

FAWCETT SECURITY ORGANIZATION v COMMERCIAL UNION FIRE, MARINE & GENERAL INSURANCE CO LTD 1984 (2) ZLR 1 (HC)

Court **High Court, Bulawayo**

Manyarara J

18 June & 6 July 1984

Flynote

Words and phrases - military law - "mutiny" - meaning of - war between guerilla factions not a mutiny - practice and procedure - liquidated claims - interest on - if interest claimed at other than normal rate, this should be stated in summons.

Headnote

The term "mutiny" refers to a combination between two or more persons who are subject to service law, or between persons two at least of whom are subject to service law, with one of the following objectives:

- (1) to overthrow or resist lawful authority in the lawful armed forces; or
- (2) to disobey such authority in such circumstances as to make the disobedience subversive of discipline or with the object of avoiding any duty or service against the enemy; or
- (3) to impede the performance of any duty or service in the armed forces.

A conflict between groups of armed men who are not subject to service law is not a mutiny.

In an action for liquidated damages, where interest is claimed a *tempore morae*, the interest rate is a standard one, 6% *per annum*. If any other rate of interest is to be claimed, this should be stated in the summons.

Case cited:

R v Grant & Others [1957] 2 All ER 694 (CMAC).

C W Jordaan, for the plaintiff

D C Campbell, for the defendant

Judgment

Manyarara J: The defendant was the insurer of the plaintiff in terms of two policies of

insurance. There was an accident and sickness policy covering violent and accidental death of security officers in the plaintiff's employ. One such employee was Mr Patrick Lennon,

1984 (2) ZLR p2

MANYARARA J

insured in the sum of \$5 000. The second policy was styled an all risks policy which covered, *inter alia*, the loss of a pistol valued at \$500. The amount at issue in respect of the loss of the pistol was \$490 as the plaintiff was required to bear the first \$10 of any such loss in terms of the policy. Both policies excluded liability if the death or loss, as the case might be, was caused by or was a consequence of, amongst other things, mutiny. The meaning of the word "mutiny" was the sole issue between the parties.

On 10 November 1980, during the currency of the two policies, Mr Lennon was shot and killed along Khami Road in Bulawayo and his pistol was stolen. The plaintiff sued the defendant for payment of \$5 000 plus \$490 on the ground that the death of Lennon and the loss of the pistol occurred in the circumstances insured against. The defendant in its plea denied liability on the ground that Lennon's death and loss of the pistol were excluded risks in terms of the insurance policies.

It was correctly agreed that the *onus* in respect of the issues was on the defendant.

Evidence of the shooting was given by Mr Johnson Gumede and was not disputed. On 10 November 1980, he was driving to a cattle sale with his employer, Mr Archie Feltman. Mr Gumede continued:

"As we were driving along the Khami Road I observed that motor vehicles were being stopped ahead of us. We then stopped and I told my employer that the situation was wrong, or bad, ahead. The European in reply said: 'Let us proceed. I think it is a police road block.' At this point I had become scared because I had observed that there was fighting going on ahead. When we got there, as I was coming out of the motor vehicle, a gun was pointed right into my face. They said to me: 'Why were you stopped there? What did you want to do?' I said: 'We were checking to see what was ahead - what was happening ahead.' I was then ordered out of the motor vehicle. We were told to get out of the vehicle; they then searched the inside of the motor vehicle. We had six pairs of trousers. One of them pulled them out and threw them down. One of them asked me who was the owner of the trousers which had been thrown to the ground. I said 'They are our trousers.' He said: 'Take the trousers, put them back in the car, we have no right to take anyone's property.' We were then lined up and told to stand there. And one of the Europeans was then shot. I do not know what they had seen about him. He was shot after we had been lined up, behind me. At this point I then fled with the other European. And that was the end of it.

.....
Q. And this man who was shot, was he standing there in the line with you?

1984 (2) ZLR p3

MANYARARA J

A. He was just arriving, he was supposed to line up behind me.

Q. And he was a European, I think you said?

A. He was.

Q. You said that you were concerned when you first saw these people because there had been fighting. Can you tell the Court a little about what you know of that?

A. Yes, we had not slept through the night. There had been the firing of guns right through the night until morning."

Mr Gumede said there were only two men who stopped the cars.

They were dressed in khaki clothes and were armed with rifles. They did not search the person of Mr Gumede or Mr Feltman. Mr Gumede had not seen any other armed men in the vicinity.

An agreed statement of facts deposed to by Mr Hywel Parry-Jones was tendered by consent of the parties. At the time of this incident, he was a Detective Chief Inspector with the ZRP in Bulawayo. In his statement he said at about 10.30 am that day he was a passenger in a car travelling westwards along Khami Road and driven by Detective Superintendent Taylor. The statement continued:

"At a point half way between Mpopoma Drive and Nketa Drive I saw a number of men on and at the side of the road. They were armed with AK and SKS rifles and two of them signalled Superintendent Taylor to pull his car over to the side of the road, which he did behind about five other cars parked on the south side of the road.

I observed a European male adult lying face down and parallel with the road approximately five metres from where we stopped. He had an obvious wound to the top of his scalp.

Superintendent Taylor and I were ordered at gun-point out of the car and forced to submit to a body search. The armed man who searched me said words to the effect that 'That dog is dead. He had a gun.' He also stated that he was a member of ZIPRA which I understand to indicate that he was a member of the armed wing of the political party loyal to Mr Joshua Nkomo, a leading political figure in Zimbabwe at the time.

I identified myself as a member of the CID and was told by the same man to 'Take that dog away' or words to that effect and he pointed to the wounded European.

I examined the European and saw that the entire top of his skull had been destroyed. He was still apparently just alive, but I concluded that nothing could be done to save his life and we had no facilities there to remove him properly.

Superintendent Taylor and I proceeded in our car and I reported the situation by radio to the Police control Room.

A few hundred metres along the road we were again stopped by a small group of

1984 (2) ZLR p4

MANYARARA J

similarly armed men to whom I identified myself as a member of the CID. One of the men said words to the effect that 'That is all right. We don't want to fight police. *We only want to fight the National Army and ZANLA.* *(1) He then added, after I told him that we wanted to get an ambulance to remove the wounded European, 'We killed that man when he tried to fight ZIPRA forces.' He showed me a pistol which he said he had removed from the European. I asked him to hand the pistol over to me, but he refused. He permitted me to record the make and serial number." (my emphasis)

Evidence of the background to this incident was given by Major-General Michael Shute, a retired officer of the Zimbabwe National Army. At the time of Zimbabwe's independence he was a Brigadier and commander of Headquarters 1 Brigade based at Brady Barracks, Bulawayo. It

Copyright Juta & Co Ltd

was his task to group the ZANLA and ZIPRA excombatants at assembly points in Matabeleland. One such assembly point was Entumbane which was a new western township of Bulawayo, offered to the Government for such purpose by the Bulawayo City Council.

Mr *Campbell* asked General Shute whether the assembly points were under the supervision of the Zimbabwe National Army and he replied:

"No. At the time leading up to the elections there was the Commonwealth Monitoring Force and in fact, although we selected the sites initially - that is the former Rhodesian army - and put recommendations up to Harare - to our Army Headquarters - the Senior Commonwealth Monitoring Force Officer, who was a General Ackland, vetted all these sites and the Monitoring Force were in position at all these assembly places before any guerillas moved into the assembly places. This was to create, as far as we could, a condition of trust, because quite naturally the former guerilla armies of ZIPRA and ZANLA were not going to move into an assembly place that had been chosen and was occupied by the former Rhodesian army".

General Shute said the guerillas had been allowed to bring what he described as their "personal weapons" into Entumbane. These consisted of pistols, rifles, light machine guns, grenades, rifle-fired projectiles and small calibre mortars. The guerillas recognised some system of discipline in which they were organized into the equivalent of a regular army's platoons and companies under "commanders". General Shute had commanders allocated to his headquarters to serve on his staff as liaison officers. Standing orders were prepared by General Shute's staff and the liaison officers covering the routine to be

1984 (2) ZLR p5

MANYARARA J

followed at Entumbane. Of relevance to this case was that on leaving their camps the guerillas were not to take their weapons with them.

On the evening of Sunday 9 November 1980, fighting broke out between the occupants of the ZANLA and ZIPRA camps. The fighting, described by General Shute as "a war", continued sporadically until the evening of the next day, ie Monday 10 November. During the night a regular army battalion moved to the outskirts of Entumbane with instructions not to join battle with either side but to merely try to contain the war between the two sides. Civilians reported movement of irregular troops outside the camps.

General Shute received police reports of harassment of Shona-speaking people by ZIPRA guerillas and some murders of off-duty soldiers in the township area. He continued:

"Generally the war, or the battle, was contained within the camp areas, in that ZANLA, as far as I could see, couldn't get out and ZIPRA had surrounded them and taken the tactical ground, as we call it, the ground of military significance, so that they could pin them down. We - I say "We" - the former army who were now trying to resolve this situation, could not move in, or didn't want to move in too closely because the one time where we had physically come up against ZIPRA there had been a battle at that bridge. And the idea was still to try and get them to stop fighting."

On the morning of 10 November, General Shute was able to reach the ZIPRA firing position overlooking the ZANLA camp. The ZIPRA camp itself was virtually deserted. With the help of the camp commanders and the ZIPRA liaison officer he was able to halt the fighting very briefly before it was resumed again. He repaired to Brady Barracks and returned to the ZIPRA firing

position with a ZANLA and ZIPRA liaison officer. A further lull in the firing was secured but it was again short-lived.

"As soon as one person fired, then another would fire", said General Shute. "It was a chain reaction and then everybody was firing again".

In the late morning of 10 November a "sky-shout" aircraft ordered by General Shute arrived. He put into it a ZANLA and a ZIPRA liaison officer to speak over the microphone through the loudspeaker system. The aircraft circled Entumbane calling on all the guerillas to go back to their camps, hand in their weapons and submit themselves to the control of their camp commanders. The aircraft was fired at.

1984 (2) ZLR p6

MANYARARA J

General Shute received authority from Army HQ in Harare to restore the situation by force if necessary. He gave the ZANLA and ZIPRA liaison officers about an hour-and-a-half to persuade their respective groups to stop the war before the army moved in with air support, in the words of General Shute to protect lives and property. The liaison officers succeeded. For as the deadline approached, the ZIPRA machine gun post withdrew and a company of regular (Rhodesian) army soldiers drove into the ZIPRA camp without experiencing any opposition from the occupants. The company advancing on the ZANLA camp was fired on, but it also succeeded in entering the ZANLA camp. By nightfall, the war had ended. I will refer to General Shute's testimony an due course that ZANLA, who were being encircled by ZIPRA, had feared that the regular army might take sides with ZIPRA against them.

Mr *Jordaan* for the Plaintiff elicited the following evidence from General Shute in cross-examination:

"The camp commanders obviously were aware of these weapons in the camp and they were presumably aware that additional weapons were being brought into the camps?

A. They must have been, yes.

Q. And weapons of that nature are basically meant for one thing, are they not?

For waging war, fighting a battle?

A. That is their specific designed purpose, yes.

Q. So the camp commanders must have been aware of the fact that the scene was being set for a pitched battle?

A. My personal opinion, if I may, was that both the former ZIPRA combatants and the former ZANLA combatants were placed very close to each other and although they had been in a liberation struggle together against the former Rhodesian army, they were very frightened of each other. And I know from my conferences with the camp commanders when I tried to stop them from continually carrying their weapons around, which a guerilla has done traditionally, they would not lock their weapons away in an armoury because they were frightened that they would be attacked and they would not have those weapons.

Q. So there was certainly no love lost between the two groups?

A. None whatsoever.

Q. And all you needed was a spark and a battle would follow?

A. Correct."

And the "spark" which kindled the flames of battle was that a ZANLA guerilla got involved in an argument with a ZIPRA guerilla and they had their weapons. Mr *Jordaan* aptly summed up the mental element on each side as: "We are being attacked; kill the enemy."

1984 (2) ZLR p7

MANYARARA J

In the course of the fighting described, the guerillas vacated their camps and dispersed throughout the western suburbs. The dispersal clearly explains the presence on Khami Road of the armed men, described by Mr Gumede and in Mr Parry-Jones' affidavit, who shot Mr Lennon and took away his pistol.

According to General Shute the ZANLA and ZIPRA guerillas had been principally concerned with fighting each other and resisting attempts by the national army to stop them from doing so. From the remarkably objective account of events given by General Shute the conclusion is inevitable that the separate acts of resistance to the army by ZIPRA and ZANLA were attributable to fear on each side that the army might take sides with the opposing guerilla group. Indeed, General Shute said that there was a fear that at one time the former ZANLA combatants and the ZANLA liaison officer were under the impression that the former (national) army was going to side with ZIPRA against ZANLA.

As already mentioned, the issue in this case is whether the events described constituted a mutiny.

Mr *Campbell* submitted that the words of the insurance policies must be given their plain, ordinary meaning: *SA Law of Insurance* by Gordon and Getz, 2 ed p 214. I am with him on his submission. Mr *Campbell* accepted the definition of "mutiny" given in the Shorter Oxford English Dictionary which is: "open revolt against constituted authority; *now chiefly specifically a revolt of soldiers or sailors against their officers* (my emphasis)" However, he cited an English case, *R v Grant, Davis, Riley and Topley* [1957] 2 All ER 694; [1957] 1 WLR 906 as authority for the proposition that any insubordination or defiance of discipline or authority by a force which is subject to discipline and usually armed would constitute mutiny; therefore the Entumbane unrest was a mutiny.

I disagree with him. I am of the view that Mr *Campbell* has relied on the case of *Grant and Others, supra*, out of its proper context and arrived at an erroneous conclusion. In British service law (the equivalent of our Defence Act) "mutiny" means:

"... a combination between two or more persons subject to service law, or between persons two at least of whom are subject to service law, (1) to overthrow or resist lawful authority in Her Majesty's forces, or any forces co-operating with

1984 (2) ZLR p8

MANYARARA J

them or with any part of them, or (2) to disobey such authority in such circumstances as to make the disobedience subversive of discipline, or with object of avoiding any duty or service against, or in connection with operations against, the enemy, or (3) to impede the performance of any duty or service in Her Majesty's forces or in any forces co-operating with them or with any part of them":

Halsbury's *Laws of England* 4 ed Vol 41 para 412. A footnote to the above definition reads as follows:

"The essence of mutiny is the existence of a combination; it is a collective offence. Hence, to constitute mutiny, there must be at least two persons subject to service law joining in the combination, although they need not be subject to the same code of service law. However, if one person subject to service law combines with others not so subject, he will not be guilty of mutiny, whatever may be the object of the combination. Not every act of disobedience committed jointly by two or more persons subject to service law amounts to mutiny; in order that it may do so, the conduct of the accused must have displayed an intention to be, not merely disobedient, and collectively so, but insubordinate, ie to defy or subvert service authority. Hence mutiny is sometimes spoken of as collective insubordination (as distinct from merely collective disobedience): see *R v Grant, Davis, Riley and Topley* [1957] 2 All ER 694, [1957] 1 WLR 906 (CMAC). Even where a combination does amount to collective insubordination it is not the practice of the service authorities to charge the offenders with mutiny unless the case is a serious one, because the offence is one of the most grave known to service law".

I find that the British service law definition of "mutiny" and LORD GODDARD's description of the word in the case of *Grant and Others supra* accord with the plain, ordinary, popular meaning of "mutiny"; ie a revolt of soldiers or sailors against their officers.

The incontrovertible fact about the Entumbane unrest is that it was a war between ZIPRA and ZANLA guerillas, neither of whom was subject to what I would term Zimbabwean service law. The conclusion I drew from General Shute's evidence was that it was understood by all concerned that the guerillas were not so subject. ZIPRA and ZANLA were each an army in its own right under its own "officers" right up to the tripartite Joint High Command at Harare. Each group had brought its own arms to Entumbane, so as General Shute testified, that it could defend itself against the other and, if the occasion arose, against the third leg of the Joint High Command in the form of the Rhodesian National Army. According to General Shute the respective camp commanders were aware of the arms build-up at Entumbane and approved of their men's readiness. The arms build-up was not unknown to the Rhodesian Army who, in what I would hail as their wisdom, preferred to turn a blind eye to the build-up to facilitate the orderly demobilization of the guerillas.

1984 (2) ZLR p9

MANYARARA J

Even if some regular military type of discipline were to be attributed to the guerillas at Entumbane at the time (and I do not express any opinion on the point) they could reasonably have claimed to have obeyed the orders of their respective officers to stop the war. This was when it eventually dawned on the guerillas that there was no cause for the shooting and that the sole object of the Rhodesian Army's intervention was to stop the shooting.

My remarks must not be misunderstood as condoning the resultant loss of lives, damage to property and harassment of civilians which must be regretted. But I find no basis for arriving at

any conclusion other than that the Entumbane unrest was a war between ZIPRA and ZANLA guerillas and not a mutiny in any known sense of the world.

Consequently the issue between the parties is resolved in favour of the plaintiff whose claim thus succeeds. Costs will follow the event.

Finally, Mr *Jordaan* applied for interest to be awarded at the ordinary rate until January 1982, and thereafter at the prime lending rate of 13 *per centum* per annum, if the plaintiff's action succeeded. Mr *Jordaan*'s argument that this is because defendant will have unlawfully withheld plaintiff's money is untenable. In this case interest is claimed in the summons a *tempore morae* without stating any rate. It is established practice from which I see no reason to depart that if it is sought to claim interest at a rate other than the normal 6% this should be stated in the summons.

There will be judgment with costs for the plaintiff in the sum of \$5 490, with interest a *tempore morae* at the rate of 6 *per centum* per annum.

1984 (2) ZLR p10

S v DUBE 1984 (2) ZLR 10 (HC)

Court High Court, Bulawayo

Smith J

6 July 1984

Flynote

Criminal law - Road Motor Transportation Act [Chapter 262] - s 47 - failing to comply with terms or conditions of road service permit - on whom responsibility for adhering to terms lies - effect of charging wrong person.

Headnote

In terms of s 47 of the Road Motor Transportation Act [Chapter 262], it is an offence to fail to comply with the terms or conditions of a road service permit. There are four possible persons who may be charged if the offence occurs. They are -

- (a) the holder of the permit;
- (b) the driver of the vehicle;
- (c) the conductor of the vehicle;
- (d) a person who is managing or supervising the business of the holder of the permit.

The last mentioned person must be charged if he is present at the time of the offence.

It is clear that the Legislature intended that the culpability for the offence should rest with the person who has, or may be deemed to have, control of the vehicle and its consequent adherence to the terms of the permit. This means that the State may not single out a person

willy-nilly from the list given; the appropriate one should be chosen. Thus, where the offence is one of failing to comply with the time-table, it would be inappropriate to charge the conductor; the driver should be charged. Where the responsibility for the defence is not allocated or is denied the State or Court may reasonably allocate such responsibility.

Cases cited:

S v Glover & Another 1978 (2) SA 41 (N);

S v Azels & Another 1975 (1) SA 723 (A).

Judgment

Smith J: The accused was charged with a contravention of s 47 of the Road Motor Transportation Act [Chapter 262] ie failing to observe the conditions of a road service permit. The particulars of the charge are that he was the conductor on a 'bus which arrived at the Ingwizi

1984 (2) ZLR p11

SMITH J

Irrigation Scheme on the Mphoengs - Plumtree Road 11/2 hours ahead of the time provided for such arrival on the time-table which formed part of the road service permit in terms of which the 'bus concerned operated. The accused pleaded not guilty but was convicted and sentenced to pay a fine of \$100. The regional magistrate who scrutinised the record pointed out that there was no evidence that it was the duty of the conductor to see that the provisions of the timetable were observed, and queried whether the conviction was proper. The trial magistrate felt that the object of s 47 of the Act would be defeated if the conductor and driver could escape liability by blaming each other for failure to observe the conditions of the time-table. He felt that the conviction was proper.

The regional magistrate has referred the matter for review, submitting that the conviction should be quashed. I sought the views of the Attorney-General on the conviction and am indebted to him for the detailed reply I received. After setting out the provisions of s 47 of the Road Motor Transportation Act, the Attorney-General replied as follows:

"In terms of the section there are four possible *personae* who may be charged with a failure to comply with the terms or conditions of a road service permit. These are:

- (1) The holder of the permit.
- (2) The driver.
- (3) The conductor.
- (4) A person who is managing or supervising the business of the holder of the permit.

In the case of the last mentioned, it is provided that he shall also be charged if he is present at the time of the offence. The obvious inference to be drawn from this provision is that the Legislature intended that the culpability for such an offence should rest with the person who has, or may be deemed to have, control of the vehicle and its consequent adherence to the terms of the permit. In this case, the term which was contravened was that relating

to the time schedule. It seems logical to assume that the person responsible for ensuring adherence to this would be the driver, for he has ultimate control over the speed at which a vehicle travels. Any possible contrary interpretation (eg a company policy which purports to place such responsibility on the conductor) would be, it is respectfully submitted, artificial. A driver must, for practical reasons, have a discretionary control over the speed at which he drives.

As the learned reviewing Provincial Magistrate has pointed out, the question of responsibility for adherence to the time-table was not probed. This being the case, and in the light of the above reasoning, I would respectfully agree that the conductor was wrongly charged.

1984 (2) ZLR p12

SMITH J

In answer to the specific questions posed by the Honourable Judge, it is respectfully submitted that:

- (1) It is a misinterpretation of the section to suppose that it is left to the election of the State to single out an accused willy-nilly from the parties mentioned in the section. Such an interpretation would be contrary to the principle *nulla poena sine culpa*. This clearly is not a strict liability offence. (see generally *S v Glover & Another* 1978(2) SA 41 (N); *S v Azels & Another* 1975(1) SA 723 (A)). If the manager or supervisor is present when the offence is committed he must be charged jointly with the person directly responsible for the commission of the offence.
- (2) A failure by the State to lead evidence that the person charged had responsibility for the fulfilment of the conditions alleged to have been contravened would usually be fatal to the charge. However, in a situation where responsibility is denied, or where no responsibility has been specifically allocated, I think it only fair that the State or Court be given an option to reasonably - not arbitrarily - allocate such responsibility. Of course, if the State elects to leave this allocation to the Court, it stands in jeopardy of losing the case. In normal circumstances, should this situation arise, it will be desirable for the State to determine responsibility."

I agree with the points made by the Attorney-General and the conviction and sentence are accordingly set aside. Any fine paid by the accused must be refunded to him.

Manyarara J: agrees

1984 (2) ZLR p13

S v GAVAZA 1984 (2) ZLR 13 (HC)

Court **High Court, Harare**

Smith J

11 July 1984

Flynote

Criminal procedure - trial - plea - once accused has pleaded before a particular magistrate, entitled to a verdict from that magistrate - trial de nova before another magistrate not permissible unless original magistrate has died or recused himself- Criminal Procedure and Evidence Act [Chapter 59] - s 163(5).

Headnote

In terms of s 163(5) of the Criminal Procedure and Evidence Act [*Chapter 59*] the accused, once he has pleaded, is entitled to a verdict from the court before which he has pleaded. There are exceptions provided by the Act itself. It is also permissible for the trial to be started *de novo* before another court in such circumstances as the death or recusal of the original judicial officer. In such an event, the proceedings should be commenced afresh: the charge should be put to the accused again and he should again plead to it. It would not be in order for the second judicial officer merely to confirm the original plea.

If the original judicial officer leaves the judicial service or becomes incapacitated for a lengthy period, the case should be referred to the High Court so that the proceedings can be set aside and the trial commenced *de nova*.

Cases cited:

S v Gwala & Other 1969 (2) SA 227 (N);

S v Mthetwa 1970 (2) SA 310 (N);

Punshon v Wise NO & Others 1948 (1) SA 81 (N);

Zackey v Magistrate of Benoni 1957 (3) SA 12 (T);

S v Makoni & Others 1975 (2) RLR 75; 1976 (1) SA 169 (R);

S v Godfrey G-S-100-76.

Judgment

Smith J: The accused was charged with housebreaking with intent to steal and theft. He appeared in Court on 27 April 1984 and admitted that he had broken into the premises concerned and taken a motor cycle as alleged. However, he said that he only wanted to go for a "joy ride" and intended to return the motor-cycle the following day. The magistrate accordingly entered a plea of not guilty.

1984 (2) ZLR p14

SMITH J

The trial was resumed on 15 May 1984 before a different magistrate who, according to the record, commenced by asking the accused if he was still pleading not guilty, and then "confirmed the plea of not guilty". There is no indication in the record as to why the original magistrate did not continue to try the case. Various witnesses were duly called and eventually the magistrate convicted the accused and sentenced him to 7 months' IWL. He also brought into effect a suspended sentence of 5 months' IWL imposed on the accused on 20 August 1982.

Section 163(5) of the Criminal Procedure and Evidence Act [*Chapter 59*] provides 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."

The Criminal Procedure Act 56 of 1955 of South Africa contains an identical provision in s 169(6). In *S v Gwala & Others* 1969 (2) SA 227 (N) at 230E, KENNEDY AJP said:

"It would seem to me that, upon a proper interpretation of s 169(6) of Act 56 of 1955, once an accused has pleaded, except where specially provided for in the Act or in any other law, or where it is impossible (for example in cases of death or recusal of the judicial officer), he shall be entitled to demand that he be either acquitted or found guilty by the judicial officer who commenced the trial. The conception of a fresh trial, under the circumstances of this case, appears to me to be directly in conflict with this sub-section. Indeed, in my opinion, the fact that special legislation was enacted, in terms of s 186(4) of the Criminal Procedure Act, to allow a magistrate, in the absence of the judicial officer who convicted the accused, to pass sentence on him, indicates strongly that a trial *de novo* as occurred in the case before us was never intended by the Legislature and is not permissible. (If the legislation were necessary to enable another magistrate to pass sentence, a *fortiori*, legislation would be necessary for a fresh trial)."

Section 312(5) of our Criminal Code contains provision similar to the s 186(4) referred to by KENNEDY AJP for a magistrate to pass sentence where an accused has been convicted by another magistrate.

The interpretation of s 169(6) of the South African Code pronounced in *Gwala's* case was endorsed by HARCOURT J in *S v Mthetwa* 1970 (2) SA 310 (N) at 313- 4. In my view the reasoning of KENNEDY AJP applies equally to s 163(5) of our Criminal Code. In the case under review, once the accused had pleaded not guilty before the magistrate

1984 (2) ZLR p15

SMITH J

who started the case, he was entitled to demand that he be either acquitted or found guilty by that judicial officer.

If, of course, the judicial officer who started the trial had died or recused himself, then it would have been in order for another magistrate to start a new trial. See *Punshon v Wise NO & Others* 1948 (1) SA 81 (N) and *Zackey v Magistrate of Benoni* 1957 (3) SA 12 (T). However, in such a case the proceedings should be commenced afresh and the charge should again be put to the accused and he should then plead afresh. It would not be in order for the second magistrate merely to confirm the plea put forward by the accused at the original hearing. There is no evidence in the record that the magistrate before whom the accused pleaded did recuse himself or has died. If that magistrate had left the Service or had become incapacitated and would be incapable for a considerable period of continuing the case, then the case should have been referred to the High Court so that the proceedings could have been set aside and the trial commenced *de novo*. See *S v Makoni Others* 1975(2) RLR 75; 1976 (1) SA 169 (R) and *S v Godfrey* G-S- 100-76.

In my view the irregularity is a fatal one and accordingly the promptings are set aside and the matter is remitted or trial *de novo* by the magistrate before whom the accused originally pleaded or before any other magistrate, other than the one who convicted the accused. If the accused is again found guilty, the sentence imposed should not be greater than that imposed in the improper proceedings and the magistrate must take into account the period of imprisonment

already undergone by the accused.

Reynolds J: agrees.

1984 (2) ZLR p16

S v PAWENI & ANOTHER 1984 (2) ZLR 16 (HC)

Court **High Court, Harare**

Ebrahim J

9 & 12 July 1984

Flynote

Criminal procedure - trial - date of - Attorney-General setting matter down for trial - particular legal practitioners not available on that date - whether accused deprived of right to legal representative of his own choice - Constitution of Zimbabwe 1980 - s 18(3) - choice of date - Attorney-General's discretion - whether unfettered - Criminal Procedure and Evidence Act [Chapter 59] - ss 146(1) and 151.

Headnote

Section 18 of the Constitution of Zimbabwe 1980, which is a section falling within the Declaration of Rights, provides that a person charged with a criminal offence is permitted to defend himself, at his own expense, by a legal practitioner of his own choice. However, this right is not absolute; the accused's predilection for a particular legal practitioner who happens to be unavailable on the date on which the accused's case is set down for trial does not mean that the case must be postponed until such time as that particular practitioner is available. The provisions of s 18 simply mean that the accused is entitled to a choice of not having a particular practitioner, whom he does not want, foisted on him. The accused's desire for particular counsel is only one consideration: there are others, such as the principle that cases should be brought to a conclusion with the minimum of avoidable delay. In this regard, the interests of all parties must be considered, not merely the interests of the accused. Such other factors must be considered as: how much notice of trial has been given; the complexity of the case; and the availability of other competent lawyers.

In setting down matters for trial, there is a long established practice for the Attorney-General to consult with the accused's legal practitioner about trial dates. Apart from constituting the most basic courtesy, there are sound practical reasons for the continuation of this practice. In any event, the Attorney-General's discretion as to the choice of a trial date is not unfettered. In terms of the proviso to s 146(1) of the Criminal Procedure and Evidence Act [Chapter 59], the High Court may order that the trial take place at an earlier date; and in terms of s 151 any Court before which a trial is pending may postpone the trial if it considers it necessary or expedient to do so. In other words, unless the Attorney-General acts reasonably, he may well find it difficult to satisfy a Court that it is not necessary or expedient to postpone a trial.

1984 (2) ZLR p17

EBRAHIM J

Cases cited:

R v Second 1969 (2) RLR 285; 1969 (4) SA 255 (RAD);

D' Anos v Heylon Court (Pty) Ltd 1950 (1) SA 325 (C);

Connelly v Director of Public Prosecutions [1964] 2 All ER 401.

I A Donovan, for the 1st applicant

A P de Bourbon, for the 2nd applicant

A Chigovera, for the respondent

Judgment

Ebrahim J: This is an application by Samson Bernard Mashata Paweni (hereinafter referred to as the "first applicant") and Charles Haruperi (hereinafter referred to as the "second applicant") for a postponement of their joint trial which has been set down for hearing for 23 July 1984.

I had previously indicated that the applications were dismissed and that my reasons would follow later. These are my reasons.

Both applicants are presently detained at the Chikurubi Maximum Security Prison in terms of s 17 of the Emergency Powers (Maintenance of Law & Order) Regulations.

The first applicant has also been on remand since March of this year on a charge of allegedly having defrauded the Government of Zimbabwe of a sum in the region of \$5,8 million. The second applicant has been on remand on a charge of bribery since April 1984.

Both applicants appeared in the Magistrates Court, Harare, where they were indicted for trial in the High Court, for the trial to commence on 23 July 1984. They face a joint trial on a charge of bribery, alternatively contravening s 3(b) of the Prevention of Corruption Act [Chapter 70].

It has been the complaint of the instructing legal practitioners of both applicants that neither of them was advised that the applicants were to be indicted at the Magistrates Court on 21 June 1984 for trial. It is their complaint, furthermore, that the normal practice of the State to discuss the question of trial dates with the applicant's legal representatives has not been followed and consequently it is alleged that the State's conduct was discourteous.

Both applicants wish to be represented by legal practitioners of their

1984 (2) ZLR p18

EBRAHIM J

own choice. The first applicant wishes to be represented by Mr *Ian Donovan* and the second applicant by Mr *Adrian de Bourbon*.

Immediately after the indictment proceedings on 21 June 1984 the instructing legal practitioners

contacted Mr Donovan and or *de Bourbon* to determine their availability for the hearing commencing on 23 July 1984.

Mr *Donovan* indicated that he would not be available for a period of seven weeks commencing on 20 July 1984 and that he would be out of the country owing to a long-standing arrangement on his part. He also indicated that he was committed on a confirmed basis to trials over the period 17 to 21 September 1984, 1 to 12 October 1984 and 2 November 1984, and that he was also tentatively committed from 26 to 28 September 1984 and from 5 November to 7 November 1984. He is, however, available for a three-week period commencing on 15 October 1984, it being the assessment of both instructing legal practitioners that the trial would take approximately three weeks to complete.

Mr *de Bourbon* indicated that he would not be available on the trial date as he was commencing another trial on 23 July 1984 and that his commitments were such that he would only be available for a three week period with effect from 15 October 1984. The Court was also advised that Mr Callow, the second applicant's instructing legal practitioner, will not be available with effect from 3 August 1984 as he will be away on leave and on business commitments overseas, returning on 17 September 1984. Mr Callow has also indicated that owing to the short notice and the unavailability of Mr *de Bourbon*, there is insufficient time to prepare properly for the second applicant's trial. It has also been intimated that unless new dates are allocated immediately Mr *de Bourbon* will not be available until the First Term 1985.

It is the contention of both applicants, furthermore, that it is apparent from discussions with the respondent and from the fact that other accused have been placed on remand facing allegations that they accepted bribes from the applicants, that they are likely to face other charges of bribery and in addition that both parties may also be charged with having defrauded the Government of Zimbabwe of \$5,8 million.

1984 (2) ZLR p19

EBRAHIM J

Both Counsel therefore based their attack on the State's approach on the following grounds:

- (1) The consequence of the State's insistence on 23 July 1984 as the date upon which the applicants' trial should commence, would be to deprive them of the opportunity of instructing a legal practitioner of their choice.
- (2) That it is wrong in principle to try accused persons on a "piecemeal" basis and that the proper course of action would be for the applicants to be tried, in one hearing, to face all the charges which the State wishes to bring against each one, it being alleged by applicants that it is apparent that the State does intend to prefer other charges against them.
- (3) That the State's attitude on the whole question of allocating dates for the hearing has been so unreasonable as to justify an award of costs against it if this Court is disposed to grant the applicants the relief they seek.

The Acting Attorney-General (Mr McMillan), in response to the allegations made by the applicants, concedes in an affidavit filed in opposition, that there had been no consultation with

the applicants or their legal representatives on a specific date of trial and that, although in certain cases liaison does take place between the representative of the Attorney-General and accused person's legal representatives on the question of trial dates, there is no legal obligation upon the Attorney-General to do so.

I understand the Acting Attorney-General's approach on this point to be that it is the prerogative of the Attorney-General to set trial dates and that, provided these trial dates are set down well in advance, he sees no reason for the Attorney-General's prerogative to be interfered with. It is his contention that justice would not be served by restricting the prerogative of the Attorney-General in the setting of the trial dates to the availability or non-availability of particular legal practitioners.

In dealing with the second ground of complaint of the applicants, ie that the applicants should not be tried on a "piecemeal" basis, the acting Attorney-General, in his opposing affidavit, deals with this fear in relation to the first applicant as follows:

"(o) Paragraphs 16, 17 and 18

- (i) In connection with the allegations contained in these paragraphs I confirm that the Applicant was initially remanded on allegations of fraud based on information provided by Police investigators. The propriety of those allegations was to be determined by the Attorney-General after considering all the available evidence presented to him by the Police. Upon a proper consideration of the evidence the Attorney-General has determined that the evidence avail-

1984 (2) ZLR p20

EBRAHIM J

able disclosed the offence of bribery and it is upon this basis that the present charges were preferred. The Attorney-General is presently not aware of any evidence relating to the possibility of bringing further charges against the Applicant.

- (ii) The Attorney-General cannot initiate a prosecution merely on the basis of ongoing and incomplete criminal investigations but can only determin (*sic*) the nature of the charge to be preferred and the person against whom such charge be preferred after a careful consideration of the evidence presented to him by the Police.
- (iii) It is not known at this stage to the Attorney-General as to whether current Police investigations against the Applicant will lead to further criminal charges being preferred against him. Further it is not known when such investigations will be completed.
- (iv) It cannot therefore be said to be in the interest of justice to postpone the trial of the Applicant. On the preferred charge pending indefinitely the conclusions of investigations whose outcome in terms of their evidential weight and whose date of completion are uncertain (*sic*).
- (v) As far (*sic*) the Applicant Charles Haruperi I am unaware of any investigations of a Criminal nature being made against him. In the circumstance there is no basis for seeking a delay of his trial in anticipation of further charges being preferred against him."

The Acting Attorney-General, in support of his contention that the trial should proceed on 23 July 1984, also made the submission that it was in the public interest and the interests of justice that there should be no postponement of the trial. In his affidavit he made the following observations:

- "4.1 I consider that it is in the public interest and in the interests of justice that this case be brought to trial without delay and that any postponement now will have a very serious adverse effect on the public interest and in the proper administration of justice.
- 4.2 There has been a prevalence of the crime of corruption particularly amongst state officials recently in Zimbabwe and there is evidence that the incidence is on the increase. In the public interest and in the interests of justice this trend must be corrected before it becomes an epidemic.
- 4.3 The Government has repeatedly indicated its grave concern about corruption in Zimbabwe and its desire and determination to eliminate this type of crime.
- 4.4 The present case concerns bribery and corruption of State officials and it would seriously affect the credibility of the State's expressed concern in this regard if this case were to be postponed now after so much notice of the date of trial has been given and, particularly, if the postponement were to be granted for the reasons stated by the Applicants and on the terms and conditions applied for.
- 4.5 The public must have confidence in the courts and in the administration of justice and I believe that if the present case which has attracted considerable public attention, were to be postponed now, except obviously for compelling reasons or in view of special circumstances, this confidence could be destroyed. I do not believe that such reasons or circumstances exist.

1984 (2) ZLR p21

EBRAHIM J

- 4.6 I have seen the affidavit by the Minister of Justice, Legal and Parliamentary Affairs and I respectfully wish to associate myself therewith. I believe that it specifies further grounds why it would not be in the public interest for this case to be postponed."

Mr *Chigovera*, who appeared for the respondent in this matter, also filed an affidavit from the Minister of Justice, Legal and Parliamentary Affairs, to support his opposition to the applications made on behalf of the applicants. He relied in particular on the passage where the Honourable Minister has stated as follows:

"6. The charge in the case concerned alleges that the bribery took place in connection with the transporting of drought relief. Much of the drought relief available in Zimbabwe is in the form of aid donated by friendly foreign countries and it is, therefore, pre-eminently in the national interest that when allegations of corruption in connection with drought relief are made they are brought to trial without delay. There is a possibility that the future grant of drought relief by foreign countries would be adversely affected if allegations of corruption in regard thereto are not brought before the Courts as soon as possible and the postponement of the trial of the case concerned could therefore have a very serious effect for this reason too."

It is against this background that I now turn to consider whether there is merit in the application made on behalf of the applicants and whether they should be granted the relief sought.

The right of an accused person to secure the services of a legal representative of his own choice is enshrined in the Constitution of Zimbabwe. Section 18(3)(c) and (d) of the Constitution, a section which falls within the Declaration of Rights, reads as follows:

"Every person who is charged with a criminal offence -

.....

- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself in person or, save in proceedings before a local court, at his own

expense by a legal representative of his own choice;

....."

Almost identical provisions were enshrined in the Constitution (Ratification) Act 1966 and were the subject of judicial comment by QUENET JP in *R v Second* 1969 (2) RLR 285 at 287; 1969 (4) SA 255 (RAD) at 256 and 257:

"The appellant's counsel submitted that the refusal violated 72 (2) (c) and (d) of the Constitution (Ratification) Act, 1966 - a section which falls within the Declaration of Rights. It reads:

1984 (2) ZLR p22

EBRAHIM J

"Every person who is charged with a criminal offence -

.....

- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice; . . . "

(the proviso added by the Constitution Amendment Act, 1966, is not material to these proceedings).

The right of choice enshrined in pare (d) was recognised and enforced by the Courts long before the Declaration of Rights was enacted. In many cases, where the exercise of a judicial discretion was questioned, the inquiry necessarily involved consideration of the right (see eg *R v Kuraza* 1967 RLR 225 at 226 F-G). The right, however, did not change its character because it was referred to expressly in 72 (2).

By that I mean that, while the assertion of the right has nothing to do with the exercise by the Court of its discretionary powers, where a postponement is claimed to secure legal representation, discretion necessarily comes into play. In such circumstances, the question is not whether an accused has the right to legal representation but whether he has had sufficient time to arrange for such representation (cf pare (c))."

The main thrust of the argument in respect of both applicants, as I see it, is that if they were to stand trial on 23 July 1984 they would not be represented by counsel of their own choice, although in respect of the second applicant his legal practitioner has also indicated that there is insufficient time to prepare adequately for the applicant's trial.

It is my view that the importance of the principle that it is in the interests of the State, and also of the individual, that cases should be brought to a conclusion with the minimum of avoidable delay, cannot be overlooked. Whilst, however, bearing this principle in mind, one should not disregard the more important principle that justice should be done. It is my view, however, that the interests of justice does not only mean the interests of accused persons alone but the interests of all parties concerned. It is in balancing the operation of these two principles that difficulty exists, and I propose to weigh the factors which lend support to the respective parties in my attempt to resolve the matter.

The mere fact that an accused person is not able to secure the services of a specific legal practitioner is not itself justification for a postponement of his trial. In the case of *D'Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 325 at 333 (c), OGILVIE THOMPSON J, as he then was,

remarked:

1984 (2) ZLR p23

EBRAHIM J

"I do not suggest that the defendant is to be regarded as unreasonable because he desired a particular counsel to conduct his case. I think that is quite a natural desire on the part of a litigant; but it is not one which can be permitted to be decisive in these matters, as I will presently more fully explain."

And he continued at 335 to 336 as follows:

"And while the availability of counsel is an element, the desire of the party to have a particular counsel is in no way a decisive factor; the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In all but the rarest of cases, other suitable counsel will be available. The test is not the convenience of counsel it is the reasonable convenience of the parties - and the requirement of getting through the Court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties."

Both applicants were indicted on 21 June 1984, a period of one month and two days before their scheduled date of trial. They were served on that day with a detailed summary of the evidence which the State anticipates leading against them during the course of this trial. They were also served with a copy of the indictment which reflects the charge they face. Copies of these documents, together with other papers incidental to the indict proceedings, are attached to the petition of the first applicant and consequently I have had sight of them. I am satisfied, from my perusal of these papers and the nature of the charge, that there is nothing so complex therein as to justify a finding on my part that the applicants have not been given sufficient time to unravel any complexities which may exist in order that they may properly defend the allegations made against them.

Mr *de Bourbon* indicated from the bar (no evidence, ie either in the form of an affidavit or otherwise, was placed before me in this regard) that there was no other legal practitioner available to represent the applicants on the date of this trial. I do not accept the validity of this intimation. There is a large body of legal practitioners practising in Harare alone and I am satisfied that even within the ranks of the firms of the applicants' instructing legal practitioners there are lawyers of the competence required to defend them adequately.

Consequently, I am therefore unable to find that the applicants have been deprived of legal practitioners of their choice, specific choice perhaps, but a choice of lawyers, no. I do not read the provisions of s 18

1984 (2) ZLR p24

WRIGHT JA

of the Constitution to mean a choice of a specific practitioner but to mean a choice of not having a practitioner foisted on an accused whom he does not want. I do not think that it was ever intended that if a specific counsel was not available, even for a period of, say, one year or more,

a party would be entitled to wait until such counsel became available.

My finding in this regard does not, however, dispose of these applications as it has also been the contention of the applicants that if the trial were to proceed on 23 July, they face the real prospect of being tried on a "piecemeal" basis as the indications are that the State will bring other charges against them at a later stage.

I entirely agree with the submissions of counsel for the applicants that it has long been the practice in Zimbabwe to prefer all the charges to be brought against an accused in a single trial, unless there is good reason for proceeding differently. I was referred to the case of *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 at 406F, where LORD REID remarked:

"So the general rule must be that the prosecutor should combine in one indictment all the charges which he intends to prefer; . . . "

And at 451B of the same case, where LORD PEARCE said:

"It would be an abuse if he could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence."

Both Mr *Donovan* and Mr *de Bourbon* argued that as the Acting Attorney-General, in his opposing affidavit, admitted the contents of para 15 of the first applicant's affidavit, as adopted by the second applicant, there was a clear indication that other charges were pending and would in all likelihood be brought against the applicants at a future date. Paragraph 15 is worded as follows:

"I now turn to another aspect of the indictment of the Applicant. As has already been mentioned the Applicant was originally arrested on a charge of fraud. Subsequent to his arrest five persons were charged with and convicted of bribery, it being alleged that they accepted bribes from the Applicant either directly or through Charles Haruperi. These five persons were: GIDEON GOVERE, JOHN CHINAKA, and three other gentlemen whose first names are unknown to me but whose surnames are ZEMBE, CHURUMANZU and CHINAWA respectively. I understand that the conviction of the last mentioned gentleman has been set aside by the Supreme Court and that this case has been remitted for trial to the Regional

1984 (2) ZLR p25

WRIGHT JA

Court. Further, I verily believe that at least two other persons have been arrested and placed on remand on charges of having accepted bribes from the Applicant. These two persons are: PHINEAS RHUHWAYA and JEREMIAH CHAMBOKO. It will be noted that it is the intention of the State to call these latter two individuals as witnesses in the trial of the Applicant and Haruperi."

It seems to me that the content of this paragraph is hardly indicative of the fact that Paweni and Haruperi are likely to face further charges following the revelations of the persons mentioned in para 15. It will not be the first time that accused persons, on being arrested, have attempted to mitigate their own conduct by attempting to shift the blame on to others. I cannot, furthermore, disregard the very clear contents of para 3 sub-para (o) of the Acting Attorney-General's affidavit in which he makes the point that following his perusal of the evidence presented to him by the police he is not aware of any evidence relating to the possibility of bringing further charges against the applicants (I have already outlined in detail the contents of the sub-paragraph referred to earlier in my judgment above). This information has been placed

before me in affidavit form by a most senior legal officer of the State, a person who has grave responsibilities and a person who, by virtue of his office, must be a person of the highest integrity. I can see no basis for disregarding the information he has placed before me and am satisfied that, on the evidence before me, as presently advised there is no reason to fear that the authorities contemplate a "piecemeal" trial approach. It seems to me, furthermore, that it would be wrong to expect our investigative authorities or the prosecuting authorities to give an undertaking to accused persons that no further charges will be brought at a later stage in the event of further transgressions being discovered. Having said that, however, I cannot stress too strongly that where the State is aware of reasons to prosecute an accused, all charges should be preferred on one indictment where possible, but I am satisfied on the evidence placed before me that at this stage there is no basis for one to find that the authorities intend to prosecute the applicants on a "piecemeal" approach.

The applicants must therefore fail on their second ground for complaint.

That being the case, their request for costs in their favour must fail. I do not consider this to be an appropriate case for costs to be awarded to the successful party, ie the respondent. It seems to me that the applicants brought a legitimate application before this Court seeking its

1984 (2) ZLR p26

WRIGHT JA

directions and, even though they have been unsuccessful in securing the remedy they sought, this is one of those types of application where they were perfectly entitled to seek the directions of this Court, particularly as the respondent refused to bring the trial on earlier to facilitate the application being made at the trial.

Before concluding my judgment I feel I must comment on criticisms which were levelled against the State during the course of this hearing.

The office of the Attorney-General was criticised for its failure in liaising with the applicant's legal practitioners in setting down a trial date for the hearing of the criminal trial against the applicants.

It was accepted by the Attorney-General in his opposing affidavit that there had been no consultation with the applicants and their legal representatives on a specific date of trial, but he contended that it is the prerogative of the Attorney-General to set trial dates and that provided trial dates are set down well in advance, giving sufficient time for all parties to prepare for trial, he saw no reason for the Attorney-General's prerogative to be interfered with, and that in any event there is no legal obligation on the Attorney-General to liaise with legal representatives of accused persons in setting trial dates.

I propose to examine this submission. Now, it is apparent that in terms of s 9 of the Criminal Procedure & Evidence Act [*Chapter 59*] all powers, authorities and functions relating to the prosecution of crimes and offences are vested in the Attorney-General. The procedure for bringing an accused person to trial before the High Court is provided for by s 146 of the Code.

Section 146(1) of the Code provides as follows:

"(1) Save as is otherwise expressly provided in this Act as to postponement or adjournment of a trial, every person committed for trial or sentence whom the Attorney-General has decided to prosecute before the High Court shall be brought to trial on such date as may be determined by the Attorney-General:

Provided that the High Court may on an application by the accused and on good cause shown by him order that the trial shall take place on an earlier date than that determined by the Attorney-General."

Section 151 of the Code, however, provides for the right of the Court

1984 (2) ZLR p27

WRIGHT JA

to order postponement. Section 151 provides as follows:

"151. Subject to the provisions of subsection (2) of section *one hundred and forty-six*, any Court before which a criminal trial is pending may, if it is necessary or expedient, postpone the trial until such time and to such place and upon such terms as to such or court may seem proper and further postponements may, if necessary or expedient, be made from time to time:

....."

It seems to me that the Attorney-General does not have an absolute right to set down a case for trial on whatever date he chooses. By virtue of the proviso to s 146 (1) of the Code, the High Court, on application by the accused and on good cause shown, can order that a trial be held earlier and in any event by virtue of the provisions of s 151 of the Code *any court* has the right to postpone a criminal trial if it considers it necessary or expedient to do so. In other words, unless the Attorney-General acts reasonably, he may well find it difficult to satisfy a court that it is not necessary or expedient to postpone a trial. For reasons that I have outlined earlier in my judgment, I do not consider that good cause has been shown for a postponement in the trial of applicants in this matter, but I do subscribe to the view that the invariable practice which has existed in this country, for as long as I can remember, of the State discussing the question of trial dates with the legal representatives of accused persons, should be adhered to. It seems to me that there are very sound practical reasons for this practice to continue, apart from it constituting the most basic courtesy.

I turn now to deal with the next aspect of criticism made during the course of the hearing which, in my view, deserves comment. It was Mr *de Bourbon's* contention that the filing of an affidavit by the Minister of Justice, Legal and Parliamentary Affairs, amounted to an incursion by the Executive into the judicial arena. I should say at the outset that I do not agree with this assertion. There are a number of matters which are heard in these courts which by their very nature require the filing of affidavits by members of the Executive, eg where applications are made to these courts for an order of *habeas corpus* in a detention matter where the Minister seeks to justify a detention or, for example, where Government is being sued, as in the recent *Bertrand* case, where affidavits were required to resist the applications made against certain Ministers. The reason for the Minister's placing an affidavit before me in this hearing is, of course, for different reasons. It seems to me that this has been done to add weight to the Acting Attorney-General's

WRIGHT JA

submission that it would not be in the public interest if the trial of the applicant were delayed.

The decisions to be made as to public interest are not such as courts are fitted or equipped to make, and consequently I see nothing wrong in principle for parties to place before a court evidence which can be of assistance in this regard, as was done in this case. I am satisfied that it is the duty of an Attorney-General, in deciding whether or not to authorize a prosecution, to acquaint himself with all relevant facts, including, for instance, the effect which the prosecution, successful or unsuccessful as the case may be, would have upon public morale and order, and with any other consideration affecting public policy. Consequently, it is my view that there was nothing improper in the obtaining of the affidavit from the Minister and the subsequent placing of it before me. The responsibility of the eventual decision on whether to prosecute or not rests with the Attorney-General and he, applying his mind to all the relevant considerations, is the sole judge on whether to do so or not. I am satisfied that there is no basis for a finding that he did not exercise his discretion properly.

Mr *Donovan* and Mr *de Bourbon* have said everything which could be said on behalf of the applicants in this matter, but I feel constrained, for the reasons I have given, to dismiss the applications. There will be no order as to costs.

Gill, Godlonton & Gerrans, legal practitioners for the 1st applicant

Stumbles & Rowe, legal practitioners for the 2nd applicant

Attorney-General, legal practitioners for the respondent

PYRAMID MOTOR CORPORATION (PVT) LTD v ZIMBABWE BANKING CORPORATION **1984 (2) ZLR 29 (HC)**

Court **High Court, Harare**

Scott J

22 June & 18 July 1984

Flynote

Delict - negligence - duty of care - negotiable instruments - cheque endorsed "a/c payee only" being received for collection on behalf of person other than payee - duty of care owed by bank to drawer of cheque.

Headnote

When a cheque is restrictively endorsed with such words as "Account payee only", a collecting bank owes a duty to the drawer of the cheque to take reasonable care not to cause the latter

financial loss by carelessly presenting a cheque for collection without also ensuring that its client is entitled to payment. When such a cheque is presented, the bank should be put on its guard to ensure that the proceeds of the cheque go to the nominated payee. It should foresee that loss may be occasioned to the drawer if the cheque were presented for payment by some person other than the named payee.

