] and consequently was included in the definition of "public order" in s 2 of the Regulations. There is no indication of this aspect, however, in the reasons furnished to the petitioner. Moreover, there is no indication of when the petitioner is believed to have conspired with "persons with external connections" to defraud Government or, indeed, who such persons are. The reference to persons with external connections and then to external agents and then to external elements contributes to the vagueness.

Having decided that the reasons furnished to the petitioner do not comply with s 21 (3) of the

Regulations, what is the remedy? Mr *Donovan* has urged that, as the first respondent has stood by the reasons

1984 (1) ZLR p243

SMITH J

given in the detention order as being adequate and has not attempted to elaborate on them, this Court should follow the lead set by the Courts in Zambia and order the release of the petitioner.

In Minister of Home Affairs and Another v Dabengwa 1983 (2) ZLR 346, BECK JA quoted from a decision of the High Court of Uganda, *Uganda v Commissioner of Prisons, ex parte Matovu* [1966] EA 514 which he found persuasive:

"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, by 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.'

BECK JA approved the approach that the violation of a safeguard relating to continued detention subsequent to the making of the carder 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. The reasons for preferring this approach are, with respect, very well expressed at pp 362-3 as follows:

"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, S1 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

1984 (1) ZLR p244

SMITH J

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 as far as the 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."

Section 21(3) of the Regulations requires that the reasons for detention be furnished within seven days. Reasons were furnished at the time of the petitioner's detention, which was eleven days ago. I have found that the reasons were vague and must be elaborated upon. As the first respondent must be well aware of the reasons, I feel that there would be no hardship caused if he were to be required to furnish adequate reasons within 48 hours.

Mr *Donovan* then argued that the power of detention had been improperly used and, on this basis, the detention order should be set aside. He referred to the vague reasons given for the detention and I would add here that Mr *Mafara* admitted that the first three allegations were very bald. He also referred to the denial of the petitioner's right of access to his legal practitioner and the manner in which the CIO officers had induced the petitioner to accompany them to the Central Police Station. He submitted that there were the strongest indications that the real reasons for the detention of the petitioner was the suspicion that he was about to flee the country. In such a case, therefore, the authorities should have arrested the petitioner in terms of the Criminal Procedure and Evidence Act [*Chapter 59*] so that the question of his being released on bail could be re-examined. Mr *Mafara* denied this, saying that the State security issue which concerned CIO was completely divorced from the fraud allegations, therefore the CIO had no *locus standi* with regard to the bail application. As CIO and CID are both organs of the State, I find it difficult to believe that they could not co-operate on this issue.

Whilst the methods adopted and reasons given for detention by the CIO officers in the case can be criticized, I do not feel that there are sufficiently strong grounds for coming to the conclusion that they were acting with improper motives. If, however, it had been established that

1984 (1) ZLR p245

SMITH J

the CIO officers had detained the petitioner merely in order to investigate a criminal offence or to prevent him from breaching the conditions of his bail, I would have adopted the views expressed by BARON DCJ in *Banda Joyce's* case, *supra*, at 240 (lines 22-39) concerning an equivalent provision in the laws of Zambia:

"The regulation gives power to arrest and detain a person if a police officer above the prescribed rank 'has reason to believe that there are grounds which would justify his detention under this regulation'; in other words, the officer may arrest and detain a person if, and only if, he has reason to believe that there are grounds which would justify the making of a Presidential detention order under reg. 33(1). The Plaintiff in this case was detained pending a decision whether she should be charged with an offence; in the event the investigation did not reveal evidence sufficient to charge her and she was released. It is clear from the record that if the investigation had uncovered evidence sufficient to support a charge the Plaintiff would indeed have been charged. I do not believe that the officer authorising this detention at any time contemplated making a recommendation to the President that the Plaintiff be detained under reg. 33(1); she was either to be charged as a result of the investigation, or released if it should prove negative or inconclusive. The regulation was used simply for the purposes of an investigation of a criminal offence - albeit a very serious offence; it was never intended to be used for such purpose and such use is unlawful."

The next matter to consider is the question of the denial by the CIO officers of the right of access to his legal practitioner which is conferred on the petitioner by the Regulations and para

2 of Schedule 2 to the Constitution. It is clear from such cases as *Minister of Home Affairs and Others v Dabengwa and Another* 1982 (1) ZLR 236; 1982 (4) SA 301 (ZSC) and *Minister of Home Affairs v Dabengwa* 1983 (2) ZLR 346 that every detained person has a right to instruct and consult with a legal practitioner of his choice. In the former case at 245 FIELDSEND CJ said:

"In my view, the learned trial Judge was clearly right in reaching the conclusion that, insofar as it conflicts with para 2 of Schedule 2, s 43 of the regulations is not saved by s 26 (2); and that the instructions issued under the regulation prohibiting the respondents from instructing and consulting with their legal advisers were at variance with the provisions of para 2 of Schedule 2 and that they are therefore *ultra vires* to that extent."

The judgment in that case was issued on 19 June 1982, and yet in March 1984 CIO officers are apparently still denying detained persons one of the rights, and a most important one at that, conferred on them by the Constitution. As Mr *Donovan* pointed out in argument, this

1984 (1) ZLR p246

SMITH J

right of access to a legal practitioner was canvassed thoroughly in the recent "Air Force Officers' trial", as it has become known, and the issue was extensively reported in the local Press. It is inconceivable that the existence and inviolability of this right is not known to all CIO officers of any standing. This Court takes a very serious view of such a deliberate flouting of the provisions of the Constitution by CIO officers. Mr Mafara conceded that the CIO officers had acted improperly in denying the petitioner the right to consult his legal practitioner in private. He said that if the petitioner had applied for a mandamus to secure this right the State would not have opposed it. I fail to understand, however, why it should be necessary for a detained person to have to apply to Court for a *mandamus* before he can exercise the rights which are conferred upon him by the Constitution. Whilst it is accepted that CIO officers must be able to investigate allegations of threats to the public security or public order in Zimbabwe, they must exercise their powers within the law. They have very extensive discretionary powers conferred upon them. The conferring of such powers carries a concomitant obligation that they must be exercised *bona fide*, reasonably, with discretion and within the law. CIO officers must be zealous in ensuring that the provisions of the Constitution and the Regulations are complied with and that the rights of detained persons are respected.

The petitioner has asked for an order that the first respondent pay his costs of suit. The petitioner has been successful in that, although his detention has not been declared unlawful, he will be able to obtain proper reasons for his detention and he will be able to consult with his legal practitioner. He would not have received these reasons, and apparently he would not have been able to consult his legal practitioner, had he not brought his petition. Mr Mafara has submitted that this Court cannot grant a *mandamus* against the first respondent because it has not been asked for on the papers. The result of accepting this submission would be that this Court would have to refuse the petition despite the failure of the CIO officers to comply with the requirements of s 21(3) of the Regulations or to allow the petitioner to consult with his legal practitioner. I reject this submission. Rule 236 of the High Court Rules provides that an ex parte application shall be made by petition and shall state the facts on which the application is based and the nature of the relief applied for. It then goes on to provide that it shall not be necessary

to ask for general or other relief which may always be

1984 (1) ZLR p247

SMITH J

given as the Court may think just to the same extent as if it had been asked for.

Although the petitioner did not apply for the award of costs on a legal practitioner and client scale, I have been very tempted to award costs on such a scale. The case of *Ebrahim v Villet* 1917 CPD 442 is sufficient authority for me to do so even though such award has not been asked for in the pleadings. I accept that such an order must not be granted lightly. However, I consider that the contemptuous denial by the CIO officers of the petitioner's right of access to his legal practitioner is sufficiently reprehensible or blameworthy to justify such an award. As this matter was not raised in argument, however, and Mr *Mafara* was not able to make any submissions in that regard, I have decided not to award costs on such a scale. I would warn the first respondent, however, that if in future an application is made to this Court by a detained person for an order to enable him to exercise his right to consult his legal practitioner because CIO officers are refusing to allow it, it is highly likely that costs will be awarded to the detained person on a legal practitioner and client basis.

It is accordingly ordered that the first respondent -

1. ensures that the petitioner is furnished with the reasons for his detention, as envisaged by section 21(3) of the Regulations, before 4 pm on Wednesday, 11 April 1984; and
2. ensures that the petitioner is permitted to exercise freely the rights conferred upon him by paragraph 2 of Schedule 2 to the Constitution and section 21(3) of the Regulations to hold communications with his legal practitioner in private; and
3. pays the petitioner's costs of suit.

The second respondent is granted absolution from the instance.

Gill Godlonton and Gerrans, legal practitioners for the petitioner.

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

1984 (1) ZLR p248

CHISVETO v MINISTER OF LOCAL GOVERNMENT AND TOWN PLANNING 1984 (1) ZLR 248 (HC)

Court **High Court, Harare**

Reynolds J

22 March and 11 April 1984

Flynote

Property spoliation - spoliation orders - long period since act of spoliation - property now in possession of a third party - third party not made party to proceedings - no practical purpose in granting order - application refused.

Headnote

A possessor of property who is forcibly deprived of his possession by means other than due legal process is entitled to have the property restored to him by means of a *manadament van spolie* or spoliation order. This is so whether or not his own possession was lawful.

Where there has been a long delay in bringing the application for a spoliation order, the Court has a discretion to refuse to grant the application where no relief of any value could be granted at the time of the hearing. This is so even if there is a reasonable explanation for the delay.

Where an applicant has been dispossessed of leased premises, an order for restoration will be of little value if the lease agreement has been properly terminated but the lessor, instead of pursuing his own rights through the proper channels, had forcibly evicted the lessee. In such a case, if the applicant were to be reinstated, the lessor could immediately apply for his ejectment.

The Court may also refuse to grant a spoliation order where the property has passed into the possession of an innocent third party. In such a case, a spoliation order against the disturber of the *status quo* will not restore the *status quo ante*, since the disturber is not in a position to restore possession. The dispute has by now moved from the realm of possessory remedies to that of a vindicatory action.

Cases cited:

Beukes v Crous and Another 1975 (4) SA 215 (NC);

Nino Bonino v de Lange 1906 TS 120;

Harris v Unihold (Pty) Ltd and Others 1981 (3) SA 144 (W);

Jivan v National Housing Commission 1977 (3) SA 890 (W);

Nienaber v Stuckey 1946 AD 1048.

1984 (1) ZLR p249

REYNOLDS J

PC Paul, for the applicant

SW Mafara, for the respondent

Judgment

Reynolds J: This is an application for a spoliation order.

On 8 August 1980 the applicant entered into an agreement of lease with the Minister of Local

Government and Town Planning whereby the applicant leased certain premises situated in the Mupandawana Township, Gutu. The applicant and his family remained in occupation of these premises thereafter. Then in January of 1983 the applicant was given notice to vacate the property by the Township Superintendent on the grounds that the applicant was no longer in employment in the area.

The Minister is cited as the respondent in this case, and his affidavit is to the effect that it is administrative policy that any resident who is out of employment for more than a month is, for that reason, no longer entitled to remain in occupation of Township premises. It was in implementing this policy that the applicant was served with a notice of termination of the lease. Clause 3 of the Agreement of Lease provides that one calendar month's notice of termination may be given by either party.

The applicant agreed that he was no longer in employment, but pleaded with the Superintendent to withdraw his notice as he had nowhere else to go. He continued to pay his rent to the District Administrator as usual. On 16 March 1983 the applicant was still in occupation of the premises when the Superintendent, the District Administrator and members of the Zimbabwe Republic Police forcibly removed the applicant and his possessions from the house, and he was denied further access to it. The applicant has stated that it is his belief that this eviction was politically motivated, but Mr *Paul*, for the applicant, now agrees that this allegation cannot be relied upon. The applicant has now applied for the premises to be restored to him.

The respondent opposed the application on the grounds that -

- (a) the lease agreement was properly terminated, and
- (b) the house has been re-allocated, and it would, therefore, be inequitable to reinstate the applicant.

1984 (1) ZLR p250

REYNOLDS J

Mr *Mafara*, for the respondent, argued that an action of spoliation was committed only if a possessor was in *lawful* possession of the property in question when he was dispossessed of that property. His contention was that as the applicant in the present case had been served with a proper and lawful notice of termination, he was, therefore, in unlawful occupation of the house on 16 March, and his forcible eviction on that date did not amount to an act of spoliation. This seems to me to be a somewhat surprising submission for, as I understand it, it is a well-recognized principle that in spoliation proceedings it need only be proved that the applicant was in possession of something and that there was a forcible or wrongful interference with his possession of that thing - that *spoliatus ante omnia restitendus est* (*Beukes v Crous and Another* 1975 (4) SA 215 (NC)). Lawfulness of possession does not enter into it. The purpose of the *mandament van spolie* is to preserve law and order and to discourage persons from taking the law into their own hands. To give effect to these objectives, it is necessary for the *status quo ante* to be restored until such time as a competent Court of law assesses the relative merits of the claims of each party. Thus it is my view that the lawfulness or otherwise of the applicant's

possession of the property in question does not fall for consideration at all. In fact, the classic generalisation is sometimes made in respect of spoliation actions that even a robber or a thief is entitled to be restored to possession of the stolen property. The oft-cited and approved passage of INNES CJ in *Nino Bonino v de Lange* 1906 TS 120 at 122 is pertinent:

"It is a fundamental principle that no man is allowed to take the law into his own hands; no one is permitted to dispossess another forcibly or wrongfully and against his consent of the possession of property, whether movable or immovable. If he does so, the Court will summarily restore the *status quo ante*, and will do that as a preliminary to any inquiry or investigation into the merits of the dispute. It is not necessary to refer to any authority upon a principle so clear."

On this basis the applicant is entitled, *prima facie*, to the order he seeks, for he has proved both factual possession and wrongful dispossession. But this is not the end of the matter, for a period of eight months has elapsed between the date of his dispossession and the bringing of this action to Court, and the question arises as to whether or not such a delay, and the consequential acquisition of legal rights in the property by a third party, has a bearing on these proceedings.

The applicant explained that the delay was occasioned by the fact that until recently he had insufficient moneys available to bring the

1984 (1) ZLR p251

REYNOLDS J

matter to Court. He submits, therefore, that there is a valid reason for the delay. It is of note that on 22 March, only six days after the eviction, the applicant's legal practitioners wrote a letter of complaint to the Township Superintendent concerning the eviction, and demanded that the applicant be reinstated.

As already mentioned, the respondent has stated that the applicant "is too late", and that the house has been re-allocated and that it would not be equitable to reinstate him, as any such order would prejudice innocent third parties.

The applicant's answer to this is to suggest that the person to whom the premises were allocated did not act *bona fide*, and is not in the position of an innocent third party. He suggests further that it would be expedient and just for this tenant to be given one month's notice to vacate the premises, and for himself to be restored to possession.

The applicant's affidavits in this connection allege:

- (a) that he "understands" that the person allocated the property in question has numerous other properties in the same township;
- (b) that he "believes" that this person was actively involved in trying to secure the applicant's eviction, and was, "to the best of his knowledge", present at the time of the eviction;
- (c) that he "presumes" that the new lease is on the same monthly basis, and it would cause no hardship to the person concerned to vacate after one month's notice;

particularly as the applicant "believes" that this person does not reside on the property himself.

The respondent has made no reply to these rather indefinite allegations, and it is necessary to decide whether this factor takes the matter any further.

It seems to me to be of little consequence that the respondent has chosen not to reply to the points made by the applicant in his answering affidavit, for they are levelled at a third party, and not at the respondent directly. Indeed, it could, possibly, be somewhat perilous for the

1984 (1) ZLR p252

REYNOLDS J

respondent to confirm, deny or even comment on the assertions made, as there could, in such an event, be a dispute arising between the respondent and the third party as to the true facts. No third or other party has been joined in these proceedings. But even if the applicant's beliefs are correct, this would be of little assistance to his case in my mind. The first two points made have only limited relevance as to the *bona fides* of the third party, and would not, in my view, even if true, prove that issue. The third point, if correct, would probably mean that a sub-tenant is in occupation of the property, and he could in fact be seriously prejudiced if served with a notice to vacate.

In any event, the irresolute nature of the applicant's affidavits indicates that he himself is unsure of the true position, and it may well be that there is no substance in his beliefs at all. If the Court were to make the order sought by the applicant in this situation, it could happen that the present lessee would dispute the allegations made, and yet would not be able to raise his version of the facts. He could, therefore, in this way be seriously prejudiced. To my mind, the onus rests on the applicant to prove that the third party was not acting *bona fide*, and that he is not in the position of an innocent third party, and this he has not done. His bare and indefinite assertions to this effect do not make them so. (See *Harris v Unihold (Pty) Ltd and Others* 1981 (3) SA 144(W)).

STEYN J in *Jivan v National Housing Commission* 1977 (3) SA 890 (W), carefully examined the matter of delay as it affects spoliation proceedings. On the authority of *Nienaber v Stuckey* 1946 AD 1048, and after reviewing the old authorities, STEYN J held that a delay of eight months in launching the petition was not, for this reason alone, sufficient to refuse relief to the applicant. He also held, however, after considering other cases dealing with the position of a third party, that -

"... A spoliation order against a party other than the spoliator is logically beyond the scope of the purpose of the *mandament* to prevent persons from taking the law into their own hands. Where possession has passed to a new possessor who became such in good faith, the *status quo ante* cannot be restored by remedial action against the disturber of the *status quo*. Unfortunately for the original possessor, the dispute has at that stage moved from the realm of possessory remedies to that of a vindicatory action. Delay on the part of the original possessor in recovering his possession, especially after he is aware of the advent of a new possessor in good faith, would, in my view, further exclude the right to such a spoliation order."

1984 (1) ZLR p253

REYNOLDS J

Finally, it was held that a Court has a discretion to refuse an application where, on account of the delay in bringing it, no relief of any practical value can be granted at the time of the hearing.

Mr *Paul* has criticised this judgment, and has contended that it was wrongly decided. I cannot agree with this submission. STEYN J in *Jivan's* case (*supra*), carefully considered opposing judgments and rejected them. I, with respect, associate myself with his views which, to my mind, accord with the bulk of authority, common sense, and the principles embodied in the *mandament van spolie*.

Finally, even if the order were to be granted, it would, in all probability, be of little practical value to the applicant. The lease agreement appears to have been properly terminated, and the respondent's only improper step, on the face of it, was to take the law into his own hands instead of pursuing his own rights through the proper channels. If the applicant were to be reinstated, it would appear that the respondent could immediately apply for his ejectment.

I hold, therefore, that the present application fails for the same reasons as given in *Jivan's* case.

As to costs, the applicant has, basically, proved his right to a spoliation order. Had the application been timeously made, and before the rights of other parties had been affected, he would have succeeded in his claim. It was only the delay involved - for which he has a reasonable explanation - and the consequences resulting, that preclude the applicant from succeeding. In the circumstances I order that each party pay his own costs.

Winterton Holmes and Hill, legal practitioners for the applicant.

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

1984 (1) ZLR p254

S v MUKADZIWASHE 1984 (1) ZLR 254 (HC)

Court High Court, Harare

Waddington J

11 April 1984

Flynote

Criminal procedure - trial records - must not be altered, particularly after proceedings concluded.

Criminal law - statutes - Road Traffic Act 1976 - s 65(2) - accused not in possession of any sort of drivers licence - incorrect to charge him with failing to produce drivers licence - if he drives, must be charged with driving without a licence.

Headnote

It is important for magistrates conducting trials, whether civil or criminal, to remember that records of the proceedings should not be altered, especially after the proceedings have been concluded. Appeal Courts and reviewing judges must be able to enjoy complete confidence in the accuracy of records placed before them. If a mistake is made on the record *per incuriam*, the magistrate should make a note on the record of the nature of the mistake and how the record should read.

Section 65(2) of the Road Traffic Act 1976 penalises any person who, having been the driver of a motor vehicle and having been required by a police officer to produce his drivers licence, fails to do so within seven days. The licence referred to in the section is one issued in terms of section 10 or 14 of the Act, that is, a learners licence and a drivers licence. If a person does not possess such a licence he cannot contravene the section. If such a person does drive a vehicle, the appropriate course is for him to be charged with contravening s 6(1) of the Act, that is, driving a vehicle without a licence. The two offences are mutually exclusive.

Judgment

Waddington J: The accused appeared in the Magistrates Court at Mvuma to face a charge of contravening s 65(2) of the the Road Traffic Act 1976. The summons which contained the charge set out a description of the particular offence in question, namely, that the accused, having been the driver of a motor vehicle and having been

1984 (1) ZLR p255

WADDINGTON J

required by a police officer to produce his drivers licence, wrongfully and unlawfully failed to do so within seven days. The summons then went on to set out an alternative charge, namely, one of contravening s 6(1) of the Road Traffic Act 1976. This offence, of course, is driving a vehicle without a drivers licence.

The magistrate, however, in convicting the accused, treated both offences described in the summons as two distinct offences, despite the fact that each offence arose out of precisely the same incident.

The Regional Magistrate who scrutinised the record pointed out to the trial magistrate that the summons had contained one principal offence with an alternative, and asked the trial magistrate why it was that he had convicted the accused as if two separate offences had been charged. The trial magistrate then replied:

"The trial Court forgot to erase the word 'alternative' as indicated on the charge sheet, the State having in fact indicated that they would be proceeding with the case as such.

The accused in fact did not produce the licence as requested by the police and in addition he had no drivers licence for the relevant motor vehicle, therefore the elements in both counts were proved."

This explanation is difficult to follow. The face of the summons, since the Regional Magistrate made his inquiry, has been altered, the word "alternative" having been crossed out in black ball pen ink and the expression "count 2" substituted in longhand. I presume that the trial magistrate

effected this alteration.

But the trial magistrate's explanation is at odds with what appears on the reverse of the summons in the spaces provided for the plea and the judgment. Opposite the legend "The prisoner, being arraigned, pleaded", appears the following:

"Court 1-G.

Alt 2 - G "

But the "1" and the "2" and the dashes have obviously been overwritten several times.

1984 (1) ZLR p256

WADDINGTON J

Opposite the word "Judgment" exactly the same entry has been made in precisely the same way with exactly the same numbers and dashes heavily overwritten. It would seem, therefore, that the trial magistrate was wrong when he implied that all he forgot to erase was the word "alternative". Assuming that a single main charge with an alternative was converted into two separate counts at the request of the State before plea - as I must, of course, accept, since the magistrate has said that this is what happened - it is strange that when the trial magistrate recorded the pleas and the judgment he should have described the second count "Alt 2" in both cases. Why not "Court 2"?

It is most important for magistrates to remember, when conducting a criminal trial or a civil trial for that matter, that the record of the proceedings should not be altered, especially after the proceedings have been concluded. Appeal Courts and reviewing judges must be able to enjoy complete confidence in the accuracy of the records which are placed before them. If a mistake concerning an important particular is made on the record by a magistrate *per incuriam*, the magistrate should make a note on the record as to the nature of the mistake and explain how the record ought to read.

I now turn to the merits of the case.

If the accused in fact possessed no valid drivers licence, one can understand the supreme difficulty he must have experienced on being requested to produce one to the police within seven days. The trial magistrate seems to have overlooked the fact that where s 65(2) of the Act refers to the production of a licence at the request of a police officer, the word "licence" means a licence as defined in s 2(1) of the Road Traffic Act 1976. "Licence" is defined as meaning *inter alia* "... an internal licence". An "internal licence" is defined as meaning "... a drivers licence ...". "Drivers licence" in turn is defined as meaning "... a drivers licence issued in terms of subsection (6) of section *ten* or subsection (1) of section *fourteen*."

The licences referred to in ss 10 and 14 are what are colloquially known as learners licences and drivers licences issued after appropriate tests conducted to establish the individual's competency to drive.

1984 (1) ZLR p257

WADDINGTON J

Consequently, the reference in s 65(2) to "licence" must mean a licence issued in terms of the Act. It follows that if a person does not possess such a licence he cannot contravene s 65(2) for the very obvious reason that the Legislature could not possibly have intended to make criminals out of all those many persons who are unable to produce, at the request of a policeman, licences they have never possessed. If an unlicensed person drives a vehicle, the remedy lies, not in the police trying to force him to do the impossible, but to prosecute him for driving without a drivers licence. It is clear that the intention was that the two offences were to be regarded as mutually exclusive.

