EBRAHIM v CONTROLLER OF CUSTOMS & EXCISE 1985 (2) ZLR 1 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and Gubbay JJA

Civil Appeal

4 June and 2 July 1985

Flynote

Customs and Excise Act [Chapter 177] s 178(2) - notice of intended proceedings against Controller of Customs and Excise - purpose of section - need for notice to specify cause of intended action.

Headnote

The Controller of Customs and Excise seized appellant's motor vehicle for an alleged contravention of the Customs and Excise Act [*Chapter 177*], and the appellant, after Enotifying the Controller that he intended to institute proceedings based "on a vindicatory action", issued summons for its return. The Controller, however, pleaded in abatement that the appellant had not given him proper notice of the cause of his action as required by s 178(2) of the Customs and Excise Act. On appeal:

Held that the purpose of s 178(2) of the Customs and Excise Act is to enable the Controller to investigate the circumstances of cases that are to be brought against him and decide whether he should settle the claims or resist them. While the approach to s 178(2) ought not to be technical, if its purpose is to be achieved the material facts upon which the validity of a seizure is challenged must be alleged. Merely to inform the Controller that the action will be a vindicatory one is totally inadequate.

Held, further, that in the instant case it was essential for the appellant to have set out the facts relating to his acquisition of the vehicle and those supportive of his contention that it had been imported lawfully into the country. Such information would have put the Controller on his guard and enabled him to conduct an investigation.

Cases cited:

Controller of Customs v Guiffre 1971 (1) RLR 91 (GD)

Osler v Johannesburg City Council 1948 (1) SA 1027 (W)

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Administrator, Transvaal v Husband 1959 (1) SA 392 (A)

A N Eastwood for the appellant

I A Donovan for the respondent

Judgment

Dumbutshena CJ: The respondent seized the appellant's motor vehicle, a BMW 728 Sedan, on 17 September 1982 in terms of a notice of seizure, number 28517C. The appellant issued a summons and declaration against the respondent. The claim was put thus:

Plaintiff claims:

(a) an order directing the Defendant to return the said vehicle to the Plaintiff, and

(b) costs.

After identifying the plaintiff and the defendant in paras 1 and 2, the declaration goes on to allege:

3. The plaintiff is the owner of a certain BMW 728 sedan engine number 712062, chassis number 5712068

4. The defendant is in possession of the said vehicle.

The prayer to the declaration repeats the claim in the summons.

Because there was confusion arising from the pleadings, it is well to set out in full the defendant's plea in abatement, which reads:

> Defendant pleads in abatement that Plaintiff has failed to comply with s 178 of the Customs and Excise Act, Chapter 177, in that:
>
> (i) No written notice containing the particulars specified in s 178(2) of Chapter 177 was delivered to Defendant prior to the issue of summons in this matter;
>
> (ii) Alternatively, and in the event that it is alleged that the letter dated 11 October, 1982 written by Defendant's legal practitioners constitutes such notice, which is denied, Plaintiff has failed to specify his cause of action in compliance with s 178(2) of Chapter 177.

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> WHEREFORE Defendant prays that Plaintiff's claims be dismissed and that judgment be granted in his favour together with costs of suit.

Section 178 of the Customs and Excise Act [*Chapter 177*], as amended, provides:

178 (1) No writ or summons shall be issued against nor a copy of any process served upon the Controller or

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any officer for anything done by him under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to him or left at his usual place of abode by the person who intends to issue such writ, summons or process or by a legal practitioner representing that person.

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

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

(4) . . .

[The learned Chief Justice then dealt with the difficulties caused by the pleadings in the court *a quo* and continued:]

In the light of that situation Mr *Donovan*, who appeared for the respondent, very fairly acknowledged that it would be appropriate for this court to set aside the order of the lower court and remit the case to it with leave to the respondent to amend the plea in abatement to allege that the seizure of the motor vehicle was effected under the Customs and Excise Act [*Chapter 177*] (for apparently that is in contention) and with leave to the appellant to file a replication; and that the costs incurred at the prior hearing be ordered to be costs in the cause. Mr *Eastwood*, while readily professing his agreement to the suggested order, indicated that he wished this court to decide whether the letter of 11 October 1982, in itself, constituted good notice. I turn my attention therefore to that issue.

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The letter in question reads as follows:

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

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

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

We point out that our client's vehicle was customs cleared in terms of Customs Clearance Certificate for Motor Vehicle number 29-955, serial number 00 252 dated the 18th March 1982.

It was Mr *Donovan's* contention that the appellant had failed to comply with the provisions of s 178 of the Act. It is clear that subs (2) of s 178 requires that the notice should "clearly and explicitly" contain the cause of action. In support of the contention that the appellant had failed so to comply, Mr *Donovan* relied strongly on the judgment of BECK J (as he then was) in *Controller of Customs v Guiffre* 1971 (1) RLR 91 (GD). That was a case in which the court had to determine whether the provisions of s 179 (now s 178) of the Customs and Excise Act, 1955,

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had been complied with and whether the Controller of Customs had received a written notice containing the information then required by s 179(2) (now s 178(2)) more than one month prior to the issue of summons. There was correspondence between the plaintiff and the Controller of Customs over a long period of time and a chronological sequence of events was disclosed. In that correspondence the plaintiff revealed that his two motor vehicles had been ordered by him before he immigrated to Rhodesia to take up residence. He was told that the motor vehicles were not eligible for rebate of duty. The Controller was informed that the motor vehicles had been ordered before the plaintiff came to Rhodesia but that subsequent to his arrival in the country he had changed his order. Under these circumstances the plaintiff thought that the Controller was not entitled to charge customs duty - a view not shared by the Controller. Following some more correspondence to which the plaintiff did

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not respond the motor vehicles were seized. The plaintiff's attorney wrote to the Controller that he had no right to seize the motor vehicles and should return them; a demand that was turned down. Thereafter on 2 September 1970 the plaintiff's attorney wrote to the Controller as follows:

> . . . I hereby give you notice on behalf of Mr Guiffre of his intention to institute proceedings against you one month after delivery hereof.
>
> The action will be for the delivery of two Chevrolet Monte Carlo Coupes, . . . and costs of suit.

The Controller replied on 16 September 1970 contending that the plaintiff's letter failed to comply with s 179(2) in that "the cause of action has not been clearly and explicitly stated therein". On 23 September 1970, by which date it was too late to attempt to give one month's notice under s 179(1) in view of the necessity created by s 179(4) of instituting action within three months of the date of seizure, the plaintiff's attorney replied:

> The cause of action is quite specific, and the action will simply be based on the fact that the motor vehicles are the property of my client and you are in possession thereof, and my client, therefore, requires delivery.

This letter was followed by service of summons on 7 October 1970.

BECK J accepted the submission advanced by the plaintiff's counsel that in determining whether the provisions of s 179(1) and (2) had been complied with, the court was not confined to the letter of 2 September 1970, but could have regard to all the earlier correspondence between the parties. At 94 C-D the learned judge said this:

> There is no indication that the plaintiff intended to abandon or to vary any contentions made in correspondence prior to the 2nd September, and it would be unrealistic not to have regard to the whole course of correspondence when considering whether the defendant, more than one month prior to the issue of summons, had received written notice containing the information required by s 179(2) of the Act.

After referring again to the correspondence, he continued (at p 94 G-I):

> It seems to me that the phrase 'the cause of the action' has been used in section 179(2) of the Act in its commonly accepted sense, which was

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> defined by LORD ESHER MR, in *Read v Brown* 22 QBD 131, as being 'every fact which it would be necessary for the plaintiff to prove if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.' Unless the phrase is so understood, the door would be opened to an erosion of the primary purpose of the section, which purpose I take to be the provision of timely opportunity to the Department of Customs and Excise to know, and, therefore, to investigate, the material facts upon which its actions are challenged, and to afford to the department the opportunity of protecting itself against the consequences of possible wrongful action by tendering early amends as envisaged by s 180 of the Act.

In the event it was held that having regard to all relevant correspondence the plaintiff had failed to set out the cause of his intended action clearly and explicitly.

I respectfully agree with what is said in the above quoted passages. In the instant case there is, of course, only the letter of 11 October 1982 to consider and it is my view that in determining whether it complies with s 178(2) there is no justification to go beyond the meaning given of the phrase "the cause of the action" in *Guiffre's* case.

The primary purpose of s 178(2) is spelt out clearly in *Osler v Johannesburg City Council* 1948 (1) SA 1027 (W), a case dealing with an action for the claim of damages from the Johannesburg City Council under s 172 of Ordinance 17 of 1939. Section 172(2) of that Ordinance required the giving of notice so as to give the defendant an opportunity of avoiding litigation by settling the case out of court. In his judgment CLAYDEN J (as he then was) said at 1031:

> The object of sec. 172(2) must, in my opinion, have been to afford opportunity to the local authority to consider whether it should meet a claim before it was involved in the costs of legal proceedings. The requirement of particulars of the cause of action indicates that the object was also to enable the local authority to investigate the question of its liability. Normally provisions which are designed to inform a person that there may be liability for some act or omission on its part require notice within a certain time of the occurrence complained of, but if regard is had to the requirement of sec. 172(1), that the action must be brought within six months, notice of intention to bring that action at least a month before

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> it is brought may have been regarded as being near enough in time to the occurrence to allow of investigation.

In *Administrator, Transvaal v Husband* 1959 (1) SA 392 (AD) MALAN JA, when considering a section similar to our s 178(2), said at 394A-D:

> In considering whether this letter is a compliance with sec. 99(a), it should be borne in mind that the primary object of the provision is to ensure that the Administration shall be apprised, within reasonable time, of an intention to hold it liable in damages sustained as a result of the default or negligence of any officer acting in the course of the execution of his duty in circumstances described in the sub-section. The Administration will thus be able to investigate the circumstances and be placed in a position to determine whether it should settle the claim or prepare its case to resist it.
>
> The approach to the interpretation of the sub-section ought, consequently, not to be technical and a notice should be held not to be a compliance with the sub-section only if it fails to set out a cause of action or if it is so wanting in particularity that it is deficient in essentials and, as a consequence, hampers the Administration in a proper

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> investigation of the complaint. While it may be desirable to have a more or less full statement of the facts relied upon, a bald statement of the essentials, in my opinion, suffices provided, however, that there has been substantial compliance with the requirements of the sub-section.

That approach has my complete approval.

If the purpose of s 178(2) is to be achieved the material facts upon which the validity of the seizure is challenged must be alleged. There is no other way in which the statutory requirement can be complied with. Merely to inform the Controller, as the appellant did in the letter of 11 October 1982, that the action will be a vindicatory one is totally inadequate. It was essential for him to set out the facts relating to his acquisition of the vehicle and those supportive of his contention that it had been imported lawfully into the country. Such information would have put the Controller on his guard and enabled him to conduct an investigation.

There remains the question of the costs of this appeal. Mr *Eastwood* submitted that even if the issue as to the propriety of the notice were decided against him the costs of the appeal should be costs in the cause of the action.

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Mr *Donovan* on the other hand submitted that the costs should be made to follow the result. I agree with Mr *Donovan*. Once counsel were agreed that the case should be remitted to the trial court, thereby enabling the appellant in the replication he intends to file to refer to all the relevant correspondence, it was unnecessary to seek a decision from this court as to whether the letter of 11 October 1982, *per se,* constituted proper notice. Having lost on the issue I see no reason to deprive the respondent of his costs of appeal. I may say also that the cause of the confusion before the lower court and the misapprehension under which Mr *Eastwood* laboured were not the fault of the respondent.

For the reasons set out above the court's order is as follows:

(1) The order of the court *a quo* dismissing the appellant's claim with costs and entering judgment for the respondent is set aside, and the case remitted to it.

(2) The respondent is granted leave to amend the plea in abatement and the appellant is afforded the opportunity to replicate thereto.

(3) Costs of the proceedings before the court *a quo* are to be costs in the cause of the action.

(4) The appellant is to pay the costs of the appeal.

Beck JA: I agree.

Gubbay JA: I agree.

Kantor & Immerman, legal practitioners for the appellant

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

S v ZVINOIRA 1985 (2) ZLR 9 (HC)

Court **High Court, Harare**

Sandura JP and Samatta J

Criminal Appeal

17 June and 3 July 1985

Flynote

Statutes - Customs and Excise Act [Chapter 177] - s 157(1)(f) - and s 71(4) of the Customs and Excise (General) Regulations, 1980 - unlawful lending of goods entered under immigrant's rebate - nature of sentences for contravention of s 157(1)(f) of the Customs and Excise Act [Chapter 177] - "indefinite lending"- nature of act - immigrant's rebate - purpose of.

Headnote

It is clear from the penalty provisions of the Customs and Excise Act [*Chapter 177*] that anyone who commits an offence in terms of the Act, renders himself liable to very harsh and severe penalties. That was the clear intention of the Legislature. It does not follow that, because prosecutions for contravening s 157(1)(f) of the Customs and Excise Act [*Chapter 177*] are rare, deterrent sentences should not be imposed. "Indefinite lending" of goods imported is almost as serious as complete disposal or sale of the property in question without the prior permission of the Controller and the payment of duty. The immigrant's rebate exists for the benefit of immigrants in respect of goods imported for the immigrant's personal use.

Cases cited:

S v De Wet 1979 RLR 147 (AD)

S v Mahomed 1978 (1) SA 219 (R)

I A Donovan for the appellant

E Chatikobo for the respondent

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Judgment

Sandura J: The appellant, a man aged 52 years, was charged with:

Contravening s 157(1)(f) of the Customs and Excise Act, Chapter 177, as amended by Act 30 of 1976, as read

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with s 71(4) of the Customs and Excise (General) Regulations 310 of 1980 in that during the period from 1st August, 1983 to 11th June, 1984 and at Harare in the said division, the accused did wrongfully and unlawfully deal with or assist in dealing with any goods, that is to say, a Mercedes Benz vehicle registration number 411-668P, two videos and two television sets, contrary to the provisions of the Act, or any law relating to customs and excise.

He pleaded guilty and was found guilty by the Chief Magistrate. He was sentenced to a fine of $1 000 or, in default of payment, 4 months' imprisonment with labour. In addition, the learned magistrate ordered the forfeiture of the Mercedes Benz motor vehicle, one colour television set and one video recorder. He also granted summary judgment in favour of the Controller of Customs and Excise for duty in the amounts of $15 377,01 in respect of the Mercedes Benz motor vehicle and $378,66 in respect of one colour television set and one video recorder. Summary judgment for the sum of $958,66 was also granted in favour of the Controller for the duty-paid value of one colour television set and one video recorder which could not be forfeited. The appellant now appeals against the sentence imposed upon him on the ground that the punishment imposed is manifestly excessive. The State opposes the appeal.

The facts of this case are these. The appellant is the Deputy Secretary in the Ministry of Information, Posts and Telecommunications and Zimbabwe's former High Commissioner to the United Kingdom. Upon his return to Zimbabwe in 1983 he imported certain property which included a Mercedes Benz motor vehicle, two colour television sets and two video recorders. The appellant signed a declaration in which he undertook not to sell, offer or display for sale, lend, pledge or dispose of these goods to any other person within a period of 12 months from the date of their entry into Zimbabwe without the prior permission of the Controller of Customs and Excise and the payment of whatever duty was payable. All the property was imported into Zimbabwe under the immigrants' rebate granted by s 71 of the Customs and Excise (General) Regulations, 1980, and no duty was paid by the appellant.

In August or September 1983 the appellant lent the Mercedes Benz motor vehicle, one colour television set and one video recorder to a wealthy businessman called Paweni. He also lent one colour television and one video

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recorder to another man called Lynch. In June 1984, ie about ten months later, officials from the Department of Customs and Excise seized the Mercedes Benz motor vehicle at Braeside Service Station, one of Mr Paweni's many businesses. They also recovered one colour television set and one video recorder from Mr Paweni's home. The other colour television set and video recorder which had been lent to Mr Lynch could not be recovered because the whereabouts of Mr Lynch were not known. The value of the Mercedes Benz motor vehicle at the time of its importation into Zimbabwe, ie its value in the country from which it was imported, was $16 446. However, its inflated and unrealistic value in this country is estimated as being between $50 000 and $65 000. The value of each colour television set at the time of importation was $250 and the value of each video recorder was $333. These amounts represent the value of these items in the country or countries from which they were imported. On the basis of these facts the appellant pleaded guilty to the charge and was found guilty and sentenced as indicated earlier in this judgment.

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Mr *Donovan*, who appeared for the appellant, submitted that the punishment imposed upon the appellant is manifestly excessive and should be reduced by setting aside the forfeiture orders and the order of summary judgment for the duty-paid value of the colour television set and video recorder which were not the subject of a forfeiture order. He had no quarrel with the sentence of a fine of $1 000 or the summary judgment granted in favour of the Controller in the amounts of $15 377,01 and $378,66 in respect of the duty for the Mercedes Benz motor vehicle and the colour television and video recorder which were the subject of a forfeiture order. The essence of his argument was that the Mercedes Benz motor vehicle should not have been forfeited.

In order to determine whether or not the punishment imposed upon the appellant is manifestly excessive, it is necessary to examine the offence committed by the appellant and the penalties laid down by the Legislature for that offence. Section 157(1)(f) of the Customs and Excise Act [*Chapter 177*] reads as follows:

> 157. (1) Any person who -
>
> ...
>
> (f) deals with or assists in dealing with any goods contrary to the provisions of this Act or any law relating to customs and excise;
>
> shall be guilty of an offence . . .

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Section 71(4) of the Customs and Excise (General) Regulations, 1980, which were made in terms of the Customs and Excise Act [*Chapter 177*], provides as follows:

> 71. . . .
>
> (4) No immigrant in respect of whom a rebate of duty has been granted in terms of this section shall sell, offer or display for sale, lease, hire, lend, pledge or in any manner whatsoever, whether gratuitiously 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 been payable but for the granting of such rebate.

The penalties for not complying with this provision are found in s 188(2) of the Customs and Excise Act [*Chapter 177*], which reads as follows:

> 188. (1) . . .
>
> (2) Any person who is guilty of an offence in terms of this Act for which no special penalty is provided shall be liable in respect of each offence -
>
> (a) in the case of an offence involving goods, to a fine not exceeding treble the duty-paid value of the goods or five thousand dollars, whichever is the greater;
>
> (b) in the case of an offence involving Zimbabwean or foreign currency, to a fine not exceeding treble the value of the currency or five thousand dollars, whichever is the greater;
>
> (c) in the case of an offence not involving goods or Zimbabwean or foreign currency, to a fine not exceeding five thousand dollars;

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(d) to imprisonment for a period for a period not exceeding five years;

(e) to both a fine provided in paragraph (a), (b) or (c) and imprisonment provided in paragraph (d).

In addition to these penalties, s 190(1) of the Customs and Excise Act [*Chapter 177*] provides more penalties. The section reads as follows:

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190. (1) Without derogating from the provisions of section *one hundred and seventy-six*, a court may, in addition to passing sentence -

(a) in the case of a conviction for an offence under this Act, give summary judgment in favour of the Controller for the amount of any duty which should have been paid by the person convicted and has not been paid;

(b) in the case of a conviction for an offence under this Act or any other law involving, in terms of subsection (2), any articles -

(i) subject to the provisions of subsection (3), declare any such articles to be forfeited to the State; or

(ii) if -

A. any articles referred to in subparagraph (i) cannot, by virtue of the provisions of subsection (3), be forfeited; or

B. the court is satisfied that it would not be equitable to order the forfeiture of the articles; or

C. the articles cannot be found or recovered;

give summary judgment in favour of the Controller for an amount equal to the duty-paid value of the articles.

It is clear from these penalty provisions that anyone who commits an offence in terms of the Act, such as the one committed by the appellant, renders himself liable to very harsh and severe penalties. That was the clear intention of the Legislature, which empowered the court to impose a fine not exceeding treble the duty-paid value of the goods or imprisonment for a period not exceeding five years or both such fine and imprisonment. In addition to that, the court can order forfeiture of the goods in question or grant summary judgment in favour of the Controller for the duty-paid value of the goods if the goods cannot be forfeited to the State. The court can also grant summary judgment in favour of the Controller for any duty which was not paid.

In the present case the duty-paid value of the goods in question, ie the Mercedes Benz motor vehicle, two colour television sets and two video recorders, is in the region of $33 740. Treble the value would be about

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$101 220. As already mentioned, the learned Chief Magistrate sentenced the appellant to a fine of $1 000 or, in default of payment, four months' imprisonment with labour. He also ordered

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the forfeiture of the motor vehicle, one colour television set and one video recorder, and granted summary judgment in favour of the Controller for the unpaid duty in respect of the motor vehicle, television set and video recorder. In respect of the television set and video recorder which could not be forfeited to the State, he granted summary judgment for the duty-paid value of those items in favour of the Controller.

Mr *Donovan*, who appeared for the appellant both at the trial and on appeal, submitted that in sentencing the appellant and making the orders already referred to, the Chief Magistrate proceeded on the basis that the appellant had acted dishonestly. He submitted that as the agreed facts do not state or raise the inference that the appellant acted dishonestly the learned Chief Magistrate misdirected himself in this regard. In making these submissions Mr *Donovan* relied upon what the learned Chief Magistrate said to the appellant before passing sentence and his comments on the appellant's notice of appeal. Before passing sentence the learned Chief Magistrate, *inter alia*, said:

> I accept that this is not similar to smuggling but your dealing in the property, as you did, was dishonest in that you were aware of the conditions of the declaration . . . You should have realized that once you started dealing in a dishonest manner with the property, you were attracting the risk of the consequences similar to whatever penalties would be imposed on other offenders in terms of this Act.

When he was called upon to comment on the appellant's notice of appeal, the Chief Magistrate, *inter alia*, said:

> I considered forfeiture to be appropriate. Once the appellant acted dishonestly with the property he took the risk of the usual consequences called for by the Act as a penalty.

Mr *Donovan* submitted that as the offence committed by the appellant is not an offence of which dishonesty is an element, the Chief Magistrate misdirected himself when he sentenced the appellant on the basis that he acted dishonestly. Mr *Chatikobo*, who appeared for the respondent, submitted that by describing the appellant's conduct in lending the goods to other persons as dishonest the Chief Magistrate meant that the appellant had deliberately

broken the undertaking which he made when he imported the goods into Zimbabwe. He submitted that the magistrate did not mean that the offence committed by the appellant was an offence of which dishonesty was an element as defined in *S v De Wet* 1979 RLR 147 (AD). I agree with Mr *Chatikobo* in this regard and hold that the learned Chief Magistrate did not misdirect himself when he sentenced the appellant. However, that is not the end of the matter.

Mr *Donovan* submitted that the total punishment imposed upon the appellant is manifestly excessive and should be reduced by setting aside the forfeiture order and the order of summary judgment for the duty-paid value of the colour television set and video recorder which were not forfeited to the State. If I were to reduce the penalties as suggested, this would leave a fine of $1 000 and summary judgment in favour of the Controller for the sum of $15 377,01, being the unpaid duty on the motor vehicle and for the sum of $378,66 which represents the unpaid duty in respect of one colour television set and one video recorder.

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Neither counsel could refer me to any previous case involving the commission of the offence which the appellant in the present case committed. In this connection Mr *Donovan* submitted that prosecutions for contravening s 157(1)(f) of the Customs and Excise Act were extremely rare and that in the circumstances there is no justification for imposing a deterrent sentence. It may be true that prosecutions for the contravention of this section are rare. This may be due to the fact that the enforcement of this section of the Act is a very costly exercise because it involves regular visits to the home of the immigrants who have been granted the rebate by officials of the Department of Customs and Excise. Because of that it is likely that the visits or checks are rarely carried out by the officials of the Department. It does not follow, therefore, that because prosecutions for contravening the section are rare, deterrent sentences should not be imposed.

The cases cited by counsel are cases which involved the contravention of s 165 of the Act, ie smuggling. However, some of the authorities are of some assistance in determining the issues before me. One such case is *S v Mahomed* 1978 (1) SA 219 (R). In that case PITTMAN J had this to say about fines and forfeiture orders at page 222C-F:

> In normal non-commercial cases, however, it has now become the rule rather than the exception to order forfeiture . . . and it usually happens that the monetary loss caused to the accused by the order is sufficiently

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> high to warrant the imposition of only a comparatively small concomitant fine. It follows that it is logical to decide whether to make a forfeiture order or the alternative of summary judgment for the duty-paid value, before assessing the fine.
>
> The decision on a forfeiture order requires first an inquiry whether a forfeiture order would be equitable. Relevant matters would include -
>
> (1) the real value of the goods to the accused . . .
>
> (2) the purpose for which they were being imported . . .
>
> (3) the importance to the accused of being allowed to retain them . . .
>
> (4) whether it would be difficult for him to replace them;
>
> (5) whether it will benefit or harm the community if he is allowed to retain them . . .; and
>
> (6) whether the accused will be able to pay an adequate monetary penalty for his offence, if imprisonment is not regarded as a suitable punishment.

Because of the view which I take of the issues in this case it is unnecessary to comment on each of the matters laid down by PITTMAN J However, with regard to the real value of the goods to the appellant the statement of agreed facts shows that this is quite considerable because of the inflated and unrealistic prices of imported motor vehicles in this country. The value of the Mercedes Benz motor vehicle is estimated as being between $50 000 and $65 000. Its value in the country from which it was imported was given as $16 446, though it is highly unlikely that the appellant as a diplomat would have paid as much as that for it. The colour television sets and video recorders are worth much more in this country than their value in the

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country from which they were imported. Again the values of these items in this country are highly inflated and unrealistic because of the scarcity of foreign currency.

With regard to the purpose for which the appellant imported the goods in question, it is difficult to accept that these goods were imported for the appellant's own personal use. I say so because shortly after the goods were imported into this country they were lent to other people. As stated earlier in this judgment, the appellant lent the Mercedes Benz motor vehicle, a

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colour television set and a video recorder to a wealthy businessman called Paweni. He lent another colour television set and video recorder to a man called Lynch. It was common knowledge that Paweni was a wealthy businessman at the time. The court takes judicial notice of that fact. There is no indication in the statement of agreed facts as to how long the lending of these items was going to last. However, what we do know from the agreed facts is that when the property was recovered from Mr Paweni it had been lent to him for about ten months. There appears to have been an indefinite lending of very valuable goods. One may wonder what type of motor vehicle the appellant was left with after lending his expensive Mercedes Benz motor vehicle to Mr Paweni for no charge for an indefinite period. Bearing in mind the fact that at the time the appellant lent his property to Mr Paweni, Mr Paweni was a wealthy businessman who could have easily paid $50 000 or more for the appellant's Mercedes Benz motor vehicle, the circumstances of this "lending" would compel one to draw the conclusion that the property in question was in fact sold to Mr Paweni. However, in view of the fact that the State accepted that the property was lent to Mr Paweni and Mr Lynch, the appellant's moral blameworthiness must be assessed on that basis. I must hasten to add, however, that my view of the matter is that this "indefinite lending" is almost as serious as complete disposal or sale of the property in question without the prior permission of the Controller and the payment of duty. The immigrant's rebate exists for the benefit of immigrants in respect of goods imported for the immigrant's personal use. As soon as the immigrant unlawfully disposes of or lends the goods in question to any other person the consequences are very serious as can be seen from the penalties laid down by the Legislature.

In the circumstances, bearing in mind everything that can be said on behalf of the appellant, I cannot say that the order of forfeiture of the appellant's goods and the summary judgment granted in favour of the Controller of Customs and Excise in respect of the duty-paid value of the television set and video recorder amounted to a wrong exercise of the magistrate's discretion. I do not consider that the punishment imposed upon the appellant is manifestly excessive. The appeal is, therefore, dismissed.

Samatta J: I agree.

Granger & Archer, legal practitioners for the appellant

Attorney-General, legal practitioner for the respondent

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ZENDERA v McDADE & ANOR 1985 (2) ZLR 18 (HC)

Court **High Court, Harare**

Sandura JP

Civil Application

20 June and 3 July 1985

Flynote

Practice and procedure - application for security for costs - both respondents peregrini - object of the rule - no reason in present case for existence of rule that property which is in dispute cannot be regarded as security for applicant's costs.

Headnote

The respondents, residents of South Africa, jointly owned a house in Harare. The house was valued at $23 000,00 and was occupied by the applicant. Applicant alleged that by virtue of an agreement between him and the respondents he was entitled to purchase and the respondents obliged to sell the house to him. The respondents instituted motion proceedings claiming cancellation of the agreement. Because the respondents were *peregrini* the applicant sought from the respondent's security for the costs which he would incur in contesting the motion proceedings. The immovable property was mortgaged to a building society for $12 500,00 and the respondents held an equity of at least $10 000,00 in the property.

Held, dismissing the application, that the object of the rule requiring a *peregrinus* to give security for the defendant's costs is to make sure that the *incola* will not suffer any loss if he is awarded the costs of the proceedings.

Held, further, that whether or not the applicant in the present case successfully opposed the motion proceedings, he would be adequately secured as far as his costs in those proceedings were concerned.

Held, further, that in a case such as the present one there was no reason for the existence of the rule that the property which was in dispute could not be regarded as security for the applicant's costs. The rule was never

SANDURA JP

meant to apply to a case such as the present one where the applicant was adequately protected by the property in dispute.

Cases cited:

Witham v Venables (1828) 1 Menz 291

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Lumsden v The Kaffrarian Bank (1884-5) 3 SC 366

Joseph v Moosa 1919 SR 20

Ginsberg v Estate Kulf 1924 SWA 1

M E Lofty for the applicant

J B Colegrave for the respondents

Judgment

Sandura JP: In this matter the applicant seeks the following order:

> That the respondents pay to the applicant's legal practitioners, Messrs. Kantor & Immerman, the sum of $1 500 cash as security for costs in Case Number HC 1551/85 and that pending such payment, Notice of Motion Proceedings in Case No HC 1551/85 be and are hereby stayed.

That respondents pay costs of this application.

The facts of this case are these. The respondents, who reside in the Republic of South Africa, jointly own a house in the suburb of Marlborough in the city of Harare. The house, valued at about $23 000, is presently occupied by the applicant, who alleges that by virtue of an agreement between him and the respondents he is entitled to purchase and the respondents are obliged to sell the house to him. On the other hand, the respondents have instituted proceedings by way of notice of motion in Case Number HC 1551/85 in which they claim cancellation of the said agreement and the eviction of the applicant from their house. Because the respondents are *peregrini* the applicant seeks from them security for the costs which he will incur in contesting the notice of motion proceedings. The respondents have refused to provide such security because they maintain that the applicant's costs are fully secured by virtue of the fact that the respondents own immovable property in Zimbabwe valued at about $23 000. Although his property is mortgaged to the Central Africa Building Society for approximately $12 500, the respondents hold an equity of at least $10 000 in that property. This equity is not encumbered in any way. The question which I must determine is whether in these circumstances the respondents are under an obligation to furnish security for the costs which the applicant will incur in opposing the notice of motion proceedings.

SANDURA JP

The issue relating to the furnishing of security for costs by a plaintiff who is a *peregrinus* is discussed by the learned authors of *The Civil Practice of the Superior Courts of South Africa* 3rd ed at p 251. There, the learned authors have this to say:

> A *peregrinus* who initiates proceedings in our courts must, as a general rule, give security to the defendant for his costs, unless he has within the area of jurisdiction of the court immovable property with a sufficient margin unburdened to satisfy any costs which may arise.

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The presence of immovable property is a defence to a claim for security, but the doctrine has not been extended to include movable property.

The court has, however, a discretion to dispense with security in exceptional cases, but should exercise its discretion sparingly.

The rule requiring a *peregrinus* to give security for the defendant's costs was laid down as far back as 1828 in *Witham v Venables* (1828) 1 Menz 291 and subsequently explained in *Lumsden v The Kaffrarian Bank* (1884-5) 3 SC 366. The object of the rule is to make sure that an *incola* will not suffer any loss if he is awarded the costs of the proceedings. The rule exists primarily to protect the interests of an *incola* who is sued by a *peregrinus.*

Mr Lofty, who appeared for the applicant, submitted that as the respondents are resident in South Africa they are *peregrini* and must furnish security for the applicant's costs in the notice of motion proceedings which the applicant is contesting. He further submitted that the fact that the respondents own immovable property valued at about $23 000 does not release them from the obligation to furnish security for the applicant's costs. He made this submission fully aware of the fact that the respondents' equity in the said immovable property is at least $10 000 and that this equity is not encumbered in any way. He based his submissions upon the rule that property in dispute cannot be regarded as security and referred me to two cases. The first of these was *Joseph v Moosa* 1919 SR 20. In that case Moosa, a *peregrinus,* sued Joseph in the High Court of Southern Rhodesia. Joseph counterclaimed and applied for security both for costs and for the amount of the counterclaim. Joseph had in his possession certain movable property which Moosa was claiming and the ownership of which was in dispute between the parties. Dealing with the respondent's argument that he was not obliged to furnish security, RUSSELL J had this to say at p 21:

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> The respondent takes up the position that, as there is a quantity of goods in the possession of the applicant, that secures the applicant, and that there is no necessity for this application, and that if anything else is required, the respondent is willing to give an undertaking in connection with these goods. It seems to me that if I decided that the possession of these goods secured the applicant, I should be deciding by anticipation not only the question as to whom the goods belong, but the question as to how the decision will go on the question of costs. It is true that in almost every case costs follow the result. I cannot say if it would be so in this particular case, as I do not know the facts of the case.

The learned judge then ordered the respondent to furnish the required security. It is quite clear that the facts of that case are very different from the facts of the present case. In *Joseph's* case the applicant, Joseph, was in possession of some movable property, the ownership of which Moosa, a *peregrinus*, was claiming. The court could not take such property as security for the applicant's costs because this would mean accepting that Moosa was the owner of the property before that issue was tried. If the court had accepted this property as sufficient security for the applicant's costs and it had been subsequently determined that the property belonged to the

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applicant, Joseph, and the court had awarded him costs, Joseph's costs would have been unsecured. In such a case the rule that the property in dispute cannot be regarded a security applies with full force and the reasons are obvious. However, the facts of the present case differ from those in Joseph's case. In the present case, the applicant is occupying the respondent's house. He admits that the house is owned jointly by the respondents and does not allege that he is the owner of this property. He alleges, however, that he is entitled to purchase the house from the respondents and that the respondents are obliged to sell it to him for the sum of $23 000.

If the applicant in this case successfully opposes the notice of motion proceedings instituted by the respondents in Case No HC 1551/85, he will be obliged to pay the purchase price of $23 000 to the respondents. In that event he would simply set off any costs awarded to him against the purchase price. On the other hand, if he did not succeed in opposing the notice of motion proceedings but was awarded costs, he would still be protected as far as costs are concerned because the respondents' immovable property could be attached and sold. In either event, the applicant is fully protected and secured in my view.

The second case relied upon by Mr *Lofty* is *Ginsberg v Estate Kulf* 1924

SANDURA JP

SWA 1. In that case the plaintiff, who was the executor of a peregrine estate, sued the defendant, an *incola,* on a mortgage bond. The mortgage bond was the only asset in the deceased's estate in the country. In his plea the defendant averred that the amount of the bond had been paid. Before that issue was determined the defendant brought an application in which he sought from the plaintiff security for his costs. It was argued on behalf of the plaintiff that the plaintiff was not obliged to furnish security for the defendant's costs because the mortgage bond was an asset in the country and was sufficient security for any costs. In dismissing this argument, GUTSCHE J had this to say at p 2:

> I would first dispose of the contention that it is unnecessary to furnish security because there is in this country an asset, viz., the bond which is sued upon. That contention seems to be untenable because it anticipates the result of the action and anticipates what the order will be as to costs. The defence is that the amount of the bond has been paid, and if that defence be upheld then there are no assets at all.

The learned judge then held that the mortgage bond did not render the furnishing of security unnecessary and ordered the plaintiff to furnish the required security for the defendant's costs. The main reason for that decision, it appears to me, was the possibility that the amount of the bond had been fully paid, in which case the deceased's estate would have had no assets at all in the country and the defendant's costs would not have been secured. It is quite clear that the facts in *Ginsberg's* case are different from the facts of the present case. In *Ginsberg's* case there was the possibility that the defendant had paid the amount of the mortgage bond in full, in which case the deceased's estate (the plaintiff) would have had no assets in the country. In the present case, however, there is no suggestion that the respondents have no assets in this country. Indeed, it is admitted by the applicant that the respondents jointly own immovable

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property in this country which is valued at about $23 000. Although this property is mortgaged to the Central Africa Building Society for about $12 500, the respondents hold an equity of at least $10 000 in the property. This equity is not encumbered in any way.

It is quite clear, therefore, that the facts of the two cases relied upon by Mr *Lofty* in his submissions are very different from the facts of the present case. Whilst it was logical in those two cases to hold that the property which was in dispute could not be regarded as security, it would be illogical, in my view, to come to the same conclusion in the present case. In my opinion, whether or not the applicant in the present case successfully opposes the notice of motion proceedings, he is adequately protected and secured as far as his costs

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in those proceedings are concerned. In a case such as the present one there is no reason for the existence of the rule that the property which is in dispute cannot be regarded as security for the defendant's costs. I cannot see any reason for the existence of such a rule in a case such as the one before me. Neither Mr *Lofty,* who appeared for the applicant, nor Mr *Colegrave,* who appeared for the respondents, could suggest any reason for the existence of such a rule or justify its existence in a case such as the present one. In the circumstances I am satisfied that the rule was never meant to apply to a case such as this one where the defendant is adequately protected by the property in dispute.

In the circumstances, the application is dismissed. The costs of this application are to be costs in the cause.

Kantor & Immerman, legal practitioners for the applicant

Honey & Blanckenberg, legal practitioners for the respondents

RB RANCHERS (PVT) LTD v ESTATE LATE McLEAN & ANOR 1985 (2) ZLR 24 (HC)

Editor's Note:(1)

Court **High Court, Harare**

Smith J

Civil Application

6 June and 4 July, 1985

Flynote

Contract - implied term of - that interest due on capital amount owing - circumstances when a court will imply a

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term in a contract.

Statutes - Bills of Exchange Act [Chapter 277] - ss 46(1)(a) and 56 - bill dishonoured by non-payment when duly presented for payment and payment refused and cannot be obtained - recovery of interest from party liable on the bill - withholding of interest if justice required that interest should be withheld - words to be given their plain meaning.

Headnote

The court should be very slow to imply a term in a contract. The circumstances when a court will do so were considered by CENTLIVRES CJ in *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A). Section 46(1)(a) of the Bills of Exchange Act [*Chapter 277*] provides that a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained. Section 56 of the Act provides for the measure of damages, which shall be liquidated damages, where a bill is dishonoured. In terms of para (a) thereof the holder may recover from any party liable on the bill the amount of the bill and interest thereon in accordance with any stipulation in the bill or from the time of presentment for payment if the bill is payable on demand, and the expenses of noting and of any protest. Paragraph (c) thereof provides, however, that interest recoverable in terms of the said para (a) may, if justice requires it, be withheld wholly

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or in part. A better approach in considering the withholding of interest if justice required that interest should be withheld would be to give the words used their plain meaning so as to include any method by which the bill was dishonoured, whether the failure to pay was excusable or inexcusable, and then to withhold interest only where justice so required. Section 56 of the Bills of Exchange Act [*Chapter 277*] deals only with the ordinary normal case where dishonour inevitably involves an inexcusable failure to pay at the proper time. If, however, s 56 should be given a wider meaning so as to apply to all cases where a cheque is dishonoured justice would require that interest be withheld in cases such as the present one, where the law prohibited the banker from meeting the cheque and thereafter the debt was paid in accordance with the provisions of the Administration of Estates Act [*Chapter 301*].

Cases cited:

Mullin (Pty) Ltd v Benade Ltd 1952 (1) SA 211 (A)

Biedermann v Allhausen & Co (1921) 37 TLR 662

NV Ledeboter & van der Held's Textielhandel v Hibbert [1947] KB 964

FC Blackie, SC for the applicant

R Y Phillips for the first respondent

Judgment

Smith J: The Late R R McLean (hereinafter referred to as "the deceased") was a cattle

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rancher. On 30 September 1982 he attended a public auction at which he purchased from the applicant cattle for a price of $47 900. He later assumed liability for the purchase of more cattle for a price of $5 800. The applicant sent an invoice, dated 26 October 1982, for an amount of $53 700 and posted it to the deceased in Gweru. On 1 November 1982 the deceased made out a cheque in favour of the applicant in the sum of $47 900 and posted it to the applicant in Harare. The deceased died on 9 November 1982. Later on that same day the applicant presented the cheque for payment but the bank refused to pay out on the cheque since it had been notified of the death of the deceased.

On 26 November 1982 the applicant lodged a claim against the first respondent in the sum of $53 700. There were substantial assets in the estate of the deceased, mainly in the form of cattle and farms. The executor had difficulties in raising sufficient funds to meet various claims against the estate, which meant that there was a considerable delay before the executor paid the claims of concurrent creditors. The administration and distribution account was only filed some time after September 1984, when the $53 700

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that was owed to the applicant was finally paid. In a letter dated 11 May 1984, the applicant for the first time claimed interest on the amount owed to it by the first respondent. The claim was for interest a *tempore morae* at the rate of 16% *per annum.* Initially interest was claimed with effect from 30 September 1982, being the date of the sale of the cattle, then from 1 November 1982, being the date of the cheque, then from 9 November 1982, being the date the cheque was presented for payment.

The executor of the estate of the deceased rejected the claim for interest, and framed an administration and distribution account which did not make any provision for the payment of interest as claimed by the applicant. The applicant lodged an objection but the second respondent refused to sustain it. When the objection was lodged the executor submitted to the second respondent *(2) a 13 page document setting out comments on the objection and why he considered that he was justified in refusing the claim for interest and asking that the objection be rejected. It is most unfortunate that before considering the objection the second respondent did not follow the normal procedure of sending the executor's comments to the objector and asking for the objector's comments. One of the reasons given by the second respondent for overruling the objection was that the late presentment of the cheque was the fault of the payee and it was only because the cheque was presented late that the honouring of the cheque had to be delayed by operation of law. I do not agree that there was any late presentment or fault on the part of the payee in this connection. It was rather the untimely demise of the deceased that led to the cheque not being honoured when presented. The applicant has accordingly approached this court for an order setting aside the second respondent's ruling on the matter and directing the executor to amend the said account so as to make provision for the payment of interest as claimed.

Mr *Blackie,* for the applicant, put forward three bases upon which the applicant was entitled to claim that interest should be paid on the amount that had been owed to it for some two years.

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These were -

(a) an implied term of the sale agreement that interest would become due;

(b) damages for breach of contract by reason of the failure to pay the purchase price;

(c) interest or damages arising from the dishonouring of the cheque.

SMITH J

IMPLIED TERM

The applicant has stated that sales of their cattle by public auction were conducted on a cash basis. However, in the sale under consideration, this condition was not enforced because the deceased was well known to the applicant and the applicant expected payment to be made immediately on presentation of its invoice. The applicant continued that had it known that payment was to be delayed for nearly two years it would not have waived its right to demand cash. It did not claim interest when it submitted its invoice "because it did not intend to give credit". Whatever the intention may have been, however, the applicant did in fact enter into a credit sale because the sale took place on 30 September 1982, and it was not disputed that the ownership of the cattle was transferred even though the deceased did not pay for them prior to his death.

The applicant, in submitting to the executor its claim for interest, stated that the deceased would have been aware that the applicant had previously run into liquidity problems and that the shareholders had injected money into the company. At the time, the applicant had a considerable overdraft at the bank and, although the deceased was probably not aware of the extent thereof, it was common knowledge among ranchers that the costs of breeding cattle were considerable and that most farmers and cattle breeders ran their businesses on borrowed money. The applicant had to raise a loan against a cession of its claim against the first respondent and this attracted interest at the rate of 16% *per annum.* As a direct result of the failure of the deceased to effect payment on due date, the applicant incurred interest charges of not less than $16 619,83. None of this has been disputed by the first respondent.

Did the parties, at the time they entered into the agreement of sale, intend that interest should be paid on the outstanding debt? Clearly they did not. The invoices sent by the applicant did not include any interest element and the deceased sent a cheque for $47 900, the exact amount of the price owing on the first sale, even though that amount had been owed for just over one month. The courts should be very slow to imply a term in a contract. The circumstances when a court will do so were considered by CENTLIVRES CJ in *Mullin (Pty) Ltd v Benade Ltd* 1952 (1) SA 211 (A). At 214H-215A he said:

> In *Barnabas Plein & Co v Sol Jacobson & Son, supra,* at p 31, STRATFORD, JA, quoted with approval the remarks of SCRUTTON LJ, in *Reigate v The Union Manufacturing Co,* 118 LT 483. Those remarks were as follows:

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> You must only imply a term if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that you can be confident that if at the time the contract was being negotiated someone had said to the parties 'what will happen in such a case?' they would have replied 'of course, so and so. We did not trouble to say that; it is too clear'.

In the present case, a term that interest would be paid could hardly be regarded as being necessary in the business sense to give efficacy to the contract. Accordingly I find that there was no such implied term.

BREACH OF CONTRACT

The argument that the applicant was in breach of contract was based on the premise that it was a condition of the contract that required payment to be made in "cash immediately". I do not consider that there was in fact such a condition. Although such sales were normally conducted on a cash basis, the applicant did in fact give the deceased credit. In its replying affidavit the applicant stated that had they known that payment was to be delayed for nearly two years they would not have waived their right to be paid immediately. Thus it is clear that that right had in fact been waived by the applicant. Accordingly, I find that the deceased was not in breach of contract and consequently the first respondent was not liable for damages arising from breach of contract.

DISHONOURING OF CHEQUE

Section 46(1)(a) of the Bills of Exchange Act [*Chapter 277*] provides that a bill is dishonoured by non-payment when it is duly presented for payment and payment is refused or cannot be obtained. Section 56 of that Act provides for the measure of damages, which shall be liquidated damages, where a bill is dishonoured. In terms of para (a) thereof the holder may recover from any party liable on the bill the amount of the bill and interest thereon in accordance with any stipulation in the bill or from the time of presentment for payment if the bill is payable on demand, and the expenses of noting and of any protest. Paragraph (c) thereof provides, however, that interest recoverable in terms of the said para (a) may, if justice requires it, be withheld wholly or in part.

The legal practitioners have not been able to refer me to any case where these provisions have been considered by our courts. The equivalent provisions in

the English Bills of Exchange Act 1882 were considered in *Biedermann v Allhausen & Co* [1921] 37 TLR 662 and *N V Ledeboter & van der Held's Textielhandel v Hibbert* [1947] KB 964. In those cases it was held that the right to claim interest on a dishonoured cheque related only to those cases where there was an inexcusable failure to pay the cheque or, alternatively, that where the failure was excusable, justice required that interest should be withheld in terms of the equivalent of para (c) of s 56. In the *Ledeboter* case at 967-8, MORRIS J said:

> In considering the claim for interest made in this action it is, in my judgment, necessary to bear in mind that it is a

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claim for damages for breach of contract. Section 57 of the Bills of Exchange Act, 1882, lays down what is the measure of damages to be applied in the normal case when a bill is dishonoured. In the present case, although the defendant did not perform his contractual obligation to meet the bill at maturity, he could not lawfully have done so. Apart from the position at common law, there was express statutory provision which prohibited him from paying the plaintiffs. In these circumstances, in my opinion, he is not liable in damages for having failed to pay. He was obliged not to pay. There seems to me to be something incongruous in asking the court to award damages against a man for failing to do what the law forbade him to do. This, in my view, disposes of the claim which is made. I do not consider that it is necessary to have recourse to sub-s 3 of s 57, of the Act, for, in my judgment, sub-s 1 deals only with the ordinary normal case where dishonour inevitably involves an inexcusable failure to pay at the proper time. The use in the section of the word 'damages' clearly connotes, and has regard to, a failure to pay which the courts would regard as without justification. If, however, contrary to my view, the wording of s 57, sub-s 1, ought to be read as conferring an automatic claim to damages in every case where a bill is dishonoured, then, in my judgment, it would be appropriate in the present case to invoke sub-s 3, and to withhold interest. Justice would, I think, require the withholding of an award of damages in a case where the omission to pay the amount on a bill was obligatory and where the payment would have been unlawful.

Mr *Blackie* has submitted that these cases are distinguishable on two grounds. Firstly, the applicant is not prohibited by the Administration of Estates Act [*Chapter 301*] from proceeding against the State and obtaining judgment against it, which would have included interest *a tempore morae,* since s 45 of that Act merely prohibits execution of that judgment. Secondly, in the cases cited, payment was both unlawful and forbidden, whereas in the

SMITH J

present case it was merely delayed. A better approach would be to give the words used their plain meaning so as to include any method by which the bill was dishonoured, whether the failure to pay was excusable or inexcusable, and then to withhold interest only where justice so required. If such an approach were adopted, justice did not require the withholding of interest in this case since there was no fault on the part of the applicant, the first respondent had benefited by having the use of the money for two years and the applicant had been severely prejudiced by the delay in payment.

Mr *Phillips* has argued that in terms of s 74 of the Bills of Exchange Act [*Chapter 277*] once a banker is notified of the death of a customer his duty and authority to pay any cheque drawn by that customer is determined. Since the Act prohibited the bank from making payment of the cheque drawn by the deceased when the applicant presented it, the cheque had not been dishonoured as contemplated by s 56 of the Bills of Exchange Act [*Chapter 277*] and the *Biedermann* and *Ledeboter* cases, *supra,* should be followed.

In my opinion, the views expressed by MORRIS J in *Ledeboter's* case which I have quoted earlier are applicable in this case. When the cheque was presented to the bank for payment, there was an express statutory provision which prohibited the banker from paying the applicant. The only person who could then pay the debt owing to the applicant was the executor and he could only pay it in accordance with the provisions of the Administration of Estates Act [*Chapter 301*]. Payment of the debt was duly made in accordance with the requirements of that Act. The failure to meet the cheque when it was presented was because the banker was complying with the requirements of the law. In my view, s 56 of the Bills of Exchange Act [*Chapter 277*] deals only with the ordinary normal case where dishonour inevitably involves an inexcusable failure to

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pay at the proper time. If, however, the said s 56 should be given the wider meaning, as contended by Mr *Blackie,* so as to apply to all cases where a cheque is dishonoured, justice would, I think, require that interest be withheld in cases such as the present one, where the law prohibited the banker from meeting the cheque and thereafter the debt was paid in accordance with the provisions of the Administration of Estates Act [*Chapter 301*].

The application is accordingly dismissed with costs.

Winterton Holmes & Hill, legal practitioners for the applicant

Scanlen & Holderness, legal practitioners for the first respondent

COMMERCIAL UNION FIRE, MARINE AND GENERAL INSURANCE CO LTD v FAWCETT SECURITY ORGANISATION BULAWAYO (PVT) LTD 1985 (2) ZLR 31 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Gubbay and Beck JJA

Civil Appeal

31 May and 5 July 1985

Flynote

Contract - interpretation - presumption that word bears ordinary meaning "contra proferentem" rule. Insurance - policy - exclusion clause - mutiny - meaning of - interpretation - presumption that word bears ordinary popular meaning - "contra proferentem" rule. Words and phrases - "mutiny". Legislation - para 1, First Schedule Defence Act [Chapter 94] - ss 55 & 58 Prisons Act [Chapter 22] - s 35 Police Act [Chapter 98].

Headnote

Where an insurance policy excluded from the agreed risks death or disability arising from mutiny, the issue was whether conflict between ZANLA and ZIPRA armed forces amounted to mutiny in terms of the policy.

Held, the word "mutiny" in the policy bore its ordinary grammatical meaning; it had not become established as a term of legal art; and its meaning should not be limited to the meaning it bears in Military Law.

Cases cited:

Debenhams (Ltd) v Excess Insurance Co (Ltd) (1912) 28 TLR 505

London and Lancashire Fire Insurance Co Ltd v Bolands Ltd [1924] AC 836

Lake v Simmons [1927] AC 487

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Lim Trading Co v Haydon [1968] 1 Lloyd's Rep 159

GUBBAY JA

Clift v Schwabe (1846) 3 CB 437

Nishina Trading Co Ltd v Chiyoda Fire & Marine Insurance Co Ltd [1969] 2 All ER 776 (CA)

Algemeene Bankvereeniging v Langton (1935) 40 Com Cas 247 (CA)

Equitable Trust Co of New York v Henderson (1930) 47 TLR 90

R v Grant, Davis, Riley and Topley [1957] 2 All ER 694

Elton v Brogden 93 ER 1171

Driscoll v Bovril 126 ER 923

Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd 1974 (1) SA 641 (A)

Cairns (Pty) Ltd v Playdon & Co Ltd 1948 (3) SA 99 (A)

Cole v Accident Assurance Co Ltd (1889) 5 TLR 736

Standard General Insurance Co Ltd v Croucamp 1959 (3) SA 162 (A)

Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd 1961 (1) SA 103 (A)

D M Campbell for the appellant

C W Jordaan for the respondent

Judgment

Gubbay JA: On the afternoon of Sunday, 9 November 1980, armed hostilities erupted at Entumbane, one of the western suburbs of Bulawayo. The protagonists were members of the former guerilla forces known as ZIPRA and ZANLA, who were separately encamped there pending their demobilization or integration in the Zimbabwe National Army. A battle of escalating dimensions ensued. It raged until the early evening of the following day, when a battalion of the National Army valiantly advanced into the immediate zone of conflict and by its physical presence succeeded in restoring peace without having to resort to the use of arms.

During that Monday morning, however, one of the persons upon whom tragedy befell was an innocent civilian, Patrick Lennon. While travelling in a motor vehicle along the Khami Road in the direction of Entumbane, he was stopped at a road-block by a number of ZIPRA combatants armed with AK and SKS rifles. He was ordered out of the vehicle and without provocation fatally shot in the head. Thereupon the murderers removed from his person an A-type 9 mm pistol.

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That weapon was the property of the respondent and it has not been recovered.

Lennon was employed by the respondent as one of its security officers. As a result of his death and the theft of the pistol the respondent instituted an action in the High Court against its insurer, the appellant, under an accident

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and sickness policy and an all risks policy, claiming to be indemnified in the sum of $5 490. In terms of the first policy the appellant had undertaken to pay an amount of $5 000 in respect of death or permanent disability suffered by a security officer in the employ of the respondent; and, under the second, to pay an amount of $490 in respect of the loss of the aforementioned pistol. The appellant denied liability on the sole ground that the death of Lennon and the loss of the pistol had arisen from or were traceable to a mutiny, a risk specifically excluded in each policy.

The contention did not find favour in the court a quo. *(3) In rejecting it, MANYARARA J relied principally upon a passage in Halsbury's *Laws of England* 4 ed vol 41 para 412 at p 392 where, with reference to the special definition of "mutiny" in s 31(3) of the Army Act 1955 (c. 18), s 31(3) of the Air Force Act 1955 (c. 19) and s 8 of the Naval Discipline Act 1957 (c. 53), it is written:

> The essence of mutiny is the existence of a combination; it is a collective offence. Hence, to constitute mutiny, there must be at least two persons subject to service law joining in the combination, although they need not be subject to the same code of service law [service in one of Her Majesty's Forces]. However, if one person subject to service law combines with others not so subject, he will not be guilty of mutiny, whatever may be the object of the combination. Not every act of disobedience committed jointly by two or more persons subject to service law amounts to mutiny; in order that it may do so, the conduct of the accused must have displayed an intention to be, not merely disobedient, and collectively so, but insubordinate, ie to defy or subvert service authority. Hence, mutiny is sometimes spoken of as collective insubordination (as distinct from merely collective disobedience).

In consequence the learned judge reasoned that as neither the ZIPRA nor the ZANLA guerillas were subject to Zimbabwean service law, in that they were not part of the recognised Armed Forces of the nation, "the Entumbane unrest was not a mutiny in any known sense of the word". In effect, he applied to the word mutiny the statutory criminal law definition contained in para 1 of the First Schedule to the Defence Act [*Chapter 94*], as read with para 8 thereof which makes such conduct an offence, namely:

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. . . an agreement between persons two at least of whom are members [ie officers, non-commissioned officers or soldiers of the Defence Forces] -

(a) to overthrow or to resist lawful authority in -

(i) the Defence Forces; or

(ii) any other Military Forces; or

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(iii) any part of any of the Forces referred to in subparagraph (i) or (ii);

or

(b) to disobey any lawful authority referred to in paragraph (a) in such circumstances as to make disobedience subversive of discipline;

In support of the appeal against the judgment of the trial court-a précis of which is reported in 1984 (4) SA 937 (ZH) *(4) - Mr *Campbell* argued that there was no warrant to ascribe to the word mutiny, in the context in which it is used in the policies, the restrictive and technical meaning contained in the Defence Act. Mr *Jordaan,* for the respondent, submitted the contrary.

The presumption that a word in a policy of insurance should be construed in its plain, ordinary and popular sense, is rebutted if it be shown that the word is established as a term of legal art in the criminal law, in which event, the criminal definition of the word governs its interpretation. The correctness of this principle of construction is beyond debate and is strikingly illustrated by the two cases cited by Mr *Jordaan,* to which I shall refer in some detail.

In *Debenhams (Ltd)* v *Excess Insurance Co (Ltd)* (1912) 28 TLR 505, an action was instituted on a fidelity policy issued to the plaintiff by the defendant, whereby the latter agreed "to reimburse to the employer (the plaintiff) to the extent of the sum stated against the name of the respective employed set forth in the schedule contained herein, such pecuniary loss, if any, as the employer shall sustain by any act of larceny or embezzlement on the part of any one or more of the said employed in connection with the respective duties stated in the schedule hereto". The plaintiff alleged that one of its employees had received in the course of his employment various sums of money for or on account of the plaintiff and had fraudulently converted the sums to his own use. By reason thereof it claimed that it had sustained pecuniary loss by larceny or embezzlement on the part of the employee. The defendant denied the contention. It submitted that the question was really one

of account between the employee and the plaintiff. HAMILTON J (afterwards LORD SUMNER), in the course of his summing-up to the jury, said that the term "embezzlement" in the policy meant the same thing as it meant in an indictment, and that there was no reason to give it any less strict meaning in the policy by which the plaintiff was insured than if a direct charge was being made.

In the second case, *London and Lancashire Fire Insurance Co Ltd v Bolands, Ltd* [1924] AC 836, the respondent was insured against loss by burglary, housebreaking and theft of cash in the cashier's office in its bakery in Dublin, subject to the proviso that "this insurance does not cover loss directly or indirectly caused by or happening through or in consequence of . . . riots". During the currency of the policy, four armed men entered the respondent's premises on a summer evening while it was still daylight, held up the employees with revolvers, and took possession of all the money they could find in the cashier's office. There was no disturbance in the neighbourhood at the time. In answer to the respondent's claim to recover the loss the appellant insurance company relied on the proviso in the policy. The House of Lords

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unanimously held that the appellant was not liable because the theft was conducted in a manner which constituted a riot in law. LORD SUMNER said at 847:

> It is true that the uninstructed layman probably does not think, in connection with the word 'riot', of such a scene as is described in the case stated. How he would describe it I know not, but he probably thinks of something, if not more picturesque at any rate more noisy. There is, however, no warrant here for saying that, when the proviso uses a word which is emphatically a term of legal art, it is to be confined, in the interpretation of the policy, to circumstances which are only within popular notions on the subject, but are not within the technical meaning of the word.

(See also the speech of *Viscount Finlay, supra,* at 844; *Lake v Simmons* [1927] AC 487 at 509; *Lim Trading Company v Haydon* [1968] 1 Lloyd's Rep 159 at 161 - a decision of the Singapore High Court).

There are, however, three qualifications to this principle. In the first place, as stressed by LORD SUMNER, it is only where a word is "emphatically a term of legal art", that is, one which has acquired a recognised technical meaning in law, that the wider or narrower popular meaning attaching to it is displaced. Thus, for example, in *Clift v Schwabe* (1846) 3 CB 437, the word "suicide"

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was given its popular sense including suicide while insane and not the limited meaning of the technical phrase *felo de se,* which refers only to sane suicide, a common law crime in England at that time. ROLFE B at 462 remarked:

> The word 'suicide' is not, as it appears to me, a word of art, to which any legal meaning is to be affixed different from that which it is popularly understood to bear.

And in *Nishina Trading Co Ltd v Chiyoda Fire & Marine Insurance Co Ltd* [1969] 2 All ER 776 (CA), LORD DENNING MR, in considering the word "theft" in a marine insurance policy subscribed to before the passing of the Theft Act 1968, said at 779D:

> The word 'theft' is not used here in the strict sense of the criminal law. It does not bring in all the eccentricities of the law of larceny. It means only what an ordinary commercial man would consider to be theft.

Secondly, the word or phrase must be a term of legal art according to the law of the particular country where the parties contemplated the loss covered by the policy might occur. This was emphasised by MAUGHAM LJ in *Algemeene Bankvereeniging v Langton* (1935) 40 Com Cas 247 (CA) at 259.

Thirdly, the word or phrase may have been used in the policy to describe an existing state of fact and not as a term of art. So in *Equitable Trust Co of New York v Henderson* (1930) 47 TLR 90, it was held by ROWLETT J that even if the word "forged" in the policy under consideration was a term of art under the criminal law of New York where the loss happened, it had been used by the parties not in its technical sense but merely to describe an existing state of fact.

In this jurisdiction mutiny first came to be defined with the passing of the Federal Defence Act,

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No. 23 of 1955. That Act repealed the Defence Act, No. 22 of 1953, enacted for the Colony of Southern Rhodesia. The Third Schedule to that latter Act specified that s 7 of the Army Act 1881 (Great Britain and Ireland) applied to the Defence Forces of the then Colony. Section 7 provided that every person subject to military law who caused or conspired with any other person to cause any mutiny in any of His Majesty's military naval or air forces committed an offence; mutiny was undefined. It is apparent from this history that the word mutiny has been defined as a statutory offence for three decades and then only in a specialized Act applicable to a limited class of persons.

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Moreover there is other legislation in this country under which mutiny, though made an offence, is not defined. Sections 58 and 89 of the Prisons Act [*Chapter 22*], as read with para 1 of Part I to the Second Schedule, prescribe the offence of mutiny in respect of both prison officers and prisoners. Likewise, s 35 of the Police Act [*Chapter 98*], as read with paras 1 and 2 of the Schedule thereto, envisages that regular force members can commit mutiny. Clearly, in so far as the personnel falling within the ambit of these two Acts are concerned, Parliament intended the word mutiny to be construed according to its plain, ordinary and grammatical meaning. (See *R v Grant, Davis, Riley and Topley* [1957] 2 All ER 694 where the meaning of mutiny in s 7 of the Army Act 1881 was considered).

It seems to me therefore that the fact that the offence of mutiny is undefined in two statutes and extends to persons other than members of the Defence Forces, is a persuasive pointer that the word, in this country at any rate, is not "emphatically a term of legal art".

Mr *Campbell* advanced the further cogent submission that mutiny has never been a common law crime. The word was in use in the English language long before it struck legislators as affording an appropriate label for the particular type of conduct it was desired to penalise. Consequently its criminal nature is not recognised and appreciated by the ordinary man of commerce as readily as most other statutory offences. And its restricted ambit has increased its obscurity.

What then is the ordinary grammatical meaning of the word? In Shakespeare's Julius Caesar, Act III Scene II, Mark Antony in inciting the crowd at Brutus' betrayal of Caesar, speaks of mutiny in the sense of a civil revolt against authority. This accords with the meaning in the Oxford English Dictionary, namely:

1. open revolt against constituted authority; now chiefly spec. revolt on the part of a disciplined body (esp. military or naval) or a section of it against its officers; behaviour subversive to discipline:

2. a rebellion of a considerable number of soldiers, sailors, or other persons in subordinate positions against those set in authority over them.

In Black's Law Dictionary, 5th ed, "mutiny" is defined as:

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to rise against lawful or constituted authority, particularly in the naval or military services.

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(See also the American *Corpus Juris,* Vol XLIV, at p 1500.)

It is clear to me that the word is chiefly used in relation to the Armed Forces of a nation because those are the statutory bodies in which discipline and regimentation are essential for their proper function. It is in the institutions of soldiers, sailors and airmen that the dictates of authority are most commonly found. Thus mutiny has acquired a military association. But there is no justification to restrict its meaning to these conventional bodies. Quite apart from the application of the word in our legislation to members of the police force, prison officers and prisoners, it would not be grammatically inappropriate to describe as a mutiny a revolt by the crew of a civilian aircraft against the authority of their captain, or by the crew of a merchant vessel sailing on Lake Kariba against their master. (See, for instance, *Elton v Brogden* 93 ER 1171; *Driscoll v Bovril* 126 ER 923). The essential ingredient is a rejection by a joint number of persons of the constraints of discipline and obedience; a collective and flagrant refusal to remain subordinate to constituted authority. Indeed, I can do no better than to repeat the lucid words of LORD GODDARD in *R v Grant et al, supra,* at 696A-B:

> There is no doubt that mutiny is a collective offence, that is to say, it cannot be committed by one man ... There is no doubt now that mutiny is an offence which deals with collective insubordination, collective defiance or disregard of authority or refusal to obey authority.

His Lordship referred to mutiny as an **offence** because it was an offence under the Army Act 1881 with which the court was concerned.

But although in my opinion mutiny is not a term of legal art to be confined to collective insubordination within the conventional Armed Forces of the nation, but is applicable, according to its ordinary natural meaning, to other statutory bodies and groups of persons subject to some form of regimentation and discipline, the contextual background in which the word is used must be examined in order to ascertain whether its scope has been narrowed. For the meaning of the word may be controlled by its context. See *Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (AD) at 646B-D; *Ivamy, General Principles of Insurance Law,* 4th ed at pp 374-376.

As there is no material difference in the wording of the relevant exception clauses in the two policies, I propose to quote the one contained in the accident and sickness policy. It reads:

GUBBAY JA

This policy does not insure against death or disability directly or indirectly caused by, arising from or traceable to . . .

(e) war invasion act of foreign enemy hostilities (whether war be declared or not) [riot strike civil commotion] civil war mutiny rebellion revolution insurrection or military or

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usurped power or service in or with any armed force.

The deletion from the clause of the usually excepted risks "riot, strike and civil commotion", is significant. These words describe what in general are situations of local civilian unrest in which security guards protecting private property are likely to be the first line of defence, and in so acting may sustain death or disability. It was obviously appreciated that in providing a security service the respondent's personnel were subject to risk from these types of disturbance. The other nominated disturbances are distinguishable in nature. I agree with Mr *Campbell* that effectively they involve a challenge to the authority of the State, to a greater or lesser extent, and in respect of which the power of the State is looked to for protection. The authority of the State includes the right and duty to enforce its discipline over all military and like forces subordinate and obedient to it. Put simply, what the parties intended was that disturbances falling within the purview of the State's control, and to which the State is relied upon for protection, would not be insured against. Mutiny is specified as one such disturbance.

It follows that in my view the meaning of mutiny as used in the policies is somewhat narrower than its popular meaning, and embraces revolt against the constituted authority of the State, collective insubordination, collective defiance or disregard or disobedience of that authority by military or like forces subordinate or obedient thereto.

An alternative submission advanced by Mr *Jordaan* was that as there was ambiguity about the meaning of mutiny, under the various classic authorities on the rule *contra proferentem* the word ought to be construed against the appellant who was responsible for drafting the policies. The rule, however, depends on there being some ambiguity in the use of a word or choice of expression which leaves one unable to decide which of two meanings is correct. See *Cairns (Pty) Ltd v Playdon & Co Ltd* 1948 (3) SA 99 (AD) at 123. In this case no doubt arises in my mind as to whether or not mutiny attracts a technical legal meaning. There is no ambiguity. It is merely a question of construction, capable of being solved by examining the context in which the word is used. As cautioned by LINDLEY LJ in *Cole v Accident*

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Assurance Co Ltd (1889) 5 TLR 736 at 737:

> . . . one must not use the rule to create the ambiguity - one must find the ambiguity first.

See also *Standard General Insurance Co Ltd v Croucamp* 1959 (3) SA 162 (AD) at 170A; *Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (AD) at 108C.

I come now to consider whether the appellant proved that the death of Lennon and the loss of the respondent's pistol were consequences of a mutiny within my understanding of the word in the policies.

There is little or no dispute about the essential facts: Following the Lancaster House agreement in December 1979, the guerillas of the ZIPRA and ZANLA forces, being the autonomous armed wings of the political parties ZAPU and ZANU (PF), reported, as they were obliged to do, to

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various assembly points sited by government in the rural areas of Zimbabwe. There they were to remain for the time being.

The guerillas were subject to their own military form of discipline with more or less conventional regimentation. They were organised into platoons and companies under a ranking structure. But once they entered the assembly places, authority and control was exercised over them by Government through a body known as the Joint High Command. It comprised the commanders-in-chief of the former Rhodesia Army, ZIPRA and ZANLA, and was chaired by the Minister of State for National Security.

The assembly places were administered by Government through the agency of soldiers of the former Rhodesia Army. They were assisted by ZIPRA and ZANLA camp commanders who acted as liaison officers. The supply of tentage, medical provisions, food and clothing, was the responsibility of the Army.

Within the space of a few months it became apparent that the living conditions in five of the assembly places in Matabeleland Province had deteriorated to the extent of being a hazard to health, and the decision was taken by Government to transfer the ZIPRA and ZANLA combatants into municipal housing at the high-density suburb of Entumbane, where a large building programme was under way with a number of houses nearing completion but unoccupied.

1985 (2) ZLR p41

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Major General Shute in command of One Brigade Headquarters, Brady Barracks, set about the task of making the proposed sites at Entumbane habitable. Four separate camps were constructed (two for each faction) and enclosed with security fencing; it being necessary to segregate the ZIPRA and ZANLA combatants who had an active distrust of one another. Several municipal buildings were converted into clinics and recreational centres, and medical equipment, beds, mattresses, tables and chairs were provided. Kitchens and ablution blocks were built. The move was organised and supervised by Major General Shute's Brigade. Military transport was used in conjunction with private omnibuses requisitioned by Government. The combatants, who had some pretentions to military-type uniforms were allowed to take their personal weaponry into the camps. This consisted of pistols, AK and SKS rifles, light machine guns, hand grenades, rifle-fired projectiles and small calibre mortars. Heavy weaponry was disallowed. A commander was appointed to each of the four camps. He had his normal command system beneath him. Standing orders for the camps were prepared by Major General Shute in consultation with the liaison officers. They concerned the storage of weapons at the camp armoury, the control of ammunition, a total prohibition upon the removal of weapons out of the camp, detailed directions with regard to sentry and guard duties, and such routine matters as the laying down of times for reveille, meals and retreats. Weekly conferences, chaired by Major General Shute, were held with the four camp commanders. Instructions to the latter were conveyed either during the conference or by the liaison officers who were accommodated at headquarters. The camps were visited regularly and both radio and telephone contact was maintained between them and headquarters. So much for the background.

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On the afternoon of Sunday, 9 November 1980, it appears that a ZIPRA combatant became involved in an heated argument with a ZANLA counterpart and ultimately both resorted to the use of their weapons. This led to over-reaction on the part of other combatants and in no time at all a mini-war was in progress involving all ranks of the two opposing factions. Small arms, machine guns, mortars, grenades and explosives were employed. The conflict expanded rapidly beyond the confines of the four camps into neighbouring residential areas.

Being alerted to the seriousness of the situation, Major General Shute attempted repeatedly to establish contact by telephone and radio with the commanders of each camp. There was no response to his calls. Concerned that hostilities might spread into Bulawayo city he dispatched an armed unit

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of soldiers to the western suburbs with strict orders not to get involved in the battle but to contain it, if possible, by surrounding the four camps. The manoeuvre met with some initial resistance. At a road bridge leading to Entumbane the soldiers were fired upon by ZIPRA combatants but succeeded in driving them off and securing the bridge.

Early on Monday morning Major General Shute and a ZIPRA liaison officer made their way in a motor vehicle to one of the ZIPRA camps. They drove over the bridge, now guarded by soldiers of the National Army, to a machine gun post manned by ZIPRA combatants. The liaison officer spoke to these men and the vehicle was allowed to continue its journey to the camp. Save for a number of injured who were receiving medical attention, the camp was virtually deserted. The combatants had deployed from the camp out towards the ZANLA camps. Major General Shute and the liaison officer went immediately to the battle lines and by means of a loud-hailer called upon the ZIPRA forces, who were being subjected to an attack from one of the ZANLA camps which was two hundred metres away, to cease firing. This they did. Thereupon he and the liaison officer crawled forward as close as they could to the ZANLA camp. He identified himself and ordered them to stop their fire. There was a lull, soon followed by a mortar attack upon the position occupied by Major General Shute and the liaison officer. This led to retaliation by the ZIPRA combatants. Major General Shute and the liaison officer then withdrew.

At about noon Major General Shute again entered the ZIPRA camp. On this occasion he was accompanied by a liaison officer from each faction. The party of three made their way from the camp to the position previously occupied and with the use of the loud-hailer the ZANLA liaison officer instructed the men in the ZANLA camp to stop firing. For a few minutes all was quiet until the ZANLA combatants recommenced firing. This evoked retaliation.

A little later that afternoon Major General Shute employed a sky-shout aircraft, manned by liaison officers of ZIPRA and ZANLA to fly over Entumbane. Through the loudspeaker system and stressing that it was the order of the Joint High Command, the liaison officers called upon everyone to return to camp and surrender their weapons. The aircraft was fired upon.

The situation was now desperate for apart from the one ZIPRA camp the other three were completely inaccessible. The ZANLA camps were surrounded by ZIPRA forces and all the main

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approaches were in control of

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ZIPRA. Authority was therefore sought and obtained to stop the war by force, with the assistance of air support.

Major General Shute reorganised the units of his battalion and instructed that an advance upon the four camps was to be made from three directions. Any resistance encountered was to be met by force and air cover would be available if the need arose. The liaison officers were given ninety minutes to stop the war before the troops would move in. They virtually succeeded in doing so. As "H" hour drew closer the ZIPRA machine gun post withdrew and one unit entered the ZIPRA camp without encountering any opposition. Approaching from another direction a second unit was fired upon by ZANLA forces. They did not return the fire and continued to advance. By nightfall all four camps were occupied by the army. The hostilities were at an end. Peace had been restored.

On these facts I entertain not the slightest doubt that the events of 9 and 10 November 1980 fell within the excepted risk of mutiny. Both ZIPRA and ZANLA were military forces whose members were regimented and subject to discipline. Initially at the rural assembly places, and later at the camps at Entumbane, the ex-guerillas subordinated themselves to the overall directions and administration of government acting through the National Army. They owed the same obedience to that authority as every other person in the country. In taking up arms, in roaming the western suburbs of Bulawayo in a war-like manner, in fighting and killing one another, in murdering and harassing innocent civilians, in deliberately refusing to communicate with One Brigade Headquarters by telephone and radio at the outbreak of hostilities and in disobeying the orders to stop the battle, the opposing factions collectively disregarded-indeed defied and overthrew-the dictates of discipline and authority lawfully imposed upon them. I a word they rose up against constituted authority.

Finally Mr *Jordaan* urged that if in fact there was a mutiny, it began after Lennon had been murdered at 10.30 am on the Monday. That contention is insupportable. Hours before the fateful occurrence the combatants had put it beyond the power of the National Army to communicate with them either by telephone or radio-an obvious indication that there was no desire for any interference in the armed conflict by the legitimate Defence Forces. On the Sunday afternoon, soldiers were fired upon at the bridge and early on the Monday morning, after calling upon the ZANLA forces to cease their fire, Major General Shute was himself subjected to a mortar attack. Clearly the mutiny commenced on the Sunday and continued until the Army marched

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into the camps on the Monday evening.

In the result I would allow the appeal with costs and alter the judgment of the court *a quo* to

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read:

. . . the plaintiff's claim is dismissed with costs.

Dumbutshena CJ: I agree.

Beck JA: I agree.

Calderwood, Bryce Hendrie & Partners, legal practitioners for appellant

Webb, Low & Barry, legal practitioners for respondent

S v NDEBU & ANOR 1985 (2) ZLR 45 (SC)

Court **Supreme rT, Harare B**

Dumbutshena CJ and Gubbay and McNally JJA

Criminal Appeal

5 and 30 July 1985

Flynote

Criminal Law - socius criminis - dissociation - when effective as a defence.

Criminal procedure - sentence - murder - dissociation by socius not amounting to a defence - a major feature of extenuation.

Headnote

The appellants were convicted of murder and sentenced to death. During the course of a housebreaking at a dwelling known by the appellants to be occupied at the time, the appellants were surprised by the householder. The second appellant, not in possession of a firearm, immediately fled and had already run some distance away before he heard the sound of the gunshot fired by the first appellant which killed the deceased.

Held in order to afford himself a defence to the crime with which the principal offender is charged, a *socius criminis* who is present, abetting in the commission of a crime, must do more than merely withdraw from the scene of the crime; in particular, he must do something positive to avert the danger which his recklessness has brought about.

Held, further, a withdrawal by an accomplice from the scene of a murder, in circumstances which do not amount to a defence, may nevertheless be a major feature of extenuation.

Cases cited:

S v Ndhlovu S-34-85 (unreported)

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S v Nkomani & Anor 1963 (4) SA 877 (A)

S v Matende & Anor AD-55-79 (unreported)

McNALLY JA

Ex parte Becerra and Cooper (1976) 62 Cr App R 212 (CA)

R v Chinyerere 1980 ZLR 3 (AD)

A P Thompson for the appellants

F S Chambakare for the respondents

Judgment

McNally JA: The two appellants were both sentenced to death on 26 September 1983 by the High Court sitting at Gweru. The facts of the case are simple and brutal. The two appellants, acting in concert and in pursuance of what was clearly a pre-planned operation, went together and by night to a suburban house in Gweru intent on housebreaking.

The first appellant had, to the knowledge of the second appellant, a gun, a tyre lever and a torch. He used the tyre lever to force open a door. Once he had done this he instructed the second appellant to cut the telephone wires. It seems also that they prepared an escape route by finding the key for the security gate and unlocking the gate. Clearly they knew the house was occupied.

The lady of the house was wakened by someone flashing a torch outside her bedroom. This person came into her room and shone the torch in her face. She screamed for her husband, the man backed out and she slammed the door on him. Almost at once she opened the door again and ran out, and as she did so she heard a shot. She then saw her husband lying on the floor. He was alive, but fatally injured. The intruders were gone.

The evidence in relation to conviction was such that Mr *Thompson,* who appeared for both appellants, did not advance any argument to suggest that his clients had been wrongly convicted.

In regard to the sentence of death imposed on the first appellant, Frank David Ndebu, there was simply nothing to be said. He used a heavy calibre pistol to shoot an unarmed man in his own house at night in the course of a premeditated robbery and housebreaking. As GUBBAY JA said in *S v Ndhlovu* S-34-85 (unreported):

> In the absence of weighty extenuating circumstances, murders committed in the course of robberies will attract the death sentence.

The moral blameworthiness of the second appellant, however, rests upon a basis significantly

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different from that upon which the first appellant is to be

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judged. In the first place there is no evidence other than his own to associate him with the crime. He did not deny his participation, either in his statements to the police or in his evidence before the court. While it may well be that he has to a degree played down his role, the fact is that the probabilities to some extent support him. In particular, his claim that he did not have the pistol is borne out by the evidence that the first appellant possessed that very weapon both before and after the killing.

The mere fact that only one of a number of wrongdoers carries a weapon does not necessarily mean, when the wrongdoing leads to murder, that he alone will fact the death penalty. The learned trial judge properly referred to the decision of the Appellate Division in *S v Nkombani & Anor* 1963 (4) SA 877 (AD) at 896G-H, where HOLMES JA spoke of the moral responsibility of the unarmed accomplice thus:

> The answer to that is that the trial court did bear in mind that this was a case of constructive intention legally imputed to the second appellant, but considered that, in the circumstances of this case, it was not an extenuating circumstance. The court likened the position of the second appellant to that of a person who reprehensibly hires another to commit a crime, and furnishes him with the required equipment. In my view, nothing has been shown to warrant this court in interfering.

Similarly, in *Matende & Machokoto v S* AD-55-79 (not reported) MacDONALD CJ confirmed the sentence of death which had been imposed on the unarmed as well as on the armed robber. The valid point is made in such cases that, although the unarmed man's moral blameworthiness may be lower than that of his armed colleague, it may still be so high that the death penalty is appropriate.

It was no doubt considerations of this nature which led the trial court to conclude that there were no extenuating circumstances in the case of the second appellant. The learned judge said of him:

> The only thing that he did not do was to pull the trigger. Only one person could have done that at a time. In our view on this particular point the moral blameworthiness of the second accused is precisely the same as that of the first accused accused.

And later:

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> When two men go housebreaking at night one armed with a gun and somebody dies, the one who has not been armed with the gun cannot expect to receive treatment much different from his accomplice, if he knew that there was a possibility that the gun would be used with fatal consequences and he did not care.

These comments, it seems to me, overlook one important point. I said earlier that we have to rely entirely on the second appellant's evidence to link him with the offence. It is his evidence that he fled at once on hearing the woman scream. He was already outside the house when he

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heard the shot being fired.

His statement, Exhibit Ten, reads, in the relevant part:

> . . . when I heard the woman crying I then ran away. On my arrival at the gate this is when I heard a gun fire.

His evidence is to the same effect. It is apparent therefore that he withdrew himself physically from the scene just before the fatal shot was fired.

The legal situation created by this last-minute withdrawal or repentance on the part of the one co-accused is not altogether clear. It was certainly accepted by counsel in the course of argument that it was relevant only in regard to the question of extenuation. But some thought must be given to the question whether it is not also relevant to conviction.

It would seem clear that English law requires more than a simple last-minute withdrawal to enable a participant to escape a verdict of guilty of the main offence. Glanville Williams: *Criminal Law: The General Part* 2 ed p 383 para 127 says:

> The matter was not discussed in the only modern English case on the subject, (*Croft* [1944] KB 295 (CCA)) where it was held that, in order to escape, the instigator must prove that he expressly and clearly countermanded the advice. The outstanding question is whether even this proof would always be sufficient to exculpate.

The learned author goes on to cite two differing examples. In the one case three highwaymen set out to rob on the highway. One turns aside and leaves his companions. Later they commit a robbery. The one who turned aside is not an accomplice. The other example is a graphic quotation from an American case:

McNALLY JA

> A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse.

In similar vein, under the heading "Repentance by Secondary Party", Smith and Hogan in the 4th Ed of *Criminal Law* say at p 136:

> If D, having counselled E to commit a crime, or being present, abetting E in the commission of it, withdraws from the project before the crime is constituted and communicates his withdrawal to E, he may escape liability for the contemplated crime - but not necessarily for incitement or conspiracy. Even a communicated withdrawal may leave D liable if he neglects to avert a danger which he has helped to create.

One of the cases referred to by Smith and Hogan is of interest because of its similarity on the facts of the present case. The case is *Ex parte Becerra and Cooper,* an application for leave to appeal against convictions for murder (and other offences), reported at (1976) 62 Cr App R 212 (CA). This was an armed robbery at night. The attack upon the old lady of the house by three men, using a knife which one had used to cut the telephone wires, woke up a young man who was a tenant. He came upon the scene, whereupon Becerra and the third man ran away. Cooper, to whom Becerra had by then given his knife, stabbed the young man to death. Becerra claimed to have said "There's a bloke coming, let's go". For purposes of the application it was assumed that he did use those words and had run away just before the stabbing. Nonetheless, the court had no difficulty in rejecting the defence of "withdrawal". Without defining what he

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would have had to have done, in order to establish that defence, the court held that

> . . . if Becerra wanted to withdraw at that stage, he would have to 'countermand', to use the word that is used in some of the cases or 'repent' to use another word so used, in some manner vastly different and vastly more effective than merely to say 'Come on, let's go' and go out through the window.