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

Cases cited:

Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd supra;

Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd 1928 WLD 251;

Philsam Investment (Pvt) Ltd v Beverly Building Society 1977 RLR 78; 1977 (2) SA 546 (R);

Atkinson Oates Motors Ltd v Trust Bank of SA 1977 (3) SA 188 (W);

Commissioner of State Savings Bank of Victoria v Permewan Wright & Co (1914) 19 CLR 457;

Great Western Railway Co v London & County Banking Co [1901] AC 914; [1900-3] All ER Rep 1004;

Hawkins v Coulsdon & Purely UDC [1954] 1 QB 319; [1953] 2 All ER 364;

Dungarvin Trust (Pvt) Ltd v Import Refrigeration Co (Pty) Ltd & Another 1971 (4) SA 300 (W);

Donoghue v Stevenson [1932] AC 562; [1932] All ER Rep 1;

Bolton v Stone [1951] AC 580; [1951] 1 All ER 1078;

Hilder v Associated Portland Cement Manufacturers Ltd [1961] 1 WLR 1434; [1961] 3 All ER 709;

Union Government v National Bank of SA Ltd 1921 AD 121.

1984 (2) ZLR p30

SCOTT J

A P de Bourbon, for the Plaintiff (respondent)

A Chaskalson, with him *I A Donovan*, for the defendant (excipient)

Judgment

Scott J: This is an exception to the plaintiff's main action to recover the sum of \$4050 from the defendant.

In the main claim, the plaintiff's (the respondent's) allegation is that on 23 August 1983 it issued a cheque for the sum of \$4 050 in favour of one David Morris on the Avondale branch of

Standard Bank. Notwithstanding the fact that the cheque was specially endorsed "A/c Payee Only - Not Negotiable & Co", the defendant (excipient), Citing as a collecting bank, did on 24 August 1983, through its sub-branch at Avondale, receive the cheque for collection. This it did, not on behalf of David Morris, the designated payee, but of "Black Mona Lisa", and paid the proceeds thereof to one Mandunya.

In the course of time the defendant presented the cheque to the Avondale branch of Standard Bank for payment and for the plaintiff's account to be debited, which account was debited accordingly.

It is plaintiff's case that the defendant owed a duty of care to the plaintiff to ensure that the cheque was paid to the payee nominated by the plaintiff. In collecting the said cheque and paying the proceeds to Mandunya, who was not the nominated payee, the plaintiff says the defendant breached that duty and acted negligently.

Resulting from the alleged negligence the plaintiff claims to have suffered loss and claims against the defendant special damages in the sum of \$4 050, together with interest thereon at 12% *per annum* from date of service to date of payment and costs of suit.

The defendant's exception is taken on the grounds that the plaintiff's declaration is bad in law disclosing no cause of action against the defendant. As collecting bank, the defendant contends that contrary to the decision in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 RLR 56; 1972 (2) SA 703 (R), it owed no duty of care in law to the plaintiff. The defendant takes the exception as a test case directed towards the position of a collecting banker to whom a cheque is handed for the purpose of collection and to that end to test or call into question the correctness of the decision in the *Rhostar* case *supra*.

1984 (2) ZLR p31

SCOTT J

Paragraph 7 of the Plaintiff's declaration is the central allegation of its case. It reads:

"Acting as aforesaid, the Defendant owed a duty of care to the Plaintiff to ensure that the said cheque was paid only to the nominated payee or to such person as the said cheque had been duly transferred by the said nominated payee."

It continues at para 8 to allege that in breach of such duty and negligently the defendant collected the said cheque and paid the proceeds to a person other than the designated payee or a person to whom the stated payee had transferred the cheque.

The *Rhostar* case was an action for damages in the sum of \$3 325 against the defendant bank for accepting a cheque for collection on behalf of its client, one Paterson, who had stolen the cheque, which was crossed and marked "Not negotiable - A/c payee only" with the words "or bearer" deleted after the name of the payee.

Paterson was a trusted employee of the plaintiff company and a signatory to the company's cheques. He had been given the cheque signed in blank by one of the company's directors to complete, to add his signature to it and to use in payment to suppliers who supplied goods to the plaintiff company. Instead, and not as payment for goods, Paterson completed the cheque

by making it payable to one "M A Henriques" who was neither known to the company nor entitled to any money from the company. Paterson then deposited the cheque with the defendant bank, who accepted the cheque for collection on Paterson's behalf and presented the cheque the same day to the Plaintiffs bankers for payment. The defendant duly received payment and the Plaintiff's bankers debited the Plaintiff's account with the amount of \$3 325.

As a result, the Plaintiff alleged negligence against the defendant for accepting the cheque for collection when Paterson was not the nominated payee. Or, in the alternative, that when the defendant presented the cheque to the plaintiffs bankers for payment, it did so negligently, in that "it had been accepted for collection on behalf of the named payee, and knowing that plaintiff banker would believe that the defendant accepted it on behalf of the payee unless advised by defendant that was not the position".

The duty of care alleged to have been owed to the plaintiff was

1984 (2) ZLR p32

SCOTT J

denied, so also the allegation that the defendant was negligent. In the alternative, the defendant contended that in terms of s 6(3) of the Bills of Exchange Act [*Chapter 277*], which reads:

"Where the payee is a fictitious or non-existing person or a person not having capacity to contract, the bill may be treated as payable to bearer",

the defendant was entitled to treat the said cheque as being payable to bearer thereof.

After a lengthy discussion on fictitious and non-existing persons, which has no bearing on the instant case, GOLDIN J made a finding that since a collecting banker, unlike a paying banker, is in a position to know whether or not the cheque is being collected on behalf of the person entitled to payment, a duty is owed by the collecting banker to the drawer of the cheque to take due and reasonable care not to cause the latter financial loss by carelessly presenting a cheque for collection without ensuring that his client is entitled to payment. He also held that it is *prima facie* negligent for a collecting banker to take for collection a cheque payable to a specified payee, on behalf of a person other than the named payee. He said the teller should and could have ascertained that the cheque was not payable to Paterson and that it was this negligence and not the conduct of the director which was the *causa causans* of plaintiff's loss.

Back in 1928 the contrary view was held in *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251, that a collecting banker would only be liable if he had knowledge that the customer had no right to the cheque and was intending to misappropriate the proceeds.

On the other hand, the finding made in the *Rhostar* case that a collecting banker owes a duty of care to the drawer of a cheque marked as described above, was assumed in 1977 to be correct by NEWHAM J in *Philsam Investments (Pvt) Ltd v Beverly Building Society* 1977 RLR 78; 1977 (2) SA 546 (R).

In the same year, FRANKLIN J held in *Atkinson Oates Motors Ltd v Trust Bank of Africa* 1977

(3) SA 188 (W) that for a collecting banker to have a positive duty of care to the true owner of a cheque who is not its customer, actual knowledge of the defective title of its customer must exist, otherwise there is no duty on a collecting banker to ensure that loss is not caused to the true owner of the cheque.

1984 (2) ZLR p33

SCOTT J

Clearly therefore the South African courts on the one hand and the Zimbabwean Courts on the other hold contrary views. The view of Mr *Chaskalson*, for the defendant, is that the decision in the *Rhostar* case that a collecting banker owes a duty of care to the drawer is wrong, is inconsistent with decisions in South Africa, is based on a misconception of Roman-Dutch law, and he urged the court not only not to follow it, but to declare that it was wrongly decided. I would like to think that Mr *Chaskalson* only urges that I do not follow the *Rhostar* case and not that I should declare that it was wrongly decided. When GOLDIN J decided that case he was a judge of the High Court. As a judge of parallel jurisdiction, I think I can only refuse to follow his decision. To make a declaration that he wrongly decided the *Rhostar* case would I think, be treading on the prerogative of the Supreme Court.

Section 7(1) of the Bills of Exchange Act [*Chapter 277*] reads:

"When a bill contains words prohibiting transfer or indicating an intention that it should not be transferable, it is valid as between the parties thereof, but it is not negotiable."

It never did come out in the arguments put before the Court how the cheque, the subject matter of this application, marked as it was, got into the hands of "Black Mona Lisa" or Mandunya. Suffice it to say that the fact of the plaintiff instituting the main claim is sufficient indication that the plaintiff never intended nor desired that the proceeds of the cheque should go to Mandunya.

Again, the Court is in the dark as to whether the words "or bearer" were left intact on the face of the cheque or whether, as in the *Rhostar* case, they were deleted. If deleted, then, as in the *Rhostar* case, I would hold that the deletion, coupled with the words "A/c Payee only - not Negotiable", are words "prohibiting transfer or indicating an intention that it should not be transferable and that the crossing and the said words convey clear and definite prohibition against transfer" (see the *Rhostar* case at 705).

If, on the other hand, the cheque, in addition to being marked "A/c Payee only - not Negotiable & Co", had the words "or bearer" after the name of the stated payee, namely David Morris, the situation would have been as follows.

1984 (2) ZLR p34

SCOTT J

Section 2 of the Bills of Exchange Act defines "bearer" as the person in possession of a bill or note which is payable to bearer. An ambiguous situation would arise, then, when the drawer in the same breath is saying, "Pay to the account of payee only" and also saying "or pay to bearer", the person in possession of the cheque, who may or may not be the nominated payee but a thief. A banker confronted with such a situation cannot deem the cheque to be a bearer

cheque. On the contrary, faced with that sort of situation, there can be no justification for paying the proceeds of the cheque to bearer. Either way, whether the words "or bearer" are deleted or intact, a banker presented with a cheque marked "A/c Payee only - not Negotiable" ought to be put on his inquiry to ensure that the proceeds of the cheque go to the nominated payee.

In an Australian case, *Commissioner of the State Savings Bank of Victoria v Permewan Wright & Co* (1914) 19 CLR 457 at 467, GRIFFITH CJ said of a cheque marked "not negotiable" that those words on a crossed cheque "are a danger signal held out before every person invited to deal with it, and are equivalent to saying "Take care, this cheque may be stolen. "

Cowen on *The Law of Negotiable Instruments in South Africa* 4 ed warns at p 435 that "anyone who takes such a cheque incurs the risk that the person from whom he acquires it had no title" - *Great Western Railway Co v London & County Banking Co* [1901] AC 414 at 418.

Before the Court the proposition is a narrow one - that is, whether on the face of the cheque there was something that should put the collecting bank on its inquiry. The words "A/c Payee only" were inserted not alone but together with the words "Not Negotiable". Reason and good sense tell me that these are cautionary words to a collecting banker into whose hands the cheque should fall to be forewarned and consequently to foresee that loss may be occasioned to the drawer if the cheque were presented for payment by a person other than the named payee.

It should, therefore, have been foreseeable by the defendant that the Plaintiff would rely upon his experience to take care to avoid this happening. Neither the defendant nor its agent is expected to have "the prophetic vision of a clairvoyant" *Hawkins v Coulsdon & Purley UDC* [1954] 1 QB 319 at 341) or the foresight of a Hebrew prophet.

1984 (2) ZLR p35

SCOTT J

But where banking experience shows that even crossed cheques marked as described can be stolen, endorsements forged, and the cheques presented for payment, good, efficient and prudent banking practice requires a banker, in dealing with other people in the course of his duty, to exhibit care with the vigilance and the diligence expected of him in the efficient discharge of his duties.

A cheque marked "A/c Payee only" contains the drawer's mandate and specific instructions, the drawer unmistakably indicating "his intention to prohibit transfer of the cheque. His bankers would have been bound to accept his instruction to pay out the cheque for the account of the payee only" - *Dungarvin Trust (Pty) Ltd v Import Refrigeration Co (Pty) Ltd & Anor* 1971 (4) SA 300 (W) at 306. In my view this is so even if "there is no statutory recognition of this practice and its legal effect is by no means settled" (Cowen op cit p440). It is a direction to the collecting banker that the proceeds of the cheque should be placed to the credit of the payee specified in the cheque. It is not an addition to the crossing of the cheque. Where, therefore, in spite of the directions projected by these words, a collecting banker is presented with a cheque for payment by a person other than the specified payee, the banker should be put on his inquiry. The reason is that the words place a duty of care on the banker to ensure that the customer who presents

the cheque for payment and whose account is credited with the proceeds of the cheque is really the payee in accordance with instructions contained on the face of the cheque.

Very real is the risk that a customer may deposit for collection a cheque to which some other person is entitled and consequently the reason for the duty of care placed on the collecting banker. If he fails in that duty to take care, and pays the proceeds of the cheque to anyone other than the payee specified by the drawer, the banker's act, as in the *Rhostar* case, should not be without negligence to warrant the banker being precluded from legal responsibility and liability: a view I adhere to even if South Africa, from whose laws we take precedence, decided in the *Yorkshire Insurance* case, *supra*, that the liability of the collecting banker to the true owner is based, not on negligence, but on knowledge that the customer had no right to the cheque and that the drawer's mandate to the drawee banker is unaffected by the words "A/c Payee Only".

Since the decision of the *Yorkshire Insurance* case in the year 1928, cases like *Donoghue v Stevenson*[1932] AC 562 established that we

1984 (2) ZLR p36

SCOTT J

must take reasonable care to avoid acts or omissions which we can reasonably foresee would be likely to injure our neighbour. There, LORD ATKIN referred to "neighbour" as the person who is so closely and directly affected by my act that I ought reasonably to have him in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. To a large extent LORD ATKIN, with that statement, has been responsible for the development of the tort of negligence to rid the law of the fallacy that unless there is a contractual link between the parties there can be no duty of care.

The test for "neighbour" is therefore "not one of physical proximity but of foresight". What makes a plaintiff a defendant's neighbour is not the relationship between the parties such as that of the manufacturer of ginger-beer and the consumer of same in the *Donoghue v Stevenson* case, *supra*, but the fact that the defendant ought reasonably to have the plaintiff in contemplation when directing his mind to the acts or omissions which are called into question, ie the alleged acts of negligence themselves. Here we are faced with the failure of the defendant or its agent to have the drawer of the cheque in mind and to observe and carry out his specific instructions which has resulted in economic loss to the plaintiff. And the test for the existence of a duty of care owed is the neighbour principle stated by LORD ATKIN, ie the foresight of the reasonable man. And so the question that follows is - was the loss suffered by the plaintiff the reasonably foreseeable consequence of the defendant's act or omission? Foreseeability of what could go wrong is what a reasonable man should have in mind. A collecting banker is deemed to be a reasonable man who ought to have the foresight that his omission or carelessness to act in accordance with the instructions of the drawer might lead to the loss sustained by the plaintiff. Therefore, in the case of *Bolton v Stone*[1951] AC 580, where the court took into account factors such as distance from the pitch, the presence of a seven-foot wall and the upward slope of the ground in the direction in which a ball was struck, a defendant was held not to be liable when he hit a cricket ball out of a cricket ground, which struck the plaintiff standing on an adjoining road to the cricket ground. Contrast *Hilder v Associated*

Portland Cement Manufacturers Ltd [1961] 1 WLR 1434 where the defendants were held liable when they allowed children to play football on land occupied by them and a ball kicked into the road caused the plaintiff's husband to have an accident on his motor cycle, because the conditions were such that the likelihood of injury to passers-by was much higher than in the *Bolton* case,

1984 (2) ZLR p37

SCOTT J

supra, and the defendants should have foreseen what was likely to occur.

So it is that in the instant case the judgement of a reasonable man is the test as to the existence of a duty. INNES CJ, in *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 129, commenting on duty of care, stated:

"Could the infliction of injury to others have been reasonably foreseen? If so, the person whose conduct is in question must be regarded as having owed a duty to such others - whoever they might be - to take due and reasonable care to avoid injury. There are innumerable cases in which South African Courts have dealt with these questions by an application of the extended principles of the Aquilian Law. But, speaking generally, there will be found in them this element: that the injury to person or property relied upon was the direct result of the act done or the force set in motion."

The person in a position to know whether the cheque is being collected by or on behalf of the person entitled to receive payment, is the collecting banker. GOLDIN J at 715E of the *Rhostar* case, said:

"... collecting bankers consider it their duty to ensure that they only present a cheque for collection on behalf of a client who is entitled to receive payment under it. In such a situation and in these circumstances a duty of care arises and is owed by the collecting banker to the drawer of the cheque to take due and reasonable care to prevent him from sustaining loss ... a collecting bank holds itself out as carrying on the business of collecting from paying banks amounts payable in terms of the drawer's cheque. Accordingly, while there is no contractual relationship between them, the collecting banker owes a duty of care to the drawer to take reasonable precautions that no harm comes to him in such circumstances."

Fraud is a game that is often present in banking practice. That being the case, the possibility of a thief handing in a stolen cheque for payment is ever present. The collecting banker's failure to act in a reasonable manner therefore can result in loss to the drawer. This therefore places a duty of care on him. For "if no duty of care is owed, it would follow that a banker need not examine or even look at a cheque to ascertain to whom it is payable" (*Rhostar* case, page 716). The fact that prudent banking practice demands that the banker examines a cheque presented for payment to ascertain that all is well on the face of the cheque is recognition by the banker of the duty of care owed to his customer. For if he fails to ascertain this and still pays the proceeds of the cheques then he must take the risk of liability. It is wise therefore that before a collecting banker presents a cheque to the

1984 (2) ZLR p38

SCOTT J

paying banker for payment, he satisfies himself that his client is really entitled to payment under

the cheque.

Accordingly, looking at the instant case in its entirety, there was a duty of care owed by the defendant to exercise due care to the plaintiff as was decided in the *Rhostar* case.

In the result the defendant's exception to the Plaintiff's main claim is dismissed with costs.

Gill, Godlonton & Gerrans, legal practitioners for the defendant (excipient).

Coghlan, Welsh & Guest, legal practitioners for the plaintiff (respondent).

1984 (2) ZLR p39

PAWENI & ANOTHER v ATTORNEY-GENERAL 1984 (2) ZLR 39 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & Gubbay JA

17 & 18 July 1984

Flynote

Criminal procedure - appeal - from decision of High Court - lies as of right in a criminal case - "criminal case" - what is - trial - right of accused to counsel of his own choice - limits on - Constitution of Zimbabwe 1980 - s 18(3) (d) - postponement of trial - further charges pending against accused - whether trial should be postponed.

Headnote

In terms of s 44(1) of the High Court of Zimbabwe Act 1981, there is an absolute right of appeal to the Supreme Court against a ruling of the High Court in "a criminal case or matter". The test, whether a matter is a criminal one, is whether the matter is one the direct outcome of which may be trial of the person concerned and his possible punishment for an alleged offence by a court of competent jurisdiction. Thus, a ruling in motion proceedings, where application was made for a postponement of a criminal trial, was a criminal case or matter and the applicant had a right of appeal to the Supreme Court. A further consequence of this finding was that an award of costs would be incompetent.

An accused person is, by virtue of s 18(3)(d) of the Constitution of Zimbabwe 1980, permitted to defend himself in a criminal case either in person or at his own expense by a legal representative of his own choice. This right is not, however, absolute: it does not mean that if, for one reason or another, it is not convenient for the legal practitioner selected by the accused to conduct the case on the date set down for the hearing, the Court has no option but to order that the proceedings be held in abeyance pending his availability. What is protected is the right of the accused to resist having a legal practitioner foisted upon him. He is entitled to choose whomever he wishes, but if his prime choice is unavailable, he must look elsewhere.

It is a well-established and salutary practice of our courts that, in general, the prosecutor should join in one indictment all charges he intends to prefer against an accused which arise out of the same alleged course of conduct. It would be an abuse if he were to bring up one charge after

another based on the same incident in order to make fresh attempts to break down the defence. Another consideration would be the loss of public confidence in the courts if the accused were to be acquitted by one

1984 (2) ZLR p40

GUBBAY

court and convicted by another on substantially similar issues of fact. Other reasons for the practice are: the unnecessary and time-consuming, as well as inconvenient, repetition caused by holding separate trials; and the considerable difficulty imposed on the courts in later trials of assessing an appropriate sentence. Where, therefore, it appears likely that the prosecutor does intend to prefer further charges, the court should, unless there is some special feature of the case which would render a single trial involving several counts prejudicial or embarrassing to the accused, exercise its discretion in favour of a stay of the trial.

Cases cited:

S v Tekere & Others 1980 ZLR 441; 1981 (1) SA 878 (ZA);

Re Clifford & O'Sullivan[1921] AC 570;

Amand v Secretary of State for Home Affairs & Anor [1942] All ER 381 (HL);

R v Rudge & Ors (1886) 16 QBD 459;

R v Kuraza 1967 (4) SA 260 (RAD);

R v Second 1969 (2) RLR 285; 1969 (4) SA 255 (RAD);

D'Anos v Heylon Court (Pty) Ltd 1950 (1) SA 324 (C);

R v Raselo & Beston 1960 R & N 803 (Ny);

R v Joannou 1957 R & N 623; 1957 (4) SA 385 (FSC);

Connelly v DPP [1964] 2 All ER 401 (HL);

S v Jantjies 1982 (4) SA 790 (C);

S v Suliman 1968 (3) SA 219 (T);

R v Thomson Holidays Ltd [1974] 1 All ER 823 (CA);

R v Heston-Francois [1984] 1 All ER 785; [1984] 2 WLR 309;

R v Humphreys[1977] AC 1.

I A Donovan, for the appellants

A Chigovera, for the respondent

Judgment

Gubbay JA: This is an appeal against the judgment of EBRAHIM J refusing an application brought by both appellants on notice of motion for a postponement of their joint trial, set down for hearing in the High Court on Monday next.

The background to the impasse between the parties to the appeal is this. The first appellant has been on remand since late March 1984 on a charge of defrauding the Government of Zimbabwe of approximately \$5,8 million. The second appellant has been on remand on a charge of bribery since April 1984. Both are presently detained in prison by order of the Minister of Home Affairs, made under s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983. Shortly after their respective arrests were effected, each appellant engaged a firm of legal practitioners to represent him, and it was appreciated by the respondent that in due course separate counsel would be instructed by those firms to appear for the appellants at their trials.

1984 (2) ZLR p41

GUBBAY JA

On 21 June 1984 and contrary to the invariable and estimable practice of discussing the proposed date of a High Court trial with the legal representative of an accused person, the respondent indicted the appellants for trial before that Court on a charge of bribery, alternatively contravening s 3(b) of the Prevention of Corruption Act [*Chapter 70*], the trial to commence on 23 July 1984. Immediately after the indictment proceedings the particular counsel by whom the appellants wished to be defended were contacted in order to ascertain their availability to appear at the trial, anticipated to take not less than three weeks to complete. Both indicated that the extent of their commitments were such that they would only be available for a three week period commencing on 15 October 1984. Their predicament was explained to the respondent, but he remained adamant that the trial was to begin on the date fixed. He declined to entertain the suggestion that he convene an earlier hearing in the High Court so that the matter could be ventilated and a ruling obtained. The attitude adopted was that if either appellant wished to move for a postponement he would have to proceed formally by way of notice of motion.

At the outset it is necessary to deal with the jurisdictional issue of whether the application before the learned judge *a quo* related to "a criminal case or matter", thereby affording the appellants an absolute right of appeal against the judgment in terms of s 44(1) of the High Court of Zimbabwe Act 1981 - a provision which did not exist in the Act's predecessor the High Court Act [*Chapter 14*]. (See in this regard, *S v Tekere & Others* 1980 ZLR 441; 1981 (1) SA 878 (ZA) at 881 B-D). If the application were not so related then, as submitted on behalf of the respondent by Mr *Chigovera*, it may be said to have come within the definition of a "civil case" in s 2 of the High Court Act as being "any case or matter which is not a criminal case or matter", in which event under s 43 of the Act an appeal lay either as of right or with leave obtained, depending on whether or not the refusal of the postponement amounted to an interlocutory decision.

The question whether a particular proceeding is a "criminal cause or matter" has frequently

arisen before both the Court of Appeal and the House of Lords in England. Many of the cases on the subject are conveniently collected in *Halsbury's Laws of England* 4 ed vol 11 para 1505. The test to be applied emerges most clearly from two decisions of

1984 (2) ZLR p42

GUBBAY JA

the House of Lords. In *Re Clifford and O'Sullivan* [1921] 2 AC 570 at 580 VISCOUNT CAVE said:

"... in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word "criminal". It must involve the consideration of some charge of crime, that is to say of an offence against the public law . . . ; and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it . . . but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction."

Twenty-one years later the test was perhaps more precisely formulated and explained by VISCOUNT SIMON LC in *Amand v Secretary of State for Home Affairs and Anor* [1942] 2 All ER 381 (HL) at 385 D-E in these words:

"If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to so, the matter is criminal. This is the true effect of the "two conditions" formulated by VISCOUNT CAVE . . ."

Applying that test I cannot doubt that by virtue of its nature and character the application for postponement related to "a criminal case or matter". Its direct outcome, whether granted or refused, was the holding of the trial of the appellants either on 23 July 1984 or at some date thereafter, and their possible punishment for the alleged crime by a court of competent jurisdiction.

I am fortified in my view by the case of *R v Rudge and Ors* (1886) 16 QBD 459, in which LORD ESHER MR, COTTON LJ and BOWEN LJ held that the decision refusing the grant of a *certiorari* to alter the venue of a trial was a judgment given in a criminal matter.

It follows that the present appeal lay as of right to the Supreme Court under s 44(1) of the High Court of Zimbabwe Act.

This leaves the way open to consider the two main arguments advanced by Mr *Donovan*, who appeared for the appellants. The first was that the refusal to grant a postponement of the trial to 15 October 1984 violated the constitutional right of the appellants to be defended by counsel of their choice.

1984 (2) ZLR p43

GUBBAY JA

Section 18(3)(d) of the Constitution of Zimbabwe - which is one of the sections falling within the Declaration of Rights - provides that -

"(3) Every person who is charged with a criminal offence -

.....

- (d) shall be permitted to defend himself in person or, save in proceedings before a local court, at his own expense by a legal representative of his own choice; . . .".

The right of choice is an inherent right which every accused possesses and it may be asserted irrespective of the nature or complexity of the proceedings. See *R v Kuraza* 1967 RLR 225; 1967 (4) SA 260 (RAD) at 262A. That is a principle of justice which has been recognised and enforced by the courts long before it became enshrined in the past and present Constitutions of this country. See *R v Second* 1969 (2) RLR 285; 1969 (4) SA 255 (RAD) at 257B. But, as the learned judge *a quo* observed, the disability of an accused to procure the services of a specific legal practitioner does not in itself justify the grant of the postponement of his trial. The inalienable right to "a legal representative of his own choice" does not mean that if, for one reason or another, it is not convenient for the person chosen to conduct the case on the date set down for hearing, the court has no option but to order that the proceedings be held in abeyance pending his availability. What is protected is the right of an accused to resist a legal practitioner being foisted upon him even where such services will be rendered to him without charge. He is entitled to choose whom he wishes to represent him, but if his prime choice is unavailable then he is obliged to look further afield and engage someone else. In other words the right of choice is subject always to the practitioner's availability on the trial date. This much emerges clearly from the following passages in the judgment of OGILVIE THOMPSON J (as he then was) in *D'Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 (C):

"I do not suggest that the defendant is to be regarded as unreasonable because he desired a particular counsel to conduct his case. I think that is quite a natural desire on the part of a litigant; but it is not one which can be permitted to be decisive in these matters, as I will presently more fully explain." (at 333).

and later:

". . . while the availability of counsel is an element, the desire of the party to have a particular counsel is in no way a decisive factor; the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In

1984 (2) ZLR p44

GUBBAY JA

all but the rarest of cases, other suitable counsel will be available. The test is not the convenience of counsel; it is the reasonable convenience of the parties - and by that I mean both parties - and the requirement of getting through the Court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties." (at 335-366).

Those remarks, though made in the context of an application to postpone argument upon an exception filed in a civil action, are nonetheless of general purport and I respectfully endorse them. They accord with the dictum of SPENSER WILKINSON CJ in *R v Raselo and Beston* 1960 R & N 803 (Ny) at 807F that -

"(if) a Legal Practitioner is unlikely to be able to appear on the date when a trial of an accused person is likely to

be fixed, he should, in my opinion, refuse to act for him, or if it subsequently turns out that he cannot appear on the date fixed, he should make arrangements for some other Legal Practitioner to appear in his stead, or failing this, he should return any fee paid to him and inform the Court that he is no longer acting for the accused."

The appellants were indicted thirty-two days before their scheduled date of trial. They were served with a copy of the indictment reflecting the nature of the offence charged and with a detailed summary of the supporting evidence the State proposed to adduce. It has not been contended, nor could it be, that they were given inadequate time for the preparation of their defence. Once it became known that the counsel of the appellants' choice were unable to appear for them on 23 July 1984, arrangements should have been made, but were not, to engage other competent counsel. In failing to adopt that course and in pinning their faith on a postponement of the trial being granted to suit the convenience of counsel, the appellants took a calculated risk.

The decision whether or not to postpone the trial fell within the discretion of the learned judge *a quo*. In the exercise of that discretion he paid careful regard to, and weighed in the balance, all factors of relevance. These were that the counsel of the appellants' choice would only be available three months hence; that the trial date had been set down well in advance, thereby affording ample time to enlist other counsel and prepare for the trial; that a refusal of the postponement would not result in the appellants being deprived of legal representation as "there is a large body of legal practitioners in Harare alone and even within the ranks of the firms of the applicants' instructing legal

1984 (2) ZLR p45

GUBBAY JA

practitioners there are lawyers of the competence required to defend them adequately"; and finally, that by reason of the prevalence of the crime of corruption, particularly among State officials, and the considerable publicity which the case has attracted, it was in the public interest and in the interests of justice that the appellants should be brought to trial with a minimum of delay. In the result he was satisfied that there was no possibility of a refusal to grant the postponement causing a miscarriage of justice.

The principles justifying interference by an appellate Court with the exercise of an original discretion are firmly entrenched. If the discretion has been exercised on judicial grounds and for sound reason, that is, without caprice or bias or the application of a wrong principle, the appellate Court will be very slow to interfere and substitute its own decision. See *R v Joannou* 1957 R & N 623; 1957 (4) SA 385 (FSC) at 386D. It is not enough that the appellate Court considers that if it had been in the position of the lower Court, it would have taken a different course.

In this case it is not possible to hold that EBRAHIM J acted upon a wrong principle or was affected by extraneous matters. The reasons given for the refusal are substantial and convincing, and if I had heard the application my decision would not have differed from his.

Mr *Donovan* next argued that the learned judge had erred in failing to exercise his inherent power to order a stay of the trial in respect of the first appellant, on the ground that it is the respondent's intention to prefer against him further charges arising out of the same course of

conduct as and when investigations by the police into those charges have been completed.

It is a well-established and salutary practice of our Courts, as with the Courts of other countries adopting comparable criminal procedures, that in general the prosecutor should join in one indictment all charges he intends to prefer against an accused which arise out of the same alleged course of conduct. See *Connelly v Director of Public Prosecutions* [1964] 2 All ER 401 (HL) at 406F, 446D and 451B; *S v Jantjies* 1982 (4) SA 790 (C) at 793 *in fine* - 794C. This is primarily because, quite apart from the financial prejudice to an accused and the additional cost to the State which would result from a series of trials the adoption of a piecemeal procedure would enable the prosecutor to

1984 (2) ZLR p46

GUBBAY JA

have a trial run on the minor charge (say, robbery) in order to test the strength of the defence in respect of the more serious charge (say, murder). As so pertinently expressed by LORD PEARCE in *Connelly's* case, *supra*, at 451C:

"It would be an abuse if he (the prosecutor) could bring up one offence after another based on the same incident, even if the offences were different in law, in order to make fresh attempts to break down the defence."

Another consideration is the inevitable loss of public respect for or confidence in the administration of justice if an accused were to be acquitted by one Court and convicted by another on issues of fact that are substantially the same. See *Connelly's* case, *supra*, at 442 B-D. Then there is the unnecessary and time consuming repetition which would occur during the separate trials. At no slight inconvenience to themselves, witnesses would again be called upon to testify. And the advantage of one expeditious hearing culminating in a single judgment dealing with all the charges would be lost, and finality delayed. Lastly, the holding of separate trials on a series of inter-related charges could lead, where convictions are entered, to the very difficulties with regard to an appropriate cumulative sentence which ROSE-INNES J had to wrestle with in *S v Jantjies*, *supra*, at 792G-793C.

Unless therefore there is some special feature of the case which would render a single trial involving several counts prejudicial or embarrassing to the accused, requiring separate trials in the interests of justice, a Court will be prone to exercise the power that is inherent in its jurisdiction to prevent abuses of its process and to control its own procedure, and refuse to allow the indictment to go for trial. In that way it will safeguard the accused from oppression or prejudice. See *S v Suliman* 1968 (3) SA 219 (T) at 225 C-E; *R v Thomson Holidays Ltd* [1974] 1 All ER 823 (CA) at 828e; *R v Heston-Francois* [1984] 2 WLR 309 (CA) at 316H-317D.

If, therefore, *Mr Donovan* is correct in submitting that the evidence reveals an intention on the part of the respondent to prefer other charges against the first appellant, or if there is a probability amounting almost to a certainty that further charges will be brought, then I am prepared to accept that the learned judge should have exercised his discretion in favour of a stay of the trial. Indeed I did not understand *Mr Chigovera* to disagree. He argued strenuously, however, that there are in fact no charges pending against the first appellant and that while

GUBBAY JA

investigations by the police into other allied offences are continuing, their outcome both in terms of evidential probity and duration are unknown. He relied strongly on the positive assertion in the respondent's opposing affidavit that following his perusal of the evidence presented to him by the police he is presently unaware of any evidence relating to the possibility of bringing further charges against the first appellant. The affidavit continues:

"The Attorney-General cannot initiate a prosecution merely on the basis of on going and incomplete criminal investigations but can only determine the nature of the charge to be preferred and the person against whom such charge be preferred after a careful consideration of the evidence presented to him by the Police. It is not known at this stage to the Attorney-General as to whether current Police investigations against the Applicant will lead to further criminal charges being preferred against him. Further it is not known when such investigations will be completed.

It cannot therefore be said to be in the interests of justice to postpone the trial of the Applicant on the preferred charge pending indefinitely the conclusions of investigations whose outcome in terms of their evidential weight and whose date of completion are uncertain."

Undoubtedly the respondent's *ipse dixit* must carry considerable weight. He is the State's most senior legal officer and of necessity a person of the highest integrity. It is an important aspect of his onerous responsibility to ensure as far as he can that an accused is not harassed or subjected to oppressive and vexatious proceedings. I think it a reasonable assumption that, if the situation had altered since the respondent deposed his affidavit 12 days ago and there was now a greater prospect of further charges being preferred against the first appellant, this Court would have been so informed.

Mr *Donovan* stressed that it was common cause that subsequent to the arrest of the first appellant, four persons have been convicted of bribery, it being proved at their trials that they had accepted bribes from the first appellant either directly or through the agency of the second appellant; and the similar conviction of a fifth person has been set aside and remitted for retrial. Furthermore at least two other persons have been arrested and placed on remand on charges of having accepted bribes from the first appellant; they are due to testify at the joint trial of the appellants.

That information is, of course, significant to the issue, but I do not consider that it leads to the conclusion that the first appellant will almost certainly face further charges of bribery. The investigations are

GUBBAY JA

on-going and it by no means follows that when completed the respondent will decide to again indict the first appellant. Much will depend upon his assessment of the cogency and reliability of the evidence available to the State, particularly that of the accomplice witnesses.

While it may be said that there is a risk of the first appellant being again brought to trial, in my opinion it is not such as to justify this Court in interfering with the discretion of EBRAHIM J not to

exercise his inherent power to stay the proceedings. After all the exercise of that power ought not to be resorted to lightly and not, I think, where the abuse of process relied upon is based more upon conjecture than fact. I can do no better than to echo the words of LORD EDMUND-DAVIES in *R v Humphreys*[1977] AC 1 at 55:

"... judges should pause long before staying proceedings which on their face are perfectly regular ..."

There is an additional factor which seems to me to underscore the correctness of the refusal to order a stay of the trial. The appellants are indicted jointly. There is no prospect of other associated charges being preferred against the second appellant and therefore no basis upon which to delay his trial. If his trial is to proceed on 23 July 1984 and that of the first appellant stayed, quite apart from the inconvenience to the State and its witnesses which such a separation would cause, the first appellant would obtain an undue tactical advantage over the second appellant. In relation to the joint charge he would be apprised in advance of all the evidence led against the second appellant and thus know precisely the case he has to meet. Any divergence from a witness's previous testimony would be seized upon and used in an effort to demolish his credibility. This could lead to the unsatisfactory consequence of the witnesses being found truthful by one court and the second appellant being convicted, and their being disbelieved by another and the first appellant being acquitted.

I am satisfied that Mr *Donovan's* second argument also fails.

It was for these reasons that following shortly upon the conclusion of argument the appeal was dismissed.

Mr *Chigovera* sought an order for the costs of the appeal. As I have already indicated, the matter is of a criminal nature, making such an award incompetent. It was therefore refused.

1984 (2) ZLR p49

Dumbutshena CJ: I agree.

Beck JA: I agree.

Gill, Godlonton & Gerrans, first appellant's legal representatives.

Stumbles & Rowe, second appellant's legal representatives.

1984 (2) ZLR p50

BON MARCHÉ (PVT) LTD v BRAZIER & ANOTHER 1984 (2) ZLR 50 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Beck JA & Gubbay JA

13 June & 30 July 1984

Copyright Juta & Co Ltd

Flynote

Delict - passing off - two businesses with similar names - businesses totally different in nature and size - whether reasonable likelihood of confusion established - whether any likelihood of injury - evidence necessary - geographical situations of two businesses - goodwill - effect on - meaning of "goodwill".

Headnote

In discussing the delict of passing off, there is one simple legal principle involved: there must be a representation by one person that his business or merchandise is that of another. In order to determine whether a representation amounts to a passing-off, one must enquire whether there is a reasonable likelihood that a member of the public may be confused into believing that the business of the one is, or is connected with, that of another. Whether there is such a likelihood is a question of fact to be determined in each case.

Factors to be considered include:

- (1) whether the two businesses operated in the same field of activity;
- (2) whether the business name of the complainant was in fact well known;
- (3) whether because of the reputation it had acquired in the area in question there was goodwill attached to its name there;
- (4) the distance between the two businesses;
- (5) whether there actually is confusion in the minds of the public.

With regard to (5), the mere fact that one business occasionally received mail or orders intended for the other would not be decisive, as it is an inconvenience to which all people and all firms carrying on business under names which may be in anyway similar to the names of other people are subject. In addition, the fact that the businesses were totally different in nature and size would reduce the risk of confusion.

"Goodwill", meaning the attractive force that brings in custom, is usually a local thing, gained within the perimeters within which a particular business operates. Where there is no goodwill attaching to a particular business, it is even less likely that confusion will occur. The existence or otherwise of goodwill is a question of fact.

It may also be the case that the words which apply to the complainant have acquired such a distinctive name among the public as to confer on the person who has used it a

1984 (2) ZLR p51

DUMBUTSHENA CJ

right to insist that others using those words must qualify them. Where the name is a descriptive one, the courts will be very reluctant to interfere even where the defendant has taken a name very closely resembling that of the plaintiff. Where the name is a fancy one, the name must have acquired a secondary meaning for the purposes of passing off, through the association between it and the business which bears its name, so that in the minds of the

public it is distinctive of that specific business.

In any event, even if it were established that there was a reasonable likelihood of confusion, it also had to be shown that this caused the diversion of custom from the complainant's business or injury to its business reputation, or both.

Decision of WADDINGTON J in *Bon Marché (Pvt) Ltd v Brazier* 1984 (1) ZLR, upheld.

Cases cited:

Capital Estate & General Agencies & Others v Holiday Inns Inc & Other 1977 (2) SA 916 (AD);

Erven Warnink BV & Ors v J Towned & Sons (Hull) Ltd & Ors [1979] 2 All ER 927;

Ewing v Buttercup Margarine Co Ltd [1972] 2 Ch 1; [1916-1917] All ER Rep 1012;

Baird & Tatlock (London) Ltd v Baird & Tatlock (1917) 34 RPC 85;

F W Woolworth & Co Ltd v Woolworths (Australasia) Ltd (1930) 47 RPC 337;

Woolworths (Pty) Ltd v Coetzer 1934 CPD 198;

Miriam Glick Trading (Pty) Ltd v Clicks Stores Transvaal (Pty) Ltd & Ors 1979 (2) SA 290 (TPD);

H P Bulmer Ltd & Anor v J Bollinger SA & Anor [1978] RPC 79;

Office Cleaning Services Ltd v Westminster Office Cleaning Association [1944] 2 All ER 269;

Boswell-Wilkie Circus v Brian Boswell Circus 1984 (1) SA 734 (N);

Durban Gift Shop (Pty) Ltd v The Gift Box (Pty) Ltd 1952 (4) SA 493 (N);

Lorimar Productions Inc v Sterling Clothing Manufacturers 1981 (3) SA 1129 (T).

A P de Bourbon, for the appellant

I A Donovan, for the respondent

Judgment

Dumbutshena CJ: This is an appeal against the judgment of the High Court (WADDINGTON J as he then was), dismissing with costs the appellant's application for an order interdicting the respondents from using the name "Le Bon Marché" in the course of or in connection with their business.

The appellant started operating the business of a supermarket under the style of "Bon Marché (Private) Limited" on 31 July 1968 at Mabelreign in Harare. Since that time more branches have been established in other centres of Harare. There are now five such branches at Mabelreign, Eastlea, Chisipite, Avondale, and Five Avenue Shopping Centre. Each of the first four branches trade under the name "Bon Marché Centre" and the Fifth Avenue branch is simply named "Bon Marché".

DUMBUTSHENA CJ

The appellant has also a central warehouse which distributes goods to its five branches. The warehouse bears the name "Bon Marché Distribution centre". All the appellant's large trucks, excepting one, have on the sides of their bodies in prominent letters the name "Bon Marché Centres". These trucks carry goods from the warehouse to the branches and between the branches.

It can be seen from the above that the appellant carries on its business in a big way. Under these circumstances it is necessary to determine by comparing, among other things, the scale of the business operations of the appellant and the respondents, to find out whether the respondents have committed the delict known as passing off.

In its founding affidavit the appellant states that it deals with customers from as far afield as the Midlands and many of its customers come from considerable distances to do their monthly shopping at the supermarkets. Of its name and goodwill this is said:

"It would be no exaggeration to say that the name "Bon Marché" is now a household name in Zimbabwe comparable with the other major supermarket chains in Zimbabwe, and we have built up considerable good will in the name during the 14 1/2 years, that we have operated the supermarket business."

It is, however, admitted by the appellant that it has no regular customers from Bulawayo, but annexed to the founding affidavit is a list of forty firms of suppliers with which it deals in Bulawayo.

The appellant first became aware of the existence of "Le Bon Marché" in Bulawayo when it received from a firm in Bulawayo, Harven Manufacturing Company (Private) Limited, a statement with an accompanying invoice intended for "Le Bon Marché" of No 4 Retreat Shopping centre, Matopos Road, Bulawayo.

Before dealing with the merits of the appeal, let me set out briefly the respondent's case as set out in Patricia Brazier's replying affidavit. Patricia Brazier and Violet Eleanor Anne Gibson presently run and manage the partnership business that goes by the style of "Le Bon Marché" at the Retreat Shopping centre in Bulawayo. Their sister, Kathleen Hilda Reynolds, retired from the partnership in November 1983.

DUMBUTSHENA CJ

Patricia Brazier and Kathleen Hilda Reynolds opened their little shop at the beginning of June 1980. A year later they were joined by Mrs Gibson. The name "Le Bon Marché" was chosen for sentimental reasons because their father "had run a small haberdashery and babies' wear shop in Britain for about fifty-eight years under the name "Bon Marché"". They would have adopted that name as it was had they not been advised of the existence of a business with the same name in Gweru. They decided to distinguish the name of their shop from that of the Gweru restaurant by adding the article "Le" to the name. Some time later they learnt that the appellant's business name in Harare was "Bon Marché". They hoped, however, that the article

"Le" prefixed to their name would be a sufficient distinction and would avoid any confusion.

In paragraph 5 of the replying affidavit the respondents set out distinctive features of their business which they claim dispel or avoid any suggestion of confusion between the appellant's supermarket business and their business. It is said:

"THAT in order to answer the apparent suggestion by Applicant that in using the name "LE BON MARCHÉ" we are attempting to "pass off" our business as that of Applicant or as being associated with that of applicant or that there is any reason able likelihood that members of the public may be confused into believing that there is any association between our respective businesses, I feel that the following facts would be helpful:

- (a) The Retreat Shopping centre is about ten kilometres from the centre of Bulawayo on the road which leads to the Matopos. It is a very modest centre comprising a filling station and two blocks of five or six shops each, running in line, parallel to the Matopos Road:
- (b) Our shop, which is in the middle of the southern block of shops, is no bigger than a large office with a plate glass window on the pavement and a single entrance door. A glass display counter runs at right angles to the front of the shop part of the way to the rear which houses, through an archway, a small office cum storeroom with sink and electric kettle for tea making and washing up. There are shelves and racks on the wall opposite the counter:
- (c) . . .
- (d) Our stock consists in the main of items of haberdashery, hand knitted or crocheted baby clothes and soft woolly toys for babies, wool and knitting and sewing materials, greetings cards, fancy wrapping paper and the like:

We sell postage stamps and are agents for dry cleaners and the State Lotteries.

We also sell occasional items of second hand clothing as a favour to customers:

1984 (2) ZLR p54

DUMBUTSHENA CJ

Our stock at any one time is about \$3 500 in value and our monthly turn-over is between \$900 \$1000:

- (e) There is a small sign within the window of the shop giving its name and on the parapet above the front of the shop in sign-writer's script is written "La Bon Marche". We have never bothered to have the error in the sign corrected:
- (f) On one occasion about a year ago the local newspaper ran a series of advertisements from the various suburban shopping centres and we were prevailed upon to purchase a small space in the section devoted to Retreat Shopping centre, but other than this we have never advertised ourselves in any branch of the media. We do not have any large trucks or vehicles upon which to advertise like Applicant. We depend upon passing casual trade as more fully described below
- (g) We do not have any letterheads with the name and address of our shop inscribed at the top. We do not write any formal letters on behalf of the business:

We do not have any inscribed order forms. My sister and I close the shop every Wednesday afternoon and visit suppliers to shop personally for stock which may be required. We do not have a central warehouse like Applicant:

We do have Cash Sale slips inscribed with the name and address of the business and a pictorial motif which we like to think epitomises the nature and style of our business. A copy of one of these is annexed marked "G". On these documents are entered purchases by customers to whom a copy is handed at the

time of the sale:

- (h) We do not employ any staff. My sister and I attend to the shop and if we both have to go out we simply close the door and post a notice saying when we will be back:
- (i) About 95% of our customers are black domestic workers from the surrounding houses and tribes people from the Communal Lands South-West of the city who shop when their buses stop en route to and from Bulawayo. To the locals we are known as "The Wool Shop" or "The Shop of the Two Old Ladies". I do not think that any of our black customers even knows the French name of our shop, much less the existence of Applicant's supermarket chain in Harare:

The butcher down the block from whom we buy our meat sends it up to us addressed to "The Wool Shop":

Most of our white customers are local housewives and casuals, many of whom are friends who pop in for tea and chat and know us as "Pat's Shop" or "Annets Shop". Although some may be aware of Applicant's supermarket chain in Harare, they know very well there is no connection between us even if they have regard to our official name, which few do".

It is difficult to believe that the facts revealed in that paragraph,

1984 (2) ZLR p55

DUMBUTSHENA CJ

when contrasted with the facts deposed to by the appellant as to the nature of its business, would have influenced the Court *a quo* to restrain the respondents from using the name "Le Bon Marche" although there is some similarity in the two names. The business operation of the appellant is vastly different from that of the respondents. It is also patently clear from the evidence that was before the court *a quo* that the respondents adopted the business name "Le Bon Marche" with no intention to deceive or to confuse or to divert the appellant's customers to their own business. By the very nature of the differences in the extent of business operations the possibility of occasioning confusion between "Le Bon Marche" in Bulawayo and "Bon Marche" in Harare is nil. By no stretch of imagination could the respondents' business be said to be an extension, branch, or agency of or otherwise connected with the appellant's business in Harare.

It was unimportant for the appellant to prove in order to succeed that its business name was known all over Zimbabwe; that the class of goods sold by the respondents were the same as those sold in the appellant's supermarkets; that because of the reputation the appellant has acquired in Matabeleland there is goodwill attached to the name "Bon Marche" and that it has suffered or is likely to suffer substantial damage to its property in the goodwill by reason of the respondents using its name. For some other requirements see *Erven Warnink BV and Ors v J Townend & Sons (Hull) Ltd and Ors* [1979] 2 All ER 927 at 941j-942a.

While in ordinary circumstances the existence of two businesses with similar names so many kilometres apart would, other things being equal, not militate against the granting of an interdict, the absence of factors which tend to establish in the minds of the purchasing public some connection or association between the two businesses will, in the face of the distance between Harare and Bulawayo, influence the court to refuse restraining the respondents from using their business name.

In considering the rights and wrongs of the appellant and the respondents in a passing off

action, it is important to take into account the fact that the wrong known as passing off consists in the making of a representation by one or more people that their business is that of another, or other people, or that it is associated or connected with that of other people. There must be some false representation by some people that their business is that of other people so that the public is led to believe that their business is that of other people. See *Capital Estate*

1984 (2) ZLR p56

DUMBUTSHENA CJ

and *General Agencies and Ors v Holiday Inns Inc and Ors* 1977 (2) SA 916 (AD) at 929C. In *Clerk & Lindsell on Torts* 15 ed para 29-28, the learned authors formulate the main characteristics of passing off as follows:

"(1) a misrepresentation (2) made by a trader in the course of trade, (3) to prospective customers of his or ultimate consumers of goods or services supplied by him, (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence) and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a quia times action) will probably do so."

It is in the light of the above that the enquiry should be conducted. And if, after an exhaustive enquiry, there is evidence establishing these elements the court will be obliged to restrain the respondent.

The many kilometres between two business concerns with similar names may not by itself be sufficient to disentitle an applicant from obtaining an interdict because other factors must be considered together with the distance. This point becomes clear when one reads *Ewing v Buttercup Margarine Co Ltd* [1917] 2 Ch 1 (CA), in which the defendant, Buttercup Margarine Company, Limited, was carrying on its business some 250 miles from London where the plaintiff as going to operate from in future. At the trial ASTBURY J granted an injunction restraining the defendant from using the plaintiff's name. On appeal LORD COZENS-HARDY MR summarised the facts relating to the two litigants and said at 10-11:

"The plaintiff has since 1904 been carrying on a business dealing with margarine, tea and such articles, and he has upwards of 150 shops of his own in which he sells his own goods. He sells upwards of fifty tons of margarine a week. The name under which he has come on business is "Andrew Ewing, trading as the Buttercup Dairy Company". The business of the Buttercup Dairy Company is largely carried on in Scotland, and to some extent in the North of England, but not near London, or even the Midlands. It is a business which is extending southwards, and I do not in the least doubt that the Buttercup Dairy Company will, if so minded, extend the business into the South of England.

The defendants are the Buttercup Margarine Company, Limited, and there are two directors added as co-defendants, though this for the present purposes does not matter. The company is one which was registered in November, 1916, and as soon as the plaintiff heard of it he complained. The defendants have never carried on their business up to the present time; but the application to the Court was made promptly and in time, with the result that the learned judge granted an injunction restraining them from carrying on business under the name of the Buttercup Margarine Company, Limited. They were at the beginning of the year engaged in

1984 (2) ZLR p57

DUMBUTSHENA CJ

building a factory, but up to the present day they have not made or sold an ounce of margarine.

In a case like that, where the plaintiff is the owner of a business which has been established since 1904 and has a turnover of half a million a year, and must be regarded as an old-established business none the less because its actual sphere of operations is mainly in Scotland and the North of England, what should I expect the defendants as honest men or honest representatives of a newly formed company to do? I should expect them to say:

"We are very sorry; we were not aware of your existence in Scotland, but as you object to our name we will change it so as not in any way to interfere with you! Instead of doing that they assert their right to use the name and file a mass of affidavits in support of their claim to do what they have threatened and continued to do; and they seek to justify their name on the ground that the arm of the Court is not long enough to reach a defendant who takes a name similar to that of the plaintiff, unless it can be shown that such name is calculated to deceive in the sense that a person desiring to be a customer of the plaintiff is induced thereby to become a customer of the defendant. And they say that there can be no deception here because they are wholesale people while the plaintiff is a retailer, that it is true that they have the fullest possible power under the memorandum and articles of association to carry on a retail business, but that at the present moment they have no such intention. I should be very sorry indeed if the jurisdiction of the Court should be regarded as so limited. No doubt mere confusion due to some acts of the defendants would not be a cause of action-the case of *Day v Brownrigg* (10 Ch D 294) is a good illustration of that-but I know of no authority, and I can see no principle, which withholds us from preventing injury to the plaintiff in his lousiness as a trader by a confusion which will lead people to conclude that the defendants are already connected in some way with the plaintiff or are carrying on a branch of the plaintiffs business."

The appellant was aware of the considerable distance between Harare and Bulawayo but sought to minimise the distance by saying:

"...in an economy such as Zimbabwe, which although widespread in geographic terms, is nevertheless of limited size, names more readily gain national acceptance than would be the case in the far larger economies of South Africa or the western nations. It is thus readily understandable that the Appellant has in fact acquired a reputation in its trading name throughout Zimbabwe. "

Such reputation was not proved, however, through cogent evidence adduced by customers of the appellant. The fact that a clerk in the employ of a supplier to both business inadvertently or absent mindedly sent to the appellant an invoice and a statement which should have been sent to the respondents is not, in my judgement, evidence of national acceptance of the appellant's reputation throughout Zimbabwe.

