

S v HARTLEBURY & ANOR 1985 (1) ZLR 1 (HC)

Court High Court, Harare

McNally J and Assessors

Criminal Trial

24 January 1983

Flynote

Criminal procedure - conduct of trial - discharge at close of State case - test - discretion of court to refuse discharge despite lack of evidence.

Evidence - inferences - must be positive proved facts from which inference can be drawn - judicial notice - enemy - need for evidence to establish foreign state an enemy.

Legislation - Official Secrets Act [Chapter 97] s 3(c)(ii) - communication of information useful to an enemy - elements of offence whether necessary to prove that State to which information was communicated was an enemy - how fact that State is an enemy may be established.

Headnote

There will be a basis for ordering the discharge of an accused at the close of the State case where (a) there is no evidence to prove an essential element of the offence; (b) there is no evidence on which a reasonable court might convict; (c) the evidence adduced by the prosecution is so discredited or manifestly unreliable that no reasonable court could safely act upon it.

Quaere: Whether the court has a discretion to put the accused on his defence, despite the lack of reliable evidence, where there is a possibility that the State evidence may be strengthened during the course of the defence.

Where the State seeks to rely on inferences drawn from circumstantial evidence it is necessary that objective facts giving rise to the inference be established.

A court cannot take judicial notice of facts which are properly within the sphere of the Executive. If the State requires a finding that a certain foreign country is an enemy then a certificate from the appropriate Minister must be produced and will be conclusive proof of such fact.

McNALLY J

Cases cited:

R v Mgoomezulu 1955 (3) SA 557 (D)

R v Kritzinger & Ors 1952 (2) SA 401 (W)

S v Heller & Anor (2) 1964 (1) SA 524 (W)

S v Ostilly & Ors 1977 (2) SA 104 (D)

S v Cooper & Ors 1976 (2) SA 875 (T)

A Chigovera for the State

AP de Bourbon for the defence

Judgment

McNally J: At the conclusion of the State case I have been asked by Mr *de Bourbon* to discharge both accused on count 1. The classical test by which to judge such an application is to ask: Is there evidence before the court on which a reasonable court might convict the accused? If there is, then the accused must be invited to put forward their defence. If they close their case without further ado then the question changes because the court will also take into account the fact that they have not chosen to answer the allegations. It is thus sometimes said that the State must at least establish a *prima facie* case.

LORD PARKER, the Chief Justice of England, issued a practice note which is to be found at page 448 of the 1962 All England Law Reports, volume 1. There he said, *inter alia*:

Without attempting to lay down any principle of law, we think that as a matter of practice justices should be guided by the following considerations.

A submission that there is no case to answer may properly be made and upheld: (a) where there has been no evidence to prove an essential element in the alleged offence; (b) where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

Apart from these two situations the tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it . . .

The decision on this matter is a decision of law and thus one to be made by the Judge alone, and here I refer to the case of *R v Mgoomezulu* 1955 (3) SA

1985 (1) ZLR p3

McNALLY J

557 (D). The criteria to be used in Roman Dutch Law are set out generally by Lonsdale and Kembo in *South African Criminal Law and Procedure*, vol 5, at pp 517 to 521. In our law the

matter is set out as follows in s 188(3) of the Criminal Procedure and Evidence Act [Chapter 59]:

If at the close of the case for the prosecution the court considers that there is no evidence that the accused committed the offence charged in the indictment, summons or charge or any other offence of which he might be convicted thereon, it may return a verdict of not guilty.

There are two phrases in that section which require brief analysis. The phrase "no evidence" has generally been taken to mean one or other of three things: (a) where there is no evidence to prove an essential element in the charge or (b) where there is no evidence upon which a reasonable man might convict or (c) where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable court could safely convict upon it. It will be seen that these three correspond very closely to LORD PARKER'S criteria.

Secondly, there has been some dispute about what is meant by the word "may" in the phrase "the court may return a verdict of not guilty". On the one hand stand the majority of Judges who say that "may" means no more than "is empowered to", so that the court will, unless there is serious reason to the contrary, discharge the accused if there is no evidence in the State case on which a reasonable court might convict. On the other hand, there is the view of ROPER J in *R v Kritzinger & Ors* 1952 (2) SA 401 (W), which has often been criticised but never been overruled, that if at the close of the State case the Judge has reason to suppose that the inadequate evidence for the State might be supplemented by defence evidence he could purposely refrain from exercising his discretion in favour of the accused. I propose to adopt the approach of TROLLIP J in the *S v Heller & Anor* (2) 1964 (1) SA 524 (W) at 542, which he sets out as follows:

The decisions are conflicting as to whether the court is obliged, or has a discretion, under section 157(3) of the Code to discharge an accused on a count on which it finds that there is at the end of the case for the prosecution no *prima facie* proof of the commission of any offence. I shall assume that the Court has a discretion. Generally, that discretion should be exercised in favour of the accused and his discharge should only be refused in exceptional circumstances . . . According to *R v Kritzinger* 1952 (2) SA 401 (W) at p 406 (ROPER J), the Court is entitled

1985 (1) ZLR p4

McNALLY J

to refuse to discharge if it considers that there is 'a possibility' that the case for the State may be strengthened by evidence emerging during the course of the defence.

I have some doubt about the correctness of that view, but I shall assume, without deciding, that such a 'possibility' does constitute an exceptional circumstance.

I, therefore, propose to consider the matter on the basis which takes into account the view of ROPER J, the minority view to which I have referred. In other words, without accepting that the approach of ROPER J is correct, I shall follow that approach and will consider the possibility that the accused may strengthen the State case when they give evidence, if they give evidence. I shall also be guided by the words of KUMLEBEN J, in *S v Ostilly & Ors* 1977 (2) SA 104 (D) at 106, where he says:

In an application of this nature it is generally accepted that the test to be applied is 'whether or not there is any evidence of the commission of the offence upon which a reasonable man might convict the accused', (and then

he cites *S v Heller*). The court, however, has a discretion and may refuse to grant the application notwithstanding the fact that the evidence adduced by the State fails to satisfy this test (cf *R v Herholdt & Ors* (3) 1956 (2) SA 722 (W)). However, in *R v Mall & Ors* (1) 1960 (2) SA 340 (N) it was stressed that this is a discretion which is to be judicially exercised. It follows, in my view, that if there is no evidence which might reasonably lead to a conviction sound reasons must exist for nevertheless not granting the application . . . The considerations to be taken into account cannot be - and ought not to be - circumscribed but, particularly in a trial of long duration and of some complexity with a number of accused involved, the interests of the accused are factors to be taken into account together with all other relevant circumstances in deciding which course will best serve the ends of justice.

and then I pass on, without reading the whole of this extract, to a later passage where he says, and I think this is relevant to this case, at page 107B:

As will be seen, when I turn to consider the facts, the evidence tendered by the State on disputed issues is largely circumstantial. With reference to such evidence, one must consider at this stage whether a reasonable man might, not should, draw the inference sought to be drawn by the State. I respectfully agree with the reasoning and observations in the

1985 (1) ZLR p5

McNALLY J

recent case of *S v Cooper & Ors* 1976 (2) SA 875 (T) at pp 888-890 on this question and with the concluding remark that:

if there is more than one inference possible from the facts assumed to be uncontradicted at the close of the case for the prosecution then that is just the sort of evidence that should be referred to the triers of fact for decision.

Having considered the proper approach to be adopted, I now turn to consider the allegations in the indictment. These read as follows: The accused are both and each or one or either of them guilty, it is alleged, of contravening s 3(c)(ii) of the Official Secrets Act [*Chapter 97*], in that on divers occasions during a period extending between the 1st of March, 1980, and the 31st of December, 1981, and at or near Harare aforesaid the accused did both and each or one or other of them wrongfully, unlawfully and for a purpose prejudicial to the safety or interests of Zimbabwe communicate to certain persons articles, documents and other information which were calculated to be or which might or were intended to be useful directly or indirectly to an enemy, that is to say, (and this is the main body of the charge), did communicate to certain agents of a foreign country a UHF radio operating on secret frequencies and intelligence obtained in the course of their work as officers of the Central Intelligence Organisation of Zimbabwe in connection with the security of the State and matters incidental thereto and thus the accused did both and each or one or other of them commit the crime, etc.

And I repeat the main body of this charge because it is to this main body that the evidence must be relevant. The main body is that they did communicate to certain agents of a foreign country a UHF radio, operating on secret frequencies, and intelligence.

The section itself is also worth citing: the Official Secrets Act [*Chapter 97*], s 3(c)(ii), reads as follows:

Any person who for any purpose prejudicial to the safety or interests of Zimbabwe - . . .

(c) obtains, collects, records, publishes or communicates to any person - . . .

- (ii) any model, article, document or other information which is calculated to be or which might or is intended to be useful, directly or indirectly, to an enemy;

shall be guilty of an offence. . .

1985 (1) ZLR p6

McNALLY J

Now, what is the evidence against the accused? The evidence was listed by Mr *Chigovera* in his address as follows: (1) That there is a photograph of accused no.2 taken by the police while he was in custody showing him standing outside a block of flats in which a person connected with South African Military Intelligence once lived.

This evidence is contained in photograph E7 in exhibit CC. It is a photograph which simply shows accused 2 standing with three other persons and although one cannot see the handcuffs, it is apparent from the other pictures that he was handcuffed to one of these three persons in what looks like a garage of a block of flats. I spell this evidence out in some detail because it is a question that has been put to this court or to me particularly as to what inference is to be drawn from that photograph, bearing in mind that any statement which might have accompanied the photograph is not in evidence before me and so I simply have a photograph of accused 2 with three apparent policemen standing outside a block of flats and I have the evidence that in one of the flats there was a South African Military Intelligence officer at one time.

The second piece of evidence to which Mr *Chigovera* has drawn attention is the existence of the passports of both accused which I have before me as exhibits, which show that they visited South Africa in 1980 and in 1981 and, according to Mr *Chigovera*, although I am not absolutely convinced that this is correct but I do not think it makes a great deal of difference, it can be seen from the entries in these passports, not only that they visited South Africa, but that they did not spend any money down there. As I say, I am not certain that that is correct, though I find these entries a little difficult to follow. Bear in mind, therefore, that that evidence has to be considered in relation to a charge that the accused communicated information to persons in Harare.

Thirdly, there is the evidence that accused 2 paid \$3 000 in cash for a motor vehicle, whether as complete payment or part payment I am not sure, and that evidence I am asked to consider and I repeat it, in connection with an allegation that the accused communicated information to an agent of a foreign government.

Fourthly, that accused 1 had in his possession a lock-gun, which as a member of CIO he might be expected to have, but which Mr X in evidence did not think was issued to him.

Fifthly, although I am not sure that this was mentioned by Mr *Chigovera*, that accused 1 had a camera with a micro-lens which, on the expert evidence led

1985 (1) ZLR p7

McNALLY J

by the State, any amateur photographer might be expected to have. The camera with or without the lens could take photographs of documents, but neither the camera nor the lens could be said to be specially adapted or suitable for taking photographs of documents.

Now, all this evidence may be described as "circumstantial evidence". As regards the inferences to be drawn from such evidence, I have accepted that one must ask oneself whether a reasonable man might draw the inferences sought to be drawn by the State and it is perhaps useful in this connection to cite the remarks made in *S v Cooper & Ors* 1976 (2) SA 875 (T) at 888H to 889C as follows:

When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, a method of inference fails and what is left is mere speculation or conjecture...One often gets cases where the facts proved in evidence - the primary facts - are such that the tribunal of fact can legitimately draw from them an inference one way or the other, or, equally legitimately, refuse to draw any inference at all. But that does not mean that when it does draw an inference it is making a guess. It is only making a guess if it draws an inference which cannot legitimately be drawn; that is to say if it is an inference which no reasonable man could draw.

Now, I am fully aware that this passage refers to the attitude of the triers of fact, which means the attitude of the full court. What I am required to determine is whether there is any possibility that any reasonable court could draw the inferences which the prosecution seeks to be drawn from the facts that I have just outlined. It seems to me that no reasonable person could possibly draw inferences of any kind or any relevant kind from the evidence I have referred to and it seems to me to be beyond a shadow of doubt that one can only speculate. To establish this it is necessary to go back to the allegations in the indictment. The essential elements in that indictment, as I have already indicated, apart from the time and the place, are first, that the accused communicated. Secondly, that they communicated to certain agents

1985 (1) ZLR p8

McNALLY J

of a foreign country. Thirdly, that they communicated a UHF radio and fourthly, that they communicated intelligence. Those are the four essential facts which the State is required to prove in this case and it must, I think, be evident that there is no evidence whatsoever before the court to substantiate any of these allegations.

I will not go through all the facts, but just by way of example, one cannot by any stretch of the imagination infer from the facts that a man possesses \$3 000, that he has communicated intelligence to South African agents. It is not even a possible inference. The most that one can say is that it is not inconsistent with the allegation. It is not impossible that a man who possesses \$3 000 might have communicated information to the enemy, but that is as much as one can say and one could make the same analysis of the other factual evidence that is before the court. In other words, one can say the fact that a man has visited South Africa, whether or not he spent money while he was down there, cannot in any possible way suggest that that man has communicated information or a UHF radio to a South African agent. It simply has no

connection whatever and the same with the fact that a man stands in police company outside a block of flats in which a South African agent at one time lived and so on.

From a picture of a man in police custody outside a block of flats, one can infer perhaps that the police suspect him of some offence connected with that place and one can go further perhaps and infer on the evidence that they suspect him of an offence related to that place and connected with the fact that a South African Military official or Military Intelligence official lived in that place. So far one can draw reasonable inferences, but beyond that is absolute and pure speculation.

And so one goes on through the list of facts proved by the State. It is not a possible inference from any one of those facts or from all of those facts taken together that the accused are guilty of this offence. No reasonable man, no reasonable assessor could possibly consider otherwise. There is no reasonable possibility that the accused in evidence could alter this situation because even if the court were to find them to be unmitigated liars at the end of their evidence, the commission of the offence charged would not be proved.

I would like to clarify one point before I conclude. The section makes it an offence and I will quote only the part of the section relevant to the charge: to communicate to any "person information which is calculated to be or which might or is intended to be useful directly or indirectly to an enemy." It does

1985 (1) ZLR p9

McNALLY J

not seem to me, although I make no ruling on the point, that it is necessary for the State to prove that any particular State is an enemy. The offence is committed by communicating to any person information which might be useful to an enemy. It is, of course, necessary to prove that this was done "for a purpose prejudicial to the safety or interests of Zimbabwe" and to prove this purpose the State may seek to prove that the person receiving the information worked for an enemy of Zimbabwe. In this context I think it is necessary to spell out, for the benefit of the prosecution, the law of this country in this regard. The prosecutor has invited this court, without leading any evidence at all on the subject to take judicial notice of the fact that South Africa is an enemy. Without clarification, it may seem to persons who are unfamiliar with the law that the court is either so stupid that it does not realise South Africa is an enemy or so perverse that it refuses to accept that South Africa is an enemy. The clear and established legal situation is that the courts acknowledge the superior authority of the Executive in this matter and do not take judicial notice of facts which are properly within this sphere of the Executive. It might well embarrass the government of Zimbabwe if a court were to make a finding that one country or another is an enemy. If the prosecutor requires such a finding, the proper procedure is for him to obtain a certificate from the appropriate Minister and place it before the court. Such a certificate will be regarded by the court as conclusive. It is not a matter of evidence. It is not a matter for cross-examination. It is accepted as conclusive. I refer in this connection, without reading the relevant extracts, to Hoffman and Zeffertt, *South African Law of Evidence*, 3rd Ed, pp 324-325 and Phipson, *The Law of Evidence*, 13th Ed, para 2-14. I recommend a study of these paragraphs to the prosecutor in case such a situation should occur again.

In conclusion, therefore, I have not the slightest doubt that there is no evidence before the court that the accused committed the offence specified in count 1. Indeed, I find it somewhat surprising that the State has persisted with the charge in the light of my ruling last month.

Accordingly, in the proper exercise of my discretion, the court returns a verdict of not guilty in respect of both accused on this count.

1985 (1) ZLR p10

LAUBSCHER v NATIONAL FOODS LTD 1985 (1) ZLR 10 (HC)

Court High Court, Harare

Reynolds J

Civil Trial

22 November 1984

Flynote

Evidence - similar fact evidence - principles relating to the admissibility of - broad test of admissibility - similar facts must bear a striking resemblance to the case in hand before similar fact evidence is admitted - similarity of conditions applicable in each case have to be satisfactorily established.

Headnote

It has been widely accepted that a broad test of the admissibility of similar fact evidence is that the similar facts must bear a striking resemblance to the case in hand. It is not possible to suggest a precise formulation of the "similar fact" rule but, in essence, subject to certain exceptions, similar fact evidence is generally admissible if it is relevant to the question in issue but it will be excluded if it proves only disposition or a mere general similarity. Before similar fact evidence can be admitted, the similarity of conditions applicable in each case would have to be satisfactorily established. A foundation for leading the similar fact evidence sought must be laid. If this is not done a case could become protracted and a number of collateral issues could be raised by admission of the similar fact evidence sought, which might in the long run have no bearing on the case at all.

Cases cited:

R v Kilbourne [1973] AC 729

R v Inder (1978) 67 Cr App R 143

Mood Music Publishing Company Limited v De Wolfe Ltd [1976] 1 All ER 763 (CA)

1985 (1) ZLR p11

REYNOLDS J

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 SC 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 sustained in his pig-farming operations through feeding his animals with 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, *R v Kilbourne* [1973] AC 729, and *R v Inder* [1978] 67 Cr App R143. 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 Company Limited 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, similar fact evidence is generally admissible if it is relevant to the question in issue, but it will be excluded if it proves only disposition or a mere general

1985 (1) ZLR p12

REYNOLDS J

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.

A number of cases has been referred to. I consider two of these to be particularly pertinent to the present matter. These are the two 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, *The Law of Evidence* at para 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 that 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 Hazen's farm were similar to those on the plaintiff's 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,

1985 (1) ZLR p13

REYNOLDS J

the same extensive examination would prove necessary in 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 clear, 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

1985 (1) ZLR p14

S v NGWEDZI 1985 (1) ZLR 14 (HC)

Court **High Court, Harare**

Smith J

Criminal Review

9 January 1985

Flynote

Criminal Law - statutes - Parks and Wild Life (General) Regulations, 1981 (SI 900 of 1981) - s 62(1)(c) "carry on the business of buying and selling raw ivory except in accordance with the terms and conditions of an ivory dealer's licence issued in terms of section 63" - what constitutes - prohibition in s 62 is directed at dealers - persons involved in isolated transactions of buying and selling trophies or ivory - offence in terms of s 47(3) of the Parks and Wild Life Act, 1975 (No. 14 of 1975).

Headnote

In terms of s 62(1)(c) of the Parks and Wild Life (General) Regulations, 1981 (SI 900 of 1981), "to carry on the business of buying and selling raw ivory except in accordance with the terms and conditions of an ivory dealer's licence issued in terms of section 63" requires a joint relation of persons for the common purpose of performing jointly a succession of acts, and not where the relation exists for a purpose which is to be completed by the performance of one act. An isolated transaction can never amount to carrying on a trade or business unless the transaction was the first in a series of intended transactions or the first act to carry on similar acts if the opportunity arises. The prohibition in s 62 is directed against dealers and not against persons who engage in isolated transactions in buying or selling trophies or ivory. A person involved in a single transaction of buying or selling trophies has committed an offence in terms of s 47(3) of the Parks and Wild Life Act, 1975.

SMITH J

Cases cited:

Modderfontein Deep Levels & Anor v Feinstein 1920 TPD 290

R v Manson 1938 TPD 63

S v P 1970 (1) RLR 82

R v Kukard (1904) 21 SC 189

R v Jutzen 1933 CPD 497

R v Ebrahim 1949 (1) PH K 18

R v Rosslee 1940 SR 146

Judgment

Smith J: The accused was charged with contravening s 62(1)(c) of the Parks and Wild Life (General) Regulations, 1981 (SI 900 of 1981). The said paragraph (c) provides that:

... no person shall carry on the business of buying and selling any raw ivory except in accordance with the terms and conditions of an ivory dealer's licence issued in terms of section 63.

The accused pleaded guilty. He admitted that he had purchased two elephant tusks and then later sold them to two members of the Police Force. He was duly convicted and sentenced to pay a fine of \$300 or, in default of payment, to undergo three months' imprisonment with labour.

I was not satisfied that the accused had been properly convicted, since it did not appear to me that he was carrying on the business of buying and selling raw ivory. I referred the matter to the Attorney-General for his views and he replied as follows:

According to Halsbury's *Laws of England*, 3rd Ed vol 6 p 84, 'carrying on business only exists where there is a joint relation of persons for the common purpose of performing jointly, **a succession of acts**, and not where the relation exists for a purpose which is to be completed by the performance of one act...'. This definition has been given general judicial recognition - see, for instance, WESSELS J in *Modderfontein Deep Levels & Anor v Feinstein* 1920 TPD 290 at p 290, quoted with approval in *R v Manson* 1938 TPD 63 at p 64-65, and *S v P* 1970 (1) RLR 82 at p 83-84 where GOLDIN J, relying on *inter alia* *R v Kukard*, (1904) 21 SC 189, *R v Jutzen* 1933 CPD 497, *R v Ebrahim* 1949 1 PH K 18, stated: 'There are decided cases in which it was held that an isolated transaction can never be carrying on a trade or business ...' unless the transaction was '... the first in a series of intended transactions or the first act to carry on similar acts if the opportunity arises ...' It seems

SMITH J

established, therefore, that 'carry in on a business' requires continuity of action, or at least, an intention to continue such action. On the basis of decided cases, therefore, I respectfully agree with the Hon Mr JUSTICE SMITH, that the accused in this particular case cannot be regarded as 'carrying on the business' on the basis of

his single transaction. With respect, however, the matter does not end there.

Unfortunately, the accused was charged under s 62 of SI 900 of 1981. Section 62 would appear to apply to **Trophy Dealers**, as the title to the section suggests. A 'dealer' is defined in s 52 as '(a) a trophy dealer or (b) an ivory dealer or (c) an ivory manufacturer . . .'. And the prohibition is against the business of buying and selling trophies and ivory **except in accordance with the terms and conditions** of a dealer's licence issued in terms of s 63. It seems clear to me that the prohibition in s 62 is directed against **dealers** and not against persons who have isolated transactions in buying or selling trophies or ivory. (See, for instance, *R v Rosslee* 1940 SR 146 at p 147). Section 62, in my respectful submission, is intended to control and regulate the buying and selling of trophies and ivory by licensed dealers - in other words, dealers would have to conduct their business **in accordance** with the terms and conditions of licences issued under s 63. And the terms and conditions of a dealer's licence are set out in s 65. As there is no evidence that the accused in the instant case is a licensed dealer, he cannot be said to have contravened s 62, which, in my respectful view, is a section directed against only licensed dealers. Section 62(1)(c), in fact, does not prohibit the buying and selling of raw ivory except under licence, but the buying and selling of raw ivory except in accordance with the terms and conditions of an ivory dealer's licence issued in terms of s 63. A section 62 offence, in my respectful submission, may only be committed by a licensed trophy dealer, a licensed ivory manufacturer or a licensed ivory dealer. However, this is not to say that the accused has not committed any offence. Section 47(3) of the Parks and Wild Life Act No. 14 of 1975, as amended by section 7 of the Parks and Wild Life Amendment Act No. 19 of 1978, specifically prohibits the selling of 'any live animal or the trophy of any animal . . . 'except in terms of a permit issued in terms of s 65. And subsection (5) of this section 47 makes it an offence to contravene the provisions of subsection (3) of section 47. It is clear, therefore, that, since there is no evidence that the accused was in possession of a permit to sell any live animal or the trophy of an animal, he should have been charged with and convicted of a contravention of s 47(3) of the Act as amended. In my respectful submission, there can be no prejudice to the accused, on

1985 (1) ZLR p17

SMITH J

the basis of the facts and his plea, if the correct section of the Act, ie c/s 47(3) of the Parks and Wild Life Act, 1975 (No.14 of 1975), is substituted.

I am indebted to the Attorney-General for the research he has conducted. I agree with his submissions and accordingly the conviction is set aside and the following is substituted:

The accused is convicted of contravening section 47(3) of the Parks and Wild Life Act, 1975.

The alteration of the conviction does not, in my view, necessitate any variation in the sentence imposed, ie a fine of \$300, or the order of forfeiture of the tusks.

Ebrahim J agrees.

1985 (1) ZLR p18

BARKER McCORMAC (PVT) LTD v GOVERNMENT OF KENYA 1985 (1) ZLR 18 (HC)

Court High Court, Harare

Samatta J

Civil Trial

15, 16 October 1984 and 16 January 1985

Flynote

Sovereign immunity - doctrine of applied in international law - restricted immunity - part of the law of Zimbabwe
- exact bounds of restricted immunity - only accords immunity to *acta jure imperii*.

Landlord and tenant - lease - not broken by a sale.

Headnote

The nature of the doctrine of sovereign immunity is a question of international law and international law is part of the law of Zimbabwe. The doctrine of restricted sovereign immunity applies to *acta jure imperii*, ie acts of purely governmental or public nature and not to *acta jure gestionis*, ie acts of a commercial or proprietary nature. The courts distinguish *acta jure imperii* from *acta jure gestionis* by referring to the nature of the State transaction or the resultant legal relationships, and not to the motive or purpose of the State activity.

Under Roman-Dutch law a sale does not break a lease, "the new owner steps into the shoes of the old owner as landlord" the provisions of the lease, express, implied or residual, remain unchanged.

Cases Cited:

Barker McCormac (Pvt) Ltd v Government of Kenya 1983 (2) RLR 72 (SC); 1983 (4) SA 817 (ZSC)

Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique 1980 (2) SA 111 (T)

Trendtex Trading Corporation Ltd v Central Bank of Nigeria [1977] 1 All ER 881 (CA)

1985 (1) ZLR p19

SAMATTA J

Hersch v Nel 1948 (3) SA 686 (A)

De Jager v Sisana 1930 AD 71

De Wet v Union Government 1934 AD 59

Creaser v Smit 1948 (4) SA 302 (T)

Shalala & Anor v Gelb 1950 (1) SA 851 (C)

Scrooby v Gordon & Co 1904 TS 937

I Congreso del Partido [1981] 1 All ER 1064 (HL)

Alfred Dunhill of London Inc. v Republic of Cuba et al 425 US 682, 48 Ed 2d 301, 96 S Ct 1954

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

I Congreso del Partido [1981] 2 All ER 1092

Etat Espagnol v Societe Anonyme de l'Hotel George V (1970) 52 ILR 317

A P de Bourbon SC for the plaintiff

H P Mkushi for the defendant

Judgment

Samatta J: This case raises some interesting points of law relating to the doctrine of sovereign immunity. Before the Second World War nearly all States treated sovereign immunity as being absolute, regardless of the circumstances of the subject matter. Since then, however, many States have abandoned the classical or absolute theory of immunity and embraced the restrictive theory under which immunity is granted only with respect of causes of action arising out of a foreign State's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. Which of these two theories forms part of the law of this country? If it is the restrictive theory, is the defendant's plea of jurisdictional immunity sustainable in law? The case, I am happy to say, has been so admirably argued that I have had all the assistance I am entitled to expect from the Bar. In the course of argument, counsel referred to a large number of authorities. Although I have considered all the cases referred to, I need only make specific reference to some of them.

The facts of the case need not be stated in detail as most of them are set at 1983 (1) ZLR 137 and 1983 (4) SA 817. They are as follows. In May 1976 the plaintiff and a company known as "Albemarle (Private) Limited" entered into a lease whereby the former leased from the latter a portion of immovable property situated at 95 Park Lane, Harare, hereinafter referred to as "the property". The duration of the lease was five years, but there was a provision granting the plaintiff an option to renew the lease. The provision was couched in the following language:

1985 (1) ZLR p20

SAMATTA J

... the Lessee shall have the option to renew its lease upon the premises for a further period of THREE years after the termination hereof, provided that the Lessee shall exercise its option by written communication addressed to the Lessor at the *domicilium citandi et executandi* referred to in this Agreement by not later than the 31st day of December 1980...

The lease was deemed to have come into force on 1 April 1976, when the plaintiff occupied the premises in question. In or about May 1980 the Government of Kenya (the defendant), a foreign sovereign government, bought the property for the purpose of using it as its High Commission in Zimbabwe. The plaintiff continued occupying the leased premises until September 1982, when it unwillingly moved out. Between May 1980 and November 1981 it paid rentals to Fox & Carney (Pvt) Ltd, a company appointed by the defendant as its agent. On 30 October 1981, however, the defendant's attorneys wrote to the plaintiff's attorneys in the following terms:

We have been instructed by our Client that henceforward, all rentals due by your Client, which rentals are received without prejudice by our Client, should be paid direct to our Client for the attention of Mr WK Karisa, and

not to Fox and Carney ...

Furthermore, we would advise that any complaints or queries from your Client relating to their occupancy of the building should be directed to our Client, once again for the attention of Mr Karisa.

The defendant's attorneys had, on 29 May 1980, written to the plaintiff in the following terms:

We refer to the recent discussion at your offices with the writer and Mr Adala, representing the Government of Kenya. The property known as Barker McCormac House is about to be transferred to the Government of the Republic of Kenya who has requested us to confirm that on completion of the period of your lease you will not be exercising the right of renewal thereof as verbally confirmed to us at our said interview. Notwithstanding the above the Kenyan Government has indicated that it may be prepared to re-negotiate the lease with you once it has assessed its own requirements with regard to office/floor space.

In its reply the plaintiff denied that an undertaking that it was not going to

1985 (1) ZLR p21

SAMATTA J

exercise the option of renewal had been made. On 2 October 1980, it formally informed Albemarle (Pvt) Ltd, as well as the defendant, that it wished to renew the lease, but the defendant would not allow it to continue occupying the leased premises. In September 1982, after failing to persuade the defendant to change its mind, the plaintiff vacated the premises and leased other premises in the city at a higher rental. About four months later it commenced civil proceedings against the defendant before this court to recover the sum of \$55 691,35, being the difference in the rental. When the Sheriff attempted to serve the summons and declaration, an official of the defendant's High Commission refused to accept the service and would not allow the Sheriff to enter the premises. The plaintiff was not to be deterred by this development in its quest for justice. It applied, under O 6 R 46 of the High Court of Zimbabwe Rules, 1971, for substituted service by affixing the summons and declaration to the gate of the High Commission. Following an order made by McNALLY J (as he then was), the application was set down for hearing. It was heard by WADDINGTON J (as he then was). The learned Judge dismissed it, holding *inter alia*, that, assuming that the restrictive doctrine of sovereign immunity formed part of our law, the purchase of the property by the defendant for the purpose of setting up its High Commission was an act *jure imperii* and, therefore, the defendant could not against its will be made a party to legal proceedings in municipal courts of Zimbabwe. The plaintiff appealed against this decision to the Supreme Court. The appeal was allowed, the Court holding, *inter alia*, that it appeared "at least arguable that on an application of the restrictive doctrine the claim might not be regarded as one in regard to which immunity could successfully be raised." (See *Barker McCormac (Pvt) Ltd v Government of Kenya* 1983 (2) RLR 72 (SC) at 81H; 983 (4) SA 817 (ZSC) at 823C.) Leave was granted to the plaintiff to effect service by the dispatch of copies of the summons and declaration to the defendant at 95 Park Lane, Harare, by registered mail. Service by this method was finally effected. In response to it the defendant filed an unconditional notice of appearance to defend, and later filed a special plea in bar to jurisdiction, and refused to plead to the merits. On 8 September, however, it requested further particulars on the merits and, after receiving them, filed a plea in which the merits of the dispute were dealt with. It also filed a claim in reconvention. Following a request for further particulars by the plaintiff, the defendant applied for, and was granted, leave to withdraw the plea to the

merits as well as its claim in reconvention.

The plaintiff adduced evidence from its Director of Production, Mr Roland Smith, on the preliminary issue. His testimony was substantially to the effect that before the plaintiff vacated the leased premises the relationship between

1985 (1) ZLR p22

SAMATTA J

it and the defendant was one of landlord and tenant.

Having outlined the facts, I turn now to the submissions. Mr *Mkushi*, for the defendant, contended with a degree of plausibility that although in South African law the doctrine of absolute sovereign immunity has yielded to the restrictive doctrine, the former doctrine remains part of the law of Zimbabwe. In a recent South African case - *Inter-Science Research & Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) - it was held by MARGO J, with whom FRANKLIN and PREISS JJ concurred, that the absolute doctrine had ceased to be part of the South African law. In the course of his judgment, the learned Judge said at 119B-C:

The first step in the inquiry is whether we should apply the absolute or the restrictive doctrine. There is an abundance of South African judicial authority, extending to recent times, in support of the absolute doctrine.

The learned Judge went on to review some of the authorities, and then said at 120C-E:

On the other hand, there is good reason to believe that the rule of sovereign immunity in international law has undergone an important change, and that the old doctrine of absolute immunity has yielded to the restrictive doctrine in which immunity is denied in respect of *acta jure gestionis* involving commercial transactions. The justification for the modern rejection of absolute immunity is two-fold. Firstly, the old-style sovereigns wielding power by acts of State, but rarely descending into commercial intercourse in foreign lands, enjoyed absolute immunity because what they did was regarded as *acta jure imperii*; but they have given way to modern governments, regularly contracting at home and abroad, and often engaged in international trading through state-owned or state-controlled corporations. Secondly, justice to the other parties involved demands that the sovereign who chooses to enter the market-places and to engage in trading operations in other countries should be held to his bargains and to his obligations.

Mr *Mkushi* submitted that the change in the South African law could not, and did not, affect our law. The sheet-anchor of his submission is s 89 of the Constitution of Zimbabwe. As amended by s 13 of the Constitution of Zimbabwe Amendment (No. 2) Act, 1981, the section reads:

Subject to the provisions of any law for the time being in force relating

1985 (1) ZLR p23

SAMATTA J

to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891, as modified by subsequent legislation having in Zimbabwe the force of law.

While admiring the ingenuity of the contention, I find myself unable to give effect to it. It is true, of course, that the judgment of Margo J in the *Inter-Science* case makes it perfectly clear that

until recently South Africa embraced the doctrine of absolute sovereign immunity, and thus it seems indisputable that according to the law in force in the Colony of Good Hope on 10 June 1891 the doctrine had no bounds. But the decision of the Supreme Court on the plaintiff's appeal against the judgment of WADDINGTON J does, in my view, rob Mr *Mkushi's* argument of any weight it may have. One of the questions before the Supreme Court was: where does sovereign immunity begin and end? After holding that the nature of the doctrine of sovereign immunity is a question of international law and international law is part of the law of this country, the court went on to answer that question. GEORGES JA, with whom BARON ACJ and BECK JA concurred, reviewed authorities from various jurisdictions and then said:

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

(See *Barker McCormac (Pvt) Ltd v Government of Kenya* (*supra*) at 79G (821F of the South African report.))

Mr *Mkushi* recognized that he had to grapple with the Supreme Court's decision if his argument was to carry conviction. He attempted to do so by contending that by using the words "and it should be incorporated in our law" the learned Judge of Appeal was appealing to the Legislature to pass a law incorporating the doctrine of restrictive sovereign immunity and not laying down that this country embraced that doctrine. With respect to the learned advocate, I disagree. A statement in a judgment of a court of law should not be construed as if it were a provision in a statute. A judgment has to be construed as a whole, and in the light of the facts of the particular case and the issues which were to be determined by the court. It seems inconceivable that, if it entertained the view that the doctrine of absolute sovereign

1985 (1) ZLR p24

SAMATTA J

immunity formed part of the law of this country, the Supreme Court would have allowed the plaintiff's appeal and ordered substituted service. In any case, what would have prevented the court room saying that our law recognizes the doctrine of absolute sovereign immunity? I can see nothing.

Mr *Mkushi* had an alternative argument on the point. He contended that the decision of the Supreme Court was given *per incuriam*, in that it would appear that the court's attention was not drawn to the provisions of s 89 of the Constitution of Zimbabwe. Mr *de Bourbon*, for the plaintiff, submitted that it is beyond the competence of this court to refuse to follow a binding decision of the Supreme Court. It would be idle to contend, in my opinion, that the Supreme Court's decision on the appeal by the plaintiff is not binding on me. In *Trendtex Trading Corporation Ltd v Central Bank of Nigeria* [1977] 1 All ER 881 (CA), where one of the issues was whether the rule of international law that the doctrine of sovereign immunity was not applicable to the ordinary commercial transactions, as distinct from the governmental acts, of a sovereign State was part of English law, LORD DENNING MR, after he had considered authorities from various jurisdictions which demonstrated that in those respective jurisdictions the doctrine of absolute sovereign immunity had yielded to the doctrine of restrictive immunity,

said at 891:

Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, some one some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank, '... we must take the current when it serves, or lose our ventures'.

Mr *de Bourbon* said that if Mr *Mkushi's* contention prevailed, Zimbabwe would "be left behind on the bank". For the reasons I have endeavoured to give, I have no doubt that, as a result of the Supreme Court's decision, Zimbabwe is already on the other side of the river, and I have, therefore, no hesitation in holding, as I do, that Mr *Mkushi's* submission that the absolute doctrine of sovereign immunity still forms part of the law of this country is, attractive though it is, untenable in law.

Before I turn to a consideration of the question whether, applying the restrictive doctrine to the facts of the case, the plea of jurisdictional immunity

1985 (1) ZLR p25

SAMATTA J

is good in law, it is necessary to examine what relationship between the parties, if any, was created when the defendant purchased the property. Relying on *Hersch v Nel* 1948 (3) SA 686 (A), Mr *Mkushi* contended that no contractual relationship between the parties resulted from the purchase. I respectfully disagree. It is common cause between the parties that when the defendant purchased the property the lease into which the plaintiff and Albermarle (Pvt) Ltd, the former owner, had entered was still in force. Under Roman-Dutch law a sale does not break a lease; "the new owner steps into the shoes of the old owner as landlord", the provisions of the lease, express, implied or residual, remaining unchanged: see *De Jager v Sisana* 1930 AD 71; *de Wet v Union Government* 1934 AD 59; *Creeser v Smit* 1948 (4) SA 302 (T) and *Shalala & Anor v Gelb* 1950 (1) SA 851 (C). In the *Shalala* case, OGILVIE THOMPSON J, with whom STEYN J concurred, cited with approval the following passage from the judgment of MASON J in *Scrooby v Gordon & Co* 1904 TS 937:

. . . when the owner of land which has been leased sells it to someone else the purchaser takes the land subject to the lease, so that he is bound to the tenant and the tenant is bound to him in the relation of lessor and lessee.

When, in the instant case, the property was bought by the defendant, therefore, a landlord/lessor and tenant/lessee relationship was, by operation of law, created between the defendant and the plaintiff.

An option to renew is usually an important term in a lease. Like other terms, it is binding on the new owner. This is in accordance with the principle *huur gaat voor koop*. But does the purchaser have a right to reject, as the defendant purported to do in the instant case, the exercise of the right of renewal by the lessee? The answer is: "No". This was made perfectly clear by OGILVIE THOMPSON J in the *Shalala* case (*supra*) when he said at 860:

The tenant who in occupation under a lease for an initial fixed term can, by the exercise of a right of renewal contained in the lease, at his will, and irrespective of his landlord's desires in the matter, extend the duration of

his tenancy. By the unilateral act of exercising the option to renew, the tenant ensures that the duration of his lease comprehends, not merely the initial term of the lease, but the total of the initial period plus the period for which he enjoys the right of renewal.

The case of *Hersch v Nel* (*supra*), relied upon by Mr *Mkushi*, does not in my respectful view support the learned advocate's contention. The issue there

1985 (1) ZLR p26

SAMATTA J

was whether the option to purchase for cash property leased is ordinarily capable of being ceded. There are no observations in the judgments delivered in the case which lend any support to the learned advocate's contention. Upon the authorities I have cited, I would hold that the plaintiff, following the purchase of the property, became the defendant's tenant/lessee, and that the clause giving the former the right to renew the lease was binding on the defendant as the new landlord/lessor.

I have held that it is the restrictive doctrine of sovereign immunity which forms part of the law in this country. Why have many States abandoned the absolute doctrine and, like Zimbabwe, embraced the restrictive doctrine? I am inclined to think that the answer to that question is to be found in the following passage from the judgment of LORD WILBERFORCE in *I Congreso del Partido* [1981] 2 All ER 1064 (HL) at 1070g-h:

The relevant exception, or limitation, which has been engrafted on the principle of immunity of states, under the so-called restrictive theory, arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based on such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state nor any interference with its sovereign functions.

What, then are the exact bounds of the immunity? It is necessary to pose this question because Mr *Mkushi* submitted that, even on an application of the restrictive doctrine, the plea of jurisdictional immunity put forward by the defendant is valid. No authority from our jurisdiction or from South African jurisdiction directly in point was cited to me and I have been no more successful in my own researches. There are, however, some authorities from some other jurisdictions which, I think, shed some light on the problem I am now confronted with. In *Alfred Dunhill of London Inc v The Republic of Cuba* 48 L 3ed 2d 301, a case decided by the Supreme Court of the United States, and which raised, among other things, the question of the scope of immunity, Mr Justice WHITE, delivering the judgment of the Court, said at 314:

. . . the United States abandoned the absolute theory of sovereign immu-

1985 (1) ZLR p27

SAMATTA J

nity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions.

(It should be pointed out that this part of the opinion was joined only by three Justices). In *Trendtex Trading Corporation Ltd v Central Bank of Nigeria (supra)*, STEPHENSON LJ dealt with the point in this way at 899f-g:

The movement or trend of opinion towards restricting sovereign immunity is based on the distinction between ordinary trading transactions and governmental acts. The new doctrine would restrict immunity to the latter, labelled in Latin as *acta jure imperii*, and deny it to the former under the description of *acta jure gestionis*. The distinction between the two categories has been found as difficult to draw as the distinction between a state's agents who are not immune and a state's agencies which are.

I cannot resist the temptation to go back to the *I Congreso* case because there LORD WILBERFORCE made some useful observations regarding the bounds of the "defence" of sovereign immunity. He said at 1070j:

When . . . a claim is brought against a state . . . and state immunity is claimed, it is necessary to consider what the relevant act is which forms the basis of the claim: is this, under the old terminology, an act '*jure gestionis*' or is it an act '*jure imperii*', is it (to adopt the translation of these catchwords used in the Tate letter) a 'private act' or is it a 'sovereign or public act', a private act meaning in this context an act of a private law character such as a private citizen might have entered into?

These authorities demonstrate, I think, that the principle of restricted immunity only accords immunity to *acta jure imperii*, ie acts of a purely governmental or public nature, and not to *acta jure gestionis*, ie acts of a commercial or proprietary nature.

But how do courts distinguish *acta jure imperii* from *acta jure gestionis*? I think *Claim against the Empire of Iran* (1963) 45 ILR 57, a case decided by the Constitutional Court of the Federal Republic of Germany, is helpful in answering that question. Briefly, the facts of the case were as follows. A firm of builders in Cologne carried out some repairs to the central heating system in the Embassy of the Empire of Iran on the instructions of the ambassador.

1985 (1) ZLR p28

SAMATTA J

Their claim was for the cost of the repairs. The question was whether the Iranian Empire, a sovereign state, could be sued for the recovery of the money in German municipal courts. The court answered the question in the affirmative, holding that the contract for repairs was to be regarded as a non-sovereign function of the foreign State. In the course of its judgment the court said at 80:

As a means for determining between acts *jure imperii* and *jure gestionis* which demonstrated one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its foreign sovereign authority, that is in public law, or like a private person, that is in private law.

And a little later the court went on to say (at 81):

This Court has therefore examined the argument that the conclusion of the contract for repair is to be regarded as a non-sovereign function of the foreign State, and has accepted this proposition as correct. It is obvious that the conclusion of a contract of this kind does not fall within the essential sphere of State authority. It does not depend ... on whether the conclusion of the contract was necessary for the regular transaction of the Embassy's affairs and therefore stood in a recognisable relationship with the sovereign functions of the sending State. Whether a State is entitled to immunity does not depend on the purpose of the function which the foreign State is thereby

pursuing.

Both passages were cited with approval by LORD WILBDFORCE in the *I Congreso* case, where LORD BRIDGE of HARWICH said at 1082j-1083c:

It does seem to me that two propositions can be derived from the relevant authorities which may often . . . provide a useful guide in deciding whether or not a claim to sovereign immunity can be sustained. First, if a sovereign state voluntarily assumes a purely private law obligation, it cannot, when that obligation is sought to be enforced against it, claim sovereign immunity on the ground that the reason for assuming the obligation was of a sovereign or governmental character. Example: State A orders uniforms for its army from a supplier in State B; when sued for the price in the courts of State B, State A cannot claim immunity on the ground that the maintenance of its army is a sovereign function. This is really elementary. But it leads on logically to the second

1985 (1) ZLR p29

SAMATTA J

proposition that, having assumed a purely private law obligation, a sovereign state cannot justify a breach of the obligation on the ground that the reason for the breach was of a sovereign or governmental character. Example: State A, having ordered uniforms for its army from a supplier in State B, repudiates the contract; when sued in the court of State B for damages, State A cannot claim immunity on the ground that, since the placing of the contract, a government of a new political complexion has made a sovereign decision, pursuant to a policy of total disarmament, to disband the army.

It is not in dispute that the defendant purchased the property for the purpose of using it as its High Commission. Mr *Mkushi* submitted that, this having been the purpose, the purchase was an act *jure imperii*. I think this contention may well be valid, but it is not helpful to the defendant in this case as far as its plea for jurisdictional immunity is concerned. Its purchase of the property did not in any way interfere with the rights of the plaintiff as a lessee and, therefore, that act could not be the subject matter of complaint by the plaintiff. The act which forms the basis of the plaintiff's claim is the alleged breach by the defendant of the lease and not the purchase of the property. Assuming that the alleged breach did take place, it is clear that it happened because the defendant wanted to use the leased premises as part of its High Commission. Does this reason make the refusal by the defendant to allow the plaintiff to continue occupying the leased premises an act *jure imperii*? I do not think so. The purpose for which a breach is committed cannot alter its character. The defendant's act of entering into a landlord/lessor and tenant/lessee relationship with the plaintiff was, in my judgment, a non-sovereign act. The fact that the defendant found it necessary, for security or other reasons, not to have tenants in the building cannot, in my opinion, convert the non-sovereign act into a sovereign act. In *I Congreso del Partido* [1981] 1 All ER 1092, LORD DENNING MR said at 1102e-g:

... there is always some action taken or omitted by the foreign government or by one of their separate legal entities which gives rise to the dispute. Sovereign immunity depends on the nature of that action: not on the purpose or intent or motive, use whichever word you like, with which it is done. To prove this I would take the old chestnut. All the pundits say that when a government department places an order for boots for the army it is acting *jure gestionis*, not *jure imperii*; but when it places an order for guns it is *jure imperii*. I cannot accept that distinction. Suppose the navy department of a foreign government orders a helicopter for military purposes and their agriculture department orders a like

1985 (1) ZLR p30

SAMATTA J

helicopter for surveying the fields. In neither case is the foreign government entitled to sovereign immunity. The seller is not concerned with the purpose for which the helicopter is required. Likewise with a gun. The seller is not concerned whether the foreign government want it to kill an enemy or to fire a salute or to train recruits.

And in the *Trendtex* case (*supra*) SHAW LJ said at 911d-e:

. . . I should make it very clear that I regard the intrinsic nature of a transaction rather than its object as the material consideration in determining whether entering into that transaction is a commercial activity or an exercise of sovereign authority.

In his powerful submission, Mr *de Bourbon* contended that, though its factual situation could be distinguished, the case of *Etat Espagnol v Societe Anonyme de l'Hotel George V* (1970) 52 ILR 317 is very helpful in determining the preliminary issue raised by the defendant. I agree. The facts of that case can be stated briefly. The Spanish Consul General in Paris, on behalf of the Direccion General del Turismo, a department of the Spanish State connected with the Ministry of Information and Tourism, concluded a lease of premises in the city. The lease, which was approved by the Spanish Council of Ministers, was drawn up in the form of, and contained the terms and conditions usual in, a normal lease of commercial property. Three years after the lease had been entered into, the owners of the premises, the Hotel George V company, instituted proceedings in the Tribunal de Grande Instance of Paris for eviction of the Direccion General del Turismo. Intervening in the proceedings, the Spanish State claimed jurisdictional immunity. The plea failed, the court holding that the conclusion of the lease was a commercial act, governed by private law, not an act of sovereignty, and, therefore, the Spanish State was not entitled to jurisdictional immunity. Almost at the end of its judgment, the court said at 321:

We conclude from these facts that the lease, far from containing clauses which are not of private law character, reaffirms, on the contrary, all the usual stipulations. Therefore the Direccion General del Turismo contracted with the Hotel George V company in the form, in the manner and in accordance with private law, as if it had been an individual. It acted in performance of an activity which is at least in part commercial, and without recourse to the exercise of any public authority. There is no fact indicating that in so acting the department performed an act involving the sovereignty of the Spanish State.

1985 (1) ZLR p31

SAMATTA J

I have no doubt, guided, as I am, by this decision and the other authorities I have referred to, that the acts of the defendant which have given rise to the instant case were of non-sovereign character. Having reached that conclusion, I do not find it necessary to deal with Mr *de Bourbon's* not uninteresting argument that, if the defendant's plea of jurisdictional immunity is good in law, the facts of the case demonstrate that the defendant has submitted to the jurisdiction of this court, thereby waiving its immunity to the suit.

For the reasons I have given, I hold that the special plea to jurisdiction has no merit. It must be, and is, dismissed with costs.

Winterton Holmes & Hill, legal practitioners for the plaintiff

Sawyer & Mkushi, legal practitioners for the defendant

S v CHINEMO 1985 (1) ZLR 32 (HC)

Court High Court, Harare

Smith J

Criminal Review

16 January 1985

Flynote

Criminal Procedure - splitting of charges - accused charged on two counts - stock theft and contravening s 5 of the Trapping of Animals (Control) Act [Chapter 134] - arising out of same act - not improper splitting of charges.

Criminal Procedure - sentence - accused convicted to two charges - stock theft and contravening s 5 of the Trapping of Animals (Control) Act [Chapter 134] - two offences are in substance one offence - sentences should be adjusted so as to reflect their substantial identity.

Headnote

The accused was charged on two counts, one being stock theft and the other contravening s 5 of the Trapping of Animals (Control) Act [Chapter 134]. The accused had set snares and a cow had been caught in one of them.

Held that charging an accused in this manner did not amount to an improper splitting of charges and since the charges arose out of a single operation motivated by a single intention, both counts were treated as one for the purpose of sentence.

Cases cited:

R v Mukudwana 1964 RLR 237 (GD); 1964 (2) PH H187

S v Ngobese 1968 (1) PH H85

Judgment

Smith J: The accused was charged on two counts, one being stock theft and the other contravening s 5 of the Trapping of Animals (Control) Act [Chapter

SMITH J

134]. The accused admitted that he had set six wire snares on Devuli Ranch and when he went to check them he found that a cow had been caught in one of the snares. He killed the cow, which was valued at \$350, and took some of the meat to his home. He was arrested when he returned for the rest of the meat. The accused was duly convicted and sentenced, on count 1 to

30 months' imprisonment with labour, of which six months' imprisonment with labour was suspended for five years, and on count 2 to 12 months' imprisonment with labour, of which four months' imprisonment was suspended for five years. In addition, the accused was ordered to pay \$350 compensation to the manager of Devuli Ranch.

In sending the record for review the magistrate has submitted that whereas originally he felt that the accused had committed two separate offences, on reflection he considered that there had in fact been a splitting of charges and that the accused should have been convicted of the trapping of an animal.

In *R v Mukudwana* 1964 RLR 237 (GD); 1964 (2) PH H187, the accused was convicted of capturing an impala in contravention of s 16(1) as read with 16(2) of the Wild Life Conservation Act [Chapter 199 of the 1963 edition] and of using snares in the said capture in contravention of s 58(1) as read with 58(3) of the same Act. YOUNG J held that it was technically correct to charge both offences in this way in accordance with the common practice and that the two offences were in substance one offence in the circumstances set out, and that the sentences should be adjusted so as to reflect their substantial identity. A similar point was considered in *S v Ngobese* 1968 (1) PH H85. In that case the accused was convicted of two offences under the Natal Game Ordinance 1955. The first offence related to the hunting of game without a licence and the second offence related to the snaring of game in contravention of the Ordinance. In his judgment JAMES J said:

The evidence established that the accused had hunted and killed the buck referred to in the charges by means of snares and that at the time he did not have a game licence or a protected game permit entitling him to hunt protected game; nor was he in possession of a permit authorising him to hunt game by means of snares.

The judge who first considered this case on review raised the question whether there was not an improper splitting of charges and after having obtained the Magistrate's reasons referred the case to the Attorney-General for his views. The Attorney-General has now been good enough to refer the court to a number of cases on the subject and in particular to

1985 (1) ZLR p34

SMITH J

R v Khan & Ors, 1948 (4) SA 868 (54/PH H187), *R v Steenkamp & Ors* 1957 (3) SA 168 (70 PH H172) and *The State v Msimango* (Natal Review No. 2923/63 dated 17th November 1965) which support his contention that there has not been an improper splitting of charges. It seems to me that under the second count the case turns on whether the accused hunted or captured game by means of a snare at a time when he did not have a permit specifically authorising him in special circumstances to use such a device, and that the offence would be committed whether or not the accused had a game licence in terms of Section 5 of the Ordinance; and that under the first count the accused would commit an offence if he hunted game without the necessary licence regardless of the method he used to achieve his purposes. It would seem that there is a substantial difference between the ingredients of the two charges and I am accordingly disposed to agree with the Attorney-General that there has not been an improper splitting of charges in the present case.

Bearing in mind, however, that the charges which were brought against the accused arose out of a single hunting operation motivated by a single intention to kill game, it seems to me that the two offences should have been treated as one for the purposes of sentence. The Attorney-General agrees with this view.

The convictions are accordingly confirmed, but the sentences are set aside and the following

substituted:

Both counts are treated as one for the purpose of sentence. The accused is sentenced to 30 months' imprisonment with labour of which six months' imprisonment with labour is suspended for five years on condition that the accused is not convicted of an offence committed within that period, which involves the theft of stock or the illegal possession of snares, for which he is sentenced to imprisonment without the option of a fine.

Ebrahim J: agrees.

1985 (1) ZLR p35

CONTROLLER OF CUSTOMS & EXCISE v AMBERLEY ESTATE (PVT) LTD 1985 (1) ZLR 35 (HC)

Court **High Court, Harare**

Gibson J

Civil Action

2 November 1984 and 23 January 1985

Flynote

Statutes - Customs and Excise Act [Chapter 177] - s 2 - definition of "manufacture" - in relation to excise duty or surtax - whether taking equal quantities of each of three different types of wine and mixing them amounts to manufacture - whether the bottling of wine amounts to manufacture - whether disposal of wine into a consumer's container amounts to manufacture.

Headnote

In s 2 of the Customs and Excise Act [*Chapter 177*], the legislature, by adding the word "includes", wished to convey that, whatever the meaning of the word "manufacture" under the Act, the word "mixing" must be taken as meaning "manufacture". While change in the substance need not be the result, nevertheless some skill ought to have been applied to the raw material for there to be a process of manufacture. Bottling is an essential final stage in producing wine from fruit and the process of reduction of a mass volume of wine from vat to smaller container is a process of manufacture. A distinction can be drawn between bottling wine and reducing wine into whatever diverse containers the consuming public care to submit. The mere disposal of wine into a consumer's container is not a process of manufacture.

Cases cited:

Commissioner of Taxes v Processing Enterprises (Pvt) Ltd 1974 (2) RLR 220 (AD)

Secretary for Inland Revenue v Hersamar (Pty) Ltd 1967 (3) SA 177 (A)

1985 (1) ZLR p36

GIBSON J

Maurice Kantor (Pvt) Ltd v Macintyre NO & Anor 1957 (2) R & N 780 (FSC)

Vanroux Motors Bpk v Commissioner of Customs and Excise 1958 (1) SA 449 (T)

I A Donovan for the plaintiff

J C J Lewis for the defendant

Judgment

Gibson J: Plaintiff is the Controller of Customs and Excise duly appointed in terms of s 4 of the Customs and Excise Act [*Chapter 177*] as the responsible authority for the collection of excise duty payable in terms of the Act.

Defendant is a company with limited liability duly incorporated. At the material time it carried on the business of wine making at Wedza.

A dispute arises because Amberley Estate had been run for some years by Richard Holmes, Senior, now deceased - in 1980 to be precise. Sometime in 1978 Richard Holmes, Senior Director, decided to sell up the farm on which he grew oranges which were then used to manufacture wine. He retained the winery itself and the farmhouse on a lease expiring in 1982. The reason he did that was not too far to see. In the winery were wine vats, each capable of holding 500 litres of wine at a time and at the relevant time holding 42 831 litres.

Defendant company manufactured wine under seven labels, including Sun Up, Super Sun Up, Don Ric, Escorro - Sweet, Medium and Dry.

In 1966 the Government promulgated regulations suspending all duty on wines wholly produced from fruit, other than grapes, grown in the country (see RGN 130 of 1966). That position pertained until February 1981, when by SI 54 of 81 as read with 563 of 1981, the Government re-introduced the duty so that on that type of wine the tariff was 100c per litre. This was shortly afterwards altered to 55c per litre.

Thus, at the time that the defendant sold the farm, no duty was payable. Had the defendant manufactured or disposed of his wine, then he would have been free of demands by the Controller.

Unfortunately for the defendant company, the market was sluggish; not much wine could be sold, although some was being sold. Indeed, the evidence was that between 1 January 1979 and 31 January 1981, 5 169 litres

1985 (1) ZLR p37

GIBSON J

of wine were dealt with by the defendant exactly as the 27 232, the quantity on which the plaintiff claims duty. The plaintiff makes no claim on the above smaller volume of wine, for good reason. That wine was disposed of during the period of the freeze when RGN 133/66 was in force.

The plaintiff's claim is for excise duty of \$14 977,35 with interest at 10% from the date of demand, namely 5 October 1982. The claim is made because, argues the plaintiff, between 1 February 1981 and 31 July 1982 the defendant company manufactured wine from fruit wholly grown in Zimbabwe.

Defendant denies that it is liable to excise duty as claimed or at all. Defendant company avers that it did not manufacture wine within the meaning of s 2 of the Customs and Excise Act [Chapter 177] or at all. In the alternative the defendant contends that by its fulfilment of the requirements of s 154(1) of the Act it did render to the plaintiff's proper officer a timeous, true and complete return of its transactions to date in that on 13 December 1978 it duly notified the plaintiff in writing that it had ceased to manufacture wines, and there and then tendered to the plaintiff the excise duty on the balance of its stock. In terms of the excise tariff prevailing at that time, the plaintiff collected duty of \$00.

The facts concerning the handling of the stock of wine during the relevant period were not in dispute. By agreement the defendant tendered Mr Richard Holmes, the current director of the defendant, for cross-examination by the plaintiff. Richard Holmes agreed that the wine was made from oranges grown on the farm owned by the company, which farm was sold in December 1978. He agreed that at the time of the sale of the farm there were 42 831 litres of wine in fibre-glass vats and that the wine in these vats had been made since the early 1970s, the last being made in early 1978. Mr Holmes stated that wine was being bottled and sold as needs arose between January 1979 and 1 January 1981. He explained that the company had seven different labels of wine, of which he gave six as Sun Up, Super Sun Up, Don Ric, Escorro - Sweet, Medium and Dry. The witness informed the Court that demand for the Escorro dropped to virtually nothing, while that of the Sun Up and Super Sun Up remained reasonable. The reason, he said, lay in the prices of the two types. The Sun Up variety was made from second-grade oranges and was sold at a lower price, while the Escorro was made from the best oranges, and the price of the wine reflected that. If nothing else had been done, such was the demand on the Escorro that the supply could have lasted for 150 years.

As a result of the sluggishness of the market for the Escorro, the company

1985 (1) ZLR p38

GIBSON J

decided to bottle the Escorro and market this as Sun Up and Super Sun Up. Mr Holmes said there was very little discernible difference in the wines - the only difference being in the type of oranges used as far as he could tell. However, because he did not wish to exhaust any one vat of Escorro completely before the others, he decided to take equal quantities of each of the Escorro - Sweet, Medium and Dry, and mix them. This process was employed in relation to 20 898 litres. Mr Holmes was adamant that this mixing was not a blending to produce a desired type of wine; the mixing was only of similar wines, and not of wines with a view to producing a type.

Under cross-examination, Mr Holmes did concede that as the volume of wines dropped in a particular vat the sediment was stirred up - thus there was need to subject the remaining wine to a process of fining by the use of a clay to settle the sediment. To refresh his memory the

witness looked at a journal which he kept at the time which showed the amount of wine in the vats and the "disposal" of that wine. Looking at the entry on 18 March 1981, 5 May 1981, and 18 August 1981, he confirmed that on those days the three Escorros had been mixed to "produce" a Sun Up variety. An entry on 24 July 1981 showed that bentonite had been added to the wine to expedite the settling of the sediment. Further entries in the diary showed that the wines had also been subjected to transfer from one vat to another. Mr Holmes reiterated and made it absolutely clear that the mixing was not in any way concerned with the quality of the wine. He mixed the wines to control the volume.

Looking at the way the 20 898 litres of wine were handled (to use a neutral word), counsel for the plaintiff, Mr *Donovan*, argued that undoubtedly the mixing which was described by Mr Holmes was well within the scope of the definition of "manufacture" as contained in the Act.

Section 2 of the Customs and Excise Act [*Chapter 177*] defines "manufacture" thus:

"manufacture", in relation to -

(a) goods liable to excise duty or surtax other than -

(i) motor spirit; and

(ii) imported goods;

includes the mixing, brewing, distilling or production of goods liable to excise duty or surtax.

1985 (1) ZLR p39

GIBSON J

In order to determine whether the processes to which the 20 898, 2 655 and 2 264 litres of wine were "manufactured" within the meaning of the Act, BEADLE CJ suggests a useful guide in *Commissioner of Taxes v Processing Enterprises (Pvt) Ltd* 1974 (2) RLR 220 (AD) at 224C:

... not only must an exhaustive examination of the particular facts under consideration be made, but an exhaustive examination must also be made of the statute in which the word 'manufacture' is used to see in what sense the legislature intended using that word ...

While I take note of this guideline, which amounts to nothing other than stressing the approach of common sense, it seems to me quite clear that the legislature, by adding the word "includes", intended and wished to convey that whatever other meaning of the word "manufacture", under the Customs and Excise Act [*Chapter 177*], the word "mixing" must be taken as meaning "manufacture".

Mr Holmes, in his evidence under cross-examination, was at pains to point out that when he mixed the wines he was more concerned with the reaction of the volume in the vats than with producing a certain quality in or type of wine. This unfortunately, in my view, is not at all material because, as the learned Chief Justice stated in the Processing Enterprises case cited *supra* at 228-9:

...there need be no change in the actual substance of the raw material before the process of dealing with it is

regarded as a manufacturing process provided skill has been applied in some way to that raw material and to such dealing, and its actual character, as opposed to its mere substance, is changed.

The use of the proviso and the words set out under the proviso would appear to qualify the earlier part of the statement to mean that while change in the substance need not be the result, nevertheless some skill ought to have been applied to the raw material for there to be a process of manufacture. This then is the test I shall adopt and follow in inspecting the processing of the three categories of wine - the 20 898, 2 655 and 2 264 litres of wine, to see whether any or all three were manufactured within the meaning of the word.

The Act uses the word "mixing" without any definition or qualification. In the absence of any other statement to the contrary, the word must be given its everyday, ordinary meaning according to everyday usage in the English

1985 (1) ZLR p40

GIBSON J

language. It would have been different if the word "blend" had been used, because to my mind the word "blend" connotes a mixing with a certain end product in view - a quality or a taste. Looking at the Chambers Dictionary of Essential English, printed in 1974, the word "mixing" is defined as:

to unite, or blend into one mass or to form by doing this a muddle or to confuse or mix up or to blend eg oil and water.

Referring again to the above definition in the context in which it is set out in the Act, I have no doubt that the handling of the 20 898 litres of wine, details of which were given by Mr Holmes, amounts to "manufacture" as defined by s 2 of the Act. Even though the definition of "mixing" as set out above gives "blending" as synonymous with "mixing", I still maintain the view that the word "blend" means more than just mixing. Thus in a kitchen, ingredients are "blended" to produce a particular dish, and nowadays not infrequently one finds a mechanical aid used for the purpose - a "blender".

The next category of wine to which the Controller lays claim is the 2655 litres of wine which had been in the vats already fined for some years. In evidence, Mr Holmes explained that this volume of wine had stayed in the vat fined since 1976 and all that was done at the material time was that it was transferred straight from the vat into bottles. Afterwards, the bottling roll caps were attached by the use of a hand-operated machine. Thereafter the bottles were labelled and disposed of.

Plaintiff argues that the volume of wine handled in this way also fell into the category of wines manufactured at the material time.

The test which plaintiff urged the Court to use to determine whether a product has been subjected to a process of manufacture is whether "that process was an essential final stage in the process of manufacture". The words of BEADLE CJ in the *Processing Enterprises (Pvt) Ltd* case (*supra*) in my view portray the position clearly at 225D-H:

It seems, therefore that when dealing with a raw material which is grown by the farmer with the object of that raw

material being subsequently manufactured into a finished product by the industrialist, the intention of the legislation must have been to encourage the handling of that raw material right through all its stages, that is from the stage when it is grown by the farmer, until the stage when the end product is eventually produced by the manufacturer. If, in the course of manufacturing that

1985 (1) ZLR p41

GIBSON J

raw product, it had to go through various stages of processing, and each stage was vital to the production of the finished product, to regard any essential stage of processing as not being a manufacturing process for the purposes of section 14, would seem to me to be illogical because it would be breaking, if I may call it that, the chain of assistance which is obviously intended by the section 5 of the Fourth Schedule, assistance which starts from the growing of the raw material until it is finally fabricated into the finished product. ... Every one of the essential processes in the course of converting the raw material into the finished product, which without doing violence to language can be termed a 'manufacturing process,' should, I think, be regarded as such, because if it were not, it might defeat the object of the legislature.

Earlier in his judgment the learned CHIEF JUSTICE had approved this passage from the judgment of WILLIAMSON JA in the case of *Secretary for Inland Revenue v Hersamar (Pty) Ltd* 1967 (3) SA 177 (AD) at 187B-D, where the learned Judge of Appeal is reported as saying:

In Income Tax Case 1052, 26 SATC 252 at 255, VAN WINSEN J refers to some of these *dicta* and he concludes that

the article claimed to have resulted from a process of manufacture must be essentially different from the article as it existed before it had undergone such process.

With this statement I do not disagree. But it must be recognised that the term 'essentially' obviously imports an element of degree into the determination of the sufficiency of the change that must be effected for a process to be one of 'manufacture'. As a result of being processed, a change may take place in regard to the nature or form or shape or utility, etc., of the previous article or material or substance.

Applying this principle to the facts of this case: There are undoubtedly a number of stages in producing wine from fruit. Even as it is stored in vats before it is decanted into suitable containers to make it accessible to the consumer, there may be several stages in the process of manufacture. The evidence of Mr Holmes dealing with what happens at disposal summarizes it all. Bottling, then, is an essential final stage. In my view the reduction of the mass volume of 2 655 litres of wine from vat to smaller container is a process of manufacture.

1985 (1) ZLR p42

GIBSON J

I must say when I first read the above passage from the *Hersamar* case I was a little puzzled to understand how the learned Chief Justice BEADLE could have cited the passage in support of his argument. It seemed to me that the passage contradicted what he had earlier given as the test of manufacture - namely that change in itself was not essential as long as some skill was involved. However, on a further reading of the passage of the judgment of VAN WINSEN J (*supra*) I see that the learned Judge expanded on the definition of essential change before and after manufacture. There was essential change in the article even if it was only in the form, shape or utility. Change in substance is not therefore the criteria even on the judgment of VAN

WINSEN J

The other test given by the learned Chief Justice BEADLE in the *Processing Enterprises* case is also a useful test - namely the test of skill being applied to the article during the manufacturing process. It seems to me that, having regard to Mr Holmes' evidence and applying this test, it could not have been said that any skill had been used in placing a roll-on cap on a bottle or in labelling. On that test the plaintiff would have failed, but he succeeds on the other test - the essential nature of the bottling as a final stage in the process of manufacture.

However, I would draw a distinction between bottling wine and reducing wine into whatever diverse container the consuming public cared to submit.

In my view the mere disposal into the consumer's container of the 2 264 litres of wine was not a process of manufacture. The disposal of the wine into the containers was akin to the cutting up of leaf tobacco into manageable parcels for the convenience of consumers. This view is fortified by the decision in *Maurice Kantor (Pvt) Ltd v Macintyre NO & Anor* 1957 (2) R & N 780 (FSC) at 783G-784G, where TREDGOLD CJ states:

I do not think that in common parlance the cutting up of a material merely for convenience of its disposal could possibly be described as "manufacture". Skilful cutting by hand or by a machine designed to facilitate the use of the material in a particular way might, without abuse of language, be called "manufacture". But, in the present case the Applicant Company merely chopped up the tobacco into rough, irregular shapes, suitable for the packages in which it was sold and without any regard to the manner of its consumption ... If this is "manufacture" then a draper manufactures the cloth he cuts into lengths for sale, or a butcher the joints he cuts from a carcase. Timber that has been turned to make a table leg might properly be described as manufactured.

1985 (1) ZLR p43

GIBSON J

Following this reasoning, in my judgment there was no process of manufacture on the 2 264 litres of wine.

The defendant in answer contends in the alternative - never mind the treatment of the wine between 1 February 1981 and 31 July 1982 - his case is that the compliance with the provisions of s 154(1) of Chapter 177 rendered that wine "non-excisable"; the duty payable at the time having been paid, the defendant is no longer liable to any duty on the stocks of wine which existed at the time of the cessation of manufacture.

Counsel for the defendant then referred to a whole series of statutory duties reposed in the Controller by the Act which duties he pointed out had not been carried out by the Controller. He instances s 109, s 144 which requires the Controller to take stock annually and which had not been done during the years 1979 and 1980; s 153 and s 122 which demands that the manufacturer keeps books and renders a return in respect of each month.

Counsel contended that the Controller had not carried out these duties because he was well satisfied that the defendant had not done anything which he was not permitted to do. Alternatively, that this was a *casus omissus*. He cited *Vanroux Motors Bpk v Commissioner of Customs & Excise* 1958 (1) SA 449 (T) at 456, and urged that to allow the plaintiff to levy duty on the wine was to let the "Controller have a second bite of the cherry".

This case is clearly distinguishable because here the Controller sought to call a hybrid vehicle which was not designated in the Act a particular type of vehicle in order to render it liable for duty. But the Court held, quite rightly in my view, that the Controller could not do that and the hybrid vehicle was a vehicle *sui generis* - not envisaged by the Act.

But counsel's argument, surely, is beside the point in that it fails to grasp the fact that what he termed the "cut-off point" had not been reached at the time the defendant purported to cease to manufacture.

Section 207(b) of the Act prescribes when duty becomes payable by a person who is still engaged in the process of manufacturing wine. He is still liable to pay the prescribed rates of duty at the time the wine is delivered from the winery (the place of manufacture) or when the wine is used or otherwise disposed of. The section could not have been better or more clearly expressed. But where a manufacturer ceases to manufacture then the time when the duty becomes payable varies. Set out below are s 207(b) and s 154(1) of

1985 (1) ZLR p44

GIBSON J

the Act because these sections will not gain by being reduced into my own words: section 207 provides:

Subject to the provisions of this Act -

- (a) . . .
- (b) goods which have been manufactured in Zimbabwe and are liable to excise duty or surtax shall be liable to excise duty or surtax shall be liable to the rates of duty which are applicable to those goods at the time when they are delivered from the place of manufacture for consumption or are used or otherwise disposed of by the manufacturer; ...

Section 154(1) provides:

If a person ... ceases to manufacture goods in respect of which the licence has been issued, or if his licence is not renewed or is cancelled, he shall, within one month of that date, render to the proper officer a true and complete return of his transactions since his last monthly return, and shall then and there pay the duty or surtax on the balance of his stock ...

The question essentially has been whether the handling of the 20 898 litres of wine, 2 655 litres of wine and 2 264 litres of wine after 1 February 1981 was consistent with the actions of one who had ceased to manufacture wine. Having seen and heard Mr Holmes, the director of the defendant company, I have no doubt whatsoever in my mind that the defendant company honestly held the belief that once compliance with the provisions of s 154(1) of the Act had been made the defendant company had thereby discharged its duties to the Controller. Thereafter that wine had become "non-excisable goods" for all time. Consequently, whatever became of the wine was immaterial. Mr Holmes was disarmingly candid with the court in explaining the detailed processes to which the different categories of the wine were subjected.

There will be judgment for the plaintiff in the sum of \$11 493,90, with interest thereon, comprising duty payable on 20 898 litres of wine. In addition there will be judgment for the

plaintiff in the sum of \$1 460,25 with interest thereon, in respect of the 2 655 litres of wine.
Plaintiff's claim for duty of \$1 245,20 in respect of the 2 264 litres of wine is rejected.

No order as to costs is made.

1985 (1) ZLR p45

GIBSON J

Civil Division, Office of the Attorney-General, legal practitioners for the plaintiff

Higham, Seirlis & Lewis, legal practitioners for the defendant

1985 (1) ZLR p46

S v BENNETT-COHEN 1985 (1) ZLR 46 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Criminal Appeal

14, 15 January and 4 February 1985

Flynote

Customs and Excise Act [Chapter 177] - s 165 - "smuggling" - mens rea - "goods"- whether includes Krugerrands.

Evidence - foreign law - proof of - adherence to international conventions - weight.

Headnote

The appellant smuggled into the country 36 Krugerrands. In the magistrates' court he was convicted of smuggling on a plea of guilty. On appeal it was contended that the conviction was not in order since Krugerrands are not "goods" within the meaning attached to that word and in s 165 of the Customs and Excise Act [Chapter 177], and cannot be the subject of a smuggling charge.

Held that smuggling requires a special intent to defraud the State or evade prohibitions and cannot be committed unwittingly.

Held, further, that Krugerrands fall into the customs tariff, the First Schedule to Chapter 177, as "coin" and are consequently "goods" in terms of the Act.

Held, further, that where the Controller of Customs and Excise and member States of the EEC using the same customs tariff classify Krugerrands as coin, the court would not be prepared to depart from such classification in the absence of expert evidence.

Cases cited:

R v Thompson & Ors [1980] 2 All ER 102 (CA)

G & P Ltd v Commissioner of Taxes 1960 R & N 596 (SR)

1985 (1) ZLR p47

McNALLY JA

Standard Bank of SA Ltd & Ors v Ocean Commodities Inc & Ors 1983 (1) SA 276 (AD)

Commander v Collector of Customs 1920 AD 510

Morris v Ritchie [1934] NZLR 196

R v Behm (1969) 12 DLR (3d) 260

Allgemeine Gold-und Silberscheideanstalt v Customs and Excise Commissioners [1980] 1 QB 390 (CA)

Warren Marine (Pty) Ltd v Secretary for Customs and Excise 1982 (3) SA 828 (AD)

C N Greenland for the appellant

R Acton for the respondent

Judgment

McNally JA: The appellant is a businessman based both in Elizabeth, New Jersey and in Cape Town, South Africa. Between 22 December 1982 and 17 January 1984 he flew into Harare Airport on ten occasions. On eight of these occasions he had in his possession a number of Krugerrands. He did not declare them to the customs authorities at the port of entry. In this way he brought into Zimbabwe a total of 36 Krugerrands which he sold in this country. He paid for them abroad the equivalent of Z\$19 800. He sold them for Z\$36 900. He claimed that certain expenses should be taken into account in determining his net profit.

It is of some interest to note in passing that if he had declared the Krugerrands and been granted an import permit he would apparently have been required to pay the following:

Customs Duty	NIL
Surtax (20% ad valorem)	3 960
Import Tax (under the Sales Tax Act)	<u>3 564</u>
	\$7 524

This would have reduced his gross profit from Z\$17 900 to Z\$10 376. I will deal later with the contention of Mr *Acton*, who appeared for the State, that the Controller of Customs should in fact have sought to impose a customs duty of 35%. This would have involved payment of a further Z\$6 930 and would have reduced the profit to Z\$3 447.

In any event, the appellant was in due course charged with eight counts of contravening s 165 of the Customs and Excise Act [*Chapter 177*], and he pleaded guilty to those charges. He was convicted and sentenced to fines

1985 (1) ZLR p48

McNALLY JA

totalling \$36 000 or, in default of payment, 36 months' imprisonment with labour. In addition summary judgment was given in favour of the Controller of Customs for the duty paid value of the Krugerrands in the sum of Z\$27 324. This was calculated presumably by taking the agreed purchase price plus the surtax and import tax as follows:

\$19 800	- purchase price/value
\$ 3 960	- surtax
\$ 3 564	- import tax
<u>\$27 324.</u>	

The court has been advised that since his conviction and the noting of his appeal, the appellant has paid the fines (but not the amount of the civil judgment) and has been declared a prohibited immigrant and has left the country.

In the course of presentation of argument in this case - and the court is indebted to counsel for the extensive research which has supported their submissions - two major issues have arisen. One is whether or not the trial court should have changed the appellant's plea from "guilty" to "not guilty" in the light of developments during the trial; and the other is whether Krugerrands are "goods" within the meaning attached to that word in s 165 of the Customs and Excise Act [*Chapter 177*].

At the resumed hearing of the matter Mr *Acton* formally conceded on behalf of the State that the plea of guilty should not have been allowed to stand. The court has no doubt that this concession is properly made. It is evident that the appellant (who was not represented and declined the offer of a postponement to enable him to find a lawyer) at all times was asserting that he committed the offence "unwittingly". He insisted on that word appearing in the statement of agreed facts and only very reluctantly agreed when at the last minute the prosecutor deleted it on the grounds (according to the uncontradicted evidence of the appellant) that the absence of *mens rea* is immaterial in this type of offence.

Now, s 165 of the Customs and Excise Act reads "Any person who smuggles any goods shall be guilty of an offence". The word "smuggle" does not appear, for some reason, in the charge sheet. The charge reads:

Firstly to Eighthly charged with the crime of contravening section 165 of the Customs and Excise Act [*Chapter 177*] in that upon the dates as

1985 (1) ZLR p49

McNALLY J

mentioned in Column One of the Schedule and at Harare in the said Division, the accused did wrongfully and unlawfully and with intent to defraud the State or to evade any prohibitions, import Kruger Rand in the quantities as specified in Column Two of the Schedule.

Whatever its defects, this charge makes it abundantly clear that part of what was being alleged was an intention to defraud the State or to evade prohibition. One cannot entertain such an intention unwittingly. In view of the fact that the appellant's objections to the deletion of the word "unwittingly" were overborne by the prosecutor, one can really attach no weight to the fact that the appellant made no formal objection when the magistrate put to him, as part of the essential elements of the offence, that he imported the Krugerrands "with intent to defraud the State or to evade a prohibition". It is clear from what happened subsequently that the appellant took the prosecutor's assertion to mean that he was in some way deemed to have the requisite intent to defraud.

Accordingly, the case can be decided on this basis alone and virtually by consent, since the only real dispute is as to whether there is any point in remitting the matter to the magistrate when the appellant is out of the country and prohibited by the State from returning. Whether the court merely sets aside the conviction and sentence and civil judgment, or sets them aside and remits the matter to the magistrate for rehearing on a plea of not guilty, the effect will be that the appeal succeeds.

It would not be right, however, for this court to ignore the other major issue. I say this not only in deference to the lengthy arguments presented by counsel and to the extensive research which they have undertaken. The issue is one which requires clarification, not only in respect of other cases but also in respect of this case. If the matter does continue it will at once be necessary for the court to decide if Krugerrands are goods; and even if it does not continue the Controller of Customs will want at least to collect the surcharge and import tax due on the basis that the Krugerrands are goods which were admittedly imported into Zimbabwe. In either event the question will arise for decision.

I proceed therefore to consider the question whether Krugerrands are "goods" within the meaning given to that word in s 165 of the Customs and Excise Act [*Chapter 177*]. I face immediately a terminological problem. It is hard to speak of a Krugerrand without calling it a coin. Yet Mr *Acton* argues strongly that it is not a coin. Let me make it clear therefore that I use the word

1985 (1) ZLR p50

McNALLY J

"coin" at this stage without prejudice to that argument, which I shall consider later.

A Krugerrand is a gold coin produced by the South African Mint containing exactly one ounce troy of fine gold. It does not have an apparent "face value" apart from the word "Krugerrand" which appears on the reverse. These and other details are available in articles which have been put before us contained in a booklet called "Gold" produced by the Swiss Bank Corporation, and in an article on "The Coins of South Africa" by Dr F K Mitchell in a publication called

Numistat for the years 1976/77.

We have also been shown the official Press Release about the launching of the Krugerrand which is contained in the "South African Digest" for the week ended July 14, 1967. This, like all the other publications referred to in this judgment, was put before us by consent. It confirms what I have said above and adds "the Krugerrand is to be minted in limited numbers and is intended for overseas issue, where, by arrangement with the Chamber of Mines, distribution will be carried out by a consortium of Swiss Banks". *Numistat* confirms that the Krugerrand has been available to the South African public only since 1970. And the Advocate-General of the Courts of Justice of the European Economic Community, quoted in *R v Thompson & Ors* [1980] 2 All ER 102 (CA) at 123g-h, says:

... in order to obtain Krugerrands in South Africa, in quantities which are moreover limited, private individuals must register a long time in advance and pay the consideration in hard currencies and they obviously do not use the Krugerrands obtained in this way to pay for their current purchases. Therefore these coins are not in fact used 'in the ordinary course' as legal tender.

All this will be important when we come to consider whether the Krugerrand is currency.

The statutory basis for the existence of the Krugerrand is to be found in the South African Mint and Coinage Act, No. 78 of 1964. In terms of that Act the Krugerrand is a Republican coin. Section 12 of that Act, falling under a Chapter headed "CURRENCY, COINAGE AND LEGAL TENDER", reads:

12. Legal tender - (1) a tender of payment of money, if made in coins which are Republican coins or Transvaal coins of current mass,

1985 (1) ZLR p51

MCNALLY J

shall be legal tender -

- (a) in the case of gold coins, for the payment of any amount;
- (b) . . .
- (c) . . .

The Act also prescribes that the Krugerrand shall consist of one ounce of fine gold. By way of contrast, it may be noted that our Reserve Bank of Zimbabwe Act [*Chapter 173*] deals with the concept of legal tender in ss 12(1) and 15(1) by reference to the face value of the notes or coins concerned. The equivalent South African Act (No. 29 of 1944) deals only with notes as legal tender (s11) again by reference to "the amount expressed in the note". Finally it may be recorded that the South African Prevention of Counterfeiting of Currency Act, No. 16 of 1965, contains a definition of "current coin" which I think would include the Krugerrand.