Leave to appeal against conviction was refused.

In our law a man who is involved in the planing of and preparation for a crime is regarded as *socius criminis.* If the crime is later committed, even if he is not present, he is guilty of the substantive offence. He may be what in English law is called a co-principal offender, or he may be an aider and abetter or accessory before the fact. In either event he may be convicted as a principal offender.

McNALLY JA

The legal problem arises when he dissociates himself from the offence before it is committed. As the very word indicates, one who dissociates himself cannot be called a *socius.* Yet what is meant by the word "dissociate"? Is it enough to run away, or are the English cases right in looking for something more?

I can discover only one reported case in the Roman-Dutch jurisdictions on the point, and that is *R v Chinyerere* 1980 ZLR 3 (AD); 1980 (2) SA 576 (RAD). In the matter LEWIS JP considered the position of one of a group of men who ran away while the group was attempting to break into a store. He thus took no part in the theft which followed when eventually they were able to gain entry. The learned judge, with the concurrence of the other members of the court, altered the verdict from one of guilty of housebreaking with intent to steal and theft, to one of guilty of housebreaking with intent to steal, and conspiracy to commit theft. He found as a fact that the appellant had dissociated himself from the ultimate offence, that is the theft of goods from the premises broken into, before that theft had been perpetrated, and thus escaped conviction for that offence as a principal.

I do not think it opportune, particularly in the absence of argument on the point, to say more than that the judgment is undoubtedly right on the facts. It may be necessary, in the light of different sets of circumstances, to analyse more fully what is meant by the phrase "dissociate himself from", and to look at the validity of the English requirements that in certain cases something more positive is required of the one seeking to dissociate himself than merely to run away.

I will content myself in this case by saying that on the facts I am not at all satisfied that the second appellant dissociated himself from the murder. He had gone along with a common intention to commit housebreaking and theft, and if necessary armed robbery. He had taken part actively in the breaking-in, and had himself then cut the telephone wires. He knew and appreciated the risk that if someone in the house woke up the firearm might have to be used to subdue the residents or to effect an escape. He was there participating when precisely that situation arose. As it happened he was so placed that he could run away. But by that stage what he did was no longer material. The reason for that is clear. The risk which he deliberately

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took was not related to what he himself might do but what his armed companion might do if challenged or cut off. He had linked his fate and his guilt with that of his armed companion. The mind that needed changing was not his but his companion's. His constructive intention to kill depended on a decision by his companion.

McNALLY JA

Constructive intention, or legal intention, is defined by Burchell and Hunt (Vol 1, *South African Criminal Law and Procedure*, p 128) as follows:

> Legal intention in respect of a circumstance consists of foresight on the part of the accused that the circumstance may possibly exist coupled with recklessness as to whether it does or not.

On the facts of this case it will be apparent that the second appellant subjectively foresaw the possibility of a killing, and was reckless as to whether or not it would occur. His flight neither averted the danger nor purged the recklessness. I have no doubt that in such circumstances mere flight was not dissociation, any more than hiding under a bed would have been. Had he disarmed or dissuaded his companion or protected the householder in some way he might perhaps have purged his constructive intention. But what he did was inadequate.

Inadequate, that is, as far as conviction is concerned. However, in relation to sentence his action was highly relevant. The failure of the trial court to give this fact due weight amounts to a misdirection on the question of extenuating circumstances, entitling this court to come to a different conclusion.

When one bears in mind the overall impression that the second appellant played a subsidiary role, the fact that he abandoned the common purpose just before the fatal shot was fired is a major feature of extenuation. In my view the proper finding in relation to the second appellant is that there were extenuating circumstances, and the trial court erred in its finding on this aspect.

Despite this, his offence was a very serious one, and the last-minute abandonment of his evil purpose serves no more than to avert the ultimate penalty. It must be made clear that crimes of this nature are particularly wicked, and that men such as the first appellant derive comfort and support from the company of fellow criminals, however subordinate a role they may play. The playing of such a role must therefore be seen to attract severe sentences. As I have indicated, it will often attract the death penalty.

I would enter a finding of extenuating circumstances in the case of the second appellant, set aside the sentence of death and substitute therefor a sentence of fifteen years' imprisonment with labour.

For the rest I would dismiss the appeals.

McNALLY JA

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Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Pro Deo

SUPIYA v MUTARE DISTRICT COUNCIL & ORS 1985 (2) ZLR 53 (HC)

Court **High Court, Harare**

Smith J

Civil Application

29 May and 10 July 1985

Flynote

Civil procedure - High Court Rules 162, 164 and 165 - statements from the Bar constitute evidence - contumacy on the part of legal practitioners as a ground for dismissing an action - importance of discovery affidavits.

Headnote

In terms of an order of MFALILA J, all respondents were required to make discovery within a given period of time. Second respondent filed a discovery affidavit out of time given under the order and stated that he represented the first and third respondents. Applicant objected to the affidavit as being invalid in so far as the first and third respondents were concerned and in any event as being inadequate.

Further applications by the applicant to secure proper compliance and proper filing of discovery affidavits elicited no formal response from the respondents' legal practitioners.

Held, contumacy is a good reason for ordering the dismissal of an action or striking out of a defence.

Held, further, a statement from the Bar can be accepted as sufficient evidence to show prejudice when looked at in the light of other known facts.

Held, further, the courts have repeatedly stressed the importance of discovery affidavits. When a court order is obtained requiring discovery and there is a failure to comply with such order, such failure is deliberate contumacy. It is not sufficient for the legal practitioner to make the excuse that because the respondents could not have made a meaningful discovery they did not bother to do so.

Held, further, on the facts as a whole it would not be sufficient to indicate the

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SMITH J

court's disapproval of respondents' action to put them on terms and this was an appropriate case to strike out the defence of the respondents.

Cases cited:

Wanson Company of South Africa (Pty) Ltd v Establishments Wanson Construction de Materiel Thermieque Societe Anonyme 1976 (1) SA 275 (T)

Leapman & Anor v Barrow 1971 (1) RLR 40 (GD); 1971 (4) SA 403 (R)

Gunn NO v Marendaz 1963 (2) SA 281 (W)

Ferreira v Endley 1966 (3) SA 618 (E)

Gerry v Gerry 1958 (1) SA 295 (W)

Durbach v Fairway Hotel Ltd 1949 SR 115; 1949 (3) SA 1081 (SR)

A N B Masterson for the applicant

S W Mafara for the respondents

Judgment

Smith J: The first respondent started to build a school on land in a communal area which the applicant alleged had been allocated to and was being used by him for the growing of crops. The facts of the case were set out by MFALILA J in his judgment HH-102-85 when he issued a temporary interdict ordering the first respondent to refrain from building operations for the construction of the school on the land in dispute and ordering the second and third respondents (who are the District Administrator, Mutare, and chief executive of the said council and the chairman of the education committee of the said council, respectively) to ensure that the first respondent complied with the order. In that judgment leave was given for the matter to proceed to trial on certain terms which included the requirements that the parties were to give discovery of all relevant documents under their control within 24 days of the handing down of the judgment (26 March 1985) and that a pre-trial conference was to be held on or before 2 April 1985. The 24 days' period for discovery elapsed on 26 April, which was a Friday, and none of the parties had made discovery by that date. The applicant, however, remedied his failure by making discovery on Monday, 29 April. At the pre-trial conference which was held on 26 April the representative of the respondents conceded that they had not made discovery but undertook that they do so by 3 May. The applicant, however, on 29 April applied through the Chamber Book for an order compelling discovery and such an order was granted on 3 May.

The second respondent filed a discovery affidavit on 6 May, in which he said he represented the first and third respondents. The legal practitioner for the

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applicant wrote to the respondents' legal practitioner advising that he did not accept that the discovery affidavit filed by the second respondent was a valid discovery affidavit on the part of the first and third respondents since there was no statement in the affidavit that he had such authority, neither was there anything from the first and third respondents confirming that the second respondent had their authority. He also objected to the total inadequacy of the scope of the discovery affidavit since it made no reference to any documents in the possession of the first respondent relating to the building of the school, its siting, the costs of its construction and the objections raised by the applicant. He also, on 8 May, in terms of Rule 162 served on the respondents legal practitioner notice requiring the respondents to make available for inspecting certain documents, including minutes of meetings of the district council and of some committees thereof, records of payments made in connection with the construction of the school and certain correspondence. The notice was in accordance with the provisions of Rule 164 and required the respondents to deliver, within six days, a notice setting a time when and where the documents could be inspected and, if any such documents were not in their possession, to state on oath that they were not and where such documents may be found, if the respondents knew of their whereabouts.

There was no formal reply to the notice and no documents were filed or served in response thereto. The respondents' legal practitioner advised that there was no intention of filing any further discovery affidavits on behalf of the respondents. However, he gave the applicant's legal practitioner an opportunity to peruse two files of documents, advising that he was doing so as a favour, and allowed him to take some documents away. Both files contained documents which were relevant to the dispute between the parties and, according to the applicants legal practitioner, included documents which revealed that certain important aspects of the first respondent's case, as revealed in documents previously filed, were quite incorrect.

On 21 May the applicant's legal practitioner applied through the Chamber Book for an order to the effect that:

(a) the first and third respondents file their own discovery affidavits;

(b) the three respondents comply properly with the provisions of the notice which called on them to produce documents for inspection;

(c) the three respondents comply fully and properly with (a) and (b) above within 72 hours;

(d) if any or all of the respondents fail to comply with (a), (b) or (c) above, the applicant is granted leave to set the matter down, to apply for the defence of the respondent(s) to be struck out and to apply for an order as originally claimed.

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An order in terms of the above was issued on 23 May 1985 but it elicited no response from the respondents.

Rule 165 of the High Court of Zimbabwe Rules, 1971, provides that if a party who has been served with a notice under Rule 164 omits to give notice of a time for inspection, the party desiring inspection may apply to a judge who may order compliance with the appropriate rules and, failing such compliance, the court may, on application to it, dismiss the claim or strike out the defence.

Mr *Masterson,* for the applicant, has submitted that the respondents failed to comply with the court order of 20 March 1985 in that they failed to make discovery; they possibly failed to comply with the court order of 3 May - the qualification being on the ground that the discovery affidavit of the second respondent did not comprise discovery on the part of the first and third respondents, and therefore the first and third respondents did not comply with the order; they failed to comply with the Rules of Court after notice to produce documents had been served on them in terms of Rules 162 and 164; and they have failed to comply with the court order of 23 May.

The headnote to *The Wanson Company of South Africa (Pty) Ltd v Establishments Wanson Construction de Matérial Thermieque Société Anonyme* 1976 (1) SA 275 (T), which accurately reflects the judgment of the full Bench delivered by CILLIE JP, reads as follows:

> Contumacy is a good reason for ordering the dismissal of an action or the striking out of a defence or counterclaim where a party to an action has failed to comply with an order of court in terms of Rule of Court 21(6) to furnish further particulars for the purpose of trial as requested by the other party in terms of Rule of Court 21(4), but contumacy is not the only reason. That striking out a defence will only be resorted to where there is contumacy on the defendant's part puts an erroneous restriction on the discretion which the Rule confers on the Court as there may be other considerations short of contumacy which may weigh so heavily as to persuade a court to resort to such a drastic remedy.

SMITH J

Mr *Masterson* has argued that in this case there are good reasons for striking out the respondents' defence. There has been the persistent disregard of the court orders and the Rules of Court referred to above. Even now there has not been complete discovery. The applicant commenced proceedings to protect his rights at the beginning of this year and there is little sign of the action being brought to trial. As the applicant is, in the meantime, being deprived of the use of his lands, this delay is prolonging the period during which he is being prejudiced. The applicant has to bear the costs of his legal actions whereas the respondents have the benefit of free legal assistance and advice from the State. He has to apply continually to court to make progress with his case and is in danger of running out of funds, whereas the respondents have no legal expenses to meet and therefore there is no financial inducement for them to comply with the Rules of Court. Finally, he submitted that there were other good an substantial reasons for ordering the striking out of the defence. The return of service of the Assistant Deputy Sheriff, Mutare, stated that on 20 March he visited the site where the school in dispute was being built and found building in progress. He took photographs, which were produced by Mr *Masterson,* that showed that additional building work had taken place, and

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stated that the chairman of the building committee had told him that building operations had ceased when the second respondent had so ordered but early in March the chief executive officer of the first respondent had said that building must carry on.

Mr *Masterson* submitted that authority for the acceptance of statements from the bar could be found in *Leapman & Anor v Barrow* 1971 (1) RLR 40 (GD); 1971 (4) SA 403 (R). At 41A (404A of the South African report) MaCAULAY J said:

In *Maeder v Carnes,* reported only in 1944 (1) PH F18, MILLIN AJ, referring to the great importance of complying with a discovery order, said this:

> A discovery affidavit should be served as soon as possible after the court's order and within a reasonable period before trial as the party on whom the affidavit was served was entitled to a proper opportunity of considering the documents, reading the affidavits, comparing the documents with those in his own possession so as to make a case, if possible, that there were further documents in existence which should have been disclosed, and to deliberate whether the court should be moved to order a further and better discovery.

SMITH J

> *Maeder's* case was followed and applied in *Sachs v Du Preez* 1945 WLD 131, where the court relied on a statement from counsel that the late filing of the affidavit would prejudice the plaintiff unless a postponement was granted. I refer to Sachs' case simply to show that a statement from the Bar as to prejudice has been accepted as sufficient when looked at in the light of the known acts.

In so far as the merits of the case are concerned, Mr *Masterson* said that when the applicant first protested at the school being built on his land, the position adopted by the respondents was that he should get compensation, and by letter dated 14 December 1984 the applicant was offered alternative land or monetary compensation. His application for an interdict was in fact opposed on the ground that an alternative remedy, ie compensation, was available to him. However, the defence then shifted and affidavits were filed to the effect that the applicant in fact had no right to the use of the land on which the school was being built. These affidavits alleged that the land in dispute had been used for grazing purposes until 1976, which was the first time that it had been under cultivation. However, photographs taken during the course of aerial surveys and an affidavit from the Surveyor-General showed that the land concerned was under cultivation in 1969 and 1974. Finally, the first respondent claimed that everyone wanted the school to be built on the site concerned and only the applicant opposed this. This was an issue that was agreed at the pre-trial conference as being one for determination. Although in the discovery affidavit of the second respondent no mention was made of any minutes of meetings of the first respondent or of any committee thereof, in the files which the respondents' legal practitioner permitted the applicant's legal practitioner to peruse, were minutes of a meeting of the first respondent held on 13 December 1984, in which it was recorded that the council was disappointed to note a report from the Deputy Director, Physical Planning, to the effect that a majority of people were not happy with the site of the secondary school at Chipfatsura and the council resolved by 27 votes to 1 with 1 abstention that the school be sited at Gwinendindi. Mr *Masterson* submitted that this highlighted the deficiencies in the discovery made by the second respondent. The abovementioned entry conflicted with the affidavits submitted in connection with the respondents' case and was vital to the case of the applicant. He submitted that there was sufficient evidence to show that continued resistance by the respondents to the claim of the

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applicant was both reckless and irresponsible and that it would not be just to allow the case to continue. He accordingly asked for the court to strike out the defence of the respondents and grant the order originally claimed.

SMITH J

Mr *Mafara,* for the respondents, has submitted that in his discovery affidavit, the second respondent made it clear that the affidavit was also for and on behalf of the first and third respondents. The second respondent was the principal officer of the first respondent and the third respondent was a councillor and chairman of the education committee. All the documents relevant to this case were in the custody of the second respondent and it would not be possible for the first respondent to produce or make discovery of any documents since it was a corporate body and could only act through an officer or employee. As regards the third respondent, as he was a councillor, all the relevant documents would be in the custody of the second respondent. He submitted that adequate discovery on the part of the respondents had been made. He argued that the reference in part II of the discovery affidavit to "inter-departmental correspondence" included minutes of council meetings and stated that when he received the files from the respondents he contacted Mr *Masterson* and made the minutes available to him. He submitted that all relevant documents had been made available to the applicant and that even if there had not been full disclosure the penalty was as set out in Rule 163 of the Rules of Court, ie the respondents would not, without the leave of the court, be able to make use of any document not disclosed. Mr *Mafara* further argued that the applications by the applicant in terms of Rules 164 and 165 were not appropriate in the circumstances as the respondents had made discovery. If, however, his submission was wrong, the documents concerned had been inspected by Mr *Masterson;* there were no further documents to be discovered and those inspected by Mr *Masterson*, though not clearly discovered, had in fact been made available. All the first and third respondents would be able to say in a discovery affidavit was that they had no documents under their control. Finally, he submitted that there ws no contumacy on the part of the respondents; if there had been any delays he asked for condonation and said that the respondents had a real and genuine defence.

The courts have repeatedly stressed the importance of discovery affidavits. This attitude was succinctly stated by BEKKER J in *Gunn NO v Marendaz* 1963 (2) SA 281 (W) at 282H, as follows:

> With reference to the discovery affidavit I wish to emphasize in the first place that an affidavit of discovery is a solemn document, it is not just a scrap of paper. It is a document to which the deponent swears as to the correctness of the contents thereof under oath . . .

In *Ferreira v Endley* 1966 (3) SA 618 (E) the court was dealing with a case where the defendant's attorneys did all that could be required of them in

SMITH J

pressing for a discovery affidavit and when eventually one was served it transpired that it was

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by no means a full disclosure. At 621A-E Eksteen J said:

> The subsequent attempt informally to disclose the documents in letters to defendant's attorneys and to claim privilege in respect of other documents is still not a proper compliance with the Rules, and defendant cannot be required to content himself with that.
>
> They are entitled to have the statements testified to under oath. It is not only because such statements may be untruthful that this is necessary, but also because parties are more careful to verify information given to their legal advisers if they know it has to be deposed to. (*Wallis & Wallis v Corporation of London Assurance* 1917 WLD 116 at p 121). Discovery affidavits are very important documents in any trial and the party requesting discovery is entitled in terms of the Rules to have a full and complete discovery on oath. (*Maxwell and Another v Rosenberg and Others* 1927 WLD 1 at p 8). In the present case, not only has the discovery affidavit been filed at a very late stage, but when it was eventually served it was incomplete in the respects set out above. At no stage has plaintiff sought to remedy these deficiencies by a supplementary discovery affidavit as he might have done, and the defendant would consequently, to my mind, be entitled to come to court to compel a further and better discovery. He cannot, however, be obliged to go to trial with plaintiff's discovery affidavit as it now stands amplified by the letters written to plaintiff's attorney in regard to other documents not referred to in the affidavit.

In the present case the second respondent has filed a discovery affidavit which clearly does not constitute full disclosure. By no stretch of the imagination could minutes of council meetings be regarded as covered by the reference to inter-departmental correspondence. When the applicant's legal practitioner pointed out to the respondents' legal practitioner that the discovery affidavit was not acceptable, the latter made no attempt to remedy the deficiency by a supplementary discovery affidavit. Furthermore, when a court order was obtained requiring the first and third respondents to make discovery, they failed to do so. I regard this failure as deliberate contumacy. Even if they could or would only have said that they had no documents other than those discovered by the second respondent, they should have said that, on oath, as required by the court order. It is not sufficient for their legal practitioner to make the excuse that because they could not have made a

meaningful discovery they did not bother to do so. The applicant is entitled to receive a statement on oath from all the respondents concerning the documents in their possession or under their control. Unless there are very special circumstances, a discovery affidavit must be signed by the party concerned and cannot be signed on his behalf by his legal practitioner - *Gerry v Gerry* 1958 (1) SA 295 (W) at 297. In view of this, the court cannot accept a statement from a legal practitioner in court as to what his client would have said in a discovery affidavit had he made one. Furthermore, the disclosure must be complete. A party cannot omit documents from his discovery affidavit and think that the only penalty would be that he would not be able to rely on that document without the leave of the court. If that were the case no party would make discovery of documents that were prejudicial to his case. Discovery must be full and honest. As TREGOLD J said in *Durbach v Fairway Hotel Ltd* 1949 SR 115 at 116-7; 1949 (3) SA 1081 at 1083:

> the whole object of discovery is to ensure that before trial both parties are made aware of all the documentary evidence that is available.

The order by MFALILA J on 20 March required the respondents to make discovery of all

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documents in their possession or under their control which may be relevant to the dispute within 24 days of the order. The respondents have still not done so, even though two subsequent court orders requiring discovery have been issued. Furthermore, a notice to produce documents for inspection was not complied with by the respondents in the manner required by the rules of Court. And, finally, the temporary interdict issued by MFALILA J on 20 March ordering the first respondent to refrain from all building operations on the land in dispute has been infringed in that building operations were resumed.

Having regard to these factors and the prejudice caused to the applicant by the delays brought about by the respondents' failure to comply fully and promptly with the court order of 20 March 1985 and the subsequent orders, I consider that putting the respondents on terms and ordering them to pay the costs of the applicant would not be sufficient to indicate the court's disapproval of their attitude or to compensate the applicant. I consider that this is an appropriate case to strike out the defence of the respondents and to order -

(a) That the first respondent shall -

SMITH J

(i) refrain from all building operations for the construction of a school upon the arable lands allocated to and utilised by the applicant in the area occupied by the inhabitants of Zhwari Village in the Marange Communal Area;

(ii) demolish and remove from those lands all concrete brick work and other elements of the school or other structure that is being built on those lands by first respondent;

(iii) remove from those lands all other building materials awaiting use for the structure of the aforesaid school.

(b) That the second and third respondents shall ensure that the first respondent complies with the aforesaid order and are further personally ordered to desist from any further action which may result in any other person or persons interfering with the applicant's attempts to utilise his lands for the production of crops.

(c) That the first respondent shall pay the applicant's costs.

Coghlan, Welsh & Guest, legal practitioners for the applicant

Civil Division, Attorney-General's Office, legal practitioners for the respondents

S v KURIMWI 1985 (2) ZLR 63 (SC)

Court **Supreme rT, Harare B**

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Dumbutshena CJ and Beck and McNally JJA

Criminal Appeal

24 June and 12 July 1985

Flynote

Customs and excise - smuggling - sentence - forfeiture of motor vehicle used in smuggling and forfeiture of goods - whether equitable - overall effect of sentence - intended use of goods - weight to be given.

Legislation - s 165 Customs and Excise Act [Chapter 177].

Headnote

Where the value of a vehicle used for smuggling goods into the country greatly exceeds the value of goods smuggled for private family use, it may be excessively harsh and inequitable to order the forfeiture of the vehicle.

When determining the overall effect of sentence-namely the penalty, any order of forfeiture and summary judgment in respect of the unpaid duty-it is relevant to consider the intended use of the smuggled goods and the various allowances granted to returning residents.

Case cited:

S v Mahomed 1977 (2) RLR 207 (GD)

R M Fitches for the appellant

E Chatikobo for the respondent

Judgment

Dumbutshena CJ: The appellant is a truck driver employed by Truck Africa (Pvt) Ltd In the course of his duty he drives between Zimbabwe and South Africa. On 24 December 1984 he and members of his family were driving from Johannesburg to Harare in a BMW 2 500 motor vehicle belonging to his wife. They were stopped at Beitbridge border post by

DUMBUTSHENA CJ

customs officers. The appellant declared goods valued at $240. He was cleared and then drove away, only to be stopped by another customs officer who searched the car. He found hidden behind the back seat of the car and in the spare wheel compartment situated in the boot of the car undeclared goods valued at $924,00. The goods were seized. The duty payable on the seized goods was $590,22.

The appellant was charged with a contravention of s 165, and in the alternative s 157(1)(d), of the Customs and Excise Act [*Chapter 177*]. It was alleged that the appellant had wrongfully and unlawfully smuggled goods, and alternatively that he had wrongfully and unlawfully made a false

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declaration. The appellant did not have an import licence.

The appellant pleaded guilty to both the main charge and the alternative charge. He was convicted on the main charge and found not guilty on the alternative charge. He was sentenced to a fine of $600,00 or, in default of payment, four months' imprisonment with labour. In addition three months' imprisonment with labour was suspended for five years on appropriate conditions. In terms of s 171(2)(a) the court declared the BMW 2 500 motor vehicle used to smuggle the goods forfeited to the State. In addition, in terms of s 190(1)(b) the smuggled goods were declared forfeited to the State. Finally the court gave summary judgment in favour of the Controller in the sum of $590,22, an amount equal to the duty payable on the goods forfeited.

The appellant now appeals against conviction and sentence and the order of the forfeiture of the motor vehicle.

[The learned Chief Justice then dealt with the appeal against conviction and, having dismissed it, continued:]

The appeal against sentence, as appears from the appellant's heads of argument, was based mainly on the order of the forfeiture of the BMW 2 500 motor vehicle, valued at $8 000.

While Mr Chatikobo , who appeared for the respondent, conceded that the order of forfeiture of the motor vehicle belonging to the wife was in the circumstances of the case "a bit harsh" because the goods smuggled were for the use of the family and that their value was not very great, he did not concede that a fine of $600 plus a suspended sentence of imprisonment was excessive. Mr Chatikobo contended that a suspended sentence of imprisonment was appropriate because the appellant is an international truck driver

DUMBUTSHENA CJ

susceptible to the temptation to smuggle goods as he travels in the course of his duties.

Both counsel were, however, agreed that the forfeiture order in respect of the motor vehicle ought not to have been made. The trial magistrate appreciated this, because in response to the notice of appeal he said:

> . . . I realise now that I might have misdirected myself in making this order without taking into consideration the value of the motor vehicle as against the value of goods smuggled. I should too have taken into account the fact that I found, as my reasons for sentence show, that the goods may well have been for the accused's family and not necessarily for sale. If I had properly addressed myself to the above two points I would not perhaps have made the forfeiture order in respect of the motor vehicle.

Whether or not one takes the view put up by Mr *Chatikobo* that the concession the respondent made was based purely on the fact that the goods smuggled were for a non-commercial purpose and on a small scale, there is no doubt in my mind that the order for the forfeiture of a motor vehicle valued at $8 000 was not equitable. That forfeiture, pitted against the background of the small value of the goods smuggled and the circumstances surrounding the smuggling itself, was not called for. In a letter addressed to the appellant's legal practitioners the trial

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magistrate repeated the above views. He sent the record on review so that the forfeiture order could be set aside.

With regard to sentence, what remains to be decided is whether, after setting aside the order of forfeiture and having regard to all the circumstances of this case, a fine of $600 can be said to be so manifestly excessive as to induce a sense of shock.

Mr *Fitches* contended that a fine of $600 standing by itself could not be said to be manifestly excessive but that the cumulative effect of the forfeiture orders and the fine should have been considered by the magistrate in assessing sentence. Now that there is consensus in the setting aside of the forfeiture of the motor vehicle, the question of the sentence imposed by the magistrate has to be looked at from a different angle.

The magistrate admits he misdirected himself. It is common cause that the sentence, forfeiture of the motor vehicle and the goods, and summary judgment, when considered together, induce a sense of shock especially

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when it is remembered that the smuggled goods were not intended to be sold. See *S v Mahomed* 1977 (2) RLR 207 (GD) at 209 E

There still remains another outstanding point that the magistrate did not take into account. The total value of the smuggled goods was in the sum of $924. Those goods were forfeited to the State. As already stated, the duty paid on those goods would have been $590,22. Summary judgment was entered in favour of the Controller in that amount. Had the appellant known that each member of his party was allowed to bring into the country free of customs duty goods worth $100, the five occupants of the motor vehicle, apart from the appellant, would have together brought in $500 worth of goods without paying duty. He of course could have brought in $100 worth on the same basis. Thus, considering the people in the car as one group, they could have declared between them $600 worth of goods and they would have paid no duty at all on that quantity. Then, on being caught with the balance of $564 worth, he would have forfeited that amount only, and been required to pay duty in the region of perhaps $360. As it is, between forfeiture and duty he has needlessly lost goods and money in the order of $590.

Had he been even more sensible, he would have sought to benefit from the further advantage which the Controller allows returning residents, namely the right to import another $100 worth of goods per head on payment of the duty involved but without the need for an import permit. On this basis, if he had declared the whole $1 164 worth, the six of them would have been allowed to import it all on payment of duty of approximately $360. Thus in reality the appellant should be punished for seeking dishonestly to deprive the State of customs duty of about $360. That is the extent of his moral blameworthiness as distinct from his foolishness.

Had the magistrate applied his mind to the features mentioned above, I have no doubt in my mind that he would have come to the view that a sentence of $600 or, in default of payment, four months' imprisonment with labour, coupled with a sentence of three months' imprisonment with labour, albeit wholly suspended for five years, together with the forfeiture of the smuggled

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goods was manifestly excessive so as to induce a sense of shock. I draw attention to *Mahomed's* case, *supra,* where PITTMAN J said at 211E-G:

> The decision on a forfeiture order requires first an inquiry whether a forfeiture order would be equitable. Relevant matters would include -
>
> (1) the real value of the goods to the accused (*S v Elmes* (GS-66-76) and *S v Smith,* 1974 (1) SA 607 (R));

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> (2) the purpose for which they were being imported (*S v Lennon* 1972 (2) RLR 259 (AD));
>
> (3) the importance to the accused of being allowed to retain them;
>
> (4) whether it would be difficult for him to replace them;
>
> (5) whether it will benefit or harm the community if he is allowed to retain them (*Coetzee v S* AD-185-76); and
>
> (6) whether the accused will be able to pay an adequate monetary penalty for his offence, if imprisonment is not regarded as a suitable punishment.

All the above factors appear to me to favour the passing of a more lenient sentence than the one passed by the magistrate. If one adds to the above factors that the appellant acted in ignorance of the law-in itself a mitigatory factor-a more lenient sentence would have been called for and an additional sentence of imprisonment would have become more inappropriate.

The appellant has not asked for the order of forfeiture of his goods to be set aside, nor has he complained of the summary judgment entered in favour of the Controller. Initially he only sought the setting aside of the order of forfeiture of the motor vehicle. It is not, therefore, proper for this court to set aside the order of forfeiture of the goods and the summary judgment entered in favour of the Controller.

With regard to the rest of the sentence the magistrate misdirected himself. He has said that he had not addressed his mind specifically to the question of the value of the motor vehicle *vis-à-vis* the value of the goods smuggled when he exercised his discretion. Further, in view of the fact that during argument it came to light that had the appellant known what was permissible in law the value of the smuggled goods would have been very little or the customs officials might have allowed him to pay duty on the remaining goods, this court is at large to interfere with the sentence passed by the magistrate.

Accordingly the appeal against conviction is dismissed. The appeal against the order of the forfeiture of the BMW 2 500 motor vehicle, registration no. 162-937E is allowed and the order is set aside. The appeal against sentence succeeds to this extent: The suspended sentence of three month's

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imprisonment with labour is set aside; the fine of $600 is also set aside and in its place is

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substituted a fine of $250. The orders for summary judgment and for forfeiture of the goods are left undisturbed.

Beck JA: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest, legal practitioners for appellant

NCUBE & ANOR v WILEY & ANOR 1985 (2) ZLR 69 (HC)

Court **High Court, Harare**

Smith J

Civil Application

4 and 17 July 1985

Flynote

Contract - suspensive and resolutive conditions - effect of failure to comply with conditions - condition inserted for the benefit of one party - waiver of such a condition - distinction between suspensive and resolutive conditions.

Headnote

In an agreement of sale of immovable property two special conditions were inserted. One condition was that the purchaser obtained a loan by a certain date and the other was that the purchaser sold another property belonging to him by a certain date. There was one general clause relating to the giving of notice in the event of the purchaser being in default of any condition.

Held, that where a condition of a contract is for the sole benefit of one party and that party has to perform on or before a fixed date, he can only waive such condition on notice being given to the other party before the fixed date.

Held, further, that a suspensive condition is one that holds the creation of the contract in abeyance pending a certain event whereas a resolutive condition recognises the existence of a valid contract the full import of which only comes into being on the happening of a certain event. A resolutive condition does not prevent a contract from coming into effect before the terms of the condition are met.

Cases cited:

Meyer v Barnardo & Anor 1984 (2) SA 580 (N)

Phillips v Townsend 1983 (3) SA 403 (C)

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SMITH J

Margo v Segers 1980 (3) SA 708 (W)

Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd 1948 (2) SA 656 (O)

Design and Planning Service v Kruger 1974 (1) SA 689 (T)

van Jaarsveld v Coetzee 1973 (3) SA 241 (A)

R Y Phillips for the applicants

M T O'Meara for the first respondent

Judgment

Smith J: The applicants entered into an agreement of sale with the first respondent, dated 7 May 1985, relating to the sale by the first respondent of a stand in Philadelphia Township for $70 000. The agreement consisted of a printed form provided by the estate agents which dealt with the purchase price and terms of payment and occupation, the relevant details being filled in by means of a typewriter, with general conditions being printed on the back page. There were nine printed general conditions, the only relevant one being No. 6, the relevant part of which reads as follows:

> 6. Notwithstanding anything to the contrary herein contained, and not withstanding any extension of time or other indulgence or concession granted by the Seller to the Purchaser, if the Purchaser shall omit to observe or perform any of the terms, conditions or stipulations herein contained, and fail to rectify the same within seven (7) days after the receipt of written notice from the Seller requiring him so to do, the Seller shall forthwith have the right by giving notice in writing to the Purchaser, to cancel this Agreement . . .

There are then two special conditions that were typed in by means of a typewriter. These read as follows:

> 10. This Sale is conditional upon the Purchaser being awarded a loan in principle or otherwise by a Lending Institution, in the amount of $42 000 (forty two thousand dollars), or such lesser amount as may be acceptable to the Purchaser by 10.6.85. The Purchaser agrees to accept such loan when offered, and not to withdraw such application when made. This application must be made by 10.5.85.
>
> 11. This Sale is further conditional upon the successful conclusion of the Sale of 43 Kilwinning Road, Hatfield by 1.6.85.

I might add, at this stage, that although the first nine so-called conditions are

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described in the agreement as general conditions, they are in fact terms of the agreement and it is only No.s 10 and 11 that are proper conditions.

The applicants allege that condition No.10 was fulfilled timeously. The first respondent, however, avers that to the best of her knowledge and belief a loan was granted by a building society but was subsequently withdrawn. It is not necessary, for the purposes of this case, for this matter to be resolved. The applicants admit that condition No. 11 was not fulfilled in that their property in Hatfield was not sold by 1 June 1985. In fact, the applicants entered into an agreement for the sale of the said property on 11 June 1985, but that sale was conditional upon the purchaser obtaining a loan.

By letter dated 11 June 1985, the first respondent wrote to the applicants saying that as the sale of the Hatfield house had not been successfully concluded by 1 June 1985, which was an essential pre-condition of the agreement, the agreement was cancelled. The applicants, however, refused to accept that the agreement was cancelled on the ground that, in terms of condition No. 6, before the first respondent could cancel the agreement she was obliged to write to the applicants requiring them to observe the terms of condition No. 11 and only if they failed to do so within seven days could she cancel the sale. The applicants, by letter dated 12 June 1985, tendered performance of their obligations but were advised that the first respondent was proceeding with the sale of the property concerned to someone else. The applicants are therefore seeking an order interdicting the first respondent from selling the property concerned to anyone else and the second respondent from passing transfer thereof to another.

Mr *Phillips* has submitted that it is a well-recognized and fundamental rule of interpretation of contracts that the plain meaning of the words used in an agreement must prevail and that they should only be departed from when to give them their literal meaning would lead to absurdity. The agreement between the parties provides for the sale to come into effect forthwith and conditions No.s 10 and 11 do not provide that the agreement will automatically lapse or be cancelled or become null and void if the conditions are not fulfilled. The only mention of cancellation of the agreement is in condition No. 6, which requires the first respondent to give seven days' notice before cancelling the agreement. Consequently, the purported cancellation by the first respondent was not valid. Alternatively, he argued that condition No. 11 was one inserted exclusively for the benefit of the applicants and, that being so, the failure of the applicants to sell their property in Hatfield could not be relied upon by the first respondent in order to avoid her obligations

under the agreement. It was for the applicants to decide whether or not they wished to waive this condition and advise the first respondent within a reasonable period.

Mr *O'Meara* argued firstly that the remedy sought by the applicants was misconceived. If the first respondent had entered into a second agreement of sale, an interdict was appropriate but, as there was no second agreement, the applicants should have sought a decree of specific

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performance and, pending such action, a temporary interdict. With regard to the merits of the present case, he submitted that the first respondent had not in fact cancelled the agreement. The agreement had been entered into subject to two suspensive conditions, ie No.s 10 and 11 , and since No 11 had not been fulfilled by 1 June 1985, no contract had come into effect. He argued that the applicants had no right to waive condition No. 11 but, if the court found that they did have such a right, it could only have been exercised on or before 1 June 1985 or, alternatively, if they could have exercised it after that date they would have had to do so within a reasonable time and ten days was not reasonable.

The first and main question calling for decision is whether the agreement lapsed as a result of non-fulfilment of the condition, or whether, notwithstanding its non-fulfilment, it is valid and enforceable as a result of the failure on the part of the first respondent to call upon the applicants to remedy the default or the election on the part of the applicants to implement its terms, which decision was conveyed to the first respondent after the expiry of the time period stipulated in the condition. In *Meyer v Barnardo & Anor* 1984 (2) SA 580 (N), the issue related to an agreement of sale which contained a clause to the effect that the agreement was conditional upon the purchaser obtaining a loan within a specified period and, should the loan not be granted within that period, then the agreement would be null and void and of no force or effect, without notice by either party to the other. KUMLEBEN J considered the line of cases which had dealt with similar issues and said at 583C-584B:

> To judge by the reported cases, resolving this question has been the almost exclusive preserve of the Transvaal Courts. In *Wacks v Goldman* 1965 (4) SA 386 (W) the purchaser failed, also by one day, to secure fulfilment of a similarly, and as explicitly, worded suspensive condition relating to the sale of property. The court (VIEYRA J) held that the condition had been inserted solely for the purchaser's benefit and
>
> that being so the failure to obtain the bond envisaged within the period laid down cannot be relied upon by the seller in order to avoid her obligations under the document.

SMITH J

(At 389). In reference to the fact that the purchaser did not inform the seller of his intention not to rely on non-fulfilment of the condition until after the stipulated period had expired, the learned Judge said at 389:

> It has been suggested that if a buyer in the position of the applicant does not intend to take advantage of the estate agent's failure to raise the bond within the time stipulated he should inform the seller of that attitude prior to the expiration of that time. This is an untenable proposition and carries its own refutation. At most it could be argued that intimation should be made within a reasonable time of the end of the time limit but as there is no doubt that this was done I find it unnecessary to determine that issue.

This twofold conclusion was confirmed by the Full Bench of the Transvaal Provincial Division in *Laskey v Steadmet (Edms) Bpk t/a Wessel de Villiers Agentskappe* 1976 (3) SA 696, and has since been applied or approved, directly or indirectly, in a number of subsequent cases: *Leal v Johnston* 1978 (4) SA 706 (W); *Margo v Seegers* 1980 (3) SA 708 (W); *Alessandrello v Hewitt* 1981 (4) SA 97 (W); *Roberto v Bandeiro & Anor* 1982 (1) SA 880 (W). To complete the list in that province: in *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) the court (ELOFF and BOTHA JJ) expressly left open the question whether a condition inserted for the benefit of a

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purchaser was terminable at his election and, in *Sturwig v Kjellqvist & Anor* 1981 (1) SA 613 (W), MOLL J held himself bound to uphold this proposition.

To date the lone judicial voice of dissent has been that of SCHOCK J in *Phillips v Townsend* 1983 (3) SA 403 (C). The learned Judge assumed that the test of 'sole benefit to the buyer' was the correct one to be applied, found that on the evidence this test was not satisfied, and went on to observe with reference to a waiver by a purchaser of the benefit of such a condition (at 409A-C) that:

> In Halsbury's *Laws of England* 4th ed at para 484 the learned authors say this where they deal with conditional contracts:
>
> > Even where a condition precedent to formation of the contract is inserted solely for the benefit of one party, so that he might waive it, he may not do so after the expiry of the time limit for fulfilment of the condition.

SMITH J

I have no doubt at all that this also reflects the position in our law.

> In the instant case it is clear that there is no question of plaintiff having waived the provisions of this condition prior to the expiration as I have said before. In no way did plaintiff indicate during the 10-day period that he would abide by the contract, notwithstanding that he did not get the facility he needed from the building society.
>
> Mr *McClarty,* who appeared for plaintiff, referred me to a number of Transvaal cases, the latest being *Margo v Seegers* 1980 (3) SA 708 (W) where the other Transvaal cases are cited. Insofar as these cases come to the conclusion that a waiver can in such circumstances as the present take place after the lapse of the time limitation period, I must express my respectful disagreement with the judgments.

After quoting various authorities he went on to say at 585E-H:

> I have cited, rather extensively, authority for what is after all a well recognised and fundamental rule of interpretation of contracts because - and I say this with deference - due regard may not have been paid to it when conditions such as the present have been considered in the past. The plain meaning of the words used in an agreement must therefore prevail unless as a necessary inference it can be said that it does not reflect the true intention of the parties. In deciding whether such an inference is justified one must consider not only whether the condition was inserted for the benefit of the purchaser but also-and this is not quite the same question-whether the seller had an interest in the stipulated consequence of non-fulfilment and would or could therefore be prejudiced if it were disregarded. A seller may understandably agree to a suspensive condition of this nature in order to accommodate the purchaser, but concomitantly regard it as a matter of importance to him that there should be certainty as to the fate of the sale at the end of the time period stated in the condition: whether it is at an end or enforceable.

He went on to point out that had the parties intended that the purchaser should have the right to "waive the condition" after its non-fulfilment, words to that effect could quite easily have been chosen and inserted in their agreement. Since the loan had been obtained one day late, he held that the agreement had lapsed on the non-fulfilment of the condition. I concur with the view of KUMLEBEN J referred to above and of SCHOCK J in *Phillips v Townsend* 1983 (3) SA 403 (C) and likewise respectfully disagree with the judgment in

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SMITH J

Margo v Seegers 1980 (3) SA 708 (W) and the other Transvaal cases cited therein to the effect that a waiver can, in such circumstances as the present, take place after the lapse of the time limitation period. An article in 44 (1981) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at p 96 sets out forceful and persuasive criticisms of the judgment in *Margo v Seegers.* At p 99 of that article the learned author said:

> The desire on the part of our courts to shield the purchaser from sharp business practice by a seller has led to a clouding of the difference between a suspensive or resolutive condition which must bind both contracting parties and a *lex commissoria* in favour of the purchaser. The latter may be waived by the purchaser, the former cannot. The courts are naturally free to interpret a claim referring vaguely to 'a condition' as being something other than a suspensive condition or even to ignore an express reference to a 'suspensive condition' where there are conflicting terms which indicate a contrary intention. But when the parties expressly refer to the contract as being subject to a supensive condition which will automatically cancel the contract after a certain period, and if there is no reason from the contract itself to doubt its being an accurate representation of the parties' intention, the courts are bound to give effect to the express words. To ignore them is tantamount to ignoring the bargain, a curse which, happily, is foreign to our courts.

The next matter for determination is whether condition No. 11 was a true suspensive condition which meant that no agreement of sale came into effect until such time as the condition was fulfilled. In my opinion condition No. 11 was a resolutive condition. The parties must have intended that the agreement of sale would come into effect immediately, otherwise the deposit of $4 000 would not have become payable until conditions 10 and 11 had been fulfilled. In *Laskey's* case, *supra,* HIEMSTRA J regarded a similar condition in the agreement under consideration in that case as being a resolutive condition. However, even if it were a suspensive condition, it would not mean that there was no agreement in effect until the condition was fulfilled. In *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O), VAN DEN HEEVER J rejected the argument that a sale comes into being only upon the fulfilment of a suspensive condition. At 666-7 he said:

> The contract (in the modern sense, now that all contracts are consensual) is binding immediately upon its conclusion; what may be suspended by a condition is the resultant obligation or its exigible content.

SMITH J

Conditions No.s 10 and 11 do not provide that the agreement shall lapse automatically on the non-fulfilment of the condition concerned by the stipulated date. However, I do not think that it is necessary for the contract to state what would otherwise be an automatic consequence in terms of the law. In Christie's *The Law of Contract in South Africa* at p 126 it states:

> A condition precedent suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolutive condition terminates all or some of the obligations flowing from the contract upon the occurrence of a future uncertain event.

In *Design & Planning Service v Kruger* 1974 (1) SA 689 (T), the distinction between a suspensive condition and a term of a contract was considered. The contract under consideration was a building contract which provided for part of the price for building the dwelling concerned to be provided by means of a loan. At 695B-E BOTHA J said:

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> In my view, the magistrate's findings of an anticipatory repudiation on the part of the appellant, and the reliance placed on behalf of the appellant on the principles relating to *mora,* both rest on a misconception of the true nature of the respondent's cause of action. The misconception flows from a confusion between a condition, properly so-called, and a term of the contract.
>
> In the case of a suspensive condition, the operation of the obligations flowing from the contract is suspended, in whole or in part, pending the occurrence or non-occurrence of a particular specified event (cf. *Thiart v Kraukamp,* 1967 (3) SA 219 (T) at p 225). A term of the contract, on the other hand, imposes a contractual obligation on a party to act, or to refrain from acting, in a particular manner. A contractual obligation flowing from a term of the contract can be enforced, but no action will lie to compel the performance of a condition (*Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (AD) at p 378 *in fin.*). This distinction between a condition and a term is of particular importance in determining the consequences of the non-occurrence of the event postulated in a positive suspensive condition.

Further, at 697G-H, he said:

> In my view, when a suspensive condition, of a kind which has not been

SMITH J

> inserted in the contract for the specific benefit of one of the parties only, remains unfulfilled, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negativing the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties equivalent to a placing *in mora* of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end.

I accept that in this case condition No. 11 was inserted for the specific benefit of the applicants only. As such, the applicants could, in my view, have waived the benefit - *Van Jaarsveld v Coetzee* 1973 (3) SA 241 (A). However, they could only have validly done so before the date specified by the parties for the fulfilment of the condition. I do not consider that it was necessary for the first respondent to give notice in terms of condition No. 6 to place the applicants *in mora* and thereafter for her to cancel the agreement. To require this would mean that despite the parties having clearly and specifically fixed dates in conditions No.s 10 and 11 for the fulfilment of the events specified therein, the first respondent would have to wait until after the relevant date had passed before writing to the applicants and giving them a further seven days within which the condition concerned had to be fulfilled. Where the parties concerned have agreed on specific dates, the agreement should be construed to give effect to the intention of the parties as so specified. Furthermore, condition No. 6 does not appear to be applicable to conditions No.s 10 and 11, which have been typed in as special conditions. Since those two conditions refer to specified dates by which the conditions must be fulfilled, how can the applicant ensure that the requirements are met by the specified date if the notice calling on them to do so is given after the date has passed? If the agreement were to be interpreted as meaning that condition No 6 applied in relation to conditions No.s 10 and 11, it would mean that, notwithstanding the dates having been specified therein, the conditions could be fulfilled at any time not less than seven days after those dates, depending on when the first respondent wrote to the applicants requiring fulfilment of the condition. This could not have been contemplated by the parties. If it was, they would have worded clauses 10 and 11 accordingly. The applicants must have known some time before 1 June 1985 that they would not be able to effect the sale of

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their Hatfield property by that date, so they could easily have advised the first respondent by that date that they wished to waive the condition. They failed to do so, however.

SMITH J

The application is accordingly dismissed with costs.

Scanlen & Holderness, legal practitioners for the applicants

Condy Chadwick & Eliott, legal practitioners for the respondent

PARKER v PARKER & ORS 1985 (2) ZLR 79 (HC)

Editor's Note:(5)

Court **High Court, Harare**

Scott J

Civil Exception and Application

4 and 17 July 1985

Flynote

Husband and wife - maintenance - variation of maintenance order by consent - effect of Exchange Control Regulations on ability to pay maintenance.

Civil Procedure - variation of an order of the High Court by the High Court - when appropriate - application for directions.

High Court Rules O 23 R 151

Headnote

In January 1983 the parties were divorced. Both parties subsequent to their divorce emigrated from Zimbabwe. Exchange Control Regulations prevented the husband from complying with the terms of the consent paper in respect of maintenance payments. The parties entered into an agreement as to how to overcome the difficulties created by the Exchange Control Regulations but this agreement was in turn rendered useless due to further Exchange Control restrictions.

The ex-wife obtained leave to sue her ex-husband by way of edictal citation for arrear maintenance arising out of the divorce order granted in 1983. To confirm jurisdiction a property belonging to her ex-husband in Harare was attached. To this claim the ex-husband excepted on the basis that in law an action may not be instituted seeking relief which has already been ordered by the court.

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Subsequently the ex-husband filed notice of motion papers seeking two

separate forms of relief, namely an order to set aside the attachment and a variation of the maintenance order. In response to an application by the ex-husband's practitioners SANDURA JP issued directives that all the matters extant between the parties be heard at the same time.

For the ex-wife it was argued that the directives given by SANDURA JP were outside his powers due to the peremptory nature of O 23 R 151 of the High Court of Zimbabwe Rules. It was also submitted that personal service of the notice of motion on the ex-wife was required to comply with the spirit of the rules governing edictal citation.

Held that the order of SANDURA JP as to directives was not an incidental order and a judge of the High Court cannot vary or alter an order of a judge of parallel jurisdiction short of expanding on it.

Held, further, that where a party to litigation condones non-compliance of rules by the other party he cannot later rely on such non-compliance to avoid the issues raised.

Held, further, that where an order for maintenance exists it is not open to a party to bring a new action seeking a fresh order to enforce it. An aggrieved party in the situation of the ex-wife being already armed with a court order should properly apply for committal for contempt in the face of non-compliance with such order. The exception to the action instituted by the ex-wife therefore succeeded.

Held, further, that as to the relief sought by the ex-husband the attachment of property to found jurisdiction is intended to provide security for a judgment which might result from the action. The failure of such action through a successful exception being taken thereto renders the continued attachment of property meaningless and the order of attachment was therefore uplifted.

Held, further, that as the ex-husband had not disclosed all the facts relating to his financial circumstances he could not show "good cause" why the existing maintenance order should be varied. He could not take refuge behind Exchange Control restrictions where it appeared on the facts that assets existed outside Zimbabwe which could be used to meet the maintenance required.

Cases cited:

Strime v Strime 1983 (4) SA 850 (C)

Sayprint Textiles & Anor v Girdlestone 1983 (2) ZLR 322 (HC); 1984 (2) SA 572 (ZH)

Bell v Bell 1908 TS 887

Meyer v Meyer 1948 (1) SA 484 (T)

Sandell & Ors v Jacob & Anor 1970 (4) SA 630 (SWA)

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SCOTT J

Shatterprufe Safety Glass (Pty) Ltd v Northern Hardware & Glass (Pty) Ltd 1983 (4) SA 26 (T)

Williams v Carrick 1938 TPD 147

Bocian v Bocian 1921 SWA 17

Slade v Slade (1884) 4 EDC 243

Hawkins v Hawkins (1908) 25 SC 784

Bold v Bold 1934 NPD 278

Treger v Treger & Anor 1977 (1) RLR 165;

Russell v Broughton 1955 (2) SA 229 (W)

Ex parte Mor-Tal Construction Co (Pvt) Ltd 1962 R&N 248 (SR);1962 (2) SA 664 (R)

Ex parte Mecer 1969 (1) RLR 117 (GD); 1969 (2) SA 207 (R)

Carroll v Carroll 1978 (4) SA 714 (W)

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

Levin v Levin 1984 (2) SA 298 (C)

Peart v Peart S-50-82 (unreported)

Fluxman v Fluxman 1958 (4) SA 409 (W)

M T O'Meara for plaintiff in HC-3196-84 and respondent in HC-1108-85

A N H Eastwood for the recipient in HC-3196-84 and applicant in HC-1108-85

Judgment

Scott J: Unless specifically stated otherwise, reference to annexures will be those attached to Mr Parker's founding affidavit in case No HC 1108-85 and the parties will be referred to by name.

Peter Parker and Mary Ann Parker were divorced in January 1983. Incorporated in the divorce order was a consent paper (annexure B) entered into by the parties, in terms of which Mr Parker was to pay Mrs Parker monthly maintenance in the sum of $800, and a grant of a usufruct to Mrs Parker, until her death or remarriage, over Mr Parker's Samora Machel house (henceforth to be referred to as "the Samora Machel property"). Prior to the divorce order Mr Parker emigrated from Zimbabwe and now lives on his boat in Majorca. Soon after the divorce Mrs Parker also emigrated, to South Africa where she currently resides. Maintenance payments for January to April 1983 were effected into Mrs Parkers' CABS account. After Mrs Parker's departure to South Africa, a Mr Hare, an accountant who was handling Mr Parker's affairs in Zimbabwe, sought, but - save for monthly remittances of $250 - failed to obtain, Reserve Bank

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permission for Mrs Parker's alimony payments to be remitted to her in South Africa (annexures, pp 12-24. So also were Mr Hare's efforts for permission to remit rents accruing from the Samora Machel

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property, which Mrs Parker had let, frustrated (annexure pp 21 and 22). Payments for March and April 1983 were returned to Mr Parker's remitting bank, I believe because both parties being by then non-residents, the Exchange Control authorities were not agreeable to alimony payments being effected from Mr Parker's blocked funds (annexure page 15).

In November 1983 Mr Hare convened a meeting with the parties in Harare. A fresh agreement intended to overcome the problem was drawn up (annexure pp 25 and 26). It contained an agreement that Mr Parker would pay Mrs Parker one-fifth of whatever income he was able to remit from Zimbabwe. Mr Parker was expecting to remit at the time $15 000 annually from interest accruing to him from W G B Kinsey & Co (Pvt) Ltd, a firm to whom he sold his shares in his company, Clearway Plant & Hire (Pvt) Ltd From January to March 1984, Kinseys defaulted with their payments and in April 1984 a general suspension of remittances of income to non-residents was imposed by the Government of Zimbabwe and remains in force. The requisites for the payments to Mrs Parker could consequently not be met.

In Mrs Parker's estimation, by October 1984 Mr Parker owed her arrears of maintenance in the sum of $18 400 and so petitioned this court in Case No 2933/84 and obtained leave to sue Mr Parker by edictal citation for the recovery of that amount and further obtained an order to attach Mr Parker's property, 149A Rhodesville Avenue (to be referred to as "the Rhodesville property"), to confirm jurisdiction.

Thereafter she issued her intendit in November 1984 in suit No 3194/84, praying for judgment in the sum of $18 400 "or in such sum as this Honourable Court may find as due and owing at the time of the hearing"; interest *a tempore morae* and costs of suit. By his notice Mr Parker excepts to Mrs Parker's intendit on the ground that as a matter of law she may not institute an action for the same relief which has already been ordered by this court.

Six months later, in April this year, Mr Parker filed a notice of motion, HC 1108/85, with a prayer for two separate forms of relief: an order to set aside the attachment on the Rhodesville property and a variation of the maintenance order.

Through the Chamber Book Mr Parker's legal practitioners applied to SANDURA JP for directions that Mr Parker's exception pleaded in Case No HC 3196/84 and his application in Case No HC 1108/85 might be heard together

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on the same occasion. After reading the documents filed of record, the Judge President

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ordered as prayed, and the two matters were set down for hearing on 4 July 1985.

At the hearing, Mr *O'Meara,* for Mrs Parker, raised certain preliminary objections. Prior to making the application for directions, he argued, leave should have been sought to make it in terms of O 23 R 151(1) of the High Court of Zimbabwe Rules, 1971, and further that Mrs Parker's legal practitioners were not advised that the application was going to be made as required by R 151(2). The Rules referred to are that:

> 151.(1) In any action after pleadings are closed, or by leave of a judge after appearance has been entered, either party may make application for directions in respect to any interlocutory matter on which a decision may be required. Such application shall be heard before a judge in chambers.
>
> (2) Six clear days' notice shall be given of the application to the opposite party.

Dealing first with the exception, Mr *O'Meara* submitted that pleadings at the stage of making the application were not closed, neither was the application for directions made in respect of an interlocutory matter on which a decision was required in terms of R 151(1) to warrant granting the application. His further argument was that in accordance with R 138(a) when an exception has been filed the parties may consent within twelve days to have it set down for hearing. Failing such consent, R 138(b) is clear that either party may apply to the court or a judge within four further days for directions as to set down for hearing. Paragraph (c) of Rule 138, he went on, gives yet a further four days within which the party excepting-failing such consent and such application as referred to in paras (a) and (b) - shall plead over to the merits if he has not already done so, and the exception shall not be set down for hearing before the trial. Notice of the exception was filed on 10 April 198. Therefore, Mr *O'Meara* continued in his argument, sixteen days from then fell on 2 May as the last day on which the application for directions could have been made in terms of R 138 and not on 18 June as was the case. The application was therefore out of time. Further, having pleaded over on Mr Parker's behalf, his legal practitioner's application to have the exception set down for hearing was contrary to the mandatory wording of para (c), which is that the exception "shall not be set down for hearing before the trial" in such circumstances. The court, he said, "has an inherent power to control its own process subject to the Rules of Court " - *Strime v Strime* 1983 (4) SA 850

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(C) at 582A. In the circumstances, the court, he said, is faced with peremptory directions, and it was not open to Mr Parker's counsel, Mr *Eastwood,* to argue the exception.

The two matters over which Mr Parker's legal practitioners sought directions involve the same parties, represented by the same legal practitioners. Upon the making of the application, the learned Judge President no doubt realized that there would be a saving in costs, that it would be expeditious, and convenient for all concerned if he directed that the two matters be heard together.

Mrs Parker, through her counsel, is now asking me to take a decision sitting as an appeal court on an order made by this court.

SQUIRES J, when faced with a similar situation in 1983 (2) ZLR 322 (HC); 1984 (2) SA 572

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(ZH) referred to *Bell v Bell* 1908 TS 887, *Meyer v Meyer* 1948 (1) SA 484 (T) and to *Sandell & Ors v Jacobs & Anor* 1970 (4) SA 630 (SWA), where variations of the court's order were allowed. But he said at 326C-D (575G of the South African report) that:

> . . . in all three the common denominator seems to be that the variation touched on an incidental question, usually-but not invariably-of procedure, the variation of which would have no effect on the final judgment.

It is the contention of Mr *O'Meara* that the order made by the Judge President was an incidental order, which therefore can be interfered with. In *Bell's* case, *supra,* INNES CJ at 894 said:

> Courts will not lightly vary their own orders ... And the cases in which such orders will be altered in the absence of fresh facts cannot be numerous.

To my mind the order to hear the two matters together was not an incidental order. It was a specific procedural order, which, if Mr *O'Meara* thinks was not in accordance with the rules, then as Squires J said at 327B (576D in the South African report) in the *Sayprint* case:

> . . . it is surprising that they did not appeal and have the order reduced in impact accordingly.

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The whole thrust of the reasons advanced by Mr *O'Meara* seems to point to an assertion that in his view the order was wrongly made. That being the case, - his submission will be better served on appeal. As a judge of the High Court, it is not up to me to vary or alter an order of a judge of parallel jurisdiction, short of expanding on it. The point raised that Mr Parker's legal practitioner's application for directions should not have been made, and having been made, should not have been granted, therefore falls away. The proper forum for that submission is a higher court.

Mr *O'Meara's* next attack was the aspect of jurisdiction. Elsewhere in this judgment I have made mention of the attachment made in suit No 2933/84 to found jurisdiction and the leave granted for Mrs Parker to sue Mr Parker by edictal citation. Consequently, Mr Parker's Rhodesville property was attached by Mrs Parker. Mr Parker's combined prayer in Case No 1108/85 is that the attachment may be uplifted and calls for a variation of the maintenance order as well. If I understand the submissions made by Mr *O'Meara* in relation to this application, it seems to me that what he is saying is that he has no quarrel with the making of the application for uplifting the attachment because the attachment was made to found jurisdiction resulting from which Mr Parker has instituted the present proceedings. But if my memory and understanding serve me right, I believe, at the tail end of his arguments, it was Mr *O'Meara's* submission, that personal service of the application for uplifting the attachment as well as the relief for variation should have, with leave, been served within the spirit of R 44(1) and (2) by edictal citation on Mrs Parker outside Zimbabwe in South Africa, where she has taken up residence. Further, that such should have been done as separate processes and not conjoined as one process as has been done by Mr Parker. In other words, jurisdiction is challenged in the relief sought. So also the exception in Case No 3196/84, which in his considered view is a new action despite the fact that the court may have jurisdiction because its order for attachment was served on Mr Parker to found jurisdiction. Notwithstanding that, failure on Mr Parker's part to comply with the Rules is non-confirmation of jurisdiction in terms of s 15 of the High Court of Zimbabwe Act, 1981 (No.

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29 of 1981). *Shatterprufe Safety Glass (Pty) Ltd v Northern Hardware & Glass (Pty) Ltd* 1983 (4) SA 26 (T) at 29B lends force to the submissions made that Rules of Court are made to be complied with and not to be "recklessly or intentionally is regarded . . .". True that Mr Parker's notice of motion was a fresh action in HC 1108/85. But as well as his notice of exception in HC 3196/84, the relief sought in the motion paper is linked with Mrs Parker's action for attachment in HC 2933/84 and, in particular, the exception is consequent to her intendit in Case No HC 3196/84. The motion

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paper was served on Mrs Parker's legal practitioners of record. They accepted service on her behalf and clearly made contact with Mrs Parker either in Zimbabwe or in South Africa for her information and her instructions, for they declared her intention to oppose the relief sought. As a follow up, she filed a replying affidavit of which she is the signatory. Albeit in her para 1 she makes it clear she does not submit to the jurisdiction of the court to hear Mr Parker's application in her para 2(c), the protests end there. She proceeds to tender a reply to every averment contained in Mr Parker's founding affidavit without any indication on her part that she was impoperly served. Whatever be Mr Parker's legal practitioner's disregard of the Rules of Court, Mrs Parker has condoned their non-compliance in filing a replying affidavit. By virtue of this the court is therefore clearly seized with the matter. Like Mr *Eastwood,* I, too, think that she has clearly entered the arena of the merits of the dispute and cannot be seen to resort to technicalities to her advantage.

With regard to the objection raised for bringing the variation application in conjunction with the uplifting application, no persuasive force of arguments was canvassed to compel me to rule that Mr *O'Meara's* challenge against the propriety of joining the two applications is well conceived. It is convenient to conjoin them, thereby effecting a saving of costs and time and avoiding a duplication of litigation. The two are part and parcel of a chain linked to the same parties. They arise from the same source of action, they concern the same issue as conceded to in para 2(b) of Mrs Parker's replying affidavit, and can conveniently be instituted together.

Likewise is the exception linked to Mrs Parker's intendit. It seems to me superfluous that it should be looked upon as a new action necessitating leave and service outside the country by edictal citation. It results and flows from Mrs Parker's intendit and it would appear that R 39 recognizes service on attorneys of record as service on the party - as was the case with the exception where service was effected on Mrs Parker's attorneys of record.

In view of Mrs Parker's main intendit action with which the court is already seized, and jurisdiction having been founded by attaching property of Mr Parker, the two parties are for all intents and purposes before the court. Service of the notice of exception on Mrs Parker's legal practitioners, seems to me therefore to constitute proper service on her. Here, too, the legal practitioners raised no objection to service being effected on them on 10 April; they accepted service, never at any time before the hearing on 4 July raising any protests with Mrs Parker's legal practitioners nor raising any

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suggestion that personal service in South Africa should have been the proper procedure.

The only ruling I can come to in view of the foregoing, is that the objections raised are without merit and must be dismissed accordingly.

In consequence the court will proceed to consider the exception in HC 3196/84 and the relief sought in HC 1108/85.

Instead of pleading to the merits, a party may except to the pleadings - R 137(b). Such is the approach preferred by Mr Parker to the merits of Mrs Parker's intendit. In the notice of exception Mr Parker questions the propriety of the judgment sought by Mrs Parker. As there is a court order for payment of maintenance which may be enforceable by processes other than those adopted by Mrs Parker, should not her claim for judgment be dismissed? That seems to me the stance taken by Mr Parker. In essence he is saying a maintenance order which is a judgment of this court is already in force which compels him to pay maintenance to his ex-wife. In similar circumstances it was the view of MILLIN J in *Williams v Carrick* 1938 TPD 147 at 158 that:

> . . . it is difficult to see how an action can be brought to enforce a payment already decreed by a judgment of the court.

In *Bocian v Bocian* 1921 SWA 17, GUTSCHE J, referring to *Slade v Slade* (1884) 4 EDC 243 and *Hawkins v Hawkins* (1908) 25 SC 784, did so to show that where the order is to pay maintenance, the procedure is to apply for committal for contempt. *Bold v Bold* 1934 NPD 278 decided subsequently that contempt proceedings do lie against a defaulter and that such orders are final judgments. MILLIN J in *Williams v Carrick, supra,* came to the conclusion at p 158 that the practice referred to by HATHORN J in *Bold v Bold,* supra:

> . . . can therefore be invoked as authority for the view that maintenance orders are final judgments for the payment of money . . .

It would seem then that resorting to an action is a disobedience of the existing order; for -

> No fresh action is competent because the matter has been determined by the judicial assessment of the obligation to pay . . .

(see p 150 of the *Williams v Carrick* case, *supra*.)

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If this were not so there would be no end to litigation. Of course, in all these cases the decision arrived at was on the basis of the defaulter's physical presence within the court's jurisdiction. Where the defaulter is outside the reach of the court's jurisdiction, as in this case, it would seem Mrs Parker would be on safer ground if she issued a writ of execution to enforce the already existing order in force. *Williams v Carrick, supra.* Admittedly, GOLDIN J varied an existing order

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in *Treger v Treger* 1977 (1) RLR 165 (GD) at 170; 1977 (2) SA 795 (R) at 798H when the question arose as to whether Mr Treger, who was separated from his wife and both parties had emigrated from Zimbabwe, was obliged to pay he maintenance *pendente lite* in currency other than Zimbabwe currency. GOLDIN J merely clarified the order by specifying that the order of the first instance could have referred to none other than Zimbabwe currency. He cannot be accused of having interfered with a "final order" or "final judgment". Because the variation affected a *pendente lite* order only - an interim order, a final order for maintenance was still a matter of future consideration by the court.

It may be asked what other information can Mrs Parker put before the court were she to resort to contempt or writ of execution proceedings which the court is not already seized with in her action for intendit. What more can she say that is not already said in her declaration? That may be so, but the intendit/declaration seeking judgment cannot by a wave of a magic wand convert the intendit into contempt or execution proceedings. What she is doing in the circumstances is asking the court to pass judgment in a matter in which the court has already done so in an order which stands until varied or discharged by a competent court. *Russell v Boughton* 1955 (2) SA 229 (W) - headnote. My considered view is that the exception is well grounded and must succeed. Consequently I am compelled to rule that Mrs Parker's intendit be dismissed.

Bearing in mind the court's finding, what should be the fate of Mr Parker's relief sought for the uplifting of the attachment order? Mr Parker does not dispute that arrears of maintenance are owed to Mrs Parker.

To found jurisdiction the court has a discretion within the language of s 15 of the High Court of Zimbabwe Act to permit or direct the issue of process for service outside Zimbabwe without ordering attachment of the property of the person sought to be sued. Authority for this may be found in *Ex parte Mor - Tal Construction Co (Pvt) Ltd* 1962 R & N 248 (SR) at 249; 1962 (2) SA 664 (SR) at 665 and *Ex parte Mercer* 1969 (1) RLR 117 (GD); 1969(2) SA 207 (R), both cases decided by BEADLE CJ, who, at 208F in the latter case, said that the court does have a discretion to order or refuse attachment.

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Examples of the type of cases in which an order for attachment have been made are:

> . . . cases where the property which is sought to be attached is property which is the subject of the very dispute in question, or cases where it is quite clear that the only property which the respondent has within the jurisdiction is the property which is sought to be attached and there is a danger that, if it is not attached, he will make away with that property and then the court's judgment would possibly be a *brutum fulmen.*

(See 249F-G (665D-E of the South African report) of the *Ex parte Mor - Tal* case).

It is important in deciding whether the court in the exercise of its discretion can equitably order an attachment of property. Wherefore BEADLE CJ continues at 665G to say:

> Obviously if the property sought to be attached greatly exceeds the value of the claim, that would be a factor to be taken into account in refusing an attachment.

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Admittedly these two cases were decided on repealed High Court Acts but the meaning and intentions of the repealed sections are as elaborated on in s 15 of the present Act.

In the instant case, the property attached is not the subject matter of the dispute between the parties, it is not the only property owned by Mr Parker in Zimbabwe - he owns as well the Samora Machel property on which Mrs Parker has a usufruct and the property attached is on the market for $60 000, which greatly exceeds the value of Mrs Parker's claim.

Putting aside all this, the property was attached to found jurisdiction and to hold as security for any judgment which Mrs Parker stood to obtain in her intendit. With that action dismissed, the attachment must necessarily fall away. She has no further reason to hold on to the attachment. Mr Parker's application for uplifting the attachment is accordingly granted as prayed.

I shall now consider whether, as sought by Mr Parker, the maintenance order should be varied. His reasons for non-compliance with payments specified in the consent paper (annexure B, p 8) or the November 1983 agreement (annexure L, p 25) appear to be threefold. Resulting from Kinsey's default

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to pay interest accruing and due to him, he was incapacitated from fulfilling his obligations towards his ex-wife as agreed in the consent paper. So also was compliance under the November 1983 agreement frustrated in view of government policy to suspend remittances of all funds arising from incomes to non-residents. Lastly, compliance was again frustrated by the dictate of government policy which disallows payments from one blocked account of a non-resident to the blocked account of another non-resident; and what funds are in his blocked account are earmarked to meet income tax liability in excess of the $12 000 in the account. What he is saying is that even without these restrictions, the source of his funds in Zimbabwe was severed by Kinsey's default. Annually, the net rental yield on the Rhodesville property is $310 and the bond repayment on same is $3 108; the property therefore does not generate any income which may be contributed towards the maintenance payments owed to Mrs Parker. But, he says, Mrs Parker is not entirely without funds. Monthly rental income accruing on the Samora Machel property is $350, far in excess of the monthly remittance of $250 she is allowed by the Reserve Bank to send out of the country. Interest has been shown by the present occupant of the Rhodesville property to purchase it for $60 000, but the sale could not proceed because of the attachment. Should the attachment be lifted to allow the conduct of the sale to proceed. Mr Parker says, he will make available to Mrs Parker $10 000 of the proceeds, and accordingly seeks a variation of the consent paper in those terms.

One wonders if Mr Parker is not conveniently seeking refuge in the Exchange Control and other regulations in operation in the country to escape from his responsibility. Surely it cannot be:

> . . . the intention of the Exchange Control Regulations to assist such a person from evading this duty.

Carroll v Carroll 1978 (4) SA 714 (W) at 715F.

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Nor are the regulations meant:

> . . . to grant a moratorium to a particular class of defaulting debtors.

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

I find it difficult to accept that the $12 000 committed to income tax payment and the Rhodesville property are all the assets Mr Parker has to his name - and the Samora Machel property, of course. He has taken up residence in

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SCOTT J

Majorca; he makes holiday trips to Zimbabwe almost annually; at the age of, 57, though he is said to be healthy and fit, he is not gainfully employed - presumably because he does not need to work - and he successfully remitted $15 000 in 1983. I would be inclined to agree with Mr *O'Meara* that somehow, somewhere, there is money stashed away undisclosed to the court, and would further agree with him that it does seem to be the case that Mr Parker has not been honest with this court. His lifestyle supports Mrs Parker's contention that he has substantial means elsewhere. For Mr Parker to succeed with the relief he prays the court to grant, he must give the court the basis upon which the court can assess his inability to pay maintenance in terms of the consent paper. On good cause show the court may vary, rescind or suspend a maintenance order in terms of s 9 of the Matrimonial Causes Act [*Chapter 39*] (see subs (5)). In this regard Mr Parker refers to his change of circumstances *vis-à-vis* Kinseys, which he says has affected his ability to pay. It is true that the parties contemplated, in p 9 of the consent paper, fluctuations in the rate of interest due to Mr Parker from Kinseys, but they also agreed on a proviso in para 2.3 that Mrs Parker "shall at all times receive a minimum amount in respect of maintenance of $800 per month." It is on this basis that Mrs Parker is saying,"You owe me arrears calculated on a monthly basis in that sum", and not on the November 1983 agreement which must now be shelved because of impediments which make it unworkable. It cannot be said that she bargained away her rights under the consent paper nor that she obliged herself under the 1983 agreement to forego the consent paper to rely on any out-of-court agreement.

> Each agreement between the parties in terms whereby applicant's maintenance was increased was no more than a tacit undertaking on her part not to have resort at that particular time to expensive litigation and to take, for the time being, an increase in maintenance in an amount less than that called for by her. No waiver, nor estoppel, nor novation properly so called is involved here . . .

Levin v Levin 1984 (2) SA 298 (C) at 302H.

The agreement of November 1983 carried with it no renunciation of Mrs Parker's rights under the consent paper just as it has not debarred Mr Parker from coming to court to pray for a variation of the consent paper. The consent order, which is a court order, takes precedence over any out-of-court agreements.

Accepting that he has no funds in Zimbabwe because the Kinseys

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SCOTT J

arrangement fell through, Mrs Parker has deposed in her replying affidavit in paragraph 8 that Mr Parker has -

1. shares in Industrial Furness Funds (Pty) Ltd, Sandton, South Africa;

2. approximately £100 000 invested in Switzerland;

3. further assets (identity and value unknown) in England; and in his boat in Majorca.

In the answering affidavit deposed to on his behalf by Mr Hare, the latter in his paragraph 17 states that, save that Mr Parker "owns the boat on which he lives, which is a small boat", he has no knowledge of any of the assets referred to by Mrs Parker. If Mrs Parker's contention is correct, then Mr Parker's founding affidavit is misleading and Mr Hare's answering affidavit does not attempt to rectify the position.

To persuade the court that these assets only exist in the imagination of Mrs Parker, Mr Parker would have been well advised to depose to the answering affidavit himself, denying the existence of those assets. Not having done so, he leaves the court with no alterative but to believe Mrs Parker when she says the said assets do exist, in particular as Mr Parker's lifestyle seems to suggest that she may be right that there are assets other than have been put before the court. It seems to me Mr Parker wants to select the most convenient way to avoid his full responsibility to Mrs Parker by seeking the present relief. In *Peart v Peart* S-50-82 (unreported), p 4, it was there held that capital resources must be taken into account when assessing means. If Mr Parker's only means by which he can pay maintenance to Mrs Parker are outside the country, then it is up to him to show how Mrs Parker's maintenance payments are met. In so saying, I am not unmindful of what was said in the *Treger* case at 168D-G (797 of the South African report) that the order of the court for payment being expressed in Zimbabwe currency, payment must be made in local currency. The currency mentioned in the order relates to Zimbabwe currency, but whether Mr Parker pays it out of capital or income from any other source is a matter entirely up to him. He cannot be seen to be enjoying the luxury of a yacht and jet-setting between Spain, England and Zimbabwe, while Mrs Parker lives on the charity of her mother.

On all the facts the court is quite unpersuaded that he lacks the means to pay the full maintenance ordered. He has thereby failed to show "good cause" why the order should be varied. His application consequently falls away. *Fluxman v Fluxman* 1958 (4) SA 409 (W). The order therefore stands as made in January 1983.

SCOTT J

In all the circumstances I make the following order:

1. In Case No 3196/84 Mr Parker's exception succeeds and Mrs Parker's intendit is dismissed with costs.

2. In Case No 1108/85 Mr Parker's prayer for the uplifting of the attachment succeeds. The attachment on the property 149A Rhodesville Avenue, Greendale, is accordingly set aside as prayed. However, his prayer

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for variation of the maintenance order fails and is dismissed with costs.

Coghlan, Welsh & Guest, legal practitioners for Mrs Parker

Kantor & Immerman, legal practitioners for Mr Parker

S v MUTUME 1985 (2) ZLR 94 (HC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Gubbay and McNally JJA

Criminal Appeal

5 and 22 July 1985

Flynote

Criminal Procedure - sentence - rape - death sentence - sentence of imprisonment commensurate with those imposed for murder seldom appropriate - rape on appellant's 15 year old daughter - very old convictions - weight to be given.

Headnote

It is only on very rare occasions indeed, and for the most serious offences, that rape will attract the death sentence. A sentence of imprisonment commensurate with that imposed for a murder will seldom be appropriate for a rape. It is a well-established practice of the courts not to give weight to convictions which are of many years' standing.

Cases cited:

S v Arabi AD-197-76 (unreported)

S v Dickson 1978 RLR 19 (AD)

S v M 1976 (3) SA 644 (AD)

R v Nqulunga 1960 (4) SA 609 (AD)

A P Thompson for the appellant

F S Chambkare for the respondent

Judgment

McNally JA: The appellant was charged before the High Court on circuit at Masvingo with the crime of rape. It was alleged that in December 1983 he raped his fifteen year old daughter.

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McNally JA

At the trial he denied his guilt but his version of events was not believed and he was convicted and sentenced to fifteen years' imprisonment with labour. His appeal is against sentence only.

In sentencing the appellant the learned trial judge remarked on the fact that the death penalty was a competent sentence for rape, and spoke properly of the violence both to the body and to the personality of the victim, and the humiliation and lasting terror which many victims suffer. He referred to the fact that the victim in this case was not only the appellant's daughter and a mere fifteen years old, but also immature for her age and a virgin at the time of the attack. Moreover he had a previous rape conviction some fourteen years previously, for which he had been sentenced to three-and-a-half years' imprisonment.

It is, of course, true that the law permits the imposition of the death sentence for rape. But, as pointed out by BEADLE ACJ (as he then was) in *Arabi v S* AD- 197-76 (not reported):

> It is accepted . . . that it is only in the most serious cases of rape that a sentence of death for this offence is imposed. Indeed, if our criminal records are examined, it will be seen that it is only on very rare occasions indeed that the death sentence is imposed for this offence.

He went on, however, to say that on the facts of the case before him he could not say the learned judge had misdirected himself. The appellant had a recent previous conviction for rape, and he broke into a house and raped the complainant twice. The death sentence was confirmed.

In *S v Dickson* 1978 RLR 19 (AD) a housebreaker raped a woman of 75 who was in her own house at night. He was sentenced to twelve years' imprisonment with labour and six strokes. The appeal was only against the imposition of strokes and it failed, the court being divided two to one on the issue.

Our attention was also drawn to the decision of *S v M* 1976 (3) SA 644 (AD) where also the death sentence had been imposed and upheld on appeal. Here again the circumstances were exceptional. An employee aged 23 had attacked his employer's wife, aged 50, very severely with a knife and stones, rendering her briefly unconscious, raped her, tied her hands with wire, dragged her across rough ground, robbed her and left her seriously injured and pouring blood.

McNALLY JA

I have no doubt that the learned judge was right to take a serious view of the present case. I do not like to speak of "ordinary" rapes, and I do not intend by using that term to diminish in any way the repugnance with which the courts regard the crime. But it must be said that in the ordinary way these offenders come before Regional Magistrates and are sentenced to between three and five years' imprisonment. I accept that this is a case which warrants a more severe sentence. I cannot accept that fifteen years, which even for murder with extenuating circumstances is a relatively severe sentence, is anywhere near appropriate.

As far as the previous conviction is concerned, it is true that s 305(4) of the Criminal Procedure and Evidence Act provides that if such a previous conviction is lawfully proved "the court shall

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take it into consideration in awarding sentence". On the other hand it is well established practice of the courts not to give weight to convictions which are of many years' standing, although our law does not contain a provision, such as was once contained in the Fifth Schedule to the South African Act, ruling out of consideration convictions of more than ten years standing - see *R v Nqulunga* 1960 (4) SA 609 (AD) at 612D-F.

It was not therefore a misdirection for the learned judge to have referred to the fourteen year old previous conviction. But it should have had very little if any effect on the sentence imposed for the present offence.

Taking into account the age of the complainant and the incestuous aspect of the offence, I am of the opinion that a sentence of eight years' imprisonment with labour would meet the case. I consider further that it would be appropriate to suspend two years of that sentence so as to provide an incentive to reform. Accordingly I would set aside the sentence of the High Court and substitute for it a sentence of eight years' imprisonment with labour, of which two years are suspended for three years on condition that the appellant is not convicted of a sexual offence involving a female, committed during that period, for which he is sentenced to imprisonment without the option of a fine. The appeal is allowed to that extent.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Pro deo

BARR v ATTORNEY-GENERAL 1985 (2) ZLR 97 (HC)

Court **High Court, Harare**

Annotations Link to Case Annotations

Smith J

Civil Application

30 May and 24 July 1985

Flynote

Road Traffic Act, 1976 (No 48 of 1976) - s 56(10) - application for prohibition from driving to be set aside - procedure.

Headnote

In making an application to set aside an order prohibiting a person from driving for life the correct procedure is to make application on notice of motion to the High Court. Whilst the Act is silent on the point, the only person qualified to act in the interests of the State is the Attorney-

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General, upon whom the notice of motion should be served and who is thereafter best able to assist the court in determining the application.

A Ebrahim for the applicant

E Chatikobo for the respondent

Judgment

Smith J: On 8 May 1973 the applicant was convicted of contravening s 219(1) of the Roads and Road Traffic Act [*Chapter 289 of 1963*] - ie driving whilst under the influence of alcohol. He was fined $100 and disqualified from driving for life. A period of ten years having elapsed from the date of the disqualification or prohibition from driving, he has now applied in terms of subs (10) of s 56 of the Road Traffic Act, 1976 (No. 48 of 1976) for the prohibition to be set aside. The applicant has not been prohibited from driving in terms of s 53 or 54(1)(b) of the Road Traffic Act, 1976, which would have precluded him from applying for the prohibition to be set aside. The applicant attached various documents to his affidavit. There was a letter from the Officer Commanding, Criminal Investigation Department, accompanying the record of previous convictions of the applicant. His

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record showed that the applicant had been convicted of offences involving driving whilst under the influence of alcohol on three occasions, namely 28 March 1963, 7 May 1964 and 8 May 1973, and of offences involving being drunk in a public place on six occasions during the period from 16 June 1965 to 2 May 1974. There was a medical certificate issued on 14 May 1984 certifying that the applicant was fit to drive a motor vehicle. There was a letter dated 5 December 1983 from a parish priest, a letter dated 10 May 1983 from the Municipal Parking Superintendent under whom the applicant was working at the time, and a letter dated 22 February 1982 from the Director of Alcoholics Anonymous. All these letters were to the effect that the applicant had settled down, was happily married and had been in regular employment with the Municipality for just over three and a half years, and that he had apparently ceased to drink alcoholic beverages. The applicant averred that he had given up drinking alcoholic beverages and totally abstained. He was an active member of Alcoholics Anonymous whilst he was living in Harare but as there was no branch of that organization in Kadoma he could not attend meetings or play an active part since he had moved to Kadoma.

The application was brought on notice of motion proceedings and the Attorney-General was cited as respondent. The Attorney-General lodged an opposing affidavit submitting that he did not have *locus standi* in the matter and that, if the procedure adopted were the correct one, then the Registrar of Road Traffic Licences should have been cited as respondent since he would be the person who would have to comply with or implement any order granted by the court. He accepted that he was entitled to receive notice of any application in terms of s 56(10) of the Road Traffic Act, 1976, but said that the order should not be sought against himself. The Attorney-General accepted that he should receive notice of such applications so that he could report to the court on any information he had which might assist the court but should not be a

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party to the proceedings. In a letter dated 24 May 1985, addressed to the applicant's legal practitioners, he commented on the evidence adduced by the applicant in support of his application and concluded that it fell short of discharging the *onus* on the applicant to convince the court of his fitness to drive.