The mistake made by that one supplier is a source of inconvenience which more often than not occurs in companies with a similarity of

1984 (2) ZLR p58

DUMBUTSHENA CJ

names. *Baird & Tatlock (London) Ltd v Baird & Tatlock* (1917) 34 RPC 85 (Scotland) was a case in which the plaintiff brought an action to have the respondent interdicted from carrying on business under the style of "Baird & Tatlock Ltd, unless words were added to distinguish the two companies and so prevent the public being deceived. It was proved that confusion sometimes arose in the mind of the public between the companies, and that orders intended for one company were sometimes sent to the other (as was done in this case with the invoice and statement). In refusing to interdict the respondent company LORD CULIEN remarked as follows on the point at 93:

"The Complainers' case, indeed, as it seems to me, comes to no more than this, that in consequence of both

Companies using in their designations the distinctive name of *Baird & Tatlock*, derived from the original Glasgow fine, their common parent, confusion will arise -as has already, although to no very serious extent, arisen-through mistakes made by careless members of the public intending to deal with the one or the other. It is, however, a possible and by no means unknown state of matters that there should be two businesses carried on quite lawfully under names which have such a degree of resemblance to each other that mistakes may be made by people who are careless in their dealings. I may refer to the well-known case of *Turton v Turton* LR 42 CD 128. A rather striking example of what may happen in this way is furnished by the evidence of Mr *R T Thomson* in the present case. He carries on in Glasgow, in partnership with Mr *R R Tatlock*, the business of analytical chemists. The firm name is *R T Tatlock & Thomson*. The only point of resemblance between it and the Respondents' name is the presence in each of the name of *Tatlock*. *Tatlock*, however, is a very uncommon name. The lines of the two businesses have a strain of chemistry in common, but differ widely. Yet it appears from Mr *Thomson's* evidence, corroborated by that of Mr *J Douglas Tatlock*, that mistakes are quite frequent, and that many orders and communications intended for the Respondents are sent to *R R Tatlock & Thomson* and have to be forwarded by that firm to the Respondents. For this confusion there is no legal remedy capable of putting an end to it. It is not the fault of the Respondents, but that of the careless people who send their communications addressed wrongly."

In *F W Woolworth & Co Ltd v Woolworths (Australasia) Ltd* (1930) 47 RPC 337 (ChD)
FARWELL J said on the same point at 343:

"The evidence that has been called before me has not satisfied me that down to the present time there deals been any serious confusion at all. I do not propose to travel through the correspondence which deals with it, certain cases have been called to my attention, and there is some evidence that in one case, a messenger boy made a mistake in delivering the invoice, and there are other cases, viz, in one case a German manufacturer wrote to the Plaintiff Company a letter making a reference to its Australian department; but I am not satisfied that down to the present time there has been in fact any real confusion."

1984 (2) ZLR p59

DUMBUTSHENA CJ

Similarly in *Woolworths (Pty) Ltd v Coetzer* 1934 CPD 198 VAN ZYL J said at 202:

"The evidence as to the misdirection of letters, one by the Standard Bank and one by the Imperial Cold Storage, does not weigh very much with me. The following passage from the judgment of LORD KINNEAR in the case of *Williamson v Meikle* (1909, Session Cases, 1277) sets out, in my opinion, very aptly how evidence of that sort should be regarded:

"The remaining point is that there has been and is likely to be a great deal of confusion by the misdirection of correspondence. That in itself does not appear to me to be very material, because that is an inconvenience to which all people and all firms carrying on business under names which may be in any way similar to the names of other people are subject. The mere fact of liability to misdirection does not in itself show either an intention to divert business or any probability that business will be diverted."

These persuasive authorities dispose of the mistake by the clerk in Bulawayo who dispatched the invoice and statement already referred to. Such evidence does not weigh very much with the Court as evidence of confusion.

What matters more is evidence which tends to prove that substantial numbers of the purchasing public or suppliers would be led to believe that they were doing business in Bulawayo with a shop associated in some way with the appellant in Harare. If that were so it would have been wrong of the court *a quo* to have refused to grant an interdict to the appellant. The many kilometres between Harare and Bulawayo, in the face of such evidence, would have been of no consequence.

But in this case there is no evidence of actual confusion. Although Mr *de Bourbon*, who appeared for the appellant, suggested that by using the name "Le Bon Marché" the respondents mislead people into believing that they are somehow connected with the appellant's business, he, however, conceded that the respondents did not trade in that name to gain the appellant's goodwill.

Absence of goodwill may represent, in a particular area of the country, the fact that the business has no customers in that area. In such a circumstance the likelihood of confusion is even more remote. In *Miriam Glick Trading (Pty) Ltd v Clicks Stores Transvaal (Pty) Ltd and Ors* 1979 (2) SA 290 (TPD) the similarity of the names "Glick" and "Click" was found to exist and on an application for passing off the court *a quo* granted an interdict. On appeal ELOFF J said at 297G:

1984 (2) ZLR p60

DUMBUTSHENA CJ

"Having regard to the totality of the circumstances I am not persuaded that the clear inference is that there is a likelihood of confusion. That being so the complete absence of evidence of actual confusion by customers becomes important. 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)."

Once it is accepted that the question of goodwill is not a factor it becomes well nigh impossible to argue that the respondents wanted or intended to benefit from the reputation and goodwill of the appellant.

Goodwill is a local thing. It is gained within the perimeters in which a particular business operates. The appellant's goodwill, so it seems from the evidence, does not extend to Matabeleland. In *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Pere et Fils* [1978] RPC 79 (CA) at 95 BUCELEY LJ said this on goodwill and its circumstance:

"It is well settled that a plaintiff in a passing off action does not have to prove that he has actually suffered damage by loss of business or in any other way. A probability of damage is enough, but the actual or probable damage must be damage to him in his trade or business, that is to say, damage to his goodwill in respect of that trade or business. "Goodwill" is a word of wide import. It was defined succinctly by LORD MACNAGHTEN in *IRC v Muller & Co's Marganne Limited* [1901] AC 217 at 224, as the attractive force which brings in custom. That force may be due to many and diverse circumstances differing in every case. It can, I venture to suggest, be said to embrace every circumstance which contributes to the success and value of the business to which it relates. It is, to use the language of LORD MACNAGHTEN in *Trego v Hunt* [1896] AC 7 at 24 "The whole advantage, whatever it may be, of the reputation and connection of the firm. ""

Without the elements of goodwill it is difficult for a plaintiff to succeed in an action for passing off involving a business name. In this case the appellant has failed to establish that the trade name "Bon Marche has become distinctive with its business, not in Harare or the Midlands, but in Matabeleland where the respondents carry on their business. There is no evidence of the appellant's business being associated in the minds of the people in Matabeleland with the name "Bon Marche". It does not avail the appellant, without evidence of goodwill or the enjoyment of a reputation in Matabeleland, to say in para 13 of the founding affidavit:

"In all the circumstances, therefore, I would earnestly submit to the above Honourable Court that the Respondents' operations, though relatively insignificant compared to the operations of the Applicant in Harare, are

nonetheless an infringement of the good will associated with the name the Applicant has built up

1984 (2) ZLR p61

DUMBUTSHENA CJ

over the last 141/2 years. The goodwill in the Applicant's name could be prejudiced if any other business in Zimbabwe tried to pass itself off as being "Bon Marche."

The principles of law governing the determination, in a passing off action, of the question whether a trade name is likely to deceive, having regard to the existence of a similar name which is being used by some other business, have been discussed in many cases and were usefully summarised by LUXMOORE LJ in *Office Cleaning Services Ltd v Westminster Office Cleaning Association* [1944] 2 All ER 269 (CA) at 270G-271C:

"The foundation of the right to restrain the user of a similar name is the principle that no one is entitled to represent his business or goods as being the business or goods of another by whatever means that result may be achieved, and it makes no difference whether the representation be intentional or otherwise; but a distinction has been and must always be drawn between cases in which the trade name or the part of it in question consists of a word or words of ordinary use descriptive of the business carried on or the article dealt in and cases in which the word or words complained of is or are of the character of a fancy word or words and primarily have no relation to such business or article but only to the person carrying on the business or dealing in the article: see per PARKER J In *British Vacuum Cleaner Co Ltd v New Vacuum Cleaner Co Ltd* [1907] 2 Ch 312 at 321. Of course, if it can be established that the descriptive word or words has or have acquired among the public, or that class of the public likely to deal with the business or goods in question, a subsidiary or secondary meaning denoting or connoting the business or the origin of the article, the person claiming to restrain the user of that word or those words can obtain the relief he seeks. This, we think, is plainly established by the decisions in such cases as *Reddaway v Banham* [1896] AC 199 and *Cellular Clothing Co v Maxton* [1899] AC 326 but the burden of establishing such fact is exceedingly difficult to discharge, as was pointed out by LORD SHAND in the last mentioned case where he said, at p 340, in referring to *Reddaway v Banham supra*:

"Of that case I shall only say, that it no doubt shows it is possible where a descriptive name has been used to prove that so general, I should rather say so universal, has been the use of it as to give it a secondary meaning and so to confer on the person who has so used it a right to its exclusive use or, at all events, to such a use that others employing it must qualify their use by some distinguishing characteristic. But I confess I have always thought, and I still think, that it should be made almost impossible for anyone to obtain the exclusive right to the use of a word or term which is in ordinary use in our language and which is descriptive only and, indeed, were it not for the decision in *Reddaway's* case, I should say this should be made altogether impossible."

It has often been pointed out by the courts that where the name under which a plaintiff trades is a descriptive one, the court is always reluctant to interfere even where the defendant has taken a name very closely resembling that of the plaintiff: see, for example, *Aerators Ltd v Tollitt* [1902] 2 Ch 319; and consequently small

1984 (2) ZLR p62

DUMBUTSHENA CJ

differences have often been held to afford sufficient differentiation. Nevertheless, if the plaintiff can show that the name, though composed of descriptive elements, in fact distinguishes his firm or company, the court will restrain the improper use of such name or of a name so closely resembling it as to be calculated to deceive (see Halsbury's Laws of England, Hailsham edn vol 32 p 628, and the cases cited in note (t)), and it is easier for a plaintiff to discharge the burden on him if he can prove that the defendant's object is to produce confusion, and is, therefore, fraudulent."

It appears to me that the appellant's trade name "Bon Marché", whatever it means, is not descriptive of the goods sold by the appellant in its chain of supermarkets. If anything it appears to be a fancy name; it may mean something else in France. There is nothing to suggest that "Le Bon Marché", the trading style of the respondents, is anything other than a fancy name which the respondents adopted for the reasons they have given as their trade name. What is important, however, is that the name "Bon Marché" should have acquired a secondary meaning in Matabeleland for the purposes of passing off through the association between it and the business which bears its name, so that in the minds of the public it is distinctive of that specific business. Without this element the public is unlikely to be misled when the name is used in another business. See *Boswell-Wilkie Circus v Brian Boswell Circus* 1984 (1) SA 734 (N) at 737G.

The learned judge considered the similarity in the names and summarised those factors, already mentioned above, which in my opinion differentiate the two businesses and make the obtaining of an interdict beyond the reach of the appellant. The learned judge said:

"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

1984 (2) ZLR p63

DUMBUTSHENA CJ

indeed were he to think that he was patrolling 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.

The style of business in respondents' 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 . . . "

With such a difference in the smallness of the trade and the paucity of every variety of goods sold in "Le Bon Marché" in Bulawayo and the wealth of variety of goods and their sheer abundance displayed and sold in the appellant's chain of supermarkets in Harare plus the factor of self-service, I am not persuaded that the appellant "established the passing off alleged" and that the Court below ought to have interdicted the respondents.

In dismissing the application the learned judge took into account every conceivable point that had been put before him by way of evidence. If, for instance, there had been any real likelihood

of confusion the appellant would have adduced direct evidence of it. Not a single witness from the general public swore an affidavit in support of the appellant saying he had been confused or misled. See *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils*, *supra*, at 106 and *Miriam Glick Trading (Pty) Ltd v Clicks Stores (Transvaal) (Pty) Ltd and Ors supra*, where ELOFF J said at 295 B-C:

"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 abstracts 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 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)"

The learned judge's enquiry into the business names, the nature and extent of the businesses carried on by both the appellant and the respondents, the services rendered, the volume of the business and

1984 (2) ZLR p64

DUMBUTSHENA CJ

many other characteristics of the two businesses was exhaustive and thorough and cannot, in my view, be faulted. I am more than convinced that the only conclusion the Court *quo* could have come to was that there was no reasonable likelihood of confusion arising from the similarity in names because the business activities of the appellant and the respondents were a world apart.

It is common cause that the respondents did not intend to deceive when they decided to call their business "Le Don Marche". It was argued, however, that the appellant feels that at some future date, as yet undetermined, when it establishes a business in Bulawayo the respondents' trade name may confuse the purchasing public and probably the appellant's suppliers. But a vaguely expressed desire of the appellant's probable future business activities in Bulawayo is not, in my view, a sufficient reason, in the absence of cogent evidence in support of the appellant's future intentions and other factors, to move the Court to interdict the respondents.

In an action for passing off the intention of the representor is always an important factor to be considered. See *Durban Gift Shop (Pty) Ltd v The Gift Box (Pty) Ltd* 1952 (4) SA 493 (NPD) at 496 G-H. In this case the intention of the respondents was not sinister to use a name that their father had used for many years.

Mr *de Bourbon* referred in his heads of argument to three cases in which the tests to be applied in passing off cases have been set out. These tests were applied by the learned judge *a quo*. It is well, however, to set out again those tests. In *Capital Estate and General Agencies and Ors v Holiday Inns Inc and Ors*, *supra*, RABIE JA (as he then was) set out the tests as follows at 929 C-G:

"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 & H Policansky* 1935 AD 89 at 97 and 113; *Truck and Car Co Ltd v Kar-N-Truck Auctions* 1954 (4) SA 552 (AD) at p 557 and 559.) Whether there is a reasonable likelihood of such confusion arising is, of course, a question of fact which will have to be determined in the light of the circumstances of each case. If the evidence establishes that there is a reasonable likelihood of such confusion arising even if the parties concerned cannot be said to be carrying on their activities in a common field, it is difficult to see how the absence of such a common field can

1984 (2) ZLR p65

DUMBUTSHENA CJ

nevertheless constitute a ground for denying relief to an aggrieved party. The absence of a common field of activities is, of course, a factor which one has to take into account when considering the question whether someone's conduct is likely to lead to confusion of the kind mentioned, but the proper weight to be assigned thereto will depend on a consideration of all the relevant facts. The crucial question in every case is whether there is a reasonable likelihood of confusion, and, this being so, it cannot be suggested that the absence of a common field of activities will always be sufficient to bar a party from obtaining relief."

See also *Lorimar Productions Inc v Sterling Clothing Manufacturers* 1981 (3) SA 1129 (T) at 1138A; and *Boswell-Wilkie Circus (Pty) Ltd v Brian Boswell Circus (Pty) Ltd and Anor supra*.

What the various authorities have from time to time emphasised however, is that each case depends on the facts surrounding it and on one simple legal principle. The question that was posed in the present appeal was determined by the court *a quo* on the facts and that simple legal principle, and nowhere in his judgment can the learned judge be faulted.

In *Boswell-Wilkie Circus v Brian Boswell Circus supra* DIDCOTF J put the principles affecting the determination of these cases in this way at 736G-H:

"That the basic rule is straightforward, and that what gives difficulty and causes controversy when these exist is usually its alignment with the facts found in individual cases, was stressed in *Durban Gift Shop (Pty) Ltd v Gift Box (Pty) Ltd* 1952 (4) SA 493 (N), a passing off suit which went on appeal to the Full Bench of this Division. BROOME JP said (at 496F):

"We were favoured with a reference to a great number of decided cases, but a preoccupation with decided authority in cases of this sort is apt to obscure two things: first, that they all depend upon a simple, elementary legal principle and, second, that everything else in them is fact. The legal principle is that a defendant may not falsely represent that his business is the business of the plaintiff.""

The facts which were before the learned judge *a quo* emphasise in nearly every respect more than anything else the difference between the appellant's business and that of the respondents.

I am not persuaded that the principle of law, so well put in the cases cited above, and the facts relating to the present case were misapplied by the court *a quo* before it came to the conclusion:

". . . that so long as the respondents restrict their business activities to what they

1984 (2) ZLR p66

BECK JA

now are, there is no reasonable likelihood of injurious confusion while applicant trades with the public in Harare only."

I would dismiss the appeal with costs.

Beck JA: I agree that the appeal must be dismissed with costs.

The CHIEF JUSTICE has drawn attention to the inadequacy of the evidence to establish that appellant's business reputation and goodwill extends to Bulawayo, save in so far as the appellant is well known to a number of suppliers in that city. Despite that inadequacy I am prepared to assume that the appellant does in fact enjoy a trading reputation there. I am also prepared to assume that the absence of evidence of a serious intention on the part of the appellant to open a branch in Bulawayo is in itself no obstacle to the relief that the appellant seeks.

I agree with the CHIEF JUSTICE that the appellant has failed to show a reasonable likelihood that the ordinary person may be led into believing that the business of the respondents is in any way connected with that of the appellant, despite the similarity of name, and I prefer to base my conclusion that the appeal must fail on that single ground.

It is clear to me that the two businesses are as different as chalk from cheese. There is simply no risk at all that the name alone might lead anyone to think that the appellant's busy supermarket chain is connected with the respondents' little cottage-type venture conducted in premises "no bigger than a large office", and colloquially referred to variously as "The Wool Shop", "The Shop of The Two Old Ladies", "Pat's Shop" or "Anne's Shop", with its exceedingly modest stock of wool, knitting and sewing materials, soft woolly toys for babies, hand knitted or crocheted baby clothes, haberdashery, fancy wrapping paper and greetings cards, and attended to by two old ladies only, except on Wednesday afternoons when a note on the closed door to the shop would tell customers when the two old ladies might be expected back from their weekly visit to suppliers.

The learned judge *a quo* correctly put the matter in a nutshell in my view when he said that anyone "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'

1984 (2) ZLR p67

GUBBAY JA

business premises were in some way connected with the applicant's".

Gubbay JA: I too agree that the appeal falls to be dismissed with costs.

The appellant sought an order from the court *a quo* interdicting the respondents from using the name "Le Bon Marche" or any similar variant of that name in connection with their business. In order to succeed it was necessary for the appellant to establish:

- (1) the reasonable likelihood of the respondents' use of the name in question deceiving the public into believing that their business is the same as that of the appellant or in some way

connected or associated with it; and

(2) the diversion of custom from its business or injury to its business reputation, or both.

With regard to the first requisite the learned judge a quo appreciated that the visual, phonetic and ideological characteristics of the trade names used by the appellant and the respondents were not to be considered in Macho but in conjunction with other important factors.

These were the range of goods sold by each business, the scale of the respective trading operations, the physical appearance of the respective premises, the manner in which the respective operations were conducted, the geographical situations of the businesses, the types of customers frequenting each, and the absence of any evidence of actual confusion between the two businesses on the part of customers in over four years. That in my opinion was the proper approach to adopt. The significant differences that the factual enquiry revealed led the learned judge to conclude firmly that there is no reasonable likelihood of members of the public being confused into thinking that the respondents' minuscule business, so aptly described by my brother BECK as "a cottage-type venture", is in any way associated with the large-scale supermarket operations conducted by the appellant. I entertain no doubt as to the correctness of that conclusion and the reasoning in support of it.

But even if it be assumed in the appellant's favour that the first requisite was met, clearly the second was not. The appellant did not allege that it had suffered any diversion of custom from its business to that of the respondents. It candidly conceded that a continuation of the

1984 (2) ZLR p68

GUBBAY JA

respondents' business under the present name will not directly affect it financially. Nor do I consider that the appellant established an apprehension of damage to its business reputation from the activities of the respondents. There is no suggestion that the respondents are or have ever been in financial difficulties or that they are prone to resort to unsatisfactory or dishonest trading practices. The name "Le Bon Marche" was assumed without any intention to deceive. The respondents had no knowledge of the appellant's business and the reputation attaching to its name. In these circumstances there is no probability to my mind of the appellant's reputation being jeopardised or being left at the mercy of the respondents.

Kantor & Immerman, appellant's legal representatives.

Gill, Godlonton & Gerrans, respondents' legal representatives.

1984 (2) ZLR p69

S v NHARI 1988 (2) ZLR 69 (SC)

Court **Supreme Court, Harare**

Gubbay JA (in Chambers, in terms of s 10(3) of the Supreme Court of Zimbabwe Act 1981)

2 August 1984

Flynote

Criminal procedure - trial - plea - *autrefois acquit* - prosecutor in earlier trial erroneously withdrawing charge - an acquittal on the merits.

Headnote

If an accused person has pleaded not guilty and the prosecutor thereafter withdraws the charge, the accused is entitled to demand that in terms of s 13 of the Criminal Procedure and Evidence Act [*Chapter 59*] an acquittal be recorded. Such an acquittal is "on the merits" for the purposes of a plea of *autrefois acquit*, even if the charge is withdrawn erroneously.

Cases cited:

S v Ndou & Others 1971 (1) SA 668 (AD);

S v Teele 1979 (4) SA 610 (BH);

S v Mokoena en 'n Ander 1981 (1) SA 148 (O).

Judgment

Gubbay JA: When this application for a certificate enabling the applicant to prosecute in person an appeal against conviction was placed before me, I entertained considerable doubt concerning the correctness of the conviction. I therefore referred the record to the Attorney-General to ascertain whether he wished to support it. He has now reported that the conviction is not supported and asks that it be quashed.

The applicant was charged in the court of the Regional Magistrate with the theft of a motor vehicle. The charge sheet alleged that:

"... on the 2nd of August, 1983 and at Harare ... the accused did wrongfully and unlawfully steal a ... Peugeot 404 Sedan registration number 274-390 Z, the

1984 (2) ZLR p70

GUBBAY JA

property of and in the lawful possession of MARTNUS IGNATIUS VAN DER MERWE . . ."

A plea of not guilty was entered. Quite apart from a denial on the merits, the applicant raised the plea of *autrefois acquit* which the Regional Magistrate promptly proceeded to investigate. It was established that the applicant had been previously charged and brought to trial in connection with the theft of the same Peugeot motor vehicle (though it bore the false registration number 364-088 K), the allegation being that he had stolen it on 29 August 1983 from a different complainant. To that charge he had pleaded not guilty. Subsequently the prosecutor had withdrawn the charge without any evidence being led because enquiries had revealed that the applicant was incarcerated in prison on the day the motor vehicle had been stolen from the

complainant. The applicant accordingly had been found not guilty. Thereafter the prosecutor had discovered that the complainant had mistakenly identified the Peugeot in question as his stolen vehicle, which accounted for the date of the theft being given as 29 August 1983. It was therefore decided to lay the present charge against the applicant.

The Regional Magistrate rejected the special plea on the ground that the applicant's acquittal was not on the merits because "it was due to an error by the prosecutor in bringing that charge in that form".

I do not agree that the previous acquittal was not on the merits. When the prosecution was stopped, the applicant was entitled to demand that in terms of s 13 of the Criminal Procedure and Evidence Act [Chapter 59], an acquittal be recorded. In *S v Ndou and Ors* 1971 (1) SA 668 (AD) it was held that when the prosecution is stopped at any stage after plea, whether evidence has been led or not, the accused is entitled to an acquittal and such an acquittal is one on the merits for the purposes of a plea of *autrefois acquit* (see at 671H and 672 E-F). He cannot be charged again in respect of the same facts. (See also *S v Teele* 1979 (4) SA 610 (BH) at 612 C-D; *S v Mokoena en 'n Ander* 1981 (1) SA 148 (O) at 149 F).

That is precisely what happened in this case. Both charges related to the same motor vehicle and their essential nature was not altered by the differing particulars in respect of the date of the theft and the identity of the complainant. If the prosecutor in the first trial had discovered his error before withdrawing the charge and had applied to

1984 (2) ZLR p71

GUBBAY JA

amend it, I do not see how the applicant could validly have contended to be prejudiced thereby.

Accordingly, in the exercise of the power conferred in s 10(3) of the Supreme Court of Zimbabwe Act 1981, and with the concurrence of WADDINGTON JA, I order that the applicant's appeal be allowed and his conviction and sentence be set aside.

1984 (2) ZLR p72

STEWART v CITY OF HARARE 1984 (2) ZLR 72 (HC)

Court High Court, Harare

McNally J

1, 2 & 8 August, 1984

Flynote

Arbitration - arbitrator - appointment of - parties unable to agree on arbitrator - neither willing to accept other's nominee - court declining to appoint either and giving parties further opportunity to agree on arbitrator - Arbitration Act [Chapter 12] - s 8 - "may appoint" - meaning of.

Headnote

The parties to an arbitration were unable to agree on an arbitrator. Each had nominated an apparently suitable person but neither side was willing to accept the other's nominee. The matter was brought before the High Court in terms of s 8 of the Arbitration Act [*Chapter 12*], for the Court to appoint an arbitrator. At the hearing, both sides advanced the merits of their own nominee without explaining their objections to the other nominee.

Held, that while s 8 stated that the Court "may appoint" an arbitrator, this meant that the Court ultimately "must appoint" an arbitrator if the parties cannot agree on one.

Held, further, that it would be wrong for the Court to appoint one of the nominated persons, since it would be inconsistent With the whole concept of arbitration that an arbitrator should be imposed in whom a party had no confidence.

Held, further, that if the parties declined to agree on any name that is proposed, the Court might eventually have to pluck a name from the air. Such a person might not be acceptable to one or both of the parties. However, just because the court might eventually have to impose an arbitrator on the parties, there is no reason why it should not do its best to avoid that situation.

Held, further, that the matter should be postponed *sine die* to provide a further opportunity to find a mutually acceptable arbitrator.

Cases cited:

Re Eyre & Leicester Corporation [1892] 1 QB 136;

Dipenta Africa Construction (Pty) Ltd v Cape Provincial Administration 1973 (1) SA 666 (C);

Pretoria Cinemas (Pty) Ltd v Cinemas Lid 1931 TPD 407.

1984 (2) ZLR p73

McNALLY J

J B Colegrave, for the applicant

M J Gillespie, for the respondent

Judgment

McNally J: Mr Stewart is seeking abolition of of lice in respect of his employment with the City Council of Harare. A dispute has arisen. The relevant provisions of the Local Authorities Employees Principal Pension Scheme provide that the dispute shall be referred to a single arbitrator. The applicant wants to appoint A, a former judge and current legal practitioner. The respondent is not happy with that nomination and seeks the appointment of B a legal practitioner.

The matter comes before me in terms of the provisions of s 8 of the Arbitration Act [*Chapter 12*]. The section provides that in these circumstances "the Court may . . . appoint an arbitrator . . . who shall have the like powers to act in the reference and make an award as if he . . . had

been appointed by consent of all parties."

Two things may fairly be said about this provision. In the first place, when it is said that "the Court may appoint", it clearly must be read to mean "the Court must appoint". There is no way the Court can ultimately avoid the duty, unless, of course, the parties relieve it of the duty by reaching agreement. See *Re Eyre & Leicester Corporation* [1892] 1 QB 136; *Russell on Arbitration* 19 ed pp 147-148. Secondly, it is clear that in the final analysis the Court may be obliged to appoint an arbitrator to whom one or even both parties object.

When the parties' legal representatives appeared before me, it seemed that they were preparing to extol the virtues of their respective candidates while politely declining to cast aspersions upon the other candidate. I therefore indicated, *in limine*, that this seemed to me an undesirable approach which would place the Court in an invidious position. On instructions from his client, however, Mr Colegrave persisted in pressing for the appointment of his client's nominee. Mr Gillespie in turn, while seeming more willing to agree to an alternative approach, drew attention to the virtues of his contender.

I remain firmly convinced that it would be wrong, and not merely invidious, for the Court to choose between the two nominees. It will, of course, be otherwise where the dispute relates to an objective criterion as to which the Court can properly make a judgment. Such was the situation in *Dipenta Africa Construction (Pty) Ltd v Cape*

1984 (2) ZLR p74

McNALLY J

Provincial Administration 1973 (1) SA 666 (C). There the one side wanted X, a Senior Counsel and former Judge, while the other side wanted an experienced engineer and nominated a panel of three. It is clear from the judgment that the one side was quite willing to accept the appointment of any suitable Senior Counsel—they were not insisting on X personally. The dispute therefore was one as to which the Court could make a rational and objective judgment, namely whether the issues could better be resolved by a lawyer or by an engineer. The Court decided in favour of the latter, and directed the other party to select one of the three nominees of the other party.

In the present case it is apparent that each side is unhappy about the choice of the other for reasons which are unexpressed. These reasons may be wholly subjective and wholly unfounded, but even if they are it seems to me inconsistent with the whole concept of arbitration that I should impose on one or the other side an arbitrator in whom they do not have confidence. This is in line with the view taken by DE WAAL JP in the case of *Pretoria Cinemas (Pty) Ltd v Cinemas Ltd* 1931 TPD) 407.

Of course, as Mr Gillespie pointed out, it might come to that in the end. If the parties steadfastly decline to agree mutually on any name which is proposed, the Court may eventually have to pluck a name from the air. Such a person may not be acceptable to one of the parties. Indeed, he may not be acceptable to either.

But it would be wrong to argue that just because the Court may eventually be forced to impose

an arbitrator on one or both of the parties, it should not do its best to avoid that situation.

One is reminded of the system of jury selection when our law provided for juries. Each side was allowed to object to a certain number of jurors "without assigning cause". The principle was and is a sound one. A party is entitled, within reason, to be subjective about such matters. But in the final analysis his subjective likes and dislikes may have to give way to the need for a decision.

For these reasons I positively decline to enter this particular arena.

I decline therefore to appoint either of the persons nominated. In order to give the parties an opportunity to agree on the name of some other person, I propose to postpone the matter *sine die*. If either party

1984 (2) ZLR p75

McNALLY J

decides that agreement is not possible, leave is given for the matter to be set down again on seven days' notice to the other side, in which case each party is requested to place before the Court a list of three nominees, together with a brief *curriculum vitae* in each case, and an assurance that the nominee will accept the appointment.

If agreement is reached, the parties may decide to remove the matter from the Roll. Meanwhile, I will reserve the question of costs, drawing attention in passing to the nailing on costs in the Pretoria Cinemas case (*supra*,) at 411.

Accordingly, the order of the Court is as follows:

- (1) The matter is postponed *sine die* and the question of costs is reserved.
- (2) Leave is given to either party on seven days' notice to the other to set the matter down for further hearing.

Atherstone & Cook, legal practitioners for the applicant.

Honey & Blanckenberg, legal practitioners for the respondent.

1984 (2) ZLR p76

BARCLAYS BANK OF ZIMBABWE LTD v BINGA PRODUCTS PVT) LTD 1984 (2) ZLR 76 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Gubbay JA & Waddington JA

28 June & 10 August 1984

Flynote

Contract - of waiver - undertaking to waive legal rights - pactum de non petendo - necessary to appreciate existence of rights - statement that party has "of intention" of bringing action - not an undertaking not to do so - where onus of establishing existence of waiver lies.

Headnote

The respondent had entered a contract to sell goods to an individual in the United States, who had, as part of the conditions of contract, agreed to lodge securities with the appellant bank. Documents were lodged with the bank, who advised the respondent's bankers of the fact. In consequence the respondent parted with the goods.

The documents which the respondent accepted as securities were actually worthless. Before the action by the respondent against the appellant commenced, the respondent sought certain evidence from the appellant bank. At that stage the respondent intended to sue its own bank for damages arising out of their alleged negligence.

The respondent's then legal advisers had told the respondent that it had no rights against the appellant. The appellant agreed to supply the evidence on condition that the respondent provided it with an unequivocal statement to the effect that the respondent had no claim against it. The respondent's legal practitioners accordingly sent a letter which stated that the respondent had "no claim against [the respondent] and . . . no intention to institute any claim whatsoever" arising out of the supply of goods to the American.

Later advice to the respondent was to the effect that there were grounds for claiming damages from the appellant and an action was instituted. The appellant entered a special plea in bar, contending that the letter referred to constituted an agreement of waiver in terms of which the bank was released of all liability to the respondent in this matter.

Held, that the words used in the letter were clear and unambiguous and needed no aids in order to interpret them.

Held, further, that for the respondent to be able to agree to waive its rights, it had to appreciate what its rights were. At the time the letter was written it did not believe that it had any rights against the appellant. A statement that no rights exist precludes any question of surrender of such rights.

1984 (2) ZLR p77

DUMBUTSHENA CJ

Held, further, that a statement that a party has no intention of bringing litigation is not equivalent to an agreement not to bring litigation that was contemplated, nor is it an undertaking not to bring litigation.

Held, further, that in a case of waiver, the onus is strictly on the party claiming that waiver has taken place. He must show that the other party, with full knowledge of his right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention of enforcing it.

Cases cited:

Glyphis v Tuckers Land Holdings Ltd 1978 (1) SA 530 (AD);

Van Rensburg en Andere v Taute en Andere 1975 (1) SA 279 (AD);

Laws v Rutherford 1924 AD 261;

Mthanti v Netherlands Insurance Co of SA Ltd 1971 (2) SA 305 (N);

Landsberg v New India Assurance Co (Pty) Ltd & Another 1969 (1) SA 110 (D);

Hepner v Roodepoort-Maraiburg Town Council 1962 (4) SA 772 (AD);

WJ Alan & Co Lid v El Nasr Export & Import Co [1972] 2 All ER 127 (CA).

A P de Bourbon, for the appellant.

M D Kuper SC, with him *A N H Eastwood*, for the respondent.

Judgment

Dumbutshena CJ: In this case, Binga Products (Pvt) Ltd, hereinafter called the respondent, entered into an agreement of sale with Craig Ted Rawson of Texas, a citizen and resident of the United States of America. The contract concerned the sale of a quantity of hides and skins and animal items by the respondent to Rawson at a price of US \$110 800,00 for export by freight to the United States. For his part Rawson agreed to lodge with Barclays Bank, First Street Branch, two negotiable securities as a guarantee for payment.

The contract of sale was set out in a letter written to the respondent by Rawson's legal practitioners on 20 January 1982. Its terms were as follows:

"We act for Mr Craig Ted Rawson who has requested us to write to you in the following terms:

Our client wishes to purchase from you, or your company,

- (1) 2 000 square foot of hippo skin with one briefcase and one belt in the same skin;
- (2) 10 000 square foot of elephant skin with one briefcase and one belt in the same skin; and
- (3) 3 trophy zebra skins.

The purchase by our client of the above items is subject to the preparation by you of a pro forma invoice reflecting:

- (1) The purchase price of the above items: and

1984 (2) ZLR p78

DUMBUTSHENA CJ

- (2) The cost of delivering the above items, c.i.f., by air, to:
Mr CT Rawson,
2200 Burnside Road,
Sebastopol,

California 95472,
UNITED STATES OF AMERICA

in care of Willcall, New Orleans Airport, New Orleans.

Our client's acceptance of your pro forma invoice will complete the contract.

For your information, you are advised that our client will lodge sufficient negotiable security with the First Street Branch, Barclays Bank of Zimbabwe Limited, to enable that branch of the bank to provide the necessary guarantee to your commercial banker, to enable the form C D.1 to be issued.

When our client delivers this letter to you he will provide you with the address to which your pro forma invoice should be submitted."

In response to this letter the respondent set out the prices of the various items in a pro forma invoice which showed a total purchase price of US \$102 600,00, and another pro forma invoice bearing the cost of freight by air in the sum of US \$2 000,00. The respondent requested that payment be guaranteed in writing by Barclays Bank of Zimbabwe Limited, First Street Branch, in favour of the respondent and to be paid through an account number at Standard Bank Limited, Samora Machel Avenue. Payment was to be made in Zimbabwe within 90 days.

The pro forma invoices were prepared on 21 January 1982. It appears that on 22 January 1982 the two banks got in touch with each other. As a result Barclays Bank wrote a letter dated 25 January 1982 to Standard Bank as follows:

"We refer to our telephone conversation of 22nd January, 1982. (Mr Haggart/Mr Adams) and confirm that we are holding in negotiable order on behalf of Mr Craig Ted Rawson, United States Dollar Securities to the value of US \$125 000,00 to secure the export to him in the United States of America by Binge Products (Private) Limited the following items, valued at US \$110 800,00:-

- (1) 10 000 square feet Elephant Hide
- (2) 2 000 square feet Hippo Hide
- (3) 2 Briefcases
- (4) 2 Belts
- (5) 3 Trophy Zebras
- (6) Lionesses (Mounted) .

Our instructions include authority to liquidate these securities not earlier than

1984 (2) ZLR p79

DUMBUTSHENA CJ

25th April, 1982, and to pay the sum of US \$110 800 to Binga Products (Private) Looted in the event that we have not received on or before 24th April, 1982, an inward telegraphic transfer of this sum from Mr Lawson in the United States for credit to your customer's account.

This information is provided principally to enable you to authorise Forms CD1 for your client to cover the export of the items herein described."

The respondent, on the strength of the representation made by Barclays Bank, the appellant in

this matter, to the respondent's bankers, sold and exported the goods under the agreement.

It turned out however, that the securities referred to by the appellant in its letter of 25 January 1982 were worthless pieces of paper. These securities purported to be "International certificates of deposit" issued by a company supposedly registered and situated in Grand Cayman-an island in the West Indies. These certificates showed that the depositor company held for the purchaser, Craig Ted Rawson, deposits of United States dollar securities to the value of \$125 000,00 at 14 per cent rate of interest maturing on 4 February 1984. The International certificates of deposit were endorsed "negotiable". The learned trial judge said of this transaction:

"For it may safely be guessed by now, there are no deposits of US dollars, there is not even a depository company by the name emblazoned on the certificates that is registered or known in Grand Cayman, and the impressive-looking documents are forgeries used in an exercise that has the hallmarks of a calculated fraud."

Before the main action was brought up for trial the appellant pleaded in bar to the respondents claim. It is as well to set out those paragraphs in the appellant's Plea in Bar that are germane to this appeal. They read as follows:

- "(2) By letter dated the 27th January 1983, a copy of which is annexed hereto as annexure "A", the legal practitioners acting on behalf of the Plaintiff indicated that the Plaintiff had been advised in law that it had no rights against the third Defendant, and requested details of the evidence to be given by one Haggart on behalf of the First Defendant.
- (3) On the 10th March 1983, the First Defendant's legal practitioners requested an unequivocal statement that the Plaintiff had no claim against the First Defendant or Haggart before the statement of Haggart's involvement would be submitted to the Plaintiff's legal practitioner. A copy of that letter is annexed hereto as Annexure "B".
- (4) On the 16th March 1983 the Plaintiffs legal practitioners wrote a letter to the First Defendant's legal practitioners, a copy of which is annexed hereto as Annexure "C".

1984 (2) ZLR p80

DUMBUTSHENA CJ

- (5) The First Defendant contends that the letter of the 16th March 1983, Annexure "C" hereto, constitutes an agreement of waiver in terms of which the First Defendant was released from all liability to the Plaintiff in respect of any claim in regard to Rawson and the export of hides and skins to Rawson in the United States of America.
- (6) Following upon the letter of the 16th March 1983, Annexure "C" hereto, the First Defendant provided the Plaintiff's legal practitioners with a copy of the statement by Haggart.
- (7) In the premises, the First Defendant contends that the Plaintiff is barred from bringing proceedings against the First Defendant in respect of the present action by virtue of the agreement of waiver referred to above".

The learned judge dismissed the plea in bar with costs. It is against this order that the appellant now appeals.

It is quite clear from the evidence that the respondent sought the assurance of its own bank, Standard Bank Limited, the second defendant in the main action, on the soundness of the guarantees of payment. It is common cause that Standard Bank communicated with an employee of the appellant. Thereafter Standard Bank is said by the respondent to have

informed it that the International certificates Of credits were "as good as cash". The respondent acted upon this advice and exported the goods to Rawson in the United States.

It turned out, however, that the securities which were said to be "as good as cash" were worthless pieces of paper. Because of that the respondent suffered loss and decided to institute an action against Standard Bank on the basis that the Standard Bank owed a duty of care to it. The respondent wrote a letter dated 27 January 1983 to the appellant's legal practitioners pointing out the chain of events which led to its incurring the loss already mentioned and expressing its intention to sue the Standard Bank. This letter is the cornerstone upon which the plea in bar was founded. To carry out its intention the respondent required certain information from Mr Haggart of Barclays Bank. Part of the letter reads:

"There are certain factual disputes between the Standard Bank and Binga Products and the evidence of Mr Haggart will be of some importance. For this reason it is important as soon as possible (if only to prevent unnecessary expenditure of costs) to obtain from Mr Haggart a statement as to his recollection of events at that time.

Would it be possible to approach him and to obtain a statement from him which should set out the following:

- (a) His recollection of who first approached him;

1984 (2) ZLR p81

DUMBUTSHENA CJ

- (b) His recollection of any discussions he had with Mr Adam of Standard Bank, Samora Machel Avenue Branch;
- (c) His recollection of any discussions of attendances he had upon Mr Rawson and/or Mr Van Jaarsveldt.

Over the telephone we made it clear that it was not the intention of our client company to institute action against Barclays Bank and certainly they have been advised in law they have no rights against Barclays Bank. Accordingly this request is merely to have some idea of what Mr Haggart's evidence will be at an early juncture. It could well assist both Binga Products and Standard Bank as it may lead to an early settlement in the matter.

We should be pleased if you would approach Mr Haggart and obtain such a state" merit and advise us thereafter. We look forward to hearing from you."

In response to this letter the appellant's legal practitioners replied by letter dated 10 March 1983 informing the respondent's legal practitioners that the appellant had provided them with a full statement of Mr Haggart's involvement in the matter and that the statement was ready for transmission to them. The transmission of the document to them was, however, conditional upon the respondent providing the appellant with "an unequivocal statement to the effect that [the respondent] had no claim against [the appellant]" or against "Mr Haggart in a personal capacity in respect of the above matter". The appellant was not prepared to send Mr Haggart's statement to the respondent before receiving from the respondent an undertaking it had itself suggested.

In response to the appellant's request the respondent's legal practitioners sent, in compliance with the appellant's condition, the following letter:

"re: BARCLAYS AND BINGA PRODUCTS (PVT) LIMITED

Thank you for your letter dated the 10th March, 1983. We hereby give an undertaking on behalf of our client that it has no claim against Barclays Bank of Zimbabwe Limited or Mr Haggart in his personal capacity and has no intention to institute any claim whatsoever in regard to Mr Craig Ted Rawson and the export of certain hides and skins to him in the United States of America.

We trust that this undertaking is sufficient. It is properly authorised by our client company. In the circumstances we look forward to receiving your statement."

Mr *de Bourbon*, who appeared for the appellant, argued that the above letter was "not merely a statement that the Respondent has no claim against the Appellant or its manager, but also it has no intention to institute any claim". He submitted that these two aspects made up

1984 (2) ZLR p82

DUMBUTSHENA CJ

"the undertaking set out in that letter".

The question is whether the words contained in the letter of 16 March can bear the meaning Mr *de Bourbon* attaches to them.

Mr *Kuper*, who appeared for the respondent, submitted that the words in that letter cannot bear the meaning the appellant attributes to them and further submitted:

"What is involved is no more than a statement on behalf of Respondent that it has no claim nor any intention to bring one. It is a statement of its attitude and understanding."

The meaning of the words used in the undertaking are clear and unambiguous and need no aids in order to interpret them. See *Glyphis v Tuckers Land Holdings Limited* 1978 (1) SA 530 (AD) at 537C.

It is difficult to see how the court *a quo*, confronted with such clear and unambiguous words, could have found that those words meant that there was an agreement of waiver. The agreement as set out in the letter of 16 March was unequivocal. The English headnote in *Van Rensburg en Andere v Taute en Andere* 1975 (1) SA 279 (AD) at 280 highlights the correct approach to the interpretation of agreements in these words:

"What the parties to an agreement intended to provide for must, in the first place, be sought in the words they used, and those words must be understood according to their ordinary grammatical meaning. It is not permissible to determine with reference to surrounding circumstances what intention the parties probably had in mind at the conclusion of the contract, and to apply that intention in the interpretation of the agreement. Such an approach would only be permissible where the document concerned is ambiguous and certainty concerning the meaning thereof cannot be reached without the use of aids. Ambiguity may appear from either the wording of the document or from the application thereof to the external facts. A document is naturally interpreted in accordance with its nature and purpose. In addition, the word or words which have to be interpreted must be read not in isolation but in the context of the document as a whole. The Court can apparently also be informed of the background circumstances under which the contract was concluded, but only to enable it to understand the broad context in which the words to be interpreted were used."

The learned judge *a quo* on the facts before him, came to the conclusion that "there was no evidence to show that what the plaintiff" (the respondent in this appeal) "did here amounted to a waiver of any claim it believed it had against the first defendant" (now the appellant). I am

DUMBUTSHENA CJ

in respectful agreement with his conclusion.

All the circumstances leading finally to the letter giving the undertaking seem to indicate that the respondent never believed, up to that point, that it had a claim against the appellant. Under those circumstances and in that frame of mind the respondent asked for the statement it required in order to bring an action against Standard Bank. Further, there was no evidence from the appellant that the respondent had the necessary full knowledge of its right or claim against the appellant. That this is so is made more clear by the fact that although Mr *de Bourbon* contended that the letter of 16 March amounted to a disclaimer of right he could not say what that right was.

In my view the difficulty the appellant finds itself in in this appeal is of its own choosing. It set out the form of the undertaking it required from the respondent. The respondent reproduced it and when proof of an agreement of waiver was required, the appellant was not able to say the contents in the letter of 16 March which it had suggested to the respondent constituted an agreement of waiver. It then believed, as was contended by the respondent in its heads of argument, "that it was unlikely that a party who said it had no claim would bring one". That in my view is not good enough.

However, Mr *de Bourbon* submitted that the law of waiver, as set out in *Laws v Rutherford* 1924 AD 261, compels the Court to say "You have given up your right, you cannot change your mind". He argued that if a party was advised by its legal practitioner that it had no right and that party gives an undertaking to that effect that party cannot resile, that the party cannot go back on its undertaking. He is held down to his stand.

It is common cause in this case that the respondent was advised by a legal practitioner that it had no claim against the appellant and that another legal practitioner gave contrary advice. Mr *de Bourbon* relied, for his contention, on *Mthanti v Netherlands Insurance Co of SA Ltd* 1971 (2) SA 305 (NPD). In that case the plaintiff instituted an action in her capacity as the guardian of a minor son who had fallen from a motor vehicle insured by the defendant for the purposes of Act 29 of 1942. The plaintiff alleged in her particulars of claim that more than sixty days before the date when action was instituted, she had "duly complied" with the provisions of s 11 *bis* (1) of the Act. The plaintiff

DUMBUTSHENA CJ

had filled in the MVA 13 form and had signed it but did not confirm the declaration on oath, nor had any commissioners attested her signature. The defendant denied the allegation. Then the plaintiff's attorney suggested that the denial should be withdrawn and disclosed to the defendant's attorneys the possibility of arranging for the action to be set down forthwith if the defendant's attorneys continued to deny that the plaintiff had complied with the provisions of s 11 *bis* (1) of the Act. The defendant's attorneys accepted the suggestion and took into account the prospect that such a result might ensue from their rejection of the suggestion. They admitted

on behalf of their clients that the Plaintiff had complied with the provisions of s11 *bis* (1) of the Act. Later on they withdrew their admission. Briefly, the defendant's changes of mind were influenced by the decision in *Landsberg v New India Assurance Co (Pty) Ltd and Anor* 1969 (1) SA 110 (D) but when that case was overruled the defendant's attorneys changed their minds again and withdrew the admission. DIDCOTT AJ (as he then was) said of this at 316 C-D:

"In unequivocal terms, the plaintiff in the instant case was notified that the defendant conceded that there had been compliance with the provisions of s 11 *bis* (1). It is clear from Mr Letty's evidence that the concession was deliberate, that it was not intended to be cluttered with any reservations or qualifications, and that it was meant to signify a final and irrevocable renunciation of the defence in that connection. The plaintiff immediately embraced the concession. In my judgement, the process of waiver was thereby completed".

The learned judge declared that the defendant was not allowed to retract its admission. In *Mthanti's* case, *supra*, there was no mistake of law or fact; the attorneys knew all applicable authorities and followed the law laid down in those authorities. They had full knowledge of both fact and the law.

In the instant case the parties are dealing with a mistake of substantive law, and in any event the agreement entered into between the parties was at the behest of the appellant and in agreeing to it the respondent never surrendered its rights because it had none. *Mthanti's* case, *supra*, is distinguished both on fact and law from the instant case.

Mr Kuper contended that the position the respondent found itself in was not dissimilar to that the applicants in *Van Rensburg and Ors v Taute and Ors*, *supra*, found themselves in. In that case WESSELS JA said at 308 D-F (see the English translation):

1984 (2) ZLR p85

DUMBUTSHENA CJ

"Keeping in mind the *onus* which rested on respondents, it appears from the evidence that for a considerable time the applicants were in considerable doubt as to their legal position in relation to their rights due to an incorrect legal opinion they obtained from an attorney concerning the validity of the water agreement. Their conduct is also ambiguous in relation to the question whether they waived their rights as a whole, or whether they merely tacitly agreed to the building of a particular dam or dams. The defence runs up against the improbability that the applicants, with full knowledge of their rights, would waive those valuable rights without any *quid pro quo* on the part of respondents. In my opinion the Court *a quo* was correct in rejecting this defence."

Van Rensburg's case, *supra*, is directly in point with the legal position the respondent found itself in after receiving two contradictory pieces of legal advice the first of which the respondent felt was incorrect.

Mr Kuper was on sound ground when he contended, both in the respondent's heads of argument and in his submissions, that:

"A statement of understanding and of intention differs from a waiver agreement (and a *pactum de non petendo*) in material respects. There is no surrender of right if the point of departure is that no rights exist. A statement that the latter is the case precludes the former. So too, a statement that a party has no intention to bring litigation is not equivalent to an agreement that he will not bring or pursue litigation which he contemplated he would bring, nor is it an undertaking not to bring litigation. There is therefore an absence of the appreciation of a right or the possibility of a right coupled with its surrender which constitutes the requisite for the Agreement of Waiver."

In *Hepner v Roodepoort-Maraiburg Town Council* 1962 (4) SA 772 (AD) at 778 D-E, STEYN CJ laid down clearly the state of mind of the person who abandons his right. He said:

"... in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue (*Smith v Momborg* (1895) 12 SC 295; *Victoria Falls and Transvaal Power Co v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 62) but in *Martin v De Kock* 1948 (2) SA 719 (AD) at 733, this Court indicated that view may possibly require reconsideration. It sets, I think, a higher standard than that adopted in *Laws v Rutherford* 1924 AD 261 at 263, where INNES CJ says:

"The onus is strictly on the appellant. He must show that the respondent, with full knowledge of her right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.""

I find the principles of waiver enunciated by LORD DENNING MR in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 All ER 127 (CA) of assistance in distinguishing the instant case from a case in

1984 (2) ZLR p86

DUMBUTSHENA CJ

which such principles are found. That case dealt with a contract of sale which included in the bargain a confirmed irrevocable letter of credit. The credit did not conform with the contract. The currency of account was Kenya shillings but the credit was expressed to be payable in sterling. At the time the sellers did not object when payment was made in sterling because the value of the two currencies was the same. The sellers made an invoice for the balance in sterling and presented it to the confirming bank on the day sterling was devalued. The sellers subsequently claimed against the buyers the difference between the contract price in Kenya shillings and the amount of Kenya shillings realisable in exchange for the amount of sterling payment after devaluation. It was held that the sellers were not entitled to claim the difference between the sterling price and the original price in Kenya shillings. The facts of this case are distinguished from those of the instant case. I seek, however, to highlight the principle of waiver set out by LORD DENNING MR at 140a-c where he said:

"The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v Davidson (Manchester) Ltd* [1952] 1 Lloyd's Rep 527. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be allowed to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them: see *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657. But there are cases where no withdrawal is possible. It may be too late to withdraw, or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made."

This principle, when read together with the law of waiver collected in Christie *The Law of Contract in South Africa* at 433-435, leaves no doubt in my mind that the learned judge a quo came to the right decision.