On the basis of what is contained in the South African legislation Mr *Greenland*, for the appellant, contends that the Krugerrand is a coin which is legal tender and therefore is currency. Its status as such is to be determined as a matter of fact by reference to the South African legislation, since each country must be allowed to define its own currency. If the South

Africans say it is currency, then we have no choice but to define it as foreign currency.

A word should be said here about the way this court takes note of foreign legislation. Normally, it should be proved as a fact, by expert evidence - Cross on *Evidence* 5th ed 66; Hoffman & Zeffertt *South African Law of Evidence* 3rd ed 90. However, and for obvious historical reasons, the courts of this country have not always required evidence of English or South African law, and indeed have sometimes refused to hear it on the grounds that it is unnecessary - *G & P Ltd v Commissioner of Taxes* 1960 R & N 596 (SR) at 603-604. But where the law is statutory and complex it may well be necessary to hear expert evidence as to its meaning and effect. The South African Appellate Division said so in respect of our law of *Exchange Control in Standard Bank of SA Ltd & Ors v Ocean Commodities Inc & Ors* 1983 (1) SA 276 (AD) at 294G. And I would certainly not wish, without expert evidence on the subject, to make any finding as to how Krugerrands can be legal tender without their having a face value. I am certainly not prepared to conclude, from the wording I have cited, that Krugerrands are, in terms of South African law, currency.

The reason for Mr *Greenland's* contention emerges at once when we look at the definition of "goods" in the Customs and Excise Act. Initially s 2 of

1985 (1) ZLR p52

McNALLY JA

Chapter 177 reads:

'goods' includes all wares, articles, merchandise, animals, matter, baggage, stores or things.

By Act 30 of 1976 this definition or description was repealed, and the following unwieldy formula was introduced:

'goods', subject to the provisions of subsection (3) of section *twenty-three* ... (there follows a list of other subsections) includes all wares, articles, merchandise, animals, matter, baggage, stores or things.

If one turns to all these named subsections one finds they are all in identical terms and they read:

In this section 'goods' include Zimbabwe and foreign currency.

Therefore, concludes Mr *Greenland*, in sections where that formula is absent "goods" clearly does not include "foreign currency". Krugerrands are foreign currency; s 165 lacks the formula; therefore for the purposes of s 165 "goods" does not include Krugerrands; therefore his client must be acquitted on the basis that Krugerrands cannot be the subject of a smuggling charge.

Against this Mr *Acton* advances a battery of arguments. I will attempt to deal with them in order.

His first submission is that s 74 of the Customs and Excise Act, as read with the Tariff which is the First Schedule to the Act, makes it clear that customs duties are to be levied in respect of goods in accordance with the Tariff. It follows from this that anything specified in the Tariff is intended to fall within the description "goods". I would not quarrel with this submission.

He next submits that a Krugerrand is an article of gold. As such it falls under Section XIV of the

Tariff. Either it falls under Chapter 71.13 - "Articles of Goldsmiths' or Silversmiths' Wares and Parts thereof, of Precious Metal or Rolled Precious Metal, other than goods falling within heading No 71.12" - or it falls under Chapter 72 - "Coin" under heading 72.01.90 "Other". The former involves a rate of duty of 35% *ad valorem*. The latter is duty free. Mr *Acton* contends that 71.13 is the correct heading. The Controller of Customs and Excise apparently thinks otherwise. He prefers the heading "Coin". So, it appears, does the Advocate-General of the Court of Justice of the European

1985 (1) ZLR p53

McNALLY JA

Communities. This appears from the opinion prepared by him in the case of *R v Thompson*, *supra*, at 126d.

I must make the comment here that this court is moving in a highly technical sphere, and, because of the way this case has developed, we do not have the benefit of expert evidence on questions relating to customs classification. The Customs Tariff of Zimbabwe has been aligned with the Customs Tariffs of many other countries, more particularly the member states of the European Economic Community. We have adopted what is called the "Brussels Nomenclature" in conformity with the convention signed in Brussels in December 1950. A great deal of expertise has gone into the alignment not only of tariff headings but also of classification. Thus, if our Controller as well as the member States of the EEC, all using the same customs tariff, have all decided to classify Krugerrands under Chapter 72 (Coins), I would not be prepared, without the benefit of expert evidence, to say that they are wrong. I see the force of Mr *Acton's* argument based on dictionary definitions which almost all say that it is an essential feature of a coin that it has a face value. I note that he is able to cite Voet 12.1.24, in the Gane translation vol 2 p 776, in support of this proposition.

I would say only that, in words often used in the advertising world, the Krugerrand may perhaps be seen as a new concept in coinage. By its spectacular success in the financial markets of the world it may have succeeded in shouldering its way into the definition of coin, broadening that definition in the process. There seems to be some recognition of that fact in Vol II of the supplement to the Oxford English Dictionary (1976) which defines "Krugerrand" as "A South African gold **coin** (my emphasis) bearing a portrait of President Kruger". The Swiss Bank Corporation booklet "Gold", to which I have referred, says that the term "bullion coin" is used to describe the Krugerrand and its competitors. Elsewhere the Krugerrand has been described as "The International Gold Bar in Coin Form" (by the Editor: International Gold Corporation, Geneva) and as "A slice of an ingot" (by the Advocate-General in *Thompson's* case, *supra*, at 128h).

For the reasons that I have given I prefer to make no positive finding as to the proper Chapter heading in the Tariff under which Krugerrands should be included. I am satisfied, however, disregarding for the moment the effect of the provision in the definition about "Zimbabwe and foreign currency" that Krugerrands are goods in the sense either of being articles of goldsmiths' wares or of being coins.

McNALLY JA

Insofar as they are coins, that conclusion is fortified by the knowledge that the Appellate Division in South Africa came to the same conclusion about "gold coin of the realm" in *Commander v Collector of Customs* 1920 AD 510, applying the definition of goods similar to the definition in our Act prior to its amendment. That court had no difficulty in approving the conclusion of DOVE-WILSON JP in the court below that coins are goods.

There are a number of decisions in other Commonwealth countries to the same effect. In *Morris v Ritchie* [1934] NZLR 196 at 197, OSTLER J held that gold sovereigns, although legal tender and "part of our currency", can be purchased and sold as well as being exchanged for currency in a different form. In effect he held they can be a commodity even if they are also money/currency. In *R v Behm* (1969) 12 DLR (3d) 260, the Quebec Court of Appeal held that silver coins constituted "goods" for the purposes of the Export and Import Permits Act. The Chief Justice held that silver coins could be regarded either as instruments of exchange or as goods. Legislation controlling the export of silver coins was obviously concerned with them as goods, since if money was to be exported it could just as easily be exported in the form of paper money. Finally, in *Allgemeine Gold & Silberscheideanstalt v Customs and Excise Commissioners* [1980] 1 QB 390 (usually called "The AGOSI case") the Court of Appeal had no difficulty in holding that Krugerrands were goods for the purposes of the Customs legislation of England.

What, then, is the effect of the amendment to the definition of "goods" which was introduced into our legislation by Act No. 30 of 1976? Mr *Acton* offers three alternative answers to the suggestion that the amendment effectively excludes Krugerrands from the definition. First, he says the amendment is unnecessary, superfluous and *ex abundanti cautela*. In other words he says "Zimbabwe and foreign currency" fall within the definition of goods, and it has been specifically said to be included in certain sections simply for the avoidance of doubt. Second, and in any event, he says that even if Krugerrands have to be conceded to be legal tender in South Africa because the Act says so, they are certainly not by any stretch of the imagination to be described as currency. And finally he says that even if Krugerrands can be said in a sense to be currency, then they have a dual nature as currency and as items of commerce. On the facts of this case they are patently to be looked at in this latter capacity.

I must say that I find the first argument difficult to accept. However, I am wholly persuaded by the second and third arguments and it is therefore unnecessary for me to come to a conclusion on the first.

McNALLY JA

I accept without hesitation that a coin without face value (and no one seems ever to have suggested that the word "Krugerrand" inscribed on the coin gives it a face value of "a rand" or "one rand") cannot form part of the ordinary currency of a country. This is simply because no one knows from hour to hour what it is worth. No one knows how much change to offer if a

Krugerrand is proffered in payment for a packet of groceries. In the 4th Edition of his work *The Legal Aspect of Money* Dr F A Mann says, at p 20, footnote 99:

But the amount in respect of which it may be tendered in payment is not specified. Not being related to a specific Rand value, the Krugerrand cannot in law have the quality of legal tender. It is a commodity and therefore, for instance, should be liable for VAT.

It seems that more and more countries are coming round to that view - see the Advocate-General's opinion previously cited, at p 132 *passim*. A Press report of a trial in December 1984 in England, which we have been shown by consent and by courtesy of the Commonwealth Secretariat, deals with the conviction of seven men and a woman for conspiracy to defraud HM Customs and Excise of value added tax (VAT) payable on the sale of smuggled gold Krugerrands. (See *The Times* newspaper for 21 December 1984).

It seems to me that it would be flying in the face of common sense to describe Krugerrands as South African currency, just because they happen to be described in South African legislation in a way which implies that they are legal tender. They are certainly not, on the information available, current in fact, nor, as I have described, can they possibly be current because of their lack of face value not to mention their unavailability as referred to earlier. I find myself unable to accept therefore that Krugerrands are South African currency and thus, from our point of view, foreign currency.

If I am wrong in that conclusion I would fall back upon Mr Acton's final argument which I find equally compelling. If, in some technical and highly artificial sense, Krugerrands can properly be described as currency, then I am wholly satisfied that they have a dual character as currency, and as goods. In the circumstances of the present case (and, I would venture to suggest, in every other conceivable circumstance) the Krugerrands were being treated as goods, as a commodity to be sold. There is no question of ambiguity or of an interpretation *contra fiscum*. The proper test is to determine the predominant use to which the particular things are put - see *Warren Marine (Pty) Ltd v*

1985 (1) ZLR p56

McNALLY JA

Secretary for Customs and Excise 1982 (3) SA 828 (AD). The Krugerrands were treated, as I suspect all Krugerrands are treated, as goods. In this case they were sold at a profit. In other cases they might be retained for capital appreciation.

I cannot imagine anyone using Krugerrands as money. If someone somewhere were to exchange Krugerrands for goods, it would seem to me, *prima facie*, that the transaction was one of barter. This would obviously be so if the transaction took place outside South Africa, since the Krugerrands would not be legal tender in that country. But even in South Africa I would be inclined to think of it as a barter transaction. I imagine the vast majority of transactions involving Krugerrands are exchanges of Krugerrands for money - in short, sales of Krugerrands.

I would hold, for these reasons, that Krugerrands are not, or more specifically that these Krugerrands were not, "foreign currency" for the purposes of the Customs and Excise Act. It follows therefore that they fall within the definition of goods in that Act and are/were capable of

being smuggled in contravention of s 165 of the Act.

It remains only to decide upon the form of the order to be made in consequence of the conclusion that the plea of guilty should not have been allowed to stand. It seems to me that in deciding whether to set aside and remit or merely to set aside, this court should be guided by the express provisions of s 255A of the Criminal Procedure and Evidence Act. That section reads:

If the court, at any stage of the proceedings in terms of section *two hundred and fifty-five* and before sentence is passed -

- (a) is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty; or
- (b) is not satisfied that the accused has admitted or correctly admitted all the essential elements of the offence or all the acts or omissions on which the charge is based; or
- (c) is not satisfied that the accused has no valid defence to the charge;

the court shall record a plea of not guilty and require the prosecution to proceed with the trial:

1985 (1) ZLR p57

McNALLY J

Provided that any element or act or omission correctly admitted by the accused up to the stage at which the court records a plea of not guilty and which has been recorded in terms of subsection (3) of section *two hundred and fifty-five* shall be sufficient proof in any court of that element or act or omission.

It is implicit in that wording that the (original) court should be directed to record a plea of not guilty and that the trial before that (original) court should proceed. The practical problem that the appellant is now outside the jurisdiction and for the present at any rate prohibited from returning even if he should want to, is not a problem which should concern this court.

In the circumstances I would make the following orders:

1. The proceedings after and including the pleas in this matter, that is to say, the pleas, the convictions, the sentences and the award of summary judgment, are hereby set aside.
2. The matter is remitted to the trial magistrate with the direction that he record pleas of not guilty on each of the eight counts and that he require the prosecution to proceed with the trial.

To that extent the appeal is allowed.

Beck JA: I agree.

Gubbay JA: I agree

Kantor & Immerman, appellant's legal representatives

1985 (1) ZLR p58

SIWELA HOLDINGS (PVT) LTD v NYIRONGO & ANOR 1985 (1) ZLR 58 (HC)

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Court **High Court, Harare**

Scott J

Civil Application

31 January and 6 February 1985

Flynote

Foreign judgment - enforcement of in Zimbabwe - principles applicable.

Reciprocal Enforcement of Judgments Act [Chapter 51] - ss 3 and 6 (as read with GN 500 of 1952) - effect.

Headnote

Once a foreign judgment is registered in the High Court in terms of the Reciprocal Enforcement of Judgments Act [*Chapter 51*], it is enforceable as though it was a judgment delivered by the High Court and a judgment creditor has all the rights accorded to a judgment creditor of the High Court. He may consequently take steps to attach what assets, if any, the judgment debtor may own in Zimbabwe, in accordance with our laws.

What the draftsman of ss 3 and 6 of the Reciprocal Enforcement of Judgments Act [*Chapter 51*] had in mind must have been to enable a judgment creditor who fails to discover sufficient or any property belonging to the judgment debtor to attach in satisfaction of the judgment debt within the jurisdiction of the original court, to enforce the judgment within the jurisdiction of the registering court if the judgment debtor has property that can be attached in that jurisdiction.

M T O'Meara for the applicant

Respondent in default

Judgment

Scott J: Default judgment for the total sum of K19 567,50 in a summons issued out by the applicant, went against the first respondent on 3 September

1985 (1) ZLR p59

SCOTT J

1981 in the High Court of Zambia. An application brought by the first respondent to have the judgment set aside was dismissed. He then appealed against the dismissal order. This appeal was left to pend till 4 June 1983, when the first respondent filed a "Notice of Discontinuance" wholly discontinuing the appeal, thereby leaving the judgment debt to subsist.

Efforts to execute the debt by a writ of fi.fa. failed. According to the bailiff's endorsement on the "Debit and Advice Note" issued out of the Zambian Court, execution failed because the first respondent had "no goods worth seizing to meet the claim". That was on 29 April 1983.

Some two months later on 23 June 1983, the first respondent obtained an order from the Deputy Registrar of the Zambian Court allowing him to pay the judgment debt by monthly

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instalments of K40. Somewhere along the line it came to the knowledge of the applicant that the first respondent, who is a musician, is due some royalties from the second respondent, a Zimbabwean company, from publications of the first respondent's records. Wishing to attach the said royalties, the applicant petitioned this court for an order to register the Zambian judgment in this court.

At the hearing of the petition, the court ordered a rule *nisi* to issue calling upon the first respondent to show cause why the Zambian judgment should not be registered here. No cause having been shown by the first respondent, this court on 30 November 1983 confirmed the rule and registered the judgment. In effect, the registration was to provide for the enforcement of the Zambian judgment here in Zimbabwe.

Having successfully registered the judgment here, the applicant has now come to court on a notice of motion asking for leave to attach the royalties due and accruing to the credit of the first respondent, from the second respondent.

Opposing the application, the first respondent filed an affidavit in opposition but on the hearing date there was no appearance by or on his behalf. Difficulties would be encountered in retaining counsel in Zimbabwe, he deposed in his affidavit, because of exchange control restrictions by the Bank of Zambia. He was therefore not in a position to engage the service of counsel to look after his interests here. More importantly, ever since the order of the Deputy Registrar for instalment payments, he had complied with the order and has been making periodic payments to the applicant's legal practitioner, who has always accepted payments on behalf of the applicant. Annexed to

1985 (1) ZLR p60

SCOTT J

his affidavit are receipts in support of the alleged payments. The order to pay by instalments has been appealed against by the applicant but he has failed to pursue the appeal. In the view of the first respondent, therefore, the applicant's present application is an abuse of process and should be dismissed with costs.

It is common cause that the appeal against the decision to pay the judgment debt by instalments is still pending. That order, according to the papers before me, was made by the Deputy Registrar of the Zambian Court. Evidently such an officer of the High Court of Zambia is competent to grant such an order and the order once made is valid. Its validity is unquestionable, for the fact that an appeal is lodged, not against the authority of the Deputy Registrar to make the order, but against the instalment payments, is supportive of its validity.

We therefore have a situation where, while a competent order made by a competent tribunal exists, the applicant goes behind that order seeking another order in satisfaction of the same judgment debt. It may therefore be argued that until such time as the Zambian order is vacated, it can be said that the present application has been brought prematurely. My initial reaction was to dismiss the application on that basis.

Giving the matter more thought, I have come to the conclusion that to do so would frustrate the object of registration and enforcement of foreign judgments in Zimbabwe. What the draftsman

of ss 3 and 6 of the Reciprocal Enforcement of Judgments Act [*Chapter 51*] (as read with GN 500 of 1952 as published in the *Government Gazette* of 6 June 1952) had in mind must have been to enable a judgment creditor who fails to discover sufficient or any property belonging to the judgment debtor to attach in satisfaction of the judgment debt within the jurisdiction of the original court, to enforce the judgment within the jurisdiction of the registering court, if the judgment debtor has property that can be attached in that jurisdiction.

The position in the instant case is that truly or falsely the bailiff of the Zambian Court returned the execution papers with the endorsement that the first respondent had nothing worth attaching. Consequent to that, the Deputy Registrar ruled that the first respondent pay the applicant K40 per month till such time as the debt was liquidated. That officer of the court made that order presumably because, taking into account the first respondent's assets in Zambia, that amount was all that he could reasonably be called upon to part with in each month.

1985 (1) ZLR p61

SCOTT J

If, as in this case, information reaches the applicant that the first respondent has assets accruing in Zimbabwe that can be attached to satisfy the debt, then irrespective of the Zambian order and of the pending appeal against that order, it seems to me that there is good ground for bringing this application. Once the judgment is registered in this court, it is enforceable in the registering court as though it was a judgment delivered by the registering court, ie this court, and a judgment creditor has all the rights accorded to a judgment creditor of this court and may consequently take steps to attach what assets, if any, the judgment debtor may own in Zimbabwe, in accordance with our laws.

There is no reason why the applicant should not have the best of both worlds if that is the only way he can recoup what is owed to him by the first respondent, provided, of course, that in the final result the total sums received by him do not exceed the actual judgment debt. In other words, nothing stops him collecting the K40 per month in Zambia and attaching the first respondent's royalties here as well.

To await the outcome of the appeal first - that is to say to get the Zambian order set aside - before bringing this application may have its dangers. The applicant may discover that the funds accruing here in Zimbabwe amount to less than the K40 per month allowed by the Zambian Deputy Registrar, or that there is nothing in Zimbabwe worth attaching at all. It is therefore in the interest of the applicant to hang on to what he has got till such time as it is safe to let go.

As Mr O'Meara, for the applicant, rightly points out, there is in fact no certainty that the first respondent has been meeting the instalment payments. Annexures "PN1" are receipts for payments received from the first respondent by the applicant's legal practitioners to the credit of "Chris Furnitures Ltd". From the papers before me, the applicant is "Siwela Holdings (Pvt) Ltd" and the first respondent has offered no explanation in his papers why payments for the applicant should be made to the credit of "Chris Furnitures Ltd". There is some doubt therefore as to whether the first respondent has in fact complied with the instalment order.

Resulting from the preceding, the application is granted as prayed.

There will be an order in terms of the amended draft order.

Coghlan Welsh & Guest, legal practitioners for the applicant

1985 (1) ZLR p62

S v ISOLANO 1985 (1) ZLR 62 (SC)

Court **Supreme Court Harare**

Dumbutshena CJ Beck & Gubbay JJA

Criminal Appeal

14 January & 7 February 1985

Flynote

Appeal - finding on credibility of witness based on demeanour and facts of case - when appeal court will interfere.

Headnote

Where a magistrate makes an adverse finding on the credibility of an appellant and his witness and the finding was based on the facts before him and his observations of demeanour, an appellate court should not disturb that finding without having been shown that the decision on credibility was wrong.

Cases cited:

Watt (or Thomas) v Thomas [1947] 1 All ER 582 (HL)

Hughes v Graniteside Holdings (Pvt) Ltd S-13-84 (unreported)

Miller v Minister of Pensions [1947] 2 All ER 372 (KB)

M Lofty for the appellant

F S Chambakare for the respondent

Judgment

Dumbutshena CJ:

[The learned Chief Justice first analysed the facts and continued . . .]

Much as I feel that in some respects Miss Dodgson was an honest witness, the magistrate's rejection of her evidence on the ground that she was a witness with an interest, cannot be criticised.

DUMBUTSHENA CJ

Mr *Lofty*, who appeared for the appellant, attacked the magistrate's judgment on several grounds. He criticised the fact that the magistrate ignored contradictions in the evidence adduced by State witnesses. In support of his criticism he pointed out many such contradictions. One such criticism was that Mrs Wood said the appellant said nothing after being called "buster", whereas the complainant and Mr Delport quoted the appellant saying "you no call me bastard". There is no doubt that on the record there are contradictions in the evidence of both the State and defence witnesses. Those contradictions standing by themselves as they do on the printed record are not the only basis upon which the magistrate came to his conclusion on the facts. The witnesses appeared before him. He observed their demeanour. He could see which of them were telling the truth or falsehoods. There are many authorities of this court and persuasive authorities from other jurisdictions on the proper approach of an appellate court to the consideration of a decision based on fact. I find the remarks of LORD MACMILLAN in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 (HL) at 590B-D very appropriate in this case. He said:

The appellate court had before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case, but it is only part of the evidence. What is lacking is evidence of the demeanour of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion, but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone completely wrong.

See also *Hughes v Graniteside Holdings (Pvt) Ltd* S-13-84 (unreported) at 10-14.

The reasoning in the above cases equally applies to the instant case. The

DUMBUTSHENA CJ

magistrate made an adverse finding on the credibility of the appellant and his witness and that finding was based on the facts before him and his observation of the witnesses that appeared before him. There was no misdirection on his finding of credibility. It is my view that an appellate court should not disturb that finding without having been shown that the magistrate's decision on credibility was wrong.

Mr *Lofty* further submitted that there were probabilities on both sides and that where the scales are evenly balanced the appellant must be given the benefit of the doubt. I agree with Mr *Lofty* in his submission but in a case in which the trial court has made an adverse finding of fact and on the credibility of the appellant's evidence and that of his witness, the scales cannot be said to

be evenly balanced.

From a thorough reading of the record it does not seem probable that the complainant invited his guests to Pino's restaurant to spoil for a fight. He seemed, from the manner in which he gave his evidence, to be a person less inclined to engage in a fight and thus spoil the evening by fighting the appellant just because of badly grilled prawns. It seems more likely to me that the appellant, having mistakenly heard the complainant utter the word bastard, thought that he had been insulted and charged back to table number six and assaulted the complainant in the manner described by the prosecution witnesses.

It also seems impossible that the complainant, pinned down as he was by the appellant, would have attempted to kick the appellant's face. The preponderance of probabilities seems to favour the complainant's version. On the appellant's own version the defence of self-defence proffered by him cannot be sustained because it does not appear feasible that the complainant could have kicked the appellant in the face in that position.

In my view the degree of proof required in a criminal case has been fulfilled. In *Miller v Minister of Pensions* [1947] 2 All ER 372 (KB), LORD DENNING described that degree of proof at 373H as follows:

. . . and for that purpose the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the

1985 (1) ZLR p65

DUMBUTSHENA CJ

course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

See Hoffman and Zeffertt: *South African Law of Evidence* 3rd ed 409-410.

I am persuaded that the magistrate was correct in rejecting the defence evidence and in accepting the prosecution evidence. There is no doubt in my mind that on the evidence before him the magistrate arrived at the right decision.

Accordingly I would dismiss the appeal against conviction.

Beck JA: I agree.

Gubbay JA: I agree.

Kantor & Immerman, appellant's legal representatives

1985 (1) ZLR p66

GORT V TINTO INDUSTRIES LTD 1985 (1) ZLR 66 (HC)

Court High Court, Harare

Samatta J

Civil Exception

10 December 1984 and 13 February 1985

Flynote

Contract - exemption clauses in - must be strictly construed.

Damages - consequential - meaning of.

Headnote

Exemption clauses in a contract must be strictly construed. A contracting party seeking to protect himself against liability for damages recoverable by law for breach of contract must do so in clear and unambiguous language. There is nothing in law which prevents a contracting party from limiting his liability very severely, but the language he employs to achieve that goal must be very clear indeed. The word "consequential" does not have one meaning only. It is capable of being used in various senses.

Cases cited:

Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd 1960 (3) SA 178 (W)

St Line Ltd v Richardsons, Westgarth & Co Ltd [1940] 2 KB 99

Croudace Construction Ltd v Cawoods Concrete Products Ltd [1978] 2 Lloyd's Rep 55

I A Donovan for the excipient (defendant)

F C Blackie SC for the respondent (plaintiff)

Judgment

Samatta J: This is an exception by the defendant to two of the plaintiff's three causes of action on the ground that those causes of action are, in view

1985 (1) ZLR p67

SAMATTA J

of certain clauses of the General Conditions of Tender which form part of the parties' contract, bad in law. The case arises from installation by the defendant of an irrigation scheme on the plaintiff's farm following the conclusion of the said contract. For the sake of convenience I shall hereinafter refer to the excipient and the respondent as the defendant and the plaintiff respectively.

The essential facts of the case which, for the purpose of determining the exception, must be

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assumed to be established, are as follows. In January 1978 the defendant, a company which carries on business, *inter alia*, as specialist irrigation engineers, supplied the plaintiff with a written design and quotation for a proposed irrigation scheme for his farm. The offer was subject to the company's General Conditions of Tender. The first paragraph of the letter which contained the offer was couched in the following words:

Further to our discussions, we now offer our design and quotation for the proposed irrigation scheme on your farm.

The second paragraph reads as follows:

The scheme is designed to apply 62mm in an 8-9 day cycle, operating effectively for 22 hours per day, with 11 hour sprayline sets.

The plaintiff accepted the offer and the scheme was installed. The scheme failed, however, to supply to the farm a volume of water set out in the second paragraph of the defendant's letter quoted above. The failure was caused by -

- (a) pipes bursting and the joints leaking; and
- (b) the inability of the recommended pump units to supply the required amount of water.

The plaintiff duly notified the defendant of the defects, but the latter has failed or neglected to remedy the scheme. The plaintiff has already spent \$3 720,48 in attempting to repair the deficiencies. In about September 1981 a Mr Mentel, acting for the defendant and duly authorised thereto, undertook on behalf of the defendant to pay to the plaintiff the costs incurred by him in repairing the deficiencies I have referred to. The reasonable and necessary future cost to the plaintiff in putting the scheme into a proper and satisfactory condition will be \$26 936,80. The defendant, says the plaintiff, in assembling the equipment and materials for the scheme and in constructing it, was negligent in that -

1985 (1) ZLR p68

SAMATTA J

- (a) it failed to satisfy itself that the equipment and materials which it recommended and installed were suitable for the scheme and capable of fulfilling the requirements of the scheme; and
- (b) it failed to take any reasonable and necessary steps to remedy the defects after the same had become known to it.

It is part of the plaintiff's case that the equipment and materials were not suitable for the scheme in that they could not supply the "stipulated" volume of water to the land. The plaintiff says that, as a result of the aforementioned negligence of the defendant, he has suffered damages in the sum of \$26 809,38, being the value of the loss of wheat production in the 1982 growing season. He has prayed for:

- (a) an order directing the defendant to rectify the scheme to comply with the "guarantee" set out in the second paragraph of its letter quoted hereinabove;

- (b) alternatively (and in the event this court not granting the relief sought in (a)), damages in the sum of \$26 936,80;
- (c) payment of the sum of \$3 720,48;
- (d) alternatively (and in the event this court not granting the relief set out in (c)), damages in the sum of \$3 720,48;
- (e) damages in the sum of \$26 809,38;
- (f) costs of suit.

It will be seen from the facts so far stated, that the plaintiff relies upon the following separate causes of action, namely -

- (1) a breach by the defendant of a written "guarantee";
- (2) a verbal undertaking by the defendant to indemnify him; and
- (3) negligence of the defendant.

The exception relates only to causes of action (1) and (3). The defendant contends that it made no guarantee regarding the functioning of the scheme and, in any case, by reason of some clauses of the General Conditions of Tender which formed part of the contract the parties entered into, it is exempted from liability for consequences of its breach of the contract. With regard to the cause of action based on negligence, the defendant says that it owed the plaintiff no duty of care to ensure that the equipment and materials which it installed were able to supply the volume of water mentioned in the second paragraph of its letter because it had expressly disclaimed any responsibility for the fitness of any particular purpose of the goods supplied or the materials used and for the performance figures stipulated in the letter.

1985 (1) ZLR p69

SAMATTA J

In any event, says the defendant, clause 8 of the General Conditions of Tender is an answer to the claim based on negligence because the damages claimed there are of a consequential character.

The first question I ask myself and which I must endeavour to answer in this case is this: Did the second paragraph of the defendant's letter amount to a "guarantee"? It will be recalled that that paragraph reads

The scheme is designed to apply 62mm in an 8-9 day cycle, operating effectively for 22 hours per day, with 11 hour sprayline sets.

Notwithstanding the forceful argument of Mr *Blackie*, for the plaintiff, to the contrary, I am of the opinion that the paragraph cannot correctly be said to constitute a guarantee. I agree with Mr *Donovan*, for the defendant, that the paragraph gives only an indication of the expected performance level of the scheme. This view seems to me to be ineluctable when one reads the paragraph, as I think one ought to, with the seventh paragraph of the General Conditions of

Tender to which the plaintiff's attention was drawn by the defendant's letter. The paragraph is couched in the following language:

Any performance figures given by us are based on our general experience and are such as we expect to obtain on test but, unless they are specifically guaranteed by us in writing, we accept no liability if those figures are not obtained. (The emphasis is mine).

My opinion would have been different if the paragraph in the letter had contained a statement to the effect that not only was the scheme designed to apply the value of water indicated, but the defendant guaranteed that it would so apply. Having held that the paragraph did not constitute a guarantee, the conclusion that the seventh paragraph of the General Conditions of Tender (quoted above) protects the defendant against liability in relation to the plaintiff's first cause of action seems to me to be inescapable. The exception to that cause of action must therefore succeed.

I turn now to the exception to the third cause of action, namely the one based on negligence. It is a correct proposition of law that exemption clauses in a contract must be strictly construed: see *Cardboard Packing Utilities (Pty) Ltd v Edblo Transvaal Ltd* 1960 (3) SA 178 (W). A contracting party seeking to protect himself against liability for damages recoverable by law for breach of contract must do so in clear and unambiguous language. There is nothing in law which prevents a contracting party from limiting his liability very

1985 (1) ZLR p70

SAMATTA J

severely, but the language he employs to achieve that goal must be very clear indeed. It will be recalled that the plaintiff claims that the defendant was negligent in that -

- (1) it failed to satisfy itself that the equipment and materials which it recommended and installed were suitable for the scheme and capable of fulfilling the requirements of the scheme, and
- (2) it failed to take any reasonable and necessary steps to remedy the defects after the same became known to it.

Mr *Donovan* contended that the sixth paragraph of the General Conditions of Tender, as read with the seventh clause, which I have already quoted, is an answer to the plaintiff's claim based on negligence because, as he put it, the clear effect of the paragraph was to do away with duty of care which the plaintiff must prove to succeed. The sixth paragraph reads:

Subject to paragraph 5, we give no guarantee or warranties (express or implied) nor make any representations of any nature whatsoever in respect of any goods supplied or any installations effected by us or the material or workmanship or the fitness for any particular purpose (whether or not that purpose is known to us) thereof. Consequently no specifications, performance figures, representations or provisions of any nature (whether written, verbal or otherwise) will be binding upon us, unless specifically guaranteed by us in writing, and we will not in any event be liable to rectify any defects nor to make any replacements or repairs unless a claim has been made (i) in the case of goods supplied, within six months after delivery, (ii) in the case of installations, within six months after the installation is effected or would have been effected but for the delay in installation caused by the premises not being ready to receive the installation or by some other factor for which we are not responsible, which ever is the earlier.

The fifth paragraph is worded as follows:

Goods supplied and installations effected by us will conform to any specifications or performance figures specifically guaranteed by us in writing and (provided that a claim has been made within six months after delivery or installation) we will rectify any defects and make any replacements or repairs necessary to give effect to such a guarantee, unless the goods or installations have been used or altered or repaired in

1985 (1) ZLR p71

SAMATTA J

any way so as, in our opinion, to cause the failure to conform, or the defect to occur.

With all the goodwill in the world, I am unable to see how these paragraphs can correctly be said to protect the defendant against a claim based on its negligence. Whatever the effect of the two paragraphs is, I have no doubt that it is not, as contended by Mr *Donovan*, to do away with the duty of care on the part of the defendant. In my opinion, the words in the sixth paragraph are not wide enough to give the defendant protection against liability arising from its negligence. That is not the end of the matter, however, because Mr *Donovan* contended that the damages claimed by the plaintiff are consequential and, therefore, not recoverable from the defendant because paragraph 8 of the General Conditions of Tender protects it from paying such damages. Paragraph 8 reads:

The Company will not in any event be responsible for any consequential loss or damage whatsoever, whether direct or indirect, arising from any alleged failure to execute this contract according to quotation.

Mr *Donovan* cited several authors and authorities including *St Line Ltd v Richardsons, Westgarth & Co Ltd* [1940] 2 KB 99 and *Croudace Construction Ltd v Cawoods Concrete Products Ltd* [1978] 2 Lloyd's Rep 55 in support of his contention. In the former case ATKINSON J discussed at some length the meaning of the word "consequential". The facts of the case are accurately given in the headnote as follows:

By a clause in a contract for the provision of engines for a ship limiting the liability of the engine builders in certain events it was provided (*inter alia*) 'nor shall their liability ever or in any case ... extend to any indirect or consequential damages or claims whatsoever.' The contract was broken by the engine builders, and the shipowners claimed damages (a) for loss of profit during the time they were deprived of the use of the vessel; (b) expenses of wages, stores, etc.; (c) fees paid to the experts for superintendence.

The learned Judge held that, inasmuch as the damages claimed were recoverable only in so far as they were the direct and natural result of the breaches, the plaintiffs' rights were not cut down by the clause in the contract, since all these heads of damage were direct and immediate, and not indirect or consequential. In the course of his judgment he said at 103-4:

1985 (1) ZLR p72

SAMATTA J

What does one mean by 'direct damage'? Direct damage is that which flows naturally from the breach without other intervening cause and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening event or some special circumstances. The word 'consequential' is not very illuminating as all damage is in a sense consequential, but

there is a definition in the Oxford English Dictionary to which both sides have appealed: 'Of the nature, of a consequence, merely, not direct or immediate; eventual.' It cites the definition of 'consequential damages' from Wharton as: 'losses or injuries which follow an act, but are not direct or immediate upon it.' But, apart from that, I have the guidance of the Court of Appeal as to what is meant by 'consequential'. In *Millar's Machinery Company Ltd v David Way & Son* [40 Com Cas 204, 210], where the Court was construing a clause of the same class as this, I find this is what MAUGHAM L said: 'On the question of damages the word 'consequential' has come to mean 'not direct'. ROCHE LJ agreed 'that the damages recovered by the defendants on the counterclaim were not merely 'consequential' but resulted directly and naturally from the plaintiffs' breach of contract.' It is quite clear that the Court there took it for granted that the word 'consequential' meant 'merely consequential' and referred to something which was not the direct and natural result of the breach.

The learned Judge then said (*ibid*):

In my judgment, the words 'indirect or consequential' do not exclude liability for damages which are the direct and natural result of the breaches complained of.

The judgment of the learned Judge was referred to without any criticism by the Court of Appeal in the *Croudace* case (*supra*). It cannot be doubted that the word "consequential" does not have one meaning only, it being capable of being used in various senses. I have no doubt, however, that in the context of para 8 of the General Clauses of Tender, relied upon by the defendant in this case, the phrase "consequential loss or damage" means, and was meant to mean, loss or damage not resulting directly or naturally from the failure to execute the contract according to the quotation. (I take it to be beyond rational debate that the word "quotation" in the paragraph must have a wider meaning than "the price.") Applying that meaning of the phrase, can it be correctly said that the loss of \$26 809,38 which the plaintiff allegedly suffered as a result of the defendant's negligence is indirect or consequential

1985 (1) ZLR p73

SAMATTA J

loss? I do not think so. What was the intervening cause which would make the loss an indirect one? The answer, in my judgment, is that on the facts placed before me there was no such cause. In my opinion, if the defendant was negligent as alleged by the plaintiff and the negligence caused the latter to suffer the loss, then that loss directly flowed from the fault. I can see no other reasonable conclusion.

For the reasons I have given, I hold that the exception is only partly valid. In so far as the cause of action based on the alleged guarantee is concerned, the exception is allowed and the relevant part of the plaintiff's claim is dismissed; otherwise it is dismissed. Bearing in mind that the defendant is only partly successful, I think the right or just order in respect of costs is that costs of the exception be costs in the cause. I order accordingly.

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

Atherstone & Cook, legal practitioners for the respondent (plaintiff)

1985 (1) ZLR p74

S v NGWENYA 1985 (1) ZLR 74 (HC)

Court High Court, Bulawayo

Manyarara J

Criminal Review

15 February 1985

Flynote

Criminal Law - approach of court to sentencing of juveniles - juvenile cuts in terms of s 330 of Criminal Procedure and Evidence Act [Chapter 59] appropriate for males of 18 years of age but under 19.

Headnote

An 18 year old unemployed youth had stolen \$5 by picking the pocket of a pedestrian. His initial sentence was an effective six months' imprisonment. On review this was held to be manifestly excessive. The proper approach in sentencing male juveniles was discussed.

Cases cited:

S v Dzama HH-155-83 (unreported)

Judgment

Manyarara J: The accused is an unemployed first offender aged 18 years. He pleaded guilty in the magistrates court to theft by pocket picking of a sum of \$5.

The agreed facts are stated as follows:

On the 22nd day of October 1984 and at about 1045 hours, the accused saw the complainant near Ramji's store, Grey Street, Bulawayo, and the complainant had some money in his pocket. The accused saw a \$5 note protruding through the complainant's pocket and the accused was attracted and stole it by snatching it from the complainant's trouser pocket. The accused was chased and arrested later. The money recovered was given back to the owner. Total value stolen was \$5.

1985 (1) ZLR p75

MANYARARA J

For the short-lived theft of a small sum of money in circumstances which the court accepted emanated from sudden temptation, the magistrate imposed a staggering sentence of 10 months' imprisonment with labour, of which only four months' imprisonment with labour were conditionally suspended for four years. I dread to contemplate the magnitude of the sentence at which the magistrate might have arrived if the accused had so much as jostled the complainant or laid his hand on the rest of the money within the complainant's pocket.

An unreported case which is directly in point is *S v Dzama* HH-155-83. There, an 18-year-old country dweller entered a shop, sat down and tried on a pair of shoes which was for sale. On the seat next to him he saw a purse. He took it, placed it in his pocket and fled, but was apprehended. The purse and contents of \$4 were recovered intact. Upon his conviction on a

guilty plea the accused was sentenced to six months' imprisonment with labour, half of which was conditionally suspended.

On review, the sentence was set aside and substituted with a sentence of eight weeks' imprisonment with labour, of which four weeks' imprisonment was conditionally suspended for three years. The reasons given by the reviewing Judge (WADDINGTON, J, as he then was) apply with striking relevance to the case before me. He said at page 2 of the cyclostyled report:

The magistrate is not recorded as having considered imposing a moderate correction of cuts. Furthermore, the magistrate did not apparently consider that the offence was clearly committed on the spur of the moment and that the sight of the untended purse must have constituted a strong and sudden temptation to the young countryman. The accused was not, it might be observed, a person who went "around taking other people's property". He had a clean record and was tempted. The offence was not premeditated.

In the circumstances of this particular case, and aware that theft in the centre of Harare is very prevalent, McNALLY and KORSAH JJ agree with me that the sentence passed was excessive and that the accused should have been sentenced to receive a moderate correction of cuts with a short suspended sentence of imprisonment. Regrettably, the accused has been in prison serving his sentence since the 13th April 1983. I cannot now substitute a sentence of corporal punishment. Instead, I have ordered the accused's immediate release from prison as he has been there long enough.

1985 (1) ZLR p76

MANYARARA J

The passage just quoted effectively disposes of the case before me and I shall follow the learned judge's judgment.

It is equally regrettable that the accused in the instant case has already served just over two months of his sentence. The only solace he can be offered is to order his immediate release. With the concurrence of KORSAH J, such order has been made, and the accused's sentence will be reduced to the level indicated in *Dzama's* case.

The legal age of majority has been topical for reasons which are extraneous to my judgment. However, it may be of assistance to some magistrates to be reminded of the proper approach to the sentencing of juvenile offenders in this country's courts. This is eloquently set out in the opening passage to the judgment in *Dzama's* case as follows:

It may be that some magistrates believe that with the lowering of the age of majority to eighteen years, moderate corrections of cuts can no longer be imposed on males of that age. That would be an erroneous view of the law. Section 330 of the Criminal Code was wisely left untouched by the Legislature when the age of majority was recently reduced. It is therefore still possible for a court to impose juvenile cuts on a young man who has not reached the age of nineteen years. The lawgiver no doubt recognised that the arbitrary conferring of majority status on eighteen year olds could make no possible difference to the laudable and long accepted principle that it is better in many cases to impose short, stinging lessons on young men under the age of nineteen years than to run the risk of spoiling their characters by exposing them to hardened criminals in the country's prisons.

It is for these reasons that, whilst confirming the conviction of the present accused, the sentence imposed on him by the magistrate is set aside and the following substituted:

Four months' imprisonment with labour, of which two months' imprisonment with labour is suspended for three years on condition that the accused is not convicted of any offence involving dishonesty committed during that

period and for which he is sentenced to undergo imprisonment without the option of paying a fine.

Korsah J agrees.

1985 (1) ZLR p77

QUARRYING ENTERPRISES (PVT) LTD v JOHN VIOL (PVT) LTD & ORS 1985 (1) ZLR 77 (HC)

Court **High Court, Harare**

Ebrahim J

Petition

6 December 1984 and 20 February 1985

Flynote

Lien - improvement lien - nature - when arises - applicable to bona fide and mala fide possessors.

Ownership - abandonment - need for proof of intention to abandon.

Mala fide occupiers - rights of in relation to improvements when owner has permitted improvements to be effected.

Headnote

Petitioner, a company engaged in quarrying operations in a remote area, had built a granite causeway across a river on land vested in a rural council, in order to gain access to its quarry sites. Council officers knew of the causeway and did nothing to prevent its being built. Some years later, however, the council purported to sell the granite making up the causeway to another quarrying company (the first respondent) which arranged for the removal of the granite to Harare by yet another company (the third respondent). Petitioner applied, *inter alia*, for third respondent to deliver to petitioner the granite in its possession. It was argued, however, firstly that third respondent had an improvement lien over the granite for the payment of the costs of transporting it to Harare; secondly that petitioner had abandoned the causeway when it ceased quarrying operations during the war years; and, thirdly, that the rural council, as the owner of the land on which the causeway was built, had the right to sell the granite since the petitioner was a *mala fide* occupier of the land.

Held that the value of the granite having been enhanced by its transport to Harare, the transport costs were *utiles impensae* entitling the third

1985 (1) ZLR p78

respondent to an improvement lien, a real lien which derives from the common law independently of any contract that may have impinged on the matter. This was so whether or not the third respondent knew of the dispute over the ownership of the granite, for the principle

applies equally to *bona fide* and *mala fide* possessors.

Held, further, that in order to prove that ownership has been extinguished by abandonment, it is necessary to prove an intention to abandon. This had not been shown in the present case.

Held, further, equating the rights of a *mala fide* occupier with those of a *mala fide* possessor, that since the council had stood by and allowed the erection of the causeway to proceed without giving notice of its own claim to the land, the petitioner was entitled to retain ownership and possession of the granite until it had been compensated for the improvements it had made to the land. This was so even though all the elements of *negotiorum gestio* were not present since there seemed to be no reason for denying such relief to a *mala fide* occupier who, though he was not a *negotiorum gestor*, had suffered loss to the benefit of a rightful owner.

Cases cited:

United Building Society v Smookler's Trustees & Golombick's Trustee 1906 TS 623

JOT Motors (Edms) Bpk t/a Vaal Datsun v Standard Kredietkorporasie Bpk 1984 (2) SA 510 (T)

D Glaser & Sons (Pty) Ltd v Master & Anor NO 1979 (4) SA 780 (C)

Union Share Agency & Investment Ltd v Green 1926 CPD 129

Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (AD)

Salvage Association of London v SA Salvage Syndicate Ltd (1906) 23 SC 169

Osaka Mercantile Steamship Co Ltd v SA Railways & Harbours 1938 AD 146

De Beers Consolidated Mines v London & South African Exploration Co (1893) 10 SC 359

Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons 1969 (3) SA 621 (T)

Klug & Klug v Penkin 1932 CPD 401

Williams' Estate v Molenschoot & Schep (Pty) Ltd 1939 CPD 360

Knoll v SA Flooring Industries Ltd 1951(1) SA 404 (T)

Gouws v Jester Pools (Pty) Ltd 1968 (3) SA 563 (T)

A P de Bourbon SC for the petitioner

J B Colegrave for the first, third and fourth respondents

1985 (1) ZLR p79

EBRAHIM J

B S Dodd for the second respondent

Judgment

Ebrahim J: The petitioner, a company engaged in the quarrying of granite in the Mutoko district, applies for confirmation of a rule nisi issued by this court in the terms set out below:

- (a) First respondent to show cause, if any, why it should not deliver to the petitioner all granite blocks removed by first respondent from the petitioner's mining sites in the district of Mutoko and from the bed of the river 2 or 3 kilometres West of Nyamazwe on the road leading to the petitioner's mining sites in the Pumbi area of the Mutoko and why it should not be restrained from removing in future any more granite blocks belonging to the petitioner in the Mutoko area and why first respondent should not, jointly and severally with second respondent, pay the costs of this application.
- (b) Second respondent to show cause, if any, why it should not be restrained from accepting royalties from first respondent in respect of granite mined by the petitioner and from encouraging or allowing first respondent or anyone else to remove any granite mined by the petitioner and why second respondent should not, jointly and severally with first respondent, pay the costs of this application.
- (c) Third respondent to show cause, if any, why it should not deliver to the petitioner all granite blocks in its possession mined by the petitioner which have been delivered to third respondent by first respondent or its agents, and why it should not pay the costs of any opposition by third respondent to this application.

The first respondent is a company which is involved in a similar business to that of the applicant and which bears the name by which its sole owner is known. It appears that this company may have been wrongly cited. The company inculpated in the main action was Natural Stones (Pvt) Ltd, which has now been removed from the Register. This company was also wholly owned by Viol. In view of this confusion an application has been made to join John Viol, also known as Hans Robert Viol, as fourth respondent in the action. There was no objection to this application and the amendment was accordingly made. In the circumstances, John Viol is joined in his personal capacity.

1985 (1) ZLR p80

EBRAHIM J

The second respondent is the Mutoko District Council (hereinafter called "the Council"). In the exercise of its functions it leases quarry sites to the petitioner. It is alleged that the Council accepted royalties from Mr Viol or one of his companies for the removal by him of granite blocks from one of the quarries leased to the petitioner. There is also a dispute concerning the sale to Viol by the Council of a quantity of granite blocks laid by the applicant across the bed of a river (name unknown, but particularized in the rule).

The third respondent is Circlepave (Pvt) Ltd, a Harare-based company specializing in stone-work. The third respondent's involvement in the matter is incidental to the principal dispute. It will be convenient, however, to deal with this involvement *in limine*.

The third respondent holds, at its Harare depot, 42 tonnes of granite blocks which it transported from Mutoko in terms of a contract with Mr Viol. The granite was removed from the bed of the river described in the draft order, by Natural Stones (Pvt) Ltd Viol had contracted with the Council to purchase and remove the granite.

As already mentioned, the applicant had placed the granite blocks on the river-bed in the form of a bridge or causeway which afforded access for heavy transport to quarry sites beyond the river.

The third respondent claims a lien on the granite at present in its possession against payment of \$2 382, which was the contract price Viol agreed to pay in respect of transport costs, cramage and storage fees.

The petitioner denies the existence of such a lien. Firstly, it maintains, the costs were incurred by a third party, Terrier Services (Pvt) Ltd, and not by the respondent. The petitioner argues that the lien claimed is not transferable. I do not accept such a proposition.

Terrier Services (Pvt) Ltd were obviously simply a sub-contractor employed for convenience by the third respondent. The work they did constituted only part of the total contract for which the lien is claimed. The third respondent, as principal, would have retained the right to claim money from Viol, as the party with whom the contract had been made.

Secondly, the existence of a lien is denied on the grounds that the value of the granite has been diminished rather than enhanced by its removal from the river-bed to Harare. In my judgment this proposition, too, is without merit.

1985 (1) ZLR p81

EBRAHIM J

A lien can obviously exist where the value has been enhanced. The value of the granite now in Harare has quite obviously been enhanced, notwithstanding the fact that it no longer forms the bridge. It is common cause that transportation charges form a large component of the selling price of the granite. The petitioner has stated that the ultimate intention was to sell the granite which formed the bridge. To effect this intention the granite would have to be transported to Harare. Now that it is in Harare, the petitioner is in a position to market it at a price inclusive of the Mutoko-Harare transport-cost component.

It is therefore clear that the transport costs were *utiles impensae* which added value to the granite. Expenditure *utiles impensae* gives rise to a lien: *United Building Society v Smookler's Trustees & Golombick's Trustee* 1906 TS 623 at 629.

There is nothing to suggest that the third respondent knew of the dispute regarding the legality of Viol's claim, but even if it had done so the lien would have prevailed, for the principle applies equally to *bona fide* and *mala fide* possessors: *JOT Motors (Edms) Bpk t/a Vaal Datsun v Standard Kredietkorporasie* 1984 (2) SA 510 (T).

In my view the third respondent has what is known as an improvement lien for the amount by which the value of the granite has been enhanced (ie the transport to Harare). This is a real lien which derives from the common law, independently of any contract which may have impinged on the matter: *D Glaser & Sons (Pty) Ltd v Master & Anor* NO 1979 (4) SA 780 (C) at 788.

On the other hand, the amount claimed includes a large component of storage and crane charges which were required by Viol and so included in the contract price. These were charges for services which did not enhance the value of the granite but were merely for Viol's convenience. They arose purely *ex contractu*. Alternatively, they fall into the class of "luxurious expenses" in respect of which no lien is claimable (See *Smookler's case*, *supra*). The third respondent cannot rely on the common law to recover these charges. It must recover them from

Viol in the normal manner of recovering contractual debts.

As far as the third respondent is concerned, the order is that on payment by the petitioner of the sum of \$882 the granite must be released. Charges subsequent to the release (ie craning and delivery) must be negotiated in the normal way.

1985 (1) ZLR p82

EBRAHIM J

The third respondent has been only partially successful in its resistance to the application. However, because its failure was based on legal issues, I am satisfied that the resistance was not unjustified. I propose to award costs in approximate proportion to the third respondent's success: *Union Share Agency & Investment Ltd v Green* 1926 CPD 129 at 141; *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (AD) at 674B. The order is that the petitioner should contribute to the extent of one-third of the third respondent's costs.

The principal issue in this case is the removal of granite blocks by Viol from two sites in the Mutoko district, where they were allegedly under the control of the petitioner. It will be convenient to deal with each site separately because of the different factual and legal issues relating to them.

THE REMOVAL OF A NUMBER OF GRANITE BLOCKS FROM MINING SITE TT 14233

The relevant site is leased by the petitioner from the Council. It is common cause that the lease is current. The petitioner has held this lease for a number of years but during the war it was forced to terminate quarrying operations for security reasons. It applied to the appropriate authority (at that time the Minister of Internal Affairs) for a reduction in rental and left two heavy cranes on site.

In 1982 two of the petitioner's employees were instructed to measure and mark 150 granite blocks in preparation for sale. The task was completed before the end of 1982. In 1984 the applicant began removal of certain blocks to fulfil a contract. Consequent on checks of records, it was found that 25 of the numbered blocks were missing. Through a contact in Europe the applicant came into possession of a list of blocks advertised for sale by John Viol. A comparison between this list and the list of blocks missing from Site TT 14233 revealed that 14 of the blocks advertised by Viol had identical numbers and closely approximating weights and measurements to 14 among the 25 blocks which had been found to be missing from the site.

When the matter of the missing blocks was originally brought to the attention of the Council the petitioner alleges that two Council officials admitted that they had accepted royalties on behalf of the Council from Viol in respect of granite removed from the site. Neither of the officials concerned now recalls having made such an admission. They say that they assured the applicant that if granite was being removed from the leased quarry sites, this would be stopped.

1985 (1) ZLR p83

EBRAHIM J

Viol has submitted an affidavit in which he states that during 1983 he removed 20 blocks from site No TT 14233. This, he says, he did with the knowledge and permission of the Council. He claims that Council officials informed him that the rental for the site had not been paid. Such a statement is in direct conflict with an affidavit sworn by the Council's Assistant Executive Officer in December 1984, in which it is acknowledged that the lease was then valid and paid up to date.

In April 1984, a letter was written by a council official to the petitioner, stating that if quarrying operations were not recommenced shortly the lease would be cancelled. Again, this conflicts with Viol's allegation that he was told during 1983 that the lease had been cancelled, due to non-payment of rent.

I do not regard the evidence of the Council officials in respect of the removal of granite from the petitioner's quarry site as satisfactory. In the circumstances, I am satisfied that it is probable that the Council did receive royalties. The draft order, in so far as it concerns this aspect of the dispute, is confirmed.

THE REMOVAL OF GRANITE BLOCKS FROM THE RIVER-BED DESCRIBED IN THE DRAFT ORDER

The applicant claims, and it is not disputed, that it laid these blocks in the river-bed to form a causeway or bridge to facilitate the use of a road which gave access to certain mining operations in a remote part of the Mutoko district. This was a public road which the Council was responsible for maintaining. The applicant had asked the Council to construct a bridge but on receiving a negative response, had proceeded with the construction now in dispute.

The legal position in regard to the petitioner's ownership of the blocks appears to be that while it retains ownership in the granite, it was a *mala fide* occupier of the river-bed.

Ownership is a fundamental concept of our law. It is acquired and extinguished only in certain circumstances. The Council maintains that it had the right to dispose of these blocks because (a) they had been abandoned, and (b) they were found on its land.

In order to prove that ownership has been extinguished by abandonment, it is necessary to prove an intention to abandon: *Salvage Association of London v SA Salvage Syndicate Ltd* (1906) 23 SC 169; *Osaka Mercantile Steamship*

1985 (1) ZLR p84

EBRAHIM J

Co Ltd v SA Railways & Harbours 1938 AD 146 at 168. There is no evidence in this case that the applicant exhibited any intention at any time to abandon the granite forming the bridge. On the contrary, bearing in mind that the purpose of the bridge was to facilitate the applicant's quarrying activities and that the Council acknowledges the currency of the leases on the quarries, it had no basis whatever for assuming an intention to abandon.

In particular, the Council's Executive Officer (Administration) has alleged that he wrote to the applicant in April 1984 to warn that unless quarrying operations were commenced soon the

leases would be cancelled. A reply was received to the effect that operations would begin on 1 July. The evidence is that the bridge blocks were removed in September. Therefore, at the time of their removal, the Council was aware that operations were to continue. In these circumstances, their alleged belief that the bridge had been abandoned cannot hold much credence and I find that no intention to abandon has been shown.

The fact that the blocks were on Council property does not, in itself, give the Council the right to summarily remove them and dispose of them. The petitioner's occupation of the Council's property through the agency of its granite blocks was *mala fide* in the sense that it knew it had no title to the land so occupied: *De Beers Consolidated Mines v London & South African Exploration Co* (1893) 10 SC 359.

The right of retention of *mala fide* occupiers after the owner has laid claim to his land has yet to be authoritatively defined - see Joubert, *The Law of South Africa* vol 15 para 108. But the author there suggests that their rights in this regard ought to equate with the law regarding the rights of *mala fide* possessors. This submission is partly based on a logical extension of the equation of the rights of bona fide possessors with those of bona fide occupiers.

The law in regard to the right of *bona fide* and *mala fide* possessors to retain their property after the land on which it is found has been claimed by the rightful owners was authoritatively set out as follows in *De Beers Consolidated Mines v The London & South African Exploration Co* (*supra*) at 372:

(1) A *bona fide* possessor retains his ownership in materials affixed by him to the land until he has parted with the possession. Even after the owner has appeared to demand possession, such bona fide possessor may retain possession until he is compensated for his improvements to the

1985 (1) ZLR p85

EBRAHIM J

extent of the enhanced value of the land and, failing payment of such compensation, he may remove the materials if he can do so without serious damage to the land, or he may surrender occupation and recover the compensation by action. (2) A *mala fide* possessor who has affixed materials to the land and, before demand made by the owner, has disannexed and removed them, is not deemed to have parted with his ownership in the materials. After demand, he no longer has the right to retain the land or remove the materials from the land, nor is he entitled to compensation except for such expenditure as he may have necessarily incurred for the protection or preservation of the land. If, however, the rightful owner has stood by and allowed the erection to proceed without any notice of his own claim he will not be permitted to avail himself of his fraud, and the possessor, although he may not have believed himself to be the owner, will have the same rights to retention and compensation as the *bona fide* possessor.

As a statement of the common law in this regard, the above reasoning is virtually unassailable - see *Brooklyn House Furnishers (Pty) Ltd v Knoetze & Sons* 1969 (3) SA 621 (T), and for the purposes of this matter I regard the final proposition in the passage quoted above to be the applicable law.

The Council, as now constituted, perhaps did not know who had built the bridge. But they had no right to assume it was theirs to destroy. Mere reference to Council records would have revealed that the bridge was not a Council asset. With a minimum of further investigations the

builder of the bridge and the circumstances of its construction would have been ascertainable.

The Council would have discovered that its predecessor had stood by and allowed the construction to proceed. Section 8 of the Rural Councils Act [Chapter 211] constitutes rural councils as bodies corporate capable, *inter alia*, of suing and being sued. It would seem, therefore, that they must have perpetual succession - see Donges & Van Winsen, *Municipal Law* at p 1. A logical extension of this is that successive councils must be taken to ratify each other's decisions, unless a successor specifically indicates otherwise. In the present case there is no indication that the Council disapproved of its predecessor's decision to allow construction of the bridge. On the contrary, it is alleged that the Council itself made use of the facility, an allegation which I find is probably true in the circumstances.

A second reason given in Joubert (*loc cit*) for the equation of *mala fide*

1985 (1) ZLR p86

EBRAHIM J

possessors with *mala fide* occupiers is that "a *mala fide* occupier must be afforded the usual claim and corresponding lien of a 'normal' *negotiorum gestor*, if all the essential elements of *negotiorum gestio* are present." The point is pertinent to this matter.

While this is not a true situation of *negotiorum gestio* - see *Klug & Klug v Penkin* 1932 CPD 401, there has undoubtedly been enrichment to the extent that the Council received payment for the granite. For the reasons given above, this was unjust enrichment. With respect to the learned author of para 108 of vol 15 of Joubert (*op cit*), I see no reason for confining recoverable expenditure to situations where "all the essential elements of *negotiorum gestio* are present". There seems no reason for denying such relief to a *mala fide* occupier who, although he was not a *negotiorum gestor*, has suffered loss to the benefit of a rightful owner. This aspect of the law is based on the equitable principle enunciated in the Digest (50.17.206) that it is only fair that nobody should become wealthier through the loss and injury to another. See the *D Glaser* case (*supra*) at 789A. Thus, actions for unjust enrichment of the sort that has taken place here are closely allied to the concept of *negotiorum gestio*. See *Williams' Estate v Molenschoot & Schep (Pty) Ltd* 1939 CPD 360; *Knoll v SA Flooring Industries Ltd* 1951 (1) SA 404 (T); *Gouws v Jester Pools (Pty) Ltd* 1968 (3) SA 563 (T).

As a consequence, it is declared that ownership in the granite blocks removed from the river-bed remains with the petitioner and the Council had no right to authorize their removal, nor had the first or fourth respondent any right to remove them. As a result, the draft order is confirmed in so far as it concerns this aspect of the case.

Turning to the question of costs in the main issue, I think it equitable that, as in my foregoing analysis, liability should be determined by considering separately the issues raised in relation to the removal of granite from (a) the quarry site and (b) the river-bed.

In regard to the removal of granite from the quarry site, there is no evidence that Viol knew that the site was subject to a current lease to the petitioner or to anyone else. Viol has given evidence, which has not been refuted, that the Council informed him that the lease had lapsed for want of payment of rental. This would explain why he felt justified in removing marked

blocks. As I have indicated, the probabilities are against the Council's denial that it knew certain of the blocks for which it received royalties came from the quarry site. This being the case, it would be unfair for the first or fourth respondents to

1985 (1) ZLR p87

EBRAHIM J

pay the costs of this aspect of the case. My order is outlined below.

The position in regard to the granite removed from the river-bed is different. It is clear from the evidence that Viol, through his agent, Gschwind, was notified of the petitioner's claim to the granite several times. The evidence appears to be that Viol himself was out of the country at the time. In that case the *onus* fell on Gschwind to verify the petitioner's claim. Gschwind neglected to do so and through his neglect rendered his principal liable, with the Council, for the petitioner's loss.

I propose to apportion costs in the main issue equally between the two issues described above.

The draft order is confirmed, save that the petitioner is entitled to reclaim the granite held by the third respondent only after payment of the transport charges. The petitioner is to pay one-third of the third respondent's costs. The costs in the action, apart from those incurred by the third respondent, are to be shared in the proportion 25% by the first and fourth respondents and 75% by the second respondent.

Honey & Blanckenberg, legal practitioners for the petitioner

Winterton Holmes & Hill, legal practitioners for the first, third and fourth respondents

Coghlan Welsh & Guest, legal practitioners for the second respondent

1985 (1) ZLR p88

S v CHITANDA 1985 (1) ZLR 88 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and McNally JJA

Criminal Appeal

31 January and 22 February 1985

Flynote

Criminal Law - Miscellaneous Offences Act [Chapter 68] s 6(e) - hinder a police officer - whether refusal to answer questions an offence.

Headnote

The appellant was charged in a magistrates court and convicted of contravening s 6(e) of the Miscellaneous Offences Act [Chapter 68], "hindering a police officer in the execution of his duty". The evidence revealed that the appellant, after an incident where he had assaulted two people, drove to a police station looking for his companion. A report had been received by the police concerning the assaults and a policeman, without arresting the appellant, attempted to question him on the affair. The appellant declined to submit to questioning, left the police station and drove away, despite being ordered by the policeman to get out of his car.

Held that in the absence of an arrest, the appellant was under no legal obligation to accompany the officer into the police station or to submit to questioning.

Cases cited:

S v Batanayi 1980 ZLR 484 (AD); 1981 (2) SA 100 (ZAD)

Hinchcliffe v Sheldon [1955] 3 All ER 406

Rice v Connolly [1966] 2 All ER 649 (QBD), [1966] 2 QB 414

Ingleton v Dibble [1972] 1 All ER 275 (QBD)

M Lofty for the appellant

F S Chambakare for the respondent

1985 (1) ZLR p89

DUMBUTSHENA CJ

Judgment

Dumbutshena CJ: The appellant was charged with two counts of common assault and one count of contravening s 6(e) of the Miscellaneous Offences Act [Chapter 68]. He denied all three charges but was convicted and sentenced on count one to three months' imprisonment with labour, and on count two to three months' imprisonment with labour, a total of six months. Three months were suspended on the usual conditions. On count three he was sentenced to one month's imprisonment with labour. All in all he was to serve an effective sentence of four months' imprisonment.

He now appeals against conviction only on count three and against sentence on all three counts.

The ground of appeal against conviction is that "the learned magistrate misdirected himself in finding that the appellant, by refusing to answer questions of the police, and in leaving the police station, resisted or hindered a police officer in the execution of his duty in contravention of s 6(e) of the Miscellaneous Offences Act [Chapter 68]."

The circumstances leading to the alleged commission of this offence are briefly as follows. The appellant went to the Goromonzi Kubatana Council Beerhall in the evening of 6 July 1984. The first complainant, Chikokonya, said that he told the appellant that the beerhall had been closed.

The appellant assaulted him. It is not clear whether the appellant assaulted the second complainant, Tsikwaurere, after he had left the beerhall, or at the beerhall. There was on both counts of assault sufficient credible evidence and the appellant was correctly convicted. He did not challenge these two convictions on appeal.

After assaulting the two complainants in the first two counts, the appellant drove his car to the police station. By the time he arrived there a report on the two assaults had already been made to the police. It is common cause that the appellant told the police that he was looking for his girlfriend. It is also common cause that Constable Gwandira, who was on duty at the Charge Office, informed the appellant of the report he had received. After having informed the appellant of that report, Constable Gwandira invited him to come behind the counter and answer questions. The appellant told the police officer that he had come to inquire about his girlfriend. He walked out of the charge office, followed by the police officer. He got into his car. The police officer ordered him to get out of the car.

In cross-examination it was put to him that he had resisted arrest by dashing

1985 (1) ZLR p90

DUMBUTSHENA CJ

out to his car. He denied resisting arrest and said he got to his car and drove away. The police officer testified in his evidence-in-chief that the appellant, upon being asked to come inside behind the counter to answer questions, walked out. The officer followed him and the appellant jumped into his motor vehicle. He ordered him to come out of the motor vehicle. The appellant refused to get out of his car and drove away. It is apparent from this evidence that at no time did the police officer tell the appellant that he was going to arrest him. He had received a report of assaults by the appellant on two people. He could have arrested the appellant in terms of s 29(1)(b) of the Criminal Procedure and Evidence Act [*Chapter 59*] had he wished to do so.

Although the charge was badly worded it, however, in its particulars sufficiently alleges that an offence was committed. The particulars were that the accused did "wrongfully and unlawfully hinder Gwandira a Constable in the Zimbabwe Republic Police there being in the execution of his duty while endeavouring as he then and there lawfully might (to) arrest the said accused for the offences mentioned and described by refusing to answer questions and fleeing away in his vehicle." However, the evidence did not establish that offence. The police officer in his evidence never mentioned telling the appellant that he was going or intended to arrest him. The intention to arrest the appellant is the most prominent particular in the charge. All that the evidence established was that the appellant went to the charge office to look for his guest and that he was invited to go behind the counter for purposes of being asked questions and he declined the invitation.

I am doubtful that on this evidence the appellant hindered the police officer in the execution of his duty. It seems to me that on the prosecution evidence, if the word "hinder" is given its ordinary meaning of "obstruction", the appellant did not hinder the police officer in the execution of his duty. The appellant was not under a legal obligation to act in the manner the police officer requested him to do.

On this aspect of his judgment the magistrate did not apply his mind to the evidence adduced by the prosecution in support of the charge. The magistrate said:

In respect to count three, the police officer gave his evidence very well and this court has no reason to disbelieve him. The accused does not seriously challenge him in his evidence. The accused was told clearly about the allegations against him and was invited to come over to the other side of the counter for questioning, which he refused. He walked

1985 (1) ZLR p91

DUMBUTSHENA J

out and locked himself inside his car. He was followed and ordered to come out of his car for questioning. Instead he took off at high speed. By resorting to this form of conduct, I must find that the accused did resist or hinder the police officer from the execution of his duties.

He failed to take account of the particulars of the offence as revealed in the charge.

Mr *Chambakare*, for the State, contended in his submission that s 6(e) of the Act affords the police latitude to investigate crimes so that they are not hindered wherever they are. That submission is very wide and would allow the police to arrest people who refuse to answer questions put to them by the police even where the police are unlawfully interrogating persons who have not committed any offence. It would mean that each time police unlawfully detain innocent people for purposes of investigating a non-existent crime and those people refuse to answer questions they would be guilty of contravening s 6(e). That in my view was not the intention of the Legislature when enacting this section. "A suspected person who refuses to answer questions by the police makes it more difficult for them to carry out their duties, but obviously he is not guilty of obstruction." See Glanville Williams, *Criminal Law (The General Part)* 2nd ed at 419-420.

Mr *Chambakare* relied on *S v Batanayi* 1980 ZLR 484 (AD); 1981 (2) SA 100 (ZAD), a decision of this court. In that case the appellant, who had authority over a person whom the police wanted to question at the police station, refused to allow that person to be questioned or investigated by the police at the police station. The trial was conducted on the basis that the appellant refused to allow the suspect to accompany the police to the police station to assist them with their inquiries into an offence. The appellant had some authority over the suspect and the effect of his order was that the police were hindered in their expressed wish to take the suspect with them to the police station to investigate the offence. So on appeal there were two issues: whether the appellant had refused to allow the suspect to accompany the police and if so, whether that refusal amounted in the circumstances to a contravention of s 6(e) of the Act. As can be seen from the above brief summary of the facts, *Batanayi's* case is distinguished from the instant case on the facts.

FIELDSEND CJ cited in his judgment in support of the conviction *Hinchcliffe v Sheldon* [1955] 3 All ER 406 and *Rice v Connolly* [1966] 2 QB 414; [1966] 2 All ER 649 (QBD). He said at 486H (101F of the South African report):

1985 (1) ZLR p92

DUMBUTSHENA CJ

The English cases of *Hinchcliffe v Sheldon* [1955] 3 All ER 406 and *Rice v Connolly* [1966] 2 QB 414, in dealing with s 51 (3) of the Police Act 1964 - where the word 'obstruct' and not 'hinder' is used - have decided that any conduct which makes it more difficult for the Police to carry out their duties can amount to obstruction. The latter case indicates how wide is the conduct covered by the English section: the defendant, who the Police thought was acting suspiciously, declined, despite repeated requests, to give his full name and address or any account of himself and declined to go with the Police to a police call-box. On a case stated the Divisional Court held that the defendant's conduct amounted to obstruction within the section as it made it more difficult for the Police to carry out their duties in keeping the peace, preventing crime and protecting property. The defendant was, however, acquitted on other grounds.

In *Rice v Connolly* [1966] 2 QB 414 at 419C-420B; [1966] 2 All ER at 651H-652D, the grounds and the reasons upon which the appellant was acquitted on appeal were stated by the Lord Chief Justice, LORD PARKER, as follows:

It seems to me quite clear that the appellant was making it more difficult for the police to carry out their duties, and that the police at the time and throughout were acting in accordance with their duties. The only remaining ingredient, and the one on which in my judgment this case revolves, is whether the obstructing of which the appellant was guilty was a wilful obstruction. 'Wilful' in this context not only in my judgment means 'intentional' but something which is done without lawful excuse, and that indeed is conceded by Mr Skinner who appears for the prosecution in this case. Accordingly, the sole question here is whether the appellant had a lawful excuse for refusing to answer the questions put to him. In my judgment he had. It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest. Mr Skinner has pointed out that it is undoubtedly an obstruction, and has been so held, for a person questioned by the police to tell a 'cock-and-bull' story, to put the police off by giving them false information, and I think he would say: Well, what is the real distinction? It is very little away from giving false information to giving no information at all. If that does in fact make it more difficult for the police to carry out their duties then

1985 (1) ZLR p93

DUMBUTSHENA CJ

there is a wilful obstruction. In my judgment there is all the difference in the world between deliberately telling a false story, something which on no view a citizen has a right to do, and preserving silence or refusing to answer, something which he has every right to do. Accordingly, in my judgment, looked upon in that perfectly general way, it was not shown that the refusal of the defendant to answer the questions or to accompany the police officer in the first instance to the police box was an obstruction without lawful excuse.

For the purposes of the instant case what is more relevant to the resolution of this appeal in the above passage is the fact that "though every citizen has a moral duty or, ... a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority and to refuse to accompany those in authority to any particular place; short, of course, of arrest."

In my view, if the learned magistrate had considered this appeal in the light of the passage quoted above, he would have found that the appellant had not contravened s 6(e) of the Miscellaneous Offences Act when he refused to go behind the counter for purposes of being asked questions when he had come to do some other business.

The soundness of the passage from *Rice v Connolly*, *supra*, was commented upon by BRIDGE
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J in *Ingleton v Dibble* [1972] 1 All ER 275 (QBD) at 279f-g as follows: -

For my part I would draw a clear distinction between a refusal to act, on the one hand, and the doing of some positive act on the other. In a case, as in *Rice v Connolly*, where the obstruction alleged consists of a refusal by the defendant to do the act which the police constable has asked him to do - to give information, it might be, or to give assistance to the police constable - one can see readily the soundness of the principle, if I may say so with respect, applied in *Rice v Connolly*, that such a refusal to act cannot amount to a wilful obstruction under s 51 unless the law imposes on the person concerned some obligation in the circumstances to act in the manner requested by the police officer.

I find support in the view I take of this appeal in the passages cited above plus the added fact that the evidence adduced by the police officer did not support the charge. The appellant was wrongly convicted. I would allow the appeal.

1985 (1) ZLR p94

DUMBUTSHENA CJ

Both the conviction and sentence are set aside.

[The remainder of the judgment is not material to this report - *Editor*.]

Beck JA: I agree.

McNally JA : I agree.

Kantor & Immerman, appellant's legal representatives.

1985 (1) ZLR p95

S v EVANS 1985 (1) ZLR 95 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Gubbay and McNally JJA

Criminal Appeal

22 January and 6 March 1985

Flynote

Criminal law - "black-out" - how established - whether may be defence to criminal charge - whether necessitates special verdict in terms of s 28(1) of Mental Health Act, 1976

Headnote

The appellant was charged with and convicted of culpable homicide arising out of a collision between two railway trains allegedly caused by his negligent driving of one of the trains. In his defence he testified that he had suffered a "black-out" due to the stress and irregular hours of his work and so had been unable to activate the appropriate braking system in time to avoid the

collision. Despite the fact that a medical practitioner called by the prosecution conceded that it would not be unexpected that a person leading the life of an engine-driver should suffer a black-out, the trial court found that the appellant had not established the defence and that in any event, if he had proved it, the court would have been obliged to enter a special verdict in terms of s 28 of the Mental Health Act, 1976. On appeal:

Held that there is no onus on an accused person to establish the defence of a black-out; as with the defence of compulsion, all that is required is that there emerge from the evidence material sufficient to raise the issue as a realistic issue. Once the issue is so raised the persuasive burden of proving the mental element of the offence rests with the prosecution.

Held, further, that the medical practitioner's evidence laid a foundation for the defence of a black-out and the persuasive burden of proving that the appellant was negligent then rested with the prosecution.

Held, further, that in the circumstances of this case, where the appellant did

1985 (1) ZLR p96

DUMBUTSHENA CJ

not act whilst unconscious during his black-out, his black-out was a defence to the charge.

Held, further, that the definition of "mentally disordered or defective" in s 2 of the Mental Health Act, 1976, does not encompass a person who suffers from a black-out such as the one suffered by the appellant, where the black-out was not caused by an injury. A special verdict of "guilty but insane" in terms of s 28(1) of the Act would therefore have been wrong.

Cases cited:

Bratty v Attorney-General for Northern Ireland [1963] AC 386 (HL) (NI)

R v Dervish [1968] Crim LR 37

S v Mapfumo & Ors 1983 (1) ZLR 250 (SC)

S v Trickett 1973 (3) SA 526 (T)

S v Mahlinza 1967 (1) SA 408 (AD)

Attorney-General v Senekal 1969 (2) RLR 368 (AD); 1969 (4) SA 478 (RAD)

J B Colegrave for the appellant

F S Chambakare for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted by the magistrates court of culpable homicide and sentenced to 18 months' imprisonment with labour. He now appeals against both conviction and sentence.

It is common cause that the appellant was driving train 505 in the early hours of the morning of 18 March 1983 from Bulawayo to Gweru. It is also common cause that train 505 collided with train 546 which was travelling in the opposite direction and driven by one Dempsey. Two men died as a result of that collision. The State alleged that the appellant was negligent in the driving of train 505 in that he did not keep a proper lookout and thus failed to observe control lights; he drove at an excessive speed and applied the wrong brake system. Both the appellant and Dempsey were employed by the National Railways of Zimbabwe as engine drivers.

The appellant denied driving negligently as alleged by the State. He testified to having had a black-out. He said in evidence he did not know what happened. In his warned and cautioned statement, Exhibit 7, he also said he had a black-out. His reply to the warning and caution reads as follows:

I regret very deeply for the loss of the two lives and damaging valuable

1985 (1) ZLR p97

DUMBUTSHENA CJ

property. On the 17th of March, 1983, the Railways Chief Clerk called up my wife at approximately 1210 hours to inform her that I was no longer working train number 411 which I was supposed to work at 0340 on the 18th of March, 1983, and that I was now to work train 505 on the 17th of March, 1983, at 2300 hours. I was not present at the time. When I got home at 2315 hours my wife told me about the change and I was already late on duty. I phoned the Chief Clerk and he confirmed that I was going to work train 505. I then departed for the local sheds and signed on duty. I got on my engine and proceeded to Mpopoma Marshalling Yard where I was given the load and given the signal to proceed. From Mpopoma I was experiencing vacuum problems but I managed to carry on as far as Daisyfield Siding where I was put on to the loop to effect a crossing. After crossing I proceeded to Wida Siding and on the approach to Wida I recall seeing the distant signal displaying amber and from there onwards I have no knowledge of what happened until after the collision with train number 546. From the time of seeing the amber until after the accident I had a black-out.

Both the appellant and Dempsey were driving DE 10-A class locomotives. They are diesel electric locomotives. They have the same fittings and appliances. Each has four different brake systems, namely the vacuum brake system, the vigilance brake system which is commonly referred to as "the dead man system", the air brake system and the dynamic brake system. Mr Wetton, a senior mechanical engineer with the National Railways of Zimbabwe, testified that the brake system which is in common use on the Railways is the vacuum brake because most of the rolling stock is vacuum fitted.

For the purposes of this appeal the vigilance and air brake systems feature significantly. It is, therefore, important to highlight the functioning of these two systems in order to appreciate better the appellant's defence. On the vigilance system Mr Wetton testified as follows:

The vigilance apparatus fitted to those locomotives, is a two cycle vigilance. There is an eight second cycle and a hundred and two second cycle. That is what it is capable of, but normally we set them up to the hundred and two second cycle. This means that the driver, every hundred and two seconds, has to cancel the vigilance, or the brakes will operate. Prior to that happening, eight seconds before the brakes are automatically applied, a buzzer sounds in the cab. . . . the vigilance system is incorporated for safety, obviously, if the train is being worked by a single

1985 (1) ZLR p98

DUMBUTSHENA CJ

man in the locomotive cab. And the vigilance system employed on those locomotives is basically either an eight second or a hundred and two second cycle vigilance. You can set it to eight seconds, or you can set it to a hundred and two. We have decided to set ours at a hundred and two.

When the vigilance cycle of a hundred and two seconds is completed the system switches off. The driver has to take corrective action any time under 102 seconds. For the purpose of taking corrective action there is a foot-operated pedal switch with which the driver activates the system. If the driver does not activate the system eight seconds before a hundred and two seconds expire a buzzer which is in the driver's cab sounds and reminds him that he has to take action. If, as already mentioned above, the driver does not reactivate the vigilance brake system the train brakes are automatically applied, that is, the rolling stock and the locomotive will be brought to a standstill.

Mr Wetton said if the vigilance brake system of train 505 had operated, the train, travelling at a speed of 60 kph, would have been automatically brought to a halt in a distance of 500 metres. The length of the loop at Wida Siding is 762 metres - the length of a standard crossing loop. It is common cause that the train shot through the distance of the loop and collided with train 546 which was on the main line and approximately 200 metres from the loop because the air brakes which are worked by compressed air had been applied accidentally.

The air brake system is confined to the locomotive only. It is usually used in shunting operations. It has a different lever from the vacuum brake system, and the two levers are positioned differently. The automatic train braking, that is the vacuum brake system, has its lever sited in such a way that the driver's hand can automatically find it. The air brake is applied manually. Once it is applied it automatically cancels the vigilance brake system. It was common cause that only the air brakes were applied to the two locomotives pulling train 505.

The fourth - the dynamic brake system - need not detain us. It does not assist the court in deciding this appeal. It however, works on generators. It is an electrical system which, when applied, reverses traction motors and turns into generators, and the electro-magnetic force restricts the speed of the train.

Before considering the appellant's defence which put simply is to the effect that he suffered "a black-out at a point on the railway line about three

1985 (1) ZLR p99

DUMBUTSHENA CJ

kilometres from the southern entrance to the Wida Siding", it is necessary to summarise what the appellant says happened when he approached Wida Siding and the observations of independent witnesses who examined after the accident the train he was driving.

The appellant said he was scheduled to drive a train at 0340 hours in the early morning of 18 March. So on 17 March he went about his business believing that he would be on duty at the scheduled time. He was away from home for the rest of the day. He returned home at 2315 hours. He was then informed by his wife of the change of duty. He was now to take out train 505

at 2300 hours on the night of 17 March. He said he would have taken a little rest had it not been for this change.

After midnight he took out train 505 and proceeded towards Gweru. He remembered crossing some trains at Lochard Siding and Daisyfield Siding. He was the first to arrive at Lochard Siding so he waited on the mainline for the other train to cross. At Daisyfield Siding he went into the loop. He drove his train out of the loop and proceeded towards Wida Siding. On approaching Wida Siding he observed the first signal, marked A on the plan, Exhibit 4, and referred to as the distant signal. Under cross-examination the appellant said that although he observed the distant signal at amber and realised that there was going to be a crossing he did not decelerate because he was "going uphill". It was common cause that he kept the throttle open at notch 8. He did not deny that once he had seen the first signal he knew he was within striking distance of Wida Siding and that he was going to approach other signals. It is not disputed that the appellant never decelerated. His train shot past the loop at notch 8 and collided with the other train.

The appellant's defence, as already mentioned, is that he had a black-out. He testified to not remembering what happened after he had seen the distant warning signal. He denied having fallen asleep or having applied the air brakes. The appellant was persistent in his defence of a black-out. In reply to the warn and caution he said: "From the time of seeing the amber until after the accident I had a black-out". In his evidence in court he asserted that he had a black-out and could not remember what happened before the accident.