In this case, therefore, the original decision of the State to charge the accused in the alternative was obviously the correct one. The decision to convert the charge into two separate offences was a wrong one. The conviction Therefore for contravening s 65(2) of the Act cannot be allowed to stand.

The conviction on what is described on the reverse of the charge sheet as "Alt 2", meaning presumably count 2, is set aside. The sentence of \$100 or in default of payment 20 days' imprisonment with labour imposed in respect thereof is also set aside. As a fine of only \$20 was imposed in respect of count 1 and as the accused paid the two fines in full, the sum of \$100 must be refunded to the accused without delay.

Smith J: agrees.

1984 (1) ZLR p258

S v HARUPERI 1984 (1) ZLR 258 (HC)

Court **High Court, Harare**

Smith J

16 May 1984

Flynote

Criminal procedure - plea of guilty - alteration of plea to one of not guilty - Criminal Procedure and Evidence Act [Chapter 59] - s 255A - procedure in terms of - nature of evidence required.

Headnote

Section 255A of the Criminal Procedure and Evidence Act [*Chapter 59*] has superseded the common law with regard to the powers available to the Court when an application is made to set aside a plea of guilty. If the accused makes his application during the course of an enquiry in terms of section 255 (ie the enquiry and procedure following a plea of guilty) and before the Court delivers its verdict, there is no *onus* on him to convince the Court of the truth of his explanation for why he wishes to change his plea. Where he has been convicted, there is an *onus* on him. The *onus* may be satisfied on the balance of probabilities, having regard to the general principles applicable when a person bears an onus in criminal procedures. In some

Copyright Juta & Co Ltd

cases, a statement from the bar by the accused's legal representative, or by the accused from the dock, may suffice. In others, *viva voce* evidence by or on behalf of the accused, and on behalf of the State, may be necessary. In such cases the magistrate should conduct the "trial within a trial" procedure, giving the accused and the State an opportunity to adduce evidence. Where the application is made to change the plea to not guilty because the accused now claims innocence, it is permissible to have regard to his statements in order to decide his guilt or innocence.

The Court should also bear in mind that some persons, content to plead guilty and be dealt with by the lower Courts, will endeavour to change their plea as soon as they realise that they are at risk of a greater punishment. *S v Mazwi* 1982 (23 SA 344(T) followed.

Cases cited:

S v Madimu 1971 (1) RLR 172;

S v Simbi 1975 (2) RLR 50;

S v Britz 1963 (1) SA 394 (T);

1984 (1) ZLR p259

SMITH J

S v Kannigan 1975 (4) SA 639(N);

S v Mbhele 1980 (1) SA 295(N);

S v Zwela 1981 (1) SA 335 (O);

S v Pillay 1981 (4) SA 151 (N);

S v Marwi supra;

S v de Villiers 1984 (1) SA 519 (O);

S v Misword and Lothingland Justices: ex p Harber [1971] 2 QB 291 ; [1971] 1 All ER 81.

Judgment

Smith J: The accused was charged with bribery, alternatively with contravening s 3(b) of the Prevention of Corruption Act [Chapter 70]. He appeared in Court on the morning of 9 April 1984 and pleaded not guilty to both charges. In the afternoon of the same day the accused was due to appear in Court in connection with an application for bail. He intimated, however, that he wanted the proceedings against him to be resumed as he wished to change his plea from not guilty to guilty. I might add that the accused was not legally represented at either hearing.

In the morning, the accused had said that he had misunderstood the charge and meant to plead guilty. When the magistrate pointed out that the charges were in the alternative and asked to which the accused wished to plead guilty he said "to both of them". The magistrate asked the accused whether he had been threatened or forced to change his plea and the accused said

no. He said that he was acting of his own free will.

The prosecutor said that he wished to proceed on the bribery charge and the magistrate carefully explained to the accused what the charge involved. He pointed out that it meant that the accused had offered money to Government officials in order to induce them to abstain from their duty and the accused indicated that he understood. He said "I agree having done everything. I am really sorry about it". The accused was duly found guilty on his plea and the case was remanded to 13 April.

At the resumed hearing the accused was legally represented. His legal representative applied for the plea of guilty to be changed to one of not guilty in terms of s 255A of the Criminal Procedure and Evidence Act [Chapter 59]. There were two grounds on which the application was based. Firstly, that although the accused had told the Court that he was pleading of his own free will and that no one had

1984 (1) ZLR p260

SMITH J

threatened or forced him to come to Court, this was not in fact correct. He had pleaded guilty because a police officer had threatened that if he pleaded not guilty, he would be detained for at least a year before being brought to trial. Secondly, the charge lacked particularity in that it did not disclose the names of each official who had been bribed and the amount of the bribe. The legal representative then called the accused to give evidence on the first ground, saying that he was not pressing the second.

The accused gave evidence concerning his duties as a fellow director of one Paweni, and the errands he ran for Paweni, who was the major shareholder in a company which ran an establishment called the Hideaway Café. He alleged that Paweni used to lend money to many people and they would come to the Hideaway Café to collect the money. The accused kept the money until the borrowers came to collect it. He never collected receipts because the arrangements were made between Paweni and the borrower. The accused then said that he was arrested on the morning of Friday 6 April and kept in the police cells until Monday 9 April when he appeared in Court. A detective inspector told him that if he did not plead guilty he would be charged jointly with Paweni, in which case he would be remanded in custody without bail or else detained in terms of a Ministerial detention order for six to twelve months. On Sunday 8 April the accused agreed to plead guilty and then when he appeared in Court on the 9 April he pleaded not guilty. He stated that when he left the Court the police officers said that he was just wasting their time and that they were going to give him some very bad treatment. He was told that he was going to be remanded to Chikurubi for 12 months or more and would be charged jointly with Paweni. This induced the accused to change his mind and plead guilty when he appeared in Court on the afternoon of the 9 April. On Wednesday 11 April the accused first saw his legal representative and told him of the threats and that his plea of guilty had not been made freely and voluntarily.

The trial magistrate refused the application for the plea to be changed. His reasons were twofold. Firstly, with regard to demeanour, he found that when the accused pleaded guilty he had been relaxed and inspired confidence that he was telling the truth whereas at his later

appearance he had appeared unhappy and his answers and manner of answering were unconvincing. Secondly, the magistrate had satisfied

1984 (1) ZLR p261

SMITH J

himself when the accused changed his plea that he was doing so of his own free will and that his answers at that time were consistent with a person making such an admission freely and not as a result of threats by the police.

Section 255A of the Criminal Procedure and Evidence Act [Chapter 59] which provides for the procedure where there is doubt in relation to a plea of guilty, was introduced into the Act by the Criminal Procedure and Evidence Amendment Act 1975 on the 19 September 1975. Prior to that date a magistrate could, under the common law, at any time before pronouncing sentence permit an accused person to withdraw his plea of guilty and substitute one of not guilty - see *S v Madimu* 1971(1) RLR 172 and *S v Simbi* 1975 (2) RLR 50. In the former case, at p 175, DAVIES J said:

"In *Patrick v R* 1963 R and N 893 (FC), however, it was accepted that a plea of guilty could be altered on appeal in certain circumstances. The requirements for such an alteration were stated by CLAYDEN FCJ to be those laid down in *Friedman v United States*, 99 US (Law Edn) 222: "The issue for determination by the court is whether the plea was voluntarily, advisedly, intentionally and understandingly entered, or whether it was at the time of its entry attributable to force, fear, fraud, ignorance, inadvertence or mistake such as would justify the Court in concluding that it ought not to be permitted to stand." The onus is on the accused to show that the plea was not voluntarily and understandingly made (per MacDONALD JP in *S v Mapawona* AD 79/77)."

The approach to be adopted by the Court in dealing with an application to change a plea of guilty was considered and dealt with at length in *S v Britz* 1963(1) SA 394 (T). CLAASSEN J at p 398F said:

"Then there is the case where the judicial officer is in doubt. If the prisoner submits, for example, that he pleaded guilty as the result of duress and the judicial officer has a reasonable doubt as to whether the plea was tendered freely, voluntarily and without duress, then in my view, because of the presumption of innocence, and the onus which rests on the prosecution that officer cannot exercise a discretion against the accused. He is then, in my opinion, bound to permit a change of plea (*R v George* 1930 EDL JS 354)."

and then at the bottom of that page and top of the next -

"The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear, fraud, duress, misunderstanding or mistake. If he fails to give an explana-

1984 (1) ZLR p262

SMITH J

tion the Court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no onus on him to convince the Court of the truth of his explanation. Even though his explanation may be improbable the Court is not entitled to refuse the application, unless it is satisfied not only that the explanation is impossible, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty.

It seems to me that on this basis all the reported cases can be satisfactorily explained."

Similar views were expressed by JAMES JP in *S v Kannigan* 1975 (4) SA 639 (N) at 640A as follows:

"It seems to me also on general principles that the magistrate should have allowed this application because, even when an explanation as to why an accused has pleaded guilty is somewhat improbable, the Court should not refuse an amendment to the plea unless it is satisfied not only that the explanation is improbable? but that it is beyond reasonable doubt false. If there is any reasonable possibility of his explanation being true then he should be allowed to withdraw his plea of guilty. For authority for that proposition I refer to *Swift Law of Criminal Procedure* 2 ed p 276."

Section 255A of the Criminal Code, which was introduced in 1975, provides as follows:

"255A. If the Court, at any stage of the proceedings in terms of section *two hundred and fifty-five* and before sentence is passed -

- (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
- (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
- (c) is not satisfied that the accused has no valid defence to the charge;

the Court shall record a plea of not guilty and require the prosecution to proceed with the trial."

This section is almost identical in wording to s 113 of the Criminal Procedure Act No 51 of 1977 of South Africa and the preceding s 255 sets out the procedure to be followed on a plea of guilty as does s 112 of the South African Act. In South Africa the Courts have considered the effect and meaning of s 113 of the South African Code and whether it codifies and replaces the common-law power of a Court to change a plea of guilty to one of not guilty. With regard to the implementation of s 113, which is equivalent to s 255A of our Criminal Code, KRIEK J, in

1984 (1) ZLR p263

SMITH J

S v Mbhele 1980 (1) SA 295 (N) at 298 B said:

"On the contrary, having regard to the language of s 113, it seems to me that the Legislature intended to effect a substantial departure from the common law position which prevailed at the time of its enactment. The position prior to that time appears to have been (see *5 v Britz* at 398-399) that an accused was obliged to give a reasonable explanation for his initial plea of guilty, but that, even if that explanation was improbable, the Court was not entitled to refuse to permit the accused to change his plea, unless it was satisfied that the explanation was beyond a reasonable doubt false. Section 113, on the other hand, requires a court to order a change of plea if it is in doubt whether the accused is in law guilty or if it is satisfied that one or other of the circumstances envisaged in para 2 above is or are present."

And then at p 299E KRIEK J said:

"Finally, there is the question of onus in relation to an enquiry as to whether or not a Court is obliged to order a change of plea pursuant to the provisions of s 113. Having regard to the wording of that section my conclusions in this regard may be stated as follows:

1. In those cases in which the basis of the application of the provisions of s 113 emerges during the course of the s 112 (1) (b) questioning, or spontaneously at any stage of the proceedings (vice the examples

mentioned above), there is no question of any onus.

2. When an accused applies for leave to change his plea from guilty to not guilty, he bears an onus of satisfying the Court that one or other of the circumstances envisaged by s 113 is present; subject to what I have said regarding an accused not being entitled to select one of those circumstances at random as it were.
3. That onus can, having regard to the general principle applicable when a person bears an onus in criminal proceedings, be discharged by proof on a balance of probabilities."

Whilst KRIEK J held that s 113 of the South African Act had effected a substantial departure from the common law provision he did not deal with the question of whether the new statutory provision replaced the common law provision or coexisted with it. In *S v Zwela* 1981(1) SA 335 (O) FLEMMING J and KOTZE AJ held that s 113 did not regulate exhaustively the question of altering pleas of guilty to not guilty. In applications for the alteration of such pleas which are not covered by s 113 (eg where the accused alleges that he pleaded guilty as a result of duress) the "common law" still applies and the application must be decided according to the discretion of the Court. The full bench of the Natal Provincial Division, in *S v Pillay* 1981 (4) SA 151, likewise held

1984 (1) ZLR p264

SMITH J

that s 113 of the South African Code was introduced to supplement and complement the provisions of s 112 thereof, and does not provide for the alteration or correction of a plea of guilty in all circumstances. Consequently in circumstances where s 113 has no application the common law principles will govern the procedure and the test to be applied by the Court in deciding whether or not to alter the plea.

These two cases of *Zwela* and *Pillay* were very carefully considered and analysed by the full bench of the Transvaal Provincial Division in *S v Mazwi* 1982(2) SA 344. At p 353 VAN DIJKHORST J said:

"Section 113 deals with all pleas of guilty. Why should it provide for only certain instances of withdrawal of a plea and then set a higher standard in respect of them? The Legislature, presumably knowing the common law, could have left out s 113 and everything would have been covered by the common law. The fact that s 113 was inserted in these circumstances is in my view indicative of the fact that the Legislature intended to legislate all-embracingly in respect of this subject. In my view there is really no room for a common law withdrawal of a plea of guilty separate from that under s 113. The following contingencies may arise:

- (a) An accused pleads guilty although he in fact is not guilty. In this case he will have a good defence in law or will not admit all the factual elements of the crime. This contingency is catered for in s 113.
- (b) An accused pleads guilty and he is in fact guilty (as shown by the enquiry under s 112) but he now wants the State to prove its case; In this case a Court will at common law not exercise its discretion in his favour; this is not a game; neither will s 113 come to his aid.
- (c) An accused pleads guilty and is in fact guilty (as shown by the enquiry under s 112) but his plea of guilty was brought about by fraud, coercion or mistake (as to the nature of his plea). In such event the plea is vitiated and is no plea at all. A court, knowing this fact, would Therefore never find the accused guilty on the basis of this "plea". In law he would not be guilty. If the Court has unwittingly found the accused guilty on the basis of such a "plea", and before sentence is pronounced the facts will lead to a conclusion that

there was no plea of guilty at all and that in the absence thereof there was no legal basis for the conviction. In these circumstances s 113 would be applicable.

For the reasons set out above I am of the opinion that s 113 of Act 51 of 1977 supersedes the common law. It follows that this appeal has to be approached on the basis of s 113 only."

With respect I concur with the reasoning set out above and am of the opinion that s 255A of our Code embraces all contingencies where there is an application to set aside a plea of guilty. There is no longer

1984 (1) ZLR p265

SMITH J

any need or place for the former common law powers which were available to the Court for setting aside such a plea, because s 255A has superseded the common law.

I agree also with the views expressed by VAN DIJKHORST J concerning the onus which rests on the accused where he has applied to set aside his plea of guilty. If the application is made during the inquiry in terms of s 255 and before the Court delivers its verdict the question of an onus cannot arise. If, however, the application is made after the court has found the accused guilty, then there is an onus on him which can be discharged by proof on a balance of probabilities, having regard to the general principles applicable when a person bears an onus in criminal proceedings. As VAN DIJKHORST J said at pp 351 and 352 in *Mazwi's case* "

"As I will point out later there is no onus before conclusion of the enquiry in terms of s 112 and before the verdict of guilty is pronounced. The onus only arises after conviction. By that time the Court (in all except the petty cases under s 112(1) (a)) will be satisfied that the accused is guilty and will have brought out a verdict accordingly. Surely it is not inequitable to require that in these circumstances anyone who wants to set aside the conviction and instal a plea of not guilty should satisfy the Court that there are good grounds for doing so?

It is further reasoned in *Zwela's case* that an accused will have to satisfy a Court on the probabilities of his innocence before it can be said that he "incorrectly admitted" an allegation, whereas thereafter upon a plea of not guilty being entered the enquiry is merely whether the accused's version could reasonably possibly be true (344A-B).

This is not as strange as it appears. Whereas a man is presumed innocent until proved guilty, once he has pleaded guilty and has been found guilty there is no reason for this presumption. Why should he then be in a better position than a defendant in a civil suit who has had judgment by consent or default granted against him? One is surely entitled to assume that a plea 'deliberately and solemnly made under the protecting caution and oversight' of the Court is freely made by an accused who fully understands and appreciates the consequences of his admission. *R v Kumalo and Another* 1930 AD 193 at 202. As such it is a solemn confession of guilt made *coram curia* (344D)."

In this case the accused has applied for the alteration of his plea on two grounds viz coercion and undue influence and also actual innocence. Similar circumstances applied in the case of *S v de Villiers* 1984 (1) SA 519(O). The judgment by STEYN J is in Africans but the relevant part of the headnote reads as follows:

1984 (1) ZLR p266

SMITH J

"Where an application for an amendment of a plea from "guilty" to "not guilty" (*vide* s 113 of the Criminal Act of 1977) rests upon two bases, namely that of coercion and undue influence on the one hand, and that of actual innocence on the other, the merits of the matter in relation to the guilt or innocence of the accused must also be taken into account and the trial Court will at least have to decide whether there is a reasonable possibility that the accused is innocent and that the application is *bona fide*. It is, accordingly, permissible in such cases to have regard to the accused's statements during explanation of plea in terms of s 112(1)(b). In cases where only the first basis is at issue, the question of guilt or innocence will be irrelevant."

As to the methods by which the requirements of s 255A may be satisfied no hard and fast rule can be laid down. The section itself gives no indication in this regard and each case must obviously be decided on its own merits. In some cases a statement from the Bar by an accused's legal representative, or by an accused from the dock, may suffice. In other cases viva voce evidence by or on behalf of the accused, and on behalf of the State, may be necessary. In such cases the magistrate should conduct the "trial within a trial" procedure, giving the accused and the State an opportunity to adduce evidence.

In my view, in this case the magistrate should have adopted the "trial within a trial" procedure in order to determine the accused's application. I do not think he was correct in deciding the issue to use the test of comparing the demeanour of the accused on the two separate occasions when the accused was giving evidence. The accused might well have been relaxed on the first occasion because he was doing what the police officers wanted him to do, whereas on the second occasion he was acting contrary to their wishes and might therefore have been fearful of, and worried about, the consequences of his change of heart. Likewise, I consider that the second basis given by the magistrate for his decision was erroneous. Obviously, on the occasion when the accused applied to change his plea from not guilty to guilty, the magistrate only accepted the plea because he was satisfied that the accused was acting of his own free will. However, this could only be on the basis of the accused's testimony at that time. When the accused gave completely different evidence on the later occasion, he should not have been disbelieved merely because the magistrate had accepted the evidence he gave on the earlier occasion.

When considering this application to change the plea, I have had regard to the *dictum* of LORD PARKER CJ in *R v Muford and Lothing-*

1984 (1) ZLR p267

SMITH J

land Justices: ex parte Harber [1971] 2 QB 291 at 299, where he referred to the clear danger that accused persons, content to plead guilty and be dealt with by the lower Courts, will endeavour to change their plea as soon as they realise that they are at risk of greater punishment. This is of course a danger that will be borne in mind by any Court called upon to determine an application for a change of plea. In this case, the accused applied for his plea to be changed before he was advised by the magistrate that he did not consider that he had adequate jurisdiction and was therefore reporting to the Attorney-General in terms of s 58(2) of the Magistrates Court act [Chapter 18].

As was stated in *de Villiers' case supra*, in considering an application to change a plea of guilty in cases such as the present one where the accused says he is in fact innocent, it is permissible

to have regard to accused's statements in order to consider his guilt or innocence. The accused did admit, according to the agreed statement of facts, that, acting on the instructions of Paweni, he had offered bribes to some State officials. The magistrate correctly pointed out to the accused what the charge meant and the accused replied that he understood and "agreed having done everything". Such a reply might possibly indicate that the accused was wanting to agree with everything because of coercion by the police. When applying for the change of plea, the accused agreed that he had handed money over to certain State officials but said that he understood they were loans. Accordingly I am not satisfied that it would be safe on the evidence in the record to reject the application of the accused on the ground that there is proof beyond doubt of his guilt.

Had the magistrate not made such definite findings on the demeanour and credibility of the accused I would have followed the procedure adopted in *Pillay's case supra* and referred the matter back to him for the purpose of enabling him to decide, in the light of this judgment, whether or not to permit the accused to alter his plea of guilty and thereafter to proceed with the case to its conclusion. As I cannot do so, however, the case will have to be tried by a different magistrate.

It is accordingly ordered that the conviction of the accused is set aside, as is his plea of guilty, and the matter is referred for trial *de novo* before a different regional magistrate. Having regard to the provisions of the proviso to s 255A of the Criminal Procedure and Evidence Act

1984 (1) ZLR p268

SMITH J

[*Chapter 59*], any element or act or omission correctly admitted by the accused in the first trial and which has been recorded in terms of s 255(3) of that Act shall be sufficient proof in the new trial of that element or act or omission.

Waddington J: agrees.

1984 (1) ZLR p269

S v RAYITI 1984 (1) ZLR 269 (HC)

Court **High Court, Harare**

16 May 1984

Smith J

Flynote

Criminal law - housebreaking with intent to commit an offence - nature of premises broken into - whether tent at holiday camp-site constitutes "premises".

Criminal procedure - review - counts quashed - sentence on others increased - whether sentence imposed on

review "more severe" than that passed by magistrate.

Headnote

The word "house", as applied to the crime of housebreaking, is a term of art covering premises or structures that are not houses in ordinary parlance. The test whether a structure or premises can be broken into is whether it 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, in addition, be some degree of permanence about the purpose for which the structure is used.

Items such as caravans and camping tents, which are specifically designed and intended for human habitation, would constitute "premises" even though, by their very nature, they are more likely than not to stand empty and unused or to be folded up and not used for substantial periods.

Thus, where the accused opened the flap (which had been tied closed) of a tent pitched in a camping site at a holiday resort, the tent would meet the test of what constitutes premises for the purposes of the offence.

Where property belonging to more than one complainant is stolen on one occasion, a single offence is committed, and the accused should be charged with only one offence. If the accused is convicted of two offences in the magistrates Court, the conviction would have to be altered on review to one count. As regards the sentence, it is permissible on review to pass a sentence greater than that originally passed in respect of the single count remaining, provided that the substituted sentence does not exceed the total sentence passed by the magistrate in respect of the theft of all the property.

1984 (1) ZLR p270

SMITH J

Cases cited:

S v Jecha and Others 1983 (2) ZLR 181;

R v Thompson 1905 ORC 127;

R v Johannes 1918 CPD 488;

R v Peter 1965 (3) SA 19 (SR).

Judgment

Smith J: The accused was charged with 3 counts of housebreaking with intent to steal and theft. On 25 November 1983 the three complainants had left their property in a bedroom - tent which they were using at a camping site at Kariba, and had secured the door of the tent by tying it with a rope. Whilst they were out fishing, the accused untied the rope, entered the tent and stole some clothes. The accused admitted that he had entered the tent and stolen the clothing referred to in counts 1 and 3.

The State withdrew the charge on count 2, and the accused was convicted on counts 1 and 3.

Copyright Juta & Co Ltd

On count 1 he was sentenced to six months' imprisonment with labour, and on count 3 to nine months' imprisonment with labour and a suspended sentence of five months' imprisonment with labour imposed on 4 March 1983 was brought into operation.

In giving his judgment, the magistrate did not indicate whether or not he had considered the possibility that the tent did not constitute premises for the purposes of the offences of which the accused was charged. The learned authors of Hunt's *South African Criminal Law and Procedure* Vol 2 point out, when discussing the offence of housebreaking, that the word "house" is a term of art that covers many types of premises or structure 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, deriving as it seems to do from both Roman-Dutch and English law sources. In *S v Jecha and Ors* 1983 (2) ZLR 181 at 183-4 SQUIRES J dealt fully with the question of what constitutes "premises". He said:

"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 the *South African Criminal Law and 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

1984 (1) ZLR p271

SMITH J

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 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 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."

According to the authors of the *South African Criminal Law and Procedure* Vol 2 there must be some degree of permanence about the use or purpose for which the structure is used, but no indication is given as to the degree of permanence considered necessary. It is not clear whether there must be habitual use over an extended period or whether intermittent use over a period is sufficient. Authority for the necessity of some degree of permanence is referred to in *R v Thompson* 1905 ORC 127 and *R v Johannes* 1918 CPD 488. In the latter case the former is merely quoted without comment.