Whatever may be said of the undertaking contained in the letter of 16 March, bearing in mind

the weight of persuasive authorities on this subject, it cannot be said that the statement contained in that letter was an agreement of waiver. That that is the true position becomes more

1984 (2) ZLR p87

DUMBUTSHENA CJ

clear when reference is made to an earlier letter dated 27 January 1983 addressed to the appellant's legal practitioners. There it is said:

"Over the telephone we made it clear that it was not the intention of our client company to institute action against Barclays Bank and certainly they have been advised in law they have no rights against Barclays Bank. Accordingly this request is merely to have some idea of what Mr Haggart's evidence will be at an early juncture. It could well assist both Binga Products and Standard Bank as it may lead to an early settlement in the matter "

Having come to the view that there was no agreement of waiver, the learned judge *a quo* came to the only conclusion possible. He expressed it as follows:

"In my view, in the result, it cannot be said that the letter by the first defendant's attorney was an offer in the terms submitted which were accepted so as to create a pactum de non petendo in this matter. These exchanges do not, in my opinion, and for the reasons given, amount to an offer and acceptance of the necessary character to create such an agreement, nor do I think they were ever exchanged with an *animus contrahendi*. They establish no more than that the plaintiff believed that had no basis in proceeding against the first defendant, and had no intention of doing so, and that the first defendant specifically sought reassurance of that attitude before handing over the statement. That does not now contractually prevent the plaintiff from changing its mind and instituting proceedings ...".

I am of the opinion that there is no need to deal with the other matter raised by Mr *de Bourbon* in his argument before us. This appeal succeeds or fails on the one point, which is whether there was an agreement of waiver or not. In the absence of evidence to the contrary it is clear from the language of the undertaking that there was never an agreement of waiver.

In the result the appeal is dismissed with costs.

Gubbay JA: I agree.

Waddington JA: I agree.

Scanlen & Holderness, appellant's legal representatives

Kantor & Immerman, respondent's legal representatives

1984 (2) ZLR p88

EX P MTYENYOKA 1984 (2) ZLR 88 (HC)

Court High Court, Harare

McNally J

9 & 15 August 1984

Copyright Juta & Co Ltd

Flynote

Insolvency - member of partnership - partnership estate sequestrated - application for rehabilitation of partner's estate - Court entitled to take into account the continued insolvency of the partnership.

Headnote

The applicant was a member of a partnership. The partnership estate had been sequestrated following its insolvency and in terms of s 18 of the Insolvency Act *Chapter 303* the applicant's estate was also sequestrated. No liabilities and no claims were proved against the applicant's personal estate, and he applied for his rehabilitation.

Held, that the fact that no claims were proved against his estate did not mean that the Court might not take into account the continued insolvency of the partnership in so far as it reflected on the merits of the application. The trustee of the insolvent estate of the partnership is, by virtue of s 64(1)(b) of the Act, entitled to look to the partner's own estate for funds to meet partnership debts, and in this case the applicant had apparently made little effort to discharge his obligations. The application was accordingly dismissed.

Cases cited:

Ex p *Cohen & Another* 1974 (4) SA 674 (W);

Ex p *Galanakis* 1970 (1) RLR 54; 1970(2) SA 406 (R);

Ex p *Burnett* 1982 (2) ZLR 37;

Ex p *Ngwenya* HC-H-363A-82;

Ex p *Foster* HC-H-233-83;

Ex p *Ndloru* 1981 ZLR 216; 1981 (4) SA 303;

Ex p *Mather-Pike* 1974 (2) RLR 250; 1975 (1) SA 771 (R).

S V Mutambanengwe, for the applicant

M T N Chingore, for opposing creditor

Judgment

McNALLY J: The applicant was in business in partnership with one Evans. The partnership business became insolvent and was sequestrated on 12 November 1980.

1984 (2) ZLR p89

McNALLY J

In terms of the provisions of s 18 of the Insolvency Act [*Chapter 303*], "where the court sequestrates the estate of a partnership it shall at the same time sequester the estate of every member of the partnership . . .". Accordingly the applicant's estate was sequestrated. He now seeks his rehabilitation. Evans has disappeared. It may be noted in passing that s 145 of the

Act provides that the partnership estate "shall not be rehabilitated".

This background is important and relevant, because the applicant seeks to make a virtue of the allegation, in para 8 of his petition, that "no liabilities were attributed to his personal estate and no claims were proved against it." This claim, it seems to me, loses a lot of its moral force when one realises that his estate was not sequestrated because of personal debts but because of partnership debts.

This raises the general question of the distinction between a partnership and its members. Generally speaking, a partnership is not a legal entity or *persona*, but merely an association of individuals: Bamford *The Law of Partnership and Voluntary Association in South Africa* 3 ed p 25. But for the purposes of the Insolvency Act a partnership is to some extent treated as an individual: Bamford *op cit* p 26. The matter was summarised thus by MARGO J in *Ex p Cohen & Another* 1974 (4) SA 674(W) at 675H-676A:

"Now at common law a partnership does not enjoy a personality separate from that of the individual partners, and the debts of the partnership are the debts of the partners themselves, each of whom is liable in *solidum*. However, the Insolvency Act departs fundamentally from that position. Section 13 provides for the sequestration of the partnership estate, as distinct from the private estates of the individual partners. Section 49(1) provides that the creditors of the partnership estate shall not be entitled to prove claims against the estate of a partner and that the creditors of a partner shall not be entitled to prove claims against the estate of the partnership; but that the trustee of the partnership estate shall be entitled to any balance of a partner's estate that may remain over after satisfying the claims of the creditors of the partner's estate in so far as that balance is required to pay the partnership's debts, and the trustee of the estate of a partner shall be entitled to any balance of the partnership's estate that may remain over after satisfying the claims of the creditors of the partnership estate, so far as that partner would have been entitled thereto, if his estate had not been sequestrated. Section 92(5), in accordance with these provisions, requires that separate trustees' accounts shall be framed in the estate of partnership and in the estate of each individual partner. "

It should be noted that s 13 of the South African Act is in essence the same as our s 18, and s 49 is the same as our s 64.

1984 (2) ZLR p90

McNALLY J

The fact therefore that no claims have been proved in the applicant's estate, does not mean that the Court may not take into account the insolvency of the partnership in so far as that reflects on the merits of the application: *Ex p Cohen (supra)* at 677F; *Ex p Galanakis* 1970(2) SA 406 (R); 1970(1) RLR 54.

Equally, the trustee of the insolvent estate of the partnership is entitled to look to the estate of a partner for funds to meet partnership debts: Insolvency Act [Chapter 303] s 64(1)(b).

I turn now to examine the merits of the application and of the objection lodged by the opposing creditor of the partnership estate.

The partnership estate and the applicant were sequestrated provisionally on 12 November 1980 and finally on 22 January 1981. The extent of the partnership's insolvency-the excess of liabilities over assets-is not stated. The petition simply states that at the time of his sequestration the applicant had no assets and no liabilities and no claims were proved against

his personal estate (section 64(1)(a), of course, prevents partnership creditors from proving claims against individual partners). It seems to me to be a debut in the papers that the total partnership debt is not shown, nor how much has been paid off. The only figure one has is contained in a letter from the Trustee dated 24 May 1983, annexed to the applicant's answering affidavit. There it is said that some \$31 000 is still due a creditors.

It appears the applicant has made contributions of \$3 450 to his Trustee, which sum has been used in terms of s 64(1)(b) of the Act to pay partnership creditors. Most of these payments have been made recently. He has been directed by the Master to contribute \$150 per month towards his estate instead of the \$25 per month paid earlier. It seems he can afford to do this although his particulars of income and expenditure are very vague. This is a serious defect-see Ex p *Burnett* 1982 (2) ZLR 37.

His Trustee's report to the Master was not favourable and commented adversely on the applicant's attitude towards his obligations and duties. It seems this attitude has improved in recent months, but the Trustee believes his earnings to be far in excess of figures reflected in his returns.

1984 (2) ZLR p91

McNALLY J

The objector is a company which was owed \$1 691,15 by the partnership, of which \$722,34 has since been paid by the applicant, leaving \$968,81 still outstanding. The objector makes various allegations which the applicant refutes, but one has the overall impression that the applicant is busily involved in the building trade. Because of the provisions of s 64 of the Act, I see little significance in the statement that the money was owed to the objector not by the applicant but by the partnership.

Obviously the applicant cannot be expected to repay the entire debt before his rehabilitation (Ex p *Ngwenya* HC-H-3S3A-82). But the fact remains that the application is not supported by the Trustee or the Master; that the applicant was at least initially not attentive to his duties and obligations; that he is able now to make significant contributions to his Trustee; that his application should have set out more details of the partnership debts and of his current earnings position; and that he should make fuller disclosure of his earnings to his Trustee if he is to satisfy the latter and obtain his support for rehabilitation.

I asked Mr *Mutambanengwe* whether he wished to consider seeking a conditional rehabilitation as provided for in ss 144 (2)(c) and 144(3) of the Act, but he did not suggest any conditions-compare Ex p *Foster* HC-H-233-83. In any event there is a further practical difficulty in the way of the applicant, arising out of his failure to comply with the six weeks' notice provision of s 141(2). There is some debate as to whether or not such a defect in the papers is a mere formal defect. I am happy to follow the decision in Ex p *Ndlovu* 1981 ZLR 216; 1981 (4) SA 303 that it cannot be said to be formal if it might cause prejudice to creditors. Mr *Mutambanengwe* argues that there are no creditors in the personal estate of the applicant. That is so, but there are, in the words of s 144(1) "other persons interested in the estate", namely creditors of the partnership estate, and they could be prejudiced. For this reason, it seems to me, I should not give the applicant leave to apply again on the same papers-see Ex p

Mather-Pike 1974 (2) RLR 250; 1975 (1) SA 771.

Accordingly, the application is dismissed, and the applicant is ordered to pay the costs of opposition of Mutare Plumbing Supplies (Pvt) Ltd the interested party opposing the application.

S V Mutambanengwe, legal practitioner for the applicant.

G Seirlis & Associates, legal practitioners for the opposing party.

1984 (2) ZLR p92

GRANGER v MINISTER OF STATE 1984 (2) ZLR 92 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Beck, Gubbay & Waddington JJA & McNally AJA

27 July & 17 August 1984

Flynote

Statutes - Constitution of Zimbabwe - Declaration of Rights - s 13(5) - derogation from during time of public emergency - para 1 (1) of Schedule 2 - limitations of - Emergency Powers (Security Forces Indemnity) Regulations 1982 as amended - s 4 - not saved by provisions of para (1) of Schedule 2 - "any person" and "action taken" - meaning of.

Headnote

The Plaintiff, a legal practitioner, had been taking photographs for a client at the scene of an accident when he was arrested, searched and held in custody by members of the Central Intelligence Organization. They had been coincidentally travelling in a government vehicle at the same time and place and had concluded that the plaintiff had been photographing their vehicle. The plaintiff claimed damages for wrongful arrest as well as for alleged assaults. In his plea, the defendant Minister denied the assaults, claimed that the arrest was justified and averred that the Minister of Defence had subsequently issued a certificate in terms of s 4(2) of the Emergency Powers (Security Forces Indemnity) Regulations 1982 (as amended) which had the effect of relieving the CIO members (and consequently the defendant) from liability for damages. The section provided that no liability for damages should attach to the President, any Minister or Deputy Minister or any member of the Security Forces in respect of any thing done by him in good faith for the purposes of or in connection with the preservation of the security of Zimbabwe. A certificate by the Minister of Defence stating that any thing was done in good faith and for those purposes was to be prime facie proof of the fact that such a thing was so done.

The plaintiff claimed that s 4 of the Regulations was *ultra vires* s 13(5) of the Constitution and the matter was referred to the Supreme Court in terms of s 24(2) of the Constitution (see *Granger v Minister of State* 1984 (1) ZLR).

Section 13(5) of the Constitution, which is part of the Declaration of Rights, gives the right to claim compensation to a person who is unlawfully arrested or detained, with certain exceptions.

Section 25 makes provision for savings in the event of public emergency; it allows an Act of Parliament to derogate from the provisions of certain sections, including section 13, and then only to the extent that it may

1984 (2) ZLR p93

BECJ JA

provide for the taking of action that is only to be taken-

- (a) during a period of public emergency; and
- (b) for the purpose of dealing with any situation arising during that period.

Held, that s 4(1) of the Regulations was not a law that provided for the "taking of any action", as envisaged by the first part of para 1(1) of Schedule 2 to the Constitution.

Held, further, that the only indemnity provided in s 13(5) and para 1(1) of Schedule 2 was one that was objective in nature, being made to depend on the test of reasonableness, whereas that conferred by s 4(1) of the Regulations was quite different, since it was made to depend only on the subjective test of the good faith of the author of the act.

Held, further, that the phrase "taking of action" in para 1(1) did not include legislative acts by the President, nor could the President be regarded for these purposes as "any person" who might benefit from the indemnity. The exercise by the President of this legislative function could only be tested by criteria applicable to laws, not by criteria appropriate to testing the actions of individuals. In any case, the reasons for legislative action by the President is not a matter that a Court may inquire into, by virtue of s 66(3) of the Constitution.

F C Blackie SC for the appellant

M J Gillespie, for the respondent

Judgment

Beck JA: In an action that is pending in the High Court a question has arisen as to a contravention of the Declaration of Rights and that question has been referred to this Court for decision in terms of s 24(2) of the Constitution.

The question has arisen in this way: It is common cause that the plaintiff is a legal practitioner and that on a day in May 1982 he was engaged on his client's behalf in taking photographs of the scene where a motor accident had previously occurred, when he was arrested, searched and held in custody for a time by members of the Central Intelligence Organisation. The plaintiff alleges, but the defendant denies, that he was also unlawfully assaulted and abused by the CIO men.

By reason of this conduct the plaintiff sued the defendant for damages, the action being commenced in October 1982. In justification of the arrest the defendant pleaded that the Central Intelligence Organisation members in question were travelling at the time in a Government vehicle; that they formed the opinion that the plaintiff was photographing their vehicle; and that

they "in consequence suspected a contravention of section 3(b) of the Officials [sic] Secrets Act (Chapter 97)". (Section 3(b) of the Official Secrets Act makes it an offence, punishable by imprisonment for a period not exceeding

1984 (2) ZLR p94

BECK JA

twenty-five years, for any person to make, for any purpose prejudicial to the safety or interests of Zimbabwe, any model or document which is calculated to be or which might or is intended to be useful, directly or indirectly, to an enemy).

The plea was amended in January of this year to add, as an alternative defence, that the Minister of Defence had issued a certificate on 30 December 1983 in terms of s 4(2) of the Emergency Powers (Security Forces Indemnity) Regulations 1982 and that "in terms of section 4(1) of those Regulations no liability for damages attaches to the said members of the Central Intelligence Organisation".

To that amendment to the plea the plaintiff replicated that s 4 of the said Regulations is-

- "(a) ultra vires section 13(5) of the Constitution as read with Schedule 2 of the Constitution;
- (b) alternatively, and in any event, *ultra vires* the Emergency Powers Act."

It is contention (a) above that constitutes the question that has arisen as to a contravention of the Declaration of Rights and that has been referred to this Court for decision.

The provisions which are said by the plaintiff to be inconsistent with the Constitution and therefore void are contained, as I have said, in the Emergency Powers (Security Forces Indemnity) Regulations, 1982 (Statutory Instrument 487 of 1982), s 4 of which was amended by the Emergency Powers (Security Forces Indemnity) (Amendment) Regulations' 1983 (SI 159 of 1983). It is the amended s 4 that is under attack, and it reads:

"4.(1) No liability for damages shall attach to-

- (a) the President or any Minister or Deputy Minister in respect of anything done in good faith by him or by any person referred to in paragraph (b) for the purposes of or in connexion with the preservation of the security of Zimbabwe; or
- (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

1984 (2) ZLR p95

BECK JA

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.

(3) The limitation of liability provided for in subsection (1) shall apply whether the cause of action concerned arose before, on or after the publication date and, notwithstanding that any judgment, agreement or settlement to pay any damages concerned have been given or made, no proceedings or claim, whether for breach of contract, set-off or otherwise, shall be taken or shall lie in respect of any such judgment, agreement or settlement.

(4) . . . [The provisions of this subsection are not relevant to the present issue]."

It is convenient to set out next those portions of the Constitution that bear upon the question that is before us, starting with s 3 which reads:

"3. This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void."

The Declaration of Rights is contained in Chapter III of the Constitution. Section 13 is part of that Chapter, and it is concerned with protection of the right to personal liberty. Subsection (1) states:

"13. (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2)."

Subsection (2) then proceeds to set out the various circumstances "hereunder a person may lawfully be deprived of his liberty, and sub sections (3) and (4) go on to prescribe how such a person must be dealt with after being lawfully arrested or detained. There follows subsection (5) which reads:

"(5) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person or from any person or authority on whose behalf or in the course of whose employment that other person was acting:

Provided that-

- (a) any judicial officer acting in his judicial capacity reasonably and in good faith; or
- (b) any other public officer, or person assisting such public officer, acting reasonably and in good faith and without culpable ignorance or negligence,

may be protected by law from liability for such compensation."

1984 (2) ZLR p96

BECK JA

I pause here to observe that it is not contended by the defendant that the provisions of the Regulations in question are such a law as is envisaged by the above-quoted proviso (b) in subsection (5) of s 13, which is really only declaratory of the common law. What is contended by the defendant is that these provisions of the Regulations are such a derogation from s 13 of the Declaration of Rights as is saved by the provisions of s 25 as read with Schedule 2 of the Constitution.

Section 25 of the Constitution, which is also a section that is part of Chapter III-the Declaration of Rights-makes provision for savings in the event of public emergency. It provides that:-

"25. Notwithstanding the foregoing provisions of this Chapter, an Act of Parliament may in accordance with Schedule 2 derogate from certain provisions of the Declaration of Rights in respect of a period of public

emergency or a period when a resolution under section 68(6) is in effect."

The only derogations that an Act of Parliament may authorise are such as are "in accordance with Schedule 2", and the important part of Schedule 2, for present purposes, is subpara (1) of para 1, which reads:

"1 (1) Nothing contained in any law shall be held to be in contravention of section 13, 17, 20, 21, or 23 to the extent that the law in question provides for the taking, during a period of public emergency, of action for the purpose of dealing with any situation arising during that period, and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the action taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

It will be seen therefore that to be "in accordance with Schedule 2", a law (whether it be a provision in an Act of Parliament, or in a Statutory Instrument enacted under the enabling provisions of an Act of Parliament-see the definition of "law" in s 113(1) of the Constitution) may:

- (i) derogate from ss 13, 17, 20, 21, 22 or 23 only. It cannot contain anything in contravention of any other sections in the Declaration of Rights, the provisions of which are thus inviolable even in periods of public emergency;
- (ii) derogate from these sections only to the extent that it may provide for the taking of action that is only to be taken (a) during a period of public emergency and (b) for the

1984 (2) ZLR p97

BECK JA

purpose of dealing with any situation arising during that period.

Only such *action* may lawfully be authorised therefore as is limited, in accordance with Schedule 2, as to the purpose for which it may be taken; as to the period during which it may be taken; and as to its nature, insofar as it may permissibly offend against the protections afforded to personal liberty (s 13), against arbitrary search or entry (s 17), to freedom of expression (s 20), of assembly and association (s 21), of movement (s 22) and against discrimination of various kinds (s 23); it cannot be action of a nature that offends against the protections afforded to life (s 12), against slavery and forced labour (s 14), against inhuman treatment, torture or degrading punishment (s 15), against deprivation of property (s 16), against the security of legal protection (s 18) and to freedom of conscience (s 19).

This, then, is the effect of the first part of the subparagraph, the clear purpose of which is to save from voidness for inconsistency with the Constitution such statutory provisions as accord with the Constitutional restraints that I have indicated.

The second part of the subparagraph has an associated but quite different purpose. This is the part that commences with the phrase "and nothing done by any person under the authority of such law".

Having saved from voidness such laws as comply with the first part of the subparagraph, the second part of the subparagraph addresses itself to the matter of actions taken by any person under the authority of such laws and it extends to such actions what amounts to a qualified indemnity only, despite the validity of the authority under which these actions are taken. The

qualification in question is one of degree, but it is one which depends upon a test that is objective in nature. That is to say, although the action taken may be of a kind that is authorised by a law that is saved by the first part of the subparagraph from voidness, that action may yet not be such as to exceed anything which could reasonably have been thought to be required for its intended purpose and under the then prevailing circumstances.

For the Plaintiff Mr *Blackie* submitted that s 4(1) of the Regulations is not such a law as is "in accordance with Schedule 2" because, firstly, it is not a law that provides for the taking of any action such as is envisaged by the first part of para 1(1) of Schedule 2; and, secondly,

1984 (2) ZLR p98

BECK JA

because all it does is to provide to certain authors of certain actions an indemnity which differs materially from the indemnity contained in the second part of para 1(1) of Schedule 2. The latter indemnity is one that is, as I have said, objective in nature because it is made to depend on the test of reasonableness, having regard to the permissible purpose and to the prevailing circumstances for which and under which, the action in question is taken; whereas the indemnity conferred by s 4(1) of the Regulations is quite different because it is made to depend only on the action in relation to its permissible purpose.

Both submissions of Mr *Blackie* appear to me to be correct and to be self-evidently so In the light of the unambiguous meaning and clear effect of the provisions of paragraph 1(1) of Schedule 2.

The argument that Mr *Gillespie* presented in support of the constitutionality of s 4 of the Regulations is an ingenious argument, but it is one which greatly strains the language of para 1(1) of Schedule 2, and I am satisfied that it is not an argument that can be upheld.

It is his submission that for the purposes of deciding the point now before us, para 1(1) of Schedule 2 must be read in the following way:

"Nothing contained in the Emergency Powers Act shall be held to be in contravention of section 13 to the extent that the Emergency Powers Act provides for the taking, during a period of public emergency, of action for the purpose of dealing with any situation arising during that period, and nothing done by any person under the authority of the Emergency Powers Act shall be held to be in contravention of section 13 unless it is shown that the action taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

Section 3 of the Emergency Powers Act [*Chapter 83*] enables the President to make such regulations as appear to him to be necessary or expedient for a variety of specified purposes during a state of public emergency and it is this enabling power, according to Mr *Gillespie*, that is embraced within the phrase in paragraph 1(1) of Schedule 2: "for the taking of action". In like manner it is so Mr *Gillespie* says, the legislative act of the President in making regulations that is embraced within the succeeding phrases in paragraph 1(1), namely: "nothing done by any person under the authority of any such law", and the "the action taken".

To describe a statutory power enabling delegated legislation to be

BECK JA

made as provision "for the taking of action" would be to resort to a most unlikely choice of phraseology; while the due legislative exercise by the President of such an enabling power is even more unlikely to be described, with what seems to me the most singular inappropriateness, as a "thing done by any person under the authority of any such law", and as "the action taken".

But it is more than just a matter of unlikely and inappropriate phraseology. It must be borne in mind that the Statutory Instrument in question is a regulation made by the President under the provisions of s 3(1) of the Emergency Powers Act [*Chapter 83*] and by virtue of the powers referred to in s 65(1) of the Constitution. In making such a regulation the President is not acting as an individual. He is acting on the advice of the Cabinet in terms of s 66(1) of the Constitution. It is therefore wholly inaccurate, and not merely inappropriate, to describe the President, acting in this way, as "any person", particularly in the light of the definition of "person" in s 113 of the Constitution as "any individual or any body of persons, whether corporate or unincorporated". It may be noted that the immediately following definition is the definition of "President".

The exercise by the President of this legislative function can only be tested by criteria that are applicable to laws and not by such criteria as are appropriate for testing the actions of individuals or bodies of persons. It is as a law that the Statutory Instrument has been challenged; it is as a law that it has been referred to this Court in terms of s 24(2) of the Constitution; and it is as a law that it must be considered when applying the provisions of paragraph 1(1) of Schedule 2.

Mr *Gillespie's* argument seeks to curb this legislative power of the President by subjecting the exercise of it to the objective test of whether the President "exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question". For a Court to be able to apply such a test it would have to know all the "circumstances prevailing at the time", which means, in the context of legislation of the kind under consideration, that the Court would have to possess all the information of which the Cabinet was possessed when advising the President to act in a particular manner, and then pronounce upon whether what was done "could reasonably have been thought to be required". Such a proposition, apart from its inherent improbability, is destroyed by s 66(3) of the

BECK JA

Constitution, which reads:

"(3) When the President is required to act in his own discretion or on the advice of any person or authority, a Court shall not, in any case, inquire into any of the following questions or matters-

- (a) on whose advice the President acted;

- (b) whether any advice was tendered or acted on;
- (c) the nature of any advice tendered; or
- (d) the manner in which the President has exercised his discretion".

While this provision in the Constitution does not operate to protect from voidness any legislative action of the President that is inconsistent with the Constitution, it certainly prevents any inquiry into the reasons for legislative action by the President, and it emphasises the point that the test in para 1(1) of Schedule 2 is not a test that is intended to be applied to legislative action by the President. It is a test intended to be applied by the Court to any action by any individual or any body of persons for which statutory authority is claimed, so as to ensure that behaviour by any individual or any body of persons that is unreasonably excessive in the prevailing circumstances will forfeit the protection that the law would otherwise accord to its author.

I do not consider therefore that the purpose and effect for which Mr *Gillespie* contends can properly be ascribed to para 1(1). The only curb on legislative action that the subparagraph contains is that which is inherent in the first part of the subparagraph, namely that legislation may derogate only from some sections of the Declaration of Rights, and not from others, and then only to the extent that it may provide for the taking of action for the purpose of dealing with situations arising in periods of emergency. The curb in the second part of para 1(1) is not a curb on legislative action by the President, as Mr *Gillespie* seeks to make it, but is a curb on conduct that is resorted to under the authority of such legislative action as is permitted by the first part of the subparagraph. Such conduct, though authorised by statutory provision, may not be unreasonably excessive in the prevailing circumstances.

Accordingly I am unable to agree that the constitutionality of s 4 of the Emergency Powers (Security Forces Indemnity) Regulations, 1982, as amended, falls to be tested according to whether or not the President, by enacting that section, "exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question."

1984 (2) ZLR p101

BECK JA

In my view this section of the Regulations is not saved by s 25 and by para 1(1) of Schedule 2 of the Constitution, because it is not a provision which provides for the "taking of - action" in accordance with para 1(1) of the Schedule, but provides instead, in subs (1) of s 4 of the Regulations, for an indemnity that is inconsistent with s 13(5) of the Constitution and with the last part of para 1(1) of Schedule 2. If subs (1) of s 4 of the Regulations is inconsistent with the Constitution, as I hold it to be, it follows that subsections (2), (3) and (4) of s 4, all of which are consequential upon subsection (1), must also be held to be inconsistent with the Constitution and void. Save to say that, speaking for myself, I found them unpersuasive, it is thus unnecessary to deal with Mr *Blackie's* additional submissions that paragraph 1(1) of Schedule 2 is so worded as to forbid such retrospective operation as is created by s 4(3) of the Regulations; or that, if retrospective operation is permissible, it must be limited to past conduct perpetrated in the particular six month period of public emergency during which the regulation was promulgated, and not to conduct perpetrated in any earlier periods of public emergency, even

though those earlier periods were extended before expiry so that there has been, for very many years now, a continuous and uninterrupted state of public emergency.

For these reasons the question referred to this Court must be answered in favour of the Plaintiff, with costs, and s 4 of the Emergency Powers (Security Forces Indemnity) Regulations, 1982, as amended, is declared to be void by reason of inconsistency with the Constitution.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Waddington JA: I agree.

McNally AJA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

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

1984 (2) ZLR p102

GORAH v MAHONA & ANOTHER 1984 (2) ZLR 102 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay & Waddington JJA

26 June & 7 September 1984

Flynote

Delict - negligence - vicarious liability for - servant giving lift to passenger who was thereafter injured due to servant's negligence - carriage of passenger prohibited by master - whether master liable.

Headnote

The first respondent was employed by the second respondent as a lorry driver. Although he had been forbidden to give lifts to people, he nevertheless gave a lift to the appellant. During the journey he negligently overturned the lorry and caused serious injuries to the appellant. Judgment was entered against the first respondent but the second respondent was granted absolution from the instance.

It was argued for the appellant that the sole consideration in law was whether the act of the servant which caused the injury was committed in the course of his employment, and the master could only be absolved if the servant's act was such as to take him outside of the sphere of his employment. In this case, the only act that directly caused the injury was the negligence of the first respondent and he was driving the lorry in the course of his employment.

Held, that judicial authority in other jurisdictions, including South Africa, was against the

appellant's contention.

Held, further, that the Courts will not adopt an approach to the facts of such cases which would tend towards too zealous a restriction of the principle of vicarious liability of a master for the delictual acts of his servant. The problem is to strike a balance between the opposing considerations of public policy and social justice, on the one hand, and, on the other, the inequity of visiting liability on a party who is not actually at fault in relation to the injury. In situations where disobedience by a servant of his master's instructions is causally linked with the injury delictually inflicted by the servant on a third party, a useful test is whether the instruction disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere. In this case, there were two distinct aspects of the first respondent's conduct-

- (1) his bad driving; and
- (2) his conduct in causing the appellant to be a passenger exposed to the risk of injury.

Unless both aspects could be said to be "acts done in the exercise of the functions to

1984 (2) ZLR p103

BECK JA

which he was appointed", it must follow that he had not acted throughout as his master's servant in inflicting harm.

Cases cited:

SAR & H v Marais 1950 (4) SA 610 (AD);

Middleton v Automobile Association of SA 1932 NPD 451;

Rossouw v Central News Agency Ltd 1948 t2) SA 267 (WLD);

Magage v Murray & Stewart (Pty) Ltd 1980 (4) SA 294(OPD);

Nott v ZANU (PF) 1983 (2) ZLR 208; 1984 (2) SA 115 (ZSC);

Ngubetole v Administrator Cape & Another 1975 (3) SA 1(AD);

Twine v Bean's Express Ltd (1946) 175 LT 131;

Minister of Police v Mbilini 1983 (3) SA 705 (AD).

P C Paul, for the appellant

No appearance for the first respondent

C N Greenland, for the second respondent

Judgment

Beck JA: In September 1979 the first respondent negligently overturned the second respondent's lorry which he was employed to drive. The appellant, who was a youth of 15 at the time, was on the back of the vehicle, having been given a lift by the first respondent. He sustained injuries in the accident, the most serious of which necessitated the amputation of his right leg below the knee. In July 1981, proceedings were instituted in forma pauperis by the appellant, duly assisted by his father, against the first respondent only. A year later, leave was given to join the second respondent. The matter came to trial before McNALLY J in February 1983, by which time the appellant had reached the age of 18 and had become a major by virtue of Act 15 of 1982. The first respondent was in default of appearance and the appellant was granted judgment with costs against him for damages in the sum of \$16 300, being \$12 000 of the \$15 000 that was claimed for pain and suffering, loss of amenities of life, disfigurement and future loss of earnings, plus \$4 300 (which was the sum that was claimed) for future replacement costs of the artificial leg. Special damages of \$474,85 for past medical expenses and the like, though proved, were not awarded however, because the evidence revealed that these expenses had been met by the appellant's father and he was not a party to the action in his personal capacity. As against the second respondent, who defended the action, the learned judge ordered absolution from the instance and awarded costs of suit against the appellant. This appeal has been brought against every part of the judgment.

In so far as the appeal against the quantum of damages that the

1984 (2) ZLR p104

BECK JA

learned judge awarded against the first respondent is concerned, no sufficient reason has been shown for interfering with the assessment of \$12 000 for general damages. It was submitted that the learned judge did not take into account the effect of the amputation on the appellant's future earning capacity. The portion of the judgment that deals with the quantification of the appellant's damages contains no reference to the appellant's future earning capacity, but that is hardly surprising, for there was no evidence that would support a finding that the appellant's future earning capacity has been diminished. The appellant's educational achievements and his father's and his own evidence concerning his future plans showed clearly that he would not have earned a living in the physical labour market, but that he would have become, and will still become, what is colloquially called a "white collar worker", probably a lawyer. It was not established that his disability would hamper his earning potential in this field of employment.

Other than the decline in the value of money no other ground of criticism was advanced against the award of \$12 000. Despite inflation however I do not think that the award is too low when compared with other awards made in our Courts. The appellant's loss of amenities by reason of the injury, though serious, has not been out of the ordinary and, as the learned judge said, it was apparent from the medical evidence that "there were no complications in the plaintiff's injury and save for a minor infection his recovery post-operatively was routine and successful."

In declining to award the appellant the special damages that were proved in the sum of \$474,85 however, the learned judge took too narrow a view. It was not pleaded that the appellant was not the correct person to claim under this head, nor so counsel assured us-was the point ever raised in the Court below after evidence was led from the appellant's father that he had effected

payment of these medical expenses. The point not having been raised, the learned judge could not be sure what the situation was as between the appellant and his father, and he was not entitled to assume that the father was the only one entitled to claim merely because his was the hand that had effected payment of these expenses which were incurred by the appellant when he was yet a minor. Had the matter been put in issue and properly canvassed it may have emerged that this claim was not improperly brought in the appellant's name. Alternatively, if the appellant's *locus*

1984 (2) ZLR p105

BECK JA

standi to advance this claim was technically defective, and if advantage was sought to be taken of that fact by the defence, the difficulty could easily have been met by immediately taking cession from the father of his right to claim.

In so far as the judgment that the appellant gained against the first respondent is concerned therefore the damages that were awarded must be increased in the amount of \$474,85.

I turn now to what was the main issue in the appeal. The learned judge held that the appellant failed to prove that the first respondent acted within the course and scope of his employment in giving the appellant a lift on the second respondent's lorry so as to make the latter vicariously liable for the injuries that the appellant sustained when being conveyed as an unauthorised passenger. In reaching that conclusion it was urged by Mr *Paul* that the learned judge erred both in fact and in law.

As far as the facts are concerned it was the second respondent's evidence that he had repeatedly given his lorry driver, the first respondent, the strictest instructions not to give lifts to people. Although the learned judge "was not greatly impressed with (his) demeanour and gained an impression that he might have exaggerated the vehemence and repetition of his ban on the carrying of passengers" he was not prepared to disbelieve this part of the second respondent's evidence. There were strong probabilities to support the likelihood that the first respondent had indeed been strictly forbidden to carry passengers. In the first place, the second respondent had been a policeman for more than 14 years and he well knew that it was unlawful to convey passengers, other than employees, on lorries. Secondly, his insurers had warned him that such passengers were not covered. Finally, and most importantly, guerillas were secretly camped on his farm at the time and they had threatened him with the most dire consequences if he should ever pick up strangers in his vehicles. In view of this support for the second respondent's evidence it cannot be said that the learned judge erred in accepting that the first respondent was under emphatic orders not to give lifts to third parties such as the appellant.

[The learned judge analysed the evidence and continued:]

Despite features in the second respondent's evidence which appear exaggerated, such as his already mentioned vehemence concerning his

1984 (2) ZLR p106

BECK JA

repeated instructions prohibiting the carrying of passengers, or his surprisingly detailed recollection of all his movements on the day prior to the accident, as well as of her less important criticisms of his evidence to which our attention was drawn in argument, I do not consider that sufficient reason has been shown for upsetting the trial judge's conclusion that the appellant's version of events was not established on a balance of probabilities.

Mr *Paul* went on to submit that even if the appellant's evidence that the second respondent knew and consented to the giving of the lift was not accepted, he should nevertheless have been held vicariously liable in damages. The sole consideration in law, Mr *Paul* argued, is whether the act of the servant which caused the injury was committed in the course of his employment. In the instant case, Mr *Paul* says that the only act that directly caused the injury was the negligent driving of the first respondent, and since it is common cause that the first respondent was driving the lorry in the course of his employment the vicarious liability of the second respondent is established.

In *South African Railways and Harbours v Marais* 1950 (4) SA 610 the South African Appellate Division was called on to decide whether the Railways were vicariously liable to the widow of a man who was travelling in the engine of the train at the invitation of the train driver, contrary to the latter's instructions, and who was killed when the driver negligently caused a derailment. It was held that the Railways were not liable. The same conclusion had been reached earlier in the courts of Natal and the Transvaal on facts which are on all fours with the facts of the present case (*Middleton v Automobile Association of South Africa* 1932 NPD 451; *Rossonw v Central News Agency Ltd* 1948 (2) SA 267 (WLD)). Reference may additionally be made to the decision in *Magage v Murray and Stewart (Pty) Ltd* 1980 (4) SA 294 (OPD), where the facts were also the same.

In the *South African Railways and Harbours v Marais* case *supra* at 620 A-H, WATERMEYER CJ pointed to the fact that the position was no different in America, England and Scotland. He said:

"There are many American decisions upon the subject of drivers of vehicles giving unauthorised lifts to friends which are collected in vol. 14 of the American Law Reports, pp 145-179 under the heading "servant permitting one to ride". They are dealt with on principles similar to English legal principles but questions as to the scope of a driver's employment are more fully gone into than they are in the English decisions, particularly in the case of *Rolfe v Hewit* (14 ALR 125).

1984 (2) ZLR p107

BECK JA

In the *American Restatement of the Law of Agency*, para 242, the law is stated as follows:

"A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.

The American decision seem to be based upon reasoning similar to that used by LORD

GREENE in the case of *Twine v Bean's Express Ltd* (175 LT 131 at 132) where he says:

"He (the driver) was employed to drive the van. That does not mean . . . that because the deceased man was in the van it was within the scope of the driver's employment to be driving the deceased man. He was in fact doing two things at once. He was driving his van from one place to another by a route which he was properly taking when he ran into the omnibus, and in driving the van he was acting within the scope of his employment. The other thing which he was doing simultaneously was something totally outside the scope of his employment-namely giving a lift to a person who had no right whatsoever to be there.

In Scotland there is the case of *Docherty v Glasgow Tramway & Omnibus Co* (32 Sc LR 353) in which LORD WELLWOOD said at pp 354 and 355:

"Suppose a private coachman in the absence of his master allows a friend to enter the carriage, and by careless caving upsets the carriage and his friend is injured, the master is not liable, because the servant was not acting within the scope of his duty in driving his, the coachman's friend in the carriage."

These decisions seem to me to be in agreement with the result at which I have arrived and it is satisfactory to find that so many other Courts, when dealing with the difficult subject of a master's liability for the acts of his servant, should have come to the conclusion that, when a driver of a vehicle gives a lift to a friend, such act being outside the scope of his employment, the master is not responsible if the friend is thereafter injured through the negligent caving of the vehicle while being earned on the vehicle."

Judicial authority elsewhere is therefore against the contention advanced by Mr *Paul* which would, if accepted, create a vicarious liability in a situation where no such liability has yet been recognised.

In *Nott v Zimbabwe African National Union* 1983 (2) ZLR 208; 1984 (2) SA 115 (ZSC) I expressed the view that this Court should not adopt an approach to the facts which would tend toward too zealous a restriction of the principle of vicarious liability of a master for the delictual acts of his servant. The problem is to know where the balance must be struck between the opposing considerations of public policy and social justice on the one hand, which would tend to widen the application of the principle, and of the inequity on the other hand of visiting liability

1984 (2) ZLR p108

BECK JA

on a party who is not himself at fault in relation to the injury suffered.

Sensible limitations have to be placed upon the reach of the principle and a variety of tests have been employed to indicate where the line must be drawn in different situations. The following observations of CORBETT JA in *Ngubetole v Administrator, Cape and Anor* 1975 (3) SA 1 (AD) at 9 are pertinent:

"In the sphere of vicarious liability the concept of "course of employment" is used as a yardstick for delimiting the master's liability for the wrongful (ie tortious or delictual) act of his servant which injures a third party. It is, as Fleming, *The Law of Torts* 4 ed p 322 points out-

"an expansive concept which provides ample scope for policy decisions and, despite the vast volume of case law, has failed to acquire a high degree of precision."

(See also Prosser *Law of Torts* 4 ed p 460, where the learned author points out that the vagueness of the phrase has permitted "a desirable degree of flexibility in decisions") . . .

It would seem that the particular formula "in the course of his employment", or, as it is sometimes expressed, 'in the scope of his employment', which originated in the English Law, is not always the one used, or favoured, by our Courts. Thus in the leading case in this Court, *Feldman (Pty) Ltd v Mall* 1945 AD 788, WATERMEYER CJ, expressed this general principle of vicarious liability thus (at pp 735-6):

"... a master is liable for harm caused to third parties by the wrongful acts of an agent if such agent is a servant and if such acts are done in the exercise of the functions to which the servant has been appointed."

Nevertheless the concept of an act done in the "course of employment" is well centrenched in our law of vicarious liability (see eg, *Mkize v Martens* 1914 AD 382 at pp 387, 390, 393, 400; *Estate Van der Byl v Swanepoel* 1927 AD 141 at pp 145-6, 153; *SA Railways and Harbours v Marais* 1950 (4) SA 610 (AD) at pp 620, 622-3) and, as this concept has been developed by our Courts, it appears to be the same as "an act done in the exercise of the functions to which the servant was appointed".

Because of this flexibility or lack of precision in the concept of "course of employment" in the sphere of vicarious liability, the courts in this country, and also in the United States of America, England and other common law jurisdictions (where the same concept obtains), have devised various tests or determining whether a particular act, or course of conduct, on the part of a servant falls within or without the course of his employment. Some of these tests are of broad, general application, others are more suited to the particular situations for which they were devised."

In situations where disobedience by a servant of his master's

1984 (2) ZLR p109

BECK JA

instructions is casually linked with the injury delictually inflicted by the servant on a third party, a useful test is whether the instruction that the servant disobeyed was one which limited the sphere of his employment or one which merely regulated his conduct within that sphere. That test is comprehensively and helpfully illustrated, stated and applied by CORBETT JA in *Ngubetole's case supra*, at 10E *et seq*.

It would be altogether too narrow an approach and indeed wrong in principle to look only, as Mr *Paul* invites us to do, at the more immediate cause of the injury to the third party, namely, the bad driving of the servant, and to ignore the servant's conduct in causing the third party to be a passenger exposed to the risk of injury by bad driving. These are two distinct aspects of the servant's behaviour looked at as a whole course of conduct. Both aspects of that conduct had to occur for the third party to be harmed; if either of them had been absent the appellant would not have lost his leg. Unless both these aspects of the servant's conduct can properly be said to be "acts done in the exercise of the functions to which the servant has been appointed" it must follow that he has not acted throughout as his master's servant in inflicting harm on the third party, and there is no room for the operation of the principle of vicarious liability of the master for the conduct of his servant.

In the *SA Railways and Harbours v Marais* case *supra*, WATER MEYER CJ analysed the servant's conduct in the following way (at 619D-E):

"The work entrusted to the driver was to drive the engine and he had to do it in such a manner as not to injure anyone by negligence in driving it. It was not the work of the administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment. It cannot be said that transporting a passenger on the engine was a negligent manner of driving the engine: it had nothing to do with

engine driving."

The CHIEF JUSTICE went on (at 620 D-E) to quote the passage from *Twine v Bean's Express Ltd* 175 LT 131 where LORD GREENE spoke of the servant "doing two things at once", only one of which it was within the scope of his employment to do.

Instances of drivers negligently injuring unauthorised passengers on their master's vehicles are instances where part of the causation of the injury done has been the servant's disobedience to an instruction that limited the sphere of his employment. Whether it is necessary, in cases

1984 (2) ZLR p110

BECK JA

of this sort, for an express instruction to be given not to give lifts in order to exclude the carrying of passengers from the sphere of employment need not now be decided, for this case has to be approached on the basis that the absence of any such limitation to the sphere of the servant's employment, or at least the waiving of it by the second respondent as far as the appellant was concerned, was not proved on a balance of probabilities. It has recently been emphasised yet again that the *onus* lies throughout on the claimant to prove that the servant acted in the course of his employment in inflicting the injury, and that this *onus* is not discharged simply by proof that at the time when the injury was inflicted the servant was on duty (*Minister of Police v Mbilini* 1983 (3) SA 705 (A)).

Accordingly I am unable to accept Mr *Paul's* submission that the learned judge *a quo* erred either in fact or in law in holding that the appellant failed to establish that the second respondent must be held vicariously liable for the wrong done by the first respondent to the appellant.

Although the point was not raised in the notice of appeal Mr *Paul* submitted in argument that the learned judge erred in ordering the appellant to pay the second respondent's costs of suit because the action was brought in *forma pauperis* and there were no circumstances that justified a departure from the usual practice of not making an order of costs against an unsuccessful pauper plaintiff.

It would seem however that, although the appellant was given leave to sue the first respondent in *forma pauperis*, no such leave was ever applied for or granted in respect of the second respondent who was only joined, as I have already indicated, a year after the action was instituted. Perhaps it was assumed that no such application was necessary. If so, that was a wrong assumption, for there was nothing, as far as I can discover, to indicate to the second respondent, when it was sought to join him, that he was to be sued *in forma pauperis*. Accordingly there was no reason for the learned judge not to make costs follow the result as far as the action against the second respondent is concerned.

With regard to the costs of appeal however, the appellant was given leave to prosecute this appeal against both respondents in *forma pauperis*, and he will not be condemned in the costs of appeal of the

1984 (2) ZLR p111

BECK JA

second respondent, against whom he has been unsuccessful.

Accordingly the appeal against the second respondent is dismissed with no order as to costs. The appeal against the first respondent is allowed, with costs, to the extent that the damages awarded in the court *a quo* are increased by the amount of \$474,85.

Gubbay JA: I agree.

Waddington JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives

Ali Ebrahim, second respondent's legal representatives

1984 (2) ZLR p112

KATEKWE v MUCHABAIWA 1984 (2) ZLR 112 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Waddington JA

1 August & 7 September 1984

Flynote

Delict - seduction - claim for damages for seduction - customary law - right to claim damages - in whom vested - Legal Age of Majority Act 1982 - gives majority status to person over 18 years of age - right of father or guardian to claim damages for seduction depends on daughter being a minor - no right to claim damages where daughter has achieved age of majority.

Headnote

Under customary law, as originally applied, an African woman was a perpetual minor who needed a guardian to assist her in her contractual obligations. Also under customary law, only the guardian of a woman was entitled to claim and keep damages for seduction of a woman. The guardian also had to give his consent to her marriage, irrespective of her age. In effect, the father owned the daughter. If she was seduced and thus wronged, the father himself was wronged and entitled to damages.

Over the years, legislative and judicial moves have been made to loosen the legal disabilities of African women. These moves have culminated in the Legal Age of Majority Act 1982, s 3 of which provides that a person shall attain the legal age of majority on attaining the age of 18 years. Section 3(3) makes this provision applicable for the purposes of any law, including customary law. Parliament's intention was to create equal status between men and women and, more importantly, to remove the legal disabilities suffered by African women because of the application of customary law. African women now have full legal capacity. An African woman can contract a marriage without the consent of her guardian because she no longer needs a

guardian. She may allow her father to ask for *roora* or *lobola* from the man who wants to marry her, but this is her choice. *Roora* is not a prerequisite to a lawful marriage.

It also follows that since the guardian of an African woman must lose his legal right to claim *roora* or *lobola* for her upon attainment of majority, the whole purpose underlying the action for damages for seduction falls away. He loses the right to sue for damages, and it passes to the daughter. She cannot vest that right in him.

Cases cited:

Ex p Minister of Native Affairs: in re Yako v Beyi 1948(1) SA 388 (AD)

1984 (2) ZLR p113

D A B ROBINSON

Tasara v Agnes Manjaya 1958 SRN 581;

Chikosi v Chikosi (1) 1973 (1) RLR 161; 1973 (3) SA 142 (R);

Chikosi v Chikosi (2) 1973 (1) RLR 199; 1973 (3) SA 145 (R);

Jirira v Jirtra & Another 1976 (1) RLR 7;

Bull v Taylor 1965 (4) SA 29 (AD).

Judgment

D A B Robinson: for the appellant: Under customary law, an action for damages for seduction may be brought by the guardian of an unmarried female where sexual intercourse has taken place between that female and the seducer without the consent of the guardian, the purpose of the action being to compensate the guardian for the loss in value of the female's potential lobolo price. Section 3(1) of the Act confers majority status upon a person who attains the age of 18 years with the result that, upon attaining the said age of majority, such person acquires full legal adult status and is released from the guardianship or legal control or power of any party.

In providing, in s 3(3), that the attainment of majority status at the age of 18 years "shall apply for the purpose of any law including customary law", the intention of the Act was to create a status of majority applicable to all Zimbabweans equally, irrespective of race or sex.

This being the case, it follows that a black Zimbabwean female who is of the age of 18 years or over is not subject to the guardianship or legal control or power of any person.

Accordingly, to allow a person, in relation to a black Zimbabwean female who has attained her majority, to recover damages in respect of that female's seduction, would be contrary to both the letter and spirit of the Act since this would be tantamount to denying a black Zimbabwean female full and legally effective majority status.

The rationale behind an award of damages for seduction is to compensate the guardian for the loss in value of the seduced female's lobolo price (see *De Souza v Munjoma* 1951 SRN 260; 1951 SRN 562 (1928/62), *Fani Sibandi v Elijah* 1956 SRN 507; 1956 SRN 795 (1928/62),

Bennet v Masawi 1958 SRN 598; 1958 SRN 863 (1928/62) and *Clifton Khumalo v Nathaniel Mthungwa* 1979 ACC 22 at 23), which presupposes a legal entitlement on the part of the guardian to the female's lobolo price.

1984 (2) ZLR p114

D A B ROBINSON

However, since, in the wake of the Act, a black Zimbabwean female who is a major may contract a valid marriage without a parent's or guardian's consent, it follows that, in so far as her guardian must lose his legal right to claim lobolo for her upon her attaining her majority, the whole purpose underlying the action for damages for seduction falls away. Consequently, there can be no impairment of a non-existent right.

When one speaks of sexual intercourse taking place between the female and the seducer without the guardian's consent, one is, in effect, referring to sexual intercourse by the female which diminishes the female's potential lobolo value without the guardian's consent.

However, once a daughter becomes a major, her father's consent is no longer of legal relevance since the father loses his legal right to lobolo upon his daughter's attaining her majority.

To uphold the decision of the Court *a quo* would not be in conformity with the letter and spirit of the Act and with the progressive thinking of Government, in that this would in effect-

- (a) deny a black Zimbabwean female who is a major the right and freedom to indulge in sexual relations outside of a validly contracted marriage without rendering her lover liable to a possible action for damages for her seduction at the instance of a third party;
- (b) subject a black Zimbabwean female who is a major to the indignity and inferiority of still being regarded under customary law as a minor in respect of whom a third party has a proprietary interest.

S J R Chihambakwe, for the respondent.

Dumbutshena CJ: In this appeal there is only one ground of appeal which reads:

"TAKE NOTICE that the above-named Appellant hereby notes an appeal against the judgment delivered by the Community Court for the Province of Midlands held at Chivhu on the 5th January, 1984, in the case No. 224 of 1983 between the above-named Respondent as Plaintiff and the Appellant as Defendant on the ground, raised in *limine*, that the Presiding Officer erred in law in holding

1984 (2) ZLR p115

DUMBUTSHENA CJ

that notwithstanding the fact that the Respondent's daughter, Molly (born 31st March 1963), was a major at the time when it is admitted by Molly that she first had sexual intercourse with the Appellant, being the 15th May, 1983, the Respondent has *locus standi*) and is entitled to claim damages for the seduction of his said daughter, Molly.

In the premises the Appellant prays that the judgment of the Community Court for the Province of Midlands held at Chivhu in the case No. 224 of 1983 be set aside, with costs, and that the Appellant's objection that the Respondent has no *locus standi* to claim damages for the seduction of his said daughter, Molly, be upheld."

It appears from the record that no evidence was led before the Community Court. If evidence was led there is no record of such evidence. However, it is apparent from the Notice of Appeal that the appellant, then defendant, raised a point in limine that the respondent, then Plaintiff, had no *locus standi* and was not entitled to claim damages for the seduction of his daughter who had by then attained the age of 18 years. In fact the daughter was born on the 31 March 1963.

The Community Court ruled as follows:

- "(1) That seduction took place several times in Harare and here in Charter.
- (2) That the defendant agreed to the Jurisdiction of the Court.
- (3) That the girl, though 20 years of age used her discretion that she is under the guardianship of her father.
- (4) That Section 17(1) of the African Customary Law and Primary Courts Act No 6 of 1981 should apply.
- (5) That defendant admitted seduction before marriage.
- (6) That the Legal Practitioner's argument was not based on any precedent by the Supreme Court of Zimbabwe or of any other Court of competent Jurisdiction.
- (7) Therefore I used my discretion that damages should be awarded."

The appellant then appealed to the District Court. The same issue as raised before the Community Court was argued in the District Court. The District Court dismissed the appeal with costs. The learned magistrate agreed that the Legal Age of Majority Act 15 of 1982 conferred majority status on any person in Zimbabwe who attains the age of 18 years. He then stated his reasons for dismissing the appeal as follows:

"The issue to be determined is indeed although the Legal Age of Majority Act 15/82 confers majority age was it the intention of the Legislature that, as in the instant case of damages for seduction, the father or guardian should not be awarded seduction damages because she is a major in terms of the Act. The provisions of

1984 (2) ZLR p116

DUMBUTSHENA CJ

Section 3 (3) are quite explicit and to the point. Though that is the case this court is fully of the strongest opinion that at no time did the Legislature intend to do away with the award of damages despite indicating that the Legal Age of Majority applies also in relation to Customary Law.

One is constrained in arriving at this decision to ask if the defendant's submissions are upheld before this court, would that not be eradicating the whole fabric of our society's Customs. Was it the intention of Parliament in enacting section 3 (3) that the tenets of custom should be done away with? The court is of the strongest opinion that at no time was it the intention of the Law giver."