Is this sufficient evidence to establish this type of defence? In *Bratty v Attorney-General for Northern Ireland* [1963] AC 386 (HL) (NI), a case in which the appellant had told the police that when he was with the girl he had a "terrible feeling" and that a "sort of blackness" came over him, at his trial three separate defences were left open to the jury, namely, (1) automatism by

1985 (1) ZLR p100

DUMBUTSHENA CJ

reason of suffering from psychomotor epilepsy; (2) that he was guilty of only manslaughter because he was "incapable of forming an intent to murder on the ground that 'his mental condition was so impaired and confused and he was so deficient in reason that he was not capable of forming' such intent; (3) that he was guilty but insane in consequence of suffering from a disease of the mind within the McNaughton Rules". The case is of interest to us because of what was said by Lord Denning about the defence of a black-out at 413-14:

It is not sufficient for a man to say 'I had a black-out': for 'black-out' as STABLE J said in *Cooper v McKenna*, *Ex parte Cooper* 'is one of the first refuges of a guilty conscience and a popular excuse'.

In *R v Dervish* [1968] Crim LR 37 *Bratty's* case was considered with approval by the Court of Appeal (Criminal Division). The commentary on that case explained the above words as follows:

Of course a jury might, as a fact, be left in real doubt where they have nothing to go on but the bare, unsupported word of the accused person, if he appeared to be a witness of truth; and it would be an artificial rule which debarred them from considering the defence in those circumstances. The requirement of some supporting evidence is based on obvious considerations of policy - otherwise it might be all too easy for guilty persons to

procure an opportunity of acquittal on fabricated evidence.

In his book *Textbook of Criminal Law* 2nd Ed at 663 the learned author Glanville Williams says of this defence:

Although the 'black-out' defence is legally recognised, it is a defence too easily feigned to be accepted without severe scrutiny. So the courts have laid down that the evidential burden in respect of the issue of non-insane automatism rests upon the defendant, and, moreover, that medical evidence must (where appropriate) be given in its support before the judge is bound to leave this issue to the jury. If there is sufficient evidence (whether coming from the defendant or from the Crown) to pass this 'initial hurdle' - to 'lay a foundation' for the defence, as the judges sometimes say - the jury will be directed that the persuasive burden of proving the mental element rests on the prosecution.

See also Smith & Hogan: *Criminal Law* 4th Ed at 40.

1985 (1) ZLR p101

DUMBUTSHENA CJ

There is in the requirement for an accused person to lay a foundation for the defence of black-out some similarity between that defence and the defence of compulsion. In the defence of compulsion the accused should adduce some evidence to show that his mind was overborne by compulsion at the time of committing the offence. Mr Justice BARON ACJ, when considering the defence of compulsion in *S v Mapfumo & Ors* 1983 (1) ZLR 250 (SC), said at 253F-G what I consider appropriate to the appreciation of the foundation to be laid in the defence of black-out. The learned Acting Chief Justice said:

There is . . . no *onus* on an accused person; all that is required is that there emerge from the evidence, whether adduced by the prosecution or the defence, material sufficient to raise the issue in question as a realistic issue, and to speak of this as an *onus* resting upon an accused, quite apart from its extent, can be misleading.

What then was the foundation laid down by the appellant at his trial? He testified to having had a black-out and to not remembering what happened until after the collision. He did not call medical evidence. The prosecution called Dr Gwisayi, the Superintendent of Gweru General Hospital. He was called specifically to tell the court what happens to somebody who has a black-out. He was asked:

What actually happens to him when he has a black-out? - What precisely happens is that the brain 'switches off', as it were, and normally a person physically collapses.

He collapses physically? -Yes.

Would you say as if he had a heart attack, or has he some control over his physical actions? - Like he has got a heart attack, he loses control.

Finally he was asked to tell the court the usual or the more common cause of a black-out. He replied: "Sorry, there are many".

In cross-examination the defence counsel reviewed the life led by an engine driver. He called it an unusually irregular life. He summarised it as follows:

They go on shift at all sorts of odd hours of the day and of the night, or early morning, and they work for a certain period and then they sleep, either in the caboose or, if they are lucky enough, back home; and then they are off

on a rest period for eighteen hours or sometimes more if they

1985 (1) ZLR p102

DUMBUTSHENA CJ

are lucky. As you can see from that sort of programme, their sleep is irregular and probably often broken and their meal times and their eating habits and so on would be very irregular and unusual. I would like to ask you whether you would agree with me, that that sort of life style might predispose one to faint or have a black-out? - In some instances I would agree with you.

After defence counsel had characterised the life of an engine driver as an unusual one the doctor agreed that it was an unusual life. What is more important is the following passage which was put to Dr Gwisayi:

And his body rhythms that I have described become disorganised, disorientated, because heaven knows when his next meal is going to come, what it is going to consist of, how much sleep he is going to have; and those sort of considerations enter into it when you are looking at an engine driver and his predisposition perhaps to having a faint or a black-out. - Correct.

And it is for that reason that I suggest to you that it would not be unexpected, for such a thing to happen to a man living that sort of life, that sort of disorganised life? - No.

You agree? - I agree with you.

In my judgment the appellant through Dr Gwisayi, a prosecution witness, laid a proper foundation for the defence by introducing evidence from which it may reasonably be inferred that the appellant suffered a black-out. His evidence alone would not have been sufficient. It seems to me that on this evidence alone the foundation for the defence of a black-out has been laid albeit on a balance of probabilities. On this evidence alone the persuasive burden of proving that the appellant was negligent now rests on the prosecution.

If I am wrong in the view I have taken, there is, however, support for the conclusion I have arrived at, derived from the evidence and observations made by other prosecution witnesses and from the nature of the brake apparatus on a diesel electric locomotive.

The appellant was driving a locomotive fitted with four brake systems. At this stage I am only concerned with two systems, the air brake system and the vigilance brake system. The train driven by the appellant crashed into one

1985 (1) ZLR p103

DUMBUTSHENA CJ

driven by Mr Dempsey at the northern side of the loop. According to Mr Dempsey the appellant's train was half in the loop and half out of the loop at the time of the collision.

Mr Wetton who went to the scene of the accident and examined the locomotives found the power controller in the locomotive of train 505 in an off position and its direction selector in the forward position. On examining the running gear and bogeys he observed that there had been excessive braking applied to the locomotives. He said "the brake blocks had fused and the cast-iron blocks had run. There was heavy discoloration of the brake blocks and of the steel

tyres of the locomotives". He explained that a locomotive runs on steel tyres which are normally pressed onto the rim of the wheel. These locomotives were new and had solid wheel discs. Mr Wetton said in spite of that there was heavy discolouration of the tyre surfaces. When he examined the rest of the train, that is, other than the two locomotives, he found no evidence of the train having been braked. In other words there was no evidence of excessive braking on any of the rolling stock and all the brakes on the rolling stock were functioning normally. He followed the loop along which the train travelled and found at intervals pieces of disintegrated brake blocks which were heavily discoloured. Bits and pieces of brake blocks were picked up from about thirty metres inside the points into the loop from the southern end, that is, from the Bulawayo end. He estimated that possibly fifty pounds per square inch air brake pressure was applied. And that when a train is travelling at 55 to 50 kph it did not take a long time to create enough heat to discolour the block. He said "the total braking force of these locomotives would be each of about four or five tons". All that energy was being applied to the wheels and the friction and heat caused the discolouration and the breaking into bits and pieces. When the rolling stock of train 505 were taken to Daisyfield Siding for static tests no similar discolouration and disintegration were found on the rolling stock. From the above evidence it is clear that the only braking system that was applied was the air brake system. It is common cause that the application of the air brakes cancels automatically the vigilance brake system - the "dead man's" brake. There was, therefore, no protection for the driver. The train could not stop automatically. One might ask why an experienced driver risked an inevitable accident by applying air brakes instead of vacuum brakes.

In my view the above evidence tends to support the appellant's assertion that he suffered a black-out. The possibility that he might have suffered a black-out is enhanced by the evidence of Mr Wetton and Mr Dempsey. Although the medical evidence adduced by Dr Gwisayi seemed not to have been based

1985 (1) ZLR p104

DUMBUTSHENA CJ

on a sound, researched scientific foundation, it is, in my view, a sufficient basis upon which a sound foundation of this type of defence can be laid. I arrive at that conclusion because his evidence is strengthened in this regard by the evidence of other prosecution witnesses.

For the purposes of this defence the manner in which the air brake functions and the case with which it can be applied are of crucial importance. To emphasise the manner in which it works and the possibility of its having been accidentally applied, it is important to look at what the magistrate said in his judgment. The learned magistrate summarised his findings at the inspection *in loco* in these words:

... the air brake, that is situated next to the driver's seat, on the left and below the vacuum brake knob. It was noted that with the knob in the off position the driver can actually lean his left elbow on this lever. A driver in a sitting position would be within easy reach of the knob and his elbow can come into contact with this knob at any time.

To push the air brake lever would take very little effort.

The possibility that the air brake was accidentally applied can be gleaned from reading what Dr

Gwisayi said, when asked whether a person "who began to suffer from a black-out might be inclined to grab hold of levers and objects which might be handy to him, in order to prevent himself from falling." He replied:

Normally with black-outs, they just come suddenly, and as I said, you switch off mentally; and the tendency is before you really can grab something, you will have collapsed.

Would you not accept, as a reasonable possibility, an outset of feeling unwell, or faint, in a moving locomotive cab, an unsteadiness which might have caused him to grab something to stop himself falling? - Well, if he was holding something, he might pull it when he gets a black-out, but he cannot grab something when he gets a black-out.

But it is possible that he might move a lever or something of that nature? - If he was holding it before the black-out, yes.

So it would have been impossible for the appellant to have grabbed the air brake before collapsing, unless as the doctor said he had been holding it

1985 (1) ZLR p105

DUMBUTSHENA CJ

before collapsing. So Mr *Colegrave*, both in his heads of argument and before us, argued that the "air brake could have been applied in a number of ways. The appellant's hand might have been on the lever at the time of the black-out. He might have had his elbow on it at the time of the accident. His inert body might have fallen against it or the swivel chair might have knocked it". If it is remembered that the air brake lever extended about a foot from the control board and that it would be almost in the crook of the driver's elbow if he sat with his hands on his lap in the ordinary sitting position as was observed at the inspection *in loco*, the possibility of an accidental knocking of its lever in the process of collapsing cannot be excluded. Mr Dempsey, an experienced locomotive driver, discounted the possibility of a driver of some years experience, and the appellant is such a driver, in his right senses applying the air brake mistaking it for the vacuum brake.

Mr *Colegrave* contended that the black-out theory was completely consistent with the failure of the appellant to apply the vacuum brakes, the failure to be jolted into wakefulness by the application of air brakes and to detect the smell from the brake blocks. Support for this contention is found in the evidence of Mr Dempsey who said that the brake blocks and the wheels would skid "very badly" and that plus the smell from the brake blocks would alert the driver. And what is important Mr Dempsey said if the appellant had made a mistake and applied the air brake it would have been a matter of seconds before he realised that he had made a mistake. Mr Wetton said the train "would bunch". There would be some form of impact into the back of the locomotive.

Prosecution evidence does not discount the fact that if the appellant had fallen asleep the vigilance system would have come into operation. If the appellant did not, because he was asleep, activate the pedal switch eight seconds before the 102 seconds elapsed, the buzzer would have sounded and awakened him. And if he did not take any action the brakes on the locomotives and rolling stock would have been automatically applied. As already pointed out when reviewing Mr Wetton's evidence the train travelling at the permitted speed of 60 kph would have pulled up somewhere in the region of 500 metres, if the vigilance system had operated.

Bearing in mind that the standard crossing loop is 762 metres, the train would have stopped before the point of impact.

The evidence discussed above distinguishes this case from *S v Trickett* 1973 (3) SA 526 (T). In that case a young woman who was mentally and physically fit was involved in a traffic accident. She was charged with and tried for negligent driving. Under favourable driving conditions her car had swerved

1985 (1) ZLR p106

DUMBUTSHENA CJ

across the white line onto the wrong side of the road and had a head-on collision with a car travelling in the opposite direction. She stated in evidence that she did not know why she went over to the incorrect side of the road unless she had had a black-out. She said she had never had a black-out before. She could not remember what happened. On appeal MARAIS J accepted her evidence but found that the conviction was justified because she had not succeeded in laying a foundation to her defence of sane automatism. The learned judge commented at 537D-E on the requirements of a defence of sane automatism or a black-out as follows:

The conclusion to which I come is that in order effectively 'to raise the defence' of sane automatism such as is relied on in the present appeal, there must, firstly, be evidence sufficiently cogent to raise a reasonable doubt as to the voluntary nature of the *actus reus* alleged in the indictment, and secondly, medical or other expert evidence to show that the involuntary or unconscious nature of the *actus reus* is quite possibly due to causes other than mental illness or disorder. If 'at the end of the day' there is uncertainty as to whether the act was voluntary or involuntary, the doubt must redound to the benefit of the accused.

See also *The South African Law Journal* 1973 Vol 90 (Part IV) at 329-330 where the laying of the foundation for a defence of sane automatism and *S v Mahlinza* 1967 (1) SA 408 (AD) and *S v Trickett, supra*, are discussed.

I have cited the above persuasive case because it shows the type of evidence which does not lay a foundation for the defence of black-out and highlights the strength of the foundation laid in the instant case. From a reading of the cases I have cited in this judgment and the analysis of the evidence in support of the appellant's defence, I have come to the view that the learned magistrate erred when he came to the conclusion that:

There was no reasonable basis at all upon which this court could say that the accused probably had a black-out. There is a mere assertion by the accused person; and this has not been shown to be the position.

The evidence adduced at the trial by Dr Gwisayi, Mr Wetton and Mr Dempsey and the observations made by the trial court at the inspection *in loco* lead to the only reasonable inference that the appellant suffered a black-out.

The learned magistrate misdirected himself on the evidence required by the appellant to lay a foundation for the defence of a black-out. He also failed to

1985 (1) ZLR p107

DUMBUTSHENA CJ

scrutinise the evidence adduced by the prosecution witnesses and its relevance to the defence proffered by the appellant.

The learned magistrate further misdirected himself when he came to the conclusion that:

. . . a black-out or amnesia is not in itself a defence, or is not necessarily in itself a defence.

Secondly that at a time a person commits a criminal offence, but is suffering from amnesia or a black-out, then his mind is disabled. It does not matter whether the disability is of a purely temporary nature, the law is concerned with the result and not the cause.

Thirdly if the amnesia or black-out be genuine, then the accused is not entitled to a verdict of not guilty, instead he would stand to be dealt with under the Mental Health Act, 23/76, and a special verdict would have to be returned.

In the instant case there is no doubt that a black-out is a defence. We are dealing here with a man who suffered a black-out and did not commit, in his state of unconsciousness, a criminal act. He did not because of the black-out drive the train negligently. His mind was not disabled by a blow on the head which caused him to act in a state of automatism. His mind, so to speak, was cut off. The definition given of the word "black-out" in the Concise Oxford Dictionary is "temporary complete loss of consciousness or failure of memory". His mind is not injured. He did not act in his state of black-out. In *Attorney-General v Senekal* 1969 (2) RLR 368 (AD); 1969 (4) SA 478 (RAD) BEADLE CJ dealt with a "disabled" mind caused by an injury at 379B-D (488H-489B of the South African report) in these words:

The injured mind of a person who has not the vaguest idea of what he is doing when he does it is surely a 'disabled' mind, just as the man himself, if clubbed into a state of unconsciousness, may be said to be 'disabled'. With respect, I agree with what was said by the JUDGE PRESIDENT in Joseph's case, *supra*. The language of the section is plain and clearly covers the case of automatism where that automatism is caused by an injury. Moreover, once it is accepted that the likely duration of, or cause of, the 'disability' are irrelevant, all doubts that the words 'other ... disability of mind' include the case of an accused who, because of an injury to his head, does not know what he is doing, are removed.

1985 (1) ZLR p108

DUMBUTSHENA CJ

I conclude, therefore, that a person who was not responsible in law for his action because he acted in a state of automatism due to injuries received to his head is not entitled to a verdict of not guilty but only a special verdict under s 31(1) [now s 28(1) of the Mental Health Act, 1976 (No. 23 of 1976).

The Learned Chief Justice, however, made it clear that he was "dealing only with a case of automatism caused by injury - case where the mind is so seriously disabled from an injury that the accused is quite unconscious of his actions." He did not express any view on whether there was in our statutory law "such a thing as 'sane automatism'". He did not even express any view on the place automatism occupies in our criminal law as it was then. See *Attorney-General v Senekal, supra*, at 379F-G (489C of the South African report). The learned Chief Justice was dealing with a person who although his mind was disabled, did some act although he had not the vaguest idea that he had done something.

It seems to me that "mentally disordered or defective", which is defined in s 2 of the Mental

Health Act in these words:

. . . in relation to any person, means that that person is suffering from mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of the mind,

does not encompass a person suffering from a black-out such as the one the appellant asserts he suffered from - a temporary loss of memory, consciousness and vision. Butterworths *Medical Dictionary* defines black-out as "Amaurosis fugax, including temporary loss of vision and consciousness occurring in aviators, caused by lessening of the quantity of blood circulating to the brain and the retina resulting from centrifugal acceleration while flying". One might add "while driving a train" in place of "while flying". This definition seems to me to point out that the person was undergoing a temporary loss of vision, consciousness or memory. In that state the person cannot be active. He is rendered passive or inactive by the loss of consciousness. He is in other words incapable of doing anything.

The learned magistrate, so it seems to me, confused cases of automatism with the instant case involving only a black-out. In *Attorney-General v Senekal, supra*, one of the cases relied upon by the learned magistrate, the accused was charged with murder after he had fatally stabbed the deceased. The accused had been involved in a fight with someone. He was separated from fighting

1985 (1) ZLR p109

DUMBUTSHENA CJ

the other man by the deceased. He then broke away from those who were restraining him, went to his room, fetched a knife and returned intending to attack the man he had been fighting. The deceased tried to wrest the knife from him. In the course of the struggle he stabbed the deceased to death. One of his defences at his trial was that as a result of the alcohol he had drunk and the injuries he had sustained in the earlier fight he was at the time acting under the sane automatism due to concussion and the alcohol he had consumed. That was his defence. Alternatively he pleaded that the death had resulted from an accident. The question was whether a person who acts in a state of automatism due to the injuries he had received to his head fell within the terms of s 31(1) of the then Mental Disorders Act [Chapter 164]. The jury acquitted the accused. On appeal by the Attorney-General the Appellate Division held at 382E-F (491H of the South African report):

In the circumstances of this case the learned trial Judge should have directed the jury that, if they were satisfied that the respondent had acted in a state of automatism due to concussion, they should return a special verdict in terms of section 31(1) of the Mental Disorders Act [Chapter 164].

And further, at 390G-H (498H-499A of the South African report):

. . . the trial Judge should simply have directed the jury that, having regard to the circumstances in which the stabbing took place, if they found that the stabbing of the deceased was purely an accident, they should return a verdict of guilty of culpable homicide.

On the peculiar facts of the instant case a special verdict in terms of s 28(1) of the Mental Health Act, which reads:

28. (1) When, in any indictment, summons or other criminal proceedings, any act or omission is alleged against

any person as an offence and evidence, including medical evidence, has been given at the trial of that person for that offence that he was mentally disordered or defective so as not to be responsible according to law for his action at the time when the act was done or the omission made, then, if it appears to the court or magistrate, as the case may be, before whom that person is tried, that he did the act or made the omission alleged but was mentally disordered or defective as aforesaid at the time when he did or made the same -

- (a) the court or magistrate shall return a special verdict to the effect

1985 (1) ZLR p110

DUMBUTSHENA CJ

that the accused is guilty of the act or omission charged against him but was mentally disordered or defective at the time when he did the act or made the omission; and

- (b) the judge or magistrate shall order that the accused be returned to prison for transfer to an institution specified in the order for examination,

would have been wrong. On the facts of the instant case once the appellant had a black-out he ceased to drive the locomotive because he was inactive. He could not in that state react to any situation. He could not, therefore, be said to have driven negligently.

The above situation can be distinguished from one in which a person pleads sane automatism. I draw assistance from an article by G Feltoe on "Sane Automatism: The Demise of a Defence?" published in *The Rhodesian Law Journal* Vol II, Part I 1971 at 21-22. There the learned author said:

It might be observed at the outset that part of the difficulty with the defence of automatism appears to be that a wide variety of situations were grouped under the generic title of automatism when they had little in common. Thus the accused was said to be acting under automatism where he was fully conscious, eg where he was holding a knife and another person grabbed his hand and caused him to stab the complainant; where he was semi-conscious or his consciousness was clouded, eg the person waking out of a nightmare and the epileptic in an attack of *petit mal* and finally where the accused was unconscious, eg the epileptic losing consciousness after an attack of *grand mal*. It was also taken to include what appeared to be pure accident situations, eg the accused, in trying to ward off an attack by a swarm of bees, accidentally hits the complainant. In addition to this is the problem that in certain of the automatic states the conduct often appears to be purposeful and intentional at face value. Automatism is defined in Gradwohl's *Legal Medicine* at p 531 as:

the performance of simple or complex acts, without the individual being aware of them at the time or afterwards. To the onlooker the performer appears fully purposeful and aware.

The average lawyer often finds it incredible that complex activity can be the result of anything other than conscious conduct. And there are

1985 (1) ZLR p111

DUMBUTSHENA CJ

problems in proving a defence. Witness the case where a person is charged with a driving offence and that person can offer no explanation for his bad driving. In fact the accused suffered a momentary impairment of consciousness after an attack of *petit mal* of which he was totally oblivious.

In the light of the evidence adduced in the instant case I do not consider it improbable that the appellant had a black-out. There is a preponderance of probabilities in his favour. The evidence raises, in my view, a reasonable possibility that he was not to blame for the accident. There was no *culpa* on his part.

Having arrived at this conclusion it is not necessary to deal with the appeal against sentence. I need, however, to mention in passing that a sentence of 18 months' imprisonment with labour for a first offender is inappropriate. In my judgment in the circumstances of this case, albeit that two people lost their lives, a sentence of a fine would have been appropriate.

Accordingly the appeal must succeed. Both the conviction and sentence are set aside.

Gubbay JA: I agree

McNally JA: I agree

Calderwood Bryce Hendrie & Partners, appellant's legal representatives

1985 (1) ZLR p112

MOYO v JANI 1985 (1) ZLR 112 (HC)

Court High Court, Harare

Mfalila J

Civil Action

12 February and 6 March 1985

Flynote

Sale - eviction from possession - what constitutes - main principle which applies to give rise to a cause of action by the purchaser against the seller for eviction from possession - rules which govern the purchaser before he can recover from the seller - eviction from possession by customs authorities - remedies available to purchaser.

Headnote

The plaintiff bought a video cassette recorder from the defendant. The sale was concluded and the plaintiff took possession of the recorder. Two months later, the customs authorities seized the recorder under the provisions of s 176 of the Customs and Excise Act [*Chapter 177*], informing the plaintiff that they were seizing the recorder because there were reasonable grounds for believing that it was liable to seizure. The plaintiff was issued with a notice of seizure which informed him of the remedies available to him if he wished to obtain the release of the recorder. The plaintiff did not institute action against the Controller of Customs for delivery of the recorder but instituted action against the defendant claiming a refund of the purchase price of the recorder.

Held that a mere demand made by a third party for possession of an article that has been sold

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does not amount to eviction of the purchaser entitling the purchaser to sue the seller, unless the purchaser can prove that the third party's title to the article is legally unassailable and that he has admitted the demand.

Held, further, that the main principle is that to give rise to a cause of action by the purchaser against the seller, eviction must be in respect of a flaw in the seller's title which existed at the time of the sale or, if arising subsequently, is due to the seller's own act.

1985 (1) ZLR p113

MFALILA J

Held, further, that the rules which govern the purchaser before he can recover from the seller include the following:

- (a) The purchaser should not when threatened by a third party give up possession voluntarily - unless the right of the third party is clearly beyond doubt not only against himself but against the seller as well;
- (b) If he retains possession as he should, and is sued, he must give the seller notice of the proceedings; and
- (c) He should put up a spirited defence against the claim of the third party.

Held, further, that in the present case the plaintiff's eviction was due to the defendant's act of selling the recorder in contravention of s 176 of the Customs and Excise Act [*Chapter 177*] and the plaintiff could neither have resisted the seizure of the recorder nor retained it.

Held, further, that there was only one thing left for him to do and that was to put up a *virilis defensio* to the claims and seizure by the Controller.

Held, further, that the plaintiff had failed to put up a *virilis defensio* to the claims of the Controller and had not shown that the Controller's legal claims to the recorder were unassailable. He could not in these circumstances have recourse to the vendor.

Case cited:

Olivier v Van der Bergh 1956 (1) SA 802 (C)

G Slater for the plaintiff

C Greenland for the defendant

Judgment

Mfalila J: Some time in September 1983 the plaintiff bought a Sanyo video cassette recorder from the defendant for \$2 800. It is disputed in the pleadings whether or not the defendant sold this video cassette recorder as a disclosed agent. The defendant has insisted all along that he sold this video cassette recorder as a disclosed agent for one Henry Matarure. This however is not an important issue at this stage of the proceedings. Be that as it may, the sale was completed and the plaintiff took possession of the recorder. Two months later, in November 1983, the Customs authorities moved in after hearing about this sale and seized the video cassette recorder under the provisions of s 176 of the Customs and Excise Act [*Chapter 177*].

The Customs authorities informed the plaintiff they were seizing the recorder because there were reasonable grounds for believing that it was liable to seizure. He was also informed that:

1985 (1) ZLR p114

MFALILA J

In terms of section 176(6) of the Act, the Controller of Customs and Excise may -

- (a) release these goods from seizure; or
- (b) declare them to be forfeited; or
- (c) in the case of dangerous or perishable goods, dispose of them out of hand.

He was further informed as follows:

If you wish, you may, within three months from the date of this notice, make representations to the Controller of Customs and Excise, Private Bag 7715, Causeway, for the release of the goods. Additionally or alternatively you may, within three months from the date of this notice and subject to the provisions of s 178 of the Act, institute proceedings for the recovery of the goods from the Controller or for the payment of compensation in respect of any dangerous or perishable goods which have been disposed of by the Controller.

If the Controller does not release the goods following representations made by you or if you do not institute proceedings within the period specified, any goods declared to be forfeited will become the property of the State without compensation.

This notice of seizure was signed and dated 11 November, 1983. Eleven days later on 22 November, 1983, the plaintiff's legal practitioners wrote both to the defendant and to the Controller of Customs and Excise about this seizure. In their letter to the defendant, Exhibit 4, they advised him that the Sanyo video cassette recorder which he had sold to their client had been seized by Customs authorities on the allegation that it was sold within the prescribed period without the relevant customs duty having been paid in respect of it and yet he had specifically advised their client that the customs duty had been paid, the letter continued:

In the circumstances we ask that you kindly provide us with proof and details in respect of the payment by you of the said Customs duty within ten days of the date of this letter. If you have not paid the Customs duty we ask that you please pay to us the purchase price of \$2 800.

We must advise that if we have not heard from you with regard to both the above-mentioned two items within ten days of the date of this letter

1985 (1) ZLR p115

MFALILA J

our instructions are to issue proceedings against you to recover the said sum of \$2 800 ... without further notice.

Indeed and as promised in this letter, the plaintiff issued summons against the defendant claiming refund of the purchase price of \$2 800 for the seized Sanyo Video Cassette Recorder.

In their letter to the Controller, Exhibit 3, the plaintiff's legal practitioners stated that they were writing on behalf of their client in terms of s 178 of the Customs and Excise Act and that their client intended to issue summons against the Controller upon the expiry of the requisite period

of one month in order to claim possession and delivery of the said video cassette recorder on the basis that there were no lawful grounds on which it was liable to seizure by him. The letter continued:

Our client purchased these two items from Mr N Maimba in the one instance and from Mr J Jani (the present defendant) in the other instance.

We understand that you have seized them on the basis that the sellers of them to our client sold them within a certain prescribed period when the requisite duty had not been paid in respect of them.

In the premises there are no lawful reasons why the two video cassette recorders should not be released to our client.

We shall be grateful for your comments and/or general advice which you might care to give us in order to avoid the necessity on our client's part of having to issue proceedings at the expiry of the requisite period of one month.

The notice of seizure and the relevant provisions of the Act are so clear that it is impossible to understand what kind of "comments and/or general advice" plaintiff's legal practitioners had in mind. It is not therefore surprising that the Controller did not respond to this letter; and the plaintiff did not live up to this threat of issuing a summons against the Controller claiming possession and delivery of the video cassette recorder. But he did live up to his threat against the seller, the defendant, against whom he instituted these proceedings to recover the sum of \$2 800 with interest and costs.

At the commencement of the trial, Mr *Greenland*, counsel for the defendant, informed the court that with the agreement of his colleague, counsel for the

1985 (1) ZLR p116

MFALILA J

plaintiff, he was applying to raise a question of law under O 29 R 200 of the High Court (General Division) Rules 1971 for determination by the court. He said that he was raising the question at this stage because depending on how it is resolved, the whole case could be finalised. Using its discretion under the rule, the court allowed the application.

Mr *Greenland* stated that he was applying for the dismissal of the plaintiff's action because the plaintiff has no cause of action against the defendant. He said that the plaintiff sued the defendant as the seller of the video cassette recorder on the basis that he had been evicted from possession of the video by the Department of Customs. He went on to say that although s 176 of the Act empowers the Controller to seize goods and order forfeiture, the plaintiff himself had written to the Controller on 22 November, 1983 stating that he had bought the video innocently under the genuine belief that duty had been paid; in these circumstances, Mr *Greenland* submitted, the plaintiff had a complete defence against seizure by customs as he had acquired the video *bona fide* and for value. In the circumstances, he said, the plaintiff cannot have a cause of action against the defendant because his dispossession was not due to a defect in the seller's title. The only time, he said, when a buyer has a cause of action against the seller is when he is faced with an unassailable claim by a third party due to a defect in the seller's title. In the present case he said the claim by customs was not only legally assailable but untenable.

Mr Slater, counsel for the plaintiff, opposed this application. In his submission the only duty which the law imposes on the purchaser is to vigorously defend himself against dispossession by third parties, but this duty does not go so far as to actually require the purchaser to prosecute the third party who seized the goods. This, he said, is because the purchaser's relationship is with the seller, not the third party (in the present case, the State). In this case, he said, the plaintiff was effectively evicted following the seizure of the goods by the State, because the seller (the defendant) was not in law entitled to sell them. Faced with this situation, the plaintiff made representations to both the third party and the defendant as seller, when neither appeared willing to take any action, he took the only fair course left to him, namely of proceeding against the seller because he is the only one with all the facts.

The first question to be answered then is whether the plaintiff was evicted from his possession of the video cassette recorder upon its seizure by Customs authorities.

Mr Slater's view was that the definition of eviction must include the present

1985 (1) ZLR p117

MFALILA J

situation wherein the seller is not in law entitled to sell goods at all and on this basis the goods are seized. The purchaser is thus evicted.

On the other side Mr Greenland's view was that eviction must not be confused with dispossession. Eviction he said has a specific meaning in that a purchaser is not evicted until a third person has established a better title. In this case he said, the Customs authorities had no title at all to the video; hence the defendant denies that the seizure of the video by Customs authorities was lawful and therefore denies that the plaintiff was lawfully evicted from possession.

What counsel for the plaintiff was saying is that the plaintiff was evicted from possession of the video by the Customs authorities because the seller who sold it to him was not entitled in law to sell it. On the other hand what counsel for the defendant was saying is that the plaintiff was not evicted from his possession of the video, because the purported eviction by the Customs authorities was unlawful as the Customs authorities had no legal basis to seize the video from him.

Eviction in the law governing sales is a technical term whose technical meaning has been expanding over the years. Thus according to some text writers, a mere demand by a third party constitutes eviction. Norman *Purchase and Sale in South Africa* at p 287-288 (4th Ed) defines eviction as:

any lawful interference with *vacua possessio* by the vendor himself or another, or any lawful menace to such *vacua possessio*.

Then the learned author continues:

It (ie eviction) thus includes a demand on the part of a third person to hand over the property sold to him if the purchaser is unable to resist such a claim, the refusal of the person in possession of the property to relinquish it to the purchaser, the demand for payment of a sum of money in order to retain the whole or portion of the *res*

vendita; and conceivably the existence of a concealed servitude over the property which interferes with the use and possession of the property. In short, anything which weakens the purchaser's right to the whole or portion of the thing sold, or which constitutes a menace to his right of having free and undisturbed possession.

But Mackeurtan's *Sale of Goods in South Africa* simply defines eviction by

1985 (1) ZLR p118

MFALILA J

explaining its evolution, the learned author stating at p 165 (5th ed):

Eviction originally meant proof by a third party in legal process against the purchaser, of a better title to the property than his, and his consequent lawful dispossession. But it has now received a more extensive meaning, and is not confined to cases where the purchaser is actually ejected by judicial decree. It includes those cases where the judicial decree is one of payment of a sum in lieu of ejectment, in which event a purchaser exercising his right to pay in order to retain the thing, is considered to be evicted to the extent of the payment. It occurs also where a purchaser unsuccessfully sues to eject a third party, and even where a purchaser, without legal process, surrenders or undertakes to surrender, his purchase to a claimant whose title is incontestable.

and concludes as follows at p 166:

In fact, eviction now includes all cases where the purchaser, owing to the vendor's fault, is properly and in fact deprived of, or cannot obtain the possession and enjoyment of, his purchase, in whole or in part.

However I think that the definition of eviction which includes mere demands by third parties is too wide and to this extent I am in complete agreement with the limitation as expounded by OGILVIE-THOMPSON J in *Olivier v Van der Bergh* 1956 (1) SA 802, the learned judge stated at page 805:

Although these authorities at first sight appear to lend credence to the suggestion that the purchaser can be said to be evicted as soon as he receives a demand for return of the article, this is not, in my opinion, a correct reading of them. While sometimes using the term eviction as equally comprehending both demand and actual dispossession, the early writers differentiated between, on the one hand, the purchaser's right to give notice to his vendor requiring the latter to defend him against threatened eviction and, on the other hand, the purchaser's right to sue his vendor for damages because he had actually been evicted. In my opinion only the former of these rights arose immediately upon receipt of the demand. It is, in my view, only to that aspect of the purchaser's rights that the above cited authorities are referring when they state, or appear to state or suggest, that a demand gives rise to the action for eviction ...

I am, therefore, of opinion that the mere receipt by a purchaser of a

1985 (1) ZLR p119

MFALILA J

demand from a third party claiming the article sold does not by itself entitle the purchaser to sue his vendor upon the warranty against eviction. Where, however, in any such action the purchaser in addition proves both that the third party's title is legally unassailable and that he - the purchaser - has duly admitted the demand and legally bound himself to comply with it, no good reason appears to me to exist why the purchaser should not be entitled to succeed even though he has not yet actually complied with the demand made upon him by the third party.

In the present case the Customs authorities seized the video cassette recorder from the plaintiff after he had bought it from the defendant. The defendant says that this seizure was unlawful, therefore the consequent dispossession of the plaintiff was not eviction. Firstly, I do not think

dispossession and eviction can be separated as suggested by Mr *Greenland*. If a purchaser is physically dispossessed of his purchase, there can, in my view, be no clearer case of eviction. The act of so dispossessing the purchaser fits in very well with the definitions of eviction quoted above as it amounts to a "serious and successful threat against his (the purchaser's) possession". The question whether such dispossession is lawful and valid must be a separate issue. Secondly, I do not agree that the Customs seizure of this video cassette recorder from the plaintiff was unlawful in the sense that there was no legal basis for doing so and that the Customs authorities had no legal claim to this video. In seizing this video cassette recorder, the Controller was exercising his powers under the provisions of the Customs and Excise Act [Chapter 177]. Section 176 of the Act empowers any customs officer to seize any goods, ship or aircraft or article, which he has reasonable grounds for believing are liable to seizure. The officer making the seizure need only have reasonable grounds for believing that the articles are liable for seizure under the provisions of the Act. In this case the Customs authorities reasonably believed that the video cassette recorder has been sold to the plaintiff in contravention of the conditions under which it had been imported into the country. Indeed that turned out to be the position. The importer of this video, Henry Matarure, had been granted an immigrant's rebate of duty in respect of this video under s 71(2) of the Customs and Excise (General) Regulations 1980 (SI 310 of 80). However subs (4) provides that an immigrant in respect of whom a rebate of duty has been granted in terms of the section may not "sell, offer or display for sale, lease, hire, lend, pledge or, in any manner whatsoever, whether gratuitously or otherwise, dispose of to any other person any effects or other goods in respect of which such rebate was granted within twelve months of the date of their entry under rebate without the prior permission of the Controller and . . . the payment of such duty as would have

1985 (1) ZLR p120

MFALILA J

been payable but for the granting of such rebate." The vendor sold this video to the plaintiff within twelve months of its entry under rebate, without the prior permission of the Controller and before duty had been paid. It was therefore sold in contravention of subs (4), and therefore liable to seizure. In seizing this video the Controller was properly exercising his powers under the Act. I am therefore satisfied on a consideration of these factors that the plaintiff was evicted from his possession of the video cassette recorder upon its seizure by Customs authorities.

The second question is, since he was so evicted, what are his remedies? Can he proceed as he did against the seller? I must say at once that had this been the usual case of vendor, purchaser and third party the answer to this question would have been easily in the affirmative. The purchaser here had actually been evicted, he is therefore in law entitled to sue his vendor for damages. However in this case the position is slightly complicated.

Mackeurtan's *Sale of Goods in South Africa* (4th ed) puts forward the rules under which the purchaser can sue his vendor, at pp 226-227. The main principle is that to give rise to a cause of action by the purchaser against the seller, "eviction must be in respect of a flaw in the seller's title which existed at the time of sale, or if arising subsequently is due to the seller's own act," and that it "must not be due to the act, fault or negligence of the purchaser". This is the main principle, and the rules which govern the purchaser before he can recover from the seller

include the following: that the purchaser should not when threatened by a third party give up possession voluntarily - unless the right of the third party is clear beyond doubt not only against himself but against the seller as well; that if he retains possession as he should, and is sued, he must give the seller notice of the proceedings; and lastly that he should put up a spirited defence against the claims of the third party.

In the present case the plaintiff's eviction was due to the seller's act of selling the video in contravention of the conditions of its entry, the plaintiff could neither have resisted the seizure of the video nor retained it as he was dealing with the State. There was therefore only one thing left for him to do and that is to put up a *virilis defensio* to the claims and seizure by the Controller. Indeed this is what the Controller himself told him to do in his notice of seizure quoted earlier. It is therefore surprising that the plaintiff's legal practitioners chose not to pursue their client's rights under the Customs and Excise Act as so clearly explained by the Controller. They chose instead to proceed against the vendor in the face of all the legal complications inherent

1985 (1) ZLR p121

MFALILA J

in the sale of goods. The most important factor which a purchaser must establish before he can successfully proceed against his vendor is that the third party's title is legally unassailable, a mere demand which has been accepted as valid by the purchaser is enough to entitle the purchaser to sue his vendor upon the warranty against eviction. In the case of *Olivier v van der Bergh* already cited OGILVIE-THOMPSON J put the matter very clearly in the last paragraph of the passage already cited to the effect that where the purchaser proves both that the third party's title is legally unassailable and that the purchaser has duly admitted the demand and legally bound himself to comply with it, he is entitled to succeed against the vendor even before complying with the demand made to him by the third party.

The notice of seizure meticulously informed the plaintiff of his rights, in particular that he was entitled within three months of the seizure of his articles, to institute proceedings for the recovery of any article not released by the Controller or for the payment of compensation, in respect of such articles. There was therefore adequate statutory machinery which was available to the plaintiff for the recovery of his seized goods. It was incumbent upon him to use this machinery. Only if he had been unsuccessful in his claims against the Controller could he have turned to his vendor for redress. Unsuccessful proceedings against the third party amount to eviction. The plaintiff not only failed to put up a *virilis defensio* to the claims of the Controller, but has not shown that the Controller's legal claim to the video was unassailable and that he had himself duly admitted the claim and legally bound himself to comply with it. He cannot in these circumstances have recourse to the vendor.

For these reasons I agree with counsel for the defendant that the plaintiff has no cause of action against the defendant. Accordingly the action is dismissed with costs.

Gollop & Blank, legal practitioners for the plaintiff

Atherstone & Cook, legal practitioners for the defendant

S v MADIGANI 1985 (1) ZLR 122 (HC)

Court **High Court, Harare**

Korsah and Manyarara JJ

Criminal Appeal

7 March 1985

Flynote

Law and Order Maintenance Act [Chapter 65] s 51(1)(c) - failure to report presence of dissidents - failure to make an immediate report of presence of dissidents in itself warranting a custodial sentence.

Headnote

A village headman had received a report concerning the presence of dissidents from one of the villagers resident in a kraal which fell under his jurisdiction. He in turn instructed the villager to make a report to the appropriate authority. The headman had no sympathy for dissidents and believed a report would be made.

Held in areas where the security situation is so tenuous as to be almost non-existent, the absence of courage to make an immediate report of the presence of dissidents should not, by itself alone, be made the basis of a severe custodial sentence.

Held, further, in the circumstances of the instant case a wholly suspended prison sentence would have been entirely appropriate.

Case cited:

S v Godo & Ors AD-193-77 (unreported)

H I Bisset for the appellant

B N Sigidi for the respondent

Judgment

Korsah J: The appellant was convicted of failing to report the presence of dissidents in contravention of s 51(1)(c) of the Law and Order (Maintenance)

KORSAH J

Act [Chapter 65], and was sentenced to 18 months' imprisonment with labour of which nine months was suspended on appropriate conditions. He appealed against the sentence on the ground that it was manifestly excessive. My brother Manyarara and I were of the persuasion

that, on the peculiar facts of this case, we would have imposed a wholly suspended sentence. But by the time the appeal came before us the accused had already served four months of the gaol sentence. We therefore ordered his immediate release and undertook to ventilate our reasons in a written judgment.

The appellant was a headman in the Lower Gweru Communal area, a part of the country teeming with dissidents. He is 61 years of age. On or about 7 April 1984, a group of about six dissidents was sighted near Thandani Kraal by the residents of the kraal. Thandani kraal fell under the authority of the accused. Unbeknown to the accused, two of the dissidents were given food and shelter at Masuku's homestead within the Ntandane kraal.

On the morning of 8 April 1984, Metshu Mpofu, Nighton Mpofu, Mzondeki Mpofu and Mochel Mpofu, who were all residents of Ntandane Kraal, held a meeting at which it was decided to report the presence of the dissidents to the accused as their headman; so that the accused, who himself had not seen any dissidents, would convey a report of dissident presence at Ntandane kraal to the appropriate authority.

It is conceded by Mr Bisset that in cases of this nature one is obliged to report - even if knowledge is indirect - the presence of persons inimical to the government. But the course of action which the Mpofu family decided on smacks strongly of passing the buck.

Nighton Mpofu was despatched that same morning to go and make a report of the dissident presence to the accused, so that the accused, as headman of the kraal would convey the report to the police. They believed erroneously that by making a report to their headman they had discharged their obligations under the law.

The accused does not deny that a report of the dissident presence was made to him by Nighton Mpofu, but he said he told Nighton Mpofu to go and immediately report the matter to the police, and that Nighton Mpofu agreed to do so. He had no reason to doubt that Nighton would carry out the instructions of his headman. He also said he believed, erroneously of course, that if he sent the same person who had sight of the dissidents to go and report, that was a sufficient discharge of his obligations.

1985 (1) ZLR p124

KORSAH J

Though such a belief may be grounded in common sense for, after all, the person who saw the dissidents would have greater knowledge of their numerical strength and the weaponry they carried and could acquaint the authorities with details that would not be within the knowledge of a third party who had not seen the dissidents, such belief runs counter to the law.

In support of his beliefs, the appellant testified that he attended no less than eight meetings in his area convened by the police and/or soldiers. At these meetings the instructions by the police were that:

If one saw dissidents the same person who had seen the dissidents must run to the police and report about the presence of the dissidents and as a result of that the police then would go for the army people.

This piece of evidence by the appellant was never challenged. The question therefore arises:

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had the appellant been misled by the persons who addressed those eight meetings into believing that the duty to report dissident presence rested only on the shoulders of the person who had sighted them? That question was never answered, but the actions of the appellant seemed to exemplify this erroneous belief.

A strong mitigatory feature in this case was the fact that the intention to report was manifest. The accused did not sympathise with the objectives of the dissidents and delegated Nighton to go and make an immediate report of the dissident presence in the area, to which instruction Nighton had acceded, but apparently failed to comply with. This case differs from those where there has been a conspiracy of silence about the presence of dissidents. Here, a decision to report was taken and the appellant said he was unable to check on whether Nighton had acted on his instructions as within 48 hours of the report made to him by Nighton, all the people under his authority were arrested by the police.

Ntandane's kraal which the dissidents visited was about two miles from the kraal of the appellant. And the appellant's kraal was also about two miles from the police station. If Nighton, with the intention of reporting the presence of dissidents had walked two miles to the kraal of the appellant, why should the appellant doubt that Nighton's resoluteness of purpose would desert him, when the appellant instructed him to run quickly to the police - a further two miles away, to make the necessary report?

In *Godo & Ors v S* AD-193-77, the four appellants were convicted in the

1985 (1) ZLR p125

KORSAH J

Regional Court of the crime of contravening s 51(1)(c) of the Law and Order (Maintenance) Act. The facts were that a band of terrorists visited a mission school on the night of 30 January 1977. On arrival at the school, they called out the names of three pupils whom they suspected were informers. When the pupils were identified, the terrorists chained them and assaulted them in the presence of the other pupils of the first appellant and of the third appellant. The second appellant was not at the scene of the assault from the beginning. He arrived towards the end. Having assaulted the three pupils, the terrorists took them away into the veld where they continued assaulting them. Two of them died as a result and the third was found next day with severe head injuries. Before the fate of the pupils was known, at a meeting attended by the first and third appellants and a Rev Hurerekwere, who was just present to hand over to the new headmaster, a decision was taken not to report the visit of the terrorists. Rev Hurerekwere who was 69 years of age was not prosecuted because of his other infirmities. The defence raised by the second and fourth appellants was that they had received instructions from members of the Ministry of Internal Affairs that it was a sufficient compliance with the duty to report to make a report to the principal of the mission, and that it was not necessary for everyone at the mission to report *en masse*. Failing to enquire whether such an instruction had been given, the trial magistrate sentenced the second appellant to six years' imprisonment with labour and the fourth appellant to four years' imprisonment with labour.

On appeal, the Appellate Division verified through the Attorney-General's Office that the Ministry of Internal Affairs had, indeed, informed persons at the school that it was a sufficient

discharge of their duty to report the presence of terrorists to the principal at the school. The Appellate Division found that there was no need for such a report by members of staff to the principal, in this case, since the principal himself was present when the terrorists arrived. In his judgment MACDONALD CJ said:

In my view, there is no reason for rejecting the evidence of the second appellant that he genuinely believed that a report would be made. The magistrate, in fact, did not reject the second appellant's evidence on this aspect. Technically, the second appellant was guilty as charged.

In my view, however, it is doubtful whether the second appellant would have been prosecuted had the Attorney-General been aware of the relevant facts. Accordingly, so far as the second appellant is concerned, I would set aside the verdict and sentence and in their place substitute a caution and discharge.

1985 (1) ZLR p126

KORSAH J

In the instant appeal, the trial magistrate accepted as a fact that the appellant instead of making a report of the presence of dissidents personally, instructed Nighton to go and make the report himself. He, however, failed to check whether the instructions which the appellant said had been given at the eight meetings convened by the police/soldiers relating to the reporting of dissident presence were, in fact, given. Even conceding that the appellant is the headman in the area, if the instructions disseminated in the area under his authority, were such as were stated by him, then he was only technically guilty of the offence.

I am fully in accord with the sentiments of the learned magistrate that:

Now, it is common knowledge that the country is experiencing considerable difficulties as a result of banditry and dissident activity in certain parts of the country. It is the duty of every person who is aware of the presence of bandits to report that fact to the appropriate authorities.

And the failure to discharge this duty ought not to be lightly treated. But in the areas where the security situation is so tenuous as to be almost non-existent, the absence of courage to make an immediate report of the presence of dissidents should not, by itself alone, be made the basis of a severe custodial sentence.

As Mr *Bisset* rightly put it, "it is rare to find a statute which imposes a positive duty on the subject to do something dangerous". In times of war and civil commotion, governments not unusually expect every citizen to be prepared to die a little for his country. But in areas where the dissident presence is manifestly strong, the citizens are poised on the horns of a dilemma. As Mr *Bisset* graphically put it:

The tribesman has two choices. He could either report the presence of dissidents, in which case the dissidents would 'sort him out', or he could fail to report them, in which case the security authorities would 'sort him out' and/or prosecute him for his failure.

Mr *Bisset* suggests that the time has come for the courts to take a realistic view of the plight of the tribesman.

In the instant appeal, it is evident that the appellant was no sympathiser of dissidents. He instructed a person under his authority to proceed immediately and make a report. He is 61

years of age with an unblemished record. There

1985 (1) ZLR p127

KORSAH J

was no evidence of any untoward event which resulted from the failure to report the presence of the dissidents.

I would have gone along with the suggestion by Mr *Bisset*, which Mr *Sigidi* magnanimously concurred in, that in the circumstances of this case the sentence imposed was manifestly excessive and a wholly suspended prison sentence would have been entirely appropriate. But the appellant has served four months of the effective term of nine months which was imposed.

Accordingly, I would set aside the sentence imposed and in its place impose the following:

The appellant is sentenced to 18 months' imprisonment with labour, 14 months of which will be suspended for five years on condition that the appellant is not convicted of a contravention of s 51(1)(c) of the Law and Order (Maintenance) Act, committed during that period for which a prison sentence without the option of a fine is imposed.

Manyarara J: agrees

1985 (1) ZLR p128

CITY OF HARARE v EWING 1985 (1) ZLR 128 (SC)

Court Supreme Court, Harare

Dumbutshena CJ and Beck and McNally JJA

8 March 1985

Flynote

Legislation - Abolition of Office and Compensation Agreement for Harare Municipal Undertaking - s 4(2)(c) - reasonableness of fundamental change of duties of employee's post - factors that may be taken into account in assessing reasonableness.

Words and phrases - "reasonableness" - meaning - circumstances that may be taken into account in assessing reasonableness.

Headnote

In terms of s 4(2)(c) of the Abolition of Office and Compensation Agreement for the Harare Municipal Undertaking (SI 831 of 1980), an employee's post is abolished if there is a fundamental change in the nature of the work content of his position, save when such change is reasonable taking into account his position, qualifications and experience. The appellant municipality had fundamentally reduced the duties attaching to the respondent's post, but alleged that the changes were reasonable having regard to circumstances other than those specified in s 4(2)(c) of the Agreement, such as the unsatisfactory relationship between the

respondent and his subordinates and members of the public.

Held that in determining the reasonableness of changes in the work content of an employee's position, regard should be had only to those circumstances enumerated in s 4(2)(c) of the Agreement. Although the word "reasonable" has been declared to mean "reasonable in all the circumstances of the case", the purpose of the Agreement was to protect employees of the municipality at Independence, and therefore the employee's interests were the only circumstances that were relevant in determining the reasonableness of any change in the functions and duties of his post.

1985 (1) ZLR p129

DUMBUTSHENA CJ

Cases cited:

Zimbabwe Broadcasting Corporation v Sones S-63-82 (unreported)

Re A Solicitor [1945] KB 368

Opera House Investment Pty Ltd v Devon Buildings Pty Ltd (1936) 55 CLR 110

P A Chinamasa for the appellant

F C Blackie, SC for the respondent

Judgment

Dumbutshena CJ: The respondent, Jack Donaldson Ewing, is employed by the City of Harare, the appellant in this case. He was first employed in June 1959 as a housing inspector and then a services levy inspector. On 14 April 1981 he was appointed to the post of Administrative Assistant (1) in the appellant's Department of Works. In this new capacity he was responsible for the control and supervision of some twenty inspectors whom he instructed in the performance of their duties. In addition he attended to the complaints, inquiries and applications for various types of permits made by the public. He also prepared reports for submission to the City Council.

However, on 25 October 1983 the respondent was informed by his immediate superior that the Director of Works, Mr Tongai Mahachi, had given instructions to the effect that the respondent must cease to have any dealings with the inspectors and to issue instructions to them. He was no more to sign annual progress reports and he was no more to have any dealings with the public.

In response to the Director of Works' instructions, the respondent wrote a letter to him on 25 October 1983, the day he was to cease performing the duties for which he was employed as an Administrative Assistant (1). The letter, Annexure B, reads as follows:

On Monday the 24th October, 1983, I was summoned to the office of the Chief Assistant (Administration and Finance). There I was given your instructions (verbally) through the Chief Assistant (Administration and Finance) that from now on I must not have any dealings with members of the Inspectorate staff, nor must I issue any instructions to them or even sign their Annual Progress Reports, furthermore I must have no dealings with any

members of the public. My main function now being to act in an advisory capacity.

Attached is a copy of the duties of the Administrative Assistant (1),

1985 (1) ZLR p130

DUMBUTSHENA CJ

Housing Inspectorate. As can be seen these verbal instructions given me are contradictory to that of the post I was offered and accepted. I now find myself virtually unemployed and am rather apprehensive about my future. Under the circumstances I respectfully requested that I be granted abolition of office with the right to claim compensation as laid down in the Industrial Agreement (Chapter 267) Abolition of Office and Compensation Agreement 6(1)(b)(iii).

I feel that if my request were granted it would be to the satisfaction of all concerned.

It is clear from this letter that the respondent felt that he was left with no work to do.

The appellant admitted that the instructions referred to above had the result of depriving the respondent of his duties except that of preparing reports to the City Council and his "new advisory function".

In his answering affidavit Mr Mahachi admitted that the respondent's new duties were at variance with his original duties but denied that his post had been abolished. He said in paragraph 3 of the affidavit:

I admit that the new duties assigned to the Applicant were at variance with the duties and responsibilities hitherto attaching the Applicant's post but I submit such changes were reasonable having regard to all the circumstances of the case. I deny emphatically that the changes resulted in a complete emasculation of the Applicant's previous duties. I emphatically deny that following the changes the Applicant was left with no work to do. As the Applicant is aware the Housing Inspectorate Section is now made up of ill experienced personnel who would benefit a lot from the Applicant's wealth of experience if only the Applicant could act responsibly and not begrudge them that experience and expertise. I believe that the Applicant has by his attitude deliberately put himself into a 'no work situation' by discouraging his subordinates from seeking his advice. If the Applicant has no work it is a situation entirely of his own making and not because of the changes. In the premises I deny that the Applicant's post was abolished as is alleged.

Mr *Chinamasa*, who appeared for the appellant, conceded at the onset of his argument that the changes brought about by the instructions given by the Director of Works were fundamental. He said that the changes deprived the

1985 (1) ZLR p131

DUMBUTSHENA CJ

respondent of the duty to deal with members of the public and the Inspectorate. He contended, however, that the respondent was left with advisory functions and the preparation of reports.

Since the appellant concedes that the changes in the functions and duties of the respondent were fundamental the only question left to be resolved is that of the reasonableness of the changes in the functions of the respondent. Mr *Chinamasa* submitted that they were reasonable having regard to the provisions of subs (2) of s 4 of SI 831/80 (The Abolition of Office and Compensation Agreement). Section 4(2) reads:

4. (2) Unless inconsistent with the context -

'abolished' means, without in any way limiting the ordinary meaning of the word -

- (a) the discharge of an employee pursuant to, or for the purpose of doing away with his job; or
- (b) a reduction in the emoluments of any employee, except where such reduction is occasioned by the operation of any industrial agreement which may be in force from time to time; or
- (c) changes in the functions and duties of a position which, in aggregate, amount to a fundamental change in the nature of the work content of the position, save when such changes in duties as are made are reasonable, taking into account the position, qualifications and experience of the employee concerned...

Having conceded that the changes were fundamental because of the change in the work content of the respondent's position, Mr *Chinamasa* contended, however, that such changes were reasonable because in deciding whether the changes were reasonable the court has to take into account the phrase in para (c) of subs (2) of s 4 of SI 831 of 1980 which reads: "... taking into account the position, qualifications and experience of the employee concerned". I am in total agreement with this leg of Mr *Chinamasa's* submission.

Mr *Chinamasa*, if I understood him well, argued that had the draftsman ended para (c) with the words "... save when such changes in duties as are made are reasonable ..." there would be no difficulty in interpreting the word "reasonable". He submitted, however, that the inclusion of the phrase "... taking into

1985 (1) ZLR p132

DUMBUTSHENA CJ

account the position, qualifications and experience of the employee concerned" were not intended to restrict the interpretation of "reasonable" to only those circumstances mentioned in para (c) of s 4. He contended further that other circumstances other than those contained in para (c) of s 4 of SI 831 of 1980 had to be taken into account. With this submission I must disagree because of the nature of those other circumstances on which he sought to rely. I shall refer to them later in my judgment.

I agree with Mr *Chinamasa* that the test to be applied in the determination of the reasonableness of the changes is an objective one. That, of course, does not necessarily mean that all the circumstances have to be taken account of in determining the reasonableness of the changes made. Mr *Chinamasa* argued, however, that those other circumstances which he urged the court to take into account were the following:

- (1) The unwholesome relationship that existed between the respondent and
- (2) The unwholesome relationship that existed between the respondent and his subordinates;
- (3) The respondent's racial offensiveness;
- (4) The nature of the changes; and

(5) the alternatives open to the appellant in the circumstances of this case.

There are two difficulties in Mr *Chinamasa's* submission. The additional circumstances upon which he relies in support of his contention relate to disciplinary matters. If the appellant wanted to discipline the respondent for the various acts of misconduct alleged against him, the appellant should have proceeded, as the respondent averred in his replying affidavit, in terms of para 16 of SI 47 of 1981 - The Industrial Agreement Salisbury Municipal Undertaking General Conditions of Service - which deals with various acts of misconduct by the employee. There is substance in that averment because the circumstances partially relied upon by the appellant should have been taken up as disciplinary measures. They cannot in my view be considered as factors determining the reasonableness of the "fundamental change in the nature of the work content of the position" of the respondent.

The second difficulty that confronts the appellant is that the respondent

1985 (1) ZLR p133

DUMBUTSHENA CJ

denied the allegations made against him. In his replying affidavit he denied them in paragraphs 4, 5, 6 and 7 in these terms:

4. As far as I am aware there have been only two complaints made against me, and these are as follows:

- (a) A complaint by the Chairman of the Works Council which was resolved when the Chairman made a written apology (a copy of which is annexed hereto as 'M') and
- (b) A complaint from a member of the public which was unsubstantiated and I would submit spurious. If there had been such complaints it was open to Council to take disciplinary measures in terms of para 16 of SI 47 of 1981 and no such proceedings were ever instituted.

I deny that I was motivated by racial considerations at any time.

5. I deny that my human relationships were either poor or crude and believe that I did have a good working relationship. As regards the analogy referred to, I would submit that it is inappropriate as there has been no elevation in my post, the factual situation being to the contrary.

6. I deny that the changes in duties referred to amount to an 'offer of reasonably comparable employment' as defined in para 4(d) of SI 831 of 1980.

7. I repeat that the new duties assigned to me did not amount to reasonably comparable employment as defined and there has most definitely been a complete emasculation of my duties.

With regard to one of the complaints against the respondent, Mr Badze, Chairman Workers committee, apologised by letter, Annexure M, dated 26 August 1983 as follows:

I accept to remove the following from my letter; 'Also your recent treatment of three junior staff in your section whom you demoted to trench diggers.' It has also been brought to my attention that Mr Ewing being only a supervisor does not have powers to demote a Council employee. I therefore apologise to Mr Ewing for the inconvenience caused to him.

1985 (1) ZLR p134

DUMBUTSHENA CJ

The letters said to have been written by members of the public registering their grievances against the respondent were not exhibited with the appellant's answering affidavit and therefore were not part of the evidence adduced by the appellant. Those allegations, if ever they were made, were therefore hearsay. It seems to me that the appellant did not take disciplinary measures because the case against the respondent was not supported by cogent evidence. It does not, therefore, avail the appellant's counsel to contend that the respondent had by being deprived of his functions been treated reasonably. In a way I cannot help sympathising with the appellant which, assuming there had been substance in the allegations, found itself saddled with an employee it could not dismiss or effect changes in the nature of his work because of the provisions of s 4 of SI 831 of 1980.

In *Zimbabwe Broadcasting Corporation v Sones* S-63-82 (not reported) FIELDSEND CJ rejected the contention that Mr Sones, the Corporation's senior sub-editor, who was demoted to the position of sub-editor, had been demoted because of justifiable disciplinary measures taken against him by the Corporation.

The employees of the Corporation were covered by Chapter IX of Staff Circular 311 (as substituted on 29 June 1978). Rule 4 reads:

ABOLITION OF OFFICE

A staff member whose service is terminated by reason of abolition of office, or whose everyday working conditions are materially varied to his disadvantage, shall, in addition to the benefits he may be entitled under the pension scheme rules, be paid by the Corporation twelve months' salary immediately on his leaving the service of the Corporation.

These Rules were introduced during the Transitional Government in 1978 and were intended, as the rules we are considering were meant, to protect employees who feared radical re-organisation of the Corporation under majority rule. They feared that they would be superseded in their positions by other employees. Both in the court below and in this court the Corporation's contention that Mr Sones was demoted because of justifiable disciplinary measures taken by the Corporation was rejected. Mr Sones was declared entitled to the benefits afforded him under Rule 4 (the Abolition of Office Rule).

It was found that the Corporation's evidence had not established any

1985 (1) ZLR p135

DUMBUTSHENA CJ

justification for disciplinary action.

In my judgment in determining the reasonableness of the changes in the duties of the respondent regard should be had only to those circumstances enumerated in para (c) of s 4 of SI 831 of 1980, that is, "the position, qualifications and experience of the employee concerned". "The word 'reasonable' has in law the *prima facie* meaning of reasonable in regard to those existing circumstances of which the actor, called on to act reasonably, knows or ought to know" per SCOTT LJ in *Re A Solicitor* [1945] KB 368 at 371. And those circumstances upon which the

appellant is "called on to act" are the ones specifically mentioned in para (c) of s 4.

I derive support for the view I have taken in what was said by LATHAM CJ in *Opera House Investment Pty, Ltd v Devon Buildings Pty, Ltd* (1936) 55 CLR 110. This was an appeal to the High Court of Australia dealing with a contract between a landlord and a tenant - a lease requiring the payment of additional rent equal in amount to the interest payable by the lessor on moneys borrowed on mortgage and applied towards the erecting of certain buildings. The interest was at a lower rate during the currency of the mortgage but after the expiration of the mortgage the interest was to be such higher or lower rate as the lessor might reasonably contract to pay. When the mortgage fell due the lessor owed £16 245 to the vendors of the land on account of the purchase money in addition to £18 131 due under the mortgage. He could have renewed the mortgage at 4 1/2 per cent but in fact borrowed £35 000 at 4 1/2 per cent for the five year term. On appeal it was held that he had acted reasonably. The facts of this case are distinguished from those of the instant case. What I find of assistance is what LATHAM CJ said about the circumstances that are relevant in determining the word "reasonable". He said at 116:

The word 'reasonable' has often been declared to mean 'reasonable in all the circumstances of the case'. The real question, in my opinion, is to determine what circumstances are relevant. In determining this question regard must be paid to the nature of the transaction. A circumstance which had no relation to the property which was the subject matter of the transaction but which depended entirely upon the personal position or personal desires of the owner of the property, would not, in my opinion, be a relevant circumstance in determining what was reasonable.

What then is the nature of the Abolition of Office and Compensation Agreement? For the better appreciation of the nature of that Agreement it is necessary to set out the provisions of s 5 of SI 831 of 1980 as amended

1985 (1) ZLR p136

DUMBUTSHENA CJ

necessary to set out the provisions of s 5 of SI 831 of 1980 as amended because in my view it highlights the nature of the Agreement which was to give protection to those employees, presumably white employees, whose jobs were, on Independence, threatened by the promotion of black employees or who feared being superseded by black employees after the advent of majority rule. Were the above eventuality to happen, s 5 provides:

5 (1) Subject to the provisions of this agreement, an employee shall have the right to claim, and to be paid, compensation by the employer if his post is abolished and -

- (a) he is not offered alternative comparable employment;
- (b) he has accepted alternative employment which is reasonably comparable employment, save in the following respects -
 - (i) the emoluments are lower; and/or
 - (ii) the conditions of employment are less favourable than those in respect of his employment at the time when his post was abolished.

(2) No employee shall be entitled to claim compensation, nor shall he be paid compensation -

- (a) if he has refused an offer of reasonably comparable employment as defined herein; or
- (b) if, having accepted such offer of reasonably comparable employment, he has not, within a period of two years from the date of acceptance of such offer, claimed that such employment is not reasonably comparable employment.

(3) No employee shall be deprived of his right to claim, and to be paid, compensation because he did not seek alternative employment whether reasonably comparable or otherwise.

(4) An employee who is promoted or transferred from a position or post listed in the First Schedule to a position or post not listed in the First Schedule shall, notwithstanding the fact that the position or post is not so listed, be entitled to claim compensation if such later position or post

1985 (1) ZLR p137

DUMBUTSHENA CJ

is abolished as though it were a position or post listed in the First Schedule.

It means, therefore, that the protection of the employee's position had a direct relation to the terms of the Agreement. If I am correct in the conclusion to which I have come, in determining the reasonableness of the fundamental changes that were made in the functions and duties of the respondent, the only issue to be determined is whether the change was reasonable "taking into account the position, qualifications and experience" of the respondent. I agree with Mr *Blackie's* submission that in the light of the wording of s 4(2) of SI 831 of 1980, which is "reasonable, taking into account the position, qualifications and experience of the employee concerned", it is the employee's interests that are to be considered in determining the reasonableness of the changes in the functions and duties of his post.

In discharging its *onus* the appellant cannot rely on disputed allegations that were not proved in the court *a quo*. The learned trial judge came to the right decision when he rejected them.

In my judgment the changes were unreasonable on account of the fact that the appellant deprived the respondent of virtually all the functions of his post. The concession that the changes made by the appellant were fundamental in the circumstances they were effected must necessarily lead one to the conclusion that their inevitable result was the abolition of the respondent's post.

For the reasons already stated I would dismiss the appeal with costs.

Beck JA: I agree

McNally JA: I agree.

P A Chinamasa & Co, appellant's legal practitioners

Condy, Chadwick & Elliot, respondents legal practitioners

1985 (1) ZLR p138

S v TSORAYI 1985 (1) ZLR 138 (HC)

Court High Court, Harare

Smith and Ebrahim JJ

Review

8 March 1985

Flynote

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - s 255B - approach which the Court must adopt in interpreting this section.

Criminal procedure - Criminal Procedure and Evidence Act [Chapter 59] - s 213A - case referred to High Court for sentence - judge may, in respect of the proceedings, exercise such of the powers conferred upon the High Court by s 29(1) and (2) of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981), as may be appropriate.

Headnote

The accused was charged with the theft of \$41 305,00. He made two confessions admitting that he stole the money. The accused wrote out the two confessions. The first one was a fairly detailed statement as to how he stole the money, the amounts he stole and the property he bought. The second one was made a day later. It referred to the stealing of much greater amounts than were admitted in the first confession and what he bought with the stolen money. He admitted stealing a total amount of \$18 400,00. He challenged the admissibility of these statements, alleging that they had been elicited by means of threats from police details.

The magistrate, after holding a trial within a trial, admitted the statements. The prosecution was, however, unable to prove that the thefts admitted by the accused had actually occurred. The magistrate was of the view that he could not convict the accused of theft due to the proviso of s 255B of the Criminal Procedure and Evidence Act [Chapter 59]. Instead he convicted the accused of contravening s 14(1) of the Miscellaneous

1985 (1) ZLR p139

SMITH J

Offences Act [Chapter 68] in respect of the unlawful possession of \$14 500,00.

Held, if the court is satisfied that the confession is genuine and that the confirming evidence required by the statute is such as to corroborate the confession in a material respect, the court must then decide, having regard to the evidence, including the confession, and the probabilities, whether or not the State has proved the guilt of the accused beyond reasonable doubt.

Held, further, that in terms of s 213 A of the Criminal Procedure and Evidence Act [Chapter 59], where a case has been referred to the High Court for sentence, the judge may, in respect of the proceedings exercise such of the powers conferred upon the High Court by s 29(1) and (2) of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981), as may be appropriate. *Held*, further, that the conviction of the accused should be set aside and the verdict should be altered to one

of guilty of theft of \$18 400.

Cases cited:

R v Taputsa & Ors 1966 RLR 662

R v Sambo 1964 RLR 565

R v Fuwane 1956 R&N 563

R v Madyedzo and Elia 1964 RLR 336

R v Sykes (1913) 8 Cr App R 232

R v Scott-Rodger 1956 R&N 421

R v Labuschagne 1961 R&N 305

S v Chikopa S-371-84 (unreported)

S v Muzanenhamo HH-170-84 (unreported)

S v Chimasoro HB-37-84 (unreported)

S v Chirwa HH-53-84 (unreported)

Judgment

Smith J: The accused was charged with the theft of \$41 305,00 from the Montclair Casino Hotel. The accused made two confessions admitting that he stole money from the Casino. He challenged the admissibility of these statements, alleging that they had been elicited by means of threats from the police details, but the magistrate, after conducting a trial within a trial, admitted them. However, the magistrate felt that he could not convict the accused of theft due to the proviso to s 255B of the Criminal Procedure and Evidence Act [*Chapter 59*]. Instead he convicted the accused of contravening s 14(1) of the Miscellaneous Offences Act [*Chapter 68*] in respect of the unlawful possession of \$14 500. The magistrate referred the case to the Attorney-General in terms of s 58 of the Magistrates Court Act [*Chapter 18*]

1985 (1) ZLR p140

SMITH J

and the Attorney-General has directed, under s 212(b)(i) of the Code that the case be transferred to the High Court for sentence.

Mr *Mkushi*, who appeared for the accused, submitted that before considering the question of sentence, the court should review the conviction because, he argued, the conviction was not proper. The Attorney-General conceded that the magistrate had misdirected himself in finding that he could not convict the accused of theft but should properly convict him of contravening s 14(1) of the Miscellaneous Offences Act [*Chapter 68*]. He submitted that the magistrate had not misdirected himself on the facts and should, on the basis of the accused's confessions, have

convicted him of theft.

The accused wrote out two confessions. The first one was a fairly detailed statement as to how he stole the money, the amounts he stole and the property he bought. The second one was made a day later. It referred to the stealing of much greater amounts than were admitted in the first confession and what he bought with the stolen money. He admitted stealing a total of \$18 400,00.

The control maintained by the management at the Casino was incredibly lax, especially when regard is had to the amounts of money involved. The one State witness said that they had suspected for about 15 months that money was being stolen from the Casino but nothing was done until about June, 1983, to tighten up on the security precautions. Locks were placed on the slot machines and the takings from them increased with immediate effect by about \$7 000 a month. Although most of the slot machines had meters which recorded the number of coins inserted, it was not until December 1983 that the management bothered to take the readings on the meters. But even then, they did not use the readings to check whether the requisite number of coins were in each machine until early January 1984, when they found that in one week there was an amount of \$1 600 missing from the machines. This would not have included the money missing from the few machines that had defective meters. Thus the management could not state definitely that money had been stolen from the slot machines other than the \$1 600. The prosecution was therefore unable to prove that the thefts admitted by the accused had actually occurred.

Section 255B of the Criminal Procedure and Evidence Act [Chapter 59] reads as follows:

Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a

1985 (1) ZLR p141

SMITH J

confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed.

The approach which the court must adopt is conveniently set out in *R v Taputsa & Ors* 1966 RLR 662 at 667E-I where LEWIS AJA said:

The effect of s 301(2) seems to be that, where there is evidence *aliunde* proving that the offence has actually been committed, the court may satisfy itself of the genuineness of the confession by the accused that he committed it or took part in it from the nature of the confession itself; where, however, there is no evidence *aliunde* proving that the offence itself has been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence. In the leading case of *R v Blythe* 1940 AD 354, TINDALL JA delivering the judgment of the Full Bench of the Appellate Division, laid down that the confirming evidence required by the statute must be such as to corroborate the confession "in a material respect", although it need not directly implicate the accused in the offence, and that the statutory requirement, in this regard, was similar to that in respect of an accomplice, as explained by SOLOMON ACJ, in *R v Lakatula* 1919 AD 362. In *Lakatula's* case, it was said that there should be corroboration in some material respect, "in order that the jury may be satisfied that the accomplice is a reliable witness upon whose evidence they may safely act." (see also *R v Troskie* 1920 AD

466 at 468, *per* INNES CJ.)

Applying this test to confessions, it seems that the confirming evidence need not amount to evidence directly confirming that part of the confession in which the accused actually implicates himself in the commission of the offence; it need only be evidence which is sufficiently corroborative of a material part or parts of the confession to satisfy the court that it can safely rely on the confession as a whole in convicting the accused.

If the court is satisfied that the confession is genuine and that the confirming evidence required by the statute is such as to corroborate the confession in a material respect, the court must then decide, having regard to the evidence, including the confession, and the probabilities, whether or not the State has proved the guilt of the accused beyond reasonable doubt. In this case the

1985 (1) ZLR p142

SMITH J

problem must be approached on the basis that there is no evidence *aliunde* that the offence has actually been committed.

As to the nature of the confessions themselves showing that they are genuine, in *R v Sambo* 1964 RLR 565 at 572A-C BEADLE CJ said:

If the accused mentions facts in his confession, the knowledge of which he could only have come by by being connected with the crime, the mentioning of such facts will, of course, be most cogent evidence to show that the confession is genuine. But even if the accused may have been questioned by the police on these very facts, their mention still has considerable probative value. If an accused freely makes a long statement and all the known facts fit in their proper sequence into this statement this may often be sufficient on which to base a conclusion that the confession is genuine, even if the police may previously have questioned the accused on these facts, because, unless the police put the actual words of the statement into the accused's mouth, if his only knowledge of the true facts has come from police questioning, he is hardly likely to present a coherent and convincing story into which all the known facts dovetail perfectly. A confession of such type will often, therefore, itself prove its genuineness.

Also in *Fuwane v R* 1956 R & N 563 at 567F and *R v Madyedzo and Elia* 1964 RLR 336 at 341A, the passage from *R v Sykes* (1913) 8 Cr App R 233 at 236 was cited where RIDLEY J discussed the tests to be applied to a confession. The passage reads as follows:

... the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? Was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?

In his first confession the accused said, in some detail, how he noticed that he could steal money from the slot machines. He stopped stealing when the bolts were fitted to the machines. He detailed the property he had bought with the money he admitted stealing. In his second confession the accused admitted stealing a total of \$18 400. He mentioned six different amounts that he stole and what he purchased with the money. He told how he sold some

1985 (1) ZLR p143

SMITH J

of the property he so purchased and used the proceeds, with additional stolen money, to

purchase other property and he deposited \$5 000 in his account with Zimbank. He said he stole all the money from the machines; he mentioned how he stole the money and said that he changed the coins for notes.

The confessions are corroborated in three respects. The one State witness demonstrated in court that money could be taken from the machines in the way the accused said he had done. When the accused was arrested he owned a Mazda, a VW, a motor-cycle and two plots and had a Zimbank passbook which he had hidden in the bathroom showing that he had \$5 000 in his account. In his confessions he admitted buying these. Once the locks had been fitted to the slot machines, the income therefrom increased by \$7 000 per month and the accused said that this was when he stopped stealing.

In the light of these factors I am satisfied that there is credible evidence outside the confessions showing that they were true, that they are corroborated and that the accused had the opportunity of committing the crime. Looking at the confessions themselves, they are fairly long, detailed statements. They contain matter which it is unlikely the police would have inserted had they concocted them. I am accordingly satisfied beyond reasonable doubt that the confessions are genuine and that they are corroborated in material respects. I am further satisfied beyond reasonable doubt that having regard to the whole of the evidence, including the confessions, and the probabilities that the accused is guilty of theft.

In terms of s 213A of the Code, where a case has been referred to the High Court for sentence, the judge may, in respect of the proceedings, exercise such of the powers conferred upon the High Court by ss 29(1) and (2) of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981) as may be appropriate. Mr *Mkushi* submitted that, since the trial magistrate has acquitted the accused on the charge of theft, it would not be competent for me to find the accused guilty of theft. This submission is not supported by the cases. In *Scott-Rodger v R* 1956 R & N 421 at 423 MURRAY CJ said:

In my opinion the magistrate should have convicted the appellant of the crime of theft, and it seems to me that this court has the power to alter a conviction from one of attempted theft to one of theft. The powers of the court are set out in the amending Act, Act 3 of 1949, s 2, which amends s 55 of the Magistrates Court Act [Chapter 11]. The High Court on appeal has the same powers as it has on review, and s 2(a) of that

1985 (1) ZLR p144

SMITH J

amending section gives the High Court power to alter or quash a conviction. I am in accord with Mr *McCormac's* contention that the word "alter" in para (a) entitles the court on review, and consequently on appeal, to alter the conviction even if it is to one which is *prima facie* of greater gravity than that recorded by the magistrate. It is clear that in terms of para (b) of that section a reviewing judge or the High Court on appeal has no power to impose a heavier sentence, but that is in contra-distinction to the conviction. There is nothing restricting the powers of the reviewing Judge or the High Court to alter the conviction to one of greater severity; and inability to increase the sentence is no ground for holding that there is any such limitation on the power to alter the conviction.

This view was accepted by BEADLE CJ in *R v Labuschagne* 1961 R & N 305 at 307-308 where, after quoting the provisions equivalent to s 29(2)(b)(i) and (iii) of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981), he said:

These sub-sections have been interpreted as giving a court of appeal power to substitute a verdict of guilty of a

more serious offence for a verdict of guilty for a less serious offence, provided that all the ingredients of the more serious offence were clearly set out in the charge. For example, in *Scott-Rodger v R* 1956 R & N 421 and in *R v Tarusika* 1959 R & N 51, a verdict of guilty of theft was substituted for a verdict of guilty of attempted theft; and in *R v Veli* 1958 R & N 296, a verdict of guilty of assault with intent to do grievous bodily harm was substituted on review for a verdict of guilty of assault. In *R v Amandawana* 1955 SR 300, a verdict of guilty of contravening s 7(1) of the Game and Fish Preservation Act [Chapter 187] (hunting "Special" game without a licence) was altered to one of guilty of contravening s 7(2)(b) of the same Act (hunting "Royal" game without a licence), the latter being a more serious offence than the former.

The conviction of the accused is therefore set aside and the following substituted -

The accused is found guilty of the theft of \$18 400.

The accused is 25 years of age and is married with one minor child. He was employed at the Casino for some 2 1/2 years and his responsibilities included looking after takings amounting to over \$7 000 per week and substantially greater amounts at month ends and over public holidays. The accused was

1985 (1) ZLR p145

SMITH J

arrested in January 1984, kept in custody for two weeks and brought to trial in February, 1984 but his trial has still not been concluded. The accused is a first offender. Factors in aggravation are that the accused was employed in a position of trust which he abused over a long period. The greed of the accused is shown by the amount of money he stole and the property he bought. One motor car was not enough for him, he had two and a motor-cycle. He had two plots of land. He did not stop stealing because he thought he had taken enough; he only did so when locks were fitted to the slot machines. Although the accused was handling a lot of money it was not that fact that tempted him. He stole money from the slot machine, not money that he was handling in the course of his duties.

I have regard to the sentences imposed in the cases of *S v Chikopa* S-37-84, *S v Muzanenhemo* HH-170-84, *S v Chimasoro* HB-37-84 and *S v Chirwa* HH-53-84.

The accused is sentenced to seven years' imprisonment with labour, of which two years' imprisonment with labour is suspended for five years on condition that the accused is not convicted of an offence committed within that period of which dishonesty is an element and for which he is sentenced to imprisonment without the option of a fine.

Ebrahim J: I agree.

1985 (1) ZLR p146

ZIMDEF (PVT) LTD v MINISTER OF DEFENCE & ANOR 1985 (1) ZLR 146 (HC)

Court High Court, Harare

Smith J

Rule *Nisi*

13 March, 1985

Flynote

Practice and Procedure - application for rule nisi made ex parte - all material facts must be disclosed which might influence a court in coming to a decision.

Headnote

There is a liability to make full disclosure in *ex parte* applications.

Cases cited:

Republic Motors v Lytton Road Service Station 1971 (1) RLR 129 (GD).

Schlesinger v Schlesinger 1979 (4) SA 342 (W).

M Gillespie for the petitioner

No appearance for the first respondent

A P de Bourbon SC for the second respondent

Judgment

Smith J: This is the return day of a rule *nisi* issued on 14 February 1985 calling upon the respondents to show cause why -

- (a) the first respondent should not be interdicted from paying to the second respondent the sum of \$60 466,00;
- (b) the Deputy Sheriff should not be ordered to attach the said \$60 466,00 *ad confirmandum jurisdictionem*;
- (c) the second respondent should not be ordered to pay the costs of the application.

The petitioner is a locally registered company and Mr R Whawell is a director thereof. Sometime during January 1984, the petitioner, the second respondent and a firm called Hall and Watts (Defence Sales) Ltd, entered into a joint

1985 (1) ZLR p147

SMITH J

venture to supply defence materials to the Zimbabwe National Army (ZNA). This agreement was reduced to writing and signed by the parties on 24 April 1984. (It is hereinafter referred to as the first agreement). In this first agreement the parties thereto were referred to as Roy Whawell and Associated Companies, Hall and Watts (Defence Sales) Ltd, and Kim Bowerman and Associated Companies. It provided that the profits available for distribution would be split in the proportion 2:4:4. The partnership accounts were to be managed by Hall and Watts (Defence

Sales) Ltd, in the United Kingdom and were to be kept in United States dollars.

The petitioner alleges that in accordance with this joint venture agreement, through Mr Whawell it negotiated contracts with the ZNA and, on instructions from the second respondent, for a period of eight months arranged for the clearing and delivery of goods supplied to the ZNA. The first respondent has paid most of the money due to the joint venture, and balance outstanding amounting to \$60 466 which is due to be paid on the 15th February, 1985. The petitioner further alleges that it has been paid nothing in terms of the partnership agreement and wishes to sue for a debatement of account of the amount due. Since Mr Bowerman will soon be returning to England and has permission to remit the final payment from Zimbabwe, the petitioner is suing for leave for debatement of account and payment thereof, attachment of the \$60 466 and an interdict restraining the first respondent from making the final payment to the second respondent until the dispute has been resolved.

The second respondent avers that the first agreement was torn up and replaced by a new agreement on 3 August 1984 (hereinafter referred to as the second agreement). This second agreement described the parties thereto as Commercial and Industrial Trade Bureau, Hall and Watts (Defence Sales) and Panex Overseas Inc. The partners' capital was the same as in the earlier agreement as were the proportions in which profits were to be distributed. The two agreements contain identical provisions, the only differences being that references in the first agreement to Roy Whawell or Roy Whawell and Associated Companies were changed in the second agreement to Commercial and Industrial Trade Bureau, and references to Kim Bowerman and Kim Bowerman and Associated Companies were changed to Panex Overseas Inc. Both agreements were signed by Mr Whawell and Mr Bowerman.