Section 91(6) of the Roads and Road Traffic Act [*Chapter 263*] - which was the provision equivalent to s 56(10) of the Road Traffic Act, 1976, and was repealed by the latter Act - provided that a person who had been disqualified in terms of that section from driving could, after the expiration of ten years, apply to the General Division on notice of motion for the removal of the

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disqualification. Section 56 (10) of the Road Traffic Act, 1976, provides that a person who has been prohibited from driving during his lifetime may apply to the High Court for the prohibition to be set aside, without specifying what form the application should take. Ordinarily, when a provision in any enactment is repealed and replaced and the wording in the substituted provision differs from that in the provision it replaces, by omitting certain words, for example, there is a presumption that the Legislature, by omitting the words concerned, intended to effect an alteration to the position that previously pertained. In this case, however, I do not think that that presumption is applicable. The Legislature omitted the words "by notice of motion" from the provision as substituted but has not indicated what procedure should be followed in such application. I accept Mr *Ebrahim's* submission that such applications should not be made *ex parte.* If such applications are made by notice of motion, on whom should the notice be served? Clearly, the State has an interest as to whether or not a person such as the applicant should be permitted to drive again. I do not think that any member of the public could have a specific interest in the matter. If the notice is to be served on the State, who is the appropriate authority? I do not think that it could be the Registrar of Road Traffic Licences since his functions are limited to issuing, endorsing and cancelling licences in accordance with the Act and regulations. If this court sets aside the prohibition from driving, the applicant is not automatically entitled to demand that a driver's licence e issued to him. He would have to apply for one in terms of the Act and comply with the requirements of the Act.

The prohibition from driving in cases such as the present one flows from the conviction of the applicant for an offence. Section 56(4) of the Road Traffic Act, 1976, specifically provides that a prohibition from driving shall be deemed to be part of the sentence passed on the person convicted. In terms of s 76(4) of the Constitution and s 9 of the Criminal Procedure and Evidence Act [*Chapter 59*] all powers and functions relating to the instituting and undertaking of criminal proceedings before any court and the prosecution of offences are vested in the Attorney-General. Accordingly, it seems to me that in applications under s 56(10) of the Road Traffic Act, 1976, the Attorney-General is the most appropriate authority on whom the notice should be served. Clearly, he would be best able to assist the court in determining the application.

I agree with the submission by Mr *Chatikobo* that this places the Attorney-General in a somewhat invidious position since there is no indication in the Act as to what is expected of

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him, and what his functions and powers are in

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relation to these applications. Since, in terms of s 72 of the Road Traffic Act, 1976, the appropriate Minister has wide regulatory powers, I would recommend that consideration be given to the making of regulations dealing with applications in terms of s 56(10) of that Act. They could deal with the method of making such applications, the service of notice, the functions of the Attorney-General and whether or not he should be able to call for reports, the publication of advertisements regarding the application and whatever else may be regarded as necessary or convenient.

As regards the merits of the application, Mr *Ebrahim* has submitted that the letters attached to the applicant's affidavit clearly establish that the applicant has reformed. He pointed out that the medical report issued in May 1984 was issued for the purposes of an application by the applicant in terms of s 56(1c) of the Road Traffic Act, 1976, for an order that the prohibition from driving shall not extend to motor cycles. As a result of that the applicant has in fact had a driver's licence authorizing him to drive motor-cycles since 1984 and he has not been convicted of any offence relating to the driving of a motor-cycle thereafter. Mr *Chatikobo,* on the other hand, has submitted that the applicant has not discharged the *onus* that rests on him since the evidence of good character and sober habits is not recent. I agree with Mr *Chatikobo* on this issue. If the applicant has continued to abstain from taking alcohol he should be able to obtain more recent and up-to-date testimony. Had the letters submitted by the applicant been more recent, I consider that he would have discharged the *onus* that rests on him.

Accordingly, I will postpone this matter in order to enable the applicant to file more recent testimony as to his good character and sober habits. In order to save the applicant incurring additional costs associated with court appearance, the further evidence may be submitted through the Chamber Book, and, if I am satisfied as to the sufficiency of the further evidence, an order setting aside the prohibition will be made. If, however, the applicant so wishes, the further evidence may be submitted on notice of motion proceedings.

A Ebrahim, legal practitioner for the applicant

Attorney-General, legal practitioner for the respondent

S v DHLIWAYO & ANOR 1985 (2) ZLR 101 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Dumbutshena CJ and Beck and Gubbay JJA

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Criminal Appeal

26 March and 26 July 1985

Flynote

Evidence - extra - curial statements - challenge - accused's evidence unsatisfactory - need remains to assess admissibility in the light of objective factors indicating possibility of police misconduct - confirmation - no attempt by police to obtain confirmation - weight to be given - identification - it is not sufficient that the identifying witness be credible, it is necessary in addition that the circumstances under which the accused was observed were conducive to satisfactory identification.

Headnote

Where an extra-curial statement remains unconfirmed, the court should not admit it purely on the basis of the unsatisfactory nature of the appellant's evidence. It is necessary to examine exhaustively the objective facts, including any unsatisfactory features of police evidence, with a view to determining whether some undisclosed occurrence may possibly have been calculated to influence the appellant in making a statement. The fact that no attempt has been made to obtain confirmation of the statement is one of the factors to be taken into account.

Where an identifying witness has been shown to be careful and truthful, it is not always necessary for the witness to be asked to give details of every feature by which he identified the accused. Evidence of identification, however, must be treated with some caution and the reliability of the witness's evidence must be tested against the cumulative weight of such factors as lighting, visibility and eyesight, his proximity to the accused, his opportunity for observation, the extent of his prior knowledge of the accused, the accused's features and appearance, the result of any

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identification parade and the accused's evidence (*S v Mthetwa* 1972 (3) SA 766 (AD) followed).

Cases cited:

R v Shekelele & Anor 1953 (1) SA 636 (T)

S v Mthetwa 1972 (3) SA 766 (A)

R v Nhleko 1960 (4) SA 712 (A)

S v Mpetha & Ors (2) 1983 (1) SA 576 (C)

S v Dhlamini & Anor 1971 (1) SA 807 (A)

R v Hackwell & Ors 1965 RLR 1 (AD)

S v Dlamini 1973 (1) SA 144 (A)

S v Chenisso 1983 (4) SA 912 (T)

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M J Gillespie for the first appellant

R M Fitches for the second appellant

F S Chambakare for the respondent

Judgment

Dumbutshena CJ: The two appellants were convicted by a judge and two assessors at a sitting of the High Court at the Mutare Circuit. The first appellant was convicted of two counts of armed robbery and three counts of murder without extenuation and was on each count sentenced to death. The second appellant was convicted of one count of armed robbery and two counts of murder without extenuation. He was sentenced to death on each on the three counts.

The appellants appeared at the trial together with two co-accused who have not appealed against their convictions and sentences because neither was sentenced to death.

The appellants were number one and two accused at the trial. The third accused was Tokozani Chiyungu and the fourth accused was Tennson Mavhika Chindenzwa. Tokozani Chiyungu was found guilty of two counts of armed robbery as a *socius* and two counts of murder with extenuation. He was sentenced to 16 years' imprisonment with labour on each count. Tennson Mavhika Chindenzwa was convicted of two counts of armed robbery as a *socius* and one count of murder with extenuation. He was sentenced to 14 years' imprisonment with labour on each count. Their sentences were ordered to run concurrently. The State withdrew one count of attempted murder and one count of housebreaking with intent to steal and theft. All the accused were found not guilty in respect to these two counts. Two further counts of arson and attempted murder were to be tried at a

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separate trial in terms of s 131(3) of the Criminal Procedure and Evidence Act [*Chapter 59*].

The two appellants are young men aged 23 years and 22 years respectively. They both reside at Manzire Village in the Chisumbanje Communal Lands, Chipinge.

In relation to the first count the State alleged that on or about 4 October 1981 the two appellants and their co-accused killed and murdered Irene Kashangura, who was an adult female living in Section 5, Middle Sabi, Chipinge. On the third count the State alleged that with force and violence they robbed Mr and Mrs Souchon of the sum of $62,00, two wristwatches and a black portable radio and used a firearm in the process. In the fourth count it was alleged that they murdered Laison Fukuzeya on or about 25 December 1981 at Mukwasine Business Centre, Chipinge. In the fifth count the State alleged that they killed and murdered Kenneth Musunungure at Daisy Hill Store, Chipinge and in the seventh count it was alleged that at or near Vutuza Bottle Store, Chipinge, they robbed Nelson Ndazawani of $400 being the total value of beer, wine and money taken by them. The appellants denied all the allegations made against them by the State, and having denied involvement in these crimes saw no reason why

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they should be represented by a legal practitioner. Mr Henning, who had been briefed to defend them, graciously accepted a watching brief.

When called upon to outline his defence, the first appellant said he knew nothing about the crimes charged because when they were committed he was not there. He did not say anything more. After his co-accused had outlined their defences, the first appellant changed his mind and stated his own defence which related in the main to allegations of assaults on him by the police.

In his defence outline the second appellant denied committing any of the offences because he was attending school. He denied possession of a firearm which the police alleged he had used in the commission of an offence. He also alleged that he had been taken to the bush and assaulted.

The two appellants complained to the magistrate about police assaults. The appellants said in evidence that they and their co-accused were subjected to water torture and were not given food for the whole week. When the police stopped torturing them they were kept in cells for six months. Then they were each taken by night to the office and asked to make statements. When they

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denied knowledge of any offence, they were assaulted. Afterwards they attended an identification parade. Both appellants said the identifying witness, Mrs Souchon, saw them through a window of a CID office going to the parade.

The State relied on the evidence of eye witnesses and on the statements made to the police by the appellants.

I now deal with count three where there is eye witness evidence.

On 19 August 1981 at about 10.30 pm Mr and Mrs Souchon and their two sons returned from the Middle Sabi Country Club to their house at No 38 Middle Sabi. Their daughter Georgina Jane who had been with the farm manager and his wife was already in bed in their cottage. After checking to see whether she was in bed, they put their sons Andrew Louis and Henry Lawrence to bed. They then retired to their own bedroom. At about midnight the light in their bedroom was switched on. Then a shot was fired and Mr Souchon fell on his back. Someone said he was going to kill them. Mrs Souchon fell over her husband. The man fired another shot. It hit her in the leg and the bullet lodged in her husband's back.

When Mrs Souchon looked up the man had disappeared. She heard someone talking in the children's bedroom. She said she called the man back to assist her because her husband had been severely injured. Henry and Georgina came into the parents' bedroom. The man followed them.

He demanded $1 000. She gave him a purse containing about $50. He said it was not enough. He then gave him her husband's purse containing about $10. He demanded watches. He was

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given her watch. He had already taken one of the children's watches. He then demanded guns. There were no guns to give him. He wanted a radio and took a portable Supersonic radio. Mrs Souchon estimated that the man had spent about half-an-hour with them.

She observed that the man was dressed in what appeared to her as an old Rhodesian camouflage uniform. He was also wearing an army type jersey with canvas elbows. She did not observe what shoes he was wearing on his feet. He carried what she thought was a small Tokarev pistol.

She described the man as of medium height and slim of build. Later on in Harare she saw a man in a restaurant who looked like him and told the CID that that was the sort of man they were looking for. She told the police that

that man in the restaurant was older than the man they were looking for.

Before I deal with the evidence of the identification I would in passing like to mention that Andrew Souchon who was an 18 year old student at the time of the trial and Henry Souchon, a 14 year old student - sons of the Souchons - could not remember the appearance of the second appellant and could not identify him at the trial.

Mrs Souchon was the only member of the family who attended the identification parade. She testified that on the day the identification parade was held she arrived at the police station and was "ushered into the member-in-charge's office where I sat while they set up the parade." She sat on a chair inside the office. Half an hour later she was asked to attend the identification parade held in an area on the outskirts of the police station about 500 metres from the member-in-charge's office which was on the far side of the westerly buildings of the police camp. She could not see the people on parade. She was "taken through the buildings on to the far side, behind a longish sort of building and I could see the member-in-charge under a tree and there was a line-up of twelve men who had their backs to me as I approached."

She was told the usual identification procedures by the member-in-charge. She turned round and faced the men for the first time. She said the moment she faced them she "knew exactly which man had been into our premises to shoot us". He was one of the men in the line-up. She told the court that she took her time because human life was at stake. She wanted to be sure of the man she would identify. She walked up the line and back and then she walked up a second time and when she returned she put her hand on the man she had recognised when she first faced the men on the parade. For what it is worth she pointed out the second appellant in court. When in cross-examination the second appellant asked her by what features she recognised him. she replied: "I recognised him by his facial - his eyes, his hairline, his general appearances, his mouth, his nose". She was not, however, asked what was peculiar about these feature which made her recognise him.

Mr Fitches, who appeared for the second appellant, contended that the identification of the second appellant by Mrs Souchon was "not sufficiently detailed to warrant a finding that he was the perpetrator" of the robbery because the identification "was interspersed with generalities and

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references to 'medium' 'average' height and that there were no distinguishing marks specifically identified by Mrs Souchon. In this regard Mr *Fitches* relied on what was said by DOWLING L, in *R v Shekelele & Anor* 1953 (1) SA 636 (T)

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at 638G-H:

> Questions of identification are always difficult. That is why such extreme care is always exercised in the holding of identification parades - to prevent the slightest hint reaching the witness of the identity of the suspect. An acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identifications. People often resemble each other. Strangers are sometimes mistaken for old acquaintances. In all cases that turn on identification the greatest care should be taken to test the evidence. Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to his height, build, complexion, what clothing he was wearing and so on should be put. A bald statement that the accused is the person who committed the crime is not enough. Such a statement unexplored, untested and uninvestigated, leaves the door wide open for the possibility of mistake.

It may appear unfortunate that the witness was not asked further questions on the peculiarities of the second appellant's features. But for purposes of this identification her evidence seems to me sufficient even without details of each and every feature or without fulfilling the requirements of a proper identification set out by DOWLING J in the above passage.

I am of this view because Mrs Souchon was a very careful and truthful witness who appreciated the danger of false identification. Had she been asked to tell the court *a quo* what features of the appellant's hairline, mouth and nose, enabled her to identify him, she would have given honest replies and descriptions of those features.

Mr *Fitches* argued that there was a long period between 20 August 1981 when the witness alleged she saw the second appellant and 17 March 1982 when the identification parade was held. He said in view of this factor alone the court *a quo* should "have treated her evidence with greater caution because of the fallibility of human observation, especially under stress." I agree with this submission. However the court *a quo* found "Mrs Souchon an exceptionally good witness, both as to honesty and as to reliability". She was a calm person who in spite of the fact that her husband and herself had been shot spoke to her attacker as if nothing had ruffled her emotions. During the identification she took her time in order to be sure that she would identify the right person.

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In support of his contention Mr *Fitches* cited a passage from *S v Mthetwa* 1972 (3) SA 766 (AD) at 768A - C where Holmes JA said:

> Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the

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> evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; see cases such as *R v Masemang,* 1950 (2) SA 488 (AD); *R v Dladla & Ors* 1962 (1) SA 307 (AD) at p 310; *S v Mehlape* 1963 (2) SA 29 (AD).

I agree with what HOLMES JA said in the above passage. In my view it supports the findings of the court *a quo.* The following factors made the identification of the offender easier. There was good lighting in the house, the second appellant was in a well lighted room with Mrs Souchon. She spoke to him for about 30 minutes or more. She observed his features, his voice and his clothes at close proximity and positively identified him, albeit after some months had passed, at an identification parade. When these factors are weighed one against the other and are coupled with the reliability and honesty of the witness, the danger of mistaken identification is excluded. Besides, although her two sons were unable to identify the second appellant, their evidence on what took place in the house corroborated that of their mother.

I am more than persuaded that the identification of the second appellant as the person who shot at Mr and Mrs Souchon in their bedroom during the night of 20 August 1981 was validly made by Mrs Souchon at the identification parade held at the Chipinge Police Station.

Besides the evidence of the identification of the second appellant made by Mrs Souchon there is evidence which corroborates her evidence in material respects. The one 7.62 mm-type spent bullet which was removed from Mr Souchon's head was fired from a 7.62 mm Tokarev pistol. There is also the evidence of her two sons who testified on what happened in the house. In my

judgment there is sufficient evidence to sustain the conviction of the second appellant without recourse to his confession. The same cannot be said of the first appellant who was not identified at the identification parade. On this evidence alone the second appellant's appeal against conviction must fail.

The first appellant was convicted on count one because of the confession he made. In that count Irene Kashangura was murdered at Section 5 Middle Sabi on or about 4 October 1981. On this count there is no other evidence besides the confession statement made by the first appellant implicating him in the commission of this offence. The evidence of Nosta Sibanda to the effect that she had last seen Irene in the company of two young men does not assist the prosecution case. However the court a quo took a different view.

The court *a quo,* having admitted the confessions, concluded that the requirement of our law that there must be proof that an offence must have been actually committed had been satisfied because there was other evidence confirming the crime. It said:

> There is no proof that Irene was murdered but it seems to us that the confession is confirmed by the very fact that Irene's dead body has been discovered. It is also confirmed by the evidence of Nosta Sibanda that she saw Irene last in the company of two young men. If we look at Aaron's statement we see that although Tokozani and Tennson were near by they were not at all times with Irene. At some stages it was only Edwin and himself who were with the girl. There is further some confirmation of his statement in the evidence of Bernard Kashangura. He said that when he saw the body the pants had been removed - and the confession speaks of forcible sexual

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intercourse with the girl.

It can be seen that the first appellant's conviction on this count depended on the admissibility or otherwise of his statement. Had the statement not been admitted there would have been no evidence upon which the first appellant could have been convicted.

On count four the two appellants and their co-accused were all convicted of the murder of the bus conductor Laison Fukuzeya at Mukwasine Business Centre on 25 December 1981. In their evidence the appellants denied the murder of Fukuzeya but their statements which were admitted into evidence by the learned trial judge were confessions of their involvement in the murder of Fukezeya.

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The deceased was a bus conductor. There were two people in the bus who gave evidence at the trial, the bus driver, Thomas Zituta, and Constable Lomazulu. Zituta testified that the bus picked up Constable Lomazulu at Chisumbanje. When the bus arrived at Mukwasine all the passengers alighted from the bus and dispersed. Lomazulu was the last passenger to leave the bus. Then two men in uniform stood at the entrance of the bus and talked to the bus conductor. There was one other person in the bus who fired a shot from a firearm after the conductor had called him, that is Zituta. After the shot the two men in uniform ran away. The witness also ran away. Zituta did not see this man enter the bus. He was not sure whether the man was dressed in army uniform or in civilian clothes. He heard one shot fired. When he returned to the bus the conductor was dead but his cash bag was missing and there were two soldiers at the scene. He noticed three holes on the roof of the bus. Constable Lomazulu who had walk five metres from the bus before there was any trouble ran away when he heard the gun shot. He did not see anyone. But on his return to the bus he noticed two bullet holes in the bus. Dr Hefferman said in his post mortem report Ex. 15 that he found a bullet entrance wound on the right submandibular region of the neck. It seems from the evidence that the deceased was shot only once. All that the evidence of these three witnesses established was that someone fired at the deceased and that the deceased died from a gunshot wound. They did not identify the man who shot the deceased. Had the statement of the two appellants been ruled inadmissible there could not have been a conviction on this count.

On count five the first appellant and the two co-accused were convicted of the murder of Kenneth Masunungure, a storekeeper at Daisy Hill Store. The second appellant was acquitted. He was acquitted because in Ex. 10 which contains his typewritten statements he denied the murder of the deceased and in his handwritten statement he tentatively admitted going to the shopkeeper together with his co-accused and then said:

> We collected the shopkeeper and took him to the store. Aaron shot the shopkeeper. He then took a lot of money. He then ran away

The court *a quo* in acquitting him of this charge in count five said:

> Now the difficulty about this statement is that when it is compared with the evidence of Daniel the State witness, it is wrong in a number of particulars. The first statement is, we arrived there at 8 in the evening. It is perhaps not

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very important but the State witness says it was 6.30.

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> The next statement he makes is, we collected the storekeeper and took him to the store. The evidence however seems clear that the storekeeper was shot as he went out of his house where he had been eating. There is no evidence therefore that he was taken to the store. The next statement is, Aaron shot the storekeeper. That may be true but Aaron says something different. And the final statement is, he then took a lot of money, and there is no evidence of that in the State case.
>
> Bearing in mind that at about the same time this accused made a statement denying all knowledge of this offence and bearing in mind that there is no other evidence at all admissible against this particular accused person, we believe that it would not be safe to convict him on that statement alone.

The court's approach in respect of the second appellant's statement was correct in every respect. The evidence from Chisigo, a security guard at the Daisy Hill Store who was eating sadza together with the deceased, did not support the assertion made by the second appellant that the deceased was taken by the appellants and their co-accused to the store where he was shot by the first appellant who took a lot of money.

Chisigo was in a better position to observe what happened. He had shortly before been eating sadza with the deceased who then left Chisigo still eating while he himself walked out of the house. Chisigo saw him "open the door a bit" and then stepped in the doorway. The deceased stood for a while, walked outside then a shot was fired. Chisigo heard the deceased cry. He took his rifle. He noticed the deceased lying on the ground and heard yet another shot. Chisigo returned the fire by firing two shots. When the firing ceased the deceased asked Chisigo to pour water on him. He did that. Afterwards Chisigo telephoned his employer, a Mr Villiers. Chisigo did not see the man who fired the shot that killed the deceased.

The first appellant was, therefore, convicted because the court *a quo* held that he admitted a common purpose in his statement Ex.7. I shall consider the admissibility of the statement made by the first appellant in reply to the warn and caution on count five.

Lastly there is the conviction of the first appellant and his two co-accused on count seven. Count seven relates to an armed robbery at the Vutuza Bottle Store on or about the 23 December 1981. There was an eye witness to the armed robbery, Nelson Ndazawani, who saw a man wearing a brown jersey

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and a brown pair of trousers enter the bottle store. He was carrying a rifle which he pointed at the witness. He demanded money. Then a customer came in and asked to buy cigarettes. The man with the rifle twice ordered the customer to walk out. He followed his order by firing three shots from his rifle. Ndazawani said one of the shots hit the customer in the leg. The man then turned to Ndazawani and demanded money. Ndazawani gave him money. The man then demanded money from the store and the Chibuku bar. He was told there was no more money. The man took twelve nips of Bols brandy and put them in his bag. He then ordered Ndazawani

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to get out of the store. Ndazawani walked out. When the owner of the bottlestore, Vutuza, arrived, the man hid behind some buildings. After Vutuza had left the man with the rifle returned to the bottle store, opened the refrigerator and took bottles of beer and put them in his bag. Then he left. Ndazawani said the bottle store was well lighted. What is important about this whole incident is that Ndazawani had time to observe the first appellant. It was unfortunate that no formal parade was held and that the police tried to suppress the fact that in January or February 1981 the police brought four men to the bottle store and Ndazawani was able to identify the first appellant as the man he saw with a rifle and who robbed the store on 23 December 1981. The first appellant admitted all what happened when he was taken to the store but denied having been pointed out by Ndazawani. And indeed Ndazawani said in evidence that he did not physically point out the first appellant but told the police that the first appellant was the person who robbed the bottle store. To some extent his evidence was corroborated by that of Lovemore Maposa, the customer who entered the bottle store during the robbery and was shot in the leg as he ran out of the bottle store. Maposa was not able in the short space of time he was in the store and in the circumstances then prevailing to observe the person with the rifle. However, the first appellant visited Maposa at the hospital where Maposa was admitted as a patient. He became suspicious because of the first appellant's behaviour when he talked to him. Maposa concluded that the first appellant was the person who shot him in the leg at the store.

The court *a quo* was favourably impressed by Ndazawani's evidence and his demeanour. The court said that he was a truthful witness with no cause to tell lies. His evidence was corroborated by that of Maposa. Of Maposa the court *a quo* remarked "We believe Lovemore's version of their meetings. He had no motive to lie and seemed an honest and straight forward person". I share the view the court *a quo* formed of Ndazawani and Maposa. I also agree with the trial court's conclusion when it said:

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> We would convict Aaron on this count on the evidence of identification by Nelson, supported by the corroborative evidence of Lovemore, even if there were no confession.

In his heads of argument Mr *Gillespie,* who appeared for the first appellant, contended that there was "insufficient evidence to convict on any count except arguably, count seven". That is this count. This view accords with that of the court *a quo.* In my judgment there was sufficient credible evidence to convict the first appellant without taking into account his confession.

I now turn to consider whether the statements made by the two appellants were, in terms of s 242 of the Criminal Procedure and Evidence Act [*Chapter 59*], properly admitted in evidence. Section 242 requires as the condition of the admissibility of confessions or statements that they have been:

> . . . freely and voluntarily made by the accused person without his having been unduly influenced thereto.

The two appellants challenged the admissibility of their statements or confessions and a trial within a trial was held. At the end of the separate issue the learned judge *a quo* stated the law

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applicable to the admissibility of statements or confessions as follows -

> If the State wishes to place before a court a statement made outside court by an accused person, the State must prove that it was made by him while in his sound and sober senses, freely and voluntarily and without undue influence. This must be proved by the State beyond a reasonable doubt.

The above is a correct statement of law. There is no doubt that the State must prove that the statements made by the accused and which were not confirmed by a magistrate and which the State tenders in evidence, were freely and voluntarily made, and as SCHREINER JA said in *R v Nhleko* 1960 (4) SA 712 (AD) at 720C:

> . . . if there has been violence before the statement, it must satisfy the trial judge that the violence did not induce the statement, either because it did not have an inducing tendency in the first instance or because that tendency had in some way ceased to operate.

In this case the two appellants made various allegations of torture against the police. Some of the allegations of assaults related to indications which the

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police wanted the appellants to make in order to show them the weapons used in the commission of the crimes with which the appellants were charged. They also alleged that they were starved, that is, deprived of food, in order to induce them to make statements. They alleged that they were kept in police custody for a long period. This allegation was clearly proven. There is a possibility that the appellants made false indications because of the assaults they complained of. They also complained of water torture. When they appeared before the magistrate they told him they had been assaulted and their statements were not confirmed. That fact alone is an indication of the presence of a factor requiring greater scrutiny of the allegations made by the appellants.

It seems to me that where it is proved that the circumstances of torture complained of prevailed - that is, assaults, water torture, starvation and prolonged detention - it would be wrong to isolate each incident in making a finding on the admissibility or otherwise of the statements, especially when the evidence as to the time when the appellants were arrested and detained is not satisfactory. In my view the cumulative effect of the various allegations of torture must be considered together in order to decide whether in the circumstances then prevailing they did or did not induce the appellants to make the confessions.

The learned trial judge was too generous in his assessment of the evidence adduced by the police and seemed to place the *onus* of proof upon the appellants. He impliedly accepted the fact that the appellants were fed by the uniformed police and yet there was no evidence from the uniformed branch denying the allegation of deprivation of food. While accepting that the Investigation Diary was "inadequate and possibly inaccurate", the learned judge *a quo* seemed to ignore that very important factor in assessing the credibility of the police witnesses. The learned trial judge's remarks on the inaccuracy of the Investigation Diary were a correct expression of the inefficient manner in which the record of the investigations relating to the appellants was kept by the very police who were giving evidence on what happened during

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investigations. The learned judge said:

> One should be able to rely on the Investigation Diary to confirm dates of arrest and dates of remand in respect of each of the accused yet these dates do not appear. Another difficulty is that Mr Mavhurah said in evidence that the accused were not taken out on investigations to show where they had hidden the firearms. Later he said accused 1 was taken out to his home for a search for firearms but that was before he made his

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> warned and cautioned statement; yet in the Diary it is said he went out twice to look for weapons, once to the home of accused 1 and once to his home again and then to Tongogara Camp. These events took place, according to the Diary, on the 25th and 28th of February, the statement having been recorded on the 17th February.

He also said of DSO Kavhurah:

> I do not say that Mr Kavhurah was lying on these matters because I can see no reason for him to lie. If he wished to lie, one would expect him to record the lie accurately in his Diary. It does however indicate careless work and a readiness to make positive statements which are wrong. It means that it is impossible to rely on the accuracy of his evidence. If cases are going to take a long time to come to court, it is all the more important to be able to rely on the detailed accuracy of the Investigation Diary. All important facts should be recorded as they occur in the Diary.

Having said that the learned judge accepted the evidence adduced by the police and rejected that of the appellants although in his remarks he tended to agree with the appellants' assertion that they were held in police custody for nine to twelve days before they were brought before the magistrate. The learned judge said after commenting adversely on Kavhurah's evidence:

> All this means that there is a strong possibility that the accused is right and Mr Kavhurah is wrong when they say that they were not sent to the Remand Prison until July, some six months after their arrest, or at least that they spent a lot of their time in police custody.
>
> It is quite wrong that accused persons should be held like this in police custody because obviously the possibility of undue influence is greater if the accused are in the hands of the police than if they are in a Remand Prison.

These general remarks are germane to the making of a finding on voluntariness. The doubts the learned judge entertained plus the allegations made by the appellants seem to me to lead to one conclusion, that there is a possibility that the police were not being honest about the events and happenings during those long days when the appellants were in their custody. In the light of the learned judge's observations the contradictions made by the appellants pale into insignificance when compared with the inaccuracies in the evidence of the police, in their failure to keep a complete and accurate record of the dates

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of the arrest, the detention and the interrogations of the appellants in the Investigation Diary.

I now turn to the allegations of assault made by the appellants. It is true that they mentioned assaults and not the allegation of torture when they appeared before the magistrate. The

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second appellant when challenging the admissibility of his statement said "I wrote it after spending a whole week without eating. I thought I would be fed if I wrote". It does happen now and again that an accused person does not mention that the statement he made was induced by one or other of the grounds upon which its admissibility can be challenged and yet during the trial some piece of evidence emerges either from the accused himself or from a prosecution witness which tends to show that the confession was induced by force or some other undue influence. It would be improper for the court to ignore that piece of evidence because the accused did not mention it at the earliest possible opportunity. I can do no better than cite a passage from *S v Mpetha & Ors* (2) 1983 (1) SA 576 (C) where WILLIAMSON J considered this point and cited passages from *Hackwell's* case, *supra,* and *S v Dhlamini & Anor* 1971 (1) SA 807 (A). The learned judge said at 586A-G:

> One must not lose sight of the fact that a layman, particularly an ignorant or uneducated one, might not complain of something for a variety of reasons. I think that QUENET JP expresses this caveat with great insight when in *Hackwell's* case *supra* at 390D-E he observes:
>
> > The appellant's failure to raise the fact of confrontation as a ground of objection should not be minimised; on the other hand, it should not be overstressed. I think that, when it is sought to exclude a confession, accused persons often regard an allegation of assault as possessing a magical quality. And for that reason, other matters no less significant may not be mentioned either because they are not considered to be of much weight or because it is felt that to mention them would weaken the effect of the objection as formulated.

MACDONALD AJA in the same case also makes this point at 402B-F when he says:

> In *R v Bene* 1963 R&N 896 CLAYDEN CJ, dealing with a submission that the accused had been overawed by persistent questioning, said at 898:
>
> > But the final answer to the contention , as indeed it is to several of the

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> other contentions, is that the argument is not supported by the appellant's evidence. He complained of the form of questioning; he said, falsely, that he complained of it to Coetzee, but so far from saying that it made him talk he denies that he made a statement at all. The argument is in reality the hypothetical one that a person who was questioned in this way would have been overawed. That has little force when that person does not say that that was so.
>
> It is important, in my view, to bear in mind that the learned CHIEF JUSTICE did not intend to lay down a universal rule that little weight will be attached to an influence improperly brought to bear upon an accused person unless the accused person complains of that influence and attributes the making of the statement to it. The fact that the accused does not complain of and/or attribute the making of the statement to a particular influence is obviously a factor which must always be taken into account, but the weight to be given to it must depend upon the circumstances of each case; see *R v Hlupe* (case 208/1964 Bulawayo - not reported). Injustices will result if the dictum of CLAYDON CJ is applied in practice as a rule of thumb.

Recognition of this consideration is also to be found in the judgment of JANSEN JA in *S v Dhlamini & Anor* 1971 (1) SA 807 (A) when at 814B the learned judge says:

> But, even in a case where an accused has failed to disclose under oath what actuated him in making, ostensibly freely and voluntarily and without having been unduly influenced thereto, a confession before a magistrate or justice of the peace, it is conceivable that other evidence of what had gone before could point so strongly to, eg,

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the operation of undue influence that such would no longer be merely a hypothetical possibility but a reasonable possibility.

See *R v Hackwell & Ors* 1965 RLR 1 (AD) at 5B and 19D - H

In the light of the above authorities it is my judgment that the appellants' allegations should have received greater weight and should have been assessed having regard to the uncertainty that had emerged from police evidence. The above factors are of such a nature that a court might come to the view that they were objectively calculated to influence the will of the appellants. WILLIAMSON J in *S v Mpetha & Ors (2), supra,* put it thus at 585C-D:

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Obviously, if in a particular case there is evidence of factors which a court thinks are objectively calculated or likely to influence the will of a person, then from a purely pragmatic point of view it will not be easy for the prosecution to satisfy the court that there is no reasonable possibility of these factors in fact having had an influence subjectively on the particular accused. Conversely, if there are factors which a court thinks are not objectively calculated or likely to influence the will of an accused, then it will, practically speaking, not be easy for the defence to persuade a court that there is a reasonable possibility that these factors in fact subjectively influenced the will of the particular accused.

In the face of the factors mentioned above there is a reasonable possibility that the statements or confessions made by the appellants were not made freely and voluntarily. In coming to this conclusion I disregard the fact that the learned judge *a quo* did not believe the evidence adduced by the appellants for the reasons he gave in his judgment. I think in deciding the question of admissibility in a case such as this one where there are allegations of assaults, denial of food, water torture, lengthy periods in police custody and above all unsatisfactory police evidence, it is unsafe to admit statements as having been made freely and voluntarily.

I find the remarks of HOLMES JA in *S v Dlamini* 1973 (1) SA 144 (A) at 146F-H very relevant to the circumstances of this case. The learned judge of appeal said:

To sum up so far, all the relevant evidence, from the time when the police first got in touch with the accused to the time when he made a confession to the magistrate, has to be analysed very carefully indeed, the pros and cons going into their respective scales; and, after the weighing, the court has to decide whether there is a reasonable possibility that the confession was not made freely and voluntarily; or that the accused was not in his sound and sober senses; or that he was unduly influenced 'thereto' (i.e. to make a confession). In other words, in all the circumstances is there proof beyond reasonable doubt that the accused's exercise of free will was not unduly influenced.

An example of particular thoroughness in the analysis of the relevant evidence is to be found in the judgment of FEETHAM JA which became the ratio of the court, in *Rex v Gumede & Anor* 1942 AD 398 at pp 411 in fin. to 433. In that case, despite the untrustworthy evidence of the accused, the confessions were held to have been wrongly admitted and

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the convictions were set aside. On this latter point, in *S v M* 1963 (1) PH H88, MILLER J, similarly did not believe the accused, but nevertheless held the confession to be inadmissible because, as the learned judge put it:

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> I am not satisfied . . . that something undisclosed did not happen to induce the accused on that day to make the statement which he did.

See also *S v Chenisso* 1983 (4) SA 912 (T).

In my judgment the overriding consideration in assessing the totality of the evidence on admissibility is whether, in the circumstances prevailing during the period the appellants were detained in police custody under conditions they have described, there are no elements of inducement which rendered the making of the statements not free and not voluntary. In examining this factor the court must scrutinize the totality of the evidence with great care. From reading the record it appears to me that the circumstances surrounding the making of the appellants' statements were not examined and scrutinized with care. I am, therefore, of the view that all the statements, including those they allege they were forced to sign, were inadmissible. I am fortified in the view I have taken because no attempt was made to have the statements of the two appellants confirmed by a magistrate. This seems suspicious especially when it is realised that the statement of the fourth accused who alleged that he had been assaulted b the police was confirmed. The learned judge did not consider this point when he made his ruling on the admissibility of the appellants' statements. In my judgment had the learned judge's attention been drawn to this fact, he would not have admitted the appellants' statements. Accordingly the ruling, by the learned judge *a quo* and by the court as a whole, that all statements made by the appellants were admissible, is set aside.

In the result the determination of the court on the various counts is as follows:

> In the seventh count the first appellant's appeal against conviction is dismissed. It remains for me to deal with the sentence of death passed on the first appellant on count seven.

When passing the death penalty on the first appellant in respect of the two counts of armed robbery the learned trial judge said:

> It is my view again that the fact is that these are part of a series and one

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> must take that into account. You and your gang terrorised the area around Chipinge from August to December 1981. Three people were killed, one was very seriously injured and two others were shot in the leg.
>
> Taking all that into account, as I believe I am entitled to do in considering the armed robbery cases, I exercise my discretion against a prison sentence in this matter.

I agree with Mr *Gillespie's* contention that the death penalty was imposed because robbery was part of a series of offences.

This court is at large to interfere with the judge's exercise of his discretion because he lumped together all the offences committed by the appellant and sentenced him to death because he had taken part in many offences over a long period of time.

Although the robbery in count seven was aggravated the appellant refrained from killing the storekeeper. He ordered him to leave the store. He fired at a customer, Maposa, as he walked

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out of the store and hit him on the leg. Later he visited Maposa in hospital. It may be said that that gesture was a sign of contrition. Besides when the proprietor of the store walked into the shop, the first appellant hid himself behind some buildings and only came out when the proprietor had left. I feel that a sentence of imprisonment is appropriate.

In the case of the second appellant the learned judge exercised his discretion in the same manner. I feel in doing so he was wrong but the features of aggravation in the case of this particular robbery are greater than the mitigatory features. The second appellant entered the Souchon house. He walked into a bedroom, switched on the lights and fired twice, shooting Mr Souchon in the head and Mrs Souchon on the leg. He only demanded money after he had shot them. That Mr Souchon did not die was a miracle. Mr Auchterlonie, the medical practitioner who treated him, described in his affidavit Ex.3, the injuries he sustained and treatment he carried out on him. He found that the dura was lacerated and torn and the brain was severely damaged in the temporal lobe with the complete disruption of the brain. Then he said in paras 5 and 6 of his affidavit:

5. I repaired this, and in about 6 months' time, it will require a further repair and replacement of the bone, which was removed. As a result of this injury, which was definitely, extremely dangerous to life, he has suffered permanent damage, that being (so) he has severe

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cerebral damage which results in epileptic activity, as well as his loss of peripheral field of vision on the right side.

6. I observed that this man, Mr Louis Souchon has made such a startling recovery, he is now undergoing speech, occupational and physiotherapy at St. Giles, and in due course another report will be submitted.

In the case of the second appellant the sentence of death was the only appropriate sentence when regard is had to the violence used and the damage inflicted on the person of Mr Souchon.

In the result the convictions and sentence in respect of the first appellant on counts one, three, four and five are set aside. The appeals on those counts are therefore allowed.

The first appellant's appeal against conviction on count seven is dismissed but the appeal against sentence succeeds to this extent that the sentence of death is set aside and substituted by the following sentence: "16 years' imprisonment with labour."

With respect to the second appellant the appeals against conviction and sentence on counts one and four are set aside and the appeals are allowed. But the appeal against conviction and sentence on count three is dismissed.

Beck JA: I agree.

Gubbay JA: I agree.

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S v CHALUWA 1985 (2) ZLR 121 (SC)

Court **Supreme rT, Harare**

Dumbutshena CJ and Gubbay and McNally JJA

Criminal Appeal

12 July and 2 August 1985

Flynote

Criminal law - sentence - murder - extenuating circumstances - nature of the crime as a factor - conviction on facts alleged by accused - weight to be given to exculpating portion of accused's version of facts.

Headnote

The seriousness or gruesomeness of an offence can never exclude the possibility of extenuation. The facts of the case must be considered with possible mitigating circumstances in order to arrive at a proper finding as to the weight to be given to each. Where the conviction is based upon findings that are based on the accused's version, these findings, even if unlikely, cannot be excluded from the consideration of extenuating circumstances.

Cases cited:

S v Ndwalane 1985 (3) SA 222 (AD)

S v Petrus 1969 (4) SA 85 (A)

S v Seputhi 1985 (1) SA 9 (AD)

P Machaya for the appellant

E Chatikobo for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted of the murder of Dzandiwandira Chimwaza with actual intent. The court *a quo* found that there were no extenuating circumstances and sentenced him to death.

As far as the facts leading up to the murder are concerned, the court has nothing but the appellant's own warned and cautioned statement to guide it.

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The prosecutor led no evidence to contradict his assertions. According to the statement the appellant had been drinking at the Machipisa Night Club from 4 pm to 10.30 pm on 25 May 1983. When he left Machipisa Night Club he met a woman to whom he proposed love. She asked him whether he had $7,00. He told her he had only $5,00. A man approached them and asked the appellant why he was talking to his wife. In reply he asked the man how a prostitute could have a husband. The man took off his jacket. The appellant slapped him. Someone separated them.

The appellant walked away towards a church in the Jerusalem Lines of Highfield township where he sometimes spent the nights. He saw the man he had quarrelled with outside Machipisa Night Club following him. He was in the company of a woman. The man recognised him and advanced towards him, produced a knife and advanced towards him. The appellant picked up a stick and hit the man. The man hit the appellant who then ran away. The appellant then went to the house of the woman, presumably the woman whom he had proposed love to at the night club. The house was in the Egypt Lines of Highfield. As the appellant was about to walk into the yard of this house he saw the man he had fought at the church following him. They quarrelled again and the appellant ran back to the church. The man followed him. They fought at the church. The appellant wrenched the knife from the man, stabbed him in the neck and kicked him with booted feet. The man fell down. The appellant left him lying on the ground and ran to a certain house where he slept outside. When he awoke in the early hours of the morning he walked along Chitepo Road. The police arrested him while walking on this road.

Alice Mudhara, a prostitute, who lives at house number 2480 Egypt Lines said the head of a human being was thrown into her bedroom through a window. It landed on her bed as she and her man client were preparing to sleep. Before this she had heard a voice saying: "You are not going to sleep tonight". On touching the head Mudhara screamed. Her screaming attracted the attention of Liza Murombedzi and her client who lived in a room in the house. She too was a lodger and a prostitute. Murombedzi and her man went to Mudhara's room and advised her to report the matter to the police. A report was made at Machipisa Police Station.

Sergeant Nhakwe proceeded to house number 2791 Jerusalem Lines where he was shown a headless body. He did not find the murder weapon in the immediate vicinity of the headless body. He then proceeded to house number 2480 Egypt Lines. He observed a broken bedroom window and impressions made by tennis shoes under the broken window. Inside Mudhara's room he

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saw a human head wrapped in brown paper. He drove away.

At the intersection of Mangwende Road and Chitepo Road Sergeant Nhakwe saw a man. He stopped because the shoes the man was wearing attracted him. He searched the man. Sergeant Nhakwe found on him a knife with what appeared to be bloodstains. He also observed that the shoes had what also appeared to be bloodstains. The bottom part of the man's pair of

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trousers and the sleeves of his coat appeared wet.

The man could not explain the bloodstains. He, however, told the police officer that he had been washing his hands and that was why his coat sleeves were wet. He took the man with him to Machipisa Police Station.

Later on DPO Chegede went to house number 2791 Jerusalem Lines and house number 2480 Egypt Lines. At house number 2791 he saw the headless body of a human being and two metres away from the body he picked up a wristwatch. He noticed blood pools around the body and signs of a struggle in the surrounding area. Later the appellant told the police that the watch was his. When he got to house number 2480 the head was still there. The uniformed police collected the headless body, the severed head and the wristwatch and took them away. At Machipisa Police Station DPO Chegede saw the appellant. He noticed bloodstains on his clothes and shoes. He was also handed a knife that seemed to have bloodstains. DPO Chegede asked the appellant about the watch. The appellant said it was his.

The forensic scientist, Amanda D Nkomo, examined various items listed in Ex. 7 taken from the appellant. She said the blood found on the appellant's trousers and jacket belonged to a group "B" person which was the blood group of the deceased. The blood scraped from the knife found on the appellant was insufficient for purposes of grouping. The blood on the tennis shoes belonging to the appellant originated from a group "B" person. The blood found on the lace curtain, the piece of glass from the window and the khaki paper used to wrap the head originated from group "B". The appellant's blood group was found to be group "A". Nkomo concluded that the blood found on the clothing of the appellant could have come from the deceased but not from the appellant.

Doctor Pirohit, who conducted the post mortem examination on the body of the deceased, found a number of stab wounds to the head. He described them as follows in his post mortem report, Ex. 6: a clean lacerated wound on the left side of the forehead lateral to the eyebrow which was 1 x 0.25 cm; a clean

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lacerated wound above the first injury; a stab wound 1 x 0.28 cm muscle deep in the right anterior axillary fold. The neck was cut off at the level of the seventh cervical vertebra cutting through the neck in front. It was his opinion that the neck appeared to have been cut by two heavy blows using a heavy weapon probably an axe. There was also an injury under the scalp - a small haematoma on the right parietal region which was 1 x 1 cm. He was of the opinion that the deceased died from shock and haemorrhage due to the injuries he had received.

The appellant of course denied the allegations made against him and denied committing the offence. He challenged the warned and cautioned statement and the statement on indications, Ex. 8 and 9, although they had been confirmed by a magistrate, because they had not been made freely and voluntarily. He testified that he had been induced to write down the statements. Mr *Machaya,* who appeared for the appellant, attacked the admission of the statements and said ultimately that they differed in many material respects from the evidence of

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State witnesses. There is no merit in the assertions of undue influence made by the appellant. The trial judge did not believe that the appellant had been forced to write the statements. Mr *Machaya* argued every point that could have been said in support of the appeal. He went through the record and analysed every conceivable point that could be used in support of the appeal. In this respect he did everything possible to support the appeal against conviction. There were some discrepancies in the evidence of State witnesses, but they were of a minor nature. The conviction of the appellant by the court *a quo* was based in the main on the statements freely and voluntarily made by the appellant and admitted into evidence by the court *a quo.*

There was, as the court *a quo* clearly recognised, no direct eye witness evidence on the commission of the offence. But there is circumstantial evidence which in its totality is so cogent as to leave no reasonable doubt in the mind of a trial court. The learned judge *a quo* fully covered in his judgment the circumstantial evidence relied upon by the court *a quo.* Briefly, there was the presence of the appellant in the vicinity of the area in which the crime was committed, which was a significant factor to be taken into account when considering the guilt or otherwise of the appellant. Coupled with this is the forensic evidence which revealed that the blood on the appellant's items of clothing belonged to a group "B" person. The deceased's blood was in group "B" while that of the appellant was group "A". To be found in the area of the murder with blood on one's clothes which belongs to the same group as that of the victim of the crime cannot be a matter of coincidence.

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Whether or not Mudhara's evidence was believe she testified to a person threatening her and to a human head being thrown into her room. The head was found in her room, the lace curtain and the fragments of broken glass were found to have blood belonging to group "B", the blood group of the head and the headless body. A wristwatch was found two metres from the body of the deceased. The wristwatch belonged to the appellant. The footprints left near the window through which the head was thrown into Mudhara's room were similar to the footprints made by the tennis shoes worn by the appellant.

On this evidence the court *a quo* convicted the appellant. The conviction cannot, in my view, be criticised.

Mr *Machaya* further submitted that the court *a quo* should have found that the appellant was mentally disordered or defective at the time he committed the crime. However, this submission was not persisted with. Mr *Machaya,* however, argued that the appellant was so excessively intoxicated at the time of committing the crime and that that intoxication, taken together with the effects of the head injury the appellant had suffered earlier, made him not to appreciate that what he was doing was wrong. That also, argued Mr *Machaya,* accounted for the appellant's loss of memory.

Doctor W Vermeulen, a Government psychiatrist, stationed at Harare Central Hospital, examined the appellant on 29 July 1983 and again on 7 October 1983. He found that the appellant had a history of heavy drinking. He was also told by the appellant that he had

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sustained a depressed skull fracture. He described this fracture as follows:

> In other words, there wasn't a crack. A little bit of bone was actually pushing in, on to his brain, of the lower occiput in the mid-line . . . That is right at the back part of the head. . . .
>
> He also had a fit which seemed to me to be due to his drinking problem although the head injury that he had last year may have played a part in that as well. And anyway I felt that it was mainly due to alcohol withdrawal when sometimes, if one drinks heavily and then one stops, suddenly - or decreases one's intake slightly - one can have a fit.

Apart from these symptoms Dr Vermeulen found no evidence of mental illness or schizophrenia. There was no evidence of mental disorder or epilepsy.

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In the light of that finding the court *a quo* could not have returned a special verdict in terms of s 28(1) of the Mental Health Act, 1976 (No. 23 of 1976). No fits were observed when the appellant was in prison and the result of an EEG examination carried out by Professor Levy was normal.

What is of importance in the evidence of Dr Vermeulen is his opinion expressed in the following passage:

> I would like to point out that the head injury which he had the year before and also his history of heavy drinking would make his tolerance to alcohol less than normal. And I, in deciding whether or not he was mentally disordered, there was a brief loss of memory it seems, it seems that he does not remember some details of the crime, such for example, he does not - he remembers most of it but he doesn't remember cutting off a head and I had to make up my mind was this due to a fit, is it possible that he was not remembering because he was having a fit when he did this, or is it possible that he did not remember some details because he had been drinking and looking at it, the overall picture, I felt that his loss of memory was due to the fact that he had been drinking and not due to the fact that at that particular time, he was having a fit, which is why I formed the opinion that he was drunk, and not mentally ill.

While the court *a quo* did not accept that the appellant was so drunk as not to appreciate that what he was doing was wrong, it did accept that he was considerably drunk but "he was not so drunk as to lose his reasoning powers as well as his capacity to form a specific intent".

Mr *Machaya* contended that the court *a quo* had erred in not finding that extenuating circumstances existed. He argued that the court *a quo* had accepted that the appellant was intoxicated to a substantial degree and that his head injury, aggravated by the effects of intoxication, caused him to behave in an irrational manner. He urged this court to accept Dr Vermeulen's opinion that "the head injury which he had the year before and also his history of heavy drinking would make his tolerance to alcohol less than normal". He also submitted that the appellant had been provoked by the deceased. In this respect it is important to remember that the appellant left the scene of the quarrel at Machipisa Night Club and was followed by the deceased. We have to accept that the deceased had a knife, which the appellant wrenched from him after which the appellant used it to stab him.

The court *a quo* considered all these matters and came to the conclusion that

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there were no extenuating circumstances. The court said:

> We have considered the extenuating circumstances advanced on behalf of the accused, namely intoxication, provocation and self-defence. The accused was drunk no doubt and that he must have felt provoked by the deceased's action of outbidding him on the woman's favours and also that he perhaps was acting in self-defence at some point, but having done so we have weighed these factors against the way the accused deliberately slaughtered the deceased like an animal for dinner, taking the head, wrapping it in something, walking with it up to Alice's house where he threw it through a window into the room. All this with utter callousness. The accused had no greater claim to Alice's favours than the deceased so he had no right really to feel provoked and as to self-defence, against whom was he defending himself when he was cutting off the deceased's head?

Mr *Chatikobo,* who appeared for the respondent, both in his heads of argument and in his submissions before us, supported the trial court's finding on extenuating circumstances. He contended that the "offence was a heinous one committed with ghastly callousness. Whatever circumstances of extenuation may be present, are far out-weighed by the features of aggravation."

In this case the court *a quo* did find that the extenuating circumstances relied upon by Mr *Machaya* existed. After making that finding on extenuating factors, the court *a quo* "weighed these factors against the way the accused deliberately slaughtered the deceased like an animal for dinner, taking the head, wrapping it in something, walking with it up to Alice's house where he threw it through the window into the room". The court *a quo* then compared the features of extenuation with the nature of the crime and found that the callousness of the crime far outweighed factors of extenuation. In doing this the court *a quo* misdirected itself. In *S v Ndwalane* 1985 (3) SA 222 (AD) VILJOEN JA, when considering the existence of circumstances of extenuation where the court *a quo* had found that "the factors which otherwise would have been extenuating, influenced the appellant to take the law into his own hands and, by a carefully planned stratagem, exacted revenge for Dube's death, any extenuation was wiped out or neutralised", said at 227E-228H:

> Such reasoning postulates a weighing up of, or a comparison between the extenuating circumstances and the nature of the crime. In so doing the court *a quo,* in my view, misdirected itself. The inquiry is whether the factors which subjectively influenced the mind of the offender to commit

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> the murder are extenuating or not; the manner in which he committed the murder is irrelevant. As STEYN CJ pointed out in *S v Petrus* 1969 (4) SA 85 (A) at 90E-G, every murder is a reprehensible crime. He calls this basic reprehensibility. BOTHA JA said in *S v Van der Berg* 1968 (3) SA 250 (A) at 252-253:
>
> > It should be noted in either case that the seriousness of the murder in the present case, the wickedness of it and the unnecessary force that was used, do not differ from the seriousness or the unnecessary force used in any other murder, especially not a murder that, as in the present case, was committed by the inflicting of a stab wound with a knife.

At 252F-G of the *Van der Berg* case *supra* BOTHA JA said:

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> 'It is obvious that, although an indication of the emotional state of the wrongdoer may be found in the nature of the crime, the question whether a particular circumstance can be taken into account as an extenuating circumstance, which involves the subjective investigation of the emotional state of the wrongdoer, cannot be tested by the nature of the crime. Thus provocation, for example, can so influence a wrongdoer's mood that it can lead to the committing of a dreadful deed, but the dreadfulness of the deed cannot nullify the provocation as an extenuating circumstance.'

The last sentence in the passage quoted above was approved by STEYN CJ in the matter of *Petrus* (*supra* at 92A). In the latter case STEYN CJ explains at 92D-G to what extent and to which effect the nature of the offence may be taken into account in the inquiry:

> 'This does however not mean that the nature of the offence, in the sense of the murder and the way in which it was committed must be left out of consideration in the determination of extenuating circumstances. Insofar as facts relevant to the murder are relevant to this investigation, they can of course not be left out of consideration. The way in which the perpetrator went about it could show that he was, for example, not as drunk as he says he was, or that alleged prior provocation had no real effect on the act. In the case of premeditated murder one could deduce with absolute certainty that a proven high degree of intoxication at the time of the murder had no bearing whatsoever on the deed, that it had no influence on the murderer and that it can therefore not be considered as extenuating. The fact that similar aspects can be taken into account

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> in the determination of the presence or absence of extenuating circumstances does not mean that alleged extenuation is placed beyond proof merely by the cruelty or baseness of the deed.'

RUMPFF A expresses his view at 95G-96B as follows:

> In the determination of whether there are extenuating circumstances or not, it is, in my opinion, self-evident that the facts of the crime must be considered together with the possible circumstances which could be mitigating. The seriousness or gruesomeness of the offence, as such, cannot exclude the possibility of extenuating circumstances. I do not think that anyone will ever allege that. What could happen is that when the extenuating circumstances are considered in the light of the facts of the case, the trial court could find that the alleged circumstances cannot be extenuating in the particular case. For instance a 17 year old, who already works and is comparatively adult, and who murders his uncle and aunt to get hold of a large sum of money would perhaps rely on his youthfulness as such, alone, in vain. Where in *S v Mahlobane* 1969 (1) SA 561 (AD) at p 568 it is mentioned that it is essential to investigate the background of a youth in order to determine his degree of adulthood, it must be read in this light. The intention of what was said there is not that the highly reprehensible nature of the offence *per se* excludes the existence of extenuating circumstances, but that all the facts of the offence may be such that a trial court could decide that a physical investigation into the accused's degree of adulthood is unnecessary, and that his youthfulness (and therefore possible reformation) cannot serve as extenuation.

The inquiry therefore is whether the circumstances are such that they are truly extenuating and, if so, whether they did influence the mind of the offender to commit the crime. The youth who out of sheer wickedness kills his father and mother will rely on his youthful age in vain. The plea of having been under the influence of liquor when he committed the murder will not avail an accused who commits a premeditated murder. And if there was provocation but the provocation did not really influence the accused to commit the murder it will not assist him to rely thereon as an extenuating circumstance. I am therefore of the view that the court *a quo* erred in concluding that the nature of the crime neutralised the extenuating circumstances.

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But if I am wrong in the assumption that the court *a quo* did regard the

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factors referred to as extenuation it, in any event, in my view, misdirected itself. The court should have found those circumstances to be extenuating. In *R v Biyana* 1938 EDL 310 at 311 LANDSDOWN JP said:

> In our view an extenuating circumstance in this connection is a fact associated with a crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of the prisoner's guilt.

It is therefore essentially a moral judgment.

(Four of the quotations in the above judgment were in Afrikaans. My brother McNALLY translated the first two of them for which I am indebted to him, and the latter two came from the official South African Law Reports Translation Volume for 1969).

What in the circumstances of this case is the effect of the factors which the court *a quo* found to be extenuating but rejected because of the callous nature of the crime? I find them extenuating because the appellant was provoked when the deceased approached him when he was talking to the woman. They started fighting. They were however separated. The appellant left. The deceased and "his wife" followed him. He stopped at the Calvary Baptist Church. He stopped outside the church by the fence. He wanted to sleep. The deceased caught up with him. The appellant picked up a maize stalk to protect himself. The deceased produced a knife. The appellant looked for a stronger weapon - a piece of wood. The appellant followed the deceased up to the gate of number 2480 Egypt Lines. The deceased followed the appellant up to Chitepo Road. They got to the yard of number 2790 Jerusalem Lines. They fought. When they fell to the ground the appellant grabbed the deceased's knife and stabbed him in the neck. He did this in self-defence, a fact accepted by the court *a quo.* The appellant was defending himself from a man who was persistently following him - a man who was bent on fighting him - probably a man who intended to use a knife in order to kill him. When a trial court considers these facts in relation to establishing whether they constitute factors of extenuation, it is conducting a subjective examination of the appellant's mind. That subjective examination cannot be tested by comparing the nature of the crime he committed with the factors of extenuation. It is only when considering the appropriate sentence when there is a conviction of murder with extenuation that a trial court may properly take into account the nature of the crime as well as the nature of the extenuating circumstances. But when considering whether a particular circumstance constitutes a factor

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of extenuation, the nature of the crime is not relevant.

In this case the appellant was convicted on facts that were largely contained in his warned and cautioned statement and his statement on indications. Those facts, which the court *a quo* accepted, reduce measurably his moral blameworthiness and yet the court *a quo* did not give

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them their due weight when considering extenuating circumstances.

I am indebted to my learned brother, Mr Justice BECK, for translating *S v Sephuti* 1985 (1) SA 9 (AD), a judgment delivered in Afrikaans, because in that judgment SMALBERGER AJA dealt with the proper approach to a consideration of extenuating circumstances when the proven circumstances include the appellant's own version of events, which are improbable but which may be reasonably and possibly true and which were relied upon by the trial court for convicting him. SMALBERGER AJA said (according to Mr Justice Beck's translation) at 18E-I:

Extenuating circumstances must have their foundation in the proven circumstances of each case. (*S v Ndlovu* 1970 (1) SA 430 (A) at 433H). The proven circumstances include those facts on which the conviction is based together with such other facts as may be proved when the enquiry into extenuation is undertaken, provided that such last-mentioned facts may only amplify or temper the findings on the merits but may not alter them. (*S v Vortsteen* 1972 (4) SA 551 (A) at 558D). In *R v Samson* 1959 (1) SA 893 (C) it was decided that where the court, in convicting an accused of murder, makes certain findings that form an integral and necessary part of the findings on which the conviction rests, those findings have to be accepted for the purposes of deciding whether or not there are extenuating circumstances. (See too *R v Mneke* 1961 (2) SA 240 (N) at 244G; Du Toit *Straf in Suid-Afrika* (Punishment in South Africa) at p 40; Hiemstra *Suid-Afrikaanse Strafproses* (South African Criminal Procedure) (3rd Ed. at 596); and compar *S v Shepard & Ors* 1967 (4) SA 170 (W) at 180D-H). In the course of his judgment in *Samson's* case at 894A-B VAN WYK J said:

> In the present case in considering whether the accused is guilty of murder the court found that his evidence might reasonably possibly be true. His evidence presents the facts in as favourable a light for himself as is possible. In view of the *onus* that rests on the Crown the court accepted the essence of the accused's version, but nevertheless found him guilty of murder. The probability is that the accused's account is

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> false, but in my view the court cannot now, when considering whether extenuating circumstances are present, reject the accused's account because of the probabilities.

This is the approach to a consideration of factors of extenuation which in the circumstances of this case the court *a quo* should have followed. In the light of what I have said above the court *a quo* misdirected itself on the question of extenuating circumstances.

Having come to the conclusion that there were present extenuating circumstances, the verdict of the court *a quo* is altered to read "Guilty of murder with extenuation".

I now come to consider the appropriate sentence the appellant deserves having regard to all the circumstances of this case. Here, a comparison of the nature of the crime and the factors of extenuation proved to exist, is justified. The crime was indeed a callous and heinous one. The appellant, according to Dr Purohit's evidence, must have chopped off the deceased's head. I would like to suggest that he did it in order to get satisfaction from throwing it into the room of a prostitute to whom he had earlier on proposed love but who had instead gone off with the deceased. I believe a sentence which meets with the approval of society's disgust with this type of crime is called for. In arriving at the sentence this court considers appropriate, I have had

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regard to all the personal circumstances of the appellant and to the mitigatory features so clearly outlined in this judgment.

Accordingly the sentence of death is set aside and substituted with a sentence of fifteen years' imprisonment with labour.

Gubbay JA: I agree.

McNally JA: I agree.

Pro Deo

S v PAWENI & ANOR 1985 (2) ZLR 133 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Criminal Appeal

17, 18, 19 June and 7 August 1985

Flynote

Criminal Procedure - duty of prosecutor - disclosure of previous inconsistent statements made by State witnesses - privilege of State witnesses' statements - effect of non disclosure of inconsistent statements by prosecutor on conduct of trial.

Criminal Procedure - sentence - bribery - most serious instance of the crime of bribery in this country - approach of courts - crimes against property in sentence not to be comparable with murder sentence.

Headnote

During the course of the criminal trial before the High Court counsel for the appellants made application for disclosure of warned and cautioned statements made by accomplices who had given evidence against the appellants. Such statements had been made in respect of their own offences and not for the purposes of the trial of appellants. In addition the accomplices had made affidavits for the purpose of the trial of the appellants. Counsel for the State objected to the disclosure of any statements on the grounds that such statements were privileged. The trial judge initially upheld State counsel's objection. At a later stage, however, an application again being made for disclosure of the warned and cautioned statements, the trial judge ordered such disclosure but only after both accomplice witnesses had given their evidence. Having disclosed the statements an accomplice witness was recalled for further cross-examination. On appeal it was submitted that the failure to disclose the statements at the outset had prejudiced the case of the appellants in that had they been disclosed earlier cross-examination of the accomplice

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would have been more intense and more pressing and the impression they made on the trial court might have been less favourable. Taking the evidence as a whole however, it could not be said that the failure to disclose the statements at an earlier stage in any way prejudiced the defence of the appellants. The cogency, general probabilities and corroboration of the accomplice witness evidence would inevitably have compelled the trial court to come to the same conclusion on the facts that it did.

The duties of a prosecutor in disclosing previous inconsistent statements discussed. Whether the disclosure of part of a privileged document results in the waiver of privilege in respect of the whole document considered, but not decided.

Bribery of public officials is a most serious evil in any society and is particularly to be guarded against in a developing country. All the reasons for requiring the exemplary punishment of public servants who accept bribes apply with equal vigour to the punishment of those who bribe them and in relation to the latter there are additional reasons for an even greater measure of deterrence and retribution.

When assessing sentence the general rule is that the court must not take into account as aggravation facts or circumstances that constitute a different and more serious offence with which the accused has not been charged. This rule is not immutable, however. In the instant case the sentence to be passed had to be commensurate with the crime of bribery only, and not with the more serious offence of fraud on a massive scale.

Sentences of fifteen years' and ten years' imprisonment imposed by the trial judge fell into the range of punishments for crimes as serious as murder with slender circumstances of extenuation. There are few occasions when crimes against property are, by their magnitude, so serious as to call for the sort of punishment that would not be inappropriate when life has been deliberately taken.

Cases cited:

R v Steyn 1954 (1) SA 324 (AD)

S v Mubaiwa 1980 ZLR 477 (AD)

R v White (No.2) 1962 R&N 485; 1962 (4) SA 153 (FSC)

Burnell v British Transport Commission [1955] 3 All ER 822 (CA)

Ex parte Minister van Justisie: In re S v Wagner 1965 (4) SA 507 (AD)

S v Xaba 1983 (3) SA 717 (AD)

S v Masinda en ' n Ander 1981 (3) SA 1157 (AD)

Attorney-General v Mantwana &Anor S-20-82 (unreported)

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S v Narker & Anor 1975 (1) SA 583 (AD)

Attorney-General v Chinyerere & Anor 1983 (2) ZLR 329 (SC)

S v Van der Westhuizen 1974 (4) SA 61 (C)

R v Conrad & Ors 1966 RLR 626 (AD); 1967 (1) SA 88 (RAD)

S v Mavunghu 1981 (1) SA 56 (AD)

P C Lloyd for first appellant

J S Sayce for second appellant

Y Omerjee for respondent

Judgment

Beck JA: [The learned Judge of Appeal first assessed the evidence and continued . . .]

Before leaving the matter of conviction and turning to sentence, it is necessary to deal with Mr *Lloyd's* submission that the convictions should be set aside on the ground of an alleged serious irregularity. Both the accomplice witnesses made warned and cautioned statements to the police after they were arrested, in reply to a warning that enquiries were being made into allegations that they were guilty of accepting bribes from Paweni. At a later stage, and this time specifically with a view to the prosecution of the appellants rather than themselves, the accomplices also furnished the police with affidavits. The attitude of State counsel from the outset of the trial was that both the warned and cautioned statements and the affidavits were privileged documents and that the State was therefore under no duty to disclose them to the defence. The defence on the other hand contended that the warned and cautioned statements were not privileged for the purpose of this trial, since they had not been brought into being for the purpose of prosecuting the appellants, and claimed therefore that the State was obliged to furnish the defence with copies of the warned and cautioned statements before the accomplices were called to give evidence.

Initially the trial judge upheld the State's refusal to furnish the defence with copies of the warned and cautioned statements that the two accomplices had previously made. At a later stage, however, after the first accomplice witness had testified, the defence again applied for disclosure of the accomplices' warned and cautioned statements, repeating the submission that they were not privileged, and contending further that it was probable that there were material discrepancies between the evidence of the first accomplice witness and his warned and cautioned statement. State counsel persisted in opposing the application, but assured the court that he was alive to his duty to reveal the contents of earlier statements made by a witness if there should be

discrepancies between it and the witness' evidence on any material point or points, in

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accordance with the oft-quoted passage in *R v Steyn* 1954 (1) SA 324 (AD) at 337A-C. (See further *S v Mubaiwa* 1980 ZLR 477 (AD)). The learned trial judge reserved his ruling on the application, which he later granted after the second accomplice witness had given his evidence; whereupon the warned and cautioned statements of both accomplices were disclosed. Thereafter the second accomplice witness was recalled for further cross-examination in the light of portions of his warned and cautioned statement. It was not at that stage thought necessary to recall the first accomplice witness for further cross-examination in the light of his warned and cautioned statement, but on later reflection, and after the defence case was closed, an application to recall the first accomplice for further cross-examination was made and was granted.

In the result therefore the warned and cautioned statements were disclosed and the defence was afforded the opportunity to cross-examine the authors of them before the trial concluded. Nevertheless it was submitted, relying on the decision in *R v White* (No. 2) 1962 R&N 485 (FSC) at 491F-492C; 1962 (4) SA 153 (FSC) at 154G-155E, that the defence had been irregularly prejudiced by the failure of the State to disclose these statements at the proper time, either before or during the cross-examination of both the accomplices. It was urged that if that had been done the cross-examination of these all-important witnesses may have been more intense and more pressing, and that the impression that they made from the outset on the trial court might have been less favourable, so that one cannot now be sure that if events had taken that course the trial court would inevitably have come to the same conclusion on the facts.

I think this submission can safely be rejected. I have paid careful attention to the discrepancies upon which the accomplices were eventually cross-examined and I am satisfied that it is fanciful to contend that the trial court's conclusion might have been different had that cross-examination come at an earlier stage in the trial. The judgment of the trial court amply demonstrates with what caution it approached all the evidence of the accomplices and I cannot for a moment accept that merely because of the interrupted sequence in which the whole of their evidence came to be put before the court an advantage may have been created for the State. And even if it were to be assumed that there is a chance that these accomplices would have been more urgently pressed and made to appear more uncomfortable had there been no temporary respite from cross-examination on the discrepancies in question. I am convinced that the cogency of the general probabilities and of the

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corroboration for their evidence that I have already referred to would inevitably have compelled the trial court to come to the same conclusion on the facts that it did. *White's* case, *supra,* is distinguishable. Not only were two previous inconsistent statements made by a crucial State witness only revealed after the trial was over, and after the trial court had finally come to its conclusion as to credibility and had given its judgment, but the extent of the inconsistencies revealed were such that, in the words of QUENET FJ, it was "by no means a fanciful hypothesis that (the trial court) might have concluded that Elisi's evidence was such a farrago of inconsistency and contradictions as to make her utterly untrustworthy". The situation in the present case falls very far short of that.

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As far as the affidavits are concerned, these were never disclosed to the defence *in toto,* but passages from them were disclosed which contained what State counsel perceived might be considered to be discrepancies with the evidence given before the trial court, and cross-examination with regard to those alleged discrepancies occurred.

It may well be that once the duty arose to reveal portions of those affidavits, which were otherwise privileged from disclosure because they - unlike the warned and cautioned statements - had been brought into being specifically for the purpose of this prosecution of the appellants, the privilege that attached to the complete document was lost and the affidavits as a whole, and not mere excerpts there from, should have been revealed. See *Burnell v British Transport Commission* [1955] 3 All ER 822 (CA); *Ex Parte van Justisie: in re S v Wagner* 1965 (4) SA 507 (A) at 514G-H.

The failure to have disclosed the contents of the affidavits as a whole does not necessarily lead to the conclusion that a fatal irregularity occurred. In the first place, there is no good reason for thinking that in the undisclosed portions of those affidavits there may have been any serious discrepancy with the evidence given by the witnesses at the trial. Mr *Lloyd* voiced a doubt that counsel who appeared for the State at the trial had a proper conception of what is meant by a "serious" discrepancy, regard being had to his earlier unwillingness to disclose to the defence the contents of the warned and cautioned statements. In this regard I commend to the careful attention of all prosecutors the following passage at 729E to 730E from the judgment of BOTHA JA in *S v Xaba* 1983 (3) SA 717 (AD):

> The concept of a serious discrepancy between the evidence given by a State witness and a prior statement made by him can be placed in proper

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> perspective by stating its antithesis: a discrepancy of a minor or trivial nature need not be disclosed (see *S v Hassim & Ors* (2) 1971 (4) SA 492 (N) at 494C-D). Serious discrepancies a re certainly not confined to those that have a direct bearing on a matter that is actually in issue at the trial. For that reason and to that extent I suggest, with respect, that to express the duty resting on a prosecutor in terms of the existence of a discrepancy 'on a material point', without further explanation, as was done in *R v White* 1962 (4) SA 153 (FSC) at 155 *in fin* and *R v Tapera* 1964 (3) SA 771 (SR A) at 772 *in fin,* can be misleading. It must be borne in mind that the rationale of the rule requiring disclosure of a previous inconsistent statement is to provide a safeguard against the danger of an accused being convicted on the evidence of a witness who is not a credible and reliable witness. Whether or not a discrepancy between the evidence of a State witness and his previous statement to the police is sufficiently serious to call for the performance of the duty of disclosure by the prosecutor must therefore be assessed in the context of the effect that such disclosure and the cross-examination following upon it might have on the credibility and reliability of the witness. In my opinion a discrepancy is serious whenever there is a real possibility that the probing of it by means of cross-examination could have an adverse effect on the assessment by the trial court of the witness' credibility and reliability. Such a real possibility is not created by a discrepancy of a minor or trivial nature.
>
> When a State witness gives evidence at variance with a statement in the possession of the prosecutor, the prosecutor must bring his mind to bear on the question whether or not the discrepancy is of a serious nature, in the sense explained above. (I leave out of consideration for present purposes a situation where the witness' deviation from his statement is so far-reaching that the prosecutor decides to discredit him by putting his statement to him in accordance with the provisions of s 190(2) of the Act.) If the discrepancy is clearly of a minor or trivial nature the prosecutor is not required to do anything. If the discrepancy is clearly a serious one, in the

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sense explained above, the prosecutor must as soon as possible after its emergence make the statement available to the defence. If the accused is unrepresented the prosecutor must forthwith disclose the discrepancy to the court. In assessing the nature of the discrepancy the prosecutor is entitled to take into account that police statements are, as a matter of common experience, frequently not taken with the degree of care, accuracy and completeness which is desirable; but that does not mean that he is entitled to ignore an averment in a

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statement which is *prima facie* in conflict with the witness' evidence. If it is not clear that the discrepancy is either serious or trivial the prosecutor should not act as the final arbiter on the question. If he is in doubt he must make the statement available to the defence (or to the court if the accused is unrepresented), for obvious reasons: if it should turn out that the discrepancy is of no real consequence, no more harm would have been done than to waste the little time required to establish that; but if he fails to disclose a discrepancy which is indeed serious, that might well result in a failure of justice.

I have made the above remarks because I believe it to be of the utmost importance that judges and magistrates presiding in criminal trials should be justified in reposing complete confidence in prosecutors to perform their duty of disclosure properly and unhesitatingly.

However obdurate the initial attitude of State counsel at the trial may have been, a perusal of the record as a whole does not suggest to me that he would have withheld any serious discrepancy from disclosure to the trial court and in my view the possibility that the undisclosed portions of the affidavits contain any such serious discrepancy can safely be discounted. Indeed, I am confident that if there should in fact be any serious discrepancy that was not disclosed, then Mr *Omerjee,* who appeared before us for the respondent, would certainly have informed this court of that fact.

The evidence that the accomplices had previously given in their own behalf when testifying in mitigation of sentence at their own earlier trial, their warned and cautioned statements, and those parts of their affidavits that were disclosed, all provided a substantial body of previously given information against which the evidence that they gave at the trial of the appellants could be measured; and this tends to fortify my confidence in concluding that there is no real risk that anything was hidden from the court that is contained in the undisclosed portions of their affidavits. Moreover, I respectfully agree with the following comments made by VAN HEERDEN AJA (as he then was) in *S v Masinda en 'n Ander* 1981 (3) SA 1157 (AD) at 1162F-1163A. (The passage is in Afrikaans. No official translation of it being available to this court, the translation is my own):

Naturally it is an acknowledged rule of practice that a prosecutor is obliged to bring to the attention of the court material discrepancies between a witness' statement and his evidence, and to make the statement available for cross-examination: *R v Steyn* 1954 (1) SA 324 (A) at

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337 and *S v Hassim & Ors* (2) 1971 (4) SA 492 (N) at 494. I cannot, however, accept that a failure to do so is without more to be regarded as a miscarriage of justice, which is in itself an elastic concept. For the sake of convenience I have spoken of a witness' 'statement'. The mere fact that a prosecutor has such a statement in his possession does not, however, mean that the witness in fact said what is attributed to him in the statement. A misunderstanding, for instance, could have crept in; the scribe of the statement may have used inaccurate

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language, or an interpreter may have interpreted wrongly. A witness may therefore deny that the statement correctly reflects his words, or may furnish an explanation for an apparent contradicting between his evidence and the statement. Moreover the remaining evidence against an accused may be so damning that even without paying regard to the account of the witness in question the guilt of the accused is clear. Such a failure therefore does not result *per se* in the conclusion that the accused was not given a fair trial. In this connection regard should be paid to the following *dictum* of OGLIVIE-THOMPSON JA in *S v Zondi* 1968 (2) SA 653 (A) at 655:

> The circumstance that a witness is subsequently ascertained to have made a prior statement contradictory of his evidence at the trial will, in the absence of any additional factor, only in very rare cases warrant the ordering of a re-trial.

I have already said that the general probabilities and the inculpatory corroboration of the main features of the accomplices' evidence conclusively establish the guilt of the appellants and even if the undisclosed portions of the accomplices' affidavits do by any chance contain matter that may be at variance with portions of their testimony at the trial I have no doubt that the same conclusion would still inevitably have been reached.

The contention that the conviction of the appellants is vitiated by a fatal irregularity arising from the tardy disclosure of the warned and cautioned statements and/or from the partial disclosure only of the affidavits previously made by the two accomplice witnesses must therefore fail.

This brings me to the matter of sentence.

Bribery of public officials is a most serious evil in any society, and is particularly to be guarded against in a developing country - see *Attorney-General v Mantwana & Anor* S-20-82 at p 3. In *S v Narker & Anor* 1975 (1) SA 583 (AD) at 586A, HOLMES JA said of bribery that it "is a corrupt and ugly

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offence striking cancerously at the roots of justice and integrity, and it is calculated to deprive society of a fair administration. In general, courts view it with abhorrence." In *Attorney-General v Chinyerere & Anor* 1983 (2) ZLR 329 (SC) this court referred with approval to the following remarks of BAKER J in *S v Van der Westhuizen* 1974 (4) SA 61 (C) at 65G:

> The third factor which the courts have to consider in assessing a penalty is the interests of society. I have already indicated that (bribery) is a most serious crime. In many cases of bribery of officials in the past even first offenders have been sent to gaol for their offence, without the option of a fine. Society does not tolerate dishonest officials in its public administration; it cannot afford to for, as soon as public administration falls into the hands of dishonest and dishonourable men, the complete corruption of the community starts to develop. For this reason society demands exemplary punishment of public servants who take bribes in connection with the exercise of their public duties. In this connection Mr *Mendelow* submitted that society does not demand that the accused should be sent to gaol. The answer to this is that society requires severe deterrent sentences for the discouragement of bribery. It is a crime which almost always involves premeditation, and often involves persistence in the conduct constituting the crime.

It may also be observed that bribery is not an easy crime to detect and that, once committed, it can be recurrent because the briber is given a hold over the person bribed, so he can readily widen the scope of the corruption. All the reasons for requiring the exemplary punishment of public servants who accept bribes apply with equal vigour to the punishment of those who bribe

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them; and in relation to the latter there are additional reasons for an even greater measure of deterrence and retribution.

Coming to the circumstances that surround the bribery that has occurred in the present case, there are certain seriously aggravating features that must be stressed, the most obvious of which is the enormous monetary prejudice that the bribery was calculated to inflict on the State to the corresponding benefit of the first appellant's company. While it is true that the value of the vouchers that the second accomplice was bribed to process for payment, and did so process in the knowledge that they were grossly inflated, is a great deal less than the alleged total (said to be about 5,8 million dollars) of all the over-payments that were made, it was nevertheless a vast sum of money that was obtained through those vouchers that the appellants bribed the second accomplice to process. Moreover, the bribes were also intended to forestall

steps to recover past over-payments, and in that sense they relate to the full extent of the prejudice caused to the State by the time the corruption was eventually uncovered and stopped.

Moreover, it was particularly despicable of the appellants to seek, through bribery, to obtain and retain such staggering profits at the expense of a programme that was designed to bring life-giving relief to those sections of the populace most sorely afflicted by one of the most prolonged and severe droughts in living memory. It should also have been apparent to the appellants that the extraordinary magnitude of the ill-gotten gains that the bribery was designed to facilitate and protect, together with the circumstances that those huge gains were made out of a humanitarian exercise for which there was international sympathy and support, could do great harm to the image of Zimbabwe in the international community if the corruption came to be revealed.

As far as Paweni is concerned it was suggested that a mitigating factor lies in the circumstance that the erroneous interpretation placed upon the contractually agreed formula was not, it seems, the brainchild of Paweni himself or of any of his employees, but of a Ministry official; and it is submitted that once the enormous over-payments had begun which this erroneous formula resulted in, the temptation to Paweni to perpetuate the situation must have been very great.

I do not doubt the magnitude of the temptation, but I question whether Paweni is entitled to any sympathy for succumbing to it. His business "empire" was clearly an extensive one and he was hardly a man in any kind of financial need, in the sense that most people would understand the word "need" in this context. The absurd gains that so ridiculous an interpretation of the formula afforded to Paweni's company could only have tempted a man of great avarice, totally insensible to all other considerations of honour and propriety, and I do not consider that he is to be treated with a measure of leniency for yielding to avarice as great as that.

When assessing sentence for an offence of which an accused person has been convicted the general rule is that the court must not take into account as aggravation facts or circumstances that constitute a different and more serious offence with which the accused has not been charged. (*R v Conrad & Ors* 1966 RLR 626 (AD) at 630F-I; 1967 (1) SA 88 (RAD) at 91H-92B;

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S v Mavhungu 1981 (1) SA 56 (AD) at 68E-H). This rule is not however an immutable rule and on occasion - as *Mavhungu's* case shows - it would

BECK JA

be unrealistic to apply it and it may properly be departed from.

I am in no doubt that in the present case it would be both unrealistic and wrong not to take into account when assessing sentence, the intended purposes for which these acts of bribery were resorted to and all the obnoxious features that adhere to those intended purposes. Bribery is an offence which, by its very nature, will be more or less morally culpable according to the purpose sought to be achieved by it. For instance, the interests of society would require the court to take a more serious view, for the purposes of punishment, of bribing a Customs officer with $100 to turn his back on the smuggling of a quantity of opium than it would take of bribing him with $100 to turn his back upon the smuggling of colour television sets of equivalent value.

But, having said all this, it is essential to keep very firmly in mind that the sentences to be passed on the appellants must still be commensurate with the offence of bribery only, and not with the more serious offence of fraud on a colossal scale-fraud with which the appellants have not been charged and of which they both, or either of them, may or may not be guilty. While the evidence in this trial shows that the Paweni Trading Corporation was not lawfully entitled in terms of its contract with Government to more than a small fraction of the enormous sums paid to it, it does not establish what portion of those over-payments may have been fraudulently obtained by one or other or both of the appellants; and even if it did, they are not to be sentenced as if they had been convicted of such a more serious offence.

It is also essential to keep firmly in mind that the sentences to be passed on the appellants must be commensurate only with those acts of bribery charged and established in this trial, and with no other acts of bribery, however widely the net of corruption may have been cast. We know, for it is part of the evidence before us, that in addition to the two accomplices, two other State officials have been convicted of accepting bribes at the hands of the appellants; and there are indications in the evidence that the rot may not have stopped there. But the appellants have been charged only with bribing the two accomplices; and insofar as the size of the bribes themselves are concerned they amounted in the case of the first accomplice to monetary sums totalling $6 200 and the promised gift of a second-hand motor-car, and in the case of the second accomplice to monetary sums totalling $4 800. Although these bribes are very substantial it is not difficult to find cases where larger inducements have been employed to empty and secure the corruption of public servants.

BECK JA

Except for the magnitude of the bribes that were paid all the other aspects of this case make it the most serious instance of the crime of bribery in the history of this country at least. Nor has our attention been drawn to any case of bribery in South Africa, England or any other country from whose legal system we derive assistance, that is as serious as this one. Sentences that

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seemed appropriate in other cases are therefore of scant assistance, but at the same time it must be said that no sentence yet passed for the offence of bribery in this country, or in South Africa, or - as far as I know - in England, comes even remotely near to the exceedingly high sentences that were passed on the appellants. In making this observation I exclude the sentences that were previously passed by another judge of the High Court on the two accomplices, and on the other two State officials who were the co-accused of the two accomplices. Those sentences, which are under appeal to this court, almost certainly had a powerful influence on the sentences that were imposed on the present appellants.