It seems clear to me that the learned magistrate's approach was wrong because he was primarily concerned with the effect on society of the abolition of the guardian's right to sue for seduction damages. The Court *a quo* held that depriving the father or guardian of this right

would result in the eradication of "the whole fabric of our society's customs."

The appellant now appeals to this Court against that judgment. Again the ground of appeal is the same that was argued before the District Court. It is said the District Court "erred in not upholding the Appellant's exception that in view of the fact that the Respondent's daughter, Molly (born on the 31st March, 1963), was a major at the time when it is admitted by Molly that she first had sexual intercourse with the Appellant, being the 15th May, 1983, the Respondent does not have *locus standi* and is not entitled to claim damages for the alleged seduction of his said daughter Molly, in consequence of which the Respondent has no cause of action against the Appellant."

The Legal Age of Majority Act repealed the Legal Age of Majority Act [Chapter 46]. Sections 2 and 3 of [Chapter 46] read as follows:

"2. A person shall be deemed to have attained the legal age of majority when he attains the full age of twenty-one years.

3. Nothing in this Act contained shall extend or be construed to prevent -

- (a) any testator from bequeathing his property in such manner as by the laws of the Colony of the Cape of Good Hope he might have done before the twentieth day of June, 1829; or
- (b) any person under the age of twenty-one years from attaining his majority at an earlier period by operation of law."

1984 (2) ZLR p117

DUMBUTSHENA CJ

Now subs (1), (2), (3) of s 3 of Act 15 of 1982 read:

"3. (1) On and after the fixed date a person shall attain the legal age of majority on attaining eighteen years of age.

(2) A person who immediately before the fixed date has not attained the legal age of majority shall on that date attain the legal age of majority if he or she has then already attained eighteen years of age.

(3) The provisions of subsections (1) and (2) shall apply for the purpose of any law including customary law and, in the absence of a definition or any indication of a contrary intention, for the construction of "full age", "major", "majority", "minor", "minority" and similar expressions in-

- (a) any enactment, whether passed or made before, on or after the fixed date; and
- (b) any deed, will or other instrument of whatever nature made on or after that date."

It can be seen that the repealed Act did not have the provisions now covered by s 3(3) of Act 15 of 1982. What was the intention of the Legislature when it enacted s 3(3)? In my view the Legislature intended to put right the anomaly created by the exclusion of African women from attaining majority status because customary law deemed them perpetual minors. The Legal Age of Majority Act [Chapter 46] did not without expressly saying so cover African women. Now subs (3) of s 3 of Act 15 of 1982 expressly says:

The provisions of subsections (1) and (2) shall apply for the purpose of any law including customary law . . .".

In my judgment the Legislature intended to cover within this provision African women whose

status as perpetual minors fell within the ambit of customary law. I find no support in the language of s 3 of Act 15 of 1982 that Parliament intended to maintain the status quo in as far as the guardian's right to claim damages for the seduction of a daughter who has attained majority status. On the contrary, the indications are that Parliament's intention was to create equal status between men and women and, more importantly, to remove the legal disabilities suffered by African women because of the application of customary law. This view is not only common sense, it is supported by the clear and unambiguous language used in subs(3).

That there has been a trend towards the removal of legal disabilities

1984 (2) ZLR p118

DUMBUTSHENA CJ

suffered by African women becomes clear through a close look at s 3 of the African Law and Tribal Courts Act [*Chapter 237*], as amended by Act 11 of 1977, which provided:

"3. (1) Subject to the provisions of this section and of any other enactment, in the determination by any court of law of any civil case between Africans or between an African and a person who is not an African the decision may be given in accordance with customary law.

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

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

(i) seduction or adultery; or

(ii) the custody or guardianship of children; or

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

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

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

(v) marriage consideration; or

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

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

(2) The capacity of any African to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the law of Rhodesia:

Provided that, if the existence or extent of any right held or alleged to be held by an African or of any obligation vesting or alleged to be vesting in any African depends upon or is governed by customary law, the capacity of the African concerned in relation to any matter affecting that right or obligation shall be governed by customary law.

(3) Subject to any enactment, where-

(a) it appears-

(i) from express agreement that the parties have agreed; or

- (ii) from the nature of the circumstances surrounding the matter within which any case as arisen that the parties have agreed or can be presumed to have agreed; that customary law or, as the case may be, the law of Rhodesia should be applicable; or
- (b) the parties express to the court their consent to customary law, as the case may be, the law of Rhodesia being applicable;

1984 (2) ZLR p119

DUMBUTSHENA CJ

that law shall be applied accordingly, and any consent referred to in paragraph (b) shall be recorded in writing and attached to the court record of the case and shall be irrevocable.

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

(5) Notwithstanding anything to the contrary in this section, in any case relating to the custody of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied. "

What is significant in this section is the fact that customary law "shall be applicable in any case which is between Africans and which relates to-

- (i) seduction or adultery;"

and other matters mentioned in the section. A court had to apply customary law when determining a claim for damages for seduction "unless the justice of the case otherwise requires." I view this as meaning "unless in the exercise of the presiding officer's discretion justice would be done by not applying customary law." However, the right of the father to claim damages for seduction under customary law was never in doubt.

The African Law and Tribal Courts Act was repealed by the Customary Law and Primary Courts Act 6 of 1981. Section 3 of Act 6 of 1981 provides:

"3. (1) Subject to the provisions of this section and of any other enactment, unless the justice of the case otherwise requires-

- (a) customary law shall be applicable in any civil case where-
 - (i) the parties have expressly agreed that it should apply; or
 - (ii) having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or
 - (iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
- (b) the general law of Zimbabwe shall be applicable in other cases.

(2) For the purposes of paragraph (a) of subsection (1)"surrounding circumstances", in relation to a case, shall, without limiting the expression, include-

- (a) the mode of life of the parties;
- (b) the subject matter of the case;

- (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe, as the case may be, which

1984 (2) ZLR p120

DUMBUTSHENA CJ

apply to the case;

- (d) the relative closeness of the case and the parties to customary law or the general law of Zimbabwe, as the case may be.

(3) The capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe: Provided that, if the existence or extent of any right held or alleged to be held by any person or of any obligation vesting or alleged to be vesting in any person depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law.

(4) Notwithstanding anything to the contrary in this section, in any case relating to the custody of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied."

Section 3 does not specify those areas of matters which fall for determination by the primary courts in which customary law shall be applicable. The section gives a discretion to the parties whether the matter in issue shall be determined in accordance with customary law or the general law of Zimbabwe.

It is my view that in terms of s 3 of Act 6 of 1981 an African woman who has been seduced can make an election as to which law she wants to be applied. If she elects the general law of Zimbabwe, then she herself can bring an action for damages for seduction. I think that in enacting s 3 Parliament "appears to have used a device which may have been expected to permit of some elasticity and provide scope for development, so as to achieve the primary desideratum of an equitable decision between the parties without laying down any hard and fast rules as to the system of law to be used to attain that end": per SCHREINER JA in *Ex p Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (AD) at 397. That appears to have been the overall intention. However, the proviso to section 3 which reads:

"Provided that, if the existence or extent of any right held or alleged to be held by an African or of any obligation vesting or alleged to be vesting in any African depends upon or is governed by customary law, the capacity of the African concerned in relation to any matter affecting that right of obligation shall be governed by customary law."

still deprived an African woman of the right of election where the right, as in this case, vested under customary law in the guardian.

1984 (2) ZLR p121

DUMBUTSHENA CJ

Apart from the above trend in recent legislation the courts of this country have by their judgments sought to heal the pangs inflicted on African women by legal disabilities brought about by customary law. The courts ruled from time to time that emancipated women were entitled to sue in their own right unassisted by their guardians. An African woman who was a

licensed trader and was carrying on business could sue in mercantile transactions arising from her business in her own right. A nursing sister or a school teacher or other such professional women could sue in their own right without being assisted by their guardians. In this regard SIMPKINS P said in *Tasara v Agnes Manjaya* 1958 SRN 581:

"The rule laid down in *Mana v Nyamayaro* 1950 SRN 237 that, in general, a native woman has no *locus standi in judicio* and must be assisted by her guardian, cannot be held to have a general application. In *Mabigwa v Matibini* 1946 SRN 117 it was held that in certain circumstances she may sue and be sued in her individual capacity unassisted, and in *Elizabeth Makola v Godongwe* 1954 SRN 409 it was held that whilst there is a presumption that a native woman is incompetent to enter into a contract, that presumption may be rebutted."

A widow or a divorcee may sue or be sued personally unassisted (*Elizabeth v Emelda* 1966 AAC xiv).

In a practice note relating to the case of *Exavier v Dolan* 1960 SRN at 677 it was said:

"This court draws attention to the fact that the plaintiff in the lower court, a native female, sued in her own name. From the record it appears that she is emancipated as she is living in Haran (an African township in Salisbury) and earning her own living. We consider that this is a case of an emancipated woman suing in respect of a personal injury as a result of an assault upon her and is therefore a case where she need not be assisted by her guardian."

See Goldin & Gelfand: *African Law and Custom in Rhodesia* at 193-194.

Following this trend s 3(2) as read with s 3(1) of the African Law and Tribal Courts Act [Chapter 237] (now repealed) received from the courts a wide and generous interpretation. In *Chikosi v Chikosi* (1) 1973 (1) RLR 161 at 164A-C; 1973 (3) SA 142 (R) at 143H 144B, DAVIES J as he then was, considered s 3(2) of that Act as it related to marriages contracted under the African Marriages Act [Chapter 105 of 1963] and remarked as follows:

1984 (2) ZLR p122

DUMBUTSHENA CJ

"Since the right of an African to claim the dissolution of a civil marriage is not one of the masters referred to in s 3(1)(a), the common law and not customary law is clearly applicable in such an action, and the capacity of a married woman to bring such action must therefore be determined according to common law. There is no doubt that under the common law a married woman can sue her husband for divorce without assistance, and the fact that she may still be regarded as in the position of a minor under customary law, is irrelevant. It may be remarked that even prior to the enactment of the statutory provisions in question this was the accepted position. See *Sikwela v Sikwela*, 1912 SR 168; *Iden v Philemon*, 1918 SR 140; *Ellen v Jim*, 1931 SR 118.

In my view the same position must apply in regard to such ancillary relief as maintenance after marriage, and therefore, by necessary inference, maintenance *pendente lite*. In such a case there seems to be no room for the application of the proviso to subs (2) and s 3."

This loosening of the legal disabilities of African women is highlighted in the headnote to *Chikosi v Chikosi* (2) 1973 (3) SA 145 as follows:

"The parties who are Africans contracted a customary union which was duly registered under the African Marriages Act, Chapter 105 (R). Thereafter while living in the United States they had entered into a civil marriage by Christian rites. Their children were born subsequent to such marriage. In an application by the wife for an order awarding her the custody of the children *pendente lite*, maintenance and other relief, held, that the justice of the case required the common law principles to apply. That would give the applicant *locus standi* to apply unassisted by her husband for the custody of the children. *Held*, further, that the applicant was entitled to payment of

maintenance for the children."

The movement towards the removal of some of the legal disabilities affecting African women received further attention in *Jirira v Jirira and Anor* 1976 (1) RLR 7 at 13E where NEWHAM J said:

"In these circumstances, and despite Mr *Chinengundu's* submissions that the property disputes between the parties should be resolved in accordance with African customary law, I find myself in agreement with Mr *Whaley*, when he argues that the parties' way of living and the nature of the transactions between them are so removed from the incidents and the customary way of life of the African people, that in principle it would be contrary to the justice of the case to apply African law and custom to the solution of the property disputes of the parties. Alternatively he contended that, even if in principle customary law does govern the parties' proprietary rights, there is no express rule in customary law applicable to the peculiar facts of this case and, therefore, the principle of justice, equity and good conscience must be applied. Mr *Chinengundu* based his submissions upon the provisions of section 13 of the African Marriages Act [*Chapter 105*]. This section reads:

"13. The solemnisation of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held,

1984 (2) ZLR p123

DUMBUTSHENA CJ

may be disposed of and, unless disposed of by will, shall devolve according to African law and custom."

The learned judge held that the proprietary rights of the parties were governed by Rhodesian law and the wife's claim for a share of that property succeeded. The question of maintenance and custody were governed by Rhodesian law and orders were accordingly made. In terms of s 3 of Act 6 of 1981 the same results which were achieved in *Jirira v Jirira supra* can now be achieved by applying ss (1) and (2) of s 3 of Act 6 of 1981.

What has been directly affected and repealed by implication by Act 15 of 1982 is the proviso to s 3(3) of Act 6 of 1981. Now the capacity to enforce or defend any rights in a court of law or to enter into contractual obligations is determined and governed by the general law of Zimbabwe. African women now have full legal capacity.

I have cited the above cases because they are important as indicators of a trend which culminated in the enactment of Act 6 of 1981. Mr *Robinson* has drawn our attention to the areas of customary law which that Act has changed, namely, the custody of children, maintenance of the wife and the minor children of the marriage. Under customary law children belong to their father (if lobola has been paid). These changes give support to Parliament's intention which led to the enactment of Act 15 of 1982. Now s 3(4) of Act 6 of 1981 provides:

"(4) Notwithstanding anything to the contrary in this section, in any case relating to the custody of children the interests of the children concerned shall be the paramount consideration, irrespective of which law or principle is applied."

With regard to the maintenance of a wife and children s 12(3) provides as follows:

"Without derogation from its powers to make any other order for maintenance, a community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [*Chapter 35*]."

and s 12(4) is to this effect:

"(4) For the purposes of an order for maintenance in terms of subsection (3) a community court shall, notwithstanding anything to the contrary contained in customary law, regard-

- (a) the person who, according to customary law, is the husband of a woman as being primarily responsible for the maintenance of that woman during

1984 (2) ZLR p124

DUMBUTSHENA CJ

the marriage and after the dissolution of their marriage, until her remarriage;

- (b) the father of a child as being primarily responsible for the maintenance of that child until the child attains the age of majority."

The above provisions have brought into line with the general law of Zimbabwe the customary practice which after the dissolution of marriage did not provide for the maintenance of the wife and required the father to pay "Chiredzwa" - rearing fee for the care and upbringing of his child only if he demanded his child from the family of his divorced wife.

In the instant case we are concerned with a claim for damages for seduction by a father or guardian whose daughter has attained the age of majority, that is, 18 years. Mr *Chihambakwe* posed this question: "What was the general effect of this Act (15 of 1982) vis-à-vis customary law and in particular on the guardian's right to sue for damages for his daughter's seduction?"

It is common cause that the effect of the Legal Age of Majority Act is that the old customary law concept, that an African woman was a perpetual minor who needed a guardian to assist her in her contractual obligations, has been done away with because every person acquires majority status on the attainment of the age of 18 years. It was also common cause that an African woman with majority status can contract a marriage without the consent of her guardian because she no longer needs a guardian. As Mr *Chihambakwe* put it "there cannot be a major over another major". He contended in his heads of argument:

"What the Act has done is to create a right which is there for the parties and/or interested persons to take, namely:

-in the case of lobola, a major woman has now the freedom to marry with or without the involvement of the father (guardian) and/or lobola;

-in the case of seduction damages, a major woman has now the freedom to deny her father (guardian) the right to seduction damages."

It seems to me that an African woman with majority status can, if she so desires, allow her father to ask for roora/lobola from the man who wants to marry her. She and she alone can make that choice. If she does agree to her father asking for roora from his future son-in-law before marriage the father can go through the contractual procedures required before an African marriage is effected. The position, as from

1984 (2) ZLR p125

DUMBUTSHENA CJ

the 10 December 1982, when the Legal Age of Majority Act came into effect, is that an African woman of majority status can contract a marriage, whether that marriage be in terms of the African Marriages Act [*Chapter 238*] or the Marriage Act [*Chapter 37*] without the consent of her guardian.

In this respect there is substance in Mr Robinson's contention which is to this effect:

"... since, in the wake of the Act, a black Zimbabwean female who is a major may contract a valid marriage without a parent's or guardian's consent, it follows that, insofar as her guardian must lose his legal right to claim lobola for her upon her attaining her majority, the whole purpose underlying the action for damages for seduction falls away. Consequently, there can be no impairment of a non-existent right".

Mr *Chihambakwe* sought to meet this contention by arguing that the delict of seduction under customary law is not founded on the relationship between the girl who is seduced and her guardian. It is a right that belongs to the father but, says Mr *Chihambakwe* "a major woman has now the freedom to deny her father ("guardian") the right to seduction damages," presumably by refusing to testify should her father sue for such damage against her will. He developed his argument by contending that a woman who has attained majority status has the right to insist on customary law being applicable in seduction claims, thereby vesting the right to claim damages in her guardian or father. Mr *Chihambakwe*'s ingenious argument falls apart when the concession he made that "there can be no major over another major" is taken into account. A woman with majority status cannot surrender her majority in order to enable her father to sue for damages for seduction. The father has no independent legal right to seduction damages, seduction being a delictual wrong. Mr Robinson argued that -

"... if the father's entitlement to lobola now hinges upon his major daughter's discretion, so to speak, then the father has no legal right to lobola in respect of such major daughter at the time of her seduction and, consequently, the father has no cause of action against the seducer irrespective of the subsequent wishes of the father's daughter, who cannot confer upon her father a delictual right of action which he does not otherwise have."

The action for seduction embraces in our general law two claims; one is for satisfaction for the defloration of the girl and the other for lessening her chances of a successful marriage. The girl seduced is entitled to be compensated for the loss of her virginity, and for her

1984 (2) ZLR p126

DUMBUTSHENA CJ

diminished chances of making a suitable marriage. See *Bull v Taylor* 1965 (4) SA 29 (AD) at 39.

According to van den Heever "there are three requisites to a claim of damages on the ground of seduction: (1) that the woman has been seduced, (2) that there has been sexual intercourse and (3) that the woman was a virgin up to the time of seduction" (see *Breach of Promise and Seduction* at p 45).

The difference between an action for seduction in the general law and under customary law is that only the guardian of a woman is entitled to claim and keep damages for seduction under customary law. Another difference is that under customary law a woman need not be a virgin at the time she is seduced. In the past there was a difference between the Shona and the

Ndebele. Among the Ndebele damages for seduction were not claimable if the woman was not a virgin but now the Ndebele follow the Shona custom. See African Law and Custom in Rhodesia, *supra* at 209. Under customary law a seduced woman's chances of marrying were reduced because virtue was taken out of her and because of her loss of that virtue the father was not entitled to claim his full roora.

I have alluded to these differences because it is my intention to discuss both the general law and the customary law and attempt to reconcile them.

In my view the right under the general law to seduction damages is personal to the person seduced. It is a delict. It cannot be surrendered to the guardian by an adult woman. I agree with Mr Robinson when he says that "for there to be a remedy in delict there must be an infringement of a right at the time of the wrongful act". That is common sense and simple logic. Seduction in customary law is based, so it seems to me, on the concept of ownership. The father owns the daughter. If she is seduced and thus wronged, it is the father who is wronged and who is entitled to damages. That might have been so under customary law as long as the woman remained a minor under the guardianship of her father. Can it still be right now that the woman is a major and no longer a minor? It cannot be right it would be wrong for the courts to perpetuate a woman's minority status by inventing a legal theory of conferring a right on one's guardian and then going against the law of the land. The courts must hold that under present circumstances

1984 (2) ZLR p127

DUMBUTSHENA CJ

absolute equality between men and women must prevail.

In this appeal we are not concerned with roora but counsel have made submissions on it. I intend in passing to suggest guidelines which may be useful in future when the question of roora arises before a daughter with majority status decides to contract a marriage. Counsel are agreed that an African woman who is a major can contract a marriage without the consent of her guardian or the payment of roora. That is the effect of ss (3) of s 3 of Act 15 of 1982. That was common cause. However roora is different from damages for seduction. Mr Robinson's contention was, and I agree with him, that

"If the daughter causes her prospective husband to settle the matter of lobola with her father before she marries her prospective husband, then the father's right to such lobola is based on contract freely entered into between him and his prospective son-in-law . . . the father's entitlement to lobola now hinges upon his major daughter's discretion . . .".

As I see it what the Legal Age of Majority Act has done with regard to roora is this: The major daughter will say to her father "Father I want to get married. You have no right to stop me. I do not require your consent because I have majority status. But if you want roora you are free to negotiate with my prospective husband. If he agrees to pay roora that is a contract, an agreement between you and my prospective husband. If he refuses to pay roora I shall go ahead with my marriage." That without deciding the effect of Act 15 of 1982 on the customary requirement of the payment of roora before marriage, seems to me to be the present position having regard to the consequences flowing from Act 15 of 1982. One of those consequences is

in the words of the then Minister of Justice published in the *Herald* on 6 September 1983:

"The father or guardian cannot frustrate or prevent a marriage from taking place by his insistence on payment of roora. He can only enforce what the son-in-law promised to pay prior to the marriage - that is after the marriage has been completed."

This Act created, in the words of the Minister of Justice "advantages for women which some people would find unpalatable."

Finally I now turn to the question in issue: Does the father still have the right to sue for damages for the seduction of his major daughter? The answer is simple. He has not because his daughter is a major and cannot vest her own right in her father. He has lost his right under

1984 (2) ZLR p128

DUMBUTSHENA CJ

customary law to sue for damages for seduction. What then is the position? It is this. The right to sue for damages for seduction - a delict - now falls on the daughter. The daughter can sue for damages for seduction under the general law of Zimbabwe, she has now the capacity to do so. That she was given, so to speak, by s 3 of Act 15 of 1982. She can bring her claim for damages for seduction under the general law. If she does and damages are granted and her father brings a claim for damages under the customary law, he will be non-suited. He will have no cause of action.

The result of the conclusion to which I have come is this: The daughter can sue for damages for her seduction and not the father. If the daughter is a minor the right of action remains with the father under the customary law. I believe this was the intention of the Legislature. It accords with both the letter and the spirit of Act 15 of 1982. I am further of the view that it is more probable and will be more in the interests of justice now that the right to sue for seduction damages lies in a major woman, the only difference being that the major woman who has been seduced must have been a virgin.

In my view the above was the intention of the Legislature and the object the Legislature sought to achieve was the liberation of African women from the legal disadvantages of perpetual minority. I believe, and I think I am right in deducing, that the Legislature was fully aware of the legal incapacity suffered by African women and fully appreciated what they intended to achieve by enacting Act 15 of 1982.

In my judgment the respondent neither had the right of action in this matter nor *locus standi*. In the result the appeal is allowed and by consent there will be no order as to costs.

Gubbay JA: I agree.

Waddington JA: I agree.

Winterton, Holmes & Hill, appellant's legal representatives

Chirunda, Chihambakwe & Partners, respondent's legal representatives

S v WILSON 1984 (2) ZLR 129 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

24 September & 4 October 1984

Flynote

Criminal law - assault - provocation as a defence to a charge of assault - provocation not a complete defence - only serves to reduce offences for which specific intent required - de minimis rule - provocation can be considered in deciding whether rule applies.

Criminal procedure - suspended sentence - refusing to bring into effect - when good cause shown - Criminal Procedure & Evidence Act [Chapter 59] - s 337(2c)(b).

Headnote

The traditional approach of our courts to the defence of provocation has been that provocation can never be a complete defence to a charge of common assault. It can only operate to reduce an offence where a "specific" intent is required (eg murder) to one where such an intent is not required. To hold otherwise, as has been suggested by academic writers, would be coming very close to giving the impression that retaliation is justified in the eyes of the law in certain circumstances.

On the other hand, when the defence of *de minimis* is advanced, there is no valid basis for excluding any provocation received as one of the surrounding circumstances to be looked at. This would not be tantamount to introducing the defence of provocation through the back door.

In terms of s 337(2c)(b) of the Criminal Procedure and Evidence Act [Chapter 59], a Court may, on good cause shown, refuse to bring into operation a suspended sentence. Where, as in this case, the degree of the accused's moral culpability was slight, it would be inappropriate for a court on the subsequent conviction to bring into effect a suspended sentence or even to suspend it for a further period.

Cases cited:

S v Nangani 1982 (1) ZLR 150; 1982 (3) SA 800 (ZS);

S v Zengeya 1978 RLR 29; 1978 (2) SA 319 (RAD);

S v Pandehuni 1982 (2) ZLR 133;

R v Maguire 1969 (2) RLR 341 (AD); 1969 (4) SA 191 (RAD);

S v Schwartz 1971 (4) SA 30 (T).

GUBBAY JA

A P de Bourbon, for the appellant

M Werrett, for the respondent

Judgment

Gubbay JA: The appellant was convicted in the magistrate's court of an assault committed upon his female domestic servant. He was not a first offender. On 13 February 1980 he had been convicted of assault with intent to do grievous bodily harm and had been sentenced to a fine of \$300 or, in default of payment, 50 day's imprisonment with labour suspended for five years on condition that he was not convicted of assault with intent to do grievous bodily harm or of any offence of which violence to the person of another is an element committed within that period. Taking the appellant's blemished record into account, the magistrate imposed upon him a fine of \$40 or, in default of payment, 40 days' imprisonment with labour and ordered that the aforementioned suspended sentence be further suspended on the same conditions for another five years. An appeal is now brought to this Court against both conviction and sentence.

The facts fall within a very narrow compass. On the evening of 4 November 1983 the appellant and his wife were entertaining a lady guest at their home in Marondera. While at the dinner table the appellant's seventeen year old son, J behaved towards his mother and the guest in a rude and aggressive manner, causing much embarrassment thereby. The appellant, who on his own admission is a strict disciplinarian, was infuriated. He ordered his son outside. J left the house by the kitchen door and stood in the yard with his back to a boiler. The appellant followed immediately and, taking hold of J by the shirt collar, intimated that it was his intention to thrash him. It was at this stage that the complainant approached from the kitchen. She pleaded with the appellant not to strike his son. The appellant instructed her to return to her duties in the kitchen and not to interfere in a matter which did not concern her. The complainant withdrew momentarily, but as soon as the resumed scolding of J reached the point at which blows were imminent, she again intervened. She placed her hand on the appellant's shoulder and begged him to desist. That incensed the appellant even more. He grabbed the complainant by the nape of the neck and after frog-marching her four or five paces towards the kitchen door gave her a forceful shove. He shouted at her. The complainant became distraught.

There can be no doubt that although the complainant's intervention

GUBBAY JA

was well-intentioned and understandable in the circumstances, the appellant was provoked by it. As an employee she had no right to meddle in a father's disciplining of an errant teenage son. She was warned off and when she intruded again it seems that the appellant, who was already beside himself with anger, lost his self-control.

Mr de Bourbon, who appeared for the appellant, challenged the propriety of the conviction on

two fronts. The first was that the magistrate should not have rejected the defence of *de minimis non curat lex*. The second was that the provocation the appellant suffered was such as to operate as a complete defence to the charge.

It is convenient to deal with the second argument in advance of the first. In support of it Mr *de Bourbon* cited the following passage in the judgment of FIELDSEND CJ in *S v Nangani* 1982 (1) ZLR 150 (SC) at 159H-160A:

"First, if the law recognises that provocation is an extenuating circumstance then there is no question of principle involved in recognising it as a circumstance which may reduce murder to culpable homicide. It is only a question of the effect to be given to it. Both self-defence and duress-see *S v Goliath*, 1972 (3) SA 1 (AD)-are now recognised as defences to murder. Either may be a complete defence or may operate to reduce murder to culpable homicide, depending on the facts. But in each case it is accepted that what is excused or reduced is an intentional killing. *There is therefore no anomaly in recognising that provocation may have a similar effect*, or at least may reduce murder to culpable homicide even where the killing is intentional." (The emphasis is mine).

I do not believe that the learned CHIEF JUSTICE was there laying down that in crimes not requiring a "specific" intent, such as common assault, the factor of provocation can found a complete defence. That was not the question which arose for decision. What he was concerned with was whether provocation which causes an accused person to lose his self-control, though not his capacity to intend to kill, has the effect of reducing murder to culpable homicide even where the killing was intentional. I cannot conceive that in likening provocation to the defences of self-defence and duress FIELDSEND CJ meant to disturb the traditional approach, so firmly reiterated and applied by the former Appellate Division of this country in *S v Zengeya* 1978 RLR 29, that provocation can never be a complete defence to a charge of assault, but can only operate to reduce an offence where "specific" intent is an ingredient to one in which it is not. Moreover, it is significant that within four months of the decision in the *Nangani* case being handed down this Court, in *S v Pandehuni* 1982 (2) ZLR 133 reaf-

1984 (2) ZLR p132

GUBBAY JA

firmed the view expressed in *S v Zengeya*, *supra*. BECK JA at 134F-G gave short shrift to the contention that provocation denuded that appellant's conduct in striking the complainant a hard karate-type blow to the neck of any unlawfulness so that he should have been acquitted. BARON JA, who concurred, was also a party to the judgment in *Nangani's* case.

I am satisfied therefore that the *obiter dictum* in *S v Nangani supra* affords no support for Mr *de Bourbon's* submission.

True enough in Burchell and Hunt *South African Criminal Law and Procedure* Vol 1 2 ed at 309 - also relied upon by Mr *de Bourbon* - the learned authors suggest that -

"... on a charge of a crime not requiring a "specific" intent like common assault, provocation should excuse liability completely if the accused lacked the *mens rea* for assault, rather than that he should be found guilty of assault, the provocation being taken into account as a mere mitigatory circumstance."

But DAVIES JA in *S v Zengeya*, *supra*, at 32 E-G gave what I regard as a most convincing reason for refusing to depart from the traditional approach, in that -

"... were one to do otherwise then one would be giving credence to the belief that retaliation is justified in the eyes of the law in certain circumstances and it seems to me that this is the very thing our criminal law guards against; it does not allow people to take the law into their own hands, and it would be coming very close to that to allow provocation to operate as a complete defence."

I should perhaps add that in any event in the circumstances of this case, I cannot accept that the provocation the appellant received was such that it could reasonably be regarded as sufficient ground for the loss of self-control leading him to act against the complainant in the manner he did (see *S v Nangani supra*, at 161E). It may have been different if he had merely pushed the complainant aside and not deliberately held her by the neck and frog-marched her to the kitchen.

The more substantial argument addressed by Mr *de Bourbon* was that having regard to the provocation the assault upon the complainant was so venial as to justify the application of the *de minimis* principle.

In *R v Maguire* 1969 (2) RLR 341 (AD) at 342I - 343B, BEADLE CJ pointed out that as provocation can never amount to an absolute

1984 (2) ZLR p133

GUBBAY JA

defence to a charge of common assault, if the provocation received could be taken into account in deciding upon the *de minimis* principle, it might be tantamount to introducing the defence of provocation through the back door. He found it unnecessary, however, to come to a firm decision on the point.

With due deference to the learned CHIEF JUSTICE I would tend to agree with Professor Burchell's comment that if in such instance the accused were acquitted, it would be because his conduct was justified on the *de minimis* principle and not on the ground of provocation (see Burchell and Hunt *op cit* at p 382 n 586; 1971 RLJ 85). In assessing the overall gravity of the incident it seems to me therefore that there is no valid basis for excluding provocation as one of the surrounding circumstances to be looked at (See *R v Botha* 1939 SR 43).

Applying that approach to this case I am entirely satisfied that the assault upon the complainant, even though it was occasioned by provocation and did not cause any physical injury, was nonetheless not so trivial as to warrant being ignored altogether. It was committed by a man upon a mature woman of 40 years of age (see *S v Schwartz* 1971 (4) SA 30 (T) at 31F). In its nature it must have been humiliating and degrading for the complainant - indeed one can but wonder whether the appellant would have behaved towards a white woman in quite the same fashion. Finally, something more than fleeting force was used; not only did the appellant take the complainant by the scruff of the neck and propel her forward some few paces, he gave her a push as well.

In my view the magistrate's conclusion, reached in the exercise of a value judgment, was correct and the appeal against conviction must accordingly be dismissed.

With regard to the sentence imposed, Miss *Werrett*, on behalf of the State, conceded that the degree of the appellant's moral culpability made it wholly inappropriate for the magistrate to

have further suspended the conditional sentence of imprisonment due to expire ten months hence. I agree with that concession. If ever "good cause" was shown for refusing to bring a suspended sentence into operation pursuant to the power granted under s 337 (2c)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*], it was in this case.

1984 (2) ZLR p134

GUBBAY JA

Mr *de Bourbon* did not strenuously urge that a fine of \$40 was a manifestly excessive punishment. I have no doubt that it is not. The appellant is in receipt of a substantial monthly income and his prior conviction for what must have been a fairly serious assault is not to be overlooked.

In the result, I would allow the appeal against sentence to the extent that the order further suspending the conditional sentence imposed on 13 February 1980 be deleted.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Stumbles & Rowe, appellant's legal representatives.

1984 (2) ZLR p135

S v TAYLOR 1984 (2) ZLR 135 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay & McNally JJA

8 October 1984

Flynote

Criminal law - Prevention of Corruption Act [Chapter 70] - s 3(d) prior to 1983 amendment - agent entering into collusive arrangement with "seller of goods" or "person engaging to render services" - appellant selling redundant Government property to a third party with a view to purchasing them himself from that third party - not covered by section.

Headnote

The appellant, at the time an officer and a provincial quartermaster in the Police Force, recommended to a board of survey that 4 lawnmowers belonging to the Force be scrapped as they were beyond economic repair. As he wished to purchase them himself but would not be permitted to do so, he arranged that a local scrap dealer should purchase the lawnmowers and later resell them to him. This arrangement was duly carried out and the appellant took the lawnmowers. The scrap dealer did not himself deal with them at all.

When the matter was discovered, the appellant was charged with contravening s 3(d) of the Prevention of Corruption Act [*Chapter 70*], the point at issue being whether the arrangement (which was accepted as being a "collusive" one) was entered into with either "the seller of

goods" or "any person engaging to render certain services". The appellant had failed to disclose the true nature of the transaction to his principal, one of the elements of the offence.

Held, that to constitute the offences, the agent (the appellant) had to contract with the third party (the scrap dealer) a sale of goods, not to himself, but to his principal (the Police Force). Alternatively, any services rendered by the third party would have to be rendered to the principal, not to the agent. The scrap dealer's action in this case could not be viewed as a service rendered for the Police; it was something done for the sole benefit of the appellant.

Cases cited:

S v A 1979 RLR 69;

Maseti v Key NO & Others 1951 (2) SA 187 (C).

1984 (2) ZLR p136

GUBBAY JA

J B Colegrave, for the appellant

M Werrett, for the respondent

Judgment

Gubbay JA: The appellant was charged with having contravened s 3(d) of the Prevention of Corruption Act [*Chapter 70*] prior to the extensive amendment to that section by the Prevention of Corruption Amendment Act No 28 of 1983. He was found guilty and ordered to undergo six months' imprisonment with labour. This appeal is against both that conviction and sentence.

The evidence established that during the period between 24 September 1982 and 23 October 1982 the appellant, then an Inspector in the Zimbabwe Republic Police, acted as Provincial Quartermaster at the Chinhoyi Police Station. In that capacity he recommended to a body known as the Board of Survey that four motorised lawn-mowers, previously in use at the Station, were beyond economic repair and should be scrapped for spare parts. He advised that the value to be placed on them did not exceed \$135. As soon as the Board had approved of his recommendation in writing the appellant, who was aware that he would not be permitted personally to purchase the lawnmowers, approached one John Gobey, a local scrap metal dealer. He enquired whether Gobey would be interested in purchasing the condemned lawn-mowers for \$135, and received an affirmative response. The following day the appellant asked Gobey whether he would be prepared to re-sell the lawn-mowers to him for \$135, if he were to be given all the parts pertaining to the lawn-mowers for which the appellant had no use. Gobey was agreeable. Thereupon the appellant forwarded the report of the Board to the Quartermaster, Mashonaland Headquarters, under cover of a letter requesting authority to accept Gobey's offer to purchase the lawn-mowers for \$135.

On 12 November 1982 the appellant received a reply to the effect that the lawn-mowers were to be disposed of in accordance with the Board's recommendation. No reference was made to a sale to Gobey. Nevertheless the appellant went ahead with his scheme to use Gobey as a front in order to acquire the lawn-mowers for himself. He obtained from Gobey, who had not even

seen the lawn-mowers, a cheque for \$135 made payable to the Mashonaland Provincial Headquarters. He then issued to Gobey his own cheque in the same amount, and arranged for the lawn-mowers to be delivered to his residence.

1984 (2) ZLR p137

GUBBAY JA

Subsequently the appellant conveyed three of the lawn-mowers to an engineering company in Harare. It succeeded in putting one into full working order and in repairing the engine of a second. The cost to the appellant was \$377.

On 8 December 1982 a fellow Police Officer, who had been sent by the appellant to Harare to pay for and collect the lawn-mowers, recognised them as having been in use at the Chinhoyi Police Station. report made to the Officer-in - Charge resulted in the appellant's arrest.

On these facts it was Mr Colegrave's submission that the appellant's actions did not come within the ambit of the former s 3 (d) of the Act. That provision, where relevant, read:

"3. If -

- (d) any agent, by collusive arrangement with the seller of goods or with any person engageng to render certain services, secretly obtains any consideration for himself or for any other person or fails to disclose the full nature of the transaction to his principal;

.....
he shall be guilty of corruption . . .".

Clearly, only two types of collusive arrangements were hit at by the Legislature, namely: (i) that between the agent and the seller of goods; and (ii) that between the agent and any person engageng to render certain services.

Accepting, as Mr *Colegrave* did, that the arrangment between the appellant and Gobey was a "collusive" one (as to which see *S v A* 1979 RLR 69 at 84 A-B), the short point is whether it was entered into with either "the seller of goods" or "any person engageng to render certain services".

Miss *Werrett*, who appeared for the respondent, initially sought to support the conviction on the ground that Gobey fell within the description of a "seller of goods" since, having purchased the lawnmowers from the Police, he then sold them to the appellant. Such an interpretation, as Miss *Werrett* later appreciated, is quite untenable. What the Legislature aimed to prevent by the imposition of a criminal sanction were collusive arrangements between persons acting on behalf of principals, on the one hand, and third parties, being sellers of

1984 (2) ZLR p138

GUBBAY JA

goods, on the other. To constitute an offence "the agent" had to transact with the third party a sale of goods not to himself as the purchaser, but to his principal. This the appellant did not do.

He purchased the lawn-mowers from Gobey on his own behalf and for his own benefit. At no stage was Gobey the seller of the lawn-mowers to the Police.

Nor is it correct to contend that Gobey was a person "engaging to render certain services". In the context of the particular subsection the rendering of services related to the principal and not the agent as being the prospective recipient. If the Legislature had intended a wider construction it would not have qualified "any person" by the inclusion of the words "engaging to render certain services".

What Gobey did was to assist the appellant to acquire the lawn-mowers by himself purporting to purchase them from the Police. That action cannot be viewed as a service rendered for the Police. (See *Maseti v Key NO & Ors* 1951 (2) SA 187 (C) at 192 D-E). Plainly it was something done for the sole benefit of the appellant.

The appellant should consider himself fortunate that the collusive arrangement he entered into with Gobey occurred before the amendment to s 3 of the Act, which came into effect on 2 December 1983. Had it been subsequent thereto, he would have fallen foul of the present s 3(1)(f) which provides that an agent shall be guilty of corruption if -

"... with intent to deceive his principal or to obtain any gift or consideration for himself, (he) fails to disclose to his principal the full nature of any transaction carried out in the course of his agency".

It was for these reasons that at the conclusion of argument the appeal was allowed and the conviction and sentence set aside.

Beck JA: I agree.

McNally JA: I agree.

Atherstone & Cook, appellant's legal representatives

1984 (2) ZLR p139

V v A 1984 (2) ZLR 139 (SC)

Court **Supreme Court, Harare**

Beck, Clubbay & McNally JJA

5 & 15 October 1984

Flynote

Family law - parent and child - paternity of child in issue - evidence - danger of relying on complainant's evidence without corroboration - necessary to look at totality of circumstances and individually established facts - sum of collective force of such facts may amount to corroboration.

Headnote

In cases where paternity of a child is in issue, corroboration is not required as a matter of law,

although as a matter of practice the court should always warn itself of the inherent danger in acting upon the testimony of the complainant without corroboration. Incidents which, taken singly, are equally consistent with the stories of both parties cannot afford corroboration, either alone or taken cumulatively; but in all such cases the exercise of caution should not be allowed to displace the exercise of common sense.

The proper approach is to look at the totality of the surrounding circumstances and independently established facts. If it appears that a number of these facts and circumstances point, albeit without overwhelming individual force, in one direction, then the sum of their collective force may be said, in a proper case, to amount to corroboration sufficient to show a balance of probability in that direction.

Cases cited:

Mayer v Williams 1981 (3) SA 348 (AD);

S v Snyman 1968 (2) SA 582 (AD);

Samuels v Ngobese 1962 (2) PH J17 (N);

Perumal v Naidoo 1975 (3) SA 901 (N);

Cracknell v Smith [1960] 3 All ER 569;

R v Mabesa 1954 (3) SA 31 (O);

R v J 1965 RLR 501; 1966(1) SA 88;

Govender v Manikam 1981 (1) SA 1178 (N).

J S Sayce, for the appellant

P van Oudtshoorn, for the respondent

1984 (2) ZLR p140

McNALLY JA

Judgment

McNally JA: The respondent sued the appellant in the Maintenance Court, alleging that he was the father of her child and claiming maintenance and costs. The magistrate found in her favour, and it is against this decision that the appeal has been lodged. The amount awarded is not in dispute nor is the *quantum* of expenses ordered by the magistrate to be paid by the appellant in terms of s 31 of the Maintenance Act [Chapter 35]. The sole issue is paternity, the appellant denying that he ever had intercourse with the respondent.

The magistrate concerned has left the Service and left the country. This Court has therefore not been able to seek her further reasons for judgment in the light of the points taken on appeal. This is unfortunate, because she has omitted to do two things which might reasonably have been expected of her. In the first place she has made no comment on the credibility or

demeanour of the three witnesses. Secondly, she has made no comment on the allegation that the baby, who was produced in court, looks very much like the appellant.

Her approach seems to have been to take those items of evidence which were common cause, and to rely on those items as corroborative of the respondent's version of events. In the result, therefore, on a balance of probabilities, she found that intercourse took place between the parties at the relevant time. It is accepted that if that issue was rightly decided then the decision as to paternity was correct.

Both parties agreed that the proper approach to the question of sufficiency of evidence was that enunciated by TRENGOVE JA in *Mayer v Williams* 1981 (3) SA 348 (AD) at 351A to 352D. It is unnecessary to set out the passage in full. In summary, it was there decided that corroboration should not be insisted upon as a matter of law, but that as a matter of practice the court should always warn itself of the inherent danger of acting upon the testimony of the complainant in a paternity case.

The magistrate in this case did warn herself of this danger. She then considered the facts which were not in dispute between the parties and found that these facts were "consistent with applicant's story and inconsistent with the innocence of the respondent (appellant)".

Mr Sayce, for the appellant, disputes this finding. He says the facts found do not amount to corroboration, and in the absence of a finding as to credibility, corroboration is necessary.

1984 (2) ZLR p141

McNALLY JA

I would agree with Mr Sayce that in this particular case the only way to avoid the "inherent danger" is to look for corroboration of the respondent's version. Three circumstances in which the inherent danger is avoided are set out by Holmes JA in *S v Snyman* 1968 (2) SA 582 (AD) at 585E. They are:

1. Corroboration of the complainant in a respect implicating the accused;
2. The absence of gainsaying evidence by him;
3. (A finding as to) his mendacity as a witness.

While this was not intended as an exclusive list, one can say that in this case the appellant did give gainsaying evidence and he was not found specifically to be a mendacious witness.

I would accept, therefore, as indeed did the magistrate, that this is a case where the respondent's evidence required corroboration.

Let us look at the facts which the magistrate found to be corroborative of the respondent's version and as to which Mr Sayce says she erred. Let us also bear in mind that in general these facts are common cause.

It is not disputed that the respondent's parents had a religious outlook and disapproved of sex before marriage. She was brought up strictly in this regard. She met the appellant at a Church

Youth Club where there were social activities and Bible Study. When he first took her out it was to a Drive-In, and he asked her father's permission. At all relevant times she lived with her family, firstly with her parents and latterly with her brother and sister-in-law. It was at her brother's house that, after a relationship lasting almost three years, she and the appellant would on occasion sit in the lounge late at night after her brother and his wife had gone to bed, and "kiss and cuddle".

He admits all this, and concedes that they were "kissing and cuddling" over the period November 1981 to January 1982 (though he says they hardly met in December). The child was born to her on 14 September 1982.

In relation to these facts Mr Sayce made a series of submissions, each supported by authority. He contended, first, that the mere existence of a Courting or boy-friend/girl-friend relationship does not amount to corroboration; second, that mere opportunity in itself does not

1984 (2) ZLR p142

McNALLY JA

amount to corroboration; third, that the appellant's inability to point out an alternative paramour is not necessarily corroboration; and finally, to counter the "cumulative effect" argument, he contended that incidents which, taken singly, are equally consistent with either version, cannot afford corroboration, and thus the cumulative effect of a series of non-corroborative facts is not corroborative.

Samuels v Ngobese 1962 (2) PHJ17 (N) is authority for the first, second and last of these contentions. *Permual v Naidoo* 1975 (3) SA 901 (N) at 903A is authority for the third. *Cracknell v Smith* [1960] 3 All ER 569 at 571E and *R v Mabesa* 1954 (3) SA 31 (O) add further strength to the "mere opportunity" rule.

The case which goes perhaps furthest to support Mr Sayce's contention is *Samuels v Ngobesa supra*. In that case CANEY J said:

"... incidents which, taken singly, are equally consistent with the story of the plaintiff and of the defendant cannot afford corroboration of the plaintiff's evidence; nor can the cumulative effect of such incidents, each of which is not corroborative in itself, amount to corroboration."

He continued:

"Mere opportunity in itself does not constitute corroboration; in particular, the fact that the parties were in love, or courting, ... does not in itself afford corroboration. "

But it is of significance that he went on to say:

"Opportunity may, however, be of such a character as to bring in the element of suspicion and the circumstances and locality of the opportunity may give rise to an inference of misconduct and may be such as in themselves to amount to corroboration."

There is a danger in applying *dicta* to facts in a piecemeal and mechanical manner without taking account of the totality of the facts. It is the very danger referred to in similar circumstances by MACDONALD AJP (as he then was) in *R v J* 1965 RLR 501 at 503; 1966 (1)

SA 88 (SR, AD) at 90E, when he said "the exercise of caution should not be allowed to displace the exercise of common sense". See also *S v Snyman supra* at 598H.

Moreover, there are facts in this case which cannot be described as equally consistent with either story. These facts are better described,

1984 (2) ZLR p143

McNALLY JA

in the words used in *Govender v Manikam* 1981 (1) SA 1178 (N) at 1185A, as:

"... evidence, in addition to that of the complainant, which in some degree is consistent with her story and inconsistent with the innocence of the defendant."

Such facts are corroborative of the respondent's story.

The proper approach, it seems to me, is to look at the totality of the surrounding circumstances and independently established facts. If it appears that a number of these facts and circumstances point, albeit without overwhelming individual force, in one direction, then the sum of their collective force may be said, in a proper case, to amount to corroboration sufficient to show a balance of probability in that direction.

I believe this was the approach of TRENGOVE JA in *Mayer v Williams*, *supra*, where he said, at 352G:

"However, in fact, in this case there is corroboration. The magistrate accepted and believed the evidence . . . that at the material time (a) the appellant and the respondent were associating on terms of familiarity and affection, and (b) that she was not associating with any other man. These facts lend credence to the appellant's version."

We are looking here for proof on a balance of probabilities that the parties had a sexual relationship in the period November 1981 - January 1982. We know that a baby was born to the respondent in September 1982. Therefore we know that she had a sexual relationship with some man in that period. Who was he? We know that during that very period she was in the habit of kissing and cuddling with the appellant, her boy-friend of some three years standing. We know of no other man being involved with her at this time. The appellant can speak only of an ex-boy-friend with whom she had gone out for a year before becoming friendly with the appellant in 1979. There is no suggestion at all that the respondent was a promiscuous person. And finally, when she discovered she was pregnant she went straight to the appellant and told him of her pregnancy. If she were lying, would she not first tell others? Why would she speak to him privately if she and he both knew they had never had intercourse?

It seems to me that there is ample corroboration, in the totality of these facts, of the respondent's version. And none of it is disputed. It is

1984 (2) ZLR p144

McNALLY JA

not necessary therefore to consider the evidence of the respondent's brother that the appellant admitted to him that there had been intercourse. His evidence in my view reads well, but in the

absence of any finding on the brother's credibility I am content to rely on the admitted facts alone. Those facts (I should perhaps mention for the sake of completeness that blood tests were neutral and inconclusive) seem to me to show a definite probability corroborative of the respondent's allegations.

On that basis I would dismiss the appeal with costs.

Beck JA: I agree.

Gubbay JA: I agree.

Stumbles & Rowe, appellant's legal representatives.

D WAtken & Co, respondent's legal representatives.

1984 (2) ZLR p145

S v BEAULE 1984 (2) ZLR 145 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay & McNally JJA

8 & 22 October 1984

Flynote

Criminal law - defences - necessity - accused shooting bull which was causing damage on farm - whether defence available if person acts in defence of his property - defence must be confined within very narrow limits - where other means are available to avert danger they should be used.

Headnote

The appellant was in charge of a farm. Over a considerable period bulls belonging to a neighbour had strayed onto the farm and caused considerable damage to crops; but in spite of complaints the neighbour took no steps to curtail the bulls' straying. Finally, the appellant ordered that one of the bulls, which had strayed several times, be shot. The killing of the bull resulted in no further incursions taking place, but also resulted in the appellant's prosecution on a charge of malicious injury to property.

The appellant raised the defence of necessity, arguing that in all the circumstances what he did was reasonable.

Held, that the Courts have always adopted a most cautious view of a defence of this nature, confining the defence within the strictest and narrowest limits.

Held, further, that it was not necessary to decide whether the defence can ever be available when a person acts to protect his property. This was because there were, in the present case, other steps open to the appellant which he should have taken before resorting to the final, drastic step of killing the bull. Whether, if those steps had been taken without success, the

appellant's action would have been justified, it was unnecessary to decide.

Held, further, that the defence also failed on the ground that there was no immediate or imminent danger from the bull at the time it was shot. Indeed, the shooting was prompted, not by necessity, but by provocation, which can never be a complete defence. The sentence correctly took this provocation into account.

Cases cited:

Ex p Minister van Justisie: in re S v van Wyk 1967 (1) SA 488 (AD);

R v Canestra 1951 (2) SA 317 (AD);

S v Werner: S v Adams 1981 (1) SA 187 (AD);

S v Wassenaar 1966 (2) PH H351 (T);

1984 (2) ZLR p146

McNALLY JA

R v Damascus & Others 19651 RLR 477; 1965 (4) SA 598 (RAD);

S v Mapfumo 1983 (1) ZLR 250;

R v Mahomed & Another 1938 AD 30;

S v Wilson 1984 (2) ZLR 129.

J B Colegrave, for the appellant

M Werrett, for the respondent

Judgment

McNally JA: The appellant is a member of a religious order known as the Marist Brothers, and he was in charge of a farm owned by the Order at all material times.

The farm had suffered considerable losses and problems as a result of the depredations of some bulls from a neighbouring farm which were continually jumping the fence between the farms. These incur signs had begun in January 1983, and when the appellant returned from a visit to Canada in February 1983 he was told they had been in the maize crop some 12 to 15 times during his absence. The bulls returned on 8 February 1983, and on 13 February the appellant reported the matter to the complainant's manager who indicated that there was nothing he could do. The appellant made various suggestions as to what could be done, and complained of the damage to his crops and the potential damage if the bulls - which were beef bulls of the Brahman breed - got in among his dairy heifers.

Between February and 19 September 1983 the bulls or one or other of them returned between 25 and 30 times, doing significant damage to the maize, vegetable and banana crops on the farm and to the crops of tenant farmers. They were frequently found with the heifers. Numerous complaints were made to the complainant's manager. The complainant personally undertook to

chain up one of the bulls on 15 September 1983, but despite this it was found on the appellant's farm on the 16, 17 and 18 September. On the 19 September the appellant ordered that it be shot, and it was shot and killed. Since that event no other bulls have strayed from the complainant's farm onto the appellant's farm. The appellant informed the complainant of what he had done and this led in due course to his conviction in the Magistrates Court for the crime of malicious injury to property.

Against this conviction he now appeals, as also against the sentence of a fine of \$100 or in default of payment 50 days' imprisonment with labour. He relies on the defence of necessity.

1984 (2) ZLR p147

McNALLY JA

The problem of what to do about domestic animals which cause damage to the property of others is a common one in Zimbabwe. It may be of some significance that five such cases have been dealt with on review during 1983 and 1984 in the High Court in Harare and Bulawayo. They are:

S v J D Worsley, Judgment No H-B-58-83

S v Cover Sibanda, Judgment No H-B-134-83

S v Marufu, Judgment No HC-H- 49-83

S v Muzondo, Judgment No HC-H-256-83

S v Maponga, Judgment No HC-H-276-84.