The second respondent denies that the petitioner conducted negotiations with the ZNA. It avers that it, through Mr Bowerman, placed a tender with the ZNA and arranged for the delivery of the items to the ZNA. Furthermore it states that the final payment due to the second respondent is \$48 794 and not

1985 (1) ZLR p148

SMITH J

\$60 466 and that this amount is not to be remitted since it has reached an agreement with the Exchange Control authorities that the money is to remain in Zimbabwe.

The second respondent denies that the Petitioner is entitled to any money it claims since it is not a party to the second agreement. It further alleges that no business was transacted in respect of which Roy Whawell or his associated companies were due any payments because from 24 April 1984, to 3 August 1984, no business was concluded "between the petitioner or Whawell".

The petitioner denies this last allegation. It also states that the first agreement was signed to formalise the relationship which already existed. The first and third parties thereto were broadly described in order to give full effect to the clauses of the agreement. In the second agreement the parties were particularly described, the second respondent was described for tax purposes and the description of the first party was merely a trading name of Roy Whawell who instructed

the petitioner, a company in which he is a major shareholder and director, to conduct business on his behalf in pursuit of the joint venture.

Mr *Gillespie* said that the petitioner and Mr Whawell intend to institute action against the second respondent for moneys owed to them or for debatement of account and settlement of the partnership affairs (i.e. the *actio pro socio* and the *actio communi dividendo*). The rule nisi was applied for and granted as a matter of urgency in order to be able to attach certain moneys to confirm jurisdiction pending the instituting of the action. There was no application for leave to sue by edictal citation because of the urgency and because the legal representatives of the second respondent could accept service of a summons. Because of the urgency of the matter, notice of the application for the rule was not given to the first or second respondent but a copy of the petition, annexure and rule had been served on both respondents. He moved that the rule be confirmed, submitting that the papers disclosed that there was a partnership in existence between the second respondent, a third party and either the petitioner or Mr Whawell personally and that the petitioner had been active in the business of the joint venture. He accepted that the present relationship between the partners was as set out in the second agreement. However, as formulated in the first agreement and as was the intention throughout, it was always intended that Mr Whawell personally or through one of his companies would be a party to the joint venture. The petitioner had commenced acting for the partnership before the second agreement was drawn up and he submitted that, since Commercial and Industrial Trade Bureau was not a

1985 (1) ZLR p149

SMITH J

limited liability company with separate personality, on a true interpretation of the second agreement, the petitioner was a party thereto. Alternatively, he submitted that Mr Whawell would join the petitioner in its action against the second respondent and in his personal capacity he sought confirmation of the rule.

Mr *Gillespie* further submitted that the petitioner and/or Mr Whawell had a substantial interest in ensuring that the money due from the first respondent to the second respondent for the joint venture remained in Zimbabwe under attachment until their dispute was resolved. He pointed out that the second respondent had not alleged that the attachment would cause grave inconvenience.

Mr *de Bourbon* opposed the confirmation of the rule on three grounds. Firstly he submitted that there were procedural defects. There was no good reason why the application for the rule *nisi* was made *ex parte* and not after due notice. Furthermore, in the petition information had been deliberately withheld by the petitioner in order to obtain the interdict. The petitioner had not disclosed that the first agreement had been cancelled by the parties thereto and that in the second agreement the identity of the parties had been changed. On these points alone, he submitted, the court should decline to confirm the rule.

The second leg on which Mr *de Bourbon* opposed confirmation was that this court had no jurisdiction to hear any action that the petitioner or Mr Whawell might bring for debatement of the partnership accounts and settlement of the partnership affairs since two of the three

partners were *peregrini* and the partnership accounts were kept in England.

Accordingly this court had no jurisdiction over the cause of action, let alone the parties. Furthermore, he submitted that these proceedings were imperfect in that the third partner was not before the court.

The third leg of Mr *de Bourbon*'s argument related to the merits of the application. He submitted that the *actio pro socio* was an action for limited relief in that it could be brought only for personal obligations and was therefore not appropriate in this case. As the petitioner claimed that the partnership was continuing in existence no action would lie by one partner against another until there had been a final settlement of accounts between the partners.

1984 (1) ZLR p150

SMITH J

I am not satisfied that the urgency in this case was such that it was appropriate for the application to be made *ex parte*. In *Republic Motors v Lytton Road Service Station* 1971 (1) RLR 129 (GD) at 132B-D BECK J said:

The procedure of approaching the court *ex parte* for relief that affects the rights of other persons is one which, in my opinion, is somewhat too lightly employed. Although the relief that is sought when this procedure is resorted to is only temporary in nature, it necessarily invades, for the time being, the freedom of action of a person or persons who have not been heard and it is, to that extent, a negation of the fundamental precept of *audi alteram partem*. It is, accordingly, a procedure that should be sparingly employed and carefully disciplined by the existence of factors of such urgency, or of well-grounded apprehension of perverse conduct on the part of a respondent who is informed beforehand that resort will be had to the assistance of the court, that the course of justice stands a danger of frustration unless temporary curial intervention can be uni-laterally obtained.

However since the respondents have now been furnished with the relevant papers and the second respondent has been heard I do not think it appropriate to discharge the rule merely because it was applied for *ex parte*.

In his affidavit Mr Whawell averred that the first agreement was still in force yet he must have been well aware that that agreement had been torn up and replaced by the second agreement. The liability to make full disclosure in *ex parte* applications was discussed in *Schlesinger v Schlesinger* 1979 (4) SA 342 (W) at 348-9 where LE ROUX J said -

Before dealing with the facts, it would in my opinion be advisable to examine the principle of full disclosure in *ex parte* applications more closely, and, especially, when a Court should exercise its discretion in favour of the party who has been guilty of non-disclosure or misstatement. Counsel for the applicant (Mr *Kriegler*) has referred me to a number of south African and English authorities which support the statement found in the excellent work of Herbstein and Van Winsen on *The Civil Practice of the Superior Courts in South Africa* 2nd ed at 94, to the following effect:

Although, on the one hand, the petitioner is entitled to embody in his petition only sufficient allegations to establish his right, he must, on the other, make full disclosure of all material facts, which might affect

1985 (1) ZLR p151

SMITH J

the granting or otherwise of an *ex parte* order.

The utmost good faith must be observed by litigants making *ex parte* applications in placing material facts before the court; so much so that if an order has been made upon an *ex parte* application and it appears that material facts have been kept back, whether wilfully and *mala fide* or negligently, which **might** have influenced the decision of the court whether to make an order or not, the court has a discretion to set the order aside with costs on the ground of non-disclosure. It should, however, be noted that the court has a discretion and is not compelled, even if the non-disclosure was material, to dismiss the application or to set aside the proceedings.

This synopsis is certainly supported by venerable authority in this country, such as *In re Leydsdorp and Pietersburg (Transvaal) Estates Ltd (in liquidation)* 1903 TS 254 at 257-8 (where it was still stated that if in the opinion of the Court the facts withheld *would* have influenced the Court in its decision, it could be set aside - subsequently changed to "*might*" - see GREENBERG J in *Phillips v May* 1936 (1) PH C 16 (W)); *Estate Logie v Priest* 1926 AD 312 at 323; *De Jager v Heilbron and Others* 1947 (2) SA 415 (W) at 419-420; *Barclays Bank v Giles* 1931 TPD 9 at 11; *Spilg v Walker* 1947 (3) SA 495 (E). It appears quite clearly from these authorities that:

- (1) In *ex parte* applications all material facts must be disclosed which *might* influence a Court in coming to a decision;
- (2) the non-disclosure or suppression of facts need not be wilful or *mala fide* to incur the penalty of rescission; and
- (3) the Court, apprised of the true facts, has a discretion to set aside the former order or to preserve it.

The replacement of the first agreement by the second agreement is obviously a material fact. The identity of the parties to any particular agreement is clearly one of fundamental importance. The only differences between the two agreements concern the identities of two of the partners. In the first agreement the two partners are very broadly described. The parties thereto some three months after the first agreement had been signed, thought that the proper identification of the partners was of sufficient importance to warrant tearing up the first agreement and replacing it with the second agreement, in which two of the partners were more specifically identified.

1985 (1) ZLR p152

SMITH J

In *Schlesinger's* case *supra* at 350B LE ROUX J said:

I need go no further. It appears to me that unless there are very cogent practical reasons why an order should not be rescinded, the Court will always frown on an order obtained *ex parte* on incomplete information and will set it aside even if relief could be obtained on a subsequent application by the same applicant.

I can see no cogent practical reason why the rule should not be discharged. In the light of my decision on this point, it is not necessary for me to canvass the other submissions made by Mr *de Bourbon*.

The rule is discharged and the applicant is ordered to pay the costs of the second respondent.

Roy Harvey & Associates, legal practitioners for petitioner

Ali Ebrahim, legal practitioners for the second respondent

1985 (1) ZLR p153

GRANGER v MINISTER OF STATE (SECURITY) 1985 (1) ZLR 153 (HC)

Court High Court, Harare

Smith J

Civil Action

14 March 1985

Flynote

Delict - actio injuriarum - damages for contumelia arising out of abuse of authority by members of the Central Intelligence Organisation - measure of.

Costs - award of on a High Court scale - when action concerned could have been instituted in a lower court - considerations which apply.

Headnote

Members of the Central Intelligence Organisation acted very unreasonably and abused their authority in their dealings with the plaintiff which amounted to *injuria* and *contumelia*. The fear they inspired in the plaintiff was very real. In the circumstances, damages in the sum of \$1 200,00 was considered adequate and reasonable.

The amount awarded to plaintiff, in damages, fell within the jurisdiction of the magistrates court. Principles to apply when the court has to consider whether to award costs on the higher scale although the action concerned could have been instituted in the lower courts.

Cases cited:

Machoni v Municipality of Gweru HH-386-82 (unreported)

F C Blackie SC for the plaintiff

M J Gillespie for the defendant

Judgment

Smith J: At about 8 am on 14 May 1982, the plaintiff was standing in the middle of the Prince Edward Dam Road, which is a four-lane highway, taking photographs of skid-marks on the road surface. He was acting on behalf of

1985 (1) ZLR p154

SMITH J

an insurance company that had insured a motor vehicle which had been involved in an accident. When he had finished taking photographs the plaintiff went to his motor car which was parked off the highway in the drive leading to the premises of a bus company. He put the camera into his briefcase, started his car and commenced to drive off. Just before he got onto

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the main highway a gray-coloured land rover came to a halt just in front of his car forcing him to stop. It later transpired that this vehicle was being used by members of the Central Intelligence Organisation (CIO). As soon as the land rover stopped three men and one woman who were in the back jumped out and approached the plaintiff.

The plaintiff alleged that one of the men came directly to him, put his hand through the open window and grabbed him by the front of his shirt and tried to pull him through the window. This man did not identify himself as a member of the CIO. He just shouted that the plaintiff was a spy. The other three CIO members converged on the car and each grabbed a door-handle and started rocking the car. They may well have been attempting to open the doors, which were locked, but the plaintiff got the impression that they were trying to overturn the car. These other three CIO members also started shouting "spy, spy kill the spy", the woman being the loudest and most vociferous. The plaintiff said that he was aware at the time that recently there had been a number of incidents where black youths had assaulted elderly whites and he feared that he was the victim or intended victim of such an assault. He said that the four people all appeared to be young, two of the men seemed to be 18 or 19 years old and were wearing colored sports shirts. He was very frightened and panicked. There was a space for him to drive round the land rover which was still in front of his car so he wound up his window which caused the CIO member to loosen his grip on the plaintiff's shirt and withdraw his arm. The plaintiff then drove off very fast; in doing so he had to drive over the pavement. His intention was to get to the Southerton police station. As he drove along the road he noticed that the land rover was being driven in pursuit of him so he drove as fast as his car could travel towards town. On two occasions the driver of the land rover overtook him and tried to get him to stop. At the intersection with Cripps Road the robot was against him and there was traffic crossing the intersection so he had to stop. The driver of the land rover stopped beside the plaintiff's car, came over, leant into the car and removed the car keys. He then grabbed the plaintiff by the front of his shirt and pulled him out of his car. The plaintiff tried to recover his car keys and in the struggle the stitching of the back seam of the jacket of the CIO member tore. The CIO member then twisted the plaintiff's arm behind his back and then the plaintiff was searched and two pens and a pencil

1985 (1) ZLR p155

SMITH J

were removed from his jacket pocket. Perhaps the person doing the searching had seen one or two James Bond films and thought that they might be lethal weapons. By this stage a fairly large crowd of on-lookers had gathered and one of them intervened and asked the CIO member who he was. According to the plaintiff the CIO member then said that he was a member of the CIO and this was the first time that the plaintiff realised that the people in the land rover were not just private members of the public and were in fact officials. After being searched the plaintiff was bundled into the land rover and taken to the CIO offices at the Central Police Station. After being kept waiting for about 40 minutes he was taken into an office where typewritten charges such as spying, photographing Government property and evading arrest were put to him. He said that he was treated very courteously and politely and he was able to explain who he was and what he had been doing. Having established his *bona fides* he was allowed to leave.

The plaintiff alleged that these events impaired his dignity and that he suffered damages in the sum of \$10 000.

The CIO members who gave evidence presented a completely different version of these events. They had been attending a briefing in the city and were travelling along the Prince Edward Dam Road to their office at St Mary's. One of the men in the back of the land rover saw the plaintiff standing in the road apparently aiming his camera at their car. He told the driver that he had seen someone taking a photograph of them so the driver, after ascertaining that the road was clear, made a U-turn and stopped the land rover in front of the plaintiff's car. The four CIO personnel then jumped out from the back of the land rover and approached the plaintiff's car. The one witness said that he approached the plaintiff and showed him the witness' identity-card but the plaintiff, without saying anything, drove off very fast. The witness denied putting his hand through the window and grabbing the plaintiff's clothing. Of the four CIO personnel involved, the three males gave evidence. They all deny that the plaintiff's car was rocked or that there was any shouting as alleged by the plaintiff. These witnesses all said that at the time the assassination of a Mr J Qabi and the blowing up of the Zanu(PF) offices at 88 Manica Road were fresh in their minds and they were in a very suspicious frame of mind. When they thought that someone was taking photographs of them or their vehicle they leapt to the conclusion that it was an agent of an enemy or hostile power and that their roles as undercover agents would be uncovered.

The one CIO member who said he was standing just behind the member who

1985 (1) ZLR p156

SMITH J

produced his identity card stated that the plaintiff had spoken to his colleague saying that a brother or relative of the plaintiff's had been killed by members of Zanu(PF). This member also said that his other two colleagues had been standing in front of the plaintiff's car and when the plaintiff suddenly drove off they had to jump out of the way to avoid being knocked over. His colleague who gave evidence said that he and the female member had stood near the plaintiff's car but did not have to jump out of the way of his car when he drove off.

When the land rover stopped in front of the plaintiff's car the driver remained in his seat. He did not see what transpired when his colleagues approached the plaintiff. Then he saw the plaintiff drive off very fast in his car and heard one of his colleagues call out that he should catch the person in the motor car. His automatic reaction was to set off in hot pursuit without waiting to pick up his four colleagues. He finally caught up with the plaintiff at the intersection with Cripps Road. This witness said that as soon as he had removed the keys from the plaintiff's car he identified himself. He denied that he had twisted the plaintiff's arm as alleged by the plaintiff or that he had in any way conducted himself in such a manner as to humiliate the plaintiff.

There is a direct conflict of evidence between the plaintiff and the witnesses called by the defendant. The plaintiff gave his evidence well - he spoke moderately and was at pains to ensure that his evidence was not exaggerated. For example he said that he thought the four people were trying to overturn his car but under cross-examination agreed that they probably were merely rocking the car. Mr *Gillespie* said that it would be irresponsible of him to suggest

that the plaintiff was deliberately misleading the court and I agree with him on this. He suggested that because the plaintiff had panicked, this coloured his evidence in some respects. He conceded, however, the inherent improbability that the plaintiff would have acted as he did had the CIO members approached him calmly and quietly as they alleged and properly identified themselves. As he said, something must have happened to have made the plaintiff panic. Having regard to the contradictions in the evidence given by the CIO witnesses I believe that the plaintiff's version of what took place must be accepted. The rocking of the car and shouts of "kill the spy" were sufficient to put the plaintiff in reasonable fear of immediate violence and this obviously led to his abrupt departure or sudden flight from the scene. I also accept the plaintiff's version of what happened at Cripps Road intersection - his arm was twisted behind his back and he was searched and then bundled into the land rover.

1985 (1) ZLR p157

SMITH J

Mr *Gillespie* has submitted that the CIO members genuinely believed that the plaintiff had contravened the Official Secrets Act [*Chapter 97*] and that this belief and their subsequent actions were reasonable in the circumstances. Whilst the CIO members might have genuinely believed that the plaintiff had acted suspiciously in photographing their land rover I consider their belief and their initial reactions to be completely unreasonable. It is difficult to understand how anyone could believe that an enemy agent would stand in the middle of a four-lane highway in broad daylight to photograph a vehicle whilst it was still so far away that the vehicle itself could hardly be identified, let alone its number-plate or occupants. Having apparently reached this absurd and unfounded belief the four CIO members then acted in a completely undisciplined and unreasonable manner in rocking the plaintiff's motor vehicle and crying out that he was a spy and should be killed.

Having found this, however, I do not think that it can equally be said that the beliefs and actions of the driver of the land rover were also unreasonable. He was not aware of the manner in which his colleagues had conducted themselves when they first approached the plaintiff. He knew that they had gone to question him and the next thing he saw was the plaintiff speeding from the scene and he heard his colleagues calling out to him to catch the plaintiff. In my view it was completely reasonable for him to pursue the plaintiff and when he caught up with him to remove his car keys. Although the driver denied having twisted the plaintiff's arm behind his back, it is common cause that as soon as the plaintiff emerged from his car he attempted to regain his car keys and the driver resisted his attempts. In the course of this some stitching on the driver's jacket was torn. Assuming that the driver had treated the plaintiff in the manner alleged by the plaintiff I consider that his actions were consonant with the rights and duties of a peace officer exercising his powers of arrest. His belief that the plaintiff was attempting to avoid being questioned or to evade arrest cannot be regarded as unreasonable.

The plaintiff has made no claim for damages based on his being taken to the CIO offices at the Central Police Station and being kept there for some 40 minutes.

Having decided that the actions of the CIO members when they first approached the plaintiff were completely unreasonable and constituted an *injuria* what is the quantum of the damages he sustained. In cases such as this the damage suffered by the plaintiff is not capable of any

precise measure, because no precise monetary value can be placed upon wounded feelings or

1985 (1) ZLR p158

SMITH J

the amount of fear inspired in a person. It must depend upon the person injured and his standing in the community, the circumstances in which the *injuria* was committed, the conduct of the injuring party and upon whether circumstances of aggravation or mitigation were present.

Counsel have referred me to a number of cases in which damages have been awarded for *contumelia* or abuse of authority. In view of the difficulty and uncertainty necessarily involved in the assessment of general damages it is helpful and instructive to have regard to awards of damages made by the courts in comparable cases. Mr *Blackie* has submitted that this is a serious case having regard to the following facts - the plaintiff is 75 years old, he is a respected senior citizen and has been a legal practitioner in this country for more than 25 years, he was going about his business perfectly innocently and was subjected to a serious assault and *contumelia* involving much loss of dignity and the abuse of authority by the CIO was such that the court should show its disfavour by awarding penal damages.

I have found that there was no *injuria* or *contumelia* involved in the events that took place at the Cripps Road intersection. However I have found that the CIO members acted very unreasonably and abused their authority when they first approached the plaintiff. It is difficult to understand why members of this Organization who are obviously trained and carefully selected for their duties should have acted in the manner in which they did; especially branding the plaintiff as a spy before they even questioned him. The fear they inspired in the plaintiff was very real. I consider that damages in the amount of \$1 200 would be adequate and reasonable in the circumstances.

I now turn to the question of costs. Section 53 of the High Court of Zimbabwe Act, 1981 (No. 29 of 1981), provides as follows:

If any proceedings which could have been brought in a magistrates court are instituted in the High Court -

- (a) the person who instituted the proceedings shall not recover any costs exceeding the amount of the costs which he would have recovered had he instituted the proceedings in a magistrates court; and
- (b) . . .

unless the High Court finds and records that the proceedings from their nature or circumstances were fit to be brought in the High Court:

1985 (1) ZLR p159

SMITH J

Provided that . . .

In this case the amount awarded falls within the jurisdiction of a magistrates court.

In *Machoni v Municipality of Gweru* HH-386-82 WADDINGTON J, considered a number of reported decisions in which the courts have considered whether to award costs on the higher

scale when the actions concerned could have been instituted in lower courts. As he said, at p 4 of the cyclostyled judgment:

The basic principle which a court should adopt in considering the question of costs was aptly described by HOLMES AJA (as he then was) in *Gelb v Hawkins* 1960 (3) SA 687 (AD) at 694A:

In seeking a basic principle to apply, I do not think it is necessary or desirable to say more than that the Court has a discretion, to be exercised judicially upon a consideration of the facts of each case, and that in essence it is a matter of fairness to both sides.

This is obviously a principle which ought to be observed when considering the manner in which s 53 of the High Court of Zimbabwe Act should be construed.

And at p 6 of the cyclostyled judgment he continued:

In my view, to bring a case within s 53 of the High Court of Zimbabwe Act, it is necessary for an applicant to show that his decision to bring proceedings in the High Court was not unreasonable. There should be present some special feature about the proceedings which takes the case out of the ordinary run of causes of action which are amenable to the jurisdiction of the magistrates courts.

When regard is had to the fact that the plaintiff is a senior and respected legal practitioner and has been in practice for over 25 years (as such he is an officer of this court), and the grossly unreasonable actions of the CIO members and that the Emergency Powers (Security Forces Indemnity) Regulations, 1982, affected the matter, I do not consider that the plaintiff acted unreasonably in pursuing his remedy in this court. I therefore find that the proceedings were fit to be brought in the High Court.

It is accordingly ordered that the defendant pay the plaintiff the sum of \$1 200

1985 (1) ZLR p160

SMITH J

with costs on the High Court scale.

Coghlan Welsh & Guest, legal practitioners for the plaintiff

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

1985 (1) ZLR p161

NATIONAL RAILWAYS OF ZIMBABWE v NATIONAL RAILWAYS OF ZIMBABWE CONTRIBUTORY PENSION FUND 1985 (1) ZLR 161 (SC)

Court **Supreme Court Harare**

Beck Gubbay & McNally JJA

Civil Appeal

26 March 1985

Flynote

Employment - essential elements of the contract - contractual assent - whether necessary between the parties.

Interpretation of statutes - official interpretation of a law - whether of assistance to court- short title - weight to be given.

Legislation - ss 3(2) and 3(3) Emergency Powers (Lower - Paid Employees) (Compensation) Regulations, 1983 SI 455C of 1983 - whether the increase is a "wage" or "salary increase".

Words and Phrases - "wage", "salary" - whether words connote any element of contractual assent - "grant" - "award" - whether implies element of munificence.

Headnote

The Emergency Powers (Lower-Paid Employees) (Compensation) Regulations, 1983 (of SI 455C of 1983) provided for a mandatory increase in the emoluments of lower-paid workers. The respondent's constitution provided for an increase in pensions paid to pensioners which would be proportionate to any "general salary/wage award granted to the majority of employees at any one time". In that the statutory increase affected the majority of the appellant's employees, the issue was whether the increase was by way of wages or salary and was an award granted by the appellant.

Held, even if at one state of history, the factor of contractual asset was an

1985 (1) ZLR p162

McNALLY JA

essential element of wages or salary, it is no longer so.

Held, further, that a voluntary act of munificence is not necessarily the meaning of the words grant and award.

Held, further, that the views of a third party concerning the meaning of legislation are of no relevance, save insofar as adopted in argument by counsel.

Semble the *indicia* of a contract of service may require restating.

Cases cited:

Blackburn v Blackburn 1920 CPD 13

Ex parte Minister of Justice: In re R v Cohen 1934 AD 521

Short v Henderson Ltd 1947 ScLt 231

R v AMCA Services Ltd & Anor 1959 (4) SA 207 (AD)

Cone Textiles v TTL Development Corporation Ltd 1979 RLR 114 (AD)

L Schuler AG v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39 (HL)

Dettmann v Goldfain & Anor 1975 (3) SA 385 (AD)

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591 (HL)

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC)

C W Jordaan for the appellant

A P de Bourbon SC for the respondent

Judgment

McNally JA: It is convenient to describe the parties to this dispute as "the Railways" and "the Fund". The Fund successfully applied to the High Court in Bulawayo for a declaratory order, and the Railways now appeal against that order.

The dispute arose because of the publication of Statutory Instrument No 455C of 1983, containing the Emergency Powers (Lower-Paid Employees) (Compensation) Regulations 1983, on 9 September 1983. These Regulations were published under the Emergency Powers Act [Chapter 83], and are therefore dependent, for their continuing validity, on the continuance of the state of emergency. They provide, broadly speaking, for the payment of an extra five or ten dollars a month to a wide category of lower-paid workers.

The Railways employ significant numbers of workers in the "ten dollar increase" category, and at once set in train arrangements to pay these increases. From the papers before the court it is apparent that these increases were regarded as, and treated as, wage increases. Consequentially therefore

1985 (1) ZLR p163

McNALLY J

arrangements were made to deduct 8% of the increase by way of additional pension contributions.

The Pensions Scheme for the Railways employees is embodied in a Trust Deed to which are annexed the Rules of the Fund. In terms of the Rules the Fund is a body corporate whose main objects are to provide pensions for members (basically Railways employees) on their retirement and for their dependants upon the death of members.

By common accord the Rules are binding on both parties. The provision which is causing the present dispute is in Rule 12.5, entitled "Bonus Payments". It reads as follows:

12.5.2 In order to maintain the value of pensions, the Railways have agreed that, in the event of a general salary/wage award being granted to the majority of employees at any one time, persons then in receipt of pensions from the Fund will be granted the same percentage increase as and by way of a bonus award and that such bonuses shall be paid by the Railways. ...

It is apparently common cause that the employees who benefited as a result of the publication of the Statutory Instrument constituted "the majority of employees" on the Railways. Accordingly the Manager of the Fund wrote to the General Manager of the Railways on 21 September 1983

claiming that pensioners were now entitled to an increase. The General Manager disputes this, and the dispute in due course came before KORSAH J in Bulawayo.

KORSAH J, in a detailed and considered judgment, came to the conclusion that the Fund was right, and he made a declaratory order accordingly.

On appeal Mr *Jordaan*, for the Railways, took two main points:

1. The increase was not a **salary/wage award**; and
2. The increase was not **granted by the Railways**.

For the purpose of considering Mr *Jordaan's* submissions I propose to equate the word "salary" with the word "wage", which again for present purposes I regard as being synonymous with "wages".

Mr *Jordaan's* first contention is that a wage is a creature of contract, the result of agreement between employer and employee. It is therefore wrong and

1985 (1) ZLR p164

McNALLY J

unrealistic to treat, as part of a man's wage, an amount paid to him, not as a result of his contract with his employer, but as a result of legislation by the Government. Mr *Jordaan* contended that the extra payment was in fact an allowance perhaps to be regarded as a cost of living allowance. The fact that the Regulations are called "Compensation" Regulations underlines the fact that the extra amount is not a wage but a compensatory payment in the nature of an allowance, and moreover a temporary allowance depending as it does on the continued existence of a state of emergency.

I am far from satisfied that it is of the essence of a wage that it is contractually agreed between employer and employee, if by that definition one intends to exclude amounts paid as a result of legislation concerning minimum wages. In *Blackburn v Blackburn* 1920 CPD 13 at 15 KOTZE J said:

I take it that by the word 'salary' is meant a fixed payment made for regular and continued services rendered, that a fixed and definite amount should be paid for such services as stipulated between the parties.

Mr *Jordaan* points to the words "as stipulated between the parties". I am not at all sure that "stipulated" in that sentence relates back to "amount". It seems to me that it may relate back to "services". But even if it does relate back to "amount" or to both "amount" and "services" I would point to the fact that later, at p 15, the learned judge spoke of "its ordinary meaning as a fixed rate of pay for regular periodical services rendered". There is no mention there of any contract.

Nor is there a contractual element in the definition Mr *Jordaan* cites from *Ex parte Minister of Justice: In re R v Cohen* 1934 AD 521 at 523, where it is said by WESSELS CJ:

Now the ordinary meaning of the words 'wage or wages' is the remuneration which an employee receives for the time (whether it be a month, a week or day) during which he works for his employer. The wage is the pay which a workman receives for the hire of his services

The Oxford English dictionary defines "wage" to mean:

The amount paid periodically, especially by the day or week or month for the labour or service of a workman or servant.

Here again there is no reference to contract.

1985 (1) ZLR p165

McNALLY J

The role of the State in the relationship between employer and employee is one which has expanded and developed greatly in recent times. LORD THANKERTON in *Short v Henderson Ltd* 1946 Sc LT 231 at 233, after referring to the four *indicia* or distinguishing marks of a contract of service, namely (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal, said:

Modern industrial conditions have so much affected the freedom of the master in cases in which no-one could reasonably suggest that the employee was thereby converted into an independent contractor, that if and when an appropriate occasion arises, it will be incumbent on this House to reconsider and restate these *indicia*. For example (a), (b) and (d), and probably also (c), are affected by the statutory provisions and rules which restrict the master's choice to men supplied by the labour bureaux, or directed to him under the essential work provisions, and his power of suspension or dismissal is similarly affected by trade union rules. ...The statement ... that selection, payment and control are inevitable in every contract of service, is clearly open to reconsideration."

Commenting on that passage, SCHREINER JA in *R v AMCA Services Ltd & Anor* 1959 (4) SA 207 (AD) at 212A said:

... there is a possibility that a number of similar statutory definitions, with their associated provisions, may press upon the common law relationships of master and servant and compel the modification of generalisations about it.

Both these comments are in a sense illustrations of the obvious, which is that a great deal has happened between the English Reform Acts of the mid-nineteenth century and the Zimbabwean Labour Relations Bill 1984, to modify what we would now call the law of labour relations. It is clear, for instance, from ss 3 and 5 of the Minimum Wages Act, 1980 (No. 4 of 1980), from s 5 of the Employment Act, 1980 (No. 13 of 1980) and from s 18 of the Industrial Conciliation Amendment Act, 1981 (No. 23 of 1981), that the Minister of Labour and Social Services has extensive powers to override the provisions of contracts between employers and employees. In relation to the first-mentioned of these Acts, his powers are specifically to require the payment of minimum wages.

Thus even if at one stage of history the contractual factor was an essential

1985 (1) ZLR p166

McNALLY JA

element of the definition of "wage" (and I am not persuaded that it was) it is no longer so.

Mr Jordaán pressed his argument further by pointing to the word "Compensation" in the

Regulations. If the extra \$10 is compensation, he argues, it cannot be part of the man's wages.

I do not think this contention can be supported. It is admittedly curious that the word "Compensation" appears in the heading of the Statutory Instrument and nowhere else in that document. But it is abundantly clear that the Statutory Instrument is laying down that the old wage plus five or ten dollars is to be the new wage. One need only set out ss 3(2) and 3(3) of the Regulations for this to be apparent. They read as follows:

3.(2) Every employer of an employee not referred to in subsection (1) who was in his employment on the 31st August, 1983, shall pay that employee -

- (a) in the case where his wage was three hundred dollars or less per month on the 31st August, 1983, a wage which is not less than the wage he was actually receiving on that date (whether or not that wage differs from the minimum wage) plus ten dollars per month; or
- (b) in the case where his wage was more than three hundred dollars but less than three hundred and ten dollars per month, a wage which is not less than three hundred and ten dollars per month.

(3) Where an established wage structure that was in operation before the 1st September, 1983, provides for a minimum starting wage for an employee of a particular class or grade, or for a minimum starting wage for employees generally, and that minimum starting wage does not exceed -

- (a) in the case of an agricultural employee, a mining employee or a domestic employee, three hundred and five dollars per month, that minimum starting wage shall be increased -
 - (i) where it is three hundred dollars per month or less, by five dollars per month;

1985 (1) ZLR p167

McNALLY JA

- (ii) where it exceeds three hundred dollars per month, to three hundred and five dollars per month;
- (b) in the case of an employee not referred to in paragraph (a), three hundred and ten dollars per month, that minimum starting wage shall be increased -
 - (i) where it is three hundred dollars per month or less, by ten dollars per month;
 - (ii) where it exceeds three hundred dollars per month, to three hundred and ten dollars per month;

and every employer concerned shall apply the said wage structure and pay wages accordingly to employees engaged on or after the 1st September, 1983.

The very last part of that extract draws attention to a point worth noting. If X was taken on by the Railways on 1 August 1983 at \$300 per month, then from 1 September 1983 he would have to be paid \$310 per month in terms of s 3(2)(a) of the Regulations. According to Mr *Jordaan's* argument he would be receiving a wage of \$300 plus a compensation allowance of \$10. But if Y was taken on by the Railways on 1 October 1983 for exactly the same job, he would receive a wage of \$310 in terms of s 3(3)(b) of the Regulations. In Mr *Jordaan's* terms one would describe

the whole sum of \$310 as his wage because (a) the Regulations call it a wage and (b) the whole sum would be contractually agreed. I can see no virtue in such a distinction. It is clear to me that as at 1 October 1983 both men in the example given were receiving a wage of \$310 per month. It makes no difference that in the case of X \$300 is contractual and \$10 is statutorily imposed, whereas in the case of Y the whole sum of \$310 is contractual because the law prohibited a contract at a lesser figure at the time he was taken on.

In short a wage is a wage, and the reason for which it is paid is immaterial. It may be paid from the goodness of the employer's heart, or because he wishes to retain the individual's services, or because his workers will go on strike if he pays less, or because in terms of Industrial Conciliation legislation a majority of other employers have agreed to it and he is bound by the majority, or because the Government has decreed it.

Once one takes that view there is no difficulty in deciding that the wage

1985 (1) ZLR p168

McNALLY JA

increase brought about by the Regulations results in an increase in the employee's "pensionable emoluments" as defined in Rule 10(1) of the Rules. It is on the basis of these "pensionable emoluments" in terms of Rule 9 that the employee's contributions towards the pension fund are calculated.

Mr *Jordaan* sought to argue that the increase fell within the group of receipts excluded from pensionable emoluments. This category is as follows:

- (a) any additional remuneration which a member may receive for performing special duties, or while acting in a vacant office;
- (b) payments for overtime;
- (c) fees, honoraria and bonuses of any kind; and
- (d) allowances of whatever character.

It was on (d) in particular that Mr *Jordaan* relied. But once one declines to describe the increase concerned as an allowance, the point falls away.

Mr *Jordaan*'s final point on this aspect of his submission was related to the temporary nature of the increase arising from the fact, already noted, that it was granted under the Emergency Powers Act. (I use the word "granted" at this stage without prejudice to Mr *Jordaan*'s submissions as to the meaning of that word, which I shall deal with later).

It seems to me that there are two answers to this contention, although perhaps they are facets of the same answer. The first is that there is no reason in logic why a wage increase should not be granted for a limited period. The second is that there is every probability that some arrangement will be made to ensure that there is no reversion to the situation prior to the granting of the increase. But if that were to happen, it would not be the first time in the modern world that civil servants or parastatal employees were required to accept a salary cut. Whichever way things turn out, I have no difficulty with the concept of a temporary wage

increase, or with the concept of a wage increase implemented by legislation of a temporary nature. Wage rates are by nature variable, and indeed the Statutory Instrument with which we are concerned has itself been repealed and replaced by Statutory Instrument 238A of 1984.

I turn to Mr *Jordaan's* second argument which is that the words "award" and "granted" in Rule 12.5.2 indicate that only a contractually agreed wage

1985 (1) ZLR p169

McNALLY JA

increase was intended to lead to bonus awards for pensioners. His contention is that what is envisaged in the rules is an award granted by the Railways. To say the Railways "granted" this increase by way of an "award" is like saying that the taxpayer grants his tax to the fiscus. The Railways did not grant this increase by way of an award. They were forced to pay it under threat of criminal sanction.

The argument endows the words "grant" and "award" with an emotional content which is more romantic than real. It is not necessary that the Railways be motivated by generosity before the bonus award scheme comes into operation. They may be motivated by threats of industrial action or by Government decree. I see no abuse of language in saying that the Railways granted an increased wage to lower-paid employees because the Government ordered them to do so. It is perhaps an additional makeweight argument in this case that paragraph 6 of the Regulations provides a possible escape route for the employer which the Railways did not seek to take. They could have applied for a waiver of the rules on the grounds of hardship, but they did not do so. I say it is a makeweight because I do not wish to suggest that if the Railways had made such an application, and been turned down, my conclusion would have been any different.

The Oxford English Dictionary illustrates the point that "grant" may involve an act of munificence but may also have a dry, factual content. Thus one meaning is given as:

... to allow or concede as an indulgence; to permit or suffer (a person) to have (something); to bestow or confer as a favour or in answer to a request.

But other meanings are:

... to allow to have; to bestow or confer (a possession, right etc.) by a formal act. Said of a sovereign. or supreme authority, a court of justice, a representative assembly etc. Also, in law, to transfer (property) from oneself to another person, especially by Deed; to yield, give up.

The former definition, if applied in the present case, would involve a paternalistic concept of kind-hearted employers and respectfully grateful employees, which is not really in tune with modern thinking.

Similarly, one of the meanings given by the same Dictionary to the verb

1985 (1) ZLR p170

McNALLY JA

"award" is "to grant or assign (to a person) by judicial or deliberate decision, to adjudge". The noun "award" in turn is defined as:

That which is awarded or assigned as payment, penalty, etc., by the terms of the judge's sentence or arbitrator's decision.

In my view the deliberate decision of the Railways to pay the increase to their lower-paid workers was a wage award granted by them to those workers, despite the fact that the award was granted in compliance with Government Regulations.

Once one accepts that the contractual element is not a necessary element in the definition of a wage, one must accept that the same is true of a wage increase. Whether the increase is payable as a result of contract or statute, the point is that it is payable as a result of a deliberate decision by the Railways to pay it. That decision results in fact in the granting of a wage award, whether voluntarily or involuntarily.

In coming to the conclusion, as I do, that the learned judge in the court *a quo* was right to find in favour of the respondent, I prefer not to rely on the argument based on the way the Railways acted when the Regulations were first introduced. It is clear from the papers before the court that the Railways initially treated the increase as a wage increase. But it is also clear that as soon as the issue between the parties was raised, the Railways backed away from that interpretation. As between these parties, there has never been a common interpretation of the meaning of the Regulations in relation to Rule 12.5.2.

In the circumstances I do not think this is an appropriate occasion to determine whether there is a conflict between the views of LEWIS JP in *Cone Textiles v TTL Development Corporation Ltd* 1979 RLR 114 (AD) at 120 and those of LORD WILBERFORCE and other members of the House of Lords in *L Schuler A G v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 (HL), and if so, which view is correct. I do not consider the language either of the Statutory Instrument or of the rules to be ambiguous. It is only where there is ambiguity that in the Roman-Dutch legal system resort has been had to the subsequent conduct of the parties as an aid to interpretation. The fact that the House of Lords frown on such an approach was noted by CORBETT JA in *Dettmann v Goldfain & Anor* 1975 (3) SA 385 (AD) at 399B-D, but without comment.

Finally I would confirm that in coming to a conclusion in this matter I have

1985 (1) ZLR p171

McNALLY JA

ignored the content of the letter at p 57 of the papers from an official in the Ministry of Transport, conveying the views of an official in the Ministry of Labour, Manpower Planning and Social Welfare as to the interpretation of the Regulations. The views of a third party as to the meaning of a Statutory Instrument are of no relevance save insofar as they are adopted in argument by counsel. Even assuming that the third party concerned was the draftsman of the Regulations, his view as to what he meant to say, or was meant to say, is irrelevant. By way of analogy I cite the passage from LORD WILBERFORCE'S judgment in *Black-Clawson International Limited v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 629D,

referred to by FIELDSEND CJ in *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 at 583A:

...it is not proper to use the report of a committee or commission or any official notes on a clause of a draft bill for a direct statement of what a proposed enactment is to mean or what the committee or commission thought it means ...

And later, at p 630A-B, he said:

...to take the opinion, whether of a Minister or an official or a committee, as to the intended meaning in particular applications of a clause or a phrase, would be a stunting of the law and not a healthy development.

Later, at p 637E, LORD DIPLOCK, agreeing with him said:

Oral evidence by members of the committee as to their opinion of what the section meant would plainly be inadmissible. It does not become admissible by being reduced to writing.

One may add that LORD HALSBURY is reported as saying (*Maxwell on Interpretation of Statutes* 11 ed p 25) that the worst person to construe a statute is the person who is responsible for its drafting "for he is much disposed to confuse what he intended to do with the effect of the language which in fact he has employed". The argument against admissibility is even stronger where, as here, the person quoted at second-hand may well not even be the draftsman.

It remains only for me to say, therefore, that I agree with the decision of KORSAH J and accordingly the appeal is dismissed with costs.

1985 (1) ZLR p172

McNALLY JA

Beck JA: I agree

Gubbay JA: I agree

Webb, Low & Barry, appellant's legal practitioners

Coghlan & Welsh, respondent's legal practitioners

1985 (1) ZLR p173

DAVIDSON v STANDARD FINANCE LTD 1985 (1) ZLR 173 (HC)

Court High Court, Harare

Reynolds J

Civil Action

25 February & 27 March 1985

Flynote

Practice and Procedure - High Court Rules - R 109, 116 and 104(1) - requirements therein - what each party

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to an action must ensure to comply with these requirements.

Costs - pursuant to plaintiff withdrawing his claim - question of costs remaining in issue - plaintiff contending that it was necessary to proceed to first day of hearing due to lack of diligence on part of defendant to ascertain true facts of the matter - defendant to ascertain true facts of the matter - defendant averring proceedings as a whole were unfounded - how award of costs determined in such circumstances.

Costs - on legal practitioner and client scale - when awarded.

Headnote

In order to comply with Rules 109, 116 and 104(1) of the High Court of Zimbabwe Rules, each party must ensure that the material facts upon which he relies are correct and accurate. It follows that, in order to be so assured, each party must pursue his inquiries with due diligence, and must not employ defective procedures.

The plaintiff withdrew his claim but the question of costs in relation to the hearing remained in issue. The plaintiff contended that the necessity to proceed to the first day of hearing was occasioned by a lack of diligence on the part of the defendant in ascertaining the true facts of the matter, thereby preventing it from pleading accurately and correctly. The defendant averred that the proceedings as a whole were unfounded and

1985 (1) ZLR p174

REYNOLDS J

were improperly brought by the plaintiff and it claimed costs on a legal practitioner and client basis.

Held, in awarding costs against plaintiff on a legal practitioner and client scale, that it is trite that a successful party may be deprived of his costs in certain exceptional circumstances. The court will only depart from the general rule that costs follow the event where it would be fair to do so, and the successful party has been found wanting or is at fault in some particular respect.

Held, further, that it is also required of a litigant that he acts reasonably and honestly at all stages of the suit, and is not responsible for unnecessary delays or other objectionable conduct, or this may result in him being deprived of his costs.

Held, further, that it is well established that costs should be awarded on a legal practitioner and client basis only in exceptional circumstances.

Cases cited:

Ritter v Godfrey [1920] 2 KB 47 (CA)

Scheepers & Anor v Pate 1909 TS 353

Pelser v Levy 1905 TS 466

Mafukidze v Mafukidze HH-279-84 (unreported)

Van der Lingen v Middelburg Municipality 1911 TPD 84

Van Marseveen v Union Government 1918 AD 60

De Villiers v Union Government 1931 AD 206

Gwinyayi v Nyaguwa 1982 (1) RLR 136 (SC)

Cone Textiles (Pvt) Ltd v Redgment & Ors HH-186-82 (unreported)

Zimbabwe Concrete Works (Pvt) Ltd v Pers HH-114-83 (unreported)

M T O'Meara for the plaintiff

C N Greenland for the defendant

Judgment

Reynolds J: The plaintiff in this matter has withdrawn his claim, but the question of costs in relation to the present court hearing remains in issue. The plaintiff contends that the necessity to proceed to the first day of hearing was occasioned by a lack of diligence on the part of the defendant in ascertaining the true facts of the matter, thereby preventing it from pleading accurately or correctly. The defendant, on the other hand, avers that the proceedings as a whole are unfounded, and were improperly brought by the plaintiff, and it claims the award of costs on a legal practitioner and client basis.

The facts that gave rise to the action were as follows: - The parties entered into a hire-purchase agreement in respect of an Alfa Romeo motor car. On

1985 (1) ZLR p175

REYNOLDS J

22 September 1981, the plaintiff took this vehicle to South Africa, having obtained a triptyque from the Automobile Association of Zimbabwe for this purpose. In terms of this triptyque the plaintiff was required to return the vehicle to Zimbabwe by 15 September, 1982, failing which he would be liable to the Association for customs duties levied in South Africa.

It appears to be the position that the car broke down at a town called Upington in South Africa, and the plaintiff requested a garage named Elron Motors to repair it. The garage mechanic investigated the problem and apparently advised that it would be uneconomic to repair the vehicle. Thereafter this garage took over the vehicle in settlement of its account for work already performed, and the car was eventually sold to a South African resident. Customs duty in the sum of R3 134 was in fact levied on the car in South Africa as the Plaintiff was unable to repatriate it within the prescribed period, and the Automobile Association of Zimbabwe paid that duty. The plaintiff in turn became liable to the Association in the equivalent sum of \$2 862,32, but he claimed this amount from the defendant on the basis that his liability was brought about by the unlawful intervention of the defendant in taking possession of the car in South Africa and authorising its sale in that country.

The plaintiff's declaration was to the effect that he had removed the car to South Africa under the mistaken belief that he had completed all payments due in terms of the hire-purchase agreement. The allegation is made that whilst the vehicle was still in South Africa the defendant "wrongfully and unlawfully seized the ... car and sold it without exporting it from South Africa and returning it to Zimbabwe". The word "seized" was subsequently amended to read "repossessed". As already stated, the basis of the plaintiff's claim for the costs of the present hearing is that the defendant was lacking in due diligence in ascertaining the true facts and pleading them. It was as a result of this fault on the defendant's part that the plaintiff persisted in his claim, and it was only when the full facts were vouchsafed by the defendant that he then decided to withdraw his claim.

It is trite that a successful party may be deprived of his costs in certain exceptional circumstances. In essence, however, the court will only depart from the general rule that costs follow the event where it would be fair to do so, and where the successful party has been found wanting or is at fault in some particular respect. (*Ritter v Godfrey* [1920] 2 KB 47 (CA) at 60-61; *Scheepers & Anor v Pate* 1909 TS 353 at 359; *Pelser v Levy* 1905 TS 466 at 469; *Mafudikze v Mafudikze* HH-279-84.

1985 (1) ZLR p176

REYNOLDS J

The Rules of Court require the plaintiff, in his declaration, to state "truly and concisely ... the nature, extent and grounds of the cause of action ...", (R109), and the defendant is required, in his plea, to "set forth concisely the nature of his defence", (R116). Each party is enjoined, by R104(1), to "raise by his pleading all matters which show the action or claim in reconviction not to be maintainable ...". It is obvious that in order to comply with these requirements, each party must ensure that the material facts upon which he relies are correct and accurate. It follows that, in order to be so assured, each party must pursue his inquiries with due diligence, and must not employ defective procedures.

It is also required of a litigant that he acts reasonably and honestly at all stages of the suit, and is not responsible for unnecessary delays or other objectionable conduct, or this may result in him being deprived of his costs. (*Van der Lingen v Middelburg Municipality* 1911 TPD 84; *Van Marseveen v Union Government* 1918 AD 60; *De Villiers v Union Government* 1931 AD 206; *Gwinyayi v Nyaguwa* 1982 (1) RLR 136 (SC)).

The conduct of both parties therefore, may be examined in the light of these prerequisites in order to determine whether or not the allegations they make against each other are of substance. To consider the position of the plaintiff first, it is my opinion that his conduct is open to objection in several respects.

The first aspect relates to the requirement of R 109, referred to above, that the plaintiff state truly the nature of the cause of action. The plaintiff bases his application for the costs on the assertion that the defendant was negligent in bringing to light the correct facts timeously. In my view it was at least equally incumbent upon the plaintiff to ensure that he was in possession of correct facts before he embarked on litigation. The position would have been different if the defendant had misrepresented the facts, or had been guilty of some form of fraud or other

misconduct. But in this case, as far as can be seen, it was, if not actually within the plaintiff's knowledge all along, at least open to him to discover the true facts himself. In such an event I do not think he can be heard to say that it was the sole responsibility of the defendant to apprise him of the factual position.

The second point is that the plaintiff included in his declaration the following statement - " Upon or about the 22nd September, 1981, plaintiff, under the *bona fide* but mistaken belief that all amounts due and owing by him to defendant in terms of the said hire-purchase agreement had been paid,... " It is, in my view, virtually inconceivable that the plaintiff could have believed

1985 (1) ZLR p177

REYNOLDS J

this. In fact a sum in excess of \$600 was still owing, and the final documentation had, obviously, not yet been completed. If there had been any doubt in his mind at all, a simple inquiry would have settled the matter without difficulty. It is certainly difficult to believe that anyone could be so casual and so irresponsible about his personal affairs, particularly when important legal consequences hinge upon the actual position.

The third particular which requires comment is that the plaintiff's conduct indicates that he was acting *mala fide* in bringing this action at all. As I understand it, the "true facts", as elicited by the defendant and recorded in his application to amend his plea, are common cause. Paragraph 4(b)(ii) of his document reads: "(ii) plaintiff requested that Elron Motors take over the vehicle in settlement of its account for work done at Plaintiff's instance, which request was agreed to by Mr P Nel on behalf of Elron Motors." It is clear from this passage that it was the plaintiff who had requested and authorised the disposal of the vehicle, and this, again, is not a fact that would be forgotten by the plaintiff. Despite this, however, the plaintiff alleged in his declaration that it was the defendant who had seized the car and sold it. It is, perhaps, significant that the plaintiff was, at the time that the summons was issued, in possession of a letter from the defendant, dated 24 August 1982, which states, *inter alia*, "Would you please advise the Standard Bank in Upington that the dealer may take possession of this wreck to defray costs, as our customer is paying off the balance in Zimbabwe". This letter suggests that the defendant was authorising the disposal of the car, and the obvious possibility arises that the plaintiff decided to exploit the opportunity offered to profit from this letter by charging the defendant with the unlawful sale of the vehicle. This possibility was strengthened upon the production of a letter from the Automobile Association of Zimbabwe dated 26 May 1983 - ie eighteen months after the plaintiff had disposed of the car to Elron Motors - requesting information as to who had given permission for the vehicle to be sold in South Africa. It may, I believe, be assumed that officials of the Association must have already questioned the plaintiff about this point in some detail, and, as they were still ignorant about the true position, they must have received either evasive or untruthful answers from the plaintiff.

To turn to the alleged remissness on the part of the defendant, it must be observed that its original plea is not inaccurate as such. The amendment sought modifies and expands on the defence, but does not materially alter it. I do not consider that it can be said that the defendant misled the plaintiff, or caused the plaintiff to take further steps along the path of the action which

subsequently proved unnecessary by the terms of the plea. Furthermore, the

1985 (1) ZLR p178

REYNOLDS J

delay incurred before the defendant discovered the precise events does not strike me as being unusually protracted or reprehensible, particularly as inquiries in another country were necessary. Finally, there was nothing to substantiate the plaintiff's allegation that the defendant had been dilatory in seeking the facts, and nothing to show that the true facts had been deliberately withheld.

In the result, it is my view that the defendant is not responsible for the final costs in this case, and I hold that the plaintiff is liable for all the costs incurred. The only question remaining is whether it has been established that grounds exist for these costs to be awarded on a legal practitioner and client basis as is contended by the defendant. It is well established that costs should be awarded on that basis only in exceptional circumstances. (*Gwinyayi v Nyaguwa, supra*; *Cone Textiles (Pvt) Ltd v Redgment & Ors* HH-186-82; *Zimbabwe Concrete Works (Pvt) Ltd v Pers* HH-14-83). As a result, no such order would be made lightly in the present case. The plaintiff's conduct, however, as has been canvassed above, in my view, was mischievous and objectionable and the cause of all the costs of the proceedings. As it was put by the learned author Cilliers in his work *Law of Costs*, at pp 66 and 67:

Absence of *bona fides* in conducting litigation may constitute a ground for awarding costs on an attorney and client scale ...

I can see no good reason why the defendant in this case should suffer financially as a result of this uncalled - for action, and costs will be awarded against the plaintiff on a legal practitioner and client scale.

Gollop and Blank, legal practitioners for the plaintiff

Atherstone & Cook, legal practitioners for the defendant

1985 (1) ZLR p179

HARARE WEST RURAL COUNCIL v SABAWU 1985 (1) ZLR 179 (HC)

Court High Court, Harare

Reynolds J

Application

21 and 27 March 1985

Flynote

Practice and Procedure - contempt procedure - primary object of.

Headnote

The primary object of the contempt procedure is to compel compliance with the court's orders. It often follows, for this reason, that any order, for committal to gaol is suspended to afford the intransigent party a powerful inducement to fulfil his obligations in terms of the order.

Cases cited:

Verkouteren v Savage 1918 TPD 62

Singer's Estate v Kotze 1960 (2) SA 304 (C)

Haddow v Haddow 1974 RLR 5 (GD)

N Willsmer for the applicant

Respondent in person

Judgment

Reynolds J: The respondent purchased a plot of land falling under the jurisdiction of the applicant council. Although this stand is, apparently, designated as a residential holding, he approached the applicant with a view to obtaining permission to erect a motel there. The respondent complied with all the preliminary formalities required of him, but after a considerable delay, his application for conversion of use was ultimately rejected. He noted an appeal against this decision to the Administrative Court in November 1984, but has not yet received any notice of the date of hearing of this appeal.

For reasons best known to the respondent, and despite the fact that he was

1985 (1) ZLR p180

REYNOLDS J

warned that he would be breaking the law if he did so, the respondent commenced building his motel on his property without authorisation by the council. This move was in fact in defiance of the council's decision to refuse the respondent's application to build a motel on this stand. It may be observed in this regard that while the noting of the appeal against the council's decision would hold in abeyance the question of whether or not the council's refusal of the respondent's application was correct, it did not have the effect of supplying approval of his building plans, or of authorising the respondent to commence building the motel without further ado.

Armed with this information, the applicant applied to this court for a temporary interdict prohibiting the respondent from continuing his building operations. This application was granted and the court order was served on the respondent on 23 February 1985, the return day being 6 March 1985. In his affidavit of 8 March 1983, the applicant's chairman, Mr R E Campbell-Logan, states that he discussed the terms of the court order with the respondent on 4 March 1985, and that the respondent was fully aware of its terms. He noted that no building operations had taken place between 23 February and 3 March, but on 4 March, after he had discussed the matter with the respondent, he observed that building activities had re-commenced. He made

arrangements to return to the site accompanied by a police constable, and he then queried the respondent's conduct. The respondent stated that he would continue building despite the court order. The affidavit then continues as follows:

12. I then said to him "do you realise that you are liable to go to gaol for contempt of Court?"

13. respondent replied "I do not care if I spend five years in gaol. When I come out the buildings will still be here, and I will put chickens in them."

The affidavit of Mr Campbell-Logan continues to the effect that both parties attended the hearing on the return day of the applicant's petition, which was 6 March 1985, and the *rule nisi* was confirmed. The effect of the interdict was explained to the respondent, and he was warned by the presiding judge that he might be penalised if he continued building operations thereafter. The affidavit concludes that the deponent personally observed the respondent carrying out further building operations on 7 and 8 March.

In further affidavits from Mr Campbell-Logan, and five other deponents, the

1985 (1) ZLR p181

REYNOLDS J

respondent is stated to have continued building on this site up to and including 16 March 1985.

The applicant has now applied for an order holding the respondent in contempt of court, and committing him to prison for 30 days.

The respondent's affidavits are to the effect that he admits having had the conversation deposed to by Mr Campbell-Logan, but his reason for adopting that attitude was his belief that he was being victimised by the applicant. The respondent also admits building up to 6 March, but alleges that he did not understand "the full purport and meaning of the temporary interdict" until it was explained to him on 6 March in court. He denies building from 6 to 12 March, but states that on 12 March he lodged an appeal against the interdict, and immediately re-commenced building operations thereafter.

To deal first with the effect of this appeal, Mr *Willsmers* has conceded that an appeal does lie without the leave of the judge, where an interdict is granted, and the effect of such an appeal is to suspend the execution of the interdict pending the outcome of the appeal. The present application, therefore, relates solely to the respondent's activities during the periods 23 February to 5 March, ie the period following the service of the temporary interdict, and 6 March to 11 March, the period following the confirmation of the rule up to the lodging of the notice of appeal against the interdict.

In respect of the first such period, the respondent admits continuing with his building activities, but states that "the legal language used by the Courts is quite different from the day to day English used by laymen like myself. I admit that I only understood the meaning of temporary interdict after it had been explained to me in the layman's language on the 6th March by this Honourable Court."

This explanation is in conflict with the terms of his opposing affidavit dated 14 March 1985, in

which the respondent, in reference to the applicant's founding affidavit of 8 March, specifically states that "As far as the contents of paragraphs 1 - 22 are concerned I have no quarrel with and admit the correctness, fairness and impartiality of the same". Included in the paragraphs so admitted are the following passages which relate to a visit to the construction site by Mr Campbell-Logan on 4 March, 1985:

9. Respondent was present and I said to him "You know that there is a High Court order forbidding you to carry on building? I see you have

1985 (1) ZLR p182

REYNOLDS J

started building again. You will be in contempt, not of the Council, but of the Court if you carry on building."

10. Respondent replied "Yes. I am going to carry on building".

The Order served on the respondent reads as follows:

IT IS ORDERED:

That a Rule *Nisi* be issued, calling upon respondent to appear and show cause, if any, to this Honourable Court sitting at Harare on the 6th day of March 1985 why: -

- (a) an interdict should not be granted to petitioner restraining respondent from performing any building operations and development on or in respect of the immovable property on Lot 1 of Good Hope situate in the district of Harare until such time as the Administrative Court of Zimbabwe may, in its discretion, make an order the effect of which is to permit such building operations and development, and;
- (b) the respondent should not pay to petitioner all costs incurred by petitioner on an Attorney and Client basis.

That this Rule operate as a temporary interdict restraining respondent from performing any building operation and development on or in respect of the immovable property on Lot 1 of Good Hope situate in the District of Harare, until the return day of this rule.

Now it seems to me that whereas this order may indeed be couched in the "legal language" referred to by the respondent, its terms and meaning are perfectly simple and clear. In any event, if the respondent had been in any doubt as to its meaning, there would have been no difficulty in him obtaining assistance in ascertaining its import and effect. The various documents that he has placed before this court, and his actual use of English in the argument he addressed to the court, indicated that he is an intelligent person with a very adequate grasp of English. I do not accept that the respondent did not understand the meaning of the temporary interdict. In continuing with his building operations after receiving the court order, therefore, the respondent deliberately and knowingly disregarded it. In so doing he was acting *mala fide* and is guilty of a contempt of court (*Verkouteren v Savage* 1918 TPD 62).

1985 (1) ZLR p183

REYNOLDS J

There is a dispute of fact between the parties regarding the second period under examination - ie from 6 to 11 March - the respondent denies building at all during this period. There are affidavits from no fewer than six persons before me, all of which consist of statements to the

effect that the respondent was engaged in building operations on week days during the period in question. Apart from Mr Campbell-Logan, the other deponents are all residents in the general area who do not appear to be connected with the applicant council in any way. They would appear, therefore, to be independent witnesses. As against this evidence, there is the bare denial of the respondent. In this situation, and particularly in view of the respondent's proven refractory attitude towards authority and legality, I must hold that the respondent was *mala fide* in wilfully disobeying the court order confirmed on 6 March 1985, and was, accordingly, again in contempt of court in this respect as well.

The primary object of the contempt procedure is to compel compliance with the court's orders. It often follows, for this reason, that any order of committal to gaol is suspended to afford the intransigent party a powerful inducement to fulfil his obligations in terms of the order (*Singer's Estate v Kotze* 1960 (2) SA 304 (C); *Haddow v Haddow* 1974 RLR 5 (GD)). In my view such an order in the present case would be both appropriate and desirable.

In the result it is ordered that the respondent be committed to prison for 30 days. This order is suspended pending the outcome of the hearing of the appeal noted by the respondent in the Administrative Court, but the warrant of committal will issue if the respondent resumes or performs any building operations and/or development on or in respect of the immovable property on Lot 1 of Good Hope situate in the District of Harare before that date.

The applicant seeks an award of costs on a legal practitioner and client scale. I am satisfied that the respondent has been solely responsible for all the costs incurred in this matter, and that his misconduct has necessitated the legal steps taken by the applicant. Costs are awarded on the scale applied for.

Surgey, Pittman & Kerswell, legal practitioners for applicant

1985 (1) ZLR p184

S v MAPHOSA 1985 (1) ZLR 184 (HC)

Court High Court, Harare

Ebrahim J

Review

27 March 1985

Flynote

Criminal Procedure - sentence - stock theft - seriousness with which the Legislature regards all instances of stock theft apparent from penalties it has specified.

Headnote

The seriousness with which the Legislature regards all instances of stock theft is apparent from the penalties it has specified. Indicative of the Legislature's attitude too is the very wide-ranging

criminalisation of conduct relating to or connected with the incidence of stock theft. The courts have not been hesitant in reflecting this opprobrium to stock theft in the sentences they have imposed in the cases which have come before them.

Cases cited:

S v Zemura S-28-83 (unreported)

S v Mpofu HB-81-81 (unreported)

S v Matshona HB-8-83 (unreported)

S v Siziba HH-288-83 (unreported)

S v Pode HH-295-84 (unreported)

S v Mashayamombe HB-74-82 (unreported)

S v Ncube HB-15-82 (unreported)

S v Dick GS-215-80 (unreported)

S v Musiimango GB-40-80 (unreported)

S v Chimombe GS-219-80 (unreported)

Judgment

Ebrahim J: The two accused in this case raided the complainant's kraal at night and made off with two donkeys valued at \$60.

1985 (1) ZLR p185

EBRAHIM J

They were subsequently arrested in possession of these animals, which were stolen by some other thieves before the complainant could collect them.

First accused is aged 33 years old, is married and has eight children. He was at the time of committing this offence engaged solely in subsistence farming. He has no assets or savings. He also has a previous conviction for stock theft dating back to February 1984. He was sentenced to three months' imprisonment with labour and, in addition, a suspended sentence of two months' imprisonment with labour was brought into effect.

The second accused is aged 54 years old, is married and has four children. He is also solely engaged in subsistence farming and is not possessed of any assets or savings. He was sentenced to pay a fine of \$80 or in default of payment to undergo 80 days' imprisonment with labour. In addition a wholly suspended sentence of two months' imprisonment with labour, to endure for five years, was imposed.

The record was scrutinised by the regional magistrate who formed the view that the sentence

imposed on the second accused was inadequate.

There appears to be some substance to the learned scrutinizing magistrate's objection, when regard is had to the aggravating features referred to by the trial court. Indeed it would seem that the sentences imposed in respect of both accused are lenient.

The seriousness with which the Legislature regards all instances of stock theft is apparent from the penalties it has specified. An ordinary magistrate has jurisdiction to imprison a person convicted by him for the theft of stock to a maximum term of four years (a period four times greater than which the magistrate ordinarily has in terms of his ordinary jurisdiction under the Magistrates Court Act). Indicative of the Legislature's attitude, too, is the very wide-ranging criminalisation of conduct relating to or connected with the incidence of stock theft. (See ss 5 and 6). The offence of entering onto land with intent to steal, which is created by s 6, carries a maximum penalty of \$1000 or imprisonment for one year or both such fine and imprisonment.

The courts have not been hesitant in reflecting this opprobrium to stock theft in the sentences they have imposed in the cases which have come before them.

Indeed research reveals only three cases dealt with by the Supreme Court in

1985 (1) ZLR p186

EBRAHIM J

the last four years, in which monetary penalties have been imposed: the one case concerning a contravention of s 4 (ie a failure to account for stock believed to have been stolen) and the other, a theft of six chickens by a 51 year old man under the influence of alcohol (See: *S v Zemura* S-28-83 (unreported); *S v Mpofo* HB-81-81(unreported)). The third case concerned the attempted theft of a goat by a man in desperate financial straits with significant family responsibilities (*S v Matshona* HB-8-83(unreported)).

The case of *S v Siziba* HH-288-83 (unreported) is also instructive. In that case a man who had stolen four goats had been sentenced to pay a fine of \$60. Sandura JP refused to certify the sentence as being in accordance with real and substantial justice, holding that a sentence of six months' imprisonment with labour, with a third or half of it being suspended, as being appropriate. (See also *S v Pode* HH-295-84 (unreported)).

In *S v Mashayamombe* HB-74-82 (unreported) a man who stole two donkeys on two separate occasions was sentenced to undergo 10 months' imprisonment with labour, six months of which were conditionally suspended. An identical sentence was imposed in the case of *S v Ncube* HB-15-82 (unreported), where three donkeys were stolen during the course of a single theft.

In *S v Dick* GS-215-80 and *S v Musiimango* GB-40-80 (both unreported), which concerned the theft of a pig and pig carcasses, sentences of nine months' imprisonment with labour and six months' imprisonment with labour were imposed. In *S v Chimombe* GS-219-80 (unreported), a theft of a sheep resulted in the imposition of a sentence of six months' imprisonment with labour. WADDINGTON J who reviewed that case noted that a sentence of three months' imprisonment with labour, imposed on the accused's accomplice, was "extremely lenient".

In my view the imposition of a fine in the case of the second accused was inappropriate. It is axiomatic that where the benefit of a fine is offered to a convicted person, the option must be a real one. That this was not the case is borne out by the fact that the accused is presently serving the alternative of 80 days in default of payment.

I find myself unable to certify these proceedings as being in accordance with real and substantial justice.

1985 (1) ZLR p187

S v MPOFU (1) 1985 (1) ZLR 187 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, & Gubbay & McNally JJA

2 April 1985

Flynote

Criminal law - culpable homicide - duty of armed details on official roadblocks - firing on civilians.

Criminal procedure - sentence - lengthy period of imprisonment awaiting trial - weight to be given.

Headnote

The setting up of roadblocks by police or military authorities is an inherently dangerous operation. It is necessary that members be given adequate instructions and equipment so as to minimise danger to the public, failing which responsibility for tragedies at a roadblock may well rest on the shoulders of superiors.

Adequate weight must be given to imprisonment on remand, bearing in mind, for instance, that 18 months in a remand prison is in some ways equivalent to a 27 month sentence.

Cases cited:

S v Nel & Anor 1980 (4) SA 28 (E)

S v Ngwenya AD-283-77 (unreported)

S v Rademeyer 1981 (1) SA 1205 (O)

S v Carvalho AD-199-78 (unreported)

N J Pattison for the appellant

B N Sigidi for the respondent

Judgment

McNally JA: The appellant was charged with one count of murder and one count of attempted

murder, but eventually his plea of guilty to culpable homicide on the first count was accepted and he was acquitted and discharged

1985 (1) ZLR p188

McNALLY JA

on the second count. He was sentenced in the High Court in Bulawayo to two years' imprisonment with labour, and he appealed against that sentence.

At the hearing the appeal was allowed and the sentence reduced to 12 months' imprisonment with labour. The facts of the case and the reasons for our decision are as follows:

The appellant was a soldier on active service in an area where there were dissidents present. He was sent out at about 8 pm on the evening of 10 February 1983, after he had just returned from a four-day foot patrol, with instructions to stop a vehicle suspected of carrying dissidents on a track which intersected the road from Legion Mine to Bulawayo.

The appellant, a corporal, took his platoon and seems to have set up some sort of ambush just on the Bulawayo side of the intersection of the track with the main road. The facts, which are to be gleaned from an agreed statement of facts plus a sketch plan, are not altogether clear, but it seems that a vehicle came from the direction of Bulawayo, on the main road, heading for Legion Mine, and drove into the ambush position. The appellant at this stage was in combat uniform, standing or walking on the side of the road. He decided to stop this vehicle to ask the occupants whether they had seen dissidents. It appears, therefore, that he did not suspect that the vehicle might be carrying dissidents.

The agreed statement continues as follows:

The accused gave an indistinct signal for the vehicle to stop.

The car slowed down slightly to approximately 80 kms per hour but showed no signs of stopping altogether.

The Accused then shot at the vehicle from the hip when it was level with him.

The shot ricocheted and as a result Roy Lahee was killed.

In fact the bullet fragmented. Portions of it hit and wounded Mrs Lahee and other portions tragically killed her four-year-old son.

I have no doubt that there was a proper basis for the plea of guilty and conviction for culpable homicide. The appellant was negligent both in

1985 (1) ZLR p189

McNALLY JA

making an indistinct signal and in firing from the hip as he did. It must be accepted, however, that he did not aim to kill or hit a person. Had the bullet not fragmented and ricocheted, no one would have been hurt. Nevertheless, the mere firing of a gun at a moving vehicle was dangerous and clearly involved a risk to life.

The learned judge who sentenced the appellant took into consideration a number of facts. He was acutely and properly conscious of the difficulty of weighing in the balance the interests of the State in putting down dissident activity and the interests of individual civilians moving innocently in areas where dissidents are active. He gave the proper attention also to the interests of the appellant, his state of fatigue and possible "edginess", his blameless life up to that moment, and his wife and two children. He noted that the appellant had been in custody since the event, a matter of some 18 months. It is a matter for adverse comment that so straightforward a case should have taken so long to come to court.

It seems to me that there is a further matter to which attention should be drawn. The setting up of "road-blocks", whether by the police or by the military authorities, is an inherently dangerous operation. I have no doubt that policemen who do so are normally given both adequate instructions and adequate equipment in the way of signs and lights. One cannot expect the military authorities, acting in an emergency and without the appropriate police training, always to be as thorough and to maintain as high a standard of care as the police. But it is desirable, I think, that the facts of this case be brought to the attention of the Director of Legal Services, Ministry of Defence, so that he may consider whether steps can be taken to improve the briefing of those members of the Army who are instructed to interfere with the free passage of motor vehicles on the roads of Zimbabwe. An instructive case on the dangers to the public arising from the setting up of inadequate road-blocks is *S v Nel & Anor* 1980 (4) SA 28 E).

It may be, therefore, that some of the blame for this most unfortunate accidental killing can be moved from the shoulders of Corporal Mpofu to those of his superiors. It may be noted that the Army authorities did not come forward in mitigation. However, on the facts before the court his own negligence was high. In the first place, by making an indistinct signal from the side of the road he may well have created the impression either that he himself was a dissident or that he was asking for a lift. He thus created a situation in which it was very likely that the driver of the vehicle would do exactly what he did - namely drive on.

1985 (1) ZLR p190

McNALLY JA

Having created that situation, and bearing in mind that he had no reason to suspect the car of being connected with dissidents, as indeed it was not, he was in no way justified in firing a shot. It is not clear why he shot at all, and the agreed statement of facts says rather obscurely "he should have shot lower than he did to avoid injury to the occupants of the vehicle". The fact is that his instructions were to stop vehicles travelling on the track. He had no instructions to stop vehicles travelling on the main road. He merely wanted to ask the occupants of the vehicle whether they had seen dissidents. I can see no reason to justify his shooting at or near the car at all. Nor did he advance any reason to justify his action.

In such circumstances I would hesitate before saying that, in general, a sentence of two years' imprisonment with labour was inappropriate. I agree with the learned judge that not much guidance is to be obtained from the cases referred to in argument - *Ngwenya v S* AD-283-77 (unreported), and *S v Rademeyer* 1981 (1) SA 1205 (O). The former case involved a gun being pointed as a joke and fired with fatal consequences. The latter involved a corporal, temporarily in charge, killing a fellow soldier negligently while both were at an army rifle range practising

shooting. *S v Carvalho* AD-199-78 (unreported), referred to on appeal, was a case involving civilians in a cafe. But I am of the view that not sufficient account was taken of the inordinate period spent by the appellant in custody pending trial. Eighteen months in the remand prison is in some ways the equivalent of a 27-month sentence, bearing in mind that a convicted prisoner in practice earns an automatic remission of one-third of his sentence in consequence of the provisions of s 113 of the Prisons Act [*Chapter 21*].

We were informed at the hearing of the appeal that the appellant had been serving his sentence since his trial and had not been released on bail pending appeal. He had therefore had been in custody for almost 26 months. Our discretion was thus in practice severely circumscribed.

In these particular circumstances we considered the sentence of two years' imprisonment with labour to be excessive and we made an order reducing the sentence, as earlier indicated, to one of 12 months' imprisonment with labour, which will have had the effect of causing his release, subject to "satisfactory industry and good conduct" within a few days of the hearing.

The Registrar is requested to send a copy of this judgment to the Director of Legal Services at Army Headquarters.

1985 (1) ZLR p191

McNALLY JA

Dumbutshena CJ: I agree

Gubbay JA: I agree

Webb, Low & Barry, appellant's legal practitioners

1985 (1) ZLR p192

S v MAYBERRY 1985 (1) ZLR 192 (HC)

Court **High Court, Harare**

Samatta & Smith JJ

Criminal Appeal

25 March & 3 April 1985

Flynote

Criminal procedure - sentence - assessment of - whether deterrence and prevalence are determining factors in the assessment of sentence to be imposed.

Headnote

It is the duty of a court sentencing an accused to give due and sufficient weight to all the factors,

both those not favourable to the accused and those which are.

It is important to avoid attaching excessive weight to factors of deterrence and prevalence.

Cases cited:

S v Madzimbamuto HS-98-82 (unreported)

S v Matoma 1981 (3) SA 838 (A)

S v Kaise & Anor AD-41-77 (unreported)

R v Nyoni AD-24-80 (unreported)

J Sayce for the appellant

A Zambuko for the respondent

Judgment

Samatta J: The appellant, John Rintoul Mayberry, was convicted by the Magistrate's Court at Marondera, upon his pleas of guilty, of 28 counts of theft. All the counts were treated as one for the purpose of sentence and the appellant was sentenced to 12 months' imprisonment with labour of which three months' imprisonment

1985 (1) ZLR p193

SAMATTA J

with labour was suspended for five years on the usual condition of good behaviour, and a further three months' imprisonment with labour was suspended on condition that the appellant compensated his employer in the sum of \$582,40, being the value of the property he stole from it.

The facts of the case, which are somewhat unusual, are as follows. The appellant, who is aged 57, was employed by the Ministry of Construction for a period of 16 years as a carpenter. Between February 29 and November 27, 1984, he stole a total of 560 litres of petrol. The crime was perpetrated on 28 occasions. On each occasion the appellant presented a 20-litre tin to a petrol attendant at the petrol tanks, Marondera Police Station, demanding to be supplied with petrol. On each occasion he was supplied with twenty litres of petrol after he had signed for its receipt. He went away and poured the fuel into his personal vehicle and used it for his personal purposes. He was arrested on November 26 when he was caught transferring the fuel he had obtained on that day from the tin to the tank of his vehicle. It is not at all clear on the record of the case why the petrol attendant acceded to the appellant's demands for fuel when the latter came to the police station with a tin only.

It is an elementary proposition of law that in passing sentence the court has to consider the offence, the offender and the interests of society. The sentence imposed should not only be suitable to the offence, but should also be suitable to the offender. All relevant factors must be considered, and each should be given the weight it deserves. In the instant case the magistrate

took into consideration every important factor, including the following:

- (1) the appellant was a first offender;
- (2) he had pleaded guilty to the charges laid at his door, thus showing some contrition;
- (3) he was an elderly man;
- (4) he had served the country as a civil servant for 16 years;
- (5) he had offered to compensate the Government for the loss he had caused to it; and
- (6) prevalence of thefts by Government employees in the country and the need to deter such anti-social activities.

Sentencing the appellant, the magistrate said, among other things:

The court has been ... urged to consider a fine. I have carefully looked at the case and feel allowing a fine would be treating the 28 counts too

1985 (1) ZLR p194

SAMATTA J

lightly. The question of deterrence must be treated as the determining factor, especially in the face of increasing dishonesty by Civil Servants.

This passage has been subjected to heavy criticism by Mr Sayce, counsel for the appellant. The learned advocate submitted that, by stating that deterrence was the "determining factor" in the assessment of sentence to be imposed on the appellant, the magistrate strayed into an error because he gave excessive weight to that factor and gave insufficient weight to the factors favourable to the appellant. With respect, I think there is some merit in this contention. It cannot be disputed that prevalence of thefts by Government employees was an important factor in this case, but in my view it was wrong to treat it as an overriding factor. The factors favourable to the appellant were also very weighty, and the magistrate was obliged to treat them as such. In *S v Madzimbamuto* HS-98-82 (unreported) DUMBUTSHENA J, (as he then was) emphasized the importance of avoiding attaching excessive weight to factors of deterrence and prevalence. He said:

Factors of deterrence and prevalence must not be permitted to weigh so heavily as to negate other factors which lessen the gravity of the offence in the particular case before the Court.

Having said that, the learned Judge proceeded to cite with approval the English headnote in *S v Matoma* 1981 (3) SA 838 (A) which reads:

The gradual and justifiable aggravation of sentences in order to combat, by means of deterrence, retribution and removal of the offender from society in the interests of society, the increasing prevalence of a particular crime must not lead, in the imposition of sentence, to an inevitable negation of a particular accused's own personal circumstances which could possibly lead to mitigation of sentence. Each case must be weighed in the light of the person and particular circumstances of the accused.

It is the duty of a court sentencing an accused to give due and sufficient weight to all the factors, both those not favourable to the accused and those which are. In the instant case the following

factors constituted, in my opinion, very strong mitigation:

- (1) the fact that the appellant was a first offender;
- (2) the fact that he pleaded guilty and expressed contrition through his advocate;

1985 (1) ZLR p195

SAMATTA J

- (3) the appellant's advanced age;
- (4) the appellant's offer to compensate the Government; and
- (6) the appellant's wife is an ailing woman.

Although Miss *Zambuko*, for the State, strongly urged us to hold that the magistrate did not misdirect himself on the question of sentence, I am of the view that inadequate weight was given to the abovenamed mitigating circumstances. The sentence was therefore, in my opinion, imposed as a result of a misdirection. But is that sentence not comparable to sentences imposed in similar cases? I have not come across a case whose facts are similar to this case. During argument two cases were referred to: *Kaise & Anor v S* AD-41-77 and *Nyoni v R* AD-24-80. I agree with Mr Sayce's submission that these cases are distinguishable from the case now before us. In the former case the driver of a petrol bowser was convicted of stealing 55 litres of petrol from his bowser. He was sentenced to six months' imprisonment with labour and his appeal against that sentence was dismissed. That case is distinguishable on two main points from the instant case. First, there was in that case a breach of trust in that the appellant had stolen the property which was placed in his possession by his employer. Secondly, the appellant in that case did not show contrition by pleading guilty. On the contrary, he went to court prepared to lie his way out of the crime he was caught red-handed committing. In *Nyoni's* case, another case of theft of fuel, there was also a breach of trust in the ordinary sense of the phrase, and the accused had three previous convictions involving dishonesty. Bearing in mind these major differences, I am inclined to take the view, if I may respectfully say so, that the two cases offer little guidance on the appropriate sentence in the instant case. In my opinion a substantial fine, conjoined with a suspended custodial sentence, would have met the justice of the case. Such a sentence would have adequately reflected the gravity of the offence the appellant was convicted of.

I would accordingly set aside the sentence the magistrate imposed and substitute therefor the following sentence:

A fine of \$800,00 or in default of payment six months' imprisonment with labour. In addition nine months' imprisonment with labour, of which,

- (a) six months' imprisonment with labour is suspended for three

1985 (1) ZLR p196

SAMATTA J

years on condition that the appellant is not again convicted of a crime committed within that period which involves dishonesty and for which he is sentenced to imprisonment without the option of a fine;

- (b) a further three months' imprisonment with labour is suspended on condition that the appellant repays, through the Clerk of the Court, Marondera, to the Government of Zimbabwe the sum of \$582,40 by 4.00 pm on April 30, 1985"

Smith J: I agree

1985 (1) ZLR p197

S v MHURIRO 1985 (1) ZLR 197 (HC)

Court **High Court, Harare**

Smith & Samatta JJ

Criminal Appeal

3 April 1985

Flynote

Statutes - Dangerous Drugs Act [Chapter 319] - ss 9(b) and 19 - appellant in possession of 501 grams of dagga - intended to take dagga to his home in the communal lands where "ancestral worship ceremony" to be held - dagga would be thrown on the fire - intention that fumes would be inhaled by people present at ceremony - ancestral spirits would then manifest themselves through mediums present at ceremony - whether possession under these circumstances was intended for distribution or supply to others - what sentence appropriate under the circumstances.

Headnote

The appellant was charged with contravening s 9(b) as read with s 19 of the Dangerous Drugs Act [Chapter 319] in that he did wrongfully and unlawfully have in his possession 501 grams of dagga. He was convicted on his plea of guilty and sentenced to 14 months' imprisonment with labour of which nine months' were suspended for four years.

The appellant said that he was taking the dagga home for ceremonial purposes connected with the appeasement of his ancestral spirits. He intended to take the dagga to his home in the communal lands where an "ancestral worship ceremony" was to be held. In the course of this ceremony the dagga would be thrown onto a fire. The intention was that the fumes would be inhaled by people present at the ceremony, some of whom were known to be mediums, and the ancestors would then manifest themselves through the mediums.

1985 (1) ZLR p198

SMITH J

The trial magistrate accepted that the appellant had genuinely intended to use the dagga for

this purpose and held that the dagga was not possessed for the appellant's own consumption but that he intended to supply or distribute the dagga to other persons.

Held, in allowing the appeal against sentence, it was not correct to hold that the appellant intended to supply the dagga to other persons.

Held, further, the element of "supplying" that the magistrate found, was that the participants would inhale the fumes from the dagga burnt. However, the dagga itself would not be physically handed to another as is the case when one hands a cigarette to another for the latter to have a puff.

Held, further, that since the magistrate had misdirected himself the Appeal Court was at large as to the sentence it considered appropriate in the circumstances.

Held, further, it is not only the supplying or smoking of dagga which constitutes an offence; unlawful possession, for any purpose, is sufficient and the Legislature does not permit exceptions in the case of dagga which is to be used for ceremonial purposes. Although the circumstances of this case were unusual and exceptional, the quantity of dagga concerned made it a serious offence.

Cases cited and referred to:

S v Wolters & Anor 1963 (4) SA 135 (N)

S v Mngadi 1965 (1) SA 129 (N)

M Foroma for the appellant

A Zambuko for the respondent

Judgment

Smith J: The appellant was charged with contravening s 9(b) as read with s 19 of the Dangerous Drugs Act [*Chapter 319*] in that he did wrongfully and unlawfully have in his possession 501 grams of prepared Indian hemp ie dagga. He pleaded guilty and was duly convicted and sentenced to 14 months' imprisonment with labour of which nine months' imprisonment with labour was suspended for a period of four years.