In *Thompson's* case MAASDORP CJ at p 128 said:

"The question we have to decide is whether breaking into a tent occupied by persons constitutes the crime of housebreaking. According to Matthaëus the crime would be committed when a person breaks into a structure permanently occupied. The test appears to me to be the permanency of the occupation, the use to which the structure broken into is put. The same principle is involved in distinguishing between *praedium rusticum* and *praedium urbanum*, namely, the purpose for which either is used. In this case the structure is used for a dwelling-house, and the sentence and conviction must be upheld."

In my view, items such as caravans and camping tents which are specifically designed and

intended for human habitation would constitute "premises" even though, by their very nature, they are more likely than not to stand empty and unused or to be folded up and not used for substantial periods. In this case, as the tent was obviously a proper tent, with a flap that could be tied closed, designed for human habitation, and as the complainants were using it for camping purposes in an area set aside for campers, I am satisfied that it would meet the test of what constitutes premises for the purposes of the offence charged.

1984 (1) ZLR p272

SMITH J

There is one further point which has to be considered and that is whether or not there has been an unlawful splitting of charges in this case. Although admittedly the property belonged to two complainants, the stealing of the property constituted one criminal transaction and in my view the accused committed only one act of theft and not two. The housebreaking itself could only have been one transaction. See *R v Peter* 1965 (3) SA 19. At 20C-D GOLDIN AJ, (as he then was) said:

"In these circumstances, it is clear that the conviction on six separate counts cannot stand. Since the evidence led at the trial revealed that there had been a theft of the property from several persons at the same place and time, one *contrectatio*, the magistrate should have brought in a single verdict of theft and not a verdict of guilty on six separate counts. Accordingly, it is necessary to amend one of the counts of theft so as to incorporate all the property alleged and proved to have been stolen by him and which formed the subject matter of separate counts. In other words, while the accused committed one act of theft and can only be found guilty on one count, it is necessary to amend this single count to include the allegations of theft from the other five complainants. See *R v Rankolane* 1931 EDL 159 and *S v Ndlovu*, *supra*."

If the accused is convicted of only one count the question arises as to the proper sentence to be imposed. The magistrate had imposed a total of 15 months' imprisonment with labour, six months for count 1 and nine months for count 3. In my view, the reduction in the number of counts must be reflected in a reduction in sentence, and I am of the opinion that nine months' imprisonment with labour is a proper sentence for the offence committed.

In *Peter's* case the accused had been sentenced to one month's imprisonment with labour on each of the six counts of theft. GOLDIN AJ set aside the convictions on five counts and incorporated in the remaining count all the items of property stolen but felt that a sentence of one month's imprisonment with labour was not adequate. At pp 20 and 21 he said:

"In my opinion the sentence of one month's imprisonment on a single amended count in the present case is not in accordance with justice and a greater sentence is required. I do not think, however, that by increasing the sentence in respect of the one count as amended I would be acting contrary to the provisions of s 56 (2) (b) of the Magistrates Court act [Chapter 15] which precludes me from imposing a sentence which is "more severe" than the sentence imposed by the magistrate's Court. In my view, by increasing the sentence on count one as amended, the sentence so substituted is not "more severe" than the sentence imposed by the magistrate as long as the substituted sentence does not exceed the total sentence imposed by the

1984 (1) ZLR p273

SMITH J

magistrate in respect of the theft of all the property which now forms the subject matter of a single count and which constituted the subject matter of six separate counts before him. In other words, I am only precluded from

substituting a single sentence of more than six months. The substituted sentence should relate not to count one as originally framed, but to one count as amended by the addition of other items, originally the subject of the other counts and in respect of which separate punishment was imposed."

The provisions of s 56(2)(b) of the Magistrates Court act (Chapter 15 of the 1963 edition) referred to above are similar to the corresponding provisions set out in s 29(2)(b)(ii) of the High Court of Zimbabwe Act 1981. With respect, I consider that the above reasoning is applicable in this case.

The following order is made:

- a) Court No 1 is amended by the addition of the items stolen from the complainant as contained in count No 3.
- b) The conviction on count No 1 as amended is confirmed.
- c) The sentence of six months' imprisonment with labour on count No 1 is set aside and a sentence of nine months' imprisonment with labour is substituted therefor.
- d) The conviction and sentence on count No 3 are set aside.
- e) The order of the magistrate bringing into operation the suspended sentence of five months' imprisonment with labour is confirmed.

McNally J: agrees.

1984 (1) ZLR p274

CONE TEXTILES (PVT) LTD v C PETTIGREW (PVT) LTD AND ANOTHER 1984 (1) ZLR 274 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA and Goldin AJA

21 March and 17 April 1984

Flynote

Practice and procedure - costs - appeal - against taxing master's award - grounds on which appeal Court may interfere with taxing master's discretion.

Headnote

An appeal court has power to interfere with a taxing master's determination of fees on two grounds. The first ground is the application of the common law grounds for review. This involves a finding that the master was grossly unreasonable or acted improperly or failed to apply his mind to the matter or erred on a point of principle or of law. In this case the Court would be at large and entitled to substitute its opinion for that of the taxing master. The Court should not

Copyright Juta & Co Ltd

overlook the fact that even if there are such grounds for interference the taxing master's decision may nevertheless have been correct.

The second ground for interference by an appeal Court is where the taxing master was clearly wrong in regard to some item. In such circumstances the appeal court has a duty to interfere and will substitute its own opinion for that of the taxing master even if it is a matter involving degree. However it should be emphasised that the Court must be satisfied that the taxing master was clearly wrong, not merely that in his place it would have come to a different decision.

Cases cited.

Nourse Mines v Clarke 1910 TPD 660;

Clan Transport Co v Swift Transport Service s 1956 R & N 120; 1956 (3) SA 480 (FC);

Shidiak v Union Government 1912 AD 642;

City Deep Ltd v Johannesburg City Council 1973 (2) SA 109 (W);

van Hurte v Rahinowitz and Minde and Anor 1947 (4) SA 366(C);

Marais v Union Government 1911 TPD 407;

Cohn v Pratt 1925 WLD 115;

Wellworth's Bazaars Ltd v Chandlers Ltd and Others 1947(4) SA 453 (T);

Adamant Labs (Pty) Ltd v General Electric Co 1964 (3) SA 363 (T);

1984 (1) ZLR p275

GOLDIN AJA

Legal and General Assurance Society v Lieberum NO and Anor 1968 (1) SA 473(AD);

Cone Textiles Ltd v Ayres and Anor 1980 ZLR 347; 1980 (4) SA 728 (ZAD);

Magola v Union and SWA Insurance Co Ltd 1978 (2) SA 154 (SECLD).

M T O'Meara, for the appellant

A P de Bourbon, for the first respondent

Judgment

Goldin AJA: This is an appeal and a cross-appeal against a decision of the High Court in a review of taxation of costs in terms of Rule 314 of the High Court Rules.

The dispute relates to senior counsel's fees for the first day in arbitration proceedings. It is common cause that junior counsel's fees should be one-half of his senior's fees. Fees marked and paid to senior counsel were \$9 000 in respect of the first day and refreshers of \$400 per

day for the 2nd to 16th day, together with a fee of \$200 for conferences. His junior received one - half of the total of \$15 200. (Notwithstanding the abolition of the division of the legal profession into a Bar and a Side Bar by the substitution of a "fused" system under which all are "legal practitioners", it is convenient to refer to senior and junior counsel on the basis of the situation which used to prevail).

The second respondent allowed a fee of \$3 000 for the first day, thereby reducing senior counsel's fee for the first day by \$6 000, and left the rest unaltered. On review DUMBUTSHENA JP (as he was then) increased the fee to \$6 000. The appellant appeals against the increase while the first respondent cross - appeals claiming that the fee of \$9 000 should have been allowed.

The question as to when a Court is entitled to interfere with a Taxing Master's determination of fees has been the subject of numerous decisions since the beginning of the century. They fall into two main categories: firstly, that a Court will only apply the common law grounds for interference on review; secondly, that if the Court is "clearly" or "distinctly" of the opinion that the taxing master was wrong it is the duty of the Court to reverse or correct it.

I will refer to some of the cases which fall into the first category. In the case of *Nourse Mines v Clarke* 1910 TPD 660 BRISTOWE J said at 661:

1984 (1) ZLR p276

GOLDIN AJA

"I agree that if the Taxing Master had exercised his discretion this Court would not overrule it. The jurisdiction of the Court to overrule the discretion of another person or officer only arises where the discretion has been improperly exercised, that is, where the officer has been actuated by some improper motive, or has not brought his mind to bear upon the question, or where he has adopted some principle which the Court considers unsound. If, therefore, the Taxing Master had considered the merits of this case, and decided that it was not reasonable to allow two counsel, I should not have interfered."

The learned judge equated the position of the Taxing Master with the position where a matter is left to the discretion or determination Of a public officer. The approach of a Court in those cases was set out in this country in *Clan Transport Co v Swift Transport Services* 1956 R & N 120; 1956 (3) SA 386 (ESC) where CLAYDEN FJ held that a Court will only interfere with the exercise of discretion where the finding was so grossly unreasonable that it indicates that he acted *mau fide*, or from improper motives or there was a failure to apply his mind to the matter. This approach, based on an examination of many decided cases, is similar to the oft quoted test applied by INNES ACJ in *Shidiak v Union Government* 1912 AD 642 at 651- 2 where he said:

"There are circumstances in which interference would be possible and right. If, for instance, such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong."

This approach was adopted by GALGUT J (as he was then) in *City Deep Limited v Johannesburg City Council* 1973 (2) SA 109 (WLD) at 113 where he said under the heading "Taxing Master's Discretion - generally" as follows:

"It has always been accepted that in reviewing the ruling of a Taxing Master the Courts will not lightly disturb the discretion which he has; it will only be interfered with if he has exercised it improperly or has not brought his mind to bear on the question in issue or has acted on a wrong principle. See *Nourse Mines Ltd v Clarke* 1910 TPD at 661. The dicta of BRISTOWE J certainly set out the position very clearly."

He went on to deal with "Counsel's fees - generally" and said:

"The same tests apply in regard to counsel's fees. The Court will not interfere with the quantum of fees which a Taxing Master has allowed counsel in a party and party

1984 (1) ZLR p277

GOLDIN AJA

bill of costs unless he has acted on a wrong principle or has exercised his discretion in a wrong manner. See *Wellworth's Bazaar v Chandlers Ltd and Others* 1947 (4) SA 453 (T) at 459, and *Duvos (Pty) Ltd v Newcastle and Others* 1965 (4) SA 553 (N) at 558."

Earlier cases which adopted this approach on review of taxation are mentioned by SUTTON JP in *Van Harte v Rabinowitz and Minde and Another* 1947 (4) SA 366 (CPD) at 368:

"It has frequently been laid down that the Court will not interfere with the exercise of his discretion unless it is clear that he has exercised his discretion improperly or erred on a point of principle. See *Liquidators Benghait Lid v Liquidators Sterling Trading Co* 1922 WLD 177; *Golombick v Atlas Insurance Co Ltd* 1916 WLD 14; *Adamson v Beckett* 1929 CPD 191; *de Villiers v Estate Hurst* 1940 CPD 518; *Cash Wholesalers Ltd v Natal Pharmaceutical Society* 1937 NP 418."

The exercise of a wider power, or more correctly an additional ground, for interference by a Court in a review of taxation, has been applied almost concurrently with the limited test based on the common law approach. These cases fall into the second category to which I referred.

In the case of *Marais v Union Government* 1911 TED 407 CURLEWIS J did not limit the Court's jurisdiction to the test set out by BRISTOWE J in the *Nourse Mines* case *supra* and to the approach in *Shidiack's* case *supra*. He said at 409 -

"I quite agree that the Court would be reluctant to interfere with the decision of the Taxing Officer; but it seems to me it is going too far to limit the jurisdiction of the Court to review the Taxing Officer's decision to cases in which he has decided a matter of principle wrongly. It is quite within the province of this Court, where the Taxing Officer has decided that a certain affidavit or witness was not necessary, to review his decision and to determine whether he was right or wrong in so holding."

TINDALL J clearly agreed with this additional ground for interference in the case of *Cohn v Pratt* 1925 WLD 115 where he said "that whatever may be the position when the question is merely one of quantum, if the Court is distinctly of the opinion that the taxing master's decision is wrong it is the duty of the Court to reverse it."

The additional principle upon which a Court will interfere is descriptively stated by MILLIN J in the case of *Wellworth's Bazaar Ltd v Chandler's Ltd and Others* *supra*:

1984 (1) ZLR p278

GOLDIN AJA

"The law, as I conceive it to be' is that in general the discretion of a Taxing Master will not be disturbed unless it is

found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider, or by giving a ruling which the Court can see no reasonable person would have given. That is the general principle. But that principle has had engrafted upon it something else, and that is this: There is a certain class of case where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps even a better opinion ... So there has developed what I call a graft on the main principle. The Court will feel it its duty to correct the Taxing Master and substitute its own opinion when the matter is one in which the Court is at least as well able to judge as the Taxing Master is."

The effect of the "graft on the main principle" was further explained by COLMAN J in the case of *Adamant Labs (Pty) Ltd v General Electric Co* 1964 (3) SA 363 (TPD) at 366 as follows:

"It is true that a Taxing Master's exercise of his discretion is not lightly to be interfered with, and that in matters of quantum the Court will seldom override his decision. But, on the authorities as I read them ... it seems to me that the Court, if satisfied that the Taxing Master was clearly wrong, even on a matter involving degree, has jurisdiction to interfere, and a duty to do so."

In the case of *Legal and General Assurance Society v Lieberman NO and Another* 1968 (1) SA 473 (AD) POTGIETER JA summarised the position at 478:

"It is clear from all these decisions that the Court's power of interference with the Taxing Master's ruling is not limited to the grounds stated in *Shidiack's* case, but that in certain cases the Court may also reverse his ruling if it is clearly of the view that he is wrong. The repealed Rules as well as the present Rules do not, in my view, confer a free discretion on the Taxing Master, but one which is subject to correction by the Court... The Court, therefore, has the power to correct the Taxing Master's ruling not only on the grounds stated in *Shidiack's* case but also when it is clearly satisfied that he was wrong. Of course, the Court will interfere on this ground only when it is in the same or in a better position than the Taxing Master to determine the point." (See also *Noel Lancaster Sands (Pty) Ltd v Theron and Others* 1975 (2) TPD 280.)

In my view, the correct position is, therefore, that the court has power to interfere with or alter a Taxing Master's ruling on two grounds. Firstly, on the application of common law rights on review which involve a finding that he was grossly unreasonable or erred on a point of principle or law. In such a situation the Court would be at large and entitled to substitute its opinion for that of the Taxing Master. It should not be overlooked that even when such grounds for inter-

1984 (1) ZLR p279

GOLDIN AJA

ference exist it need not follow that the Taxing Master's decision must necessarily be set aside or altered. He may have arrived at the correct decision for a wrong or even improper reason

Secondly, regardless of the absence of any common law ground for interference, the court has a duty to interfere if satisfied that the Taxing Master was clearly wrong in regard to some item. In such a case the Court will substitute its own opinion for that of the Taxing Master even if it is a matter involving degree.

It is emphasised, however, that the court must be satisfied that the Taxing Master was clearly wrong and not merely that in his place it would have come to a different decision.

The relevant facts to which this approach is applicable are briefly as follows. The parties have been involved in disputes arising from a building contract for the erection of a factory and associated structures by the first respondent for the appellant. This is the seventeenth case before the superior Courts of this country as a result of this contract. One dispute concerning

the issue of an architect's certificate was referred to arbitration which commenced on 16 October 1978 and terminated seven weeks and twenty-two volumes of evidence later. The arbitration award was followed by proceedings to set it aside: *Cone Textiles Ltd v Ayres and Another* 1980 ZLR 347; 1980 (4) SA 728 (ZAD).

In September 1980 the architect issued a final certificate. A dispute followed which was referred to arbitration which I will call the second arbitration. The first respondent was represented by senior counsel, junior counsel and an attorney. The arbitration was heard by two arbitrators. The hearing was preceded by five pre-trial conferences during which thirty-six alleged defects in the construction and materials used by the first respondent were discussed with the result that about 45 issues emerged and these included issues which were the subject matter of the First Arbitration. The Second Arbitration took place on 23 and 27 November 1981 and on 4 - 18 and on 21 and 22 December 1981.

The arbitrators awarded the first respondent \$92 860 after referring to 45 separate issues and awarded costs on the High Court scale including the costs of three legal practitioners.

1984 (1) ZLR p280

GOLDIN AJA

Upon taxation of costs the second respondent heard both sides and inquired from other counsel what fees were charged by senior counsel. He disallowed \$6 000 of senior counsel's fees and this decision was taken on review before the High Court. His decision was attacked and considered by the Court on two main grounds. Firstly, that he had acted improperly in seeking the views, and thereby raising the likelihood of being influenced by the replies of other counsel at the Bar. The details of this allegation were in dispute and the second respondent contended that it was a general inquiry which did not affect his independent decision based on his experience and submissions made before him. The judge a quo did not find his conduct was improper. Secondly, it was alleged that the second respondent failed to apply his mind to the complexity of the case. He stated in his affidavit that having dealt with taxation of the First Arbitration bill of costs he "possessed a much greater awareness" of the work involved in the Second Arbitration. He also said:

"I have accordingly assessed the complexity of these arbitration proceedings as being equivalent to a High Court opposed civil commercial trial lasting for the same number of days in which costs of two counsel were allowed (three legal practitioners) whilst in addition I have taken into account the exceptional number and volume of documents that had to be studied by counsel.

The learned judge was of the view that the second respondent failed to appreciate and give effect to the complexity of the dispute. There were 45 issues of which a significant number were canvassed in the First Arbitration. It was essential for counsel to study the 22 volumes containing 2 212 pages. While most building disputes involve a number of issues without necessarily being particularly complex or difficult, there were complex issues requiring more than usual concentration, application and study. The time required to read, understand and prepare for trial was also significantly longer than in the type of case with which the second respondent equated this one.

It is not clear whether or not the second respondent misdirected himself concerning his

inquiries about fees charged by counsel. I am not certain that he did so misdirect himself. I agree, however, with the judge *a quo* that the fee of \$3 000 was totally inadequate and this inadequacy followed no doubt from the mistaken view that the case was of average difficulty as described by him. The second respondent was clearly wrong and the increase for the first day was fully justified (see the *Adamant Labs* case, *supra* at 368).

1984 (1) ZLR p281

GOLDIN AJA

For these reasons I would dismiss the appeal against the increase in senior counsel's fees from \$3 000 to \$6 000. The same considerations justify the dismissal of the cross-appeal. The fee of \$9 000 can perhaps be justified on the basis of attorney and client costs which the successful party incurred to satisfy a desire to be represented by eminent counsel with a reputation for superior skill. Unsuccessful litigants should not be oppressed, however, by having to pay an excessive amount of costs merely to provide the successful litigant with a full indemnity (see *Magola v Union and SWA Insurance Co Ltd* 1978 (2) SA 154 (SECLD) at 155).

I turn to the question of costs on review and appeal. In the Court *a quo* there was no order as to costs. No reasons were given. In my view the general rule should have been applied that in the absence of good reason for the contrary costs should follow the result. The first respondent was substantially successful and had to come to Court to obtain an increase in senior counsel's costs from \$3 000 to \$6 000 with the proportionate increase in respect of junior counsel.

In the proceedings before us the appeal and the cross-appeal concerning the sum of \$6 000 are dismissed. The first respondent however succeeds in altering the order as to costs in the court *a quo* and his cross-appeal did not significantly increase the duration of appeal. Nevertheless the appellant had to consider it and prepare to argue it as much as the first respondent counsel had to do in respect of the appeal.

In all the circumstances I would order the appellant to pay one-half of the taxed costs of this appeal.

Accordingly I would order:

- (a) The appeal is dismissed.
- (b) Save that the first respondent's costs on review in the Court *a quo* must be paid by the appellant, the cross-appeal is dismissed.
- (c) The appellant must pay one-half of the costs incurred by the first respondent in the proceedings before this Court.
- (d) The rest of the trial Court's order is confirmed.

1984 (1) ZLR p282

GOLDIN AJA

Beck JA: I agree.

Gubbay JA: I agree.

Byron Venturas and Travlos, appellant's legal representatives.

Gill, Godlonton and Gerrans, respondent's legal representatives.

1984 (1) ZLR p283

S v MATIMBE AND OTHERS 1984 (1) ZLR 283 (HC)

Court **High Court, Harare**

Waddington J

2 May 1984

Flynote

Criminal procedure - charge - before plea of guilty entered, Court must be satisfied that elements of offence are understood by accused and admitted.

Children - failure by parents to provide adequate medical treatment - parents members of religious sect whose tenets preclude medical treatment - duty of parents - Children's Protection and Adoption Act [Chapter 33]

Headnote

Particularly when an accused person is unrepresented or is lacking in legal knowledge, magistrates, before entering pleas of guilty to offences with which the accused is charged, should be satisfied that the accused understands the elements of the offences and admits those elements. The elements of the offence must be fully and properly explained and recorded.

The Children's Protection and Adoption Act [Chapter 33] makes it an offence, in s 7(1), for the parent or guardian of a child or young person to assault, ill-treat, neglect, abandon or expose the child or to allow a child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause unnecessary suffering. The fact that the religious beliefs of parents preclude reliance on medical treatment does not relieve them of their responsibilities under the Act. The interests of the children come first and parents, no matter what their religious beliefs, must supply their children with reasonable medical treatment when it is needed.

Cases cited:

S v Mukadziwashe 1984 (1) ZLR 254;

S v Murivani H-B-26-83;

S v Lambat SC 102/83

S v Muchinenyika and Another AD 214/72;

WADDINGTON J

Judgment

Waddington J: These two trials were presided over by the same magistrate on the same day at Karoi on 19 March 1983. In the first trial the two accused were charged with two offences, namely, assault with intent to commit grievous bodily harm and, secondly, contravening s 7(1) of the Children's Protection and Adoption Act [*Chapter 33*]. In the second trial the accused was charged with the offence of assault with intent to commit grievous bodily harm only. In each trial the charge of assault with intent to commit grievous bodily harm concerned the same facts.

The cases relate to the tragic consequences which flowed from the neglect by her parents of a small girl of five years of age. The facts briefly are as follows.

The complainant, the young daughter of the two accused in the first trial, was lying asleep one night during December 1983, when she was bitten on the right hand by a snake. She cried for help and her parents came to her assistance. They killed the snake. When they examined the child's hand, they observed the fang marks left by the snake, and, doing what most concerned parents would have done, made an incision with a razor blade or other sharp instrument with a view to sucking out the venom. The child was not taken to be examined by a medical doctor because her parents were members of a religious organization whose adherents are forbidden by the tenets of their faith to receive treatment by medical practitioners. When a member is injured or falls ill, prayer is the only remedial measure taken for therapeutical purposes. These beliefs, it may be accepted, were genuinely and deeply held convictions of the child's parents, however misguided they might appear to be to others.

After three days, the child's arm and body became extremely swollen. Observing the condition of the fingers on the affected hand - a condition which is described in the statements of agreed facts in the two cases as "rotting", which suggests that gangrene had set in - the parents took the child to their local pastor. By this time the child was unconscious. Following the teachings of their religious persuasion, the pastor and the parents prayed over the child, who then, it would seem, regained consciousness. For the reason that the child's affected fingers were rotting, so it would seem, her father instructed the pastor, who was the accused in the second case, to cut off the thumb and all fingers

WADDINGTON J

save the little finger of the child's right hand. This was done, though how it was accomplished without causing the child excruciating agony is not revealed in the record of either trial.

The facts described above were admitted by each of the accused so far as they were known to each accused.

The two accused in the first trial, the parents of the child, after the amateur operation had been performed at their instigation, persisted in denying the complainant any medical treatment. The wounds deteriorated and further decay set in. Ultimately they were obliged to take the child to the Karoi Rural Hospital to be examined.

No effort was made at the trial to ascertain exactly what had been done to the child between the time of the amateur operation and her first examination at the Karoi Hospital. A medical affidavit sworn by Dr Cleary confirms that there were no digits on the right hand of the child save for the little finger. He also observed severe impairment of function and disfigurement. The suggestion Therefore is that the child's hand had been exposed to burning by great heat at some stage but one is left to speculate as to what really happened.