In none of these cases was the defence of necessity raised or considered. In most of them the sentence was reduced on the grounds of the provocation offered by the marauding beast.

The defence of necessity is discussed in Volume I of *South African Criminal Law and Procedure* (commonly known as Burchell and Hunt) at 283 et seq. It is said at 285 that -

"For an act to be justified on the ground of necessity (a) a legal interest of the accused must have been endangered, (b) by a threat which had commenced or was imminent but which was (c) not caused by the accused's fault; and in addition it must have been (d) necessary for the accused to avert the danger and (e) the means used for this purpose must have been reasonable in the circumstances".

The defence is closely akin to the defence of duress or compulsion, and in relation to both defences, it has been said, although not with complete unanimity (see for example *Ex p Minister van Justisie: In re S v Van Wyk* 1967 (1) SA 488 (AD)) that the threat founding the necessity or the duress must be a threat of death or grievous bodily harm and not merely a threat against property.

In *R v Canestra* 1951 (2) SA 317 (AD) at 324H SCHREINER JA said:

"The only necessity compelling the appellant to risk contravening the regulation is economic and that is not a form of necessity that the law recognises."

This passage was cited with approval by RUMPF CJ in *S v Werner: S v Adams* 1981 (1) SA

187 (AD at 331H, although on the facts the learned CHIEF JUSTICE found that there was in any event no absolute necessity.

The success of the defence in the case of *S v Wassenaar* 1966 (2) PH H351 (T) may have been due to the aggressiveness of the bull and the

1984 (2) ZLR p148

McNALLY JA

age and disability of the farmer. The judgment does not deal with the matter in terms of the controversy about defence of property as against defence of life of physical well-being.

In relation to compulsion it was stated in our courts by MACDONALD J (as he then was) in *R v Damascus and Others* 1965 RLR 477 at 483-4; 1965 (4) SA 598 (SR) at 603 A-B that -

"Generally speaking it is only threats of death or grievous bodily harm which are likely to expose a person to such a motive, (ie compulsion) and there is every justification for limiting the defence to threats of such a nature and for excluding threats against property. This limitation has been accepted in most systems of law."

Indeed this Court has still left open the question whether duress (compulsion) can ever be regarded as a complete defence, at any rate to a murder charge - see *S v Mapfumo and Others* 1983 (1) ZLR 250.

What can be stated with confidence is that the Courts adopt a most cautious view of a defence of this nature.

"Clearly" said WATERMEYER AJA (as he then was) in *R v Mahomed and Another* 1938 AD 30 at 36, "exemptions from criminal liability based upon (the defence of necessity) must be confined within the strictest and narrowest limits because of the danger attendant upon allowing a plea of necessity to excuse criminal acts."

I would for myself prefer to avoid laying down any rule about whether the defence of necessity can ever be available when a person acts in defence of his property. To kill or harm a person in defence of one's property is one thing; but to kill another's animal of negligible value when it is doing irreparable damage to one's valuable property and there is no other way of stopping it, may be a different matter. And of course, property and life may be overlapping concepts. If a peasant in a drought area kills a beast which is eating his maize supply, who is to say whether he is killing in defence of property or in defence of life itself?

In the present case it is, I think, more productive to withdraw from the quagmire of philosophical and legal theory to the firmer ground of fact. The magistrate in an admirable judgment came to the conclusion that the appellant's behaviour in all the circumstances was not justifiable in terms of the defence of necessity. I agree with him. I can

1984 (2) ZLR p149

McNALLY JA

understand the appellant's annoyance; I can appreciate that he and his tenants suffered grievous loss and inconvenience; but I cannot accept that what he did was necessary or

Copyright Juta & Co Ltd

proportionate to the damage sought to be averted.

To my mind it is clear that the appellant had other means open to him which he should have pursued before resorting to the final drastic step of shooting the bull. He should have threatened and then taken legal action both by way of claiming damages and by way of seeking an interdict; he should have sought the assistance of the police; he should have consulted his legal advisers and the police in writing and advised the complainant in writing in the form of an ultimatum, before even contemplating shooting the animal.

I guard against saying that if all these measures failed he would have been justified in doing what he did. What I do say is that not having taken any of these steps he was not justified in summarily shooting the beast.

Not only does the defence fail on the ground that the appellant had other means open to him, it fails also on the ground that there was no immediate or imminent danger from the bull at the time it was shot. It was simply present on the farm.

Indeed I would agree entirely with the magistrate's conclusion that the shooting was "the culmination of his (the appellant's) frustration". It was provocation not necessity which prompted the shooting, and provocation, as recently reiterated by GUBBAY JA in *S v Wilson* Supreme Court Judgment No 92/84 (not yet reported)*(2), can never be a complete defence.

For these reasons I would dismiss the appeal against conviction.

As far as sentence is concerned, it seems to me that the magistrate achieved a proper balance between on the one hand an understanding of the appellant's well founded anger, and on the other the need to discourage individuals from taking the law into their own hands.

In the circumstances I would dismiss the appeal against sentence as well.

1984 (2) ZLR p150

BECK JA

Beck JA: I agree.

Gubbay JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

1984 (2) ZLR p151

LOURENCO v RAJA DRY CLEANERS & STEAM LAUNDRY (PVT) LTD 1984 (2) ZLR 151 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

27 September & 30 October 1984

Flynote

Contract - sale - terms of - implied warranty against latent defects - sale of old motor vehicle - when implied warranty may be inferred.

Practice and Procedure - trial - pleadings - amendment to - amendment during trial - when allowed - costs following amendment of pleadings - when costs may be awarded - absolution from the instance - when it may be granted.

Headnote

The appellant (defendant during the trial) advertised a two-ton truck for sale in the newspaper. The truck was first registered in 1967 but had shortly before it was put on sale had fairly extensive repairs and work done to the engine. The respondent (Plaintiff), which carried on business in Mutare, instructed its agent in Harare, a Mr Ranchod, to buy the truck. Ranchod took a mechanic to inspect the vehicle and they took it for a short test drive. Ranchod was handed a list of the repairs carried out and was told by the defendant's husband that the vehicle was in good condition and good working order. The evidence did not support the defendant's contention that the vehicle was to be sold voetstoots.

Satisfied with the vehicle's condition, Ranchod paid the agreed purchase price and the vehicle was taken to Ranchod's home, some 8 km away. A few days later, the plaintiff's driver collected the truck to drive it to Mutare. It only reached the outskirts of Harare before breaking down. The defendant's husband was informed and agreed to do something about the matter.

The plaintiff claimed for rescission of the contract, on the basis that the defendant had made express warranties as to the condition of the truck and had agreed, but failed, to repair the defects; alternatively, for the return of the vehicle in good order and condition. The court *a quo* gave judgment for the plaintiff in the sum of the purchase price.

At the close of the plaintiff's case the defendant's counsel applied for absolution from the instance on the ground that the evidence did not establish any express warranty. The plaintiff's counsel then applied to amend their pleadings to include an allegation that the defendant had given an implied warranty. The trial judge rejected the defendant's application and granted the plaintiff's. After the conclusion of the defendant's case judgment was given for the plaintiff.

1984 (2) ZLR p152

It was contended on appeal that the trial judge erred-

- (a) in refusing to grant absolution from the instance;
- (b) in allowing the plaintiff to amend its pleadings; and
- (c) in finding that there was an implied warranty.

Held, that in an application for absolution, the question is whether the plaintiff has adduced evidence upon which a reasonable court could or might find for the plaintiff. Where, as here, there is evidence to show that an implied warranty could be inferred, a refusal to grant

absolution was justified, even though the plaintiff had until then not specifically relied on implied warranties.

Held, further, that in terms of 020 R132 of the High Court (General Division) Rules 1971 a party may apply for and the court may grant an amendment to the pleadings at any stage during the proceedings. The mistake or neglect of one of the parties in placing the issues properly before the court must not be allowed to stand in the way of the principal object of the proceedings, which is to do justice to the parties. An amendment would only be refused if it caused prejudice to the defendant which was not remediable by payment of costs.

Held, further, on the question of costs, that had a postponement been necessitated by the amendment of the pleadings, the plaintiff would have had to pay the costs occasioned by such a postponement, but where, as here, there was no postponement and no extra wasted costs caused, the judge was entitled to refuse the defendant her costs.

Held, further, that for the defendant's husband to claim that the vehicle was in "good condition" did not itself amount, in the case of an old vehicle, to an implied warranty as to its soundness. However, because-

- (a) a great deal of work had been done on the engine;
- (b) the defendant's husband *had* claimed that the vehicle was in good condition; and
- (c) he had handed the plaintiff's agent a list of minor defects;

it was easy to infer that there was an implied warranty that the vehicle had no latent defects. The fact that it broke down so soon after the sale justified the inference that the latent defect was present at the time of the sale.

Cases cited:

Astrovlanis Compania Naviera SA v Linard [1972] 2 All ER 647; [1972] WLR 1414;

Mazibuko v Santam Insurance Co Ltd & Another 1982 (3) SA 125 (AD);

Gascoyne v Paul & Hunter 1917 TPD 170;

Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971(1) RLR 1; 1971 (4) SA 90 (RAD);

Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (AD);

Gandy v Makhanya 1974 (4) SA 853 (N);

SA Steel Equipment Co (Pvt) Ltd v Lurelk (Pty) Ltd 1951 (4) SA 167 (T);

Frenkel, Wise & Co Ltd v Cuthbert 1947 (4) SA 715 (C);

Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd & Anor 1967 (3) SA 632 (D);

Levenstein v Levenstein 1955 SR 91; 1955 (3) SA 615 (SR);
Mabaso & Ors v Minister of Police & Another 1980 (4) SA 319 (W);
Goldblatt v Sweeney 1918 CPD 320;
Lakier v Hager 1958 (4) SA 180 (T);
Seboko v Soll 1949 (3) SA 337 (T);
Addison v Harris 1945 NPD 444;

1984 (2) ZLR p153

DUMBUTSHENA CJ

Hackett v G & G Radio & Refridgerator Corp 1949 (3) SA 664 (AD);
Van Os v Breda 1911 TRD 165.
C N Greenland, for the appellant
J B Colegrave, for the respondent

Judgment

Dumbutshena CJ: The appellant, hereinafter referred to as the defendant, who resides in Harare, advertised in *The Herald* the sale of a two-ton Daihatsu truck. The respondent, hereinafter referred to as the Plaintiff, a company doing business in Mutare, instructed Mr Ranchod of Harare to buy the truck. Mr Ranchod took with him a Mr Holland, a motor mechanic, who inspected the motor vehicle by looking underneath and opening the bonnet. They drove the motor vehicle round the block. They were both satisfied with the condition of the motor vehicle. Mr Ranchod was then handed a list of repairs, Exhibit 1, carried out on the engine and other minor repairs. Mr Lourenco, the defendant's husband who was responsible for selling the car, told Mr Ranchod that it was in good condition and good working order.

Mr Ranchod paid the purchase price in the sum of \$3 800 to Mr Lourenco. Mr Lourenco's driver drove the truck to Mr Ranchod's house, a distance of 8 kilometres.

On 27 June 1981 Mr TG Raja, the Managing Director of the plaintiff company, and KG Raja left Mutare for Harare. They looked at the truck which was parked at Mr Ranchod's house. It appeared to them to be in good condition.

That evening Mr TG Raja, Mr Ranchod's father-in-law, and Mr Ranchod left Harare for London in England. Mr KG Raja arranged for the truck to be driven by Mr Nathan Matambanashe to Mutare. Mr Matambanashe was employed by the plaintiff as a driver.

On 28 June 1981 Mr Matambanashe started on his journey to Mutare. The driver did not know his way from Ridgeview to the Mutare Road. Mr Mukesh Raja led him by driving ahead of the truck. Mr Raja drove up to Sir James MacDonald Avenue and turned right into Samora Machel Avenue. He then proceeded along Samora Machel Avenue, followed by Mr Matambanashe. He

testified that he was driving at about 30 km/h at the maximum. At Haddon Motors Mr Raja drove back to town.

1984 (2) ZLR p154

DUMBUTSHENA CJ

Mr Matambanashe then drove along the Mutare Road until he stopped the truck near what was the Beverley Rocks Motel, now the Government Training centre. He stopped the truck because he felt extreme heat from underneath the seat and he observed smoke coming out from the same direction. He pulled off the road and stopped immediately.

After waiting for ten to fifteen minutes Mr KG Raja arrived. He lifted up the seat because the engine was situated underneath the seat. Mr Matambanashe noticed that there was oil all over the engine, oil was coming out and the water in the radiator was boiling. Mr Raja said he noticed both the water and oil boiling.

Mr Raja drove back to town and informed Mrs Lourenco of the breakdown. They left the defendant's employee looking after the truck while they proceeded to Mutare. When Mr Raja arrived in Mutare he said he made a telephone call to Mr Lourenco who said he would look into the matter and do something about it. Subsequently the truck was towed to Mr Lourenco's house but no repairs were carried out.

The central point in this appeal is whether there was an implied warranty as to the condition of the motor vehicle, or whether the truck was sold voetstoots, as is contended by the defendant.

A reading of the plaintiff's particulars of claim as outlined in its declaration projects the fact that the defendant had made express warranties as to the condition of the truck. It was pleaded as follows:

"Defendant warranted and represented, on two separate occasions, to Mr Ranchod and Mr K J Raja respectively, that the truck was in good order and condition and had no defects. The warranty was that the vehicle had had certain work done to it, that it had no defects and that it was in perfect working order."

To these allegations the defendant made a bare denial and also asserted that the truck had been sold voetstoots.

It appears that at some time during the plaintiff's case counsel for the plaintiff indicated his intention to amend the declaration. However, the amendment was handed in after the defendant's counsel had applied for absolution from the instance on the ground that the plaintiff's evidence had not revealed that the defendant -

1984 (2) ZLR p155

DUMBUTSHENA CJ

". . . had warranted and represented to the plaintiff that the vehicle was in good order and condition and had no defects".

In my view although the amendment did not precisely set out the circumstances alleged as an

implied warranty, the amendment was sufficiently clear and was amplified by the evidence.

Paragraphs 3 and 4 of the declaration were amended thus:

- "1. In paragraph 3 thereof as read with Plaintiffs Further Particulars by the deletion of 'In or about June 1981, Defendant' and the substitution of 'In or about June 1981, Defendant's husband, acting upon Defendant's behalf impliedly or expressly'.
2. In paragraph 4 thereof as read with Plaintiffs Further Particulars by the deletion of 'Defendant agreed to have the vehicle repaired at his expense and Defendant accordingly re-took possession of the vehicle' and the substitution of 'Defendant's husband, acting upon Defendant's behalf re-took possession of the vehicle and on the 27th June 1981, or thereafter impliedly or expressly agreed to have the vehicle repaired at his expense.'"

In passing let me say that the plaintiff did not seem to be aware of the particulars upon which its claim was based. The same can be said of the defendant because of the failure of counsel, (who was not Mr *Greenland*) to cross-examine Mr Ranchod on the defence of voetstoots.

One of the essentials of pleading is that the declaration or plea must set out precisely that which is alleged. The overriding requirement of proper pleading is -

"... that the litigation between the parties ... should be conducted fairly, openly and without surprises and incidentally to reduce costs."

See *Astrovlanis Compania Naviera SA v Linard* [1972] WLR 1414 at 1421; [1972] 2 All ER 647.

As already pointed out, at the close of the plaintiff's case counsel for the defendant applied for absolution from the instance. The court, without adjourning to consider its judgment, dismissed the application because the learned judge found that there were "enough grounds on which a reasonable court might find judgment in the long run for the Plaintiff".

The learned judge indicated, when she refused the application, that reasons for such a ruling would be incorporated in her judgment. She,

1984 (2) ZLR p156

DUMBUTSHENA CJ

in her attempt to give such reasons, considered the evidence in its total effect on the trim as a whole.

There is, however, no doubt in my mind that at:

"... the close of plaintiff's case there was evidence upon which a court, applying its mind reasonably, could have come to the conclusion that ..."

there was an implied warranty. See *Mazibuko v Santam Insurance Co Ltd and Anor* 1982 (3) SA 125 (AD) at 133. In that case CORBETT JA said at 132H:

"In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff; in other words whether plaintiff has made out a *prima facie* case. This is trite law."

However, it was the defendant's contention that absolution should have been granted at the end of the plaintiff's case because the "Plaintiff's cause of action was founded in express warranties allegedly given by Defendant which induced him to purchase the vehicle" and yet it was the plaintiff's evidence at the trial that no warranties of any kind were given. While that was so, there was still the question of an implied warranty to be considered. It must be remembered that the *onus* of proof in a criminal case is higher than in a civil case. This criterion in the difference of the standard of proof applies when an application for absolution is made at the end of the plaintiff's case as it does when the court considers final judgment at the end of a trial.

The approach by the court to an application for absolution from the instance was laid down in the case of *Gascoyne v Paul and Hunter* 1917 TPD 170 by DE VILLIERS JP at 173 as follows:

"The question therefore is, at the close of the case . . . was there a *prima facie* case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

It must be remembered too that an application for absolution stands on the same footing as a submission of no case to answer in a criminal case, except for the difference in the standard of proof pointed out above. It may be in this particular case the defendant might have succeeded had she not elected to give evidence after the application for

1984 (2) ZLR p157

DUMBUTSHENA CJ

absolution from the instance was refused. In *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 at 4 C-F BEADLE CJ considered the approach in *Gascoyne v Paul and Hunter*, *supra* and commented as follows:

"In that case, it was pointed out that an application for absolution from instance stands on much the same footing as an application for the discharge of an accused at the close of the evidence for the prosecution, but it is stressed (see p 173 of the judgment) that it would, indeed, be curious if, in civil cases, [the court] were to apply a more stringent rule of practice than in criminal cases. It would seem to me that, as in a criminal case the *onus* of proof is always higher than in a civil case, evidence which in a criminal case would be insufficient to justify refusing an application for the discharge of an accused might well in a civil case be sufficient to justify refusing an application for absolution from the instance. *Gascoyne's* case stresses that it is perfectly competent for a court to refuse an application for absolution from the instance when the application is made at the close of the *plaintiff's* case, but to grant it if the defendant then promptly closes his case and renews the application without calling any evidence at all. There is no inconsistency in two such diametrically opposed orders, though the evidence before the court in each application is identical."

The question is whether absolution should have been granted merely because the plaintiff had not pleaded an implied warranty and the amendment to the pleadings was handed in at the end of the application for absolution.

It appears to me that where there is evidence which tends to show that an implied warranty could be inferred from the surrounding circumstances a refusal to grant absolution is justified. In my opinion an inference justifying an implied warranty could have been drawn from the plaintiffs evidence at that stage of the proceedings. The learned trial judge, in considering whether there was evidence to establish a *prima facie* case, went beyond that and evaluated the evidence

adduced by the plaintiff's witnesses as if she was considering a final judgment. She said:

"I was of the view that the plaintiff company must have succeeded at the close of its case to show that defects existed on the vehicle at the time of the sale which would have gone against its decision to purchase the vehicle, or that the vehicle was not fit for the purpose for which it was purchased-*Lakier v Hager* 1958 (4) SA 180 at 181.

Clear was the evidence of Mr Ranchod that Mr Lourenco gave no warranty or representation as to the soundness of the vehicle. Equally clear was his evidence to a question put to him by the Court, that Mr Lourenco told him the vehicle was in good working condition.

1984 (2) ZLR p158

DUMBUTSHENA CJ

This, coupled with the list, Exhibit 1, which list enumerated the extent of the repairs canted out on the vehicle, motivated Mr Ranchod into buying the vehicle for the plaintiff company. Any knowledge that the vehicle would break down within a distance of ten miles would have gone against the decision of any reasonable man from purchasing the vehicle, Mr Ranchod not excluded.

I felt that whatever the defect, it was latent and not obvious to the cursory inspection of the vehicle conducted by Messrs Holland and Ranchod. "

The learned judge, however, cannot be criticised for not allowing the application for absolution. It would have been wrong for the court to have rejected the plaintiff's evidence as summarised above. In *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (AD) at 409 G-H MILLER AJA (as he then was) stated what appears to me to be applicable in the circumstances of this case. He said:

". . . bearing in mind that, when absolution from the instance is sought at the close of plaintiffs case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at p 173; *Ruto Flour Mills (Pty) Ltd v Adelson* (2), 1958 (4) SA 307 (T))."

See also Herbstein and Van Winsen: *The Civil Practice of the Superior Courts in South Africa* 3 ed p 464, and *Gandy v Makhanya* 1974 (4) SA 853 (NPD) at 856.

It is important to bear in mind that a plaintiff can avoid absolution even if he cannot persuade the court hearing the application that there exists an actual preponderance of probability in his favour.

On the evidence on the record it is my view that the learned judge was correct in refusing the application for absolution because she was not satisfied that a reasonable court could not draw the inference for which the plaintiff contended. There was the fact of substantial repairs effected to the engine. Besides, Mr Lourenco had uttered remarks about the condition of the motor vehicle. And more importantly there was the circumstance of its breaking down about ten miles from Mr Ranchod's house the first day the plaintiff drove it. This evidence, coupled with the denial of a voetstoets clause, led to the only inference which the learned judge was entitled to draw, which is that an implied warranty could be presumed.

1984 (2) ZLR p159

DUMBUTSHENA CJ

Let me now deal with the sixth ground of appeal which is to the effect that the "Learned Judge erred in Law in granting Respondent's application to amend its pleadings".

It was contended by Mr *Greenland*, who appeared for the defendant, that the court *a quo* ought not to have granted leave to the plaintiff to amend its pleadings after an application for absolution from the instance. No authorities were cited in support of that contention. I have already pointed out that it is not clear at what stage the amendment was applied for. What is clear is that it was handed in in written form after the ruling on the application for absolution.

A reading of Rule 132 of Order 20 of the High Court (General Division) Rules 1971 makes it clear that a party can apply to amend his pleadings at any stage of the proceedings. Rule 132 reads:

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

The learned judge correctly summarised the effect of authorities on this subject. The main aim and object in allowing an amendment to pleadings is to do justice to the parties by deciding the real issues between them. The mistake or neglect of one of the parties in the process of placing the issues before the court and on record will not stand in the way of this unless the prejudice caused to the other party cannot be compensated for in an award of costs. The position is that even where a litigant has delayed in bringing forward his amendment, as in this case, this delay in itself, in the absence of prejudice to his opponent which is not remediable by payment of costs, does not justify refusing the amendment. See *SA Steel Equipment Co (Pty) Ltd and Ors v Lurelk (Pty) Ltd* 1951 (4) SA 167 (TPD) at 172G; *Frenkel, Wise & Co Ltd v Cuthbert* 1947 (4) SA 715 (CPD) at 718; *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Anor* 1967 (3) SA 632 (D & CLD) at 638A-642H; *Levenstein v Levenstein* 1955 SR 91; 1955 (3) SA 615 (SR); and *Mabaso and Ors v Minister of Police and Anor* 1980 (4) SA 319 (WLD).

I now turn to the second ground of appeal. It is stated that the learned judge erred in finding that the vehicle in question had not been

1984 (2) ZLR p160

DUMBUTSHENA CJ

sold voetstoets.

I have already mentioned that Mr Ranchod, who bought the motor vehicle as the plaintiff's agent, was never closely cross-examined on the vaetstoets sale. Some questions on a voetstoets sale were put to a witness who was not present at the sale when that issue was thus belatedly brought up by the defendant's counsel. The impression this omission induces in one's mind is that the defence of voetstoets was never a strong part of the defendant's case. This is how the defendant's counsel handled the issue when cross-examining the plaintiff's witnesses.

Mr Ranchod was asked during his evidence-in-chief the following questions:

- "Q. Is there any truth in the assertion that the sale was on a voetstoorts basis, that is on as it stands basis?
- A. No, Mr Lourenco did not mention that.
- Q. You are quite sure?
- A. Yes
- Q. Would you have been prepared to buy the vehicle for your father-in-law if you would have known that it was on a voetstoorts or as it stands basis?
- A. I do not think so I could buy it myself unless I had contacted my father-in-law again and told him exactly that these are the conditions and whatever he told me then of course I would act upon.
- Q. But you are quite sure that you were not told that it was a *voetstoorts* sale?
- A. No, there was no mention of that. "

In spite of Mr Ranchod's denial that the sale of the motor vehicle was on a voetstoorts basis, the issue was not vigorously pursued and yet Mr Ranchod was the man who had negotiated the contract of sale of the motor vehicle with Mr Lourenco.

Mr TG Raja testified that he would not have purchased the motor vehicle had he been told that the sale was on that basis. In cross-examination a question was put to him on this important issue as follows: -

"And you also say you would not have purchased the vehicle had it not been or had he told you specifically that it was a *voetstoorts* sale?".

He replied "Yes". That was the end of the cross-examination of Mr TG Raja on this important defence.

1984 (2) ZLR p161

DUMBUTSHENA CJ

Mr TG Raja is said by the defence to have been told by Mr Lourenco during a telephone conversation that the motor vehicle was being sold "as is". Mr Lourenco was asked in his evidence-in-chief:

- "Q. And what was agreed on the phone?
- A. Well, they only asked the question, "What is the condition of the truck like?" And I told them exactly that I am selling this truck, it was a Daihatsu 2 tonne panel van. The price was \$4 000, but I did mention there also at the same time that I have done the repairs, you know, like an engine, the gear box and few other places, etc. I have listed down all these things, you know and at the same time I also mentioned that I would be selling the truck as is.
- Q. Did you mention that on the telephone at that stage?
- A. I did.
- Q. Are you quite certain about that?

A. I am quite certain.

Q. Would you repeat what you said?

A. I said that I will be selling this truck as it stands.

Q. Did you say as it stands or as is, which is it?

A. Well, as is."

The telephone conversation between Mr Lourenco and Mr TG Raja was not put to Raja in cross-examination. If that conversation had taken place the defendant's counsel should have asked Mr TG Raja about it.

In my view if Mr TG Raja had agreed to buy the motor vehicle voetstoots, Mr Ranchod would not have taken with him a mechanic, Mr Holland, to examine the truck. Further, it is inconsistent for Mr Lourenco to sell the motor vehicle voetstoots and still insist that the purchaser look at the amount of work he had done on it. He was asked:

"And did you repeat to him (Mr Ranchod) any conditions of the sale?".

He replied:

"Well, the condition of the sale was that I was selling the truck as is, that they might look at all the amount of work that I had done on the truck and I was selling the truck as is and this is exactly what I used."

I agree with Mr *Colegrave*'s submission that the assertion that the motor vehicle was in good condition is inconsistent with its being sold voetstoots, because it was in the defendant's interest to divulge to Mr Ranchod that it was in good working condition in order to enhance the sale, more so when the repair to the engine was a "masterpiece". And Mr Lourenco did agree under cross-examination that he suggested to

1984 (2) ZLR p162

DUMBUTSHENA CJ

Mr Ranchod that the motor vehicle "was in a good and sound condition in a running condition."

In my view on this evidence the court *a quo* was justified in rejecting the defence evidence. Once that evidence was rejected:

". . . the seller is presumed to warrant that at the time of sale the thing sold is free from all latent defects, for in this instance there was no question of the car having been sold "as it stands". . ."

(per SEARLE J in *Goldblatt v Sweeney* 1918 CPD 320 at 323).

However, Mr *Greenland*, who appeared for the appellant, contended that the latent defect did not exist at the time of sale. In support of his contention he relied on the fact that Mr Ranchod had brought with him Mr Holland, a motor mechanic, who inspected the motor vehicle before it was bought.

In support of his submission Mr *Greenland* cited *Lakier v Hager* 1958 (4) SA 180 (TPD). That was a case in which the Plaintiff had purchased a nineteen year old car. He asked for a

roadworthiness certificate. The defendant gave him one which had been issued a few days before the sale. The Plaintiff was satisfied to accept the roadworthiness certificate as a performance of the condition. Before buying the car he tested it by driving it, and was satisfied with its performance. Four days after taking delivery he drove it. He swerved to avoid a pool of water and a traffic inspector stopped him and asked him to obtain a roadworthiness certificate. There was nothing relating to the swerving which indicated its performance on the road. When it was tested a roadworthiness certificate was not granted. He then sent it to a garage and after that he sent it to another garage for examination. After receiving an adverse report he rescinded the sale and claimed the return of the purchase price. The purchase price was not returned. He then sued for rescission, basing his claim on latent defects.

In his judgment RAMSBOTTOM J (as he then was) remarked at 184 E-H:

"The man is buying a very old car, and he must give it a proper inspection. If he wishes to rely on defects existing at the time of the sale which are latent then, I think, he must show that he gave the car a proper inspection, and a proper inspection involves examining, at any rate, the external part of the car, whether that is underneath or on top. I think that one of the things that a person buying an old

1984 (2) ZLR p163

DUMBUTSHENA CJ

second-hand car of this kind might be expected to look for would be a cracked chassis, and if that had been done in this case it would immediately have been discovered. But assuming that I am wrong in this and assuming that the cracked chassis was a latent defect, it seems to me that there is no evidence to show that this was material. The evidence is that the chassis might last a long time even with the crack in it, although Mr Walker, who said that, said that he would consider a car with a cracked chassis is not roadworthy. But there is a great difference between saying that a car with a cracked chassis is not roadworthy and saying that a car with a cracked chassis is not fit for the purpose for which it was sold. There is no evidence that this crack could not have been repaired by welding or in some other simple way for a few shillings."

Lakier v Hager supra is distinguishable on the facts from the instant case. It is true that Mr Holland examined the motor vehicle. He had a look at the vehicle, under the vehicle and examined the external part of the engine which was clean, no doubt because it had been overhauled. He examined the oil and declared it clean. He looked at the list of repairs and declared that a lot of work had been done. He drove the truck round the block. What is important is that the examination was external. The parts that went wrong-the three pistons and the conrods - were inside the engine. Mr Holland's external examination of the engine could not have revealed any latent defects.

The vehicle was only driven from Mr Lourenco's house to Mr Ranchod's house (a distance of only 8 kilometres) and from Mr Ranchod's house to near Beverley Rocks Motel (a distance of about 10 miles) where it broke down. I find nothing that could be criticised in the manner Mr Matambanashé drove the truck on his way to Mutare. He had been instructed to drive carefully because the engine had just been overhauled.

In my opinion had the Plaintiff's agent known that the pistons and conrods were going to break after driving a short distance, he would not have bought the motor vehicle. There is evidence which tends to support the view that a reasonable man could not have bought the motor vehicle knowing the defects that led to its breakdown.

Now let me turn to the *onus* of proof. I agree with Mr Greenland that the *onus* of proving that the defect existed at the time of the sale is on the buyer. (See *Seboko v Soll* 1949 (3) SA 337 (TPD) at 350). However, RAMSBOTTOM J said on the same page:

"This review of authorities shows, in my opinion, that there is no rule in South Africa by which the *onus* of proving that no defect existed at the time of the sale is

1984 (2) ZLR p164

DUMBUTSHENA CJ

thrown on the defendant. I do not need to consider what the effect is of a presumption of law - a matter which was touched on by STRATFORD CJ in *Tregea and Another v Godart and Another* 1939 AD 16 at 32 and by the same learned JUDGE in *Estate Weiner v Weisholtz* 1945 AD 95. In my opinion the *onus* of proving that the defect existed at the time of the sale is on the buyer. That is an essential fact which he must allege in his declaration, and the *onus* of proof is placed upon him by the pleadings - it never shifts. See *Pillay v Krishna and Another* 1946 AD 946 at 952 and 953 and *Klaassen v Benjamin* 1941 TPD 80 at 85. The fact that a defect in the article or animal purchased is discovered shortly after the sale is one of the circumstances from which an inference may be drawn that the defect existed at the time of the sale; it has no greater efficacy. If at the close of the case there is no balance of probability in favour of the buyer, he must fail."

Let me deal with some of the evidence adduced by some of the witnesses. From that evidence it is clear that Mr Lourenco genuinely believed that the motor vehicle was in good condition and in good running order. Mr Khan said that after the engine had been over-hauled it was "a masterpiece." It is true that he testified that he knew of no defect. The mere saying that the motor vehicle, a second-hand one, was in good condition has been the subject of many comments in a number of cases. It has been held that that phrase is not an express warranty.

In *Addison v Harris* 1945 NPD 444 - a case in which the respondent hired to the appellant a much used Ford lorry and in which the respondent admitted at the trial that he had told the appellant that the lorry was in good condition at the time the contract was entered into-in giving effect to the phrase "in good condition" SELKE J said at 448:

"Now it seems to me that, in the circumstances, it would be wrong to interpret that expression in the sense in which the same expression might be interpreted in relation to a brand new vehicle. I think the expression must be construed very much in the light of the circumstances in which it is used; and thus, in my view, when used with reference to an oldish second-hand vehicle, it means that the vehicle is in good condition *of what it is*, viz, an old, used vehicle, which in turn imports little more than that the maker of the statement knows of no defect then existing in the vehicle, or of any particular thing likely to cause it to break down in the immediate future. And if such a statement, when made with reference to an oldish, used vehicle, imports any promise as to the future-which I am inclined to doubt-it seems to me that it ought not normally to be construed as an undertaking or promise that the vehicle will not suffer any such sudden temporary breakdowns as notoriously happen to old, used motor vehicles. At the most, I think, such a statement may possibly import an undertaking that the vehicle will not, with ordinary and proper use, break down in a final sense in the then immediate future. In the present instance, that the statement which respondent admittedly made, was not construed by the parties as any promise or undertaking against temporary breakdowns or breakages, is strongly suggested by the express term of the contract itself, whereby

1984 (2) ZLR p165

DUMBUTSHENA CJ

the appellant specifically undertook liability for 'breakages'."

While agreeing with what the learned judge stated in the above passage, I distinguish it from the present case. It is true "in good condition" cannot be said to constitute an express warranty. In the instant case it is important to examine the surrounding circumstances, including the expression that the car was in good condition, to find out whether an implied warranty could be inferred.

Let me pause here to repeat what WATERMEYER CJ said in *Hackett v G & G Radio and Refrigerator Corporation* 1949 (3) SA 664 (AD) at 685-686:

"It is, however, sufficient for the purposes of this judgment to say that the *actio redhibitoria*, even if it does not include an action for rescission based on an express warranty against latent defects or on the actual knowledge of such defects on the part of the seller, does at any rate include an action for rescission based on the ground of a latent defect of which the seller is unaware and in respect of which he has given no express warranty."

This is the position in this case. The defendant did not, so it appears from the evidence, give an express warranty against latent defects. I can presume in her favour that she had no knowledge of such defects.

The plaintiff succeeded "on the ground of a latent defect of which the seller" was "unaware and in respect of which (she) has given no express warranty."

These are the surrounding circumstances from which an inference may be drawn: Mr Lourenco handed Mr Ranchod a list of major repairs to the engine and showed him minor defects that needed attention. One can say that this was not an ordinary second-hand car because it had a renewed, overhauled engine. The list of the spare parts, Exhibit 1, used in overhauling the engine shows that a major reconditioning exercise was carried out. Although Exhibit 1 shows that no new conrods were replaced Mr Khan testified that he discovered, when he had put in the pistons and examined the conrods, that the Number One and Number Four conrods were wrong. He sent Mr Lourenco to get conrod belts. It is not clear from his evidence whether he put in new conrods or only conrod belts. What is clear, however, is that a major repair exercise was carried out and because of that, or the impression gathered from it, the engine was almost new. It was at that point not an ordinary second-hand car.

1984 (2) ZLR p166

DUMBUTSHENA CJ

What is important is that with the work put in on the repair of the engine, together with the remarks that the motor vehicle was in good condition and in good working order, it becomes easy to infer from a combination of these factors that there was an implied warranty that the motor vehicle had no latent defects.

This inference is further strengthened by the fact that Mr Lourenco showed Mr Ranchod minor defects that needed to be attended to, thus implying that the rest of the vehicle had no latent defects. Besides, the motor vehicle had only been driven from Mr Lourenco's house to Mr Ranchod's house by Mr Lourenco's driver who had been given instructions by Mr Khan on how to drive it. And then Mr Matambanashe drove it, as the evidence reveals, at about 30 km/h on the Mutare road for a distance of about ten miles. There was no sudden decline on that road to require the driver to rev the engine out at neutral as was suggested by Mr Khan.

Mr Khan was asked:

- Q. "Can you think of any reason why he should have put the vehicle in neutral?
- A. Well, I can't see the reason, but I am merely stating if he wanted to get momentum from the vehicle and cover his speed that he was doing, whatever it may be, I can't tell you. All I know is that there is a decline there and you can put a vehicle in neutral and let it roll down to the bottom and when you get to the top, bring it back in gear.
- Q. You can't think of any reason why it should have been done?
- A. Well, I don't know. I can't comment on that because I was not present."

This is not a case where one expects "temporary breakdowns in old and much-used machines. Such breakdowns may result from ordinary wear and tear, notwithstanding that the machine is not used in any improper way" per SELKE J in *Addison v Harris supra* at 449.

In the instant case the breakdown was after the engine had been overhauled, and the breakdown consisted among other things of pistons and conrods which had been fitted in the engine. The motor vehicle was not being over-revved or revved in low gear.

In my judgment the fact that the motor vehicle broke down shortly after the sale is one of the circumstances from which an inference may be drawn that the defect existed at the time of the sale. It justifies the inference that it had a latent defect at that time. See *Seboko v Soll*

1984 (2) ZLR p167

DUMBUTSHENA CJ

supra, at 350.

It is my considered view that plaintiff has discharged the *onus* of proof which was upon him right through the trial.

I turn now to the question of costs up to the stage when the plaintiff applied to amend the declaration.

Mr *Greenland* submitted that the judge *a quo* should have awarded the defendant costs up to the stage when the defendant was faced with a completely new cause of action, that is, when the plaintiff's application to amend the declaration was granted. The plaintiff sought to obtain the defendant's consent to the proposed amendments. The defendant refused. It can be said that by raising the defence of *voetstoots* the defendant invited the amendment.

Generally a party that gives notice of amendment is liable to pay the costs occasioned to the other party. Rule 115 of Order 17 of the High Court (General Division) Rules 1971 dealing with amendments of a claim stated in a summons, says:

"In his declaration a plaintiff may alter, modify or extend his claim or claims as stated in the summons and the summons shall thereupon be deemed to be amended in accordance with the claim or claims made in the declaration:

Provided that where the defendant shows that he is prejudiced by such amendment the court may make such

order as to costs or otherwise as the justice of the case demands."

If the opponent has not consented and has good grounds for opposing the application, the applicant will be ordered to pay his opponent's costs.

In this case there was no postponement to enable the defendant to reply to the amended declaration. Had there been, the plaintiff would have been ordered to pay wasted costs. Therefore, the allowing of the amendment did not involve extra wasted costs. The defendant did not even amend her plea. The judge *a quo* was, therefore, entitled to refuse the defendant her costs. BRISTOWE J put it thus in *Van Os v Breda* 1911 TPD 165 at 169:

"With regard to the costs, the only point which has been argued is one which is said to arise by reason of the Court having allowed an amendment to the declaration, expressly raising the question of waiver. It is suggested that, where the Court

1984 (2) ZLR p168

DUMBUTSHENA CJ

allows such an amendment, the plaintiff ought to pay all the costs up to the date of the amendment. I have never before heard such a suggestion. Where an amendment renders a postponement necessary, the costs, thrown away, are usually allowed to the defendant; that is common practice. But here the objection that written notice had not been given was merely a technical objection. Amending the declaration (even if it was necessary to amend it, which I doubt) so as to allege a waiver, did not make any difference to the case which the defendant perfectly well understood the Court was going to try. No costs have been wasted by the amendment, and I do not think it ought to affect the decision as regards costs."

See also Herbststein and Winsen: *The Civil Practice of the Superior Courts in South Africa*.

In my view the refusal by the judge *a quo* was based on right principles. The appeal on this issue of costs of amendment cannot, therefore, be entertained.

Accordingly the appeal is dismissed with costs.

Gubbay JA: I agree.

McNally JA: I agree.

Ali Ebrahim, appellant's legal representatives.

George Seirlis & Associates, respondent's legal representatives.

1984 (2) ZLR p169

NYEMBA v JENA 1984 (2) ZLR 169 (HC)

Court High Court, Harare

Sandura JP

4 & 31 October 1984

Flynote

Copyright Juta & Co Ltd

Statutes - interpretation of - Legal Age of Majority Act 1982 - s 3 - inconsistent with provisions of s 13 of African Marriages Act [Chapter 238] and proviso to s 3(3) of Customary Law and Primary Courts Act 1981 - earlier sections impliedly repealed.

Practice and Procedure - actions at instance of African woman - may be brought even if she is not assisted by her husband.

Headnote

In terms of s 3 of the Legal Age of Majority Act No 15 of 1982 a person becomes a major for all purposes on reaching the age of 18 years. The effect of this provision is that any previous statute which imposes any reduction in capacity is impliedly repealed. Two such provisions are s 13 of the African Marriages Act [Chapter 238] and the proviso to s 3(3) of the Customary Law and Primary Courts Act 6 of 1981. The effect of such implied repeal is that an African woman is entitled to sue in her own right, unassisted by her husband.

Cases cited:

Katekwe v Muchabaiwa 1984 (2) ZLR 112;

West Ham Church Wardens & Overseers v Fourth City Mutual Building Society [1892] 1 QB 654.

A R Chizikani, for the Plaintiff

C R H Hartley, for the defendant

Judgment

Sandura JP: In this matter the plaintiff, a married woman, claims from the defendant the sum of \$18143, together with interest and costs of suit. That sum represents damages for the personal injuries which she sustained when, as she alleges, the defendant unlawfully and maliciously shot and injured her. When the matter came up for trial, Mr *Hartley*, who appeared for the defendant, made an application *in limine* for an order that the plaintiff does not have *locus standi*

1984 (2) ZLR p170

SANDURA JP

in judicio because she is not entitled to sue the defendant in her own right unassisted by her husband. The application was opposed by Mr *Chizikani*, who appeared for the plaintiff.

Because Mr *Hartley's* application is based upon the fact that the plaintiff is a married African woman to whom African customary law applies, it is necessary to state that the plaintiff and her husband initially contracted a customary union which was duly registered under the African Marriages Act [Chapter 238]. Thereafter the parties entered into a civil marriage by Christian rites. This was a marriage under the Marriage Act [Chapter 37]

Mr *Hartley's* submissions may be summed up as follows:

- 1 The plaintiff's claim for damages is a claim for property.
2. In terms of s 13 of the African Marriages Act [*Chapter 238*] the property of a married African woman is governed by African law and custom.
3. In terms of the proviso to s 3(3) of the Customary Law and Primary Courts Act 6 of 1981, the plaintiff's capacity in this action is governed by customary law.
4. The Legal Age of Majority Act 15 of 1982 does not affect the plaintiff's capacity. She still requires the assistance of her husband in order to sue the defendant for damages.

Before dealing with the validity or otherwise of these submissions, it is necessary to look at the statutory provisions relied upon by Mr *Hartley*. Section 13 of the African Marriages Act [*Chapter 238*] reads as follows:

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

Section 3(3) of the Customary Law and Primary Courts Act 6 of 1981 reads as follows:

"3. (1)
(2)"

(3) The capacity of any person to enter into any transaction to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe:

Provided that, if the existence or extent of any right held or alleged to be held by any person or of any obligation vesting or alleged to be vesting in any person

1984 (2) ZLR p171

DUMBUTSHENA CJ

depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law."

Finally, s 3 of the Legal Age of Majority Act 15 of 1982 reads as follows:

- "3 (1) On and after the fixed date a person shall attain the legal age of majority on attaining eighteen years of age.
- (2) A person who immediately before the fixed date has not attained the legal age of majority shall on that date attain the legal age of majority if he or she has then already attained eighteen years of age.
- (3) The provisions of subsections (1) and (2) shall apply for the purpose of any law including customary law and, in the absence of a definition or any indication of a contrary intention, for the construction of "full age", "major", "majority", "minor", "minority" and similar expressions in -
- (a) any enactment, whether passed or made before, on or after the fixed date; and
 - (b) any deed, will or other instrument of whatever nature made on or after that date."

Subsections (4), (5), (6) and (7) of s 3 are not relevant for the present discussion.

Mr *Chizikani*, who appeared for the plaintiff, whilst not specifically accepting that the first three submissions made by Mr *Hartley* are valid, submitted that since the provisions of the Legal Age of Majority Act 15 of 1982 are inconsistent with the provisions of s 13 of the African Marriages Act [Chapter 238] and the proviso to s 3(3) of the Customary Law and Primary Courts Act 6 of 1981, the latter provisions have been repealed by implication. I agree with that submission. For the purpose of determining the issues before me I shall assume, without deciding, that the first three of the submissions made by Mr *Hartley* and already listed in this judgment are valid.

Recently, the Supreme Court of Zimbabwe had to determine whether the father of a girl who has reached the age 18 years and has been seduced has *locus standi in judicio* to sue for seduction damages. This issue was considered in the case of *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 and DUMBUTSHENA CJ held that in such a case the father has neither the right of action nor *locus standi in judicio* because of the provisions of the Legal Age of Majority Act. After reviewing a number of cases, the learned CHIEF JUSTICE had this to say at: 123 B-C:

1984 (2) ZLR p172

DUMBUTSHENA CJ

"What has been directly affected and repealed by implication by Act 15 of 1982 is the proviso to s 3(3) of Act 6 of 1981. Now the capacity to enforce or defend any rights in a court of law or to enter into contractual obligations is determined and governed by the general law of Zimbabwe. African women now have full legal capacity."

That is an accurate interpretation of Act 15 of 1982, in my view.

Finally, if I correctly understood Mr *Hartley*, he submitted that there could not be any repeal of a statutory provision by implication. This, in my view, is incorrect. Dealing with this issue Sir Rupert Cross had this to say at p 3 of his book *Statutory Interpretation*:

"Normally there must be an express repeal, but the whole or part of an enactment may be impliedly repealed by a later statute."

Thereafter, the learned author quoted with approval what was said by the trial judge in *West Ham Church Wardens and Overseers v Fourth City Mutual Building Society* [1892] 1 QB 654 at 658, as follows:

"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together."

Applying that test I am satisfied that the statutory provisions relied upon by Mr *Hartley* have been repealed by implication by the Legal Age of Majority Act 15 of 1982.

In the circumstances, I find that the plaintiff has *locus standi in judicio*. The application *in limine* is, therefore, dismissed with costs.

Guni & Guni, legal practitioners for the plaintiff

Coghlan Welsh & Guest, legal practitioners for the defendant

TAVENGWA v MARINE CENTRE (PVT) LTD 1984 (2) ZLR 173 (HC)

Court High Court, Harare

Smith J

18 October & 21 November 1984

Flynote

Statutes - Emergency Powers (Termination of Employment) Regulations, 1982 - s 4 - termination of contract of employment by notice prohibited - section does not prohibit summary dismissal if proper grounds exist.

Employment - contract of - termination of on grounds of misconduct - even if notice of termination given, dismissal still summary.

Headnote

Section 4 of the Emergency Powers (Termination of Employment) Regulations, 1982 (Statutory Instrument 714B of 1982) prohibits any employer from terminating any contract of employment by notice unless both parties mutually agree or the employer obtains written approval from the Minister. The Minister's right so to approve is given by s 5, which sets out the circumstances in which such approval may be given. The regulations do not, however, prohibit an employer from summarily dismissing an employee, provided that the normal grounds for summary dismissal exist, such as dishonesty or laziness.

If there are grounds for summary dismissal and employment is terminated on those grounds, the fact that the employer gives cash in lieu of the notice that he would ordinarily have given does not alter the fact that the dismissal is a summary one.

Cases cited:

Steve v National Meat Suppliers Ltd 1937 AD 177;

Flemmer v Ainsworth 1910 TPD 81;

Usakos Recreation Club v Slaney 1950 (3) SA 121 (SWA);

Gracie v Hull, Blythe & Co (SA) Ltd 1931 CPD 539.

W B Chirimauta, for the applicant

A N H Eastwood, for the respondent

Judgment

Smith J: The applicant alleges that on 28 October 1983 he and the respondent entered into a contract whereby the applicant was to be

SMITH J

employed as general manager of the respondent on conditions set out in Annexure A to his affidavit. The respondent avers, however, that the contract was in fact entered into between the applicant and Mistraal Fibreglass (Pvt) Ltd of which the respondent is a wholly-owned subsidiary. This is in fact borne out by the said Annexure A which is a letter confirming the applicant's appointment as "General Manager of the above Company (ie Mistraal Fibreglass (Pvt) Ltd) and its wholly owned subsidiary Marine centre (Pvt) Ltd." The respondent also avers that the said Annexure A does not accurately reflect the conditions of employment since the applicant has folded in his own hand- writing the words "reviewed \$2 000 plus \$500 entertainment".

It is not disputed that the contract of employment was to commence on 1 November 1983, and that during the first three months either party could terminate the contract on 24 hours' notice. The applicant duly commenced work on 1 November 1983 as managing director and was paid his full salary and allowances for November and December. On 20 January the applicant was dismissed. He received a letter dated 23 January 1984 from the respondent, in which he was referred to a meeting on Friday, 20 January 1984, between himself and a director of the respondent, when he was informed that his employment with the company was being terminated on the basis of 24 hours' notice in terms of his letter of appointment. The letter also indicated that the respondent was reserving its rights against the applicant in respect of any unauthorised expenditure, including his unauthorised removal of a vehicle. The letter contains a written endorsement at the bottom, as follows:

"The above named has been dismissed in terms of his conditions of employment during probation period."

with the signature and official stamp of the Deputy Regional Industrial Relations Officer. The official stamp is dated 24-01-1984.

The applicant claims that this purported dismissal is unlawful since it was in contravention of the Emergency Powers (Termination of Employment) Regulations, 1982, published in Statutory Instrument 714B of 1982 (which regulations are hereinafter referred to as "the Emergency Regulations"). As the respondent has refused to reinstate him, he is claiming an amount of \$11500. This sum was arrived at by including \$2 000 for salary for November and December and \$500 for allowances for these two months, even though the applicant admits

SMITH J

that he received his full salary and allowances for November and December.

The respondent denies that the dismissal was unlawful as it obtained the confirmation of the Deputy Regional Industrial Relations Officer and it was entitled to assume that that officer was a duly authorized official. Alternatively, it submitted that it had the right to dismiss the applicant summarily on the grounds of his unauthorized removal of the respondent's vehicle and his unauthorised expenditure of the respondent's funds. The respondent submitted that it would be

unreasonable to require it to reinstate the applicant because of this misconduct and also because of his subsequent conduct-viz he assaulted the principal director of the respondent, as a result of which the latter was unconscious for 45 minutes. The applicant was fined \$120 for this assault. The applicant admits the assault but claims that it is irrelevant as he is claiming damages for unlawful dismissal and not reinstatement.

The relevant sections of the Emergency Regulations read as follows:

"2. (1) These regulations shall apply to every undertaking, industry, trade or occupation.

(2) These regulations shall apply notwithstanding any other law or agreement to the contrary.

.....

4. No employer shall terminate any contract of employment by notice unless -

(a) the employer and employee mutually consent to the termination of the contract; or

(b) the employer obtains the prior written approval of the Minister before terminating the contract.

5. (1) The Minister may approve the giving of notice to an employee when he is satisfied that the period of notice is in accordance with the contract of employment, and that it is necessary, for economic or other reasons, including the relative interests of the undertaking, industry, trade or occupation, or of the employee, to terminate the employee's contract of employment."

It is common cause that the Emergency Regulations apply to occupations such as that of the applicant when he was managing director of the respondent and that the provisions thereof would override the provisions of the contract entered into between the parties. Mr *Chirimuuta* accepted that the unauthorised use of a vehicle and the unauthorised expenditure of moneys by the applicant would amount

1984 (2) ZLR p176

SMITH J

to misconduct, but submitted that notwithstanding such misconduct the Emergency Regulations prohibit dismissal unless the prior written approval of the Minister has been obtained.

Mr *Eastwood* submitted that there were two issues to be resolved. Firstly, whether the applicant had been lawfully dismissed and, secondly, whether it was appropriate to bring the proceedings on notice of motion. The first argument raised by Mr *Eastwood* on the first issue is that the regulations are directory and not mandatory. He submitted that the effect of the Emergency Regulations was to render an employer who unlawfully dismissed an employee liable to prosecution but not to confer any rights on the employee either for reinstatement or for damages. The Emergency Regulations did not render the act of the employer null and void if he had failed to obtain the prior written approval of the Minister. The second argument raised by Mr *Eastwood* was that the Emergency Regulations applied only to the termination of contracts of employment by notice and not to termination where summary dismissal was justified. It could not have been the intention to protect dishonest or negligent employees. Mr *Eastwood* then submitted that the respondent had in fact complied with the requirements of the Emergency Regulations since the letter from the respondent to the applicant informing him of the termination of his services had been endorsed by an official in the Ministry headed by the

Minister concerned. This endorsement was made on 24 January, which, he submitted, was within the 24 hours' notice given by the letter dated 23 January, and as the Emergency Regulations did not prohibit the giving of notice, the dismissal was lawful in that it took effect after the approval of the official which was given on behalf of the Minister.