The appellant said that he was taking the dagga home for ceremonial purposes connected with the appeasement of his ancestral spirits. In addressing the trial court in mitigation, the appellant's legal representative said that the appellant intended to take the dagga to his home in the communal lands where an "ancestral worship ceremony" was to be held. In the course of this ceremony the dagga would be thrown onto a fire. The intention was

1985 (1) ZLR p199

SMITH J

that the fumes would be inhaled by people present at the ceremony, some of whom were known to be mediums, and the ancestors would then manifest themselves through the

mediums.

The trial magistrate accepted that the appellant had genuinely intended to use the dagga as set out above. On that basis he held that the dagga was not possessed for the accused's own consumption but that the appellant intended to supply or distribute the dagga to other persons. His reasoning was that the manner in which the dagga was to be used was such that any person within the particular place where the dagga was going to be burnt could easily inhale dagga fumes without intending to. The trial magistrate regarded the moral blameworthiness of the accused as being very high because of his intention to supply the dagga to others.

Mr *Foroma* has submitted that the magistrate erred in sentencing the appellant on the basis that he possessed the dagga for distribution or supply, and he also submitted that the sentence was so severe that it induced a sense of shock. Miss *Zambuko* relied on the meaning given to the word "supply" in the Shorter Oxford Dictionary to argue that since the appellant had "furnished, provided or afforded something needed or wanted" he had indeed possessed the dagga for the purpose of supplying it to the persons who would be present at the proposed ceremony.

In *S v Wolters & Anor* 1963 (4) SA 135 (N) which dealt with the question of whether or not ammunition had been unlawfully supplied to another, MILLER J at pp 138-139 stated:

It seems to me, therefore, that the first and fundamental inquiry in this case is: What is the meaning of the word "supply" as used in sec.23? It does not appear that the magistrate directed his attention to that question; certainly he did not deal with it in his reasons.

The word "supply" is not defined in the Act. It is a word which has a large variety of meanings, depending upon the context in which it is used. In its present context it seems to me that its most likely meaning is "to provide" or "to furnish" a person with ammunition (*Shorter Oxford English Dictionary*). The Afrikaans word used in the Act is "verstrek", which is said to mean "furnish, supply, procure, provide with". (*Groote Woordeboek - Kritzinger, Steyn, Schoenees and Cronje*). *Prima facie*, I would hesitate to accept that to hand ammunition which has been ordered by A, to B for purposes of delivery to A in his capacity as A's

1985 (1) ZLR p200

SMITH J

agent, or as a public carrier or the like, would be to "supply" ammunition to B. There is no doubt that B would be placed in possession of the ammunition but according to ordinary English usage, the person from whom the ammunition was so obtained would supply it not to B, who would merely handle it as an agent or carrier, but to A.

Further on at p140, he said:

It seems to me, therefore, that unless there are reasonably clear indications in Act 23 of 1937 that "supply" as used in s 23, has a wider connotation than its ordinary and usual one, there is no justification for assigning such wider meaning to the word, particularly when we are dealing with a provision the breach of which entails serious criminal consequences.

HENNING J in *S v Mngadi* 1965 (1) SA 129 (N) adopted the reasoning in *Wolter's* case, *supra* when he was reviewing a case where the accused had been convicted of supplying dagga to a child for the purpose of delivering it to another. He quashed the conviction and substituted one for unlawful possession of dagga.

In my view, it is not correct in this case to hold that the appellant intended to supply the dagga

to other persons. There is no evidence that the appellant was going to give the dagga to anyone else to use for the ceremonial purposes. From the record it appears to have been assumed that he himself was the instigator of the ceremony and would throw the dagga onto the fire. The element of "supplying", that the magistrate found, was that the participants would inhale the fumes from the dagga he had burnt. However, the dagga itself would not be physically handed to another as is the case when one hands a cigarette to another for the latter to have a puff.

Having decided that the magistrate misdirected himself, this court is at large as to the sentence it considers appropriate in the circumstances. In this case it was apparently accepted by the trial magistrate that the accused did not smoke dagga and did not intend to start, neither was the dagga to be smoked, in the ordinary sense, by anyone else. However, it is not only the supplying or smoking of dagga which constitutes an offence; unlawful possession, for any purpose, is sufficient and the Legislature does not permit exceptions in the case of dagga which is to be used for ceremonial purposes. In *Mngadi's case supra* at p 130D HENNING J said:

1985 (1) ZLR p201

SMITH J

I am also mindful of the numerous cases which come up for review where severe penalties have been imposed for possession of dagga for the purpose of sale or supply. The task of the police to combat the evil is a formidable one and the Legislature has clearly indicated the seriousness with which it regards the unlawful sale or supply of dagga. Bearing all these considerations in mind, one has to deal, in the result, with each case on its merits. There is no suggestion in the present matter that the accused acquired the dagga with the object of supplying it to anyone else, or that he obtained or parted with it for the purpose of gain. The circumstances are unusual and exceptional, so that in all fairness the case could hardly be regarded as a serious one.

Likewise in this case the circumstances are unusual and exceptional but on the other hand, because of the quantity of dagga concerned, it is still a serious one. Had it not been established that the appellant did not possess the dagga for the purposes of supplying it to others, the sentence would have been entirely appropriate. As this court has found, however, that this element was not present, I consider that a heavy fine, conjoined with a suspended term of imprisonment, would be appropriate. In determining the amount of the fine I have had regard to the circumstances of the appellant as disclosed by his legal representative at his trial.

The appeal is allowed, the sentence imposed on the accused is set aside and the following is substituted:

The accused is sentenced to pay a fine of \$500 and, in addition, to undergo nine months' imprisonment with labour, all of which imprisonment is suspended for a period of four years on condition that the accused is not convicted of a crime committed within that period which involves the unlawful cultivation, possession, sale or supply of dagga for which he is sentenced to imprisonment without the option of a fine.

Samatta J: I agree

1985 (1) ZLR p202

CROW v DETAINED MENTAL PATIENTS SPECIAL BOARD 1985 (1) ZLR 202 (HC)

Court **High Court, Harare**

Ebrahim J

Petition

21 February & 24 April 1985

Flynote

Statutes - Mental Health Act, 1976 - s 59 - convening of Special Board - decision of Special Board - application against for an order of certiorari, an order of mandamus and order of prohibition - whether or not and to what extent, the exercise of a discretion conferred on any person or body may be controlled by courts.

Headnote

The applicant, a mental patient, was detained at M prison in terms of a Presidential Directive made in terms of s 28(5) of the Mental Health Act, 1976. Soon after his admission to M prison, the Superintendent thereof reported that the applicant was of sound mind and recommended his discharge. A Special Board was convened by the Minister in terms of s 59 of the Mental Health Act. The Board postponed the hearing to a future date and sought a further report of the visiting consultant psychiatrist. At a further hearing the Board declined to make a recommendation for the applicant's release and intimated that it would seek out the Ministry's views with regard to the policy to be adopted in the applicant's type of case. The Board also considered that in the event of a policy guideline being established by the Minister, the hearing might be re-opened; and accordingly postponed the hearing for twelve months.

Against the decision of the Special Board, the applicant sought, *inter alia*, the following relief:

- (1) The decision of the respondent not to recommend the release of the applicant from M prison is set aside (an order of certiorari).
- (2) The respondent is directed to receive such evidence as the applicant wishes to present relating to the depression from which

1985 (1) ZLR p203

he suffered in October, 1982; thereafter to present a report to the President of its findings (an order of *mandamus*).

- (3) Dr B shall take no further part in the preparation of this report (an order of prohibition).

Held, dismissing the application with costs, that the report of the Board is not a decision affecting the rights of the application : it is but part of the decision-making process. There is not discernable in the wording of s 33(1) of the Mental Health Act, 1976, any entitlement on the part of the applicant to any such report. There is no particular draft provision specifying when and in what circumstances any such report referred to in s 33(1) is to be made. That being the case, the High Court cannot by any order of *mandamus* compel the Board to submit a report when Parliament has seen fit not to so compel the Board.

Held, further, that applicant's counsel contended that as the Board had exceeded its jurisdiction

in making a recommendation instead of confining itself to the presentation of a report, then the recommendation is a nullity. *Certiorari* will generally not issue to quash a nullity. New proceedings may be instituted, *certiorari* being superfluous. The applicant cannot compel the Board to reconsider the matter afresh. The only person who can insist upon such a report is the Minister.

Held, further, that the spirit encapsulated in the precepts of "natural justice" is applied neither rigidly nor blindly, but fluidly and flexibly, taking into account not only the considerations of the individual but those of government as well; with a mature outlook and recognition that in some cases the public interests may legitimately supersede those of the individual.

Held, further, that bearing in mind the fact that the Board was purely an administrative body with no power of decision directly affecting the rights of the applicant it was unlikely that a reasonable man would come to the conclusion that the Board, comprised of an experienced magistrate and an experienced legal practitioner both of long standing and eminence, was influenced by the bias of Dr B

Cases cited:

Everett v Griffiths & Anor [1921] AC 631 (HL)

Van den Berg v Director of Economic Affairs 1983 (1) SA 106 (A)

Minister of Home Affairs v Dabengwa 1983 (2) ZLR 346 (SC); 1984 (2) SA 345 (ZSC)

R v Dunsheath ex parte Meredith [1950] 2 All ER 741 (KB)

Herring v Templeman & Ors [1973] 3 All ER 569 (CA)

1985 (1) ZLR p204

EBRAHIM J

R v The Statutory Visitors to St Lawrence's Hospital, Caterham; ex parte Pritchard [1953] 2 All ER 767 (QB)

R v Metropolitan Police Commissioner; ex parte Parker [1953] 2 All ER 717 (QB)

Tabakian v District Commissioner, Salisbury 1973 (2) RLR 348 (GD)

Ridge v Baldwin & Ors [1963] 2 All ER 66 (HL)

Lower Hutt City Council v Bank [1974] 1 NZLR 545

Re: Liverpool Taxi-Owners' Association [1972] 2 All ER 589 (CA)

R v Amber Valley District Council, ex parte Jackson [1984] 3 All ER 501 (QB)

Furnell v Whangarei High Schools Board [1973] 1 All ER 400

Wiseman & Another v Borneman & Ors [1969] 3 All ER 275 (HL)

Pearlberg v Varty (Inspector of Taxes) [1972] 2 All ER 6 (HL)

Re: Pergamon Press Ltd [1970] 3 All ER 535 (CA)

The King v Port of London Authority; ex parte Kynoch Ltd [1919] 1 KB 176 (CA)

Witham v The Director of Civil Aviation & Anor HH-39-83 (unreported)

Hannam v Bradford City Council [1970] 2 All ER 690 (CA)

I A Donovan for the applicant

C N Greenland for the respondent

Judgment

Ebrahim J: The applicant is a mental patient detained at Mlondolozi Prison in terms of a Presidential directive made in terms of s 28(5) of the Mental Health Act, 1976, subsequent to a special verdict being passed in respect of him, on the occasion of his trial on a charge that he murdered his wife, his mental disorder being defined as "depression".

Mlondolozi Prison is designated a "special institution" in terms of s 2 of the Act. (See Government Notice 434 of 1978).

Soon after his admission, the Superintendent of the Prison reported that the applicant was mentally of sound mind and recommended his discharge. In making his recommendation, the Superintendent presumably acted in terms of s 31(b) (as read with s 231) of the Act. The substance of his recommendation appears to have been derived from the report of the visiting consultant psychiatrist, Dr Vermeulen.

A Special Board was convened by the Minister in terms of s 59 of the Act, and it held a meeting on 27 June 1984 to consider the applicant's case. The applicant was represented by his attorney, who put forward the various

1985 (1) ZLR p205

EBRAHIM J

submissions contained in annexure "E" to the record of the meeting of the Detained Mental Patients Board (hereinafter referred to as "the Record") which included, *inter alia*, the following submissions:

- (a) that Mlondolozi is a rehabilitative institution;
- (b) that, as the applicant was of sound mind and not legally responsible for the murder of his wife, it would be anomalous to continue to detain him; and
- (c) the continued detention of the applicant in a mental institution would eventually unbalance his mental equilibrium.

The Board and, in particular, Dr Baker, a member of the Board, were doubtful that the risk of a

relapse by the applicant into the mental disorder, under the influence of which he murdered his wife, had been eliminated. The Board accordingly postponed the hearing to 26 September 1984.

At the reconvened hearing, an additional report was filed by the visiting consultant psychiatrist, Dr Vermeulen, in which he expressed the opinion that "taking into account the context of [the illness] the depression was of a reactive rather than endogenous nature." He went on to discount the findings by another psychiatrist, Dr Hollander, of "obsessional-phobic" features and heavy drinking habits, and concluded that the applicant was stable. He went on to speculate that "it is unlikely that he will be faced with exactly the same situation again. It is even less likely that he will stab anyone again ... as he is prone to depression as any normal adult."

Apparently unimpressed by Dr Vermeulen's predictive powers as to the likelihood of the applicant being faced with a similar set of circumstances such as those leading up to the death of his wife, the Board sought a further report on the following points:

- (a) the risk of recurrence of a depression such as was present before the offence; and
- (b) the risk of violent behaviour under similar circumstances if another depression does occur.

At a further hearing on 31 October 1984, Dr Vermeulen's reply to these queries was:

that there is a moderate risk of a re-occurrence of a depression such as was present before the offence; and

1985 (1) ZLR p206

EBRAHIM J

that there is a low risk of violent behaviour under similar circumstances if another depression does occur.

It should be stated that the "similar circumstances" refer to the circumstances in which the applicant killed his wife - which were broadly to the effect that as a result of marital discord, the applicant and his wife separated; he took two knives with him and went to see his wife either to effect reconciliation or to kill himself and perhaps his wife; when she rejected his pleas, he killed her.

The Board declined to make a recommendation for applicant's release and intimated that it would seek out the Ministry's view with regard to the policy to be adopted in this type of case.

In written reasons prepared on 31 October 1984, the Board held that:

... in view of the fact that the patient had only been admitted to Mlondolozi Prison since September, 1983, and considering his own personality, an insufficient period of detention had elapsed to ensure that in the event of patient being subjected to similar psychological disturbance in the future, he would not succumb to aggressive instability.

The Board also considered that in the event of a policy guideline being established by the Minister, the hearing may be re-opened, and accordingly postponed the hearing for twelve months.

It is against this decision of the Special Board that the applicant has caused these proceedings

to be instituted. The relief sought by the applicant, as amended by Mr *Donovan*, is as follows:

- (1) The decision of the respondent not to recommend the release of the applicant from Mlondolozi is set aside (an order of *certiorari*).
- (2) The respondent is directed to receive such evidence as the applicant wishes to present relating to the depression from which he suffered in October 1982; thereafter to present a report to the President of its findings (an order of *mandamus*).
- (3) Dr Peter Baker shall take no further part in the preparation of this report (an order of prohibition).
- (4) The respondent pay the costs of these proceedings.

In asking for this relief, the applicant urges the court to find that:

1985 (1) ZLR p207

EBRAHIM J

- (1) The Board was biased.
- (2) The Board failed to give the applicant a fair hearing.
- (3) The Board acted *ultra vires*.
- (4) The Board took into account various irrelevant considerations.
- (5) The Board's failure to give reasons is indicative of impropriety in itself.

Although these various irregularities were not specifically raised by Mr *Donovan*, that they are the cause of applicant's dissatisfaction with the Board is clearly apparent from the various papers filed by him in support of the application.

THE LAW

The crisp issue in this case is whether or not this court has the right to intervene at all, ie whether or not, and to what extent, the exercise of a discretion conferred on any person or body may be controlled by the courts.

Obviously the starting point is to determine whether or not a discretion at all has, in fact, been conferred on the body or person against whose actions complaint has been made. This is a question which can rarely be determined with any assurance, as there may be no statutory provision on the matter; or, where there is, its interpretation lies with the courts. LORD MOULTON made the following statement in the case of *Everett v Griffiths & Another* [1921] AC 631 (HL) at 695:

If a man is **required** in the discharge of a public duty **to make a decision** which affects, **by its legal consequences, the liberty or property of others**, and he **performs that duty** and makes that decision **honestly and in good faith**, it is, in my opinion, a fundamental principle of our law that he is **protected**. (My emphasis).

(See also: *Van den Berg v Director of Economic Affairs* 1983 (1) SA 106 (A)).

The terms "honestly and in good faith" and "protected" embrace very wide concepts in the context of this passage, and are not to be construed as they would ordinarily be understood. Before dealing with them, it is necessary to deal with the first problem arising out of the *dictum*: The nature of the administrative function conferred.

THE STATUS OF THE BOARD

It is clear from the respondent Board's supporting affidavits that the Board

1985 (1) ZLR p208

EBRAHIM J

was constituted in terms of s 59 of the Act. In terms of the Act the Board is required to make any report required in terms of s 32 (transfer) or s 33 (discharge) of patients detained in terms of s 28(5) in terms of a special verdict.

As both counsel for the applicant and the respondent noted, the obligation of the Board is to make a report. Both counsel contended that this the Board failed to do; and suggested that what the Board did do was to make a recommendation - a course which was outside the Board's mandate.

The Oxford English defines:

- (a) "report" as being, *inter alia*:
 - (i) a narrative, an account of a fact or event;
 - (ii) to relate, state or notify something as a result of special observation or investigation;
 - (iii) to give an account of, or to speak or talk in a certain way of a person or thing.
- (b) "recommend" as, *inter alia*:
 - (i) to communicate a report to a person;
 - (ii) to inform;
 - (iii) to counsel; advise.

These words are obviously very close to each other in their meaning, and, *prima facie*, then, the objections of both counsel to the conduct of the Board are on this point no more than semantic hair-splitting.

Assuming, however, that the Board did act *ultra vires* in making a recommendation and ought not to have done so, nevertheless this leaves unanswered the question as to the status of the Board.

In making a report, is it - in the words of LORD MOULTON (*supra*) - "making a decision" in the discharge of a public duty; "the legal consequences" of which affect "the liberty or property of any person", and should it perform that duty "honestly and in good faith" so as to attract the "protection" of the law?

Mr *Greenland* argued very persuasively that this was not so, and that the only duty the Board had was to make a report to the President - and no-one else. He further contended with some force that the Report of the Board did not

1985 (1) ZLR p209

EBRAHIM J

have any legal consequences at all, insofar as it was not binding on the President, who could if he chose ignore its contents altogether. For this latter proposition Mr *Greenland* referred to the provisions of s 33(1), which provide that:

33. (1) Subject to the provisions of section *thirty-six*, the President **may** order the discharge of any patient who is detained in terms of this Part:

Provided that a patient such as is described in section *twenty eight* ... shall not be discharged except on a report from a special board. (My emphasis).

Mr *Greenland's* argument was, if I have understood it correctly, that the applicant has no right to liberty *per se*, having lost it by virtue of the special verdict. In this, he would seem to be correct: upon a special verdict being entered, the President may, in terms of s 28(5):

... give such directions as he deems fit as to the further detention, care, management and treatment of the patient concerned in an institution, special institution **or other place, including a prison**. (My emphasis).

Except in the case of a patient detained by virtue of a special verdict (and in one other case which it is unnecessary, for the purposes of this argument, to specify), the President has sole and absolute discretion to order a patient's release.

Mr *Greenland* further contended that the report of the Board had only the effect of fettering the President's discretion to a limited extent: without first receiving such a report, the President cannot exercise his powers in terms of s 33(1).

As I understand Mr *Greenland*, his argument was that the report of the Board is a procedural requirement only, albeit that in practice its substance is given due weight. It is also more than a condition precedent to the exercise by the President of the powers conferred on him in terms of the Act. Even if the President was of a mind to release the applicant without the report of the Special Board first being had and obtained, the President cannot direct that he be released. Even if the report is favourable, and the President declines to release the applicant, so Mr *Greenland's* argument went, the applicant would have no recourse. That being the case, the report of the Board is no more than

1985 (1) ZLR p210

EBRAHIM J

a purely administrative step in the process leading up to the decision by the President as to whether or not the applicant is to be released.

Section 33(1) imposes upon the President a duty to consult with the Special Board. And, that being the case, Mr *Greenland* contended, the functions, operations and procedures of the

Special Board are beyond the purview of this court. Mr *Greenland's* argument suggested that since the Act was silent on these points, the obvious intention of Parliament was to displace the requirements of natural justice from operating on the Board.

Quite clearly, the Act does not specify at all:

- (1) When the report is to be made - whether orally or in writing.
- (2) How it is to be compiled.
- (3) What matters it is to take into account.
- (4) How, if at all, the report is to be challenged.

These matters are presumably set out by the Minister when he establishes the Board. If that is the position (and, quite clearly, it seems to be so), the argument of counsel for the respondent has merit.

Generally, however, Parliament seems to prescribe consultation in situations that are inappropriate for a statutory hearing and that are beyond the reach of natural justice. Two factors are ordinarily present. First, the decision being taken involves to at least some degree the formulation and application of policy ... [often hinging] on the broadest policy considerations. Wide discretion on the part of the decider is thought to be inimical to the operation of the *audi alteram partem* rule. Secondly, those with a right to be consulted are likely to have something special to contribute to the decision ... because they possess their own expertise in the matter ... Depending on who is being consulted, then, the aim may be to protect outside interests or to ensure better decisions (by furnishing information and viewpoints), or both. Any individual interests will not however, be so drastically affected as to bring natural justice into play. This difference is illustrated by the scheme for licensing the employers of dock workers. A licensing authority has power to revoke a licence if satisfied of certain facts. The employer has power to revoke a licence if satisfied of certain facts. The employer is entitled to appeal to the Secretary of State for the Environment, who must direct an enquiry to be held, **and after consulting with the Secretary of State for Employment** render a decision ... **The Secretary of State for**

1985 (1) ZLR p211

EBRAHIM J

Employment ... is merely advising on labour policy, which will presumably help to determine whether the licence is actually revoked, once the power to revoke has been established. Any interests he might have are purely tangential. Parliament simply wishes to ensure that no decision is taken without an awareness of his opinions. (See *The Legal Requirements of Consultation*, Jergensen 1974 Public Law at 291).

It seems therefore that on this the argument must be answered in favour of respondent. The report of the Board is not a decision affecting the rights of the application: it is not part of the decision-making process.

The soundness of Mr *Greenland's* argument was demonstrated further by the fact that there is not discernible in the wording of the relevant section any entitlement on the part of the applicant to any such report. And it is also obvious that there is no particular draft provision specifying when and in what circumstances any such report referred to in s 33(1) is to be made. That being the case, this court cannot by order of *mandamus* compel the Board to submit a report when Parliament has seen fit not to so compel the Board.

It is trite that *mandamus* may only be issued to enforce a mandatory public duty (see *Principles*

of *Administrative Law*, Griffiths & Street at 233-5, 303; *Administrative Law*, Garner 5th ed at 207 et seq. See also: *Minister of Home Affairs v Dabengwa* 1983 (2) ZLR 346 (SC); 1984 (2) SA 345 (ZSC) and *R v Dunsheath ex parte Meredith* [1950] 2 All ER 741 (KB) at 743A-B). Mr *Donovan* also contended that as the Board had exceeded its jurisdiction in making a recommendation instead of confining itself to the presentation of a report, then the recommendation is a nullity. *Certiorari* will generally not issue to quash a nullity. New proceedings may be instituted; *certiorari* being superfluous. The applicant in this event is faced with the difficulty that he cannot compel the Board to reconsider the matter afresh and submit a report in proper form. The only person who can insist upon such report is the Minister. This point was well taken by Mr *Greenland*.

I have doubts in fact that the report of this Board has **any** legal consequences in respect of this particular applicant at all.

Section 33(1) by its own terms is subject to the provisions of s 36, which falls under Part III of the Act, which is headed "Mentally Disordered or Defective Persons who are Dangerous." Section 36(1) provides that:

1985 (1) ZLR p212

EBRAHIM J

Subject to the provisions of section *eighty* -

- (a) the President, on a report from the special institutions board may order the discharge ... of any patient received into a special institution in terms of ...subsection (5) of section *twenty-eight* ...

The Act clearly provides that only the President, **on a report of a Special Institutions Board**, may order the release or transfer of a patient in a special institution by virtue of s 28(5). A Special Institutions Board is constituted in terms of s 58 by appointment of the President.

In the instant case, the applicant is a patient detained in a special institution, and no Special Institutions Board has made any report. All that this court can do is exercise its powers in terms of s 80 to make an appropriate order. In view of the court's wide powers under that section and in view of the very wide prerogative powers of the President in terms of s 33(1) and s 36(1) which may conceivably conflict with those of this court, the court ought not to make any order without the benefit of full argument from all parties concerned.

Even if I am wrong in my view, on the applicability of s 36, Mr *Greenland's* argument finds support in two English cases. See: *Herring v Templeman & Ors* [1973] 3 All ER 569 (CA); *R v The Statutory Visitors to St Lawrence's Hospital, Caterham*; *Ex parte Pritchard* [1953] 2 All ER 767 (QB).

The *Statutory Visitors* case concerned a juvenile who had been committed to an institution in terms of the English equivalent of our special verdict. In terms of the English Mental Deficiency Act of 1913, the order of committal was valid for only one year. It could be extended by a specially constituted Board of Control for a further period of five years, after it had considered a special report of the Visitors (the equivalent of our special boards, etc), who were required by the Act to submit such special report "**within one month after having seen the defective** as to

his mental condition and means of care and supervision which would be available if he were discharged, and stating whether, in the opinion of the visitors, the defective is still a proper person to be detained in his own interest or under guardianship. (My emphasis).

It can be seen that the English Act provides for:

- (1) when the report is to be made; and

1985 (1) ZLR p213

EBRAHIM J

- (2) what matters it is to take into account.

This is not so with our Act.

Returning to the facts of that case: The visitors duly considered the matters in respect of the juvenile concerned, after she was examined by them. Her mother was present during the examination and asked for permission to have counsel represent her and her child. This was refused. The Visitors duly submitted a report recommending that the detention of the juvenile be extended. The mother sought an order of *certiorari* quashing the report. The court of the Queen's Bench Division, under the stewardship of LORD GODDARD CJ, made the following remarks:

What is the scope of the order of certiorari? In these days certainly this court has no desire to limit the scope of the order of certiorari. Before modern legislation so enormously increased the number of orders and inquiries which are made by various government departments, certiorari only applied to what was strictly an inferior court ... calling on that tribunal to return into this court the record and orders it had made or the particular process it was desired to question in order that this court might examine what had been done and see whether or not it was in accordance with law. In modern times the scope of the order of certiorari has been considerably increased, and in a well-known judgment in *R v Electricity Comrs Ex p London Electricity Joint Committee Co (1920) Ltd*, ATKIN LJ said ([1924] 1 KB 205):

Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the [Queen's] Bench Division exercised in these writs.

It will be observed that there must be 'authority to determine', and that the persons must be those who have a duty to act judicially, in which case, their orders, if they act in excess of their authority, can be reviewed by this court under the order of certiorari which has now taken the place of the writ. It is essential to remember that there must be something that can be called a determination which will affect the rights of the applicant and a tribunal whose duty is to act judicially. It is not easy to give an exact definition of what is meant by 'act judicially', but I should say that for this purpose it means a body bound to hear evidence from one side and

1985 (1) ZLR p214

EBRAHIM J

the other. There need not be anything called strictly a lis, but the body would have to hear submissions and evidence by each side and come to a judicial conclusion approximately in the way a court must do. Unless there is an order or a determination by the body to whom it is suggested the order should be directed the order of certiorari will not lie. Attempts are constantly made ... to enlarge the order of certiorari beyond that which can possibly be

allowed. We do not in any way desire to limit the control which this court can exercise over various bodies which are set up under a variety of statutes because it is very important that those bodies, though they may be given wide powers affecting the property of ... subjects, should be controlled and kept within the bounds of the jurisdiction which has been conferred by Parliament. But if Parliament has put duties on, or given powers to, persons, it is not for this court to take away those powers unless we can find that the tribunal is exceeding its powers. The first question we have to decide in this case is whether the persons to whom this order is sought to be directed are a tribunal at all.

It appears to me ... that these visitors are not, for this purpose, a tribunal at all and that they have no power to give a decision. The decision whether the infant is to remain in the hospital after the year has elapsed ... is to be the decision of the Board of Control, and these visitors' reports ... are no more than material which is put before the board to enable the board to come to a decision. The visitors have no power ... to say that this infant is to be detained after a year. All they have to do is to see her, to ascertain the means of care and supervision which will be available if she is discharged, and to state whether, in their opinion, she is a proper person to be detained in her own interest in the institution.

When the visitors assembled to consider this case the mother of the infant desired to be heard by them and to be represented by counsel. ...

Where do we find that there is any obligation on the visitors to hear anybody? They are not entrusted with the duty of coming to a decision; that is the duty of the board. The board are told by Parliament what evidence or facts or matter they are to have before them when they come to a decision. It is always possible for the parent or guardian and the detained person himself to obtain the opinion of a duly qualified medical practitioner, who may or may not agree with the view put forward by the medical officer of the institution. ... In my opinion, it is abundantly clear that the visitors here are not a body against whom an order of

1985 (1) ZLR p215

EBRAHIM J

certiorari will lie because they have no power to come to a decision. If the board comes to a decision that this infant is to be detained, a question may then arise for our determination, but we cannot grant certiorari to bring up a report which is nothing more nor less than a piece of evidence to lay before the board. (per LORD GODDARD CJ at 768D-769H).

The comments of the CHIEF JUSTICE at 771A-E and 772A-C and those of PARKER J at 773A-C are equally instructive.

As to when a body may be said to be performing an administrative as opposed to a judicial or quasi-judicial function, see *R v Metropolitan Police Commissioner; ex Parte Parker* [1953] 2 All ER 717 (QB) - and, in particular, at 722.

In the other case *Herring v Templeman (supra)*, a student of a teachers training college had been dismissed. He sought to have the dismissal set aside on various grounds based generally on his claim that the principles of natural justice had been denied him during the various stages leading up to his dismissal. His action was based not on any statutory rights which had been infringed but certain contractual rights arising out of his membership with the college; but the issues applicable are the same: which are basically, a determination as to whether or not the college had exceeded its power in dismissing him as it did.

Parts of the decision are not relevant insofar as the status of the various bodies whose actions were attacked in that case are not necessarily equivalent to that of the Board in this case, but the principles enunciated are relevant to another part of the argument which will later be dealt

with.

Turning to the facts of *Herring's* case: The college was constituted by a charitable trust deed. Its operations were governed by the terms of the deed, which provided, *inter alia*, for the creation of a governing body (hereinafter referred to as "the Governors"); an academic board (hereinafter referred to as "the Board"), which included the Principal; and the Principal.

The Board was empowered to recommend to the Principal dismissal of a student found to be wanting in academic ability. The Principal could, in his turn, recommend dismissal. Any such dismissal by him was effective as soon as the Governors confirmed it by resolution. The Governors were obliged to consider any representation made by the student before passing such resolution.

1985 (1) ZLR p216

EBRAHIM J

The plaintiff had been dismissed in the final year of his study pursuant to a recommendation of the Board, who submitted a report to the Principal. He considered the report and passed it on to the Governors, recommending the plaintiff's dismissal. The Board considered the report, considered the representations of plaintiff and confirmed his dismissal. Plaintiff instituted action for the revocation of the Governor's decision on the following grounds:

- (1) That he had been denied a hearing by:
 - (a) the Board, which took into account extraneous matters not relevant to the deliberations, including adverse comments on his capabilities; and
 - (b) the Principal, who acted on the Board's report without hearing him first.
- (2) That he had been denied a fair hearing by the Governors in that they denied him the opportunity of challenging the report of the Board.

Counsel for the defendant in that case applied for the claim to be struck out as disclosing no cause of action. In allowing the application, the court held that there had been no breach of the principles of natural justice on the grounds that:

- (1) There was no obligation on the Board to accord plaintiff a hearing as it was duty bound only to form an unbiased assessment of his capabilities; and this they did, taking into account all relevant considerations. It had not been shown that, in taking account of the adverse opinions of his attitude and suitability to teaching and comments on his inability "to understand his deficiencies and ... [lack] ... of that capacity for self-criticism which might have given hope that he might one day be able to equip himself satisfactorily for the teaching profession", the Board had taken account of any fact which it ought not to have done.
- (2) There was no ground for implying that the Principal had to re-open the question of the Board's recommendation before himself adopting it. (It is noteworthy that the Principal was himself a member of the Board).
- (3) That the Governors were not a court of law and the hearing before them was neither a law suit nor a legal arbitration. It was bound only to act fairly and this it had done.

EBRAHIM J

In making these various rulings, the court, in a judgment prepared by RUSSELL LJ, relied on the following propositions:

... the complaints in relation to the actions of both the academic board and the principal both assert that each should have accorded the plaintiff a hearing ... Such contractual obligations ... can arise, if at all, only by implication from the contract alleged. There is no express provision for such hearings. By way of contrast ... the governing body ... [cannot] resolve to confirm a recommendation of the principal ... save after considering such representations ... as the student may wish to make.' There being this express requirement in the case of the body **who alone possessed the power to expel it is not easy to see on what principle of law an implied obligation of the kind alleged should be imposed on either the academic board or the principal who have only the power to make recommendations ...** (at 584b-c; my emphasis).

The duty of the academic board under the alleged contract ... was to form an unbiased assessment of his standard of work based on the entirety of his record and potential. This was their function. **If they thought it relevant** in making that unbiased assessment **to take into account all or any of the matters ... [already referred to] ... we think they are entirely free to do so. We see no unfairness in the academic board judging these matters on all relevant material available to them from whatever source, and in their so doing without first hearing the plaintiff.** (at 584e-f; my emphasis).

In the present case **the academic board ... had no power to expel.** It only had power to recommend expulsions ... The 'extraneous' matters [of which account should have been had] ... were not matters which ... the board was entitled to or did take into account. Those matters were, under the hierarchical structure in question in this case, **solely for the governing body who were enjoined ... to grant a hearing or to entertain written representations before taking their final decision.** (at 585g-h; my emphasis).

Counsel for the plaintiff's argument in relation to the academic board ... amounted almost to a contention that the proceedings at both stages had to be conducted before a court or before a legal arbitrator. We emphatically disagree." (at 586e).

EBRAHIM J

Like the academic board, **the principal had no power to expel a student, but only to recommend his expulsion.** What he was passing on as his own recommendation was the academic board's recommendation ... **He could have declined to pass it on. But he decided to pass it on as something with which he agreed. He must clearly have applied his mind to the question whether he should accept the recommendation; otherwise he would not have passed it on as he did.** (at 586f-g; my emphasis).

The basic argument was that the governors were in serious error in refusing to re-open the academic board's assessment of the plaintiff's fitness to be a teacher on the grounds stated, **in refusing to allow witnesses to be called, examined in this connection and to reveal to the plaintiff all the evidence, opinions and reports** on which that assessment had been reached by the academic board ...

We have already pointed out that the hearing before the governing body was neither a law suit nor a legal arbitration. It was a hearing designed to enable the governing body to decide whether, notwithstanding the academic board's and principal's recommendations, there were any reasons why those recommendations should not be accepted. It was neither a rehearing nor a retrial of all those matters which led to the academic board's and principal's recommendations. It is no criticism of the governing body to say that, looking at its composition ..., it is not, and was not intended to be, a body expert in the same fields as those in which the academic board was expert. (at 586j-587c; my emphasis).

The purpose of the hearing before the governing body is not, as we think, that there should be a detailed review of the reasons for or against the evidence on which the recommendation had been arrived at. (at 586c-d).

Though no exact analogy can be drawn between the Board in this case and the governors in *Herring's* case, some of the principles enunciated by the court in relation to the Governors in that case are, as has already been said, apposite.

The governing body is master of its own procedure. Its members are not judges in a law court, nor are they legal arbitrators. They are entitled to such flexibility in their procedure as they think the particular case under consideration requires. (at 587g-h).

1985 (1) ZLR p219

EBRAHIM J

Was the governing body then bound to act as a court of appeal from [the assessment of the board]? We do not think so. The governing body recognised that it was not bound by the assessment [of the board]. On that, the crucial issue, its discretion was unfettered ... Its duty was to be fair. It was fair ... We see no reason to think that there was any vestige of unfairness. (at 588a-d).

Mr *Greenland* argued, likewise, that the discretion of the Board in this case was unfettered as the Board was not a tribunal.

Indeed, all the cases cited by Mr *Donovan* revolved around the question of whether or not **the tribunals** in these cases, which were undeniably bound to act judicially, had in fact done so. See: *Tabakian v District Commissioner, Salisbury* 1973 (2) RLR 348 (GD).

Perhaps anticipating this difficulty Mr *Donovan* advanced the thesis that the Board in this case was equivalent to a statutory inquiry. He argued further that it was therefore bound to act fairly. And this, he said, the Board did not do. He cited the various grounds put forward by the applicant in support of the main allegations of breaches of the principles of natural justice. Although I am of the view that, to a degree, Mr *Donovan's* assertions that the Board acted unfairly go too far, I am inclined to agree with him; that the Board was required to act fairly, albeit that it was a purely administrative body.

I rely, for this proposition, on the provisions of s 80, to which I have already referred, and various considerations which I shall refer to later.

THE FAILURE TO ACT FAIRLY

Under this head, Mr *Donovan* cited the following errors made by the Board:

- (1) The consideration of "extraneous matters", viz:
 - (a) the policy of the Ministry in these cases;
 - (b) the moral blameworthiness of the applicant and the period of incarceration he would have had to undergo but for the special verdict; and
 - (c) the consideration of statements made by the applicant's wife prior to her death.
- (2) The failure to call Dr Vermeulen to amplify his reports and the consequent finding by the Board that applicant was suffering from endogenous depression.

EBRAHIM J

- (3) The failure to give reasons.
- (4) The bias on the part of the Board and, in particular, on the part of Dr Baker, a member thereof.

The "duty to act fairly" has not been analysed in great detail and, indeed, Professor Wade in *Administrative Law* 4th ed at 446, remarks that the term was coined simply to evade the consequences that arise from the classification of functions into "judicial" and "administrative":

At least we reach the result directly ...: administrative powers which affect rights must be exercised in accordance with natural justice.

If this was the basis of Mr *Donovan's* argument, then I reject it for the various reasons already given. Obviously, the English law on the amenability of statutory inquiries to judicial control is considerably enhanced by the Tribunals and Inquiries Act, 1971, which regulates the conduct of almost all inquiries held in terms of any administrative exercise which are not specifically regulated by the enactment empowering them to be held. And too much reliance cannot be placed on the English law.

The "duty to act fairly" has been the subject of much judicial examination in the English courts, where the concept was first recognized in the case of *Ridge v Baldwin & Others* [1963] 2 All ER 66 (HL), where LORD REID observed at 76D-E:

We do not have a developed system of administrative law - perhaps because until fairly recently we did not need it. So it is not surprising that in dealing with new types of cases the courts have had to grope for solutions, and have found that old powers, rules and procedure are largely inapplicable to cases which they were never designed or intended to deal with.

LORD EVERSHED, in his turn, made the following comments at 84G-85B:

It has been said many times that the exact requirements in any case of the so-called principles of natural justice cannot be precisely defined; that they depend in each case on the circumstances of that case ... Your Lordships were therefore not unnaturally referred to a great many cases, but as I believe that your Lordships agree, it is by no means easy to treat these decisions as entirely uniform and still less easy to be able to extract from them the means of propounding a precise statement of the circum-

EBRAHIM J

stances or of cases in which the principles can be invoked before the courts. I am, however, content to assume that the invocation should not be limited to cases where the body concerned, whether a domestic committee or some body established by a statute, is one which is exercising judicial or quasi-judicial functions strictly so called; but that such invocation may also be had in cases where the body concerned can properly be described as administrative - so long as it can be said ... that the invocation is required in order to conform to the ultimate principle of fitness with regard to the nature of man as a rational and social being. On the other hand, it is ... no less plain now that Parliament may by appropriate language in a statute make it clear that the activity or discretion of the body constituted by the statute is not to be subject to any control or interference by the courts.

In several decisions since then, the English courts and other courts in the Commonwealth have tended to eschew the traditional or classical approach to problems of administrative necessity

and the consequent infringement of individual liberties and rights, by classification of functions.

Furthermore, we believe that the clear-cut distinction, once favoured by the courts, between administrative functions, on the one hand, and judicial functions on the other, as a result of which it is proper to require observance of the rules of natural justice in the latter but not in the former, is not in these days to be accepted as supplying the answer in a case such as we have before us. Former clear-cut distinctions have been blurred in recent years by directions from the highest authority to apply the requirements of fairness in administrative action as well, if the interests of justice make it apparent that the quality of fairness is required in those actions." (per McCarthy P, *Lower Hutt City Council v Bank* [1974] 1 NZLR 545 at 548).

The result has been that the spirit encapsulated in the precepts of "natural justice" is applied neither rigidly nor blindly, but fluidly and flexibly, taking into account not only considerations of the individual but those of government as well; with a mature outlook and recognition that in some cases the public interests may legitimately supersede those of the individual. (*The Judicial Review of Administrative Action* de Smith 238 *et seq*, 257, 270 *et seq*).

Inherent in this view is the appreciation that policy may require that individual interests be compromised and undertakings publicly given be

1985 (1) ZLR p222

EBRAHIM J

broken, (see *Re Liverpool Taxi-Owners' Association* [1972] 2 All ER 589 (CA); also *R v Amber Valley District Council*, ex parte *Jackson* [1984] 3 All ER 501 (QB)), provided that there is nevertheless fair play in the process.

Natural justice is but fairness writ large and juridically it has been described as "fair play in action". Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But ... the requirements of natural justice must depend on the circumstances of each case and the subject-matter under consideration. (per LORD MORRIS, *Furnell v Whangarei High Schools Board* [1973] 1 All ER 400 at 412b).

While the courts may imply into any suitable case an obligation to act with fairness, it does not follow that fairness necessarily requires a plurality of hearings or representations. The requirements of fairness will vary from case to case. As was said in *Wiseman & Anor v Borneman & Others* [1969] 3 All ER 275 (HL):

Every public officer who has to decide whether to prosecute or raise proceedings ought first to decide whether there is a *prima facie* case, but no one supposes that justice requires that he should first seek the comments of the accused or the defendant on the material before him. (per LORD REID at 277I-278A).

In this regard see also *Pearlberg v Varty (Inspector of Taxes)* [1972] 2 All ER 6 (HL).

The case of *Re Pergamon Press Ltd* [1970] 3 All ER 535 (CA) related to a Board of Trade Investigation under the Companies Act, and to the duties of inspectors. Their function was inquisitorial and they could, if they thought fit, make findings of fact. They were under a duty to report to the Board of Trade and obliged to send a copy to the company concerned. The court held that although the proceedings before the inspectors were only administrative, and not judicial or quasi-judicial, yet the proceedings were of such a nature that the inspectors were bound to act fairly, even though the report might not result in further action against the company or directors.

The inspectors can obtain information in any way which they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter or verse. An outline of the charge will suffice.

1985 (1) ZLR p223

EBRAHIM J

This is what the inspectors propose to do, but the directors want more ... In all this the directors go too far ... Remember [this is] not a judicial proceeding ... (per LORD DENNING MR at 539f-h).

On the basis, then, of these decisions I am not prepared to accept Mr *Greenland's* submissions that the court cannot scrutinize the proceedings of the Board on the ground that it was purely an administrative body. While it is true that the Act does not specify any of those features which Mr *Greenland* urged would signify that the Board was to act quasi-judicially, I am satisfied that Parliament intended, by virtue of s 80, that the Board must act fairly within the meaning of that term as hereinbefore analysed and explained.

Mr *Greenland* argued that the policy of the Minister, the rationale behind the detention of persons who are held legally irresponsible, were all relevant considerations to be taken into account by the Board. Furthermore, the Board had placed all these matters before applicant's legal practitioner and these were open to discussion. They were charged with the function of reporting to the Minister on the discharge of the applicant. In this regard their discretion was unfettered. If in their deliberations they considered it to be relevant to debate these factors, they were entirely free to do so. (See *Herring's case, supra*). Mr *Greenland* further commented that the Board was not bound to give the applicant a hearing in any event, but that they did do so, and that no criticism can therefore attach to it. (See also: *The King v Port of London Authority, ex parte Kynoch, Ltd* [1919] 1 KB 176 (CA) at 184). I agree; the Board was bound to act fairly and this it did - and in acting fairly it was not required to act as a court of law or a legal arbitration. (See also *Herring's case, supra*, and *Pergamon Press, supra*).

Mr *Donovan* also criticized the Board's consideration of the statements made by the applicant's deceased wife before her demise. Bearing in mind that the Board was not engaged in a legal suit and the non-applicability of the rules of evidence which would bind a tribunal engaged in such a suit, I am unable to agree with his submission. If, in the Board's unfettered discretion, they considered that this description of the accused's behavioral patterns during the stressful situation leading to his institutionalization, was relevant, it was quite right to do so. It did so openly and with the applicant's knowledge (see *Herring's case, supra*).

In any event, these various factors appear not to have played a decisive role in the deliberations. The Board's last two meetings of 26 September and 30 October 1984 revolve around the cogency of Dr Vermeulen's opinion,

1985 (1) ZLR p224

EBRAHIM J

which opinion was not accepted (see page 37 of the record).

The criticism that the Board did not accept the opinion of Dr Vermeulen is without substance.

Even a court of law is not bound to accept the opinion of an expert. As Dr Baker pointed out, whether the depression causing the applicant's mental instability was endogenous or reactive was really a matter of opinion on which even experts might disagree. (See the respondent's replying affidavits, p 53, para d.) Inherent in the notion of discretionary power, too, is the power to make mistakes. In any event, the decisive consideration was the fact that the Board was not satisfied that the risk of a relapse had been sufficient eliminated.

I am not persuaded by Mr *Donovan's* argument that the Board breached the rules of natural justice by not calling Dr Vermeulen before it. This assertion is tantamount to saying that the Board was compelled to accept his views, which were not only before it in written form, but were views on which clarification had been sought on more than one occasion. (See *Perlberg's* case, *supra*.)

It has been stated that the Board was really a body to be consulted and there is no requirement that the consultation need be in public nor is there a need to disclose all the information obtained. I am satisfied that in refusing to disclose its reasons the Board did not act unfairly.

In this regard, the comments of LORD DENNING in the *Pergamon Press* case (*supra*, at 537H et seq) and those of LORD GODDARD CJ in the *Statutory Visitors* case (*supra*, at 772A-C) are instructive.

The only remaining consideration is the allegation of bias, made against Dr Baker. Bias which disables or invalidates any proceedings must be shown to be one of three kinds before the courts will take cognisance of it:

- (1) bias arising out of a pecuniary interest; or
- (2) personal bias; or
- (3) bias on the subject-matter.

The first of these may be safely ignored, as may any suggestion that there was any personal bias. Clearly, this was not established on the papers before the court. Indeed, Mr *Donovan's* argument was, if I understood him correctly, that the Board and, in particular, Dr Baker, had approached the case with a closed mind and preconceived ideas. In making this claim, the applicant relied on several factors:

1985 (1) ZLR p225

EBRAHIM J

- (1) The impressions of the applicant's legal representative at the various meetings of the Board, which impressions were based on the comments of the Board in respect of
 - (a) the policy and rationale behind the incarceration of mental defectives who are held to be legally irresponsible;
 - (b) the policy of the Ministry generally;
 - (c) the conclusion that the applicant had been suffering from endogenous depression;

- (d) references made by Dr Baker to the relative stability of the environment at Mlondolozi Prison as compared with the atmosphere of ordinary life; and
 - (e) indications that Dr Baker may have been doubtful of the validity of the trial court's assessment of the applicant's state of mind at the time of committing the offence; and his susceptibility to alcohol. (See page 29 of the applicant's notice of motion papers).
- (2) The observation of the applicant's father, who met and discussed the matter with Dr Baker. (See pages 40-44 of the applicant's notice of motion papers.)

In assessing these various considerations put forward in support of the allegations of bias, it is well to bear the following points in mind:

- (1) the proper time frame during which the impressions were created in relation to the proceedings of the Board in their entirety; and
- (2) the principle earlier enunciated - that the requirements of fair play vary from case to case, and circumstance to circumstance; and that what may disqualify in a court of law may not disqualify in proceedings taken in a purely administrative context.

It is also obvious that the various bases upon which the applicant's legal practitioner alleges bias, are the selfsame grounds put forward as the irrelevant considerations which the Board improperly considered.

As has already been said, the Board was given an unfettered discretion to consider the release of the applicant, who was committed to a special institution as a result of having committed a crime whilst under the influence of a mental disorder. If the Board, in its discretion, thought it relevant and part of their function to consider these aspects, they were entirely free to do so, provided, of course, they did so in a manner which was fair. This they did.

1985 (1) ZLR p226

EBRAHIM J

I can see no ground for concluding a vitiating bias therefrom.

Once these considerations are excluded from the allegations advanced under this head, little remains from which bias may be inferred. At most, one can say that Dr Baker exhibited an overly enthusiastic approach to the discharge of his functions. I am not satisfied that the nature of this "bias" is such as would entitle this court to intervene:

... mere interest or even enthusiasm which an official may have in the discharge of his functions in pursuance of the object or purpose of his office, is not bias in the sense required by the law in the matter of reviews. (per SQUIRES J, in *Witham v The Director of Civil Aviation & Anor* 1983 (1) ZLR 52 (HC) at 56 B).

It is apparent also that the impressions of the applicant's legal practitioner, which are referred to above, were gained during the course of the Board's **first** meeting held on 27 June 1984. (See page 29 of applicant's notice of motion papers). At all subsequent meetings the Board was, almost exclusively, seized with the considerations of the likelihood of a relapse.

Noteworthy also is the fact that the applicant's father spoke to Dr Baker on 20 November 1984, at a time long after the decision of the Board had been reached and at a stage when the opinions and views of the Board which he had adopted and shared must have hardened and

set. If, in the course of the discussions, the doctor made the statements he is alleged to have made, I do not conceive it to be the duty of this court to call them into question; particularly so, when regard is had to the nature and functions of the Board. Again, reference is made to the cases of *Pergamon Press* and the *Statutory Visitors (supra)*.

Mr *Greenland* invited the court to resolve the allegations of malice by the applicant and the denials of the Board thereto on the papers as filed. The adoption of this course amounts to the resolution of the issues by a "half-baked" trial; and the invitation of counsel must be declined.

Even assuming, then, that at the very worst, Dr Baker was biased in respect of the subject-matter, and that this type of bias is cognizable by this court on review, is the bias of such seriousness that reasonable people might think the applicant had been unfairly treated? That was the test Mr *Donovan* urged the court to apply. See: *Hannam v Bradford City Council* [1970] 2 All ER 690 (CA) at 694a-c.

1985 (1) ZLR p227

EBRAHIM J

Bearing in mind the fact that the Board was purely an administrative body with no power of a decision directly affecting the rights of the applicant, is it at all likely that a reasonable man would come to the conclusion that the Board, comprising of, as it did, an experienced magistrate and an experienced legal practitioner, both of long standing and eminence, was influenced by the bias of Dr Baker? I think not.

In all the circumstances, the application must fail and be dismissed with costs.

Atherstone & Cook, legal practitioners for the applicant

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

1985 (1) ZLR p228

S v MHANDU 1985 (1) ZLR 228 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, Gubbay and McNally JJA

Subject ???

3 and 26 April 1985

Flynote

Evidence - sexual offences - cautionary rule - identity of assailant the only issue.

Criminal procedure - charge splitting - three offences with one complainant. Whether one count or three - sentence - statutory offences - s 3(a) Criminal Law Amendment Act - ill-defined custom that marriage to a

woman gives man licence in respect of female relatives - consent of complainant - weight to be attached.

Headnote

The evidence established that the complainant had undoubtedly had sexual intercourse with a man in about October 1983 when she was 14 years old, and had subsequently borne a child. The only issue was the identity of the offender, it being alleged that the appellant was falsely incriminated -

- (a) out of malice; and
- (b) for his wealth, to enforce a marriage.

Intercourse had taken place on three occasions, the complainant not protesting and apparently giving consent on the third occasion in accordance with an ill-defined custom by which a married man is allowed some licence in respect of his wife's female relatives. The appellant was a much older businessman and schoolteacher.

Held, where the identity of the offender is the sole issue, and surrounding circumstances do not reveal the reasonable possibility of conscious or unconscious fabrication, a judicial officer may act on the single, uncorroborated evidence of the complainant.

1985 (1) ZLR p229

McNALLY JA

Held, further, that in sentencing, the ill-informed consent of a young complainant is by no means mitigatory.

Semble, the custom referred to is not a mitigating feature.

Cases cited:

S v Mutawarira & Anor 1973 (1) RLR 292 (AD); 1973 (3) SA 901 (RAD)

S v Christie 1982 (1) SA 464 (AD)

S v Mupfudza 1982 (1) ZLR 271 (SC)

R v Judson 1965 RLR 501 (AD); 1966 (1) SA 88 (SRAD)

R v Shava 1967 RLR 367 (GD)

S v Tshuma S-86-84 (unreported)

R M Moyo-Majwabu for the appellant

B N Sigidi for the respondent

Judgment

McNally JA: The appellant was charged with and convicted of three offences involving s 3(a)

of the Criminal Law Amendment Act [*Chapter 58*]. The offences alleged involved his having unlawful carnal knowledge of a girl under the age of 16 on three separate occasions in the month of October 1983. In fact the same girl was involved in all three counts and it would have been preferable, I think to charge the offence in one count. See *S v Mutawarira & Anor* 1973 (1) RLR 292 (GD) at 296; 1973 (3) SA 901 (RAD) at 903. However, there is no settled rule in this regard (see *S v Christie* 1982 (1) SA 464 (AD) at 485) and any prejudice that may have been inherent in the procedure adopted was nullified by the fact that the magistrate took all three counts as one for purposes of sentence. He sentenced the appellant to 12 months' imprisonment with labour of which he suspended half. The appeal is against conviction and sentence.

It was established in the magistrates court that the appellant is a schoolteacher aged 46 who lived in the Chilimanzi Communal Lands. His wife is the sister of the complainant's father. The complainant was 14 at the time of the alleged offence. Both parties lived in the same village, 100 metres apart. The appellant admitted knowing she was under 16. The complainant gave birth to a baby girl on 25 July, 1984. There is thus no doubt that she had intercourse with some man in or about October 1983.

The complainant says it was the appellant. She says the first occasion he had sexual intercourse with her was on a Friday afternoon when she was collecting firewood. He forced her to the ground. She did not consent. She did

1985 (1) ZLR p230

McNALLY JA

not scream. She bled. Her mother was in Bulawayo at the time. She reported to her mother when she came back from Bulawayo four days later, but reported only that the appellant was "troubling" her. The second occasion was also a Friday. He came in the morning asking for water and then forced her to the ground and had sexual intercourse again. She bled again and did not go to school. She told her mother, again without telling her the full truth, and her mother advised her to speak to her aunt, the appellant's wife. She did so, again without being specific as to the nature of the sexual molestation. Her aunt simply told her not to worry since such behaviour was customary.

There is apparently some ill-defined custom in the area that marriage to a woman gives a man a certain licence in respect of her female relatives. The extent of the custom is unclear, but it is unlikely that the licence extends to female children. However, it may be that puberty rather than the age of 16 is the dividing line between children and young women.

In the light of this advice from her aunt, the complainant did not resist the appellant on the third occasion, which was a Saturday. He asked her to help him push a wheelbarrow, and when they reached some kopjes they had sexual intercourse again. This was the last time.

The complainant was cross-examined about one Canisius. She admitted knowing him, though she said they went to different schools. She denied he was her boyfriend. The specific allegations later to be made by the defence witnesses were not put to her by the appellant's then legal representative.

The complainant's mother said that on her return from Bulawayo her daughter said the appellant "comes worrying her". She gained the impression that the appellant was just "patting her or touching or fondling her breasts, because they are sister-in-law and brother-in-law". She apparently took no action. In October her daughter made a second report. She said the appellant was worrying her. Her mother advised her to go and speak to her aunt, the appellant's wife. Then again she saw her daughter who was crying and talking of the appellant. (This statement in the context in which it appears, seems to refer back to the first occasion, despite the use of the word "again".)

At her husband's request she saw the appellant and his wife. She says the appellant was warned "to continue playing with her in the manner complainant was saying". It is clear the word "not" has not been omitted. The appellant says he denied doing anything more than greeting the complainant. But he admits

1985 (1) ZLR p231

McNALLY JA

that there was a meeting and a complainant made in October. His wife also confirms the meeting and the complainant. But she denied telling the complainant came to her and complained. But she denied telling the complainant not to worry because this was customary behaviour.

The defence case consisted essentially of three parts - a denial that the events alleged took place at all; an assertion that there was enmity between the two parties, the hatred coming from the complainant's side rather than the appellant's side; and an assertion that the complainant had been seen consorting with another boy who could well have fathered her child.

The appellant himself denied that the events took place, but he did admit, as already recorded, that in October he was approached by the complainant's father, through his (the appellant's) wife, who "said that complainant had given them report that she was not pleased (with) the way I played with her". He denied doing more than greeting her.

The appellant's wife said she was approached by the complainant's mother who said the appellant "is not playing with complainant properly". She summoned the complainant. "I asked her she said accused said he wanted water to drink." She continued: "My husband took me to father and mother of complainant. He denied emphatically." She also said: "I would not have arranged for a go ahead since we don not see eye to eye." I take this to be a reference to the allegation that she told her niece not to worry about such behaviour since it was customary. She denied that the complainant had ever alleged sexual intercourse. But obviously some allegation of a sexual nature was made which the appellant "denied emphatically".

The defence then called Venge Gomba, the father of the appellant's wife and the complainants father. He lives with the appellant's wife and is supported by them. He gave evidence solely as to the enmity between this son (the complainant's father) and the appellant. The reasons for the enmity are somewhat obscure, but he said it had persisted for some two years.

Next Felicitas Gwazha was called. She is the daughter of the last witness and thus the sister of the appellant. The main point of her evidence was that the complainant was in love with one

Canisius. She often saw them on Sundays at the well. She said her brother (the complainant's father) was against appellant because the latter supported their father and mother and her. Because of her dependence on the appellant she is not an impartial witness.

1985 (1) ZLR p232

McNALLY JA

Finally a sixteen year old youth was called who gave evidence about the relationship between the complainant and the young Canisius. His evidence is very hard to follow, but that is partly perhaps because the record is not verbatim but based apparently on the magistrates notes. He said:

In 1983 I was sent to buy some meat. On my way home I met complainant and Canisius coming from a hill. Before I saw them I heard footsteps I ran away. I saw them another Sunday at Nyautonge River. I first saw Canisius asking for William. That was the day I saw them together. I was at Machekane School with complainant. I know nothing about the case.

In cross-examination the following is recorded:

Q. Why do you say they (presumably the complainant and Canisius) had sexual intercourse?

A. A beast jumped.

Q. So you knew that?

A. Yes.

Q. Did you tell the complainants mother?

A. I made a report (to) Gwashe.

Q. Why did you not tell the mother?

A. I just told the complainant's aunt.

In re-examination he said:

Bonifacia's mother beat me up. I was physically assaulted.

The assault was candidly admitted by the mother of the complainant, who said she did so because:

He came bragging saying that he had been given bread to be a witness.

One further piece of evidence by the complainant's mother is worthy of note. It was suggested to her in cross-examination:

You would have liked your daughter to have been married by the accused?

and she replied:

1985 (1) ZLR p233

McNALLY JA

Yes, since he had elected to love her.

The magistrate rejected the "enmity" allegations and also found that the evidence of the sixteen year old boy did not establish that the complainant had sexual relationships with other men so as to make her a prostitute. His main basis for rejecting the defence, however, was that the complaint to the appellant and his wife in October 1983 was made before it could have been known to anyone that the complainant was pregnant. So there was no reason for them to conspire in the age-old trick of blaming a wealthy man for the pregnancy of their daughter.

On appeal Mr *Moyo-Majwabu* argued that there was insufficient evidence for conviction.

The question of sufficiency of evidence in sexual cases and the need for corroboration has been dealt with frequently in this court, and the leading case, though counsel did not refer to it, is *S v Mupfudza* 1982 (1) ZLR 271 (SC). In that case BARON JA said, at 273E:

The court looks for corroboration of the evidence of a suspect witness. But - perhaps precisely because of the search for corroboration - trial courts frequently forget that the court must first decide whether the suspect witness is credible; ... If not, the matter is at an end, and the question of corroboration of, or support for, his testimony does not arise; it is only if the court believes the witness that in cases where a cautionary rule applies it then proceeds to consider whether it might still not have been deceived by a plausible witness.

The magistrate did not specifically comment on the credibility of the witnesses. It would have been better if he had done so. But clearly he believed the complainant. He had grounds for doing so. She was candid about her initial limited complaint and she admitted consent on the third occasion. It remains therefore to consider whether her evidence was adequately corroborated or supported.

In dealing with this aspect BARON JA said, at 275B:

The question then is: in what circumstances can the court be satisfied that the danger of false incrimination has been excluded and that it is safe to rely on the evidence of the suspect witness? Ideally the court will rely on corroboration, in its stricter sense, implicating the accused. But even in

1985 (1) ZLR p234

McNALLY JA

the absence of corroboration there may be circumstances which can properly satisfy the court that the danger has been excluded. These circumstances do not lend themselves to close description; ... The danger in all cases of this kind is of false incrimination, but the reasons for that danger - the possible motives of the suspect witness - may be many and various, and will vary from case to case. ... The complainant in a sexual case may allege that a consensual intercourse was a rape out of fear of a father or a husband; or she may accuse the wrong person of what was clearly a rape in order to protect the real culprit; ... It is the possible motives in the particular case which the court must consider together with the evidence in the case in order to decide whether in the particular circumstances the danger of false incrimination can safely be regarded as having been excluded.

Now, the present is a case where the question of consent is not material, save perhaps to the extent that it affects credibility. Nor is it open to question that at about the time alleged the complainant had a sexual relationship with some man - the birth of the child is conclusive evidence on that point. So the danger which we are seeking to guard against is simply the danger that the blame has been laid deliberately at the wrong door. There is no question of

mistaken identity.

It was precisely this point which arose for consideration in *R v Judson* 1965 RLR 501 (AD); 1966 (1) SA 88 (SRAD). LEWIS AJA (as he then was) said, at the foot of p 508:

It seems to me, therefore, that where the identify of the offender is the sole issue, the approach to be adopted, at the stage when the court weighs up all the evidence and considers its verdict, should depend on the particular circumstances of each case. Generally speaking, the special formula as laid down by WATERMEYER CJ, (ie that the merits of the complainant and the demerits of the accused as witnesses are beyond question) will be appropriate where it is a question of the complainant's word against that of the accused, where the court can derive no real assistance from the surrounding circumstances and where the danger of a false identification has not been eliminated; but if the surrounding circumstances exclude any reasonable possibility of mistaken identity or of any potential motive to falsify the identity of the offender, then the underlying reason for that special approach will fall away.

There is in this case a potential motive to falsify the identity of the offender.

1985 (1) ZLR p235

McNALLY JA

The defence has been put forward. But it has been put forward on two different bases which are to an extent mutually exclusive. Thus it is first suggested that the appellant has been chosen because he is wealthy and the complainant's parents would like to see her married to a wealthy man. But on the other hand it is said they have a grudge against him. Why would they want their daughter to marry a man whom they hate?

It is in this context that I find convincing the evidence of the complainant's mother when she says frankly that she favoured the marriage "since he had elected to love her". This is both good evidence in rebuttal of the alleged hatred, and an admission which a scheming and lying mother would be unlikely to make.

It seems to me also that on the particular facts of this case the evidence of the complaints is especially significant. I am conscious of the fact that on the evidence as recorded there is not an exact concordance between the evidence of the complainant and her mother. But it seems to me that the general tenor of the evidence of the complaint is confirmed by the evidence of the appellant and his wife. Thus it is established beyond question that:

1. In October 1983 the complainant spoke to her mother about the appellant "worrying" her sexually on more than one occasion.
2. In the same month this complaint was relayed by the complainant to her aunt, the wife of the appellant.
3. Again in the same month the complainant's parents (or one or other of them) spoke to the appellant and his wife about the matter.

This evidence is not "corroborative" in the strict sense of the word, since a witness cannot corroborate herself. I rely on it as evidence tending to exclude the danger of false incrimination, and I cite again the words of BARON JA in *Mupfudza's* case, *supra*:

But even in the absence of corroboration there may be circumstances which can properly satisfy the court that the danger (of false incrimination) has been excluded.

What the learned judge is saying is that there are cases where, even in the absence of corroboration, a conviction may be appropriate. *R v Judson, supra*, was such a case. It was in that case that MACDONALD AJP (as he then was), in a separate judgment, said, at p 503F-G:

1985 (1) ZLR p236

McNALLY JA

... the exercise of caution should not be allowed to displace the exercise of common sense. If a judicial officer, having anxiously scrutinized such evidence with a view to discovering whether there is any reasonable possibility of conscious or unconscious fabrication is satisfied that there is no such possibility and that the evidence of the single Crown witness may, due and proper weight being given to the whole of the evidence, be safely accepted as proving the guilt of the accused beyond reasonable doubt, he should not allow his judgment to be swayed by fanciful and unrealistic fears.

I am strongly impressed by this "complaint" evidence for the following reasons:

1. There is not the slightest doubt that the complainant did complain about sexual harrassment by the appellant.
2. She did so in October 1983 before she could have known she was pregnant. She could not therefore have had an improper motive falsely to accuse him.
3. Her complaint was a shy and childish one about being "worried" sexually. If she was a scheming hussy seeking a wealthy "father" for her illegitimate child, she would have accused him of rape outright.
4. She persisted in her complaint after her mother first ignored it, and persuaded her family to discuss it with the appellant and his wife. But even then her family did not appreciate that sexual intercourse was involved. So her parents were not trying to acquire a wealthy "in-law" or to vent their anger on their "enemy", the appellant.
5. The complainant herself spoke to the appellant's wife. That much is admitted by the wife. Understandably, the wife denies telling her niece not to bother about it. But the complainant is most convincing when she says that it was because of this advice that on the third occasion she did not resist. If she were trying to foist Canisius's child on to the appellant why would she tell such a complicated story and why put herself at least partially in the wrong?

To my mind, her conduct, and that of her parents, in October 1983 is wholly inconsistent with the suggestion that they are seeking falsely to foist her illegitimate child on to the appellant. The picture created in my mind is that

1985 (1) ZLR p237

McNALLY JA

of a child genuinely distressed by the appellant's behaviour, not fully comprehending the consequences of it, shy about describing it, and obedient to the apparent view of her elders that she should submit to it.

In those circumstances I would borrow the words of LEWIS AJA in *Judson's case, supra*, p 507I:

... it is difficult to see how there remains any inherent potential danger of a false implication, requiring this special approach to the case as propounded by WATERMEYER CJ, before a conviction can result.

The magistrate seems to have been misled by the provisions of paragraph (a) of proviso (i) to the section under which the appellant was charged. He seems to have understood the defence evidence about the boy, Canisius, as evidence designed to show that the complainant was a prostitute. In fact it was led to show that someone else could have been the father of her child. It seems to me, however, that the evidence was so badly presented and so vague that the magistrate was entirely justified in rejecting it. It falls far short of proving an intimate relationship.

I conclude therefore that the magistrate's decision to convict the appellant cannot be faulted.

As far as sentence is concerned, no real misdirection was alleged. If there is a customary practice entitling married men to make their wife's juvenile relations pregnant, then the sooner it is put a stop to the better. It may be that the complainant's mother favoured a marriage so that the child could be properly looked after, but it is equally clear that the appellant has no intention of marrying the complainant.

The facts of *R v Shava* 1967 RLR 367 (GD) are quite remarkable and entirely different. The sentence in that case is no guide to a proper sentence in this case. It was argued that the complainant consented. This submission entirely ignores the fact that she only consented on the third occasion, because, she says, her aunt, the appellant's wife, told her not to worry because such behaviour was customary. Such ill-informed consent by one so young is no real consent, and certainly not mitigatory. Finally it was argued that this court in *Tshuma v S* S-86-84 (unreported) approved a sentence of six months' imprisonment with labour, half suspended. But in that case the girl was older and more sophisticated and willing; the teacher was younger; and there was only one incident. In any event the court was dealing there with the

1985 (1) ZLR p238

McNALLY JA

submission that the sentence was too heavy, and it rejected that submission. It was not being asked to consider whether the sentence was too light.

This is a bad case of a much older businessman/schoolteacher having intercourse three times with a mere child of fourteen and fathering a child on her. I am not persuaded that the magistrate erred in his sentence. Had the appellant been charged with and convicted of rape, as he might well have been, the sentence would have been far more severe.

I would dismiss the appeals against conviction and sentence.

Dumbutshena CJ: I agree

Gubbay JA: I agree

Gwati & Partners, appellant's legal practitioners

1985 (1) ZLR p239

S v BRANNIGAN 1985 (1) ZLR 239 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ, and Gubbay and McNally JJA

Criminal Appeal

2 and 26 April 1985

Flynote

Road Traffic - motorcycle - rider's duty to use lights even in daytime - negligence - failure to foresee failing of other driver - intersection - duty to keep look-out while crossing.

Headnote

The appellant drove through an intersection in a built-up area. He satisfied himself before proceeding that there was no traffic to which he ought to give way, failing to see a motorcyclist some distance away, driving without his lights on, at a speed estimated at 190 kph. He did not check again while crossing the intersection, collided with and killed the motorcyclist.

Held that a motorcyclist has a duty to keep a light showing even in daytime.

Held, further, that the appellant was not negligent in failing to see the motorcyclist when first he checked.

Held, further, that the appellant was not negligent in failing to keep a look-out while crossing the intersection in that he was under no duty to foresee the precipitate advent of a party travelling at excessive speed.

Case cited:

R v Hendrickse 1965 RLR 611 (AD)

H I Bissett for the appellant

B N Sigidi for the respondent

Judgment

Dumbutshena CJ: On 7 May 1983 a collision occurred between a Toyota pick-up van driven by the appellant and a multi-cylinder motor cycle ridden by Mark Calcaterra. As a result of that collision Mark Calcaterra died.

1985 (1) ZLR p240

DUMBUTSHENA CJ

The collision occurred at the intersection of Birchenough Road and Livingstone Avenue. The traffic on Livingstone Avenue has a right of way whilst that on Birchenough Road is controlled by "Give Way" signs. The appellant was travelling on Birchenough Road and the deceased was

riding his motor cycle on Livingstone Avenue.

As a result of that collision the appellant was charged with culpable homicide. He denied the charge but was convicted and sentenced to a fine of \$200. He now appeals against that conviction.

The brief facts of this case are not in dispute. It is common cause that the trailer of the appellant's motor vehicle was filled with grass loaded on it at the Midlands Academy of Music. From the Academy of Music the appellant drove his motor vehicle from Birchenough Road in an easterly direction on to Livingstone Avenue. He stopped at the entrance of the Midlands Music Academy to allow four or five cars travelling into Gweru on Livingstone Avenue in a northerly direction to pass on. He then proceeded across the western lane of Livingstone Avenue which has a dual carriageway. When he was in a position in the middle of the Avenue he looked left and right and saw no traffic which would impede his driving through. He commenced to cross the eastern lane of Livingstone Avenue at a very slow speed. When his vehicle was half way across the lane he heard a noise coming from the direction of his left and then observed the deceased on his motor cycle "boring down upon him in the act of braking". He observed the deceased at a distance of 15 to 20 metres. The deceased's motor cycle collided with the Toyota pick-up van which was almost across the lane entering Birchenough Road.

Havenga, who was called as a prosecution witness, testified that the deceased was travelling at about 190 kph while he himself followed the deceased at a speed of 160 kph. Havenga said that he saw the appellant's motor vehicle when he was about 100 to 150 metres away. He estimated the distance between the deceased's motor cycle and the appellant's motor vehicle as between 60 to 70 metres. He said that the deceased's motor cycle had only rear brakes functioning. He was satisfied that riding a motor cycle with only rear brakes on was "crazy".

There was no other evidence led by the prosecution. The magistrate said in his judgment that he could not rely on Havenga's evidence because he could not believe that the deceased was travelling at 190 kph while his motor cycle was in first gear.

1985 (1) ZLR p241

DUMBUTSHENA CJ

A reading of the record makes it clear that the deceased was travelling at a very fast speed in a built-up area. Nelson, a defence witness, said in his evidence that the deceased's motor cycle was travelling at a fast speed. He thought that the deceased and Havenga were racing. It seems to me that there was no better person to give an estimate of the speed at which the deceased was travelling than Havenga, who was travelling behind him.

One can also infer from the fact that the appellant did not see the deceased's motor cycle when he looked up Livingstone Avenue, a distance of 300 feet, and when he checked for traffic on his left and on his right and was only able to see the motor cycle when it was 15 to 20 metres away from his motor vehicle, that the deceased's motor cycle was travelling at a very fast speed. Further, the length of the brake marks which was given on the plan as 52 metres is supportive of the fast speed at which the deceased was travelling.

In the face of this evidence the magistrate could only speculate on what might likely have

happened. There was no evidential basis for the conclusion he came to. He failed to appreciate that Havenga was a prosecution witness with no axe to grind. Yet the magistrate was able to say:

From the spot of the accident to the traffic lights is about 300 metres. Havenga says the deceased was travelling in the first gear and only changed into second gear just before the collision. Now to suggest that the deceased was travelling at 190 km/h in first gear is highly improbable. All the same it is only Havenga's opinion that the deceased was travelling at 190 km/h and therefore I cannot rely on this.

It appears to me he also relied for the conclusion he arrived at on the fact that a motor cycle travelling at 190 kph would have caused greater damage than that revealed on the photographs. There was no evidence to establish the amount of damage on a motor car which collides with a motor cycle travelling at a great speed. He also did not believe that the appellant could only see up to 300 feet on a fairly straight stretch of Livingstone Avenue. He did not believe that Nelson, a defence witness, noticed the two cyclists because he had first heard the roaring sound of their motor cycles. The magistrate remarked in his judgment:

... one would start wondering as to where the deceased came from for he did not come from any side road but down Livingstone. Accused's car was hit on the front passenger door which indicates it was more or less in the middle of the road. If accused had seen a distance of 300 feet being

1985 (1) ZLR p242

DUMBUTSHENA CJ

clear even though he was travelling at 20 km/h he would have crossed or the trailer of his van would have been hit by the deceased. It came from the accused that he had a passenger. However, the defence decided not to call this witness who could have been helpful both to their case and to the court since he was sitting in the direction from which the deceased came. From what I have said I am of the opinion that the accused was negligent in the circumstances. He had to satisfy himself that it was safe to cross the main road. Therefore he did not have a proper watchout and thus caused the accident causing the death of the deceased.

That conclusion, based as it is on speculation, cannot be sustained. From the record there seems to be no evidence upon which the magistrate could properly find that the appellant was negligent.

It cannot be said that the appellant failed to keep a proper look-out when there is evidence that he stopped at the entrance of the Academy of Music to allow four or five cars to pass. There is also the appellant's uncontradicted evidence that he drove his motor vehicle to the middle of the traffic island, stopped and looked to the left and to the right, saw no cars, and then proceeded to drive on. It is clear from this evidence that he was keeping a proper look-out.

The magistrate erred in rejecting the evidence that the deceased was travelling much too fast. I agree with Mr Bisset, who appeared for the appellant, when he argued "that to require of the appellant that he should as a prudent motorist have expected and been on his guard against the sort of happening which occurred, is unrealistic. The likelihood of a vehicle travelling as fast as that of the deceased colliding with the appellant is about on a par with that of a collision with a low-flying aeroplane, and the comparison seems appropriate". Besides, a motor cycle is not as big as a motor car hence the requirement that the headlights must be on even during daytime in order to make it easier for drivers of other motor vehicles to see it. There was no

evidence that the deceased had his headlights on and would easily have been seen.

The appellant, as every driver is expected to do, kept a proper look-out by checking on both his left and his right for vehicles which might have been on the road. He was not obliged to wait patiently thereafter for vehicles travelling at 190 kph in a built-up area whose prescribed speed limit is 60 kph. Travelling at that speed it is no wonder that the appellant failed to see the deceased's motor cycle at a distance of 300 feet. Once he had satisfied himself that there was no traffic to which he had to give way, the appellant,

1985 (1) ZLR p243

DUMBUTSHENA CJ

as a prudent driver, was entitled to proceed to enter Birchenough Road. Had the appellant seen the motor cycle at a distance of 300 feet, it is proper to assume that he would have either driven away quickly or taken some other avoiding action instead of driving at a speed of 10 kph knowing that there would be a collision.

In my judgment the appellant satisfied himself before driving towards Birchenough Road that he could, in the absence of other traffic on the road, drive safely into Birchenough Road because he checked for traffic on his left and on his right before driving on. On this evidence it is difficult to justify the magistrate's finding of negligence. This case is distinguished on the facts from *R v Hendrickse* 1965 RLR 611 (AD) where it was said that a driver of a motor vehicle crossing a main road from a side road must not only look out for traffic before he enters such road, but must keep such look-out until he has completed his crossing. That case was decided on its own peculiar facts.

Mr *Sigidi*, who appeared for the respondent, conceded both in the respondent's heads of argument and before us that the evidence had not established the appellant's negligence. He further conceded the excessive speed at which the deceased was travelling.

The overall burden of proof rests on the State to prove beyond reasonable doubt that the deceased died because the appellant drove negligently or recklessly. The State did not discharge that onus. It appears to me that the appellant did what he was required to do as a prudent driver. He gave way to some motor vehicles that were entitled to the right of way. He kept a proper look-out and drove after satisfying himself that the road was clear.

Accordingly I would allow the appeal and set aside both the conviction and sentence.

Gubbay JA: I agree

McNally JA: I agree

Webb, Low & Barry appellant's legal practitioners

1985 (1) ZLR p244

ZIMBABWE FOOTBALL ASSOCIATION v MAFURUSA 1985 (1) ZLR 244 (SC)

Court High Court, Harare

Mfalila J

Trial Cause

4 April and 8 May 1985

Flynote

Suretyship - principal debtor procures loan from plaintiff - defendant guaranteed that principal debtors repaid a portion of the loan - new agreement in terms of which principal debtors would repay balance of loan in instalments - summons issued against principal debtors - judgment entered against principal debtors who continued to pay in instalments - plaintiff then issued summons against defendant for the balance outstanding - whether new agreement had any effect at all on the old agreement in extending time in which principal debtors were to repay the loan - whether such extension of time released the surety.

Headnote

L procured a loan from the plaintiff in terms of an agreement. It was also agreed that the entire loan would be repaid on a specific date. The defendant guaranteed that L would repay the loan and executed a deed of undertaking in this regard. L repaid to plaintiff only a portion of the loan. A new agreement was entered into between L and plaintiff in terms of which L would repay the balance of the loan in instalments. Summons was issued against L by plaintiff and judgment was entered against L for the outstanding balance. L, however, continued making payments by monthly instalments to plaintiff in terms of the new agreement. Plaintiff then issued summons against defendant for the balance outstanding. Defendant averred that, since plaintiff and L entered into a compromise, the loan agreement fell away because the compromise agreement novated the old agreement between the parties. Plaintiff countered that its compromise agreement with L did not affect defendant's original liability because the main purpose of the new agreement was to give L

1985 (1) ZLR p245

MFALILA J

an extension of time in which to pay the loan; that the new agreement was entered into after the time for performance by L and, therefore, the compromise agreement did not amount to a novation leaving defendant's obligations as a guarantor under the old agreement intact.

Held, the narrow rule that an extension of time, particularly that which is granted to the debtor after the debt became payable, cannot be regarded as a novation and therefore the surety is not discharged has been widened over the years. Apart from cases of novation a surety would be released after due date if in addition he can show that he himself had been prejudiced thereby.

Held, further, that in the present case the extension of time was granted after the whole debt became due and payable; therefore this *per se* could not discharge the defendant as surety unless he could show that he was prejudiced thereby, which he failed to do. It was upon him to

particularise how this extension of time had prejudiced him.

Held, further, that the novation did not and could not discharge the defendant as guarantor. The new agreement only affected the extent not the nature of his obligation to the plaintiff because the plaintiff still needed a guarantee that it would be paid.

Held, further, that instead of being liable for the whole amount, the defendant became under the new agreement only liable to the extent of the unpaid instalment(s).

Cases cited:

Estate Liebenberg v Standard Bank of South Africa Ltd 1927 AD 502

Beer v Roach 1950 (4) SA 370 (C)

Miller v Muller 1965 (4) SA 458 (C)

Williams v Atkinson Motor Garage Ltd 1933 OPD 72

J B Colegrave for the plaintiff

A C Chizikani for the defendant

Judgment

Mfalila J: Some time in the month of October 1982 the plaintiff, Zimbabwe Football Association, executed a memorandum of agreement (Ex 2) with One Love Promotions (hereinafter referred to as the principal debtors). The background to this memorandum was as follows: The principal debtors are a musical promotions organization. At the time they needed money to transport to Harare by air a group of 18 musicians from London. They did not have this much money, so they approached the plaintiff association and requested a loan for the equivalent of eighteen tickets. The plaintiff agreed to purchase return tickets for air transportation of 18

1985 (1) ZLR p246

MFALILA J

members of this London musical group - Aswald and Kingsounds - on Air Zimbabwe between London and Harare. The total cost was Z\$13 300. This is the loan which was the subject of the memorandum of agreement in which the principal debtors undertook without reservation to refund the plaintiff the total amount of this loan by noon on 1 November 1982, together with Z\$500 for interest and service charges. The agreement also provided that notwithstanding the date of signing of the agreement, the effective date shall be 8 October 1982, and that the said agreement shall be subject to and be interpreted and construed according to the laws of the Republic of Zimbabwe.

However, before actually making this loan, the plaintiff required a guarantee that the principal debtors would repay it. To this end the defendant, Tendai Mafurusa, guaranteed this payment by the principal debtors and executed a deed of undertaking (Ex 1) in favour of the plaintiffs in the following terms:

... WHEREAS the ZIMBABWE FOOTBALL ASSOCIATION (hereinafter called ZIFA) is desirous of safeguarding its rights in respect of certain financial undertakings entered into and between ZIFA and One Love Promotions, Promoters of the Musical Group Aswald and Kingsounds of London, England (hereinafter called the Promoters).

AND WHEREAS One Love Promotions will act as agents for the Aswald and Kingsounds groups during the foresaid musical tour of Zimbabwe between October and November 1982.

NOW THEREFORE THESE PRESENTS WITNESSETH

I, the undersigned, Tendai Mafurusa

DO HEREBY guarantee payment to ZIFA the amount of Z\$13 820,00 (thirteen thousand eight hundred and twenty dollars) being the amount owing by the Promoters in terms of a signed agreement effective 8 October 1982 should the agents default under the said agreement.

I furthermore agree that should such default occur full payment will be made to ZIFA within SEVEN (7) days of breach of the said signed agreement.