In each trial, when the accused were called upon to plead, they each, as I have said, admitted the facts which I have outlined briefly above. As regards the parents of the complainant, it is difficult to establish with precision what happened when they were called upon to plead. The reverse of the charge sheet discloses that the original plea entered in the case of each accused was "Not guilty" because the symbol "NG" appears opposite the name of each accused in respect of count 1, ie the charge of assault with intent to commit grievous bodily harm.

Each accused pleaded guilty to the second charge, which was one of neglecting a child in contravention of s 7(1) of Chapter 33.

In the case of count 1, however, the symbol "NG" appearing opposite the name of each accused has been altered (by the magistrate presumably) by the drawing of a horizontal line through the letter "N". No explanation appears on the record for this alteration. In the magistrate's handwritten notes, the following statement appears taken on plea from each of the accused: "I deny the charge". Once again in each case the word "deny" has been crossed out and substituted by the word

1984 (1) ZLR p286

WADDINGTON J

"admit". Once again, no explanation is given on the record as to why the original statements of the accused, namely "I deny the charge", were altered to read, "I admit the charge".

In the recent case of *S v Mukadziwashe* 1984 (1) ZLR 254 I had occasion to criticise the growing practice of magistrates of making alterations to the records of trials without giving any explanation for those alterations. I reiterate that the altering of a material aspect of the record can amount to a gross irregularity and is most undesirable. In the circumstances of this case the nature and seriousness of that irregularity will become even clearer having regard to what follows.

In the trial held against the parents of the complainant, the magistrate, in explaining the essential elements of the offence in conformity with s 255 (2)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], asked the accused whether they assaulted the complainant with intent to do her grievous bodily harm. In reply to this question, the first accused stated, "I thought we were assisting the child, I am sorry now that this has happened, I agree the hand of my daughter could have been saved." The second accused replied, "Yes, but we thought that

prayer would save our child, we have failed." Immediately thereafter the magistrate went on to question the accused about the elements of the offence constituting the second count. He asked them whether they accepted "that the two of you failed to protect this young daughter," and each accused replied in the affirmative. Thereafter, the first accused further explained that the incident occurred because their faith required that no one should be medically treated other than with water and salt after prayers have been said for the patient.

From the accused's replies to the charges, a number of things should have been patently obvious to the magistrate. First, it should have been obvious that the accused did not intend to admit an intention to commit grievous bodily harm when they instigated and procured Pondiwa Mapfumo to cut off the child's fingers. That intention was the very heart of the offence charged. It was their intention to assist the child, according to their explanations. There was no unequivocal admission of an intention to cause harm.

In addition, the statement of agreed facts suggests that the child's fingers, when they were amputated, had rotted. The possibility there-

1984 (1) ZLR p287

WADDINGTON J

for should have presented itself to the magistrate's mind that by removing them no grievous injury would necessarily have been caused for the digits might have been clinging to the hand by threads of skin only at the time. This subject, however, was not examined by the trial magistrate.

So far as the second count was concerned, the two accused, as I have already indicated, merely agreed that they had "failed to protect" their young daughter. The offence in question consists in a parent or guardian of a child or young person assaulting, ill-treating, neglecting, abandoning or exposing the child; or allowing the child to be assaulted, ill-treated, neglected, abandoned or exposed in a manner likely to cause unnecessary suffering. By merely asking the two accused whether they had "failed to protect" the child, the magistrate, in my view, completely failed to explain the essentials of the charge to the accused. Having regard to the state in which the child was found by Dr Cleary ultimately, it is not at all surprising that the two accused admitted that they had "failed to protect" their daughter. But that was not the essence of the charge at all. What their replies to the charge might have been had the essential elements been fully and properly explained to them is very much a matter for speculation.

I now turn to consider the position of the accused in the second trial. When the charge of assault with intent to commit grievous bodily harm was put to him, he also stated, "I deny the charge". In his case, too, the word "deny" has been struck out and the word "admit" substituted without any explanation appearing on the record for the alteration. Notwithstanding this, the accused, when outlining his defence, stated, "I wish to say that I agree with the State outline but it was not my intention to injure the complainant." In the face of that statement I have the greatest difficulty in understanding why the magistrate permitted the plea of guilty which he had entered to stand. The accused's reply was not an unequivocal admission of guilt. Once again the State outline suggests that the digits of the child's right hand might have reached such a state of decomposition that their removal by the accused might not necessarily have amounted

to an act calculated to lead to grievous bodily harm. This was a topic which the magistrate in the second trial should have investigated carefully and thoroughly but did not.

1984 (1) ZLR p288

WADDINTON J

Having regard to decisions such as *S v Murivani* H-B-26-83 and *S v Lambat* SC 102/83, it is perfectly plain to me that there is the gravest doubt that it has been shown that the three accused, none of whom were represented or were experts in the law, understood and admitted the charges and their elements. I am quite satisfied that a substantial miscarriage of justice has probably occurred in these cases, and that the convictions cannot be allowed to stand.

It is a matter for considerable concern that the convictions must be set aside because, having regard to the admissions made by the accused and the very strong evidence which must have been available to the State, it may be more than likely that all three accused are guilty of the offences for which they were abortively tried. In setting aside the convictions, I feel constrained to remark that members of the particular sect concerned should not be comforted by this decision. The Law Reports contain several instances of cases where parents of the same faith as the accused in the present cases have been convicted of serious criminal offences for failing to provide adequate remedial medical treatment in cases of illness and injury suffered by their children. This is a subject which was referred to at some length by the late SIR HUGH BEADLE CJ in the case of *S v Muchinenyika and Matongerere* AD 214/ 72. At p 3 of the cyclostyled report, the learned CHIEF JUSTICE, dealing with a case of two parents who were members of the same religious persuasion with which I am concerned in this judgment, said the following:

"It is accepted without question that the belief of the appellants was genuinely and sincerely held but, as has been so often pointed out when dealing with the Children's Protection and Adoption Act, this Act is intended to protect children and it is in the interests of all children that persons who do not observe the provisions of the Act should be punished so that others may learn by the example of the punishment not to repeat the same sort of offences. There is no law which prescribes what a man may or may not do in matters of remedial care once he is an adult, but it is clear from the policy of the Act that so far as young persons and children are concerned, where they require medical care, that care must not be unreasonably withheld and notwithstanding the beliefs of the parents as to the effectiveness of medical care, they may not simply rely on prayer and in this way relieve themselves from their responsibilities under the Act of providing the medical care which their children require.

In view of the sincerity of the beliefs of the appellants in this case one may, when looking at them alone, perhaps have some sympathy for them, but the Court must look at the matter from the point of view of other children and the repetition of

1984 (1) ZLR p289

WADDINGTON J

other possible offences of a similar character. It must be brought home to possible offenders that the interests of the child comes first and that parents, no matter what their religious beliefs are, must supply the children with reasonable medical attention when the children require it."

In my view, I would not be serving the interests of justice if I were merely to set aside the convictions in these two cases. It is a matter of considerable importance, and public policy demands it in my view, that children must be able to assume that they will receive the full protection of the law which requires parents to take proper care in ensuring that injuries and

illness are timeously treated by orthodox medical means. I therefore intend to remit this case for trial *de nova* before a different judicial officer so that the criminal liability of the child's parents and the local pastor who was responsible for amputating the child's fingers, may be properly and thoroughly investigated.

The following order is therefore made with the concurrence of my brother SAMATTA:

1. The convictions and sentences in each case are set aside.
2. The charges against Jobo Matimbe and Rabeka Matimbe in the one case and Pondiwe Mapfumo in the other, are remit ted for trial de novo before a different judicial officer.
3. In the event of the conviction of any of the accused at their new trials, any period spent in prison already must be taken in to account in the assessment of sentence, and regard should be had to the level of sentence imposed in *Muchinenyika's* case (, *supra*,) and *R v Malipa and Anor* 1966 RLR 378.
4. Pending their new trials, the three accused are to be released from prison.

I might add that I am grateful to the Attorney-General for his views and assistance in this case even though I have reached a conclusion different from that contended for by him.

1984 (1) ZLR p290

S LTD v COMMISSIONER OF TAXES 1984 (1) ZLR 290 (SC)

Court Supreme Court, Harare

Beck JA, Gubbay JA and Waddington AJA

13 March and 15 May 1984

Flynote

Statutes - Sales Tax Act [Chapter 184] - assignments partially performed hire-purchase agreements in respect of corporeal movable property - not agreements of sale in terms of Act and so do not attract sales tax.

Headnote

The appellant company was a financial institution. In the normal course of business it would discount hire-purchase agreements, taking cession of the rights of the original seller, including the ownership of the goods. It would sometimes happen that later the purchaser might ask to be released from his obligations under the hire purchase agreement. This he could do if he could find a substitute party willing to undertake those obligations and acquire the property and if such substitute was id, acceptable to the appellant. In this event, the substitute buyer would pay no deposit or initial cash payment for the goods. He would simply assume the obligations and rights of the original purchaser under the agreement. The substitution would be brought about by a tripartite agreement signed by the three parties.

The Commissioner of Taxes contended that these assignment agreements resulted in new sales by the appellant to the assignee of the goods and that sales tax fell to be paid on the new sale, based on the amount of the unpaid balance owed under the original hire - purchase

agreement.

Held, that if the Commissioner's contention were correct, there would be incongruous results. One is that s 24(1)(a) of the Hire - Purchase Act [*Chapter 284*], which requires a deposit and the reservation of the rights of ownership in the seller, would have to be complied with. Another is that sales tax would be paid on two "prices", one of which is really included in the other.

Held, further, that the agreement of assignment, which established a contractual relationship between the seller and the assignee, is not necessarily an agreement of sale. The original agreement was partly performed and all the assignment did was transfer rights and obligations as between assignor and assignee. The rights and obligations assigned were residual ones that originated in a hire-purchase agreement but did not constitute the terms of a new hire-purchase agreement between

1984 (1) ZLR p291

BECK JA

different parties concerning the same mere but at a lower price. There may well, of course, be a further agreement of sale between the assignor and the assignee but such a sale would not attract sales tax.

Cases cited:

Labuschagne v Denny 1963 (3) SA 538 (A);

Ensor v Kader 1960 (3) SA 458 (N);

Botha v Van Niekerk and Anor 1983 (3) SA 513 (W).

C W Jordan, for the appellant

I A Donovan, for the respondent

Judgment

Beck JA: This is an appeal from a decision of the Fiscal Appeal Court upholding the contention of the Commissioner of Taxes that certain agreements, the nature of which is described below, attract sales tax.

In terms of the Sales Tax Act [*Chapter 784*] sales tax is payable on the sale value of corporeal movable property that is sold by a registered trader in the normal course of business. "Sale." includes barter, exchange and hire.

The circumstances whereunder the assignment agreement in question came into being are described in the judgment of the Court *a quo* as follows:

"The appellant, though a registered trader with a sales tax number in terms of the Sales Tax Act, is primarily a financial institution. As such, and in the normal course of its business, it discounts hire-purchase agreements, taking cession of the rights of the original dealer or seller - including ownership of the goods thus being sold - in the usual way, and by the usual agreement which is acknowledged by the original seller and purchaser. It sometimes happens, however, that the purchaser party to such a ceded agreement subsequently asks to be

released from it, that is, prior to the discharge of all his obligations to pay the outstanding balance of the purchase price. If such a purchaser can find a substitute party anxious and willing to acquire the goods sold, and prepared to assume liability for the obligation, and who is acceptable to the cessionary seller as a credit risk, the appellant accedes to such a change of debtor.

Such a substitution also occasionally results from the repossession of goods sold under such a discounted hire-purchase agreement upon the default of the purchaser. In this sort of event, the appellant cessionary will try to dispose of the goods for the benefit of both itself and the debtor. If it finds, or knows of, someone else wishing to acquire such goods, who may not have the economic ability to pay cash for them, such person is substituted for the original buyer under the discounted

1984 (1) ZLR p292

BECK JA

hire-purchase arrangements. Like the substitute buyer in the first instance, a substitute buyer in repossession circumstances pays no deposit nor initial cash payment. He simply assumes, *pro tanto*, the remaining undischarged obligations of his predecessor in the title and the latter's rights, particularly the right to eventually acquire ownership of the goods in question upon payment of the remaining amount owing."

The agreement by which such a substitution was achieved is a tripartite one that is contained in a standard form provided by the appellant company, the relevant portions of which read as follows:

"ASSIGNMENT

1. I the undersigned ... of ... the hirer under and in terms of a hire purchase agreement entered into by me with ..., No. ..., dated ..., do hereby cede, assign, delegate and transfer to ... all my right, title and interest in and to the said hire purchase agreement and all my rights and obligations as hirer there under which at the date hereof amount to \$...
2. And I the undersigned ... of ... do hereby accept the cession, assignment, delegation and transfer to me and in my favour and undertake duly and faithfully to fulfil all the terms, conditions and obligations imposed upon the hirer under and in terms of the said hire purchase agreement as and from the date hereof.
3. And I the undersigned ... the creditor under and in terms of the said hire purchase agreement do hereby agree to the said cession, assignment, delegation and transfer and I further agree that by reason thereof and as from the date hereof the said ... is released from his obligations under the said hire purchase agreement and the said ... is accepted as hirer thereunder in his place."

It is accepted by the appellant that if these assignment agreements resulted in new sales between the assignee and the appellant of the corporeal movable goods, then such sales took place in normal course of the appellant's business. The Commissioner's contention that was upheld in the Fiscal Appeal Court and that was adhered to in argument before us is that the assignment, which is both a cession and a delegation, novates and therefore terminates the original hire-purchase agreement and brings into being an entirely new agreement of sale, in the form of another hire-purchase agreement, between the appellant as seller and the assignee as purchaser. Sales tax therefore falls to be paid on the new sale, the purchase price of the goods (or "sale value") on which the tax is leviable being the amount of the unpaid balance that was still owed under the original hire-purchase contract when it was novated.

1984 (1) ZLR p293

BECK JA

If that contention is correct it appears to give rise to results that seem incongruous. It would seem to follow, for instance, that there would have to be compliance afresh with the requirements of s 24(1)(a) of the Hire-Purchase Act [*Chapter 284*], if the new hire-purchase contract is not to be treated as a sale without reservation of ownership and on credit at a price that is 25 per centum lower than the amount of the outstanding balance that was owed under the novated hire-purchase contract. In point of fact, s 24(1)(a) of the Act is not complied with afresh when assignments of the nature described above are concluded, and it has not been suggested before us now that in consequence the appellant's rights of ownership are lost and that it can only recover from the assignees 75% of the outstanding indebtedness for the discharge of the whole of which they accepted liability in terms of the delegation embraced in the assignment agreement.

Another incongruous consequence of that contention is that although only one price, viz that which was originally agreed upon, is the price that is ultimately paid for the purchase of the goods, sales tax is nevertheless levied on a greater sum that is made up of two "prices", the latter of which, being a duplication of the unpaid portion of the purchase price has built into part of the sales tax that was levied in respect of the original sale.

Be all that as it may, I am satisfied for other reasons that it is wrong to conclude that by reason of the assignment a new agreement of sale is brought into being between the assignee as purchaser, and appellant as seller, of the goods that were originally sold by the appellant to the assignor.

It is correct that the assignment, consisting of both a cession of rights and a delegation of obligations with the creditor's consent, operated as a novation of the original hire - purchase contract and divested the assignor of his rights and obligations as the purchaser thereunder. It is also correct that the assignment, by vesting and burdening the assignee with everything that yet remained to be performed of those rights and obligations, created a contractual relationship between the appellant and the assignee where none had existed before. It does not follow however, that this newly created contractual relationship between the appellant and the assignee is necessarily itself a contract of sale (or of hire, barter, or exchange) of the corporeal movable goods originally sold by the appellant to the assignor. The original hire-purchase agreement

1984 (1) ZLR p294

BECK JA

was a partly performed one when the assignment agreement came to be concluded. What was ceded to the assignee was the right to receive what yet remained for performance of the appellant's obligations. What was delegated to the assignee was what yet remained for performance of the assignor's obligations. The transfer by cession and delegation of these remaining incorporeal rights and obligations was the only subject matter of the agreement of assignment as between the assignor and the assignee (*Labuschagne v Denny* 1963 (3) SA 538 (A)). For the enjoyment of the rights that were ceded it was necessary that the assignor should deliver to the assignee the corporeal movable goods to which those rights related, but in

making that delivery the assignor was acting on his own behalf in fulfilment of his obligation as assignor. There is no room for saying that he effected delivery of those goods on behalf of the appellant and in discharge of the latter's obligation as a seller to effect delivery of the *merx*. That obligation of the seller had already been discharged by the appellant before the original hire-purchase agreement was novated and it was no longer a component of those as yet unfulfilled reciprocal rights and obligations that were assigned.

In short, the rights and obligations that were assigned were certain residual rights and obligations that originated in a hire-purchase agreement but which did not in themselves constitute the terms of a new hire-purchase agreement between different parties concerning the same *merx* but at a lower price.

It might well be the case in very many instances of such an assignment that the assignment agreement would be but part of a wider agreement between the assignor and the assignee, the substance of which, as between *them* (as distinct from the agreement created between the appellant and the assignee), could well be that of sale. The assignor, although only a purchaser under an undischarged hire-purchase contract, is capable of concluding a valid sale of goods even without the appellant's consent (*Ensor v Kader* 1960 (3) SA 458 (N)). *A fortiori* he can sell a *res aliena* with the owner's consent. The assignor is also the only one who is, without more, in a position to comply with the obligation that a seller has to deliver to the purchaser possession of the *merx*. In return for possession of the goods and for the ceded right to acquire ownership thereof, the obligation undertaken by the assignee to pay to the appellant the as yet unpaid instalments owed by the assign-

1984 (1) ZLR p295

BECK JA

nor would usually represent only part of the assignee's obligation towards the assignor to pay a larger price for the goods - a price agreed upon between the two of them only, without any reference to the appellant. It is not in dispute that the appellant is never brought into the picture of what, in addition to the assignment agreement, may be agreed upon between the assignor and the assignee. Where the assignor is not selling the goods in the normal course of business as a registered trader in terms of the Sales Tax Act any such sale as may occur between the assignor and the assignee does not, of course, attract sales tax.

The effect of assignment agreements such as these is to uncouple the link that binds the assignor to the appellant under the hire-purchase agreement and to couple the assignor to that link (of *Botha v Van Niekerk and Anor* 1983 (3) SA 513 (W) at 530F, per FLEMMING J). The consequence of that is not to create a new agreement of hire-purchase, but to create something different, namely an agreement that the unfulfilled portions of the appellant's hire-purchase agreement with the assignor will be fulfilled as between the new parties.

It was conceded on behalf of the Commissioner that if this appeal succeeds it should carry costs for the successful appellant, in terms of s 13 of the Fiscal Appeal Court act [Chapter 180] read with ss 19(2) and 20(1)(b) (iii) of the Supreme Court of Zimbabwe Act 1981.

Accordingly I would allow the appeal with costs and order that the Commissioner's assessment

of sales tax arising from the assignments in question be set aside.

Gubbay JA: I agree.

Waddington AJA: I agree.

Atherstone and Cook, appellant's legal representatives.

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

1984 (1) ZLR p296

S v BENATAR 1984 (1) ZLR 296 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA and Gubbay JA

20 March and 15 May 1984

Flynote

Criminal law - contempt of Court - whether susceptible of an attempt - disobedience to order of Court in a civil case - can be prosecuted criminally - contempt must be such that administration of justice brought into disrespect.

Headnote

There are broadly, four types of cases where it is not possible to attempt to commit an offence. These are -

- (a) offences of omission;
- (b) offences where the overt act manifests the existence of a hostile intent sufficient to constitute the offence (eg treason);
- (c) where the nature of the offence is such that it may be committed negligently but not intentionally;
- (d) where a mere condition or situation is punishable.

The offence of contempt of Court does not fit into any of these categories and it would be against logic and good sense to hold that it is one that it is impossible to attempt to commit. Where the offence of contempt of Court (or an attempt thereat) arises out of disobedience to a Court order in a civil case, it is ordinarily left to the interested party, in whose favour the disobeyed order was granted, to take action to have the contempt punished. This does not preclude the Attorney-General from bringing a criminal prosecution, but as a matter of policy he will not do so unless the contempt is serious enough to make criminal proceedings necessary in the public interest. The fact that the value judgment this necessarily involves later turns out to be erroneous is no reason, however, to acquit.

What must be proved is that the accused's contempt in disobeying the Court order was one which unlawfully and intentionally violated the dignity, respect or authority of the Court in the administration of justice. This is unlikely to occur except where the disobedience is committed in circumstances manifesting actual disrespect for the Court in such a way as to bring the administration of justice into contempt.

1984 (1) ZLR p297

GUBBAY JA

Cases cited:

S v Laurence 1975 (4) SA 825 (AD);

S v du Plessis 1981 (3) SA 382 (AD);

R v Wenzel 1940 WLD 269;

R v Kandogoro 1980 ZLR 54; 1980 (2) SA 581 (R);

S v Ntanzu 1981 (4) SA 477 (N);

S v Ndlovu 1982 (2) SA 202 (T);

Balogh v Crown Court at St Albans [1974] 3 All ER 283 (CA);

S v Beyers 1968 (3) SA 70 (AD);

Cape Times Ltd v Union Trades Directories (Pty) Ltd and Others 1956 (1) SA 105 (N); *S v Hartmann and Another* 1983 (2) ZLR 186; 1984 (1) SA 305 (ZS);

In re the Corinbatore (McCarthy, Respondent) (1897) 18 NLR 179.

A P de Bourbon, for the appellant

M Werrett, for the respondent

Judgment

Gubbay JA: The appellant was charged in the magistrate's Court with the crime of contempt of Court, it being alleged in the charge sheet that -

"... on a date to the prosecutor unknown but during the month of May, 1983, (he) did unlawfully and intentionally violate the dignity, repute and authority of a judicial body, that is to say, did communicate and meet with Julia L ..., a minor, in violation of Court order issued by Mr Justice Waddington at the High Court, Harare, on the 23rd February, 1983."

He was convicted of attempted contempt of Court and the passing of sentence upon him was postponed for a period of two years subject to the condition that he does not within that period meet or communicate in any manner whatsoever with Julia prior to her attaining the age of 18 years. This appeal lies against that conviction.

The appellant is 26 years of age, a divorce and the father of a child. He is a well-educated and

worldly person. Julia is 10 years younger, being born on 8 February 1967. She is a schoolgirl, intelligent and headstrong, and disposed to oppose parental authority, particularly that exercised by a somewhat domineering father. The product of an affluent home, she has been denied no material advantage.

The appellant and Julia met in June 1982 as members of the same socio-religious group. They became friends and in due course Julia turned to the appellant for comfort and support. She confided in him the unhappy and strained relationship at home and her difficulty in communicating with her father, except at a most perfunctory level. She

1984 (1) ZLR p298

GUBBAY JA

expressed the belief that her father had little feeling for her and showered his affections on her two younger brothers. The appellant responded with sympathy and understanding. The friendship between them blossomed and when, as was inevitable, it came to the notice of Julia's parents they were much averse to it. They feared that the relationship might develop along more intimate lines. Moreover, quite apart from the fact that the appellant was so much older than Julia, they considered him to be a man of low repute. Every effort to persuade Julia to cease the association was to no avail and proved to be counter-productive. She remained defiant of the advice and entreaties of her parents. The appellant was also spoken to, but despite his assurance to the contrary, the two continued to meet, often at his flat and sometimes fairly late at night.

On 11 December 1982 Julia proceeded with her parents on holiday to the United States of America. While there she was tense, sullen and distant to her family. Without her parents' knowledge she boarded a flight to Zimbabwe on 28 December 1982, having surreptitiously removed her return ticket from her father's briefcase. She telephoned her parents upon arriving at Harare and it was arranged that she be cared for by her maternal grandmother until the family returned on 18 January 1983.

Once reunited with Julia, it became apparent to her parents that the association with the appellant was continuing unabated and that her emotional dependence upon him was even stronger than before. In the belief that a sexual relationship had developed, and notwithstanding Julia's protestations, a complaint was laid with the police, Julia being at that time still under the age of 16 years.