In my opinion, the provisions of the Emergency Regulations are mandatory. It is clear that the intention, when issuing the Emergency Regulations, was to ensure that large numbers of workers were not suddenly and arbitrarily thrown out of their jobs and made to walk the streets looking for employment without the Government having been made aware of the situation and been satisfied that the steps taken by the employer concerned were justified. It is Government policy to protect the interests of workers and obviously this could not be done effectively if workers could have their services lawfully terminated before the Government could investigate the position and ascertain whether or not the retrenchment was necessary. It would be completely unworkable to have a situation where an employer could

1984 (2) ZLR p177

SMITH J

discharge a large number of workers and then be directed by the Government, some weeks or months later, to re-employ the workers concerned because the Government had ascertained that the retrenchment was not necessary or justified. The employer and the workers would have made decisions and taken actions as a result of the retrenchment which would be nullified or upset by the Government's direction to re-employ the workers concerned. Thus the Government could only ensure that discharges were necessary and justified if employers were required to consult with the relevant Ministry and obtain approval before they discharged any workers. In my view, if an employer purports to discharge an employee in contravention of the Emergency Regulations, in that he has not obtained the prior written approval of the Minister or of a duly authorised official, his action is a nullity and the employee can demand to continue receiving his pay, or he may claim damages.

Do the Emergency Regulations prohibit the summary dismissal of employees? Section 4 thereof prohibits an employer from terminating any contract of employment by *notice* and s 5(1) thereof provides that the Minister may approve the *giving of notice* to an employee. It is trite law that in interpreting a statute or statutory instrument, meaning must be given to each word used unless such course would lead to absurdity. In addition, unless the context otherwise requires, the words used must be given their natural meaning and, if they are used in connection with some particular business or trade, they will be presumed to be used in a sense appropriate to or usual in such business or trade. The Law of Master and Servant recognizes two methods by which an employer can terminate a contract of employment with his employee. He may do so by giving the employee due notice as provided in the contract or, if there is no provision therefor, notice which is reasonable in the circumstances. Where an employer gives an employee notice in terms of the contract of termination of his employment, the employer does not have to give reasons therefor and no Court can inquire into whether or not the termination is justified. As long as the employer abides by the terms of the contract, the employee cannot sue for damages for unfair or unreasonable dismissal.

In addition, the employer may summarily cancel the contract, but only if there are grounds

justifying the cancellation. The general principle is that the employer is entitled to dismiss an employee summarily whenever the employee's behaviour is such as to amount to a repudiation of his obligation to perform his duties faithfully and

1984 (2) ZLR p178

SMITH J

truly: cf *Zieve v National Meat Suppliers Ltd* 1937 AD 177 at 186, 187.

The most common grounds justifying summary dismissal are dishonesty, negligence or some other form of misconduct. In *Hemmer v Ainsworth* 1910 TPD 81, it was held that good grounds for dismissal were the use by the employee of his employer's property for his own purposes and the fact that he had secretly used his position to make money at his employer's expense.

An employer cannot summarily dismiss an employee merely because he suspects that the employee has been guilty of some form of misconduct. There must be facts constituting *prima facie* proof of the misconduct complained of and then the employee, if he cannot controvert them, has an *onus* to prove further facts which will explain his conduct consistently with his obligation to perform his duties faithfully and truly. If an employee feels that his summary dismissal is not justified, he may apply to an appropriate Court for redress and the Court will award him damages if it finds that the dismissal was not justified.

There is a very clear distinction in this branch of the law between discharge on notice and summary dismissal. It must be assumed that the issuer of the Emergency Regulations was well aware of this distinction. Consequently, since s 4 of the Emergency Regulations specifically refers to the terminating of contracts "by notice", it must be concluded that there was no intention to deal with cases of summary dismissal. After all, summary dismissal is the very antithesis of discharge after notice. Furthermore, s 5 of the Emergency Regulations specifies the circumstances in which the Minister may approve the giving of notice to an employee. These circumstances do not cover the case of summary dismissals; a clear indication that s 4 itself does not prohibit summary dismissals.

Does the fact that s 4 of the Emergency Regulations does not prohibit an employer from summarily dismissing an employee nullify the effect of the Emergency Regulations or frustrate the presumed intention of the issuer of those regulations? I do not think so. An employer cannot resort to summary dismissal of any employee unless he can prove some form of misconduct on the part of that employee justifying his dismissal. Moreover, the employer would have to prove his case in Court if the employee sued him for wrongful dismissal. Furthermore, the Emergency Regulations must not be seen as a protection for dishonest or lazy workers to enable them to remain in

1984 (2) ZLR p 179

SMITH J

employment. They are there to protect the ordinary, *bona fide* workers from being unjustifiably or unreasonably discharged on notice. If a worker is dishonest or lazy and this can be proved, the Emergency Regulations do not deprive the employer of his common law rights to dismiss

the worker summarily.

In the present case, the respondent purported to discharge the applicant on giving him 24 hours' notice as provided in his contract of employment. It is clear, however, that its reason for doing so was the misconduct of the applicant, ie his unauthorised use of the company car and unauthorised expenditure of company money. The termination of the applicant's services was virtually summary. Although the respondent referred to the giving of notice, in my view its actions amounted to the summary dismissal of the applicant. Consequently, I do not consider that the dismissal of the applicant was in contravention of the Emergency Regulations. In *Usakos Recreation Club v Slaney* 1950 (3) SA 121 (SWA) it was held that where a club committee has informed an employee in writing that they had decided to dismiss him for unsatisfactory service and to pay him one month's salary in lieu of notice, the offer of payment for the month did not constitute a condonation of the misconduct. Similarly, in the present case I do not consider that the fact that the respondent gave the employee 24 hours' notice constituted a waiver of its right to dismiss the applicant summarily. If, on the other hand, the respondent, after becoming aware of the applicant's misconduct, had given him one month's notice and continued to allow him to come to work for the month, it could not then be argued that the employee was being dismissed summarily. In *Gracie v Hull, Blythe & Co (SA) Ltd* 1931 CPD 539, where a servant was dismissed for misconduct on 2 March but was credited with his salary to the end of March, GARDINER JP at 541 remarked:

"I do not think that it can be said that the payment of wages to the end of the month continues the service, where the master intimates clearly that the service is terminated."

In the light of the conclusions I have reached as to the proper interpretation of s 4 of the Emergency Regulations, it is not necessary for me to deal with the submissions made by Mr *Eastwood* concerning the validity of the notice given by the respondent to the applicant or the propriety of the present proceedings being brought on notice of motion.

1984 (2) ZLR p180

SMITH J

The applicant's claim is dismissed with costs.

Chirunda Chihambakwe & Partners, legal practitioners for the applicant.

Kantor & Immerman, legal practitioners for the respondent

1984 (2) ZLR p181

MAYISVA v COMMERCIAL UNION FIRE & GENERAL INSURANCE CO LTD & ANOTHER **1984 (2) ZLR 181 (HC)**

Court High Court, Harare

Samatta J

5-7 & 21 November 1984

Flynote

Delict - negligence - motoring cases - motor vehicle overtaking another which turned right and caused collision
- duty on turning and overtaking motorists.

Damages - personal injuries and loss of amenities - general damages for - principles applicable.

Headnote

When the driver of a motor vehicle wishes to turn right across an adjoining carriageway, his action is potentially hazardous and he has various obligations imposed on him. The first is clearly to signal his intention of turning, the second is to refrain from turning until it is safe to do so. He is not entitled to assume that a following vehicle has seen his signal, even if an adequate signal has been given.

Conversely, before overtaking, a driver must satisfy himself that it is safe to do so. He has no absolute right to overtake; he is not entitled to do so when prevailing conditions make such a course not reasonably prudent. He must keep the overtaken vehicle under observation; he must not overtake if it is turning right or indicating an intention to do so.

The assessment of damages for personal injuries and loss of amenities is one of the most difficult of judicial tasks. The law recognises that money cannot renew a battered or shattered physical frame. Further, general damages are intended to be not a penalty, but compensation. The best a judge can do is to award what he considers to be a reasonable compensation, bearing in mind that as far as possible comparable injuries should be compensated by comparable awards. The Court must be on its guard to see that its natural sympathy for an injured person does not result in overlooking the fact that the figure of justice carries a pair of scales, not a cornucopia.

Where the Plaintiff suffered severe injuries to his arm necessitating extensive medical treatment over a long period and resulting in him being unable to indulge in the sports and hobbies he used to, general damages of \$6 000 were awarded (reduced, because of findings on apportionment of damages, to \$1500).

Cases cited:

Bata Shoe Co Ltd (South Africa) v Moss 1977 (4) SA 16 (W);

S v Swart 1976 (4) SA 348 (T);

Sandier v Wholesale Coal Suppliers Ltd 1941 AD 194;

1984 (2) ZLR p182

SAMATTA J

Mair v General Accident Fire & Life Assurance 1970 (1) RLR 124; 1970 (3) SA 25 (R).

D M Foroma, for the Plaintiff

A P de Bourbon, for the defendants

Copyright Juta & Co Ltd

Judgment

Samatta J: On 14 April 1982 two motor vehicles collided along the Enterprise Road near the Grange Service Station. The vehicles were a lorry driven by the second defendant, and a Renault car which, according to the pleadings, was being driven by the Plaintiff. As a result of the collision, the Plaintiff's arm was severely injured and some of his property damaged. The Plaintiff says that the collision was solely caused by the second defendant's negligence. The second defendant, whose vehicle was at the material time insured by the first defendant, was, according to the Plaintiff, negligent in one or more or all of the following ways:

1. He failed to keep a proper lookout.
2. He failed to take reasonable steps to indicate his intention to turn to his right.
3. He attempted to enter the road adjoining the Enterprise Road without taking reasonable steps to ensure himself that it was safe to do so.
4. He attempted to enter the adjoining road without waiting a reasonable period for the Plaintiff to overtake him completely.
5. He failed reasonably to apply his brakes or take other steps to avoid collision when he could reasonably have done so.

The Plaintiff claims from the first defendant, alternatively from the second defendant, general damages in the sum of \$10 000. He also claims the following special damages from the second defendant:

- | | |
|--|---------|
| (a) Medical and hospital expenses: | \$1 230 |
| (b) Transport expenses from his house to the Medical centre: | \$1 008 |
| (c) Cost of repairing jacket: | \$10 |
| (d) Cost of replacing torn shirt: | \$12 |
| (e) Cost of repairing a watch damaged during the collision: | \$200 |

In their plea the defendants have denied that the second defendant drove his lorry negligently as alleged or at all. They have pleaded, in the alternative, that "in the event of it being found that the Second Defendant was negligent, which is not admitted, the said collision was also due to the negligence of the Plaintiff". The Plaintiff's acts or omissions which are said to have constituted negligence are:

- (1) failing to keep a proper lookout;

1984 (2) ZLR p183

SAMATTA

- (2) overtaking when it was not safe to do so; and
- (3) failing to take reasonable action to avoid a collision.

The defendants have asked me, in the event I hold that both drivers are to blame for the accident, to apportion liability in terms of the Law Reform (Contributory Negligence) Act [Chapter 45].

The Plaintiff gave evidence and called two witnesses, one Bernard Makwaro and Patrol Officer Martin Mugaza. His testimony may be summarised as follows. On the day in question he was driving along the Enterprise Road, going in the direction of the City centre. He had one passenger, Bernard Makwaro, who was in the front left passenger's seat. He caught up with the second defendant's lorry and drove behind it for a distance between 5 and 7 km. He was then driving at a speed between 40 and 50 km/h. As the two vehicles approached the Grange Service Station, the second defendant, by using indicators, signalled that he was intending to pull to the left of the road, and he did so pull, beyond the yellow dotted line. When the second defendant switched on his indicators, he, the Plaintiff, was driving at a distance of 20-30 metres behind the lorry. As a result of the second defendant pulling to the extreme left there was enough space for the Plaintiff to pass through. As he overtook the lorry, suddenly, and without any prior warning, the second defendant changed his course and turned to the right. The Plaintiff, in an attempt to avoid a collision, hooted, braked and then swerved to the right. The lorry's front right wheel, however, hit his car between the doors on the left-hand side. When the lorry was very close to his car, he screamed and Bernard Makwaro jumped to the back seat. At the time of the collision he raised his left arm in an attempt to ward off any blow and, as a result, the arm was badly injured by the crashing window frame of his car. Some of his property was damaged. The lorry pushed his car to the other side of the road. The Plaintiff was emphatic that prior to turning to the right the second defendant made no indication, mechanically or otherwise, that he intended to do so. Later the police and an ambulance arrived on the scene. In examination-in-chief the Plaintiff said that, because of the serious injuries he had suffered, he was unable, at the scene, to make a statement to the police. When he was being cross-examined by Mr *de Bourbon*, for both defendants, however, he changed his story and asserted that he made a statement. He denied, however, having said the following to Patrol Officer Mugaza:

"I was coming into town with the 2nd Party ahead of me. As we reached the

1984 (2) ZLR p184

SAMATTA

Grange Service Station I saw one left stop light but no indicators of the car in front of me. I thought he was turning left or to pull off the road so I overtook on his right. He turned to the right immediately and we collided."

The Plaintiff said, and this is not denied, that following the accident, he was hospitalised for some time, and later he received medical treatment as an out-patient. It is common cause that, as a result of the accident, the Plaintiff suffered the following injuries:

- (1) a fracture of the lower humerus;
- (2) a fracture of the mid-shaft of the left ulna;
- (3) a large laceration of the medial forearm with an associated ulna nerve injury; and

(4) a bruising of the lumbar spine.

It is also common cause that on 20 April 1982, under anaesthetic, the fractures were reduced and an above-elbow plaster applied. Later it was decided to plate the fractured ulna and this was carried out on 4 May. According to the medical report of Mr Standish-White, one of the doctors who treated him, the Plaintiff will need further treatment: the removal of the plate from the left ulna, and, if the ulna nerve function does not improve, the repair of the ulna nerve. The latter will entail an ulna nerve transplant. According to the doctor's estimation this treatment, which will entail hospitalisation, will cost \$600. The Plaintiff told the Court that before the accident his hobbies were wrestling, karate, tennis, golf and dancing. He is now unable to engage in any of the first four of these. Because of the injury to his arm, the Plaintiff said, he finds it difficult to hold a partner while dancing. He claimed that in all he had made 56 trips between his residence and the Medical centre for the purpose of being examined or receiving treatment, and he used to pay between \$8 and \$8,50 per trip for a taxi.

The testimony of Bernard Makwaro as to how the accident occurred was substantially similar to that of the Plaintiff. He said the Plaintiffs vehicle was about 10 metres behind the lorry when the second defendant pulled to the left side of the road. According to the witness, the left tyres of the lorry were completely off the tarred part of the road before the vehicle suddenly turned to the right. The Plaintiff hooted and braked to avoid a collision. The witness said he has a driving licence now, but had none in April 1982. He also said that the Plaintiff did not make any statement to the police at the scene of the accident as he had fainted. The witness denied that the second defendant gave the signal for turning to his right.

1984 (2) ZLR p185

SAMATTA

In April 1982, Patrol Officer Mugaza was stationed at the Highlands Police Station, carrying out charge-room duties. He was the policeman who visited the scene of the accident. His testimony was to this effect. He found the lorry and the Plaintiff's vehicle 55 paces apart. The former vehicle was at the entrance of the road leading to the service station, while the Plaintiff's vehicle was on the same road nearer the service station. He recorded the statements of both the Plaintiff, who was able to speak despite having been injured, and the second defendant. He inspected both vehicles at the scene. His material findings in relation to the lorry were as follows:

- (1) the lights were off;
- (2) the right front indicator was flashing;
- (3) there was a scratch on the right side of the wheel.

The hooter was not in working order. The rear indicators were defective, while the front ones were in good condition. The inspection of the Plaintiffs vehicle revealed the following:

- (1) both light and indicator switches were off;
- (2) the front passenger door was dented; and

(3) the windscreen was broken.

According to the witness, the Plaintiff appeared to him to be in his sound and sober senses when he made, read and signed his statement. The witness recorded the statements of the drivers of the vehicles and what he saw at the scene in a Traffic Accident Book. According to p 14 of the book, the driver of the Renault made the following statement regarding how the accident occurred:

"I was coming into town with the 2nd Patty ahead of me. As we reached the Grange Service Station I saw one left stop light but no indicators of the car in front of me. I thought he was turning left or to pull off the road so I overtook on his right. He turned to the right immediately and we collided."

On page 3 of the Traffic Accident Book the Patrol Officer recorded that the person who was injured was a passenger. In his testimony, however, he said that he was mistaken when he so recorded, the injured party having been the driver.

The witness said no one told him that, prior to the accident taking place, the lorry had reached the gravel verge of the road on the left hand side. He did see eight paces of skid-marks, but there were no marks revealing how the Plaintiff's car came to be where he found it.

1984 (2) ZLR p186

SAMATTA

There was only one witness on the defendants' side He was the second defendant. His evidence was as follows. He was driving from Mutoko going to Harare when the accident occurred. He had two passengers in the vehicle. As he approached the Grange Service Station, he checked on his rear-view mirror twice to see whether there was any traffic behind him. There was none. Just before he reached the intersection, he switched on his front right indicator to show that he intended to turn to his right. He did not, however, use his rear-view mirror to satisfy himself that it was safe for him to make that turn. He pulled to the middle of the road, and as he turned to his right the collision took place. He applied his brakes and his vehicle came to a halt. The Plaintiff's vehicle did not stop immediately. It stopped near the pumps at the service station. He got out of his lorry and went to assist the driver of the other vehicle to remove his passenger from it. The passenger was injured. The second defendant asserted that just before the accident his speed was 20 km/h, while the Plaintiff's vehicle was moving at a high speed. The second defendant emphatically denied having at anytime, before the collision, given the signal for turning to the left. He asserted that before the accident his vehicle was in working order. The indicators, including the rear ones, were in working order. He claimed that, as a result of the collision, the cord connected to the unit controlling the rear indicators, which was located below the mudguard, had snapped, causing the indicators not to function. The damage, according to the second defendant, did not affect the front indicators, the right hand one of which was still flashing when Patrol Officer Mugaza arrived on the scene. The second defendant said there is a bend near the Grange Service Station. Regarding the injured person, the second defendant asserted that the ambulance which carried him to the hospital left the scene as the police arrived. He said he was certain that the police did not speak to the injured person at the scene. The second defendant denied that he failed to keep a proper lookout. He also denied that he switched on his front right indicator light after the accident had occurred.

With that outline of the evidence laid before the Court, I now turn to the first question which I must endeavour to answer in this case: Under what circumstances did the collision between the two vehicles take place? One's sympathies lie naturally with the Plaintiff, who suffered serious injuries as a result of the accident, but I must, on this account, be all the more careful to see that no conclusion in his favour is arrived at unless it is authorised by the evidence before me. It seems to me,

1984 (2) ZLR p187

SAMATTA

having regard to that evidence, that it is not possible to hold that the collision occurred under circumstances described by the Plaintiff and his witness. I shall give my reasons why I am of that view. In the first place, if the car, as was asserted by Makwaro, was travelling at a speed of 40-50 km/in and was about 10 m behind the lorry shortly before the second defendant turned to the left, it does not require a genius in mathematics to say with confidence that the lorry would already have been overtaken by the Plaintiff when the second defendant allegedly suddenly turned to his right. If Makwaro's testimony on that point is true, one is at a loss to understand why the collision occurred at all. Secondly, the statement recorded by PO Mugaza from the driver of the car on the scene of the accident is not consistent with the evidence of the Plaintiff or that of his witness. It will be recalled that that statement was as follows:

"I was coming into town with the 2nd Party [ie the second defendant] ahead of me. As we reached the Grange Service Station I saw one left stop light but no indicators of the car in front of me. I thought he was turning left or to pull off the road so I overtook on his right. He turned to the right immediately and we collided. "

During cross-examination the Plaintiff denied having made this statement. If that denial is true, then the statement must have been made by Makwaro, a fact which would be consistent with the second defendant's assertion that it was the passenger and not the driver who was injured. Whether it was made by the Plaintiff or by his witness, the statement tends to give colour to the second defendant's version of the accident. In the statement there is no mention whatsoever of the second defendant having pulled to the left of the road before turning to his right. Thirdly, the second defendant impressed me as a reliable witness. He gave his story calmly and in an objective manner. He convincingly stuck by it when he faced long cross-examination. Although in the plea it is admitted that the Plaintiff was the one driving the car, I would like to say, for what it is worth, that it is more probable than not that the driver was Bernard Makwaro. The Patrol Officer's evidence to the effect that he was mistaken when he recorded in the Traffic Accident Book that the person injured was a passenger, would appear to be incorrect.

I have sufficiently demonstrated, I hope, why I prefer the second defendant's version of the accident to that of the Plaintiff and his witness. I hold and find as a fact that the second defendant did not at any time before the collision pull to the left or indicate his intention to

1984 (2) ZLR p188

SAMATTA

do so. I accept the second defendant's evidence regarding the circumstances under which the

collision took place.

I turn now to the question whether the second defendant was negligent. If I understood him correctly, Mr *de Bourbon* conceded that the second defendant's omission to use his rear-view mirror, just before he started turning to the right, to satisfy himself that it was safe to make that manoeuvre, constituted negligence. I respectfully approve of this concession. The obligations of a driver who wants to execute a righthand turn are not in doubt. They were, if I may respectfully say so, succinctly stated by COLMAN J in *Bata Shoe Co Ltd (South Africa) v Moss* 1977 (4) SA 16 (W). The learned Judge said at 20-21C:

"When the driver of a motor vehicle wishes to turn across an adjoining carriageway at right angles to his previous line of travel, his proposed action is pregnant with danger. He is about to do something which is inherently hazardous and he is therefore fixed with certain important obligations. The first of those is that he must signal clearly his intention to make the turn, and do so in such a manner as to warn approaching drivers, drivers following him, and the driver of any vehicle who may be seeking to overtake him, of the intended change of direction. It is not sufficient, however, that the driver of the vehicle which is about to turn signals his intention to do so, even if the signal is given in good time. His further obligation is to refrain from making the turn until an opportune time, to use the phrase which the Appellate Division has used in that regard. An opportune time in that context is a time when the motorist who wishes to turn can carry out his intention without endangering or even materially impeding the progress of any other person or vehicle lawfully on the road. It is the duty of the driver who wishes to make the turn to satisfy himself by full and careful personal observation that the time is opportune in the sense which I have indicated."

Although he has timeously given a clear indication of his intention to turn to his right, a driver of a motor vehicle is not entitled to assume that following traffic has seen his signal: see *S v Swart* 1976 (4) SA 348(T). It is the duty of such a driver to satisfy himself that any indications he has given of his intention to execute a right-hand turn have actually been seen and heeded by the driver of the following vehicle. He is not entitled to assume, as the second defendant did in the instant case, that his signal has been observed simply because he has given an adequate signal. According to his evidence, which I have accepted, when he came close to the Grange Service Station, the second defendant used his rear-view mirror twice and saw no traffic behind him. When he came close to the intersection, he merely turned on his right indicator lights and shortly thereafter he started to negotiate the right-hand turn. It was his duty, just before he started turning, to

1984 (2) ZLR p189

SAMATTA

satisfy himself that the indication he made had been seen and heeded by the driver of the following vehicle. He omitted to take that necessary precaution and, in the circumstances, he must be held to have been negligent. Having reached that conclusion, I must now turn to the question whether the Plaintiff was guilty of contributory negligence.

I take it to be settled law, without citing cases, that before overtaking, a driver must satisfy himself that it is safe to do so. The driver of a rear vehicle does not have a right to pass the front vehicle under any circumstances. He is not entitled to overtake when prevailing conditions render such a course not reasonably prudent. He is obliged to keep under observation the front vehicle and must not overtake it when it is turning to its right or when its driver has indicated his intention to turn to his right. These rules must be applied in the instant case when deciding

whether or not the Plaintiff was guilty of contributory negligence. According to the evidence I have accepted, before he reached close to the intersection the second defendant used his rearview mirror twice to check whether there was traffic behind him. He says he saw none, and I accept this assertion. When he was a short distance from the intersection he switched on his right indicator light indicating that he intended to turn to his right. As he so turned, the collision took place. The Plaintiff's vehicle did not stop until it reached near the pumps, a distance of about 55 paces from the point of impact. What do these facts disclose? In my view they disclose that before the accident took place the Plaintiff's vehicle was being driven at excessive speed or its driver was not keeping a proper lookout, or both. The Plaintiff asserts that he did not see the lorry's right indicator flashing. If this assertion is true, then it means that he was not keeping a proper lookout at the time. If it is not true, then one is bound to conclude that at the time he was not driving at such speed as could enable him to pull up and avoid a collision. Either way he was negligent. The distance the car travelled after the accident seems to me to demonstrate that just before the collision the vehicle was being driven at an excessive speed. A driver must always observe such speed as will enable him to avoid his vehicle coming into contact with another vehicle. When a motorist is about to overtake another vehicle, a very high duty lies upon him to keep a proper lookout to see that he can execute the manoeuvre with safety to other users of the road, including the driver of the vehicle immediately preceding his.

Since I have found both the second defendant and the Plaintiff to have been negligent, I must now proceed to consider apportionment of

1984 (2) ZLR p190

SAMATTA

fault. The provision of law governing the determination of that question is s 4(1) of the Law Reform (Contributory Negligence) Act [*Chapter 45*], which reads:

"Where any person suffers damage which is caused partly by his own fault and partly by the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the claimant, but the damages awarded in respect thereof shall be reduced by the Court to such an extent as the Court may deem just and equitable having regard to the respective degrees of fault of the claimant and of such other person in so far as the fault of either of them contributed to the damage."

The subsection provides no arithmetical formula by which a Court should apportion fault. The use of the words "just and equitable" in the subsection would tend to indicate that the legislature wanted the question to be regarded as basically one of common sense. The Court must, of course, take into consideration all relevant matters, including the standard of conduct imposed by the law on the parties and the degree to which the conduct of each of them fell short of that standard. In the instant case the second defendant's negligence consisted of only one omission, namely failure to satisfy himself, just before he commenced negotiating the right-hand turn, that it was safe to execute that manoeuvre. The Plaintiff, on the other hand, drove at an excessive speed and failed to keep a proper lookout. This is very high degree of negligence.

Weighing the parties' faults against each other and in the light of the standard of care each owed to the other at the material time, I am inclined to hold that the second defendant's fault is 25% and that of the Plaintiff is 75%. That finding brings me face to face with the task of determining the amount of compensation the Plaintiff is entitled to receive from the defendants.

I propose to start with general damages.

GENERAL DAMAGES

The assessment of damages for personal injuries is undoubtedly one of the most difficult of judicial tasks. The law recognizes, as common sense does, that money cannot renew a physical frame that has been battered or shattered. The assessment of damages in cases of personal injuries is not an exact exercise. In this connection, it is not irrelevant, I think, to quote the observations made by WATERMEYER JA (as he then was) in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199:

"... it must be recognised that though the law attempts to repair the wrong done to

1984 (2) ZLR p191

SAMATTA

a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case."

General damages for personal injuries are not a penalty, but compensation. The best a judge can do is to award what he considers to be a reasonable compensation, bearing in mind that as far as possible comparable injuries should be compensated by comparable awards. It cannot be doubted, I think, that the Plaintiff suffered serious injuries. He has claimed \$5 000 as damages for pain and suffering. Guided, as I am, by the cases which Mr *de Bourbon* cited in the course of his helpful final address - including *Huni v Ndangana* HC-H-138-84, *Nyangoni v Maziveyi Bus Service (Pvt) Ltd* HC-H-160-84, and *Mutandiro v Mbulawa* HC-H-354-84, I am of the view that an award in the sum of \$3 000 would be a fair and reasonable compensation. The Plaintiff also claimed \$5 000 as damages for loss of amenities. I take into account, in making an assessment here, among other things, the fact that now the Plaintiff can hardly participate in his favourite sports and the social functions he used to enjoy. He will have to adjust himself considerably and his social life is likely to be considerably less exciting for a fairly long time. In assessing the compensation, I have reminded myself that general damages are not a penalty, but compensation, and have heeded the caution voiced by SIR JOHN MURRAY CJ in *H. K Lewitt v W M Inch & South British Insurance Co Ltd* (unnumbered and unreported judgment dated 25 July 1957, cited by LEWIS AJP in *Mair v General Accident Fire & Life Assurance Corporation Ltd* 1970(1) RLR 124 at 129; 1970 (3) SA 25 at 29G:

"... in the process of awarding money compensation for [personal injuries], one must be on one's guard to see that one's natural sympathy for an injured person does not result in overlooking the fact - to quote Mr Justice GREENBERG's classic phrase in *Innes v Visser*, 1936 WLD 44 at p 46 - that the figure of justice carries a pair of scales, not a cornucopia."

I consider an award of \$3 000 as being reasonable compensation for the loss of amenities in the instant case. I turn now to the claims for special damages.

It is an elementary proposition of law that a claim for special damages must not only be

specially alleged and claimed, but also be

1984 (2) ZLR p192

SAMATTA

strictly proved. Having made that observation, I must now deal with the five claims for special damages made by the plaintiff. I propose to start with the claim in respect of future medical expenses the plaintiff anticipates incurring.

ESTIMATED FUTURE MEDICAL EXPENSES

The plaintiff has asserted - and on this point he is supported by Mr Standish-White's report which was admitted in evidence by consent-that he will need \$600 for future medical treatment, which will include the removal of the plate from the left ulna and possibly an ulna nerve transplant. Mr *de Bourbon* submitted that a figure of \$400 would be adequate because the Plaintiff can invest the money. Bearing in mind the "disease" of inflation which affects almost everyone in society, I am not disposed to agree with the learned advocate. I think Mr Standish-White's assessment is reasonable and fair.

MEDICAL EXPENSES ALREADY INCURRED

The defendants have admitted that the plaintiff spent \$852,86 on medical examinations and treatment. They dispute any amount exceeding that figure. In the course of his final address Mr *Foroma*, for the plaintiff, very fairly conceded that the amount of \$144,01 claimed in the first item of the Schedule of Medical Expenses (Exhibit 2) was mistakenly claimed. With regard to the claim for \$205,19 in item No 2 of the Schedule, I agree with Mr *de Bourbon* that the plaintiff has failed to prove that claim. The evidence before me tends to show that the \$205,19 was a payment in respect of medical treatment which was received before the accident occurred. I would reject the claim. There was no other medical expense which the plaintiff was able to establish. In the circumstances, I hold that he has proved that he spent \$852,86 in respect of medical expenses.

THE JACKET

As already pointed out, it was common cause that, as a result of the collision, the plaintiff's jacket was damaged. The plaintiff asserted in the witness-box that it would cost \$10 to repair it. He did not disclose, however, how he arrived at that figure. He adduced no evidence from a tailor, and I am unable to say that his estimation is reasonable one.

THE SHIRT

The plaintiff's shirt was damaged beyond repair as a result of the accident. It was an old shirt but the plaintiff did not reveal how old it

1984 (2) ZLR p193

SAMATTA

was at the time of the accident. The plaintiff claims \$12 but I am unable to hold and find as a

fact upon the evidence before me, that the shirt was worth \$12 at the time of the accident.

THE WATCH

In the Declaration, amended on the very day the plaintiff gave his testimony, the claim in respect of the watch is couched in the following language: "Cost of repairing Plaintiff's Seiko automatic watch damaged in the collision: \$200". In his evidence the plaintiff said that the watch cannot be repaired because the required spare parts are not available in the country. He went on to assert that, as a result of the watch being damaged, he has suffered a loss of \$120 being half of what he paid for it when it was new. I think the plaintiff's "evidence" that the watch cannot be repaired in the country is based on hearsay. I can attach no weight to it. I think it was necessary for the plaintiff to adduce evidence from an expert in watches to assist the Court in determining the monetary loss he (the plaintiff) has suffered as a result of the watch being damaged. As it is, the evidence before me regarding the watch is speculative. I am not satisfied that the plaintiff has proved his claim in respect of the watch.

THE TRANSPORT EXPENSES

As will be recalled, in his testimony the plaintiff claimed that he made a total of 56 trips, using taxis between his house and the Medical centre for the purpose of being medically examined or treated. He asserted that he used to pay between \$8 and \$8,50 per trip. The plaintiff did not produce any document to prove his assertions. He said that the taxi drivers issued no receipts. That may be so, but the plaintiff should have been able, if his assertion that he made 56 trips were true, to produce a medical document which corroborated his assertion. He did not produce one. In the Schedule of Medical Expenses the plaintiff included a claim for \$144,01, an amount which was paid in respect of a medical examination and/or treatment which had nothing whatsoever to do with the injuries he sustained in the accident. I am unable, in view of this falsity, to make a finding favourable to the plaintiff on the basis of his unsupported testimony.

CONCLUSION

For the reasons I have given, I enter judgment in favour of the plaintiff against the first defendant and, alternatively, the second defendant in the sum of \$1 500. Judgment is also entered in favour of the plaintiff

1984 (2) ZLR p194

SAMATTA

in the sum of \$363,21 against the second defendant. The rule laid down in *Lemire v Rhodesia Railways* 1981 ZLR 251 is, in my opinion, applicable to the instant case on the question of costs. It was held in that case by SMITH J, as he then was, that in cases where there is a claim for damages and no claim in reconvention or tender by the defendant, the Plaintiff is ordinarily entitled to recover all his costs, notwithstanding that the Fourth has reduced his damages on account of his contributory negligence. The Plaintiff will have all his costs.

Sawyer & Mkushi, legal practitioners for the Plaintiff.

Atherstone & Cook, legal practitioners for the defendants.

LAUBSCHER v NATIONAL FOODS 1984 (2) ZLR 195 (HC)

Court High Court, Harare

Reynolds J

22 November 1984

Flynote

Evidence - similar fact evidence - admissibility of - principles summarised.

Headnote

Similar fact evidence may be led in both civil and criminal cases and the principles relating to its admissibility apply to both. The principles are, broadly -

- (a) that the similar facts must bear a striking resemblance to the case in hand;
- (b) that the evidence should not be oppressive or unfair to the other side, and that the other side should have fair notice of it and be able to deal with it;
- (c) that it should be reasonably conclusive and not such as to raise a host of collateral issues incapable of ready resolution;
- (d) that it is inadmissible if it proves only character or disposition or a mere general similarity;
- (e) that the presumptions or inferences sought to be drawn are subtly cogent to counter-balance the inconvenient delays or other dangers that might arise from the admission of similar fact evidence; and
- (f) that before the similar fact evidence can be admitted, the similarity of conditions applicable to each case will have to be established.

Cases cited:

DPP v Kilbourne [1973] AC 729; [1973] 1 All ER 440;

R v Inder (1978) 67 Cr App Rep 143;

Mood Music Publishing Co Ltd v de Wolfe Ltd [1976] 1 All ER 763;

Metropolitan District Asylum v Hill (1882) 47 LT 29;

Manchester Brewery v Coombs (1900) 82 LT 347;

Holcombe v Hewson (1810) 2 Camp 391.

I A Donovan, with him *M J Gillespie*, for the Plaintiff

A P de Bourbon, for the defendant

Judgment

Reynolds J: In this case the Plaintiff claimed damages from the defendant company in respect of the deaths and loss of profits he

1984 (2) ZLR p196

REYNOLDS J

sustained in his pig-farming operations through feeding his animals what was alleged to be contaminated foodstuffs that he had purchased from the defendant company.

The matter presently falling for consideration concerns the Plaintiff's stated intention to lead evidence from other pig farmers who have sustained similar losses after having also fed their pigs with the defendant's allegedly poisonous foodstuffs. *Mr de Bourbon*, for the defendant, has objected to the admissibility of this evidence as being irrelevant and prejudicial.

The principles relating to the admissibility of similar fact evidence are well established. It has been widely accepted that a broad test of admissibility is that the similar facts must bear a striking resemblance to the case in hand. In this regard see, for example, *DPP v Kilbourne* [1973] AC 729; [1973] 1 All ER 440 and *R v Inder* (1978) 67 Cr App R 143. It has also been widely accepted that the principles of admissibility of similar fact evidence are the same in both criminal and civil cases. LORD DENNING, in *Mood Music Publishing Co Ltd v de Wolfe Ltd* [1976] 1 All ER 763, added a proviso to this: that such evidence should not be oppressive or unfair to the other side, and that the other side should have fair notice of it and be able to deal with it. But this is not the only criterion, with respect, and in the words of LORD WATSON in *Metropolitan District Asylum v Hill* (1882) 47 LT 29, such evidence should not merely "afford a reasonable presumption as to the matter in dispute, but should be reasonably conclusive, and should not raise a difficult and doubtful controversy of precisely the same kind as that which the jury have to determine." Furthermore, and as *Mr de Bourbon* has said, it is a relevant consideration that Pandora's box might be opened by the calling of such evidence and this would give rise to a host of collateral issues incapable of ready resolution.

It is not necessary or even possible to suggest a precise formulation of the "similar fact" rule, but in essence, and as I understand the position, subject to certain exceptions which do not concern us presently, similar fact evidence is generally admissible if it is relevant to the question in issue, but it will be excluded if it proves only character or disposition or a mere general similarity. It is also necessary that the presumptions or inferences sought to be drawn by the similar fact evidence are sufficiently cogent to counter-balance the inconvenient delays and other dangers that might arise from the admission of such evidence.

1984 (2) ZLR p197

REYNOLDS J

A number of cases have been referred to. I consider two of these to be particularly pertinent to the present matter. These are the two classic brewery cases of *Manchester Brewery v Coombs* (1900) 82 LT 347, and *Holcombe v Hewson* (1810) 2 Camp 391, both of which are referred to in the 13th Edition of *Phipson on Evidence* at paragraph 12-62. In these cases the question was whether beer supplied to a publican had been good or bad, and similar fact evidence was tendered of the sale of the brewery's beer to other publicans. In the latter case it was held that this evidence was inadmissible and LORD ELLENBOROUGH CJ said: "We cannot inquire into the quality of different beer sold to different persons. The party might deal well with one and not with others." In the Manchester Brewery case, on the other hand, as I understand it, the evidence was held to be admissible, but only if it could be shown that all the beer was of the same brewing. In other words, before the similar fact evidence could be admitted, the similarity of conditions applicable in each case would have to be satisfactorily established.

Applying these principles to the present case, it would seem on the face of it that if other farmers also used the defendant's food and suffered the same misfortunes as did the Plaintiff, then their experiences are logically relevant to the present case and of cogent probative force. But this superficial view requires further examination. Certainly, in regard to the farmer presently the subject of this issue, Mr Hazens, there has been no evidence of any sort placed before this Court to suggest his foodstuffs were purchased at the same time approximately as those purchased by the Plaintiff, or that his animals became affected within a similar period of time after consuming the suspect food, or that any other pig-farmers purchasing the defendant's feed at the same time suffered a similar fate, or that the animal husbandry practices and procedures adopted by Mr Hazens were similar to those practised by the Plaintiff, or, indeed, that any of the conditions obtaining on Mr Hazens' farm were similar to those on the Plaintiffs farm. The foundation for leading the evidence sought has not been laid, in my view.

Mr *de Bourbon* has already devoted much time in exploring with the witnesses the other possible ways in which the Plaintiff's pigs may have become affected. His suggestions have ranged from the possible use of polluted water to the possible contraction of a virus disease, and, no doubt, the same extensive examination would prove necessary in

1984 (2) ZLR p198

REYNOLDS J

regard to any other witness giving similar fact evidence. The witnesses would also be asked many additional questions, no doubt, as to the conditions prevailing on their farms. Furthermore, it would probably also be regarded as necessary by the defendant to call other evidence, if this is available, of many other farmers who used the defendant's foodstuffs without suffering any adverse effects. In the result, there can be no doubt that this case would be protracted, and that a number of collateral issues would be raised by the admission of the evidence sought, which may in the long run have no bearing on the present case at all. It may also be remarked that in my view it is not desirable for any investigation of this nature to be conducted in Court by examining the witnesses whilst they are giving evidence.

I must make it dear, however, that I cannot make any final ruling on the matter at this stage. It is, in my opinion, open to the Plaintiff to lay the proper foundation for the leading of this evidence at any time, and in respect of any of the witnesses he chooses to call, and in such

event the matter will be examined at that juncture, and a different decision from the one I shall give in this particular matter may possibly be given then.

For the present purposes, and in relation to the evidence that the Plaintiff wishes to lead at this stage, that is evidence from Mr Hazens, the objection is upheld and this evidence is ruled to be inadmissible.

Coghlan, Welsh & Guest, legal practitioners for the Plaintiff.

Lazarus & Sarif, Bulawayo, and *Kantor & Immerman*, Harare, legal practitioners for the defendant.

1984 (2) ZLR p199

ANGLO-AFRICAN SHIPPING CO (CA) (PVT) LTD v TRINITY ENGINEERING (PVT) LTD & ANOTHER 1984 (2) ZLR 199 (HC)

Court High Court, Harare

Smith J

18 October & 28 November 1984

Flynote

Statutes - Usury Act [Chapter 299] - money-lending - whether a transaction is one of money-lending - discounting of bills of exchange and factoring of invoices - where such may be regarded as money-lending transactions. Contract - money-lending - interest claimed in excess of that allowed under Usury Act - Plaintiff riot precluded thereby from recovering capital amount plus interim allowed in terms of Act. Practice and procedure - application for summary judgment - unliquidated counterclaim raised as defence - where such counterclaim will probably be appreciably less than main claim and no payment into Court made, not a bona fide defence for purposes of resisting summary judgment.

Headnote

The object of discounting a bill of exchange or factoring an invoice and that of lending money on the strength of such a document is essentially the same: to provide one party with ready money. The nature of the two transactions is fundamentally different. In the former transaction, the discounter buys the bill for less than its face value (the difference being known as the "discount" or "discount charges"), and becomes owner of all the rights given by it against the signatories. He has no rights against the seller. In the latter, the bill is negotiated merely as security for the repayment of the loan of money; the borrower is obliged to repay the amount borrowed. The lender is secured against a default by the borrower by his rights of recourse under the bill.

In ascertaining the nature of the transaction, the Court must have regard to its substance and not merely its form. Thus, where the "discounter" always looked to the "seller" primarily for the payment of capital, commission and interest; where negotiations regarding the payment of capital after due date were between the discounter and the seller, the latter being regarded by

the former as being principally liable; and where the discounter, in its statements of account to the seller, referred to payment of "interest", the transaction was more properly regarded as one of money-lending

1984 (2) ZLR p200

SMITH

rather than discounting.

The fact that the interest claimed was in excess of that authorised by the Usury Act [Chapter 299] did not preclude the discounter from recovering the capital amount of the loan, together with such interest as the law allowed it to recover.

In an application for summary judgment, where an unliquidated counterclaim is raised as a defence, the defendant should make some effort to establish the *quantum* of the counterclaim and should seek to protect its position by making an appropriate payment into Court. Unless this occurs, where the counterclaim is, in all probability, appreciably less than the main claim, the counterclaim will not be treated as disclosing a *bona fide* defence for the purpose of resisting an application for summary judgment.

Cases cited:

Tucker v Ginsberg 1962 (2) SA 58 (T);

Radman v Rabinowitz 1949 (4) SA 497 (C);

Hanan v Turner 1967 RLR 293; 1967 (4) SA 368 (R);

Stassen v Stoffberg 1973 (3) SA 725 (C);

Groenewald v Plattebosch Farms (Pty) Ltd 1976 (1) SA 548 (C);

Wilson v Hoffmann & Another 1975 RLR 3; 1974 (2) SA 44 (R).

J B Colegrave, for the Plaintiff

P C Paul, for the defendants

Judgment

Smith J: The Plaintiff operates a business trading, inter alla, as a factor, financier alla shipper. In march 1983 the Plaintiff, at the request of the first defendant, represented by the second defendant, factored certain invoices from Zisco steel and the Ministry of Water Resources in the amounts of \$17 512,20 and \$2 300 respectively and issued a cheque, made payable to the first defendant, in the sum of \$14 645,31.

Then, in April 1983, the Plaintiff, again at the request of first defendant, represented by the second defendant, discounted a promissory note made by Chigubu Brothers (Pvt) Ltd in favour of the first defendant for the sum of \$20 000 due on 11 July 1983, and issued a cheque, made payable to the first defendant, in the sum of \$18 826,99. This promissory note was endorsed by

the first and second defendants and the Plaintiff became holder in due course. On presentation by the Plaintiff the promissory note was dishonoured. On 5 April 1984 both defendants signed a deed of suretyship, each guaranteeing payment of the debts of the other. The first defendant defaulted in its repayment to the Plaintiff but paid on account the sum of \$17 969,04 on 16 May 1984.

The balance outstanding on 5 September 1984 amounted to \$26 609, which the Plaintiff is claiming with interest and a commission charge and costs of suit.

1984 (2) ZLR p201

SMITH J

The defendants contend that the deed of suretyship is incomplete in that it was contemplated that it would be signed by two other sureties, neither of whom in fact did so. The defendants also contend that both interest and commission are charged on the amounts owed to the plaintiff, that the commission is in reality simply an additional interest charge and that consequently the effect is that the rate of interest actually charged is usurious and contrary to the provisions of the Usury Act [Chapter 299]. Furthermore, since the Plaintiff has not taken an instrument of debt from either defendant, it cannot recover interest which is in excess of a rate of 17% per annum simple interest. As the defendants were alleging that the Plaintiff was charging interest at a rate in excess of the maximum rate permitted by the Usury Act [Chapter 299], they requested, in terms of s 17 of that Act, that Mrs Darney present herself for examination at the hearing of the application for summary judgment.

Tucker v Ginsberg 1962 (2) SA 58 (T) was a case in which the Plaintiff was claiming provisional sentence on a cheque drawn by the defendant in his favour and held by him, which was dishonoured by non-payment. TROLLIP J found that the probabilities favoured the defendant's succeeding in proving that the transactions in question were "substantially ones of moneylending", and that s 9 and s 11 of the South African Usury Act (which are identical to s 16 and s 17 of the Usury Act [Chapter 299] would therefore apply. In deciding what order should be made in consequence of such finding, he considered the provisions of s 11 of the South African Act - the equivalent of s 17 of Chapter 299 - and said at 65G-66D:

"The defendant alleges that the interest that is claimed by and has been paid to the Plaintiff is usurious; and it was not contested that that requirement of the section had not been complied with. The other requirement, however, is that the transaction on which the Plaintiff relies must be for "money lent" or a "loan". In my view it is fundamental to the invocation of the section that it must first be objectively established as a fact that the transaction was money-lending, either by its being admitted in the proceedings, or, if disputed, by proof in the ordinary manner. It is only after that has been established that the Plaintiff can be compelled to submit to the extraordinary procedure of being examined "to prove his claim", which I think means to prove that the amount he is claiming is within the limits permitted by the Usury Act. In provisional sentence proceedings no difficulty arises in applying the section if it is common cause that the claim is for money lent. If, however, that is disputed, the defendant must first show that he will probably succeed in proving that the transaction was a loan (*Liepner v Berman* 1944 WLD 16; *Emdin v Gluckman and Gluckman* 1946 WLD 340. If he succeeds, the Court's finding in his favour is only provisional and not final (*Olaf v Minnie* 1952 (4) SA 369 (AD) at pp

1984 (2) ZLR p202

SMITH J

374 F-G) and the question therefore arises whether the Court can, on such a tentative finding that the transaction was a loan, order the examination of the plaintiff under s 11. I do not think so. After all, it might ultimately be found by the trial Court that the transaction was not a loan, in which event the examination of the plaintiff would have been unwarranted and unnecessary. Moreover, I do not think that the Legislature in s 11 ever intended that the proceedings should be split into two separate and distinct hearings-the one to determine the amount claimed, and the other taking place subsequently to determine the nature of the transaction.

The above considerations confirm my view that in provisional sentence proceedings where the defendant alleges the payment or claiming of usurious interest but it is disputed that the transaction was money-lending,' the Court cannot order the plaintiff's examination under s 11 to prove the amount of his claim as part of the provisional sentence proceedings, after merely finding that the defendant would probably succeed in the principal action in proving that the transaction was moneylending. The correct order in my view is then to refuse provisional sentence."

In the present case, the examination of Mrs Darney took place with the consent of the parties, before the Court heard argument as to whether or not that was the proper procedure.

Mrs Darney, who is a director of the plaintiff company and has been employed by the plaintiff for nine and a half years, was duly called to be examined as a witness to prove the claim of the defendants. She said that the plaintiff was not a money-lender and did not lend money but was in fact a confirming house. It discounted bills and factored invoices but this constituted only a minor part of its business. With regard to the promissory note referred to above, the various signatures on the back of the note were that of a director of Chigubu Brothers (Pvt) Ltd, in order to guarantee the note, that of the first defendant as endorser, that of the second defendant as surety and that of plaintiff as endorser. Notice of the dishonouring of the note had been given to the first defendant, but not through a notary. The bankers had telephoned the plaintiff to advise of the dishonour and the plaintiff had then advised the first defendant by telephone. The second defendant had told the plaintiff that he had reclaimed from Chigubu Brothers (Pvt) Ltd the goods for the purchase of which the promissory note had been made, and that is why the plaintiff had had recourse against the defendants instead of against the maker of the note in the first instance.

Mrs Darney said that the plaintiff did not follow a set procedure when discounting bills of exchange; commission would always be demanded but the rate would vary depending on the tenor of the bill, ie its maturity date, and sometimes on the credit-worthiness of the

1984 (2) ZLR p203

SMITH J

person wishing to have the bill discounted. She said that the Plaintiff had purchased the note from the first defendant and had not taken it as security for a debt or lent money to the first defendant. The first defendant had not proceeded against the drawer or maker of the note, who was the principal debtor, because the second defendant had said that he would pay what was owing. When she was asked why the accounts submitted to the first defendant referred to "interest" that was due and not to "commission", she said that the Plaintiff could not do business if it did not charge interest. The debit note sent to the first defendant was headed "discounting charges" but under that heading it showed a commission charge and interest.

As regards the two invoices, they had been bought from the first defendant with the right of

recourse against the first defendant and against the second defendant as surety. The invoices had been factored in the expectation that the amounts due would be paid within thirty days of the statement being sent out. 20% of the amount due on the invoices was retained by the Plaintiff, as it was not normal practice to pay the full value. When the account was settled, the 20% retention money would be refunded to the first defendant less the commission and interest payable. Commission was calculated on the value of the invoiced amount. If the first defendant paid the commission and interest and the invoice was paid, the retention money of 20% would be refunded. The two invoices concerned in the transaction in question were factored in March 1983 in the expectation that they would be paid at the end of April. When this did not eventuate, commission was charged and interest raised on the unpaid amount at the end of June 1983. This was continued each month thereafter. Mrs Darney said that if the transaction had been by way of a loan, and not a discount, greater interest charges would have been raised. She said that the Plaintiff carried on business as a confirming house, not a money-lender, and that confirming houses operated on the basis of charging commission and interest on the amount disbursed for the period the amount owed was outstanding.

In *Tucker's* case, *supra* TROLLIP J, in considering the distinction between discounting a bill and lending money on the strength of it, said at 62A-63A:

"The object of both discounting a bill and lending money on the strength of it is the same, namely, to provide the one party with ready money, but the nature of the two transactions is fundamentally different; according to the authorities such difference

1984 (2) ZLR p204

SMITH J

is "distinct and palpable". See *de Villiers v Roux* 1916 CPD 295, where the *English* cases are collected, and *Moser v Meiring*, 1931 OPD 74. In so far as they are relevant to the present dispute the points of difference are as follows: in the former transaction, the object is achieved by the party selling the bill before its due date for an amount in cash that is less than the amount of the bill (the difference being known as the "discount" or "discount charges"), and on negotiation of the bill to the discounter, he becomes the owner of all the rights given by it against the various signatories thereto according to the relevant Bills of Exchange statute. The seller does not undertake to repay the amount of the bill on due date. His only obligation is to negotiate the bill to the discounter, and when he has done that, he is not under any further obligation *qua* seller to the discounter. He may, of course be liable to the discounter as one of the signatories of the bill, if he too has signed it, but that is on the bill *qua* signatory and not *qua* seller. The discounter is compensated for so laying out his money by the "discount" that he receives when the bill is finally paid. In the latter transaction, the object is achieved by the party borrowing the money from the lender and undertaking to repay an equal amount on due date, the bill being negotiated or delivered to the lender merely as security for the repayment of the loan. The borrower, whether or not he too has signed the bill, is principally liable to repay the amount borrowed, but the lender is secured by having his rights of recourse under the bill against the signatories in case the borrower defaults. The lender is compensated for so laying out his money by the "interest" that he charges the borrower. This interest can, of course, be paid in advance when the loan is made.

As each party has given the transactions a different label, I think that it is appropriate to add here that the label used is not decisive. Despite the label, the Court must look at the nature of the transaction and not its object because, as stated above, the object is the same in both cases - see *Olds Discount Co Ltd v John Playfair Ltd* [1938] 3 All ER 275 at 277, and in ascertaining its nature the Court must have regard mainly to its substance and not merely its form. That appears from s 14 (i) itself and see also *In re George Inglefield Ltd* [1933] Ch 1 at 17, 24 & 27; *Lawson & Kirk v SA Discount (Ply) Ltd* 1938 CPD 273 at 278, 280-1. For that purpose, in the circumstances of the present case, the Court must scrutinise the whole course of the parties' dealings (of *Lawson & Kirk's* case,

supra).