Despite the undertaking by the principal debtors that they would refund the plaintiff the total amount of the loan by noon on 1 November 1982, they had

1985 (1) ZLR p247

MFALILA J

refunded only \$5 000 at the time the summons in this suit was issued, having paid that amount on 9 October 1982.

It appears that the principal debtors made no further payments until the following year on 17 August 1983, when they received from the plaintiff a reminder about this debt. Three days later, on 20 August 1983, the principal debtors responded to this remainder and wrote to the plaintiff's attorneys in the following terms:

We acknowledge receipt of your letter dated the 17th August 1983.

We regret the late payment of the amount we owe to ZIFA

We would like to bring to your attention the fact that we are currently engaged in projects that we hope will raise the amount we owe to ZIFA in the not too distant future. However, at the present time, we are not in a position to pay the full amount owed but we are prepared to offer your clients \$240 per month in reduction of the debt as from the 1st October 1983.

We trust that this proposal will be satisfactory to your clients and look forward to hearing from you in due course.

This, then, was a proposal by the principal debtors to vary the terms of repayment of the loan as contained in the original agreement which provided for the repayment of the total amount of the loan together with interest on 1 November 1982. As by this date they had refunded only \$5 000, and they did not have any further funds, they proposed to start making payments by monthly instalments of \$240 towards the reduction of the balance of the loan, starting from 1 October 1983. There was no direct acceptance of this offer by either the plaintiff or its attorney, but the fact that the plaintiff accepted the payments made in this manner is proof enough that it accepted this proposed mode of payment by instalments. Indeed, this position is admitted by the plaintiff in paragraph 1(a) of its replication.

Under the new agreement, the principal debtors paid their first instalment of \$240 on 12 October 1982 and continued making such payments regularly every month until March 1984, when the payments started to take on an irregular pattern. But, for reasons which are not clear, since the instalments were being regularly paid at the time, the plaintiff issued summons against the principal debtors for the whole outstanding balance and on 17 January

1985 (1) ZLR p248

MFALILA J

1984 the plaintiff got judgment for the sum of \$9 180 with interest from 15 October 1983 to the date of payment. The principal debtors, however, continued making payments by monthly instalments as per the new agreement and they have continued doing so ever since, albeit with some degree of irregularity, the last payment being made on 29 March 1985, amounting to \$320.

On 14 September 1983, that is to say after the new arrangements in repayment of the loan had been proposed by the principal debtors, the plaintiff issued summons against the defendant for \$9 900, being the balance then outstanding of the loan advanced to the principal debtors and which repayment he had guaranteed. The defendant was being sued as guarantor because, the plaintiff alleged, the principal debtors had failed to pay the money loaned to it.

The defendant replied that it is true the principal debtors failed to meet their obligations to repay the loan on the due date and that he as guarantor was called upon to pay the balance then due, but he said that since the plaintiff and the principal debtors entered into a compromise agreement on or about 20 August 1983 to which he was not a party, his liabilities under the original agreement fell away because this compromise agreement novated the old agreement between the two parties.

To this the plaintiff countered that its compromise agreement with the principal debtors did not affect the defendant's original liability because, first, the main purpose of the new agreement was to give the principal debtors an extension of time in which to pay the loan; secondly, that this new agreement was entered into after the time for performance by the principal debtors on 1 November 1982. Therefore, plaintiff said, the compromise agreement did not amount to a novation, leaving the defendant's obligations as a guarantor under the old agreement intact. In these circumstances the following issues were drawn up at a pre-trial conference between the parties:

1. Whether the compromise agreement which plaintiff entered into with the principal debtors and to which defendant was not a party, releases defendant from his liabilities under the original agreement of guarantee.

In particular, whether the said compromise agreement:

- (a) was granted solely in order to give the principal debtors an extension of time in which to pay;
- (b) was entered into after the time for performance by the principal

1985 (1) ZLR p249

MFALILA J

debtors on the 1st November 1982;

- (c) could be construed as amounting to a novation of the principal debtors' original obligation;
- (d) prejudiced the defendant.

2. Is defendant entitled to rely upon any of the usual benefits of a surety?

What effect therefore did this new arrangement regarding the mode of repayment of the loan have on the original agreement? As indicated, under the original agreement, the plaintiff agreed to lend so much money to the principal debtors, that the whole of this amount was payable by them on 1 November 1982; and by a collateral agreement with the defendant, on failure by the principal debtors to pay the whole amount by this date, the defendant was to step in and pay the whole amount within seven days. Is it correct to say, as the plaintiff is saying, that this new agreement had no effect at all on the original agreement because it merely extended the time in which the principal debtors were to repay the loan and that this agreement was entered into after the time for performance by the principal debtors on 1 November 1982? It has been held in some cases that an extension of time, particularly that which is granted to the debtor after the debt became payable, cannot be regarded as a novation and therefore the surety is not discharged.

In *Estate Liebenberg v Standard Bank of South Africa Ltd* 1927 AD 502, WESSELS JA stated the rule thus at 507:

It must at once be conceded that by our law every extension of time is not considered to effect a novation. It seems quite clear that if the extension of time is given after the debt becomes payable and when the debtor is *in mora*, then a failure to sue the debtor, or even the actual granting to him of an extension of time, cannot be regarded as a novation, and therefore the surety is not discharged.

However, this narrow rule has been widened over the years, particularly by the judgment of VAN WINSEN AJ in the case of *Beer v Roach* 1950 (4) SA 370 (C). In this case, while the learned judge expressed the view that the *dictum* of WESSELS JA in the *Liebenberg* case was authority for the proposition that an extension of time given after due date does not *per se* release the endorser or surety, the learned judge went on to state that it [the dictum] should not be read as intending to lay down that an extension of time so granted can never release the endorser or surety. After considering this and other authorities, the

1985 (1) ZLR p250

MFALILA J

learned judge held that, apart from cases of novation, a surety would be released by reason of an extension of time granted after due date if in addition he can show that he himself had been prejudiced thereby. This case was quoted with approval and relied on by CORBETT J in *Miller v Muller* 1965 (4) SA 458 (C). In this case the surety was sued on an instrument of debt, but he claimed release on the ground of extension of time granted to the principal debtor. The plaintiff excepted to the defendant's plea and, as one of the grounds of exception, advanced the contention that insofar as the plea raised the defence that defendant, as surety, was released from his liability on the promissory note because of the extension of time granted to the principal

debtor, the company, it was bad in law and constituted no defence because *ex facie* the plea, as amplified by further particulars, the extension of time was granted after the first instalment became due and payable and therefore (because of the acceleration clause) after the full debt became due and payable. This contention was rejected by the learned judge, who held that such a plea discloses a defence provided that the defendant can show that it was made without his knowledge or consent and that it prejudiced him. In the present case, the extension of time was granted after the whole debt became due and payable; therefore this *per se* cannot discharge the defendant as surety unless he can show that he was prejudiced thereby. This the defendant failed to do. It was upon him to particularize how this extension of time had prejudiced him. However, the matter does not end there because, apart from extending the time in which the principal debtors were to pay the loan, the agreement proceeded to provide for the outstanding balance to be paid by instalments of \$240 per month. Under the original agreement of 8 October 1982, the whole amount of the loan was payable by noon on 1 November 1982. Under the new agreement embodied in the letter of 17 August 1983, the balance of the loan then outstanding with interest was payable in monthly instalments of \$240 until such time as the principal debtors were in a position to pay the whole amount at once. No time limit was set and the agreement provided for no penalty clause in the event of the debtor's defaulting in any of their instalments. It is clear, then, that the arrangements under the new agreement were very different from those in the original agreement, and it would be flying in the face of hard facts to say with the plaintiff that the original agreement was not novated. In *Williams v Atkinson Motor Garage Ltd* 1933 OPD 72, where the bond not only secured an existing debt but proceeded to provide that "the debt shall be payable in monthly instalments, each of which instalments shall include capital and interest and if at any time instalments be not punctually paid, then the whole amount of the debt secured by the bond shall be immediately claimable without notice", BOTHAM J held that the terms of the bond clearly constituted a novation of the debt.

1985 (1) ZLR p251

MFALILA J

What is the effect of this novation on the defendant's liability as guarantor - does it mean, as he says, he is discharged from all his obligations under the deed of undertaking? I do not think so. The plaintiff agreed to lend money to the principal debtors on condition that someone guaranteed repayment. The defendant provided this guarantee. The extent of his liability as guarantor was co-extensive with the liability of the principal debtors, namely that as the whole amount was payable by him on the agreed date by the principal debtors, so the whole amount was payable by him at once in the event of the principal debtors defaulting. The principal debtors defaulted, but the plaintiff, instead of pressing for its milligram of flesh under the existing agreement, not only granted an extension of time to the principal debtors but allowed them to pay the debt in monthly instalments and without any penalty clause. But this new repayment agreement between the plaintiff and the principal debtors did not and could not discharge the defendant as guarantor. The new agreement only affected the extent, not the nature, of his obligation to the plaintiff, because the plaintiff still needed a guarantee that it would be paid. But instead of being liable for the whole amount at once in the case of default, the defendant became under the new agreement only liable to the extent of the unpaid instalment(s). The position would, of course, have been different if there was an acceleration clause.

For these reasons the claim of \$9 900 with interest against the defendant is dismissed, but instead I enter judgment for the plaintiff in the sum equal to any unpaid instalments to date under the new agreement.

In the circumstances, the fairest order to make with regard to costs is one which requires each side to pay its own costs. It is so ordered.

Gollop & Blank, legal practitioners for the plaintiff

Guni & Guni, legal practitioners for the defendant

1985 (1) ZLR p252

S v MUVHAKI 1985 (1) ZLR 252 (HC)

Court **High Court, Harare**

Reynolds J

Review

8 May 1985

Flynote

Criminal law - indecent assault - accused must intend not only to assault complainant but to do so indecently - intention to do so does not refer to accused's purpose or desire.

Criminal procedure - charge - difficulty in deciding whether proper charge crimen injuria, common assault or indecent assault - if possible offences overlap, Attorney General has a discretion as to which charge should be brought.

Criminal procedure - sentence - indecent assault - sentence of 12 months' imprisonment with labour for this indecent assault grossly excessive.

Headnote

After some prior discord the accused approached the place where the complainant was seated and, seizing hold of her one leg, he lifted it high, thereby exposing her private parts. She was not, apparently, wearing any underclothes at the time, although this was not specifically canvassed at the trial.

In relation to indecent assault the accused must intend not only to assault the complainant but to do so indecently. His motive in behaving as he did may help to explain his intention, but his motivation is in no other way relevant to the question of his guilt or innocence. The accused's "intention" to assault the complainant indecently refers to the legal requirements of intention, actual or constructive, and not his purpose or desire.

In some cases, similar to the present one, difficulty has been experienced in deciding whether or not the proper charge has been brought. If the possible offences overlap, the

REYNOLDS J

which charge should be brought, and the approach that should be adopted is set out in condensed form in *S v Dziva* 1971 (1) RLR 202 at 205A-B. In applying that statement of law to the present case, it appeared that the Attorney-General would have been in some difficulty in deciding whether to charge the accused with indecent assault, common assault or *crimen injuria*.

In view of the fact that the accused's dominant object was to humiliate the complainant it would, since the offences overlap, have been preferable to charge the accused with *crimen injuria*. The charge of indecent assault is not to be declared invalid or improperly laid for this reason. The Attorney-General had a discretion to bring either charge or he could have charged the accused with indecent assault as a main charge, and with *crimen injuria* in the alternative. The accused was, therefore, properly charged with indecent assault.

A sentence of 12 months' imprisonment with labour for this indecent assault was grossly excessive. However, it was a relatively serious matter bearing in mind the substantial *contumelia* present.

Cases cited:

R v Abrahams 1918 CPD 590

R v Jeremiah 1947 (2) SA 938 (SR)

R v Moyo & Ors 1968 (2) RLR 242 (GD)

S v Eriya GB-17-70 (unreported)

R v Mlambo 1957 (4) SA 727

S v Peterson & Ors 1971 (1) RLR 49 (GD); 1971 (2) SA 130 (R)

R v M 1947 (4) SA 489 (N)

Z v R 1957 (2) PH H 240

S v F & Anor 1982 (2) SA 580 (T)

R v X & Y 1938 EDL 30

R v Herbst 1942 AD 434

S v Mkize 1962 (1) PH H 3

S v Brereton 1970 (2) RLR 272 (AD); 1971 (1) SA 489 (RAD)

S v Dziva 1971 (1) RLR 202 (GD)

S v J 1975 (4) SA 698

R v Payne 1934 CPD 301

R v E 1954 (4) SA 501 (SR)

R v Enoch 1954 SR 130

R v Maurice AD-135-63 (unreported)

Judgment

Reynolds J: The accused was charged with and convicted on one count of indecent assault and one of common assault. He was sentenced to 12

1985 (1) ZLR p254

REYNOLDS J

months' imprisonment with labour on the indecent assault charge, and to three months' imprisonment with labour on the second count.

The facts which were found by the trial magistrate to have been proved on the first count were that there had been some dispute between the accused and members of the complainant's family. After some prior discord the accused approached the place where the complainant was seated, and, seizing hold of her one leg, he lifted it high, thereby exposing her private parts. She was not, apparently, wearing any underclothes at the time, although this point was not specifically canvassed at the trial.

In relation to the second count, the complainant in this charge is the husband of the complainant on count 1, and this assault was said to have occurred the day after the alleged indecent assault. The facts established on this count were that the accused approached the complainant and for no apparent reason struck him one blow with a clenched fist on his cheek. No injury was sustained as a result.

Two matters fall for consideration in this case. The first is whether, on the facts proved, the charge of indecent assault was established. Our law, in this respect, has, for a great many years followed *R v Abrahams* 1918 CPD 590; (*R v Jeremiah* 1947 (2) SA 938 (SR); *R v Moyo & Ors* 1968 (2) RLR 242 (GD) and *S v Eriya* GB-17-70 (unreported)). The law, as stated in *Abraham's* case, is found in the following passage which appears at 593 of the report:

when ... assault is qualified by the term 'indecent' ... it is the act of violence that is qualified; there must be an act of indecent physical violence. I do not think that the qualification refers to the motive or purpose of the offender. ... Nor, leaving aside the question of purpose, do I consider that indecent language or even indecent acts applied to the accused himself and not to the complainant, can make an assault indecent. If, for instance, a man were to expose his person, though this might be indicative of an intent to rape, I do not think it would make a catching hold of a girl by the arm an indecent assault. It might, of course, justify a conviction for public indecency, if committed in a public place, or for *injuria*. But for an indecent assault, the violence constituting the assault must in itself be indecent; there must be some indecent handling of the complainant.

R v Abrahams has now stood for some sixty-seven years, but has been subjected to much criticism during his period. (See, for example, the

1985 (1) ZLR p255

REYNOLDS J

comments and cases cited at 497 of the second edition of Hunt's *South African Criminal Law & Procedure*, vol 2. As appears below, however, I do not agree with all the objections raised by the learned author. It is my view that the majority judgment in the *Abrahams* case has been misconstrued, and the first criticism advanced by the learned author does not seem to be valid). In addition to these objections, it is apparent that the approach adopted by the courts of other countries is different from that in use in Zimbabwe. The approach of English and Canadian courts, for example, is to the effect that the circumstances surrounding the act of alleged indecency may properly be taken into account in determining the accused's guilt or innocence. In this way, conduct which may be decent in itself, if accompanied by circumstances of indecency, such as spoken words which determine the true nature of the act, may properly be charged as indecent assault. (See Smith & Hogan's *Criminal Law* at 418-20). It may be desirable, therefore, in the interests of contemporary policy, and in an appropriate case, to reconsider the *R v Abrahams* approach. Be that as it may, *R v Abrahams* applies in our law presently, and the instant case must be decided on this basis.

The statement in the *Abrahams* case that "the violence constituting the assault must in itself be indecent; there must be some indecent handling of the complainant" has caused some confusion, particularly in cases where the accused has touched or held a part of the complainant's body which is not normally regarded as being private or intimate. It is sometimes argued, in such cases, that the act in itself is not indecent, and that the offence of indecent assault has not, therefore, been proved. The present case falls directly into this category, for the accused held the complainant only by the leg, and, presumably, by the lower portion of the leg or ankle. That act, in itself, was clearly not an "indecent handling of the complainant" as such. The question arises, then, as to whether this act nevertheless constituted an indecent assault. In answering this question it is my view that regard must be had to the accused's intention, as this term is employed in legal usage, in behaving as he did. It is necessary that motive and intention should not be confused here. In the extract from the *Abrahams* case, cited above, it is stated, "I do not think that the qualification refers to the motive or purpose of the offender." This passage, as I see it, relates to the accused's motive as opposed to his intention in law.

In general terms, it is trite that *mens rea*, as an essential ingredient of criminal liability, extends to all elements of a crime. Thus, in relation to indecent assault, the accused must intend not only to assault the complainant, but to do so indecently. His motive in behaving as he did may help to explain his

1985 (1) ZLR p256

REYNOLDS J

intention here, but his motivation is in no other way relevant to the question of his guilt or innocence. (*R v Mlambo* 1957 (4) SA 727 at 737). The accused's "intention" to assault the

complainant indecently refers to the legal requirement of intention, actual or constructive, and not to his purpose or desire. Two distinct situations may arise which both require that the accused's intention be determined in order to explain his allegedly indecent act. The first such situation will occur when there is what would normally be regarded as an innocent act, but which brings about an "indecent" result. In this event, if it is proved that it was the accused's intention to cause such a result, then he will, in my view, be guilty of an indecent assault, whatever his motive or purpose may have been.

The second situation arises when an otherwise indecent act may be explained by establishing the accused's intention in carrying out the conduct in question. For example, if the accused has touched the complainant's breasts he may be charged with indecent assault. But if his motive in so doing was to recover his wallet which the complainant had removed from his pocket and had stuffed down the front of her dress, his "intention", in all likelihood, would not have been to assault her in an indecent way. (See *S v Peterson & Ors* 1971 (1) RLR 49 (GD); 1971 (2) SA 130 (R); *R v M* 1947 (4) SA 489 (N)). In this latter case, *R v M*, the accused had been charged with indecent assault in that he had attempted to lift up the complainant's dress and to lie on her. In giving the judgment of the court, MILNE AJ said, at 493:

... an attempt by a man to lift a woman's clothing when it is not done with her consent, express or implied, or reasonably inferred or **otherwise plainly with some non-sexual motive**, seems to me to have all the elements of an indecent assault; ... (my emphasis).

I understand the learned judge here to refer to "motive" as meaning "intention" and not that he held the view that an otherwise "decent" motive would necessarily exonerate the accused from criminal liability. If the accused was attempting to save the complainant from a possible bite from a venomous spider he had seen crawling up her dress, the accused's motive and his intention would be entirely innocent. If, however, his motive was to show members of an audience at a theatre production that the leading lady was not wearing underclothes and thereby to humiliate her, his intention, in law, would, in my view, be to expose her private parts, and his act would, accordingly, be an indecent one. (See, too, *Z v R* 1957 (2) PH H 240; *S v F & Anor* 1982 (2) SA 580 (T)).

1985 (1) ZLR p257

REYNOLDS J

In a matter that bears some similar features to the present case, *R v X & Y* 1938 EDL 30, the two female accused were charged with criminal *injuria*. The agreed facts were that the elder of the two accused suspected that the complainant had had an affair with her husband. The two accused thereupon kidnapped the complainant from her home at night, gagged her, and drove her to a lonely part of a suburb near to where they lived. They removed the pyjama trousers that the complainant was wearing, opened her legs and pressed "some foreign substance" - believed to be ground chillies - into her vagina. They then pulled out her eyelashes with tweezers, cut off the hair on her head - including her eyebrows - with scissors, and pulled out her pubic hair. The complainant was then made to walk back to her home in this injured and semi-naked state. These grim facts go some way, perhaps, towards verifying Vanbrugh's assertion that "a slighted woman knows no bounds." It was argued by counsel for the accused that the facts proved amounted only to an indecent assault, and the accused should not,

accordingly, have been convicted of *crimen injuria*. In dismissing this submission, PITTMAN AJP said at 32:

There was something here more than a mere assault, namely the intention gravely to impair that ethical interest of the complainant, to which the Romans gave the name *dignitas*. Such assault together with that specific intent affecting it would clearly not have been exactly described by the term 'indecent assault'.

I do not take this passage to mean that the facts of the case did not amount to an indecent assault, or that a charge of indecent assault would not have been a valid one. All that was meant, in my view, was that a charge of criminal *injuria* was the most appropriate one that could have been brought in the circumstances, and the conviction was, accordingly, upheld.

It must be emphasized that in our law the issue of intention arises only where the nature of the act itself is, or may possibly be, indecent. If the accused's handling of the complainant is in itself completely devoid of any indecency, such as the touching of an arm or a toe, and there is no "indecent" consequence from the act in question, then no matter how lewd or obscene his intentions were in behaving in that way, no indecent assault has been committed. Thus, in *R v Jeremiah, supra*, where the accused grappled with the complainant, announced his intention to have sexual intercourse with her, undid his fly-buttons - (this was a 1947 case) - but did not actually touch her in any part of her body normally regarded as private or intimate, it was held that these facts did not establish an indecent assault. This conclusion was

1985 (1) ZLR p258

REYNOLDS J

reached despite it being quite obvious that the accused's intention was to attack the complainant in an indecent manner (see, too, *R v Abrahams, supra*, *R v Herbst* 1942 AD 434, and *S v Mkize* 1962 (1) PH H 3). In the instant case the point of significance is that the accused did not merely touch the complainant's leg; he lifted it to a height sufficient to expose her private parts. In the same way, in *R v M, supra*, it was held that the lifting of the complainant's dress - an act innocent in itself - constituted an indecent assault when the accused's intention was established.

In some cases similar to the present one, difficulty has been experienced in deciding whether or not the proper charge has been brought. In the case of *S v Brereton* 1970 (2) RLR 272 (AD); 1971 (1) SA 489 (RAD) and *S v Dziva* 1971 (1) RLR 202 (GD), *BEADLE CJ affirmed that it is our law that it is competent to charge a person with criminal injuria* only when the facts alleged could not establish any other appropriate and well-recognized charge. In other words, if the facts would not prove a well-known crime such as rape or assault, but they would nevertheless prove an unlawful and intentional *injuria* to the dignitas of another, then and only then may a charge of *crimen injuria* be laid. This is expressed in *Dziva's* case, *supra*, at 204H-I in the following terms:

The Rhodesian courts, in conformity with principle, have consistently taken the line that the crime of criminal *injuria* must be confined to those residual *injuriae* comprising the old crime of criminal *injuria*, which cannot be charged under other more appropriate and well-recognized names.

This declaration of the law is qualified if the possible offences overlap. In such circumstances the Attorney-General has a discretion as to which charge should be brought, and the approach

that should then be adopted is set out in condensed form in *Dziva's case, supra*, at 205A-B as follows:

... where two offences are committed, the proper thing to do is to charge the accused with the more serious of the two. If it is not possible to ascertain which is the more serious of the two, then the proper approach is to charge the accused with what may be regarded as the more appropriate charge in the circumstances, and, in ascertaining which is the more appropriate, the courts must look to the existing practice. The accused's dominant purpose in committing the crime is also a factor to be considered.

1985 (1) ZLR p259

REYNOLDS J

In applying this statement of the law to the present case, it seems to me that the Attorney-General would have been in some difficulty in deciding whether to charge the accused, on the first count, with indecent assault or *crimen injuria*, but in view of the fact that it seems clear that the accused's dominant object was to humiliate the complainant, it would, in my opinion, and as the offences overlap, have been preferable to charge this accused with criminal *injuria*. I do not think that there can be any doubt that he would have been convicted had that charge been laid originally, but I do not consider that the charge of indecent assault actually brought is to be declared invalid or improperly laid for this reason. The Attorney-General had a discretion to bring either charge, or he could have charged the accused with indecent assault as a main charge, and with *crimen injuria* in the alternative. (See *S v J* 1975 (4) SA 698; *R v Payne* 1934 CPD 301; *R v Enoch* 1954 SR 130 (published in 1954 (4) SA 501 *sub nom. R v E*) and *Maurice v R* AD-135-63 (unreported)).

I am satisfied, therefore, that the present accused was properly charged with indecent assault. I have already examined the need to differentiate between motive and intention in a charge of this nature. In the instant case, I hold the view that the accused's dominant motive in lifting the leg of the complainant was to mortify and degrade her, and I do not believe that any element of concupiscence arose at all. His motive, therefore, was to shame and humiliate the complainant but he knew, none the less, that in lifting her leg, her private areas would be exposed to the gaze of those in her company, and he, therefore, intended this result. He intended that they should see her underclothes, or, as it happened, her private parts. (See *R v Petersen & Ors, supra*; *S v Brereton, supra*). In my mind the accused's conduct has shown all the elements of an indecent assault, and I find that the accused was properly convicted on the first count. This conviction, and that on count 2, where the propriety of the conviction is not in issue, are hereby confirmed.

I turn now to the second point that requires consideration, and this concerns the severity of the sentences imposed for these two offences. It is my view that both sentences are grossly excessive. In this regard, the Attorney-General, to whom I am indebted for his assistance, makes the following remarks:

Whatever view his Lordship takes of the propriety of the conviction, the sentences in respect of both counts are manifestly excessive.

Sentences on the scale imposed by the magistrate in respect of the charge

REYNOLDS J

of indecent assault are almost exclusively reserved for assaults which are:

- (a) gravely injurious; or
- (b) perpetrated against young children; or
- (c) persistent.

Compare: *S v Joko* HH-497-83 (unreported)

S v Ncube HH-96-83 (unreported)

S v Tigere GB-80-80 (unreported)

Manyemba v S AD-82-79 (unreported)

Ndhlovu v S AD-88-79 (unreported)

S v Mwaleni GS-222-77 (unreported)

As regards the sentence imposed in respect of the charge of common assault, no authority need be cited to support the contention that the sentence is manifestly excessive. It is doubtful whether in fact, a custodial penalty was warranted.

I agree with these comments, but would add that the first count was a relatively serious matter bearing in mind the substantial element of *contumelia* present. This was an aggravating feature, particularly as it was the complainant's father-in-law who witnessed her shame.

In all the circumstances the sentences imposed on both counts are hereby set aside, and on count 1 the following is substituted:

Six months' imprisonment with labour of which three months' imprisonment with labour is suspended for three years on condition that the accused does not, within that period, commit any offence of which assault, indecent assault or *crimen injuria* is an element, for which a sentence of imprisonment without the option of a fine is imposed.

On count 2 the following sentence is substituted:

Fined \$20 or five days' imprisonment with labour:

Smith J: agrees

**PATRIOTIC FRONT-ZIMBABWE AFRICAN PEOPLE'S UNION v MINISTER OF JUSTICE,
LEGAL AND PARLIAMENTARY AFFAIRS (1) 1985 (1) ZLR 261 (HC)**

Court **High Court, Harare**

Smith J

Notice of Motion

8 May, 1985

Flynote

Statutes - Electoral Act, 1979 - s 165 A(2) - exercise of powers conferred upon the President - Electoral Act (Use of Symbols) Regulations, 1985 (SI 121A of 1985) - s 2 - prohibition contained therein - ultra vires and void for vagueness.

Headnote

In the exercise of the powers conferred upon him by s 165A of the Electoral Act, 1979, the President made the Electoral Act (Use of Symbols) Regulations, 1985 (SI 121 of 1985). Section 2 of those regulations contained certain prohibitions relating to the use, possession or wearing in connexion with, or in furtherance of the objects and activities of, a political party any object or thing which consisted of, incorporated or bore

- "(a) any symbol, representation or device forming part of the badge or uniform of the Defence Forces, the Zimbabwe Republic Police or the Prison Service;
- (b) any symbol, representation or device which so closely resembles any symbol, representation or device referred to in para (a) as to be likely to deceive".

The applicant applied for an order that, *inter alia*, the Regulations be declared null and void as being ultra vires s 165A of the Electoral Act, 1979, or alternatively that they be declared void for vagueness.

Held, declaring the Regulations null and void as being ultra vires s 165A of the Electoral Act, 1979, that there can be no doubt that the regulatory

1985 (1) ZLR p262

SMITH J

powers conferred upon the President by s 165A of the Electoral Act, 1979, are extremely wide. He can make any regulations he considers desirable for the proper and efficient conduct of the forthcoming general elections or to deal with any matter or situation connected with those elections. He may not make regulations under s 165A which are not connected with the forthcoming general elections. The Regulations do not refer anywhere to the forthcoming general elections or, in fact, to any elections at all. They prohibit the use, possession or wearing, in connection with, or in furtherance of the objections and activities of, a political party, specified symbols, representations or devices. The prohibition contained in the Regulations would cover activities not connected with the forthcoming general elections and was therefore ultra vires.

Held, further, the Regulations created substantial uncertainty as to what activities were prohibited. Consequently the Regulations, even if they were not *ultra vires*, would be void for vagueness.

Cases cited:

Central African Examiner (Pvt) Ltd v Howman & Ors NNO 1966 RLR 75 (GD)

British Chemicals & Biologicals (SA) (Pty) Ltd v South African Pharmacy Board 1955 (1) SA 184 (A)

R v Bilse 1953 (2) SA 770 (O)

R v Jopp & Anor 1949 (4) SA 11 (N)

Smith NO & Anor v Wonesayi 1972 (1) RLR 262 (AD); 1972 (3) SA 289 (RAD)

S v O'Malley & Anor 1976 (1) SA 469 (N)

The Master v I L Back & Co Ltd 1981 (4) SA 763 (C)

A P de Bourbon SC for the applicant

S Muchecheitere for the respondent

Judgment

Smith J: The applicant is a political party which won 20 seats at the General Elections in 1980 and intends to contest the forthcoming general elections which are scheduled to be held in June 1985. At the Sixth Congress of the applicant in October 1984, it adopted a new symbol. This symbol (hereinafter referred to as the "ZAPU Symbol") has as its background the colours of the flag of Zimbabwe. It depicts a round, black-lined circle with white in the middle. In this circle and with its wings stretching upwards and slightly outside it, is a black eagle in flight. The eagle has its feet extended with talons stretched out as though about to seize its prey. In many reproductions of the ZAPU Symbol the letters "ZAPU" or "PF-ZAPU" appear above the bird and

1985 (1) ZLR p263

SMITH J

the words "People's Power" often appear below the bird. It is the intention that the candidates who will be contesting the forthcoming general elections on behalf of the applicant will, in terms of s 53(1)(b) of the Electoral Act, 1979, use the ZAPU Symbol.

Since the adoption of the ZAPU Symbol numerous items have been produced with the symbol on it in order to publicize and promote the applicant generally. The ZAPU Symbol has appeared on items such as membership cards, donation cards, banners, badges, letterheads, pamphlets, advertisements, T-shirts, ties, dresses and other articles.

The Electoral Amendment Act, 1985 (No 13 of 1985), inserted s 165A in the Electoral Act, 1979. In subs(1) of the said s 165A, the term "the elections" is defined as meaning the first general election held after the 18th April, 1980, and any by-election held within one year of the last polling day of that general election. Subsection (2) thereof provides as follows:

(2) Notwithstanding any other provision of this Act but subject to subsection (4) and to subsection (4) of section 61

of the Constitution, the President may make such statutory instruments as he considers necessary or desirable to ensure that the elections are properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the elections.

Subsection (3) enumerates specific matters which may be provided for in regulations made in terms of subs (2). The wide powers conferred on the President to make regulations are evidenced by the fact that subs (3) specifies that such regulations may provide for suspending or amending any provision of the Electoral Act, 1979, or any other law in so far as it applies to the elections or for validating anything done in connexion with, arising out of or resulting from the elections in contravention of any provision of the Electoral Act, 1979, or any other law. Thus, in matters connected with the forthcoming general elections, the President may make regulations which suspend or amend Acts of Parliament.

In the exercise of the powers conferred upon him by s 165A of the Electoral Act, 1979, the President made the Electoral Act (Use of Symbols) Regulations, 1985 (SI 121A of 1985), (hereinafter referred to as "the Regulations"), which were published in a *Gazette Extraordinary* dated 24 April 1985. Section 2 of the Regulations provides as follows:

1985 (1) ZLR p264

SMITH J

2. (1) Subject to the provisions of subsection (2), no person shall use, possess or wear in connexion with, or in furtherance of the objects and activities of a political party any object or thing which consists of, incorporates or bears -

- (a) any symbol, representation or device forming part of the badge or uniform of the Defence Forces, the Zimbabwe Republic Police or the Prison Service;
- (b) any symbol, representation or device which so closely resembles any symbol, representation or device referred to in paragraph (a) as to be likely to deceive.

(2) The provisions of subsection (1) shall not apply in respect of the use, possession or wearing of any object or thing which was being used, possessed or worn, as the case may be, immediately before the date of commencement of these regulations until the 8th of May, 1985.

...

(5) Any person who contravenes the provisions of subsection (1) shall be guilty of an offence and liable, on conviction, to a fine not exceeding five hundred dollars.

Prior to the promulgation of the Regulations, the president and officials of the applicant met the respondent on 22 April 1985 and made representations concerning the draft regulations. In a letter dated the same date, which was signed on behalf of the Secretary for Justice, Legal & Parliamentary Affairs, the president of the applicant was advised that, following upon the representations made, the draft regulations would be amended to provide for a period of grace for 14 days. A copy of the proposed regulations was apparently sent with that letter, in which it was intimated that the regulations would be gazetted shortly. That letter also stated that the Secretaries for Defence and Home Affairs, the Police and the Prison Service, had been asked to submit copies of their badges which would be supplied to the applicant.

The applicant has applied for an order that the Regulations be declared null and void as being

ultra vires the said s 165A or alternatively that they be declared void for vagueness or alternatively that it be declared that any person shall be entitled to use, possess or wear in connection with, or in furtherance of the objects and activities of the applicant, the ZAPU Symbol with or without the letters "PF-ZAPU".

1985 (1) ZLR p265

SMITH J

The respondent has submitted that as the date of the forthcoming general elections has not yet been announced, there is still time for the applicant to choose a different symbol and promote it in order to identify it with the candidates supported by the applicant. The reason for the making of the Regulations was that the Government feared widespread violence, contrary to the spirit of free and fair elections, if symbols of the Defence Force, Police Force or Prison Service were used by political parties. This fear arose because there had been incidents in which badges of the Defence Forces (particularly the Air Force) had been confused by the public with the ZAPU Symbol. The respondent further submitted that during the forthcoming general elections the Security Forces would be stretched to the utmost and their efficiency would be gravely impaired if the public, or even a section of it, confused them with a political party or *vice versa*. Another ground put forward for the fear was that if a party used a badge associated with the Security Forces, voters may believe that the party was a branch of, or sponsored by, the Government and vote for the party concerned, which would give the party an unfair advantage. The respondent further submitted that the ZAPU Symbol was very similar to the badges of the Air Force of Zimbabwe and the Zimbabwe Republic Police Support Unit.

Finally, the respondent has submitted that the fact that the Regulations do not specify that they were approved by the Electoral Supervisory Commission does not invalidate them as approval by that Commission is not a prerequisite to their validity. However, from the correspondence filed, it appears that by letter dated 17 April 1985 copies of the proposed regulations were submitted to the Electoral Supervisory Commission in terms of s 61(3) of the Constitution. A letter dated 22 April 1985, purporting to be signed by the Secretary to the Electoral Supervisory Commission, referred to the abovementioned letter dated 17 April 1985, and subsequent telephone conversations with the writer of that letter, and confirmed that the said Commission had neither comments to make on nor any objections to raise against the draft regulations.

The Support Unit of the Zimbabwe Republic Police has as its emblem a symbol of a swooping eagle with its wings stretching upwards and talons extended. This emblem is worn by all members of the Support Unit on the left shoulder and is displayed on all vehicles and other equipment of that Unit. The emblem of the Air Force of Zimbabwe is a bateleur eagle in flight. Its wings are almost horizontal, and its talons are not extended.

Mr *de Bourbon* has argued that the Regulations are *ultra vires* because s 165A of the Electoral Act, 1979, only permits regulations to be made for the

1985 (1) ZLR p266

SMITH J

purpose of ensuring that the elections are properly and efficiently conducted or to deal with

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matters connected with the elections and, by virtue of the definition of the elections, that section is of effect for only a restricted period. The Regulations, on the other hand, do not purport to have a limited life and do not anywhere refer to the forthcoming elections. They merely lay down a blanket prohibition on the use of certain symbols in connection with or furtherance of the objects and activities of a political party without any restriction as to time or as to whether the activities are connected with the forthcoming general elections. He queried how the Regulations could be regarded as being necessary or desirable for the proper and efficient conduct of the general elections. He argued that s 53(6a) of the Electoral Act, 1979, specifies the grounds on which a electoral officer may reject a symbol proposed by a candidate and the Regulations do not modify or amend this section. The grounds permitted do not include one that the symbol resembles an emblem used by the Security Forces. Mr *de Bourbon* also argued that the Regulations discriminated against the applicant since it had already chosen the ZAPU Symbol, which would be prohibited, and therefore was in contravention of subs (4) of the said s 165A. Finally, on the question of *ultra vires*, Mr *de Bourbon* argued that, from the correspondence attached to the pleadings, the Electoral Supervisory Commission did not have sight of the proposed regulations after their amendment on the basis of representations made by the applicant.

On the question of whether the Regulations were void for vagueness, Mr *de Bourbon* pointed out that although the National Army, the Air Force, the Police Force and the Prison Service each had its own badge, within the Army there were various brigades and units, each of which had their own insignia and uniforms and likewise in the Air Force each squadron had its own badge. The Support Unit, which I have referred to earlier, was a unit of the Zimbabwe Republic Police and its emblem was completely different from that of the Police Force. If anyone wanted to know what the badges and uniforms of the Security Forces were, he would have to inquire from each of the various forces.

Finally, Mr *de Bourbon* submitted that if the regulations were not found to be *ultra vires* or void for vagueness, the court should make a declaratory order in terms of s 14 of the High Court of Zimbabwe Act, 1981, as to the right of persons to use, possess or wear the ZAPU Symbol. He argued that in *Central African Examiner (Pvt) Ltd v Howman & Ors* NNO 1966 RLR 75 (GD), LEWIS J had distinguished the previous line of cases not very convincingly and that the judgment of GREENBERG JA in *British Chemicals & Biologicals*

1985 (1) ZLR p267

SMITH J

(SA) (Pty) Ltd v South African Pharmacy Board 1955 (1) SA 184 (A) should be followed.

There can be no doubt that the regulatory powers conferred upon the President by s 165A of the Electoral Act, 1979, are extremely wide. He can make any regulations he considers desirable for the proper and efficient conduct of the forthcoming general elections or to deal with any matter or situation connected with those elections. Thus he could make regulations which he considers to be necessary or desirable in order to prevent violence during the election processes or ensure free and fair elections. However, his regulatory powers are not unlimited. He may not make regulations under the said s 165A which are not connected with the forthcoming general elections. The Regulations do not refer anywhere to the forthcoming

general elections or, in fact, to any elections at all. They prohibit the use, possession or wearing, in connection with or in furtherance of the objects and activities of a political party, specified symbols, representations or devices. There is no limitation as to the period of the prohibition or that the activities of the political party must be connected with the forthcoming general election. Thus the use of a prohibited symbol in furtherance of the objects of a political party which does not intend to contest the forthcoming general elections would be prohibited.

In *R v Bilse* 1953 (2) SA 770 (O) at 773F, HORWITZ J said:

In deciding the question whether a regulation is *intra vires* or otherwise, the first approach must be to ascertain whether it falls within the powers conferred by the enabling statute. A regulation which goes beyond the limitations imposed by the authorising Legislature or beyond the limitation in the power expressly or impliedly conferred by the enabling legislation, would be *ultra vires*.

It is clear that the prohibition contained in the Regulations would cover activities not connected with the forthcoming general elections and is therefore *ultra vires*.

Having reached the conclusion that the Regulations are *ultra vires*, it is not necessary to deal with any of the other arguments put forward by Mr *de Bourbon*. However, I would like to deal briefly with his argument that the Regulations are void for uncertainty. In *R v Jopp & Anor* 1949 (4) SA 11 (N) it was laid down that in determining whether a regulation is void for uncertainty, the court must first construe the regulation, and in doing so must apply the usual canons of construction with no bias towards "benevolence";

1985 (1) ZLR p268

SMITH J

thereafter it must ask itself whether the regulation, so construed, indicates with reasonable certainty to those who are bound by it the act which is enjoined or prohibited. If it does, it is good; if it does not, it is bad.

In *Smith NO & Anor v Wonesayi* 1972 (1) RLR 262 (AD); 1972 (3) SA 289 (RAD) at 274A-E (295-6 of the South African report), BEADLE CJ said:

The reasons for which subordinate legislation will be set aside by a court on the grounds of vagueness have long been settled. If the words are capable of being understood with reasonable certainty by those who are bound by them, they will not be regarded as being too vague. See *R v Jopp & Anor* 1949 (4) SA 11 (N) at p 14. The words must not be 'so vague as to create confusion or substantial uncertainty in the minds of reasonable subjects who have to apply its terms.' See *Arnold v Race Classification Appeal Board & Anor* 1967 (2) SA 267 at p 272. 'It is, however, the duty of the court to avoid, if possible, the conclusion that the **Notice** is too vague to be effective' - Per CENTLIVRES JA in *R v Pretoria Timber Co (Pty) Ltd & Anor* 1950 (3) SA 163 (AD) at p 170. 'The law requires reasonable and not perfect lucidity and the fact that cases may arise in which it would be difficult, perhaps extremely difficult, to apply the regulation is not 'a reason for holding that the description is not reasonably clear'.' - Per SCHREINER JA, in the same case at p 176.

As I see it, if the legislation can be applied with reasonable certainty in the vast majority of cases, that is enough, and the fact that in borderline cases it may be extremely difficult to apply is not a ground for holding the legislation to be void for vagueness.

The tests referred to above were approved in *S v O'Malley & Anor* 1976 (1) SA 469 (N) and *The Master v I L Back & Co Ltd* 1981 (4) SA 763 (C).

In this case the Regulations apply to all persons and not only to a limited class. The ordinary man in the street is prohibited from using, possessing or wearing, for certain purposes, any object or thing which consists of, incorporates or bears any symbol, representation or device forming part of the badge or uniform of the Army, Air Force, Police or Prison Service. The badges and uniforms of these bodies are not registered or prescribed in any manner or form. The Commander, Commissioner or Director of the force concerned may at any time adopt for that force a new badge or uniform. The Respondent has submitted that if a party is in any doubt as to what badges are

1985 (1) ZLR p269

SMITH J

used by the Security Forces, it can ask the Secretary for Defence or the Commanders of the forces concerned. Whilst it may be reasonable to expect a political party to make such a request, is it reasonable to expect the ordinary man in the street to do so? However, even if a person does make such a request and obtains the necessary information, there is no way that he can find out if there has been a change to any uniform or whether a new badge has been substantially adopted. If the Commander of the Army or Air Force changes any part of an existing uniform or adopts a new badge, he does not have to give public notice thereof. Thus a political party might be lawfully using a particular symbol and might even have had that symbol accepted by the electoral officer for use on the ballot paper when a similar symbol is adopted for a unit of the Army, or Air Force or Police. How can the party find out that the new symbol has been adopted?

In *Back's* case (*supra*), *TEBBUTT J*, at 777A, said:

For all the reasons to which I have referred I have come to the conclusion that the regulation in question and the annexure thereto, as they presently exist, are such as to create substantial uncertainty for those who have to apply them and to whom they apply; that accordingly the regulation is void for vagueness and that therefore the Master's claims must fail.

For the reasons outlined above I feel that the Regulations create substantial uncertainty as to what activities are prohibited. An ordinary member of the public cannot reasonably be expected to know what symbols may not be used. Consequently, the Regulations, even if they were not *ultra vires*, would be void for vagueness.

Accordingly, it is declared that the Electoral Act (Use of Symbols) Regulations, 1985, published in SI 121A of 1985, are null and void as being *ultra vires* s 165A of the Electoral Act, 1979. The respondent is ordered to pay the applicant's costs of suit.

Scanlen & Holderness, applicant's legal practitioners

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

1985 (1) ZLR p270

SONGORE v COMMISSIONER OF TAXES 1985 (1) ZLR 270 (SC)

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Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Civil Appeal

16 May 1985

Flynote

Legislation - s 32, Sales Tax Act, [Chapter 184] - s 12 Fiscal Appeal Court Act [Chapter 180].

Practice and Procedure - summary judgment - assessed tax - defence that tax incorrectly assessed - not bona fide where no timeous objection made to assessment.

Revenue - sales tax - objections - failure to object to assessment precludes later defence to Commissioner's application for summary judgment.

Headnote

Where a taxpayer has not complied with the procedure for objecting to an assessment to sales tax he may not resist the Commissioner's application for summary judgment on the basis that the assessment is incorrect.

J P Haxen for the appellant

G E Mandizha for the respondent

Judgment

Beck JA: In the court *a quo* summary judgment was applied for and was granted by the magistrate in respect of the plaintiff's claim for assessed tax in terms of the Sales Tax Act [Chapter 184]. The defendant has appealed against that judgment.

In the respondent's heads of argument in this court the point was taken for the first time that in terms of s 32 of the Sales Tax Act a person who is dissatisfied

1985 (1) ZLR p271

BECK JA

with any assessment may lodge with the Controlling Officer an objection in writing, such objection to reach the office of the Controlling Officer not later than thirty days after the person making the objection has been notified of the assessment, but (and this is accepted by the appellant) no such objection was ever lodged to the assessments upon which summary judgment was applied for. It was contended that, the appellant not having availed himself of the provisions of that section and of s 12 of the Fiscal Appeal Court Act [Chapter 180], he was not entitled to circumvent those procedures by resisting an application for summary judgment in the magistrate's court, thereby seeking in effect to make the Controlling Officer's decision subject to an appeal to the magistrates court.

Mr *Haxen*, who appears for the appellant, has accepted the correctness of this point and has

conceded that the appeal must therefore be dismissed.

Both parties are also *ad idem* that, in consequence of the point having been raised for the first time before this court, an adjustment to the order of costs that was made in the court *a quo* must be made.

Accordingly we order that the appeal be dismissed with costs, save that the order of the court *a quo* is to be varied by directing that the costs awarded to the plaintiff are not to include any costs relating to the replying affidavit that was filed by the plaintiff.

Gubbay JA: I agree

McNally JA: I agree

Scanlen & Holderness, appellant's legal representatives

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

1985 (1) ZLR p272

S v MANGEZI 1985 (1) ZLR 272 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, and Gubbay and McNally JJA

Criminal Appeal

3 April and 27 May 1985

Flynote

Criminal procedure - conduct of trial - duty of court to maintain a detached impartiality and not to descend into the arena - giving assistance to inexperienced prosecutor on technical points - whether permissible - defence outline - status of.

Evidence - extra-curial statement - challenge in defence outline - duty of court.

Headnote

A judicial officer who takes over the examination of prosecution or defence witnesses, even without showing bias, acts improperly. While it may be appropriate to give technical assistance to an inexperienced prosecutor, it is axiomatic that such a one will generally be more capable of conducting litigation than an unrepresented accused, who will be more deserving of, and in need of, guidance from the bench. A judicial officer who descends into the arena, even to remedy the shortcomings of an incompetent prosecutor, destroys any impression of impartiality and invariably places himself in an adverse position when it comes to assessing demeanour, and in consequence his findings of credibility may be unreliable.

The defence outline of an accused person is part of the record and generally becomes part of

the defence evidence.

Allegations of duress in a defence outline must be investigated whether or not they are repeated in evidence by the accused.

Cases cited:

S v Sigwahla 1967 (4) SA 566 (AD)

1985 (1) ZLR p273

DUMBUTSHENA CJ

S v Rall 1982 (1) SA 828 (AD)

R v Hepworth 1928 AD 265

Yuill v Yuill [1945] 1 All ER 183

Jones v National Coal Board [1957] 2 All ER 155

R v Manjonjo 1963 R&N 703

S v Majuru 1976 (1) RLR 198 (AD)

James for the appellant

B N Sigidi for the respondent

Judgment

Dumbutshena CJ: Only the convictions and not the sentence are challenged in this appeal. The appellant was charged with one count of theft and one count of contravening s 14(1)(a) of the Miscellaneous Offences Act [*Chapter 68*], to which he pleaded not guilty. In convicting him the magistrate stated his conclusions as follows:

Accordingly, in detail, the accused is found GUILTY on the first count of theft as charged of 16 empty drums, two 13-amp plugs and one 15-amp plug. As regards the remaining items alleged in the charge, that is the first charge, the accused is found GUILTY of the competent verdict of contravening s 14(1)(a) of the Miscellaneous Offences Act, these items being one 5 litre tin containing varnish; 20 litre tin containing Tellus 68 oil and 65 litres of petropine. These latter items not having been proved to have come from the Railways.

As regards the second count, the list that was properly proved by the witness, Mr Majetsha, consisted of the first two pages and not the third page and extends from the first item as charged in the second count, down to the words '2 x 44 gal. drums' on the charge. The remaining items, for convenience, I have bracketed, put in parenthesis, that is the last eight lines of that charge on the front of the indictment. All these items are on the third page of the list which the witness said he knew nothing about and the Accused is found NOT GUILTY in respect of those particular items.

It will be seen from the above that the appellant, who was originally charged with two counts, had three verdicts returned against him. On the view that we take of the appeal it is unnecessary to express an opinion on the competency of such a procedure. Because the point was not argued before us, I prefer to leave it open.

DUMBUTSHENA CJ

Mr *James*, who appeared for the appellant, contended that the magistrate had identified himself with the prosecution. He had usurped the functions of the prosecutor and led police witnesses on the evidence relating to the taking down of warned and cautioned statements and their introduction and production in court.

In his reply to the notice of appeal the magistrate was happy to explain his participation in the leading of this type of evidence by saying:

Most prosecutors, even after two years' experience, have little or no idea of how to introduce a Warned and Cautioned Statement, and even less idea of how to conduct a challenge as to voluntariness in the separate issue, or how to cope with a challenge as to contents in the main issue, if, indeed, they know the difference. The only way this court has been able to teach prosecutors (if they stay prosecuting long enough) is to show by example. It will be noted that at no stage has the court indicated partiality or a disbelief in the accused's case in relation to the statement or the case as a whole, till judgment, and thereby has not entered the arena patently adverse to the accused. The court has also assisted the accused in the presentation of his case, and has in no way suggested that the accused's case has been pre-judged and so inhibiting his defence.

From a reading of the record it appears that the magistrate did not confine himself to helping an inexperienced prosecutor "to introduce a warned and cautioned statement". He went beyond that stage and examined substantially prosecution witnesses in areas of evidence which had nothing to do with introducing warned and cautioned statements. That this was so can be seen in his questioning of Mahachi. He allowed the prosecutor to put to Mahachi only a few questions and took over the examination of Mahachi. For about the length of four pages of evidence, the magistrate pressed on questioning the witness and each time enlisting replies that were favourable to the prosecution case. Mr *Sigidi*, who appeared for the respondent, in conceding that the magistrate had identified himself with the prosecution, remarked briefly that the magistrate had entered into the arena.

It is not only when a judicial officer shows bias that his leading or cross-examining of a witness may be condemned, it is also the fact of taking over the examination of the prosecution or defence witnesses that is not permissible.

In this case it is clear that the magistrate was more inclined to assist the

DUMBUTSHENA CJ

prosecution and less inclined to help the appellant, who was unrepresented. That this was so is clear from the fact that although the appellant had alleged in his defence outline that he had been "threatened with indefinite detention unless (he) accepted the charge" and that bail would not be granted unless he confessed, the magistrate did not assist him in putting to police witnesses the allegations of duress. The magistrate must have known that the appellant was more ignorant of challenging the admissibility of his statements than the prosecutor, a legal practitioner, was ignorant of introducing into evidence warned and cautioned statements. If the magistrate was as impartial as he alleged, why did he not put questions to police witnesses on

the allegations of duress made against them by the appellant? He indirectly reminded or tried to remind the appellant of the allegations he had made against the police. From a reading of the record the appellant seemed not to understand what the magistrate wanted him to do. It would have been proper for the magistrate to put directly to police witnesses the allegations made by the appellant. He put it this way during the appellant's cross-examination of Constable Chirau:

BY COURT (To Accused)

You have heard what the witness has said. The witness has said that basically two statements were taken from you on the occasions alleged, that you made them freely and voluntarily and you adhered to them and signed them. Do you have anything to say about that? - I put it to the witness that when those statements were made he was not there, he only came in to give his signature after a long process of arguing.

Any other comment? - When I heard the witness saying that Constable Murapa compiled a list, I put it to him that no list was compiled whatsoever, but Mahachi suggested that the list should be made by the Railways where they were taking the property.

Yes? - And also I put it to the witness that when he was at my house the police were inactive upon the matter and Chirau himself pointed to me that the police had really nothing against me, but it was as if there was no Railway security there could be no case. Then he said he feared the Railway security.

Yes? - And I also put it to him that he never entered my house - he was just standing by the fence. The DD workers who were there were being ordered by Mahachi to load the stuff while the police were standing at random, no recording.

1985 (1) ZLR p276

DUMBUTSHENA CJ

Yes? - I put it to the witness when Mahachi entered the office he used to go out and leave his chair for Mahachi and he would only come to give his signature. And I also put it to him that he once mentioned a headache on the case, that Mahachi is a headache, he caused a headache and I put it to him that on one occasion when Mahachi was in together with some other of his fellows, he said he was taking a trip to Njube and in most cases he was not present, he would only appear to give his signature.

Yes? - So I put it to him that all he has said is against him, as Mahachi used to say, but he had evidence on that. I put it to him that he was suggesting, because he was not present all the time, he is suggesting things went this way, that way. He had no interest in the case.

Yes? - Thank you.

It can be seen from the above passage that the appellant did not understand what he was required to do or how to challenge the admissibility of the statements he was alleged to have made freely and voluntarily. He was an unrepresented accused who was appearing in court for the first time and who needed the assistance of the court.

While it is true that a magistrate is obliged and entitled to put additional questions to witnesses and accused persons whenever necessary in order to elicit or elucidate the truth more fully in respect of those important aspects of the case that seem to him clouded by unclear and sometimes confused evidence, he is not entitled to descend into the arena on the side of the prosecution or the defence. A magistrate must remain right through the trial detached and impartial.

In the instant case the magistrate took part substantially in the leading of prosecution evidence

but did not do the same for the unrepresented accused.

In *S v Sigwahla* 1967 (4) SA 566 (AD) at 568 F-H HOLMES JA said:

In this court Mr *Stegmann*, for the appellant, contended that the trial court's findings of credibility were vitiated by the undue extent to which, so he submitted, the learned Judge had descended into the arena, with resultant clouding of his judicial vision by the dust of conflict. A submission of this nature is rare in this court. It was made, unsuccessfully, in *R v Roopsingh* 1956 (4) SA 509 (AD) at pp 513G *et seq.*, and *S v Adriantos en' Ander* 1965 (3) SA 436 (AD) at p 438. The principle

1985 (1) ZLR p277

DUMBUTSHENA CJ

is clear. A judicial officer should ever bear in mind that he is holding a balance between the parties, and that fairness to both sides should be his guiding star, and that his impartiality must be seen to exist. There are occasions, particularly where a party is unrepresented, when the judicial officer will properly take some part in the examination of witnesses, but in the main, and as far as is reasonably possible, he will usually tend to leave the dispute to the contestants, interrupting only when it is necessary to clarify some point in the interests of justice. Thereby he is better able to form objective appraisals of the witnesses who appear before him, and he also avoids creating wrong impressions in the minds of those present.

The trial magistrate does not believe that he entered into the arena and that his mind was clouded by the conflict. That he was favourably disposed to the prosecution case is a conclusion that can easily be inferred from the magistrate's taking over from the prosecutor the questioning of some of the prosecution witnesses. A judicial officer who takes over the examination of witnesses deprives himself of the opportunity to observe the mannerisms of a witness displayed in the witness-box that to a large extent help a judicial officer to determine his demeanour. Such observation as makes it possible for a judicial officer to determine the demeanour of witnesses is only possible when examination of such witnesses is being done by counsel.

I entertain some doubts that the assessment of the credibility and demeanour of prosecution witnesses was done with detached impartiality. It does not avail the magistrate to say " ... at no stage has the court indicated partiality or a disbelief in the accused's case in relation to the statement or the case as a whole, till judgment, and thereby has not entered the arena patently adverse to the accused", as the magistrate stated in his reply. What is important is that justice must be seen to be done. When a judicial officer takes over the examination of prosecution or defence witnesses it cannot be said that justice has been done because the judicial officer immersed himself into the conflict on one or the other side.

It is salutary to repeat what was said by TROLLIP AJA (as he then was) in a passage in which he considered the matters I have referred to above in *S v Rall* 1982 (1) SA 828 (AD). After citing the remarks of CURLEWIS JA in *R v Hepworth* 1928 AD 265 at 277 which are as follows:

A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the

1985 (1) ZLR p278

DUMBUTSHENA CJ

rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.

TROLLIP AJA remarked at 831-832H as follows:

(1) According to the above quoted dictum of CURLEWIS JA the Judge must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused (see, for example, *S v Wood* 1964 (3) SA 103 (O) at 105G; *Rondalia Versekeringskorporasie van SA Bpk v Lira* 1971 (2) SA 586 (A) at 589G; *Solomon & Anor NNO v De Waal* 1972 (1) SA 575 (A) at 580H). The Judge should consequently refrain from questioning any witness or the accused in a way that, because of its frequency, length, timing, form, tone, contents or otherwise, conveys or is likely to convey the opposite impression (cf *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A) at 570E-F; *Jones v National Coal Board* [1957] 2 All ER 155 (CA) at 159F).

(2) A Judge should also refrain from indulging in questioning witnesses or the accused in such a way or to such an extent that it may preclude him from detachedly or objectively appreciating and adjudicating upon the issues being fought out before him by the litigants. As LORD GREENE MR observed in *Yuill v Yuill* [1945] 1 All ER 183 (CA) at 189B, if he does indulge in such questioning -

'he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.'

(See, too the *Jones* case *supra* at 159C-E). Or, as expressed by WESSELS JA in *Hamman v Moolman* 1968 (4) SA 340 (A) at 344E, the Judge may thereby deny himself -

'the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to

1985 (1) ZLR p279

DUMBUTSHENA CJ

determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts.'

The quality of his views on the issues in the case, including those relating to the demeanour or credibility of the witnesses or the accused or the relevant probabilities, may in consequence be seriously impaired (see, eg *R v Roopsingh* 1956 (4) SA 509 (A) at 514-5). And, if he is sitting with assessors, that may well adversely influence their deliberations and opinions on those issues.

(3) A Judge should also refrain from questioning a witness or the accused in a way that may intimidate or disconcert him or unduly influence the quality or nature of his replies and thus affect his demeanour or impair his credibility. As LORD GREENE MR further observed in *Yuill's* case *supra*, at 189B-C:

It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge to what it is when he is being questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue.

In this case the magistrate regrettably deprived himself of the detached impartiality, as was said by LORD GREENE in *Yuill v Yuill* [1945] 1 All ER 183 at 189A-B:

A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a judge who himself

conducts the examination. If he takes the latter course, he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation.

In my judgment this trial cannot be said to have been fair. Right from the beginning of the trial the scales of justice were tilted in favour of the prosecution. I am burdening this part of my judgment with authoritative passage from judgments of wiser and more learned judges who have pointed out in their judgments so aptly the matters I am now concerned with. I must shy away from spoiling wisdom in those judgments by paraphrases of my

1985 (1) ZLR p280

DUMBUTSHENA CJ

own. It is important that judicial officers who assume the mantle of prosecution or defence counsel in the mistaken belief that they are doing justice to the parties should read the above-cited passages before they descend into the arena and thereby cloud their visions with the dust of conflict. In this regard it is also instructive to read what was said by DENNING LJ (as he then was) in *Jones v National Coal Board* [1957] 2 All ER 155 at 159D-H:

Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales-the 'nicely calculated less or more'- but the judge at the end decides which way the balance tilts, be it ever so slightly. ... it is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other; see - *R v Cain* (4) ((1936) 25 Cr App Rep 204); -*R v Bateman* (5) ((1946) 31 Cr App Rep 106); and *Harris v Harris* (6) (Apr. 8, 1952, The Times, Apr. 9, 1952) by BIRKETT LJ, especially. And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost; see *R v Clewer* (7) ((1953) 37 Cr App Rep 37). The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Bacon spoke right when he said that:

Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.

I have elsewhere in this judgment referred to the admissibility of the two warned and cautioned statements made by the appellant. These two statements were admitted in evidence in spite of the fact that the appellant had alleged that they had been made under duress. What I find difficult to understand is the fact that the magistrate did not appreciate that the appellant had raised the issue of the voluntariness of the statements in his defence

1985 (1) ZLR p281

DUMBUTSHENA CJ

outline and that that in itself was a challenge to the voluntariness of the statements. In his reply to the notice of appeal the learned magistrate commented as follows:

The accused, in giving a defence outline, is not giving evidence, when he says that 'Cst. Murapa threatened me with indefinite detention .. said there could be no bail for me unless I accepted the charge' and 'I would die in detention unless I accepted the charge'. The significance of the reference to pages 13-15 of the record here seems obscure, unless the objection is to the judicial officer necessarily having sight of the alleged statements for the purpose of leading the necessary evidence. It should be pointed out that the court was quite aware of the potential prejudice in regard to the trier of fact being acquainted with the contents of a statement which could be found inadmissible.

The learned magistrate seems, from a reading of the above passage, to have misread the ground of appeal which reads:

The learned trial magistrate erred in law in the procedure he followed in allowing production of the extra-curial statements particularly in the light of the appellant's defence outline (CF p 11/13-15 of record and *Manjonjo v R* 1963 R&N 703 at 707-8; *Majuru v S* 1976 (1) RLR 198).

It must be realised that the defence outline is part of the record of the trial proceedings. In many trials in the magistrates courts an accused person when called to give evidence informs the presiding magistrate that he adheres to his defence outline and the prosecutor thereafter cross-examines him. That defence outline is surely part of his evidence. It seems to me, however, that the appellant's attention was not sufficiently drawn to allegations he had made in his defence outline because the magistrate did not regard it as part of his evidence. And because of that when he said Constable Murapa was not present when the statements were made, he was not asked to tell the court who was present and who of the police officers had threatened him. That omission on the part of the magistrate can only be attributed to the magistrate's lack of appreciation of the import, in a trial, of a defence outline.

One must infer from the magistrate's understanding that he did not appreciate that once an allegation of undue influence or duress has been made " ... there must be careful enquiry to make sure that there is not an alternative objection that if anything was said it was extracted by force". See *Manjonjo v R* 1963 R&N 703 at 707H. And in *S v Mujuru* 1976 (1) RLR 198 (AD) at 200G-H

1985 (1) ZLR p282

DUMBUTSHENA CJ

MACDONALD ACJ (as he then was) cited a passage in the judgment of CLAYDEN CJ in *Manjonjo v R supra* at 707 and added the following:

A court must of necessity be on its guard against making the assumption that because the denial is false, the accompanying allegation of an assault is also false, more particularly when the accused person is an unsophisticated and uneducated person. Nor does it follow that the assault may not prove to be extremely relevant to the question of whether the statement was made freely and voluntarily.

In the instant case the lower court completely ignored the appellant's allegations of duress and undue influence. As a result no separate trial was held and the statements were produced in evidence. Mr *Sigidi*, who appeared for the respondent, conceded, properly in my view, that the statements were improperly introduced into evidence. I agree with him.

In my view it was unsafe to convict the appellant on the uncorroborated evidence of an accomplice, Freddy Ndlovu, and on the unsatisfactory evidence adduced by the prosecution

witnesses.

In his judgment the magistrate seemed not to have appreciated the danger of convicting on the evidence of an accomplice. He did not even think that Freddy Ndlovu, who had been found in possession of empty 44 gallon drums he said were given him by the appellant and who was charged with an offence arising thereof, was an accomplice. He did not, therefore, warn himself of the danger of convicting on the uncorroborated evidence of an accomplice. In his reply to the notice of appeal the magistrate specifically stated that Freddy Ndlovu was not an accomplice. He put his view as follows:

If one accepts the defence outline as the truth, Freddy Ndlovu could never be considered an accomplice, as he is alleged to have taken from the accused only drums that he could prove to the accused that he paid for, so it is alleged that what drums he did receive were acquired legally from the accused, and any drums acquired illegally were entirely outside the knowledge of the accused. Freddy Ndlovu's evidence was that he acquired more than the four drums allegedly received from the accused, but that he did not pay for them at any time, but nevertheless considered that the accused had authority to dispose of them in the manner that he did. At no stage was it suggested that Ndlovu was an accomplice, nor did it ever appear to the court that any cogent fact emerged suggesting it.

1985 (1) ZLR p283

DUMBUTSHENA CJ

The learned magistrate erred in the view he took of the factors that constitute a witness an accomplice. It is clear from the evidence that Freddy Ndlovu was a recipient of the drums that were allegedly stolen by the appellant. Mr *Sigidi* conceded that he should have been treated as an accomplice and the cautionary rule applied, although in fairness to him he contended that there was sufficient evidence upon which to convict the appellant.

It now remains to consider briefly the rest of the evidence which Mr *Sigidi* submitted was "strong evidence" against the appellant. I do not agree with that submission. In my judgment the rest of the evidence was, to say the least, very unsatisfactory. Property was collected from the appellant's house by police details and National Railways of Zimbabwe security employees. No list of that property was made as the property was being removed from the appellant's house. A list of the property was compiled by Majetsha and Morgan in the absence of the appellant and the police at some other place. Three lists of the property were tendered in evidence but no one could say who had compiled the third list. Besides, there was no clear identification of the property belonging to the National Railways of Zimbabwe. The drums were painted in colours common to all such drums. The plugs were first said to be marked with Railway lettering but this was afterwards denied. There was no missing property at the appellant's place of work. And what is more important Majetsha said it was impossible for the appellant to steal property from elsewhere. How could one believe that the State had proved its case beyond reasonable doubt in the face of such unsatisfactory evidence?

The indications are that the case was badly investigated and prosecuted. This is borne out by the fact that the trial magistrate had no confidence in the ability of the prosecutor to conduct his case with a degree of competence. The police charged the appellant with two counts, theft and the contravention of s 14(1)(a) of the Miscellaneous Offences Act but because the case was badly investigated and presented, and for some other reasons which are not clear in the

magistrate's judgment, the trial magistrate split Count One into two counts and convicted the appellant of theft and contravention of s 14(1)(a) of the Act - a very undesirable thing to do. The unsatisfactory nature of the prosecution case cannot in my view be improved by the fact that the magistrate did not believe the appellant. The *onus* of proof is on the prosecution and not on the defence.

It is my judgment that it is unsafe to convict on evidence so badly presented and so manifestly unreliable because of material irregularities.

1985 (1) ZLR p284

DUMBUTSHENA CJ

Accordingly I would allow the appeal and set aside the convictions and sentence.

GUBBAY JA: I agree

McNALLY JA: I agree

Sansole & Senda, appellant's legal practitioners

1985 (1) ZLR p285

S v MPOFU (2) 1985 (1) ZLR 285 (HC)

HH-177-85

Court **High Court, Harare**

Reynolds J

Case Transferred for Sentence

17 and 29 May 1985

Flynote

Criminal Procedure - sentence - accused pleading guilty to and convicted on 11 counts of theft by conversion - factors to be taken into account and examined in an attempt to assess an appropriate sentence.

Headnote

The accused pleaded guilty to and was convicted on 11 counts of theft by conversion in the magistrates court. The matter was transferred to the High Court for sentence. In an attempt to assess an appropriate sentence, it is necessary to examine various pertinent factors:

1. A balance has to be struck between the interests of society and those of the offender.
2. In all multiple crime cases the courts pay regard to and look at the totality of the criminal behaviour.

3. It is an aggravating fact if the offences disclose repeated breaches of trust. However, allowance should be made for a person who, contrary to his normal character, succumbs to strong temptations that are put in his way to break the law.
4. A first offender is normally treated with a measure of leniency by the courts.
5. A plea of guilty may or may not indicate contrition on the part of the accused. Whether or not there is a genuine expression of remorse will depend upon the circumstances of each particular case. What a plea of guilty does accomplish, though, is to contribute to the smooth and efficient administration of the system of criminal justice.
6. Care should be taken not to let it be thought that the person who

1985 (1) ZLR p286

pleads not guilty to the charge is being penalised in any way for so doing.

7. An aggravating feature would be the element of greed involved in the theft of a large sum of money.
8. The penalty ultimately imposed must always be fairly and objectively related to the gravity of the offence itself, and the prevalence of an offence must not be taken too far.
9. The restitution of stolen property has always been regarded as a mitigating factor. It is proper for the court itself, if the matter is not raised by the defence, to investigate the prospects of restitution and to give due weight depending upon the circumstances, if this form of reparation is made. The accused should be encouraged to make restitution.
10. The objects of imposing a condition that the accused should make restitution do, *inter alia*, induce compliance with conditions of suspension. A corollary of this object is that the accused is made to understand that if he does comply with the condition he will earn a lesser sentence. It is this combined rationale which forms the basis of the decision to pass a sentence partly suspended on conditions of restitution and whether or not the accused can pay does not always influence this decision.
11. It is highly desirable to keep anyone out of prison as much as may be possible, particularly first offenders.

Cases cited:

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

S v Coetzee 1970 (1) RLR 185 (AD); 1970 (4) SA 83 (RAD)

S v Kruger 1976 (3) SA 290

S v Razaro 1979 RLR 353
S v Chikopa 1984 (1) ZLR 209 (SC)
Attorney-General v Chipisah AD-58-81 (unreported)
R v Lord (1979) 1 Cr App R (S) 177
R v Mvelase & Ors 1958 (3) SA 126 (N)
R v Karg 1961 (1) SA 231 (AD)
S v Mbingo 1984 (1) SA 552 (AD)
R v Boesigo 1956 (1) SA 234 (AD)
R v David & Ors 1964 RLR 2
S v Rheeder 1976 (1) SA 848 (O)
S v Orr AD-41-76 (unreported)
S v Chitsaka AD-127-79 (unreported)
R v Zindoga 1980 RLR 86 (AD)

1985 (1) ZLR p287

REYNOLDS J

R v Lamb 1969 (2) RLR 193
S v Magkise 1973 (2) SA 493 (O)
S v Zumbika 1978 RLR 192
Attorney General v Lino & Anor S-107-84 (unreported)
S v Tshondeni; S v Vilakazi 1971 (4) SA 79 (T)
R v Clarke [1982] 1 WLR 1090
S v Wood 1973 (2) RLR 11 (AD)
S v Sibanda HB-49-83 (unreported)
S v Sango HH-217-84 (unreported)
C N Greenland for the accused
T Karwi for the State

Judgment

Reynolds J: The accused pleaded guilty to and was convicted on eleven counts of theft by conversion in the magistrates court. The matter was then transferred to this court for sentence in terms of s 58 of the Magistrates Court Act [Chapter 18].

The agreed facts were that the accused had been employed as an assistant financial accountant by the complainant firm. In this capacity the accused was granted authority to make out and cash company cheques in order to replenish the firm's petty cash account. Availing himself of the singular opportunity thereby afforded him, the accused proceeded to cash cheques to the value of approximately \$4 500 on each of eleven separate occasions between January 1984, and January 1985. He converted these various sums to his own use. The total sum that was misappropriated in this way amounted to \$48 714.

The accused alleged that he committed these crimes in association with an accomplice, and this fact is indeed common cause. The accomplice was in fact the accused's superior at his place of employment and was the financial accountant there. This person will not apparently be prosecuted for the part he played in the commission of these crimes.

None of the stolen money has been recovered, and the accused states that he has spent all that he received, mainly on the purchase of a motor vehicle, a stereo radiogram, and on general household expenditure.

The conviction recorded in the magistrates court has been confirmed in this court.

1985 (1) ZLR p288

REYNOLDS J

The accused is 29 years of age. He is married to a teacher and has one child. He had been employed by the complainant company for some four years, and at the time that he committed the offences charged was earning a gross salary of \$1 233, or a net \$785 per month. His terminal benefits will amount to the sum of \$5 666,23 before any tax deductions are taken into account. The accused has made no offer to restore the stolen money, in whole or in part.

In attempt to assess an appropriate sentence in this case, it is necessary to examine the various pertinent factors in some depth.

A balance has to be struck between the interests of society and those of the offender, or, as RUMPFF JA expressed in *S v Zinn* 1969 (2) SA 537 (AD) at 540G:

What has to be considered is the trial consisting of the crime, the offender and the interests of society.

I shall consider each of these elements in turn as far as this may be possible.

The multiple offences committed here are inherently serious in that a large total sum has been stolen by an employee who has abused the position of trust that he occupied. The facts disclosed a persistent course of misconduct over a period of nearly twelve months.

In all multiple crime cases the courts pay regard to what Thomas describes as 'the totality principle.' "(The court) must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences." Thomas *Principles of Sentencing*, 2nd Ed p 56).

In effect the accused normally receives a "discount" for bulk offending, particularly where the various counts are similar in nature, for the imposition of a separate and consecutive sentence for each individual charge would result in a very high aggregate penalty which would be disproportionate to the moral blameworthiness of the accused having regard to his line of conduct as a whole. In giving effect to this principle, individual sentences are passed on each count in some cases, whereas in others a globular penalty is imposed, but in either event, the overall severity of the sentence is modified to take account of the total and combined impact of all the offences together. In the present case I consider that the imposition of a globular sentence would be appropriate as the various counts were virtually identical in nature. (See *S v Coetzee* 1970 (1) RLR 185 (AD); 1970 (4) SA 83 (RAD); *S v Kruger* 1976 (3) SA 290 - Translation at page 562; and *S v Razaro* 1979 RLR 353).

1985 (1) ZLR p289

REYNOLDS J

The total amount stolen of \$48 714 is a large sum of money by any standards, and the complainant firm has suffered substantial prejudice as a result of the accused's depredations. It seems to be probable that some of this loss will be recoverable, but not all of it.

The accused in this case was placed in a position of trust by his employers and it is an aggravating fact that these offences disclose repeated breaches of that trust. In the words of Ashworth, *Sentencing and Penal Policy*, at 194:

positions of trust are not normally given to individuals unless they have unblemished references, and so the offence may be seen as a betrayal of those very characteristics. Society operates in certain spheres largely on the basis of trust, and one of the burdens of a position of trust is an undertaking of incorruptibility. The individual who puts himself forward as trustworthy, is trusted by others and then takes advantage of his power for his own personal ends can be said to offend in two ways - not only does he commit the crime charged (be it theft, false accounting or a sexual offence), but in addition he breaches the trust placed in him by society and by the victims of the particular offence.

It was argued by Mr *Greenland*, on behalf of the accused, that although there had been these breaches of trust, because there had been little or no checking of the accused's work, and in fact his superior - the alleged accomplice - had incited him to steal in this way, the accused's culpability was substantially reduced. I would agree that this situation does indeed have a material mitigating effect, and that it is only right that allowances should be made for a person who contrary to his normal character succumbs to strong temptations that are put in his way to break the law. This is particularly so if the temptation arises from a failure by those responsible to take reasonable and adequate precautions against dishonesty, or where opportunities are created for the person concerned to engage in unlawful activities with little risk of detection. Such falls from grace should be treated with understanding and moderation by the courts in my view.

In *S v Chikopa* 1984 (1) ZLR 209 (SC) at 211F-G, DUMBUTSHENA CJ said:

If society by its laxity has created conditions conducive to the commission of thefts or frauds then the court will, in assessing sentence, consider the interests of the accused less harshly than in a setting in which society has provided strict procedures which are meant to prevent the commission of offences of this magnitude.

REYNOLDS J

(See, too *Attorney General v Chipisah*, AD-58-81 (unreported)).

This consideration, is however, off-set to a limited extent by the fact that persons are placed in positions of trust in view of their previous good records, and as an expression of faith and confidence in their good conduct. As such they are expected to possess sufficient control and character to withstand the pressures and temptations which are put in their way. As the learned author Ashworth, *supra*, puts it (at page 200),

The existence of temptation is part and parcel of positions of trust, just as previous good character is a natural precondition of occupying such a position and anyone who undertakes such a position has the additional obligations which go with it.

Furthermore, it must be borne in mind that society operates to a large extent on a social network based on trust and inter-dependence. This is an essential and integral part of normal, day to day affairs in the life of a community, and anyone who fails to uphold his duties in this respect weakens the fabric of the social system as a whole. It would, in my view, be ill-advised for the courts to extend to such a person any immoderate or undue lenity. (See *R v Lord* (1979) 1 Cr App R (S) 177 at 178, where it was held that the usual leniency shown to a first offender might be withheld "where the offence of the defendant is difficult to discover or where the offence can be easily carried out.")

For the present case, however, on balance it is accepted that the accused's conduct was rendered somewhat less reprehensible by virtue of the temptations and other forces that influenced him. This indicates that he is less censurable than the person who commits a criminal act where there is no such temptation.

It is a concomitant and aggravating fact that the present accused carried out a persistent and systematic course of dishonesty over a protracted period of time. During this period he had ample time to reflect on his conduct calmly and dispassionately, and to decide on his future actions in the light of all the considerations that might be considered by him to be applicable. Despite this, he chose to persist in his unlawful activities.

Turning to the accused's personal circumstances, it is clear that any sentence of imprisonment will bear heavily on the accused and on the members of his family. He has previously enjoyed a position of respect and esteem in the

REYNOLDS J

community, and it would appear that the present series of offences were out of character. By the same token, however, a higher standard of behaviour is expected of those who hold responsible position. The accused is a first offender. This term includes a person such as the accused, who is convicted for the first time although he has committed a number of offences before he is caught and brought to book. This is so for the accused has not previously received, at first hand, the salutary experience of a criminal trial, nor has he suffered any

penalty for his misbehaviour. A first offender is normally treated with a measure of leniency by the court. There are obvious reasons for this. The offence in question may have been an isolated lapse, and the offender deserves a chance to reform himself and to conform in future with the dictates of society. The present accused will benefit from this factor.

Mr *Greenland* has drawn attention to the fact that the accused has pleaded guilty to all charges, has been co-operative with the police, and has said that he is contrite. Mr *Greenland* has submitted that these factors should operate in mitigation of sentence. These submissions require examination. It seems to me to be likely that the accused would have experienced difficulty in denying having committed the offences with which he was charged in this case.

It was he who signed and cashed the cheques in question and he was unable to account for the proceeds. In these circumstances it is probable that his plea followed upon the realization that no other course was open to him. Having said that, it is in my view a legitimate consideration, nonetheless, that the accused has pleaded guilty to the crimes charged. A plea of guilty may indicate contrition on the part of the accused. This does not necessarily follow, and whether or not there is a genuine expression of remorse will depend upon the circumstances of each particular case. What a plea of guilty does accomplish, though, is to contribute to the smooth and efficient administration of the system of criminal justice. In some cases, and the present case is not one of these, it may also save certain types of witnesses the ordeal and embarrassment of a court appearance. But in the first respect mentioned the plea merits recognition and credit to an extent. It is a fact that a significant portion of offenders, although knowing full well that they are guilty of a crime charged, still hotly protest their innocence. It is by no means uncommon for such persons to attack the *bona fides* and veracity of the most honest and impartial of witnesses, to prolong trials extensively and unnecessarily, to concoct specious and spurious defences, and generally to cause a considerable waste of public time and money. This is against public interest. I believe that it is more for this reason than any other, such as the so

1985 (1) ZLR p292

REYNOLDS J

called automatic right based on a supposed declaration of contrition, that the courts generally allow an offender some mitigation of sentence if he pleads guilty. In this way such an offender is encouraged to adopt the more honest and laudable procedure of making a clean breast of his culpability, and of facing up to the consequences of his misconduct. I should stress that, in my opinion, no more than a modest discount should be allowed on this basis, otherwise the innocent may feel under undue pressure to enter a false plea of guilty. It should, perhaps, also be stressed that care should be taken not to let it be thought that the person who pleads not guilty to the charge is being penalized in any way for so doing (see *R v Mvelase & Ors* 1958 (3) SA 126 (N)). Nor should it be thought that there is any suggested erosion of a person's right to deny the charge laid, and to put the prosecution to the proof of it.

In the instant case the accused's pleas will be taken into account to this extent, but not on the basis that a plea of guilt automatically entitles the accused to leniency because this amounts to an expression of contrition. It is often difficult to decide whether or not there is genuine remorse shown in any particular case. In the present matter I would have expected some rather more

tangible evidence of contrition than the mere *ipse dixit* of the accused's legal representative, had there been genuine feelings of remorse and the desire to make amends. At no time has the accused made any efforts - or any offer - to repay the moneys that he stole, even in part. He has relatively substantial assets, and yet there has been no offer made to realise these assets and to make the proceeds available to the complainant firm. The accused has taken no positive step to indicate the contrition that his representative states exists. In the result I do not believe that I can find that the accused in this case is genuinely contrite.

An aggravating feature in the instant case is that, as with practically all cases involving the planned theft of large sums of money, these offences were motivated by greed as opposed to need. The accused was in receipt of a relatively substantial net monthly salary of \$785,00. This should certainly have been more than adequate to provide for the needs of the accused and his small family.

Turning finally to the interests of society in cases of this nature, it can be said in broad terms that the community requires the protection of the courts, as far as this may be possible, against the depredations of criminals. The public expects and requires that proper sentences are passed by the courts in individual cases which satisfy this need, and which also mollifies its sense of disapproval and reprobation engendered by the accused's criminal acts.

1985 (1) ZLR p293

REYNOLDS J

(*R v Karg* 1961 (1) SA 231 (AD); *S v Mbingo* 1984 (1) SA 552 (AD)). Society's denunciation of the offence and its "demand for justice" becomes more vociferous when a particular crime has become prevalent in the area. The fact of prevalence is a relevant consideration in the assessment of sentence (*R v Boesigo* 1956 (1) SA 234 (AD)). Matters of this nature, however, must be balanced against the moral blameworthiness of the particular offender, and indignation and passion must not be allowed to sway fairness and reason (*R v David & Ors* 1964 RLR 2). In applying these factors to the present case, the first point to be made is that thefts by employees of large sums of money are alarmingly prevalent in Zimbabwe at present. Scarcely a week goes by without at least two such cases being dealt with by the courts. In an effort to stem this tide of criminality, the courts have been imposing markedly more severe sentences than before. Sentences passed not even ten years ago appear to be notably out of line with the general run of sentences passed for similar offences today. (Compare *S v Rheeder* 1976 (1) SA 848 (O); *S v Orr* AD-41-76 (unreported); *S v Chitsaka* AD-127-79 (unreported)). It is necessary to add, however, that the prevalence of an offence must not be taken too far when punishment is being assessed. The penalty ultimately imposed must always be fairly and objectively related to the gravity of the offence itself. (*R v David & Ors, supra*).