Two other matters require comment before stating the conclusion to which we have come regarding sentence.

The first is the need to draw specific attention to the lesser role played by Haruperi.*(6) I have already mentioned in passing that, unlike Paweni, Haruperi was not shown to have acquired a pecuniary benefit from any of these bribes, all of which were designed to obtain and protect payments for the Paweni Trading Corporation to which that company had no right. Haruperi had no stake in that company. He did of course enjoy the patronage of the Pawenis, and it is very likely that in assisting Paweni as he did he had an eye to the perpetuation of a relationship that was of substantial pecuniary benefit to himself, and was not motivated entirely by misguided altruistic considerations of friendship. It would be fair to say, however, that the difference in their ages, the long-standing friendship between their families, the impressive extent to which Paweni had become an important figure in the business world, and the obligation that Haruperi would have felt under by reason of the past financial help that the Pawenis had given him, would all have contributed greatly to undermining any disinclination that he might otherwise have exhibited towards acquiescing in the criminal requests that Paweni made of him. These features, together with the abovementioned cardinal feature that what he did on Paweni's instructions was done for the latter's benefit, are not sufficiently reflected in the difference of sentence that was drawn by the learned judge *a quo* in punishing the two appellants. These features, together with the abovementioned cardinal feature that what he did on Paweni's instructions was done for the latter's benefit, are not sufficiently reflected in the difference of sentence that was drawn by the learned judge a quo in punishing the two appellants. These

features also, together with the fact that Haruperi, unlike Paweni, is a first offender, merit the suspension of part of the sentence to be imposed on Haruperi.

The remaining matter relates to the learned judge's decision to bring into operation the suspended sentence of twelve months' imprisonment with labour that had been imposed on Paweni more than four years earlier. The condition of suspension was that Paweni refrain from committing during the period of suspension any offence "involving dishonesty". Mr *Lloyd* argued that bribery is not an offence that involves dishonesty as a necessary element, in the same way as theft or fraud does; and he contended that a condition of suspension worded in this manner can only be broken by committing an offence of which dishonesty is a necessary element, and not by committing some other kind of offence however dishonest the purpose may be for which

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it is committed. But whether or not he is correct in that submission I am satisfied that the sentence that is to be passed on Paweni must, if it is to meet the justice of the case, be of so substantial a duration that no purpose whatsoever is to be served by tagging onto it the sentence of twelve months that was previously suspended and I do not propose to bring it into operation therefore, even though I am of the view that the sentence of fifteen years' imprisonment with labour that was imposed on Paweni must be reduced.

In my view the sentences of fifteen and ten years' imprisonment that were respectively imposed on Paweni and on Haruperi are both manifestly excessive. They are sentences that fall into the range of punishments for crimes as serious, for example, as murder with slender circumstances of extenuation. There are occasions of course when crimes against property are, by their magnitude, so serious as to call for the sort of punishment that would not be inappropriate when life has been deliberately taken. But this is not such a case. It is a crime against public administration. The nature and extent of pecuniary loss to Government that it was designed to achieve, and the other features I have mentioned, make it an exceptionally serious instance of this class of crime, but it nevertheless belongs to a category of offences for which sentences of the order of those that were imposed are - or have previously been - unheard of.

For all these reasons I conclude that the appeals against conviction must be dismissed, but that the appeals against sentence must be allowed to the following extent:

The sentence on the appellant Paweni is altered by setting aside the order

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BECK JA

bringing into operation the previously suspended sentence of twelve months' imprisonment with labour, and the sentence of fifteen years is reduced to one of ten years' imprisonment with labour.

The sentence on the appellant Haruperi is reduced from ten years to four years' imprisonment with labour, of which one year is suspended for five years on condition that he is not convicted of having committed, during the period of suspension, bribery or a contravention of the Prevention of Corruption Act [*Chapter 70*] and sentenced to imprisonment without the option of a fine.

Gubbay JA: I agree.

McNally JA: I agree.

Pro Deo

GRAIN MARKETING BOARD v BINGA GURU (PVT) LTD 1985 (2) ZLR 147 (HC)

Court **High Court, Harare**

Reynolds J

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Civil Action

29 July and 8 August 1985

Flynote

Arbitration Act [Chapter 12] - s 6 - stay of proceedings in the face of a submission to arbitration - incidence and effect of onus - s 8 of Act - application where contract requires appointment of foreign arbitrator.

Headnote

Where an enactment requires a court to be satisfied that there is no good reason why a matter should not be referred to arbitration it is necessary for the person who opposes the referral to satisfy the court as required. The party seeking a stay of proceedings has the burden of showing that it has at all relevant times been ready and willing to assist in the conduct of the arbitration. Thereafter when consideration is given as to whether the stay should be allowed or not the onus shifts to the person who opposes the stay. However, if the court is satisfied that the matter should or should not be referred to arbitration it is unlikely that the burden of proof would have any effect on the court in arriving at that decision.

Where an agreement provides that an arbitrator "of a third country mutually agreed upon" may be appointed, that does not prevent s 8 of the Arbitration Act [*Chapter 12*] from being applicable, failing such agreement, in allowing recourse to the courts to seek the appointment of a local arbitrator. It would be anomalous if it were to be held that the Act only applies in respect of the appointment of an arbitrator in Zimbabwe.

Cases cited:

Stanhope v Combined Holdings and Industries Ltd 1950 (3) SA 52 (E)

Heyman & Anor v Darwins Ltd [1942] 1 All ER 337 (HL)

Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd 1970 (2) SA 498 (A)

REYNOLDS J

Glanfield v Asp Development Syndicate Ltd 1911 AD 374

Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1982] 1 Lloyds Rep 582

Hodson v Railway Passenger's Assurance Co [1904] 2 KB 833 (CA)

I A Donovan for the plaintiff

C Mutasa for the defendant

Judgment

Reynolds J: The parties in this matter entered into a written contract in terms of which the defendant was to supply and sell to the plaintiff a consignment of some 7 000 metric tonnes of

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rice at US$268 per tonne. The rice was to be delivered at Beira by 15 June 1984, but it was eventually delivered more than six weeks later. In consequence of the delay the plaintiff incurred additional charges and costs totalling just over $48 000, and summons was issued on 18 March 1984 for the recovery of that sum, together with interest and costs.

Mr K Mutasa, as a director of the defendant company, raised a special plea in terms of s 6 of the Arbitration Act [*Chapter 12*] that the plaintiff's action be stayed, the contention being that they should submit to arbitration any dispute arising that could not be settled amicably between them, and that the matter should, therefore, be resolved in that way and not by litigation.

The plaintiff submitted that any question of arbitration had fallen away by virtue of the fact that the defendant had been, and still was, unwilling to have the dispute settled in this way, and that the application for a stay of proceedings should, accordingly, be dismissed.

There is some difficulty as to the question of *onus* in this case. Section 6 of the Act reads as follows:

> 6. (1) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect to any such matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do

> all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings subject to such terms and conditions as may be just.

It seems to me that the burden of proof shifts at different stages of this inquiry. At the first stage, in my view, it is necessary, where an enactment requires a court to be satisfied that there is no good reason why a matter should not be referred to arbitration, for the person who opposes the referral to satisfy the court as required. The *onus* in this respect, therefore, is on the plaintiff in this case. On the other hand, it is my opinion that the burden rests on the defendant to show that it has, at all relevant times, been "ready and willing to do all things necessary to the proper conduct of the arbitration". (See Mustill & Boyd *Commercial Arbitration* p 417; *Stanhope v Combined Holdings & Industries Ltd* 1950 (3) SA 52 (E) at 57; *Heyman & Anor v Darwins Ltd* [1942] 1 All ER 337 (HL) at 355. Cf *Kathmer Investments (Pty) Ltd v Woolworths (Pty) Ltd* 1970 (2) SA 498 (A) at 504H. At the second stage of the inquiry, ie when consideration is given as to whether the stay should be allowed or not, I consider that he onus shifts to the plaintiff again. It is he, after all, who opposes the enforcement of the arbitration clause in the agreement. In this respect the learned authors of *Commercial Arbitration, supra,* state at 424:

> In recent years, no weight has been given to this verbal distinction. The presumption in favour of granting a stay, which in recent years has been almost overwhelming, has swamped any meticulous consideration of the question whether the discretion to grant a stay has been shown to exist at all.

The distinction is probably rather academic in any event, and it would be only in most unusual

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circumstances that it would assume any material significance. If the court is satisfied that the matter should or should not be referred to arbitration, it is unlikely that the burden of proof would have had any effect on the court in arriving at that decision.

The real issue in the present matter is to determine the defendant's true attitude. In this regard, and on his part, the plaintiff relies on various letters that were addressed to the defendant, and various meetings that were held, to show that the defendant was unwilling to submit to arbitration. The plaintiff has made his attitude clear on a number of occasions, and this is to the effect that (a) the defendant is personally liable as claimed, and (b) if it is not possible to resolve the dispute by themselves amicably, the matter should be

settled either by litigation before the courts of Zimbabwe, or by reference to the Foreign Trade Arbitration Organization of the Republic of South Africa. The plaintiff alleges that the defendant has not responded to these alternative suggestions, and has delayed matters to such an extent that the matter can be resolved now only by trial action.

The defendant, on the other hand, states that he is, and has always has been, ready and willing to abide by the terms of the arbitration agreement. In a letter dated 25 September 1984 and marked number "7" in a bundle of documents produced as an exhibit, the defendant rejected both the plaintiff's alternative suggestions as "premature", and expressed the wish that they should at first try to settle the matter amicably between themselves before resorting to such measures. No progress was made and on 10 January 1985, the plaintiff wrote to the defendant, repeating his original suggestions, and demanding a response within eight days. The defendant's reply to this was dated 15 January 1985, in which it is stated:

> We have several times send (*sic*) telexes to our supplier to contact the shipper so that he can reddress (*sic*) the problem. Up to now we have not had any favourable response. In our last telex we have suggested that we have to go to arbitration and we are awaiting their reply. We have suggest (*sic*) London, Geneva and Nairobi.

The defendant argued that this letter amounted to a rejection of the plaintiff's proposals, and a counter-suggestion as to a different venue. The plaintiff contended that he understood this passage to refer only to the defendant's efforts to settle some dispute with its supplier. In this regard, I consider that the plaintiff's understanding of this letter was entirely reasonable and rational; any other conclusion would place an unacceptable strain on the limits of interpretation. On 24 January 1985, the defendant wrote another letter to the plaintiff in reference to a telephone conversation that he and the plaintiff's legal representative had held the previous day. *Inter alia,* the letter contained the following:

> Arbitration can only be successful if all the parties - the suppliers, the shipper, the agencies, insurers, and the buyer - are all on the table. For just Binga Guru and the GMB to fly out for arbitration is nonsense. If we want to sort out something between ourselves as we all live here, let us just meet and sort out the problem.
>
> The question of litigation is a waste of much scarce National resources,

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> which we do not encourage. Of course, we are aware that some people may benefit from it, but we believe it is not proper.

This particular letter crossed one from the plaintiff's legal representative in which it was stated that summons would be issued.

Mr *Mutasa,* of Hove Mutasa & Associates, legal practitioners for the defendant, argued that it was unreasonable of the plaintiff to suggest that a South African based organization undertake any arbitration proceedings found necessary. It is significant that this objection has not been raised previously, but it seems to me that had the defendant given consideration to the practical effect of the suggestion, it may well have taken exception to the idea. By the same token, had the plaintiff given careful thought to its proposal, it would have realized just how impractical and objectionable it was. Be this as it may, it is clear that the defendant has at no time made any move to accept or reject the plaintiff's proposals, nor made any meaningful attempt to settle the matter, and the question remains as to whether this dilatory conduct demonstrates its unwillingness to submit the dispute to arbitration.

It must be noted at the outset that the material time is from the period when the proceedings commenced - ie 18 March 1985 - to the present. At no time during this period has the defendant repudiated the arbitration agreement, nor has he ever stated that he was not willing to submit the matter to an agreed arbitrator. He has merely expressed the opinion that he believes that it is essential for the supplier and other associated parties to be present at any such hearing, too. It is clear, in my view, that his belief in this last respect is incorrect. The only parties to the contract in question were the plaintiff and the defendant, and the part played by any other parties is irrelevant.

It may be mentioned at this stage that Mr *Donovan,* for the plaintiff, argued that difficulties would arise if the court directed that the matter be referred to arbitration. I do not think that the court can anticipate difficulties before they occur or make allowance for such a possibility. The court cannot just assume that the defendant will prove to be obstructive or contrary. (See *Glanfield v Asp Development Syndicate Ltd* 1911 AD 374 at 383.)

There is, in my view, only one area that remains where there may be some room for doubt as to the defendant's right to a stay, and this relates to the defendant's protracted and persistent failure to take any positive or meaning-

ful steps towards meeting the plaintiff's requests and proposals. The "secondary" contract to arbitrate will come to an end, as I understand the position, if events occur which effectively render performance impossible. Unacceptable delay would fall into this category, although it may be questionable as to whether or not a delay as such would constitute a breach of the contract. Assuming that it would, it appears that undue delay can result in the contract to arbitrate being discharged. (*Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1982] 1 Lloyd's Rep 582). The question arising for decision, then, is whether the defendant's delays

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can be termed or classified as "inordinate" or "excessive", or so great as to warrant the inference that it did not in fact desire that the matte be referred to arbitration. I think not. The defendant has at worst been guilty of some measure of dilatory conduct, and of a refusal or disinclination to accept the plaintiff's stated opinion that the other parties should not be present at any arbitration hearing. Mere delay as such is not sufficient: it is the inference to be drawn from the delay which is of significance. This will assist the court in deciding whether the defendant was indeed "ready and willing" as it avers (*Hodson v Railway Passengers' Assurance Co* [1904] 2 KB 833 (CA) at 841). In the present case I do not think that any inference can be drawn from the facts that the defendant was not "ready and willing to do all things necessary to the proper conduct of the arbitration."

In the result, I am satisfied that the stay ought should be granted.

Certain practical difficulties arise. The plaintiff has expressed the fear that if the application succeeds it will be possible for the defendant to frustrate his further efforts to make any progress with regard to the resolution of their dispute. Whereas the view has already been expressed that such a possibility should not be assumed, it is a fact that a considerable period of time has elapsed since it became apparent that referral for arbitration was necessary. It may well be that the parties will be able to agree on an arbitrator now, particularly as the defendant will be aware that his belief that other parties should be involved is considered to be incorrect. I hope that this will be the outcome, but in the event that all efforts prove fruitless, it is desirable to provide for that result.

The contract entered into by the parties was, it appears, based on a standard form that has been in use for many years, and for all such types of contract. The arbitration clause in this contract provides that the unresolved dispute should be referred to a Foreign Trade Arbitration Organization "of a third country mutually agreed upon . . .". This provision creates further difficulties,

REYNOLDS J

as this court would obviously have no jurisdiction to make an appointment in a third country. Furthermore, arbitration in another country would obviously raise costs very considerably, and there could well be problems regarding foreign currency. Section 8 of the Arbitration Act, which provides that the court may make appointment, on application, where the parties cannot concur on an arbitrator, would, therefore, and *prima facie,* appear to be of no application in the present matter. But on further consideration, I am of the view that to invoke the provisions of this section of the Act would not be invalid. The parties have expressly stated that they wished to have their dispute resolved by arbitration, and it seems to me that it would be no violation of their agreement, if they are unable to concur in the appointment of an arbitrator in another country, to allow recourse to this court in terms of the Act. The relevant provisions of this Act are, after all, specifically designed to allow recourse to the courts if the parties are unable to agree on an arbitrator. This is the whole intention of the Legislature. The effect of the provision is that the appointment is made in terms of the Act, and not the agreement. The only distinction here is that the parties have specified that the arbitrator is to be "of a third country". But, in my view, the same principle applies: the parties have agreed that unresolved disputes should be

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submitted t arbitration, and they are unable to agree on the necessary appointment. They should then be allowed recourse to the court to make the appointment. Both parties are domiciled in Zimbabwe, and the agreement was signed in this country. It seems to me that it would be anomalous if it were to be held that the statute would apply only in respect of agreements that concern the appointment of an arbitrator in Zimbabwe. I propose to give directions on this basis.

In the result of the foregoing, the application for a stay of proceedings is granted with costs. If the parties do not concur in the appointment of an arbitrator in terms of the contract of agreement on or before 30 September 1985, then leave is given for either party to proceed in terms of s 8 of the Arbitration Act [*Chapter 12*]. In this event, each party is requested to nominate two Zimbabwean persons or organizations as potential arbitrators, together with a description of the identity, qualifications and suitability of each.

Coghlan, Welsh & Guest, legal practitioners for the plaintiff

Hove, Mutasa & Associates, legal practitioners for the defendant

S v MUCHENJE 1985 (2) ZLR 154 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and McNally JJA

Criminal Appeal

9 and 26 August 1985

Flynote

Criminal Law - murder - sentence - s 314(1)(b)(iii) of Criminal Procedure and Evidence Act [Chapter 59].

Headnote

The appellant had killed an elderly man in the course of a robbery. The deceased's wife was severely assaulted in the same incident. The appellant was assisted in his criminal acts by a *socius* who had not been apprehended. In respect of the death of the deceased the only evidence available was that of the appellant. The approach of the court to improbable but unaccountable evidence by an accused person considered.

Section 314(1)(b)(iii) of the Criminal Procedure and Evidence Act [*Chapter 59*] was introduced to allow a court to impose a death sentence upon a person who might otherwise unjustifiably escape it. In this case the imposition of the death sentence in respect of the attempted murder of the deceased's wife amounted to a misdirection as the effect of such sentence was to impose the death sentence twice in respect of essentially one course of conduct.

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Cases cited:

S v Chaluwa 1985 (2) ZLR 121 (SC)

S v Seputhi 1985 (1) SA 9 (AD)

S v Chimbamba & Anor 1977 (2) RLR 131 (AD)

A S G Nhari for the appellant

F S Chambakare for the respondent

McNALLY JA

Judgment

McNally JA: The appellant was charged with the murder of an elderly man and the attempted murder of his (the deceased's) wife. He was found guilty on both counts and sentenced to death on both. The appeal is against sentence only, on the grounds that the trial court erred in failing to find that there were extenuating circumstances in relation to Count One and mitigatory features in relation to Count Two.

The facts which were accepted by the trial court were that the appellant and another man entered the house of Mr and Mrs Bradnick in Harare after dark on 4 October 1983, intent on theft. The appellant says that they saw the deceased come out of his kitchen door and go into the garden and they seized the opportunity to enter the house by the open door. While they were inside he returned. There was a brief scuffle between the deceased and the appellant and then the deceased ran off to the bathroom, saying that he was going to fetch a gun. The appellant followed in order to disarm him.

The defence outline, which is the only version of events available, continues:

8. Having got into the bathroom, the deceased fetched a gun and the accused got hold of the deceased's arm and the two grappled with each other. The accused admits that he assaulted the deceased with clenched fists and also kicked the deceased in an attempt to make the deceased release the gun.

   While all this was happening the accused's colleague, Mike, was elsewhere in the house. The accused called out to him to come and assist disarm the deceased.

9. By the time Mike came to the accused's assistance, both accused and the deceased had fallen down and were still grappling and fighting. The deceased was then disarmed but was injured at this time and bleeding. The accused believes that the deceased may have knocked his head against a hard object during the struggle causing the injury that eventually caused his death.

   He is however prepared to accept that one or more of his punches could possibly have caused the said fatal injury.

In his evidence the appellant elaborated on this. He was asked:

Q. Why did you assault him then once he was lying on the ground? You

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McNALLY JA

were in possession of the firearm, why did you continue to assault him? A After he was disarmed we did not assault him for a long period.

Q. But you did assault him thereafter?

A. Yes, whilst he was lying on the ground we did.

Q. I want to know why you assaulted him then?

A. As far as I am concerned he wanted to kill me.

Q. And so you were angry?

A. Yes.

Q. You didn't just want to beat him up to such an extent that he would be unable to interfere in your theft?

A. That was my intention.

Q. To punish him?

A. Yes.

He later said that when the deceased fell down they both kicked him. Only when he was leaving the house did he see Mrs Bradnick lying on the floor bleeding. This was after they had stolen money, property and the gun. He assumed his colleague had assaulted Mrs Bradnick.

The next day the two Bradnicks were found lying in their house. The house was locked and the telephone ripped out. Mr Bradnick died some 24 hours after the assault of a fractured skull. Mrs Bradnick recovered.

The appellant was arrested the same day, in possession of some of the missing property. He was uninjured. He is 28 years old and apparently heavier than the deceased who weighed 65 kgs and was in his seventies. Mrs Bradnick was 71 or 72 at the time of the assault.

The CHIEF JUSTICE has recently set out the proper approach of the court when faced with improbable but uncontradicted evidence by an accused person. See S v Chaluwa S-75-85 (not yet reported) *(7) and *S v Sephuti* 1985 (1) SA 9 (AD). In this case it was accepted by the State and indeed alleged in the indictment that the appellant had an accomplice, so it must be accepted that that was so. Similarly it must be accepted that the deceased went and got a gun.

In relation to the murder charge it has been argued that the court should have found extenuating circumstances. The learned judge did find that there was no actual intent to kill. The deceased was still alive when the appellant

McNALLY JA

left the premises. It was claimed that the existence of a constructive intent, coupled with the

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drink taken by the appellant before the event, coupled with the fact that he assaulted the deceased in self-defence, having entered the house unarmed, should have led to a finding of extenuating circumstances.

I accept that there was a constructive and not an actual intent to kill. The trial court accepted this, but decided on an overall assessment of the circumstances that this did not justify a finding of extenuation.

I proceed to consider the other circumstances. The consumption of alcohol is in my view of no extenuatory relevance. The appellant claims that he and his accomplice met and discussed the acquisition of funds by unlawful means while drinking beer between 2 pm and 4 pm on the day of the murder. There is no suggestion that they were drunk at 4 pm, far less at 8 pm or later when they entered the Bradnick's house.

It is true that they entered the house unarmed. But even if one accepts that it was necessary to disarm Mr Bradnick, the fact remains that it cannot have been a very difficult task. The gun was not fired, nor was the appellant injured. He carried out a brutal assault to the head, face and body of an old man into whose house he had come at night to steal, with a companion. The assault left blood in abundance in several rooms, particularly the bathroom, the kitchen and the dining-room where the deceased was found in a pool of blood. The appellant admits that he continued to assault the deceased after he had disarmed him, to punish him or render him harmless. Having carried out this brutal assault he then proceeded with his original intention to steal, and having collected together the items he wanted he (or his companion) then carefully cut the telephone and locked the house before leaving.

In these circumstances the trial court cannot be criticised for reaching a finding that there were no extenuating circumstances.

I turn next to consider the sentence on the second count.

The assault on Mrs Bradnick was a severe one and it is astonishing that she has made an apparently complete recovery. She was 71 or 72 at the time of the assault, suffering from arthritis, cataracts in her eyes, and hardness of hearing. There can be no question but that the assault was dangerous to life and that there was a recklessness as to whether or not she died, both in the assault and in the locking of the doors and the cutting of the telephone wires after the assault and theft. The appellant is as guilty as his alleged colleague

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McNALLY JA

of the attempted murder, even though it is accepted that he himself did not assault her. Their common purpose was clearly established.

A trial court is empowered to sentence to death a person convicted of attempted murder. It is further provided, in s 314(1)(b)(iii) of the Criminal Procedure and Evidence Act [*Chapter 59*], that a court may pass the death sentence for any offence "potentially dangerous to life" committed on an occasion when a murder is committed either by the offender himself or by an accomplice.

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On either of these bases therefore the trial judge had a discretion to impose the death penalty.

The learned trial judge, after making a reference to s 314(1)(b)(iii) aforesaid, did not make any further analysis of the facts pertaining to the moral blameworthiness of the appellant in relation to Mrs Bradnick. He noted that it was a result of comments made in *S v Chimbamba & Anor* 1977 (2) RLR 131 (AD) that the Act had been amended to permit the death sentence. Chimbamba was a case where an 82 year old woman had been assaulted and left to die by one of two house-breakers. The other had remained on guard outside. The court had been unable to determine which of the accused had remained outside, and had been obliged to return a verdict of culpable homicide in relation to both, the victim having subsequently died. It was however satisfied that whoever killed her was guilty of murder.

In the present case, however, not only is it accepted that it was not the appellant who attempted to murder Mrs Bradnick by assaulting her, but also it is a fact that she did not die. The learned judge did not advert to these facts in imposing the death sentence. In my view this was a misdirection. Moreover s 314(1)(b)(iii) is, to my mind, intended to allow the court to impose a death sentence upon a person who might unjustifiably escape it. In this case the appellant is to suffer the death penalty in regard to Count One. To impose that penalty in relation to Count Two because Count One was committed on the same occasion, is in effect to punish the appellant again for Count One, where he has already received the ultimate sentence.

Thus if the death sentence was imposed because the offence was attempted murder, the court erred in neglecting to take account of the fact that the appellant was only a *socius* in relation to that offence. If it was imposed by reason of the provisions of subs (b)(iii) the court erred for the reason I have set out.

In view of the misdirection this court is at large as to sentence on Count Two.

McNALLY JA

In all the circumstances I consider a sentence of twelve years' imprisonment with labour to be appropriate.

Accordingly in relation to Count One the appeal against sentence is dismissed. In relation to Count Two the appeal is allowed, the sentence of death is set aside and there is imposed in its place a sentence of twelve years' imprisonment with labour.

Dumbutshena CJ: I agree.

Beck JA: I agree.

Pro Deo

J PAAR & CO (PVT) LTD v SHIELD OF ZIMBABWE INSURANCE CO LTD & ANOR 1985 (2)

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ZLR 160 (HC)

Editor's Note:(8)

Court **High Court, Harare**

Sandura JP

Civil Action

1, 2, 3, 4 July and 28 August 1985

Flynote

Insurance - interpretation of words in contracts of insurance - "theft" - the criminal definition of "theft" applies when that word is used in an insurance policy.

Contract and delict - duty of care - a person who has entered into a contract with another party may have a duty of care arising therefrom in respect of third parties - such duty cannot be higher than that owed to the party with whom he contracts.

Headnote

If a word has an accepted legal definition that definition will apply when it is used in a contract of insurance. The word "theft" is well established as a term of legal art in our criminal law. It is the definition of theft in our criminal law which governs its interpretation in the policy insurance under consideration.

Where a person enters a contract with another party, which contract gives rise to a duty of care in respect of the property of one party, a duty of care in respect of the property of a person who is not a party to the contract can arise. Such duty of care cannot extend beyond the obligations incumbent upon the party in terms of the contract. Whether there is a breach of duty is a factual question to be decided in respect of each set of circumstances.

Case cited:

Commercial Union Fire, Marine and General Insurance Co Ltd v

SANDURA JP

Fawcett Security Organisation (Byo) (Pvt) Ltd 1985 (2) ZLR 31 (SC); 1986 (1) SA 432 (ZSC)

C Greenland for the plaintiff

I A Donovan for the first defendant

H I Bissett for the second defendant

Judgment

Sandura JP: The plaintiff in this matter carries on business as a vehicle fleet operator. The first

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defendant, a company which carries on the business of insurance, was known as "South British Insurance Company Limited" at the time the summons was issued but has since changed its name. The second defendant is a company which carries on the business of safeguarding property in the city of Bulawayo. The plaintiff's claim against the two defendants is as follows:

As against first defendant:

(a) An order declaring first defendant to be liable to pay to plaintiff the damages of $7 000,00 or any portion thereof which it may not be entitled to or able to recover from second defendant.

(b) Costs of suit, including any costs incurred in respect of its claim against second defendant which it might be ordered to pay or bear itself.

As against second defendant:

(a) Damages in the sum of $7 000,00.

(b) Damages in the sum of $20 006,40.

(c) Costs of suit, including any costs incurred by it in respect of its claim against first defendant which it might be ordered to pay or bear itself.

The facts of this case are these. On 23 March 1977 and at Harare the plaintiff and the first defendant entered into a written agreement of insurance in terms of which the first defendant undertook to indemnify the plaintiff for any loss or damage (other than consequential loss) resulting from, *inter alia,* theft or attempted theft of an AVM fuel tanker owned by the plaintiff. In terms of another written agreement between the plaintiff and Total Zimbabwe (Pvt) Ltd (hereinafter referred to as "Total"), the plaintiff hired the said AVM fuel tanker to Total. On 3 November 1979, and at Bulawayo, the fuel tanker was unlawfully removed from the premises of Total by an employee of Total, one

SANDURA JP

Frank Muzira. Whilst the tanker was being driven away it was overturned, thereby occasioning the plaintiff damages. When the fuel tanker was unlawfully removed from Total's premises there was in existence an agreement between Total and the second defendant, Fawcett Security Organisation (Bulawayo) (Pvt) Ltd (hereinafter referred to as "Fawcett"), whereby Fawcett undertook to provide guards to safeguard the property on Total's premises.

The issues in this case were stated by the parties in a minute of the pre-trial conference, the relevant part of which reads as follows:

1. The sole issue between plaintiff and first defendant is whether the conduct of Muzira in removing the vehicle constituted theft or attempted theft for the purposes of the policy of insurance issued by the first defendant to the plaintiff.

2. The issues between the plaintiff and the second defendant are as follows:

   (i) Whether the removal of the vehicle by Muzira was unlawful;

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(ii) Whether the second defendant owed the plaintiff a duty of care to ensure that the vehicle was not unlawfully removed from the premises;

(iii) Whether the second defendant negligently breached that duty of care;

(iv) The quantum of the plaintiff's damages.

I shall first deal with the issue between the plaintiff and the first defendant. That issue is whether the removal of the fuel tanker from Total's premises by Muzira constituted theft or attempted theft of the tanker. I think it was common cause at the hearing of this matter that the tanker in question was unlawfully removed from the premises. Indeed, I did not understand Mr *Donovan,* who appeared for the first defendant, to argue that such removal had been lawful. Whether the unlawful removal of the tanker constituted theft or attempted theft depends upon the meaning of "theft".

Dealing with the meaning of words in insurance policies, the learned authors of *MacGillivray & Parkington on Insurance Law,* 7th ed, have this to say on pp 438-439:

SANDURA JP

> A word or phrase which has a recognised technical meaning in law will usually be taken to bear that meaning, and not a wider or narrower popular meaning. When, therefore, a word which is established as a term of legal art in the criminal law appears in a policy, the criminal law definition of that word should govern its interpretation, for, as Viscount Sumner said in *Lake v Simmons,* 'I dissent from the view that criminal law should be regarded as irrelevant merely because a document is commercial. After all, criminal law is still law, and so are its rules and definitions. ' It is important, however, to distinguish words which are not terms of legal art, but rather popular descriptions of criminal acts having a different technical definition in law, such as 'suicide' or, until recently, 'theft'. Thus in considering the word 'theft' in a marine insurance policy, LORD DENNING MR said: "The word 'theft' is not used here in the strict sense of the criminal law. It does not bring in all the eccentricities of the law of larceny. It means only what an ordinary commercial man would consider to be 'theft'." It is submitted, however, that if this word appeared in a policy subscribed to after the passing of the Theft Act 1968, it might well receive the current criminal law definition of that term.

The same views were expressed by Gubbay JA in Commercial Union Fire, Marine & General Insurance Company Ltd v Fawcett Security Organisation (Byo) (Pvt) Ltd S-58-85 (not yet reported) *(9). The learned judge had this to say at page 4 of the cyclostyled judgment †(10) :

> The presumption that a word in a policy of insurance should be construed in its plain, ordinary and popular sense, is rebutted if it be shown that the word is established as a term of legal art in the criminal law, in which event, the criminal definition of the word governs its interpretation. The correctness of this principle of construction is beyond debate . . .

I am in full agreement with those views.

In this country the word "theft" is well established as a term of legal art in the criminal law. This means that it is the definition of theft in our criminal law which governs its interpretation in the policy of insurance under consideration. The definition of "theft" is found at p 602 of Vol II of *Hunt, South African Criminal Law & Procedure,* 2nd ed. The learned author defines "theft" as follows:

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SANDURA JP

Theft consists of an unlawful *contrectatio* with intent to steal of a thing capable of being stolen.

In other words, theft is the unlawful appropriation of property belonging to another with the intention of permanently depriving that other of it. This is the established definition of theft in this country. I must now consider whether the unlawful removal of the fuel tanker by Muzira amounted to theft or attempted theft in the sense indicated above.

As is the case in all civil actions, the burden of proof rests upon the plaintiff to establish its case on a preponderance of probability. The plaintiff in the present case must, therefore, establish on a balance of probability that Muzira's unlawful removal of the fueltanker from Total's premises constituted theft or attempted theft. The plaintiff's witnesses stated that on the day in question Muzira unlawfully removed the tanker from the premises where it was parked and subsequently overturned it when he failed to negotiate a bend. This was accepted by the first defendant. It was further alleged by the plaintiff that when Muzira unlawfully removed the tanker from Total's premises he intended to steal it. The first defendant denied this and produced the record of Muzira's criminal trial which shows that he was charged *inter alia* with contravening s 48(1)(b) of the Road Traffic Act, 1976, in that he drove the tanker without the consent of its owner. He pleaded guilty and was found guilty. In my view all this evidence is irrelevant as it does not prove that Muzira did not commit theft or attempted theft. All it establishes is that he was charged with and pleaded guilty to contravening a section of the Road Traffic Act. In my view, the unlawful removal of the tanker from the premises where it was parked and the manner in which it was done constitute a *prima facie* case of theft or attempted theft. In the absence of any evidence to the contrary, the intention to steal must be inferred from the unlawful removal of the tanker. Muzira was not called as a witness by the first defendant and, in the circumstances, there is no evidence to rebut the plaintiff's *prima facie* case. I agree with the submission made by Mr *Greenland,* who appeared for the plaintiff, that in the circumstances the plaintiff cannot and must not be expected to prove any more than he has proved in order to succeed. I am, therefore, satisfied that the plaintiff has proved to the satisfaction of this court that Muzira stole its fuel tanker on the day in question. In the circumstances, the plaintiff is entitled to succeed against the first defendant. The *quantum* of damages suffered by the plaintiff was agreed between the plaintiff and the first defendant as being $6 713,71. The plaintiff is, therefore entitled to that sum with costs.

SANDURA JP

I now turn to deal with the issues between the plaintiff and the second defendant. As indicated earlier, those issues are -

(1) whether the removal of the fuel tanker by Muzira was unlawful;

(2) whether Fawcett owed the plaintiff a duty of care to ensure that the plaintiff's fuel tanker was not unlawfully removed from Total's premises;

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(3) whether Fawcett negligently breached that duty of care; and

(4) the *quantum* of the plaintiff's damages.

Dealing with the first issue, there can be no doubt in my mind that the removal of the fuel tanker was unlawful. Indeed, Mr *Bissett,* who appeared for the second defendant, did not argue that the removal was lawful. With regard to the second issue, again, there is no doubt whatsoever that the second defendant owed the plaintiff a duty of care to ensure that the plaintiff's fuel tanker was not unlawfully removed from Total's premises. The second defendant had entered into an agreement with Total in terms of which the second defendant provided security guards to safeguard all the property on Total's premises. That property included the plaintiff's fuel tanker. Mr *Bissett* did not argue that the second defendant did not owe the plaintiff a duty of care to ensure that the said tanker was not unlawfully removed. He submitted, however, that the duty of care could not extend beyond the obligations incumbent upon the second defendant in terms of its contract with Total. In my view, this is a valid submission. Mr *Bissett's* main argument, however, related to the third issue, ie whether the second defendant negligently breached its duty of care to the plaintiff. In this regard, he submitted that the second defendant did what it was obliged to do in terms of its contract with Total and did not, therefore, breach its duty of care to the plaintiff. In order to determine this issue it is necessary to look at the evidence which was led by the parties and the circumstances surrounding the unlawful removal of the tanker from the premises in question.

Mr Crosby, Total's Operations Manager, gave evidence for the plaintiff. His evidence was that Total hired the second defendant (Fawcett) to guard its premises in Bulawayo and that it was Fawcett's duty to guard the premises against sabotage and the unlawful removal of property from those premises. That property included the plaintiff's fuel tanker. The ignition keys for this tanker and Total's own tanker were kept in the tankers so that in case of any

emergency, such as fire at the fuel depot, the tankers could be driven away without delay. There were two tankers and one delivery van on the premises in question. There were also three drivers on the said premises - two for the tankers and one for the delivery van. In this regard, Mr Crosby said that the security guard who was on duty when the plaintiff's tanker was unlawfully removed should have known that the person driving it was not one of the three drivers. He added that all the employees on the premises in question had Total's identity cards. Each card ha a photograph of the bearer and his name. He was not sure, however, whether the card indicated the capacity in which the employee was employed. The procedure at the gate was that the employee would produce his identity card before the guard could let him enter the premises. If a driver was going out to deliver fuel to Total's customers, he would produce invoices at the gate and the security guard would record the driver's destination as well as the driver's name before allowing the tanker to leave the premises. Mr Crosby also said that there was nothing unusual about fuel deliveries being made early in the morning on Saturdays.

Mr Fawcett, who gave evidence for the second defendant, stated that the security guards were not concerned with the capacity in which an employee was employed by Total. If an employee

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produced an identity card at the gate indicating that he was employed by Total, that employee was allowed to enter the premises and, if he subsequently drove a motor vehicle out of the premises, it was assumed that he was authorized to do so. Mr Fawcett added that in such a case the guard would take down the name of the driver and his destination. He would check the tanker or motor vehicle for the carriage of any unauthorized property, such as fuel or oil contained in tins, before allowing the tanker to leave. According to Mr Fawcett, that was all the guards were required to do in terms of the contract between Total and the second defendant. They were not required to know who the authorized drivers on the premises were, nor were they given a list of authorized drivers. Indeed, Mr Crosby did not say that the security guards or the second defendant were given such a list, though he said that the security guards should have known who the drivers were. Finally, Mr Fawcett said that the theft of a tanker full of fuel was a very remote possibility and that theft of such a tanker by a man employed by Total as a labourer was even more remote.

The evidence of Mr Nkala, the security guard who was on duty when the fuel tanker was stolen, was as follows. Shortly before 6 am on Saturday, 3 November 1979, Muzira arrived at the gate and identified himself as Total's driver. He produced his identity card and informed the guard that he had come to collect the fuel tanker in order to deliver fuel to a customer in Beitbridge.

SANDURA JP

After satisfying himself that Muzira was an employee of Total, Nkala let him into the premises. Muzira then walked to the fuel tanker and Nkala followed him and recorded the number of the fuel tanker, the name of the driver and his destination. He then allowed Muzira to drive the tanker away. He had no reason to suspect that Muzira was not telling him the truth. Nkala also said that he thought that Muzira was the authorized driver of the tanker because he had previously seen him driving the tanker. However, I do not accept that part of his evidence because it was not put to the plaintiff's witnesses. That part of the defence came out for the first time when Nkala gave his evidence. In any event, Nkala was not a particularly good witness. I am, however, prepared to accept his evidence as to the circumstances in which the fuel tanker was removed from the premises in question because it sounds true.

The issue which I must now determine is whether the security guard was negligent in allowing Muzira to drive away the fuel tanker. In determining this issue, I must decide whether theft of the fuel tanker in the circumstances deposed to by the guard was reasonably foreseeable. In other words, could a reasonable man have foreseen the likelihood that the tanker full of fuel would be stolen by Muzira, who was employed as a labourer by Total. The answer to this question is important because the principle that there can be no liability for causing another person loss or harm which could not reasonably have been foreseen is well established. After giving this matter very careful consideration, I have come to the conclusion that the theft or unlawful removal of the fuel tanker in the circumstances already referred to was so remote that it could not have been reasonably foreseeable. Muzira was employed by Total and was one of the employees authorised to be on the premises. He carried an identity card which established that authority. Once he was on the premises, it was no part of the guard's obligations to ensure that if he (ie Muzira or any other employee of Total) drove the tanker he had been actually

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authorized to do so. In the circumstances, it seems to me that the likelihood of theft of a tanker full of fuel by one of its labourers was not even foreseen by Total. I say so because Total did not have a system whereby a guard sent to its premises for the first time would be made aware of the identities of the authorized drivers.

Having come to the conclusion that the theft or unlawful removal of the tanker was not reasonably foreseeable, it follows that the security guard was not negligent. The plaintiff cannot, therefore, succeed against the second defendant. The fourth issue between the plaintiff and the second defendant regarding the *quantum* of damages falls away. The plaintiff's claim against the second defendant is, therefore, dismissed with costs.

SANDURA JP

As indicated at the beginning of this judgment, the plaintiff claims against the first defendant the sum of $7 000 and "costs of suit including any costs incurred in respect of its claim against second defendant which it might be ordered to pay or bear itself." I cannot see any reason why the first defendant should be ordered to pay the costs incurred by the plaintiff in respect of its claim against the the second defendant or those costs which I shall order the plaintiff to pay to the second defendant.

Finally, Mr *Bissett* submitted that should the plaintiff's claim against the second defendant be dismissed, Mr Fawcett, Mr Nkala and Mr Sibanda should be declared necessary witnesses. I cannot see any reason for declining to make such a declaration.

In the circumstances, I make the following order:

1. That judgment be and is hereby entered for the plaintiff against the first defendant in the sum of $6 713,71 with costs.

2. That the plaintiff's claim against the second defendant be and is hereby dismissed with costs.

3. That Mr Fawcett, Mr Nkala and Mr Sibanda be and are hereby declared necessary witnesses.

D W Aitken & Co, legal practitioners for the plaintiff

Winterton, Holmes & Hill, legal practitioners for the first respondent

Webb, Low & Barry, legal practitioners for the second respondent

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S v MUPANDUKI 1985 (2) ZLR 169 (SC)

Court **Supreme Court, Harare**

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Dumbutshena CJ and Beck and Gubbay JJA

Criminal Appeal

4 July and 4 September 1985

Flynote

Exchange Control Act [Chapter 170] - minimum mandatory fine - special reasons for not imposing such fine - approach of court where amount involved substantial and no prospect of fine being met - temptation to resort to sentences of ever increasing severity to curb increasing lawlessness to be avoided.

Headnote

Appellant was the Secretary-General of the Zimbabwe Red Cross. In collusion with certain businessmen appellant exported foreign currency amounting to $362 565,41. On appeal it was found that although appellant had not personally benefitted from the export of foreign currency he had in all probability benefitted personally in some way in Zimbabwe. The trial court found no special reasons existed and accordingly the minimum mandatory fine imposed in terms of the Exchange Control Act [*Chapter 170*] had to be imposed. In addition, in light of the failure to repatriate any of the money exported, a further mandatory prison sentence had to be imposed.

The trial court imposed a fine of $375 000 or, in default of payment, 10 years' imprisonment, together with a further six years' imprisonment with labour in respect of the failure to repatriate the foreign currency.

Held, that where the amount of a fine is not left to the discretion of the court and where it is far beyond the ability of the accused to pay the fine, the alternative sentence must not be excessive in relation to the gravity of the offence.

Held, further, that the extent of the accused's culpability is the factor by which to determine the length of the period of imprisonment that should

be imposed as an alternative to the fine.

Held, further, following *S v Skenjana* 1985 (3) SA 51 (AD), that lengthy terms of imprisonment do not necessarily act as deterrent factors nor satisfy the requirements of society as to retribution. It is not in the public interest that potentially valuable human material should be damaged by long incarceration. Resorting to ever increasing severity in sentencing is an insidious temptation to judicial officers to stem the tide of ever increasing lawlessness-a tide that requires many forms of endeavour other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed.

Cases cited:

S v Nyati 1972 (2) RLR 215 (GD)

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S v Sibanda & Ors 1977 (2) RLR 189 (GD)

S v Skenjana 1985 (3) SA 51 (AD)

A P de Bourbon SC for the appellant

Y Omerjee for the respondent

Judgment

Beck JA: The appellant was convicted on fifteen counts of having contravened s 5(1)(a)(i) of the Exchange Control Act [*Chapter 170*] as read with s 16(1)(b) of the Exchange Control Regulations, 1977, by causing foreign currency to be exported from Zimbabwe without authorisation. The value of the currency exported, expressed in Zimbabwe dollars at the rates of exchange prevailing at the relevant times, amounted to $363565,41. The trial court was not satisfied that special reasons existed for imposing a fine of less than the value of the currency exported. Nor was any of the exported currency returned to Zimbabwe. In the result the trial court treated all fifteen counts as one for purposes of sentence and imposed on the appellant a fine of $375000, or 10 years' imprisonment with labour in default of payment, and in addition a sentence of six years' imprisonment with labour. This appeal has been brought against both conviction and sentence.

The appellant was the Secretary-General of the Zimbabwe Red Cross Society. Between July 1982 and June 1983 fifteen cheques, all drawn on banks outside Zimbabwe in favour of the Zimbabwe Red Cross Society, were received in Harare by the appellant, having been sent by the League of Red Cross Societies in Geneva. The manner in which they were dealt with was described by the learned trial judge as follows:

> All of them were endorsed by the accused in his capacity as Secretary-

BECK JA

> General of the Society. He applied the stamp of the Society and appended his initials. The endorsement was not restricted in any way and so the cheque could be negotiated anywhere and to anyone.
>
> None of the cheques were negotiated or cashed in Zimbabwe. Eleven of the fifteen cheques were produced in court as Exhibit 4. Nine of them bear on their back the signature of a Khumid S Patel and two the signature of a Surech G Patel. These two persons are the daughters of a Mr M B Patel of Orgam Trading Company, who was at one time a member of the fund-raising committee of the Society. Of these eleven cheques six were cashed at the United Virginia Bank, which is in Virginia, and four at the Bank of Virginia Eastern, Norfolk, Virginia, in the United States of America, and one was banked at the National Westminister Bank, Birmingham, England. The total amount of these fifteen cheques calculated in Zimbabwe currency is $362 565,41.
>
> It is also common cause that the accused gave these fifteen cheques to a person or persons who were not authorised dealers in terms of the Exchange Control Regulations, 1977, and that he was not duly authorised, in terms of the said Regulations, so to do. In exchange for each cheque he received from the person or persons concerned Zimbabwe currency which exceeded the value of the cheque. In each case he caused to be issued to the League, by the Society, a receipt for the amount in Zimbabwe currency for which the cheque was drawn with the excess being receipted as an anonymous donation. The money so received was deposited in the Society's account with the bank or building society. The total amount receipted as having come from the League through the medium of the fifteen cheques was $362 565,41 and the total amount receipted as having come from

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anonymous donors was $39 397,62. Thus, the Society did not suffer because of these transactions; in fact, it benefited to the extent of $39 397,62.

The appellant sought to explain his conduct in the following way: He said that local businessmen approached him and offered to take such cheques and to pay for them in Zimbabwe currency more than their face value. He said that the reason that local businessmen gave for making such an offer to him was that they would be able to strengthen their applications for foreign currency allocations for their business needs by depositing such external cheques with their local banks in order that they might falsely claim that they had earned foreign currency for the benefit of the country. The appellant went on to say that he put these dishonest proposals to the Action Committee of the

BECK JA

Zimbabwe Red Cross Society, consisting of the Chairman, Mr Matara, the first Vice-Chairman, Mr Justice McNally and the Treasurer, Mr Chikondo. These three gentlemen allegedly all agreed that cheques received from Geneva should be dealt with in this irregular manner, that the League in Geneva should be sent receipts for the face value of

the cheques only, and that the additional premiums paid locally for the negotiation of such cheques should be receipted by the local Society as anonymous donations. Pursuant to this alleged instruction from the Action Committee the appellant directed that all external cheques arriving at the offices of the Society be handed to him so that he could dispose of them to local businessmen in the manner indicated. Thereafter he brought back to the offices of the Society the proceeds of these disposals, always in the form of cash, which he handed to the accountant to be banked with the instruction that a receipt be sent to Geneva for no more than the face value of the cheque, converted to Zimbabwe dollars, and that so much as exceeded that amount be reflected in the Society's books as an anonymous donation.

The appellant claimed that in these circumstances he was unaware that he was acting unlawfully, but *bona fide* believed that he was lawfully entitled to deal with these cheques in the manner indicated.

I find that claim to be totally absurd. The appellant, as his evidence amply reveals, is not at all lacking in shrewdness. I am utterly convinced that he would not for a moment have thought that Mr Patel, or any of the other persons who bought foreign cheques from him at a premium, would deposit those cheques with local banks. It is also inconceivable that any businessman would expect to be able to use foreign cheques drawn in favour of the local Red Cross Society, to lend false support to an export performance record, and it is beyond belief that any businessman would have told the appellant so ridiculous a story; or that the appellant, if told it, would have been so gullible as to have believed it. Indeed, in answer to an enquiry from Geneva as to where and when one of the cheques in question was cashed, the appellant himself wrote that he believed that the cheque might have been cashed in London. When taxed with this in cross-examination he offered an explanation that was as unlikely as it was convoluted.

The absence of any sensible reason why, if the transactions were really believed to be above

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board, receipts should not have been issued in the normal way to the purchasers of the cheques for the amounts of the premiums "donated" to the Society; the circumstance that no representative of the Society but the appellant knew for how much each cheque was bought, or by

BECK JA

whom, while the proceeds of the transactions that the appellant concluded were never brought back to the Society in any form other than in cash and in very considerable amounts; and the glaringly obvious reason behind such transactions - which was of course to exploit the illegal market created by persons with a desire to acquire funds outside the country without being particular as to how they might do so - all show conclusively that the appellant knew perfectly well that he was unlawfully causing foreign currency to be exported.

As for the appellant's contention that this protracted and highly unlawful course of behaviour was known to and approved by all three members of the Action Committee of the Society, I think the comment is deserved that its falsity is only matched by its extravagance and audacity. Apart from the extreme unlikelihood that the most senior office bearers of the Red Cross Society would have conspired to countenance such patently illegal and seriously prejudicial conduct, the reactions of innocence of two of them upon hearing of it stand clearly revealed. It was the Treasurer, Mr Chikondo, who first discovered the irregularities as a result of conducting a spot check of the books and who drew attention to them in a memorandum addressed to the members of the National Executive Council, and it was Mr Justice McNally who, upon discovering and appreciating what might have been going on, lost no time in causing the Society's auditors to investigate the matter urgently. On being given the results of that investigation he immediately informed the Reserve Bank and the Attorney-General, and it was as a result of his actions that the offences were uncovered and the prosecution instituted.

There is no doubt whatsoever in the light of all the evidence that the appellant knew perfectly well that he was contravening the law, and that he lied about the members of the Action Committee of the Society lending their blessing to what he was doing. The appeal against conviction is totally devoid of merit and must fail.

Turning to sentence, there can be no doubt that the court *a quo* was entirely correct in finding that the appellant had failed to show that special reasons existed for the purpose of s 5(3a) of the Act. It was suggested that the appellant had shown that he had not derived any personal benefit at all from these transactions in that he had faithfully handed over to the Red Cross Society the full amount of the premiums paid by the purchasers of the cheques. The trial court, however, found it "hard to believe him on this point", and with good reason. He had lied extensively in his evidence and there was nothing to go on other than his own assurance concerning the

BECK JA

magnitude of the premiums that he negotiated. The total amount that he paid over to the Red

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Cross Society by way of "anonymous donations" accruing from the disposal of these external cheques was, as has been indicated above, $39 397,62, which is only 10,8% of the total face value of the cheques. There was unchallenged evidence that premiums well in excess of that percentage had on other occasions been paid in order to acquire external funds unlawfully, and so there is a strong likelihood that the appellant did in fact acquire a significant benefit for himself as well as for the Red Cross Society from these transactions.

In the absence of special reasons for imposing a fine of a lesser amount than the amount of currency that was unlawfully exported, the trial court was compelled to fine the appellant at least $362 565,41. Furthermore, since none of this money was repatriated to Zimbabwe the trial court was also compelled to impose upon the appellant, in addition to the fine, a sentence of imprisonment.

In his judgment on sentence the learned trial judge has not explained why he thought it appropriate to round up the figure of the fine by more than $12 000 so as to make it $375 000, and I find it difficult to appreciate why he did so. There was, and is, no prospect at all of the appellant being able to pay anything like the minimum amount that he must be fined and it seems to me that no purpose is to be served by fixing the fine in any sum higher than the mandatory figure of $362565,41 that is indicated by the evidence.

The reality of the matter is that the appellant will have to serve whatever period of imprisonment is imposed as an alternative to the fine. In selecting a period of ten years' imprisonment with labour as that alternative, the learned trial judge stated that the sentence of imprisonment had to be commensurate with the amount of the fine.

In a case such as the present however, where the amount of the fine is not left to the discretion of the court and where it is far beyond the ability of the accused person to pay that fine, it is of especial importance that the period of imprisonment that is selected as an alternative must not be excessive in relation to the gravity of the offence. It must be realistically commensurate with the moral culpability of the accused person. (See: *S v Nyati* 1972 (2) RLR 215 (GD) at 216E; *S v Sibanda and Others* 1977 (2) RLR 189 (GD) at 191A).

The selection of ten years as an appropriate alternative can only have been

dictated by the magnitude of the fine and not by the gravity of the offence, particularly since a further period of imprisonment had to be, and was, imposed.

When considering the gravity of the offence it must be borne in mind that although there was grave prejudice to the State in preventing $362 565,41 worth of foreign currency from being subject to the control of the Government of Zimbabwe, there was no suggestion that any of this foreign currency was acquired by the appellant himself for his external enjoyment. All that currency went into the external coffers of people like Mr Patel who bought the cheques from the appellant. Mr Patel and the other purchasers of the cheques having found it prudent to leave Zimbabwe, there is no chance now that the money will ever be repatriated to this country and the appellant is directly to blame for having created that serious situation. It must be appreciated

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however that in the circumstances of this case the appellant himself does not stand to gain at all by the non-repatriation of this money. The external nest-eggs that have been created are not his, and whatever monetary benefit he may have gained for himself within Zimbabwe by reason of his activities would seem to have been far less than the amount of the monetary fine, for the State produced no evidence of any dramatic increase to the appellant's patrimony.

Accordingly it is in my view clear that the trial court misdirected itself in laying emphasis on the magnitude of the fine rather than on the extent of the appellant's culpability as the factor by which to determine the length of the period of imprisonment that should be imposed as an alternative to the fine.

Moreover, conjoining to the sentence of ten years a further six years, so as to impose a total of 16 years' imprisonment with labour as the effective sentence that the appellant will have to serve, is to arrive at an overall sentence which in my opinion is manifestly excessive. In this connection I record my own respectful agreement with the following recent observations by NICHOLAS JA in *S v Skenjana* 1985 (3) SA 51 (AD) at 54I to 55D - observations which I consider to be very pertinent to the insidious temptation to judicial officers to resort to sentences of ever-increasing severity in a vain attempt to stem the tide of increasing lawlessness - a tide that requires many forms of endeavour other than just those that are offered by the powers of sentencing if it is to be contained, let alone reversed. The learned judge of appeal said:

> My personal view is that the public interest is not necessarily best served by the imposition of very long sentences of imprisonment. So far as

> deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length. Indeed, it would seem to be likely that in this field there operates a law of diminishing returns: a point is reached after which additions to the length of a sentence produce progressively smaller increases in deterrent effect, so that, for example, the marginal deterrent value of a sentence of 20 years over one of say 15 years may not be significant.
>
> Similarly in regard to the aspect of retribution. This has tended to yield ground to the aspects of deterrence and reformation, but it is not wrong that, in determining a proper sentence, the courts should give some recognition to the natural indignation and the fears and apprehensions of interested persons and the community at large. (See *S v Karg* 1961 (1) SA 231 (A) at 236A-B). In a case such as the present the court must give heed to the demand of the ordinary citizen for the condign punishment of robbers who invade the sanctity of the home to commit rapine and violent assault and worse. But that demand may well be satisfied by the imposition of less than the most severe sentence.
>
> Nor is it in the public interest that potentially valuable human material should be seriously damaged by long incarceration. As I observed in *S v Khumalo & Anor* 1984 (3) SA 327 (A) at 331, it is the experience of prison administrators that unduly prolonged imprisonment brings about the complete mental and physical deterioration of the prisoner. Wrongdoers 'must not be visited with punishments to the point of being broken'. (*Per* HOLMES JA in *S v Sparks & Anor* 1972 (3) SA 396 (A) at 410G.)

In the result therefore the appeal against conviction is dismissed, but the appeal against sentence succeeds to the following extent:

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All fifteen counts are taken as one for the purposes of sentence and the appellant is sentenced to a fine of $362565,41, or to three years' imprisonment with labour in default of payment, and in addition he is sentenced to four years' imprisonment with labour.

Dumbutshena CJ: I Agree.

Gubbay JA: I agree.

Sawyer & Mkushi, legal practitioners for the appellant

BAECK v TINAGO 1985 (2) ZLR 177 (HC)

Court **High Court, Harare**

Smith J

Civil Action

18 July and 4 September 1985

Flynote

Costs - legal practitioner and client scale - where appropriate.

Headnote

Where party imputes fraud to a person which is entirely without foundation such action will support an application for an award of costs on a legal practitioner and client scale.

Case cited:

Morris v Jacobs & Anor 1950 (2) SA 189 (D)

A P de Bourbon SC with him *F C Anderson* for the plaintiff

D Foroma for the defendant

Judgment

Smith J: [The learned judge summarised the facts of the case and then continued. . .]

With regard to costs, Mr *de Bourbon* has asked that they be awarded on a legal practitioner and client basis because of the allegation by Mr *Foroma,* which the defendant did not abandon, that the confirming letter was a fraudulent fabrication. Mr *Foroma* has opposed this because there was no proof that the confirming letter had been sent immediately and because the defendant denied the accuracy of the contents, and so the only conclusion was that it had been deliberately tailored to corroborate the plaintiff's case. In *Morris v Jacobs & Anor* 1950 (2) SA 189 (D), the court awarded attorney and client costs to the defendants where the plaintiff had imputed fraud to a professional man in regard to his profession, which the court found was

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without foundation. In this case I consider that there was no foundation for imputing fraud

SMITH J

to the plaintiff. The defendant could have alleged that the plaintiff was mistaken or under a misapprehension when he wrote the letter - there is no foundation to establish fraud.

It is accordingly ordered that the defendant shall pay the plaintiff the sum of $3 500 and shall pay the plaintiff's costs on a legal practitioner and client scale. The plaintiff is declared to be an essential witness.

Morris, Beale & Collins, legal practitioners for the plaintiff

Sawyer & Mkushi, legal practitioners for the defendant

HUGHES v LOTRIET 1985 (2) ZLR 179 (HC)

Court **High Court, Harare**

Mfalila J

Application for summary judgment

1 August and 11 September 1985

Flynote

Civil Procedure - summary judgment - High Court Rules Order 10 Rules 64, 65 and 67 - applicant for summary judgment can lead evidence in support of the application in his founding affidavit - thereafter he cannot in any way add to or extend the scope of the evidence provided - summary judgment is only available when the plaintiff has a clear case and the defendant no possible defence thereto.

Headnote

In dealing with an application for summary judgment the whole of O 10 of the High Court of Zimbabwe Rules, 1971, must be looked at in context. In particular R 67 as read with R 64 and 65 can only be interpreted as allowing an applicant to adduce evidence by way of his founding affidavit. The South African Rules of Court are worded differently and accordingly South African decisions on this aspect are of no application in interpreting the Zimbabwean Rules. Rule 67 provides that the affidavit which is delivered with the notice under R 65 can contain evidence to which the applicant is confined at the hearing. In an application under R 64 the applicant is allowed to include evidence in the accompanying affidavit to which R 67 restricts him at the hearing. Summary judgment will only be granted were the plaintiff has made out a cause of action to which the defendant has no possible defence.

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Cases cited:

Kosak and Co (Pty) Ltd v Keller & Anor 1962 (1) SA 441 (W)

South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd & Ors 1962 (3) SA 601 (W)

Roberts v Plant [1895] 1 QB 597

Kodak Ltd v Alpha Film Corporation Ltd [1930] 2 QB 340

MFALILA J

C Anderson for the applicant

D R Granger for the respondent

Judgment

Mfalila J: The applicant, David Hughes, applied for summary judgment against the respondent, Peter Lotriet, in the sum of $3 000 plus interest at 8% and costs.

The background to this application is that on 14 February 1984 the applicant lent and advanced the sum of $3 000 to the respondent at the latter's request, with a stipulation that this money was repayable on or before 14 April 1985. This loan was made on the security of certain musical instruments which were pledged and delivered to the applicant.

On the repayment date, the respondent defaulted, giving one reason or another until two months later when the applicant issued summons under O 3 R 13 of the High Court of Zimbabwe Rules, 1971, claiming repayment of the loan. When the respondent entered appearance to defend, the applicant filed this application for summary judgment, stating that the respondent does not have a *bona fide* defence to his claim for the repayment of $3 000. He therefore applied for an order awarding him judgment in the sum of $3 000 with interest at 8% a *tempore morae* and the costs of this application.

In his notice of opposition to this application, the respondent asked the court to dismiss the application because he has two *bona fide* defences to the applicant's claim in the summons. Firstly, that he was wrongly cited as the defendant because in the loan transaction he had approached the applicant on behalf of his company and that therefore the applicant should not have instituted the action against him personally but against the company, International Musical Enterprises (Private) Limited. Secondly, that the applicant is in breach of contract *vis-à-vis* the company which has a claim in reconvention for the recovery of assets valued at $5 300 in good working order and/or the cost of repair or depreciation, as well as the damage caused to the public address system.

Amplifying his first ground of defence, the respondent stated in his affidavit that summary judgment should not be granted when any real difficulty as to a matter of law arises. In this case he said there is no cause of action against him personally because the loan agreement was

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between the applicant and a company of which he is a director. However, as this assertion does not tally with the written agreement (Annexure "A" to the applicant's affidavit), the respondent decided to solve the difficulty by seeking to block the admission

MFALILA J

of this written agreement at this stage on the following grounds. Firstly, he said that the applicant should have annexed it to the summons-not, as he did, to the affidavit for in this way he said it constituted evidence in support of the applicant's case, which is not permitted by O 10 R 64. The affidavit, he added, is only supposed to verify the cause of action in the summons, certifying further that in applicant's opinion there is no *bona fide* defence to the action. Secondly e averred that the agreement, Annexure "A" to the applicant's affidavit, is not disclosed in the summons nor does it constitute any part of the cause of action which is to be verified. Hence, the court should strike out paras 3-17 of the applicant's affidavit as constituting evidence in support of his claim. In support of these submissions he cited the decisions in *Kosak & Co (Pty) Ltd v Keller & Anor* 1962 (1) SA 441 (W) and *South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd & Ors* 1962 (3) SA 601 (W). Therefore, he said, as the written agreement Annexure "A" is inadmissible at this stage, the question of its construction does not arise.

In the *Kosak* case, *supra,* which was also an application for summary judgment, counsel for the defendant made an application to strike out several passages from the plaintiff's affidavit on the ground that they constituted evidence. It was agreed that if the application to strike out succeeded, then the application for summary judgment had to fail. I think the same is true in this case. If the application to exclude Annexure "A" and to strike out paras 3-17 succeeds, the application for summary judgment must inevitably fail. In the Kosak case the relevant rule of the Transvaal Rules of Court which was in issue was Rule 42 bis (T) which provides as follows:

> (2) Such an application shall be served and lodged with the Registrar on not less than seven days' notice delivered not more than fourteen days after the date of expiry of the *dies induciae* stated in the summons and the plaintiff shall deliver with such notice an affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount, if any, claimed and stating that in his opinion there is no *bona fide* defence to the action and that appearance has been entered solely for the purpose of delay. If the claim is founded on a liquid document a copy of the document shall be annexed to such affidavit.
>
> (3) Upon the hearing of an application for summary judgment the defendant may:
>
> . . .
>
> (c) satisfy the court by affidavit (copy of which must be served on the

MFALILA J

> plaintiff or his attorney not less than twenty-four hours prior to the time for such hearing) or with the leave of the court by oral evidence of himself or of any other person who can swear positively to the facts that he has a *bona fide* defence to the action; such affidavit or evidence shall disclose fully the nature and grounds

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of the defence.

On the strength of these provisions, counsel for the defendant contended that this rule made it clear that the affidavit of the plaintiff was limited by the wording of the rule, namely that the deponent had to be a person who knew the facts and all that he was entitled to say was that he believed there was no *bona fide* defence and that entry of appearance was for the purpose of delay. This, counsel urged, was the purpose and spirit of summary judgment proceedings, for were it otherwise these proceedings would be turned into motion proceedings in the fullest sense of the word. He urged therefore that no evidence could be placed before the court by the plaintiff and therefore the letter, being the letter referred to in para 8(a), being evidence, should be struck out. The other paragraphs referred to should be struck out because they were superfluous and irrelevant.

The court (GALUT J) accepted these arguments and held that in an application for summary judgment under Rule of court 42 *bis* (T) a plaintiff should not give evidence as to the facts supporting his case in his affidavit. The judge then continued at 444A-B:

> Then too if one contrasts the provisions underlined by me in the said sections of Rule 42 bis it will be seen that the Rule requires a defendant to disclose fully the nature and grounds of the defence, whereas similar provisions are not provided for in the case of the plaintiff.
>
> It follows from what I have said above that the letter and para 8(a) should be struck out. For similar reasons paras 2, 3 and 4 (save for the last two lines in each of these paragraphs), 5, 6, 7 and 8(b) should also be struck out. It further follows that the application for summary judgment must fail.

The same court adopted the same reasoning in a latter case, *South African Trade Union Assurance Society Ltd v Dermot Properties (Pty) Ltd & Ors (supra),* DE WET JP stating at 602D:

> In that case (*Kosak's*), *inter alia,* a written contract on which the alleged claim was based and annexed to the affidavit of the plaintiff was struck out on the view that this annexure constituted evidence which was not permitted by Rule 42 *bis.*

MFALILA J

It is clear that the respondent's application to strike out paras 3-17 in the applicant's affidavit as well as to disallow Annexure "A" at this stage is fully supported by the decisions in these two cases.

Expanding on his second line of defence, the defendant stated that he had a good counterclaim against the applicant:

(a) For the damage to the Yamaha Public Address System.

(b) Damages for loss of use.

(c) Damage to the articles pledged and failure to return them in good condition.

Therefore, he submitted, this application for summary judgment should be dismissed because, according to accepted practice, summary judgment is only granted if all defences raised are

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obviously unacceptable; in other words, to oppose an application for summary judgment successfully on legal grounds or otherwise, it is only necessary to raise a fairly triable issue, which he has done, and that in any case the drastic remedy provided under this Order should only be resorted to and accorded where the plaintiff can establish his claim clearly and the defendant fails to set up a *bona fide* defence or to raise a fairly triable and arguable issue. For the foregoing reasons, he asked the court to dismiss the application and grant him unconditional leave to defend, because the issue as to whether the loan was made to International Musical Enterprises or to the defendant, and whether both parties were *ad idem* in this regard, can only be resolved by evidence and examination of witnesses at the trial and the aspects of the counterclaim, which may well exceed the claim in convention.

With regard to costs, the defendant averred that since the plaintiff was aware he opposed the claim and that he had a valid defence, at least in regard to the articles pledged, in applying for the dismissal of this application, costs are likewise claimed.

At the hearing of this application, Mr *Anderson,* counsel for the applicant, urged this court to grant summary judgment as prayed because there is no factual dispute which falls within the ambit of this application.

With regard to the defendant's first line of defence that there is no cause of action against him personally because the loan transaction was between the applicant and a company of which respondent is a director, Mr *Anderson* countered that by saying this the respondent was admitting that he was an agent of the company and that therefore he must be personally liable because he signed the agreement without disclosing his agency.

MFALILA J

Dealing with the defence based on the counterclaim against the articles pledged, Mr *Anderson* submitted that since there was a valid pledge to the applicant of these properties to secure the loan, the respondent has no right of set-off although he has a right of action for damages should there be any loss or damage to the property pledged, but the pledge cannot be used as a bargaining lever because the applicant is under no duty to account until the pledge is extinguished by repayment of the debt. He therefore asked the court to grant summary judgment as prayed and said that as both defences put forward by the respondent are bogus and bad in law, this is an instance for the award of increased costs.

I think I have already said that if the respondent's application to strike out paras 3-17 from the applicant's affidavit as well as to disallow Annexure "A" at this stage is allowed, the application for summary judgment must fail. I have also said that the respondent's application is supported by the decision in the two cases cited. But I do not think this can be the end of the matter when the provisions of the entire Order 10, not merely R 64, are examined. Order 10 of the High Court of Zimbabwe Rules provides for the granting of summary judgment and the relevant Rules provide as follows:

Rule 64: Where the defendant has entered appearance to a summons for a debt or liquidated demand with or without interest and costs, the plaintiff on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed, if any, and stating that in his belief

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there is no bona fide defence to the action, may apply to the court to enter summary judgment for what is claimed in the summons and costs.

Rule 65: Notice of an application for judgment under rule 64 shall be served on the defendant, not more than twelve days after entry of appearance, and shall be returnable not less than twelve days after service. With the notice shall be served a copy of the affidavit referred to in rule 64.

Rule 67 provides for a limitation as to evidence at the hearing of the application: it states -

> **No evidence may be adduced by the plaintiff otherwise than by the affidavit of which a copy was delivered with the notice,** nor may either party cross-examine any person who gives evidence *viva voce* or by affidavit:

MFALILA J

> Provided that the court may put to any person who gives oral evidence such questions as it considers may elucidate what the defence is.

In the light of these provisions, it cannot be correct to consider or treat R 64 in isolation as impliedly suggested by the respondent. If one did so, one might arrive at the same conclusion reached in the two cases cited above, namely that the applicant's affidavit should not contain any evidence but the bare assertion that he believes there is no *bona fide* defence, and that entry of appearance was for the purpose of delay. In arriving at the conclusions which they did, GALUT and DE WET JJ never had to consider a provision similar to our Rule 67. By stating that no evidence may be adduced at the hearing by the plaintiff otherwise than by the affidavit, of which a copy was delivered with the notice, Rule 67 implies that the affidavit which is delivered with the notice under R 65 can contain evidence to which the applicant is confined at the hearing. The result must be that in his application for summary judgment under R 64, the applicant is allowed to include evidence in the accompanying affidavit to which R67 restricts him at the time of hearing. Any other interpretation would render the provisions of R 67 meaningless. Indeed, the learned authors of Joubert: *The Law of South Africa* vol 3 (Civil Procedure & Costs) in para 276 p 156, make the following observation:

> The rules relating to summary judgment make no provision for the filing of any affidavit by or on behalf of the plaintiff seeking summary judgment other than the affidavit described in rule 32(2). The plaintiff is expressly confined to this affidavit. Any purported amplification of or addition to this affidavit must be disregarded. **The rule that no evidence may be adduced by the plaintiff otherwise than by the affidavit delivered in support of the application for summary judgment is peremptory and does not permit of any other or further affidavit by the plaintiff.** (The emphasis is mine).

In the present case, both paras 3 and 17 sought to be struck out and the written agreement (Annexure "A") are part of the affidavit which was delivered under R 64 in support of the application for summary judgment. They are not an addition nor an amplification of this affidavit to render them inadmissible under R 67. They are evidence which the applicant is allowed to include in his affidavit and to which he is confined under R 67. There is therefore no ground on which I can exclude or strike them out.

With regard to the defence based on the counterclaim, the question is whether the respondent has a right of action to recover the pledged articles at this

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MFALILA J

stage. It is not disputed that these articles were validly pledged to the applicant to secure the loan of $3 000. This valid pledge therefore had the effect of conferring on the applicant (the pledgee) a real right in the articles pledged and this right can only terminate when the pledge is extinguished. The pledge is extinguished only after the original or principal obligation is discharged, in the present case when the loan of $3 000 is discharged. Until this is done, the respondent as pledgee or has no right of action either for their return or damages for their loss or damage.

I shall now at this stage decide whether the applicant has made out a case for summary judgment. The principles were well stated in *Roberts v Plant* [1895] 1 QB 597 by LORDS ESHER and LOPES, with LORD ESHER stating at 603:

> The substance of Order XIV is that where, with reference to a claim within Order III, r 6, (debt or liquidated demand), the plaintiff can shew to the satisfaction of the judge that he has a clear case against the defendant, which the defendant cannot possibly answer, the judge may give the plaintiff leave to enter judgment forthwith, without the expense and delay which would be involved in letting the case go on to trial in the ordinary way. That is a stringent power to give, and therefore the Courts have said that its exercise must be strictly watched, in order to see that the plaintiff has brought himself within the scope of the provisions of the order; but that does not mean that effect will be given to every unsubstantial technicality that may be set up by way of objection to proceedings under the order. The meaning is that care must be taken to see that the plaintiff has, in accordance with the terms of the order, made out a cause of action to which the defendant can have no possible defence.

Sentiments to the same effect were voiced by LORD LOPES in the same case and by LORD SCRUTTON in *Kodak Ltd v Alpha Film Corporation Ltd* [1930] 2 QB 340.

In the present case the respondent's first proposed defence is that he was wrongly sued because he obtained the loan from the applicant only on behalf of his company; and he sought to prove this by attempting to exclude the piece of evidence which shows that he signed the loan agreement in his personal capacity, namely the written agreement itself, which is in the following terms:

> **DAVE GIVE PETE $3000**
>
> **DAVE TAKES DRUM KIT +**

MFALILA J

> **TO THE MONEY TO BE PAID BACK ON OR**
>
> **BEFORE APRIL 14 85**
>
> **CONSIDERATION TO BE**
>
> **FULL ACCESS TO THE FACILITIES**

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OF THE SHOP FOR DJH - INCLUDING

REPAIRS (TIME ONLY) - RENTAL THAT WOULD

NORMALLY BE PAID FOR EQUIPMENT

HELD (?)

IF MONEY NOT PAID DJH CAN SELL

EQUIPMENT TO RECOUP MONEY

Equipment to be returned in sound

working condition as taken.

The agreement was signed both by the applicant and the respondent, nowhere is International Musical Enterprises mentioned. The invoice (Annexure "A" to the respondent's affidavit) does not carry the matter any further because it shows that these articles were sold to the applicant and, if they were pledged, then that is a matter between the company and the respondent, who is shown to have personally received the loan of $3 000. In any event, since the respondent chose to sign the contract as an undisclosed agent, he is personally liable on it. His proposed first line of defence that there is no cause of action against him has therefore no merit.

His second line of defence is also devoid of merit because he has no right to set off or counterclaim for the articles pledged before the principal obligation is discharged.

My overall view of the matter on the papers before me is that the applicant has satisfied me that he has a clear case against the defendant which the defendant cannot possibly answer. The respondent has not raised any arguable or triable issues, as I have attempted to demonstrate. In these circumstances, the plaintiff, the present applicant, should not be subjected to the expense and delay of going to trial.

For these reasons summary judgment is entered as per the draft order.

Morris Beale & Collins, legal practitioners for the applicant

Granger & Archer, legal practitioners for the respondent

GEORGIADES & FLOREY BUILDING (PVT) LTD v BORROWDALE BUTCHERY (PVT) LTD 1985 (2) ZLR 188 (HC)

Court **High Court, Harare**

Smith J

Civil Application

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26 and 30 September 1985

Flynote

Commercial Premises (Rent) Regulations, 1983 (SI 676/83) - statutory tenant - rights of lessor in ejectment proceedings.

Headnote

Whilst the Commercial Premises (Rent) Regulations, 1983, are intended to protect lessees of commercial premises from unscrupulous landlords, it is not the intention of the Legislature to provide lessees with indefinite tenure. In particular s 22 of the Regulations - referring to a lessor requiring good and sufficient grounds for the eviction of a lessee - makes it clear that if the court is satisfied that the lessor has good and sufficient reasons for requiring possession of the property the lessor is entitled to have the lessee evicted. The Regulations cannot be construed so as to mean that the lessee's interests outweigh the lessor's.

Cases cited:

Trustee in Mashonaland of the Church of the Province of Central Africa v Timms 1973 (1) RLR 307 (GD); 1973 (4) SA 464 (SR)

Hoosein Brothers v Moffat Outfitters (Pvt) Ltd HH-301-85 (unreported)

Alhadeff v AR Khan and Co (Pvt) Ltd HH-165-85 (unreported)

M T O'Meara for the applicant

M J Gillespie for the respondent

Judgment

Smith J: The applicant is the registered owner of property in Borrowdale on which buildings have been erected. The greater part of the buildings is

SMITH J

used for a supermarket but one of the shops (hereinafter called "the leased premises") is leased to the respondent, who operates a butchery therein. The applicant is a wholly-owned subsidiary of TA Holdings Ltd and the supermarket on the property concerned is operated by another wholly-owned subsidiary of TA Holdings, known as "Maceys". TA Holdings and Maceys considered that the premises and facilities on the property concerned were insufficient for the proper conduct of the supermarket and accordingly embarked on a reconstruction scheme to be carried out over a period of 12 weeks at a cost in excess of $190 000. The reconstruction scheme involved the leased premises being converted into a bottle-store within the supermarket operated by Maceys. In order to carry out the reconstruction, the applicant needs to have possession of the leased premises and, therefore, on 2 May 1985 the applicant wrote to the respondent giving notice that it must vacate the leased premises by 31 July 1985.

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The respondent has occupied the leased premises for over 30 years. The last written agreement it had with the applicant expired in April 1984, whereafter the respondent has simply continued to occupy the leased premises on payment of a monthly rental.

It is common cause that the leased premises are commercial premises as defined in s 3(1) of the Commercial Premises (Rent) Regulations, 1983 (SI 676 of 1983) (hereinafter referred to as "the Rent Regulations"), and in terms of s 2 thereof the said regulations apply to the leased premises. The respondent has refused to vacate the leased premises on the grounds that when the written lease expired in April 1984 it became a statutory tenant as referred to in Part IV of the Rent Regulations. Accordingly, as long as it continued to pay the rent due and perform the other conditions of the lease, it could not be evicted from the premises unless there were good and sufficient grounds therefor.

Section 22(2) of the Rent Regulations reads as follows:

> (2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -
>
> (a) continues to pay the rent due, within seven days of due date; and
>
> (b) performs the other conditions of the lease;
>
> unless the court is satisfied that the lessor has good and sufficient

SMITH J

> grounds for requiring such order other than that -
>
> (i) the lessee has declined to agree to an increase in rent; or
>
> (ii) the lessor wishes to lease the premises to some other person.

When considering an analogous provision in the Rent Regulations, 1970, in *Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 (GD) AT 312H-313A; 1973 (4) SA 464 (SR) at 467D-E, BEADLE CJ said:

> The Regulations provide no yardstick as to what a court should regard as sufficient ground for ordering the ejectment of a statutory tenant. The application of this section was considered by the Appellate Division in the case of *Tucker v Buchan* 1968 (4) SA 809 (RAD). The judgment in that case does not attempt to itemise the grounds which a court would regard as sufficient. The approach of MacDONALD JA, in that case clearly indicates that the court must make a value judgment based on the merits of each particular case, and that is the manner in which I consider I must approach this matter.

Mr *O'Meara* has submitted that there can be no doubt that the applicant has embarked on a genuine scheme to reconstruct the property which include the leased premises. Moreover, the reconstruction plan is part of an overall reconstruction plan affecting all the Maceys supermarkets in Harare and other parts of the country which has been formulated with a view to providing better facilities and a better service for its customers. He also pointed out that both the Landlord and Tenant Act 1954, of England, and the Rent Control Act, No. 80 of 1976 of South Africa specifically provided that the landlord or lessor could evict his tenant or lessee if he

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required the property concerned for the purposes of a reconstruction or rebuilding scheme. In the case of *Hoosein Brothers v Moffat Outfitters (Pvt) Ltd* HH-301-85 (unreported), where the plaintiff established that it was necessary for the building in question to be renovated at some considerable expense, the court held that he had established that there were good and sufficient grounds for requiring the eviction of the lessee. Accordingly, he submitted that the applicant's scheme of reconstruction constituted good and sufficient grounds for requiring the eviction of the respondent.

In *Hoosein Bros* case (*supra*), at p 7 of the cyclostyled judgment, and that of *Rosa Alhadeff v A R Khan & Co (Pvt) Ltd* HH-165-85 (unreported) at p 4 of the cyclostyled judgment, I said that the real purpose was to prevent unscrupulous landlords from taking advantage of the shortage of commercial

premises to increase their tenants' rents unjustifiably. Mr *Gillespie* submitted that the Rent Regulations in fact went further. If their purpose was so limited, the Rent Regulations would have been more specifically drafted so as to refer thereto instead of referring generally to "good and sufficient grounds". In *Timms's* case, *supra,* at 314B-C (468D of the South African report), BEADLE CJ said:

> It is quite true that the Rent Regulations do allow a statutory tenant to evade his common law and his moral obligations by remaining in occupation, but it does seem to me that the protection given to tenants to evade common law and moral obligations should not be extended further than is necessary to comply with the spirit of the Regulations.

Mr *Gillespie* contended that, whilst these remarks were appropriate for the regulations concerned, they were not applicable in the case of the Rent Regulations. The Rent Regulations were intended to give the lessees of commercial premises security of tenure and, as such, the statutory tenants should not be regarded as persons who were evading their common law and moral obligations. He submitted that if regard were had to the scope of the alterations planned by the applicant to the premises concerned, they would not constitute a reconstruction or rebuilding scheme as contemplated in the South African legislation. This amounted, in fact, to mere cosmetic operations to the facade of the buildings, with the main expense being devoted to the provision of parking facilities. Finally, Mr *Gillespie* submitted that the court should have regard to the public interest and the interests of the lessee, in addition to the interests of the lessor. He referred to the service provided by the respondents to inhabitants of the suburb and to the fact that if the respondent were to be evicted he would be put out of business. The papers showed that the applicant could carry out its plans without ousting the respondent.

I accept that the Rent Regulations might well apply in the case of landlords other than those who fall into the category of "the unscrupulous landlord". However, s 22 of the Rent Regulations refers to the lessor having good and sufficient grounds for the eviction of the lessee. In my opinion, this means that the court must be satisfied that the lessor has good and sufficient reasons for requiring possession of the property and, if it is so satisfied, the lessor is entitled to have the lesee evicted. In this case the applicant has satisfied the court that he has *bona fide* embarked on an extensive reconstruction programme which requires that the respondent vacate

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the leased premises so that the rebuilding can be carried out. There is no evidence that the applicant has

SMITH J

undertaken the scheme merely in order to have the respondent evicted. I do not think that the Rent Regulations can be construed so as to mean that the lessee's interests outweigh the lessor's and that, in the present instance, the applicant must revise his reconstruction scheme so as to leave the leased premises unchanged.

Accordingly I feel that the applicant is entitled to an order of eviction.

The draft order sought by the applicant would require the respondent to vacate the leased premises within three days. When I asked Mr *O'Meara* whether he thought this was reasonable, he pointed out that before these proceedings were instituted, the respondent had been given three months' notice to vacate the premises. However, after taking instructions, he said that the applicant was prepared to give the respondent ten days to move, but any further delay would mean that the completion date for the alterations would be delayed, to the prejudice of the applicant. Mr *Gillespie* submitted that the notice given was irrelevant since the respondent was a statutory tenant and therefore entitled to remain on the leased premises and that the respondent should be allowed a reasonable period in which to move. He suggested that a period of one month would be reasonable. I agree that the respondent should be given a reasonable time in which to move. When regard is had to the type of business carried out by him and the period for which he has carried on that business on the leased premises, I consider that one month would be a reasonable period.

It is accordingly ordered that the respondent restore to the applicant occupation of that portion of the supermarket erected on Subdivision A of Lot 52 of Subdivision 3 of Borrowdale Estate, leased to the respondent, on or before 31 October 1985, failing which the Deputy Sheriff be ordered to eject the respondent. The respondent is ordered to pay the costs of the application.