I have re-stated above what is virtually trite law in order to arrive at this criterion to apply in the present case: if the Court in adopting the approach just mentioned concludes that whatever the parties, or either of them, call their transaction, the "seller" and "discounter" in "discounting" the bill, agreed, understood or intended, tacitly or otherwise, that notwithstanding the tenor of the bill the seller should remain primarily, and the signatories should be secondarily, liable to pay the amount thereof, it should find that the transaction was "substantially one of money-lending". The reason is that such agreement, understanding or common intention would add the main element of a loan to the transaction while abating or subtracting therefrom a characteristic feature of discounting."

In this case there are a number of features which are the same as those which led TROLLIP J in *Tucker's case*, *supra* to find that the transactions with which that case was concerned were "substantially

1984 (2) ZLR p205

SMITH J

ones of money-lending", viz the Plaintiff always looked to the defendants primarily the payment of the capital, commission charges and interest; that negotiations regarding the payment of capital and other charges after due date were between the Plaintiff and the second defendant, and in these negotiations the defendants were regarded as being principally liable to the Plaintiff; and that the Plaintiff, in its statements of account of the first defendant, referred to the payment of "interest", a term which is more appropriately used in connection with money-lending than with discounting.

On balance, therefore, I am of the opinion that the nature of the two transactions was such that they were money-lending transactions rather than discounting.

Mr Colegrave, for the Plaintiff, has submitted that, even if it is found that the transactions were in effect money-lending transactions and that, by virtue of the provisions of the Usury Act [Chapter 299] the interest charged was unlawful, the defendants were still liable to repay the capital sum plus the maximum rate of interest permitted in terms of the said Act and that accordingly summary judgment should be ordered in those amounts. I take it from this that the Plaintiff is prepared to reduce his claim accordingly. It is clear that the Plaintiff is entitled to the repayment of the capital-see *Radnan v Rabinowitz* 1949 (4) SA 497(C). In *Hanan v Turner* 1967 RLR 293 at 295E-H LEWIS J said:

"It seems quite clear that the common law position is that notwithstanding that usurious interest has been illegally charged, this does not preclude the lender from recovering the capital amount of the loan, together with any amount of interest which the law legally allows him to recover.

In the case of *van Quieten v Pienaar* 1928 TPD 407, MR JUSTICE SOLOMON, with whose judgment MR JUSTICE KRAUSE concurred, said as p 412: "At common law the defence of usury does not non-suit the Plaintiff but reduces the amount of his claim to the amount of his capital plus the rate of interest allowed by law. See *Taylor v Hollard* (1886) 2 SAR 78 and *Reuter v Yates* 1904 TS 855." That was followed in the later case of *Spencer v The Merchant's Credit Corporation Ltd* 1933 WLD 69.

Apart from the fact that there is clear authority for this proposition, it would be manifestly absurd if the law were to allow a borrower to be unjustly enriched by retaining the capital amount received at the expense of the lender. The law only castigates the charging of usurious interest on the capital, not the lending of the capital itself. Section 10 of the Usury Act in my view reflects the common law position and clarifies it to the extent that it makes clear what

SMITH J

recovered by a lender in addition to the capital, when excessive interest has been charged in contravention of section 9."

In this case, the capital sums were advanced to the first defendant in March and April 1983. Then in May 1983 the first defendant paid the Plaintiff an amount of \$17 969,04. The second defendant has averred that over the years he has paid the Plaintiff interest charges in excess of what he was obliged to pay in terms of the Usury Act [Chapter 299]. He has not attempted to quantify the amount that he considers he has overpaid or to lodge a claim in reconvention. Where a defendant has raised a claim in reconvention and the claim is unliquidated, the law to be applied has been stated by CORBET J (as he then was) in *Stassen v StoTberg* 1973 (3) SA 725 (C) at 728-9. I quote from the official English translation of the Law Reports as follows:

"If it is accepted therefore that defendant can hold Plaintiff liable for damages in respect of the alleged defects in the house, the question arises whether defendant's affidavit discloses a valid defence on this ground. Defendant alleges that he is entitled to a "substantial counterclaim" against Plaintiff for damages caused by the latter's "defective work". Although the various defects are fully described, the quantum of this alleged counterclaim is not fully set out. Indeed there is no indication whatsoever of, eg, to what extent the value of the property was reduced by the defects or of how much it would cost to repair them. Whatever the amount may be, it is probably less than the balance of the purchase price and the other amounts claimed by Plaintiff. I will accept that, in terms of the Uniform Rules of Court - particularly Rule 22 (4) - a defendant who admits the main claim is entitled to raise an unliquidated counterclaim as a defence; that if the counterclaim exceeds the main claim, it constitutes a valid defence in respect of the whole of the main claim. (See *Spilhaus & Co Ltd v Coreejees* 1966 (1) SA 525 (C)); and if the counterclaim is less than the main claim, the defendant may pay the balance into Court and in this way raise a valid defence to the whole main claim. (See *KoorzElp Beleggings (Edms) Bpk v Allied Minerals Ltd* 1970 (1) SA 674 (C)). On the other hand, if a defendant raises an unliquidated counterclaim without in any way establishing its quantum - or indeed making any effort to establish it - and where it appears that, in all probability, the counterclaim will be appreciably less than the main claim, and no payment into Court was made, such "counterclaim", in my opinion, does not disclose a bona fide defence for the purpose of summary judgment."

The decision was approved in *Groenewald v Plattebosch Farms (Pty) Ltd* 1976 (1) SA 548 (C) at 550F.

A different approach was taken by BECK J (as he then was) in *Wilson v Hoffman & Anor* 1975 RLR 3; 1974 (2) SA 44. Unfortunately, the decision of CORBET J in *Stassen's case*, *supra*, was not cited before BECK J in *Wilson's case* at 45D-C of the South African report, BECK J

SMITH J

said:

"I do not think that the phraseology used by a would-be defendant who seeks to avert the extraordinary procedure of summary judgment should be placed under a microscope. A mere want of particularity in making averments that disclose the defence sought to be relied upon is not ordinarily fatal to the defendant, provided only that the facts averred would, if proved, be a good defence."

And, further on, at 45E-H:

"So far as I am aware the point has not yet been argued OF decided in Rhodesia. Certain obiter observations in the *Mercury Investments* case, *supra*, would seem to suggest that it was assumed that a smaller counterclaim cannot be relied upon In defence to an application for summary judgment upon an admitted and larger debt.

Without the benefit of argument I am not, however, prepared to deny to the present defendants the right of defending the Plaintiff's claim in the ordinary way by reason of this circumstance alone. Trotmar's case has been criticised more than once, and I would refer in particular to the observations of MURRAY J (as he then was), in *Du Toit v De Beer*, 1955 (1) SA 469 (T). As presently advised I am not sufficiently persuaded that the defendants should be subjected to the restrictions of a summary judgment against them when they have made averments which I regard as sufficient to entitle them to plead a counterclaim as a partial defence to the magnitude of the claim and to seek to protect their position with regard to costs, if so advised, by making an appropriate payment into Court."

The defendant has made vague allegations concerning interest he has paid on entirely different transactions. His remedy for any such payments, if they were in respect of excessive interest charges in contravention of the Usury Act "Chapter 299], is set out in s 12 of that Act. The fact that the Court has found that the two transactions with which this case is concerned were substantially ones of money-lending does not automatically mean that all the other transactions between the parties were also money-lending ones.

Mr *Paul* raised the point that the deed of suretyship was signed by the two defendants only whilst it was clearly envisaged that two other persons would also sign as sureties. As each surety accepted liability jointly and severally and waived all the benefits available to sureties, I do not think that either the first or the second defendant can avoid liability solely on the basis that other persons did not sign the deed of suretyship.

The Plaintiff advanced the first defendant an amount of \$15 45352 on 16 March 1983 and an amount of \$18 82699 on 11 April 1983, giving a total of \$34 280,51, and was repaid \$17 969,04 on 16 May 1984.

1984 (2) ZLR p208

SMITH J

Accordingly summary judgment is ordered in favour of the Plaintiff against both defendants, the one paying the other to be absolved, in the amount of \$16 311,47, plus interest at the maximum rate permitted in terms of the Usury Act [Chapter 299] on \$15 453,52 for the period from 16 March 1983 to 10 April 1983 and on \$34 280,51 for the period from 11 April 1983 to 15 May 1984 and on \$16 311,47 for the period from 16 May 1984 to the date of payment, together with costs of suit.

Gollop & Blank, legal practitioners for the Plaintiff.

Winterton, Holmes & Hill, legal practitioners for the defendants.

1984 (2) ZLR p209

PAAR & CO (PVT) LTD v SOUTH BRITISH INSURANCE CO LTD & ANOTHER 1984 (2) ZLR

Copyright Juta & Co Ltd

209 (HC)

Court High Court, Harare

Samatta J

22 October & 28 November 1984

Flynote

Practice and procedure - interrogatories - service of - necessity for strict compliance with provisions of O 28 R 193 of High Court Rules.

Headnote

In terms of O 28 R 193 of the High Court Rules, where interrogatories are to be served on more than one person or are required to be answered by an agent or servant of a party, a note at the end of the interrogation must state which of the interrogatories each party is required to answer; in the case of an agent or servant, it must state which agent or servant is required to answer. The provisions of this Rule are peremptory, because compliance with the Rule enables the opposite party to decide whether or not to oppose an application to seek leave to serve interrogatories.

Case referred to: *Serfonten & Another v Irvine* 1979 RLR 510; 1980 (2) SA 63 (ZAD).

A P de Bourbon, for the Plaintiff.

H I Bissett, for the second defendant.

Judgment

Samatta J: This is an application under Order 28 Rule 191(1) of the High Court of Zimbabwe Rules, 1971, hereinafter referred to as "the Rules", for directions for an order:

- (1) giving the Plaintiff leave to serve on the second defendant interrogatories relating to certain matters in question between the parties;
- (2) requiring the second defendant to answer the interrogatories on affidavit within a specified period; and
- (3) allowing the Plaintiff to serve the interrogatories on Mr R J B Fawcett, director of the second defendant, for purposes of reply.

Mr *Bissett*, for the second defendant, has opposed the application on several grounds.

1984 (2) ZLR p210

SAMATTA J

The background to the application may be briefly stated. In December 1979 the Plaintiff brought an action against the first defendant, its insurer, claiming compensation in respect of a loss it says it suffered when one of its motor vehicles, which was being guarded by the second

defendant's employees, was allegedly stolen. In April 1981 the Plaintiff applied, without opposition, to join the second defendant as a defendant. The action against that company was based on alleged breach of duty of care to guard the vehicle. In view of the conclusion I have arrived at in this matter, I do not find it necessary to reproduce the interrogatories in respect of which the Plaintiff makes the application.

As already pointed out, Mr Bissett opposed the application on several grounds. His first argument was that the application was bad in law because Order 28 Rule 193 of the Rules had not been complied with. That Rule reads as follows:

"When interrogatories are to be served on two or more parties or are required to be answered by an agent or servant of a party, a note at the end of the interrogation shall state which of the interrogatories each party or, as the case may be, an agent or servant is required to answer, and which agent or servant."

Mr *Bissett* contended that this provision is peremptory, and failure to comply with it is a serious irregularity. I agree. While the Court recognizes that it is dangerous to allow procedural rules to become the master rather than the servant of justice, it cannot disregard the fact that however technical a procedural rule may appear, it is almost always based on legal principle. The compliance with the requirement laid down by Rule 193 enables the opposite party, among other things, to decide whether or not it should oppose the application to seek leave to serve interrogatories on it. In the application now before me it was very important for the Plaintiff to comply with Rule 193 because not all the interrogatories could properly be answered by the Secretary or some other senior officer of the second defendant. Mr *de Bourbon*, for the Plaintiff, quite fairly conceded that the omission to comply with the rule was a procedural error, but he went on to invite me to condone the error and grant the application, arguing that it is fairly clear from the interrogatories themselves as to who is expected to answer them. That contention may be well founded, but I am not disposed to think that, assuming that the matter is one which lies within the discretion of the Court, I should condone the error.

The failure to comply with Rule 193 of the Rules is not, in my

1984 (2) ZLR p211

SAMATTA

opinion, a minor irregularity. Unless cogent reasons exist for condoning the irregularity, I think this Court should refuse to take such a step.

I can see no such reasons in this matter.

Mr *Bissett* also contended that the information sought by the Plaintiff cannot properly be sought by way of interrogatories. In view of the conclusion I have reached on the question of failure to comply with Rule 193, I find it unnecessary to deal with this not uninteresting contention. The decision in *Serfontein & Anor v Irvine* 1979 RLR 510; 1980 (2) SA 63 (ZAD) does not, however, appear to support the contention.

The application is dismissed with costs.

D W Aitken & Co, legal practitioners for the Plaintiff.

Webb Low & Barry, Bulawayo, and Scanlen & Holderness, Harare, legal practitioners for the second defendant.

1984 (2) ZLR p212

ATTORNEY-GENERAL v GAVAZA 1984 (2) ZLR 212 (SC)

Court **Supreme Court, Harare**

Gubbay ACJ, McNally JA & Baron AJA

21 November & 4 December 1984

Flynote

Criminal procedure - trial - plea made before one magistrate but trial conducted before another - unless first magistrate is no longer available by reason of death, retirement, illness or incapacity, he is seized of matter and must hear whole trial - Criminal Procedure and Evidence Act [Chapter 59] - s 163(5).

Headnote

In terms of s 163(5) of the Criminal Procedure and Evidence Act [*Chapter 59*], once an accused person has been called upon to plead to the charge he is entitled to demand that he be either acquitted or found guilty. This has consistently been interpreted in South African Courts as meaning that he is entitled to demand that he be either acquitted or found guilty by the judicial officer who commenced the trial, unless it becomes impossible for that judicial officer to do so. The judicial officer who records the plea is seized of the matter and is obliged to conduct it to finality. It is only where he becomes *Linctus officio* by reason of his leaving the service, death, physical or mental incapacity which is likely to continue for a long time, or recusal that the proceedings are aborted and become void.

Cases referred to:

S v Gwala & Others 1969 (2) SA 227 (N);

S v Mthetwa 1970 (2) SA 310 (N);

S v Mphetshwa 1979 (1) SA 925 (Tk);

S v Oagamang 1980 (3) SA 298 (BH);

S v Motswadira 1979 (2) SA 1175 (NC);

S v Makoni & Others 1975 (2) RLR 75; 1976 (1) SA 169 (R);

S v Godfrey & Others G-S-100-1976.

KA Esat, for the appellant

J B Colegrave, for the respondent

Judgment

Gubbay ACJ: On 27 April 1984 the respondent was arraigned in the magistrates Court on a charge of housebreaking with intent to steal

1984 (2) ZLR p213

GUBBAY ACJ

and theft. He admitted the allegations that on 18 April 1984 he had broken into the residence of Ronald Lewis Gurr and had removed therefrom a Yamaha motorcycle. He explained, however, that he had taken the motorcycle for the purpose of going on a "joy-ride" and that he had intended to return it the next day. The magistrate thereupon entered a plea of not guilty and adjourned the proceedings to 15 May 1984.

On that day the trial was resumed before a different magistrate, who commenced by asking the respondent whether he wished to maintain his plea of not guilty. The respondent made it clear that he did. The complainant and security guard were then called to testify. The respondent also gave evidence, but in the end was convicted. He was sentenced to undergo seven months' imprisonment with labour and a suspended sentence of five months' imprisonment with labour imposed two years previously was brought into operation.

The proceedings came before SMITH J on automatic review. As there was no indication in the record that the magistrate before whom the trial had commenced on 27 April was not present and available to continue the hearing on 15 May, the learned judge considered that the proceedings before the second magistrate were a nullity. He accordingly set aside the conviction and sentence and ordered that the matter be remitted for trial de nova by the magistrate who had recorded the respondent's original plea or before any other magistrate, other than the one who convicted the accused. I may say at this juncture that the formulation of that order is, with respect, inconsistent with the rationale of the judgment.

The Attorney-General has appealed against the review judgment on a point of law in terms of s 44(6) of the High Court of Zimbabwe Act, 1981. It is his contention that the learned judge erred in holding that once the respondent had pleaded before the first magistrate, s 163(5) of the Criminal Procedure and Evidence Act [Chapter 59] required him to proceed with the trial to its conclusion.

Section 163(5) of the Act provides:

"Any person who has once been called upon to plead to any indictment, sum mons 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." .

1984 (2) ZLR p214

GUBBAY ACJ

In support of his interpretation of the section the learned judge quoted with approval the principle enunciated by KENNEDY AJP in *S v Owala and Ors* 1969 (2) SA 277 (N), dealing with the substantially similar provision in the former South African Criminal Procedure Act 56 of 1955

(now replaced by Act No 51 of 1977). The relevant passage in the judgment, at 230E, reads:

"It would seem to me that, upon a proper interpretation of s 169(6) of Act 56 of 1955, once an accused has pleaded, except where specially provided for in the Act or in any other law, or where it is impossible (for example in cases of death or recusal of the judicial officer), he shall be entitled to demand that he be either acquitted or found guilty by the judicial officer who commenced the trial." (The emphasis is mine).

That principle was reaffirmed by HARCOURT J in *S v Mthetwa* 1970 (2) SA 310 (N) at 313 in fine - 314C;; and in Transkei, where the Criminal Procedure Act, 1955 (RSA) still applies, ROSE-INNES J in *S v Mphetshwa* 1979 (1) SA 925 (Tk) at 925H, described it as being incontrovertible.

Mr *Esat*, who appeared for the appellant, sought to distinguish the decisions in the *Gwala* and *Mphetshwa* cases on the ground that they concern a situation far removed from the present. In each the trial before the first magistrate went beyond the preliminary stage of recording the accused's plea; the intervention of the second magistrate occurring after at least some evidence had been adduced. That of course is correct. But the ratio which emerges clearly from the judgments is that as soon as an accused has pleaded to a charge in a Court properly constituted and appointed to try him, that Court and no other assumes jurisdiction and is seized with the trial. From that moment onward, and irrespective of whether any evidence in support of the charge has been placed before it, that Court is obliged to conduct the trial to finality, unless it becomes impossible for it to do so.

Strikingly illustrative of this principle is the unreported judgment of the Transvaal Supreme Court in *S v Botha*, delivered on 8 June 1978. It was cited with approval by STEENKAMP J in *S v Oagamang* 1980 (3) SA 298 (BH) at 300 G-H. The facts were these. After a plea of guilty had been recorded by a magistrate the case was postponed. Thereafter a second magistrate, who was unaware of the initial proceedings, started the case afresh. The accused, who on that occasion was legally represented, again pleaded guilty. He was convicted and sentenced. On appeal it was held that the trial was void because it had not been

1984 (2) ZLR p215

GUBBAY ACJ

proved that the first magistrate was no longer available in the absolute sense.

In common with SMITH J, I am not persuaded to adopt an interpretation of s 163(5) of Chapter 59 different from that accorded to s 169(6) of Act No 56 of 1955 (RSA), and s 106(4) of Act No 51 of 1977 (RSA) where the plea is one of guilty. I am entirely satisfied that Mr *Colegrave*, who appeared for the respondent, is correct in his submission that the Legislature enacted s 163(5) in the recognition that the entering of a plea marks a critical watershed in criminal proceedings. Issue is joined before the Court taking the plea and the trial is commenced. Save where it is specifically enacted to the contrary or where the proceedings become abortive and therefore a nullity, the original Court continues in existence and retains exclusive jurisdiction until the point is reached to render judgment of acquittal or conviction.

Section 182 of the Act authorises the separation of the trial of two or more accused charged jointly, at any time during the proceedings; and s 312(5) permits the proceedings as to sentence

to be presided over by a magistrate other than the one who convicted the accused. The existence of these special procedural provisions in my view serves to indicate that if the Legislature intended that a trial commenced before a judicial officer would be continued or recommenced *de novo* before another where the first judicial officer remains available, it would have said so expressly. See *S v Gwala and Ors*, *supra*, at 230 F-G; *S v Mphetshwa*, *supra*, at 927E.

Mr Esat somewhat tentatively advanced the further submission that to construe s 163(5) so as to exclude a judicial officer from presiding over a trial in which only a plea of not guilty has been taken previously by another judicial officer, will entail considerable inconvenience to the State in administering the work of the Courts; and, in addition, could cause the accused prejudice in that the first judicial officer may not be able to deal as expeditiously with the trial as another whose commitments are not as pressing or heavy. This may well be so, but the factor of any resultant prejudice, whether to the accused or the State, affords no justification to impart to the subsection a meaning which the Legislature did not intend it to have (See the remarks of VAN DEN HEEVER J in *S v Motswadira* 1979 (2) SA 1175 (NC) at 1176H and my own in *Moll v Commissioner of Police and Others* 1983 (1) ZLR 238 at 244F-G). The solution lies in the hands of the Legislature. In South

1984 (2) ZLR p216

GUBBAY ACJ

Africa the problem was met by the introduction of s 118 into the Criminal Procedure Act, 1977. That section provides that if a judicial officer before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced before him, the trial may continue before another judicial officer of the same Court. Plainly a comparable provision in the Criminal Procedure and Evidence Act of this country is called for.

The position then which obtains is that s 163(5) of the Act contemplates that the judicial officer before whom the accused has pleaded remains available to hear the whole of the trial. If he should become no longer available by reason of retirement, resignation or discharge from the service, death, physical or mental incapacity which is likely to persist for a considerable period, or recusal, he becomes *functus officio*. The proceedings are aborted and become void. As a matter of practice, where the judicial officer is a magistrate, the proceedings are submitted for review by the High Court and a declaration of nullity is made, leaving the way open for a fresh trial to be brought (See *S v Makoni & Ors* 1975 (2) RLR 75; *S v Godfrey and Ors* G-S-100-1976).

In this case, as the learned judge was at pains to emphasise, no such abortive event occurred.

Accordingly, I would dismiss the appeal. The order of remittal is however altered to the extent that the magistrate who recorded the respondent's original plea is directed to continue with the trial.

McNally J: I agree.

Baron AJA: I agree.

Pro Deo.

1984 (2) ZLR p217

S v MELROSE 1984 (2) ZLR 217 (SC)

Court **Supreme Court, Harare**

Gubbay ACJ, McNally JA & Baron AJA

26 November & 4 December 1984

Flynote

Criminal law - assault with intent to do grievous bodily harm - "grievous bodily harm," - meaning of.

Evidence - medical - affidavits - necessity to call medical practitioner to amplify written reports.

Headnote

The appellant, a farmer, had discovered that one of his employees had failed to carry out one of his duties which was to "blow down" a boiler daily. Failure to carry out his duty could have resulted in the boiler exploding. The employee's false insistence that he had carried out this task resulted in the appellant losing his temper and striking the employee on the head with a pipe wrench that he had been using. He held the wrench by its head and hit the complainant with the handle. The medical evidence (which was given in report form) indicated that the complainant had received a laceration in the temporal region, caused by a single blow with a blunt instrument. No permanent injury was likely.

The appellant was convicted of assault with intent to do grievous bodily harm, and the question was whether the harm intended to be inflicted was "grievous".

Held, that there was some dispute in the decided cases on the precise meaning, one line of cases holding that the harm must be such as "seriously to interfere with health" and the other that "grievous bodily harm" means no more nor less than "really serious bodily harm".

Held, further, that in the present case it was not necessary to decide which formulation was correct. The facts from which the appellant's intention could be inferred showed that the injury actually sustained were no less serious than had been intended. Since the injuries were not very serious, it would be wrong to hold that the appellant had intended to inflict harm which "seriously interfered with health" or was "really serious". Accordingly, the appellant should have been convicted of common assault.

Held, further, that this was one of those cases where the medical report was lacking in detail and should have been amplified by *viva voce* evidence. Prosecutors should regard it as the rule rather than the exception that the doctor's verbal evidence is necessary and magistrates should remember that it is their right - indeed, their duty - in any case where they believe *viva voce*

evidence would be of assistance to

1984 (2) ZLR p218

GUBBAY ACJ

require the doctor to attend Court.

Cases cited:

R v Edwards 1957 R&N 107;

R v Ashman (1858) 1 F & F 88;

R v Matsukis 1940 SR 76;

S v Collett (1) 1978 RLR 205; 1978 (3) SA 206 (RAD);

DPP v Smith [1960] 3 All ER 161;

S v Moyarza 1980 ZLR 460;

S v Mbelu 1966 (1) PH H176;

S v Ncube & Another 1983 (2) ZLR 1; 1984 (1) SA 204 (ZS).

S Sayce, for the appellant

M Werrett, for the respondent

Judgment

Baron AJA: The appellant, a farmer, was convicted of assaulting a boiler attendant, employed by him, with intent to do grievous bodily harm. One of the complainant's duties was to "blow down" a boiler daily. The appellant appears on the day in question to have suspected that the complainant was not doing so, but the latter insisted that he was; the appellant sent the complainant for a pipe wrench and proceeded to open a cock, whereupon water and smoke came out. It seems that this satisfied the appellant that the complainant was not in fact blowing down the boiler daily; he again asked the complainant if he was doing so and on being told again that he was the appellant lost his temper and struck the complainant a single blow on the head with the wrench. The appellant explained why he had lost his temper; he said that the boiler, a very large one, operated at a pressure of 50 l b/sq in, and that if not properly maintained it could explode with the force of a landmine. If this happened the attendant could be injured and he, the appellant, would be responsible. He agreed that he had hit the complainant hard in order to drive the point home, but he insisted that he had held the wrench by the head and hit the complainant with the handle; the complainant said he had been hit with the head.

The injury sustained by the complainant was a laceration in the temporal region, which the complainant said was stitched. The medical report said that the injury was likely to have been caused by a single blow with a blunt object and that no permanent disability was likely; it did not

however give the length of the laceration, and did not say whether it was stitched.

The appellant in cross-examination said that he realised that hitting

1984 (2) ZLR p219

BARON AJA

a person with this spanner was dangerous but that his intention was to "bring the point home" (presumably the importance of blowing down daily); he realised that he would cause pain. The record then contains the following question and answer:

"Q. Hit him hard to cause injury?

A. I must accept that. "

This rather curious answer suggests to me that either the question was "You hit him hard *enough* to cause injury?" or that the appellant so understood it. But be that as it may, expressions like "dangerous" and "hard" are relative; the question is whether the harm intended to be inflicted (whether actually or constructively) is "grievous", as that word has been judicially defined.

The question was considered in some detail by BEADLE J (as he then was) in *R v Edwards* 1957 R & N 107. He referred to the direction to the jury by WALES J in an old English case, *R v Ashman* (1858) 1 F & F 88, cited with approval in *Matsukis v R* 1940 SR 76, that -

"... it is not necessary that such harm should have been actually done or that it should be either permanent or dangerous: if it be such as seriously to interfere with comfort or health it is sufficient."

He referred also to *Bourbon v R* 1956, Case No 18, Federal Supreme Court (unreported) where CLAYDEN ACJ said that the harm must be such as "seriously to interfere with health". BEADLE J preferred the formulation of CLAYDEN ACJ in *Bourbon's* case, , *supra*, and held that the harm must be such as seriously to interfere with health. The question arose again in *S v Collen* (1) 1978 RLR 205; 1978 (3) SA 206 (RAD). That case was primarily concerned with whether the consent of the victims could in the circumstances be raised as a defence to a charge of assault; whether the harm was grievous was by comparison a minor issue. However, the Court held that the beatings on the buttocks administered by the appellant were clearly not assaults with intent to do grievous bodily harm, and cited with approval the dictum of VISCOUNT KILMUIR LC in *DPP v Smith* [1960] 3 All ER 161 that "grievous" means no more and no less than "really serious". But it is significant to note the context in which the dictum was delivered; VISCOUNT KILMUIR at p 171 had cited certain passages in the trial judge's direction to the jury, and observed that the direction was clearly based on the well-known direction of WILLES J in *Ashman*, *supra*, and expressly disapproved that direction when he said:

1984 (2) ZLR p220

BARON AJA

"... I can find no warrant for giving the words "grievous bodily harm" a meaning other than that which the words convey in their ordinary and natural meaning. "Bodily harm" needs no explanation and "grievous" means no more

and no less than "really serious".

That this Court in *Collett (1)*, *supra*, intended to adopt the test in *DPP v Smith*, *supra*, is clear immediately after citing the passage I have just cited the Court continued at 210H:

"Whipping would not be countenanced as a legal punishment if it inflicted "really serious" injury . . ."

The question arose again in this Court in *S v Moyana* 1980 ZLR 460 where LEWIS JP said at 462D: "Grievous bodily harm was in fact suffered by the complainant, within the meaning of that phrase as set out in *R v Edwards*, *supra*". *Collett (1)*, *supra*, on which LEWIS JP had himself sat, was not referred to.

We thus have an interesting position. *Edwards*, *supra*, was decided by a Court consisting of BEADLE and QUENET JJ (as they then were) which, after referring to the famous dictum of WILLES J in *Ashman*, *supra* adopted the modification by CLAYDEN ACJ in *Bourbon*, *supra*, which omitted the reference by WILLES J to "comfort". In 1960 the House of Lords in *DPP v Smith* *supra*, disapproved *Ashman*, *supra*. In 1978 this Court, consisting of MACDONALD CJ, LEWIS JP and GUBBAY AJA (as he then was), adopted the dictum of VISCOUNT KILMUIR LC in *DPP v Smith*, *supra* as to the meaning of grievous bodily harm; but two years later this Court, composed of LEWIS JP, myself and GOLDIN JA, went back to the *Edwards* test, but without, as I have said, being referred to *Collett (1)*, *supra*.

On the facts in the present case the point does not perhaps arise because the result, as we shall see presently, would be the same applying either test; however, the two tests do not necessarily mean the same thing. Mr Sayce, who appeared on behalf of the appellant, submitted that "really serious" had a wider connotation than "seriously interfere with health", and I can see the force of this submission; there may be force also in the suggestion that the word "really" adds something to "serious". I express no final view on these problems but I perceive that they may fall to be decided in a future case on different facts.

Both Mr Sayce and Miss Werrett, who appeared on behalf of the respondent, cited *S v Mbelu* 1966(1) PH H176 which set out guidelines

1984 (2) ZLR p221

BARON AJA

- albeit not exhaustive - from which the intention of an accused person could be inferred: these are the nature of the weapon used; the degree of force with which it was wielded; the point on the victim's body at which the attack was aimed; and the actual injuries sustained. There can be no doubt that the pipe wrench which the appellant used was a weapon with which very serious injury indeed could be inflicted; and there can be no doubt also that the blow was aimed at and landed on the complainant's head. On the other hand the appellant maintained consistently that he had reversed the wrench and inflicted the blow with the handle and, as Miss Werrett very properly conceded, the magistrate having made no finding on credibility and having made no finding as to whether he accepted or rejected this evidence of the appellant, this Court must assume in the appellant's favour that he did in fact reverse the wrench. It is clear also that the degree of force used could not have been very great; the magistrate described the injury sustained by the complainant as "not very serious", and reading the

complainant's evidence and that of the appellant there is nothing to suggest that the blow did not land where it was intended to land. It is therefore valid to draw the inference that the injury actually sustained by the complainant was no less serious than the appellant intended to inflict (as might, for instance, be the position if an assailant had aimed a very heavy blow at a victim's head but because of avoiding action by the victim or for some other reason had succeeded in delivering only a glancing blow).

The intention necessary for the commission of this offence was formulated by LEWIS JP in *Moyana*, *supra*, and followed by this Court in *S v Ncube and Anor* 1983 (2) ZLR 1; 1984 (1) SA 196, in the following terms:

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

On the facts I do not think that this is really a case of a man being aware of possible consequences and being reckless in regard thereto. As I have said, although the appellant, on his own admission, was in a temper we must proceed on the assumption that he was sufficiently in control of himself to reverse the wrench; and it is also clear that the blow landed where it was aimed. The consequences were, broadly speaking, what the appellant intended. The magistrate's finding that the injury was not very serious would in itself seem to me to rule out a

1984 (2) ZLR p222

BARON AJA

conviction on a charge requiring an intention to inflict harm which "seriously interferes with health" or was "really serious". And there is further evidence that the injury was not very serious; the medical report, compiled as a result of an examination carried out only a few hours after the assault, revealed no bruising in the area of the injury. For these reasons, and whether the correct test be that laid down in *Edwards*, *supra*, or in *Collett* (1), *supra*, I am satisfied that the State has failed to show that the intention of the appellant was to inflict grievous bodily harm on the complainant. I would therefore allow the appeal against conviction and substitute a conviction for common assault.

Turning then to sentence, this Court is obviously at large and must consider the proper sentence for this particular common assault. Without question there are aggravating features, of which perhaps the most serious were the nature of the weapon used and the fact that the assault was committed by an employer on an employee. It is true that the assault was spontaneous and in the heat of the moment; but, as I have said, the appellant was sufficiently in control of himself to reverse the wrench and consequently the fact that he used such a weapon at all is in my view an aggravating feature. But the feature which concerns me most of all is the assault on an employee. Mr Sayce submitted that "in the new political dispensation obtaining since Independence an employer is no longer in a position to abuse his authority over his work-force". One would wish that this were so, but unhappily I am by no means satisfied that it is; I think Miss Werrett makes a valid point when she says that it is difficult to believe that the appellant would have behaved as he did towards an equal. Consequently, although I do not think that this offence merits a prison sentence even totally suspended, I regard the offence in all the surrounding circumstances to be serious and meriting a substantial fine. I would set aside

the sentence imposed by the magistrate (a fine of \$800 or, in default of payment, six months' imprisonment with labour, plus four months' imprisonment with labour totally suspended) and substitute in its place a sentence of a fine of \$400 or, in default of payment, three months' imprisonment with labour.

I cannot refrain from commenting on the medical evidence in this case. As I have said, the medical report does not state the length of the laceration on the complainant's head, nor does it say whether that laceration was stitched; nor is there any indication that there was bruising in the region of the injury. Both this Court and the High Court have

1984 (2) ZLR p223

BARON AJA

said repeatedly how important it is, particularly in a case of any seriousness, that the doctor be called to amplify and explain the contents of his report and generally to assist the Court in an assessment of the nature and seriousness of the injuries and the inferences to be drawn from the presence or absence, as the case may be, of injuries. One knows that doctors are busy people but this is no excuse for failing to place before the Court all the relevant evidence; and the viva voce evidence of doctors in, for instance, homicide, rape and serious assault cases is very relevant indeed. Prosecutors should regard it as the rule rather than the exception that the doctor's evidence is necessary, and magistrates should always have in mind that it is their right and indeed duty in any case where they believe that viva voce evidence may be of assistance to require the attendance of the doctor. There can be no doubt that in the present case the doctor's evidence would have been of assistance and that he should have been called.

Gubbay ACJ: I agree.

McNally JA: I agree.

Stumbles & Rowe, legal practitioners for the appellant.

1984 (2) ZLR p224

NATIONAL RAILWAYS OF ZIMBABWE v COGHLAN, WELSH & GUEST 1984 (2) ZLR 224 (HC)

Court **High Court, Bulawayo**

Korsah J

7 December 1984

Flynote

Practice and procedure - costs - bill of - submission of bill of costs for taxation - there must be some vinculum juris between party and legal practitioner before party can require bill of costs to be taxed.

Headnote

The appellant statutory corporation wished to negotiate a loan from a Canadian agency called the Export Development Corporation of Canada (EDC). EDC granted the loan; one of the conditions of the loan agreement was that legal expenses incurred by EDC would be met by the National Railways of Zimbabwe. Among those expenses were fees levied by the respondent Zimbabwean firm of legal practitioners, who acted in Zimbabwe on behalf of EDC. In October 1983 the NRZ, in accordance with the agreement, settled EDC's legal fees. In October 1984, because they took issue with the magnitude of the fee levied by the respondents, they sought an order requiring that the respondent's bill of costs be submitted for taxation.

Held, that the respondents were instructed on behalf of EDC and were answerable to them alone. There was, therefore, no *vinculum juris* between the NRZ and the respondents. The privilege of having a bill of cost taxed can be claimed only by a party to the original litigation or transaction or his successor in title. Just as the respondents had no claim against NRZ for payment of their fees, so too NRZ had no right to have the respondents' bill taxed.

Held, further, that even if there was some legal nexus between the NRZ and the respondent, the former exhibited conduct plainly inconsistent with an intention to enforce its rights, by paying EDC's bill (which included the respondents') on presentation; and so could be said to have waived any rights it may have had to have the respondents' bill of costs taxed.

Case referred to:

Zuurbekom Ltd v Union Corporation Ltd 1947 (1) SA 514 (A).

H I Bissett, for the applicant.

A P de Bourbon, for the respondent.

Judgment

Korsah J: This is an application by way of notice of motion for an

1984 (2) ZLR p225

KORSAH J

order that the respondents be compelled to submit their bill of costs for taxation. The other reliefs sought are ancillary to the main one above stated.

The applicant is a statutory corporation. It carries on business in Zimbabwe. It seeks this order against the defendants, a firm of attorneys carrying on business in partnership in Zimbabwe. Although the representative capacity in which the respondents were being proceeded against was not alluded to in the notice of motion, Mr de Bourbon, in accustomed manner, waived his right to object to the application on this score.

The claim arises in this way. The applicant wished to negotiate a loan to it from a Canadian Agency, the Export Development Corporation of Canada (hereinafter referred to as "EDC"). The loan was for US\$7 000 000. The EDC appointed its Canadian solicitors, Gowling and

Henderson of Ottawa, to act for it. Gowling and Henderson in turn instructed the respondents to act in Zimbabwe for the EDC.

The loan was eventually concluded. It was a term of the loan agreement that the legal expenses incurred by the EDC would be borne by the applicant. Those expenses included, of course, the fees and disbursements of the respondents.

The applicant does not quarrel with the disbursements totalling \$368,23 which the respondents claim they incurred. It accepts that such disbursements were made, and made correctly. But it takes issue with the fee of \$6 000 levied by the respondents.

The applicant, in accordance with the term of the agreement in that behalf, has settled the legal expenses which were incurred by the EDC and which, of course, included this fee of \$6 000 levied by the respondents.

The respondents resist the granting of the order sought by the applicant on two main grounds. The first is that the applicant has no locus standi with regard to the question of a taxation of the fee levied by them. And the second is that, having already paid the expenses incurred by EDC, the applicant has waived any right to insist upon a taxation of the respondents' fee, if, indeed, such a right was available to the applicant.

1984 (2) ZLR p226

KORSAH J

From the very onset, the respondents were aware, as were all concerned with the negotiations, that their fees would be provided from moneys paid to the EDC by the applicant. But as between the applicant and the respondents there was no privity of contract.

Mr *Bissett*, for the applicant, however, argued strenuously that the EDC was a mere conduit pipe for the payment of the respondents' fees and that in those circumstances the applicant was entitled to ask that the respondents' fees be taxed. Mr Bissett illustrates his argument with the following example.

In an uncontested divorce matter, Mr Doe agrees to pay to his wife her costs as between attorney and client. Her legal practitioners proceed and obtain the divorce, and present her with an account for fees of \$5 000; she pays this and sues Mr Doe for recovery. Mr Bissett asks: Can it be seriously suggested that Mr Doe is not entitled to compel the practitioners to have their fees taxed?

I do not think this analogy is on all fours with the case before me. To begin with, when Mr Doe agrees to pay his wife's costs as between attorney and client, the law implies that such costs shall be reasonable. If Mrs Doe pays just any account of fees without bringing to the notice of Mr Doe the amount of such bill she does not thereby deprive Mr Doe his right of having the bill taxed, for he was never given the opportunity to exercise his privilege of asking that the bill be taxed. Mr Doe's right to begin proceedings for taxation commences when the bill of costs is presented to him. The mandate given to Mrs Doe by her husband did not confer upon her a right to waive Mr Doe's privilege of having the costs taxed.

The privilege of having a bill of costs taxed can be claimed only by a party to the original litigation or transaction or his successor in title. And any licensing arrangement with such a party is not equivalent to a succession in title. What is more, the privilege can be waived by the client alone and not by his legal adviser or anyone else on his behalf.

Mr *Bissett's* rhetorical question receives the answer he desires, not for the reasons he advances, but rather because Mrs Doe's legal practitioners, acting as her agents in the matter, were privy to the presentation of the inordinate fee of \$5 000. The position is made clearer if one appreciates the fact that had EDC, on whose behalf Gowling and Henderson engaged the respondents, refused to pay the

1984 (2) ZLR p227

KORSAH J

respondents the respondents could have laid no claim in law against the applicant for their fees. The only legal entity to which the respondents could, in law, have looked for payment would have been the EDC. It would have been a good defence to an action by the respondents against the applicant that there was no contract as between it (the applicant) and the respondents. That defence is, likewise, available to the respondents.

As between the applicant and the respondents there was no consensus of mind which could lead to any agreement or contract whatever. And liabilities are not to be forced upon people behind their backs any more than one can confer a benefit upon a man against his will.

No one can doubt that the rule permitting taxation of costs is a salutary one. It prevents attorneys from charging the public fees that are unreasonable and unconscionable as much as it protects attorneys from receiving insufficient fees. But the right to demand taxation can be claimed only by a party to the original litigation or transaction or his successor in title.

As stated earlier, the respondents were instructed by Messrs Gowling and Henderson of Canada on behalf of EDC; and it is to EDC alone that the respondents are answerable. The applicant is a complete stranger to any arrangement between the respondents and EDC and is entitled to no benefit or condemned to no obligation under that arrangement.

I note too, that the memorandum of fees by the respondents attached to the applicant's affidavit was addressed to Messrs Gowling and Henderson as the agents of EDC. It is dated December 1982. The respondents aver, and it is not denied by the applicant, that the fees were fixed after consultation on the quantum thereof with Messrs Gowling and Henderson as the agents of EDC. Gowling and Henderson accepted the fees disbursements charged by the respondents and settled the respondents' account with payment in March 1983 for the fees and in June 1983 for the disbursements.

By a letter dated 28 September 1983, EDC called on the applicant to make payment of the expenses incurred by EDC. The first paragraph of the letter reads:

"We list the following expenses thee were incurred by Export Development

1984 (2) ZLR p228

KORSAH J

Corporation in connection with the above-mentioned Loan Agreement".

So, by 28 September 1983, the applicant was cognisant with the expenses which EDC claimed it had incurred in respect of the loan agreement. The applicant did not ask for a reduction of this bill. With - out protest, it paid EDC the full amount requested on 10 October 1983.

In other systems of law with which I have had some acquaintance, a person entitled to require any costs to be taxed must begin proceedings for the taxation within a stated time after the order for costs was entered or after notice of the order was served on him. Order 38 Rule 308(1), by virtue of which the applicant seeks an order that the respondents be compelled to have their memorandum of fees taxed, stipulates no time limit within which the relief for an order of taxation may be sought. Presumably the relief may be sought within a reasonable time before execution is levied. This should naturally lead me to the second ground upon which the application is opposed. But before I do so I wish to digress a little. I am surprised and disturbed by the absence of any explanation of the inordinate length of time between the receipt of EDC's letter relating to recoverable expenses on 14 October 1983, and the filing of this application for an order for taxation on 31 October 1984. I am further surprised and disturbed by the fact that after the applicant had effected payment of EDC's bill of expenses it took it naively than one year to initiate the present proceedings against the respondents.

I am aware that Roman-Dutch law has not as yet embraced the English equitable doctrine of aches. See *Zuurbekom Ltd v Union Corporation Ltd* 1947 (1) SA 514 (A) at 535. But it accepts that where in the circumstances of a particular case the enforcement of the remedy by the Plaintiff would cause some great inequity and would amount to unconscionable conduct on his part, the *exceptio doli* may be brought into operation. I am not saying that the conduct of the applicant herein calls into operation the *exceptio doli*. I only mention it in passing.

The second ground upon which the application is opposed presupposes this Court holding that there is a nexus between the applicant and the respondents which would entitle the applicant to a grant of the relief it seeks. Though I have already held that there is no nexus between the parties upon which the relief sought can be based, I now turn to the second ground of opposition on the assumption that there

1984 (2) ZLR p229

KORSAH J

existed privity of contract between the parties (which I do not for one moment agree exists).

There is no denial that the applicant was fully aware of its right to ask for the memorandum of the fees to be taxed before making payment. But it was submitted on behalf of the applicant, that because it wanted its loan, it is illogical to suggest, as do the respondents, that in order to protect its rights to taxation of the respondents' account the applicant should have refused to pay EDC or, at least, paid under protest.

The fact remains that the applicant, with full knowledge of its right to demand a taxation of the memorandum of fees submitted by EDC, exhibited conduct plainly inconsistent with an intention

to enforce its rights, by paying the bill so presented to it. By electing to make payment rather than demand a taxation of costs, the applicant waived its right to demand a taxation of costs. If, when the mythical Mr Doe was presented by Mrs Doe with the bill of costs of \$5 000, he had, with full knowledge of his right to demand that the bill be taxed, elected to pay the bill in full rather than demand it be taxed, he too would have been deemed to have waived his right to demand a taxation of costs. But in the example given by Mr Bisset, Mr Doe was presented with a fait accompli and his right to demand taxation could not be exercised under the licence he gave to his wife.

If a party, without objection or protest to an irregularity of which he has full knowledge, proceeds to take a further step in an action or transaction, he is deemed to have waived the irregularity and cannot subsequently rely on the irregularity as furnishing him with a right to defeat the claim or defence of his opponent. Thus, even if there had been a contractual nexus between the applicant and the respondents, which of course there is not, the applicant would be deemed to have waived, by its payment of the bill to EDC, its right to demand a taxation of costs.

The submission by Mr *de Bourbon* that the respondents are justified in refusing to have their bill taxed, as requested, finds favour with me. The applicant was not and is not the respondents' client, and as between them there is no *vinculum juris*. There could, therefore, be no question of over-reaching. The respondents' client accepted respondent's fees and charges and paid their account. If the applicant had any reason to object to the respondents' charges, the applicant should have

1984 (2) ZLR p230

KORSAH J

refused to make payment to EDC of such charges, the applicant's obligation to pay such charges being to EDC and not to the respondents.

There is no merit in this application and it is accordingly dismissed.

1984 (2) ZLR p231

HOSKING v CASLING & ANOTHER 1984 (2) ZLR 231 (HC)

Court **High Court, Harare**

Reynolds J

15 November, 7 & 19 December 1984

Flynote

Partnership - dissolution of - assets of former partnership - right of access of former partners to records of former partnership - right to be exercised reasonably and for a reasonable period only.

Headnote

On the dissolution of a partnership, all the former partners have, in the absence of any agreement to the contrary or a distribution of the assets of the partnership, equal rights to all the books of record compiled during the subsistence of the partnership.

Failing any agreement to the contrary, no former partner would have any right to limit another's rights of access to the partnership's records. However, such a right must be exercised reasonably and should be in force for a reasonable period only. It would be inequitable and unreasonable to allow access for an unlimited period of time.

Cases referred to:

Romersa v Buch 1917 TPD 266;

Robson v Theron 1978 (1) SA 841 (AD).

B G Venturas, for the applicant

A P de Bourbon, for the respondents

Judgment

Reynolds J: This is an application on notice of motion for an order that the applicant be afforded access to documents in the possession of the respondents, and "that the respondents be interdicted from destroying or otherwise disposing of any of the records in question".

The background to the present application is that the applicant had, since January 1974, carried on practice in partnership with the two respondents and one Alan Hatley, as chartered quantity surveyors under the style of "Hocking, Casting & Partners". Then, in 1983, the applicant resigned from the partnership, and the remaining

1984 (2) ZLR p232

REYNOLDS J

partners carried on practising under the style of Casting, Hatley & Rigby.

Following the dissolution, it was agreed that the assets of the former partnership, which included work in progress, should be divided in accordance with the share held by each partner in the partnership. This division has not yet been completed. There is a dispute between the parties as to what arrangements were made regarding the files and records of the former practice. The applicant, on the one hand, alleges that it was agreed that former partners would have free access to those files and records which were kept at the offices occupied by the respondents. The respondents, on the other hand, state that the agreement was that the applicant would have access only to all the work in progress files which he was handling at the time. Whatever the true nature of the agreement was, however, it is apparent that discord arose in regard to the applicant's access to and use of the records concerned, and it is for this reason that the application has been brought for a definitive ruling on the matter.

That the applicant has just as much right to these records as do the respondents is, in my view, clear. On the dissolution of a partnership, the former partners all have exactly the same rights. This is, of course, subject to any agreement to the contrary.

In *Romersa v Buch* 1917 TED 266, a case which concerned a similar application to the present one but relating to books of account, DE VILLIERS JP at 270 approved the following statement of the law:

"... a partner is *prima facie* entitled to a full investigation of the partnership books. He has an equal right to them with every other partner; they are as much his as theirs . . ."

The same right would apply to books of record compiled during the subsistence of the partnership. In Bamford's *The Law of Partnerships & Voluntary Associations in South Africa*, 3 ed, the learned author sums up the law on this point as follows:

"No partner has the right to retain possession of any of the partnership assests, nor to dispossess co-partners of partnership property. "

Failing any agreement to the contrary, therefore, the respondents would have no right to attempt to limit the applicant's rights of access to the records of the former partnership.

1984 (2) ZLR p333

REYNOLDS J

In regard to the agreement alleged by the respondents, it is common cause that the applicant had right of access to at least certain of the records. In any event, and at best for the respondent, it appears that there was, in all probability, no consensus between the parties as to any limitations attaching to the applicant's rights in this regard.

I consider that the files and documents in question may be regarded as undistributed assests of the former partnership. There has been some suggestion that a certain number of the files are the property of the client concerned, but this seems to me to be doubtful. The client would, in all probability, be entitled to request a copy of documents prepared on his behalf, and this could no doubt be supplied, but it would be very surprising if the file itself, containing all the firms's workings and documentation, could be demanded as of right.

The principles of the common law relating to the rights of partners after dissolution have been usefully summarised by JOUBERT JA in *Robson v Theron* 1978 (1) SA 841(AD). This is to the effect, as I understand it, that certain of the partnership assets may be realized by agreement in order to liquidate any partnership debts, and the remaining assets may then be distributed or divided by agreement or, if no such agreement is reached, by recourse to the Court. In cases where the division or distribution of any particular asset is not possible or practicable, then that asset may be sold by public auction-and the partners may obtain a right to bid at that auction-or the asset may be stored at any convenient situation, and each partner would retain the right of access to, and use of that asset. (See, too, *Lindley on Partnerships*, 14 ed pp 598 602).

In the present matter, a distribution of assets is to be made but has, as yet, not been completed. It appears that at present there is no intention or desire to volunteer these files and records for distribution or division, and the action relates solely to the applicant's rights of

access.

As stated above, the applicant in this case has indeed a right of access to the records in question but, in my view, this right is subject to the requirement that it must be exercised reasonably, that is that the right must be exercised in a reasonable manner, and should be in force for a reasonable period of time only. I have not been able to locate any authority where the issue of reasonableness has been raised, but I believe that, in cases such as the present one, where it is apparent that dissension exists, this is a necessary element of any Court order made.

1984 (2) ZLR p234

REYNOLDS J

In the present case, the records concerned have been housed by the respondents, at their expense, in premises that they rent. In the future the new partnership may itself change; different premises may be taken; staff changes may occur; new records may be located with the Old, or new work done on the old files; and a variety of circumstances may develop which would make it most inconvenient and undesirable for the applicant to have direct and uninhibited access to the respondents' records rooms. For this reason it is necessary to govern the right that he enjoys to a certain extent.

As to the duration of the applicant's right of access, the cases do not appear to limit the period during which access may be allowed, although the point does not appear to have been specifically raised. In those matters which deal with books of account, there would probably be no difficulty, for once the books have been inspected, or audited, the need for further access would, in all likelihood, fall away. But in the present case, and in similar matters that might concern records maintained by other professional partnerships, for example, to make an order that access should be allowed without any limitation would, in my opinion, be unreasonable and inequitable, and probably impracticable. Mr *Venturas*, for the applicant, has recognised this, and has submitted that a period of five years would be appropriate. I agree with this.

In the result the following order is made:

- (1) That the applicant is entitled, on written request by him, to have access to or to be supplied with named files or records which were compiled during the existence of the former partnership and which are presently in the possession of the respondents.
- (2) That respondents afford such access or provide such records at their business premises not later than one day after the receipt of such request.
- (3) That respondents are interdicted from destroying or otherwise disposing of any of the records in question.
- (4) That the applicant is entitled to examine the documents concerned for a period of not more than seven days, and shall then return them in the same order to the respondents' business premises.
- (5) That this order shall apply for a period of five years from the date of this judgment, subject

to any earlier sale, division or distribution of the said records.

1984 (2) ZLR p235

REYNOLDS J

There will be no order as to costs.

Byron Venturas & Partners, legal practitioners for the applicant.

Stumbles & Rowe, legal practitioners for the respondents.

Endnotes

1 (Popup - Popup)

* ZANLA was the armed wing of the political party headed by Mr Robert Mugabe (later Prime Minister of Zimbabwe)- ED.

2 (Popup - Popup)

See p129 of this volume. - ED.