The restitution of stolen property has always been regarded as a mitigating factor (*R v Zindoga* 1980 RLR 86 (AD)). It is the complainant after all who is primarily concerned with the loss of his property, and he who benefits from its recovery. Furthermore, it is in the interests of society as well if the restitution takes place in that the complainant is content, the accused is making an effort to redeem himself and part of the affront against the social order has been repaired. As I see it, it is proper for the court itself, if the matter is not raised by the defence, to investigate the prospects of restitution and to give due weight, depending upon the circumstances, if this form

of reparation is made. It is, in my view, desirable for the courts to encourage any person convicted of having committed an offence against property, such as theft or arson, to restore to the victim of the crime the value of the property in question. Such an approach is consistent with the greater emphasis which is increasingly being placed on reconciliation, restitution and rehabilitation as a means of crime prevention and remedial control.

There is no problem if the accused volunteers or desires to restore the property concerned or its value and is able to do so. The appropriate order may follow. Where difficulty does arise is where the accused declines to make restitution although he may be in a position to do so. The point arises

1985 (1) ZLR p294

REYNOLDS J

as to whether he can and should be induced to do so by means of a suspended sentence, or some other form of persuasion.

There appears to be some conflict of opinion in this regard. In such cases as *R v Lamb* 1969 (2) RLR 193; *S v Magkise* 1973 (2) SA 493 (O); *S v Zumbika* 1973 RLR 192; and *Attorney-General v Lino & Anor* S-107-84 (unreported), it is clearly stated that when a court suspends part of a sentence subject to stated conditions, those conditions must be reasonably capable of fulfilment. Furthermore, it is stated that the court should probe the offender's professed ability to pay the compensation ordered, and should be satisfied in this regard before imposing a suspended sentence.

On the other hand, in *R v Zindoga* 1980 RLR 86 (AD), it was held that:

A court does not have to be satisfied of the ability of an accused person to make restitution before making appropriate provision in its sentence for such an eventuality. Nothing is lost by making appropriate provision for the possibility of restitution, even where the prospects of this appear to be remote.

This case is the binding authority on the point in question, I believe, for the remarks contained in the later Supreme Court decision of *Attorney-General v Lino & Anor*, *supra*, in which no reference was made to *Zindoga*, incidentally, were *obiter*.

In view of this conflict, and in the absence of specific reasons having been given in *Zindoga's* case, *supra*, it may be of some value to venture some tentative suggestions that might, with respect, go some way towards what I believe possibly explains the rationale behind the *Zindoga* decision.

The objects of imposing a condition that the accused should make restitution were stated by CILLIE JP. in *S v Tshondeni*; *S v Vilakazi* 1971 (4) SA 79 (T) to be:

- (a) to prevent the accused serving unnecessary imprisonment;
- (b) to cause the accused to realise fully the consequences of his irresponsible criminal behaviour, and
- (c) to compensate the injured party for the loss suffered.

REYNOLDS J

I do not believe that this list purported to be exhaustive, and it is my view, with respect, that one very important ground has been omitted, and this is the matter of inducement. As with virtually any suspended sentence, in suspending part of the sentence on conditions of restitution the courts convey a threat or a promise of what will happen if the accused fails to comply with that condition. There is a clear warning to the offender which he disregards at his peril. I would add then, as a fourth object of imposing such a condition: 'to induce compliance with conditions of suspension'. A corollary of this 'additional' object is that the accused is made to understand that if he does comply with the condition he will earn a lesser sentence. It is this combined rationale which, I believe, forms the basis of the decision to pass a sentence partly suspended on conditions of restitution, and whether or not the accused can pay does not always influence this decision.

Inquiries by the court, or evidence given, may indicate that there is no possibility of the accused repaying the complainant, and the passing of a suspended sentence to allow for restitution may be considered therefore to be a complete waste of time. Even so I fail to see how such a provision would cause a prejudice to the accused or anyone else and the accused would at least be given the chance, should the opportunity arise unexpectedly and subsequently, to secure the benefit of a reduced sentence. To put it another way, in the context of a condition relating to compensation, the justification of the sentence is not dependant upon there being a reasonable prospect that the condition imposed will be met, for the purpose of the order is based on a different footing altogether. Let us say that the court decides, in a specific case in which there are no mitigating circumstances, that a particular sentence would be appropriate. By the same yardstick, if a material mitigating factor was established in another, but otherwise identical case, then *ceteris paribus*, a lesser sentence would undoubtedly be called for. In my view the court is doing no more than giving effect to this aspect when passing a sentence which is partly suspended on condition that the accused perform some mitigatory act. The accused is encouraged to perform the act by the carrot that is held in front of him. His blameworthiness is reduced by meeting the condition, and a lesser penalty is, therefore, appropriate. If he is unable to perform the act required of him, he will not suffer any additional penalty, but will merely be unable to earn the reduction offered to him.

It would, in my view, be inequitable to deny the accused the opportunity of serving a lesser sentence because there is doubt whether he is in a position to make restitution. There are many instances that may arise which would enable him to meet the condition imposed. One such example comes from

REYNOLDS J

Zindoga's case itself, (*supra*). The accused in that case had failed to satisfy the magistrate that he was able to repay the complainant the money that he had stolen. The magistrate then passed a sentence which did not include the suspension of part of the sentence on conditions of repayment. The accused's relatives came forward subsequently, expressing the desire to make

payment on the accused's behalf. They were put to the delay, uncertainty and expense of an appeal in order to request that restitution be recognised by way of a reduction of sentence. Had a suspended sentence been passed originally, these undesirable features would have been avoided, and the incentive to repay on certain and stated terms would have been present all the time.

Another example that springs to mind includes the accused who experiences a change of heart about repaying the complainant. If, as sometimes happens, an accused person is still in possession of the stolen property, he may form the intention to retain that property until he has completed serving whatever sentence is imposed. He believes that he will then be in the enviable position of being able to relax and enjoy the tax-free fruits of his improbity. Doubtless he states to the trial court that he has spent all the money he stole. Despite this initial resolve, however, and after he has experienced some of the awful, dehumanizing conditions of prison life, he may well wish to secure the earliest possible release from prison, even if it means disgorging his ill-gotten gains to do so. If a suspended sentence has been passed he will be aware of the opportunity thus afforded him, and will be able to decide whether or not the incentive offered is sufficient.

It has also happened that the accused has purchased property of value with the money he has purloined, either in his own name, or in the name of some friend or relative. The accused expressly declines to realise these assets, if their existence becomes known at all, in order to compensate the victim of his crime. It is, in my view, equally desirable to allow a person in this situation the chance of changing his mind, and reducing the period of his incarceration. It is no complete answer to this to suggest that the complainant can pursue his remedies in the civil courts. Very often financial difficulties on the part of the complainant, the question of ownership, the actual location of any property purchased, or other similar problems preclude the institution of civil proceedings. Furthermore, restitution is sometimes made by relatives or friends of the accused and persons of this nature cannot be sued by the complainant civilly. It is well recognised that it is highly desirable to keep anyone out of prison as such as may be possible, particularly first offenders. It is also most desirable to impose the least possible punishment that would meet the justice of the case: *R v Clarke* [1982] 1 WLR 1090. This objective

1985 (1) ZLR p297

REYNOLDS J

is one of the very reasons for imposing a suspended sentence. (*S v Magkise, supra*). The detrimental effects of long-term imprisonment are well known. The British Advisory Council on the Penal System published a report in 1977 which includes the following:

All sentences, save the shortest, follow a familiar pattern; most prisoners settle down to the routine and become inured to the attendant hardships and deprivations of prison life. Prolonged and repeated imprisonment is destructive of family relationships, and by encouraging the prisoner's identification with the attitudes of the prison community increases his alienation from normal society. In addition, long-term institutionalisation is all too likely to destroy a prisoner's capacity for individual responsibility and to increase the problems he must face when he returns to society.

(See, too *S v Wood* 1973 (2) RLR 11 (AD); *S v Sibanda* HB-49-83 (unreported)).

In some cases an accused person may be saved from serving an effective custodial sentence at all by complying with the conditions of a suspended sentence, or he may substantially reduce the period that he would otherwise serve. The advantages that flow from this favour not only the accused, but the complainant and society as a whole. It is, therefore, a profitable exercise to encourage compliance (see *Sango v S* HH-217-84 (unreported)).

An additional notion is that a person who breaks the law should not be allowed to enjoy a financial advantage over those who are law-abiding. "Justice requires that the unlawful advantage be removed and the social balance restored." (*Sentencing & Penal Policy, supra*, at 293). In principle, the offender should be punished for the offence he has committed, and in addition to that, his unlawful gain should be taken from him.

In *S v Magkise, supra*, at 494 it was stated that:

If the convicted person is not in a position to pay the compensation ... (he) will then serve imprisonment on account of his poverty and not as a result of any malice or negligence on his part.

This statement was approved in the cases of *S v Zumbika and Attorney-General v Lino & Anor, supra*. With great respect, this view may require examination. If it is meant that the accused will be punished because of his

1985 (1) ZLR p298

REYNOLDS J

poverty this seems to me to be of rather doubtful validity: the accused is not being penalised because he is poor - this would go directly against the principle of equality before the law - but he is simply unable to earn the lesser sentence offered to him by making restitution and thereby mitigating the gravity of the offence he has committed. On occasion this fact arises from his own intransigence or irresponsibility. In exactly the same way and in the same reasoning, he may not be able to earn a possible reduction of sentence by establishing any other mitigating factor.

For these reasons, and apart from being bound to follow the decision in *Zindoga's* case, the conclusion reached, with respect, commends itself to me, and I intend to impose a partly suspended sentence on the present accused on this basis. There is a possibility, and I put it no higher than that, that the accused may still be in possession of part of the stolen money in this case. He certainly has material assets that he may decide to dispose of and so earn a reduction of sentence. His terminal benefits are not inconsiderable, even after taxation, and by parting with these in favour of the complainant company, he will earn further remission of sentence. There is also a possibility that his friends or family may wish to assist him in making reparation for his misdeeds, and thereby entitle him to a greater or even the maximum reduction of sentence provided for.

In regard to the actual sum to be repaid by the accused, it is common cause that he shared, in equal proportions, the total amount stolen with another. He will, accordingly, be responsible for the repayment of only half of the total sum misappropriated, ie \$24 357.

In all the circumstances, and bearing in mind in particular the extreme prevalence of such crimes today, and the fact that, in any event, a notably lucrative crime such as this one calls for

an exception and exemplary sentence, the accused is sentenced as follows:

Nine years' imprisonment with labour of which (a) two years' imprisonment with labour will be suspended for three years on condition that the accused does not commit any offence of which dishonesty is an element within that period and for which a sentence of imprisonment without the option of a fine is imposed;

(b) a further three years is suspended on condition that the accused repays to the complainant company, through the Registrar, the sum of \$24 357 on or before 3rd of December 1985. If within that period the accused has

1985 (1) ZLR p299

REYNOLDS J

not repaid this amount in full, but has paid a portion of it then that portion of the suspended sentence which the accused will serve will be in proportion to the amount that the accused has actually paid.

1985 (1) ZLR p300

MUNICIPALITY OF KWEKWE v SPACE AGE INVESTMENTS (PVT) LTD 1985 (1) ZLR 300 (SC)

Court Supreme Court, Harare

Beck, Gubbay and McNally JJA

Civil Appeal

24 and 31 May 1985

Flynote

Set off - unenforceable moral obligation - set off operates *ipso jure*.

Costs - matter determined on point raised first on appeal.

Headnote

In the High Court the appellant obtained judgment in convention on a claim for unpaid rates but suffered an adverse judgment on the respondent's claim in reconvention founded on a *conditio indebiti* where mistake, although one of law, was also induced by the appellant by a misrepresentation. Costs were awarded to the respondent as the substantially successful party.

Held, there was at least on the appellant a moral obligation to pay the amount claimed in reconvention. A moral obligation founds a set-off and set-off operated *ipso jure* to discharge the debt claimed in convention.

Held, further, that where an appeal is determined on arguments advanced for the first time on appeal, this may be reflected in the appeal court's order as to costs.

Cases cited:

Smith v Bezuidenhout en Kie 1967 (3) SA 41 (O)

Fensham v Jacobson 1951 (2) SA 136 (T)

Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd 1971 (1) RLR 1 (AD)

Dharumpal Transport (Pty) Ltd v Dharumpal 1956 (1) SA 700 (A)

1985 (1) ZLR p301

BECK JA

A P de Bourbon SC for the appellant

I A Donovan for the respondent

Judgment

Beck JA: The appellant was the plaintiff and the respondent the defendant in the court *a quo*. I shall continue to refer to them as such.

The plaintiff sued the defendant for \$13 595, and interest thereon, being unpaid assessment rates in respect of the defendant's property for the period 1 July 1978 to 31 December 1980.

In its plea the defendant admitted this claim but averred that it was:

... entitled to set off against that amount excess rates paid by it in previous years, particulars of which are set out more fully in its claim in reconvention.

In the counterclaim the defendant averred that the plaintiff had fraudulently represented to the defendant that the plaintiff was entitled to assess rates on the defendant's property on a certain basis whereas in truth it was not entitled to assess rates on that basis, and that the defendant:

... relying on the said misrepresentation and unaware of the falsity thereof, in the *bona fide* and reasonable but mistaken belief that they were due, paid rates in an amount of \$13 887,25 in excess of the maximum amount payable for the period between 1st July 1973 and 30th June 1978.

In these premises the defendant counterclaimed for the repayment to it of \$13 887,25.

To this counterclaim the plaintiff pleaded a confession and avoidance. The plaintiff admitted the misrepresentation but denied knowledge of its falsity, averring that:

... it *bona fide* believed that it was in law entitled to act as it did, but which belief it now accepts was incorrect.

The plaintiff went on to admit that the defendant paid \$13 887,25 in excess of the maximum amount payable for the period between 1 July 1973 and 30 June 1978, but averred:

1985 (1) ZLR p302

BECK JA

... that any mistaken belief on the part of defendant was in relation to a mistake of law and not to a mistake of fact then existing.

In those premises the plaintiff denied the defendant's right to repayment of the \$13 887,25.

In the court *a quo* the *bona fides* of the plaintiff was accepted and the trial was conducted on the basis that both parties genuinely believed at the time that the plaintiff was entitled to assess rates in respect of the defendant's property on the basis that it did. It was accepted that this belief constituted a mistake of law, not fact, but it was nevertheless contended for the defendant that it was entitled to recover the excess rates mistakenly paid to the plaintiff.

But for this claim to repayment under a *condictio indebiti* it was not suggested at the trial that the defendant had any other basis for relying upon a right of set-off against the plaintiff's admitted claim in convention for \$13 595.

The learned trial judge held that because the plaintiff acted *ultra vires* in levying from the defendant the excessive rates it did from July 1973 to June 1978, and because the plaintiff by its misrepresentation to the defendant induced in the latter the same mistake of law under which it laboured, the relief of a *condictio indebiti* should not unjustly be denied to the defendant even though the mistake that led to the payment was a mistake of law. Accordingly he gave judgment to the plaintiff on the claim in convention and judgment to the defendant on the claim in reconvention. He awarded the costs of suit to the defendant.

The plaintiff thereupon noted this appeal contending that there is no right of recovery where a payment is made as a result of a mistake of law and that the learned trial judge should therefore have dismissed the counterclaim and should have given judgment with costs to the plaintiff on the claim in convention.

At the outset this court raised the point that there was, at least, a natural obligation on the plaintiff to repay the excess rates mistakenly paid to it, and which it was never entitled to exact from the defendant; that a natural obligation suffices to support a right of set-off; and that set-off operates *ipso jure*. (*Smith v Bezuidenhout en Kie* 1967 (3) SA 41 (O); *Fensham v Jacobson* 1951 (2) SA 136 (T)). Accordingly the debt of \$13 595 was discharged and the plaintiff was not entitled to judgment on the claim in convention.

1985 (1) ZLR p303

BECK JA

Mr *de Bourbon*, for the plaintiff (appellant), accepted that this is so. He said that if the point had been raised at an earlier stage it would have been conclusive and the plaintiff would almost certainly not have proceeded any further. While accepting that the general rule that costs follow the result is not usually departed from merely because an appeal has turned on a new point raised by the court, Mr *de Bourbon* has submitted that the circumstances of the present matter are such that the successful defendant (respondent) should either get no order for the costs of this appeal, or, at best, should be granted only a portion of the costs of appeal.

Mr *Donovan* freely accepts that this court has a wide discretion with regard to the costs of appeal and he accepts further that it is a relevant consideration that had the point been raised earlier the appeal would almost certainly not have been noted, or persisted in. As against that, however, he has suggested that there should be no great sympathy for the plaintiff which has pursued in the court *a quo*, and which sought to pursue further on appeal, a claim for money to

which, in equity, it was not entitled. He also tentatively submitted that, quite apart from the point that was raised, the defendant's prospects of successfully resisting the appeal were at least reasonable. As to that, however, there has been no attempt to support the defendant's claim to a *condictio indebiti* for the refund of such small portion of the sum of \$13 887,25 as exceeds the amount of the plaintiff's claim in convention, and counsel have refrained from addressing any argument to us on the correctness or otherwise of the basis upon which the judgment proceeded in the court below. It is not, therefore, a factor to which regard can now be had.

As observed by BEADLE CJ in *Supreme Service Station (1969) (Pvt) Ltd v Fox & Goodridge (Pvt) Ltd* 1971 (1) RLR 1 (AD), at p. 7E:

... it is an accepted rule that, where an appeal succeeds on arguments advanced for the first time on appeal, this may be reflected in the appeal court's order as to costs.

In my view the circumstances of the present matter are such that this court's order as to costs should reflect the consideration that had the point been timeously raised the matter would not have proceeded as far as it has done. I think it would be unfair to award to the successful defendant all its costs of appeal when it has at no time taken the point that it could have taken and which would - so it is agreed - at once have proved conclusive. On the other hand I think it would also be unfair to deprive the defendant of all its costs of successfully resisting an appeal that the plaintiff accepts it would not

1985 (1) ZLR p304

BECK JA

have brought had the point occurred to it. The situation is very similar to that which arose in *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A) and I propose to make the same order that appeared to be fair in that case.

Although the appeal fails for the reason stated, it is necessary that the order of the court *a quo* be altered to read:

Judgment is entered for the defendant on the claim in convention. No order is made on the claim in reconvention. The plaintiff is to pay the costs of suit.

The plaintiff (appellant) is to pay half the defendant's costs of appeal.

Gubbay JA: I agree.

McNally JA: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

Scanlen & Holderness, respondent's legal practitioners

1985 (1) ZLR p305

PATRIOTIC FRONT-ZIMBABWE AFRICAN PEOPLE'S UNION v MINISTER OF JUSTICE,

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LEGAL & PARLIAMENTARY AFFAIRS 1985 (1) ZLR 305 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, and Beck and Gubbay JJA

Civil Appeal

8 June 1985

Flynote

Constitutional law - act of State - meaning of term - executive prerogative - whether subject to judicial review - Constitution of Zimbabwe, s 58(1), 65, 67.

Review - grounds for - administrative action - delegated legislation.

Interpretation of statutes - subsidiary legislation - unreasonableness.

Legislation - Constitution of Zimbabwe, s 58, 65, 67 - Electoral Act, 1979, s 12, 165A - Electoral Act (Modification) Notice, SI 155A of 1985 - Proclamation No. 2, SI 163 of 1985.

Headnote

The exercise of an executive prerogative is not necessarily an act the question of the validity of which is beyond the jurisdiction of the court. The term act of State should only be applied to those acts in respect of which the courts' jurisdiction is ousted. All other executive acts, whether within the prerogative or not, are subject to review on the usual grounds.

Proclamation No. 2 of 1985, and s 4(a) of the Electoral Act (Modification) Notice, 1985, are not *ultra vires*.

Although the date fixed by Proclamation 2 of 1985 for nomination of the electoral candidates was so early as to cause awkwardness and inconvenience to contesting parties, this falls far short of the unreasonableness of the nature described in *Kruse v Johnston* [1848] 2 QB 91. *Council for Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) approved.

1985 (1) ZLR p306

DUMBUTSHENA CJ

Cases cited:

Beckmann v Minister of the Interior & Ors 1962 (2) SA 233 (E)

Attorney-General v Nissan [1969] 1 All ER 629 (HL)

CCSU v Minister for the Civil Service [1984] 3 All ER 935 (HL)

S v Werner 1980 (2) SA 313 (W)

Kruse v Johnston [1898] 2 QB 91

A P de Bourbon SC for the appellant

B D Crozier for the respondent

Judgment

Dumbutshena CJ: This is an appeal against the judgment of MFALILA J delivered at the High Court in Harare on 7 June 1985. In his judgment the learned judge did not support the appellant's assertion that the Proclamations relating to the forthcoming General Election made by the President in terms of the Electoral Act, 1979, were *ultra vires* the Act or were *ultra vires* on the ground that they were unreasonable. The appellant sought in the High Court the following orders:

1. That the date fixed for the sitting of the nomination court in terms of Proclamation 2 of 1985 (Statutory Instrument 163 of 1985), namely Monday, 10 June 1985, be and is hereby declared *ultra vires* s 12 of the Electoral Act (No 14 of 1979) as modified by s 4 of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985).

ALTERNATIVELY

That the date fixed for the sitting of the nomination court in terms of Proclamation 2 of 1985 (Statutory Instrument 163 of 1985), namely 10 June 1985, be and is hereby declared void for unreasonableness.

ALTERNATIVELY

That s 4(a) of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985) be and is hereby declared *ultra vires* s 165A of the Electoral Act (No 14 of 1979).

2. That the respondent shall provide copies of the Voters' Rolls in each of the Eighty Common Roll Constituencies to the applicant by not later than 5 pm on 5 June 1985.

3. That the respondent shall pay the applicant's costs of suit.

1985 (1) ZLR p307

DUMBUTSHENA CJ

The learned judge *a quo* considered the submissions made in the court below and dismissed the application with costs.

An appeal was lodged on the same day, 7 June 1985. On 8 June 1985 the Supreme Court heard argument and dismissed the appeal for different reasons. In dismissing the appeal we said:

Assuming that the judge *a quo* was wrong in coming to the conclusion that the courts have no power to declare the Proclamation in question *ultra vires*, we are firmly of the view that it has not been shown, having regard to all the circumstances, that the Proclamation fixing nomination day as 10 June 1985 is *ultra vires* for unreasonableness. Nor are we satisfied that the appellant is entitled to prayer 2 of the draft order. Accordingly the appeal is dismissed with costs. Full reasons for this decision will follow later.

These then are our reasons for dismissing the appeal:

The appeal against the judgment of the High Court arises from the fact that the President is, by s 165A of the Electoral Act, 1979, vested with power to make statutory instruments which he

considers necessary and desirable in order to ensure that an election is properly run. He can also suspend or amend any provision of the Electoral Act or any other law which applies to the election. Section 165A reads:

165A. (1) ...

(2) Notwithstanding any other provision of this Act but subject to subsection (4) and to subsection (4) of section 61 of the Constitution, the President may make such statutory instruments as he considers necessary or desirable to ensure that the elections are properly and efficiently conducted and to deal with any matter or situation connected with, arising out of or resulting from the elections.

(3) Statutory instruments made in terms of subsection (2) may provide for -

- (a) suspending or amending any provision of this Act or any other law in so far as it applies to the elections;
- (b) altering any period specified in this Act within which anything connected with, arising out of or resulting from the elections must be done;
- (c) validating anything done in connexion with, arising out of or resulting from the elections in contravention of any provision

1985 (1) ZLR p308

DUMBUTSHENA CJ

of this Act or any other law;

- (d) empowering any person to make orders or give directions in relation to any matter connected with, arising out of or resulting from the elections;
- (e) ...

(4) Statutory instruments made in terms of subsection (2) may make different provision in respect of different classes of voters, candidates or persons:

Provided that no such statutory instrument shall be made or applied so as to discriminate between different candidates or classes of voters in the same election in the same constituency.

In terms of s 58(1) of the Constitution of Zimbabwe the President can issue a Proclamation in the *Government Gazette* calling for a general election to be held on such a day or days within a period not exceeding four months after the dissolution of Parliament as the President may fix. In terms of s 12(1) of the Electoral Act the President is empowered to include in the Proclamation matters required in terms of s 12. For the purposes of this judgment the following provisions of s 12 will suffice:

12. (1) In a proclamation in terms of subsection (1) of section 58 of the Constitution fixing a day or days for the holding of a general election, the President shall provide for the matters required by this section.

...

(4) For the purposes of the election of members of the House of Assembly the President shall fix -

- (a) a place or places at which, and a day, not less than fourteen or more than twenty-one days after the day of publication of the proclamation referred to in subsection (1), on which a nomination court shall sit in terms of section *fifty-three* to receive nominations of candidates for election as members of the House of

Assembly; and

- (b) a day or days, not less than twenty-one or more than forty-five days after the nomination day fixed in terms of paragraph (a), on which a poll shall be taken if a poll becomes necessary in terms of paragraph (c) of subsection (12), of section *fifty-three* for the election of members of the House of Assembly; and
- (c) a day on which the rolls for that election shall be regarded as closed for the purpose of accepting the registration of voters who may vote at the election, which day may be on or after the day of publication of the proclamation referred to in subsection (1) or not more than thirty-one days before that day.

1985 (1) ZLR p309

DUMBUTSHENA CJ

(5) ...

(6) In fixing the days in terms of paragraph (b) of subsection (4), the President may fix different days for the election of different classes of Common Roll members or of Common Roll members and of White Roll members.

(7) The President may, subject to the provisions of section 58 of the Constitution, by further proclamation in the *Gazette*, alter any day, time or place fixed in terms of subsection (2), (3) or (4) and the day, time or place as so altered shall be deemed to have been fixed in terms of subsection (2), (3) or (4), as the case may be.

The President reduced the number of days during which a nomination court could sit in terms of subs (4) of s 12 of the Electoral Act from between not less than fourteen and not more than twenty-one days after the day of publication of the Proclamation calling for the election of members of the House of Assembly by making the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985). Section 4(a) of Statutory Instrument 155A of 1985 fixed the days between which a nomination court could sit to a day between not less than five days and not more than twenty-one days after the publication of the Proclamation calling for the election of members of the House of Assembly. Statutory Instrument 155A of 1985 was published in the *Government Gazette* on 27 April 1985. By the same Statutory Instrument the President shortened the period between the nomination of candidates and the polling day from between twenty-one to forty-five days to between fourteen to forty-five days. But this does not concern us in his judgment.]

On 3 June 1985 Proclamation 2 of 1985 (Statutory Instrument 163 of 1985) was published, proclaiming the general election in terms of s 58(1) of the Constitution. It also provided for matters referred to in s 12 of the Act. The day for the General Election for the White Roll seats was fixed as 27 June 1985 and the days for the Common Roll seats were fixed as 1 and 2 July 1985. The President fixed 10 June 1985 as nomination day for all intending candidates for the Common Roll seats. Mukwati Building, Harare, was chosen as the seat of the nomination court in terms of s 53 of the Act to receive nominations of candidates for election as Common Roll members of the House of Assembly.

In terms of Proclamation 3 of 1985 (Statutory Instrument 164 of 1985) the constituencies for the forthcoming election were published. It was believed by the authorities that they would be made available for members of the public to read.

1985 (1) ZLR p310

DUMBUTSHENA CJ

What worried the appellant in the whole process set out above for the holding of the General Election was the fixing of 10 June 1985 as nomination day. The day fixed for the nomination of candidates fell, in terms of s 4(a) of the Electoral Act (Modification) Notice 1985, between not less than five days and not more than twenty-one days after the date of publication of the Proclamation. Unhappily for the appellant, nomination day was fixed as 10 June 1985. Matters were not improved by the proclamation of the constituencies on 3 June 1985, which then became available for perusal by members of the public for the first time.

In the affidavit sworn by Joshua Mqabuko Nkomo, the leader of the appellant, PF-ZAPU, it is contended "that the date and place set for the nomination court does not allow enough time for the Applicant's prospective candidates to comply with the necessary requirements to submit their completed nomination papers."

It should be made clear right from the onset that the appellant did not seek the postponement of the days set down for the holding of Common Roll elections. What the appellant sought was the postponement of the sitting of the nomination court from 10 June 1985 to 16 June 1985.

The appellant applied to the High Court for a declaration that the fixing of nomination day as 10 June 1985 was void for unreasonableness. To come to that conclusion a court has to find that Proclamation 2 of 1985 (Statutory Instrument 163 of 1985), which fixed nomination day as Monday, 10 June 1985, was *ultra vires* s 12 of the Electoral Act (No. 14 of 1979), as modified by s 4 of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985), or alternatively it has to declare s 4(a) of the Electoral Act (Modification) Notice 1985 *ultra vires* s 165A of the Electoral Act.

Mr *de Bourbon*, who appeared for the appellant, did not seek to argue that s 4(a) of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985) was *ultra vires* s 12 of the Electoral Act. The respondent's contention was that s 4(a) of the Electoral Act (Modification) Notice 1985 only allowed the President, in terms of s 12 of the Electoral Act, to fix the interval between the election proclamation and nomination day at five days.

It was submitted by Mr *Crozier*, for the respondent, that s 4(a) of the Electoral Act (Modification) Notice 1985 was *intra vires* s 165A of the Electoral Act because s 165A(3)(b) allows the President by statutory instrument to alter any period specified in the Act. It was further submitted that the Electoral Act

1985 (1) ZLR p311

DUMBUTSHENA CJ

(Modification) Notice 1985 was not unreasonable because five days was ample time for prospective candidates to decide whether or not to stand for election and to obtain papers for nomination. It was the respondent's case that the fact that the Electoral Act (Modification) Notice specified a period of seven days during part of which voters' rolls may not be available for inspection by the public could not affect the validity of s 4(a) itself, however; at the most it may affect the validity of the election Proclamation.

Mr Crozier, both in his heads of argument and in his submissions before us, contended that:

... the fixing of the date of a general election including ... all dates associated with it - ie including nomination day - is an act of State conferred on the President directly by section 58(1) of the Constitution, and the courts have no power to question the reasonableness of such an act.

He relied in support of his contention on what was said in *Beckmann v Minister of the Interior & Ors* 1962 (2) SA 233 (E) at 239C-E and 240H. At 239C-E WYNNE J said:

It is manifest from s 41 that the proclamation of a date for a general election is a species of an act of State. The Supreme Court of the Republic of South Africa has no jurisdiction to postpone any election. A Provincial Division has jurisdiction in respect of all matters relating to the election itself - from the initial stage of proclamation of nomination day and polling day to the final stage of the determination of the result of the election. But it cannot make any order the effect of which would be to necessitate the postponement of a general election in respect of any one electoral division. This is a manifest fetter on the jurisdiction of the Supreme Court in electoral matters. An election must take place without let or hindrance. There is no jurisdiction whatsoever in this court to make an order having the effect of postponing an election.

And at 240H the learned judge went on to say:

Neither an English nor a South African court has any power to postpone an election, since the holding of a parliamentary election is essentially an act of State. Just as an English court will not grant useless injunctions and cannot encroach upon the Sovereign's prerogative in regard to parliamentary elections, so too courts in our Republic cannot grant

1985 (1) ZLR p312

DUMBUTSHENA CJ

mandatory injunctions making inroads upon the prerogative of the State President in whom alone the power to postpone a general election is vested.

While Mr *de Bourbon* made the comment that what was said by WYNNE J might be true, he was not prepared to make any concession because the instant case was not an application for the postponement of an election date. It was an application for nomination to take place on 16 June instead of 10 June 1985. Were that to happen, polling would still take place on 1 and 2 July 1985.

In my judgment, *Beckmann's* case, *supra*, is distinguished from the present case in this respect. The applicant in that case had already been nominated. The relief he sought in the Port Elizabeth Circuit Local Division was based on the fact that the ballot papers to be used in the poll were in breach of s 76(1) of the Electoral Act, 46 of 1946 as amended, because the names of the two candidates in the electoral division of Port Elizabeth North were not printed in alphabetical order. The error was discovered after nomination day. However, in the circumstances of that case, assuming there was merit in the application, the application was correctly held to be premature and that it should have been brought by election petition after the conclusion of the elections.

I believe that the phrase "act of State" was loosely used in *Beckmann's* case, *supra*. Joubert in *The Law of South Africa* Vol 5 at para 44 note 5 says:

There is little authority concerning the precise nature and scope of the defence of act of State in South African law. The term 'act of State', although usually reserved for an act of foreign policy, is not a technical term and was

used by the court in *Beckmann v Minister of the Interior* 1962 2 SA 233 (E) 239 240 with reference to an executive decision determining the date of a general election.

It is interesting to note that the same author says in para 44:

An act of the executive performed as a matter of policy in relation to another state or a subject of another state is termed an 'act of State'.

It is uncommon to use the phrase an "act of State" in the context WYNNE J used it in *Beckmann, supra*, because "acts of State" are prerogative acts connected and concerned with external affairs or, more specifically, with foreign states and their subjects.

1985 (1) ZLR p313

DUMBUTSHENA CJ

De Smith in *Constitutional and Administrative Law* defines "acts of State" at 130-131 in these words:

Acts of State are primarily prerogative acts of policy in the field of external affairs - for example, the declaration of war, the conclusion of a treaty, an annexation of territory, the recognition of a foreign sovereign, state or government. However, there can be no all-inclusive short definition, covering the different senses in which the term 'act of State' has been used. In one aspect an act of State is a manifestation of national sovereignty by the executive branch of government. When the courts say that an act of State is not cognizable by municipal courts (ie United Kingdom courts, and, for most purposes, the Judicial Committee of the Privy Council), they usually mean that once it is established to their satisfaction that an act performed by or with the authority of the Crown or a foreign government falls within the legal concept of an act of State, they are not concerned with the propriety of the grounds on which it has been exercised; they do not mean that the Crown can remove a matter from their jurisdiction by the bare assertion that it is an act of State.

See also *Halsbury's Laws of England* 4th ed vol 18 para 1413; Palley: *The Constitutional History and Law of S Rhodesia* at 67-68.

The phrase "act of State" is not a term of art. It has been used generally as a prerogative act of policy in matters affecting foreign affairs, that is, as the authorities have consistently used it, "An act of the executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown", is an act of State. See *Halsbury's Laws of England, supra*. That meaning of the term "act of State", as used in the above passages, has become notorious. It is a phrase that has carved for itself a permanent meaning in the field of foreign relations. Its use in domestic affairs may soon find its resting place in the archives of legal history.

In my view an act of State is an act of the executive in those areas of executive prerogatives which oust the jurisdiction of the courts. But such executive prerogatives are now very few and far between because whenever the exercise of executive prerogative affects the private rights, interests and legitimate expectations of the subjects or citizens, the jurisdiction of the courts is not ousted. The private rights, interests and legitimate expectations of the citizens subject to judicial review acts of the executive which would otherwise oust the jurisdiction of the courts. I find support for the view I have

1985 (1) ZLR p314

DUMBUTSHENA CJ

expressed in what was said by LORD REID in *Attorney-General v Nissan* [1969] 1 All ER 629 (HL) at 639A:

If I thought that any act done against the person or property of a British subject wherever situated could be an act of state in the sense that he was deprived of all right to apply to an English court for redress, then I would think that the taking of this hotel was an act of state. But for the reasons which I have already given I am of opinion that a British subject - at least if he is also a citizen of the United Kingdom and colonies - can never be deprived of his legal right to redress any assertion by the Crown or decision of the court that the acts of which he complains were acts of state.

It is the private rights, interests and legitimate expectations of the citizens of Zimbabwe the High Court was called upon to look into any finding out whether by fixing 10 June 1985 as nomination day there would be time for interested people to participate in the general elections without any obstacles being placed in their way through lack of time to go through the procedures leading to nomination day.

In questioning the statutory instruments complained of the courts are in no way engaging in the:

... usurpation of State Executive functions which constitutionally are vested in the State President, who in most cases exercises these functions and powers on the advice of the Cabinet which is responsible to the elected representatives in Parliament, and therefore ultimately to the electorate. A non-representative branch of Government should not be in a position to make value judgments on otherwise lawful exercise of State powers by a representative branch of Government.

The notion expressed in the above passage by the learned judge *a quo* is foreign to our law and practice because courts test the legality of Acts passed by Parliament - a body composed of elected representatives of the people. And if the courts have no jurisdiction to test acts of decision-makers because of particular executive prerogatives called into question, the jurisdiction of the courts is not ousted because the Judiciary is not an elected body.

In Zimbabwe, unlike the United Kingdom where most of the royal "prerogatives are non-statutory attributes of the Crown, not statutory attributes of its servants" (see de Smith: *Constitutional and Administrative Law* at 113),

1985 (1) ZLR p315

DUMBUTSHENA CJ

prerogatives are creatures of constitutional conventions and practices, some of which were applicable before the coming into effect of the present Constitution.

There are therefore prerogatives exercisable by the President which are conferred on the President by the Constitution, and which the courts, all things being equal, cannot enquire into because the President, acting on the advice of the Government, is the best judge - shall I say the Government is the best judge - of matters of policy in those areas covered by the prerogatives.

Section 65 of the Constitution confers such powers on the President. Section 65 reads:

65. (1) The President shall have such powers as are conferred by this Constitution or by or under any Act of Parliament and, subject to any provision made by Parliament, shall, as Head of State, have such prerogative powers as were exercisable before the appointed day.

(2) Without prejudice to the generality of subsection (1), the President shall, subject to the provisions of this Constitution, have power -

- (a) to appoint, accredit, receive and recognize diplomatic agents and consular officers;
- (b) to enter into and to ratify international conventions, treaties and agreements;
- (c) to proclaim and to terminate martial law;
- (d) to declare war and to make peace; and
- (e) to confer honours and precedence.

(3) Subject to the provisions of this Constitution and any Act of Parliament, the President shall do and execute all things that pertain to his office according to such constitutional conventions and practices as were applicable before the appointed day.

The appointment, accrediting, receiving and recognising of diplomatic agents and consular officers; the concluding and ratification of international conventions, treaties and agreements; the proclamation and termination of martial law, the declaration of war and the making of peace; and the conferring of honours and precedence on the citizens of Zimbabwe are not matters in which the court is qualified to substitute its own judgment for the judgment and opinion of those responsible for the conduct of foreign affairs.

1985 (1) ZLR p316

DUMBUTSHENA CJ

There are other functions performed by the President in terms of the Constitution which the courts may not enquire into. Section 67 contains those prerogatives. They are set down as follows:

67. (1) The President may, subject to any such lawful conditions as he may deem fit -

- (a) grant a pardon to any person concerned in or convicted of an offence against any law;
- (b) grant a respite, either indefinite or for a specified period, from the execution of any sentence for such an offence;
- (c) substitute a less severe punishment for that imposed by any sentence for such an offence; or
- (d) suspend for a specified period or remit the whole or part of any sentence for such an offence or any penalty or forfeiture otherwise imposed on account of such an offence.

(2) Where a person resident in Zimbabwe has been convicted in another country of an offence against a law in force in that country, the President may declare that that conviction shall not be regarded as a conviction for the purposes of this Constitution or any other law in force in Zimbabwe.

However, should these prerogatives be exercised under unlawful conditions or be performed outside the law, the courts, in my judgment, have a duty to find out whether the facts upon which the prerogative power was exercised were lawful. It seems to me that judicial review of

executive action now depends more and more on the deprivation of the rights of the citizens. It is my view that, in the absence of procedural impropriety, it is unlikely that the courts would enquire into the exercise of the prerogatives set out in s 67 of the Constitution.

In terms of s 68(1) the President may by proclamation declare a state of emergency affecting any part of Zimbabwe or the whole country. This is a question of national security. Judges are not qualified to take decisions that concern the security of the State. The Executive is better placed to form an opinion or judgment on matters concerning the security of the State.

There are matters in which the President may exercise executive authority without the advice of the Cabinet. In terms of subs (2) of s 46 the President "may send messages to the Senate or the House of Assembly and such messages shall be read by a Minister". He can so act as long as he has regard

1985 (1) ZLR p317

DUMBUTSHENA CJ

to the constitutional conventions and practices referred to above. Should he act without regard to such of the constitutional conventions and practices as are, in terms of subs (3) of s 46, "relevant and appropriate in the circumstances", the courts may, in my opinion, examine those facts and circumstances outside the law which the President used in the formulation of his judgment or opinion.

It is proper to remember that what is said in *Halsbury's Laws of England*, *supra*, para 1414, namely that:

An act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and the municipal courts cannot question it: it is a catastrophic change, constituting a new departure, and the municipal law has nothing to do with the act of change by which the new departure comes about.

Hence the courts have no jurisdiction to question the validity of an act of state, and an individual cannot rely upon an act of state in order to found a cause of action,

should always be read in the context of the definition of "act of State" given above.

There is no room for believing that the judges are in a position to substitute their opinion for that of the President in the exercise of his authority to dissolve Parliament, to appoint a Prime Minister, to appoint and dismiss Ministers, or to declare a state of emergency.

However, modern legal thought seems to suggest that:

Dicey's classic statement in *Law of the Constitution* (10th ed, 1959) p 424 that the prerogative is 'the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown' has the weight behind it not only of the author's own authority but also of the majority of this House in *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1964] 2 All ER 348 at 353, [1965] AC 75 at 99 per LORD REID. But as LORD REID himself pointed out, this definition 'does not take us very far'.

DUMBUTSHENA CJ

935). The tendency is to examine by judicial review those residues of "discretionary and arbitrary authority".

In my view, the arbitrary exercise by the executive of a prerogative, regardless of its effects on those who may be deprived of their rights or interests or who have legitimate expectations, is nowadays subject to judicial review. The reason for reviewing such executive action is that it would be unfair to deprive a citizen of his rights, interests or legitimate expectations without hearing what he has to say or to deny him the opportunity to find out whether the decision emanating from the exercise of an executive prerogative is legal or not, or, for that matter, irrational or unfair.

I agree with Mr *Crozier's* submission that where the Legislature has intended the courts to adjudicate upon actions taken in electoral matters, it has said so expressly. In support of his contention he mentioned ss 13, 28, 29, 31(4), 32(2), 33(4)(b), 41(14)(b), 47, 50, 53(14)(b), and many others of the Electoral Act. A reading of the sections cited by Mr *Crozier* reveals that they mainly deal with the process of elections themselves or incidents and happenings that take place after the President has fixed the day the nomination court sits and the day when the poll is to be held.

A close examination of the sections referred to also reveals that the Legislature set out various ways by which aggrieved parties can seek redress from the courts. Some of the sections, as I understand them, do not direct the aggrieved parties to seek redress through petitions after elections have been held. I refer to s 53(14), among others, which permits a candidate whose nomination has been declared null and void and who has been notified of the same to appeal immediately to a judge of the High Court in Chambers.

While it is correct to contend that the Legislature has not expressly provided for a review of the exercise of the President's powers under s 12 of the Act, it is not correct to state, as did Mr *Crozier*, that the power so granted is not subject to review. The President, in the exercise of his powers under s 12 of the Act, is supposed to act lawfully and reasonably. If he acts unlawfully or unreasonably to the detriment of the rights of citizens, the courts in my judgment have jurisdiction to review the exercise under those circumstances of the President's actions.

In the instant case the appellant is a political party in this country. Its members are citizens who feel deprived of their legal rights to contest a general election fairly because they believe that the date fixed for nomination will not afford

DUMBUTSHENA CJ

them the opportunity to peruse voters' rolls and to study or have sight of the newly defined constituencies. The question is: can the court redress their grievances or are the hands of the

court tied by the doctrine of "act of State" or executive prerogative?

Mr *de Bourbon* does not believe that the hands of the court are tied. He submitted that the court has power to review the proclamation in accordance with the enabling Act. He relied in support for his contention on *S v Werner* 1980 (2) SA 313 (W).

The headnote of the English Translation at 365 reads:

There is no doubt that a proclamation issued in terms of an Act is subject to the rights of the courts to test it.

The learned judge in that case, after considering authorities cited in support of the contention that a proclamation is tested according to the purport and extent of the enabling provisions and therefore stands on the same level as other subordinate legislation and does not have the unassailability of an Act of Parliament, said at 321 (Translation):

It remains subordinate legislation; it remains an act which must be authorized by a statute. Consequently, in my opinion, there is no doubt that a proclamation issued in terms of an Act is subject to the right of the courts to test it.

I hold the same view on Proclamation 2 of 1985 (Statutory Instrument 163 of 1985).

Parliament delegated to the President the authority to make law by statutory instruments and proclamations for the better conduct of general elections. In this way the Power to fix the day for nomination of candidates for election to the House of Assembly was derived from s 58(1) of the Constitution and, more specifically, from subs (4) of s 12 of the Electoral Act. It is clear then that the President's power to amend and suspend any provision of the Electoral Act or any other law in so far as it applies to the elections, altering any period specified in the Electoral Act as long as that alteration is connected with or arises out of or results from the elections, is derived from Parliament. In other words, his power is derived from statute.

The question that falls for resolution is whether the courts can test the validity

1985 (1) ZLR p320

DUMBUTSHENA CJ

of anything done by the President and, more particularly, Proclamation 2 of 1985 (Statutory Instrument 163 of 1985) and the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985).

CCSU v Minister for the Civil Service, Supra, is a case in which employees of the British Government Communication Headquarters (GCHQ), which was a branch of the Civil Service whose main function was to ensure the security of the United Kingdom military and official communications and to provide signals of intelligence for the Government, were deprived of a right to belong to trade unions. There had been several disruptions at GCHQ. In 1981 a disruption resulted in part of the operations of GCHQ being virtually closed down. The dispute was meant to do as much damage as possible to Government agencies. The Minister for the Civil Service, using the royal prerogative power, excluded employees from membership of any trade union except the departmental staff association approved by the Director GCHQ. The instruction was issued without prior consultation. Civil servants applied for judicial review. (See

the Headnote). LORD ROSKILL considered whether the Minister's exercise of power derived from a prerogative or statute can be challenged in court. he said at 956a-c:

If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under art 4 of the 1982 Order in Council so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

This passage is subject to this qualification: that in our country those prerogatives derived from s 65 of the Constitution cannot be reviewed by the courts, but many others are subject to review.

I come now to Mr *de Bourbon*'s contention that the Proclamation be declared *ultra vires* for unreasonableness. He relied in support of his contention on the affidavit evidence adduced by Joshua Mqabuko Nkomo, Welshman Hadane

1985 (1) ZLR p321

DUMBUTSHENA CJ

Mabhena (the Secretary-General of PF-ZAPU) and Dr Isaac Lentswi Nyathi (a Central Committee member of PF-ZAPU).

In short, the deponents complain of the shortness of time between the presentation to the President of the Delimitation Commission Report on 30 May 1985, the publication and the purported distribution of voters' rolls to the 80 constituencies, some of which are in remote areas inaccessible by plane and sometimes by road. They say that prospective candidates will not have the time to find registered voters in their constituencies who will nominate them. They say in effect 10 June 1985 is too near. The appellant's candidates will not have sufficient time to round up 10 to 20 voters to nominate them. And this problem is compounded by the fact that the nomination court sits in Harare where all prospective candidates will have to travel rather than attend at the office of the constituency registrar. The appellant did not believe that voters' rolls would have reached all the provincial administration centres before nomination day and that prospective candidates would have had time to inspect them by that day. The appellant felt that the prospective candidates would not have time to complete all the formalities required for the completion of nomination papers. It was then felt by the appellant's deponents that it was "grossly unreasonable in all the circumstances to set 10 June 1985 as the nomination date". Mabhena and Dr Nyathi deposed to the attempts they made to get the Voters' Rolls or to find out whether the voters' rolls had been distributed to provincial centres. The replies to their enquiries were negative.

Mr *de Bourbon* argued that fixing the nomination day as 10 June 1985 on 3 June 1985 was not reasonable because the Delimitation Commission reported to the President on 30 May 1984 and the Cabinet considered the Report on 3 June 1985 and approved and published it. It was,

however, not available to the public, and it was questionable whether the public knew that it existed. We were informed that the Report became generally available on 4 June 1985.

The Minister of Local Government and Town Planning, Enos Chamunorwa Chikowore, the Minister responsible for District Administration, said in his opposing affidavit that on the morning of 5 June 1985 he:

... caused copies of all voters rolls to be dispatched by the quickest possible means, where necessary by District Development Fund aircraft, to the district administration offices in every constituency.

1985 (1) ZLR p322

DUMBUTSHENA CJ

He said that by 9 am on 6 June 1985 his officials had informed him "that all these rolls have been safely delivered to their destinations".

In his second opposing affidavit sworn on 6 June 1985, the Minister retracted the above assertions made in his earlier deposition by stating that voters' rolls had been dispatched to provincial centres and not to administrative offices. He, however, said that they had reached provincial administrative centres on the same day, 5 June 1985, and that they were being distributed on 6 June 1985 to all district administrative offices. It was his evidence that "the majority of district administration offices had already received their voters' rolls". He thought that by the afternoon of 6 June 1985 every district administration office would have voters' rolls available for inspection.

Eddison Jonas Mudadirwa Zvobgo, the Minister of Justice, Legal and Parliamentary Affairs, the respondent in this appeal, confirms the dispatch of voters' rolls. He asserts that it is not necessary for candidates to inspect voters' rolls to ensure that voters who nominate them are registered because voters have been sent slips and they will be on the appropriate rolls, and the constituencies in which they are registered can be ascertained from the Delimitation Commission Report.

Most of the evidence adduced, apart from a few exceptions, was based on hearsay or mere speculation or conjecture. It was not possible to establish whether voters' rolls reached all the provincial administrative centres in time or to establish the number of people who had not received them by 7 June 1985.

Mr *de Bourbon* argued that when one looks at all these circumstances Proclamation 2 becomes unreasonable and the fixing of nomination day as 10 June 1985 also becomes unreasonable.

There seems to be no doubt, in my mind, that the prospective candidates were very much pressed for time. But one must remember that the appellant's candidates have a political organisation represented in all four corners of the country. It is possible for the appellant's candidates, using the party machinery, to overcome the difficulties created by the shortening of time between the Proclamation of a general election and the fixing of a date for the sitting of the nomination court.

It is in the light of all the circumstances mentioned above that we have to decide whether

Proclamation 2 was void for unreasonableness. In

1985 (1) ZLR p323

DUMBUTSHENA CJ

contending that the Regulations and Proclamation 2 were unreasonable Mr *de Bourbon* relied on *Kruse v Johnston* [1898] 2 QB 91 at 99 ([1895-1899] All ER 105 at 110G-H). In *Kruse v Johnston, supra*, LORD RUSSELL of Killowen CJ set out the tests to be applied when a court considers whether a by-law is void for unreasonableness. He said at 99-100:

... I do not mean to say that there may not be cases in which it would be the duty of the court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operations as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and *ultra vires*.'

Mr *de Bourbon* conceded that in the instant case there had been no bad faith disclosed. So that ground or test of unreasonableness falls away. We are left with three tests which I shall consider below.

Can one seriously suggest that Proclamation 2 is "partial and unequal" in its operation as between the different political parties or prospective candidates? If by fixing 10 June 1985 as nomination day Proclamation 2 was partial and unequal, it was partial and unequal to all prospective candidates because it was not shown that some candidates received voters' rolls before others or, for that matter, that one political party's candidates had sight of the voters' rolls before the candidates of other parties. All the candidates had to work within the time limits set out in Proclamation 2. It was not shown on the papers that only the appellant's candidates were disadvantaged by the operation of the time limits imposed by the Proclamation. There was no different treatment for candidates of the ruling party or any other party for that matter. On this ground the appellant cannot succeed.

Can Proclamation 2 be said to be "manifestly unjust"? Mr *Crozier* contended that "a period of six days is ample time to obtain the signatures of ten voters on a nomination paper". I agree with him that the date for nomination cannot be manifestly unfair solely because it is too soon after the Election Proclamation just because it is believed that voters' rolls have not been available in all constituencies throughout the whole seven days. And nomination day cannot be said to be manifestly unfair because prospective candidates have

1985 (1) ZLR p324

DUMBUTSHENA CJ

not had a long time to scrutinize the Delimitation Commission report. On this ground too the appellant has failed to show the unreasonableness of Proclamation 2.

In my view the appellant has not shown that the fixing of nomination day as 10 June 1985 has "involved such oppressive or gratuitous interference with the rights of those subject to them as

could find no justification in the minds of reasonable men", even if those reasonable men live in the remote district of Binga. The appellant did not sustain a convincing argument in support of the assertion that the bringing of nomination papers to Harare was oppressive and gratuitous. Even if it would have brought hardship to candidates the political parties' machineries would have cushioned the hardship by bringing the nomination papers to Harare and by organising the process of nomination, filing of nomination papers and paying deposits for their candidates. I am therefore of the view that the fixing of nomination day as 10 June 1985 did not involve "such oppressive or gratuitous interference with the rights" of prospective candidates.

There is therefore no ground for holding that Proclamation 2 was void for unreasonableness.

The President acted in terms of delegated authority. In terms of subs (3)(a) of s 165A of the Act he has power to amend any provision of the Electoral Act "or any other law in so far as it applies to the elections". With that authority he amended subs (4) of s 12 of the Act by enacting s 4(a) of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985). He thereby reduced the number of days required in terms of subs (4) of s 12 of the Act for fixing a day for the sitting of a nomination court. He followed that by Proclamation 2 of 1985 (Statutory Instrument 163 of 1985) in which he proclaimed Monday, 10 June 1985 as the date on which a nomination court was to sit.

In my judgment:

... looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness,

1985 (1) ZLR p325

DUMBUTSHENA CJ

(per LORD RUSSELL of Killowen CJ in *Kruse v Johnston*, *supra*, at 99) I cannot say, having regard to the intention of the Legislature and the delegated authority, that what the President did was in any way unreasonable.

In fixing a date when the nomination court had to sit the President was acting in terms of delegated powers under the authority of Parliament. Once the delegated or subordinate legislation is *intra vires* the enabling Act, the courts cannot declare Proclamation 2 void for unreasonableness.

In saying this I am not in agreement with the view expressed by the learned judge *a quo* that "Courts cannot declare *ultra vires* statutory instruments made in the exercise of State Executive powers on the basis of unreasonableness. Once the President or the Executive exercises delegated powers embodied in a statutory instrument (or a statutory instrument, to borrow the phrase used by the learned judge *a quo*, "made in exercise of State Executive powers") the courts, in the exercise of their judicial review powers, have a duty to test the validity of those statutory instruments if they have "consequences on the private rights or legitimate expectations of other persons..." See *CCSU v Minister for the Civil Service*, *supra*, at 950.

Further, I am of the opinion that if the maker of the statutory instrument derives his power from a

statute the courts can subject it to judicial review. Supposing the President had fixed 29 June 1985 as the day on which the nomination court could sit and fixed, as indeed he did, 1 and 2 July 1985 as general election days, I have no doubt in my mind that the Statutory Instrument enacted by the President would be subject to review by the courts for unreasonableness on the ground that the consequences of fixing nomination day so close to the general election days would deny prospective candidates the opportunity to find voters to fill their nomination papers and to campaign.

The tests for condemning subordinate legislation laid down in *Kruse v Johnston*, *supra*, by LORD RUSSELL of Killowen CJ have stood the test of time. But many years have passed since they were enunciated and in that time judicial review of executive and administrative acts has developed to such an extent that only a few prerogative actions remain untouched by the process of judicial review.

More recently the House of Lords laid down the grounds upon which administrative actions are subject to judicial review. These grounds appeal to me not only because they were pronounced by an eminent Law Lord, but

1985 (1) ZLR p326

DUMBUTSHENA CJ

also because they make clear the wide extent of the theatre of operation in which courts can test the validity of prerogative actions. LORD DIPLOCK, in *CCSU v Minister for the Civil Service*, *supra*, at 950j-951d, put and described the three grounds as follows:

The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is *par excellence* a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to VISCOUNT RADCLIFFE'S ingenious explanation in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the

1985 (1) ZLR p327

DUMBUTSHENA CJ

decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

Commenting on LORD DIPLOCK'S three grounds, LORD ROSKILL said of them at 954c:

My noble and learned friend Lord Diplock in his speech has devised a new nomenclature for each of these three grounds, calling them respectively 'illegality', 'irrationality' and 'procedural impropriety', words which, if I may respectfully say so, have the great advantage of making clear the differences between each ground.

In his speech LORD ROSKILL put down the grounds upon which courts can subject executive action to judicial review. A reading of his classification shows that there is no difference between his grounds and those set down by LORD DIPLOCK. I repeat what he said below because a comparison of the different approaches made by the two noble and learned Law Lords spells out more clearly the problem we are dealing with in this case. He said at 953j-954a:

But your Lordships are vitally concerned with that branch of judicial review which is concerned with the control of executive action. This branch of public or administrative law has evolved, as with much of our law, on a case by case basis and no doubt hereafter that process will continue. Thus far this evolution has established that executive action will be the subject of judicial review on three separate grounds. The first is where the authority concerned has been guilty of an error of law in its action, as for example purporting to exercise a power which in law it does not possess. The second is where it exercises a power in so unreasonable a manner that the exercise becomes open to review on what are called, in lawyers' shorthand, *Wednesbury principles* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The third is where it has acted contrary to what are often called 'principles of natural justice'.

I respectfully agree with LORD DIPLOCK'S three grounds on the reviewability of decisions taken under royal prerogative (in our case Executive

1985 (1) ZLR p328

DUMBUTSHENA CJ

prerogative), which clearly state the grounds upon which actions taken under executive prerogative can be attacked by the courts.

I have no doubt in my mind that the Electoral Act (Modification) Notice 1985 and Proclamation 2 of 1985 (Statutory Instrument 163 of 1985) are reviewable by the court on the grounds so ably stated by LORD DIPLOCK.

In the instant case we have subjected Proclamation 2 of 1985 to judicial review and have come to the view that the Proclamation is *intra vires* s 12 of the Electoral Act (No. 14 of 1979) as modified by s 4 of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985).

In coming to this conclusion we do not share the view expressed by the judge *a quo* that once a:

... Statutory Instrument is otherwise legally valid in the sense that it is promulgated in accordance with the law, that should be the end of the matter and courts should not go on to consider whether that Statutory Instrument is

reasonable.

In my view when the court comes to the conclusion, when considering a statutory instrument which is subject to judicial review, that it was "promulgated in accordance with the law", that is not the end of the enquiry. Having reached that stage, it is up to the appellant to show that the fixing of nomination day was unreasonable or was not made lawfully. To adopt Lord DIPLOCK'S nomenclature, the court must then enquire whether there was, in the carrying out of the duties imposed on the Executive by a Statutory Instrument which is *intra vires* the enabling Act, "illegality" or "irrationality" or "procedural impropriety". See *CCSU's* case, *supra*, at 950j-951d for a full appreciation of the meaning of those three grounds.

If the President, in the exercise of his executive powers, fixed the nomination day in terms of the enabling Act the enquiry as to the lawfulness of that Act or the reasonableness of his setting a particular date comes to an end in favour of the executive act because the President acted in an executive capacity and lawfully in terms of the Proclamation. In such a circumstance it would be impermissible for the appellant to accept the legality of Proclamation 2 and challenge the fixing of nomination day which was done within the ambit of the enabling Act as amended.

Mr de Bourbon illustrated the circumstances under which the fixing of a day

1985 (1) ZLR p329

DUMBUTSHENA CJ

for nomination could be challenged. Were the President, in the exercise of his executive duty, to fix nomination day four days after the date of publication of the Proclamation contrary to subs(4) of s 12 of the Act as amended by s 4(a) of the Electoral Act (Modification) Notice 1985 (Statutory Instrument 155A of 1985), would it be impermissible for an aggrieved party to challenge the lawfulness or reasonableness of that executive action? I think not. The courts would, on the grounds of illegality and irrationality, challenge the executive act. In my judgment the President would not have understood correctly the law that regulates his decision-making power. It would then be up to the courts, in the event of a challenge, to subject the executive act to judicial review.

In the instant case the President acted in terms of the enabling Act. He fixed a date for the nomination court to sit which is within the ambit of s 4(a) of the Electoral Act (Modification) Notice 1985 (SI 155A of 1985).

Mr Crozier's contention that the fact that "the election proclamation, in terms of s (4)(a) of the Electoral Act (Modification) Notice, 1985, specified a period of seven days, during part of which voter's rolls may or may not have been available for inspection, cannot affect the validity of s (4)(a) itself" is sound. It shows no unreasonableness.

There was no illegality nor irrationality nor procedural impropriety in what the President did. We have come to the conclusion therefore that in the fixing of 10 June 1985 as nomination day the President did not act unreasonably because reasonable is a relative term and must be proportioned to the circumstances of the case as a whole.

In my view, the appellant's evidence on affidavits sworn to by its deponents failed to prove the

unreasonableness complained of.

For the the above reasons we dismissed the appeal with costs.

Beck JA: I concur with the reasons that the learned Chief Justice has given for holding that the appellant failed to show that the Proclamation is void unreasonableness. The affidavits revealed no more than that the appellant, in common with the other parties contesting the election, was suddenly confronted with an immediate need to exert itself with the utmost energy and despatch in order to meet the requirements for nominating its candidates by the date fixed in the Proclamation. Its forebodings that it might not be able

1985 (1) ZLR p330

BECK JA

to do so were purely speculative, and it was only in relation to very few constituencies in remote areas that the difficulties complained of had any prospect of turning out to be more than just a matter of inconvenience.

The date that was fixed for nomination was no doubt so early as to make things awkward for all the contesting parties, but that is no reason for declaring the Proclamation void for unreasonableness. As the CHIEF JUSTICE has emphasised, unreasonableness must be of the nature described by LORD RUSSELL CJ in *Kruse v Johnston* [1898] 2 QB 91 in order to support an *ultra vires* argument, and I have no doubt that the matter complained of by the appellant falls far short of that.

With regard to our refusal to grant prayer 2 of the order that was sought in the court *a quo*, I would make the observation that, although it would have eased some of the pressures on the appellant - as well as on all the contesting parties - if it had been possible to furnish everyone with copies of the voters' rolls, there is nevertheless no statutory obligation to provide such additional copies; and the rolls, which only came into existence at the eleventh hour, were not improperly withheld from perusal by any interested persons.

There is little I wish to add to the extensive consideration that has been given in the learned judgment of the CHIEF JUSTICE to the jurisdictional question that, at the conclusion of argument, we assumed could be answered in the appellant's favour. Although it is not strictly necessary for the question to be decided, in the light of our view on the facts in relation to the complaint of unreasonableness, the point was argued and it is as well to state our views.

I am satisfied that the assumption that we made was a correct assumption and I entirely agree with the learned CHIEF JUSTICE that the Proclamation is not such an "act of State" as to put the matter of its validity beyond the jurisdiction of the courts.

As is apparent from the authorities that the CHIEF JUSTICE has referred to, the term "act of State" is not one that has been used with precision. At 637H to 638F in the case of *Attorney-General v Nissan* [1969] 1 All ER 628, LORD REID observed:

I think that a good deal of the trouble has been caused by using the loose phrase 'act of state' without making clear what is meant. Sometimes it seems to be used to denote any act of sovereign power or of high policy or any

act done in the execution of a treaty. That is a possible definition,

1985 (1) ZLR p331

BECK JA

but then it must be observed that there are many such acts which can be the subject of an action in court if they infringe the rights of British subjects. Sometimes it seems to be used to denote acts which cannot be made the subject of enquiry in a British court. But that does not tell us how to distinguish such acts; it is only a name for a class which has still to be defined. One definition which has been accepted in some quarters is that of Professor Wade, quoted in *7 Halsbury's Laws of England* (3rd Ed), at p 279:

An act of the executive as a matter of policy performed in the course of its relations with another state including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown, is an act of state.

I do not think that this is entirely satisfactory. I am not sure what is meant by 'as a matter of policy'. One hopes that all acts of the executive are done as a matter of policy and not on random decision, and certainly it would not be possible for a court to enquire whether a particular act of the executive had or had not been done as a matter of policy. And what about acts subsequently rectified? ... Then next 'in the course of its relations with another state': I do not much like this as a description of a war of conquest. I think one would have to add 'or against another state or a subject of that state'. I have already said that I can find no reason why an act performed against a British subject should take on a different character and become an act of state because done by the government in the course of or arising out of its relations with another state. ... Professor Wade was no doubt merely attempting to make the best of a confused body of authority, and not attempting to make new law. If I attempted that I would certainly do no better. But I would suggest to your Lordships that we cannot rest content with that. I think we must say either that all acts of the executive are acts of state, or that acts of the executive should only be called acts of state in cases where the court will not enquire into them or given relief in respect of them but should not be called acts of state when the court's jurisdiction is not ousted.

LORD REID'S suggestion that "acts of the executive should only be called acts of state in cases where the court will not enquire into them or give relief in respect of them" accords with the view of the CHIEF JUSTICE, with which I respectfully associate myself, that "an act of State is an act of the Executive in those areas of executive prerogatives which oust the jurisdiction of the courts".

1985 (1) ZLR p332

BECK JA

The CHIEF JUSTICE has indicated what some of those areas are and the examples that he has given illustrate very clearly, I think, that the Proclamation in question has nothing in common with such "acts of State". The Proclamation in question has no greater sanctity than any other piece of delegated legislation which, to be valid, must be made *intra vires* the powers conferred in the enabling legislation, without which powers the delegated legislation could not have come into being in the first place. And it is well settled that if the powers conferred in the enabling Act are exercised unreasonably, in the sense explained in *Kruse v Johnston*, *supra*, that is a ground for striking down the delegated legislation as *ultra vires*.

Accordingly I fully agree with the Chief Justice that, if the delegated powers conferred by the Electoral Act had been exercised unreasonably, this court would have had the right and the duty to declare the Proclamation invalid.

Gubbay JA: I agree with the judgments of the learned CHIEF JUSTICE and BECK JA and there is nothing that I can usefully add.

Scanlen & Holderness, appellant's legal representatives

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

1985 (1) ZLR p333

ZVOBGO v MUTJUWADI & ORS 1985 (1) ZLR 333 (HC)

Court High Court, Harare

Sandura JP

Civil Exception

6 and 9 June 1985

Flynote

Defamation - exception to plaintiff's declaration - discloses no cause of action and is bad in law - test of what constitutes defamatory matter at exception stage - different from that at trial stage.

Headnote

The fourth defendant excepted to plaintiff's declaration on the ground that it was bad in law because it disclosed no cause of action in that the words relied upon were not reasonably capable of conveying a defamatory meaning.

What the court has to decide at this stage is whether the words complained of are reasonably capable of conveying to the average reader the defamatory meaning assigned to them by the plaintiff. i.e. whether the words complained of by the plaintiff in the instant case could or might be regarded as defamatory by a reasonable person of normal intelligence who has knowledge of the circumstances.

Cases cited:

Conroy v Stewart Printing Co Ltd 1946 AD 1015

Demmers v Wyllie & Ors 1980 (1) SA 835 (A)

A *Donovan* for the fourth defendant (excipient)

A *P de Bourbon SC* for the plaintiff (respondent)

Judgment

Sandura JP: This application which has been made by the fourth defendant is in two parts. The first part is an application to strike out paragraph 8 of the plaintiff's declaration, and the second

part is an exception

1985 (1) ZLR p334

SANDURA JP

to that declaration on the ground that it discloses no cause of action.

The facts of this case are these. The plaintiff is the Minister of Justice, Legal and Parliamentary Affairs in Zimbabwe and a senior member of a political party known as the Zimbabwe African National Union (Patriotic Front), hereinafter referred to as "the party". In August 1984 the party held its second congress at Borrowdale in the city of Harare. At that congress the party for the first time created a politburo consisting of fourteen top members of the party. The plaintiff was excluded from that very powerful and supreme organ of the party.

Subsequently, in the October 1984 issue of the *Drum* magazine there appeared an article which the plaintiff considered defamatory. Thereafter, the plaintiff instituted proceedings against the fourth defendant, claiming damages for defamation in the sum of \$500 000. The plaintiff's declaration does not state in what capacity the first defendant has been sued, but alleges that he caused the printing and publication of the article complained of. It is, however, reasonable to assume that he is either the editor or a reporter of the *Drum* magazine. The second defendant is the publisher and the third defendant is the printer of the magazine. The fourth defendant is the distributor of the said magazine in Zimbabwe. The present application concerns the fourth defendant only.

Paragraph 6 of the plaintiff's declaration reads as follows:

That in the issue of the aforesaid newspaper dated October, 1984 the first Defendant caused to be printed and published, the third Defendant printed, and the second Defendant published and the fourth Defendant distributed in Zimbabwe the following false, malicious and defamatory words concerning the plaintiff:

Hard working Dr Nathan Shamuyarira, the intellectual confidant of Mugabe, came into the politburo instead of Dr Eddison Zvobgo - tipped not so long ago by many to be the only man to rival Mugabe.

He certainly wasn't excluded simply because Mugabe feared him, if indeed he ever worried about him. Zvobgo has tripped up a few times, his behaviour is not always perhaps what Mugabe expects of leaders, and then of course he has been known on at least one occasion to have criticised the leadership of the country, and the leader is, of course, Mugabe. Zvobgo, sources within Zanu say, is an 'unashamed region -

1985 (1) ZLR p335

SANDURA JP

a list', and comes from the influential Karanga grouping of Shona(s). It must have taken some courage on Mugabe's part to act so sure-footedly and dump [him].'

Paragraph 7 of the declaration reads as follows:

That by reason [of the] aforesaid article plaintiff has suffered damage in his fair name, fame, reputation and position as a government minister as well as in his career as a politician.

Finally, paragraph 8 reads as follows:

That further by reason of the aforesaid article the Petitioner (*sic*) by implication has been referred to as indolent, lazy and irresponsible divisionists (*sic*) within the party and/or government.

The fourth defendant's application to strike out paragraph 8 of the plaintiff's declaration is based on the view that that paragraph is inconsistent with and contradictory to the words relied on in paragraph 6 of the declaration. Mr *Donovan*, who appeared for the applicant, submitted that paragraph 8 of the plaintiff's declaration must be struck out because it is at variance with the words of the article complained of and contained in paragraph 6. The issue which I must determine here is whether paragraph 8 of the plaintiff's declaration is inconsistent with or contradictory to the words of the article relied upon in paragraph 6. Mr *de Bourbon*, who appeared for the plaintiff, argued that paragraph 8 was not inconsistent with or contradictory to paragraph 6. He submitted that far from being at variance with paragraph 6, paragraph 8 was merely alleging that since the article in question compares the plaintiff to hard working Dr Nathan Shamuyarira and refers to the plaintiff as an unashamed regionalist, a reader of the article would understand the article to mean that the plaintiff is a lazy, indolent and irresponsible divisionist. Obviously, this is something that must be established at the trial. I agree with Mr *de Bourbon*'s submissions and, therefore, hold that paragraph 8 is not inconsistent with or contradictory to paragraph 6 of the declaration which sets out the words of the article alleged to be defamatory. The application to strike out the paragraph in question must, therefore, be dismissed.

I must now deal with the fourth defendant's exception to the plaintiff's declaration. The fourth defendant excepts to the plaintiff's declaration on the ground that it is bad in law because it discloses no cause of action in that the

1985 (1) ZLR p336

SANDURA JP

words relied upon are not reasonably capable of conveying a defamatory meaning.

I ought to make it quite clear right from the outset that I do not have to determine at this stage whether or not the article in question is in fact defamatory. What I must decide is whether the words complained of are reasonably capable of conveying to the average reader the defamatory meaning assigned to them by the plaintiff. This is made quite clear by Burchell in his new book: *The Law of Defamation in South Africa* at pp 102-3, where the learned author says:

Where exception is taken to the plaintiff's declaration, the test of what constitutes defamatory matter is different from that at the trial stage.

TINDALL JA said in *Basner v Trigger* 1945 AD 22: 'In other words all the court is called on to decide at this stage is whether a reasonable person of ordinary intelligence, having heard the defendant's words and having knowledge of the circumstances ... **might** reasonably understand these words as meaning that the plaintiff had been guilty of illegal and criminal conduct...'

The test on exception is, therefore, whether a reasonable person of normal intelligence and with knowledge of the circumstances **could** or **might** regard the statement as defamatory, whereas at the trial stage the test is whether a reasonable person **would** regard it as defamatory.

Similar views were expressed by GREENBERG JA in *Conroy v Stewart Printing Co Ltd*. 1946

AD 1015 at 1018 as follows:

It is clear, and it was common cause, both in the court *a quo* and in the argument before us, that the test to be applied in regard to the exception is whether the words complained of are reasonably capable of conveying to the average reasonable person of ordinary intelligence, who has knowledge of the facts set out in para 3. of the declaration, the meaning assigned to them in the innuendo

As to the meaning of the words "reasonable person" or "reasonable man" MULLER JA had this to say after a review of a number of cases in *Demmers v Wyllie & Ors* 1980 (1) SA 835 (AD) at 842H:

From the above it is clear, I think, that the words 'reasonable person' or

1985 (1) ZLR p337

SANDURA JP

'reasonable man' referred to in the decisions cited is a person who gives a reasonable meaning to the words used within the context of the document as a whole and excludes a person who is prepared to give a meaning to those words which cannot reasonably be attributed thereto.

Bearing in mind that a defamatory statement is one which tends to diminish the esteem in which the person to whom it refers is held by others, the question which I must now answer is whether the words complained of by the plaintiff **could** or **might** be regarded as defamatory by a reasonable person of normal intelligence who has knowledge of the circumstances. In answering that question the dictionary definitions of "regionalist" and "divisionist" are of very little assistance because the plaintiff relies upon a quasi-innuendo. It is, however, necessary to look at the article complained about and the circumstances in which the plaintiff was excluded from the party's politburo. As already stated the plaintiff is the Minister of Justice, Legal and Parliamentary Affairs and a very senior member of the party. Shortly after the plaintiff was excluded from the party's politburo, the article complained of was published. This article purported to explain why the plaintiff had been excluded from the party's supreme body. The article states that "Hard working Dr. Nathan Shamuyarira, the intellectual confidant of Mugabe came into the politburo instead of Dr. Eddison Zvobgo ...". This might be interpreted to mean that the plaintiff is not as hard working as Dr Nathan Shamuyarira. Furthermore, the article states that the plaintiff has "tripped up a few times". This suggests that the plaintiff has made errors or mistakes on a few occasions, but does not say what sort of errors these are. The article also states that the plaintiff's "behaviour is not always perhaps what Mugabe expects of leaders ...". This could be interpreted to mean that the plaintiff's behaviour falls below the standard of behaviour expected from political leaders by the Prime Minister. Finally, the article states that:

Zvobgo, sources within Zanu say, is an 'unashamed regionalist' and comes from the influential Karanga grouping of Shonas.

This might be interpreted to mean that the plaintiff favours or concentrates on the development of his own district, province or region as opposed to national development. It might also be interpreted to mean that the plaintiff as a government Minister favours, prefers or ensures the employment in his Ministry of people from his own region or province.

It is common knowledge in this country and the court takes judicial notice that the Prime

Minister and many other prominent politicians have spoken

1985 (1) ZLR p338

SANDURA JP

against racism, tribalism, nepotism and regionalism. Anyone displaying such tendencies might be despised in our society. Mr *Donovan*, who appeared for the fourth defendant, conceded that it might be defamatory to say that someone is a racist, tribalist or nepotist. In my view, it might also be defamatory to say that the plaintiff is a regionalist. In the circumstances, I am satisfied that the words in question could or might be regarded as defamatory by a reasonable person of normal intelligence. In reaching this conclusion I have ignored, as I ought to, any defences which the fourth defendant may raise against the plaintiff's action.

In the circumstances the application to strike out paragraph 8 of the plaintiff's declaration and the exception to that declaration are dismissed with costs.

Coghlan Welsh & Guest, legal practitioners for the applicant

Chirunda, Chihambakwe & Partners, legal practitioners for the respondent

1985 (1) ZLR p339

ALLAN v MINISTER OF HOME AFFAIRS 1985 (1) ZLR 339 (HC)

Court High Court, Harare

Reynolds J

Civil Action

8, 9 and 11 November 1984, 1 April, 10 May and 12 June 1985

Flynote

Criminal procedure and Evidence Act [Chapter 59] - ss 29(1)(b) and 29(1)(f) - "reasonable grounds" for arrest - what is "reasonable" - onus on defendant to establish the lawfulness of his employee's conduct - investigation with essentials of particular offence required.

Headnote

Sections 29(1)(b) and 29(1)(f) of the Criminal Procedure and Evidence Act [*Chapter 59*] require that a peace officer has "reasonable grounds" for suspecting or believing that an offence has been committed before he can effect an arrest. This is an objective test of reasonableness. The expression "reasonable grounds" may be taken to mean a fair and sensible basis of belief. The *onus* is upon the defendant to establish the lawfulness of his employee's conduct on a balance of probability. There must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. The power of arrest should be exercised only in cases of urgency or real necessity.

Cases referred to:

Ingram v Minister of Justice 1962 (3) SA 225 (W)

S v Nell 1967 (4) SA 489 (SWA)

Ngcobo v Minister of Police 1978 (4) SA 930 (D)

S v Purcell-Gilpin 1971 (1) RLR 241 (AD)

R v Van Heerden 1958 (3) SA 150 (T)

Native Commissioner and Union Government v Nthako 1931 TPD 242

Rosseau v Boshoff 1945 CPD 135

1985 (1) ZLR p340

REYNOLDS J

Prinsloo & Anor v Newman 1975 (1) SA 481 (AD)

Hicks v Faulkner (1881) 8 QBD 167

Beckenstrater v Rottcher & Anor 1955 (1) SA 129 (AD)

Glinski v Mclver [1962] AC 726

May v Union Government 1954 (3) SA 120 (N)

S v Nel & Anor 1980 (4) SA 28 (E)

R v Mbombela 1933 AD 269

Cape Town Municipality v Paine 1923 AD 207

DPP v Smith [1960] 3 All ER 161

Nkala & Anor v S 1962 (1) SA 248 (SR)

Granger v Minister of State 1985 (1) ZLR 153 (HC)

M J Gillespie for the plaintiff

C Dube for the defendant

Judgment

Reynolds J: On 11 January 1983 the plaintiff, who is a chartered surveyor, proceeded to Bulawayo from Harare on business in order to undertake the valuation of certain properties there. He had a camera with him and he photographed these properties for later use. Having completed his work in the late afternoon, he had a short period of time to spare before proceeding to the airport to catch his return flight to Harare. He decided to utilize this time by

using up the film on his camera in photographing old and historic buildings in the city centre which were of interest to him. He took photographs of five such buildings, the last of which was south of, and across the road from the Bulawayo central police station. In order to get a good view of this last building, the plaintiff positioned himself in the centre of an intersecting road on the eastern side of the police station, where there is a central parking area. In so doing, he was opposite the charge office entrance door. He proceeded to take his photograph, and then decided to make his way back to his hired car to drive to the airport. His attention was immediately attracted to a uniformed policeman standing behind the charge office counter, who summoned him inside. This officer, Section Officer Mutimbiri, informed the plaintiff that he was under arrest for taking photographs of the police station, and stated that this was an offence under the Law and Order (Maintenance) Act. The plaintiff was thereafter questioned by the Section Officer, and by members of the CID, mainly a Detective Inspector Jambawu, and after some period of time, the duration of which is in dispute, he was allowed to spend the night with a friend of his in Bulawayo. The plaintiff states that this was on the undertaking that he would return to the police station the following morning. This he did, but the police inquiries, which concerned the processing of his film, extended into the afternoon, and he was

1985 (1) ZLR p341

REYNOLDS J

finally told that he was free to leave at approximately 3 pm on 12 January. The plaintiff managed to secure a seat on the evening flight to Harare.

The plaintiff claims \$3 000 in damages for his wrongful arrest and subsequent detention by the defendant, acting through his employees. The fact of the arrest is not in issue, but there is a dispute between the parties as to the duration of the plaintiff's detention in police custody. This aspect is considered below. The question that arises at this stage is whether the police actions fell within the limits of the powers conferred on them by s 29 of the Criminal Procedure and Evidence Act [*Chapter 59*]. In this particular case the police officers concerned could have acted under any one of the three following provisions. These three sections read as follows:

Section 29(1)(a):

29. (1) Every peace officer and every other officer empowered by law to execute criminal warrants is hereby authorized, subject to the general or specific directions of a superior officer or person placed in authority over him, to arrest without warrant -

(a) every person who commits any offence in his presence; ...

Section 29(1)(b):

(b) every person whom he has reasonable grounds to suspect of having committed any of the offences mentioned in the First Schedule; ...

Section 29(1)(f):

(f) any person being or loitering in any place under such circumstances as to afford reasonable grounds for believing that he has committed or is about to commit an offence; ...

Defendant's plea to the plaintiff's action is:

2. (a) Save to admit that Defendant acting through his employees at Central Police Station, Bulawayo, arrested and detained Plaintiff, the remaining allegations contained in this paragraph are denied;
- (b) Defendant avers that his employees had reasonable grounds for such arrest and imprisonment in that the said employees *bona fide* believed on reasonable grounds that the plaintiff was a spy.

1985 (1) ZLR p342

REYNOLDS J

Further particulars to this plea were that:

Defendant's employees believed that plaintiff had committed or was attempting to commit or manifesting an intention to commit an offence,

which was specified to be a contravention of s 3(b) of the Official Secrets Act [*Chapter 97*]. This provision would fall within the ambit of a "First Schedule Offence".

It was common cause that the *onus* was upon the defendant to establish the lawfulness of his employee's conduct on a balance of probability. VIEYRA AJ expressed this in the following terms in *Ingram v Minister of Justice* 1962 (3) SA 225 (W) at 227D -

All interferences with the liberty of the citizen are *prima facie* odious and it is for the person responsible to establish why in the particular circumstances such interference is legally justified: ...

(See, too, *S v Nell* 1967 (4) SA 489 (SWA); *Ngcobo v Minister of Police* 1978 (4) SA 930 (D); *S v Purcell-Gilpin* 1971 (1) RLR 241 (AD)).

As already stated, the defendant contended that his employees were empowered to act as they did in terms of the relevant provisions of the Code set out above. I do not think that the first section applies to this case. Both the other provisions require that the peace officer has "reasonable grounds" for suspecting or believing that an offence has been committed before he may effect an arrest. This belief or suspicion must satisfy an objective test of reasonableness. (*R v van Heerden* 1958 (3) SA 150 (T); *Ngcobo v Minister of Police* (*supra*); *Native Commissioner & Union Government v Nthako* 1931 TPD 242). In *Rossseau v Boshoff* 1945 CPD 135 at 137, the following passage in the judgment of JONES AJP is relevant:

I think I may further state that when one comes to consider whether he had reasonable grounds one must bear in mind that in exercising these powers he must act as an ordinary honest man would act, and not merely act on wild suspicions, but on suspicions which have a reasonable basis.

(See, too, the judgment of WESSELS JA in *Prinsloo & Anor v Newman* 1975 (1) SA 481 at 504 (AD))

Rather like the elephant, the word "reasonable" is easy to describe but

1985 (1) ZLR p343

REYNOLDS J

difficult to define. Indeed, in the fourth edition of *Stroud's Judicial Dictionary*, under the heading "Reasonable", appears the following:

It would be unreasonable to expect an exact definition of the word 'reasonable'.