Atherstone & Cook, legal practitioners for the applicant

Gill, Godlonton & Gerrans, legal practitioners for the respondent

S v JENKINS 1985 (2) ZLR 193 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and Gubbay JJA

Criminal Appeal

7 October 1985

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Flynote

Criminal Procedure - irregularities in proceedings before magistrate court - magistrate using vernacular during course of trial and interviewing state witness in private - duties of magistrates on notice of appeal being filed.

Headnote

A magistrate's action in interviewing a State witness in the absence of the parties and communicating with that witness in a language that the defence could not understand so as to make the communication in effect a secret one is wholly irregular and is in itself enough to vitiate a trial.

Magistrates are obliged to comply with the provisions of R 23(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979. A failure to do so deprives the Supreme Court of their views in respect of the grounds of appeal filed on behalf of appellants.

Cases cited:

R v Maharaj 1960 (4) SA 256 (N)

S v Marais 1966 (2) SA 514 (T)

S v K 1974 (3) SA 857 (C)

S v Collier 1976 (2) 378 (C)

S v Mutawarira & Anor 1973 (1) RLR 292 (AD)

I A Donovan for the appellant

F S Chambakare for the respondent

1985 (2) ZLR p194

BECK JA

Judgment

Beck JA: The appellant works for a company called Kariba Ferries (Pvt) Ltd that owns a vessel known as the "Sea Horse" which has for some years now plied Lake Kariba. In August 1983, a surveyor found the "Sea Horse" to be unsafe and prohibited it from carrying passengers on the lake after the end of September. The vessel had not been certified by a surveyor as safe once more when it carried passengers on the lake from 25 to 27 December, 1983.

The appellant was charged in his personal capacity with contravening s 15(a) of the Inland Waters Act [*Chapter 258*]. Although the record does not reflect this, it has been averred, and not disputed, that at the outset of the trial it was agreed before the magistrate that, notwithstanding the form of the charge, the intended accused was not the appellant personally, but the company Kariba Ferries (Pvt) Ltd, and that the appellant was therefore being charged in a representative capacity only. The prosecution was successful, but the magistrate, seemingly forgetful of what had been agreed at the outset, convicted the appellant personally, not the company, and fined

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him $50.

It may be said in passing that the charge would more aptly have been laid under s 22(1) of the Act, which section empowers a surveyor or other authorised person to direct that a vessel which is in use on inland waters, but is found to be unsafe, shall be berthed; and it prohibits the use of such a vessel in navigation upon inland waters until a surveyor has certified in writing that the vessel is safe once more. Section 15 on the other hand is concerned with the initial certification of a vessel before it can be used for the first time and it is not the appropriate section under which to bring the facts of this case. Other than suggesting that the invocation of s 15(a) rather than s 22(1) had the effect of leading the magistrate to place too great an emphasis upon the imperative nature of the requirement that a written surveyor's certificate must be in the possession of the master of the vessel before it may be sailed, Mr *Donovan* accepted that nothing turns upon the choice of section, for the particulars of the conduct charged were adequately stated, and under whichever section the charge was laid the defence was the same, namely that the appellant entertained an honest and reasonable belief that permission to sail had in fact been granted by an appropriate authority, and that the requisite *mens rea* was therefore lacking.

The legal practitioner who appeared for the appellant at the trial has made an affidavit in support of an application to set aside the conviction and sentence on the ground of serious defects in the record and also on the ground of certain irregularities in the conduct of the trial.

BECK JA

That affidavit spells out in detail the respects in which the record, which was kept by the magistrate in manuscript, has allegedly failed in some instances to reflect evidence that was given and in other instances has incorrectly reflected evidence that was given. These respects in which the record of the evidence is said to be seriously incomplete and incorrect are all very relevant to the defence of lack of *mens rea.*

The affidavit also sets out in detail the irregularities complained of. These were that, at a time when an important State witness was allegedly becoming flustered under cross-examination, the magistrate indulged in a verbal exchange with the witness in a vernacular language with which both the appellant and his legal practitioner are unfamiliar. Furthermore, while that same witness was still under cross-examination the magistrate adjourned the court and took the witness into an adjoining office where he spent some time alone with him out of hearing of anyone else. On resuming, the magistrate initially declined to say what had passed between them, but later placed on record that he had taken the witness aside to ask him what would become of the company in the event of a conviction.

On behalf of the State, three affidavits have been filed, ostensibly in answer to the specific allegations made in the affidavit of the appellant's legal practitioner at the trial. The respective deponents to these three affidavits are the magistrate, the public prosecutor and the interpreter. All three affidavits are totally unhelpful. That made by the magistrate reads: "The proceedings in the above record are true and correct to the best of my knowledge." That made by the public prosecutor is in the following terms: "The record of this case as it stands is true and correct for

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(sic) the best of my knowledge. And I have nothing else to add." The interpreter's affidavit merely says: "In the case of above I did interpret faithfully, impartially, diligently and to the best of my ability."

No attempt whatsoever has been made to answer any of the detailed averments contained in the affidavit of the appellant's legal practitioner. It is quite wrong to seek to put in issue those properly detailed averments by means of such bald and generalised assertions that assiduously avoid answering directly, and with particularity, the specific complaints that the appellant advanced.

In *R v Maharaj* 1960 (4) SA 256 (N) at 258B-C, BROOME JP said:

> It is a principle of justice as administered in this country that trials must

BECK JA

> take place in open court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being administered in a secret manner instead of in open court. It is elementary that a judicial officer should have no communication whatsoever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties. For that reason the conviction must be set aside.

Subject to certain permissible exceptions the general principle above referred to also applies to the administration of justice in Zimbabwe, and the consequences of violating it will be equally fatal. Certainly the magistrate's action in interviewing a State witness in the absence of the parties, and also in communicating with that witness in a language that the defence could not understand so as to make that communication in effect a secret one, was wholly irregular and is in itself enough to vitiate the trial.

In addition thereto the failure by the State to deal with the allegations of serious deficiencies, also leads to the conclusion that the conviction and sentence must be set aside. It is apparent that there is no way whereby the record can now be sufficiently corrected and the appellant would seriously be prejudiced if this court were to attempt to reach its own conclusions with regard to the appellant's guilt on the strength of a record of the evidence that is said, without proper contradiction, to be incomplete and inaccurate in respects that are relevant and material to the defence raised by the appellant. There is no dearth of precedent for setting aside the conviction and sentence in such circumstances. See: *S v Marais* 1966 (2) SA 514 (T); S v K 1974 (3) SA 857 (C); *S v Collier* 1976 (2) SA 378 (C). Indeed, at the conclusion of argument, Mr *Chambakare,* who appears for the State, very properly felt constrained to concede that the conviction and sentence cannot be supported in the circumstances which have been revealed.

Accordingly the application and the appeal must be allowed and the conviction and sentence are set aside.

Dumbutshena CJ: I have read in draft the judgment prepared by my brother Mr Justice BECK. I agree with it. I have also read in draft the observation made by my brother Mr Justice GUBBAY

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and associate myself

BECK JA

with that observation. And for the reasons which my brothers give I would allow the appeal.

Gubbay JA: I agree. I would however, make one further observation. The irregularities referred to by my brother Beck are compounded by the magistrate's failure to deal with the notice of appeal which raised six specific and pertinent grounds upon which the correctness of the conviction was challenged. Indeed there is nothing on the record to indicate that the magistrate even examined these grounds. His omission to file a statement in reply was in breach of R 23(1) of the Supreme Court (Magistrates Court) (Criminal Appeals) Rules, 1979 (SI 504 of 1979). See *S v Mutawarira & Anor* 1973 (1) RLR 292 (AD) at 300A-C.

I draw attention to the matter because there appears to be an increasing tendency among magistrates to overlook the necessity to comply with R 23(1), thereby depriving this court of the benefit of their views.

Coghlan, Welsh & Guest, legal practitioners for appellant

MADONDO v MKUSHI 1985 (2) ZLR 198 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and McNally JJA

Civil Appeal

15 October 1985

Flynote

Customary law - method of ascertainment of particular custom - evidence of, who may give.

Legislation - Administration of Estates Act [Chapter 301], s 69(2) - African Wills Act [Chapter 240], s 7 - Customary Law and Primary Courts Act 1981, s 5.

Headnote

In a dispute concerning the inheritance to a deceased estate according to Karanga custom conflicting versions of the applicable custom were put before the court. The matter was remitted for evidence to be adduced to establish the relevant custom and its content.

Held the existence and content of a custom must be established by the evidence of academic experts or tribal savants where there is dispute or doubt on the point.

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Cases cited:

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

Colman v Dunbar 1933 AD 141

Massey-Harris Co (SA) Ltd v Erasmus 1941 SR 160

A A Chiwara for the appellant

C N Greenland for the respondent

Judgment

Dumbutshena CJ: This is an appeal against the judgment of the magistrates court sitting at Chivhu dismissing the appellant's application challenging the appointment of Mr Honour Mkushi as heir to the estate of the

DUMBUTSHENA CJ

late Zivengwa Japi Madondo who died on 7 July 1978. Zivengwa Japi Madondo died intestate and left in his estate a farm at 1274 Wiltshire, Charter. He was survived by his wife and his daughter Eunice Regina who is married to Mr Mawire. It is not clear from the record whether he was married according to African custom or not but since his estate was distributed in the manner outlined in the magistrate's judgment we can assume that he contracted a customary marriage.

The distribution of his estate was complicated by the fact that Zivengwa Japi Madondo's father, Madondo Maburutse, had three wives. The first wife had three sons, namely Makore, Mujeri and Zivanayi Gumisayi. The second wife had two sons, Philemon Mujeri, the appellant, and Sanangurayi. The third wife had one son Zivengwa Japi, the deceased, and two daughters, Namatirayi and Pindiso. Namatirayi is the mother of Mr Honour Mkushi, the respondent. The deceased's father had one sister, Makazvita, and one brother, Munyonga Maburutse Gutu.

There is a dispute in this appeal. The appellant does not agree that the appointment of the heir to the deceased's estate is made by the eldest surviving sister of the deceased. The appellant's contention appears from the magistrate's judgment to be as follows:

> He challenged the appointment because it was uncustomary and the method adopted to arrive at the rightful heir was wrong. He says a vote was taken and people who were not qualified to take part also voted. He says he did not agree at the meeting that the children of a particular house only take part in the distribution of their own father's estate. He says his uncle Maburutse Gutu and Makore are the people to decide and they would have chosen him because he is the deceased's younger brother. Then he says it is his aunt Makazvita who chooses the heir and she is still alive. He denies that the deceased's sister is qualified to choose the heir.

The respondent's case was put by the magistrate as follows:

> . . . the estate is decided by the children of the woman to whom the deceased was married and they do not interfere in the inheritance matters of other houses. In this case respondent's mother, Pindiso, and Namatirayi decided what was to happen to their brother's estate and they appointed *Honour Mkushi,* the nephew of the

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deceased.

It was contended by the respondent that it was the eldest sister of the deceased that appointed the heir.

DUMBUTSHENA CJ

There is a conflict between the parties as to the usages and customs of the Karanga in matters affecting the distribution of the deceased's estate and the appointment of the heir to the estate.

It is specifically laid down in subs (2) of s 69 of the Administration of Estates Act [*Chapter 301*] that the controversies or questions arising from the distribution of the estate of deceased Africans married according to African custom shall be decided according to African usages and customs. The provisions of subs (1) and (2) of s 69 of the Administration of Estates Act read as follows:

> (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried, is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.
>
> (2) If any controversies or questions arise among his relatives or reputed relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, which evidence he may supplement from his own knowledge.

The learned magistrate, acting in terms of subs (2) of s 69 of the Act, took down and recorded evidence of the usages and customs of the Karanga from witnesses called by the parties to the dispute. He came to the conclusion that Mr Honour Mkushi was the rightful heir and dismissed the appellant's application.

But that evidence, as it appears on the record, cannot be reconciled. Counsel for the parties, Mr *Chiwara* and Mr *Greenland* who appear for the appellant and the respondent respectively, are agreed that the evidence on the record leaves the matters in dispute unclear. With the agreement of counsel, we ordered that the matter be referred back to the trial magistrate to take further evidence as to who, under Karanga or Shona custom, is or are the rightful heirs to the estate of Zivengwa Japi Madondo.

DUMBUTSHENA CJ

It appears to me that no useful purpose will be served by considering the evidence recorded by the provincial magistrate at the trial of this matter at Chivhu.

For the purpose of this judgment s 7 of the African Wills Act [*Chapter 240*] sets out clearly what the heir in African customary law is. The section reads:

> The heir at African law of any deceased African shall succeed in his individual capacity to any immovable

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property or any rights attaching thereto forming part of the estate of such deceased African and not devised by will.

In *Matambo v Matambo* 1969 (2) RLR 154 at 157B-D; 1969 (3) SA 717 (RAD) at 719A-B, BEADLE CJ considered s 6 of the African Wills Act [*Chapter 108*] (now repealed), the predecessor to s 7 of the African Wills Act which was in identical words. He said at 157B-D (719A-C of the South African report):

> It seems to me that what must be decided here is what precisely the Legislature meant by the words 'heir at African law' where they occur in s 6 of the African Wills Act. The word 'heir' here, since there is nothing to indicate any intention to the contrary, must be construed in the normal grammatical sense in which it is understood in our law. I look, therefore, to our law to see what is meant by the word 'heir'. Bell's *South African Dictionary,* 3rd ed, p 346, quoting from Morice's *English and Roman-Dutch Law,* 2nd ed, p 291, defines 'heir' thus:
>
> > In regard to intestate succession the heirs are the persons who are entitled to succeed to the property of the deceased.
>
> Paraphrasing s 6 of the African Wills act in the light of that definition I consider that s 6 must be interpreted as meaning: 'The person at African law who is entitled to succeed to the property of any deceased African shall succeed in his individual capacity to any immovable property.'

If Mr Honour Mkushi was appointed heir to the estate of Zivengwa Japi Madondo in accordance with Karanga custom then he is entitled to the farm in his individual capacity. However his appointment did not meet with the approval of some members of the Madondo family. It was said he was not appointed in accordance with Karanga custom. So the issue in this case is, what is Karanga custom? The evidence on the record does not fully answer that question.

DUMBUTSHENA CJ

In the view of this court a thorough investigation or inquiry into the Karanga custom pertaining to inheritance of the estates of persons who die intestate is required. Both counsel entertain doubts as to what that custom is. Is it only Karanga custom which is applicable? Or is Karanga custom the same as Shona custom? Is it the eldest sister of the deceased who appoints the heir? Or is it the brother or half-brother of the deceased?

The court must ascertain what this customary law is. How the court should go about ascertaining that custom is laid down in s 5 of the Customary Law and Primary Courts Act, 1981. Section 5 reads:

> If a court of law entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings after having considered such submissions thereon as may be made, and such evidence thereof as may be tendered, by or on behalf of the parties, it may, without derogation from any other lawful source which it may have recourse to, consult reported cases, text books and other sources, and may receive opinions either orally or in writing, to enable it to arrive at a decision in the matter:
>
> Provided that -
>
> (i) the decision as to the persons whose opinions are to be relied upon shall be one for the court after considering such submissions thereon as may be made and such evidence thereof as may be tendered by or on behalf of the parties;
>
> (ii) any cases, text books, sources and opinions consulted by the court shall be made available to the

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parties;

(iii) any such oral opinion shall be given to the court in the same manner as oral evidence.

No cases were cited before the magistrate at Chivhu. Yet there are cases on inheritance. I am sure that counsel representing the parties will cite reported cases and text books to the court after the taking of further evidence. I need not burden this judgment with what I consider to be relevant reported cases and text books. The learned provincial magistrate will, after hearing counsel's submissions, decide for himself what he considers to be relevant authorities.

We decided to send back this case to the trial magistrate for him to take further evidence because the issue to be resolved in this case is of singular

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DUMBUTSHENA CJ

importance. There may be other cases of this nature pending before the courts or still to come before the courts. We therefore think it important for the magistrate to take evidence from experts on African custom. The receipt by the court of their opinions will go a long way in assisting the court to come to a just decision. The parties may, in consultation with the trial magistrate, decide to call their own experts. That will be proper. But the decision as to which people's opinions the court will rely on is one for the court. Here the court will be guided by the proviso to s 5 of Act No. 6 of 1981.

I would, however, like to suggest the type of people this court thinks will be of some assistance to the trial court. Mine is only a suggestion. The court and the parties may decide that the people I have named below are qualified or not qualified to express opinions on Karanga custom in particular or on Shona custom in general. They will be able to inform the court whether Karanga custom is different or the same as Shona custom on the appointment of the heir to the estate of a deceased person. I believe men of the standing of Mr J C Kumbirai of the University of Zimbabwe and Mr A Munjanja of 7 Goodwood Close, Waterfalls, Harare, should, if the court and the parties think them qualified to express opinions on this issue, be called to give expert evidence. There must be many others qualified to express opinions. The parties may prefer to add to the list names of well-informed and educated chiefs whose opinions will be just as weighty as those of the above gentlemen.

There is evidence on the record which differs on the method used by the Karanga when appointing the heir to the estate of a deceased person. What is required now is a clear enunciation of the custom of the Karanga or Shona in this regard. I do not like to say one side or the other was right or wrong. This court has not heard the appeal argued.

A thorough inquiry will, I believe, assist the magistrate when he considers his judgment. I would like also to believe that the evidence that will be tendered by the expert witnesses will be weighty and material and will be practically conclusive because if it is not it will still leave the issue of the custom used in such matters in doubt and the matter will not be finalised. See *Coleman v Dunbar* 1933 AD 141 at 160; *Massey-Harris Co (SA) Ltd v Erasmus* 1941 SR 160 at 167.

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At the end of hearing counsel on the taking of further evidence we made an order condoning the late noting of the appeal. We also set aside the decision of the magistrate. We further ordered that the matter be remitted to the same

DUMBUTSHENA CJ

magistrate, Mr A N Mnkandla, who tried it at Chivhu, for the taking of further evidence from experts on Karanga and/or Shona customary law. We also reserved the costs.

May I add that the record of the proceedings at Chivhu will form part of the evidence to be considered after hearing the evidence of the experts and counsel's submissions. The learned magistrate will then consider afresh who the rightful heir to the estate of the late Zivengwa Japi Madondo is.

I have already stated that this matter is of great importance. I hope that there will be no delay in setting it down for the taking of further evidence.

Beck JA: I agree.

McNally JA: I agree.

A A Chiwara & Co, legal practitioners for appellant

Sawyer & Mkushi, legal practitioners for respondent

S v BENATAR 1985 (2) ZLR 205 (HC)

Court **High Court, Harare**

Sansole J

Criminal Application for Bail

9 and 16 October 1985

Flynote

Criminal Procedure - bail following conviction - principles applicable.

Headnote

In an application for bail following conviction the crux of the matter is, firstly, that the discretion to grant or refuse bail is vested in the court and, secondly, that in exercising this discretion the court must consciously endeavour to the best of its ability to put in balance the interests of the individual or his liberty and the interests of the administration of justice. The decision must not endanger the administration of justice whilst at the same time it must not frustrate the liberty of

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the individual. It is a very delicate balance indeed.

Cases cited:

S v Williams 1980 ZLR 466 (AD)

S v Kilpin 1978 RLR 282 (AD)

S v Tengende & Ors 1981 ZLR 445 (SC)

S v Bennett 1976 (3) SA 652 (C)

A P de Bourbon for the applicant

T B Karwi for the respondent

Judgment

Sansole J: On 2 October 1985 the applicant in this matter was convicted by a regional magistrate in Harare of two counts of theft, namely US$3 500, DM 500 and two counterfeit US dollar notes on the one count and jewellery worth $85 000 on the other. The trial regional magistrate was of the opinion that he did not have sufficient jurisdiction to sentence the applicant. Thus he

SANSOLE J

referred the matter to the Attorney-General, in terms of s 58(2) of the Magistrates Court Act [*Chapter 18*]. Consequently the prosecutor applied for the cancellation of the bail, it being alleged that as a result of the conviction, the applicant, *inter alia,* was likely to abscond and thus avoid serving his sentence. Mr *de Bourbon,* who appeared for the applicant in the court a quo, vigorously opposed the application for the cancellation of bail, but in vain.

The State, both in the court a quo and in this court, has advanced two reasons in support of its application, and these are that:

(a) The applicant is likely to abscond and with all the more reason now that he has been convicted and stands in great jeopardy of being sentenced to a lengthy period of imprisonment, and

(b) the applicant, having attempted suicide prior to his conviction, he is now more likely to do so, on account of his conviction and fear of imprisonment.

The trial regional magistrate's attention was drawn to the law and factors that hold sway when dealing with an application for bail after conviction. He cited and applied the case of *S v Williams* 1980 ZLR 466 (AD). Having considered the law, he said at p 2 of his judgment on bail application:

> The fact is that the accused has in the past attempted to commit suicide, and whilst this factor did not preclude him from being granted bail prior to conviction, the position shows that under conditions of stress he has these tendencies. The situation now is that he has been convicted on these two counts and is likely to be sentenced to a long term of imprisonment by the High Court. **I have not lost sight of the fact that he may well be successful when his case is reviewed by the High Court or on appeal.** (The emphasis is my own). Nevertheless, I am

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satisfied that there is a real possibility of the accused not appearing either by absconding, which can be done without a passport, or alternatively by trying to take his life.

For these reasons the trial regional magistrate concluded that the applicant had failed to prove that it was in the interests of justice that his bail be extended.

It is a well-known fact that each decision is based on its own facts. Accordingly, and before dealing with the law in this matter, I propose to give a brief resume of the history of this matter. The background to it is fraught

SANSOLE J

with emotional antagonism between Mr Samuel Levy and the applicant which arises from the applicant's amorous association with one Julia Levy, the daughter of Mr Samuel Levy. It is a highly emotional background which bristles with hatred by Mr Samuel Levy of the applicant. As will be seen from the applicant's petition, it reveals that in February 1983, Mr Samuel Levy issued an interdict, on notice of motion, prohibiting the applicant from communicating with Julia Levy. Apparently the applicant, on account of his amorous involvement with Julia Levy, breached this prohibition. Consequently, in May 1983, he was arrested on charges of contempt of court arising from the breach of the interdict, abduction of Julia Levy and having sexual intercourse with a woman under the age of sixteen, named Julia Levy. He stood trial. He was acquitted of the charges, save for the charge of contempt of court. He appealed and he was acquitted of this charge on appeal. The applicant alleges that at the end of this trial, Mr Levy threatened him with words to the effect that this was not the end of the matter and that he, Mr Levy, would get the applicant yet. Indeed, the charges which are the subject of this conviction were subsequently brought against the applicant. The applicant acquired the knowledge that these charges were being brought against him whilst he was in South Africa. Nevertheless, he returned to this country in spite of this knowledge. Upon his return, and acting through his legal practitioners, he contacted the police and the Director of Public Prosecutions and announced his return to this country. An understanding was reached in terms of which he would surrender his passport and would make himself available to the police so as to assist them in their investigations. Nevertheless, he was subsequently arrested for the charges for which he now stands convicted.

The applicant was admitted to bail on a sum of $1 000 subject to certain reporting conditions and also on condition that he did not communicate with Julia Levy. Thereafter, the applicant appeared on remand many times. On 16 November 1983, on the occasion of one of his numerous remands, his bail was cancelled by the magistrate upon the production of a Ministerial certificate in terms of s 106(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*]. The applicant immediately petitioned the High Court to have the certificate set aside. Fortunately, an agreement was reached with the representative of the Attorney-General and the certificate was withdrawn and the applicant was re-admitted to bail. Thereafter, the applicant, through his legal practitioner, made frequent attempts to secure trial dates for the charges, but in vain. To his dismay, on or about 19 March 1984, the applicant learned through his legal practitioners and the police that further charges, *inter alia* conspiracy to murder Mr

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Levy, were being preferred against him.

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The applicant took fright and went to Bulawayo. Julia Levy, upon learning about these fresh charges, insisted on joining the applicant in going to Bulawayo. As a result of his impulsive decision to go to Bulawayo and his failure to dissuade Julia Levy from going with him to Bulawayo, he breached his bail reporting conditions and the prohibition against any communication with Julia Levy.

Whilst in Bulawayo, the applicant and Julia Levy tried to pacify Mr Levy by talking to him over the telephone but all was in vain. The applicant also telephoned the police to inform them about his whereabouts. On 22 March 1984, the applicant was arrested by the police in his flat in the company of Julia Levy. The police observed that the applicant's wrists and Julia Levy's wrists were slashed. Consequently, the applicant was sent for medical observation. On 10 April 1984, the applicant applied for admission to bail. The application was opposed by the State. A psychiatrist's report was produced. It revealed that the applicant was not at that time homicidal, suicidal or mentally disturbed. Thus, the applicant was granted bail in the sum of $5 000 cash and a surety of $5 000. It is the cancellation of this bail which has resulted in application for bail to this court by the applicant.

I now turn to the law and considerations which should be taken into account when considering the granting or refusal of bail after conviction. The law is adequately dealt with in authorities such as *S v Williams* 1980 ZLR 466 (AD), *S v Kilpin* 1978 RLR 282 (AD) and *S v Tengende & Ors* 1981 ZLR 445 (SC).

Whilst it is true that:

> the principles governing the grant of bail before conviction are entirely different from those governing its grant after conviction, particularly where the accused's guilt is not in issue and a substantial prison term is the usual sentence for the offence. (See headnote in *Kilpin's* case, *supra*).

However, as FIELDSEND CJ said in *Williams'* case, *supra,* at 468G-H:

> . . . the proper approach should be towards allowing liberty to persons where that can be done without any danger to the administration of justice. In my view, to apply this test properly it is necessary to put in the balance both the likelihood of the applicant absconding and the prospects of success. Clearly, the two factors are inter-connected because the less likely are the prospects of success the more inducement there is on an applicant to abscond. In every case where bail after conviction is

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sought the onus is on the applicant to show why justice requires that he should be granted bail.

Earlier on in the same case at the same page at paragraph E-F, the learned Judge said:

> On the authorities that I have been able to find it seems that it is putting it too highly to say that before bail can be granted to an applicant on appeal against conviction there must always be a reasonable prospect of success on

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> appeal. On the other hand even where there is a reasonable prospect of success on appeal bail may be refused in serious cases notwithstanding that there is little danger of an applicant absconding.

In my view, these remarks are very sound and they are in accordance with principle. However, they highlight the crux of the matter, which is, firstly, (a) that the discretion to grant or refuse bail is vested in the court. The court must exercise this discretion judicially. Secondly, (b) in exercising this discretion the court must consciously endeavour to the best of its ability to put in balance the interests of the individual or his liberty and the interests of the administration of justice. The decision must not endanger the administration of justice whilst at the same time it must not frustrate the liberty of the individual. It is a very delicate balance indeed.

Turning now to the grounds advanced by the State in opposition to the application, namely that -

(a) the applicant is likely to abscond, and

(b) the applicant is likely to commit suicide.

I reject the second ground because it contradicts what the psychiatrist said about the disposition of the applicant. Dr Vermeulen, who examined the applicant after the attempted suicide, said that the applicant did not, at the time of the examination, have any homicidal or suicidal tendencies, and that he was not mentally disturbed. In any event, the applicant has been on bail since that examination in March or April 1984 to the time of his conviction on 2 October 1985. This is a very considerable time indeed. Notwithstanding that, he appeared to have weathered the frustration and the stress which must have been enormous. There is no evidence to suggest that his disposition had since changed. The issue of great concern to me is whether or not it can be said, on the evidence before me, that the applicant is likely to abscond. I have to satisfy myself that this risk is sufficiently great to justify the refusal of bail.

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I am concerned at the tendency or the attraction to so readily assume that a conviction of necessity induces a need on the part of the person to abscond. This is the basis upon which the argument was put to me by Mr Karwi, who appeared for the State. He was so vehement in his argument on this point to the extent that he was not prepared to contemplate a possibility that bail could be granted at all. He further argued that there was no reasonable prospect of success on appeal. I need not say more on this aspect of his argument, but suffice it to say that he is contradicted by what the learned trial magistrate said in his judgment on bail. He said, "I have not lost sight of the fact that he (ie applicant) may be successful when his case is reviewed by the High Court or on appeal" (see p 2 of his judgment).

Taking into account the emotional background of this matter and the behaviour of the applicant to date, I have decided to lean in favour of his liberty. Thus, I have decided to grant him bail pending appeal. However, I am fully conscious of the seriousness of the offences of which he stands convicted. It has been said:

> In striking a balance between the liberty of the subject and the proper administration of justice, the imposition of conditions in an application for bail can be decisive. Where bail can be granted subject to safeguarding conditions,

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the court should, if possible, lean in favour of doing so . . . (see headnote, *S v Bennett* 1976 (3) SA 652 (C)).

Having decided to grant bail upon certain conditions, I invited Mr *Karwi* to assist the court by indicating what sort of conditions the State would consider suitable. He declined to assist, and contended that the State's attitude was, simply, that bail should be refused. Accordingly, I felt I was at large to formulate such conditions as I thought desirable, bearing in mind the need to ensure that as much as reasonably practicable the administration of justice is not endangered. These conditions are adequately set out in the court order.

Kantor & Immerman, legal practitioners for the applicant

Attorney-General, legal practitioner for the State

S v MHARAPARA 1985 (2) ZLR 211 (SC)

Court **Supreme Court, Harare**

Gubbay, Beck and McNally JJA

Criminal Appeal

24 July and 17 October 1985

Flynote

International Law - jurisdiction of Zimbabwean courts in respect of criminal offences committed outside of Zimbabwe.

Headnote

Appellant was charged with the theft of the equivalent in Belgian francs of Z$30 499,82 whilst he was based in Belgium and attached to the Zimbabwe Representative Mission. The theft was only discovered after the appellant had left Belgium and returned to Zimbabwe. On a charge of theft being put to the appellant on trial before the High Court of Zimbabwe, an exception to the charge was taken on the grounds that the Zimbabwean courts had no jurisdiction to deal with the matter. The exception having been dismissed, the appellant appealed.

Held that here is no justification for a rigid adherence to the principle that with the exception of treason only the common law crimes perpetrated within the borders of Zimbabwe are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for having victims even greater. A strict interpretation of the principle of territoriality could create injustice where the constituent elements of the crime occur in more than one state or where the *locus criminis* is fortuitous so far as the harm flowing from the crime is concerned. A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime

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must be favoured.

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Cases cited:

Paweni & Anor v Attorney General 1984 (2) ZLR 39 (SC); 1985 (3) SA 720 (ZSC)

Radwan v Radwan [1972] 3 All ER 967 (Fam D)

Cox v Army Council [1962] 1 All ER 880 (HL)

S v A 1979 RLR 69 (GD); 1979 (4) SA 51 (R)

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)

Strassheim v Daly (1911) 221 US 280

K Laue for the appellant

I Chatikobo for the respondent

Judgment

Gubbay JA: On 3 June 1985 the appellant appeared before the High Court in answer to an indictment alleging that during the period extending from 25 June 1984 to 6 July 1984, and at the Zimbabwe Representative Mission in Brussels, Belgium, he had stolen money, in the course of employment, amounting to 1 524 981 Belgian Francs (the equivalent of Z$30 499,62), the property of the Zimbabwe Government. He did not plead but, in terms of s 156(1) of the Criminal Procedure and Evidence Act [*Chapter 59*], excepted to the indictment with a view to having it quashed, on the ground that the court had no jurisdiction to try him upon an averment that the theft had been committed in Belgium. For the purpose of ruling upon the exception it was agreed that the learned trial judge (MFALILA J) should have regard to the facts contained in the written outline of the State's case, which reads:

1. The accused is aged about 30 years and is employed by the Ministry of Foreign Affairs as an Executive Officer. At the time of the commission of his offence, he was based abroad with the Zimbabwe Embassy in Brussels, Belgium. His duties involved administration and the control of finance.

2. On the 12th June 1984 the accused received written notification from the Ministry of Foreign Affairs' Head Office in Harare that he was being recalled home for re-assignment. He had been in Brussels since the 31st December 1981.

3. On several occasions over a period of two weeks, dating from about the 25th June

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1984 to the 6th July 1984, the accused stole from the Zimbabwe Embassy in Brussels money in the sum of 1 524 981 (one million five hundred and twenty-four thousand nine hundred and eighty-one) Belgian Francs, (which is equivalent to Z$30 499,62).

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The money was stolen in the following manner: 110 109 Belgian Francs from cash receipts not deposited to the Embassy Account, 1 134 872 in the form of cheques which he got by supplying false information to his superiors. These moneys above were supposed to have been banked by the accused but the accused converted the money to his own use. The accused also fraudulently got a member of the Embassy in Brussels to countersign a requisition to transfer 280 000 Belgian Francs from the Embassy Account. After withdrawing the money the accused converted it to his own use.

4. Of the Z$30 499,20 stolen, nothing has been recovered.

To this was added the further accepted fact that the appellant had departed from Belgium prior to the alleged offence being discovered.

After hearing full argument MFALILA J dismissed the exception, holding that Zimbabwean courts have jurisdiction over the appellant in accordance with the nationality or active personality principle of international law. He rejected the main contention advanced by the State that jurisdiction may be assumed where a person performs an act outside the country which is a crime if performed inside the country and a harmful effect of the act is felt by the victim there. In other words, that our courts should assume jurisdiction in every case except where an act is performed wholly outside the country and no harmful effect is felt inside the country. * (11)

Following upon the ruling of the learned judge the appellant was not called upon to plead to the indictment as an intention to appeal was intimated. The appeal was duly noted pursuant to s 44(1) of the High Court of Zimbabwe Act 1981, which provides that "an appeal in any criminal case shall lie to the Supreme Court from any judgment of the High Court, whether in the exercise of its original or its appellate jurisdiction."

Despite an initial argument to the contrary advanced by Mr Chatikobo, who appeared for the respondent, there can be no question but that the appeal is properly before this court. Although interlocutory in nature, the decision dismissing the exception was clearly a judgment given in a "criminal case", thereby affording an appeal as of right. See *Paweni & Anor v Attorney-General* 1984 (2) ZLR 39 (SC) at 41D-42G; 1985 (3) SA 720 (ZSC) at 722B-723A.

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At the outset it is as well to indicate that Mr *Chatikobo* conceded that the Zimbabwean Embassy in Brussels is not a geographical extension of the physical terrain of Zimbabwe, but

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forms part of the territory of Belgium. Consequently the clear implication that the appellant stole at least some moneys while within the confines of the Embassy, is no foundation upon which to assume jurisdiction against him. I am satisfied with the correctness of that concession. I agree entirely with the submission made to, and accepted by, CUMMING-BRUCE J (as he then was) in *Radwan v Radwan* [1972] 3 All ER 967 (Fam D) at 971h that:

> . . . the doctrine that an embassy or consulate is strictly the territory of the sending state is now, and has for long, been regarded as a heresy by the unanimous opinion of those academic authors who command respect in the exposition of international law.

The popular myth is firmly laid to rest in *Satow's Guide to Diplomatic Practice,* 5th ed at p 107, where it is stated:

> The term 'exterritoriality', or 'extraterritoriality', is sometimes used to denote the totality of privileges and immunities accorded to diplomatic agents, their families and subordinate staff, or to describe the status of embassy premises. But it is now everywhere accepted that it does not mean that the diplomat is not legally present in the receiving state or that the embassy is deemed to be foreign territory. Marriages, or crimes, occurring on diplomatic mission premises, are regarded in law as taking place in the territory of the receiving state.

See further O'Connell, International Law 2nd ed vol 2 at p 903; Fawcett, *The Law of Nations* (1971) at pp 64-65; O Oppenheim's *International Law* 8th e, vol 1 para 390.

In his discussion on the principle of nationality the learned judge a quo said*(12):

> 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

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> 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; . . . But a case such as the present, involving as it does a member of the country's 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.

That exposé does not, I venture to think, accurately reflect upon the nationality or active personality principle. As I perceive the position, there is no rule of international law directing or obliging states to exercise criminal jurisdiction over their nationals for offences committed abroad. International law merely permits every state to apply its jurisdiction against its own citizens even when they are situate outside its boundaries. See O'Connell *op cit* at p 823; Oppenheim op cit at p 330. Thus the fact that customary international law is part of the municipal law of a state does not assist, because there is only a permissive principle involved and not a mandatory rule. The permissibility under international law for a state to exercise jurisdiction is not a sufficient basis for the exercise of jurisdiction by a municipal court of that state. A municipal court must be satisfied in addition that the municipal law itself authorises the trial of a national for an offence committed abroad which would be punishable if committed at

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home. The matter is concisely put by O'Connell *op cit* at pp 824-825 in this way:

> There is no restriction on the competence in international law of a State to prosecute its own nationals for acts done on foreign territory. Whether or not a prosecution can be sustained is entirely a matter of municipal law, which may choose to disinterest itself in the activities of its nationals extraterritorially. Until the middle of the nineteenth century there was a tendency to think that international law allowed no jurisdiction over either nationals or aliens in respect of acts committed on alien territory, and the maxim of Paulus *'extra territiorium jus dicenti impune non paretur'* was frequently quoted in support of this view. However, English and American courts have held that there is no restriction on the competence of the legislature to extend the criminal law to cover the acts of nationals abroad, and that it is entirely a question of construction to what extent it has done so. . . .

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In the absence of statute, however, Anglo-American jurisdiction is, as a matter of common law, territorial.

See also *Cox v Army Council* [1962] 1 All ER 880 (HL); Joubert *The Law of South Africa,* vol 5, para 569; Lansdown and Campbell *South African Criminal Law and Procedure,* vol 5 at p 8. It is therefore essential that there be in existence some rule of municipal law, either in statute or common law, which provides for the exercise of jurisdiction in such a case.

In this country there is no legislation giving extraterritorial jurisdiction to the courts where nationals commit thefts abroad. It would be very much a new departure, unsupported by authority, for the courts to assume jurisdiction simply because of the inability of bringing the appellant to trial in Belgium or because his prosecution here would not involve any interference with Belgium's legitimate affairs.

While accepting the proposition that the alleged theft in Brussels may have harmed the Zimbabwe Government at home, MFALILA J declined to exercise jurisdiction on that ground. It is apparent that he was influenced greatly by the judgment in *S v A* 1979 RLR 69 (GD); 1979(4) SA 51 (R). In that case I had occasion to examine the English decisions in *Treacy v Director of Public Prosecutions* [1971] 1 All ER 110 (HL), *R v Baxter* [1971] 2 All ER 359 (CA) and *Director of Public Prosecutions v Stonehouse* [1977] 2 All ER 909 (HL), which were relied upon by State counsel in support of the submission that the narrow ground upon which jurisdiction was assumed in the past, where a theft is committed entirely outside the territorial boundaries, had been developed and extended. My analysis of those judgments led me to express the following view at 80D-F and 81D-F (57F-G and 58E-F respectively of the South African report):

> 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, has 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.

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And:

> . . . 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.

Having carefully re-read the English trilogy I am now firmly of the opinion that the reasoning therein does not entirely support the principle I have sought to enunciate. It would seem to be too restrictive. While it may be that on the facts of two of those cases the deception was aimed at obtaining the property of a victim in England, and in that sense its impact could have been felt there, the underlying *ratio* was that a court may exercise jurisdiction where either a substantial element of the offence or the harmful effect thereof occurred within its territorial boundaries. It was not, as I understand it, that in the absence of an attempt to abstract or the actual abstraction of the property in England where the victim resided, no harmful effect could possibly be felt by him there. I shall illustrate this by reference to the three cases.

In *Treacy v Director of Public Prosecutions, supra,* LORD DIPLOCK was the only member of the House to approach the problem along unconventional lines. He considered that the presumption against extra-territorial jurisdiction was based in international rules of comity and said that there was no reason in comity why persons who did physical acts outside England which had harmful consequences inside the country should not be liable to punishment if they subsequently came to England. He expressed himself thus at 122a-c:

> Nor . . . can I see any reason in comity to prevent Parliament from rendering liable to punishment, if they subsequently come to England, persons who have done outside the United Kingdom physical acts which have had harmful consequences on victims in England. The State is under a correlative duty to those who owe obedience to its laws to protect their interests and one of the purposes of criminal law is to afford such protection by deterring, by threat of punishment, conduct by other persons which is calculated to harm those interests. Comity gives no right to a State to insist that any person may with impunity do physical acts in its own territory which have harmful consequences to persons within the territory of another State. It may be under no obligation in

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> comity to punish those acts itself, but it has no ground for complaint in international law if the State in which the harmful consequences had their effect punishes, when they do enter its territories, persons who did such acts.

The unanimous judgment of the Court of Appeal in *R v Baxter, supra,* was delivered by SACHS LJ. In essence it was 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 posted in Northern Ireland and arrived in England where they were read by but did not deceive the management of either company. It was relevant that from the moment of dispatch until the moment the claims finally failed, the appellant had never left Northern Ireland. The object of sending the letters was to get the pools companies to dispatch 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 the deception was aimed at the property of victims within the jurisdiction. It was said at 362a-b:

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> The older authorities deal *inter alia* with the origin of the rule relating to jurisdiction; they underline as LORD DIPLOCK pointed out in *Treacy v Director of Public Prosecutions,* that in modern times its only substantial foundation is based on internal 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.

But the high water mark on the question of jurisdiction where all the physical acts are perpetrated externally was reached by the House of Lords in *Director of Public Prosecutions v Stonehouse, supra.* The facts were these: In July and September 1974, Stonehouse, a man prominent in English politics, insured his life in England for the benefit of his wife, for a total amount of £125 000. On 19 November 1974 he flew to Florida, ostensibly for a business meeting. The next 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. There he was recognised on 24 December 1974. No claim was ever made for the policy money though the news of his supposed death had been published broadly in England, reaching both the insurance company and his wife - the latter being an innocent party. He was tried at the Central Criminal Court on a charge of attempting to obtain property by deception and the jury convicted him. The Court of Appeal upheld the

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conviction. On a further appeal to the House of Lords the point of law certified was:

> Whether the offence of attempting on 20 November 1974 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.

In dismissing the appeal it was held that the principle that the English courts have jurisdiction where what was done outside the country caused the obtaining of property by deception in England from the person to whom it belongs, was sufficiently wide to cover their jurisdiction to try the inchoate offence of an attempt to obtain it.

With the exception of VISCOUNT DILHORNE, the other four members of the House followed LORD DIPLOCK'S approach in *Treacy's* case, *supra.* LORD DIPLOCK himself said at 916h-j:

> Once it is appreciated that territorial jurisdiction over a 'result-crime' does not depend on acts done by the offender in England but on consequences which he causes to occur in England, I see no ground for holding that an attempt to commit a crime which, if the attempt succeeded, would be justiciable in England does not also fall within the jurisdiction of the English courts, notwithstanding that the physical acts intended to produce the proscribed consequences in England were all of them done abroad.

LORD KEITH OF KINKEL observed at 937j-938a:

> English criminal law has consistently adopted the approach, in cases involving a foreign element, that, where an act done abroad has resulted in harmful consequences in England, the actor may be tried by an English court.

He continued at 939h-940b:

> In my opinion it is not the present law of England that an offence is committed if no effect of an act done abroad is

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felt here, even though it was the intention that it should be. Thus if a person on the Scottish bank

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> of the Tweed, where it forms the border between Scotland and England, were to fire a rifle at someone on the English bank, with intent to kill him, and actually did so, he would be guilty of murder under English law. If he fired with similar intent but missed his intended victim, he would be guilty of attempted murder under English law, because the presence of the bullet in England would be an intended effect of his act. But if he pressed the trigger and his weapon misfired, he would be guilty of no offence under the law of England, provided at least that the intended victim was unaware of the attempt, since no effect would have been felt there. If, however, the intended victim were aware of the rifle being pointed at him, and was thus put into a state of alarm, an effect would have been felt n England and a crime would have been committed there. The result may seem illogical, and there would appear to be nothing contrary to international comity in holding that an act done abroad intended to result in damage in England, but which for some reason independent of the actor's volition had no effect there, was justiciable in England. But if that were to be the law, I consider that it would require to be enacted by Parliament.

Consistent with what I comprehend as the broad principle laid down in the English cases are the similar remarks of the legendary MR JUSTICE OLIVER WENDELL HOLMES, when delivering the unanimous opinion of the Supreme Court of the United States in *Strassheim v Daily* (1911) 221 US 280 at 284-285:

> If a jury should believe the evidence, and find that Daily did the acts that led Armstrong to betray his trust, deceived the board of control, and induced by fraud the payment by the state, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the state until after the fraud was complete. Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power.

That case is apposite because, like the present, the external commission of a common law offence and the concept of an extension of territorial jurisdiction, were under consideration. It appears that Daily, while in the state of Illinois, and with the connivance of the prison warden Armstrong, perpetrated a fraud upon the board of control of the Michigan state prison by representing that certain items of machinery sold and delivered to the prison

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were new, when to his knowledge they were second-hand.

Significantly also the learned authors Lansdown and Campbell *op cit* at pp 9 and 11, in their treatment of the English decisions, accept the applicability of the harmful effect principle to the criminal common law in South Africa, and do not suggest that where what is an offence against property, its operation is confined to instances where such property, as well as the victim, are within the jurisdiction. this is what they say:

> The general principle of the common law that jurisdiction does not extend to acts committed abroad appears to be losing ground in the face of a trend indicating that where the constituent elements of a crime occurred in different countries, the offence may be tried in any jurisdiction where any of those elements, or their harmful effect, occurred.

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And:

> It is accordingly submitted that there may be circumstances where, in a case reflecting foreign and domestic elements, it becomes irrelevant to ask where the crime was committed or whether the last essential act occurred within the territory of the Republic. Our courts may find themselves not compelled to disclaim jurisdiction if satisfied that either a substantial element of the offence or the harmful effect thereof occurred within the Republic. It is conceded that where the foreign elements in an offence predominate the connection between the physical acts of the offender or their harmful effects, on the one hand, and the Republic, on the other, may indeed be so tenuous that our courts will hesitate to exercise criminal jurisdiction.

With regard to the law of Zimbabwe, I can see no justification for a rigid adherence to the principle that, with the exception of treason, only those common law crimes perpetrated within our borders are punishable. That principle is becoming decreasingly appropriate to the facts of international life. The facility of communication and of movement from country to country is no longer restricted or difficult. Both may be undertaken expeditiously and at short notice. Past is the era when almost invariably the preparation and completion of a crime and the presence of the criminal would coincide in one place, with that place being the one most harmed by its commission. The inevitable consequence of the development of society along sophisticated lines and the growth of technology have led crimes to become more and more complex and their capacity for harming victims even greater. They are no

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longer as simple in nature or as limited in their effect as they used to be. Thus a strict interpretation of the principle of erritoriality could create injustice where the constituent elements of the crime occur in more than one state or where the *locus commissi* is fortuitous so far as the harm flowing from the crime is concerned. Any reluctance to liberalise the principle and adopt Anglo-American thinking, could well result in the negation of the object of criminal law in protecting the public and punishing the wrongdoer. A more flexible and realistic approach based on the place of impact, or of intended impact, of the crime must be favoured.

Accordingly, I am satisfied that although all the constituent elements of the theft occurred in Belgium, in particular the obtaining of the money there, the State is nonetheless entitled to proceed upon the present indictment and adduce evidence at the trial, if such is available, to establish the fact that the harmful effect of the appellant's crime was felt by the Zimbabwe Government within this country.

Without intending in any way to influence the outcome of the necessary factual determination by the trial court, I would merely point out that the theft is alleged to have been committed within the precincts of the country's Embassy in Brussels by one of its nationals posted on official diplomatic duties; that the stolen money may have formed a portion of funds remitted by Government to meet the cost of maintaining, administering and operating its Embassy in Belgium; and that it may have been necessary to replace the considerable amount of money stolen by the further transfer of foreign currency from Zimbabwe, thereby depleting the country's much needed external reserves.

For these reasons I would dismiss the appeal.

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Beck JA: I agree.

McNally JA: I agree.

Kantor & Immerman, legal practitioners for appellant

Attorney-General, legal practitioners for respondent

"A" v COMMISSIONER OF TAXES 1985 (2) ZLR 223 (HC)

Editor's Note:(13)

Court **High Court, Harare**

Smith J

Income Tax Appeal

10, 11 June and 23 October 1985

Flynote

Income Tax Act [Chapter 181] - ss 8, 18, and 81 - "gross income" - credit sales - avoidance or postponement of liability to tax.

Headnote

The appellant was a wholly-owned subsidiary of another company and sold goods wholesale to that parent company. The parent company in turn sold the goods to members of the public through various retail outlets. As a result of changes in the accounting system of an external controlling group of companies which were to be followed in Zimbabwe, the appellant sold goods to the parent company at cost and subsequently received payment of a 25 per cent mark-up when the parent company had in turn sold the goods to the public.

The respondent assessed the appellant in respect of the year ended 31 March 1981 and included in the assessment an amount of $309 522. The appellant objected on the basis that that amount represented the mark-up allowance it was due but had not in fact received in the year of assessment and accordingly was not part of its taxable income for that year. The respondent disallowed the objection and the appellant appealed.

The respondent contended that the amount assessed formed part of the selling price of the goods sold by the appellant and was therefore taxable in terms of s 8(1) of the Income Tax Act [*Chapter 181*]; alternatively s 18 of the Act applied as the transaction amounted to a credit sale and the

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amount was therefore deemed to accrue to the appellant; alternatively s 81 of the Act applied as the scheme was one intended to avoid or postpone the liability of tax by the appellant.

Held that the effect of the system introduced was that when appellant sold goods to the parent company they were sold on the basis of cost plus a mark-up of 25 per cent. Therefore, the mark-up payment accrued to the appellant when the goods were delivered to the parent company.

Held, further, that in any event the appellant and the parent company had entered into an agreement the effect of which was that ownership of the goods passed on delivery and full payment therefor was to be made at a later date. Such an arrangement would constitute a credit sale for the purposes of s 18 of the Act and the appellant would be liable to tax on the amount assessed.

Held, further, that in deciding whether or not s 81 of the Act is applicable, it is irrelevant that the effect of any scheme or arrangement does not alter the situation that previously existed in so far as the liability to tax is concerned. Regard must be had to the scheme or arrangement irrespective of whether it has an effect which differs from, or is the same as, that of a scheme or arrangement which it replaces. The appeal was accordingly dismissed.

Cases cited:

Mooi v Secretary for Inland Revenue 1972 (1) SA 675 (AD)

Machinery Exchange (Pvt) Ltd v Lomagundi Agricultural Engineers (Pvt) Ltd 1967 RLR 138 (GD)

Secretary for Inland Revenue v Geustyn, Forsyth & Joubert 1971 (3) SA 567 (A)

Commissioner of Taxes v F 1976 (1) RLR 106 (AD)

Hicklin v Secretary for Inland Revenue 1980 (1) SA 481 (AD)

A P de Bourbon SC for the appellant

I A Donovan for the respondent

Judgment

Smith J: The appellant is a company incorporated under the law of Zimbabwe, which carries on business in this country as a wholesaler. It is a wholly-owned subsidiary of another company (hereinafter referred to as "the parent company"), which is also incorporated under the law of Zimbabwe and which carries on business in this country as a retailer. On 14 September 1982 the respondent issued an amended assessment in respect of the year ending 31 March 1981 in terms of which it included the sum of $309 522 in the taxable income of the appellant. The appellant objected, contending that

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the sum of $309 522 was not taxable income in its hands during the year of assessment ended 31 March 1981 in terms of s 8 of the Income Tax Act [*Chapter 181*] (hereinafter referred to as "the Act"). The respondent disallowed the objection and the appellant has appealed therefrom. It is asking that the assessment issued on 14 September 1982 be amended by the deletion of the sum of $309 522 from its taxable income.

The business of the appellant is to acquire goods for sale solely to the parent company and the parent company then sells such goods, retail, to members of the general public through some 26 outlets. The appellant and the parent company are linked to companies in South Africa (hereinafter called "the South African group") and conduct their inter-company relationship in a manner similar to that adopted by the South African group. Prior to 1965, the South African group operated in a manner whereby the wholesaling company sold goods to the retailing company with the price being paid on delivery. This meant that the wholesaling company, in a particular year of assessment, would show as part of its taxable income profits it had made on the sale of goods to the retailing company, even though the group as a whole had not made any actual profit in respect of such sales because the goods concerned were still owned by a member of the group and had not been sold to members of the public. This system was altered by the South African group in 1965 in order to avoid paying tax in a particular year of assessment on goods which had not been sold outside the group in that year. In effect, the payment of tax was postponed until the following or later year of assessment, when the goods were actually sold to members of the public. The system then adopted was that the wholesaling company in the South African group sold the goods on a consignment basis to the retailing company. This meant that the retailing company only paid for the goods when it sold them to members of the public, and a concomitant result was that the ownership of the goods did not pass to the retailing company until such time as it sold them. Thus, it would only assume ownership at the same time as it passed ownership to the purchaser.

This system of selling goods on a consignment basis operated between the appellant and the parent company in Zimbabwe.

Some time prior to 1979, the principal company in the South African group, which was the retailing company, went public-one-third of the shares thereof were sold to members of the public. This meant that the annual accounts and balance sheet of that retailing company were published and made public. The balance sheet of that retailing company did not reflect, as

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part of its assets at the end of the financial year, the value of the stock held in the many outlets of that retailing company since the goods were, at that stage, still owned by the wholesaling company and not by the retailing company. It was felt by the major shareholders of the South African group that this gave a distorted or unbalanced picture of the retailing company's true financial position. The major part of its assets consisted of the stock-in-trade and it was felt that the balance sheet should in fact show the value of the stock held in the various outlets. Accordingly, the South African group instituted a new scheme whereby the wholesaling

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company sold the goods to the retailing company on the basis of cost price plus a percentage mark-up, with ownership passing on delivery. At the end of each financial year, an adjustment was made between the two parties in respect of any goods remaining unsold to the effect that the retailing company would not be liable to pay during that financial year the 25 *per cent* mark-up. This adjustment was reflected as a debit against the wholesaling company and a credit against the retailing company in the trading accounts between the two companies.

During 1979 the appellant and the parent company were instructed to enter into a similar arrangement and the terms thereof were reduced to writing in a letter from the appellant to the parent company dated 23 November 1981. In that letter the appellant said that it was confirming in writing the new arrangement entered into with effect from 9 July 1979, ie the selling price would be cost price plus 25 *per cent,* at the end of each financial year the parent company would be granted a temporary allowance equal to the 25 per cent mark-up on unsold stocks at that date which would be withdrawn when the stocks were sold and the parent company would be given an allowance to compensate for, and which would be equivalent to, the loss of gross profit suffered by the parent company as a result of mark-downs. The price would be payable within thirty days after the month of purchase.

Until the early part of this year, the financial consultant to the South African group thought that this arrangement had in fact been implemented between the appellant and the parent company and this was alleged in the appellant's case which was lodged on 2 March 1983. At the hearing, however, the appellant amended its case to allege that the new system entered into with effect from 9 July 1979 was as follows. Goods were sold to the parent company at a selling price equal to the cost of the goods to the appellant plus 25 *per cent* of the cost of such goods as would in due course be resold by the parent company to members of the public. Ownership of the goods passed on delivery. Each month the appellant debited the parent company with the cost price of the goods delivered in that month and at the end of each month the

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additional amount payable to the appellant was calculated on the basis of sales made by the parent company during the month and debited to the parent company. Thus, the parent company made two payments to the appellant in respect of goods purchased by it during each month. At the end of the month in which the goods were delivered, it paid the basic cost price of the goods. Then, at the end of the month in which the goods were sold, it paid the 25 *per cent* mark-up, unless the goods were sold subject to a mark-down, in which case the appropriate deduction would be made (hereinafter referred to as the "mark-up payment").

The sum of $309 522 represents the anticipated mark-up payment due on goods supplied by the appellant to the parent company during the financial year ending 31 March 1981, which had not been resold by the parent company. The appellant contends that this anticipated mark-up payment would only accrue to it as and when the goods concerned were resold by the parent company and, therefore, since the goods concerned were not resold during the financial year in question, that sum should not be treated as part of its income during the financial year. The respondent, on the other hand, contends that the said sum accrued to the appellant during the financial year in question as part of the selling price of goods sold to the parent company for the

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purposes of s 8(1) of the Act. Alternatively, the respondent contends that in terms of s 18 of the Act the said sum is deemed to have accrued to the appellant during the financial year in question. Alternatively, the respondent avers that -

(a) the arrangements by which the appellant supplied goods to the parent company with effect from 9 July 1980 was a transaction, operation or scheme for the purposes of s 81 of the Act;

(b) the effect of this arrangement was to avoid, postpone or reduce the amount of the appellant's liability for income tax;

(c) this arrangement was entered into or carried out by means of or in a manner which would not normally be employed on entering into or carrying out an arrangement of that nature;

(d) this arrangement created rights or obligations which would not normally be created between persons dealing at arm's length under an arrangement of that nature; and

(e) the avoidance, postponement or reduction of the amount of the appellant's liability for income tax was one of the main purposes of this arrangement;

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and that, in the premises, in determining the appellant's liability for tax in the year of assessment in question it was appropriate to include the said sum in the appellant's taxable income.

Two witnesses gave evidence on behalf of the appellant. The first was the financial consultant of the South African group, and the second was the general manager and a director of the parent company and a director of the appellant. They both gave their evidence well and I accept their *bona fides.* I accept their evidence without hesitation.

The term "gross income" is defined in s 8(1) of the Act as meaning the total amount received by or accrued to or in favour of a person or deemed to have been received by or accrued to or in favour of a person in any year of assessment from a source within or deemed to be within Zimbabwe, and the definition then specifically excludes or includes specified classes of amounts received. Mr *de Bourbon,* for the appellant, has submitted that the evidence has established that the system adopted by the appellant and the parent company with effect from July 1979 for the sale of goods was one whereby the cost price was payable on delivery of the goods but the mark-up payment only became due and payable when and if the goods were subsequently resold by the parent company. Thus, at the time of the sale of the goods, ie when they were delivered, the appellant had merely an expectation or contingent claim to the mark-up payment. This claim was contingent on two factors - firstly, that the parent company sold the goods and, secondly, that the parent company sold them at the usual price, ie with a 25 *per cent* mark-up because if the goods were sold at a lower price then the appellant received a proportionately lower mark-up price. He therefore submitted that, as was held in *Mooi v Secretary for Inland Revenue* 1972 (1) SA 675 (AD), the mark-up payment did not accrue to the

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appellant when it sold the goods to the parent company but only when the parent company sold the goods.

Mr *Donovan,* for the respondent, conceded that if the facts showed that the right to the mark-up payment was contingent or conditional upon the resale of the goods by the parent company, then it could not be held that the amount of the mark-up payment had accrued at the time of the sale of the goods concerned. However, he urged that, accepting the evidence given by the witnesses called by the appellant, this court had to determine what was the nature of the system or arrangement introduced between the appellant and the parent company in July 1979 to replace the then existing arrangement of sales being on a consignment basis. From the letter dated 23 November 1981, it was clear that the two parties intended to introduce the system that had been

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introduced within the South African group and which they had been instructed to introduce. It was equally clear from the evidence led that the books of account were not kept in a manner consistent with that new system, and that this failure to keep the books in the required manner arose from a misunderstanding on the part of certain directors or members of staff in Zimbabwe or from a failure on their part to appreciate fully what was required under the new system.

In July 1982 the finance manager, when writing to the respondent, referred to the $309 522, which is the subject matter of this appeal, as being "the temporary allowance on unsold stocks" between the appellant and the parent company, which, of course, is the concept inherent in the system which the parties were instructed and intended to introduce. It was only about a month later that the witness, who was a director of the appellant and of the parent company, realized that the system reflected in the books of account was not in accordance with the system that the parties had been instructed and, in fact, intended to introduce. His reaction was to advise the directors of the South African group that the system in operation within their group had not been adopted, but he did not do anything to change the book-keeping system in operation because he thought that such a change would complicate procedures unnecessarily since, in his view, the new system constituted merely a change in terminology. He did not think tat it would affect the situation regarding the payment of taxes. The financial consultant to the South African group was not advised of this discovery until the early part of this year.

Mr *Donovan* submitted that, in the light of these facts, the appellant and the parent company not only intended to introduce the system that had been introduced with the South African group and which they had been instructed to introduce, but in fact and in law they did introduce such a system, but failed to change their books of account to accord with the new system and failed to pass the temporary allowance at the end of the year of assessment. Mr *de Bourbon* argued that this court could not make such a finding. Paragraph 9 of the Twelfth Schedule provides that if the Commissioner does not admit the statement of facts in the appellant's case he shall lodge a statement setting out which allegations he admits as correct and which he denies. In the present appeal, the respondent's statement did not deny the appellant's allegations as to the system which had been introduced in July 1979, it merely put the appellant to the proof of the averments made. Therefore, whilst it might be held that the appellant had not proved the

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particular set of facts alleged, it could not be argued that the evidence established a different set of facts. That could only be done if the appellant's averments were denied by the

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respondent. I cannot accept this submission. Where an appellant makes certain allegations and the respondent has no grounds for holding the averment to be false or incorrect, it is only reasonable that he should put the appellant to the proof thereof rather than deny the allegations. If evidence is led that establishes a factual situation which differs from that alleged by the appellant, this court must be able to find and accept that that situation exists. It would be anomalous for this court to be precluded from so finding merely because the respondent did not deny the averment. There can be no prejudice to the appellant because once he is put to the proof of particular averments he is aware that the respondent has not accepted them.

In my opinion the evidence led has established that in July 1979 the respondent introduced the system which it had been instructed by the South African group to introduce but it failed to change its accounting methods to reflect the new system and it failed to pass the temporary allowance at the end of the relevant year of assessment. Where a company performs an act its "intention" must be gathered from the actions of those responsible for managing its affairs. In this case, they were instructed by the South African group, which had effective control, to introduce a particular system and thereafter, in a letter from the appellant to the parent company, the former advised the latter of the details of the system. Subsequently, in correspondence with the respondent and in submitting its case on appeal, the appellant maintained that that particular system had been introduced. I do not think that the appellant can now argue that merely because it had not changed its accounting system it had in effect introduced a system different from that contemplated by those responsible for managing its affairs. The effect of the system introduced by the appellant in July 1979 was that when it sold goods to the parent company they were sold on the basis of cost plus a mark-up of 25 per cent. Therefore, the mark-up payment accrued to the appellant when the goods were delivered. Accordingly, the mark-up payment of $309 522 accrued to the appellant during the year of assessment ending 31 March 1981. The appellant did not grant the parent company a temporary allowance of such amount immediately before 31 March 1981.

If the appellant had established its allegations that the system as reflected in the books of account had been introduced, in my opinion s 18 of the Act would have been applicable and the mark-up payment would be deemed to have accrued to the appellant. Section 18 of the Act provides as follows:

> 18. If any taxpayer has entered into any agreement with any other person in respect of any movable property the effect of which is that -

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> (a) the ownership shall pass to that other person on delivery of the property; and

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(b) the amount payable to the taxpayer under the agreement shall be paid in instalments;

the whole of that amount shall, for the purposes of this Act, be deemed to have accrued to the taxpayer on the date on which the agreement was entered into: . . .

There can be no doubt that in this case the appellant and the parent company had entered into an agreement in respect of movable property, the effect of which was that ownership of the property passed to the parent company on delivery. The only other requirement is that the amount payable to the appellant must be paid in instalments. In *Machinery Exchange (Pvt) Ltd v Lomagundi Agricultural Engineers (Pvt) Ltd* 1967 RLR 138 (GD) at 142A-D, GOLDIN J said:

> In *R v Kruger* 1950 (1) SA 591 (O), the meaning of the word 'instalment', in a different context, was considered, and HORWITZ J says, at p 597:
>
> > An instalment is merely a portion of a debt, a sum of money divided into portions that are made payable at different times (Webster's Dictionary).
>
> In Earl Jowitt's *Dictionary of English Law,* an instalment is defined as a portion of a debt, as follows:
>
> > When a debt is divided into two or more parts, payable at different times, each part is called an instalment, and the debt is said to be payable by instalments. (See p 981)
>
> *The Shorter Oxford Dictionary* has this to say:
>
> > 1. The arrangement of the payment of a sum of money by fixed portions at fixed times . . . 2. The payment, or the time appointed for payment, of different portions of a sum of money, which, by agreement . . . is to be paid in parts, at certain stated times . . . 3. Each of several parts into which a sum payable is divided, in order to be paid at different fixed times; a part of a sum due paid in advance of the remainder . . .

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Here the amount owing by the parent company for the goods delivered was divided into two parts which were to be paid at different times. I accept that the second part might not become payable if the goods concerned were not sold or might be reduced if the goods were marked down before sale. However, as regards the vast majority of the goods sold by the appellant, it was obviously contemplated that they would be sold within two or three months with the correct mark-up and therefore the mark-up payment would become due and payable on their resale. It seems to me that the two elements of the price payable were clearly fixed as was the time each payment became due. I do not think it could be held that, because a small proportion of the goods sold by the appellant might not be resold or might be resold with a lesser mark-up, the mark-up payment in respect of all the goods was conditional upon the resale of the goods. The appellant must have contemplated, and operated on the basis, that it would receive the mark-up payment in respect of the goods it sold but that there would be a small reduction in respect of goods which were not eventually resold or which were marked down. Therefore, if the appellant had established that the system which it alleged had been introduced had in fact been introduced, whereby the goods it sold were sold on the basis that it was paid the cost price on delivery and the mark-up payment when the goods were resold by the parent company, the sales of such goods would, in my opinion, have been credit sales to which the provisions of s 18 of the Act apply. Therefore the matter would have had to be remitted to the respondent for him

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to consider any decision in terms of s 15(2)(g) or s 18 (proviso (i)) of the Act.

The final contention of the respondent was that in determining the liability of the appellant for tax in the relevant year of assessment he had regard to the provisions of s 81 of the Act. It is not necessary to quote s 81 in full because the various requisites which must co-exist in order to justify the Commissioner's invoking his powers under that section were enumerated in *Secretary for Inland Revenue v Geustyn, Forsyth & Joubert* 1971 (3) SA 567 (A) at 571E-H as follows:

(a) a transaction, operation or scheme entered into or carried out;

(b) which has the effect of avoiding or postponing liability for tax on income or reducing the amount thereof; and which

(c) in the opinion of the Secretary, having regard to the circumstances under which the transaction, operation or scheme was entered into or carried out, -

(i) was entered into or carried out by means or in a manner which would not normally be employed in the entering into

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or carrying out of a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; or

(ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a transaction, operation or scheme of the nature of the transaction, operation or scheme in question; and that

(d) the avoidance, postponement or reduction of the amount of such liability was, in the opinion of the Secretary, the sole or one of the main purposes of the transaction, operation or scheme.

It was accepted by counsel that the first requisite was satisfied in that a transaction or scheme had been entered into with effect from July 1979. Mr *de Bourbon* argued that none of the other three requisites was satisfied. It was frankly admitted that when the South African group introduced the system of sales on a consignment basis in 1965, which system operated in Zimbabwe up until July 1979, the sole purpose, and the effect, was to postpone or to reduce the liability of the wholesaling company to tax. When the new system was introduced into the South African group and between the appellant and the parent company, it did not have the effect of avoiding or postponing liability for tax because the position that previously pertained with regard to liability for tax was not changed. He submitted that the intention behind s 81 of the Act was to prevent persons from changing their affairs in order to avoid or postpone liability for tax. Therefore, if the scheme introduced did not alter a previously existing position in relation to liability for tax, s 81 would not apply. With regard to the third requirement, he submitted that the purpose of the new arrangement was to provide for the transfer of the ownership of the goods when they were sold, which was the normal position that pertained to sales such as those under consideration, and therefore the transaction was not abnormal within the meaning

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of s 81(a) or (b) of the Act. Finally, he submitted that the sole and avowed purpose of the new arrangement was to enable the parent company to reflect in its balance sheet the value of its stock holdings and not to avoid or postpone its liability for tax.

Mr *Donovan* argued that in looking at the effect of the new arrangement, the court should not compare the position under the new arrangement with that which previously pertained and then hold that because there was no change in the tax position the effect of the new arrangement was not to avoid or postpone liability for tax. He submitted that the correct approach would be to look at the effect of the new arrangement in terms of which the profit element did not arise until the goods were resold, and, if it was found that but

for the new arrangement the full price would become payable on the sale by the appellant, then the new arrangement did have the effect of avoiding or postponing liability for tax. It was not relevant that under the consignment basis that prevailed previously, liability for tax did not arise until the goods were subsequently resold by the parent company. As regards the third requirement, he argued that the rights and obligations created were not such as would normally be created between persons dealing at arm's length in a number of respects. First, there were no trade or commercial considerations which would justify the postponing of the mark-up payment until such time as the parent company resold the goods, and it was not the type of arrangement that parties dealing at arm's length would agree to. Secondly, there was no provision for when the goods would be deemed to have been sold. Yet, when the parent company and the appellant entered into an agreement in February 1984 with a third party to provide credit facilities to the parent company in relation to the goods it purchased from the appellant, the agreement provided that the third party would be entitled to the mark-up payment when the goods had been sold by the parent company, but such goods would be deemed to have been sold within three months after they were purchased from the appellant. Thirdly, the sole reason for the delay in the appellant's receiving the mark-up payment was because of the liability for tax that the group would as a while incur before the goods had been resold to members of the public. Fourthly, the arrangement in relation to the marking down of goods by the parent company was abnormal in that the retailing company had complete discretion as to whether or not it was necessary or desirable to reduce the price of goods in order to sell them to members of the public, and yet the wholesaling company would bear the cost or effect of such mark-downs.

In construing the provisions of s 81 of the Act, the approach to be adopted by our courts was set out by MacDONALD JP (as he then was) in *Commissioner of Taxes v F* 1976 (1) RLR 106 (AD) at 115C-H as follows:

> The approach therefore to be adopted by the courts in construing the remedial provisions of s 81 is - so far as the language permits and without stretching it - to ensure that the Legislature's intention to suppress the mischief succeeds and to this end suppress 'subtle inventions and evasions for the continuance of the mischief' and 'add force and life to the cure and remedy according to the true intent of the makers if the Act *pro bono publico'.* Clearly the courts must not, by their interpretation of the provisions of the section, deprive them of their efficacy.

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> The first point to notice about the section is that it relates to 'any transaction, operation or scheme'. Each of these words is of wide and general import and there are few activities of a taxpayer which will not be appropriately described by one or other of them. The next point is that the Commissioner is obliged to exercise his powers under the section if the transaction, operation or scheme has the stipulated 'effect', if he is of the 'opinion' that the requisite abnormality is present and if he is further of the 'opinion' that the taxpayer's purpose was as stated in the section. Here again there is a clear indication that it is the intention of the Legislature to cast the net in such a way as to block every possible avenue of escape. This intention is also manifest by the further provision that when the stipulated effect is present and the requisite opinions are held, the onus rests on the taxpayer (under the Eleventh Schedule to the Act) to establish on a balance of probabilities that he did not have the purpose set out in the section. Moreover, the section strikes not only at avoidance but also at mere postponement and reduction. This is a further indication of the Legislature's intention to make the section all-embracing.

If the appellant had established that the system it introduced was the arrangement whereby it sold the goods to the parent company at cost and then became entitled to the mark-up payment only as and when the goods were resold by the parent company, it seems to me that the effect thereof would have been to avoid or postpone its liability for tax. Admittedly the consignment-basis arrangement that was in existence before the new arrangement was introduced had the same effect of avoiding or postponing liability for tax - but, so what? When considering the effect of any scheme or arrangement for the purposes of s 81 of the Act, regard must be had to that scheme or arrangement, irrespective of whether it has an effect which differs from, or is the same as, that of a scheme or arrangement which it replaces. Furthermore, it seems to me that the Commissioner could reasonably be of the opinion that the requisite abnormality was present. In *Hicklin v Secretary for Inland Revenue* 1980 (1) SA 481 (AD) at 494H-495N, TROLLIP JA said:

> I turn now to consider this latter, crucial part of the problem - whether requirement (c) in s 103(1)(i) or (ii) relating to normality was fulfilled. A few preliminary observations about paras (i) and (ii) of the sub-section. When the 'transaction, operation or scheme' is an agreement, as in the present case, it is important, I think, to determine first whether it was one concluded 'at arms' length'. That is the criterion postulated in para (ii). For 'dealing at arms' length' is a useful and often easily determinable premise from which to start the inquiry. It connotes that

SMITH J

> each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself. . . Hence, in an at arms' length agreement the rights and obligations it creates are more likely to be regarded as normal than abnormal in the sense envisaged by para (ii). And the means or manner employed in entering into it or carrying it out are also more likely to be normal than abnormal in the sense envisaged by para (i).

In the present case, of course, the parties were not dealing "at arm's length". The abnormal features were as pointed out by Mr *Donovan* - the parent company would have no liability to pay the mark-up payment unless it sold the goods concerned; it could unilaterally decide to mark down the price and the appellant had to accept a lower return or, indeed, no mark-up payment at all; there was no time limit within which the mark-up payment had to be made since it depended upon when the goods might be sold. Finally, I think that the Commissioner could reasonably be of the opinion that the appellant's purpose was to avoid or postpone liability for

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tax. The original purpose when the consignment basis was introduced was to avoid or postpone liability for tax. This was admitted by the appellant. The main purpose in introducing a new system was to enable the value of stocks held to be shown in the balance sheet of the parent company. However, the appellant was equally concerned to ensure that any new system that was introduced did not alter the position in regard to liability for tax. It seems to me therefore that this was one of the main purposes in introducing the new arrangement - to ensure that the liability for tax was avoided or postponed to the same extent as under the consignment basis of selling goods.

For the reasons set out above the appeal is dismissed and Assessment No. 263 560/4C/3 034/81 is confirmed.

Coghlan & Welsh, Bulawayo, legal practitioners for the appellant

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

CHIBAYA v CHIBAYA 1985 (2) ZLR 237 (HC)

Court **High Court, Harare**

Sansole J

Civil Application

26 September and 23 October 1985

Flynote

Husband and wife - maintenance pendente lite - no order possible by High Court when an order as to maintenance exists - status of order of maintenance by community court.

Headnote

The High Court will not, save in exceptional circumstances, entertain applications for maintenance *pendente lite* where there is already in existence an order of the magistrates court on the matter. The proper course is for an application to be made in that court for a variation or discharge of that order before an application is made to the High Court. A community court established in terms of the Customary Law and Primary Courts Act, 1981 (No. 6 of 1981), enjoys concurrent jurisdiction with the magistrates court on the issue of maintenance.

Cases cited:

Kirk v Kirk 1969 (2) RLR 328 (GD)

R v de Jager 1953 (2) SA 197 (T)

Joseph v Joseph 1958 R&N 500 (SR); 1958 (4) SA 268 (SR)

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Hoffman v Hoffman 1964 (1) SA 746 (CP)

D W Aitken for the applicant

M J Gillespie for the respondent

Judgment

Sansole J: This is an application on notice of motion by the applicant against the respondent, in which she is claiming against him -

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SANSOLE J

(a) maintenance *pendente lite* for herself and the four minor children of the marriage, and

(b) a contribution towards her costs in the sum of $500.

The papers filed of record reveal that the applicant and the respondent were married to each other on 27 September 1973 and that this marriage still subsists. There are four minor children in respect of whom there is an existing maintenance order which was granted to the applicant by the community court in Harare on 15 July 1980. In terms of this maintenance order, the respondent was ordered to pay a globular sum of $80 per month for and as maintenance of the minor children. The applicant alleges in her supporting affidavit that she is employed as a temporary employee in the Linen Department of an hotel in Harare and that she is paid "an extremely modest income by any contemporary standards", namely $132 net per month. Accordingly, she was finding it extremely difficult to make ends meet, particularly in view of the fact that she is obliged to support the four minor children. She further alleged that the maintenance order against the respondent was granted a long time ago, in 1980. Thus, this maintenance was now utterly inadequate for the growing needs of her family and herself. Therefore, and for that reason, she now required it to be varied.

The respondent, by his answering affidavit, denied that he was liable to the applicant at all and also declined to make a contribution towards her costs.

Mr *Aitken,* who appeared for the applicant, argued vigorously that the applicant had made out a strong case against the respondent for both claims. However, Mr *Gillespie,* who appeared for the respondent, raised an objection *in limine*, regarding maintenance *pendente lite,* namely that this court had no jurisdiction to entertain this claim as there was already in existence an order of the community court on the matter. He cited *Kirk v Kirk* 1969 (2) RLR 328 (GD) in support of his submission. Indeed, this submission is well made and it is sound in law. There is ample authority to the effect that this court should not, save in very exceptional circumstances, entertain applications for maintenance *pendente lite* where there is already in existence an order of the magistrates court on the matter. The proper course is for an application to be made in that court for a variation or discharge of the order before an approach may be made to this court. As ROPER J put it in *R v de Jager* 1953 (2) SA 197 (T) at 199E:

> The ordinary rule of law is that an order made by a court can (except by way of appeal or review in a higher court)

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not be varied except by the

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court itself; and in maintenance cases where there is a change of circumstances the court which made the original order must be approached for a variation.

This principle has been followed and applied in many case such as *Joesph v Joseph* 1958 R&N 500 (SR); 1958 (4) SA 268 (SR) and *Hoffman v Hoffman* 1964 (1) SA 746 (C).

The question is whether an order of maintenance by a community court is at par with that made by a magistrates court. Section 12(3) of the Customary Law and Primary Courts Act, 1981 (No. 6 of 1981), as amended by Act 21 of 1982, provides as follows:

. . . community court may make an order for maintenance in accordance with the provisions of the Maintenance Act [*Chapter 35*].

Clearly, this makes it quite plain that a community court enjoys concurrent jurisdiction with the magistrates court on the issue of maintenance. Accordingly, and for this reason the applicant's claim for maintenance *pendente lite* is refused and it is hereby dismissed for want of jurisdiction.

[The facts relating to the application for a contribution to costs have been omitted from this report.]

D W Aitken & Co, legal practitioners for the applicant

Gill, Godlonton & Gerrans, legal practitioners for the respondent

MUZONDO v MUZONDO 1985 (2) ZLR 240 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Gubbay and McNally JJA

Civil Appeal

3 and 28 October 1985

Flynote

Husband and wife - maintenance - arrears - whether wife has a claim for arrear maintenance in respect of herself.

Child - maintenance - arrears - necessary proof - wife receiving assistance from third party - whether may claim arrears from husband.

Evidence - judicial notice - cost of maintaining child.

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Legislation - Matrimonial Causes Act [Chapter 39] s 10(1) - desertion - meaning.

Headnote

The appellant husband was ordered by the High Court to pay to the respondent wife arrears of maintenance in respect of the minor children of the marriage. No evidence had been led to establish the amount of maintenance provided by the wife during the relevant period. Moreover the facts were that the wife's father had gratuitously provided for and maintained the children during the period in question.

Held the court, in a proper case, is entitled to use its general knowledge as to the approximate cost of maintaining a child in Zimbabwe.

Held, further, that a wife can claim arrear maintenance for her children in terms of s 10(1) of the Matrimonial Causes Act [*Chapter 39*] if her husband has failed, even temporarily, to provide the necessary support which the law enjoins. It is not necessary that he should have maliciously deserted her.

Held, further, that the support given by the wife's father was not maintenance provided by the wife and could not be reclaimed from the husband.

Held, further, *obiter*, that the principle "*in praeteritum non vivitur*" as

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applied to wives was old-fashioned and unenlightened and might need reconsideration.

Cases cited:

Woodhead v Woodhead 1955 SR 70

Africa v Africa 1985 (1) SA 792 (SWA)

Esso Standard SA (Pty) Ltd v Katz 1981 (1) SA 964 (A)

Mkwanazi v van der Merwe & Anor 1970 (1) SA 609 (A)

M J Gillespie for the appellant

M T O'Meara for the respondent

Judgment

McNally JA: Mrs Muzondo sued her husband in the High Court for a decree of divorce on grounds of cruelty, and ancillary relief. She was broadly successful. The appeal relates only to two aspects of the award of ancillary relief, namely the award of arrear maintenance for the children in the sum of $4 200 and the award of $746,05 in respect of air fares which Mrs Muzondo paid for herself and her baby from Canada to Zimbabwe, from money borrowed from a friend. Dr Muzondo claimed and received that sum from the University of Zimbabwe as

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reimbursement of his wife's travelling expenses, but declined to pass the sum on to her.

It is unnecessary to deal at any length with the second matter. Mr *Gillespie,* who appeared for the appellant, did not abandon the appeal but did not address any argument to us in support of it. We do not think there is an argument. The learned trial judge's decision to award the sum cannot be faulted.

The question of the arrear maintenance is a more difficult one. The learned trial judge found that, save for an amount of $100, the appellant had failed entirely to maintain his two daughters during the period in respect of which the claim was made. "Consequently", it was said "the defendant must be made to pay up the arrears of maintenance". Because it was held that the responsibility should fall equally on both parties, and that maintenance would amount to $100 per month per child, an award was made on the basis of $50 per month per child, less the $100 already mentioned (which in fact related to a different period).

The facts are these:

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1. The parties were married in Kingston, Ontario, on 22 November 1975.

2. Their daughter Tukiso was born on 3 December 1977.

3. Dr and Mrs Muzondo returned to Zimbabwe in or about October 1978.

4. Mrs Muzondo returned to Canada as planned, in November 1978, leaving Tukiso here with her maternal grandfather at Wedza.

5. Their daughter Tarisai was born in Canada on 14 March 1979.

6. Dr Muzondo obtained custody of Tukiso from her grandfather in May 1979.

7. Mrs Muzondo and Tarisai arrived in Harare on 9 June 1979.

8. The magistrates court ordered Dr Muzondo to return Tukiso to Mrs Muzondo on 31 August 1979.

9. From September 1979 to December 1982 (when a maintenance court ordered Dr Muzondo to pay $100 a month maintenance for each child) and ever since, Mrs Muzondo has resided in Harare with the two children, apart from the four months from May - August 1982 when they were with Dr Muzondo.

10. The maternal grandfather, Mr Chidawanyika, has assisted Mrs Muzondo unhesitatingly when she needed money for herself and her children.

11. Mr Chidawanyika is content that that money should not be repaid by Mrs Muzondo. It was a gift not a loan to her.

12. Mr Chidawanyika disapproved of his daughter's marrying without payment of lobola

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(roora) and is not on good terms with the appellant.

Now the law in relation to arrear maintenance is different depending on whether the maintenance is for the wife (or ex-wife) herself, or for the children.

As far as the wife is concerned, the law is said to be contained in a maxim from Voet 2.15.15. which reads "*Non enim quisquam in praeteritum vivit aut alendus est*". (Gane's translation is "a person does not live nor have to be maintained in arrear".) The maxim, more commonly shortened to "*in praeteritum non vivitur*", is described in Boberg's *Law of Persons and the Family* at p 252 as "a principle". If it is a principle, it seems to me to be a

remarkably old-fashioned and unenlightened one. Indeed, according to Gane the expression was taken by Voet from the Code of Justinian, and relates originally to arrear maintenance due under a will. Spiro makes the interesting point, at p 364 of 3 Ed of his *Law of Parent and Child*, that "the import of this maxim has still to be ascertained".

BEADLE J, as he then was, put it this way in *Woodhead v Woodhead* 1955 SR 70; 1955 (3) SA 138 (SR) at 139D:

> . . . in the absence of any agreement or any court order, if she has succeeded in maintaining herself without incurring debts she has no claim to arrear maintenance from her husband.

Other judges have adopted this approach without comment over the years, most recently STRYDOM J in *Africa v Africa* 1985 (1) SA 792 (SWA).

Fortunately perhaps it is not necessary on this occasion to look afresh at the rights of wives in relation to arrear maintenance for themselves. The reason is that we are here concerned with arrear maintenance for children. A clear distinction is drawn between the two cases, both at common law and by statute.