On 11 February 1983, four days after Julia's sixteenth birthday, the High Court was moved, upon an urgent petition, to grant a rule *nisi*, returnable on 23 February, calling upon the appellant to show cause why he should not be interdicted -

"... from meeting or communicating in any manner whatsoever with the petitioner's daughter ... during her minority.
"

On the return day the rule was confirmed without opposition from the appellant.

1984 (1) ZLR p299

GUBBAY JA

It was not disputed by either the appellant or Julia that they had engaged in sexual intercourse. Both claimed that it occurred upon one occasion only, shortly after Julia's sixteenth birthday, and that they were deeply in love. They denied any illicit relationship prior thereto.

On 28 February 1983 the appellant left the country on a ten-week business trip to America and Europe. While abroad he wrote and posted three cards to Cate and Wally, mutual friends of his and Julia. Each contained a reference to Julia and a request. In the order of their dispatch the cards read as follows:

"Am now in Mexico City and have spent an amazing 3 weeks all over Mexico including Acapulco. Have had such a great time and I have met so many people but I am really missing you both. *Please tell Julia I miss her and love her even more.* Am going to Los Angeles tomorrow for a few weeks. Will write again soon. Take care. Say hi to everyone.";

"Having a great time and have seen so many guys from Rhodesia. Went to Disney land, Hollywood, Beverley Hills, and many more which are incredible. Have been to a few concerts on Sunset Strip which were also amazing. Am going to Switzerland in a few days to see Richard. Miss you both so much and cannot wait to see you. *Send love to Julia and Howzit to everyone.* Please also send love to Charmadene and apologise for me but do not have her address. Take care.";

"Well I have been in Athens for 5 days now and have been unsuccessful so far. Am going to the Islands next week to try with the authorities there to start a business. The Greek authorities have piled so many complications on to me that it is impossible to start a business but I have not given up. After that am going to Cyprus and then to Israel and will be coming back within a few weeks. Have just had a call from a friend of Julia who said she tried to commit suicide but is alright now. Please phone her to find out how she is and calm her down. *Tell her I love her and will be back soon.* Take care."

(The emphasis is mine).

It was common cause that the postcards were received by the addressees in Zimbabwe, but the State failed to prove that the messages were conveyed by them to Julia. There was also no evidence to support the allegation in the charge sheet that the appellant had actually met with Julia after the granting of the interdict.

The magistrate held that the reference to Julia in the postcards indicated an intention on the appellant's part that his sentiments be communicated through the agency of the addressees, in defiance of the

1984 (1) ZLR p300

GUBBAY JA

order of the High Court. Accordingly, he convicted the appellant, not of the substantive offence of contempt of Court, but of an attempt to commit that offence.

Mr *de Bourbon*, who appeared for the appellant, accepted that in writing and posting the cards to Zimbabwe the appellant's actions passed beyond the stage of preparation and fell into what has been termed "completed attempt". The appellant had done everything he set out to do, but the result he intended did not materialise through the inaction of the recipients. See *S v Laurence* 1975 (4) SA 825 (A D) at 827-828; *S v du Plessis* 1981 (3) SA 382 (A D) at 401C.

Counsel boldly submitted, however, that only the substantive offence of contempt of Court is punishable. An attempt is not.

Viewed broadly, there are, I consider, four types of cases where an attempt is not possible. These are:

- (i) Where the offence is purely one of omission and the *actus reus* does not include any consequence of the omission. Either the omission occurs or it does not - for instance, a failure to render an income tax return.
- (ii) Where the overt act manifests the existence of a hostile intent sufficient to constitute the offence, even though the act would be no more than preparation if some other crime had been charged. The offence of treason is an example. If one attempts to endanger the State, one commits the full offence of treason. See *R v Wenzel* 1940 WLD 269 at 273.
- (iii) Where the nature of the offence is such that it may be committed negligently but not intentionally. Thus as *mens rea* in the form of intention is required for attempt, there cannot be a crime of attempted culpable homicide. See *S v Kadongoro* 1980 ZLR 54; 1980 (2) SA 581 (R); *Sv Ntanzu* 1981 (4) SA 477 (N).
- (iv) Where a mere condition or situation is made punishable as where the *actus reus* is "a state of affairs", such as "being drunk in a public place" or "being found". See Smith and Hogan Criminal Law 4 ed at p 263; and generally *S v Ndlovu* 1982 (2) SA 202 (T) at 205 A - 207 A

1984 (1) ZLR p301

GUBBAY JA

Mr *de Bourbon* did not endeavour to argue that contempt of Court fits into any of these categories. That it plainly does not is a persuasive indication that it is not to be regarded as a crime impossible to attempt.

Moreover, on principle there would appear to be no sound reason for a contrary view. To take a graphic illustration: suppose that upon his return from overseas the appellant, armed with a step-ladder, proceeded late in the evening to Julia's residence in order to pay her a surprise visit. Aware of which upstairs bedroom she occupied, he climbed the step-ladder to her window, only to find the room vacant and the bed unslept in - Julia having decided to spend the night at the home of her grandmother. Such conduct would show an intention on the part of the appellant to breach the interdict. It would amount to a completed attempt. It seems to me to offend against both logic and good sense to hold that no offence was committed because, by virtue of circumstances beyond the appellant's anticipation and control, the dignity or authority of the Court was not actually violated.

Mr *de Bourbon* was content to rely on the obiter dictum of STEPHENSON LJ in *Balogh v Crown Court at St Albans* [1974] 3 All ER 283 (CA) at 290d. The relevant passage in the judgment reads:

"Contempt of Court is a misdemeanour at common law, but I doubt if an attempt to commit contempt is punishable as such. Whether it is or not, I have no doubt that acts which would not amount to an attempt cannot amount to a contempt, of whatever type or category. It is not a contempt to plan or intend a contempt or to take such preliminary steps towards carrying out the plan or intention as the appellant took. "

In that case the alleged contemnor, a clerk employed by solicitors for the defence, became exceedingly bored as the trial of the client dragged on. He decided to enliven the proceedings in Court by releasing "laughing gas" into the Court room. He reconnoitred the building after dark and discovered that he could release the gas from the roof into the ventilation system. The next morning he brought into Court a half cylinder of nitrous oxide, concealed in an attaché case. He waited for an opportunity when he could ascend the roof without anyone seeing him. It never came for the police had noticed him the night before and were watching him that morning. The moment he left his attaché case unattended the officers took hold of it. They feared it might contain a bomb. They arrested Balogh, who explained his intentions to them. He was brought before the presiding judge, who considered that it was

1984 (1) ZLR p302

GUBBAY JA

difficult to imagine a more serious contempt of Court, and ordered Balogh to be imprisoned for six months.

The Court of Appeal held Balogh had committed neither a contempt nor an attempted contempt. His actions were merely preparatory and not sufficiently proximate to amount to an attempt. His intent to disrupt the Court was insufficient to make him guilty. LORD DENNING MR expressed the opinion that it was possible to attempt a contempt. He said at 289c:

"Contempt of Court is a criminal offence which is governed by the principles applicable to criminal offences generally. In particular, by the difference between an attempt to commit an offence and an act preparatory to it."

Similarly, LAWTON LJ remarked at 296b:

"Making preparations to commit a crime is not the same as committing it or attempting to commit it; such conduct does not become criminal until it is so near to the crime that an intelligent onlooker watching what was going on would say that the person under observation was about to commit it.... Providence intervened to save him from turning his preparations into criminal action. It follows that what he was proved to have done was just, but only just, short of contempt of Court."

I respectfully associate myself with the majority view in preference to that of STEPHENSON LJ. Assume Balogh had taken the gas onto the roof of the Court building, placed the mouth of the cylinder at the inlet to the ventilation system and turned it on, but was seized and the cylinder turned off, before any of the gas could reach the Court. Such conduct would not have raised a real risk of interference in the Court's proceedings because he was stopped in time. However, it was his undoubted intention to do so and clearly his actions would have passed the preparatory stage.

For these reasons I reject Mr *de Bourbon's* submission that the offence of contempt of Court is a crime impossible to attempt. The main thrust of the argument advanced on behalf of the appellant was that if the offence of contempt of Court is susceptible of an attempt, the nature of his actions, though directed to a disobedience of the interdict, thereby involving civil contempt,

do not constitute a crime.

1984 (1) ZLR p303

GUBBAY AJ

Since the leading decision in *S v Beyers* 1968 (3) SA 70 (AD) there is no longer any doubt that civil contempt, in the sense of a wilful and *mala fide* refusal or failure to comply with an order of the Court, can be the subject of criminal proceedings at the instance of the State, notwithstanding that the civil litigant in whose favour the order was granted also has *locus standi* to institute a similar proceeding. As pointed out by STEYN CJ, to accept a proposition that an intentional non-compliance with an order of Court, which is not an uncommon phenomenon, cannot be criminally prosecuted by the State -

"... will result in the authority and esteem of our Courts, even in the most flagrant cases thereof, having no effective protection. The decision as to whether or not to institute action would then vest in a private authority who will be led by his own interest according to his wishes and who does not enjoy the same means as does the State to investigate and present the matter. He would also, according to *Cape Times Ltd v Union Trades Directories (Pty) Ltd and Ors* 1956 (1) SA 105 (N), lose his capacity to institute action where, after the contempt had already been committed, the order is obeyed. The effective protection of the authority and esteem of our Courts is essential for the operation of a proper system of law and is a matter of great importance to the State" (at 8 1 C-E, in translation).

But it is not in every case of refusal to comply with an order of Court given in civil proceedings that the Attorney-General must or will intervene to indict the defaulting party. In the first place, to secure a conviction it would have to be established that the contempt fell within the definition of criminal contempt of Court. Secondly, it seems that as a matter of policy the Attorney-General will not seek to prosecute unless the contempt is serious enough to make criminal proceedings necessary in the public interest; in other cases he will be content to leave the matter to the litigant in whose favour the order was made to apply for appropriate relief. In the words of STEYN CJ in the *Buyers* case, *supra*, at 81A-B and F (in translation):

"From the nature of the case and in view of the availability of the civil law procedure it is understandable that in ordinary circumstances it is left to the interested party in favour of whom the disobeyed order was granted to take action to have the civil contempt punished. It is accordingly not customary for a public prosecution to be instituted."

And:

"In my opinion he (the Attorney-General) does possess the authority to prosecute also for a civil contempt. It may be assumed that he would, as with criminal defamation, not do so lightly but where the circumstances make it necessary in the public interest it would be his duty to take action."

1984 (1) ZLR p304

GUBBAY AJ

Mr *de Bourbon*, as I understood him, submitted that it was incumbent upon the State to prove that the civil contempt committed by the appellant was sufficiently significant to make his prosecution necessary in the public interest. And that as the evidence adduced at the trial showed that the interests of the public did not require to be safeguarded, he ought to have

been acquitted.

With that submission I cannot agree. The Attorney-General considered that the appellant's breach of the interdict amounted to criminal contempt of Court and that it was necessary in the public interest that he be prosecuted for such conduct. Nothing derogated from the Attorney-General's right to make that decision and the appellant's conviction cannot now be attacked on the ground that the value judgment as to the necessity to institute criminal proceedings against the appellant was erroneous. Whether it was or not is entirely beside the issue.

The challenge to the conviction must therefore be directed at the point of whether it was proved that the appellant's contempt in disobeying the interdict was one which unlawfully and intentionally violated the dignity, respect or authority of the Court in the administration of justice (see Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* at p 166; Hunt *South African Criminal Law and Procedure Vol II* at p 205). This is unlikely to occur save where the disobedience is "accompanied by circumstances manifesting actual disrespect for the Court in such a way as to bring the administration of justice into contempt" (per MILNE J in the *Cape Times* case, *supra*, at 121G). That is the test to be applied and not the "real risk of interference test" formulated in *S v Hartmann and Anor* 1983 (2) ZLR 186; 1984 (1) SA 305 (ZS), as suggested by Mr de Bourbon. That case was concerned with contempt of Court relating to *sub judice* proceedings, a genre of contempt different from that resulting from an intentional non-compliance with an interdict.

It is in this area that the case against the appellant broke down. Taking full account of the background to the relationship between the appellant and Julia and no way minimising the responsibility of the High Court towards her as minor, the appellant's disobedience to the order was nonetheless of a venial nature. He did not try to communicate with Julia directly. Indeed, it is difficult to infer from a reading of

1984 (1) ZLR p305

GUBBAY JA

the full contents of the postcards that they were written with the dominant purpose of the expressions of love being made known to Julia. This is particularly so with regard to the first and second postcards where the requests are almost in the nature of an aside and give the impression that the appellant will not be overly concerned if his feelings do not reach Julia's ears. The request in the third postcard is more explicit and demanding. There is an element of urgency attached to it. But the appellant was understandably upset at learning that Julia had attempted suicide. He wished her to be comforted and reassured. That is what prompted him to write "Tell her I love her and will be back soon".

Giving the matter the closest consideration I can, I am not satisfied that the appellant's disobedience to the interdict in the circumstances in which it occurred, manifested disrespect for the Court in such measure as to bring the administration of justice into contempt. After all, the breach was somewhat technical and did not amount to setting the Court order at defiance. It was far removed in the seriousness from the breach of the order examined in the case of *In re The Corinbatore (McCarthy, Respondent)* (1897) 18 NLR 179, which provides a good example

of a civil contempt falling within the definition of a criminal contempt of Court.

Accordingly, I would uphold the appeal and set aside the conviction.

Dumbutshena CJ: I agree.

Beck JA: I agree.

Kantor and Immerman, appellant's legal representatives.

1984 (1) ZLR p306

ATTORNEY-GENERAL v SLATTER AND OTHERS 1984 (1) ZLR 306 (SC)

Court **Supreme Court, Harare**

17 January and 23 May 1984

Beck JA, Gubbay JA and Waddington AJA

Flynote

Criminal procedure - confirmation proceedings in terms of s 105 C of Criminal and Evidence Act [Chapter 59] - denial of access, by accused to legal advisers - effect of confirmation proceedings - magistrate at confirmation proceedings aware accused seeking access - magistrate's duty - effect of failure to enquire into denial of access - role of magistrate in proceedings under s 105 C - evidence - contents of challenged statement - can be used to prove voluntariness of statement - objection to proceedings under s 105 C - onus then on State to prove proceedings regular - only when onus discharged may statement be produced at trial in terms of s 242 (1a).

Headnote

The right of an accused person to access to his legal advisers is a fundamental one, enshrined in the Constitution. It is also expressly provided in s 101 of the Criminal Procedure and Evidence Act [*Chapter 59*] that the friends and legal advisers of an accused person shall have access to him during preparatory examinations, and by s 105C this entitlement applies to confirmation proceedings in terms of that section. Access to legal advisers for consultation before the proceedings are commenced is an integral part of the accused person's right to the assistance of his advisers while the proceedings are being held. A violation of the right is an irregularity of the most serious and fundamental kind, sufficient to vitiate proceedings in terms of s 105C.

The fact that the confirming magistrate is unaware of the violation does not save the proceedings from the vitiating effect of the irregularity; but if he is aware, it is his duty not to proceed with the confirmation proceedings before access is afforded. Failure to do so would be a fatal irregularity.

The role of the magistrate at confirmation proceedings is essentially an investigative one, and the investigation envisaged by the section is a thorough one. No more is required of the magistrate than is reasonable in the circumstances; but if he has any reason, coming from any

source, to suspect that the accused's desire for access is being improperly frustrated, it is most certainly unreasonable for him to proceed

1984 (1) ZLR p307

BECK JA

with the proceedings without first making proper enquiry and investigation into whether the accused is being denied access. While he is not bound in every case to investigate whether the accused wishes to have access to his legal adviser, circumstances may readily arise when his failure to do so will result in the perpetration of a gross irregularity which will vitiate the proceedings.

It is a well established practice in Zimbabwe and elsewhere for the Court to look at the contents of a statement in order to assist it to decide whether the statement was made freely and voluntarily. Sometimes this course is not only permissible but necessary, and the accused may be cross-examined as to the truth of the contents.

An objection that confirmation proceedings, as a whole, were fatally irregular, and therefore unlawful and invalid, by reason of a denial of the accused's right to legal assistance, strikes at the root of s 105C in all its parts. Where there is such an objection the onus is on the State to show that the proceedings were validly conducted.

Only if the State discharges that onus does s 242 (1a) come into play, which allows the State to produce the statements without further proof and casts on the accused the onus of proving his challenge .

Appeal by Attorney-General against rulings of law made by DUMBUTSHENA JP In *S v Slatter and Others* 1983 (2) ZLR 144 dismissed.

Cases cited:

R v Kuraza 1967 RLR 225; 1967 (4) SA 260 (RAD);

R v Second 1969 (2) RLR 285; 1969 (4) SA 255 (RAD);

S v Seheri and Others 1964 (1) SA 29 (AD);

S v Wessels and Another 1966 (4) SA 89 (C);

S v Blooms 1966 (4) SA 417 (C);

S v Nqula 1974 (1) SA 801 (E);

S v Khumbusa 1977 (1) SA 394 (N);

S v Mkhize 1978 (3) SA 1065 (7);

S v Baloyi 1978 (3) SA 290 (7);

R v O'Connor (1964) 48 DLR 110;

Thornhill v Attorney-General of Trinidad and Tobago (1974) 27 WIR 281;

S v Munakwa 1982 (1) ZLR 30;

S v Mpetha and Others (2) 1982 (2) SA 406 (C);

R v Werekwere AD 115/66;

S v Lebone 1965 (2) SA 837 (AD); *R v Hammond* [1941] 3 All ER 318;

Wong Kam-ming v The Queen [1979] 1 All ER 939 (PC);

S v Mapheele 1963 (2) SA 651 (AD).

E Chatikobo, for the appellant

I A Donovan, for the respondents

Judgment

Beck JA: This appeal has been brought by the Attorney-General in terms of ss(6) of s 44 of the High Court of Zimbabwe Act 1981. The Notice of Appeal enumerated five points of law said to have been wrongly decided by DUMBUTSHENA JP (as he then was) in the case of *S v Slatter and Ors* 1983 (2) ZLR 144. In respect of two of the five

1984 (1) ZLR p308

BECK JA

points, however, Mr *Chatikobo*, who appeared on behalf of the Attorney-General, abandoned the appeal, having accepted that too much had been read into the judgment and that the learned JUDGE PRESIDENT did not in fact decide what it was suggested in the Notice of Appeal that he had decided in those two respects.

The first of three remaining grounds of appeal was formulated as follows:

"The learned judge erred in finding that failure by members of the police force to grant the accused persons access to their legal representatives prior to confirmation proceedings in compliance with the provisions of section 2(1)(a) of the Second Schedule to and section 13(3) of the Constitution of Zimbabwe invalidates confirmation proceedings which were properly conducted in the magistrates' Courts in terms of section 105C of the Criminal Procedure and Evidence Act, Chapter 59."

This formulation does not accurately state what the learned JUDGE PRESIDENT decided on this point. In the first place, he was concerned, according to the facts he found proved, not with a mere failure by the police to grant the accused access to their legal representatives. To refer to it simply as a "failure" is to put a gloss on a calculated course, consisting of deliberate denials by the police of repeated requests by both the accused persons and by their legal representatives for access, in order to prevent the accused from receiving professional assistance before statements were recorded and confirmed. Thus, the learned JUDGE PRESIDENT found that:

"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."

His findings concerning the improper motive for this persistent obstruction emerge from the following passage:

"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, vitiate confirmation proceedings, and is in my view not in compliance with the provisions of s 105C of the Code.

1984 (1) ZLR p309

BECK JA

In circumstances referred to above, the main purpose for denial 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."

In the second place, the learned JUDGE PRESIDENT did not hold that the confirmation proceedings were "properly conducted" in the magistrates' Courts in terms of s 105C of the Act. He held precisely the opposite. He specifically said, in the passage that I have just quoted, that what was done was "not in compliance with the provisions of section 105C of the Code." There can be no possible doubt about the correctness in law of the statement. As is pointed out in the judgment, one of the provisions of s 105C is the provision in ss (6) that -

"The provisions of ... [section] *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."

Section 101, in turn, is to the following effect:

"101. (1) The friends and legal advisers of an accused person shall have access to him, subject to the provisions of any enactment relating to the management of prisons.

(2) An accused person, while the preparatory examination is being held, shall be entitled to the assistance of his legal advisers."

Section 105C of the Act Therefore itself provides that while confirmation proceedings are held the accused shall be entitled to the assistance of his legal advisers. It goes without saying that access to legal advisers for consultation before the proceedings are commenced is an integral part of the accused person's right to the assistance of his advisers while the proceedings are being held.

In *S v Kuraza* 1967 RLR 225 (A); 1967 (4) SA 260 (RAD) and in *R v Second* 1969 (2) RLR 285 (A); 1969(4) SA 255 this Court's predecessor emphasised the fundamental nature of this inherent right. In *S v Seheri and Ors* 1964 (1) SA 29 (A), *S v Wessels and Anor* 1966 (4) SA 89 (C3), *S v Blooms* 1966 (4) SA 417 (C), *S v Nqula* 1974 (1) SA 801 (E), *Khumbusa v The State and Anor* 1977 (1) SA 394 (N), and *S v Mkhize* 1978 (3) SA 1065 (T), proceedings were held to

be vitiated because there had

1984 (1) ZLR p310

BECK JA

been an irregular deprivation of the accused's right to legal assistance. In *S v Baloyi* 1978 (3) SA 290 (T) at 274B, MARGO J was of the view that the right is breached where an accused has been "in any way prevented from having legal assistance", even though there is no allegation that he wished to be legally represented.

In the *Canadian* case of *Regina v O'Connor* (1964) 48 DLR 110 HAINES J said at 115:

" It is the early participation of counsel both in fact development and fact presentation which lends some semblance of reality to the concept of the balance existing between the accused and the otherwise irresistible forces of the State. To waylay counsel in this crucial and vital stage of fact development, as the police in this instance would seem to have desired to do, is tantamount to waylaying the cornerstone of our concept of criminal justice so painstakingly assembled through almost countless generations. Proper police processing as a facet of criminal procedure is no less an aspect of criminal justice; indeed it is integral because the liberty of subjects is safeguarded in the procedure as well as in the substance of law. This belief was inherent in the remarks of Mr Justice Roach in his report in the 'Master of an Investigation into the Arrest and Detention of Robert Wright and Michael Griffin', Law Society of Upper Canada Special Lectures at p 57; His Lordship spoke of police processing as follows:

'They should also understand that it is their duty, once they arrest a citizen, to tell him at once the charge on which he is arrested. Arrested with or without a warrant, the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as may enable him to regain it.

They should understand, too, that there can never be any justification for holding a prisoner incommunicado. We are told that such practice exists behind the iron curtain. There is certainly no room for it under our system of freedom under the law. If that were permitted, then a citizen could simply disappear for a day or several days, and no (one) would know of his whereabouts except the police who had him in custody. The prisoner, if he has to remain in custody, is certainly equally entitled, through his relatives or friends, to gather up evidence that will prove him innocent, as the police are entitled to gather up evidence that will prove him guilty.

The suggestion that any detective or other police officer is justified in preventing or attempting to prevent a prisoner from conferring with his counsel is a most shocking one. The suggestion that counsel, if he is permitted to confer with his client who is in custody, might thereby obstruct the police in the discharge of their duties is even more shocking. The prisoner is not obliged to say anything and the lawyer is entitled to advise him of that right.

1984 (1) ZLR p311

BECK JA

The lawyer is an officer of the Court and it is the function of Courts to administer justice according to law. To prevent an officer of the Court from conferring with the prisoner who in due course may appear before it, violates a right of the prisoner which is fundamental to our system for the administration of justice."

The prisoner's right to silence to which reference is made in the extract from what was said by ROACH J is not without considerable qualification in our procedure. That does not, however, undermine the importance of the prisoner's right of access to his legal advisers. If any thing it strengthens it. One only has to consider the provisions of s 242A(1) of the Criminal Procedure

and Evidence Act to appreciate how necessary professional assistance is for a proper understanding of their operation.