This is so, no doubt, but in my view the ordinary and accepted meaning of the word provides an adequate definition for the present purposes. This is conveyed in most dictionaries as:

sensible; fair; moderate; in accordance with reason.

(See the somewhat elaborate definition of "reasonable and probable cause" formulated in *Hicks v Faulkner* (1881) 8 QBD 167 at 171). Thus, the expression "reasonable grounds" may be taken to mean a fair and sensible basis of belief (*Prinsloo & Anor v Newman, supra*, at 495). The words "reasonable grounds" qualify the belief or suspicion referred to - (*R v van Heerden, supra*) - and the suspicion entertained by the peace officer must, accordingly, be reasonable as well; that is whereas the suspicion need not be a matter of certainty, or even probability, it must not, at the other extreme, be vague, remote or tenuous. It is, perhaps, more a question of a feasible possibility, a matter of likelihood. (See *Beckenstrater v Rottcher & Anor* 1955 (1) SA 129 (AD); *Gliniski v Mciver* [1962] AC 726; *May v Union Government* 1954 (3) SA 120 (N); and *S v Nel & Anor* 1980 (4) SA 28 (E)).

As already stated, the test of reasonableness is objective: ie the question to be answered is whether the notional "reasonable man" in the accused's situation would have behaved in the same way as did the accused. DE VILLIERS JA in *R v Mbombela* 1933 AD 269 at 272 expresses the matter in this way -

A reasonable belief, in my opinion is such as would be formed by a reasonable man in the circumstances in which the accused was placed in a given case. The 'reasonable man' is in this connection the man of ordinary intelligence, knowledge and prudence. It follows that mistake of fact is not reasonable if it is due to lack of such knowledge and intelligence as is possessed by an ordinary person, or if it is due to such carelessness, inattention and so forth, as an ordinary person would not have exhibited. The particular point, however, which is raised by the question reserved, is whether there is only one type of 'reasonable man' who is to be taken as the legal standard, or whether in a case like the present, another type of reasonable man is to be conceived of, viz., 'an

1985 (1) ZLR p344

REYNOLDS J

ordinary native aged 18 years and living at home in his kraal.' I have no doubt that by the law of this country there is only one standard of 'reasonable man.'

(See, too, *Cape Town Municipality v Paine* 1923 AD 207; *Ingram v Minister of Justice, supra*; *DPP v Smith* [1960] 3 All ER 161).

Again, in *R v van Heerden, supra*, it is stated at 152E -

... the grounds of suspicion must be those which would induce a reasonable man to have the suspicion.

In applying these various requirements and considerations to the present case, the established facts, the evidence led and the submissions of counsel may be examined. To turn, firstly, to the

facts known to the arresting detail, Section Officer Mutimbiri, these were:

- (a) he was within the charge office of the main Bulawayo Police Station, and he was familiar with the outer and east-facing aspect of this building;
- (b) it was broad daylight, and the sun was shining, although it was late afternoon;
- (c) the plaintiff was in open view, and had apparently been engaged in taking a photograph or photographs;
- (d) the plaintiff was walking towards the police station with a camera in his hands;
- (e) the plaintiff immediately obeyed the officer's request for him to enter the charge office.

According to the Section Officer, he suspected and believed that:

- (a) the plaintiff had taken a photograph of the police station;
- (b) the plaintiff was an enemy agent who wished to use this photograph for purposes of espionage.

It was, in my view, perfectly reasonable for the witness to form the opinion

1985 (1) ZLR p345

REYNOLDS J

that the plaintiff had just taken a photograph of the police station. The plaintiff was favourably positioned to do so, had a large camera in his possession, and there was no other obvious subject-matter in the vicinity. Section Officer Mutimbiri alleged that he had seen the plaintiff using a flash bulb, and whereas in the event it seemed to me to be doubtful that this was so, it was apparent that something had attracted his attention to the plaintiff having just taken a photograph. I find that the officer's initial belief was, therefore, well founded. It is the second belief or suspicion, however, that requires closer examination. It requires, in my view, a "giant step" indeed for anyone to believe that a person is a possible spy simply because he may have taken a photograph of a police station. It is, of course, necessary to avoid taking an armchair view of this matter. The Section Officer was in no position to form a careful and analytical evaluation of the situation: he had no time for more than a snap judgment. Despite this, it seems to me that on the known facts enumerated above, it was, or should have been, obvious to the officer that it was highly unlikely that the plaintiff was bent on any untoward or subversive activities. At best, the fact that the plaintiff may have photographed the eastern side of the police station building warranted no more than a polite inquiry as to his reasons for doing so. To formally arrest a man in such circumstances seems to me to be an over-reaction and an abuse of power. In fact, the Section Officer made no inquiries at all, and his belief or suspicion was, therefore, based solely on his unverified and, as it happened, erroneous belief that the plaintiff had taken a photograph of the police station. In *Nkala & Anor v S* 1962 (1) SA 248 (SR) at 250D HATHORN J expressed the view, with which I respectfully agree, that:

there must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. *A fortiori* there can be no reasonable suspicion where, as in this case, there was no investigation relating to one of the essentials of the offence.

In the instant case there was no inquiry of any sort made prior to the arrest.

It is my experience that it is not uncommon for certain officers within the ranks of the police force to first arrest and detain a possible suspect, and thereafter, at the convenience of the detail concerned, to institute inquiries and investigations in order to ascertain whether the arrest was justified. I sincerely hope that this is not the general and sanctioned practice, for, if it is, I consider that such procedure would be improper and objectionable. It appeared to me that it was this undesirable practice that was adopted in the

1985 (1) ZLR p346

REYNOLDS J

present case. This is unfortunate, for it is essential, in my view, for any person entrusted with the signal power of arrest to recognise, and to keep constantly in the forefront of his mind, the concept that this power should be exercised only in cases of urgency or real necessity. Had the Section Officer carried out his duties on this basis, I do not think that the plaintiff would have been arrested at all.

Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson - "The God who gave us life gave us liberty at the same time." Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved. In a speech delivered in the House of Commons in 1783, William Pitt said, "Necessity is the plea for every infringement of human freedom. It is the argument of tyrants." The warning implicit in these words must be heeded. Instances of unwarranted or oppressive assumptions of power may always be challenged in the courts.

It is against this background, and within the confines of this principle, that I believe those who may exercise the far-reaching powers of arrest should operate. The discretion allowed should be exercised sparingly, reasonably and responsibly. It does not seem to me that the defendant's employees in the present case exercised their discretion in this way. Even after the initial apprehension of the plaintiff, the inquiries and investigations undertaken by the two police officers seemed to me to be casual and perfunctory, and certainly did not indicate that the plaintiff was indeed a possible enemy agent. It is significant that neither the plaintiff's person nor his possessions were searched; no inquiries were made as to contacts he had made while working in Bulawayo; he was released into the custody of an unknown friend; the film in his camera-presumably the most vital piece of evidence that might conclusively establish his guilt - was passed to the friend of the plaintiff's friend to be developed; and the plaintiff was invited to return to the police station the following day. According to the defendant's witnesses it was at no time disclosed that the plaintiff had hired and was in possession of a car. I would have expected this to be one of the first lines of inquiry made: it would be a real possibility that a genuine spy would have items of evidential value

1985 (1) ZLR p347

REYNOLDS J

in his immediate and more remote possession. Inspector Jambawu said that he had asked the plaintiff if he had a car, and the plaintiff had said nothing about being in possession of a car. This seems to me to be highly improbable; the plaintiff would have no possible reason to deny this fact. Furthermore, there were no further and obvious questions asked as to how, for instance, he had carried out his work in Bulawayo without transport.

The mere fact that a photograph may have been taken of a police station seems to me to be more likely to provoke the question, "Whatever for?", than to suggest possible espionage. It was suggested that "an enemy might wish to attack the station". In my opinion, there would be little apparent advantage to be gained by such an enemy of the country if he attacked the Bulawayo Police Station. Furthermore, there would always be a considerable element of risk in attacking a building in the centre of a relatively large city.

It must surely be common knowledge that photographs are taken of virtually every conceivable subject; the interests and pursuits of photographers are infinite. Buildings, particularly historic buildings, are popular subject, and literally millions of pictures must be taken annually of buildings of note or interest throughout the world. Very often prints of such buildings are on public sale as postcards in every stationer's shop. It would be absurd to arrest, as a potential spy, the purchaser of a postcard depicting, for example, the Prime Minister's Offices or State House, and yet the police officer's action in the present case fell not far short of that.

In the recent case of *Granger v Minister of State* 1985 (1) ZLR 153 (HC), it appears that members of the Central Intelligence Organization decided to apprehend the plaintiff in that case because he had, they believed, taken a photograph of the Landrover vehicle in which they were travelling, thereby allegedly contravening the Official Secrets Act [*Chapter 97*]. SMITH J, in giving judgment, described their belief as "absurd and unfounded".

It must be stressed that the taking of photographs is almost invariably a completely innocuous pastime. Obviously, a photograph or a plan of a key installation or a building of significance **could** be of value to an enemy agent, but the act of taking a photograph, *per se*, is not, in my view, a suspicious act. If the circumstances in which the photograph are taken are suspicious, or there is some reasonable indication that inquiries are necessary in order to establish the *bona fides* of the photographer, then that is another matter. In no way is it suggested that valid and reasonable suspicions should be disregarded, particularly when any question of espionage may be involved.

1985 (1) ZLR p348

REYNOLDS J

All that is required is a reasonable and realistic approach. This approach was not, I find, evident in the present case.

In the result I find that the defendant has not discharged the *onus* that rests on him, and that Section Officer Mutimbiri did not have reasonable grounds to suspect or believe that the plaintiff had committed or was about to commit an offence. His arrest and detention of the plaintiff was,

therefore, unlawful.

To turn to the question of damages, the main area of dispute between the parties concerns the duration of the plaintiff's detention, and the stage when he was officially released from custody. There is a complete conflict of evidence on these issues, which would be difficult to resolve. As it happens, I consider that it is unnecessary to attempt to resolve this conflict, and to come to a decision on the basis of the credibility of the witnesses. This is so for, by consent, and after the evidence had been led, the relevant Police Diary of events was produced in evidence. This document, when read together with the defendant's plea and the minutes of the pre-trial conference held, establishes the following:

1. The plaintiff was arrested and detained by the defendant acting through his employees.
2. The plaintiff was permitted to sleep during the night of 11 January away from the police station but was not permitted to leave Bulawayo.
3. The plaintiff was obliged to return to the police station on 12 January.
4. The plaintiff was eventually released after the film in his camera had been developed, and the negatives printed.

In the result, I consider it to be preferable to calculate the damages due on these agreed facts. Unfortunately, the Diary produced does not give times. It can, however, be safely said that the plaintiff was held at the police station for a significant period of time, although at most for only a few hours. In addition, he remained in police custody, albeit not in the sense of physical restraint, for the remainder of the night of 11 January, and until the early afternoon of 12 January. It is on this basis that the *quantum* of damages may be assessed.

1985 (1) ZLR p349

REYNOLDS J

The plaintiff is a professional man of standing and his arrest and detention were a matter of great concern and anxiety to him, and no doubt to his wife as well. As was stated by BROOME JP in *May v Union Government*, *supra*, at 130E:

Our law has always regarded the deprivation of personal liberty as a serious injury, and where the deprivation carries with it the imputation of criminal conduct of which there was no reasonable suspicion the injury is very serious indeed.

Here, the criminal conduct alleged was espionage, a very serious crime indeed. The plaintiff was placed in fear, and was subjected to indignity, embarrassment and humiliation. This was exacerbated when his situation was made known to his employers and to his Bulawayo friend. His movements were unlawfully restricted for approximately 20 hours, and he missed two flights back to Harare in consequence.

In all the circumstances I am of the view that the plaintiff's claim for damages in the sum of \$3 000 is fair and reasonable, and judgment is entered for the plaintiff in that sum with costs.

Gill, Godlonton & Gerrans, legal practitioners for the plaintiff

S v MHARAPARA 1985 (1) ZLR 350 (HC)

Court High Court, Harare

Mfalilia J

Criminal Trial

3, 4 and 20 June 1985

Flynote

Court - jurisdiction - theft committed outside Zimbabwe - when court will assume jurisdiction.

Headnote

The accused was charged with theft. It was alleged that at the Zimbabwe Representative Mission in Brussels, Belgium, and during the course of his employment, the accused did wrongfully and unlawfully steal a sum of money, the property of the Zimbabwe Government and in the lawful custody of one M

At the commencement of the trial the accused did not plead but excepted to the charge under the provisions of s 156(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] on the ground that the indictment did not disclose any offence cognisable by the court in that it was not an offence for an accused person to steal money in Belgium and that this meant that the High Court had no jurisdiction to try the accused for theft which he is alleged to have committed in Belgium.

Held, there can be no justification in law in extending the territorial principle and saying that because the accused is in the Diplomatic Service of the State and the victim of the offence is the Government, the offence should be triable in Zimbabwe because of the harmful effects caused to the Government.

Held, further, that the harmful effect is that which is caused to the victim of the offence in Zimbabwe whose property in Zimbabwe is unlawfully obtained or attempted to be unlawfully obtained by an accused who is outside the country and all the physical acts constituting the offences are committed outside the country. The court then would not assume

MFALILA J

jurisdiction over an offence committed abroad in respect of property belonging to a resident in Zimbabwe but which is also abroad merely because such an offence has harmful effects in Zimbabwe.

Held, further, that under the principle of nationality or active personality in International Law, a State has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or are its nationals at the time when the offence was committed or when he is or they are prosecuted and punished. So long as there is no conflict with the territorial principle and the rights of other States there can be no breach of International Law in a State assuming such jurisdiction. It is, however, a principle which should not lightly be applied in view of the possible conflict with the legitimate rights of other states.

Held, further, that a case such as the present, involving a member of the country's diplomatic service stealing property of the State while on diplomatic service abroad, is a fit case for the application of the principle. Accordingly the Zimbabwe courts did have jurisdiction to try the accused under the Nationality principle.

Cases cited and referred to:

S v A 1979 RLR 69 (GD)

Treacy v Director of Public Prosecutions [1971] 1 All ER 110 (HL)

R v Baxter [1971] 2 All ER 359 (CA)

Director of Public Prosecutions v Stonehouse [1977] 2 All ER 909 (HL)

I Chatikobo for the State

K Laue for the accused

Judgment

Mfalila J: The accused, Rodwell Joseph Mharapara, is charged with the crime of theft. The particulars allege that during the period extending from 2 June 1984 to 6 July 1984 and at the Zimbabwe Representative Mission in Brussels, Belgium, and during the course of his employment, the accused did wrongfully and unlawfully steal money amounting to the sum of 1 524 981 (one million five hundred and twenty-four thousand nine hundred and eighty-one) Belgian francs, which is equivalent of Z\$30 499,62, the property of the Zimbabwe Government in the lawful custody of Solomon Mahaka.

At the commencement of the trial the accused did not plead but excepted to the charge under the provisions of s 156(1) of the Criminal Procedure and Evidence Act [Chapter 59] on the ground that the indictment does not disclose any offence cognizable by the court, in that it is not an offence for an accused person to steal money in Belgium. Mr *Laue*, who appeared for the

1985 (1) ZLR p352

MFALILA J

accused, explained this to mean that this court had no jurisdiction to try the accused for the offence of theft which he is alleged to have committed in Belgium.

In support of the exception, Mr *Laue* submitted that apart from treason, criminal jurisdiction in

respect of all other offences is territorial and is determined with reference to the place where the offence is committed, so that a State has jurisdiction to punish only those crimes committed within its territory as defined in International Law; and that this definition does not include its embassies abroad. He added that as this offence was wholly committed outside Zimbabwe, in Belgium, then on the authority of the decision of this court in *S v A* 1979 RLR 69 (GD), this court has no jurisdiction to try the accused unless it be shown that he brought into the country some of the stolen money.

Mr *Chatikobo*, who appeared for the State, conceded that this court does not have jurisdiction to try offences committed outside Zimbabwe and that Zimbabwe embassies abroad do not form part of Zimbabwe territory, but he submitted that this court has jurisdiction to try the accused on two grounds. First, by extension of the territorial principle because of the harmful effects the accused's offence has on Zimbabwe. Secondly, on the nationality principle that this court should assume jurisdiction to try the accused, who is not only a national of Zimbabwe but a high-ranking officer in the country's Diplomatic Service who could not be tried in Belgium. If therefore this court rules that it has no jurisdiction, he said, no other court has, resulting in the non-trial of the accused, and this, he said, would amount to a grave injustice.

In the leading Zimbabwean case on the subject of jurisdiction - *S v A* (*supra*) - argument was advanced on behalf of the State seeking to develop or extend the general principle that a crime committed outside the country is not justiciable within Zimbabwe except for offences like theft which, being a continuous offence, can be justiciable when committed outside Zimbabwe if the stolen property is physically brought within the country. In that case, the facts were as follows: the accused, a Rhodesian resident, was charged in the General Division, *inter alia*, with several counts of theft in which it was alleged that he appropriated for his own use money held by him outside Rhodesia on behalf of a corporate body incorporated in Rhodesia, and thereafter failed to account for the money in Rhodesia. No part of the *contractatio* took place within Rhodesia and in respect of all counts but one it was not established that the instruction to transfer the money had been issued in Rhodesia. It was contended by Mr *Glaum*, for the State, that recently

1985 (1) ZLR p353

MFALILA J

this aspect of the law had been developed and that the court will assume jurisdiction where a person performs an act outside the country which is a crime if performed outside the country and the harmful effect of the act is felt by the victim inside the country. In other words, it was contended, the court will assume jurisdiction in every case except where the act is performed wholly outside the country and no harmful effect is felt here. This contention was based on the decisions and the remarks made in the following English cases:

1. *Treacy v Director of Public Prosecutions* [1971] 1 All ER 110 (HL)
2. *R v Baxter* [1971] 2 All ER 359 (CA)
3. *Director of Public Prosecutions v Stonehouse* [1977] 2 All ER 909 (HL).

In *Treacy v Director of Public Prosecutions* the facts were that the accused wrote and posted in England a letter addressed to a lady in Germany in which he demanded that she send £175 to

him at an address in England, with the threat that, if she did not, he would inform her husband of some allegedly discreditable conduct on her part. This letter was received by the lady in Germany. The question for decision was whether when a person makes an unwarranted demand with menaces by letter posted in England and received abroad, he can be tried in England on a charge of blackmail under s 21(1) of the Theft Act 1968. The trial court held that the accused could be tried in England. On a further appeal to the House of Lords, the appeal was dismissed by a majority on the ground that the demand was made when the letter was posted in England, and LORD DIPLOCK made the following remarks at 121g-h:

It would be an unjustifiable interference with the sovereignty of other nations over the conduct of persons in their own territories if we were to punish persons for conduct which did not take place in the United Kingdom and had no harmful consequences here.

Then after discussing the rules of international comity the learned Law Lord continued at p125a-c:

... For reasons I have stated earlier, the rules of international comity, in my view, do not call for more than that every sovereign State should refrain from punishing persons for their conduct within the territory of another sovereign State, where that conduct has had no harmful consequences within the territory of the State which imposes the punishment.

1985 (1) ZLR p354

MFALILA J

I see no reason for presuming that Parliament, in enacting the Theft Act 1968, intended to make the offences which it thereby created subject to any wider exclusion than this. In my view, where the definition of any such offence contains a requirement that the described conduct of the accused should be followed by described consequences the implied exclusion is limited to cases where neither the conduct nor its harmful consequences took place in England or Wales. It follows that, even if the definition of 'blackmail' of s 21 of the Act falls into the category of offences in which the physical acts of the accused must be followed by consequences occurring after completion of those acts, it is sufficient to constitute the offence of blackmail if either the physical acts are done or their consequences take effect in England or Wales.

R v Baxter was a converse situation. The Court of Appeal (SACHS LJ) held that the English courts had jurisdiction to try a charge of attempting to obtain property by deception where letters claiming moneys from two football pools companies on a false pretence were sent from Northern Ireland and arrived in England where they were read by, but did not deceive, the management of both companies. The object of sending the letters was to get the pools companies to despatch money from England and an actual claim to the money was communicated there. If the attempt had succeeded, the money would have been obtained within the jurisdiction. Clearly, then, the deception was aimed at the property of the victim within the jurisdiction. So both the victim and the property were in the jurisdiction. The court then continued at 362a:

The older authorities deal *inter alia* with the origin of the rule relating to jurisdiction; they underline as LORD DIPLOCK pointed in *Treacy v Director of Public Prosecutions*, that in modern times its only substantial foundation is based on international comity which leans against the courts of this country punishing those who in another country have done something which neither has caused nor could cause injury to persons or property here.

And lastly the *Director of Public Prosecutions v Stonehouse*. In this case the facts were that in July and September 1974, Stonehouse, a well-known public figure in England, insured his life in

England for the benefit of his wife for £125 000. On 19 November 1974 he flew to the USA on a business trip. The following day, he simulated his death by drowning, stating that he was going for a swim and not returning to his hotel. In fact he travelled to Australia under an assumed name but he was recognized there on 24 December 1974. No

1985 (1) ZLR p355

MFALILA J

claim had been made by his wife to the policy money though the news of his supposed death had been published in England. He was tried in England for, among other things, attempting to obtain property by deception. He was convicted and unsuccessfully appealed through to the House of Lords, where the following point of law was certified at 914g:

Whether the offence of attempting ... to obtain property in England by deception, the final act alleged to constitute the offence of attempt having occurred outside the jurisdiction of the English courts, is triable in an English court, all the remaining acts necessary to constitute the complete offence being intended to take place in England.

The House of Lords held that in a case of obtaining property by deception, the basis of the jurisdiction was not that the accused had done some physical act in England, but that his physical acts, wherever they were done, had caused the obtaining of the property in England from the persons to whom it belonged.

After dealing at length with these English cases, GUBBAY J (as he then was) continued in *S v A* (quoted *supra*) at 80D:

I have quoted at length from the speeches of the learned Law Lords because in my opinion Mr *Oshry* is correct in saying that their remarks were not intended to go beyond a situation where the harmful effect to the victim in England is the actual obtaining of his property there, or an attempt to obtain it there. It is a 'result-crime', as LORD DIPLOCK put it, the result being the harmful effect to the victim in England by unlawfully obtaining his property from him there, or attempting to do so. I can find nothing in the speeches which implies that if the victim, while physically in England, had his property stolen abroad, and all the physical acts in pursuance of such theft were committed abroad, the offence would nonetheless be triable in England because of the harm the offence caused the victim in England. I am fortified in this conclusion by the manner in which the *Stonehouse* case is treated in HALSBURY'S *Laws of England*, 4th edition, volume 11, as read with the 1978 Supplement. The reference to the decision is incorporated in paragraph 77, *sub nomine*, 'Acts done partly within and partly outside England', and reads:

In respect of the offence of obtaining property by deception the gist of the offence lies in the act of obtaining, which must be in England. Thus a person who practises a deception out of England, and by means of

1985 (1) ZLR p356

MFALILA J

that deception obtains property in England, is triable in England. The same applies as regards attempts to obtain property by deception.

The learned judge then concluded at 81D-F:

In my view the principle laid down in the *Baxter* and *Stonehouse* cases ... relates to offences such as fraud or theft by false pretences where the false representation in its entirety is made by the offender out of the country but is directed at the obtaining of property within it. Where the physical acts take place outside the country the

subject-matter must always be within it in order for the offender to be amenable to the local jurisdiction.

For the foregoing reasons I reject Mr *Glaum's* argument. The principle I propose to apply is that where the theft is committed outside the country, this court will only assume jurisdiction over the thief if he brings the stolen property within the jurisdiction.

But Mr *Chatikobo* urged that the argument, ie Mr *Glaum's* argument which was rejected in the *S v A* case, should be accepted in this case, and that the court should hold that it has jurisdiction to try the present accused because the principle stated in that case was correct only in so far as the facts of that case were concerned and can be distinguished from the present case on the basis that that case involved an ordinary citizen of Zimbabwe who went abroad and committed an offence while there, whereas the present case involves an accused who is posted to a foreign country on official diplomatic duties and who while there steals in the course of his employment the property of the Zimbabwe Government. Such an offence, he said, inevitably has harmful effects on the Zimbabwe Government at home. I do not think the principle stated in the *S v A* case can be varied merely on the different nature of the accused and the complainant. In the present case, like the *S v A* case, the property involved was outside Zimbabwe and all the physical acts in pursuance of the alleged theft of this property were committed outside Zimbabwe. There can therefore be no justification in law in extending the territorial principle and saying that because the accused is in the Diplomatic Service of the State and the victim of his offence is the Government, the offence should be triable in Zimbabwe because of the harmful effects caused to the Government in Zimbabwe. The harmful effect referred to is the harmful effect to the victim of the offence in Zimbabwe whose property in Zimbabwe is unlawfully obtained or attempted to be unlawfully obtained by an accused who is outside the country and all the physical acts constituting

1985 (1) ZLR p357

MFALILA J

the offence are committed outside the country. The court then would not assume jurisdiction over an offence committed abroad in respect of property belonging to a resident in Zimbabwe but which is also abroad merely because such an offence has harmful effects in Zimbabwe.

But I think that Mr *Chatikobo* was on firmer ground on the nationality or active personality principle. Under this principle in International Law, a State has jurisdiction with respect to any crime committed outside its territory by a person or persons who is or are its nationals at the time when the offence was committed or when he is or they are prosecuted and punished. So long as there is no conflict with the territorial principle and the rights of other States, there can be no breach of International Law in a State assuming such jurisdiction. It is, however, a principle which should not lightly be applied in view of the possible conflict with the legitimate rights of other States; for instance, the court would not have applied this principle in the *S v A* case. But a case such as the present, involving as it does a member of the country's Diplomatic Service stealing property of the State while in Diplomatic Service abroad, is a fit case for the application of the principle. The accused could not be tried in Belgium unless Zimbabwe lifted his diplomatic immunity there, and since he was no longer within the Belgian jurisdiction by the time the offence came to light, there is no way in which Zimbabwe could send him back to Belgium to stand trial. The situation, therefore, would amount to a non-trial of the accused and

this I am satisfied would amount to a grave injustice.

For these reasons, I am satisfied that this is a fit case for this court to apply the nationality principle and hold that the Zimbabwe courts have jurisdiction to try the accused on this principle. The exception is accordingly dismissed and unless the accused intends to appeal against this judgment, he will now be required to plead to the charge.

Attorney-General, legal practitioner for the State

Kantor & Immerman, legal practitioners for the accused

1985 (1) ZLR p358

ZIMBABWE BANKING CORPORATION LTD v PYRAMID MOTOR CORPORATION (PVT) LTD 1985 (1) ZLR 358 (SC)

Court **Supreme Court, Harare**

Annotations [Link to Case Annotations](#)

Beck, Gubbay and McNally JJA

Civil Appeal

17 May and 24 June 1985

Flynote

Delict - Actio Legis Aquilia - liability for purely economic loss - collecting bank negligently failing to comply with restrictive endorsement on a cheque - whether such is wrongful, founding an action in delict.

Bank - collecting bank - whether owes a duty of care to drawer of cheque.

Bills of exchange - collecting bank - duty towards drawer of cheque - whether to be determined on principles of Aquilian liability or that of intermediate possessor of stolen goods.

Legislation - s 85 Bills of Exchange Act [Chapter 277] - whether defines duty of collecting bank towards drawer of cheque.

Public policy - manner of conducting enquiry into question of social desirability of policy under consideration.

Headnote

Held, the present scope of the *Lex Aquilia* is such as to provide a basis for relief in cases of purely economic loss where the cause of loss can be regarded as wrongful.

Held, further, that the Bills of Exchange Act does not regulate the question of the duty of a collecting bank towards the drawer of a cheque.

Held, further, that public policy, where it falls to be considered by a court, is to be considered conservatively. In particular, in determining whether

behaviour causing purely economic loss is to be regarded as wrongful, the courts must exercise care and circumspection with a view to determining whether, paying due regard to the notion of justice and the interests of the litigants and of the community as a whole, it is socially desirable to impose liability.

Held, further, that the duty of a collecting bank towards the drawer of a cheque should not be determined on the basis of the liability of an intermediate possessor of stolen property.

Held, further, that a collecting bank owes a duty of care under the *Lex Aquilia* to avoid causing loss to the drawer of a cheque by dealing negligently therewith.

Cases cited:

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

Philsam Investments (Pvt) Ltd v Beverley Building Society & Anor 1977 (1) RLR 78 (GD); 1977 (2) SA 546 (R)

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

Yorkshire Insurance Co Ltd v Standard Bank of South Africa Ltd 1928 WLD 251

Leal & Co v Williams 1906 TS 554

National Housing Commission v Cape of Good Hope Savings Bank Society 1963 (1) SA 230 (C)

Union Government v National Bank of SA Ltd 1921 AD 129

Administrator, Natal v Trust Bank of Africa Ltd 1979 (3) SA 824 (AD)

Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (AD)

Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH)

Autorama (Pvt) Ltd v Farm Equipment Auctions (Pvt) Ltd 1984 (1) ZLR 162 (HC); 1984 (3) SA 483 (ZH)

King v Dykes 1971 (2) RLR 151 (AD); 1971 (3) SA 540 (RAD)

Standard Bank of South Africa Ltd v Sham Magazine Centre 1977 (1) SA 84 (AD)

Cape Town Municipality v Paine 1923 AD 207

Peri-Urban Areas Health Board v Munarin 1965 (3) 367 (AD)

Herschel v Mrupe 1954 (3) SA 464 (AD)

Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd & Ors 1982 (4) SA 890 (AD)

Trust Bank of Africa Ltd v Barnes NO 1975 (3) SA 1002 (AD)

1985 (1) ZLR p360

McNALLY JA

Da Costa v Bank of Ceylon (1969) 72 New Law Reports 457

Campbell v Blue Lime Association Ltd 1918 TPD 309

John Bell & Co Ltd v Esselen 1954 (1) SA 147 (AD)

Mine Workers' Union v Prinsloo & Ors 1948 (3) SA 831 (AD)

Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk 1972 (1) SA 761 (AD)

Morris v West Hartlepool Steam Navigation Co Ltd [1956] AC 552 (HL)

Groves-Raffin Construction Ltd et al v Bank of Nova Scotia et al (1976) 64 DLR (3d) 78

Silva v Appuhamy (1967) 67 New Law Reports 457

A Chaskalson SC with him

I A Donovan for the appellant

A P de Bourbon SC for the respondent

Judgment

McNALLY JA: The appellant (Zimbank) appeals with leave against the decision of Mrs Justice Scott in the court *a quo* dismissing its exception to the declaration of the respondent (Pyramid) *(1).

Pyramid sued Zimbank in an Aquilian action alleging a duty of care and damage flowing from negligence on the part of Zimbank. What happened was this: Pyramid drew a cheque for \$4 505 in favour of one David Morris on the Avondale Branch of the Standard Bank. The cheque was crossed "A/C Payee only Not Negotiable & Co." The next day, despite the restriction on the face of the cheque, Zimbank's Avondale Sub-branch received the cheque for collection not on behalf of Morris but on behalf of "Black Mona Lisa" and paid the proceeds to one Mandunya.

Instead of dealing with these allegations on the merits, Zimbank excepted to the declaration, asserting that as the collecting banker it owed no duty of care to Pyramid, and therefore Pyramid's allegations gave rise to no cause of action.

In so pleading Zimbank raised squarely an issue which has been decided differently in this country and in South Africa. In this country the General Division of the High Court (as it was

then) held that a collecting banker could be and on the facts was liable to the drawer of a crossed cheque in an action based on negligence. That was the decision of GOLDIN J in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 (GD); 1972 (2) SA 703

1985 (1) ZLR p361

McNALLY JA

(R). The principle was accepted by NEWHAM J in *Philsam Investments (Pvt) Ltd v Beverley Building Society & Anor* 1977 (1) RLR 78 (GD); 1977 (2) SA 546 (R).

In South Africa FRANKLIN J in *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W) considered the *Rhostar* judgment but preferred to follow an earlier decision of TINDALL J in *Yorkshire Insurance Company Ltd v Standard Bank of South Africa Ltd* 1928 WLD 251, that the collecting bank acting in good faith is not liable on any ground "neither *ex delicto* nor upon contract or quasi-contract nor in natural equity."

It may be noted that there was no appeal in the *Rhostar* case, *supra*, where the defendant was also Zimbank under its former name. Thus the decision of GOLDIN J has stood as the law of this country since February 1972. It is not challenged in this appeal and the matter is being treated as a test case. There has been no similar test case in South Africa since *Atkinson Oates*, presumably because the banks are satisfied with the state of the law as expounded in that case. There has however been a contribution by academic writers. Generally, with the exception of Professor Cowen, they have supported *Rhostar's* conclusion, though not necessarily its reasoning.

The law on the subject is a fabric of many threads. I find it useful to separate out those threads and consider each of them separately.

The elements of the situation as I see it are these -

1. The Roman-Dutch common law on the liability of intermediate possessors of stolen property.
2. The significance of the English common law and English statutory alteration of the common law position.
3. The Zimbabwean statute law and its effect on the position of intermediate possessors of stolen cheques.
4. The state of the *lex Aquilia* in 1928 and the significance of its development and extension in more recent times.
5. The common sense equitable view - what the reasonable layman would consider to be just.
6. The policy considerations and the respective roles of the court and Legislature.

I will deal with them in that order.

1985 (1) ZLR p362

McNALLY JA

1. THE ROMAN-DUTCH COMMON LAW ON THE LIABILITY OF INTERMEDIATE POSSESSORS OF STOLEN PROPERTY

I would not think it possible to question the statements of TINDALL J in the *Yorkshire Insurance* case, *supra* on this aspect. The learned judge said at p 281 *et seq*, after setting out the general applicability of the *lex Aquilia*:

But though a duty such as that contended for on behalf of the plaintiffs has been enunciated in the general terms stated, the Roman-Dutch authorities deal particularly with the specific case of the person who innocently received stolen property and has parted with it innocently. The South African decisions quoted above and the Roman-Dutch authorities referred to in them make it clear that such a person is not liable to the true owner for the value of the property; in our law he is not liable for damages on the ground of conversion, or on the ground that the price is 'money had and received' for the true owner, as it is phrased in English law. It is true that in the passages in question the authors are dealing with the vindicatory action or *actio ad exhibendum* (eg Voet 6.1.10) but they state definitely that the purchaser who buys the stolen article in good faith and disposes of it in good faith is not liable on any ground, neither *ex delicto*, nor upon contract or quasi-contract nor in natural equity.

It will be seen from this passage that TINDALL J was distinguishing the Roman-Dutch law on the specific point in question from the general *lex Aquilia* on the one hand and from the English law of conversion on the other.

As to the *lex Aquilia*, he was no doubt right to do so in 1928. I will return later to consider whether the *lex Aquilia* today is a wider concept and whether that should affect a decision on facts similar to those which faced TINDALL J in 1928.

2. THE ENGLISH LAW OF CONVERSION AND THE STATUTORY ALTERATION OF THAT LAW

What is the English law of conversion? The answer emerges from the words of INNES CJ in *Leal & Co v Williams* 1906 TS 554 at pages 557-8:

Were this case brought in England, the authorities seem to show that Williams might succeed by an application of the doctrine of conversion - a doctrine which, originating in actions of trespass for the detention of goods found, was ultimately extended to cover promissory notes and

1985 (1) ZLR p363

McNALLY JA

chooses in action. It is not for me to define what is meant by 'conversion' seeing that eminent English judges express doubt on the subject. But I desire to refer to a definition in *Hollins & Ors v Fowler & Ors* (7 Eng & Ir App 757) which is as follows:

Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion.

Applying that doctrine to promissory notes, the English courts would make a *bona fide* intermediary liable to the true owner for the proceeds of a cheque or note for which he had obtained cash by means of a forged endorsement.

It would seem therefore that under the doctrine of conversion a collecting banker would always be liable to the true owner of a stolen cheque whether *bona fide* or not, whether negligent or not. It was for this reason that legislation in England was necessary, not to pin liability on the collecting banker, but to relieve him of liability where he could show he had acted in good faith and without negligence. This is the effect of s 82 of the Bills of Exchange Act 1882, and s 4 of

the Cheques Act 1957. Thus in England, and evolving as it were from the opposite direction, the law holds a collecting banker liable for negligence.

It is important to appreciate this history behind the legal position of a collecting banker in England, because it seems to me, with respect, that too much is made by Professor Cowen in his 1981 LC Steyn Memorial Lecture (1981 TSAR 193 *et seq*) of the fact that "there is ... abundant authority for the proposition that a collecting bank does not in England owe any common law duty of care to the owner of a stolen cheque to avoid loss to that owner through negligence in dealing with the cheque." The statement is to my mind true, but devoid of significance. Under the law of conversion the collecting bank has an obligation far wider than that which would arise under a duty of care. Where there is an absolute liability what need is there to consider a qualified liability? To put it another way, the English common law of conversion did not excuse a collecting banker's negligence, it rendered him liable when he was negligent as well as when he was not negligent. There was no need for the concept of duty of care which is no more than a bridge between the person who is negligent and the person affected by that negligence. Conversion provided a far stronger and wider bridge.

1985 (1) ZLR p364

McNALLY JA

3. THE STATUTORY LAW IN ZIMBABWE MODIFYING THE COMMON LAW POSITION

Our Legislature in the past has adopted South African legislation, not always with very great promptitude. Thus after TINDALL J had pointed out, in the *Yorkshire Insurance* case, *supra*, that the original provision was meaningless - I refer, without repeating them, to his words at pages 278-280 of the judgment - the South Africans in 1943 and this country in 1959 amended the legislation.

It is of interest that in 1959 the Federal Legislature made provision differently for Southern Rhodesia on the one hand and Northern Rhodesia and Nyasa - land on the other - see the Federal Cheques Act, No 5 of 1959. Clearly this was because of the different common law situation in the territories. Insofar as Southern Rhodesia was concerned the provisions then introduced are now to be found in s 85 of the Bills of Exchange Act [*Chapter 277*] of the Laws of Zimbabwe.

I do not propose to set out in full the provisions of s 85. In summary, insofar as it is relevant to the matters with which we are concerned, it provides:

- a., That the true owner of a stolen cheque crossed 'not negotiable' may recover the amount of his loss from any intermediate possessor for value (including a donee);
- b., That a collecting bank is excluded from the definition of 'inter-mediate possessor'.

Thus the section alters fundamentally the common law position of intermediate possessors other than the collecting bank by introducing something akin to the English doctrine of conversion. But the position of the collecting bank is left unaffected. The collecting bank thus remains subject to the common law.

If this is the proper understanding of the legislation, as with respect I think it is, then it is not

correct to say that our Legislature has legislated to cover the situation of the collecting bank. It has carefully avoided doing that. It has legislated for everyone else concerned, with the exception of the collecting bank. It has left the collecting bank to be dealt with in terms of the common law. It is the task of the courts to expound that common law. We are in exactly the same position *vis-à-vis* this problem as TINDALL J was. The new legis-

1985 (1) ZLR p365

McNALLY JA

lation has not changed the position. The question is whether the passage of time and the development of the common law have changed the position.

By following this line of reasoning I avoid becoming embroiled in the argument about the correctness of the *obiter dicta* in *National Housing Commission v Cape of Good Hope Savings Bank Society* 1963 (1) SA 230 (C) at 236-7 which was raised by Mr Chaskalson. I do not seek to read words into the section. I say the section does not arise for consideration.

4. THE STATE OF THE *LEX AQUILIA* IN 1928 AND THE SIGNIFICANCE OF ITS DEVELOPMENT AND EXTENSION IN MORE RECENT TIMES

It is not necessary to delve deeply into this aspect of the case. There is no doubt that the scope of the *lex Aquilia* is now seen to be far wider than in 1928, insofar as it is now accepted as including liability for pure economic loss not arising from physical injury to person or property. It is true that the learned author of the article on Delict in Vol. 8 of the *Law of South Africa*, in paragraph 24, says that the wider interpretation has always been our law, and cites a passage from a judgment of DE VILLIERS CJ in 1886 to prove his point. I am happy to accept this as correct, but it was not always perceived to be so. In the older cases there was almost always a reference to injury "in his person or property" (see p 281 of the *Yorkshire Insurance case*, citing *Union Government v National Bank of South Africa Ltd* 1921 AD 129). The learned author blames this tendency on the influence of English Law. I do not think it necessary to apportion blame. The doubts have been resolved by RUMPFF CJ in *Administrator, Natal v Trust Bank of Africa Ltd* 1979 (3) SA 824 (AD) when he said (and I quote from the translation) at page 831:

The unsatisfactory state which has existed in our law since the *Herschel* case, the differing judgments in Provincial Divisions subsequent thereto and the attitude of both the appellant and the respondent in this court are sound reasons as to why a judgment should now be given recognising or rejecting the existence of such a right (ie a right to compensation for pure patrimonial loss) in our common law ... The birth pangs of such a right of action have endured so long that the time has arrived, perhaps even with a Caesarian section, that the child should be brought into the world.

Thus was the seal of approval set on a wider perception of the scope of the *lex Aquilia*. At page 832F the learned CHIEF JUSTICE said (of the action based on negligent misstatement) "In my opinion the ground of action can and

1985 (1) ZLR p366

McNALLY JA

ought to be placed in the extended range of application of the *lex Aquilia*." At page 834E he

continued "What must however be kept in mind is that in our law the liability flowing from negligent misstatement arises as delictual liability, outside the contractual context. It is unnecessary to decide whether there can be delictual liability within a contractual context". That decision, a negative one, has since been taken in South Africa in the majority judgment in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

In this country also there are not only the *Rhostar and Philsam* decisions but also *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH), and *Autorama (Pvt) Ltd v Farm Equipment Auctions (Pvt) Ltd* 1984 (1) ZLR 162 (HC); 1984 (3) SA 483 (ZH); not to mention the important general remarks of MACDONALD ACJ (as he then was) in *King v Dykes* 1971 (2) RLR 151 (AD) at 153-5; 1971 (3) SA 540. The situation is summed up generally in Boberg *Law of Delict* vol. 1 pp 106-108.

5. THE COMMON SENSE EQUITABLE VIEW

It does not seem to me out of the ordinary, policy considerations apart, that a bank which negligently handles someone's cheque, causing him loss, should be liable in damages to him for that loss, at least up to the amount of the cheque. Indeed I would think that to the average reasonable man in the street that would seem to be a wholly sensible proposition. (See the comment by one Bank's spokesman in the letters column of the Herald of 23 May 1985). How then has our law managed to come to a different conclusion?

In the first place the transaction has been pigeonholed under the complex law of negotiable instruments, a part of the law merchant, instead of under the straightforward *lex Aquilia*. Secondly there has been a further pigeonholing into the category of the *actio ad exhibendum* which has involved treating a stolen cheque in the same way as a stolen car or a stolen watch, and treating the collecting bank just like any other intermediate possessor (See *Cowen, supra*, p 203).

The first pigeonholing is not particularly important, save perhaps that it conditions the legal mind with a miasma of mystique. The second categorising is to my mind more specifically misleading.

A cheque, and more especially the cheque with which we are concerned, with its various restrictive endorsements, is not to be equated with an ordinary

1985 (1) ZLR p367

McNALLY JA

piece of stolen property. A cheque by definition is signed by the drawer, drawn on a named branch of the bank, and payable to a named person. The endorsements on it indicate that the drawer or a subsequent endorser has given certain instructions to the bank on which it is drawn and certain directions to the collecting bank (see *Standard Bank of SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (AD) at 504-5).

Such a cheque not only describes itself in a way that a stolen car or watch does not. It also describes and prescribes how it is to be dealt with; and in general and in theory at least it has no value unless it is dealt with in the way described and prescribed. Indeed the correct handling

of paper is fundamental to the whole system of negotiable instruments. In this respect a stolen crossed cheque is fundamentally different from a stolen car or a stolen watch.

Consider the position of the purchaser of a stolen watch. He cannot be relevantly negligent with it after he has bought it, since even if he loses it carelessly, his negligence is "negligence in the air". So if negligence is to be considered, it can only arise out of the circumstances in which he acquired possession. Was he negligent in not checking adequately the title of the person from whom he bought it? The answer provided by our law is a perfectly sensible one. It is unreasonable to impose upon purchasers so wide and general a duty of care. A purchaser is not required to suspect the *bona fides* of every seller. Only if he knows, either actually or constructively, of the seller's defective title, can he be held responsible to the true owner, if he has in good faith lost or disposed of the property. But if he still possesses it, then he must yield it to the true owner, whether or not he was negligent in acquiring it.

Consider further the position of the purchaser of a stolen watch which is "endorsed" or engraved with words indicating ownership. "This watch belongs to John Nodoro" or "Mary Jones from her loving husband". Certainly such an endorsement will be relevant in determining whether the purchaser was actually or constructively aware of the seller's defective title. But even in such a case I would see no reason to go beyond the criteria of the *actio ad exhibendum*. The purchaser is liable if he is *mala fide*, or so reckless as to be deemed *mala fide*. But he should not be liable simply for negligence because there is no policy reason for imposing on him a duty of care to the world at large. Such liability, potentially unlimited in *quantum* and scope, is precisely the sort of liability which the courts are loath to acknowledge, especially where an adequate remedy is available on an alternative basis.

1985 (1) ZLR p368

McNALLY JA

The position is quite different, as I have said earlier and elaborate below, when one considers the collecting banker *vis-à-vis* the crossed cheque.

I would therefore go further than Professor Cowen, and would query the equating of a stolen crossed cheque with a stolen piece of ordinary property.

I would however agree with Professor Cowen that it is questionable, indeed illogical, to treat the collecting bank in the same way as any other intermediate possessor. (Indeed the Act itself, in s 85, recognises a distinction albeit for a different purpose). It is even more illogical to regard the collecting bank as further removed from responsibility on the ground that it is a mere agent. After all, every cheque that is issued has to be collected, even if the collecting bank and the drawee bank are one and the same. The collecting of the proceeds of a cheque is an essential part of the system. The collecting bank is not only a necessary part of the mechanism but also, as pointed out by GOLDIN J in *Rhostar*, the last line of defence for the drawer. To describe a collecting banker as "one of the intermediate possessors of a cheque" and "a mere agent for his customer" is to ignore his essential role in a system thanks to which he exists, a system moreover which depends for its justification upon the fact that it and he can be relied upon (one might even say, "banked upon"). The banking system, in short, creates a relationship of care between a drawer of a crossed cheque and a collecting bank. (I make no comment as to the

relationship between other parties and a collecting bank or between the drawer and his own bank).

Why then has the law in such cases as *Leal & Co v Williams*, *supra*, the *Yorkshire Insurance case*, *supra*, and the *Atkinson Oates* case, *supra*, moved away from the common sense approach? The answer can only be in the first two cases that the *lex Aquilia* was not then seen to be sufficiently developed to provide a natural home for the obvious remedy. One notes the reluctance with which INNES J came to the conclusion he reached in *Leal & Co v Williams*, *supra*, and the passing thought that "something might possibly be made of the case on the ground of negligence" (p 559). But the *lex Aquilia* was then, as in 1928, too undeveloped to bear the extended burden. The courts had no choice but to fall back upon the inadequate *actio ad exhibendum*. Perhaps by 1977 the cumulative weight of authority and settled commercial practice in the Transvaal was too great to be moved, and *Atkinson Oates Motors Ltd* had to bear the consequences.

6. THE POLICY CONSIDERATIONS

1985 (1) ZLR p369

McNALLY JA

There are three aspects of the policy question.

- a., Is it a question of policy whether or not to extend the application of the aquilian action into the sphere of the collecting banker, and if so what are the criteria?;
- b., Since the Legislature has become involved in this question by means of s 85 of the Bills of Exchange Act, are the courts interfering in a matter properly to be left to the Legislature, if they pronounce positively upon the matter?;
- c., Should the courts be concerned that a decision allowing the question of negligence to be raised in relation to the conduct of a collecting banker might cause havoc in the commercial and financial world?

I will deal with these three policy considerations in turn.

It is a matter for debate whether the courts in fact create law or merely recognise the wider applicability of existing law in the light of current modes of thought. I prefer the latter view, and it may be noted that RUMPFF CJ, in the passage I quoted earlier, spoke of "recognising the existence of such a right". He did not purport to create it. Therefore I would say, not that the courts are extending the applicability of the *lex Aquilia*, but that they are recognising the artificiality of the limitations formerly placed upon the scope of that action. I would not accept therefore that this court is making new law if it applies the criteria of negligence, duty of care and wrongful action to the conduct of a collecting banker. I would say that the court is simply applying the modern understanding of the *lex Aquilia* in a new specific situation. Of course there are policy considerations which point to the need for caution. One does not want to open up a Pandora's Box of new liabilities. In the present case however the dangers commonly feared are not present. The parties to whom a duty of care may be owed are strictly limited by the writing on the document itself. The amount of the potential liability is written for all to see on the face of

the cheque. The criteria set out by Boberg (*op cit*) at pages 104-105 are amply met.

Secondly, as I read the legislation, the legislators have expressly left the position of the collecting banker to be governed by the common law. I have dealt with the point earlier in my judgment. So far from usurping the function of the Legislature, the courts in deciding this matter are carrying out the role which the Legislature has left to them. And in any event it would seem to me, if a choice has to be made, that the primary duty of the courts is to the public at large. It is not the role of the courts but of the Legislature to protect the

1985 (1) ZLR p370

McNALLY JA

special interests of the banks. Indeed it is the bank, by taking the exception, which has prevented the courts from hearing evidence on the merits of the matter. I do not for a moment suggest that the bank acted improperly I merely draw attention to the fact that this procedure by way of exception prevents the courts from ascertaining what the bank's special interests are. If legislative intervention is required it is more appropriate that such intervention should be at the instance of the banks, than at the instance of the general public, who have neither the means of collective communication nor the expert knowledge necessary to lobby the Legislature.

Finally it does not seem to me, on the particular facts of this case, that this court should feel itself under restraint because of a fear of causing damage to the banking system. We know that by statute and for many years English collecting banks have been liable in negligence to the drawers of crossed cheques. The text books tell us that this is so in many other countries. It has been the law in this country since the *Rhostar* decision in February 1972. In confirming *Rhostar* on this point we create no new situation.

It will be apparent from what I have said that in my view the *lex Aquilia* does provide a basis upon which a collecting banker may be held liable in negligence to the drawer of a crossed cheque. Accordingly I find that the declaration in the case before us does disclose a cause of action. I would dismiss the appeal with costs.

Gubbay JA: I have had the advantage of reading the judgment of McNally JA: it is only after careful and anxious reflection that I too have reached the conclusion that the appeal is to be dismissed with costs.

The question raised by the appeal is not the legal effect of the words "A/C Payee Only - Not Negotiable & Co" which were endorsed upon the cheque stolen from the respondent, but whether under the *lex Aquilia* a collecting bank owes a duty of care (or legal duty) to the drawer of a stolen cheque collected on behalf of its customer who is not the nominated payee. That question is simple to formulate but difficult to resolve.

In this jurisdiction the decisions in *Rhostar (Pvt) Ltd v Netherlands Bank of Rhodesia Ltd* 1972 (1) RLR 56 (GD); 1972 (2) SA 703 (R) and *Philsam Investments (Pvt) Ltd v Beverley Building Society & Anor* 1977 (1) RLR 78 (GD); 1977 (2) SA 546 (R) touch upon the issue. I say "touch" advisedly because in neither case was it readily appreciated that what was being contended for was an extension of the categories of liability in the sphere of

GUBBAY JA

pure economic loss, that is, recovery for financial damage sustained without the interposition of physical injury to person or corporeal property.

In the *Rhostar* case the facts were these: The plaintiff company required two signatures on all cheques drawn on it. It was customary for one director, Taitz, to sign a cheque in blank that was crossed and marked "not negotiable - a/c payee only" and to give it to a trusted employee, Paterson, who had authority to complete and add his signature to the cheque. This was done so that Paterson could pay suppliers of goods on delivery and thereby obtain a discount for the company even if the goods arrived at a time when no directors were present to sign cheques. On the cheque in question Paterson fraudulently, and with the intention of stealing from the company, filled in as payee the name "M.A. Henriques" (to whom the company was not indebted) and an amount of \$3 325, struck out the words "or bearer" and deposited the cheque into his own account with the defendant bank for collection. The drawee bank (The Standard Bank Ltd.), having no means of knowing that collection was not being made for the named payee, paid the defendant bank and debited the company's account with \$3 325. In consequence the company sued the defendant bank to recover its loss on the ground of negligence. Despite the absence of a tort of conversion under Roman-Dutch law, GOLDIN J (as he then was) rejected the defendant's plea that "a collecting banker owes no duty of care to the drawer" (at 711H) and having found on the facts that the defendant had been negligent, gave judgment for the plaintiff.

Mr *Chaskalson* attacked the cogency of the reasoning of GOLDIN J and in this he is supported by the criticisms to which FRANKLIN J subjected the judgment in *Atkinson Oates Motors Ltd v Trust Bank of Africa Ltd* 1977 (3) SA 188 (W) at 194B-195D. For the most part I am in respectful agreement with FRANKLIN J and with the submissions of counsel. But in the context of the present problem I consider it is necessary to mention but one aspect of the ratio. GOLDIN J referred to such well-known authorities as *Cape Town Municipality v Paine* 1923 AD 207 at 216-217 and *Peri-Urban Areas Health Board v Munarin* 1965 (3) 367 (AD) at 373E-H for the proposition that an action for negligence will lie if a *diligens paterfamilias* would foresee the possibility of harm occurring and take steps to guard against it. From this he concluded that a collecting bank owes a duty of care to the drawer of a cheque (see at 715B-716C). (A similar approach was adopted by SCOTT J in the court *a quo*). In so doing the learned judge, so it would seem, failed to appreciate that a claim against a collecting bank is for economic loss unrelated to damage to property and that the foreseeability test cannot be applied without restriction

GUBBAY JA

to such claims. The fact that it is foreseeable that payment of a cheque to the wrong person may cause financial harm to the drawer is not enough to give rise to a duty of care. See *Herschel v Mrupe* 1954 (3) SA 464 (AD) at 477F-G, 485A-C, and 490A; *Osborne Panama SA v Shell & BP South African Petroleum Refineries (Pty) Ltd & Ors* 1982 (4) SA 890 (AD) at

900G-901A. There is no general principle of delictual liability for economic loss negligently caused. It must have been caused wrongfully as well as culpably. There must have been an infringement of a legally protected right, the determination of which requires the exercise of a judicial value judgment embracing all relevant facts including matters of policy. See *Administrateur, Natal v Trust Bank van Afrika Bpk.* 1979 (3) SA 824 (A) at 833D-H. For whereas physical injury to person or corporeal property is *prima facie* unlawful, causing economic loss is not. See *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (AD) at 497A; Joubert, *The Law of South Africa* vol; 8 para 24 at p 35.

In *Philsam Investments (Pvt) Ltd v Beverley Building Society and Another*, *supra*, the validity of the judgment in the *Rhostar* case was not challenged by either counsel who appeared for the defendants. It is not surprising therefore that NEWHAM J applied the reasoning of GOLDIN J (see at 552B and 553B) without perceiving the necessity to approach the claim posed by the nature of the loss from the standpoint of pure economic loss.

In neither case therefore was the issue which this court has to decide squarely faced. Interestingly enough it was left open by the South African Appellate Division in *Trust Bank of Africa Ltd v Barnes* NO 1975 (3) SA 1002 (AD) at 1010G-1011B.

In *Yorkshire Insurance Co Ltd v Standard Bank of SA Ltd* 1928 WLD 251 it was argued for the plaintiff, which had taken cession of action from the drawers of the stolen cheques, that in collecting payment in respect of them the defendant bank owed a duty of care under the *lex Aquilia* (see at 268). The argument was firmly rejected. TINDALL J held that for two reasons there was no room for involving the *lex Aquilia*: In the first place because he was unable to discover any trace of such a duty in the Roman-Dutch authorities. And secondly, because the whole question of delictual liability where stolen property passes through the hands of an intermediary was dealt with exhaustively under the rubric of the *actio ad exhibendum* by the Roman-Dutch authorities who:

... state definitely that the purchaser who buys the stolen article in good

1985 (1) ZLR p373

GUBBAY JA

faith and disposes of it in good faith is not liable on any ground, neither *ex delictio*, nor upon contract or quasi-contract nor in natural equity. (At 282).

That decision came during an era when the concept of liability for pure economic loss unintentionally caused had never been contemplated let alone considered by the courts. Thus today its correctness must be gauged against the subsequent material growth of the law. (See too the obiter remarks of WEERMANTRY J in *De Costa v Bank of Ceylon* (1969) 72 New Law Reports 457 at 508).

FRANKLIN J in the *Atkinson Oates* case, *supra*, was alive to the problem of recovery for pure economic loss. After confessing to considerable difficulty in deciding whether to extend liability for negligence to the situation confronting him, and impressed by the need to exercise judicial

caution, he expressed the view that:

... there is no sound reason for me to depart from the safe guide adopted by TINDALL J, in the *Yorkshire Insurance* case of the position of the bona fide purchaser of stolen property who has innocently disposed of it. I agree with the approach of TINDALL J, that that is the law which should be applied to the position of a collecting banker. It follows from this judgment that, in order 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. In the absence of any allegation of such knowledge on its part there is, in my judgment, no duty upon a collecting banker to ensure that no loss is caused to the true owner of the cheque. (At 198H-199A).

It is clear that in embarking upon the policy-based enquiry as to whether the development in the law since the *Yorkshire Insurance* case should permit an extension of remedies, the learned judge was influenced predominantly by the compelling factor of the undesirability of interfering with this branch of the law pertaining to a collecting bank as it had stood since 1928. The absence of any detailed discussion of other criteria, such as those hereinafter referred to, appears to me to bear this out.

Mr *Chaskalson* is, of course, correct in cautioning that in determining whether any norm of behaviour causing economic loss should be characterised as wrongful, the adoption of a conservative approach is required. (See the *Lillicrap* case, *supra*, at 500D-E and the authorities there

1985 (1) ZLR p374

GUBBAY JA

cited.) Certainly there is need for "care and circumspection" in the ascertainment of whether a particular type of action is one which will be confined within reasonable and manageable bounds and is not fraught with what aptly has been described as "overwhelming potential liability". Each case must be assessed pragmatically on its own facts and merits, with primary weight being laid upon the policy of the law. The court must ask itself whether, paying due and proper regard to the notion of justice and the interests of litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances. See *Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (1) ZLR 47 (HC); 1982 (3) SA 55 (ZH) at 61F-H.

What factors should be evaluated and balanced? It is not possible to formulate an exhaustive list applicable to every situation. But so far as this claim is concerned it seems to me important to determine whether the loss is finite and the number of potential claimants limited and identifiable; whether the success of the action will result in a multitudinous train of claims for incalculable loss; whether the appellant is to be regarded as possessing skills and special responsibility in the particular commercial activity in which it is engaged; the desirability of maintaining long-established principles of law which currently are being acted upon, and whether there is a need to place the present ground of action within the extended scope of *lex Aquilia*, since the Legislature has once before taken the initiative in this area by enacting the now s 85 of the Bills of Exchange Act [Chapter 277].

Mr *de Bourbon* argued strongly that in an action based on a cheque in circumstances such as the present the potential plaintiffs are limited to two and are easily predictable, namely the drawer of the cheque or the payee (or persons holding title under him); indeterminate liability for

economic loss does not arise since the loss will be restricted to the amount *ex facie* the cheque itself; and there is and will only be a single loss with little, if any, likelihood of a multiplicity of actions. I find this a cogent and acceptable proposition, which has earned the approval of academic writers. See Boberg, 1979 Annual Survey of South African Law at p 135; Tager, 1979 South African Law Journal Vol 96 at p 391; Malan, 1979 De Jure at p 38; and Waring, 1980 THRHR Vol 43 at p 420.

Professor Cowen, in his LC Steyn Memorial address published in 1981 TSAR 193 *et seq*, remarks that:

... in practice, it would be impossible for a large bank to predetermine

1985 (1) ZLR p375

GUBBAY JA

the extent of potential liability in respect of all cheques passing through clearance, even on any one day, let alone during a longer period. (At 207).

While this may be true in a generalised sense it underplays the fact that each potential claim will be finite, will arise separately from any other and will be related to a specific act on the part of the collecting bank. The bank will not be faced with the dilemma of a single negligent act giving birth simultaneously to inestimable loss from an indeterminate class of potential victims launching an endless stream of actions.

Mr *de Bourbon* did not seek to quarrel with the well-established principle that the liability of an intermediary who acquired and disposed of stolen goods is dependent upon whether he acted in bad faith. Nor did he suggest that that principle had been applied wrongly where it was a negotiable instrument that had passed through the hands of an intermediary who was not a collecting bank. See for instance, *Leal & Co v Williams* 1906 TS 554; *Campbell v Blue Lime Association Ltd* 1918 TPD 309; *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (AD) at 153A-G. What Mr *de Bourbon* did urge was that dictates of policy justify placing the liability of a collecting bank upon a different footing from that of the ordinary intermediary. Support for that approach is forthcoming from Professor Malan, who in 1979 De Jure at pp 34-37 writes convincingly of the "professional responsibility" of bankers as a class. He, like Mr *de Bourbon*, argues that as a banker, by virtue of his calling, has or ought to have special skill and competence, it is unsound and illogical to equate his position in collecting payment of a stolen cheque with that of an ordinary *bona fide* purchaser of stolen goods who subsequently disposes of the goods in good faith. For in the exercise of his expertise and responsibility which arise from the professional services he renders the public, the banker owes a duty of care (in the policy-duty sense) to avoid causing loss to the owner of a stolen cheque by negligently dealing with it. In my view the argument is attractive. After all the collecting banker appreciates or ought to appreciate the significance of instructions upon a cheque and that they are there to be observed. He can verify whether the payee designated on the cheque is his client. He alone is in a position to know whether it is being collected on behalf of the person entitled to receive payment; the paying banker has no knowledge of that - a critical fact I did not understand Mr *Chaskalson* to dispute. If the cheque indicates that his client is not so entitled, the collecting banker is able to safeguard the drawer from loss by acting as a buffer. He has the machinery at his disposal to do so. He

can allow a reasonable period of time to elapse before paying out to his client the funds

1985 (1) ZLR p376

GUBBAY JA

represented by the cheque, thereby permitting either enquiries to be made as to the depositor's title, or the drawer an adequate opportunity to instruct the drawee bank to stop payment on the cheque. By exercising reasonable diligence in this regard the collecting banker is able to minimise, if not neutralise, the relatively high risk affecting a cheque in the sense that payment can be obtained by an unlawful possessor with comparative ease.

In 1981 TSAR at p 220, Professor Cowen contends that an impressive reason against the acceptance of a duty of care is that the test of liability propounded by TINDALL J in the *Yorkshire Insurance* case embodies a long-established understanding of the law; for the decision has stood for more than five decades, and on several occasions the South African Appellate Division has referred to "the undesirability of interfering with the law as laid down over a long course of years even where there is reason to think that it had been incorrectly laid down" (per GREENBERG JA in *Mine Workers' Union v Prinsloo & Ors* 1948 (3) SA 831 (AD) at 851; see also *Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 (1) SA 761 (A) at 767G-768A).

In this country the decision in the *Rhostar* case has stood unchallenged for thirteen years. Whether or not its *ratio decidendi* is convincing is beside the point. Collecting banks have regulated their conduct and practices to conform with it for that many years and, in a manner which is in line with the position obtaining in England and certain other countries (see Malan 1978 De Jure at p 334 ff.), have afforded the drawers of stolen cheques a much - needed protection. To revert at this stage to the law operative prior to 1972, from a policy angle would constitute, in my opinion a retrograde step-one which the ordinary reasonable businessman would find almost incomprehensible. To him the facility to recover from a collecting bank any loss occasioned by the negligent handling of a cheque is good common sense; far preferable to the simplistic view that economic losses should be absorbed as normal business risks.

Furthermore, to reinstate the law as it was before the *Rhostar* case could lead to the misgivings highlighted by GOLDIN J at 716D that:

(if) no duty of care is owed, it would follow that a banker need not examine or even look at the cheque to ascertain to whom it is payable. Such conduct would ensure that he had no knowledge that his customer had no right to the cheque and consequently he would not be liable for any loss incurred by the drawer.

1985 (1) ZLR p377

GUBBAY JA

In the *Atkinson Oates* case, *supra*, at 195C FRANKLIN J sought to discount such a consequence with the comment that "if officials of the bank deliberately shut their eyes to what is going on, it could not be said that they did not have knowledge, and the bank would accordingly be held liable, not on the ground of negligence, but on the ground of knowledge...". But with due deference the two cases are different. As Professor Cowen so lucidly illustrates:

(to) throw caution to the winds because there is no legal duty to be cautious, is not the same thing as deliberately refraining from making enquiries after one's suspicions have been aroused ... (*op cit.* at p 209).

And it seems to me that the foreboding entertained by GOLDIN J, if anything, is underscored by the ruling in *Standard Bank SA Ltd v Sham Magazine Centre* 1977 (1) SA 484 (AD) - adopted in the *Philsam Investments* case at 550D-E - that the words "A/C Payee Only" do not restrict the negotiability of a cheque but are merely a direction to the collecting bank that the designated payee should receive payment. From this it would seem to follow that without a duty of care the words would lack practical meaning.

Mr *Chaskalson* argued that to recognise the existence of a duty of care will place upon the shoulders of a collecting bank a burden extending beyond the immediate duty to act without negligence in the collection and payment to its customer of a stolen cheque. Secondary consequences may and probably will arise. This was appreciated and heavily emphasised by ROBERTSON JA in the Canadian case of *Groves-Raffin Construction Ltd et al v Bank of Nova Scotia et al* (1976) 64 DLR (3d) 78, where he said at 131-132:

... I have in mind, among other things, that, if the duty existed, it would appear to require each bank, when it receives for deposit to the credit of an individual customer a cheque drawn by a corporation, to examine the cheque to see whether the person who signed the cheque for the corporation and the payee are one and the same person; this would increase the volume of banks' work in a marked degree. Think of the added difficulties when the signature is not known to the teller and is not readily identifiable as that of one who has the same name as the payee! Or would the duty of enquiry be moderated in those circumstances and depend on the degree of legibility of the signature? What about the common case where the signature of an officer is merely reproduced on the cheque but the cheque bears in addition the pen and ink initials of a junior official: how far must the bank go in trying to identify the initialler with the payee? In every case where the bank is, or should be, able to

1985 (1) ZLR p378

GUBBAY JA

identify the signatory or initialler with the payee, must the bank make inquiry? Or has it a discretion to omit inquiry where it thinks that the amount of the cheque is, for example, no greater than what it thinks the signatory's monthly salary or wage may or should be? In my respectful opinion, these considerations far outweigh what the learned Judge considered to be 'the social demands of the day'.

With respect I think the learned judge of appeal was rather inclined to assume that the recognition of a duty of care will almost inevitably entail liability. This, of course is not so. The standard of care attaching to any mode of conduct put in issue will have to be determined by assessing a variety of factors, such as the general level of skill and diligence exercised by bankers as a class, the likelihood of injury and the costs and practicability of taking measures to guard against it. In the words of the inimitable LORD REID in *Morris v West Hartlepool Steam Navigation Co Ltd* [1956] AC 552 (HL) at 574:

... it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.

But this apart, the apprehensions expressed by ROBERTSON JA are, in my view, countered effectively by the reality that since February 1972 when the decision in the *Rhostar* case was given, banks in this country have assumed the duty of care and the consequences flowing from

it, and no doubt have ordered their affairs, procedures and techniques accordingly. The need to display vigilance has become a fact of their daily lives and there is no basis upon which to suppose that they are unable to cope with it. What is now being sought is an extinction of an already created and fairly long-standing burden, if burden it be.

Mr *Chaskalson* further argued that no need exists for extending the Aquilian action to a collecting bank which passes on a stolen cheque for payment, because the Legislature entered this special commercial field in 1959 by specifically making provision for its protection (now s 85 of the Bills of Exchange Act [*Chapter 277*]). Any modification in the law therefore to improve the standing of the owner of a stolen cheque *vis-à-vis* the collecting bank should be left to the discretion of Parliament. The submission echoes

1985 (1) ZLR p379

GUBBAY JA

the *obiter dictum* of TAMBLAH J in *Daniel Silva v Johannis Appuhamy* (1967) 67 New Law Reports 457 at 472, a decision of the Supreme Court of Ceylon.

I am unable to agree that Parliament intended the liability of a collecting bank for loss sustained by the drawer of a stolen cheque to remain as propounded in the *Yorkshire Insurance* case until it was considered necessary to introduce further legislation. I am satisfied that nothing more can be read into the relevant statutory provision than that Parliament deemed it appropriate to make an exception and to leave the position of a collecting bank to be governed by the common law as modified or developed by the courts.

Nonetheless, I am not unmindful of the force of the contention that since the Legislature has already encroached upon this branch of commercial law and imposed a liability where none had previously existed upon other persons taking stolen cheques marked "not negotiable", it is politic that the decision whether or not to extend the liability of the collecting bank falls more properly within its domain. The Legislature has the machinery and resources to embark upon a far-reaching investigation into the desirability and necessity for such an extension, and may well be better equipped to evaluate and balance the conflicting social and economic interests than a court of law.

But upon an overall assessment of the relevant factors and with perhaps especial regard to the professional responsibility owed by banks, the state of the law in this country since 1972 and the need to maintain certainty in so far as the public are concerned, it does seem to me that considerations of justice and convenience warrant a recognition of a common law duty of care on the part of a collecting bank to the owner of a stolen cheque to prevent loss by negligently dealing with that cheque. I have no reason to believe that the affirmation of the judgment in the *Rhostar* case will throw the banking system into disorder or prove socially hazardous. In my opinion society is better served by retaining the remedy.

Beck JA: I am satisfied that this court should recognise that the appellant bank owed a duty of care under the *lex Aquilia* to the respondent on the facts of this case and that the appeal must therefore be dismissed with costs. I have nothing to add to the full and careful reasoning advanced by my brothers in their respective judgments, with which I agree.

Gill, Godlonton & Gerrans, appellant's legal representatives

Coghlan, Welsh & Guest, respondent's legal representatives

985 (1) ZLR p380

PARKER v W G B KINSEY & CO (PVT) LTD 1985 (1) ZLR 380 (HC)

Court **High Court, Harare**

Smith J

Civil Application

3 May and 26 June 1985

Flynote

Statutes - Companies Act [Chapter 190] - s 167 - scheme of arrangement which has been sanctioned - setting aside of - considerations which apply.

Headnote

The applicant claimed an order that the scheme of arrangement, under which the respondent company was being managed, be set aside. The scheme of arrangement had been sanctioned in terms of s 167 of the Companies Act [*Chapter 190*]. The ground for the applicant's claim was that the respondent company had breached the scheme of arrangement in several respects.

Held, in dismissing the application, that when the court sanctioned the scheme of arrangement which the applicant was seeking to set aside, the court must have been satisfied as to the reasonableness of the scheme.

Held, further, that there is no provision in the Companies Act [*Chapter 190*] for the court to set aside a scheme which it has sanctioned.

Held, further, that in the present case there was no suspensive condition or condition precedent in the scheme which was alleged to have been fulfilled or not fulfilled, as the case may be. If there had been, then the aggrieved party would have been entitled to apply to the court to have the scheme set aside, whether or not there were unfortunate consequences to the creditors.

Held, further, that in the absence of any such conditions the court, in this case, would have been able to set aside the scheme of arrangement but only if there had been a material breach of the terms thereof and there was no other remedy available to the aggrieved party to protect his rights. Before

1985 (1) ZLR p381

SMITH J

setting aside the scheme, however, the court would have to be satisfied that the other creditors

or persons affected were aware of the application to the court to set aside the scheme and had an opportunity to make representations to the court.

Cases cited:

Serein Investments (Pty) Ltd v Myb (Pty) Ltd 1967 (4) SA 437 (C)

Du Preez & Anor v Garber : In re *Die Boerebank Bpk* 1963 (1) SA 806 (W)

Administrateur-General vir Suidwes-Africa v Hotel Onduri (Edms) Bpk en Andere 1983 (4) SA 794 (SWA)

Cohen NO v Nel & Anor 1975 (3) SA 963 (W)

Eastwood for the applicant

A P de Bourbon SC for the respondent

Judgment

Smith J: The respondent is a company which is being managed under a scheme of arrangement which has been sanctioned in terms of s 167 of the Companies Act [*Chapter 190*]. A meeting of creditors of the respondent was held on 11 December 1983, at which the scheme was approved by the creditors. Prior to this, the applicant and the respondent had entered into an agreement, dated 3 December 1980, in terms of which the applicant sold to the respondent his issued shares and loan account in a company, Clearway Plant Hire (Pvt) Ltd, for \$525 000. The respondent was required to make a down payment of \$25 000 and pay the balance in instalments. An addendum to the said agreement was entered into to the effect that if 54% of the net asset value of Clearway Plant Hire (Pvt) Ltd and the applicant's loan account at 30 September 1980 were not valued at \$525 000, the applicant waived his right to the difference between the two amounts.

The respondent failed to pay monthly instalments of interest in respect of the months of August and September 1983 and also the capital sum of \$25 000 due on 1 October 1983. This was because the respondent was experiencing considerable liquidity problems. In terms of the agreement of sale, the default of the respondent meant that the full balance of the purchase price became due and payable. The liquidity problems of the respondent led to the meeting of creditors on 1 December 1983 at which the scheme of arrangement was approved. The applicant was represented at this meeting and his claim, for the purpose of the meeting, was accepted as being \$425 000, ie the balance of the purchase price payable in terms of the agreement of sale. Prior to the meeting on 1 December 1983 the respondent was challenging the amount payable by

1985 (1) ZLR p382

SMITH J

it under the agreement of sale. The applicant was aware of this challenge but was not given figures quantifying the amount disputed. After the scheme of arrangement came into effect there was much correspondence between the legal representatives of the parties concerning the

dispute as to the amount payable by the respondent under the agreement of sale. Unfortunately, this did not lead to any resolution of the matters in dispute. On 8 March 1985, the respondent instituted action against the applicant in Case No 674/85 in which it claimed cancellation of the agreement of sale, alternatively reduction in the purchase price payable, alternatively damages or, alternatively, that one of the matters in dispute be referred to arbitration. The present proceedings were, of course, instituted by service of the notice of motion on 28 February 1985.

The scheme of arrangement provides *inter alia* for the following matters -

- (a) the appointment of a management committee to administer and control the business and affairs of the respondent;
- (b) the management committee shall meet as often as necessary but not less than once in each month;
- (c) the management committee shall report to creditors at least once every three months;
- (d) the priority of payments from the respondent's net income and, specifically, the payment by 31 March 1984 of -
 - (i) all creditors whose capital claims are under \$2 000;
 - (ii) 25% of such claims between \$2 000 and \$5 000;
 - (iii) 15% of such claims exceeding \$5 000.

The applicant is claiming an order that the scheme of arrangement be set aside. The grounds for this claim are, firstly, he has received no reports from the management committee; secondly, the respondent has failed to respond to the request for fixing a time and manner of proving the applicant's claim and thirdly, that other creditors are receiving preferential treatment in that they have received more, *pro rata*, than he has.

The respondent has not denied that reports have not been sent out by the management committee or that the applicant has not been notified of a time and place to prove his claim, but Mr *de Bourbon* has submitted that these are trivial matters. He agreed, however, that the third point raised by the applicant could constitute a material breach of the scheme of arrangement.

Mr *Eastwood* has been unable to find any case where a court has set aside a

1985 (1) ZLR p383

SMITH J

scheme of arrangement which has been sanctioned by the court. He has, however, referred to *Serein Investments (Pty) Ltd v Myb (Pty) Ltd* 1967 (4) SA 437 (C) at 438H-439B, where DIEMONT J said:

This is a scheme which has been sanctioned by the court. It is a statutory compromise which has been entered into by the creditors and approved of by the court only after the conditions set forth in sec. 103 of the Act have been observed and complied with. It is a compromise which, to quote the words of the statute, is 'binding on all the creditors'. If those words are to be given their ordinary meaning, they mean that the creditors are bound by the terms of the compromise. Whereas previously a creditor had the right to sequester the company and look to the liquidator to pay him a dividend in due course, he is obliged now to sit back and wait for the professional liquidator

or receiver to implement the terms of the compromise. The compromise is binding upon him and unimpeachable - even if he did not vote for it - until such time as it has been set aside. If he disapproves of the method of distribution as being in conflict with the terms of the compromise, he may have a remedy against the receiver. He may even be entitled to ask the court to set aside the compromise - this is an issue that was not argued and I express no final view on it. What I do say is that while the compromise remains valid the creditors are bound by it. A creditor cannot circumvent the effect of the compromise or seek to accelerate the payment of dividends by taking independent action to liquidate the Company and so indirectly set at naught the order made by the court in pursuance of the terms of sec. 103 of the Act.

Mr *Eastwood* argued that a scheme which has been sanctioned by the court must be subject to the control of the court in order to ensure that it is administered fairly. He said that the management committee was not complying with the terms of the scheme, even though it had been given every opportunity to do so, and furthermore no explanation was given for such failure.

Section 167(2) of the Companies Act [Chapter 190] provides that a scheme of arrangement shall only become binding on all the creditors or class of creditors if it is sanctioned by the court. The function of the court in this regard and the manner in which it should exercise its discretion were considered by TROLLIP J in *du Preez v Garber: In re Die Boerebank Bpk* 1963 (1) SA 806 (W). At 814C-D he said:

1985 (1) ZLR p384

SMITH J

The first duty of the court when asked to sanction a compromise or arrangement under s 103, which *prima facie* appears to have been agreed to by the requisite majorities of creditors or members, is to satisfy itself that the terms of its order for convening the meetings, and the statutory requirements of the Act, have been complied with, because upon that depends the jurisdiction of the court to confirm it and so bind all the creditors and members concerned.

And then at 823C he went on to say -

How then should the court exercise its discretion in this case? The test usually adopted is that of MAUGHAN J, in *re Dorman Long, supra*, at p 659, namely,

whether the proposal is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve

but in regard to that and other tests which have been propounded in the decided cases, I am inclined to agree with what BROOME J, said in *Mahomed v Kazi's Agencies (Pty) Ltd & Ors* 1949 (1) SA 1162 (N) at p 1172, namely, that they are

no more than considerations which courts have found proper to be taken into account in particular cases, rather than as laying down the correct method of approach in all cases;

in other words, they are guides to, but not fetters on, the court's discretion. Compare too *Ex parte Judicial Managers Goldfields Building Society* 1934 WLD 45 at p 47, where SOLOMON J, said that s 193(2) appeared to him

to give a complete discretion to the court in regard to sanction or otherwise.

What is clear is that the court's function is not merely to register the decision of the statutory majority of creditors on the arrangement (In *re English, Scottish and Australian Chartered Bank*, (1893) 3 Ch 385 at p 409); it has to be satisfied that the arrangement is one that on its merits it ought to be rendered binding on all the creditors

concerned; that is, on those who did and those who did not attend the meeting; and the *onus* is

1985 (1) ZLR p385

SMITH J

on the applicant who seeks confirmation to so satisfy the court (Gower on *Modern Company Law*, 2nd ed. at p 570; Ex parte *Coleman* 1933 WLD 177 at p 197).

In the case of the scheme of arrangement which the applicant is seeking to have set aside, this court, when it sanctioned the scheme, must have been satisfied as to the reasonableness of the Scheme. As Mr *de Bourbon* pointed out, there is no provision in the Companies Act [Chapter 190] for the court to set aside a scheme which it has sanctioned. In Serein's case, *supra*, DIEMONT J declined to express a view on whether or not the court could set aside a scheme which had been sanctioned on the grounds that the method of distribution was in conflict with the terms of the compromise. In *Administrateur- General vir Suidwes-Afrika v Hotel Onduri (Edms) Bpk en Andere* 1983 (4) SA 794 (SWA), the court clearly contemplated that an offer of compromise sanctioned by the court, containing a suspensive condition, could be set aside if the suspensive condition was not fulfilled. In *Cohen NO v Nel & Anor* 1975 (3) SA 963 (W), FRANKLIN J considered the effect of a compromise which had been sanctioned by the court. At 969E-G he said:

I have come to the conclusion that, having regard to the approach of our courts to a sanctioned compromise, i.e. that it is a contract binding on all concerned, it is not only permissible but essential to have regard to all its terms of on this point, see *Penkin and Another v Roeland Shoes (Pty) Ltd and Others* 1972 (1) SA 513 (C) at pp 518E-F and 520D). Whilst I agree with Mr King that normally the binding effect of a compromise, if sanctioned, cannot be questioned, his argument overlooks the fact that para 5.2 of the offer before me specifically states that:

If the arrangement ... is not sanctioned or **if accepted and sanctioned** and any of the conditions precedent hereto shall fail, lapses ...

The words emphasised clearly provide for the lapsing of the offer on the failure of any of the conditions precedent (in this instance that contained in para 4.4) even if the offer is sanctioned by the court. That was one of the terms of the binding contract agreed to by all parties, and in my judgment it leaves it open to any of the parties to allege and prove that, despite the fact that the offer was sanctioned by the court, one of the conditions precedent embodied in it was not fulfilled and consequently the offer lapsed.

At 970A he said:

1985 (1) ZLR p386

SMITH J

In doing so I have given full weight to all the submissions advanced by Mr King, including the unfortunate consequences to the creditors flowing from the subsequent liquidation of the company. The overriding consideration, in my view, is that the court which is ultimately called upon to adjudicate upon the merits of the dispute should have before it all the relevant facts relating to the alleged failure of the conditions precedent embodied in para 4.4 of the offer.

In the present case there is no suspensive condition or condition precedent in the scheme which is alleged to have been fulfilled or not fulfilled, as the case may be. If there had been, then of course the aggrieved party would have been entitled to apply to the court to have the scheme set aside whether or not there are "unfortunate consequences to the creditors". In the

absence of any such circumstance, I consider that this court would be able to set aside the scheme of Arrangement but only if there had been a material breach of the terms thereof and there was no other remedy available to the aggrieved party to protect his right. Moreover, before setting aside the scheme, the court would have to be satisfied that the other creditors or persons affected were aware of the application to the court to set aside the scheme and had had an opportunity to make representations to the court.

The applicant has not alleged that he has no alternative remedy. Mr *Eastwood* has argued that the management committee has to take many decisions in administering the affairs of the defendant and that this court cannot effectively direct how the company should be run. I agree with that submission. However, I do not accept as a corollary that this court must therefore set aside the scheme of arrangement at this stage. If the plaintiff is dissatisfied with the manner in which the management committee is running the affairs of the company, then he should seek a declaratory order as to his rights or an order requiring the members of the management committee to comply with the terms of the scheme. Having regard to the long period over which the dispute between the parties has dragged on, it does not appear that there has been any degree of urgency attached to the matter.

Accordingly, the application is dismissed with costs.

Kantor & Immerman, legal practitioners for the applicant

Gill Godlonton & Gerrans, legal practitioners for the respondent

Endnotes

1 (Popup - Popup)

The judgment of the court *a quo* was reported in 1984 (2) ZLR at page 29 - *Editor*.