The common law position is set out in *Woodhead's* case, *supra*, at 72-3 (140C-141A of the South African report) in these words:

> It seems to me, however, that a claim made by the wife against the husband for money which has been expended on the children is distinguishable. It is true that the duty of the parents to support of the children is reciprocal, but here the duty is not owed each to each, but to a third party and the only factor which determines the distribution of this duty between the parents is the circumstances of the parents themselves. There is no question of the claim against one being set off against the claim of the one against the other, as there might be where the wife is claiming arrears in respect of her own maintenance. Public interest would also appear here to demand that the wife be entitled to recover, because if she could not the interests of the children might suffer by the wife limiting her expenditure on the children. It seems to me that where the husband is more affluent than the wife, and thus has a clear duty to bear a portion of the cost of the maintenance of his children, his wife should be entitled to bind him to pay up to the amount of this portion to the same extent as she can bind him to pay for any other necessaries

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McNALLY JA

> bought for the family. It is no argument to say that the children had already been supported and therefore the claim together with the support is past. True, they have been supported, but only by the wife discharging the husband's obligations on his behalf, and to hold that, because of this, the husband should be able to evade his responsibilities would be as unconscionable as it would be illogical. The maxim *in praeteritum non vivitur* can have no application to this case. I am of the opinion, therefore, that *Oberholzer's* case *supra,* does not apply to this case, and that where, as in this case, a wife is deserted by her husband, left almost without means, by dint of her thrift and industry manages to support the children, and where her husband is well able to afford to bear his share of the duty to maintain the children, and the wife makes a timeous claim, she should be able to recover from her husband the money she has expended on maintaining the children up to the amount which the court considers could reasonably represent the husband's share of the reciprocal duty of maintaining them.

See also Boberg *op cit* at pp 257 (note 40) and 258. The Zimbabwean statute law is in s 10(1) of the Matrimonial Causes Act [*Chapter 39*], and it was introduced, by way of amendment, by Act 18 of 1959. It reads as follows:

> Where a wife who has been deserted by her husband has provided for the maintenance of any minor children of the marriage, she shall be entitled to recover in arrear from the husband such maintenance or such portion of such maintenance as the court may consider just or equitable in the circumstances.

I do not read the words "who has been deserted by her husband" as limiting in any way the category of wives who may benefit in terms of this section. "Desertion" here means, in my view, a failure, even temporarily, to provide that necessary financial support which the law enjoins. It is not to be equated with malicious desertion.

There is thus a valid legal basis upon which the wife's claim in this case fell to be considered. But Mr *Gillespie* contended on two grounds that her claim should have been dismissed.

In the first place he contended that she failed to adduce any factual evidence. She did not tell the court how much she had spent on the children between December 1978 and December 1982. This submission is correct. The record contains, as Exhibit 6, a statement of income and expenses, made by Mrs

Muzondo to the Country Court of Frontenac in Canada on 7 September 1978. This is three months before the period with which we are concerned, and it was followed by a reconciliation and by the parties' departure for Zimbabwe. It is no accurate guide to the state of Mrs Muzondo's finances after she returned to Canada on her own in November/December 1978.

The only other evidence of her expenses is contained in Exhibit 2. It is clear however, from her own evidence-in-chief that this schedule is intended to describe the position in 1984. It was placed before the court in support of the claim that the maintenance of $100 each month for each of the children ordered by a magistrate in December 1982, should be increased to $150. It is far removed in time therefore from the period prior to December 1982 with which we are concerned.

I do not think that the High Court, sitting as it was in this case as a family court, should be required to demand the same standard of accurate accounting as it might do in a commercial

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case. The court, in a proper case, is entitled, I would think, to use its general knowledge based on the many similar applications made to it each week. Obviously, if evidence is lacking, it will have to err on the side of caution, and it may be that in some cases absolution from the instance may be fairer to an applicant than a low award.

In saying this I do not intend to go in principle beyond what has been said generally in relation to claims when the evidence as to quantum is scanty, but where it is clear that some quantum exists. I am thinking of cases such as *Esso Standard SA (Pty) Ltd v Katz* 1981 (1) SA 964 (AD) at 969H *et seq* and *Mkwanazi v van Der Merwe & Anor* 1970 (1) SA 609 (AD) at 631B-732. I am saying only that a court may perhaps be more tolerant of a failure to adduce evidence where it has a working knowledge of the level at which maintenance orders are regularly made.

I note that in *Woodhead's* case, *supra*, BEADLE J managed to come to a conclusion on scanty evidence, and that in *Africa's* case, *supra,* the application was dismissed.

I must say that in this present case the factual evidence is scanty in the extreme. For the purpose of considering Mr *Gillespie's* first submission (the lack of factual basis for making any calculation) I propose to consider the period for which arrear maintenance is claimed in two parts.

The first period runs from the birth of Tarisai in Canada on 14 March 1979

McNALLY JA

to the return of Mrs Muzondo and Tarisai on 9 June 1979. During that period Mrs Muzondo undoubtedly cared for Tarisai. But her income and expenditure situation during that period was far from routine. In the first place it seems that she was drawing substantial social security benefits in Canada as a working mother on maternity leave. We have no details of this. Secondly she was both disposing of assets and settling up debts preparatory to emigration. We have no picture at all of the net financial situation. Thirdly, whereas the court may be in a position to know, at least in broad outline, what it costs to maintain a child in Zimbabwe, it cannot pretend to take judicial notice of the costs or standard of living in Canada in the spring and early summer of 1979.

For all these reasons it seems to me quite impossible to determine what, if anything, should be paid by Dr Muzondo to Mrs Muzondo by way of arrear maintenance for Tarisai for this period. I see no alternative to a finding of absolution from the instance in this regard. The court was simply not placed in possession of any of the relevant facts.

As far as arrear maintenance for the children in Zimbabwe is concerned - ie for Tukiso from December 1978 and for Tarisai from June 1979 - I would think that it might be possible, by stretching the indulgence of the court, to justify the award of some figure on the basis of an estimate of what Mrs Muzondo must have provided. In other words I think it might be possible to find a way around Mr *Gillespie's* first submission. However at this point one has to consider his second submission which is that Mrs Muzondo is not shown to have provided any maintenance at all for the children during this period.

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I turn then to Mr *Gillespie's* second argument. He points out that it is common cause that Mrs Muzondo's father maintained her and her children while they were in Zimbabwe and until Dr Muzondo began to pay maintenance in terms of the magistrate's order in December 1982. I except, of course, the period when Tukiso was actually staying with her father from May to the beginning of September 1979, and the period May - August 1982, when both children were with Dr Muzondo.

During that time Mr Chidawanyika not only bought a house to accommodate Mrs Muzondo and the children, he paid whatever was needed for groceries, school uniforms etc. He even paid for a holiday in France for herself and the children. And earlier, when Mrs Muzondo went back to Canada in November/December 1978, he looked after Tukiso at his home in Wedza until May

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McNALLY JA

1979 when she was taken away by Dr Muzondo.

Not only did Mr Chidawanyika assume these responsibilities gladly and generously, he also insists that he wants no repayment from his daughter. He gave the money and the support. "It is not our custom" he said, to demand payment of such money. In fact it seems that in his view, and because lobola (roora) was not paid, he does not even regard the children as being Dr Muzondo's. In that sense he may think that Dr Muzondo has no right to maintain them.

It is not necessary to decide in this case whether or not Mr Chidawanyika can claim some or all of his expenditure from Dr Muzondo on the basis of either unjust enrichment of *negotiorum gestio*. What is clear is that it was he (Mr Chidawanyika) and not Mrs Muzondo who supported the children then. Insofar as he gave money to Mrs Muzondo he gave it for that purpose and as a donation to her. She did not, in the words of the statute, "provide for the maintenance of the minor children" and so she cannot "recover such maintenance". See generally Boberg, *op cit* p 253 note 25. Accordingly I consider that this part of her claim for arrear maintenance for the children should not have succeeded.

Although the appeal has been substantially successful, the fact remains that the appellant has been seriously remiss in his duty to assist in the support of his children. For this reason the court will make no order as to the costs of the appeal.

The appeal is allowed to the extent that the judgment of the court *a quo* is amended by the deletion of the order "that the defendant pay the plaintiff arrears of maintenance in the sum of $4 200,00". In its place there will be an order "that in respect of the plaintiff's claim for arrear maintenance for the children of the marriage the defendant is absolved from the instance." There will be no order as to the costs of appeal.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Winterton, Holmes & Hill, legal practitioners for appellant

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D W Aitken & Co, legal practitioners for respondent

S v MATEKETA 1985 (2) ZLR 248 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and Gubbay JJA

Criminal Appeal

11 October and 1 November 1985

Flynote

Criminal Procedure - sentence - murder - extenuating circumstances - failure by High Court to give reasons - approach to determination of issue - mitigating facts mentioned by accused - weight to be given to such where accused provides evidence on which he is convicted.

Headnote

Where the trial court fails to give adequate reasons for its finding on extenuation, the appellate court is at large. Where the court relies in convicting the accused on facts deposed by himself it cannot reject as improbable mitigating features alleged by him where these may reasonably be true.

Cases cited:

S v Masuku & Ors 1985 (3) SA 908 (AD)

S v Chaluwa 1985 (2) ZLR 121 (SC)

R M Fitches for the appellant

F S Chambakare for the respondent

Judgment

Dumbutshena CJ: The appellant was convicted by the High Court sitting at the Masvingo Circuit of murder with actual intent. The trial court did not find extenuating circumstances and sentenced the appellant to death. She now appeals against that sentence.

Briefly the facts of this case are as follows. The appellant and the deceased were married to each other. They had been so married for twenty-one years.

DUMBUTSHENA CJ

They had six children of the marriage. They were teachers at Mutsime Primary School, a

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school whose head teacher was the deceased. Besides teaching, the deceased had two stores. He managed one store and the appellant ran the business of the other store.

Although the State called a number of witnesses the only evidence that implicated the appellant was her own evidence. It is significant to note right from the beginning of this judgment that her evidence was not contradicted by the State because there was no State evidence adduced which was material to the proof of the offence with which she was charged.

What emerges from the appellant's evidence is that the deceased used to assault her in the privacy of their home. He only assaulted her once, in March 1983, in public at their store. There were people present including her own school pupils. The State did not adduce evidence contradicting that allegation. If anything, the prosecution witnesses to some extent corroborated her allegation. The two State witnesses Ephias Dube and Simbarashe Dube were brothers of the deceased. Ephias Dube was aged twenty-one years at the time of the trial. He was a grade six pupil at Mutsime Primary School. The sum total of his evidence was that he had never noticed any assaults on the appellant by the deceased. He never received reports of ill-treatment of the appellant by the deceased. He stayed with the appellant and the deceased.

On 6 April, he had, together with the family, an evening meal. After the meal the deceased and the appellant retired to bed. There was nothing abnormal that evening in the conduct of the deceased and the appellant. It was only in the early hours of the following morning that the appellant told him that an intruder had broken through a window and was in the bedroom of the deceased. She said the man was armed with a weapon. She advised that the neighbours should be awakened and informed. Afterwards he learnt the truth.

Under cross-examination he agreed that he had heard a rumour that the appellant had been heavily assaulted in March 1983 by the deceased but he was not personally told of the assault. He confirmed that the appellant left her home for four days during that time.

The next State witness was Simbarashe Dube, then a grade three pupil at Mutsime Primary School. At the time of the trial he was fourteen years of age. At the time the offence was committed he had lived with the deceased's family for one year and three months. During that time nobody had told him of any problems between the deceased and the appellant.

DUMBUTSHENA CJ

He did not see anything unusual on the evening of 6 April. He retired to bed with the others. Early the following morning the appellant told him and his companions that there was an intruder in the house. He and the appellant went to Munyaradzi's kraal. The rest of his story relates to what transpired afterwards.

But under cross-examination he said in reply to a question whether the appellant had left home in March 1983: "Yes I did not see her". He could not remember the day. He also could not remember for how many days she was away from home. The appellant's mother also came to find out what had happened. The appellant did not tell her.

These vague memories of the rumours of assault on the appellant and her absence from home

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in March 1983 are to some extent important because they are supportive of the appellant's evidence. The prosecution did not seek to contradict that allegation by calling people who were present in the store when, as she said, she was being assaulted.

She also testified to her husband assaulting her on many other occasions. She testified to his dreams and threats. Because her allegations eventually led to the events of 6 April, 1983 I would like to set out her evidence-in-chief as she described those events:

Q. You indicate that your husband used to assault you on many occasions, were you making any reports to any members of his family?

A. No, I did not. I did not find it necessary to tell the public or other people about our domestic fight.

Q. Mrs Mateketa, let us now come to this incident. You indicate in your defence outline that your husband had a dream on 3 April, 1983. Can you advise the court as to the nature of the dream or what your husband advised you about this dream?

A. We were having an evening meal. My husband told me that he had a bad dream and that he was going to die a very sad death or bad death. I asked him why he was taking a dream seriously. He said he was joking. That day I thought he was going to do something, but he continuously said he was joking. On the 6th we were in bed.

Q. Just on the question of when you say you were in bed, were you sleeping on the bed or on the floor?

DUMBUTSHENA CJ

A. We had spread our bed on the floor because he said it was too hot that night.

Q. Were the windows of your bedroom closed?

A. One was opened with the curtains drawn and the other one was closed.

Q. And what time did you retire to bed?

A. I did not check my time but we went to bed early.

Q. Can you then describe in detail the incident?

A. After we had slept for some time, I think it was about 9 or 10 pm, he shook me and said, 'Do you still remember the dream I told you about that day?' I again said to him, 'Why do you take a dream as truth?' After I said that he got up. He spoke in a loud voice. He was shaking. He said, 'I swear. Today I am going to kill you.'

Q. When he said these words were you still lying down?

A. Yes.

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Q. And where in relation to you in this room was he standing?

A. He was just next, stood up and stood straight next to me. He had not taken a step. He said, 'I will kill you today, thereafter hang myself'. And he said, 'Tomorrow there will be two dead bodies here'.

Q. Did he tell you the reason why he would kill you as well?

A. He said he would kill me because he did not want me to be inherited after his death by other men.

Q. Did he tell you how he was going to kill you?

A. He did not say how he was going to kill me, but he said he was going to hang himself.

Q. Did you think at the time that your husband would carry out that threat?

A. I believed so because all the time each time he said a thing after swearing he would carry it out.

Q. If you can continue to describe the incident?

A. After he had said that there would be two dead bodies that day, he went to a corner where there was a basin. He relieved himself. He was breathing heavily, shaking and trembling as he was talking as though he had been possessed by some spirits.

DUMBUTSHENA CJ

Q. During your married life had he ever behaved in that manner?

A. Not the manner of his talking and breathing.

Q. You say after he had relieved (himself), did he do anything else?

A. He repeated that he was going to kill me that day and kill himself. He got into the blankets.

Q. Were you still in the blankets yourself?

A. I was.

Q. What did he do when he came back to sleep?

A. He slept on his side still breathing heavily but did not talk to me.

Q. For how long did this breathing continue?

A. He took some time, but I cannot estimate it until the breathing changed and I realised he had fallen asleep.

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Q. Had you at any stage fallen asleep?

A. I couldn't sleep. I was in fear because I knew he was going to carry out his threat as before.

Q. Mrs Mateketa, after you had realised that your husband had fallen asleep and thinking that he might carry out his threat, why didn't you sneak out of the house and seek help?

A. I got out of the blanket, got hold of the door, trying to pull it, the door was locked. The key was not on the door.

Q. One of the windows was open, why didn't you use the window?

A. Below this window was a two legged table and on the table were some bottles. I couldn't have managed to climb out through this window.

Q. Then you advise the court, what did you do when you woke up? You say you tried the door, you found it was locked and the key wasn't there. What did you do after that?

A. I felt that death was imminent. I felt it within my body. I then looked around for a weapon to injure him so that if he got up he would be helpless.

Q. Where did you look for a weapon?

A. Under the bed because under this bed he kept some of his tools.

Q. Did you then find any weapon?

1985 (2) ZLR p253

DUMBUTSHENA CJ

A. The first thing I got hold of was an axe.

Q. And then what happened.

A. As soon as I got hold of this axe I was possessed with an extra power. I just felt like injuring, injuring him so much that when he gets up he would not hit back. I quickly struck blows one after another three times without resting.

Q. Was there any light in this room when you did that?

A. We had a candle light but it was off.

Q. Did you then manage to get out of the house?

A. I took some matches, put on the candle, took a long time looking for the key and I found it at the foot of this table near the window.

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Her story is amply supported by what she said in reply to the warned and cautioned statement. There is a ring of truth in her version of the events of that night. She said:

> On Sunday the 3rd April, in the evening, my husband said he had dreamt a very bad dream about his death. He said he was going to die a very painful death. So he said he did not want to die that type of death. He said he wanted to hang himself before that day. He said before I die I want to kill you first so that no one will inherit you. I asked him why he took dreams to be a true thing. He said he was joking. From that time, he did not show that he would do anything. On Wednesday at about 9-10 pm I was asleep and he woke me up and asked if I still recall his dreams he had told me of. I said again why he took dreams to be a true thing. Then he talked in a trembling voice and said I am about to die and before I die I am going to kill you first. Then I started to tremble with fear. He stood up and went to a place where there was a chamber-pot and passed urine. After that he stood there for some time and later got into the blankets quietly. From that time I did not fall asleep and I was shivering with fear. I head him snoring asleep. I then stopped shivering. I then thought of killing him first. Failure to do it I was going to die. I got up and looked around for anything near by and then got hold of an axe. Having obtained the axe, I felt possessed of much power which I had never got of and I then struck him with full force on the head. I then repeated twice or thrice. He did not make a move. I then realised that he was dead. I thought of reporting myself to Sandawana Police. I then thought if his relatives learnt that I had killed him, they would kill me. Therefore I took that it was a thief who got in through the window and left having killed him. I

DUMBUTSHENA CJ

> took the axe and put it in the car and then I woke up children and told them a lie that I had seen a thief who was armed with something and that they were to go and advise his young brother that a thief had gone in the house. I and the other boy, went to the Village of Munyaradzi Gumbo. I told him a lie and he said that he was not going by himself as the thief had a weapon. We then stayed until it was daylight. He went to another and they went to that house and he came back and said father was dead. When the police came, I told them the same lie because I was afraid of the relatives of the deceased. When they took me away, I told them the truth and as to why I did it.

That the appellant was telling the truth is underlined by what she told the court in her evidence-in-chief. In a case where the prosecution depends for conviction on an accused person's own evidence it is not advisable to try and contradict that evidence without adducing evidence in support of the prosecution version, nor is it advisable for a trial court to speculate on mere assumptions of what might have happened when the only evidence the trial court relies on for conviction is that of the accused person.

In my judgment the appellant's evidence and her confession statement provide the motive for the killing and establish the intention. I find it difficult to understand why in the light of what I have said above the court *a quo* rejected the appellant's account "about the dream, the conversation about the dream before she killed her husband". I do not believe that the appellant was trying to put up "a half-hearted attempt to set up a defence of self-defence." I agree with Mr *Fitches*, who appeared for the appellant, that what was put up by the appellant was a defence of necessity. The court *a quo* ought to have viewed the appellant's defence subjectively. Instead of rejecting her defence the court should have put itself in the position of the appellant who was in that room alone with the person who was threatening her with death. She said herself: "Yes, death was imminent". She was in reasonable fear of her life. See Burchell and Hunt, *South African Criminal Law and Procedure* Vol 1 pp 285 and 286. But we are not here considering the defence of necessity because there is no appeal against conviction. As a defence on the merits, however, it could not have succeeded.

I find it strange that the court *a quo* without any supporting evidence commented as follows on

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the reason why the couple slept on the floor:

> The court notes that on that night the couple slept on the floor. The accused states that it was the deceased who suggested that they slept on

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> the floor, but it must be generally known that if you are going to chop anything then you want a firm base upon which to put the object you are about to chop up. That is, for instance, if the accused had attacked her husband while she slept on the bed, the mattress would have given in on impact of the axe upon the neck or the fact and the volume or degree of force would not have rendered the same deep cuts that are shown in the photographs and were found by the doctor. In other words, if you are going to chop effectively and efficiently and rapidly with good results you want a firm base upon which to chop.

The only evidence on this aspect of the case was from the appellant who told the court that the deceased suggested sleeping on the floor because it was hot. That too was the reason given for leaving one of the windows open.

This appeal is against the sentence of death because the court *a quo* did not find any extenuating circumstances. It said: "The court has considered your submissions and rules that there are no extenuating circumstances". No reasons were given for coming to that conclusion. The omission to give reasons is an irregularity which gives this court the opportunity to interfere with the trial court's finding. See *S* v *Masuku & Ors* 1985 (3) SA 908 (AD) at 912D. Having found that no extenuating circumstances existed the trial court went on to receive submissions in mitigation of sentence. When there is no extenuation the death penalty is mandatory. There is no room for a plea in mitigation. Because the trial court found no extenuating circumstances and did not provide reasons for so finding, this court is entitled to examine the evidence on the record to find out whether there are extenuating circumstances. I say this because this court is obliged to consider the question of extenuating circumstances, as I have already stated above, by looking at the evidence and deciding on the question of extenuation afresh. In *S v Masuku & Ors supra*, at 912J-913B, NICHOLAS AJA stated the way an appellate court goes about examining afresh the issue of extenuation as follows:

> The way in which the question should be approached has often been stated. See for example *S v Ngoma (supra ubi cit)* where CORBETT JA said:
>
> > The determination of the presence of extenuating circumstances involves a three-fold enquiry: (1) whether there were at the time of the commission of the crime facts or circumstances which could have influenced the accused's state of mind or mental faculties and could serve to constitute extenuation; (2) whether such facts or

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> > circumstances, in their cumulative effect, probably did influence the accused's state of mind in doing what he did; and (3) whether this influence was of such a nature as to reduce what he did. In deciding (3) the trial court passes a moral judgment. (See *S v Babada* 1964 (1) SA 26 (A) at 27-8; *S v Letsolo* 1970 (3) SA 476 (A) at 476G-H; *S v Sauls & Ors* 1981 (3) SA 172 (A) at 184C-D; *S v Smith & Ors* 1984 (1) SA 583 (A) at 592H-593C.)

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In this case the appellant was convicted on her own evidence. There was no prosecution evidence contradicting what she said in her evidence and what she said in reply to the warned and cautioned statement. From her evidence the intention the court *a quo* found emerged clearly. Besides that, there also emerged factors which, although not discounting her guilt, measurably reduced her moral blameworthiness. The sad story told to her by the deceased will feature prominently in searching for extenuation. He told her he was going "to die a very painful death. He did not want to die that type of death." He was going to hang himself. And more importantly, for the purpose of searching for factors of extenuation, he told her that he did not want her to be inherited by someone else. Then there is that frightening dream. She was told it once on 3 April 1983 and then it was repeated on the Wednesday the offence was committed. She was asleep. He awakened her. He reminded her of the dream. "He talked in a trembling voice an said I am about to die and before I die I am going to kill you first." As he talked he "was breathing heavily and shaking and trembling as though he had been possessed". She trembled with fear. He passed urine into a chamber-pot. Then he stood for a while and then went to sleep. He started snoring. The appellant could not sleep. She was in fear of her life because she thought he would carry out his threat. She was forced by threats to murder the deceased. I believe the reasonable fear was created by the threat of death. That fear operated in the mind of the appellant. It is that fear that affected her thinking at the time that the court must look at.

In the instant case the appellant's state of mind must be looked at, having regard to the circumstances prevailing in that room. She could not find the key to the door. She feared climbing on to the bed in order to jump out through the open window. In desperation, so it would seem from her evidence, she looked for a weapon. In her own words she said: "As soon as I got the axe I was possessed with extra power. I quickly struck blows one after another three times without resting." That was the state of mind in which she was. I would like to think that she was completely possessed with fear, the type of fear which instills strength and courage because one is desperate.

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The court *a quo* should have considered whether these factors which caused the appellant to commit the murder were extenuating or not. The fact that she committed the murder in the manner she did and with actual intent is irrelevant at this stage of the exercise. The relevant inquiry is whether the factors which subjectively influenced the mind of the appellant to commit the murder were extenuating. See *S v Chaluwa* S-75-85 (not yet reported) *(14) and the cases cited therein at 8-11. † (15)

In a case in which an accused person has been convicted on evidence given by the accused herself and the facts in that evidence reduce the moral blameworthiness of the accused the trial court should given them their due weight when considering the existence or otherwise of factors of extenuation. In *S v Chaluwa, supra*, at 12-13 ‡(16) I said:

> In this case the appellant was convicted on facts that were largely contained in his warned and cautioned statement and his statement on indications. Those facts, which the court *a quo* accepted, reduce measurably his moral blameworthiness and yet the court *a quo* did not give them their due weight when considering extenuating circumstances.

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I am indebted to my learned brother, Mr JUSTICE BECK, for translating *S v Sephuti* 1985 (1) SA 9 (AD), a judgment delivered in Afrikaans, because in that judgment SMALBERGER AJA dealt with the proper approach to a consideration of extenuating circumstances when the proven circumstances include the appellant's own version of events, which are improbable but which may be reasonably and possibly true and which were relied upon by the trial court for convicting him. SMALBERGER AJA said (according to Mr JUSTICE BECK'S translation) at 18E-I:

> Extenuating circumstances must have their foundation in the proven circumstances of each case (*S v Ndlovu* 1970 (1) SA 430 (A) at 433H). The proven circumstances include those facts on which the conviction is based together with such other facts as may be proved when the enquiry into extenuation is undertaken, provided that such last-mentioned facts may only amplify or temper the findings on the merits but may not alter them (*S v Vortsteen* 1972 (4) SA 551 (A) at 558D). In *R v Samson* 1959 (1) SA 893 (C) it was decided that where the court,

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> in convicting an accused of murder, makes certain findings that form an integral and necessary part of the findings on which the conviction rests, those findings have to be accepted for the purposes of deciding whether or not there are extenuating circumstances. (See too *R v Mneke* 1961 (2) SA 240 (N) at 244G; Du Toit *Straf in Suid-Afrika* (Punishment in South Africa) at p 40; Hiemstra *Suid-Afrikaanse Strafproses* (South African Criminal Procedure) (3rd Ed. at 596); and compare *S v Shepard & Ors* 1967 (4) SA 170 (W) at 180D-H.) In the course of his judgment in *Samson's* case at 894A-B VAN WYK J said:
>
> > In the present case in considering whether the accused is guilty of murder the court found that his evidence might reasonably possibly be true. His evidence presents the facts in as favourable a light for himself as is possible. In view of the *onus* that rests on the Crown the court accepted the essence of the accused's version, but nevertheless found him guilty of murder. The probability is that the accused's account is false, but in my view the court cannot now, when considering whether extenuating circumstances are present, reject the accused's account because of the probabilities.
>
> This is the approach to a consideration of factors of extenuation which in the circumstances of this case the court *a quo* should have followed.

In the instant case we do not know how the trial court came to reject the existence of extenuation because no reasons were given. In the view of this court the factors I have enumerated above constitute extenuation. Accordingly the verdict of the court *a quo* is altered to read "Guilty of murder with actual intent and with extenuation".

Now I come to consider the appropriate sentence the appellant ought to be given having regard to the manner in which she committed the crime and her personal circumstances.

The deceased and the appellant were married to each other. They had lived together for twenty-one years. They were both teachers at Mutsime Primary School. They helped each other in running their two shops. They had six children. The last child now lives with a relative of the deceased. They were doing well. They sent their children to school. That they loved each other becomes clear from the fact that the appellant did not tell other people whenever she was assaulted. She even refused to tell her mother that she had been assaulted in public in March 1983. I would like to think that in so

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refusing, she was protecting their marriage and their reputation as teachers. The deceased did not want to die and leave his wife, the appellant, to be inherited by someone else. This, one would like to assume, shows the high degree of his love.

The events of 6 April changed all that. The appellant witnessed the deceased in a terrible state of mind. He spoke in a trembling voice. He was shaking when he said: "I swear today I am going to kill you". The appellant decided to do something before he killed her. She was seized by fear, fear for her life. I believe she became frustrated and frightened and she felt in that state of mind "that death was imminent". She had to do something to save herself. She did but unhappily she murdered her husband. Besides she was a first offender with no history of a violent past.

But the crime she committed fills one with revulsion. She delivered with great force three blows with an axe in the vital area of the head. Dr. Dahlia who conducted the post mortem examination on the deceased's body found a four-centimetre long wound through the left ear of the deceased. There was a long deep cut at the back of the neck which was more to the left side of the neck extending to the cervical spine. It was 12 centimetres long. The third cut was also 12 centimetres long. It was a long deep cut in the region of the lower part of the neck extending down towards the left shoulder. The doctor's opinion was that death was due to the deep cut into the cervical spine. It was a gruesome and callous murder. These injuries accord with the appellant's description of how she felt possessed of great strength and hacked her husband to death. She brutally murdered the deceased who was asleep and snoring and therefore defenceless.

The sentence I am going to pass should in my view fit the offender while at the same time meeting the approval of society. I admit it is not always that society approves sentences imposed by the courts. Sometimes the disapproval is justifiable and at other times society's reaction is not justified because society does not have the full story. The court has the advantage of seeing the offender and of comparing his personal circumstances with the crime he has committed. The court is thus able to assess an appropriate sentence having taken into account mitigatory and aggravating factors. It is in the main a value judgment. In my view the appellant's mitigatory features considering the circumstances surrounding the commission of this murder call for a sentence that fits a woman who has been left with a great deal of responsibility and who on the evidence was goaded into committing this offence.

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Accordingly the sentence of death is set aside. In my view justice will be met by substituting the death penalty with a sentence of 10 years' imprisonment with labour.

Beck JA: I agree.

Gubbay JA: I agree.

Pro Deo

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S v NDHLOVU & ORS 1985 (2) ZLR 261 (SC)

Court **Supreme Court, Bulawayo**

Annotations **Link to Case Annotations**

Dumbutshena CJ and Beck and Gubbay JJA

Criminal Appeal

29 October and 18 November 1985

Flynote

Evidence - extra-curial statements - effects of irregularity of confirmation proceedings - identification - need for circumspection in assessing evidence - proper conduct of identification parade.

Headnote

The extra-curial statements of three suspects were tendered for confirmation before a magistrate who did not hold three separate inquiries *in camera* but consolidated the proceedings into one.

An identifying witness who had not seen the malefactors during the several months that had elapsed between the commission of the offence and the date of his arrest as a suspect was placed in the same police vehicle in which the appellants were being transported. He was questioned for over a day by police before identifying the three appellants who were all on a single parade.

Held that separate proceedings must be held in respect of the confirmation of extra-curial statements made by different persons. Irregularity in the confirmation proceedings does not render a statement inadmissible but deprives the State of the benefits of having the statement confirmed.

Held, further, that confidence and sincerity in an identifying witness are not enough, the greatest circumspection should be employed in assessing evidence of identification. An identification parade should consist of at least eight persons similar in appearance to the suspect; two suspects of roughly similar appearance may be paraded with at least twelve other persons; in no circumstances should more than two suspects be paraded together.

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Cases cited:

S v Mehlape 1963 (2) SA 29 (AD)

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S v Mthetwa 1972 (3) SA 766 (AD)

R v Aluverino 1963 R&N 614 (SR)

R v Kola 1949 (1) PH H 100 (AD)

S v Mlati 1984 (4) SA 629 (AD)

R v Masemang 1950 (2) SA 488 (AD)

R v Crispen 1967 (3) SA 450 (RAD)

B Longhurst for the appellants

B N Sigidi for the respondent

Judgment

Gubbay JA: The three appellants were tried by a judge and assessors with the crime of murder. They were found guilty, without extenuating circumstances, and were sentenced to death. The sole issue in the appeal is one of identification, that is to say, whether the trial court erred in holding that there was proof beyond reasonable doubt that the three appellants committed the murder charged.

During the afternoon of 5 May 1982, Ethan Nyoni was accosted by a gang of four men as he was about to enter his kraal in the Mpandeni Communal Lands, in the district of Plumtree. Three of the men were wearing blue long-sleeved jerseys with leather patched elbows while the fourth was clad in camouflage uniform. All wore khaki coloured wide brimmed hats. The uniformed man, who was taller than his associates, was armed with an AK/AKM rifle. Threatened with death, Nyoni complied with the order to take them to a beerdrink. He led them a distance of eleven kilometres to the kraal of his uncle, Nicholas Tshuma. As they neared that destination Nyoni was instructed to wait under a tree. The shortest of the men stood guard over him. The other three entered the kraal. Within minutes Nyoni heard the sound of two shots being fired in rapid succession followed, after a brief pause, by a third shot and a cry of anguish. Thereafter the three men reappeared with a cardboard box in their possession. Together with Nyoni the four then headed in a westerly direction, making for Embakwe Mission. On the way it was suggested that they should "let the dog go". No objection was raised and so Nyoni parted company with the gang and returned to his kraal. He had been in custody for four hours. He told no one in authority of his terrifying experience for fear that were he to do so he would be sought out by his captors and killed.

The shots that Nyoni heard fired were the cause of the death of Nicholas

Tshuma. He sustained three separate gunshot wounds. The first was through the left upper arm, shattering the humerus; the second was to the left upper anterior abdomen, rupturing the liver and haemoperitoneum; and the third was to the left posterior thigh. He had been in his

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dining hut with three companions when an unknown armed man suddenly appeared in the doorway. After ordering the occupants to lie face down, he demanded that the owner of the kraal identify himself and hand over his money. Tshuma produced the little cash he had in his pocket but the robber scorned the offering. He accompanied Tshuma to the sleeping hut in search of more money. As they left the dining hut another stranger entered and warned that no one was to move. It was whilst in the sleeping hut that Tshuma was foully murdered.

Each appellant testified, denying any complicity in the offence. They were disbelieved by the trial court which accepted Nyoni's identification of them as culprits.

Nyoni's evidence on that critical and disputed issue stood alone. There were two facets to it:

(1) He said that after a lapse of several months - the date being established as 31 July 1982 - the police had arrived at his kraal to arrest him. Immediately upon being placed in the police vehicle to be conveyed to the Plumtree Police Station, he had recognised the second appellant, who was in custody, as a member of the gang. And he had told the police so in the hearing of the second appellant. He assumed that since he had been abducted from outside his kraal by the gang, the second appellant had informed the police of where he lived.

(2) After being interrogated by the police for over a day he had picked out the three appellants at an identification parade held on 2 August 1982 at the Plumtree Police Station.

It is properly recognised that the positive assurance of identification by a single honest witness - and Nyoni was found to fit into that class - will not suffice. Confidence and sincerity are not enough. The possibility of a mistake occurring in the identification, especially where the witness has not known the person previously, demands that the greatest circumspection should be employed. As WILLIAMSON JA warned in *S v Mehlape* 1963 (2) SA 29 (AD) at 32F-G:

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> The often patent honesty, sincerity and conviction of an identifying witness remains, however, ever a snare to the judicial officer who does not constantly remind himself of the necessity of dissipating any danger of error in such evidence.

In similar tone HOLMES JA, in *S v Mthetwa* 1972 (3) SA 766 (AD) at 768 A-C, remarked with his accustomed lucidity:

> Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities.

(See also *Aluverino v R* 1963 R&N 614 (SR) at 615I-616H.) Hence a cautious approach is

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necessitated, not only because a conviction is sought upon the evidence of a single witness, but also because the identification of an accused person is a matter notoriously fraught with error. It is an area wherein the potential for honest mistake looms large.

A close scrutiny of Nyoni's evidence relating to his identification of the second appellant on 31 July 1982 reveals disquieting features.

In the first place, having been arrested and informed that he was to be interrogated in connection with the murder of Tshuma, he was confronted with the second appellant who was in the vehicle in the custody of the police. In such circumstances the second appellant was compromised, for there is a real possibility that his custodial presence influenced the identification of him as one of the gang of four, especially as Nyoni assumed that it must have been the second appellant who had directed the police to the whereabouts of his kraal. It seems to me that the identification made is barely more cogent than that of a testifying complainant who, upon asked whether he is able to see his previously unknown assailant amongst those persons present in the

court, points to the accused in the dock.

Secondly, it is significant that neither in examination-in-chief nor under cross-examination did Nyoni aver that upon seeing the second appellant in the vehicle, he straightaway recognised him and immediately advised the police of that fact. It was only on consequence of leading questions put by one of the assessors that those claims were advanced. Nothing is less convincing than a "Yes" or "No" to a set of words framed by a questioner, and its probative weight is minimal. Moreover, as this particular piece of evidence was not adduced by the prosecutor, the overwhelming probability is that there was no reference to it in the witness's proof. That, of course, does not necessarily reflect upon its veracity but care in accepting it must be exercised. Additionally the failure of the prosecutor to adduce corroboration from the police officer to whom Nyoni said he made the report cannot be overlooked. There was no suggestion that the officer concerned was unavailable and one can only conjecture as to why such evidence was not led. Was it because support for Nyoni was not forthcoming?

The impression I gain is strong that in seeking to establish the second appellant's complicity in the murder, the intention of the police was to rely upon the inculpatory content of an extra-curial statement recorded from him (in the event ruled inadmissible by the learned judge), supported by Nyoni's ability to point him out at the identification parade. Indeed, if the fact of Nyoni's recognition had been brought firmly to the attention of the arresting officers one wonders why the second appellant was asked to stand in the parade two days later. For it must have been appreciated that any identification of him at that stage would be valueless.

I am not unmindful that Nyoni remained in the presence of his captors for as long as four hours, but three months passed before he had sight of the second appellant. During the intervening period he would have had to retain a mental picture of the facial and other physical characteristics, of which there was no evidence of any distinctiveness or peculiarity, of not

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merely one man, but four.

Applying the requisite degree of circumspection to this aspect of Nyoni's unsupported evidence, I am not convinced that the possibility of mistake may be discounted.

In the judgment of the trial court the view is expressed: "That the identification parade was properly conducted cannot be doubted". Speaking for

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myself, I entertain such a doubt. I consider that in a number of respects the conduct of the parade offended against the cardinal principle of fairness to the appellants. See *R v Kola* 1949 (1) PH H 100 (AD); *S v Mlati* 1984 (4) SA 629 (AD) at 634.

Separate parades were not held in respect of the three appellants for they were placed among seven other persons. The accepted practice in this country is that the parade should consist of at least eight persons who are similar to the suspect in general appearance. I am not aware of any practice in respect of two or more suspects being included in one parade, but lest there be such a practice, I draw attention to Rule 14 of the British Home Office Circular No. 109/78, which is cited in Archbold, *Criminal Pleading, Evidence and Practice,* 41 Ed at p 904. It provides:

> One suspect only should be included in a parade unless there are two suspects of roughly similar appearance in which case they may be paraded together with at least twelve other persons. In no circumstances should more than two suspects be included in one parade and where there are separate parades they should be made up of different persons.

The procedure outlined in this Rule commends itself to me as one to be adopted. It acts as a safeguard against prejudice and ensures that the parade has maximum probative value. Thus even if the presence in the parade of the second appellant should be disregarded on the ground that he had been seen two days previously by Nyoni, and assuming that the first and third appellants were "roughly similar in appearance", the number on the parade fell short by three persons. In other words, the first and third appellants were included in a line-up of nine persons and not twelve.

Furthermore, I think it wholly improper of the police, in the knowledge that Nyoni had observed the second appellant as an arrested person, to have included him in the parade. See Hiemstra, *SA Strafproses* 3 Ed at p 71. The effect was to vitiate the information given to Nyoni at the inception of the parade that the three suspects may not be participants. Once Nyoni realised that the second appellant was actually in the line-up the risk existed of his being influenced to think that one or more of the other perpetrators of the crime were included.

Finally, I am concerned that the parade was conducted only after Nyoni had been interrogated. Beside the second appellant, the first and third appellants were in custody on suspicion of their involvement, and the possibility of

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Nyoni being advised during the course of questioning, or otherwise coming to learn, that three persons were being held for the murder cannot be dismissed. Such possible knowledge on his part may have induced a belief that three of the gang of four were present in the parade.

The cumulative effect of these adverse features causes me misgivings as to the accuracy of the identification of the first and third appellants. I would respectfully associate myself with the following passage in the judgment of VAN DEN HEEVER JA in *R v Masemang* 1950 (2) SA 488 (AD) at 493-494:

> The probative value of personal identification will of course depend upon all the surrounding circumstances and each case will have to be decided on its merits. But where such identification rests upon the testimony of a single witness and the accused was identified at a parade which was admittedly conducted in a manner which did not guarantee the standard of fairness observed in the recognised procedure, but was calculated to prejudice the accused, such evidence standing alone can have little weight.

The only remaining factor operating against each appellant is that his evidence of an alibi was rejected by the trial court. Certainly the appellants were unimpressive witnesses and the individual accounts of their movements over the period extending from 1 to 5 May 1982 were intrinsically unsatisfactory. Nonetheless I am not convinced that if the trial court had directed itself properly on the issue of identification it would have convicted the appellants independently of the evidence of Nyoni. It seems to me that the acceptance of the identification by Nyoni played no small measure in the verdict reached.

I am thus of the opinion that the guilt of the appellants was not proved to that degree of certainty which the law demands and that upon a proper assessment of the evidence as a whole it was dangerous to convict.

Accordingly I would allow the appeals and set aside the convictions and sentences.

Before concluding I consider it necessary to allude to an unfortunate error which occurred during the course of the proceedings. At the inception of the trial the prosecutor, acting pursuant to s 242(1a) of the Criminal Procedure and Evidence Act [*Chapter 59*], produced to the court as evidence the warned-and-cautioned statements recorded from the three appellants, which

bore the endorsement of having been confirmed on 10 August 1982. Defence counsel thereupon submitted that on two grounds the statements had not been properly confirmed in terms of s 105C(3) of the Act. In the first place, the confirming magistrate had failed to satisfy himself that the allegations made by the appellants to him on 29 July 1982 that they had been assaulted by the police, were no longer adhered to. And secondly, he had conducted the confirmation proceedings in an irregular manner, in that he had not held a separate "in camera" hearing in respect of each appellant but had dealt with all three together.

After receiving the evidence of the confirming magistrate, in which the failure to hold separate hearings was acknowledged, the learned judge immediately pronounced that as the

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warned-and-cautioned statements had not been properly confirmed they were inadmissible. The prosecutor did not protest the ruling.

It is unnecessary to decide whether the learned judge was right in his view that the manner in which the proceedings had been conducted nullified the confirmation of the statements. What is clear is that even if that were so the consequence is not to render the statements inadmissible as evidence, but merely to deprive the State of the benefit of the proviso to s 242 (1a) of the Act and to place upon it the *onus* of proving the requirements of voluntariness and an absence of undue influence.

But for this misdirection on the part of the learned judge, it may be that the State would have succeeded in proving, in the course of a "trial within a trial", that the appellants' statements, containing as they did admissions of being associated in the offence, were admissible.

Regrettably the defect cannot now be rectified by setting aside the convictions and sentences and ordering a remittal for re-trial. The principle is well established that the power of remittal is sparingly exercised where the necessary evidence to prove the State case has not been led, and then only where such evidence is either beyond doubt or unlikely to be disputed. In the present case it is certain that the admissibility of the statements will be contested.

A not dissimilar situation arose in *R v Crispen* 1967 (3) SA 450 (RAD), where the magistrate had ruled as inadmissible, for want of a formal warn and caution, evidence of a spontaneous and voluntary explanation made by the appellant to a patrol officer. On account of the omission of such evidence

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GUBBAY JA

the State did not support the conviction. It applied to the appeal court for the case to be remitted for re-trial. As there was every likelihood that the patrol officer's evidence of what the appellant had said to him would be disputed, the application failed and the appeal was allowed.

Dumbutshena CJ: I agree

Beck JA: I agree.

Pro Deo

MEMAN & ANOR v CONTROLLER OF CUSTOMS AND EXCISE 1985 (2) ZLR 270 (HC)

Editor's Note:(17)

Court **High Court, Harare**

Smith J

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Civil Action

23, 25 September and 28 November 1985

Flynote

Customs and Excise Act [Chapter 177] - Customs and Excise (General) Regulations 1980 (SI 310/80) - s 71(2)(a)(iv) of the Regulations - "own funds" - borrowed money cannot constitute a person's "own funds".

Headnote

In order to qualify for the rebate of customs duty allowed an immigrant under s 71 of the Customs and Excise (General) Regulations, 1980, it is necessary to establish that the goods purchased by the immigrant were purchased with "his own funds". This means that the funds must be owned by the immigrant, that is that he has earned them or been given them or acquired them in some other manner other than by borrowing.

Cases cited:

Voss v Controller of Customs 1956 R&N 678 (SR)

Jefferies v Commissioner of Customs & Excise 1954 (3) SA 607 (E)

S v Ndlovu 1983 (4) SA 507 (ZS)

Commissioner of Inland Revenue v Da Costa 1985 (3) SA 768 (AD)

Cotler v Variety Travel Goods (Pty) Ltd 1974 (3) SA 621 (AD)

Shenker Bros v Bester 1952 (3) SA 664 (AD)

A P de Bourbon SC for the plaintiffs

I A Donovan for the defendant

SMITH J

Judgment

Smith J: The second plaintiff (hereinafter referred to as "Meman") * (18) was born in Zambia but came to this country in 1963 and was educated here. He left in May 1977 to go to England, where he was allowed entry for one month. There he stayed with his sister, who was married to a Mr Bobat and resided in Bolton, in Lancashire. He got married in June 1977 and then applied for a residence permit and a work permit, but it was only late in 1978 that he was eventually given authority to work in England. Early in 1980 Meman returned to Zimbabwe for a holiday and shortly thereafter he and his wife returned to this country as immigrants. On their return he learnt that he and his wife could each import a motor vehicle into Zimbabwe and that they would be entitled to a rebate of the duty that would otherwise be payable on the vehicles. Accordingly, he arranged through a local firm for the importation of two motor cars. When these arrangements were confirmed he telephoned his brother-in-law (hereinafter referred to as

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"Bobat) and asked him to deposit in Meman's bank account the money that Meman had loaned him. Bobat did so. The first instalment on the motor cars was due in December 1980. Meman instructed a local bank to arrange for the payments for the motor cars from his bank account in Bolton. The instructions went through the bank's head office in London and there was a delay of some months before the payment for the two motor cars was duly made.

Meman and a friend of his drove the two motor cars into Zimbabwe via Beitbridge, where they were given a temporary clearance. In Harare Meman went to see a customs officer, who asked what funds had been used to purchase the motor cars. He said that he had earned money playing cricket as a professional cricketer for the Shropshire County Cricket Club and for Tonge Cricket Club, and that he had lent a firm, KB Textiles (for which Bobat worked), over £20 000 which had been repaid to him when he wanted to purchase the motor cars. Meman had two meetings with customs officials and was asked to provide documentary evidence concerning the funds which had been used in the purchase of the motor cars. In a letter dated 14 October 1981 he certified that:

(a) from May 1977 to September 1980 he had been employed by a firm, Coates Bros, at a monthly salary of £250, which he kept; and

(b) at the same time he was engaged as a semi-professional cricketer and during the four seasons he received a total of £12 500 from a local cricket club, and £16 750 from a minor cricket club, which he gave to Bobat as a loan to KB Textiles.

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He said that when he handed this letter to the particular customs official he also told that official that he earned £25 000 from dealing in commodities.

Meman admitted that in this letter he had deliberately given false information in a number of respects. As regards his employment by Coates Bros, he had entered such employment in March 1979, not May 1977, and his starting salary was £200 and had subsequently been increased but not to £250 per month. He had not received £250 per month as stated in the letter. As regards his earning from cricket, he had in fact been employed by two local cricket clubs, Pudsey St Lawrence and Tonge, for two seasons each and by the minor county club for three and a half seasons. From Tonge CC he had received £1 150 (not the £12 500 alleged), from Pudsey St Lawrence CC £920 and from Shropshire CCC £1 290 in professional fees plus a travelling allowance and hotel expenses.

The plaintiffs were given temporary import licences for the two motor cars on 14 October 1981, "pending clearance under immigrants rebate". In November 1981 Meman wrote to the defendant and enclosed a letter addressed to him from KB Textiles, which showed the amounts loaned by him to the firm from 1977 to 1980, which totalled £22 250, and the amounts repaid in 1980 and 1981, which totalled £13 500, leaving a balance of £8 750 still owing.

Meman was asked for a breakdown of the amounts paid to him by the two cricket clubs, so he provided the addresses of the clubs and also a letter from a firm of chartered accountants who were the auditors of KB Textiles. This letter confirmed the amounts Meman loaned to KB

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Textiles and the dates of the loans and the amounts repaid and the dates thereof. It also enclosed copies of the firm's bank statements showing the year and month in which Meman had made the loans. The relevant credits were made up with other moneys received by the firm and so did not correspond with the amount actually loaned at one time.

On 23 December 1981 the defendant seized the two motor cars. Shortly thereafter Meman obtained two letters relating to his earnings from playing cricket. One merely indicated that he had played for the Shropshire County Cricket Club from 1977 to 1980 and had been paid in cash. The other purported to be signed by the chairman of the Tonge Cricket Club and certified that Meman had been engaged by the Club from 1977 to 1980 and that his earnings during that period amounted to £12 500. Meman admitted that he had fabricated this letter and forged the chairman's signature but said

that the chairman had in fact sent him the Club's letterhead and told him to fill in such details as he required. Unfortunately, Meman had destroyed the covering letter which the chairman had written and sent with the letterhead.

Meman's legal practitioner wrote a letter dated 10 February 1982 to the defendant, advising that he had been instructed to institute legal action for the recovery of the motor cars. In that letter he said that Meman had instructed him that he, Meman, had supplied the defendant with all the information necessary to establish how the money, which had been used to purchase the motor vehicles, had been obtained. Consequently, all that now remained was for the defendant to make a decision on the matter. Subsequently, the defendant wrote to the said legal practitioner, asking for a bank statement from the auditors of KB Textiles' account books showing the source of the various amounts that the company had paid to Meman. Meman thereafter, on 20 May 1982, met another customs official to try to resolve the issue. The meeting was very brief. At that meeting Meman maintained that the information he had previously given as to his earnings from cricket was in fact correct. The customs official produced a document which alleged that the information was false and Meman walked out of the office, saying that his lawyer would contact the official. On 26 May 1982 the defendant's legal adviser wrote to Meman's legal practitioner, advising him that the defendant had evidence that the information produced by Meman as to his earnings from cricket was false. The response was a letter from Meman's legal practitioner, stating that the respondent's request for information had been fully complied with and that Meman could clearly show that he had earned the money concerned from his cricketing ventures. In cross-examination Meman admitted that the statement made by his legal practitioner in that letter contained a number of falsehoods because he had not told his legal practitioner the truth.

The next step in this saga took place on 7 June 1983, when Meman's legal practitioner again visited a customs official and the defendant's then legal adviser, Mr Sayce, in an attempt to resolve the matter. Prior to this meeting, Meman had told his legal practitioner that there had been other sources of funds available to him in England at the time in that moneys had been paid from Zambia into an account in his father's name in England. Meman's legal practitioner said that he mentioned this fact at the meeting on 7 June merely to try to put across to the

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customs official that Meman had in fact had other funds available to him to purchase the motor cars had he in fact wished to use them. He did not allege that these moneys, or part of them, had been loaned to KB Textiles. Mr Sayce, however, disputed this. He said that the clear

SMITH J

impression he and the customs official gained at the meeting was that the moneys from Zambia had been used for the purchase of the motor cars. Their reaction was to request documentay evidence showing the chain of transfer of the funds. Mr Sayce said that this documentary evidence was not produced and that it was at a later meeting on 5 July between him and Meman's legal practitioner that the latter first mentioned that he had referred to the moneys from Zambia in order to "paint the overall picture" and not to intimate that these moneys had been used to purchase the motor cars.

By notice filed 8 August 1985 the defendant requested further particulars concerning the source of funds used to purchase the motor cars. The particulars were filed on 16 September 1985 and in them Meman stated that from freelance buying and selling of commodities between May 1977 and April 1980 he had earned approximately £25 000. Over the period from July 1977 to April 1980 he had loaned KB Textiles £22 250 (no terms had been agreed as to how this sum was to be repaid), and it was from these sums that the motor cars had been purchased.

Meman said that when he first arrived in England he did not have a work permit. Bobat suggested to him that he should buy and sell commodities in order to earn an income. Bobat gave him some introductions and he embarked on this venture with some success. However, he did not want the authorities to know of his activities because he did not have a work permit. It was for this reason that he did not tell the defendant, or indeed even his legal practitioner, until the eleventh hour that he had engaged in these dealings and earned a considerable sum of money. Meman said that although he never mentioned these earnings in any letter to the defendant, he did mention verbally to a customs official sometime between October 1981 and January 1982 that whilst he had been living in England he had been dealing in commodities. However, he did not mention the amount that he earned through such dealings. The official had not shown any interest in this fact because at the time the parties were solely concerned with Meman's earings from cricket. He never referred to these dealings or the income he earned therefrom in any of his letters to the defendant because he did not want to mention the fact in writing.

When cross-examined about his dealings in commodities, Meman said that all sales were conducted on a cash basis. He gave the money he received to his wife and she kept it in a cupboard. He started his dealing in September 1977, buying and selling what he described as "fast lines" such as clothing. He dealt fairly frequently with about six people from whom he bought the

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goods. He was introduced to them by Bobat but he did not know their names or addresses and

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he had no documentary evidence to prove the purchases. He sold the goods to ten or twelve people in the Lancashire area but likewise he did not know their names or addresses. He said that his standard mark-up on the goods was 10 to 20 *per cent*. Meman agreed, when it was put to him, that he started dealing in commodities in August or September 1977, having arrived in England in May and been married in June. He was then asked where he got the £2 000 that he loaned KB Textiles in July. After a lengthy hesitation he said that he thought he had his dates mixed up and that in fact he started trading in July and made a profit of £2 000.

As regards the loans to KB Textiles, Meman said that when the company wanted to borrow money Bobat would come round to his house and he paid over the amount concerned in notes. There were no witnesses and no receipts or acknowledgements of debt were issued. The only arrangement regarding repayment of the loans was that Meman would contact Bobat when he needed the money.

The only witness called by Meman to give evidence concerning his dealings with KB Textiles was Bobat. He had worked with a firm of chartered accountants, L McEvoy Andrew & Co, in Lancashire, for three years and subsequently he was employed by KB Textiles as a company secretary. He was responsible for the financial affairs of KB Textiles. The company had cash flow problems and had to obtain overdraft facilities from a bank and loans from financial institutions and private individuals. Bobat said that he had suggested to Meman that the latter should buy redundant stocks which were freely available and sell them at a profit and he gave him leads and introductions. The mark-up on sales varied between 30 and 60 *per cent.* Bobat said that between July 1977 and April 1980 Meman had loaned KB Textiles a total of £22 250 and that KB Textiles repaid £13 500 between December 1980 and March 1981. Bobat would usually telephone Meman and ask for the loan and then go to Meman's house and get the money in notes. There was no mention of any interest being payable but Bobat explained this by saying that he was of the Moslem faith and the taking of interest was contrary to the laws of that faith. Bobat said that Meman was identified in the creditors ledger of KB Textiles as being a creditor of the company. The sums lent by Meman, being in the form of cash, were deposited at the bank with other moneys received by KB Textiles and therefore the bank statements and deposit slips would not identify the specific sum received by the company.

Section 7 of the Customs and Excise (General) Regulations, 1980 (SI 310 of

1980), provides for the granting of a rebate of the customs duty in respect of goods imported by an immigrant. The rebate may be granted in respect of a motor vehicle subject to certain conditions. In the present case, the condition which has led to the dispute between the applicants and the defendant is that the motor car must have been paid for by the immigrant "from his own funds held outside Zimbabwe".

It was common cause that the *onus* lay on the plaintiffs to establish that the motor cars were paid for from their own funds held outside Zimbabwe (See *Voss v Controller of Customs* 1956 R&N 678 at 683 and *Jefferies v Commissioner of Customs & Excise* 1954 (3) SA 607 (E)).It was also common cause that this onus had to be discharged on the balance of probabilities. In this

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connection, in *S v Ndlovu* 1983 (4) SA 507 (ZS) at 510D, BARON JA said:

> To establish a case or an issue on a balance of probabilities requires no more than that the court come to the conclusion that the party's version of the event is probably true.

As regards the function of the court in cases such as this, Mr *de Bourbon* submitted, and Mr *Donovan* agreed with him, that the court was not merely sitting on review of the decision of the defendant. In *Commissioner of Inland Revenue v Da Costa* 1985 (3) SA 768 (AD) at 774H-775A, van HEERDEN JA said:

> With reference to the provisions of the Income Tax Act 40 of 1925 CENTLIVRES JA said (at 150):
>
> > That the Legislature apparently thought that it was necessary to give a special right of appeal in cases where a matter is left to the discretion of the Commissioner appears from a number of instances where that special right is conferred . . . In all these cases it seems to me that the Legislature intended that there should be a re-hearing of the whole matter by the Special Court and that that court could substitute its own decision for that of the Commissioner. For, as CURLEWIS JA pointed out in *Bailey v Commissioner for Inland Revenue* 1933 AD at 220, the Special Court is not a court of appeal in the ordinary sense: it is a court of revision.
>
> It seems clear, therefore, that in cases involving the exercise of a discretion by the Commissioner the Special Court on appeal to it is called

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> upon to exercise its own, original, discretion and that the views expressed by FRIEDMAN J are not well founded. That much was indeed common cause at the hearing of this appeal.

It seems to me that in appeals from the decision of the Controller of Customs and Excise to seize goods liable to seizure, the Legislature likewise intended that there should be a re-hearing of the whole matter and that the court could substitute its own decision for that of the Controller . Indeed, after a hearing the court is probably in a better position than the Controller to make a decision in the matter because not only does it have before it all the documentary evidence that the Controller had but it has also had the opportunity of hearing the plaintiff give evidence which has been tested in cross-examination.

Meman gave evidence as to the money he earned in England during the period from mid-1977 to mid-1980. He was in the difficult position of having to admit that not only had he deliberately lied to Customs officials on a number of points but, further, that he had actually prepared a false letter which purported to be from the Tonge Cricket Club and forged the signature of the chairman. I do not accept his evidence that the chairman had sent him the club's letterhead and invited him to make a false statement, but he has subsequently destroyed the letter from the chairman. Meman's evidence as to his dealings in commodities was not at all convincing. At first he said that he started dealing in commodities in September but then had to change this date to July in order to explain that his first loan to KB Textiles was in July 1977. With regard to the actual dealings, he apparently bought from about six suppliers and sold to ten or twelve buyers. But he was not able to give the name or address of any one of these. Boat gave him what was called "leads and introductions" but apparently this did not include names and addresses because Meman could not remember any of them and Bobat said that he did not know any

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details of the dealings. Likewise, in relation to the loans to KB Textiles, Meman's evidence was not very persuasive. Even if it is accepted that for religious reasons he was not prepared to accept interest on money he lent out, one would have thought that he would at least want a receipt for the money he lent or an acknowledgment of debt. Despite the submissions made by Mr *de Bourbon,* I do not think that any reliance can be placed on the evidence given by Meman. The reasons he advanced for not telling the defendant about his dealings in commodities were that he did not want the authorities in England to know that he had worked and earned money there whilst not legally permitted to do so. As Meman had returned to live in this country, it is difficult to see why he should fear this. Perhaps his attitude was reflected in his answer to the question of what had happened to the balance

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of the money he said he had loaned to KB Textiles. He said that he had been paid the balance in cash and given most of it to another of his brothers-in-law to keep because he still had residence rights in England, and if he went there and registered as being unemployed the authorities would require bank statements and he did not want to have to show what funds he had. This, to my mind, illustrates Meman's regard for honesty and his attitude to the truth.

Bobat was the only other witness called to give evidence concerning Meman's financial affairs in England. He had been a friend of Meman's for many years and was his brother-in-law. Bobat gave his evidence well but there was no independent evidence to corroborate his evidence. The only documentary evidence of the loans made by Meman to KB Textiles was, Bobat said, in the company's creditors ledger. Although Bobat knew what evidence was available, he apparently made no effort to obtain or produce such evidence. The letter from McEvoy Andrew & Co, the firm of chartered accountants, dated 1 December 1981, which purported to confirm the various loans made to KB Textiles by Meman and the partial repayment thereof, cannot, in my opinion, be accepted on its mere production, especially since Meman has admitted that he forged a letter to support his case.

However, the crux of the matter is that Meman is required to establish that the motor cars in question were paid for from his own funds held outside Zimbabwe. He has established that they were paid for from funds held outside Zimbabwe in that they were paid for with moneys which were drawn from a bank account in England in his name. Mr *de Bourbon* has submitted that this is sufficient but I cannot accept that submission. Section 71(2)(a)(iv) of the regulations referred to earlier requires that the immigrant must show that the moneys were his own funds. In my opinion, this means that the funds must be owned by the immigrant, that is that he has earned or been given them or acquired them in some other manner other than by borrowing. If an immigrant has borrowed money, I do not think that it can be said that it is his own money as required by the said s 71(2)(a)(iv) because then the use of the words "his own" would be tautologous. The section need only, in that case, refer to funds held outside Zimbabwe.

Is Meman's story about his dealings in commodities "probably true" as stated in *Ndlovu's* case, *supra*? The motor cars were seized on 23 December 1981 and the plaintiffs issued summonses claiming the release of the motor cars in March 1982. The first time Meman mentioned that he had earned money by dealing in commodities was a few weeks before the trial commenced. Mr

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de Bourbon explained that it was only on 9 August 1985 that the plaintiffs were

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formally asked what their allegations would be at the trial and consequently that was why they were so late in putting forward their version. I cannot accept this excuse. The plaintiffs have known ever since the motor cars were seized why the defendant was not satisfied that they had been lawfully imported. They could have come forward at any time with their version and if they were able to satisfy the defendant they would have avoided the necessity for any court action. However, they produced their version at a very late stage in the proceedings when it was too late for the defendant to make any inquiries into their allegations. Moreover, the story told by Meman was so bald and lacking in detail that no part of it could have been investigated by the defendant, and the only evidence produced to substantiate his claims was that of Bobat. No books of account or other satisfactory documentary evidence were produced. Since Meman knew that the defendant had already proved that his earlier versions were false and that he had forged a supporting document, he must have realised that he would have to produce fairly substantial evidence to corroborate his new version of events.

In *Cotler v Variety Travel Goods (Pty) Ltd* 1974 (3) SA 621 (AD) at 629H-630A, WESSELS JA said:

> There is undoubtedly substance in the contention. However that might be, a party upon whom an onus of proof rests, can ordinarily only discharge that onus on the basis of credible and reliable evidence which establishes that his version is, as a matter of probability, the truth and that of his opponent false.

In similar vein, in *Shenker Brothers v Bester* 1952 (3) SA 664 (AD) at 670 E-G, GREENBERG JA said:

> The evidence of these two witnesses, as was to be expected, has not been contradicted by any evidence led on behalf of the defendants, but this fact does not relieve the plaintiff of the obligation to discharge the onus resting on him (see *Siffman v Kriel* 1909 TS 538; *Katz v Bloomfield & Keith* 1914 TPD 379; *Nelson v Marich* 1952 (3) SA 141.) In the first of these cases, INNES CJ said:
>
> > It does not follow, because evidence is uncontradicted, that therefore it is true . . . The story told by the person on whom the *onus* rests may be so improbable as not to discharge it.
>
> Similarly, the circumstance that evidence is uncontradicted is no justification for shutting one's eyes to the fact, if it be a fact, that it is too vague and contradictory to serve as proof of the question in issue.

SMITH J

In my view, the evidence produced by the plaintiffs is not sufficient to prove the question in issue, ie that the motor cars were purchased from their own funds held outside Zimbabwe.

Accordingly, the plaintiffs' claims are dismissed with costs.

Ali Ebrahim, legal practitioner for the plaintiffs

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

NCUBE v NDHLOVU 1985 (2) ZLR 281 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ and Beck and Gubbay JJA

Civil Appeal

29 October and 28 November 1985

Flynote

Appeal - grounds not advanced in lower courts - whether may be raised for first time on appeal.

Contract - mistake of law - whether vitiates contract - mistaken motives - effect of.

Customary law - contract between seducer and father of seduced major daughter in terms of which former agrees to pay damages to the latter in respect of seduction of the daughter - whether enforceable.

Headnote

Appellant seduced the major daughter of the respondent. He signed an agreement undertaking to pay the respondent damages for the seduction. His claim of duress was dismissed in the lower courts and in the Supreme Court three contentions were advanced: that the contract was void for immorality; that it was void as contrary to public policy, being based upon trading children for money; that it was voidable as being induced by a mistake in law. None of these grounds had been raised below.

Held that the first two grounds raised questions of law and fact, and since no evidence had been led to establish the factual basis, the points could not be advanced for the first time on appeal. The third ground was a question of law alone which could be dealt with on appeal, there being no prejudice to the respondent.

Held, further, that a contract induced by a mistake in law or a mistaken motive remains enforceable.

Held, further, that there is no reason why the undertaking of a seducer of a woman over the age of majority to pay damages for seduction to the father should not be enforced.

DUMBUTSHENA CJ

Cases cited:

Morobane v Bateman 1918 AD 460

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Van Rensburg v Fouriesburg Hotel (Edms) Bpk 1980 (2) SA 26 (O)

Sampson v Union and Rhodesia Wholesale Ltd 1929 AD 468

Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd & Anor 1972 (4) SA 208 (EC)

Miller & Ors v Bellville Municipality 1973 (1) SA 914 (C)

Sawyer & Anor v Windsor Brace Ltd [1942] 2 All ER 669

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

J James for the appellant

M P Mahlangu for the respondent

Judgment

Dumbutshena CJ: The appellant appeared before the community court at Bulawayo to answer a claim for damages for the seduction of Judith Ndlovu, the respondent's niece. Judith Ndlovu was then aged 27 years. She had had two children with other men before the appellant seduced her.

The appellant's defence was that the girl he seduced had attained the age of majority and therefore the respondent was not entitled in terms of the Legal Age of Majority Act, 1982 (No. 15 of 1982) to claim damages for seduction. Under cross-examination he agreed that he had signed a document in which he agreed to pay the respondent $500. It was his evidence that he had been forced to sign the document because ". . . they had said that we were at their home, we should abide by their law."

Mr *James,* who appeared for the appellant, conceded, properly in my view, that there was no evidence of duress. Mr *James* contended that upon a proper construction of the claim on the summons, the respondent's claim for damages was based on delict and not on contract as contended for by the respondent. That contention is, however, not supported by the evidence. The appellant's case was that he had been forced to sign the document tendered in evidence as Ex 1 because of duress. The plea of duress not having been persisted in all that remains is the evidence of a document signed by the appellant and it is upon that document that the decision of this court will be based.

It is also the point which the district court had to decide. The point at issue is whether on 22 October 1983 the appellant signed the document Ex 1, under duress and the further point in issue is whether in terms of the Legal Age of Majority Act the agreement was valid. The district court came to the

conclusion that the appellant had "voluntarily contracted to pay seduction damages, and the

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agreement holds good."

The appellant has appealed against the decision of the district court on three grounds namely that:

1. The honourable court erred in law in accepting a contract which was based on immorality to stand.

2. The honourable court erred in law in accepting a contract which was based upon trading the custody of minor children for money.

3. The honourable court erred in law in accepting a contract which was voidable due to a mistake of law on the part of both parties and appellant exercised its right to cancel the contract.

None of the points raised in the notice of appeal were pleaded at the community court nor raised and argued before the district court. Mr *Mahlangu,* who appeared for the respondent, contended that the appellant ought not to be allowed to raise for the first time on appeal, matters which were not pleaded in the community court nor argued in the district court.

In this case Mr *James* contended that the contract, Ex 1, relied on by the respondent was illegal because the purpose for which it was drawn was to sell and buy the custody of the children. He also argued that the contract was based on immorality and should never have been admitted by the district court. No evidence was led before the community court to sustain these allegations of fact.

It is clear that the basis upon which the respondent claimed damages was the contract agreed to and signed by the appellant on 22 October 1983. In plain language it says:

Ncube has agreed to pay $500,00 damages for spoiling Ndlovu's niece.

The document dated 12 June 1983 says: "Ncube (the appellant) admits the case of spoiling the child. (Ndlovu's niece). He says he wants children only. We say no because ours (our niece) was damaged so we say let us appeal."

What is clear from a reading of the above passages is that the appellant agreed to pay the sum of $500 in order to get the custody of his children. The

respondent was not satisfied. He wanted to appeal presumably because he wanted to receive seduction damages and lobola. What is important for the purposes of this appeal is that the appellant agreed to pay $500. The respondent believed the money the appellant had agreed to pay was for damages for seduction. Both counsel contended that there was a mistake of law.

Let me first deal with Mr *Mahlangu's* contention that the appellant should not be allowed to raise for the first time on appeal matters which were not raised in his plea or in argument before the district court. That submission is well made. Mr *Mahlangu* submitted further that the question

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whether the agreement was immoral, or whether it was intended to trade or sell the children, or whether the parties believed at the time that the appellant was legally liable to pay damages for seduction could only be dealt with after evidence had been adduced. Because no evidence on these matters was led and they were not in issue at the community court, the appeal ought to be dismissed otherwise the respondent's case would be prejudiced.

The first two grounds of appeal raise questions of law and fact. Here Mr *Mahlangu's* contentions are valid. I am more than satisfied that there was no evidence led to prove that the agreement was immoral and that it was the intention of the parties to trade or sell the children for $500. There was no evidence adduced by the appellant proving the primary facts or surrounding circumstances making the contract an immoral one. These primary facts cannot be argued on appeal for the first time. It would be unfair to the respondent to allow the appellant to argue them in this court. The position is different when one is dealing with a question of law. See *Morobane v Bateman* 1918 AD 460 at 464, *Van Rensburg v Fouriesburg Hotel (Edms) Bpk* 1980 (2) SA 26 (O) at 29G-H.

The third ground of appeal was raised for the first time in this appeal. It was contended that in accepting a contract which was voidable due to a mistake of law on the part of both parties the district court erred. Both the appellant and the respondent agree that this is a point in law which can be argued for the first time on appeal. Besides there is nothing in the arguments advanced by Mr *James* which indicates that the respondent would be prejudiced by taking this point in this court. It is, however, trite law that a voluntary payment under a mistake of law cannot be recovered. In *Sampson v Union and Rhodesia Wholesale Ltd (in Liquidation)* 1929 AD 468 at 481 WESSELS JA explained the proposition in these words:

DUMBUTSHENA CJ

> The general proposition of law is that if you think the meaning of a clause is such and such, you cannot get rid of your liability when you discover that the true legal meaning is different from what you thought, for you cannot be heard to say that you did not know the law. And if the other party innocently expresses as his opinion that the legal meaning of the clause is the same as you read it, then if both put a wrong legal construction on the clause you are still bound because the law is presumed to be equally within the knowledge of both parties.

See also *Hodgetts Timbers (East London) (Pty) Ltd v HBC Properties (Pty) Ltd & Anor* 1972(4) SA 208 (E) at 213C-F, *Miller & Ors v Bellville Municipality* 1973 (1) SA 914 (C) at 919A-C, *Sawyer & Anor v Windsor Brace Ltd* [1942] 2 All ER 669, Christie, *The Law of Contract in South Africa* at 329; Cheshire and Fifoot's *Law of Contract* 9th Ed at 641.

In the present case there is no doubt that the appellant agreed to and accepted the contract. He believed that by paying $500 to the respondent he would get custody of his children. The respondent had other ideas; he believed that the $500 was for seduction damages. It is clear that the motive or reason of each party for entering into the contract was different. In the case of each party the motive was a mistaken one but the agreement does not become void because of mistaken motives. See Cheshire and Fifoot's *Law of Contract, supra,* at 244. The contract does not become voidable because the parties had wrong and differing motives. A joint mistake will render a contract void if because of the mistake the contract that is made is impossible to

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perform. This is not such a contract.

Relying on *Katekwe v Muchabaiwa,* 1984 (2) ZLR 112 (SC) Mr *James* argued that the respondent had no right to sue for damages for the seduction of his major niece. In *Katekwe v Muchabaiwa, supra,* the court was dealing with the effect of the Legal Age of Majority Act, 1982 (No. 15 of 1982), on claims for seduction damages by a father or guardian of a girl who has attained the age of majority. In that case I put the issue in the form of a question and answered it as follows *(19):

> Does the father still have the right to sue for damages for the seduction of his major daughter? The answer is simple. He has not because his daughter is a major and cannot vest her own right in her father. He has lost his right under customary law to sue for damages for seduction.

DUMBUTSHENA CJ

> What then is the position? It is this. The right to sue for damages for seduction - a delict - now falls on the daughter. The daughter can sue for damages for seduction under the general law of Zimbabwe, she has now the capacity to do so.

In the present case the question at issue is one of a contract not a delict. Different considerations apply when parties enter into a contract. What binds the two parties in this case is the agreement made between them. In this agreement the appellant was to pay the respondent $500. This is what the respondent seeks to enforce. There is no question of delict entering into the dispute because the respondent relied at the community court on a written contract which was tendered in evidence. While the appellant admitted that he signed the contract, his only defence was that duress was used to make him sign the contract. But his counsel has not sought to argue his appeal on the basis that the signing of the contract was an involuntary act induced by duress. Having conceded that duress was not proved, the appellant failed to make any submission that had substance. The result is that the respondent's case remains intact. The respondent is entitled to claim payment of $500 because the contract was entered into voluntarily.

In these circumstances I would dismiss the appeal with costs.

Beck JA: I agree.

Gubbay JA: I agree.

Sansole & Senda, legal practitioners for the appellant

Lazarus & Sarif, legal practitioners for the respondent

S v MLALA 1985 (2) ZLR 287 (HC)

Court **High Court, Bulawayo**

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Korsah and Manyarara JJ

Criminal Appeal

5 and 29 November 1985

Flynote

Criminal law - sentence - sentencing of women - effect of sentence where complainant does not wish to prefer charges.

Headnote

If the wrong-doer's offence is against the personal property of the complainant and not against the person or the public interest generally, and the complainant does not wish to press charges, then it is impossible to say that the person wronged would derive any satisfaction from any punishment imposed on the wrong-doer. An unwillingness to press charges may be a strong mitigating factor. If the person directly prejudiced can show mercy a court of law cannot ignore such magnanimity.

Cases cited:

R v Zindoga 1980 ZLR 86 (AD); 1980 (2) SA 991 (RAD)

R v Harvey 1967 RLR 203 (AD)

S v Zumbika 1978 RLR 192 (GD);

S v Morgan HS-106-82 (unreported)

S v Louw AD-19-78 (unreported)

S v Chitare HH-189-83 (unreported)

J James for the applicant

G Nyoni for the respondent

Judgment

Korsah J: The appellant was charged with seven counts of fraud committed within the period commencing 29 August 1984, and ending on 16 November 1984. The total prejudice to the complainant was $1 170. She

KORSAH J

pleaded guilty to the charges and was sentenced to serve a term of 12 months' imprisonment with labour, of which six months' imprisonment with labour was suspended on the sole condition of good behaviour. It is against this sentence that she appeals.

The appellant, aged 24 years, is an unmarried mother of a five-year-old child. At the time of the

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commission of the offences under consideration, she resided at her father's house at Tshabalala with her uncle, who was the complainant in this case. She was unemployed, and the father of her child was maintaining neither mother nor child. Although her own father was a teacher, she received no assistance from him because, as she put it, the "did not get on very well."

Some time during the month of April 1984, the complainant gave to the appellant, for safe-keeping, his CABS savings account book and went to work in the communal lands. On 24 August 1984, the complainant collected his savings book from the appellant, withdrew $25 from his account, and returned the book to the appellant. Since then the appellant made seven withdrawals from the complainant's account, all of which totalled $1 170.

When eventually the complainant asked for the return of his savings account book some time in February 1985, he was informed by the appellant that the book had been stolen. It was only when the complainant went to report a stolen savings book at CABS that he was told that his account stood at $14,65 and not $1 184,65 as it should have been.

On 19 March 1985, the appellant was arrested and she admitted making the withdrawals and using the money for her own needs.

At the time of her trial the appellant was employed by Zimbabwe Banking Corporation at a salary of $380, and she had moved her residence to the Montrose area of Bulawayo. She informed the trial court that she had agreed to repay her uncle the whole of the amount she withdrew from his account, by getting a loan and doing part-time accounts.

The offer to make restitution coupled with a real ability to do so is regarded as a mitigatory factor of a particular character. Thus MACDONALD CJ in *R v Zindoga* 1980 ZLR 86 (AD) at 88C-E; 1980 (2) SA 991 (RAD) at 992E-F said:

> In crimes such as theft, restitution is always a mitigating factor. Its exact

KORSAH J

> weight will, of course, depend upon the surrounding circumstances. Generally speaking, it will be given considerable weight where the accused is a first offender. The weight to be given it, however, must be carefully balanced against the need in the public interest for deterrent sentences.

The trial court dismissed the appellant's offer to make reparation on the ground that it was made in a half-hearted manner, and therefore attached no weight to it. Considering that the appellant was a female first offender and that she was employed at the time of her trial, nothing would have been lost by making the appropriate provision for the possibility of her making reparation. The court was in error when it dismissed the offer out of hand.

In *R v Harvey* 1967 RLR 202 (GD) at 205D, MACDONALD AJP said:

> All courts should, and usually do, make a sharp distinction between men and women in the matter of sentence. While this may be due partly to the instinctive tendency of men to deal more gently with the opposite sex, there are cogent practical reasons for treating the sexes differently in the matter of sentence. Although the population is made up of almost equal numbers of men and women, offences involving dishonesty committed by men greatly

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outnumber those committed by women and it rarely happens that a woman is convicted for a second time of such an offence. Recidivists are almost invariably men.

These differences in the pattern of crime are very properly reflected in the sentences imposed for a first conviction for a crime of dishonesty. It is not, in general, considered desirable in the case of a woman who is a first offender to impose an unconditional prison sentence.

If the objects of suspending a portion of a sentence upon a condition that the offender makes reparation are:

(a) to prevent the offender serving a sentence of imprisonment (either in its entirety or in part);

(b) to cause the offender to appreciate fully the consequences of his irresponsible criminal conduct; and

(c) to compensate the injured party for the loss suffered

(see the headnote in *S v Zumbika* 1978 RLR 192 (GD);1978 (3) SA 155 (R))

then the appellant's offer to make reparation presented the trial court with a golden opportunity to suspend the sentence either in part or in its entirety

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KORSAH J

upon a condition that she make full payment to the complainant within a reasonable time.

Mr *Nyoni* contended that although the appellant lived free of rent, when she was entrusted with the savings book by her uncle, she fraudulently converted the $1 170 to her own use within three months, which indicates that she was motivated primarily by greed and not need, and she lied to the complainant when he asked for the return of his savings book. He conceded, however, that, the appellant being a woman, she fell to be sentenced in line with the policy considerations regarding women, and that, although the trial court did make mention of women tending less to recidivism it did not properly consider the overall approach to sentencing women.

In her notice of appeal, it was intimated that leave of this court would be sought to lead evidence to establish that the complainant did not wish to have his niece prosecuted. The purpose of such evidence, said Mr *James,* was that, while conceding that it is the prerogative of the State to determine whether to proceed with the prosecution of any person, the lack of desire on the part of the complainant to have the miscreant prosecuted may be a very weighty mitigatory factor as far as sentence is concerned. An admission by Mr *Nyoni* that the prosecution of the appellant was against the wishes of the complainant obviated the need to lead any fresh evidence on appeal.

It is only fair to point out that the trial magistrate was unaware of the attempts made by the complainant to have the prosecution of his niece dropped, and did not, therefore, consider the weight to be given to that issue, if any. Mr *Nyoni* has left the issue whether or not an

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unwillingness to have a miscreant prosecuted, in such circumstances, can be a mitigating factor, open for this court to decide.

If I may venture an opinion, the object of punishment is as much to assuage the feelings of the person wronged as to protect society from anti-social conduct. It is said, that the person wronged must derive some satisfaction that the wrong-doer has been made to pay a just penalty for his offence, and the wrong-doer must not feel aggrieved that the penalty exacted from him outweighs the seriousness of the offence.

If the wrong-doer's offence is against the personal property of the complainant, and not one against the person or the public interest generally, and the complainant does not wish to press charges, then it is impossible to say that the person wronged would derive any satisfaction from any punishment

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KORSAH J

imposed on the wrong-doer. On the facts of the present case, where the wrong-doer is the niece of the complainant, who did not wish to press charges against her, the complainant would indeed be aggrieved and dissatisfied if his niece were to receive a custodial sentence. In these narrow confines an unwillingness to press charges may be a strong mitigatory factor. If the person directly prejudiced, in such circumstances, can show mercy, a court of law cannot ignore such magnanimity.

Both Mr *James* and Mr *Nyoni* were in agreement that the imposition of a fine and a wholly suspended sentence would be the most appropriate punishment in this case. As a guide to the *quantum* of the fine, Mr *James* referred the court to *Morgan v S* HS-106-82 (unreported); *Louw v S* AD-19-78 (unreported), both of which are summarised in *Chitare v S* HH-189-83 (unreported).

Mr *Nyoni* was not lacking in industry, and brought to our attention three cases, including *Morgan v S, supra,* in which fines have been imposed on females first offenders for theft of like amounts.

Of the cases cited by counsel, that of *Morgan v S, supra,* seemed to be the most appropriate to follow. In that case, the appellant, an unmarried mother of 20 years of age, with a child, some 20 months old, to support, was convicted of thirty counts of theft involving an amount of $1 149, from her employer, over a period of four months. The court doubted that she required so much money over such a short period to purchase medicines for her chronically ill child.

Substituting a sentence of a fine of $300 together with nine months' wholly suspended on condition that full reparation was made, for the original sentence of 12 months of which nine months was suspended, SQUIRES J commented as follows at p 2 of the report:

> . . . it ought to be borne in mind that theft from an employer committed in abuse of a position of trust, is regarded as a serious offence, and any thought that an offender of this nature may buy his or her way out of a consequent sentence of imprisonment by offering to make restitution, should be firmly discouraged. A willingness and ability to make restitution is certainly a factor to take into account in considering a sentence and **in paying regard to the impact of the offence upon the injured party;** but by itself, this by no means achieves the result that such an

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offender will not be sent to prison. And if it were not for the appellant's particularly difficult personal circumstances, we should have been

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inclined to uphold the magistrate's sentence, notwithstanding the failure to take into account the offer to make restitution. (Emphasis mine).

In the instant case, the appellant was unemployed. She was the unmarried mother of a child of five years. She was destitute. Though she was in a position of trust, she did not steal from an employer. The impact of the offence on her uncle (the injured party) was that he did not want to press charges against the appellant. In these circumstances a fine coupled with a wholly suspended sentence seemed to me to be the appropriate punishment.

The above are the reasons why, with the concurrence of my brother MANYARARA, we upheld the appeal on the ground that the sentence was manifestly excessive and substituted the sentence hereunder for that imposed by the trial court.

The accused is sentenced to pay a fine of $300 or, in default of payment, serve three months' imprisonment with labour. In addition six months' imprisonment with labour, the whole of which is suspended for three years on condition that the accused repays through the clerk of the Magistrates Court, Bulawayo, to the complainant the sum of $1 170 in monthly instalments of $100 beginning at the end of November 1985, and continuing on the last day of each succeeding month until the whole sum stolen is paid.

The warrant of committal is suspended until the end of November 1985.

Manyarara J: agrees.

CITY OF HARARE v PARSONS 1985 (2) ZLR 298 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Civil Appeal

7 November and 2 December 1985

Flynote

Administrative law - statutory appeal against decision of administrative agency - powers of appellate tribunal - "Wednesbury principle" - applicabality to statutory appeals.