Mr Donovan (to whom we are indebted for appearing so that there might be full argument) also referred us to the judgment of GEORGES J (as he then was) in *Terrence Thornhill v Attorney-General of Trinidad and Tobago* (1974) 27 WIR 281, which held that right of a person detained by the police to have prompt access to a legal adviser is a common law right that existed before it gained express protection in the Constitution of Trinidad and Tobago.

It is plain Therefore that a violation of ss (6) of s 105C, as read with s 101, of our Criminal Procedure and Evidence Act constitutes an irregularity of the most serious and fundamental kind, sufficient to vitiate the proceedings for which s 105C makes provision. The fact that the confirming magistrate is not aware that such a violation has occurred cannot save the proceedings from the vitiating effect of the irregularity. In the instant case the learned JUDGE PRESIDENT was clearly of the view, on the facts, that it was unlikely that the confirming magistrates were unaware that access was being sought but had not been obtained. If that is indeed so, then it was their duty not to have proceeded with the confirmation proceedings before access was afforded, and their failure to do so was a further fatal irregularity of a like nature; but even if they were not so aware, the continuing irregularity created by the obstructiveness of the police remained and its vitiating effect on the proceedings was unaffected by the magistrates' ignorance of its continued existence.

The decision of the learned JUDGE PRESIDENT did not, as was submitted, depend only, or even mainly, upon a reliance on s 13(3) and on

1984 (1) ZLR p312

BECK JA

para 2(1) (a) of the Constitution. It was his view that those provisions enshrine and give protection to the subject's timeous right of access to legal advisers, and their existence fortified him in the decision that what was done in the instant case rendered the confirmation proceedings a nullity. As I understand the judgment of the learned JUDGE PRESIDENT it was in that sense only and for that purpose only that he referred to the provisions relating to access that are contained in the Constitution. He considered those provisions to be distinct from ss 105C and 101 of the Act upon which he primarily relied for the conclusion that he reached. It should be noted, as is apparent from his judgment, that the conclusion to which he came did not of course mean that vitiation of the confirmation proceedings precluded all possibility that the statements could be used in evidence. It meant only that the State had not succeeded in relieving itself of having to discharge the onus of proving that the statements were made freely and voluntarily and without undue influence.

In my view therefore the learned JUDGE PRESIDENT did not, as I said at the outset, decide that the confirmation proceedings were "properly conducted in the magistrates' Courts in terms of section 105C" but, despite that, were invalidated by the prior violation by the police of the accused's constitutional rights to access. Rather, he decided, correctly, that the denial of access to their legal advisers, which was a continuing state of the affairs up to and during the confirmation proceedings, was a fatal breach of the provisions of s 105C of that Act, as well as

a breach of the provisions of the Constitution. Accordingly there is no substance in the first ground of appeal.

The second of the remaining grounds of appeal was formulated thus:

"The learned trial judge misdirected himself in holding that confirming magistrates are duty bound to inquire of accused persons brought before them for confirmation of statements in terms of section 105C of the Criminal Procedure and Evidence Act, Chapter 59, whether they have consulted their legal representatives."

Once again, the ground of appeal does not correctly reflect what was decided. At p 154 D-F of the judgment, the learned JUDGE PRESIDENT appeared to negative the suggestion that confirming magistrates should always make such an enquiry. He referred to the fact that most accused persons who appear at confirmation proceedings "cannot af-

1984 (1) ZLR p313

BECK JA

ford to engage the services of a legal practitioner or are ignorant of their existence" and then went on to say 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."

In his argument before us Mr *Chatikobo* submitted that unless the confirming magistrate is an active party to the denial of access, his mere knowledge that there had been such a denial, and his failure to enquire into that, does not vitiate the proceedings.

With that proposition the learned JUDGE PRESIDENT assuredly did not agree. Neither do I. I have already referred to the fact that the learned JUDGE PRESIDENT was of the view, on the facts, that it was "a most unlikely thing" that the magistrates were unaware that access had been sought, and it was under those circumstances that he said, at p 156A of his judgment, that the accused should have been asked, before proceeding with the confirmation proceedings, whether or not they had succeeded in seeing their lawyers.

As I have already said, the possibility that the magistrates may have known of the attempts to obtain access but nevertheless proceeded with confirmation proceedings before access was afforded was correctly treated as a possible additional irregularity. The essential reason for holding that the proceedings were vitiated was that the fundamental and constitutional right of the accused persons to access to their lawyers was breached by the police and that this denial was still operative when the proceedings commenced and prevented them from being properly conducted in terms of s 105C of the Act which incorporates the provisions of s 101, whether or not the magistrates had knowledge of what had happened.

Magistrates to whom application is made by the prosecutor, at the request of the police, for the confirmation of a statement by an accused person, must be conscious that their role in terms of s 105C is essentially an investigative one, and, as pointed out by this Court in *S v Munukwa* 1982 (1) ZLR 30 at 33, the investigation that is envisaged by the section is a thorough one. While no more is required of a magistrate than is reasonable in the circumstances (*R v*

BECK JA

535 (A) at 540H), it is most certainly not reasonable for him to proceed with confirmation proceedings without first making proper enquiry and investigation into whether the accused is being denied access to his legal representatives if he has any reason, from whatever source he may have gleaned it, to suspect that the accused's desire for access to legal representation is being improperly frustrated. Precisely what enquiries he should make to ensure that s 105C is properly complied with in all its parts will vary as the circumstances of each case can vary. The questions that are indicated in the departmental form with which magistrates are provided reflect the minimum enquiry that will be required in almost every situation. The case of *S v Mpetha and Ors* (2) 1982 (2) SA 406 (C) contains a helpful exposition by WILLAMSON J of what is expected of the magistrate under the cognate South African procedure and applies equally to the nature of the investigation that is required of the confirming magistrate in our procedure.

Accordingly Mr *Chatikobo's* submission under this ground of appeal must be rejected and it must be affirmed that, while magistrates are not bound in every case to investigate whether accused persons brought before them for confirmation of statements wish to have access to their legal representatives, circumstances may readily arise when a confirming magistrate's failure to do so will result in the perpetration of a gross irregularity that will vitiate the confirmation proceedings. In the instant case, nothing said by the learned JUDGE PRESIDENT with regard to this aspect amounted to a misdirection.

The last ground of appeal was that -

"The learned judge erred in holding that it is improper to make reference in his judgment to the contents of challenged confirmed warned and cautioned statements unless such statements are held admissible. He erred in so holding because where the admissibility of extra-curial statements is in issue the format, contents and genuineness of the statements may be cogent evidence to prove that the statements were made freely and voluntarily and without undue influence."

If this formulation was meant to convey that the learned JUDGE PRESIDENT held that regard could not be had to the contents of the statements for the purposes of determining whether they were made freely and voluntarily and without undue influence then, once again, it is not a correct reflection of what he decided.

BECK JA

The complaint appears to have reference to the following passage in the early part of the Judgment:

"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. That 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."

The words that I have italicised in this passage demonstrate, it seems to me, that the learned JUDGE PRESIDENT was saying no more than that a misleading impression of the strength of the prosecution case, for the proof of which there was no evidence other than the contents of the challenged statements, could be created by summarising, as part of the *State* case, the contents of those very statements. To do so might suggest that the evidence available to prove those summarised allegations was both admissible and credible, whereas the admissibility of that evidence had yet to be decided, and the credibility of it might never arise for final decision.

No part of the judgment suggests, as far as I can see, that when it falls to be decided whether a statement was made freely and voluntarily and without undue influence the contents of that statement may not be looked at. It is a well established practice in the Courts of Zimbabwe to do so, for, as indicated by BEADLE CJ in *R v Werekwere* AD 115/6 -

"The actual statement itself may often be the most important evidence in determining whether or not that statement is made voluntarily. A long rambling statement which goes into great detail, many of which details are proved to be true by independent evidence, is much more likely to be made voluntarily than involuntarily. A man whose mind has been overborne by compulsion is unlikely to go into such detail."

Moreover it not infrequently happens that the accused's challenge to the statement takes the form of alleging that the statement is not really his but was made at the dictation of the police from whose mouth alone came the allegedly false assertions implicative of the accused. In such cases it is not merely permissible, but necessary, for the Court to have reference to the contents, and indeed the accused may be cross examined as to the truth of the contents. In such cases, too, the fact -

1984 (1) ZLR p316

BECK JA

if fact it be - that statement contains exculpatory as well as incriminatory matter will often be relevant to the credibility of the accused's challenge. Our practice in this respect has followed that of the South African Courts, for which regard may be had to *S v Lebone* 1965 (2) SA 837 (A). A similar approach was reflected in the decision of the English Court of Criminal Appeal in the case of *R v Hammond* [1941] 3 All ER 318, but has been departed from in the majority opinion expressed in *Wong Kam-ming v The Queen* [1979] 1 All ER 939 (PC).

I do not find anything in the judgment of the learned JUDGE PRESIDENT that is in conflict with our established practice in this regard. I would emphasise, however, that the challenge that was raised before the learned JUDGE PRESIDENT in relation to the admissibility and use of the statements in evidence was of a two-fold nature. One aspect of the challenge was that the statements were not freely and voluntarily given and that undue influence was brought to bear upon the accused. The refusal to give the accused access to their lawyers was merely one of the ways in which their freedom of volition was said to have been overborne; it was asserted that other ways were also used, such as physical ill-treatment. Insofar as it may have been relevant for the decision of this aspect of the challenge the Court was, as has been said, free to have regard to the contents of the statements.

The other aspect of the challenge, however, was quite separate and distinct. It had to do with

where the *onus* lay with regard to the first aspect of the challenge, for the contention that was separately raised was that the statement had not been properly confirmed (by reason of the fatal irregularity constituted by the denial of legal representation) and therefore could not simply be "received in evidence upon their mere production by the prosecutor without further proof" in terms of s 242(1a) of the Act so as to cast upon the accused, in accordance with the proviso to that section, the *onus* of proving the first-mentioned aspect of the challenge so as to prevent their use in evidence.

Section 242(1a) of the Act comes to the assistance of the State when a confession or statement has been "confirmed in terms of subsection (3) of section *one hundred and five C*". But -

1984 (1) ZLR p317

BECK JA

"[i]t is a recognised canon of construction of statutes that any reference in any law to any action or conduct is presumed, unless the contrary intention appears from the statute itself, to be a reference to a lawful or valid action or conduct "

(Per BOTHA JA in *S v Mapheele* 1963 (2) SA 651 (A) at 655D).

No contrary intention that I can discover appears from the statute itself and hence the phrase "confirmed in terms of subsection (3) of section *one hundred and five C* " must mean lawfully or validly confirmed in terms of that subsection. An objection that the confirmation proceedings as a whole, from start to finish, were fatally irregular, and therefore unlawful and invalid, by reason of denial of the accused's right to legal assistance, strikes at the root of s 105C in all its parts. In such a situation the persuasive *onus* lies on the State to show that the confirmation proceedings were regularly, lawfully and validly conducted. Only then does s 242(1a) come into play and only then is the *onus* shifted to the accused to prove that the statements were not, despite their confirmation, in fact made freely and voluntarily and without undue influence.

Where, as happened in this case, evidence that is relevant to one aspect of the challenge is also relevant to the other aspect of the challenge, question may well arise as to which party should have the right and the duty to begin with the presentation of its evidence, and as to what opportunity should be given to lead evidence in rebuttal. Those are procedural matters for regulation by the trial Judge in each case.

In my opinion the Attorney-General has failed to establish that the trial Judge erred in law in any of the respects referred to and the appeal should therefore be dismissed.

Gubbay JA: I agree.

Waddington AJA: I agree.

Pro Deo

1984 (1) ZLR p318

S v HAMADZIRIPI 1984 (1) ZLR 318 (HC)

Court High Court, Harare

Waddington J

23 May 1984

Flynote

Criminal procedure - evidence - in affidavit form - production of - necessity for formalities prescribed by s 260 of the Criminal Procedure and Evidence Act [Chapter 59] to be complied with.

Headnote

In terms of s 260 of the Criminal Procedure and Evidence Act [*Chapter 9*], medical evidence in criminal cases may be produced in affidavit form. However, it must be produced from the bar by one of the parties, the prosecutor or the accused, and only after three days' notice has been given to the other party in terms of s 260(7). If the affidavit comes to the Court's notice in any other way, it would be an irregularity for the Court to take cognizance of the contents.

Where, on review, it was found that the magistrate had taken cognizance of an affidavit which was not produced in accordance with the formalities prescribed by s 260, but whose contents indicated a probability that the accused was mentally disordered, the case was remitted to the magistrate for the medical evidence to be properly adduced.

Judgment

Waddington J: The accused in this case was convicted by a magistrate of housebreaking with intent to steal and theft and sentenced to a term of imprisonment part of which was suspended on conditions.

The accused pleaded guilty and explained in pleading how he had committed the offence. In mitigation the accused said:

"This is the first time I have been arrested. Sometimes I am mentally sick. Sometimes I get mentally disturbed. I am quite normal now. Married with 3 children. I am unemployed. No assets."

1984 (1) ZLR p319

WADDINGTON J

There is nothing on the record disclosing that the trial magistrate, in view of the accused's statement, investigated the possibility that at the time of the commission of the offence the accused was mentally disturbed so as not to be responsible in law for his actions. It is clearly the duty of any Court during the course of criminal proceedings to bear in mind constantly that when an accused person (especially a person who is not represented by a legal practitioner) suggests that he might have been mentally disturbed at the time of the commission of the offence, an investigation into the accused's mental condition may be necessary. Section 27(1)

of the Mental Health Act 1976 provides *inter alia* that -

"If, at any time during a ... trial of any person -

(a) it appears to the ... magistrate presiding ... that that person is mentally dis ordered or defective;

or

(b) a report in terms of the proviso to subsection (1) of section twenty-six is received by ... the magistrate presiding that that person is mentally dis ordered or defective; . . . the magistrate shall inquire into the mental condition of that person."

Thereafter the section goes on to provide how the inquiry must be conducted. As I have said, nothing in the record shows that in this case the accused's statement put the trial magistrate on his guard.

However, from the information now placed before me by the trial magistrate on review, it seems that the accused's mental condition was considered by the magistrate. The magistrate, in submitting the record of the proceedings for review, has stated in an accompanying letter that he was in possession, at the trial, of an affidavit by Dr Vermeulen, the government psychiatrist. The affidavit, which the magistrate states he took into account as evidence, indicates that the accused was a "recovered schizophrenic". The magistrate admits quite candidly, however, that he overlooked a report which formed part of the affidavit and on which the doctor had written in longhand -

"The accused suffers from schizophrenia. He was mentally disordered at the time of the alleged crime and not responsible for his actions. He has recovered sufficiently to stand trial."

As the accused in pleading recounted clearly what he had done at the time of the commission of the offence and as the doctor's affidavit stated that accused was a "recovered schizophrenic", the magistrate

1984 (1) ZLR p320

WADDINGTON J

apparently decided that the accused was not mentally disturbed when the offence was committed. The Magistrate appreciates that he misdirected himself on the facts because he failed to take into account Dr Vermeulen's opinion that the accused was not responsible for his acts at the time the offence was committed. That opinion was of vital importance as Dr Vermeulen is a highly qualified expert in the field of psychiatry. Had his true views in this case been taken into account the accused might well have been the subject of a special verdict returned in terms of s 28(1) (a) of the Mental Health Act 1976. The conviction of the accused cannot be allowed to stand, for to ignore Dr Vermeulen's opinion, I am satisfied, would probably result in a substantial miscarriage of justice.

One other matter must be dealt with. The affidavit of Dr Vermeulen was not, according to the record, produced by either the prosecutor representing the State or the accused in terms of s 260 (2) of the Criminal Procedure and Evidence Act [Chapter 59].

Subsection (2) of s 260 reads as follows -

"(2) In any criminal proceedings in which it is relevant to prove -

- (a) any fact ascertained by a medical practitioner in any examination carried out by him which is proper to the duties of a medical practitioner;
- (b) that any treatment, including the performance of an operation, was administered by a medical practitioner;
- (c) any opinion of a medical practitioner referred to in paragraph (a) or (b) relating to any fact or treatment referred to in that paragraph;

a document purporting to be an affidavit relating to any such examination or treatment and purporting to have been made by a person who in that affidavit states that he is or was a medical practitioner and in the performance of his duties in that capacity he carried out such examination and ascertained such fact in such examination or administered such treatment, and, in either case, arrived at such opinion, if any, stated therein shall, on its mere production in those proceedings by any person, but subject to the provisions of subsections (7) and (8), be *prima facie* proof of the facts and of any opinion so stated."

The magistrate has not explained in his letter accompanying the record of the trial how he came to have been in possession of the affidavit. From my own experience in reviewing cases of this description, I have reason to believe that such affidavits when signed by the deponent are addressed to the clerk of Court, who merely attaches them to the record of the trial which is placed before the magistrate when the trial is resumed or commenced. If this occurred in the instant case it would have

1984 (1) ZLR p321

WADDINGTON J

constituted an irregularity because s 260 (2) of the Code makes it quite plain that the contents of affidavits may only be treated as *prima facie* evidence if produced by some person during the criminal proceedings concerned. This means that either the State or defence must do so for no one else enjoys the right of audience in a criminal trial. A magistrate cannot therefore have regard to an affidavit that has been brought to his attention merely because the clerk of Court happens to have attached it to the record between hearings or before the commencement of the trial. (of the decision in the case of *Hayes v Baldachin and Others* 1981 (1) SA 749 at 755D-H). To constitute *prima facie* evidence of the facts or opinions stated therein, an affidavit must have been placed before the Court in accordance with the prescribed procedure, that is, by being produced from the bar by the State or by the accused during the criminal proceedings, ie during the trial.

But that is not all. Section 260 (7) of the Code reads as follows -

- "(7) An affidavit referred to in this section shall not be admissible unless the prosecutor or the accused, as the case may be, has received three days' notice of its intended production or consents to its production."

Nowhere in the record does it appear that the accused or the State was given the relevant notice of production required by this provision or that the prosecutor or the accused consented to its production. On the face of the record therefore the affidavit was also inadmissible as evidence. The statement that the accused was a "recovered schizophrenic," should not therefore have been taken into account by the magistrate.

The conviction and sentence are therefore set aside and the proceedings are remitted to the

magistrate for the trial to be reopened and the question of the accused's mental condition at the time of the commission of the alleged offence to be reconsidered. Dr Vermeunlen should be called as a witness to explain why in his opinion he considered that the accused was not responsible for his acts. If any other evidence on this subject is available, it may also be adduced and thereafter the magistrate may decide whether to convict, acquit or return a special verdict of section 28(1) of the Mental Health Act 1976.

McNally J: agrees.

1984 (1) ZLR p322

NATIONAL RAILWAYS OF ZIMBABWE CONTRIBUTORY PENSION FUND v NATIONAL RAILWAYS OF ZIMBABWE ZLR 1984 (1) 322 (HC)

Court **High Court, Bulawayo**

Korsah J

23 May 1984

Flynote

Contract - in writing - interpretation of - subsequent conduct of parties - to what extent such may influence interpretation of contract.

Headnote

The applicant corporate body administered the pensions payable to former employees of the respondent statutory corporation. Both were parties to a Trust Deed and Rules which set out, *inter alia*, how pensions were to be determined. It was provided in the Rules that "in the event of general salary/wage award being granted to the majority of employees at any time", pensioners were to receive from the respondent a bonus award in the same percentage.

In terms of the Emergency Powers (Control of Salaries and Wage Increases) Regulations 1981 (SI 925A of 1981), an increase in salaries and wages was imposed by the Government. The respondent, as it had done on other occasions when there had been an increase in the wages payable to its employees, applied a weighted average increase in pensions. In terms of the Emergency Powers (Lower-paid Employees) (Compensation) Regulations (SI 455C of 1983), employers were required to increase the wages of lower-paid employees. Approximately 55% of the respondent's employees were affected and there was an increase of 3% of the total salaries and wages paid by the respondent.

The applicant contended that this increase was a "general salary/wage award" in terms of the Rules and that the persons receiving pensions should receive a bonus award from the Railways of 3%. The Railways' contention was that in terms of the Rules this obligation arose only when the Railways themselves granted the general salary or wage award but not where wages were increased by Executive action.

Held, that the plain meaning of the Rule did not in any way restrict the source of the increase or restrict the respondent's undertaking to cases where increases in wages were voluntary or

negotiated.

Held, further, that if there were any ambiguity, it was proper to take notice of the way in which the parties themselves had interpreted their rights and duties under the documents, as acts done by the parties purporting to act under the document afford the best possible evidence as to the interpretation which the parties placed on it. As the

1984 (1) ZLR p323

KORSAH J

Railways had increased pensions previously following a compulsory wage increase, they must have accepted that they were obliged to do so, and the same interpretation should be followed now.

Cases cited:

Leader v Duffey (1888)13 AC 294;

Breed v van den Berg 1932 AD 103;

Shill v Milner 1937 AD 103;

Consolidated Diamond Mines of SWA Ltd v Administrator of SWA and Another 1958(4) SA 572 (AD);

Cone Textiles (Pvt) Ltd v TTL Development Corporation Ltd 1979 RLR 114; 1979(2) SA 1051 (RAD);

James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 (HL).

A P de Bourbon, for the applicant

C. W Jordan, for the respondent

Judgment

Koshah J: In this application by way of notice of motion, the Applicant seeks a declaration:

- "1. That persons in receipt of pensions from Applicant as at the 1st September, 1983, are entitled to a bonus award in terms of Rule 12.5.2. of Applicant's Rules in consequence of the increase in the wages of a majority of Respondent's employees brought about by the Emergency Powers (Lower-paid Employees) (Compensation) Regulations, 1983.
2. That the amount of the said bonus award shall be a percentage of such pensions equal to the percentage increase in the total salaries and wages paid to all Respondent's employees as the result of the said regulations, namely 3%.
3. That the amount of the said bonus award is payable by Respondent to Applicant with effect from the 1st September, 1983."

The applicant is a corporate body established by a Trust Deed and Rules dated 4 October

1949, as subsequently amended from time to time. A copy of the Trust Deed and Rules incorporating all amendments made to date was attached to the application as Annexure 'A'.

The respondent, who is a party to and bound by the aforementioned Trust Deed and Rules, is also a corporate body, established in terms of the Transport Services (Railways and Airways) (Transition) Act 1967.

Rule 12.5.2. of the Trust Deed and Rules, captioned "Wage alignment bonus awards," stipulates that:

1984 (1) ZLR p324

KORSAH J

"In order to maintain the value of pensions, the Railways have agreed that, in the event of a general salary/wage award being granted to the majority of employees at any time, persons then in receipt of pensions from the Fund will be granted the same percentage increase as and by way of a bonus award and that such bonuses shall be paid by the Railways. Bonus awards shall be calculated on the un-commuted part of the pension to which has been added all previous increases. Provided however that bonus awards shall not be granted in respect of any annuity or annuities payable in terms of Rule 12.3.1 (a) (ii) or in accordance with the Pensions and Provident Funds Legislation."

In accord with s 3(2) of the Emergency Powers (Lower-paid Employees) (Compensation) Regulations 1983, published in SI 455C of 1983, which provides that:

- "(2) Every employer of an employee not referred to in subsection (1) who was in his employment on the 31st August, 1983, shall pay that employee -
 - (a) in the case where his wage was three hundred dollars or less per month on the 31st August 1983, a wage which is not less than the wage he was actually receiving on that date (whether or not that wage differs from the minimum wage) plus ten dollars per month; or
 - (b) in the case where his wage was more than three hundred dollars but less than three hundred and ten dollars per month, a wage which is not less than three hundred and ten dollars per month."

the respondent increased the wages of those of its employees affected by the provisions of the Statutory Instrument with effect from 1st September 1983. Approximately 55% of all the respondent's employees benefited under the provisions of the Statutory Instrument. The result was an increase of 3% of the total salaries and wages paid by respondent to all its employees with effect from that date.

Hitherto, it had been accepted by both the applicant and respondent that bonus awards which have been granted to pensioners in terms of Rule 12.5.2, including such an award granted in consequence of the increase in salaries and wages required by the Emergency Powers (Control of Salaries and Wage Increases) Regulations 1981 (published in SI 925A of 1981), would be a percentage of the pensions equal to the percentage increase in the total salaries and wages paid to all respondent's employees; and that the bonus awards are payable by the respondent to the applicant for incorporation in the pensions paid by the applicant.

It is the contention of the applicant that this increase in wages resulting from the promulgation of SI 455C: of 1983, was "a general salary/

KORSAH J

wage award" which was "granted to the majority of employees" as envisaged under Rule 12.5.2. of the Trust Deed and Rules. If this contention is valid, it follows that the persons in receipt of pensions from the applicant at that date - 1 September 1983 - should receive the same percentage increase in their pensions as a bonus award, and such bonuses must be paid by the respondent.

The respondent contends that on a proper construction of Rule 12.5.2., the respondent is only obliged to grant a bonus award in the event of the respondent granting a general salary/wage award to the majority of its employees either voluntarily and with, or without, preceding negotiations; or as a result of a determination made by a mediator, arbitrator or Industrial Tribunal in accordance with the service contract between the respondent and its employees. The view taken by the respondent is that the Rule has no application where wages payable to the respondent's employees are increased by Executive decree without prior consultation with, or consent of, the respondent.

A cardinal rule of construction, which is in accordance with reason and common sense, was stated thus by LORD PILLSBURY in *Leader v Dickey* (1888) 13 AC 294 at 301:

"...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 maybe inaccuracy and in consistency, 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."

Reading through Rule 12.5.2., it is dear to me that the respondent gave a specific undertaking, in no way restricted by the source of the award, to grant the same percentage increase to pensioners, in the event of a general salary/wage award being granted to the majority of employees at any time. Nowhere does it appear that the Rule is limited to voluntary or negotiated increases in salary; or that wage increases by Executive decree are exempt from the rule.

KORSAH J

The intention of the parties as enshrined in the Rule was to maintain the value of pensions. How can effect be given to this intention if the Court is to read into the Rule restrictions as to source which the parties, in their wisdom, did not impose upon the undertaking?

The respondent contends that when the parties reached the agreement recorded in Rule 12.5.2., they could not reasonably have foreseen or contemplated the possibility of governmental intervention to compel the respondent to increase the wages of its employees in this manner. Thus the parties never intended the Rule to apply in such a case.

The practice by governments of employing legislative instruments to stipulate a basic minimum

wage has been of long duration. By Rule 17.4, these Rules were deemed to have come into force and effect on 1 January 1978. It is improbable that, at that date, the parties could not reasonably have anticipated the possibility of some form of governmental intervention. At that date, the world economic recession had already commenced, governments were more and more concerned with improving the lot of the worker, and resort was had to divers ways of compelling employers to increase wages. In this country the Industrial Tribunal set up under the Industrial Conciliation Act [*Chapter 267*] could impose a wage increase on an employer. The possibility of governmental intervention could not have escaped the parties.

To my mind, the plain meaning of the language used in Rule 12.5.2. admits of no other interpretation than the one I have placed on it. But as the respondent contends that the wording of the Rule gives rise to some ambiguity, then one of the most settled rules for the construction of ambiguities in documents is that judicial notice will be taken of the way in which the parties themselves have interpreted their rights and duties under the document. When acts have been done by persons purporting to act under the document, they afford the best possible evidence as to the interpretation which those persons placed on it.

This view of the law was succinctly stated by STRATFORD JA in *Breed v van den Berg* 1932 AD 283 at 292 thus:

"If one of two parties to a contract asserts that it has a certain meaning and the other agrees that this is the meaning to be given to it, a Court of law will give effect to that

1984 (1) ZLR p327

KORSAH J

meaning. If this mutually accepted meaning is in conflict with the clear construction of the contract, we have all the requisites for rectification of the document. If on the other hand, the parties give to an indefinite and vague document by itself un-enforceable, a meaning consistent with it, then the latter in the eye of the law is the meaning it should bear. In both cases we cannot go beyond the intention of the parties when once we have a clear expression of that intention".

This view of the law was quoted with approval by RANDALL AJA in *Shill v Milner* 1937 AD 103 at 110. FAGAN CJ in *Consolidated Diamond Mines of South West Africa Ltd v Administrator of South West Africa and Another* 1958 (4) SA 572 AD at 632 had this say:

"The subsequent conduct of the parties to an agreement may afford evidence of a common interpretation of an ambiguous document by both parties to it ... and the Court would, on satisfactory evidence of such common interpretation by the parties concerned, hold them to it."

See also *Cone Textiles v TTL Development Corporation* 1979 RLR 114 at 120; 1979 (2) SA 1051 (RAD) at 1055 where LEWIS JP quoted with approval the words of PAGAN CJ.

This view of the law accords with English law, but it would appear that in *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796, the House of Lords qualified the English view by holding that, and I quote from the headnote -

"In construing a contract (eg for the purposes of ascertaining any intention of the parties as to the proper law) it was not proper to have regard to the conduct of the parties after the contract had been made."

At p 798 of the report, LORD REID states:

"I must say that I had thought it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later".

LORD HUDSON's view, appearing at page 801D of the report is this:

"I should add that I cannot assent to the view which seems to have found favour in the eyes of LORD DENNING MR and WIDGERY LJ that as a matter of construction the contract can be construed not only in its surrounding circumstances but also by reference to the subsequent conduct of the parties."

1984 (1) ZLR p328

KORSAH J

In my view, since the issue for determination in the above-quoted English case was the ascertaining of the proper law governing the contract, the decision of the House of Lords does no more than stipulate that the subsequent conduct of the parties cannot be used as an aid to ascertain the proper law governing the contract.

In any case, I consider myself bound by the principle of *stare decisis* to follow the decision of the Appellate Division of Rhodesia in *Cone Textiles (Pvt) Ltd v TTL Development Corporation*, *supra*.

It appears that, in consequence of the increase in salaries and wages required by the Emergency Powers (Control of Salary and Wage Increases) Regulations, 1981' published in Statutory Instrument 925A of 1981, the respondent applied a weighted average increase in pensions. The respondent admits applying such weighted average increases in pensions on previous occasions when there had been an increase in wages payable to its employees.

Mr *Jordaan*, for the respondent, contended that under s 6 of SI 925A of 1981 it was left open to negotiate increases of pay with employees, and to agree on a percentage increase applicable to pensions, whereas by the provisions of SI 455C of 1983 a wage increase was imposed on the employer without the right to negotiate with his employees; and that this difference between the two Instruments made possible the invocation of Rule 12.5.2. in the case of the former and the same inapplicable with respect to the latter.

Attractive as this argument appears, it suffers from two major defects: (a) it does not have regard to the power given under s 6(a) to the Minister to waive any of the provisions of SI 455C, if he is satisfied that adherence to the regulations will cause undue hardship. In other words, the Railways, by making out a case of hardship, could have avoided the obligation imposed on them by SI 455C of 1983; (b) It overlooks the fact that there are no restrictive words qualifying "general salary/wage award."

From the conduct of the parties, it seems to me they understood Rule 12.5.2. to mean that whenever a "general salary/wage award" is granted to the majority of the respondent's employees, the same percentage increase will be granted as a bonus award to persons in receipt

KORSAH J

of pensions, in order to maintain the value of pensions. This is discernible from the conduct of the parties in the past, and that is the interpretation that should be placed on Rule 12.5.2.

Mr *Jordaan* put forward a curious proposition which I had heard before and which had not found favour with me. He said the Regulations under SI 455C of 1983 were promulgated under the Emergency Powers Act and that once the state of emergency ends the Regulations made under the Act fall away.

We may then have a situation where the respondent lowers the salaries of its employees, but has no corresponding right under the Rules of the Trust to lower the pensions payable. The Regulations, so runs this argument, were, therefore, not made to benefit persons in receipt of pensions.

Curiously enough, SI 925A of 1981, under which the respondent conferred a benefit on a person in receipt of pensions, was also made under the Emergency Powers Act. Furthermore, the principle of law has always been that a salary or wage being the result of a contract between an employer and an employee, the employer cannot reduce the employee's salary without his consent. The possibility of the situation envisaged by Mr *Jordaan* arising is so remote as not to merit serious consideration.

Finally, I reject the argument that SI 455C of 1983 awarded compensation and not a wage/salary increase. The whole tenor of the Regulations was to increase the salaries/wages of the lower-paid employees. Although it may be possible, I have yet to come across compensation undefined in quantum and payable monthly for an indefinite period.

The craftsman, in s 3 of SI 455C of 1983, did not provide for the payment of compensation, but rather proclaimed a general award for an increase of salary of persons receiving a stipulated salary or less.

"Pensionable Emoluments" is defined in Rule 10.1 of the Trust Deed and Rules. The applicant enquired of the respondent, after the publication of SI 455C of 1983, whether the increases required by such regulations would be treated by the respondent as pensionable emoluments within the defined meaning of the term. The respondent replied in the affirmative, and indicated that deductions had been made by it from the wages of employees who received increases in terms of the

KORSAH J

Regulations for their contributions to the Fund on the basis that such increases form part of their pensionable emoluments.

In all the circumstances of this case, I am firmly of the view that the applicant is entitled to the relief sought and I make an order in terms of the draft.

Coghlan and Welsh, Applicant's legal representatives.

Webb, Law and Barry, Respondent's legal representatives.

1984 (1) ZLR p331

S v KONDOWE 1984 (1) ZLR 331 (HC)

Court **High Court, Harare**

McNally J

30 May 1984

Flynote

Criminal law - Criminal Law Amendment Act [Chapter 58] - s 3(d) - unlawful carnal knowledge of female imbecile or idiot - woman deaf and dumb - whether covered by section - evidence necessary

Headnote

The fact that a woman is deaf and dumb does not mean that she is an "imbecile or idiot", as envisaged by s 3(d) of the Criminal Law Amendment Act [Chapter 58]. Deaf and dumb persons may well be perfectly normal as regards intellect and have problems only in communication. Whether a particular person is an imbecile or idiot is a question for expert evidence or at the very least evidence by persons who know her.

Cases cited:

R v K 1951(4) SA 49 (O);

S v Nkosi 1967(1) PH H 112(T).

Judgment

MacNally J: The accused was charged with contravening s 3(d) of the Criminal Law Amendment Act [Chapter 58] by having sexual intercourse with a female imbecile or idiot. He was convicted and sentenced to 12 months' imprisonment with labour, of which six were suspended.

The only evidence about the woman was contained in the police "Summary of case", where it was said she was 19 years old and deaf and dumb. It was not suggested that she was in any way forced. In fact, in a handwritten amendment to the summary the magistrate added the words, "No force necessary. Girl consented by implication. She is unable to understand. Incapable of living independent life."

1984 (1) ZLR p332

McNALLY J

It did not seem to me that this was adequate proof of the essential fact that the girl was an imbecile or idiot. Indeed, to anyone who has read the book or seen the stage or screen version of the life of Helen Keller, it will be very clear that deaf and dumb persons may be perfectly normal from the point of view of intelligence. Their problem is one of communication, not one of intellect. They may seem to lack intellect if they are not properly taught. Helen Keller herself was of exceptional intelligence.

It is true that the magistrate asked the accused if he knew the woman was an imbecile and he said, "Yes". But this does not solve the State's difficulty. The State has to prove two things:

1. That the complainant was an imbecile or idiot.
2. That the accused knew that she was, or at least foresaw the possibility that she might be.

The accused's plea of guilty and his admission are adequate proof of his state of mind and Therefore adequate compliance with requirement 2 above. But whether or not she is an imbecile or idiot is a question for expert evidence or at the very least evidence by persons who know her. I am doubtful that inexpert evidence alone will ever be enough, but it is not necessary for me to rule definitively on that aspect of the problem and I will not do so.

I am entirely satisfied that the evidence in this case does not begin to establish that the complainant is an imbecile or idiot. For a fuller consideration of what evidence should be led, I would refer to *R v K* 1951 (4) SA 49 (O), where the matter is extensively considered. In *Nkosi v The State* 1967 (1) PH H 112 (T), the medical evidence was that the woman was "mentally abnormal, that is mentally retarded and she has partial paralysis of both legs." The doctor was asked, "Is she an idiot and imbecile in her present condition?", and he answered, "No, Sir, that is going a bit far." He was then asked if he would accept the word "*stompsinnig*" (dull, stupid, dense) and he agreed with that description. The Court set aside the conviction.

This is not a case in which I can properly use the provisions of s 29(2)(b) proviso (v) of the High Court of Zimbabwe Act to remit the matter for further evidence. It was for the State to prove the essential

1984 (1) ZLR p333

McNALLY J

elements, and it cannot be allowed to re-open its case and to have what is commonly called a second bite at the cherry.

The Attorney-General is in agreement with the quashing of the conviction. I am grateful for the research undertaken urgently by the Attorney-General's representative, much of which is incorporated in this Judgment.

With the agreement of GIBSON J the conviction and sentence are set aside. Arrangements have already been made for the release of the accused.

1984 (1) ZLR p334

S v RUZANI 1984 (1) ZLR 334 (HC)

Court **High Court, Bulawayo**

Reynolds J

15 June 1984

Flynote

Criminal procedure - trial - discharge at end of State case - no evidence to prove essential elements of offence
- accused nevertheless put on his defence - verdict set aside on review.

Headnote

By pleading not guilty, the accused person is deemed to have demanded that the issues raised by such a plea shall be tried by the Court. Where, at the close of the *State* case, the Court considers that there is evidence upon which a reasonable Court might convict, the accused will be put on his defence. If not, the Court decides whether to discharge the accused. It is only in exceptional circumstances that the accused should be put on his defence even though there is no evidence against him which might justify a conviction.

Where the accused was put on his defence although the prosecution had failed to prove essential allegations against him, and the accused should have been (but was not) discharged at the end of the *State* case, there was a failure of justice and the verdict entered should be set aside on review.

Cases cited:

R v Zulu and Another 1947 (1) PH H122 (N);

R v Louw 1918 AD 344;

R v Herholdt and Others (3) 1956 (2) SA 722(W);

S v Heller and Another (2) 1964 (1) SA 524 (W);

S v Ostilly 1977 (2) SA 104 (D);

R v Lakatula and Others 1919 AD 362;

Knoetse v Charles 1944 EDL 128.

Judgment

Reynolds J: In this case the accused was convicted of contravening s 46(1) of the Road Traffic Act, 1976, the offence commonly known as "drunken driving". He was sentenced to nine months' imprisonment with labour, of which three months' imprisonment with labour was suspended on conditions, and in addition, he was prohi-

REYNOLDS J

bited from driving Class 4 vehicles for six months and his driver's licence was cancelled.

In view of the fact that there had been, in my opinion, a miscarriage of justice in the case, the immediate release of the accused from custody was ordered. These are the reasons for that order.

The accused pleaded not guilty to the charge, stating that he had not - been drunk at the relevant time. He alleged that a breathalyser test carried out was of no value as the policeman conducting the test had demonstrated to the accused how to use the apparatus by breathing into it himself, and that this had materially affected the final reading as the policeman himself was very drunk.

There was only the one witness called for the State and this was the police officer who conducted the breathalyser test. His evidence related solely to his own qualifications and condition on the day in question, and to the procedure that he had adopted when conducting the test. The State case was then closed. The magistrate quite properly found that it had been proved that the test was carried out satisfactorily, and that the accused had been intoxicated at the time of the test. There was, however, no evidence that the accused had been driving a motor vehicle at the time and on the day in question upon a public road. These matters are, of course, essential elements of the charge.

By s 169 of the Criminal Procedure and Evidence Act [*Chapter 59*] the accused is, by pleading not guilty to a charge, "deemed to have demanded that the issues raised by such plea shall be tried by the Court". He is, in other words, taken to deny all the averments contained in the charge and the State is put to the proof thereof (*Zulu and Another v R* 1947(1) PH H 122 (N)). By s 188(3) of the same Act, a Court is given a discretion whether or not to discharge an accused at the close of the *State* case if it "considers that there is no evidence that the accused committed the offence charged". It seems to me that this latter provision must receive consideration whether or not there is an application made for discharge, particularly when, as in the present case, the accused is unrepresented. There is nothing on the record before me to indicate whether the magistrate considered this point at all. If he did, or if he made any assumption such as that the points in question were not in issue, then the record should have reflected this.

REYNOLDS J

The normal test adopted at the close of the *State* case in this respect is whether the prosecution has presented evidence upon which a reasonable Court might convict. If so, then the accused is put on his defence. If not, then the Court decides whether or not to discharge the accused. The weight of authority in this regard is to the effect that, as a general rule, when the above test has not been satisfied, then the accused should be discharged. It is only in exceptional circumstances that the accused should be put on his defence even though there is no evidence against him at the close of the *State* case which might possibly justify a conviction: see *R v*

Louw 1918 AD 344 at 352; *R v Herholdt and Others* (3) 1956 (2) SA 722 (W); *S v Heller and Another* (2) 1964 (1) SA 524 (W) and *S v Ostilly* 1977 (2) SA 104 (D).

In *casu* had the magistrate considered the point, he would, in all probability, have discharged the accused then and there or, as the missing evidence was formal in nature, he might have allowed the State to re-open its case in order to lead that evidence. As he adopted neither of these courses, however, the question arises as to what action, if any, should be taken on review. As already mentioned, this accused person was not discharged at the close of the *State* case although there was no evidence led by the State to prove that he had committed the offence in question, but was put on his defence. He answered questions put by the prosecutor, and in so doing, furnished the evidence that was lacking in the *State* case.

There is clear authority for the view that the exercise of the magistrate's judicial discretion in this respect cannot be interfered with on appeal or review: *R v Lakutula and Others* 1919 AD 362; *Knoetse v Charles* 1944 EDL 128. Where, however, the Court *a quo* has not exercised a discretion at all, or has exercised it improperly, it seems to me that there should be a remedy available to the accused. It is wrong in principle for an accused person to be required to convict himself when the Court trying his case has been in error as to his rights.

In the present case, then, I am of the opinion that the State did not prove issues that were essential elements of the charge and that the accused should have been discharged at the close of the *State* case in consequence. There has been a failure of justice in this respect, and the verdict eventually entered must be set aside.

1984 (1) ZLR p337

REYNOLDS J

Even if I am wrong in this respect, however, there is another matter of concern that also calls for consideration. Having been put on his defence the accused was asked to explain how the accident had occurred. He then stated that he had been driving normally when the complainant, a pedestrian, had suddenly run out in front of his vehicle without giving any warning of his intentions. The accused stated that he had applied his brakes immediately, but a collision had ensued. The accused also stated, somewhat questionably, that the complainant had run into his stationary vehicle. This is most improbable in view of the fact that the prosecutor informed the Court subsequently that the "pedestrian had both legs broken." The magistrate may well have found this particular aspect of the accused's evidence untenable, but the balance of his story, which was not in itself unreasonable, was the only evidence that was available to the magistrate to enable him to decide what had actually happened. This version of the accused clearly put forward the assertion that the accused had not been negligent at all, and that the complainant had been solely responsible for the collision. The assessment of sentence in cases such as the present one is normally based on two factors: (a) the degree of intoxication established and (b) the extent of the negligence or recklessness proved. The magistrate does not mention either of these factors in giving his reasons for imposing the sentence he did. Despite this, and as to the first point (a) above, it was clear that the degree of intoxication was not particularly high, being 193 mg of alcohol per 100 ml of blood. In regard to the second point (b) above, it was not proved that the accused had driven improperly at all. In these circumstances a custodial

sentence is certainly not called for, particularly one of an effective six months.

It may also be mentioned that in his reasons for sentence the magistrate records: " The pedestrian lost both legs and is now incapacitated for life". Even if this is so, and the only fact on record relevant to this finding comes from the prosecutor who stated that the pedestrian's legs were broken in the accident, it is trite that the consequences of a collision do not have any bearing on the degree of negligence of the party concerned.

In all the circumstances, the conviction and sentence imposed are hereby set aside and the matter is remitted for trial *de nova* before a different magistrate. If the accused is again tried and convicted, any

1984 (1) ZLR p338

REYNOLDS J

period already spent in custody is to be taken into account in the assessment of sentence.

Mannarara J: agrees

1984 (1) ZLR p339

DEVELOPMENT AID FROM PEOPLE TO PEOPLE v KIRK 1984 (1) ZLR 339 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA and Waddington JA

30 May and 18 June 1984

Flynote

Corporate bodies - objects for which body established - charitable organization promising to refund damage done by inmates to visitor's vehicle - no liability apart from promise - power to donate assets - whether reasonably incidental to carrying on of organization's business.

Headnote

The appellant organization was a voluntary, non-profit making organisation, established in Denmark. For its funds it relied on charitable donations from individuals or governments. A branch of DAPP was formed in Zimbabwe and registered as a welfare organisation. It was a common-law *universitas*, capable of suing and being sued in its own name. It was established in Zimbabwe in order to help with the establishment, construction and running of a school in the Shamva area. The purpose of this school was to rehabilitate, educate and train a large number of young people who had returned from Mocambique following the end of hostilities in Zimbabwe.

The objects of DAPP were stated under its constitution to be:

"1. to render development aid to people and popular movements in developing countries, and to this end

promote establishment of training centres, as well as to take part in development projects in these countries;

2. to publicise the activities of the organization and to inform about development problems in general."

In 1980 the respondent, a local farmer, came to the school at the invitation of one of DAPP's farming consultants. The invitation was extended at least in part as a reciprocal Courtesy to the respondent for assistance he had given. When he arrived in his car, the students mistook him for another farmer for whom they felt antipathy. Stones were thrown and the respondent's car destroyed by fire.

The next day DAPP representatives met and decided to compensate the respondent, for whom they felt a moral obligation. They were also apprehensive that the incident might draw unfavourable publicity on DAPP. When a suitable vehicle was found,

1984 (1) ZLR p340

GUBBAY J

DAPP undertook in writing to pay the respondent \$4 700. They later had second thoughts, however, and refused to pay the promised sum. The respondent instituted proceedings, relying on the promise.

DAPP raised the defence that it was not empowered in terms of its constitution to make payments of this type and that the undertakings it gave were *ultra vires*. The question was, then, whether that promise, necessitating alienation of DAPP's resources derived exclusively from donors for the specific purpose of rendering aid to the developing people of Zimbabwe, was *ab initio* void.

Held, that the motive behind the original undertaking did not make the undertaking any thing other than a gratuity inspired by a combination of philanthropy and expedience.

Held, further, that the power by a company or other such corporate body to donate its assets for charitable purposes cannot be lightly inferred. It is only if the transaction is reasonably incidental to the carrying on of the company's business that it may be sanctioned.

Held, further, that in view of free nature of DAPP, its objects and the source of its income, a gratuitous expenditure of so large a sum for the purposes mentioned was too remote a transaction to ground the requisite probability of being reasonably incidental to the carrying on of DAPP's activities.

Cases cited:

Working Men's Club and Institute Union Ltd v Swansea Corporation [1958] 3 All ER 414 (QBD);

Garment Workers' Union v de Vries and Others 1949 (1) SA 1110(W);

Hutton v West Cork Railway Co (1883) 23 ChD 654;

Amalgamated Society of Woodworkers of SA and Another v Die 1963 Ambagsaal vereniging

1967(1) SA 586(T);

Charterbridge Corporation Ltd v Lloyds Bank Ltd & Another [1969] 2 All ER 1185 (ChD);

Re Hilt Garage (1964) Ltd [1982] 3 All ER 1016 (ChD);

Re Horsley and Weight Ltd [1982] 3 All ER 1045 (CA);

Parke v The Daily News Ltd and Others [1962] 2 All ER 92g (ChD);

Rolled Steel Products (Holdings) Ltd v British Steel Corp and Others [1982] 3 All ER 1057 (ChD).

M J Gillespie, for the appellant

M T O'Meara, for the respondent

Judgment

Gubbay JA: With the coming of Independence to Zimbabwe, the Ministry of Education embarked upon the establishment of a primary school and Agricultural training centre at Camp Haven Farm in the Shamva District, called the Chindunduma Youth Academy. Its purpose was to rehabilitate, educate and train a large number of young refugees who had returned from Mocambique shortly after the termination of hostilities. The project was ambitious, involving as it did about 2 000 children. As the Ministry was in need of both financial support and practical aid, an approach was made to a voluntary non-

1984 (1) ZLR p341

GUBBAY J

profit-making organisation in Denmark, known as Development Aid From People To People (conveniently referred to as "DAPP"). Assistance was sought with the construction of classrooms and boarding hostels, the provision of educational facilities and agricultural equipment and with the resettlement programme in general. The appeal was answered. It was precisely the type of development project of interest and concern to DAPP, which existed to promote the welfare of oppressed and under-developed people. A fund-raising campaign was launched and generous donations secured from the three Scandinavian Governments as well as from the public of Denmark.