Appeals - statutory appeals from administrative agencies - nature of proceedings - powers of appellate tribunal.

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Headnote

An appeal from the order of a local supervisory authority to a magistrate in terms of s 7 of the Nursing Homes Registration Act is not a review but an appeal in the nature of a complete re-hearing. The "Wednesbury principle" is applicable only to reviews of administrative action and not to appeals against administrative orders. A tribunal exercising a statutory jurisdiction of appeal amounting to a complete re-hearing is bound to approach the matter afresh with a complete and unfettered discretion giving due weight to the evidence laid before it.

Cases cited:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (CA)

British Airways Board v Laker Airways Ltd & Ors [1984] 3 All ER 39 (HL)

Commissioner of Inland Revenue v da Costa 1985 (3) SA 768 (AD)

Sagnata Investments Ltd v Norwich Corporation [1971] 2 All ER 1141

Tikly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T)

1985 (2) ZLR p294

McNALLY JA

S v Mohamed 1977 (2) SA 531 (AD)

Rosenberg v South African Pharmacy Board 1981 (1) SA 22 (AD)

Libman v General Medical Council [1972] 1 All ER 798

City of Salisbury v Sagit Trust Ltd 1981 ZLR 479 (SC)

Jackson v Adams 1958 R&N 747 (SR)

P A Chinamasa for the appellant

A P de Bourbon SC for the respondent

Judgment

McNally JA: The parties to this dispute have each at various stages played the role of appellant, respondent or applicant. To avoid confusion I shall therefore call them "the City Council" and "Mr Parsons" respectively.

Mr Parsons has wanted for some time to convert part of the Selous Hotel in Harare into a convalescent home for twelve patients on three floors of the east wing of the hotel. He is the owner/manager of the hotel and his wife is a highly qualified nurse.

His first hurdle lay in the fact that town planning permission was necessary. The stand was

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zoned for Residential Buildings which included use as a Licensed Residential Hotel. This is Use Group B1. Convalescent homes fall under Use Group B2 - Residential Buildings (Institutional). Thus an application had to be made to the City Council for a permit in terms of s 27 of the Regional, Town and Country Planning Act, 1976 (No. 22 of 1976). Such permits are required for "development", and "development" is defined in s 22(1)(b)(i) as including:

> the altering of the character of the use of any land or building, other than -
>
> (i) where the existing use and the proposed use both fall within the same prescribed group of land or building uses.

No actual development in the sense of structural alteration or addition was proposed.

This application was refused by the City Council on 5 May 1983. Mr Parsons then appealed in terms of s 39 of the Act to the Administrative Court. He won his appeal. The court unanimously ordered the City Council to issue the permit subject to certain conditions.

I was at one stage concerned that there was no evidence before us as to

McNALLY JA

whether these conditions had been fulfilled. In particular I was concerned about Condition 6, which reads as follows:

> (6) A formal Town Planning Application, accompanied by the prescribed plans for approval to the alteration of the buildings, shall be submitted to the Local Planning Authority on or before 30th June, 1984, or such later date as the Local Planning Authority may approve on good cause shown and on written request being made to it prior to 30th June, 1985.

My concern was simply that if the formal town planning application had not been made in time or, being made, had not been approved, then possibly the permit had fallen away. If that were the case, then there would be no authority for the change of use. Without change of use, there could be no application for registration under the Nursing Homes Registration Act [*Chapter 325*] and the case could be decided on that basis.

Mr *de Bourbon,* who appears for Mr Parsons, has convinced me that we cannot dispose of the case in this fashion. He points out, quite rightly, that the City Council at no stage in the proceedings under the Nursing Homes Registration Act has taken the point that the other proceedings are not yet complete, or that the change of use has not been authorised. He has informed us that as far as his client is concerned the requirement for a formal town planning application was waived because no structural alterations were envisaged.

On consideration I think we must accept that this is so. Mr *Chinamasa,* appearing for the City Council, advised us that he had been unable to obtain instructions on the point, but he had to concede that had there been any merit in the point the City Council would undoubtedly have raised it before the provincial magistrate.

We must proceed therefore on the assumption that town planning permission for the change of use of the premises has been granted. We should not have to make assumptions on such

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important points. But there is no alternative.

Mr Parsons' next step was to apply for registration of his convalescent home in terms of the Nursing Homes Registration Act [*Chapter 325*]. It is an offence to "carry on" a nursing home (which is defined so as to include a convalescent home) without being "duly registered in respect thereof with the local supervising authority in accordance with the provisions of this Act."

McNALLY JA

The local supervising authority, which again is the City Council, may refuse the application on the grounds, *inter alia:*

> that, for reasons connected with situation, construction, accommodation, staffing or equipment, the home or any premises used in connexion therewith are not fit to be used for a nursing home of such description as the nursing home named in the application . . .

(I note in passing that this clearly envisages that there may be different requirements for different kinds of nursing homes).

The City Council in due course did refuse the application. It did so in an order apparently handed down on 22 October 1984. I say "apparently" because, quite astonishingly, the document in which it must have been embodied is not before the court. The Act itself, in s 6(2), provides that a copy of the order be sent to the applicant. Yet we know of its existence only because, in his notice of appeal to the provincial magistrate, Mr Parsons appeals "against the decision of the respondent of the 22nd October 1984". Moreover he goes on in his grounds of appeal to say:

> The conditions sought to be imposed by the respondent are unreasonable, unnecessary for the purpose of attaining the objects of the enabling Act and are in any event *ultra vires* the enabling Act.

No one has bothered to tell us what those conditions were.

In fact there is now a dispute, which we have no means of resolving, as to what those conditions were. In broad terms it seems to be agreed that they had something to do with the provision of different sluicing facilities and a requirement for extra staff. At the hearing there was raised a further fire safety requirement, which Mr Parsons says was raised for the first time at the hearing. It seems likely that he is right.

This is a most unsatisfactory situation. It is difficult enough to resolve disputes when the parties know what they are arguing about. To provide answers when the parties are not agreed as to the questions is a task calling for more than mere judicial skills.

I have run somewhat ahead of the current of events. The Nursing Homes Registration Act provides for an appeal by any person aggrieved by an order of a local supervising authority. The provision is contained in s 7 of the Act,

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which reads as follows:

> 7. (1) Any person aggrieved by an order of a local supervising authority refusing an application for registration or cancelling any registration may, within fourteen days after the date on which the copy of the order was sent to him and in such manner as may be prescribed, appeal against the order to the court of the provincial magistrate; and the appellant or the local supervising authority, if aggrieved by the order made by the magistrates court, may appeal against that order to the Supreme Court.
>
> (2) On any such appeal, the magistrates court or the Supreme Court, as the case may be, may make thereon such order, not inconsistent with the provisions of this Act, as such court may deem fit.
>
> (3) The provisions of the Supreme Court of Zimbabwe Act, 1981, the Magistrates Court Act [*Chapter 18*] and any rules made thereunder shall, *mutatis mutandis,* apply to any appeal made in terms of subsection (1) against an order of the magistrates court as if it were an appeal against the judgment in a civil suit of a magistrate.

Acting in terms of this provision, Mr Parsons appealed to the provincial magistrate. It becomes necessary at once to determine what kind of appeal we are concerned with.

Mr *Chinamasa* contended that the hearing before the magistrate was of the nature of a judicial review of an administrative decision. Therefore the court was limited, in its ability to interfere with the decision, by the parameters set out in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). The headnote of that case adequately sets out the finding of LORD GREENE MR at p 223. It reads, in the relevant part, as follows:

> In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account.

Beyond that, the learned Master of the Rolls said, the court will only interfere "if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it" (see p 230).

Mr *de Bourbon,* on the other hand, contended that the provincial magistrate had wider powers. The Wednesbury principle, as it is called by LORD DIPLOCK in *British Airways Board v Laker Airways Ltd & Ors* [1984] 3 All ER 39 (HL) at 54j, is relevant, he said, only in review cases. In the present case there is a statutory right of appeal. The provincial magistrate is specifically empowered in s 7(2) "to make thereon such order, not inconsistent with the provisions of this Act, as such court may deem fit". He urged the court to hold that the provincial magistrate was entitled to treat the matter as a re-hearing at which he could exercise his own original discretion. He cited *Commissioner of Inland Revenue v da Costa* 1985 (3) SA 768 (AD) at 774H-J in support of this submission.

This court, however, he said, had no such freedom. Relying again on *Commissioner of Inland Revenue v da Costa, supra,* at 775G, he contended that the Supreme Court should intervene only if the provincial magistrate "did not bring an unbiased judgment to bear on the question, or did not act for substantial reasons, or exercised (his) discretion capriciously or upon a wrong

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principle".

In considering the merits of these rival contentions, I must begin by saying that LORD GREENE, in laying down the "Wednesbury principle", was laying it down expressly in the context of judicial review. He said at p 228:

> When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. . . . **it must always be remembered that the court is not a court of appeal.**

In the present case the court of the provincial magistrate is a court of appeal. The court's power to intervene stems from statute, by way of a statutory appeal, rather than from the common law by way of judicial review. One must therefore look to the terms of the statute to determine what kind of an appeal it is. Garner, in the 5th edition of his book *Administrative Law* has this to say at p 99:

> The grounds on which a statutory appeal may be brought also vary considerably. Sometimes the jurisdiction of the court is precisely defined by reference to a number of grounds of appeal, and in some cases a list of this kind is concluded with words to the effect that 'in any other case' the court shall dismiss the appeal. A common ground for a statutory

McNALLY JA

> right of appeal is that the administrative agency against whose decision the appeal is brought, has acted *ultra vires* or otherwise than in accordance with the procedure of the statute. . . . In yet other cases, the right of appeal may be 'at large'; in other words, the appellant will be able to ask the appropriate court to investigate the merits of the matter and to substitute their decision for that of the administrative agency against which the appeal has been brought.

In the present case it seems to me clear that the right of appeal is stated as widely as it could be:

> On any such appeal, the magistrates court or the Supreme Court, as the case may be, may make thereon such order, not inconsistent with the provisions of this Act, as such court may deem fit. (Section 7(2) of Chapter 325).

This very question was considered in the Court of Appeal in England in 1971 in *Sagnata Investments Ltd v Norwich Corporation* [1971] 2 All ER 1441. Sagnata Investments wanted to put up an amusement arcade at Norwich. As in this case they met with the approval of the Town Planning committee. But under the Betting, Gaming and Lotteries Act, 1963 they had to obtain a permit from the Fire Service and Licensing Committee of Norwich Corporation. That Committee refused a permit. The Act provided that in the case of a refusal "the authority shall forthwith inform the applicant of the refusal and furnish him with a written statement of the grounds thereof, and the applicant may appeal ... to the next practicable court of quarter sessions". The applicant duly appealed. The Recorder at Quarter Sessions set out his approach to the appeal in these words:

> . . . I must consider the matter *de novo* . . . I must now approach the matter afresh with a complete and unfettered discretion.

LORD DENNING MR disagreed with the Recorder and dissented from EDMUND DAVIES LJ

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and PHILLIMORE LJ who upheld the Recorder's decision in favour of the appellant. They all three agreed that the Recorder was obliged to give due weight to the view of the local authority. LORD DENNING spoke of giving it "great weight" whereas the others agreed that he should not "lightly reverse the opinion of a duly constituted and elected local authority". Apart from that they were agreed that the appeal was a re-hearing of all the evidence, though LORD DENNING complained that evidence should be limited to evidence of matters raised by the notice of appeal. Otherwise, he said, the Corporation

might be prejudiced (in the present case, of course, it was the individual, Mr Parsons, who was prejudiced by the introduction of new evidence about fire hazards).

Ultimately, however, the difference between LORD DENNING and the other two Lord Justices was that they considered the Recorder had to exercise a fresh discretion with due regard to the Corporation's policy, whereas he considered that the Corporation's policy discretion should not be overruled so long as it was not unreasonable and so long as they had given the applicant a fair hearing.

On the English authority therefore it is clear that a hearing such as that before the provincial magistrate in this case is a complete re-hearing in which the magistrate has a complete discretion to substitute his conclusion on the evidence for that of the local authority. He is not restricted to intervening only if he is satisfied they were unreasonable. He may conclude that their view is reasonable, but his view is different, and if he does he may substitute his view for theirs and rule accordingly. He will not, of course, lightly disagree with the view of a local authority, more particularly, I would add, in technical matters, and where that view is advanced, explained and justified in reasoned and undogmatic terms by competent experts and elected representatives of the people.

I turn to the Roman-Dutch authorities on the same point. Mr *de Bourbon* relied on *Commissioner of Inland Revenue v da Costa, supra,* to support his contentions. The passages at pages 774J to 775G certainly do support them, but it may be said that this case dealt only with the position under the special terms of the South African Income Tax legislation.

For a more general view of the powers of a court on appeal I think the starting point must be the decision of TROLLIP J (as he then was) in *Tikly & Ors v Johannes NO & Ors* 1963 (2) SA 588 (T).

In that case a committee of valuators made a decision on the value of property, and the owners of that property appealed, in terms of the statute, to a revision court consisting of a magistrate and two assessors. The question arose as to what was the nature of the appeal.

TROLLIP J set out three possible interpretations. The appeal might be:

(i) an appeal in the wide sense, that is, a complete re-hearing of, and

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fresh determination on the merits of the matter with or without additional evidence or information . . .;

(ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . .;

(iii) a review, that is a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly . . .

The learned judge decided that the first interpretation was the correct one for three reasons. They appear at pp 591-592 of the judgment, and I summarise them here for convenience -

(i) The wording of the statute;

(ii) The fact that the original tribunal did not conduct judicial or quasi-judicial proceedings and were not obliged to hear evidence, give reasons or keep a record of proceedings;

(iii) The fact that the appellate tribunal had of necessity to hear evidence itself and to determine the issue on the basis of what it heard.

The classification in *Tikly's* case, *supra,* was approved by the *Appellate Division in S v Mohamed* 1977 (2) SA 531 (AD) at 538. There it was held that an appeal from a refusal of bail was an appeal in the wide sense. In *Rosenberg v South African Pharmacy Board* 1981 (1) SA 22 (AD), because of the restrictive words governing the appeal in s 24(2) of the Pharmacy Act, it decided the appeal was of the second kind, ie an appeal in the ordinary strict sense. But even then it was clearly more than a review (see p 33D).

I am satisfied in the present case because of the wide wording of the section granting the right of appeal and because the City Council does not in such cases conduct a full hearing with evidence and argument recorded and reasons given, that the appeal is an appeal in the wide sense.

There may appear to be a conflict between, on the one hand, statements like "appeal in the wide sense", "complete re-hearing" and "fresh and unfettered

discretion", and on the other hand "due weight should be given to the views of the tribunal" and "it should not be lightly be overruled" etc.

It seems to me this conflict is more apparent than real when one appreciates what a "complete re-hearing" involves. In a sense it is far more than a re-hearing, because there has not previously been a hearing at all. In another sense it is more than a re-hearing, because the tribunal which "heard" the matter in the first place itself gives evidence at the "re-hearing". Not only the officials but the members of the tribunal can appear and explain their reasons and their policy considerations.

The present, in fact, is a typical case. Mr Parsons made an application. In due course various

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officials from various departments of the City Council made recommendations. We do not know exactly what those recommendations were, or why they were made. These probably went before a sub-committee of the City Council. There may have been debate. We do not know the details. In due course the sub-committee forwarded the recommendations (perhaps amended or expanded, but again we do not know) to the full City Council. After further debate and discussion, or perhaps as a matter of routine and without discussion, the recommendations were adopted.

All this is brought out in the open at the appeal hearing. The officials are available for cross-examination as to the reasons for their recommendations. The Council members are entitled to give evidence as to their reasons for accepting or rejecting the advice of their officials, and as to their policy in regard to such applications. It may transpire that the Council was divided, approving the proposal by a small majority, or that they ignored or overruled the advice of their expert officials.

Thus, at the end of the day, the whole picture should ideally be before the magistrate. It is not really a question of his giving due weight to the **decision** of the Council. It is a question of his giving due weight to the **evidence** placed before him by the Council. If that evidence shows that the decision was unanimous, well-reasoned, founded on practical common sense, supported by the logical opinion of experts, disinterested, and apparently in the public interest, then naturally the magistrate will give it considerable weight. If on the other hand the evidence shows that the decision was a split decision, taken against the advice of expert officials, based on rigid, dogmatic and inflexible opinions, self-seeking, and unsupported by reasoned argument, then he will probably have no difficulty in overturning it.

McNALLY JA

In the final analysis therefore the *dictum* that the appellate court must give "due weight" to the decision of the tribunal appealed against, means little more, in this type of case, than that it will give proper attention to the evidence that the members and officials of the tribunal place before it. That surely goes without saying.

This situation is to be contrasted with others where the decision of the tribunal appealed against must inevitably carry more weight simply because of the procedures involved. Thus in England in appeals against the General Medical Council, there is a full and wide statutory right of appeal, but the procedure is such that there is not in fact a re-hearing of the evidence. In such cases the *onus* on the appellant in seeking to displace the decision of the tribunal will perforce be greater - see the remarks of LORD HAILSHAM in *Libman v General Medical Council* [1972] 1 All ER 798 at 800a.

At the other end of the scale we have the appeals to this court from the Administrative Court, appeals which are statutorily limited in their scope. That tribunal is headed by a judicial officer, supported by expert assessors. It hears and records evidence; hears argument; and gives written reasons for its judgment. The views of such a tribunal, thus compiled and prepared, are interfered with by an appeal court only:

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> . . . if it finds that the decision was not based on reasonable grounds, that some wrong principle was applied, that matters were taken into account which should not have been considered, or that matters were not considered which should have been taken into account.

(*City of Salisbury v Sagit Trust Limited* 1981 ZLR 479 (SC), citing *dicta* from *Jackson v Adams* 1958 R&N 747 (SR).)

It may be noted that the three examples I have given correspond roughly with the three types of appeal described by TROLLIP J in *Tikly's* case *supra.*

From all this it will be apparent that in my view the appeal to the provincial magistrate permitted by s 7(2) of the Nursing Homes Registration Act [*Chapter 325*] is a full appeal involving a hearing of all the evidence, at the end of which the magistrate has an unfettered discretion, to be exercised judicially, to decide between the merits of the contentions of the appellant on the one hand and the respondent (the local supervising authority) on the other. That, indeed, seems to be the way the provincial magistrate did approach his task.

McNALLY JA

I now return to the facts of the case, and to my earlier observation about the lack of definition of the issues. This is, in effect, a civil trial, and like any other civil trial it requires pleadings so that the issues may be defined. The "pleadings" in a case such as this, and in the absence of any regulations prescribed in terms of s 16 of the Act, should consist of the "notice" referred to in s 6(1), the reply in writing, the offer of an opportunity to show cause, and a record of whatever representations were made. All these are referred to in that subsection. They should also include the order referred to in s 6(2) and the notice of appeal referred to in s 7(1).

None of these documents except the notice of appeal were before the provincial magistrate. They should have been. But it seems to me that it was the appellant who was most seriously disadvantaged by the absence of these documents. In particular it seems he came to court to contest two issues and found himself contesting three.

I turn then to consider the three issues which were contested.

SLUICING

The local supervising authority (the City Council) apparently requires a separate sluice room at the end of each of the three floors, to be fitted with a slop hopper and a stainless steel sink. Mr Parsons argues that in so small an establishment, where each patient has a separate room with its own bathroom and toilet there is no need for such complex and expensive facilities because there is no danger of cross-infection. He contended that his was a convalescent home, not intended for people suffering from infectious diseases. He also produced a document purportedly prepared by the National Association of Medical Aid Societies which set out their grading system for private hospitals. It appears that this body, which is a respected and responsible body, recognised Mr Parsons' convalescent home in 1983 (the requirement for registration under the Act was seemingly overlooked) and classified it as a "D" Grade Private Hospital. "A", "B" and "C" Grade Private Hospitals require a sluice room under this grading

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system but "D" Grade Hospitals do not.

The City Council witnesses on this aspect were Dr Mbengeranwa, the City Medical Officer of Health, and Mr Gorman, the Assistant Chief Health Inspector. Neither of the was aware of the NAMAS document. Neither of them explained how their fear of cross-infection could arise when waste matter from each patient was to be disposed of in that patient's private toilet. Neither seemed to address his mind to the fact that generally speaking the

McNALLY JA

patients would be non-infectious. Neither appeared to draw any distinction between a large general hospital on the one hand, and a small convalescent home on the other. Yet it seems only common sense that the former would require more elaborate sterilization facilities than the latter. And, as I have noted earlier, the Act, in s 4(1)(b), clearly envisages that different criteria should apply to different kinds of nursing homes.

Mr *Chinamasa* put forward some argument based on the risk of cross-infection when one patient left and the next patient moved in. There was no evidence on this question and it was certainly not put to Mr Parsons' witnesses. The same may be said about his argument that washing soiled linen in the bath or basin would lead to some human waste going into an "open gully trap system" whereas it should go to a closed sewerage system. None of this was either raised by the City Council or put to Mr Parsons' witnesses. The words "open gully trap system" do not appear on the record.

It seems to me that on the evidence the magistrate was quite justified in preferring the contentions of Mr Parsons, his wife and the two doctors who all said the system was quite adequate.

STAFFING

Section 16 of the Act provides that the Minister may make regulations about "the proportion of qualified nurses among the persons having the superintendence of or employed in the nursing of patients in a nursing home". The Minister has not made any such regulations. Yet the Medical Officer of Health apparently required a staff of seven whereas Mr Parsons proposed six - two SRN's two SEN'S and two nurse aides. The two SRN's would live in - one of them was his wife. No reason was advanced why seven were required, and indeed the Medical Officer of Health suggested that his proposals were "only guide lines" and later "this was advice only."

Mr *Chinamasa* advanced no argument on this aspect and I cannot fault the magistrate's decision not to uphold this ground of refusal of registration.

FIRE PRECAUTIONS

I have already made the comment that the question of fire precautions does not seem to have been part of the City Council's original complaint. This, of course, would have been clear if we had before us the documents we should have had. It seems evident, from the rather scanty record, that Mr *de Bourbon* did not mention fire safety requirements in his opening remarks, and

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the need for fire precautions was not put to any of Mr Parsons' witnesses. This is

McNALLY JA

strange because Exhibit 6 shows that the question of fire precautions was raised internally in the City Council months before the hearing in the magistrates court.

It may well be therefore that, without leave, the City Council was not entitled to raise the matter. However, no objection was taken and certainly it would be wrong to exclude such potentially important evidence for purely technical reasons.

What seems to have happened is that the day before the hearing a Mr Gatsi, who described himself as a Leader Fireman with the Fire Brigade, number five in rank, inspected the premises "to find out if the minimum requirements were being abided by". He did not refer to any by-laws or explain the policy of the City Council. The requirements he laid down were extremely onerous and would have necessitated extensive re-building. They would probably render the whole project impracticable. It was not made clear what qualifications the witness had, nor indeed what authority he had to speak for the City Council.

It is wholly unsatisfactory that evidence should be given in this manner by or on behalf of the City Council. In the first place it would seem that this witness has simply set out the requirements contained in the Model Building By-Laws, 1977, published in Government Notice 41 of 1978 and adopted by the City Council in Government Notice 363 of 1979. These By-Laws are incredibly complex. That is why I use the words "it would seem". An expert witness, who should give evidence first to prove that he is an expert, should in his evidence explain by reference to the By-Laws why he is suggesting each particular requirement.

The second unsatisfactory feature of this evidence is that these By-Laws relate to how buildings are to be constructed. *Prima facie* they do not govern buildings already constructed at the time the By-Laws were introduced. It seems safe to presume that the Selous Hotel predates the By-Laws. Thus again, *prima facie,* the new By-Laws do not apply. Indeed Mr Gatsi admitted this in cross-examination. Nor is there any basis for saying that as soon as a change of use is authorised the new Building By-Laws become operative. If there were room for such a submission the City Council should have made it in the hearing before the Administrative Court.

I note that in Chapter 11 (Fire Protection) of the new Building By-Laws, the requirements for convalescent homes (under the heading "Institutional

McNALLY JA

Occupancy") are more stringent than for hotels (under the heading "Residential Occupancy").

Under the old By-Laws, Government Notice 704 of 1933, the hotel would have been classed as a "domestic building" whereas the convalescent home would have been a "public building". The fire precaution requirements in respect of these two categories were different, but I am unable

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without expert guidance to say whether as a convalescent home the relevant part of the building would have been acceptable (from a fire precaution point of view) under the old By-Laws. The hotel clearly was and remains acceptable.

The crux of the matter however is this: Does the City Council contend that as a matter of policy it is not prepared to register any nursing home in a building which does not comply with the fire protection requirements of the new Building By-Laws? Or does it contend that it is not prepared to register this particular convalescent home in such a building? In either event, what are the Council's reasons for such a policy or such a decision? They may be good reasons; they may be bad reasons. That is for the court to decide.

Similarly, does the Council contend that as a convalescent home, the relevant wing of the hotel would not have complied with the Fire Protection requirements under the old By-Laws? What would it take to bring it into line with the old requirements? If these changes were made would the City Council be prepared to register the home? If not, why not?

Again, the reasons put forward by the City Council may be good ones or bad ones. It is the function of the provincial magistrate to decide that question. But it is entirely unhelpful for some official to come forward and say in effect "the applicant does not comply with the new Building By-Laws in relation to fire protection". It is unhelpful because it is self-evident.

The question is "Why should he comply with those By-Laws?" The answer by the City Council must be a reasoned answer which will seek to satisfy the provincial magistrate. To say simply "Those are our requirements" is not enough. Yet that is in effect exactly what Mr Gatsi said. At one point he is recorded as saying "Modifications have to be introduced if use is to be changed". He states it as a fact. It is not a fact. It is an argument. His job is to convince the provincial magistrate that it is a good argument. He made no attempt at all to do so. To put it another way, the City Council's witnesses were laying down the law. That was not their function. It was the function of the provincial magistrate. Their function was to persuade and convince the

provincial magistrate that their view was the better view, based on sound reasons. If they succeeded he would lay down the law according to their proposals.

As it was, the City Council witnesses gave no reasons at all why the court should impose the full rigour of the new Building By-Laws on Mr Parsons' proposed convalescent home. The magistrate had no basis whatever for making a finding in favour of the Council.

I would therefore have dismissed the appeal on this ground as well, were it not for one fact. No thought was given by either party, or by the magistrate, to the question whether even under the old By-Laws, the change of use to use as a public building would not have required the owner to submit to fire protection requirements more stringent than those for an hotel. If so, would it not be reasonable and in the public interest for the City Council to require those alterations now before registering the premises as a convalescent home?

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Since this matter was not investigated I do not think it would be right for this court simply to dismiss the appeal. We should not be a party to the creation of a possible fire hazard simply because the City Council's witnesses did not present their case adequately. I note incidentally that Mr Parsons himself concedes that he should be required to confine bed-ridden or non-ambulatory patients to the ground floor.

Accordingly, and in the exercise of the powers contained in s 20(1)(b)(iv) of Act 28 of 1981, I would set aside the judgment of the Provincial Magistrate and I would remit the case to him for further hearing in relation only to the question of fire precautions. Mr Parsons, as the interested party, should set the matter down, and either party may lead such witnesses as they consider necessary and appropriate in relation to fire precautions. The parties should also place before the court the documents to which I have referred in this judgment. The magistrate will then, in the light of the considerations outlined in this judgment, decide afresh whether to allow Mr Parsons' appeal, with or without conditions, or to dismiss it.

As far as costs are concerned, the position is that the City Council has lost on two of the three issues and may or may not lose on the third which it apparently introduced at the last moment. Moreover, if it succeeds, it will succeed on an aspect which it did not even raise.

McNALLY JA

In the circumstances I see no reason why Mr Parsons should not have his costs, both here and in the court below.

In summary therefore, it is ordered that:

1. The judgment of the Provincial Magistrate is set aside;
2. The matter is remitted to him for further hearing in relation only to the question of fire precautions, and subject to the following directions-
    a. The respondent shall set the matter down.
    b. Each party may adduce such evidence and lead such witnesses as it considers necessary and appropriate in relation to fire precautions; and
    c. The parties shall lodge with the court the documents referred to in sections 6 and 7 of the Act, Chapter 325;
3. The appellant is ordered to pay the respondent's costs of appeal; and
4. The order as to costs by the Provincial Magistrate in relation to the hearing before him is to stand.

Beck JA: I agree.

Gubbay JA: I agree

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P A Chinamasa, legal practitioners for appellant

Granger & Archer, legal practitioners for respondent

NATIONAL FOOD DISTRIBUTORS v WELTMAN 1985 (2) ZLR 310 (HC)

Court **High Court, Harare**

Mfalila J

Civil Application for Summary Judgment

4 December 1985

Flynote

Civil Procedure - summary judgment - judgment sought in foreign currency.

Headnote

In the face of Exchange Control restrictions Zimbabwe courts cannot freely give judgments in a foreign currency even where the proper law of the contract is foreign law. Anyone who seeks redress in Zimbabwean courts will have to state his claim and have his judgment in Zimbabwean currency.

Cases cited:

Voest Alpine Intertrading Gesellschaft MBH v Burwill and Co SA (Pty) Ltd 1985 (2) SA 149 (W)

Miliangos v George Frank (Textiles) Ltd [1975] 3 All ER 801 (HL)

R M Fitches, for the applicant

I A Donovan for the respondent

Judgment

Mfalila J: This is an application for summary judgment in the sum of R96 886,05.

The applicant is a South African company carrying on business in that country and the respondent, who is currently resident in Zimbabwe, was at the relevant time resident in South Africa and carried on a bakery business there. When this bakery business collapsed, he left South Africa and came to Zimbabwe. It is for this reason that the claim was instituted in this country, although the cause of action arose in South Africa.

The applicant stated that during the period between October/November 1984

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and March to May 1985 it supplied and sold to the respondent various foodstuffs valued at R96 886,05 in the form of flour, oil and fat which he used to bake bread and related products. This amount, it said, was unpaid at the time the respondent left South Africa and came to reside in Zimbabwe. The applicant's Credit Manager stated in his affidavit that the respondent has no *bona fide* defence to the applicant's claim and that appearance to defend has been entered merely for the purpose of delay.

In his opposing affidavit the respondent set out his defence to the applicant's claim, directed not at the fact of his liability but at the amount claimed. According to him he owes the applicant a lesser sum because, according to him, the following items were not credited to his account:

(a) the proceeds of the wheat subsidy cheques for the months of June, July and August 1985;

(b) his own expenditure on behalf of ASAB in effecting repairs and improvements to the bakery premises;

(c) his own expenditure on behalf of ASAB in effecting repairs to vehicles lent to him in order to put them into the condition in which ASAB had warranted they would be in so as to be fit for their contemplated purpose;

(d) the proceeds of stock returned to ASAB.

I should perhaps deal with the question of the relevant currency first. The claim against the respondent was stated in South African Rands, which is a foreign currency. The question is whether this court can give judgment in a foreign currency. In a recent case, *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co SA (Pty) Ltd* 1985 (2) SA 149 (W), this question was considered against the background of an English decision in *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL) in which it was held that it was competent for a plaintiff, in respect of a contracted debt, to obtain judgment in an English court for payment of a sum of money expressed in the currency of a foreign country, provided the proper law of the contract was the law of that country. In the *Alpine* case (supra) NESTADT J stated at 152B-C:

> I do not intend to canvas what I would term the attractive and persuasive reasoning of the English courts in now adopting what was described in the Barclays Bank case as a revolutionary new procedure, because I do

> not believe the cases in question can avail the plaintiff. The ability to do the conversion as at the date of judgment (or even thereafter) rests, as I understand them, on the court's power to give judgment in a foreign currency. It was not argued on behalf of the plaintiff that this was the position in South Africa and that I could or should accordingly give judgment in a foreign currency, ie US dollars.

I agree with this approach because Britain does not have Foreign Exchange Control legislation; this is an additional reason why the courts of that country cannot feel any inhibition in giving judgments in foreign currencies. But in this country, where the reverse is the case, courts cannot freely give judgments in a foreign currency even where the proper law of the contract is

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foreign law. Anyone who seeks redress in Zimbabwean courts will have to state his claim and have his judgment given in Zimbabwean currency.

Coming back now to the substantive question in this application, the general rule is that summary judgment will not be granted where the respondent is able to demonstrate that he has a *prima facie* defence, in other words where the respondent proves the existence of a triable issue. In the present case the respondent sought to show that the amount claimed by the applicant is not correct because there are certain sums it did not take into account in his favour. There can be no doubt that if this is true and proved, the respondent's liability is much less than what is stated in the claim. I do not accept the contention that this allegation is vague.

For these reasons the application for summary judgment is dismissed with costs.

Coghlan, Welsh & Guest, legal practitioners for the applicant

Atherstone & Cook, legal practitioners for the respondent

WOLFENDEN v JACKSON 1985 (2) ZLR 313 (SC)

Court **Supreme Court, Harare**

Annotations Link to Case Annotations

Beck, Gubbay and McNally JJA

Civil Appeal

22 November and 5 December 1985

Flynote

Estoppel - res judicata - requirements for - maintenance court - whether issues previously decided are binding on the parties - onus.

Delict - seduction - basis of liability of seducer.

Practice and procedure - pleadings - magistrates court pleadings viewed more indulgently than pleadings in High Court.

Headnote

Appellant's claim against respondent for maintenance for her child had been dismissed by a maintenance court on the ground that respondent was not the child's father. Appellant then instituted proceedings against respondent in a magistrates court for damages for seduction, alleging in her particulars of claim that as a result of the seduction she had given birth to the child and had thereby incurred certain out-of-pocket expenses. Respondent's plea in abatement, that the issue of seduction and birth of the child was *res judicata* between the parties, was upheld and appellant's claim was dismissed. On appeal:

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Held that the requirements for the *exceptio rei judicatae,* which is a form of estoppel, are that the previous proceedings relied on must have been between the same parties or their privies and that the same question must arise. The additional requirement mentioned in Voet 44.2.3, that there must also be the same cause of action, means that the parties are estopped from disputing any issue necessarily decided by the court in reaching its judgment in the previous proceedings.

Held, further, that the basis of liability for damages for seduction does not depend on the failure to establish the respondent's paternity issue of paternity of the child was *res judicata* between the parties, and this was

fatal to appellant's claim for out-of-pocket expenses incurred in consequence of the seduction.

Held, further, however, that the basis for liability for seduction is the defloration of the girl and the lessening of her changes of making a suitable marriage; since the issue of whether or not respondent had had sexual intercourse with the appellant and whether or not she was a virgin at the time was not decided by the maintenance court, it was still open to her to claim general damages for seduction.

Held, further, that the appellant's particulars of claim should not have been construed as linking irrevocably the conception of the child with the act of seduction, firstly because the courts adopt an indulgent and more liberal attitude towards pleadings in a magistrates court as against pleadings in the High Court and tend to uphold their validity if at all possible; and secondly, because the burden of establishing *res judicata* was on the respondent and he should have applied for further particulars clarifying the issue.

Cases cited:

Le Roux en 'n Ander v Le Roux 1967 (1) SA 446 (A)

Bertram v Wood (1893) 10 SC 177

Boshoff v Union Government 1932 TPD 345

Veley v Vinjevold 1935 NPD 578

Turk v Turk 1954 (3) SA 971 (W)

Liley v Johannesburg Turf Club 1983 (4) SA 548 (W)

Mvaami v Standard Finance Ltd 1976 (2) RLR 257 (GD); 1977 (1) SA 861 (R)

African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (AD)

Jacobs v Lorenzi 1942 CPD 394

Wepener v Joubert 1943 EDL 262

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Louw v van Rensburg 1982 (3) SA 36 (SWA)

Bull v Taylor 1965 (4) SA 29 (A)

Ellisons Electrical Engineers Ltd v Barclay 1969 (2) RLR 461 (AD); 1970 (1) SA 158 (RAD)

Lowrey v Steedman 1914 AD 532

C N Greenland for the appellant

M J Gillespie for the respondent

Judgment

Gubbay JA: On 22 March 1983 the appellant, an unmarried woman, (to whom I shall refer hereafter as "the plaintiff") gave birth to a baby boy. The

GUBBAY JA

respondent ("the defendant") disputed that he was the father and refused to provide maintenance. So on 21 April 1983 a summons was issued under s 4(1) of the Maintenance Act [*Chapter 35*], calling upon him to show cause before the maintenance court why he should not be ordered to maintain the child in the sum of $85 per month. Confident that the impregnator was another, the defendant proposed that the plaintiff, the baby and himself, should submit to blood tests in order that the issue of paternity be determined. The plaintiff agreed and on 18 July 1983 blood samples were taken from them and examined by a Dr Emmanuel. On analysis these showed that an antigen in the baby's blood is not present in that of the plaintiff. In the opinion of Dr Emmanuel it must have been inherited from the baby's natural father and as the defendant does not possess the particular antigen he could not be the father.

On the strength of the forensic evidence the maintenance court, on 18 August 1983, dismissed the plaintiff's complaint, holding that in terms of s 6(2)(a) of the Maintenance Act the defendant was not legally liable to maintain the child.

The plaintiff failed to note an appeal timeously against the judgment of the maintenance court. It was only three months later that she applied to this court for condonation. Her application was opposed and ultimately refused by GEORGES CJ.

Thereafter on 31 May 1984 the plaintiff issued a summons out of the magistrates court against the defendant. The relevant paragraphs of the particulars of claim read:

3. On the 8th July 1982, the defendant seduced and had sexual intercourse with the plaintiff as a consequence whereof the plaintiff became pregnant and on the 22nd March 1983 gave birth to a child.

4. As a consequence of such seduction the plaintiff sustained damages in an amount of $1 200,00.

5. The plaintiff in giving birth to such child incurred lying-in medical and nursing expenses

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in the sum of $322,05.

In answer to a request for further particulars, para 3 was amplified by including the allegation that the seduction occurred at the defendant's residence and that she was a virgin at the time. The defendant responded by filing a plea in abatement in these terms:

Plaintiff's claim is *res judicata* in that the issue of defendant's seduction

GUBBAY JA

of her and the consequent birth of her child was the subject matter of a claim by plaintiff under Case No M 114/83 in the maintenance court for the Province of Mashonaland held at Harare, in which case a final judgment was awarded in favour of defendant.

The magistrate upheld the *exceptio rei judicatae* in respect of both claims for damages and dismissed the action with costs. It is against that decision that the appeal to this court now lies.

The *exceptio rei judicatae* is based principally upon the public interest that there must be an end to litigation and that the authority vested in judicial decisions be given effect to even if erroneous. See *Le Roux en 'n Ander v Le Roux* 1967 (1) SA 446 (A) at 461H. It is a form of estoppel and means that where a final and definitive judgment is delivered by a competent court, the parties to that judgment or their privies (or, in the case of a judgment *in rem,* any other person) are not permitted to dispute its correctness. The origin of the doctrine is to be found in the civil authorities, which laid down two requirements for its successful invocation, namely, that the proceedings relied upon must be between the same parties or their privies, and that the same question, *eadem quaestio,* must arise. (See *Bertram v Wood* (1893) 10 SC 177 at 180.) In Roman-Dutch law the requisites were divided into three. Voet 44.2.3 says that there must also be the same cause of action. This third requirement was commented upon by GREENBERG J in *Boshoff v Union Government* 1932 TPD 345 at 349 to the following effect:

> *Voet's* words for the last requisite are *ex eadem petendi causa.* This rule is quoted with approval in *Bertram v Wood* (*loc cit,* at p 181). In a later decision in the Cape Supreme Court by the same learned Judge, (*Wolfaard v Colonial Government* 16 SC 250), he says: 'As pointed out by *Voet* (44.2.4.), the cause of action is the same whenever the same matter is in issue.'
>
> It does not appear to me that where *Voet* (in 44.2.3) speaks of the same cause of action, he means the cause of action in the narrow sense in which it is used by us as a term of pleading. It appears from *Voet* (44.2.4) that, to use his own words, 'where it is competent to employ both the redhibitory action and the action *quanti minoris* on account of the article purchased being tainted with such a defect that the buyer would for that reason not have purchased it . . .' then if one action is used, the subsequent action can be met by the pleading of *res judicata.* Now the redhibitory action and the *quanti minoris* action are different causes of

GUBBAY JA

> action and it appears to me, therefore, that *Voet* cannot be using the words 'cause of action' or *eadem petendi causa* in the narrow pleading sense that they are sometimes used in our courts.

In determining what was meant by "the same cause of action" the learned judge at 350 invoked the English authorities on "issue estoppel" and applied the formulation in Spencer-Bower's *Res*

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Judicata, s 162, (now Spencer-Bower and Turner), which reads:

> Where a decision set up as a *res judicata* necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the fact of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms; but, beyond these limits, there can be no such thing as a *res judicata* by implication.

Some academic doubt has been expressed recently as to whether GREENBERG J was correct in holding that parties are estopped from disputing an issue decided by the judgment of a court as distinct from being estopped only from relying upon the same cause of action (see Hoffman and Zeffert, *South African Law of Evidence,* 3 Ed at 267). But the fact remains that since 1932 the approach in *Boshoff's* case, *supra,* has been applied in numerous decisions. I need only mention *Veley v Vinjevold* 1935 NPD 578 at 581; *Turk v Turk* 1954 (3) SA 971 (W) at 972C-G; *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551A-H; and, in this jurisdiction, *Mvaami (Pvt) Ltd v Standard Finance Ltd* 1976 (2) RLR 257 (GD); 1977 (1) SA 861 (R) at 866E- H Indeed Mr *Greenland,* who appeared for the plaintiff, accepted the law as there stated. In my opinion, he was correct in so doing.

The status of the maintenance court as a competent court is clearly established by s 22(1) of the creating Act. It is there provided that every order made by a maintenance court that is a magistrates court has the effect of a civil judgment of that magistrates court and that the provisions of the Magistrates Court Act [*Chapter 18*] and the rules made thereunder relating to the enforcement of a civil judgment apply to that order. Nor can it be doubted that in dismissing the plaintiff's complaint the maintenance court delivered a final and definitive judgment as opposed to an interlocutory order (see *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977

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(2) SA 38 (AD) at 45 *in fine* - 46C); for the refusal to make an order in terms of s 6 of the Act is specifically made appealable under s 27(1). At the present time the enquiry is not whether that judgment is right or wrong but simply whether there is a final judgment in existence.

Faced with the insuperable difficulty that the issue of paternity of the child had been adjudicated upon between the same parties by the maintenance court, and that its judgment was of a final nature, Mr *Greenland* wisely conceded that the plea of *res judicata* was fatal to the plaintiff's claim for repayment of the out of pocket expenses incurred in consequence of the alleged seduction. Clearly the defendant's liability depends, not on whether he seduced the plaintiff, but on whether he is the father of the child. See *Jacobs v Lorenzi* 1942 CPD 394 at 400; *Wepener v Joubert* 1943 EDL 262 at 270; *Louw v van Rensburg* 1982 (3) SA 36 (SWA) at 39D-E.

Mr Gillespie, for the defendant, accepted that the basis of liability for seduction is the defloration of the girl and for lessening her chances of making a suitable marriage. See *Bull v Taylor* 1965 (4) SA 29 (AD) at 39A. He further acknowledged that the issues of whether the defendant had intercourse with the plaintiff on 8 July 1982 and whether the plaintiff was a virgin were not

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decided by the maintenance court. He argued, however, that in para 3 of the particulars of claim the plaintiff has linked irrevocably the conception of the child with the act of seduction; or, to express the matter another way, the identity of the seducer with the identity of the father; and since the maintenance court held that the defendant is not the father the inevitable conclusion is that he was not the seducer. The argument is not without attraction, but the difficulty is that it relies upon a particular construction being given to para 3. One must read into the pleading that subsequent to 8 July 1982 the plaintiff did not hae sexual intercourse with anyone else which led to her pregnancy.

For two reasons I do not consider that it is justified to import such an inference. In the first place, pleadings in the magistrates court are not to be examined under a magnifying glass. Magistrates courts adopt an indulgent and more liberal attitude towards them as compared with pleadings in the High Court. The tendency is rather to uphold their validity if at all possible and try to determine what the real issues are between the parties. See *Ellisons Electrical Engineers Ltd v Barclay* 1969 (2) RLR 461 (AD) at 464C-D; 1970 (1) SA 158 (RAD) at 161A-B. Secondly, the burden of establishing the special plea of *res judicata* was, of course, on the defendant (see *Lowry v Steedman* 1914 AD 532 at 539), and it seems to me that in order to found the

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argument raised by Mr *Gillespie* an attempt should have been made to obtain from the plaintiff, by means of a request for further particulars, an admission that from the date of the alleged seduction to the date of her certain pregnancy she had not engaged in sexual intercourse with anyone else. Such an averment would have negated the possibility of the plaintiff being wrong with regard to the **consequence** of the defendant's alleged seduction of her; and since out of her own mouth no one but the seducer could have fathered the child, and as the issue of paternity had been adjudicated upon adversely to her, the *exceptio rei judicatae* would then logically have stood as a bar to the claim for seduction damages.

In the result I am satisfied that the magistrate erred in upholding the special plea to the cause of action for seduction. He ought simply to have ordered that the words "as a consequence whereof the plaintiff became pregnant and on the 22nd March 1983 gave birth to a child" be struck out from para 3.

The question of costs remains. In my view this is a case where it is appropriate that the parties should bear their own costs, both in this court and in the court *a quo.* The plaintiff has not achieved substantial success. She has succeeded on the one cause of action but failed on the other. The degree of success of both parties is equal. Accordingly I would order as follows:

1. The appeal in respect of the cause of action pleaded in para 3 of the particulars of claim to the summons is allowed.

2. The appeal in respect of the cause of action pleaded in para 5 of the particulars of claim to the summons is dismissed.

3. There will be no order as to the costs of the appeal.

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4. The judgment of the court a quo is altered to read:

The plea of *res judicata* is upheld in respect of the cause of action pleaded in para 5 of the particulars of claim to the summons and in respect to the words 'as a consequence whereof the plaintiff became pregnant and on the 22nd March 1983 gave birth to a child' in para 3 thereof. For the rest it is dismissed. There will be no order as to costs.

Beck JA: I agree.

McNally JA: I agree.

Atherstone & Cook, legal practitioners for appellant

Winterton Holmes & Hill, legal practitioners for respondent

STAMBOLIE & ANOR v NYAMUTAMBA TRANSPORT (PVT) LTD 1985 (2) ZLR 320 (HC)

Court **High Court, Harare**

Sandura JP

Petition

7, 8 November and 11 December 1985

Flynote

Companies Act [Chapter 190] - petition for provisional winding up order - ss 179(f), 178(a) and 178(c) - strict compliance with requirements of s 178(a) required - bona fide and reasonable dispute as to indebtedness will defeat a claim based on s 178(c).

Headnote

In an application for a rule nisi calling upon interested parties to show why the respondent should not be wound up in terms of the Companies Act [*Chapter 190*], the petition relied on s 179(f) of the Act to show that the respondent was unable to pay its debts. Accordingly petitioners relied on the provisions of ss 178(a) and 178(c) of the Act. Section 178(a) lays down three conditions with which a petitioning creditor must strictly comply. Failure to comply with each condition will defeat a claim based on it. Similarly before a petitioner can rely on s 178(c) he must satisfy the court the respondent is unable to pay his debts. If the respondent can show that he has a bona fide and reasonable defence to the claim giving rise to the indebtedness this section will be of no assistance to the petitioner.

Cases cited:

Phase Electric Co (Pty) Ltd v Zinmans Electrical Sales (Pty) Ltd 1973 (3) SA 914 (W)

BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd 1978 (2) SA 481 (T)

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Re Lympne Investments Ltd [1972] 2 All ER 385

Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd 1979 (1) SA 265 (W)

McLeod v Gesade Holdings (Pty) Ltd 1958 (3) SA 672 (W)

A N H Eastwood for the petitioners

A P de Bourbon SC, with him *R M Fitches* for the respondent

Judgment

Sandura JP: In this matter the petitioners have applied for a rule nisi calling upon all interested parties to show cause why the respondent should not be wound up in terms of the Companies Act [*Chapter 190*]. The petition is for a provisional winding-up order by the court on the ground that the respondent is unable to pay its debts in terms of s 179(f) of the Companies Act. This is disputed by the respondent company which opposes the application and alleges that because of several counterclaims which it has against the petitioners it does not owe the petitioners any money and that, in fact, the petitioners owe it a sum in the region of $73 000.

The facts of this case show that there have been various business dealings between the petitioners and the respondent since 1983. The petitioners supplied the respondent with meat and other products to enable the respondent in turn to fulfil its contract for the supply of these products to the Army. The petitioners alleged that as a result of these business dealings the respondent owes them more than $200 000. They further allege that as the respondent has failed to pay this debt it is unable to pay its debts in terms of s 179(f) and should be wound up. With regard to the respondent's inability to pay its debts, the petitioners rely upon the provisions of s 178(a) or (c) of the Companies Act. These provisions read as follows:

178. A company shall be deemed to be unable to pay its debts -

(a) if a creditor, by cession or otherwise, to whom the company is indebted in a sum exceeding one hundred dollars then due, has served on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office and if the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor; or

(b) . . .; or

(c) if it is proved to the satisfaction of the court that the company is

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unable to pay its debts and, in determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

I must now look at the facts of this case in order to determine whether or not the petitioners can rely upon the provisions of s 178(a) or (c) to establish that the respondent is unable to pay its debts. Mr *de Bourbon,* who appeared for the respondent, submitted that the petitioners cannot

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rely upon these provisions because the requirements laid down therein were not complied with. I propose to deal with the provisions of s 178(a) first. Quite clearly, para (a) lays down a number of conditions with which a petitioning creditor who intends relying upon the paragraph must comply. These are:

(a) that the company must be indebted to the petitioning creditor in a sum exceeding one hundred dollars, which must be due;

(b) that the creditor must serve on the company a demand requiring it to pay the sum so due by leaving the demand at its registered office; and

(c) that for three weeks thereafter the company must have neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

These conditions or requirements are the same as those found in the South African Companies Act. In *Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W), COETZEE J considered these conditions and had this to say at 917B-C:

> The way in which this section is framed is significant. Only if the prerequisites enumerated in a conditional clause exist, does the court have the power to order a winding up of the company on this ground. Hence each of the conditions contained in this sub-section must be strictly satisfied a *priori.* 'Service' on the company of a demand is required and the method of its service is exclusively described as 'by leaving the same at its registered office.'

The learned judge went on to hold that the statutory requirement regarding service of the demand was not complied with where the letter of demand was merely sent to a post office box although the letter had been received by the company. A similar view was expressed by MARGO J in *BP & JM Investments (Pty) Ltd v Hardroad (Pty) Ltd* 1978 (2) SA 481 (T) at 487A-B.

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In the present case the letter of demand written on behalf of the petitioners was dated 7 August 1985. It is common cause that this letter was received by the respondent not later than 8 August 1985. However, the petitioners do not state in their founding affidavit the manner in which the letter of demand was served on the respondent. Furthermore, the petition was issued on 22 August 1985, ie fourteen days after the letter of demand had been received by the respondent. Thus, even if one were to assume that the letter of demand had been properly served on the respondent, the respondent was not given the period of twenty-one days to pay the sum demanded. The petition was, therefore, issued too early. MEGARRY J dealt with a similar situation in *Re Lympne Investments Ltd* [1972] 2 All ER 385. In that case the learned judge dismissed the petition for the winding up of a company on the ground that it had been issued one day too soon as the period of three weeks from the service of the demand had not expired. In the case before me, I am satisfied that the petitioners did not comply with the provisions of s 178(a). The petition was issued prematurely and there is no evidence to show that the letter of demand was properly served upon the respondent in terms of s 178(a). In the circumstances, the petitioners cannot rely upon the provisions of s 178(a) in order to establish that the respondent is unable to pay its debts. I must now determine whether they can rely upon the

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provisions of s 178(c).

Before the petitioners can rely upon s178(c), they must prove to the satisfaction of the court that, taking into account the contingent and prospective liabilities of the respondent, the respondent is unable to pay its debts. In this regard it is to be noted right from the outset that the petitioners have not alleged in their affidavits a general inability on the respondent's part to pay its debts. As far as this aspect of the matter is concerned, the respondent denies being indebted to the petitioners and, in fact, alleges that the petitioners are indebted to it in the sum of about $73 000. The issue which I must now determine is whether the petitioners are creditors. The determination of this issue is complicated by the fact that there are many facts which are in dispute in this case. These relate to how much money the respondent paid to the petitioners and whether the various counterclaims which the respondent says it has against the petitioners are genuine.

Whether the petitioners succeed or not depends entirely upon whether the debt in question is disputed by the respondent on *bona fide* and reasonable grounds. This has been made abundantly clear in a number of cases. In *Machanick Steel & Fencing (Pty) Ltd v Wesrhodan (Pty) Ltd* 1979 (1) SA 265 (W), NESTADT J had this to say at 269A-B:

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> In my approach to this matter I must bear the following in mind. An application for the liquidation of a company should not be resorted to to enforce the payment of a debt which is bona fide disputed by the company. The liquidation of a company affects the interests of all creditors and shareholders and an order for its liquidation should not lightly be granted on the application of a single creditor (*Badenhorst v Northern Construction Enterprises (Pty) Ltd* 1956 (2) SA 346 (T)). On the other hand, as appears from this case, where it *prima facie* appears that a respondent is indebted to an applicant in an application of this kind, the onus is on the respondent to show that such indebtedness is disputed on bona fide and reasonable ground.

The same principle was expressed by RAMSBOTTOM J in *McLeod v Gesade Holdings (Pty) Ltd* 1958 (3) SA 672 (W) at 678E, as follows:

> It is well recognised that a winding-up order will not be made where there is a *bona fide* dispute as to an existence of a debt. Where there is a *bona fide* dispute, the court may order an applicant to prove his debt by action before applying for a winding-up order, but . . . the dispute must be a *bona fide* one.

Thus it is well established that winding-up proceedings should not be resorted to in order to enforce payment of a debt, the existence of which is *bona fide* disputed on reasonable and substantial grounds; the procedure is not designed for the resolution of disputes as to the existence or non-existence of a debt.

I now turn to the respondent's counterclaims against the petitioners in order to determine whether the respondent disputes its indebtedness to the petitioners on *bona fide* and reasonable grounds. It is common cause that if the counterclaims are unfounded the respondent's indebtedness to the petitioners would be in excess of $200 000. Before dealing with the respondent's counterclaims it is pertinent to state that prior to 5 July 1984 there was in existence a partnership between the respondent and the first petitioner. That partnership broke up on 5 July 1984. Subsequently, a provisional liquidation order was made against the

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respondent. This order was later discharged for reasons which I need not go into. Having said that, I now proceed to deal with the three major counterclaims raised by the respondent against the petitioners.

The first of these counterclaims arose out of meat purchases from the Cold

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Storage Commission by the partnership and by the respondent. It is the respondent's contention that it was charged by the first petitioner the sum of $117 981,42 for its own meat and for which it had already paid the Cold Storage Commission the sum of $61 441,77. The relevant paragraph (pp 6-7) of the respondent's answering affidavit filed with the Registrar of this court on 27 August 1985 reads as follows:

> At the time of the provisional liquidation of respondent on the 5th July 1984, respondent had shortly prior to that date raised its own guarantee with the Cold Storage Commission for the supply of meat to it and had in fact, ordered meat up to the 5th July 1984 at a value of $61 441,77. ... This meat was delivered direct to first petitioner's premises by the Cold Storage Commission and it was the respondent who ultimately paid the Cold Storage Commission for this meat through the guarantee raised through NEM Insurance Company (Zimbabwe) (Private) Limited.
>
> At the time of the break-up of the partnership between respondent and the first petitioner, it was accepted by first petitioner that of this meat ordered from the Cold Storage Commission, it had stocks to a value of $15 528,70. . . . The respondent in provisional liquidation was subsequently charged by the first petitioner for the balance of the meat supplied by the Cold Storage Commission, excluding the stock on hand referred to above for a total sum of $102 452,72, which sum was paid by N K Peake Trust (Private) Limited to the first petitioner on behalf of the respondent, who was then in provisional liquidation. Effectively, therefore, respondent was charged, including the stock in hand, $117 981,42 for its own meat and for which it had already paid the Cold Storage Commission $61 441,77. The respondent is entitled to and has therefore applied set off against the amounts due to first and second petitioners. It is stressed, again, that the first and second petitioners sorted out payments amongst themselves.

Dealing with this claim in their answering affidavit the petitioners aver that this claim was part of an overall settlement reached between the parties and that, therefore, there is no basis for the respondent to raise it now. Paragraph 9 of their answering affidavit reads as follows:

> The whole purpose of the settlement that was arrived at was to achieve an overall resolution of all the disputes and it was never intended to achieve only a partial resolution of those disputes.

SANDURA JP

This is denied by the respondent.

The second counterclaim raised by the respondent against the petitioners arises out of transport charges, ie charges for the delivery of petitioners' goods by the respondent. The relevant paragraph of the respondent's answering affidavit on p 7 reads as follows:

> After the partnership ceased on the 5th July 1984, respondent collected and delivered goods for first and second petitioners over the period 5th July 1984 to 31st July 1985 and over this period travelled a total distance of 23 632

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> kilometres, which respondent is entitled to invoice the first and second petitioners for at the rate of twenty cents per kilometre/ton based on a seven ton truck. The total charge amounts to $33 084,80. . . .

Dealing with this claim, the petitioners again allege that all disputes between them and the respondent were part of an overall settlement already referred to in this judgment. In para 16 of their answering affidavit the petitioners aver as follows:

> . . . Whilst it is correct that the respondent did collect various ration supplies for the petitioners, it did so in the course of effecting other collections from the petitioners of meat and supermarket products supplied by the petitioner to the respondent and it incurred no significant extra mileage in carrying certain other supplies for the petitioners on the same occasions. Certainly at no time did the respondent ever suggest that there was a charge to be raised for carrying these relatively small amounts on trips that were anyway being made by the respondent and nor was any invoice ever presented for such charges to the petitioners. The first sight I had of the invoice was after the present petition was launched.

Again the respondent denies this claim as part of the overall settlement already referred to and maintains that it is entitled to charge the petitioners for the services rendered.

Finally, the third major counterclaim raised by the respondent against the petitioners involves the sum of $1 565 612,60. The respondent alleges that during the period extending from 5 July 1984 to 1 August 1985 the petitioners overcharged the respondent for the beef, bacon and other meat products which they supplied to the respondent by $156 612,60. It is alleged that for a long time the petitioners charged incorrect prices for beef and bacon and its substitutes in terms of the Rations Supply Tender to the Ministry of Defence.

SANDURA JP

Again, this is denied by the petitioners.

It can be seen, therefore, that there are some very serious disputes of fact between the parties. These disputes involve very large sums of money. The respondent's counterclaims can hardly be described as spurious. In my opinion the disputes between the parties cannot be resolved on the basis of the affidavits filed by the parties. However, I am satisfied that the respondent disputes its indebtedness to the petitioners on *bona fide* and reasonable grounds. If proved, the respondent's counterclaims would completely wipe out the respondent's indebtedness to the petitioners. In these circumstances, the petitioners cannot rely upon the provisions of s 178(c) to establish that the respondent is unable to pay its debts. In any event, as the learned authors of *Henochsberg on the Companies Act* 3 ed state at p 607:

> The court has a discretion as to whether or not a winding-up order is to be made and, in a case where the creditor's claim is disputed, the court will generally exercise its discretion against making an order at the instance of a person claiming to be a creditor if it is satisfied that the claim is *bona fide* disputed on reasonable and substantial grounds . . .

As I have already concluded that the debt in question is disputed by the respondent on *bona fide,* reasonable and substantial grounds, I must exercise my discretion in favour of the respondent in dismissing the application. As far as costs are concerned both Mr *Eastwood,* who appeared for the petitioners, and Mr *de Bourbon* agreed that costs should be awarded to the successful party. Both counsel also agreed that the wasted costs of 10 October 1985 should

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be borne by the respondent. They further agreed that if the respondent succeeded in its opposition to the application, the costs awarded to it should include the costs of employing three legal practitioners.

In the circumstances it is ordered:

> That the application be and is hereby dismissed with costs, which costs shall include the costs of employing three legal practitioners, but exclude the wasted costs of 10 October 1985, which shall be borne by the respondent.

Kantor & Immerman, legal practitioners for the petitioners

Scott & Associates, legal practitioners for the respondent

S v MUCHIMIKWA 1985 (2) ZLR 328 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Criminal Appeal

21 November and 13 December 1985

Flynote

> Criminal procedure (sentence) - murder - extenuating circumstances - youthfulness - investigation of issue - need for thorough investigation and statement of reasons for finding.

Headnote

Youthfulness of an offender in itself may amount to an extenuating circumstance; a teenager is *prima facie* regarded as immature and on that ground extenuation can be found especially if other factors influenced his personality on account of his youthfulness; an older person of 20 years or more can show by acceptable evidence that he was psychologically immature to the extent that his immaturity could serve in extenuation. A detailed analysis of the issue of extenuation is necessary.

Cases cited:

S v Lehnberg & Anor 1975 (4) SA 553 (A)

S v Phillips & Anor 1985 (2) SA 727 (N)

S v Ngoma 1984 (3) SA 666 (A)

S v Ceaser 1977 (2) SA 348 (A)

S v Mapatsi 1976 (4) SA 721 (A)

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S v Felix & Anor 1980 (4) SA 604 (A)

S v Sigareta & Anor S-65-84 (unreported)

S v Charamba S-146-82 (unreported)

S v Simbi & Anor S-118-82 (unreported)

A Thompson for the appellant

E Chatikobo for the respondent

1985 (2) ZLR p329

Judgment

McNally JA: The appellant was convicted of murder by the High Court on circuit at Mutare. No extenuating circumstances were found and he was sentenced to death.

His appeal was heard by the court despite the fact that no notice of appeal has been filed. The fact that appeals in cases when the sentence of death has been imposed are regarded as virtually "automatic" should not lead to an abandonment of the proper procedures. The High Court of Zimbabwe Act, 1981 (No. 29 of 1981), provides in s 44(2)(c) that a person may, if sentence of death has been passed upon him, appeal to the Supreme Court against his conviction or the sentence or both such conviction and sentence. Unless notice of appeal and grounds of appeal are lodged in terms of Part IV of the Rules of this court, we do not know whether the appeal is against sentence only or against both conviction and sentence.

Even where, as here, counsel finds himself unable to put forward any submission, a notice of appeal in proper form should be submitted.

On the facts of this case the court had no difficulty in accepting that counsel's inability to put forward any submissions in relation to conviction was well-founded. The evidence that the appellant had stayed with the deceased was common cause. The evidence that after a short interval of days he returned to visit the deceased was given on the basis of voice identification by someone who was familiar with the appellant. Any danger in relying on such evidence was eliminated by the evidence of the appellant's confirmed confession, and of his indications to the police of the site where he had hidden property missing from the deceased's hut. The property was recovered from this hiding place in his presence and identified by acceptable witnesses. The appellant's efforts to shake all this evidence were wholly unsuccessful.

There is no substance whatever in the appeal against conviction.

As far as the sentence of death is concerned, this followed inevitably upon the finding of an absence of extenuating circumstances. This finding in turn is not adequately documented in the record. The learned judge is recorded as saying:

> Mr Henning has said all that can possibly be said in the accused's favour in relation to whether or not there are any extenuating circumstances in this case.

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McNALLY JA

> We have examined these various factors that have been put forward, and have thought very hard as to whether or not anything else may be said in the accused's favour. But we find that none of these factors, even if true, can be regarded as extenuating circumstances.

We do not know what counsel said. Apart from the question of the appellant's age, to which I will return, there is nothing to be said. This was a particularly callous attack on a young man who had befriended the appellant and taken him into his home as a guest for some days. The motive for the attack was theft. After the attack the appellant went back to the deceased's house and stole a quantity of his personal possessions. The indications are that it was a premeditated attack. The deceased was walking all unsuspectingly with the appellant when the latter hit him twice from behind on the head with a stick which he had collected for the purpose. The appellant then left him, dying, but not yet dead, and returned to the house from which he removed the property.

The only factor which merits consideration in relation to extenuation is the age of the appellant. It seems that originally he was alleged to be 27. In his defence outline he says "that he is 19 and not 27 years of age". In the doctor's report he is described as " apparent age 18". In his evidence, which was not challenged, he says he was born on 2 February 1965. This would make him 18 years old as at the date of the murder, 4 August 1983. The photographs of him in Exhibit 6 show a young man who could well be 18 or 19 at the time they were taken.

On the other hand the appellant claims to have been in the Army (the liberation forces) since 1975. He admits he was then a "young boy" (p 114 line 18). On his version he would have been 10 years old in 1975. Moreover, his previous convictions reveal that he was treated as an adult in October 1981, when on his version he was only 16 years and 8 months old.

There is nothing in s 314 of the Criminal Procedure and Evidence Act [*Chapter 59*] to prevent the court from sentencing to death a person of 18 or 19 years of age, who is indeed a major in terms of the Legal Age of Majority Act, 1982. Nevertheless the courts are particularly concerned about the death sentence being imposed on young people. As RUMPFF CJ said in *S v Lehnberg & Anor* 1975 (4) SA 553 (AD) at 560 (and I quote from the official translation):

> In the first place youthfulness in itself amounts to an extenuating

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> circumstance. This is part of our common law. The Legislature has, it is true, laid down that the sentence of death is compulsory when someone of 18 years or older commits a murder, [NB our law in Zimbabwe lays down 16 years or older] except when there are extenuating circumstances, but the discretion of considering youthfulness as an extenuating circumstance has not been removed.

Later in the judgment (at 561 of the translation) the learned CHIEF JUSTICE continued:

> As far as the question of extenuation is concerned, teenagers should, in my opinion, in general be considered immature, and therefore entitled to extenuation, unless the circumstances of a case are such that a court feels

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itself compelled to impose the sentence of death. There are of course degrees of maturity where teenagers are concerned, but naturally no teenager has the maturity of an adult. Youthfulness is immaturity, lack of experience of life, thoughtlessness and especially a mental condition prone to being influenced, especially by adults. And a person of 18 or 19 years is, in my opinion, immature, whether he is still at school or university or has already worked for a year or longer. To impose the death sentence on youths, without more ado, is to measure the youth with the same yardstick as a mature adult. And I do no think that the administration of justice in a civilised State is anxious, except in exceptional circumstances, to send teenagers to the gallows. For this reason the youthfulness of teenagers is often considered as an extenuating circumstance by our courts. I am further supported in this attitude by data appearing in the latest annual report of the Department of Prisons, and further information gained with the help of the Attorney-General of the Transvaal. According to this report, for the year ending 30 June 1974, 43 persons have been executed during that year. Twenty-five persons have on the other hand been reprieved. I am aware of the fact that in certain cases new facts came to the notice of the Executive and also that the Executive is free to reprieve whomsoever it wishes, but the percentage of those reprieved remains striking. This in any case means that in 25 of the 68 cases in which the Supreme Court had found no extenuating circumstances, the Executive, for whatever reason, has commuted the sentence of death. Concerning the 43 persons executed and the 25 reprieved the following information has been gained in connection with the youthfulness of those reprieved. The age mentioned is the age of the convicted person at the time of the commission of the offence. No person of 17 years has been executed and one has been reprieved. No person of

McNALLY JA

18 years has been executed and one has been reprieved. Four persons of 19 years have been executed and five have been reprieved. Three persons of 20 years have been executed and six have been reprieved.

In view of these considerations I am of the opinion that the death sentence ought only to be imposed on a teenager, who has committed a murder, if it actually appears that he killed out of inherent wickedness. Such an approach does not mean that in such a case no *onus* rests on the accused with regard to extenuating circumstances. It only means that a teenager is *prima facie* regarded as immature and on that ground extenuating circumstances can be found, unless it appears that the wickedness of his deed rules out immaturity. The youthfulness of a teenager will serve as extenuation especially if other factors influenced his personality on account of his youthfulness. It also means that a person of 20 years of age or older can show, by acceptable evidence, that he was psychologically immature to the extent that his immaturity could serve in extenuation.

The approach in the *Lehnberg* case, *supra,* has been followed consistently in South Africa, the most recent reported examples being *S v Phillips & Anor* 1985 (2) SA 727 (N) and *S v Ngoma* 1984 (3) SA 666 (AD).

In the latter case the appellant was found to have been 18 years old at the time that he shot and killed a farmer's wife in the course of a housebreaking and and theft. The trial court, by a majority, found no extenuating circumstances. The appeal court found that there was no actual intent to kill but only *dolus eventualis.* It had no evidence of any significance about the appellant's background. In the final analysis the conclusion of the court was expressed by CORBETT JA at 676D as follows:

Having considered all the relevant circumstances, the youthfulness and immaturity of the appellant, his lack of education and unsophisticated background, and the circumstances of the crime, and paying some regard to the fact that it was committed with *dolus eventualis,* I am of the opinion that the only reasonable conclusion is that extenuating circumstances were present. I do not think that in all the circumstances the commission of the crime should be attributed to inherent wickedness. . .

Accordingly the finding of the majority of the trial court was set aside, a verdict of murder with extenuating circumstances was entered, and a sentence of 15 years' imprisonment with labour

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was imposed in lieu of the death sentence.

McNALLY JA

On the other hand in *S v Ceaser* 1977 (2) SA 348 (AD) a young man in his twentieth year (ie 19) at the time of the offences had also been found guilty of murder without extenuating circumstances, despite the absence of *dolus directus.* The Appellate Division noted that there was nothing traumatic or out of the ordinary in his upbringing and background. In all the circumstances it declined to interfere with the finding of the trial court. It confirmed the death sentence.

There was an elaboration by RUMPFF CJ of the comments he made in *Lehnberg's* case, *supra,* in the case of *S v Mapatsi* 1976 (4) SA 721 (A) at 724C-D in which he said:

> Murder is always a wicked deed and whenever it has to be considered whether the accused's youthfulness cannot serve as extenuation, then not only must the nature of the act be considered, but also the motive with which the crime was committed, the personality of the accused and other relevant factors which, in the particular instance, come to light in order to determine whether the offence was committed from the inherent wickedness of the accused. (Translation.)

The facts of that case were that the appellant and up to four other youths accosted three drunken men. In the course of the confrontation the appellant for no apparent reason knifed the deceased to death. The CHIEF JUSTICE, taking notice of his illiteracy, his wandering and uncontrolled childhood and his youthfulness, came to the conclusion that extenuating circumstances should have been found. It is of particular interest to note that the appellant had a number of previous convictions. Of these the learned CHIEF JUSTICE had this to say at 724H-725E:

> The appellant admitted certain previous convictions and it is enlightening to see how someone like the appellant, who has probably lived from a tender youth without encouragement or being subject to authority, was punished. I mentioned 'encouragement' because the witness Kwenane, who apparently knows the accused very well, was asked whether the appellant was 'stupid', and her answer was 'no, he is not stupid'. Still, the appellant said that he only went up to sub - B Whether he completed sub - B nobody knows. He did say that he could not read or write. When appellant was 15 years old, he was sentenced to four strokes with a light cane for theft of a jacket. When he was 17 years old he was convicted of two counts of housebreaking with intent to steal and theft. If at that stage a proper enquiry had been made, it would most probably have come to

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> light that he was in need of immediate supervision and education so that he could possibly fulfil a useful role in society. Secs. 342 and 343 of the Criminal Procedure Act, 56 of 1955, make provision for such education and supervision. Instead of an educational punishment he received, as a 17 year old, three months' imprisonment on each count. On 13 May 1975, when he was 18 years old, he was convicted of assault with intent to do grievous bodily harm. Again, nothing was done to try and make something out of him and he was simply sentenced to eight strokes with a light cane and then released into society. On 31 May he committed the murder of the deceased in this case, but was arrested only later. On 31 July 1975 he was found guilty of malicious injury to property, viz. damaging window panes. With what he already had behind him, he was sentenced for a third time to strokes, five strokes with a light cane. In my opinion, what has happened in this case shows how our courts sometimes neglect to try and save by way of a suitable punishment in time a young and physically defective

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> analphabete, who had been degenerating into an aimless roamer not under supervision, from himself an for the sake of the community. It must also be emphasised, as has frequently been remarked in the past already, that fruitless application of strokes serves no purpose and that, as appears from this case, compulsory education and supervision would probably have prevented a lot more than imposition of strokes.

See also *S v Felix & Anor* 1980 (4) SA 604 (AD) at 611C *et seq.*

In this court there has not, to my knowledge, been any disapproval of Lehnberg's case, supra. It was referred to quite recently in the appeal of *Sigareta & Anor v S* S-65-84 (not reported). But there the young men involved were between 20 and 21 years of age, and the appeal on the ground of youthfulness failed. In *Charamba v S* S-146-82, the age of the appellant was between 20 and 24 and this was regarded as relevant, but not of sufficient weight to overturn a finding that there were no extenuating circumstances. Again, in *Simbi & Anor v S* S-118-82 (unreported), this court remitted the matter for further investigation of age and a reassessment of the finding on extenuating circumstances in the light of the decision on the age of the appellant. The court did not advert to the decision in *Lehnberg's* case *supra.* Nor did it do so when the matter was re-heard (S-128-83), and the sentence was confirmed despite the youthfulness of the appellant.

I must say that the investigation of this very important and possibly crucial factor in the court *a quo* was not altogether satisfactory. The defence may

McNALLY JA

well have thought that when the appellant's bald assertion as to his age (which is, of course, strictly hearsay and thus inadmissible) went unchallenged, then that was the end of the matter. On the other hand the appellant went a long way towards contradicting what he said, by claiming to have gone to war at the age of 10 and by admitting in effect that he was treated as an adult in court when on his version he was only 16.

As a result it is impossible to say whether or not the trial court made any finding on the question of his age when considering extenuation. I have earlier cited the words of the judgment on this aspect. I should add that the finding as to the intent of the appellant was somewhat cryptic, and a more detailed analysis is desirable.

All in all, it seems that the only safe course is to follow the procedure adopted in *Simbi's* case, *supra.* Accordingly the sentence of death is set aside and the matter is remitted to the trial court with leave to either party to lead further evidence as to the age of the appellant. It would be desirable for the State to arrange for a scientific medical examination of the appellant to be undertaken, subject, of course to his consent. In considering whether to give consent he will no doubt be advised as to the question of *onus* in matters of extenuation.

The trial court is to consider afresh the question of extenuating circumstances, and will then pass the sentence it considers appropriate.

Beck JA: I agree.

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Gubbay JA: I agree.

Pro Deo

AGERE v NYAMBUYA 1985 (2) ZLR 336 (SC)

Court **Supreme Court, Harare**

Beck, Gubbay and McNally JJA

Civil Appeal

28 November and 13 December 1985

Flynote

Interpretation of statutes - presumption against retrospective operation - distinction between alteration in procedure and change in substantive law.

Legislation - Legal Age of Majority Act, 1982 s 3(3) - whether retrospective.

Headnote

The Legal Age of Majority Act, 1982, effects an alteration of the substantive law in that it deprives the guardian of a major ward of a vested right to sue for seduction damages; it is not retrospective in effect. It is a fundamental rule of construction in our law that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or impair existing rights or obligations unless such a construction is clearly intended or arises as a necessary implication, for instance where it is expressly retrospective, or deals with past events, or concerns matters of procedure, practice or evidence.

Cases cited:

Curtis v Johannesburg Municipality 1906 TS 308

R v Granger 1958 (2) SA 443 (AD)

Esat NO, ex parte 1974 (2) SA 197 (C)

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

Principal Immigration Officer v Purshotam 1928 AD 435

R v Margolis & Ors 1936 OPD 143

Bartman v Dempers 1952 (2) SA 577 (A)

Katzenellenbogen Ltd v Mullin 1977 (4) SA 855 (A)

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Re Athlumney, Ex parte Wilson [1898] 2 QB 547; [1895-9] All ER Rep 329 (QBD)

Yew Bon Tew v Kenderann Bas Mara [1982] 3 All ER 833 (PC)

B Mparadzi for the appellant

No appearance for the respondent

Judgment

Gubbay JA: In May 1967 the respondent's ward, his sister Patricia, was seduced by the appellant. She was then aged twenty-four. Seventeen years later, at which stage even the overly optimistic respondent had lost all hope of the appellant purging his wrong by offering his hand in marriage, a summons was issued out of the community court claiming damages. At the trial which followed the appellant took the point *in limine* that the effect of the Legal Age of Majority Act, 1982, which came into operation on 10 December 1982, was to deprive the respondent of *locus standi in judicio.* The presiding officer overruled the objection and after hearing evidence in respect of the measure of damages suffered - the seduction being admitted - awarded the respondent $250. Thereupon the dissatisfied appellant challenged the ruling on the legal issue, but not the extent of the award, before the district court. In that forum he fared no better. Ever persistent, he now appeals to this court.

The contention advanced by Mr *Mparadzi* , who appeared for the appellant, is that the Legal Age of Majority Act, and in particular s 3(3) thereof, is concerned with procedure in courts of justice as opposed to substantive law, and in the absence of any express provision to the contrary, regulates the procedure in every action for seduction damages after its coming into force, even though the cause of action arose before that operative date or the action was then pending. Accordingly, on and after 10 December 1982, *locus standi* to bring the action vested in Patricia and not in the respondent.

Section 3(3) of the Act, where relevant, reads:

> (3) The provisions of subsections (1) and (2) (which reduce the age of majority from 21 to 18 years) shall apply for the purpose of any law including customary law . . .

If this provision, read in the context of the Act, is procedural in nature then the result is that urged by Mr *Mparadzi,* for no person has a vested right in any course of procedure. If the Legislature alters the mode of procedure the subject can only proceed according to the altered mode. See *Curtis v*

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Johannesburg Municipality 1906 TS 308 at 312; *R v Granger* 1958 (2) SA 443 (AD) at 449; *Ex parte Esat NO* 1974 (2) SA 197 (C) at 198G-H; *Maxwell on The Interpretation of Statutes* 12 Ed at 222.

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Difficulty is often occasioned in determining whether an enactment affects procedure and consequently will act retrospectively, or whether it affects substantive rights with the presumption against retrospective operation not being rebutted. The distinction between the two may be extremely fine. Fortunately that is not the situation here. Nothing is clearer from the judgment of DUMBUTSHENA CJ in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) than that the effect of s 3(3) of the Act is to rid the guardian of a major ward of a vested right acquired under customary law to sue for seduction damages. This is what the learned CHIEF JUSTICE had to say at pp 127H-128C:

> Finally I now turn to the question in issue: Does the father still have the right to sue for damages for the seduction of his major daughter? The answer is simple. He has not because his daughter is a major and cannot vest her own right in her father. He has lost his right under customary law to sue for damages for seduction. What then is the position? It is this. The right to sue for damages for seduction - a delict - now falls on the daughter. The daughter can sue for damages for seduction under the general law of Zimbabwe, she has now the capacity to do so. That she was given, so to speak, by s 3 of Act 15 of 1982. She can bring her claim for damages for seduction under the general law. If she does and damages are granted and her father brings a claim for damages under the customary law, he will be non-suited. He will have no cause of action.
>
> The result of the conclusion to which I have come is this: The daughter can sue for damages for her seduction and not the father. If the daughter is a minor the right of action remains with the father under the customary law. I believe this was the intention of the Legislature. It accords with both the letter and the spirit of Act 15 of 1982.

The question, of course, remains whether Parliament intended to prejudicially interfere **retrospectively** with the guardian's vested right to use.

It is a fundamental rule of construction in our law, dating probably from Codex 1:14:7, that there is a strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impair existing rights or obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it

is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that the Legislature intends to deal only with future events and circumstances. In *Principal Immigration Officer v Purshotam* 1928 AD 435 at 450 STRATFORD JA succinctly set out this general rule as follows:

> The rule of interpretation is well established; it is that where in express terms or by necessary implication (which is much the same thing) the enactment is to have a retrospective effect, that effect must be given to it whatever the consequences may be. If, on the other hand, the clear intention to have a retrospective effect cannot be extracted from the words used in their context, then the enactment must not be taken to affect pre-existing rights.

These words echo what INNES CJ said many years earlier in *Curtis'* case, *supra,* at 311, namely:

> The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the courts will not find that it intended so inequitable a result as the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion.

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(See also *R v Margolis & Ors* 1936 OPD 143 at 144; *Bartman v Dempers* 1952 (2) SA 577 (AD) at 580C; *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (AD) at 884D; and WRIGHT J's well-known exposition of the rule in *Re Athlumney, Ex parte Wilson* [1895-9] All ER Rep 329 (QBD) at 331I-332B).

In *Yew Bon Tew v Kenderann Bas Mara* [1982] 3 All ER 833 (PC) a more flexible approach was adopted. It was there held that the proper approach "is not to decide what label to apply . . . , procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights or obligations" (per LORD BRIGHTMAN at 839f).

But whether the classic approach or the more flexible one is applied, the answer in this case is the same. There is just no indication that the Legislature intended that s 3(3) of the Act, affecting as it does the vested right of the guardian under the customary law to sue for the seduction of a major ward, should operate retrospectively.

GUBBAY JA

Accordingly the appeal must be dismissed. As the respondent did not appear, no order for costs is made.

Beck JA: I agree.

McNally JA: I agree.

Brian Mparadzi & Co, legal practitioners for appellant

S v MAKAMBA 1985 (2) ZLR 341 (SC)

Court **Supreme Court**

Beck, Gubbay and McNally JJA

Criminal Appeal

26 November and 31 December 1985

Flynote

Evidence - administrative action - proof of - need for production of actual order, prohibition, permit etc. - omnia praesumuntur rite esse acta - limits of maxim.

Legislation - Emergency Powers (Maintenance of Law and Order) Regulations, 1983 s 11(3)(b).

Headnote

The appellant had been convicted of entering or remaining in a protected area without a permit

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so to do. The only evidence given as to the existence of the protected area was the *ipse dixit* of the arresting policeman and an area Youth Brigade leader. Held the order declaring the area to be a protected are ought to have been produced; the maxim *omnia praesumuntur rite esse acta* does not apply to an essential averment in the charge.

Cases cited:

R v Mathlaba 1951 (1) SA 49 (T)

R v John 1962 R&N 13 (SR); 1962 (2) SA 654 (SR)

R v Henkins 1954 (3) SA 560 (C)

R v Dillon [1982] 1 All ER 1017 (PC)

Sigaba v Minister of Defence and Police & Anor 1980 (3) SA 535 (Tk)

A P de Bourbon SC for the appellant

F S Chambakare for the respondent

Judgment

McNally JA: The strange feature of this case is that it is the accused person who did not appeal, Siyafa Msipa, whose guilt was in our opinion not established on the evidence. Accordingly, and in the exercise of my powers of review, and with the concurrence of BECK and GUBBAY JJA, I have already directed that he be released from prison.

The appellant, Makamba, and his co-accused, Msipa, were both charged with a contravention of s 3(1), as read with s 3(2), of the Precious Stones Trade Act, 1978 (No. 8 of 1978), in that:

> . . . upon or about the 5th day of August 1984, and at or near Hlatini village, Mberengwa, in the Midlands Province, the said accused, not being a licensed dealer or otherwise authorised in terms of the Act, did wrongfully and unlawfully deal in or possess precious stones, to wit 19 uncut emeralds.

Makamba was also convicted on a second count with which I shall deal later, involving his being unlawfully in a protected area.

The State evidence was given by two young women, Anah Msipa and Melody Dhani, and a Youth Brigade leader, Collen Maphosa. Further evidence was given by a policeman but that evidence related only to Count Two.

The two young women were sisters. Both were nieces of Msipa and Anah Msipa was the girlfriend of Makamba. They travelled with the two accused and two others, in Makamba's car, from Zvishavane to the village called Hlatini. At the village Collen Maphosa approached Makamba and questioned him about his reason for being there. It was then, after some persuasion, that Makamba took Maphosa to where 19 emeralds were hidden, in an anthill near Msipa's house. Makamba then tried to convince those assembled that the emeralds were Msipa's but Msipa denied all knowledge of them.