In June 1980 the Zimbabwe Branch of DAPP was formed, and a few months later it was registered as a welfare organisation. It is a common-law *universitas*, capable of suing and being sued in its own name. The six permanent staff members comprising the managing committee, together with a group of Scandinavian voluntary workers, earnestly set about the task of assisting Government with the development and operation of the Chindunduma Youth Academy. The donated funds were utilised to that end.

On Sunday, 5 October 1980, Wolle Johannes Kirk and his family visited Camp Haven at the invitation of DAPP's family consultant, one Pedersen. Kirk, an experienced and influential farmer, had rendered certain advice on the agricultural exercise and Pedersen considered that

he was due some hospitality. Events, however, took an unexpected and nasty turn. Soon after the Kirk party alighted from their motor vehicles they were surrounded by a hostile group of stonethrowing students. Efforts by both Pedersen and the headmaster to calm the youths and restore control failed and the visitors were forced to withdraw. Some of them, as well as a DAPP worker, sustained minor injuries. The incident culminated in the students setting fire to and completely destroying the motor vehicles of Kirk and his nephew, Kim Birketoft.

It seems that the cause of the disorder was that the students mistakenly took Kirk to be the previous owner of Camp Haven Farm - a man whose reputation found no favour with them - and they feared that he had returned in order to reacquire the property and evict them therefrom. Their belief was strengthened by the manner in which Kirk and his nephew were dressed; Kirk in a broad-rimmed bush hat popu-

1984 (1) ZLR p342

GUBBAY J

lar with white farmers during the war, and Birketoft in a T-shirt and soft sun hat commonly worn by the former Rhodesian security forces.

At a meeting held the next day Lara Mott, the Chairlady of the local branch of DAPP, verbally undertook to Kirk and Birketoft that the organization would compensate them for the loss of their vehicles. Her promise was motivated by sympathy for the predicament of the two invited guests towards whom she felt a moral obligation, coupled with an apprehension that were the incident to be publicised by them DAPP's reputation could be harmed.

Birketoft knew exactly the replacement vehicle he wished to purchase and settled immediately for the sum of \$1 800. He was paid out of the construction account for the Chindunduma project. Not so Kirk. His loss was more difficult to quantify as a suitable replacement vehicle was not readily available. It was only many months later that he succeeded in procuring such a vehicle at a cost of \$4 700, and on 20 November 1981 DAPP, represented by one of its other officers, undertook in writing to pay that sum to him.

When ultimately it became clear to Kirk that it was no longer intended to make good his loss, he instituted proceedings in the High Court against DAPP, claiming payment of the sum of \$4 700. The defence raised was that DAPP was not empowered by its constitution to make a payment of the type demanded of it and that consequently the undertakings given on its behalf were *ultra vires* and of no force and effect. The defence failed and judgment was entered against DAPP. It now appeals to this Court on the ground that the learned judge *a quo* (McNally J) erred in concluding that the undertakings to effect payment were *intra vires* the constitution.

In determining the nature and extent of the powers a voluntary association is permitted to exercise, the proper and accepted approach -

" ... is to consider first the written constitution and the objects there laid down. It is only in two events that one is entitled to go outside those objects. One is that if, on a reading of the constitution, it is impossible to see which are the main objects out of a series of objects, then one is entitled to look at the activities; secondly even if one can find what appears to be a main object in the constitution but it is ambiguous, again one would be entitled to look to the way in which the organisation has acted."

GUBBAY J

(Per LORD PARKER CJ in *The Working Men's Club and Institute Union, Ltd v Swansea Corporation* [1958] 3 All ER 414 (QBD) at 419 E-F).

Under its constitution DAPP's powers are not separated from its objects, which are stated to be:

- " 1. To render development aid to people and popular movements in developing countries, and to this end promote establishment of training centres, as well as to take part in development projects in these countries;
2. To publicise the activities of the organisation and to inform about development problems in general."

Those two objects are defined in unambiguous language and so recourse may not be had to the manner in which DAPP has conducted itself. The first object is paramount; the second ancillary, designed to enable the organisation to enlist and procure tangible support for the promotion of its essential undertaking. But it is implicit that DAPP may alienate its funds and assets either by way of development aid or in order to publicise its activities. It is also implicit that it may expend moneys upon a host of other things which are necessary for, supportive of or incidental to the promotion of its express objects. See Bamford, *The Law of Partnerships and Voluntary Associations in South Africa* 3 ed at p 133. Thus, for example, it is permissible for it to purchase tents to accommodate its voluntary workers, to hire offices and pay the rental accruing thereon, to buy petrol for motor vehicles, and to meet the cost of many other items without which the implementation of its objectives would be totally frustrated.

In such a context it has been said that a Court must look at a constitution broadly and benevolently and with good sense. For a court to adopt a fault-finding, over-critical and narrow approach would result in the calamitous situation of a very large number of administrative acts done by lay bodies being struck down. See *Garment Workers' Union v De Vries and Ors* 1949 (1) SA 1110 (W) at 1129.

It is not in issue that DAPP's liability to reimburse Kirk in the sum of \$4 700 can only be founded on the promise to compensate him in the amount of his loss. The question turns then on whether that promise, necessitating an alienation of DAPP's resources derived exclusively from donors for the specific purposes of rendering aid to the developing people of this country, was *ab initio* void.

GUBBAY J

The learned judge *a quo* correctly found that each of the motives for the promise to pay was of equal weight in the mind of DAPP's representative. They were, as already mentioned, the discharge of what was considered to be a moral or humanitarian obligation and a desire to avoid adverse publicity which might harm the activities of the organization. But either actuating factor would not, in my view, render the promise upon its implementation anything other than a

gratuity inspired by a combination of philanthropy and expedience.

More than a hundred years ago BOWEN LJ in *Hutton v West Cork Railway Co* (1883) 23 ChD 654 at 673 put the principle governing charity by companies thus:

"Most businesses require liberal dealings. The test is not whether it is *bona fide*, but whether as well as being done *bona fide*, it is done within the ordinary scope of the company's business, and whether it is reasonably incidental to the carrying on of the company's business for the company's benefit. Take this sort of instance. A railway company, or the directors of the company, might send down all the porters at a railway station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided it is a matter which is reasonably incidental to the carrying on of the business of the company, and a company which always treated its employees with Draconian severity, and never allowed them a single inch more than the strict letter of the bond, would soon find itself deserted - at all events, unless labour was very much more easy to obtain in the market than it often is. The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company. ... Charity has no business to sit at boards of directors *qua* charity. There is, however, a kind of charitable dealing which is for the interest of those who practise it, and to that extent and in that garb (I admit not a very philanthropic garb) charity may sit at the board, but for no other purpose."

In short, the power to donate an asset, particularly one of substantial value, cannot be lightly inferred. See *Amalgamated Society of Woodworkers of SA and Anor v Die* 1963 *Ambagsaalvereniging* 1967 (1) SA 586 (T) at 594F.

In Re Lee, Behrens and Co, Ltd [1932] All ER Rep 889 (ChD) at 890 *in fine* - 891A, EVE J propounded the following test to determine the validity of the exercise by directors of an implied power to pay a pension to the widow of an ex-director:

"But, whether they (gifts of corporate property) may be made under an express or implied power, all such grants involve an expenditure of the company's money, and that money can only be spent for purposes reasonably incidental to the carrying

1984 (1) ZLR p345

GUBBAY J

on of the company's business, and the validity of such grants is to be tested, as is shown in all the authorities, by the answers to three pertinent questions: (i) Is the transaction reasonably incidental to the carrying on of the company's business? (ii) Is it a *bona fide* transaction? and (iii) Is it done for the benefit and to promote the prosperity of the company?"

The second two limbs of that test in so far as they as they were said to be relevant to a determination of whether a transaction is within a company's express powers have been rejected in recent years as inappropriate: see *Charterbridge Corporation, Ltd v Lloyds Bank Ltd and Anor* [1969] 2 All ER 1185 (ChD) at 1191 B-D; *Re Halt Garage* (1964) Ltd [1982] 3 All ER 1016 (ChD) at 1030e; *Re Horsley and Weight Ltd* [1982] 3 All ER 1045 (CA) at 1052 b-c.

The present case, of course, is not concerned with the exercise of an express power in DAPP's constitution to make donations. It is concerned with the extent to which the power to donate should be read into the objects clause. Accordingly, as was common ground between counsel, the enquiry to be made is whether the three requirements of EVE J's test have been satisfied; the onus of upholding the validity of the promise being upon the assessor. (See *Parke v The Daily News, Ltd and Ors* [1962] 2 All ER 929 (ChD) at 942E).

If DAPP were a profit-orientated organisation charged with its self-advancement and generating its own income, then I think there would have been more merit in the contention that the undertakings given to Kirk and Birketoft - actuated at least in part by a desire to avoid any publicity of the incident which might adversely affect its public image and reputation - were reasonably incidental to the furtherance of its commercial purposes. But the organisation does not seek its own advancement. It does not exist for its own benefit. It exists for the advancement and benefit of under-developed people who are the object of its charitable endeavours. It channels funds from donors to the needy for eleemosynary purposes and is honour bound to utilise those funds in accordance with the donors' wishes. That is a paramount obligation.

Against that background a gratuitous expenditure as large as \$6 SQO (or \$4 700), even if motivated solely (which it was not) by a desire to avoid the possibility of DAPP's reputation being damaged, thereby affecting the readiness of others to donate funds or contribute their

1984 (1) ZLR p346

GUBBAY J

personal labour to the organisation, seems to me too remote a transaction to ground the requisite probability of being reasonably incidental to the carrying on of DAPP's activities - particularly as there could be no certainty that Kirk and Birketoft would hold their tongues. Moreover, I frankly fail to appreciate how a government, corporate body or private individual, previously prepared to donate money to DAPP, would gain the impression, upon an accurate account of the facts of the incident, that any stigma or blame attached to DAPP in the manner in which it controlled its affairs or promoted or assisted the project in hand. After all the attack mounted by the students was not directed at DAPP's representatives but at the visitors, and arose through a misunderstanding as to the identities of Kirk and Birketoft.

Nor do I consider, as Mr *O'Meara* urged, that the likely reaction of a fair-minded man to the incident would be that developing people who resorted to violent and riotous behaviour were not deserving of financial aid; and that Therefore it was prudent to buy the silence of the injured parties. I think that such a hypothetical individual would appreciate that the money he contributed was to be devoted to the further development of youths in need of rehabilitation, who by virtue of having been reared in an environment of violence had not as yet learned the settled and established modes of behaviour. Though not condoning the unruly behaviour of the students, he would have viewed it, I believe, with a measure of understanding and tolerance.

I am satisfied Therefore that the fear of the incident resulting in bad publicity to DAPP's image was not realistically entertained. Indeed that is borne out by DAPP's subsequent preparedness to go to trial, well aware that by so doing the incident would become public knowledge.

Contrary to the submission made it seems to me that if word went abroad that DAPP's representatives had diverted so substantial a sum of money from funds acquired for the specific purpose of advancing the interest of under-developed people, their action would be viewed with disfavour by donors and potential donors. In the appreciation that DAPP was not responsible for the conduct of the students such persons would think long and hard before providing financial aid to an organization capable of alienating its resources in such a manner.

GUBBAY J

It is my opinion that the first question posed by EVE J is not susceptible of an affirmative answer and consequently the undertakings given on behalf of DAPP must be held *ultra vires*. It is thus unnecessary to embark upon the further enquiries which the second and third questions envisage. (See in that regard *Rolled Steel Products (Holdings) Ltd v British Steel Corp and Ors* [1982] 3 All ER 1057 (ChD) at 1077g.)

The appeal is allowed with costs and the order of the court *a quo* altered to read: " The Plaintiff's claim is dismissed with costs".

Dumbutshena CJ: I agree.

Waddington JA: I agree.

Civil Division of the Attorney-General's Office, appellant's legal representatives.

Atherstone and Cook, respondent's legal representatives.

MAFUKIDZE v MAFUKIDZE 1984 (1) ZLR 348 (HC)

Court High Court, Harare

Reynolds J

13 and 27 June 1984

Flynote

Practice and procedure - costs - action brought without notice of demand and in any case not disputed - costs awarded against successful party.

Headnote

Costs usually follow the event, but a successful party may be deprived of his costs in such circumstances as -

- (1) causing of premature or unnecessary litigation;
- (2) causing unnecessary expense;
- (3) continuing proceedings without good cause;
- (4) instituting vexatious or frivolous proceedings.

The most extreme order the Court may make in these circumstances is to award costs to the

unsuccessful party.

Where the successful party launched motion proceedings without any notice or prior demand and forced the defendant to come to Court when he did not dispute the demand, the conduct of the successful party merited the Court's disapproval and the award of costs against her.

Cases cited:

Havenga v Lotter 1912 TPD 395;

McMurtrie v Norton 1922 EDL 140;

Jones v Curling (1884) 13 QBD 286;

Botha v Bendheim 1912 CPD 365;

Chenille Industries v Vorster 1953 (2) SA 691 (O);

Rester v van Niekerk 1960 (2) SA 363 (E);

Scheepers v Pate 1909 TS 353;

Myers v Schraga 1947 (2) SA 258 (T);

Friedland v Cohen 1906 TS 239;

Cromwell Property Investment Co v Hucks [1939] 3 All ER 257;

Palley v Knight NO 1961 (4) SA 633 (SR);

Kent v Bevern and Co 1907 TS 395;

1984 (1) ZLR p349

REYNOLDS J

Bosch v Titley 1908 ORC 27;

Chetty v Louis Joss Motors 1948 (3) SA 329 (T).

F T Muchena, for the applicant

M J Gillespie, for the respondent

Judgment

Reynolds J: This matter concerns only a question of costs. The relevant facts are that the applicant instituted divorce proceedings against her husband, one Solomon Mafukidze, on 14 November 1983. In her declaration the applicant included a claim for the return of cattle and certain other property which she stated belonged to her, but which was then in the possession of her husband. The applicant then filed a notice of motion on 25 January 1984 claiming the return of some of these items from the respondent, who is her husband's elder brother, and stating that he had "wrongfully and unlawfully" removed these items. The list submitted referred

to 24 head of cattle, 21 sheep and one roll of wire mesh. The respondent, in his replying affidavit, admitted taking possession of the property claimed, except for a lesser number of sheep, and he stated that the applicant's son had specifically requested that he take care of these animals on behalf of his parents the respondent stated that he had not received prior notice of the applicant's wishes or demands, and he offered to return the property at the applicant's convenience.

By order of this Court, the applicant was, accordingly, empowered to collect the property in question, but the issue of costs was postponed for argument, leave being given to either party to set the matter down As it happens, it is the respondent who has set the case down for the present hearing.

At the notice of motion proceedings the respondent filed a supplementary affidavit from the applicant's son, Tinashe Matukidze, who stated that he had been caring for the animals in question, but he had then received a letter from the applicant to the effect that he should deliver the animals to the respondent. He carried out her wishes accordingly, and drove 24 cattle and five sheep to the home of the respondent. The roll of wire mesh was taken in order to construct a pen to contain the animals.

For the purposes of the present hearing, the applicant has filed a further affidavit herself, and a supplementary affidavit from the

1984 (1) ZLR p350

GUBBAY J

kraalhead of the area, one Magaba Mande. The applicant denied having authorized her son, Tinashe, to deliver the animals to the respondent, and stated that, having interviewed Tinashe on the subject, "he gives me the impression" that he was under pressure from the respondent (a) to hand over the animals and (b) to swear to the false affidavit. She concluded that she had reasonable grounds for believing that the respondent would not surrender the property even if demand were to be made of him.

Kraalhead Mande's affidavit is to effect that the property had been left in his custody by the applicant, and that the respondent had indicated that he did not approve of that arrangement, and had in fact alleged that the deponent was using the cattle for his own benefit. He stated that Tinashe had eventually come, and had told him that the property was to be handed over to the respondent. Paragraphs 8 and 9 of this affidavit read as follows:

- "8. At that time Tinashe gave me the impression that he was under pressure from the Respondent to hand over the property to him.
9. In the end I had no option but to let Tinashe take the cattle and other property to the Respondent despite the fact that I did not approve of same."

It may be observed from this passage that this evidence corroborates the respondent's claim that Tinashe arranged for the cattle and other property to go to the respondent.

In my view, there is one notable feature of this case which conclusively determines the matter of costs on its own, and this is the question of demand. It is a well - recognized principle of our law

that a party is not entitled to recover his costs in legal proceedings against another unless he has first made demand of that person (*Havenga v Lotter* 1912 TED 395; *McMurtrie v Norton* 1922 EDL 140). This principle accords with ordinary practice and common sense. In the present case it appears that the applicant at no time made any approach to the respondent for the return of her property. This impresses me as being singularly strange conduct. I would have thought that, in normal circumstances, if a person discovers that another has taken his property, the first thing he would do would be to inquire as to the reason for the taking. If such an inquiry reveals no criminal intent or *mala fides*, it would be the normal and natural thing to do to request the

1984 (1) ZLR p351

REYNOLDS J

return of the property. It is, to my mind, and irrational act to rush straight into litigation without first making such a preliminary inquiry. The facts of the present case do not indicate that it is the type of matter which necessitates urgent legal steps being taken in order to counter an unlawful and potentially prejudicial act, that is, the type of case in which a prior demand would probably prove fruitless and costly. In fact there seemed to be no need for urgent action at all, and the suggestion made by the applicant that she feared that the respondent could have disposed of the property is not only unsubstantiated in any way, but had he done so, he would have rendered himself liable to criminal prosecution. In any event the applicant did not file a certificate of urgency, nor did she make any application to Court to prevent the possibility of disposal of the property.

It may also be remarked that the applicant's alleged belief that the respondent would not willingly return her property does not appear to me to be based on a reliable or even a reasonable foundation. Her actions stemmed from "impressions" and "beliefs" rather than concrete facts or even positive convictions. The supplementary affidavit from Kraalhead Mande is couched in the same indefinite terms. This situation makes it even more extraordinary that she would launch headlong into the issue of legal process before attempting to resolve the matter with a simple inquiry.

Numerous examples may be found of exceptions to the general rule that costs follow the event, although the Court will, however, only depart from this general rule when good grounds exist for so doing (*Jones v Curling* (1884) 13 QBD 286). Grounds for holding that a successful party may be deprived of his costs include:

- (a) the causing of premature or unnecessary litigation (*Botha v Bendheim* 1912 CPD 365; *Chenille Industries v Vorster* 1953 (2) SA 691 (O); *Bester v van Niekerk* 1960 (2) SA 363(E));
- (b) causing unnecessary expense (*Scheepers v Pate* 1909 TS 353; *Myers v Schraga* 1947 (2) SA 258 (T));
- (c) continuing proceedings without good cause (*Friedland v Cohen* 1906 TS 239); and
- (d) instituting vexatious or frivolous proceedings.

REYNOLDS J

In this last category the English case of *Cromwell v Hucks* [1939] 3 All ER 257 has some similar features with the present matter. It is my finding that the present applicant was certainly guilty of at least the first three of these categories.

If the Court decides that it is necessary to depart from the general rule as to costs, it may make a variety of orders, the most extreme of which is that the successful party is to pay the costs of his opponent. This is an unusual order and one which is seldom given, but the Court's final decision depends upon the conduct or misconduct of the party concerned. In *Palley v Knight* NO 1961 (4) SA 633 at 638, BEADLE CJ expressed the position in this way:

"It is unusual for a Court to order that a successful party should pay costs of an unsuccessful party. Cases do arise when such an order is made, but they are usually cases in which the Court disapproves of the actions of the successful parties."

(See, too, *Kent v Bevern and Co* 1907 TS 395 at 400).

The case of *Bosch v Titley* 1908 ORC 2 7 is authority for the proposition that it is necessary, before such an order is made, for the conduct of the successful party to have been the cause of all the costs of the proceedings. (See, too, *Chetty v Louis Joss Motors* 1948 (3) SA 384).

I am of the view that the facts of the present case fit squarely within the principles and considerations to which I have referred above. I find that the applicant's conduct earns this Court's disapproval. Her actions have also been responsible for all the costs incurred in this case. Her determination to initiate and persist in this ill-founded suit must have proved most irksome to the respondent.

In all the circumstances the costs of the initial notice of motion proceedings and of the present hearing are awarded to respondent.

Sawyer and Mkushi, legal practitioners for the applicant

Coghlan, Welsh and Guest, legal practitioners for the respondent

S v CHIRONGA 1984 (1) ZLR 353

Court High Court, Harare

McNally J

27 June 1984

Flynote

Criminal law - Customary Law and Primary Courts Act 1981 - s 24(1) (e) - refusing or wilfully failing to pay

damages etc - meaning of - practice and procedure - desirability of invoking criminal sanction.

Headnote

In terms of s 24(1)(e) of the Customary Law and Primary Courts Act 1981, any person who, having the means to pay, refuses or wilfully fails to pay damages, compensation, costs or expenses awarded against him is guilty of an offence. Mere failure to pay is not enough; there must be a deliberate refusal to pay. The Court should also establish whether the accused has the means to pay.

Since there is a procedure laid down in s 13 of the Act whereby a judgment creditor can sue out a writ of execution, the criminal sanction should not be invoked unless the process of execution has in some way been deliberately frustrated by the person ordered to pay.

Cases cited:

National Assistance Board v Prisk [1954] 1 All ER 400;

R v Arends 1946 NPD 441;

R v Senior [1899] 1 QB 283; [1895 - 9] All ER Rep 511;

S v B 1968 (2) SA 649 (T).

Judgment

McNally J: The accused was convicted in the magistrates Court of a contravention of s 24(1)(e) of the Customary Law and Primary Courts Act 1981. The section provides:

"Any person who ...

- (e) having the means to pay any damages, compensation, costs or expenses awarded against him, refuses or wilfully fails to make such payment or to comply with any order of a primary Court relating to such payment...

1984 (1) ZLR p354

McNALLY J

shall be guilty of an offence."

the accused had been ordered by the Masvingo Primary Court to pay \$500 by way of "seduction fees". He admitted he had neglected to pay the money.

The regional magistrate queried whether mere neglect was enough to bring the accused within the scope of the section. The magistrate said that in his view the use of the word "fail" meant that negligence was sufficient.

In saying this, the magistrate has not given effect to the word "wilfully". In England it has been held that "wilful neglect to pay" in terms of a statute concerning maintenance of wives, means "deliberately refusing to pay": *National Assistance Board v Prisk* [1954] 1 All ER 400.

In South Africa it has been said that "wilfully" in certain contexts may mean "otherwise than by

inadvertence or through erroneous belief": *R v Arends* 1946 NPD 441; and see *R v Senior* [1899] 1 QB 283 at 290, 291; *S v B* 1968 (2) SA 649 (T).

In mitigation the accused said he earned \$166 per month and asked for time to pay the \$500. That request in itself was some indication of his inability to pay. It is an element of the offence that "*having the means to pay ... he wilfully fails*". He should have been asked if he had the means to pay.

It seems clear to me that the prosecution itself in this case was misconceived. There is a procedure laid down in s 13 of the Customary Law and Primary Courts Act whereby any person who has a judgment in his or her favour can sue out a writ of execution, which writ can then "be executed by an authorised messenger of the community Court in the prescribed manner." The prescribed manner may be found in SI 809 of 1981, S 27.

I would not have thought that the criminal sanction should be invoked unless the process of execution has in some way deliberately been frustrated by the person ordered to pay.

1984 (1) ZLR p355

McNALLY J

The Attorney-General does not support the conviction. I am satisfied that the accused should not, on the facts available, have been charged or convicted. The person to whom the money was to be paid should pursue his or her remedies as outlined above.

With the agreement of EBRAHIM J the conviction and sentence are set aside. The fine of \$75 must be refunded to the accused.

Endnotes

1 (Popup - Popup)

On this point, see also *Tobacco Finance Ltd v Zimnat Insurance* 1982(1) ZLR 47, a Judgement of SQUIRES J - ED

2 (Popup - Popup)

See pp 138F - 139A of this volume. ED.