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It is convenient to deal first with the evidence against Msipa. The fact is that both the young women say in their evidence that Msipa simply came in the car with Makamba because he wanted a lift to his home village. There is no evidence that he expected Makamba to arrive in Zvishavane that night. Moreover both the girls deny that there was a stop on the journey when Msipa and Makamba went together into the bush. It was on this occasion, according to Makamba, that Msipa showed him the emeralds. That is why, he says, he was able to show the emeralds later to Collen Maphosa.

McNALLY JA

There was nothing in Collen Maphosa's evidence that inculpated Msipa.

Thus the only evidence against Msipa was contained in what Makamba said. It is obvious that a court cannot rely solely on what one accused person says in order to convict the other. Makamba had every reason to lie; because unless he blamed Msipa he had no explanation for how he came to know where the emeralds were.

There is only one part of Anah Msipa's evidence which could be said to implicate her uncle, Msipa, and that is when she said that both the accused stated they were going to Mberengwa to look for their stones. That part of her evidence is however very confused. She said first that the two accused arrived at her house at about 10.30 pm, and said they were going to "look for their things". But from what she said later (and she was confirmed on this point by Melody Dhani) it is quite clear that she does not allege that the two accused arrived together. It is possible that she said "they" arrived, meaning the accused Makamba and his friends Isaac and Lovemore. The interpreter may then have translated "they" as "the two accused". It is common cause that Msipa did not arrive with Makamba and his two friends. Msipa was at the house all along, asleep in another room. Her evidence therefore is probably the result of a misunderstanding or a mistranslation.

Mr *Chambakare,* who appeared for the State, quite properly conceded that there was not sufficient evidence to convict Msipa. Accordingly his conviction and sentence have been set aside as a matter of review.

I now turn to the evidence against Makamba, the appellant. He was the only one of the witnesses in court who did not actually come from Hlatini village. He is a travelling salesman based in Harare. So one is entitled to ask "Why did he go to the village, and how did he know about the emeralds hidden in the anthill?"

He was not truthful about his reasons for going there. In his defence outline he simply said he went to visit his girlfriend in Zvishavane, and then "from Zvishavane we went to Mberengwa Communal Land". He gives no reason. He says that on the way Msipa, who was his "father-in-law", and to whom he had given a lift, tried to interest him in emeralds, and even showed him some, but he was not interested.

Anah Msipa says that he told her he was going to the village "to look for his things" which he later amplified by saying he wanted to look for stone.

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McNALLY JA

Melody Dhani also said that he told her "he wanted to go and buy his things - I would say stones. He mentioned that he wanted to buy stones".

The Youth Brigade leader, Collen Maphosa, also gave evidence about the appellant's stated intentions, but I must confess I am unhappy about the admissibility of the statements made to this man. It is evident that he took his job as Youth Brigade leader very seriously. He approached the appellant, obviously having some prior information, and, in his own words, "I told them to tell the truth and said that if they told lies we would hand them to the Police or Army".

The appellant of course was unrepresented, but the magistrate should have considered the question of whether the provisions of s 242 of the Criminal Procedure and Evidence Act [*Chapter 59*] had been complied with.

It seems to me quite evident that they were not. The Youth Brigade leader was a person in authority, who made threats that he would hand the appellant over to the Police or the Army unless he told the truth. In consequence of those threats the appellant changed his story and led Maphosa to the emeralds. The examples given at pp 852-853 of Vol V of Lansdown and Campbell *South African Criminal Law and Procedure* (Criminal Procedure and Evidence) clearly support the view that statements made in such circumstances are not made freely and voluntarily and without undue influence and are thus inadmissible. The fact that the appellant led Maphosa to the emeralds is of course admissible in terms of s 243 of the Act.

It is true that the two young women may well have been lying to protect their uncle. But there was no need for them to implicate the appellant in order to protect their uncle. They could perfectly easily have said that he did not tell them why he was going to the village.

Then when he came to give evidence the appellant for the first time claimed to have gone to the village to see his girlfriend's aunt so that she could solve the problems of his wife's three miscarriages. He said his girlfriend (Anah Msipa) knew of these problems and indeed it was she who suggested calling in aid her aunt.

In my view it is quite extraordinary, even for an unrepresented accused, not to have put this version to Anah Msipa in cross-examination. Nor is it an improper introduction of inadmissible evidence "by the back door" to record that he did not give this explanation to Collen Maphosa. This allegation

McNALLY JA

appears for the first time in the appellant's evidence. I think the magistrate was justified in rejecting the appellant's explanation for his presence at Hlatini Village.

In the result we have two facts -

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1. The appellant went to the village for a reason as to which he has lied to the court;

2. The appellant was able to produce emeralds concealed in an anthill near the village.

It seems to me to be an irresistible inference that the reason he went to the village was to deal in some way with the emeralds. That inference is confirmed by the evidence of the two young women. The only reasonable conclusion is that the appellant is guilty of dealing in or possessing the stones as charged, bearing in mind the enormously wide definition of "deal" in s 2 of Act 8 of 1978:

> 'deal' in relation to precious stones, means buy, sell, barter, pledge, exchange, give or receive, or offer or expose for sale, barter, pledge or exchange, or have any other dealing or transaction whatever.

At the very least he was an accomplice of the possessor of the emeralds in that he must have come to Hlatini village in response to an offer to sell him the emeralds. Whether the offeror was his co-accused Msipa or someone else, we simply do not know.

Accordingly I would uphold the conviction. The sentence, which is a mandatory minimum one of three years' imprisonment with labour, was not challenged on appeal.

I turn next to consider the second count which concerned the appellant only.

The appellant was convicted of contravening s 11(3)(b) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983, contained in SI 458 of 1983, in that he entered or remained in a protected area without a permit.

As proof that the area concerned was a protected area the State led the evidence of a policeman who was a Detective Patrol Officer in the Gold Section. He said it was "a protected area for non-residents - 100

kilometres". This means presumably that the area forms a circle around a point (the mine?) with a radius of 100 kilometres. He continued:

> Where accused was arrested is 17 kilometres from the mine. It is within the protected area. There are police signs displayed at various entries into the area. I know which road accused used. There is a warning sign on the road. It is clearly visible. A big sign, black background with an arrow and white letters.

Later he said "permits are now issued at Gold Section Offices. A person from Harare would have to get a permit from us in Bulawayo".

The appellant denied that he knew it was a protected area. He admitted he saw a sign with "Protected Area" but he said he thought the area referred to was fenced.

For completeness' sake I should mention that the Youth Brigade leader for the area also said the area was protected. He had been told so by Comrade (Minister) Richard Hove. He said there were posts to show it was a protected area, posts at Chegudu area and Kombani area.

Neither of these two witnesses was the "protecting authority" authorised to make the order, and

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thus *prima facie* their evidence on the point was hearsay and thus inadmissible.

It does not seem to me that this is the proper way for the State to prove that an area is a protected area, especially when the penalty for being in one without a permit is imprisonment for up to a year without the option of a fine. Freedom of movement is a fundamental right under the Constitution s 22). The curtailment of that right is a serious matter.

Under the heading "The Proof of Subordinate Legislation" Garner in his work *Administrative Law* 5 Ed at 92 says:

> Judicial notice is taken of all public statutes . . . Judicial notice will also be taken of Rules of the Supreme Court . . . but in general Orders in Council and Ministerial Regulations are not so noticed and so have to be proved before the courts. This is done quite simply, by the production of a copy of the statutory instrument in question . . . and the same rule applies also to any other regulation so issued. In the case of a regulation or other form of subordinate legislation (for example the type of sub-

McNALLY JA

> delegated legislation considered in *Blackpool Corporation v Locker*) which has not been printed by HM Stationery Office, a copy either printed or written (or partly printed and partly written) certified by the appropriate certifying officer in the Department concerned will be receivable in evidence in any court. If it is necessary to prove, for the purpose of criminal proceedings, that a Minister has 'approved' some object, this must be done strictly; thus a circular from the Home Office stating that the Secretary of State had approved a particular device for the purpose of carrying out a breath test authorised under the Road Safety Act, 1967, was held not to be admissible as evidence of approval by the Secretary of a particular piece of equipment used in a specific case.

In our law there is no difficulty about proving the making of the order by the protecting authority. In terms of the provisions of s 56(3) of the very Regulations with which we are concerned:

> A copy of any order, permit, prohibition, declaration or directive made or given under these regulations and certified under the hand of the appropriate authority making or giving it shall on its mere production in any proceedings before a court be accepted as *prima facie* proof of the making and of the contents thereof.

So it is not even necessary to call the protecting authority or his deputy to prove the making of the order or its contents. I make no comment as to whether such a person should be called to give evidence as to the way in which public notice of the order has been given, in terms of s 56(2) of the Regulations.

It is obviously of the greatest importance that the order should be produced in court before someone is sent to prison for the breaching of it. In the first place, it will be the best evidence that the order was indeed made. Secondly, it will enable the court to be satisfied as to its formal validity. Thirdly, the court will be able to see the extent of the order, both geographically and in point of time or duration. Finally, the court will be able to see whether the order applies to the accused person, because an order under s 11 declaring an area to be a protected area may either "prohibit" the entry of persons or "regulate" the entry of persons. Thus s 11(3) provides that:

> **Subject to such exceptions as may be provided for in the order** made in terms of subsection (1) no person shall enter or remain in a protected area unless . . . (My emphasis).

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McNALLY JA

It has been suggested that the maxim *"omnia praesumuntur rite esse acta"* operates in such situations, so as to enable the court to presume the formal validity of official acts. In *R v Mathlaba* 1951 (1) SA 49 (T) the accused were charged with public violence in resisting police attempts to break up a meeting which had been prohibited by the Minister of Justice. There was no admissible evidence to show that the Minister had prohibited the meeting. The magistrate and the police had ordered the prohibition on the basis of a telegram purporting to come from the Minister. The court held that as it was the duty of the magistrate and the police to have acted upon the telegram their actions must be presumed to have been lawful.

Hoffman and Zeffertt, *South African Law of Evidence* 3 Ed at 430, comment somewhat unenthusiastically that this case is "perhaps the highwater mark of the doctrine". I can find no record of its having been referred to in any subsequent reported judgment in the South Africa Law Reports. Certainly the more general view is that the maxim "does not apply to an essential averment in a charge of a type which is usually proved by evidence in the normal way" (per BEADLE CJ in *R v John* 1962 R&N 13; 1962 (2) SA 654 (SR)). This is the stand that has been taken in several jurisdictions - *R v Henkins* 1954 (3) SA 560 (C); *Dillon v R* [1982] 1 All ER 1017 (PC); *Sigaba v Minister of Defence and Police & Anor* 1980 (3) SA 535 (Tk).

I am satisfied that where, as here, it is of the essence of the State case that there was an order made, the State must prove the order that was made by using the method of proof envisaged by the Regulations themselves or some other method involving admissible evidence. Indeed the issue here is not whether the order declaring the protected area has been made properly and in due form (*"rite"*) but whether it has been made at all and, if so, in what terms. It is patently a matter of substance and not one of form.

On this ground alone, and without going further into the merits, I am satisfied that the conviction on this count must be set aside.

In the circumstances the following order is made -

1. By way of review the conviction and sentence on the accused person Siyafa Msipa are set aside.

2. The appeal by the appellant Takawira Augustine Makamba in relation to count 1 is dismissed and the conviction and sentence on that count are confirmed.

McNALLY JA

3. The appeal against conviction and sentence on count 2 is allowed, and they are set aside.

Beck JA: I agree.

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Gubbay JA: I agree.

Lazarus & Sarif, legal practitioners for appellant

DULY & COMPANY LTD v SHONGE 1985 (2) ZLR 351 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck and Gubbay JJA

Civil Appeal

5 December 1985 and 15 January 1986

Flynote

Hire - purchase - seller - whether bound by representations made by supplier of goods - supplier - whether vulnerable to action by purchaser of goods.

Sale - Aedilitian remedies - warranty - what amounts to - whether remedy may be based on warranty given by supplier of goods sold by finance company in hire-purchase contract.

Headnote

The respondent concluded a hire-purchase agreement with a finance company in terms of which the finance company sold respondent a vehicle supplied by the appellant. Before the agreement was concluded, appellant's salesman had told the respondent that the vehicle was "in good working condition" and that he knew this because of "the report that came from the workshop". The vehicle subsequently broke down and respondent had it repaired by the appellant but refused to pay appellant's charges on the ground that the salesman's assertions amounted to a warranty.

Held that the salesman's assertions went beyond mere praise and commendation; they were statements of fact material to the purpose for which respondent wanted the vehicle and induced respondent to enter into the hire-purchase agreement. They therefore constituted a warranty entitling the respondent to the Aedilitian remedies.

Held, further, that it did not matter that the warranty was given by the appellant, the supplier of the vehicle, and induced the respondent to enter into a hire-purchase agreement with a third party; respondent could sue appellant for breach of the warranty even though the terms of the hire-

purchase agreement precluded any such action against the finance company.

Held, further, that before would-be purchasers conclude hire-purchase agreements, they should enter into collateral agreements with the suppliers of the goods warranting the quality or

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suitability of the goods supplied.

Cases cited:

Phame (Pty) Ltd v Paizes 1973 (3) SA 397 (AD)

Brown v Sheen and Richmond Car Sales Ltd [1950] 1 All ER 1102

Wells (Merstham) Ltd v Buckland Sand and Silica Co Ltd [1964] 1 All ER 41 (QBD)

AFIC (Pty) Ltd v Rhodesia Commercial Flying School (Pvt) Ltd 1970 (2) RLR 85 (GD)

F C Blackie SC for the appellant

M J Gillespie for the respondent

Judgment

Dumbutshena CJ: The appeal is against the decision of the magistrates court sitting at Harare dismissing the appellant's claim made against the respondent for the payment of the sum of $1 215,66 for work done and material used in the repair of a Nissan truck belonging to the appellant.

The appellant is a car dealer. The respondent is the owner of Shonge Enterprises. The respondent went to the business premises of the appellant. He saw a Nissan truck which he wished to buy. He was told that the purchase price was $18 950. He entered into a hire-purchase agreement with Scotfin Finance Limited (hereinafter referred to as "Scotfin"). Scotfin purchased the truck from the appellant and hired it to the respondent. The respondent made an initial payment of $3 385. The balance still outstanding was $26 707,32, payable in 36 monthly instalments of $741,87.

On a number of occasions soon after acquiring the truck the respondent sent it to the appellant for repairs. These repairs were not charged to the account of the respondent. The respondent believed that he was not being charged because he had been given a warranty. The appellant's version was that the repairs were carried out without charging the respondent in order to accommodate their client and not as proof that there was a warranty attaching to the sale of the truck. The magistrate did not believe that the appellant carried out repairs costing approximately $700 in order to accommodate the respondent, who was not a client of the appellant.

DUMBUTSHENA CJ

What concerns this appeal more than anything else is the break-down of the truck on 16 May 1983 when it was being driven to Gokwe. The respondent reported the break-down to the appellant. The truck was repaired by the Kadoma branch of the appellant company. After the repairs were effected a bill was sent to the respondent. He refused to pay because, according to him, the truck was under guarantee.

The sum of $1 215,66, the cost of the repair and the materials, was not in dispute. What was in

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dispute was whether the appellant had warranted the quality and fitness of the truck to the respondent. The respondent said that the appellant's salesman, a Mr Mlambo, had warranted that the truck was in good working condition and had been repaired in its workshop. The appellant disputed the allegation and relied on an entry in Ex 1, which specifically stated: "No warranty implied or given". All the appellant's witnesses said in evidence that no warranties were given on second-hand motor vehicles. In the court below the appellant's salesman was disbelieved, as was the appellant's motor mechanic, a Mr Yakobe, and judgment was entered for the respondent.

Mr *Blackie,* who appeared for the appellant, contended that no reliance could be placed on the respondent's evidence that the appellant had given him a guarantee, as such evidence was never mentioned in his evidence-in-chief. The question of a guarantee was mentioned when the respondent was cross-examined. It is of no importance when or how a vital piece of evidence is mentioned. In this case what is important is that the appellant's own witness corroborated the respondent's assertion.

Mr *Blackie* also argued that the phrase "in good working condition" was mere praise and commendation made by the salesman. He placed reliance on what was said by HOLMES JA in *Phame (Pty) Ltd v Paizes* 1973 (3) SA 397 (AD) at 417-418. In those passages the learned Judge of Appeal was considering the relevant law in South Africa. At 417H-418A among other things he said:

> To sum up so far, on a *conspectus* of all the foregoing authorities, decisions and discussions, we consider that the relevant law in South Africa may be stated as follows -
>
> 1. The Aedilitian remedies (*actio redhibitoria* or *actio quanti minoris*, as the case may be) are available if the *res vendita* suffered from a latent defect at the time of the sale.

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> 2. The Aedilitian remedies are also available if the seller made a *dictum et promissum* to the buyer upon the faith of which the seller entered into the contract or agreed to the price in question; and it turned out to be unfounded.
>
> 3. A *dictum et promissum* is a material statement made by the seller to the buyer during the negotiations, bearing on the quality of the *res vendita* and going beyond mere praise and commendation.
>
> 4. Whether a statement by the seller goes beyond mere praise or commendation will depend on the circumstances of each case. Relevant considerations could include the following: whether the statement was made in answer to a question from the buyer; its materiality to the known purpose for which the buyer was interested in purchasing; whether the statement was one of fact or of personal opinion; and whether it would be obvious even to the gullible that the seller was merely singing the praises of his wares, as sellers have ever been wont to do.

Did Mr Mlambo's statement go beyond mere praise or commendation? In para 4 above HOLMES JA outlined the relevant considerations to be taken into account when considering whether the *dictum et promissum* was mere praise and commendation.

For the purposes of this appeal it is my opinion that one of the considerations to be taken into account is the "materiality to the known purpose for which the buyer was interested in

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purchasing" the truck. The second essential consideration is whether it was a statement of fact. In my view the two considerations are relevant to the determination of whether what was said by Mr Mlambo amounted to an express warranty.

In the light of what I have said above, I would now like to consider what Mr Mlambo said. The respondent testified that Mr Mlambo told him that the truck "was in good working condition" and that he knew that because of "the report that came from the workshop". When Mr Mlambo was asked "What report came from the workshop?" he replied, "They take them down to the workshop, they fix them, they test them, and they said the vehicle was all right and that it was in good condition".

These statements go beyond mere praise and commendation. They are therefore material to the purpose for which the respondent wanted to buy a

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truck and they are statements of fact. They induced the respondent to enter into an agreement of hire-purchase with Scotfin. It is difficult not to believe that a truck that has been through the workshop and is in good working condition is not a good buy.

Of course the appellant denied that such warranty had been given because salesmen were instructed not to give guarantees and warranties on second-hand motor vehicles. In support of the denial use was made of the statement given in Ex 1 which reads "No warranty implied or given". The respondent denied that that statement was written before he signed Ex 1. Whether the statement in Ex 1 was written before the respondent signed that document is of little weight in the light of Mr Mlambo's evidence which supports the respondent's allegation.

It is clear from the evidence, and the respondent's own evidence, that he was induced by the alleged warranty to enter into the hire-purchase agreement with Scotfin. (See *Brown v Sheen and Richmond Car Sales Ltd* [1950] 1 All ER 1102 at 1103H). In *Wells* (*Merstham*) *Ltd v Buckland Sand and Silica Co Ltd* [1964] 1 All ER 41 (QBD) EDMUND DAVIES J (as he then was) said at 45F-I:

> Then does it make any difference that, the warranty having been given to the plaintiffs, all the purchases other than the first were made by the plaintiffs from a third party? If that question demands in law an affirmative answer, the result would not be justice, for, as I have said, it was purely fortuitous that all the loads were not sold by the defendants direct to the plaintiffs. But in my judgment such an affirmative answer is not required, as several reported decisions indicate. Thus, in *Brown v Sheen and Richmond Car Sales Ltd* ([1950] 1 All ER 1102), *Shanklin Pier Ltd v Detel Products Ltd* ([1951] 2 All ER 471) and *Andrews v Hopkinson* ([1956] 3 All ER 422), all tried at first instance, and *Yeoman Credit Ltd v Odgers* ([1962] 1 All ER 789), in the Court of Appeal, the warranty given by the defendant was held enforceable notwithstanding that the main contract was subsequently entered into between the plaintiff and a third party. As McNAIR J said in the second case ([1951] 2 All ER at p 472):
>
> > If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A or that B

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> should do some other act for the benefit of A
>
> And if Clark gave the warranty which I have found that he did, it would be absurd in the circumstances of the case to regard that warranty as being impliedly restricted to orders placed directly by the plaintiffs with the defendants.

The above cases clearly show that it does not matter that the warranty was given to the respondent by the appellant and the respondent afterwards entered into a hire-purchase agreement or contract of sale with Scotfin; he can still sue for damages for breach of a warranty given by the supplier of the goods.

What the respondent is relying on is a warranty in a collateral agreement with the appellant before he entered into the hire-purchase agreement with Scotfin. (See *AFIC* (*Pty*) *Ltd v Rhodesia Commercial Flying School* (*Pvt*) *Ltd* 1970 (2) RLR 85 (GD) at 90G-H where MaCAULAY J said:

> In this situation, it seems to me that it is open to the defendant to rely on any warranties which it may have received from the plaintiff when entering into the agreement with Bowmaker. It is also open to it to rely on any false and fraudulent representations by the plaintiff, such as those pleaded, as inducing it to enter into the hire-purchase agreement with Bowmaker, and to claim damages for any breach of any such warranties or representations. In doing so, it would be relying on a collateral agreement with the plaintiff separate from and outside the terms of annexure 'B', which, on the averments made in the declaration, only bind it *vis-à-vis* Bowmaker, the substituted seller of the two RSA aircraft.

During argument I drew the attention of counsel to what I consider disadvantages suffered by many unsuspecting people who buy second-hand goods on hire-purchase without first ascertaining their quality and fitness for the purpose for which they are bought and then find that they can sue neither the supplier nor the finance company with whom they entered into a hire-purchase agreement or a contract of sale. In this case the respondent seems to have done the right thing. My comments on this subject are meant to draw the attention of the public to a long-standing anomaly.

There was no warranty or guarantee given to the respondent by the third party, the seller of the truck, Scotfin. In para 17 of the hire-purchase

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agreement, Ex 6, it is clearly stated:

> 17. The Purchaser takes delivery of the goods on the understanding that the Seller has no obligation to ascertain whether the goods are fit or suitable for the Purchaser's intended use.

Further the purchaser's attention is drawn to para 17 before signing the agreement when he acknowledges that:

> I/we further represent and warrant that before signing this Agreement my/our attention was drawn to Paragraph 17 on the reverse side hereof and I/we understand that the Seller does not give any guarantee or warranty of condition whatsoever with the goods specified in Part 1 of the Schedule hereto, or represent that they will be

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> suitable for any particular purpose or that they are satisfactory and the Seller takes no responsibility for repairing or replacing the said goods in selecting which I/we have relied on my/our own unaided judgment.

What is significant in the above paragraphs is that anyone who purchases or hires goods from a finance company without first obtaining an express warranty from the supplier of the goods cannot sue the finance company for damages, nor can he get any relief from the supplier of the goods unless he has been given a collateral warranty.

It seems to me that the would-be purchasers of goods from finance companies must, before concluding agreements with finance companies, enter into collateral agreements with the suppliers of goods before they buy them from finance companies because such purchasers, once the finance company has drawn their attention to the "no warranty clause", may lose all their money should the goods for one reason or another be defective. They are, in the circumstances described above, not protected by ss 11 (2) and (3) of the Hire-Purchase Act [*Chapter 284*] which read:

> (2) Every agreement shall be deemed to contain any warranties or conditions implied in a contract for the sale of goods under any law.
>
> (3) The seller shall not be entitled to rely on any provision in the agreement excluding or modifying any warranty or condition referred to in subsection (2) unless he proves that, before the agreement was made, the provision was brought to the notice of the purchaser and its effect made clear to him.

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To avoid such losses it is important for the purchaser to ascertain the quality and fitness of the goods he intends buying for any purpose before he enters an agreement of hire-purchase or a contract of sale with a finance company because the finance company can prove that they brought to the purchaser's notice the provision in the agreement excluding "any warranties or conditions implied in a contract for the sale of goods". In order to protect the public from unnecessary financial loss, the Legislature may think it worthwhile to amend s 11 by including a paragraph to the effect that no person shall buy second-hand goods from a finance company without first obtaining from the supplier of the second-hand goods a written warranty.

[The learned Chief Justice then dealt with the question whether or not the respondent had proved that there was a latent defect in the vehicle when he purchased it, and concluded:]

In the instant case there is no balance of probability in favour of the respondent. Therefore the appeal must succeed.

Accordingly the appeal is allowed with costs. The judgment of the magistrate is altered to read:

Judgment is entered for the plaintiff with costs.

Beck JA: I agree.

Gubbay JA: I agree.

Honey & Blanckenberg, legal practitioners for appellant

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Stumbles & Rowe, legal practitioners for respondent

MAY & ORS v RESERVE BANK OF ZIMBABWE 1985 (2) ZLR 358 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ and Beck, Gubbay and McNally JJA and Sandura AJA

Civil Appeal

9, 10 July 1985 and 21 January 1986

Flynote

Constitution - s 16 - compulsory acquisition of external securities - calculation of adequate compensation.

Exchange Control Regulations, 1977 - s 12 - acquisition of external securities - whether adequate compensation includes compensation for premium payable on transfer of external securities within Zimbabwe.

Headnote

Since the unilateral assumption of independence in 1965, local residents have had no right under exchange control legislation to purchase external securities with local funds save to the extent that the total investment did not exceed the value of a "pool" of foreign exchange in the form of locally-held foreign securities already acquired prior to that event or enlarged by the addition of the value of external securities brought in by immigrants. External securities held in the pool were traded on the Zimbabwe Stock Exchange at a price quoted in Zimbabwe currency. A sale would take place on the local Stock Exchange but would be effected thereafter by the local broker on a foreign stock exchange under his name. The foreign currency generated by the sale would be held by the local broker and would be available for the purchase by residents of further foreign securities. The demand for access to this foreign currency in order to purchase foreign securities brought about, when demand exceeded supply, the payment f a premium on the externally-quoted share price; if demand were less than the supply a discount prevailed. From November 1983 until 14 March 1984, when dealings in foreign securities were suspended as part of the expropriation scheme under s 12A of the Exchange Control Regulations, 1977, the prices of South African shares on the Zimbabwe market was higher than

the price of the same shares on the South African market converted at the ruling rate of exchange, the higher price being equivalent to a premium of 31% on buying transactions and 31% on selling transactions. The premium was established by brokers each day, and at the time of expropriation was 30%. Appellants had acquired South African securities which were expropriated under the scheme put into effect by the respondent. If dealings had not been suspended the premium of 30% on selling transactions would probably have continued until at least May 1984; had the securities been voluntarily sold the price realised would have been that

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quoted on the Zimbabwe Stock Exchange. The compensation payable under the scheme was the value of the securities on the Johannesburg Stock Exchange on the day of expropriation, converted to local currency at the ruling rate of exchange. Appellants contended that, in order for the compensation to be "adequate" in terms of s16 of the Constitution of Zimbabwe, it should be based on the locally quoted value, ie it should take cognizance of the premium.

Held (per DUMBUTSHENA CJ, SANDURA AJA concurring), that the premium was not part of the integral value of the shares and for that reason alone it would have been wrong to assess compensation on the basis that the premium was an integral part of the value of the shares.

Held, further, that to be adequate, compensation must sufficiently recompense the owner for his loss without imposing as unwarranted penalty on the public; the payment of compensation in respect of the premium would entail the imposition of such unwarranted penalty in that the community would be paying for the risk undertaken by the appellants that the premium would be recovered.

Held, further, that whereas in terms of the Regulations the compensation was required to be the "market value" of the shares, this market value meant the best price which could be obtained on the open market which had to be based on the Johannesburg Stock Exchange.

Held, further, (per McNALLY JA, SANDURA AJA concurring), that prior to the 1980 Constitution the State had the right to expropriate external securities without paying compensation for the premium, and announced its intention to exercise that right; persons holding or acquiring securities thereafter undertook not only the usual risk of depreciation in value of the securities, but the additional risk in respect of the possible expropriation of the securities and loss of the premium; the introduction of the existing Constitution only guaranteed existing rights and could not convert the precarious right in respect of the premium into an absolute right; adequate compensation was accordingly the lesser amount calculated on the basis of ignoring the premium.

Held, further, that the respondent did not acquire the premium but merely deprived the appellants of its benefit and is accordingly only obliged to pay compensation in respect of that which it acquired namely the securities themselves.

Held, further, (per BECK and GUBBAY JJA dissenting), that the only market in which local investors could deal was the local market; on that local market the premium paid was an inseparable component of the value of the shares; the Constitution obliges the payment of adequate compensation; compensation is to be determined with reference to the value of the property to the person from whom it is acquired, any alteration in value caused by the expropriation itself being ignored; it being accepted that the market value will be adequate compensation, the market value of the external securities was their Zimbabwe market value inclusive of the 30% premium.

Cases cited:

Todd v Administrator, Transvaal 1972 (2) SA 874 (A)

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Minister of Agriculture v Estate Randeree & Ors 1979 (1) SA 145 (A)

Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council 1979 (1) SA 949 (W)

Sammel & Ors v President Brand Mining Co Ltd 1969 (3) SA 629 (A)

Melwood Units Pty Ltd v Commissioner of Main Roads [1979] 1 All ER 161 (PC)

Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands [1947] AC 565

Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk 1973 (3) SA 376 (A)

Holden v Inland Revenue Commissioner [1974] AC 868 (PC)

United States v Miller (1943) 317 US 369; 87 L Ed 336

Searl v School District No. 2 (1889) 133 US 533

Gibson v Norfolk County Council [1941] 1 KB 191

Raghubans Narain Singh v Uttar Pradesh Government AIR 1967 SC 465

Nelungaloo Proprietary Limited v The Commonwealth & Ors (1948) 75 CLR 495

Mathiba & Ors v Moschke 1920 AD 354

Mavromati v Union Exploration Import (Pty) Ltd 1949(4) SA 917 (A)

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC); 1982 (1) SA 490 (ZS)

Madzimbamuto v Lardner-Burke NO & Anor 1968 (1) RLR 203 (AD); 1968 (2) SA 284 (RAD)

Rudder v Limestone County (1929) 68 ALR 776

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

Lechoana v Cloete & Ors 1925 AD 536

Williams v Taxing Master 1982 (2) ZLR 122 (HC)

Gatooma Rural Council v Crook 1974 (1) RLR 321 (AD); 1974 (3) SA 840 (RAD)

A Chaskalson SC, with him *M T O'Meara* for the appellants

W H R Schreiner SC, with him *J B Colegrave* for the respondents

Judgment

Dumbutshena CJ: This is an appeal against the judgment of Smith J * (20) dismissing the appellants' applications for payment of additional compensation for their external securities

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expropriated by the respondent under s 12A of the Exchange Control Regulations, 1977, as amended by the Exchange Control (Amendment) Regulations, 1984 (No. 3) published in SI 95A of 1984. There are in reality four appeals; however, the principal issue in each appeal is the same. That issue was whether compensation for the expropriated external securities should have been assessed by reference to the value of the securities on the Zimbabwe Stock Exchange immediately prior to expropriation as was contended by the appellants or by reference to the value on the Johannesburg Stock Exchange at the date of expropriation converted into Zimbabwe currency at the then ruling rate of exchange as the respondent did in each case. For convenience all appeals were dealt with on the grounds of appeal filed by Mr Michael Adrian Aylmer May so the rest of the appeals fall to be decided on the same grounds.

Before setting out the history of the exchange controls relating to this matter let me set out the relevant Exchange Control Regulations. On 28 March 1984 the Government published the Exchange Control (Amendment) Regulations, 1984 (No. 3) already referred to above. These regulations introduced s 12A into to the principal regulations. Its relevant provisions read as follows:

> 12A. (1) Subject to this section, the Minister may acquire any security if-
>
> (a) the acquisition is reasonably necessary in the interests of public safety, public order or the utilization of such security for a purpose beneficial to the public generally or to any section thereof; and
>
> (b) the Minister considers it necessary or desirable to do so.
>
> ...

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> (6) The Minister shall, upon giving a direction in terms of subsection (4), or as soon thereafter as is reasonably possible, pay to the owner of the security concerned, and to any other person who has an interest or right therein that is affected by the acquisition, adequate compensation, which shall be-
>
> (a) the market value of the security concerned, or of the interest or right therein, as the case may be, as at the date of the giving of the notice in terms of subsection (2) or the date of the giving of the direction in terms of subsection (3), whichever is the higher; or
>
> (b) if, in the particular circumstances of the case, a greater or lesser amount than the amount determined in accordance with paragraph (a) constitutes adequate compensation, such greater or lesser amount.

What is important for the purpose of this appeal is subs (6) of s 12A, which requires the payment of adequate compensation to the owner of the security expropriated. Reference should be made at this stage to s 16 of the Constitution of Zimbabwe which requires the acquiring authority to pay adequate compensation. I shall refer later in my judgment to s 16 of the Constitution.

It is important to point out that the South African securities were quoted on the Zimbabwe Stock Exchange at a premium. If compensation based on the value of the external securities on the Zimbabwe Stock Exchange had been paid the appellants would have received substantially more compensation than was paid to them. The difference between the value of the shares on the Johannesburg Stock Exchange is, as was contended by the appellants, the premium

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element which became an essential part of the price of shares on the Zimbabwe Stock Exchange. It is common cause that at the time the external securities were acquired by the respondent the premium payable for them on the Zimbabwe Stock Exchange was 30 *per cent.*

On 29 May 1984 the respondent, acting in terms of s 12A of the Exchange Control Regulations 1977, as amended by the Exchange Control (Amendment) Regulations, 1984 (No. 3), expropriated and acquired the external securities. The value of the securities was not that ruling on the Zimbabwe Stock Exchange on the relevant date but the value of the securities on the Johannesburg Stock Exchange. In terms of subs (6) of s 12A of the Exchange Control Regulations as read with s 16 of the Constitution the respondent was obliged to pay compensation. On 4 July 1984 the respondent paid compensation to Mr May in the sum of $26 463,57. The amount was credited to his bank account. His bank deducted $20 in respect of bank charges. Mr May had

not instructed compensation money to be paid to his bank account. He argued that the bank charges were for the account of the respondent. It is now common cause that the bank charges were for the account of the respondent. This issue is no longer contested.

The legal question to be resolved in this appeal is whether the learned judge *a quo* was right when he dismissed the appellants' applications on the ground that they had been paid adequate compensation in terms of s 16 of the Constitution as read with s 12A(6) of the Exchange Control Regulations.

Before consideration is given to the question of the compensation the appellants were entitled to receive from the respondent, it is necessary to look at the history of the development of the external security market and the Regulations that created that market. The history of the exchange control regulations relating to these securities was set out in detail by the learned judge *a quo.* It will suffice to quote from his judgment that history as he narrated it. It is this * (21):

> Prior to 1961 there was very little restriction on investment in external securities. In 1961 exchange controls were introduced and a scheme was devised pursuant to which all external securities purchased by residents were purchased through members of the local Stock Exchange and were required to be registered in the name of local nominee companies. The effect of this was that residents were able to invest in external securities but the interests of the country were protected in that the residents could not dispose of the scrip themselves on the foreign stock exchange. Thus there was a bar on the permanent removal of funds from the country. After 11 October 1965 the right of residents to purchase external securities with local funds was withdrawn and from that date no further funds were permitted to leave the country for this purpose. By then, however, a 'pool' of foreign exchange invested in external securities had been built up. That 'pool' was allowed to remain in existence and thenceforth residents were only entitled to invest in external securities with local funds to the extent that the total investment in external securities did not exceed the value of the investment represented by the 'pool'. Between 1966 and 1972 the 'pool' was enlarged by the addition of the value of scrip brought to this country by immigrants pursuant to an 'arbitrage system' allowed by the Reserve Bank. The external securities held in the 'pool' would vary from time to time as a result of

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switching transactions or transactions involving the sale of a particular security by one person giving rise to a foreign exchange credit and the use of that credit to enable another person to buy a different security to the equivalent value. The 'pool' was a foreign exchange resource which could be realised for the benefit of the country at any stage.

Thus, after 1965, since no additional foreign exchange could be used by residents to purchase external securities, the value of the 'pool' of external securities was by and large fixed (except for the value of additional securities brought into the 'pool' under the arbitrage system). Accordingly, in so far as demand for the right to participate in external securities exceeded the supply of such external securities, that demand could not be met by channelling it to the normal market (eg the Johannesburg or London Stock Exchange) and an independent market for the right to invest in this limited quantity of external securities was created on the local stock exchange. The effect of this was that buyers in this country were prepared to pay a premium for the right to invest in the 'pool' of external securities. To some extent the premium was apparently created by the belief of investors that by purchasing into the 'pool' the prospect existed of converting their funds to foreign currencies in the future. This premium could at any time have disappeared and been replaced by a discount.

The level of the premium was established by the brokers meeting each day on the stock exchange, when the premium was 'bid' and, once fixed, would be announced and recorded as the premium on that day. The level of the premium varied from time to time and in 1975 reached an all-time high of 74,25% (selling). The amount of the premium bore no relation to the scarcity or otherwise of any particular share. It was a percentage applied overall to all external securities. It was merely added to the market price of the share on the relevant foreign stock exchange.

During 1976 the premium reached a maximum of 77% (buying) but in 1977 the maximum reached was 55% (buying). The decline was apparently caused by a statement made by the then Minister of Finance in his budget speech on 15 July, 1976. In that statement he warned investors in external securities that if it should become necessary for the State to expropriate external securities, no account would be taken of any premium paid when determining the amount of compensation that would be paid by the State. In 1978 the respondent reminded investors in external securities of this statement made by the Minister of Finance in 1976.

1985 (2) ZLR p365

It can be seen from the above that the premium fluctuated according to the nature of the circumstances prevailing in the country at the relevant times. The brokers established the level of the premium on the Stock Exchange each day. This premium, according to the Chairman of the Zimbabwe Stock Exchange, Mr Burdett-Coutts, applied to deals on both the Johannesburg and the Zimbabwe Stock Exchanges. In his affidavit, Mr Upfill-Brown describes the premium paid by the investors in foreign securities as entirely a speculative one which had no basis in reality, as there was never any prospect of the Government relinquishing its control over these foreign investments. In paragraphs, 18, 19 and 20 of his affidavit he says:

> Because of the excessive demand to invest in external securities, prospective investors were prepared to pay in local currency so much per cent above the ruling price of such securities as reflected on the relevant stock exchange i.e. Johannesburg or London. If, for example, the ruling price for a share was $1,00 an investor was prepared to pay $1,10 for it. Thus, through the greed of the local buyer, the local price of such external securities was pushed up, of course to the benefit of the seller who received far more here for his shares than he would have if there had been no premium.
>
> I attach, marked 'A.U.B. 1' a Schedule detailing the high and low points of the premium/discount in respect of external shares over the years 1966 to February 1984 when dealings in external shares were suspended by the Respondent. It is to be observed from this Schedule that in 1976 the premium went up to a maximum height of 77% (buying) but came down to a maximum height of 55% (buying) in 1977. The decline was caused by a statement made by the Minister of Finance in his budget speech on the 15th July, 1976, when he warned that if it should become necessary for the State to realise such securities, no

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account could be taken of any premium paid when reimbursing persons who had invested in such securities. This caused members of the Rhodesian Stock Exchange to redouble their efforts to explain the rules appertaining to investment in such securities but the warnings were in vain and the demand to invest in such securities again increased.

Risks are taken daily in stock exchanges all over the world and the payment and possible recovery of the premium was just as much a risk to the investor as was the risk he took in investing in the securities themselves.

All investments in securities are by their very nature a risk to the investors.

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The payment of a premium in order to acquire foreign currency with which to purchase shares was one such risk the investor was prepared to forego if things did not work well.

It is common cause that the only market on which dealings in external securities could lawfully take place was the Zimbabwe Stock Exchange. The dealings were in Zimbabwe currency. These dealings, as we have already seen, were transacted at a "premium" or "discount" prevailing at the time. It is the existence of that premium which is at the centre of the dispute in this appeal.

According to the appellants the Zimbabwe market price was the value of the securities in Zimbabwe "and the prices on the Zimbabwe Stock Exchange were used for the assessment of brokers' commission and as a basis for valuing such securities for death duties and for the purpose of estate duty, income tax and capital gains tax". The appellants' contention is that had they realised their interests on the Zimbabwe Stock Exchange, they would have received the amount of the premium reckoned at 30 *per cent* immediately before the appropriation. It is this 30 *per cent* which, it is argued, the appellants should have received together with the value of the securities.

The learned judge *a quo* did not think so. He was of the opinion that the premium disappeared when the market in external securities was abolished by the respondent. Because the premium disappeared at that time he came to the conclusion that it should be ignored in assessing compensation. In the learned judge's view the effect of the acquisition of all foreign securities by the respondent was to abolish the market in Zimbabwe for foreign securities.

Mr *Schreiner,* who appeared for the respondent with Mr *Colegrave,* submitted that there existed two potential markets, ie, the foreign and the local market and what was in dispute was which market was to be used in order to place a value on the shares. Mr *Schreiner* argued that the learned judge *a quo* had in effect held that the local market had been created by the State. After its termination there could be no justification for making the assumption that that local market still existed for purposes of postulating the existence of a national market as contemplated in *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A). Because there were two markets, if I understood Mr *Schreiner's* argument well, after the termination of the local market there still existed a market for the shares on the Johannesburg Stock Exchange. I agree. The existence of two markets distinguishes this case from *Todd v Administrator, Transvaal, supra,* and *Minister*

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of Agriculture v Estate Randeree &

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Ors 1979 (1) SA 145 (A) in which the need for postulating the existence of a "notional" market was necessary because the only existing market had, in a manner of speaking, been extinguished.

I agree with Mr *Schreiner* that the learned judge *a quo* did not accord a value to the shares which was "diminished as a result of the expropriation". He did not fix compensation by reference to the value of the shares to the expropriating authority. The learned judge assessed the value of the securities as the value they had on the Johannesburg Stock Exchange. Adequate compensation in terms of s 12A(6)(a) for the securities was assessed on an existing market value.

In deciding to exclude the premium as part and parcel of the value of the shares expropriated the learned judge declined to attribute to the shares an enhanced value which they might have had, had the current local market continued to exist.

In my view by coming to the above conclusion the judge a quo did not disregard the well established rule that in expropriation cases the effect of the scheme of expropriation on the market value must be disregarded. See *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 954C-D; *Sammel & Ors v President Brand Mining Co Ltd* 1969 (3) SA 629 (A) at 693B; *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] 1 All ER 161 (PC) at 164J-165D; *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 at 572.

After a careful consideration of authorities the learned judge came to the conclusion that the effect of the scheme of expropriation on the market price must be disregarded. He cited a passage from *Pointe Gourde Quarrying and Transport Co. Ltd v Sub-Intendent of Crown Lands, supra,* at 572-3 which reads:

> It is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition. As it was put by EVE J in *South Eastern Ry Co v London County Council:*
>
> > Increase in value consequent on the execution of the undertaking for or in connexion with which the purchase is made must be disregarded.

This rule was recognized by the Full Court and, indeed, appears to be the

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> basis of its main conclusion, for in the course of his judgment BLACKALL CJ, after a reference to LORD BUCKMASTER'S statement of the principle in *Fraser v Fraserville,* proceeds:
>
> > In the present case, although a value as a quarry had admittedly been created prior to the acquisition, that value was increased by the fact that a base was being established in the vicinity for which a large quantity

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> of stone in a readily accessible situation was required. In other words, the value was enhanced by the scheme of the party acquiring the land, and that is not a factor for which additional compensation may properly be awarded.

After considering *Todd v Administrator, Transvaal, supra,* CORBETT JA said in *Minister of Agriculture v Estate Randeree & Ors, supra,* at 152B-E:

> I return now to the problem as to how the provisions of s 8(1) of the Act are to be applied where, as in this case, owing to the nature of the zoning there is no open market for the property expropriated and the only potential purchaser is the expropriating authority. When a similar situation confronted this court in *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) (the report of the case describing the respondent as being the Administrator of Natal) the following approach was adopted (per RABIE JA, who delivered the judgment of the court, at 881H-882A):
>
> > It is obvious that when a situation arises where there is only one potential purchaser, viz the expropriating authority itself, there can hardly be said to be an 'open market' in which the value of the property can be determined in the manner envisaged by s 8(1)(a)(i) of the Act. The Act, however, requires the 'open market' test to be applied, and the question accordingly arises how that is to be done in a case like the present. The only possible answer, it seems to me, is that the arbitrator should determine the value of the property, with such potential as it has, in the same way as he would have done if there had been several possible purchasers. In other words he must ignore the fact that there is only one potential purchaser, and he must assume that there is an 'open market'.

(The 'arbitrator' mentioned in this extract must in this context be read as a reference to the court constituted in terms of s 7 of the Act.) See also *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) at 388G-389D.

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These cases are distinguished not only by the nature of the property expropriated in the instant case but also by the existence of two markets, one that immediately disappeared with the implementation of the scheme and another from which the expropriating authority based its assessment of the values of the securities. In my view it would be more accurate to say the respondent made a realistic assessment which was based on the one value of the securities on the Johannesburg Stock Exchange, the only market then still existing.

Mr *Chaskalson,* who appeared for the appellants with Mr *O'Meara,* contended that the premium which was an integral part of the price or value of the shares in Zimbabwe did not disappear when the market in external securities was abolished and could, as the learned judge a quo seemed to suggest, not be ignored. He argued that the abolition of the market was part of the scheme of expropriation and since the premium was an integral part of the value of the shares, there was no reason why it should be ignored when other elements of market value such as dividend prospects or dividends declared but not yet paid, should be taken into account. Mr *Chaskalson's* reasoning cannot be faulted if the court accepts that the premium was included and must have been included as part of the value of the securities.

It is important to consider the reasoning by which the learned judge came to form his conclusions. He did think and expressly stated that although in the assessment of compensation, the effect of the scheme of expropriation on the market price of the property expropriated must be disregarded, it was his view that those cases did not relate to the instant

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case because the market was specifically created by the State. The learned judge stated * (22):

> However, these cases (*Todd v Administrator, Transvaal, and Minister of Agriculture v Estate Randeree & Ors* - the insertion is mine) which I have mentioned do not relate to a situation where the market in question has been specifically created to deal with particular circumstances and has been permitted by the State to continue to operate subject to State regulation. When this situation pertained and the State, in the public interest, had decided that the operation of the market so created must be terminated, it seems to me that it would be wrong to assess compensation as though the market had continued to operate.

For the above reasons the learned judge did not therefore take account of the

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market which the State had abolished. However, Mr *Chaskalson* submitted that it was fallacious to say that the premium element disappeared when the market in external securities was abolished, and could thus be ignored in assessing compensation. He urged that since other elements of the market value such as dividend prospects or dividends declared but not yet paid were taken into account why should the premium be ignored for purposes of the assessment of compensation.

I have arrived at the same conclusion as the learned judge on a slightly different premise. In my view the premium was not a part of the integral value of the shares and for that reason alone it would have been wrong to assess compensation on the basis that the premium was an integral part of the value of the shares. The argument advanced by Mr *Schreiner* that there were two potential markets for shares, the foreign market and the local market, finds favour with me. It is the existence of these two markets that distinguishes what was said in *Todd v Administrator, Transvaal, supra,* and *Minister of Agriculture v Estate Randeree & Ors, supra,* from the instant case. In this case there is no need for the court to assume that there is "an open market" or to think in terms of a notional market in order to assess compensation because there was a market existing, the Johannesburg Stock Exchange, on which the external securities were traded and on which the respondent correctly, in my view, assessed the compensation paid to the appellants. That is the market that was used to place a value on the shares. There was, therefore, no need to postulate the existence of a "notional" market. In *Todd v Administrator, Transvaal, supra,* there was no factual market in existence. In the instant case there was.

It is the existence of this market that made Mr *Schreiner* contend that the learned judge did not, in basing his assessment on the value of the shares on the Johannesburg Stock Exchange, "accord a value to the shares which was diminished as a result of the expropriation". Nor did he fix compensation by reference to the value of the shares to the expropriating authority as suggested by the appellants' counsel. "The value he attributed to the shares was the value they had on the only market which then existed".

What now remains is the question, was the compensation paid adequate?

As a starting point it is necessary to consider the relevant provisions of s 16(1) of the Constitution of Zimbabwe. These provisions read as follows:

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(1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -

(a) . . .

(b) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof . . . ;

(c) requires the acquiring authority to pay promptly adequate compensation for the acquisition; . . .

There is no dispute here as to why the external securities were acquired. The respondent acted in terms of the authority of a law that authorises the compulsory acquisition of property. What is in dispute is the amount of compensation paid to the appellants. The appellants say it was not adequate because it was not assessed on the value of shares on the Zimbabwe market which would have included the premium element of the value. (See *Holden v Inland Revenue Commissioner* [1974] AC 868 (PC) at 876D and 877D-E.)

There was no relevant authority directly in point with the issue contested in this appeal. I have made some limited searches for such an authority without success. It may be there are cases which I have not come across in which investors have paid a premium for foreign currency with which to buy foreign shares and that premium has been taken as an integral part of the value of the shares. For the purposes of the present case I have proceeded on the basis that the determination of the different contentions submitted by the appellants and the respondent depends on the peculiar facts in this case. Later on in this judgment I seek to distinguish *Holden's* case, *supra,* from the present case.

It is important to understand the two elements of the share transactions on the Zimbabwe Stock Exchange. The Zimbabwe investor who wanted to purchase a share had first to obtain the necessary foreign currency for which a price was fixed by the brokers each day and which price depended upon demand for the limited supply of foreign currency. If he secured the foreign currency, he then paid a price for the share itself. The price of this share was determined by the demand on the relevant foreign stock exchange.

The respondent's contention was that the premium was an amount which was separate and distinct from the price of the share and did not exist because of the demand for a particular share, but owed its existence to the great demand for the limited amount of currency available for purchasing the share. As Mr

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Schreiner put it: "It was severable from the price of the share itself." Even if it is common cause

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that immediately before the expropriation the amount of the premium was reckoned at 30 per cent, those who bought foreign securities when the premium was at a maximum height of 77% or 55% in 1977 would not have received adequate compensation had their shares included the 30% premium ruling at the time of expropriation. They would have received less than the value of their shares or what they paid for them because the premium was at 77% or 55%. To them the premium, as an integral part of the shares, was 77% or 55% depending on the high or low points of the premium at the time when the shares were purchased. I would have been unreasonable for the respondent to have paid different compensation to each of the appellants, the amount being determined on whether at the time shares were purchased the premium was 77%, 55% or 30%. If one ignores the fact that the appellants paid a premium for foreign currency with which to purchase shares on a foreign market and accepts that the premium was an integral part of the price of the shares, then Mr *Chaskalson's* contention becomes attractive. As I have said above one would have had to calculate compensation having in mind the different premium rates prevailing at the time the securities were purchased. To do so would to ignore the true value of the securities on the Johannesburg Stock Exchange at the time they were expropriated.

In support of the appellants' contention that the premium was part of the value of the shares, Mr *Chaskalson* relied on *Holden v Inland Revenue Commissioner, supra,* the only case where a premium was paid for United Kingdom securities. In that case a resident of New Zealand entitled to sterling funds in the United Kingdom converted the funds into New Zealand currency which was available in New Zealand. He instructed his stockbroker to make the necessary arrangements. The stockbroker arranged in New Zealand a price in New Zealand currency for selected United Kingdom securities on a particular day. He then instructed his agent in London to buy these securities with sterling funds and sell them at the same time for New Zealand currency. The New Zealand resident received more New Zealand currency than he would have received if he had remitted his sterling funds through a banking system at the official rate of exchange. Through the banking system for each £100 sterling at the official rate, he would have received approximately NZ £100 7s 6d for his £100 sterling. Through the transactions in securities he received an amount which varied from NZ £105 to NZ £113.

In *Holden's* case, *supra,* the question at issue was whether the securities were acquired for the purpose of sale and whether a profit or gain had been made

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because of the money received in excess of £100 sterling. The dominant purpose for which the securities were bought was that they should immediately be sold. There was a great demand for sterling securities so people paid the holders of sterling funds a premium. The New Zealand residents were enabled to obtain sterling funds by this method and the New Zealand holders of sterling funds were able to obtain New Zealand currency. Because of the great demand for sterling funds the New Zealand residents paid a premium to the holders of sterling funds. The transaction was a direct one. That premium was part and parcel of the price of sterling funds. The owner of sterling funds, in other words, sold them at a price higher than that obtaining at the official rate of exchange. It seems to me that the transactions in securities outside the official

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rate f exchange were a straight forward transaction. The premium passed from the resident with New Zealand currency to the holder of sterling securities. The premium was paid at the end of the transactions. In the instant case the premium was paid to enable the appellant to acquire foreign currency with which to buy shares which did not have a premium as an intergral part of their value or price. In *Holden's* case, *supra,* at 877D-E, a passage relied on by Mr *Chaskalson* in support of the contention that the Zimbabwe price was what the shares were worth to the appellants and also in support of the fact that a lower price on a different and inaccessible market was irrelevant, LORD WILBERFORCE said:

> The funds owned by the appellants did, in truth, have a special, ie premium, value to a New Zealand resident. And so far from their being inaccessible except at the official rate, they were inaccessible, in the sense that they could not have been bought, at that rate. They were only accessible if he paid the premium. To treat them, therefore, as having only their official rate value, is to disregard the fact that they were freely available for external use and, for that reason, commanded a premium value. Thus they had the same value (disregarding brokerage etc.) as the purchased securities. No profit was made on the sale.

In any event in the present case the market was the Johannesburg Stock Exchange or the Zimbabwe Stock Exchange. The respondent purchased the securities on a market where they were quoted and traded. *Holden v Inland Revenue Commissioner, supra,* is distinguishable from the present case.

Having come to the conclusion that the price of foreign securities did not include the premium paid for acquiring foreign currency, it is necessary to consider what is meant by adequate compensation. Adequate compensation has been defined variously in different cases. I have personally no quarrel

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with the definition in *United States v Miller* (1943) 317 US 369 at 373-4; 87 L Ed 336 at 342-3 cited by Mr *Chaskalson* in support of his submission and in the definition in *Black's Law Dictionary* 5 Ed which is:

> Adequate compensation. - Just value of property taken under power of eminent domain, payable in money, as guaranteed by 5th Amendment. Market value of property when taken. It may include interest and may include the cost or value of the property to the owner for the purposes for which he designed it. Such only as puts the injured party in as good a condition as he would have been in if injury had not been inflicted.
>
> And the definition of "just compensation": Means the full monetary equivalent of the property taken. . . It means a settlement which leaves one no poorer or richer than he was before the property was taken. . . Full and perfect equivalent of the property taken. . . Market value at the time of taking; ie highest price for which property considered at its best and most profitable use can be sold in open market by willing seller to willing buyer, neither acting under compulsion and both exercising reasonable judgment.

What is considered "the full monetary equivalent of the property taken" depends on what the market value of the property taken is at a given time. I do not read in these definitions the inclusion of any speculative and risky element of the price which results in the owner acquiring the property in order for him to derive a benefit in an uncertain market sometime in the future.

It was the respondent's contention that an absolute value cannot be placed on what constitutes "adequate" compensation. I agree. The compensation, to be "adequate", must be "sufficient" to

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compensate the owner for the loss of his property, without imposing an unwarranted penalty on the public because the acquisition is effected in the interest of the public of community. The interest of the owner of the property acquired must of necessity be balanced with the interest of the public from whom the money paid in compensation comes. It is here where the principles accepted by the United States courts are relevant. In *Searl v School* District No. 2 (1889) 133 US 553, at 562 the court stated:

> That right (of expropriation) is the offspring of political necessity, and is inseparable from sovereignty unless denied to it by its fundamental law. It cannot be exercised except upon condition that just compensation shall be made to the owner, and it is the duty of the State, in the conduct of the inquest by which the compensation is ascertained, to see that it is

> just, not merely to the individual whose property is taken, but to the public which is to pay for it. . . . No formula will be adequate unless its breadth of view and flexibility of adaption are fitted and proportioned to the scheme and purpose of the inquest. The problem is one of justice between the individual proprietor, on the one hand, and, on the other hand, the sovereign, or the representative of sovereign power. *Rudder v Limestone County* 68 ALR 776, at 779; *New York Ontario and Western Railway Company v Livingston* ALR 1078.

It seems to me that the taking of the premium paid by the appellants as an integral part of the price of the shares would "impose an unwarranted penalty" on the community by making the community pay for the speculative risk the appellants were prepared to take on the hope that their shares would be worth much more in the future. To make the community pay for the risks taken by the appellants in their belief that there was a possibility for recovering the premium would in my judgment be inequitable.

In the instant case, when considering the meaning of adequate compensation, a close examination of subs (6)(a) and (b) of s 12A of the Exchange Control Regulations is called for because paragraphs (a) and (b) spell out the adequate compensation which a Minister shall pay. Such adequate compensation must be:

(a) the market value of the security concerned, or of the interest or right therein, as the case may be, as at the date of the giving of the notice in terms of subsection (2) or the date of the giving of the direction in terms of subsection (3), whichever is the higher; or

(b) if, in the particular circumstances of the case, a greater or lesser amount than the amount determined in accordance with paragraph (a) constitutes adequate compensation, such greater or lesser amount.

It may be timely to look at the meaning of market value. In *Gibson v Norfolk County Council* [1941] 1 KB 191 at 195 HUMPHREYS J defined "market value" as follows:

> 'Market value' assumes that the thing which is said to have the market value is something which somebody will buy and that there is a market in which it can be sold, and that what the purchaser will pay for it on the average is the market value.

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The expression "market value" is not defined in the Regulations. The Indian Supreme Court has given a meaning to market value in statutes where it is not defined by looking to its meaning under other statutes and adopting the meanings of the expression as defined in those statutes. The court defined market value in the Income-Tax Act by comparing its definition under the Land Acquisition Act 1894. In *Raghubans Narain Singh v Uttar Pradesh Government* (AIR 1967 SC 465) the Indian Supreme Court said that:

> 'market value' means the price that a willing purchaser would pay to a willing seller for a property having due regard to its existing condition, with all its existing advantages, and its potential possibilities when looked at in its most advantageous manner, excluding any advantages due to the carrying out of the scheme for the purposes for which the property is compulsorily acquired.

In my judgment the words used in subs (6) of s 12A of the Regulations bear an ordinary meaning and the term "market value" means the best price which can reasonably be obtained on the open market. In this case the best price was ascertained by basing the assessment of compensation on the prices prevailing on the Johannesburg Stock Exchange at the date when the respondent gave notice of its intention to acquire the shares. There was no need for the willing purchaser and the willing seller to interact in order to get the right price. The price of the shares on the Johannesburg Stock Exchange was fixed having regard to the market forces and other extraneous circumstances prevailing at the time the shares were acquired by the respondent. There was no need for the court to determine adequate compensation. The money equivalent of the shares expropriated was the value of the shares traded on the Johannesburg Stock Exchange at the time the shares were expropriated. That price was the value of the shares to the appellants. Had they converted them on that foreign market, the only market still existing since the Government had abolished the Zimbabwe market, they would have received no less and no more than the respondent paid them.

The object of compensation was succinctly summarised by DIXON J in *Nelungaloo Proprietary Limited v The Commonwealth & Ors* (1948) 75 CLR 495 at 571-572 as follows:

> Now 'compensation' is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner

> expropriated the full money equivalent of the thing of which he has been deprived.
>
> Compensation *prima facie* means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes (*Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* ((1939) AC 302, at p 318)). Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his

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> ownership and of his consequent rights of disposition existing under the general law at the time of acquisition.

In the light of the requirements of our legislation and the principles of compensation embodied in the above passage, it cannot be said the learned judge *a quo* erred in arriving at the conclusion he did. It is unfortunate that the appellants lost the money paid in premiums. The loss they suffered can be likened to that suffered by a man who repairs his damaged car in order to enhance its selling price but only receives its market value which does not include the money he spent on repairs.

In my opinion the real value of what was acquired was the price of the shares unencumbered by the premium paid in order to obtain foreign currency with which to buy the shares. The assets acquired by the respondent were the shares and nothing more.

The appellants knew that in the event of the Government expropriating their shares the premium they paid would be disregarded. The Government had made its intentions clear in the budget speech delivered by the Minister of Finance in 1976 when the premium reached its peak of 77%. The fact that that speech was made at a time when the country did not have a justiciable Declaration of Rights does not in my opinion reduce the validity of the warning given to holders of external securities. The important point to remember is that even at that time compensation was to be paid but without

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the premium element. The difference now is that the Declaration of Rights protects in s 16 of the Constitution the individual from deprivation of his property and, in a manner of speaking, compels the acquiring authority in the event of expropriation of property to pay "promptly adequate compensation for the acquisition". And it is now possible for an individual affected to apply for compensation in the High Court.

It is contended by the appellants that the statement made by the former Minister of Finance cannot be relied upon for purposes of interpreting statutory instruments. They rely on the persuasive authorities of *Mathiba & Ors v Moschke* 1920 AD 354 at 362; *Mavromati v Union Exploration Import (Pty) Ltd* 1949 (4) SA 917 (A) at 927. See also *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 (SC) at 582E-583E; 1982 (1) SA 490 at 496G-497C.

Mr *Chaskalson* painted with the same brush the article published in the Business Herald of June 1978 and the warnings issued by the respondent in 1978, referred to in Mr Woodward's affidavit. He argued that these warnings were hearsay and irrelevant. In my judgment the Minister of Finance's statement and the warnings issued by the respondent were not intended as aids in the interpretation of statutory instruments. That statement, the article in the Business Herald and the warnings by the respondent to investors stating:

> the Bank also wishes to draw to your attention the statement made by the Minister of Finance in Parliament on 15th July 1976, when he warned that should it become necessary for the State to realise such foreign assets no account could be taken of any premium paid for external securities when reimbursing persons who hold such assets

are not aids to the interpretation of s 12A of the Exchange Control Regulations. They are,

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however, of importance as a link in the chain of historical events that occurred during these times.

Most of the investors in foreign securities, if not all, received the respondent's circular. The importance of the Minister's statement and the respondent's circular is that the matters referred to in them are matters of fact concerning the issues before this court. As matters of fact they are relevant. There is ample evidence on the papers that all authorised dealers advised their clients. I can only say that all investors in the external securities must have been advised by their bankers of the Minister's statement and were aware of it. The purpose or motive of the Minister's statement and the respondent's

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circular was to forewarn holders of external securities that it was Government policy, in the event of expropriation, not to pay the premium element. Those statements are admissible. See *Madzimbamuto v Lardner-Burke NO & Anor* 1968 (1) RLR 203 (AD) at 294F; 1968 (2) SA 284 (RAD) at 354E.

The appellants must have continued to maintain their external securities in the knowledge that, as contended by the respondent, "the premium was at risk". In the light of that knowledge the appellants must have appreciated that, in the event of expropriation by the respondent, they would receive compensation only for the value of the shares.

I am in agreement with the learned judge a quo that the respondent was obliged to pay compensation for the actual value of the shares acquired by it as determined on the appropriate foreign stock exchange on the relevant date.

I would therefore dismiss the appeals with costs.

Sandura AJA: I have had the advantage of reading in draft the judgments prepared by the learned CHIEF JUSTICE and my brother Mr Justice McNALLY. For the reasons they give, I too would dismiss the appeals with costs.

McNally JA: The four appellants applied on notice of motion to the High Court (SMITH J) seeking additional compensation from the respondent (the Reserve Bank) for their interest in certain shares (external securities) which had been expropriated by the Reserve Bank.

Leaving aside for the moment the minor and subsidiary issues, the main dispute, which concerns many persons other than the four appellants, is as to the criterion used in assessing the amount of "adequate compensation".

The facts, and what one may call "the arithmetic" are not in dispute. In effect the appellants want 30% more than they have received, and that 30%, it is agreed, is the difference between the price of the shares on the given day on the Zimbabwe Stock Exchange and the price on the Johannesburg or other relevant Stock Exchange, converted into Zimbabwe dollars.

The history of the matter is set out fully in the judgment of the learned trial judge. The relevant

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paragraphs have been reproduced by the CHIEF JUSTICE and I need not repeat them.

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The starting point for consideration of the question must be the Constitution of Zimbabwe. Section 16(1) of the Constitution provides as follows:

> (1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -
>
> (a) . . .
>
> (b) requires that the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilization of that or any other property for a purpose beneficial to the public generally or to any section thereof . . . ;
>
> (c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;

It is not in dispute that the Reserve Bank is the acquiring authority, that it was properly authorised by law to acquire the appellants' interest in the shares, and that the acquisition was reasonably necessary in compliance with s 16(1)(b). All that is in dispute is the interpretation of the words "adequate compensation".

The law authorising the acquisition is to be found in the Exchange Control (Amendment) Regulations, 1984 (No. 3), published on 28 March 1984 in Statutory Instrument 95A of 1984. These Regulations add a new s 12A to the original Regulations published in GN 399 of 1977. They authorise the Minister (whose powers are delegated by GN 414 of 1977 to the Reserve Bank) to acquire any security, and require him to:

> . . . pay to the owner of the security concerned, and to any other person who has an interest or right therein that is affected by the acquisition, adequate compensation, which shall be -
>
> (a) the market value of the security concerned, or of the interest or right therein, as the case may be, as at the date of the giving of the notice in terms of subsection (2) or the date of the giving of the direction in terms of subsection (3), whichever is the higher; or
>
> (b) if, in the particular circumstances of the case, a greater or lesser amount than the amount determined in accordance with paragraph (a) constitutes adequate compensation, such greater or lesser amount.

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It must be noted at once that the provisions of para (b), just cited, do not authorise payment of compensation which is less than adequate. If they did, they would be *ultra vires* the Constitution. They say simply that the market price may not always be the proper measure of compensation. Where that is the situation then adequate compensation must be paid whether it is more or less than the market price.

The parties have taken issue over the question as to what is "the market". The appellants say the market is the Zimbabwe Stock Exchange (or was, until the respondent destroyed it by

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intervening and expropriating). The respondent says it is the Johannesburg or other appropriate Stock Exchange. It seems to me that this dispute must be resolved in favour of the appellants. It was the State after all which created the Zimbabwean market and required all Zimbabwean residents who wished to buy or sell external securities to do so in that market, and nowhere else. Mr *Schreiner,* who appeared with Mr *Colegrave* for the respondent, submitted that it was purely an artificial market. All markets are in a sense artificial. What is important is that the Zimbabwe Stock Exchange was, for Zimbabwean residents, the only place where they could buy and sell external securities using local currency. For them, perforce, it was the only market, and the price they could obtain there was the market price.

Mr *Schreiner* further submitted that by the action of the State in expropriating all or most of the eternal securities available, the market was destroyed. Again, this may be so. But in assessing compensation one looks at the situation as it would have continued to exist had there been no intervention by the expropriating authority. The learned judge in the court *a quo* rightly cited the statement of DIXON J to this effect in *Nelungaloo Pty Ltd v Commonwealth & Ors* (1948) 75 CLR 495 at 571. There is not the slightest doubt, in fact it is common cause, that without the intervention of the respondent the market would have continued for some time at the 30% premium level. I am satisfied that the market price of the expropriated securities on the appropriate date was 30% higher than the figure chosen as adequate for compensation purposes by the respondent.

The market price, however, may not be the appropriate basis for determining the adequacy of the compensation. The particular circumstances of the case may dictate some other measure. Compensation is a matter of equity, and of being fair both to the person expropriated and to the general public for whose sake the expropriation is undertaken, and from whose pockets, by way of taxation, the price ultimately comes.

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There is a good example of such a variation in one of the American cases cited before us. In *George Rudder v Limestone County,* a case heard before the Alabama Supreme Court in 1929, reported in 68 ALR 776, it was held that, where part of a man's land is expropriated, it is proper to assess the value of the land so expropriated and then to subtract the amount by which the value of his existing land will be enhanced by the presence of the development for the purpose of which the expropriation took place. Thus, for example, if the State expropriates half a man's farm to build a new highway, and the presence of the highway doubles the value of the remainder, he has lost nothing. The market value of the half that was taken is not, in such a case, the measure of his loss.

Indeed it was not necessary for counsel to go to Alabama to find this example, because the very same principle finds expression in s 28(2) of the Land Acquisition Act, 1979 (No. 15 of 1979). That section provides, in its relevant parts, as follows:

In assessing compensation the Court shall . . .

(a) assess compensation for the land, materials or interest or right in land, as the case may be, on the market

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value thereof . . .

(b) . . .

(c) have regard to any increase in the value of any other property or rights of the claimant, or to any benefit which the claimant will receive, due to any works undertaken by the acquiring authority which are connected with the acquisition of the land, . . .

The same Act, incidentally, in s 28(3)(b), enshrines another principle to which I have referred earlier, namely that in assessing compensation no account is to be taken of any effect created by the act of expropriation itself. This is the principle I applied earlier in rejecting the argument that since the State's action had effectively destroyed the local market one had to look at the Johannesburg market to ascertain the value.

I turn now to consider the question whether the market price is the proper measure of "adequate compensation" in the circumstances of this case or whether, by the application of the principle contained in s12A(b) of the Regulations, the lesser amount paid by the Reserve Bank is adequate.

In order to do this it is necessary to look at the nature of the premium. It was explained in these words by Mr Upfill-Brown, who is the Managing Director

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of a firm of investment consultants, and was for many years a stockbroker in Zimbabwe. He was the originator of the scheme whereby the purchase and sale of external securities was controlled in the interests of the preservation of Zimbabwe's foreign currency reserves:

17. The demand for investment in external securities increased and there were insufficient funds coming in from arbitrage deals and the sale by local investors of such securities to enable Brokers to satisfy such demand. The demand for external securities was prompted largely by the desire of many local investors to acquire an interest in concerns situated outside the country, in the belief not only that this could provide a more secure investment, but also that it could provide the prospect, however unrealistic, of converting their funds to foreign currencies in the future. The premium paid was thus an entirely speculative one, and had no basis in reality as there was never any prospect of the Government relinquishing its control over these foreign investments.

18. Because of the excessive demand to invest in external securities, prospective investors were prepared to pay in local currency so much per cent above the ruling price of such securities as reflected on the relevant stock exchange ie Johannesburg or London. If, for example, the ruling price for a share was $1,00 an investor was prepared to $1,10 for it. Thus, through the greed of the local buyer, the local price of such external securities was pushed up, of course to the benefit of the seller who received far more here for his shares than he would have if there had been no premium.

19. I attach, marked 'A.U.B. 1' a Schedule detailing the high and low points of the premium/discount in respect of external shares over the years 1966 to February 1984 when dealings in external shares were suspended by the Respondent. It is to be observed from this Schedule that in 1976 the premium went up to a maximum height of 77% (buying) but came down to a maximum height of 55% (buying) in 1977. The decline was caused by a statement made by the Minister of Finance in his budget speech on the 15th July, 1976, when he warned that if it should become necessary for the State to realise such securities, no account could be taken of any premium paid when reimbursing persons who had invested in such securities. This caused members of the Rhodesian Stock Exchange to redouble their efforts to explain the rules appertaining to investment in such securities but the

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warnings were in vain and the demand to invest in such securities again increased.

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20. Risks are taken daily in stock exchanges all over the world and the payment and possible recovery of the premium was just as much a risk to the investor as was the risk he took in investing in the securities themselves.

Mr Upfill-Brown annexed to his affidavit (which I should say was filed on behalf of the Reserve Bank) two documents. The first demonstrated that, save for a period in 1982, there was always a premium rather than a discount on external shares between 1966 and 1984. The second was a letter by his firm to all clients dated 12 May 1978. One can assume, and the evidence indeed confirms, that all commercial banks advised their clients in 1978 in similar terms. The first paragraph of the letter is worth quoting:

The Reserve Bank of Rhodesia has instructed us to remind you that one of the conditions under which you have been permitted since 23rd February, 1961, to invest in securities which have a quotation on a Stock Exchange outside Rhodesia, is that the sale proceeds of such securities and any dividends, interest, etc, accruing therefrom, can be received only in Rhodesia in Rhodesian currency. It is important that you understand that you will not under any circumstances, or at any time, be entitled to receive the sale proceeds from such securities, or of any rights stemming therefrom, in foreign currency outside Rhodesia. The Bank also wishes us to draw to your attention the statement made by the Minister of Finance in Parliament on the 15th July, 1976, when he warned that should it become necessary for the State to realise such foreign assets, no account could be taken of any premium paid for external securities when reimbursing persons who hold such assets.

Before I leave Mr Upfill-Brown's affidavit I should perhaps comment, in relation to the last sentence in his para 17, that the decision in *Standard Bank of SA Ltd & Anor v Ocean Commodities Inc & Ors* 1983 (1) SA 276 (AD) might be taken as a sign that those who hoped, in one way or another, to realise their securities abroad in foreign currency, were not as unrealistic as he thought. Nonetheless the point he makes is a valid one. The premium was speculative. The right to recover it was precarious. I will return to this point in a moment.

The applicant, Mr May, disputes certain expressions of opinion by Mr Upfill-Brown, and further disputes his right to annex the letter from which I have quoted. The objection, however, was not sustained by the learned trial judge, nor was it contended before us that the letter was inadmissible. I can see no

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basis for regarding it as inadmissible. Nor do I accept that it is either irrelevant or inadmissible for the respondent to cite a statement made in Parliament by the Minister of Finance in his budget speech of 15 July 1976. Mr May in fact expressly accepts (he uses the words "I do not challenge") that the Minister made the statement attributed to him. He contends that a mere statement in Parliament is not binding in law, nor is it conclusive as an interpretation of the law. He goes on to say that the statement was made at a time when the present Constitution was not in force and the Minister was not bound by a Constitution "which required adequate compensation to be paid when assets were compulsorily acquired". Finally he says:

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> In any event Mr DC Smith could not by means of a statement in Parliament establish some form of price control or even establish a price at which the shares could be compulsorily acquired.

I think these assertions and counter-assertions need careful analysis.

In the first place, what do the appellants say about their own knowledge of the Minister's statement after 1978? Mr May does not deny it. He says only: "I am quite certain that a large number of investors were unaware of the statement made by the Minister of Finance." I am satisfied that this court can accept that Mr May was aware of the statement, at least after 1978, if not at the time that it was made. Mr Thomas, speaking for the Thomas family adopts the replying affidavit of Mr May (see p 20 of the papers in the Thomas appeal), and must be taken therefore as aligning himself with Mr May's knowledge of the Minister's statement.

The record of the application of the Cairns Family Trust was not prepared for the appeal and we were advised by Mr *Chaskalson* - with whom appeared Mr *O'Meara* - that it was agreed that the Cairns and Thomas records were identical. It must be assumed therefore that the appellants in that case knew by 1978 or when they acquired their shares, whichever was the later, of the Minister's statement.

Mr Katz, speaking for Frogmore Tobacco Estates, also adopts the affidavits of Mr May, and goes no further than to say, at p 42 of the papers in the Frogmore Tobacco Estates appeal, that "the Applicant has no record of having received a copy of the circular attached to the affidavit of Mr Winter of Zimbabwe Banking Corporation Limited". Had he intended to deny knowledge of the Minister's statement I would have expected him to say so specifically in answer to Mr Woodward's assertion, in para 21 of his

affidavit, that investors before and after 1978 must have known of the statement.

It may therefore be assumed that each of the appellants knew, either by 1978 or when he bought the shares if he bought them after 1978, that the Minister had issued a public statement as to the Government's intentions in the event of expropriation.

It seems to me that one can treat in identical fashion those persons who continued to hold their external shares after they became aware of the Minister's statement, and those persons who subsequently acquired external shares. Both categories of persons (and the appellants fall into one or other of the categories) accepted the risk of expropriation at a figure which excluded the premium. None of the appellants has suggested that under the previous Constitution the Minister's threat was an empty one, a threat of unlawful action. Indeed the very opposite point is made by Mr May at p 160 of the papers when he says:

> Furthermore, at the time that statement was allegedly made, Mr Smith (the then Minister of Finance) was not bound by a Constitution which required adequate compensation to be paid when assets were compulsorily acquired.

The position, then, of all the appellants is this: since 1978, or since they purchased the shares, whichever is the later, they have held or acquired their shares in the knowledge that, quite apart

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from the ordinary risks involved in the holding of any share, namely that its inherent value might depreciate, they faced an additional risk. That extra risk was that the Government might expropriate the shares and decline to pay the premium. The risk was a known risk. Its existence had an effect upon the price. That is why the premium fell significantly after the Minister's statement in 1976, and again after the Reserve Bank issued its reminder in 1978. From then on, each one of the appellants had a choice. Sell, and collect the premium, or hold on and risk expropriation without compensation for the premium.

It seems to me therefore that when the blow fell, the appellants and all others in their situation must be regarded as people who have gambled and lost. It would be wholly illogical to do otherwise. They are no more entitled to compensation for the premium than an unlucky State Lottery ticket holder is entitled to have his dollar back.

McNALLY JA

I have used the word "precarious" to describe the nature of the appellants' right to recover the premium. By that I mean that their right to recover the premium, at whatever level was currently applicable, was subject to the State's right to expropriate. If expropriation took place, they lost the premium. As DE VILLIERS JA said in *Lechoana v Cloete & Ors* 1925 AD 536 at 545:

> With us, too, a thing may be held *precario* apart from contract - what is known in English Law as leave and licence.

Mr JUSTICE SMITH in his judgment at the original hearing used the phrase "grace and favour" to express what I think was the same thought.

It may be argued "What right did the State have in the first place to declare unilaterally through the Minister that it would not reimburse people for the premium if it expropriated the shares?" The answer to this question involves an appreciation of the nature of foreign currency. One speaks loosely of a Zimbabwean resident buying shares on the Johannesburg Stock Exchange. He does not in fact do so in so simple a fashion. He is first obliged to acquire, with his Zimbabwean money, the necessary foreign currency to pay for the shares (I ignore the case where the person concerned already has money abroad). The State, through the Reserve Bank, controls the supply of foreign currency. If it declines to make such currency available, a resident cannot make a purchase abroad. See s 9(h) of the Reserve Bank of Zimbabwe Act [*Chapter 173*] and s 3 of the Exchange Control Regulations, 1977 (RGN 399 of 1977). It is in this sense therefore that the purchasing of assets abroad can be said to be by grace and favour of the State. The State has the power and the right, in the interests of the community, to limit and control access of residents to foreign currency and thus to foreign assets.

It was only because of the way in which the State decided to control access to external Stock Exchanges that the premium arose. The State could, as the learned judge *a quo* said, have abolished the premium or made it payable to the State. It chose, by way of liberality, to allow free market forces to apply. The State did not charge a premium for the foreign currency that it made available, and thus in equity there was no reason why it should be obliged to buy it back at a premium. For, of course, it is not the shares which the State wants. It is the foreign

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currency.

If, then, the State had the right, prior to the present Constitution, to expropriate external securities without paying compensation for the premium, and

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announced its intention to exercise that right in that manner, persons holding or acquiring such securities after that time did so, as I have said, precariously. They knew that their right to recover the going premium was subject to and conditional on there being no expropriation.

In what way, then, did the introduction of a Constitution with a justiciable Declaration of Rights affect the rights of such persons? It could not serve to convert a precarious or conditional right into an absolute right. It could do no more than confirm and guarantee existing rights. If the existing right was precarious, or conditional, it remained so under the new Constitution.

Finally I must deal with the contention that the Minister could not, by means of a statement in Parliament, make new law, or purport to place a binding interpretation on existing law, or establish some form of price control, or establish a price at which shares could be compulsorily acquired. The answer is that this contention is accepted (See *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 at 582E *et seq*; 1982 (1) SA 490 at 496F *et seq*). I look to the statement simply to establish as a fact the knowledge of the appellants as to the Government's lawful intentions. Whether a Minister under the present Constitution could successfully do the same thing is another matter, as to which I make no comment.

I conclude therefore that in the circumstances surrounding the cases of the present appellants, adequate compensation is not the Zimbabwean market value of the shares concerned, but the lesser amount calculated on the basis of ignoring the premium.

There is another line of reasoning which leads one to the same conclusion. It is based on the argument which found favour with this court in the *Hewlett* case, *supra,* at 590A-C, namely that there is a distinction between deprivation and acquisition, and that "not every deprivation or property must carry compensation with it". The then CHIEF JUSTICE, FIELDSEND CJ, said at 594E:

> The fact is that the limitation imposed on the Legislature by s 16(1) is that it shall not pass a law compulsorily acquiring property without compensation, not that it shall not pass a law depriving a person of property without compensation.

It seems to me to be clear that, on the peculiar facts of this case, one can say that the Reserve Bank's interest was solely in the shares on the appropriate foreign Stock Exchange. The Reserve Bank wanted the foreign asset. It had

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no interest whatsoever in acquiring shares on the Zimbabwe Stock Exchange. This is borne

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out, in the papers of the Frogmore Tobacco Estates appeal at p 31, where a copy of the "Notice of Acquisition of Securities" is set out. It is quite clear that what is being acquired there is a portfolio of shares on the Johannesburg and London Stock Exchanges. The Reserve Bank, as I mentioned earlier, is statutorily entitled to deal in foreign currency. It does not suffer from the limitations imposed on other persons in Zimbabwe with regard to exchange control. It would therefore be pointless for it to enter into the local market where the others perforce have to deal. If it wished to become an investor it could invest directly in the foreign Stock Exchange. Clearly its objective was to put itself in a position to realise foreign assets and thus release foreign currency for alternative uses.

By acquiring the shares on the foreign Stock Exchange, the Reserve Bank deprived the appellants of an asset on the local Stock Exchange. But it did not acquire that asset. It should be required in terms of s 16 of the Constitution to pay compensation only for what it acquired. And what it acquired was worth 30% less than the asset of which the appellants were deprived. Thus I reach the same conclusion as before. I may say that this argument was touched on by Mr *Schreiner,* but without reference to the *Hewlett* case, *supra,* or to the distinction between deprivation and acquisition which was at the core of that decision.

The application which was to be moved by the appellants was abandoned by Mr *Chaskalson,* and the question of the rate of interest falls away in the light of the conclusion to which I have come.

In the premises it remains only to say that in my view the appeals should be dismissed with costs. In terms of the provisions of Rule 58 of the Rules of this Court, as read with the provisions of Rule 311 of the Rules of the High Court, it is not necessary to make an order as to the fees of two counsel. The reasonable fee consequent upon the employment of two counsel is allowable unless a special order to the contrary is made. "Counsel", as SQUIRES J pointed out in *Williams v The Taxing Master* 1982 (2) ZLR 122 (HC) at 126C means, in the context of Rule 311(a), a practitioner instructed by another practitioner for the case. Thus as he said earlier at 126A: "The Rule still only applies to the use of two legal practitioners in addition to the instructing legal practitioner". This is a case where clearly the use of three legal practitioners was justified.

BECK and GUBBAY JJA

Beck and Gubbay JJA: In motion proceedings before the High Court, four applicants sought orders against the respondent, the Reserve Bank of Zimbabwe, for the payment of additional compensation for the expropriation under s 12A of the Exchange Control Regulations, 1977, as inserted by the Exchange Control (Amendment) Regulations 1984 (No. 3), of their external securities, being shares in South African registered companies.

In each of the applications the principal issue was the same: it was whether the compensation which was payable should be assessed by reference to the value of the external securities as quoted on the Zimbabwe Stock Exchange immediately prior to the implementation of the scheme of expropriation (as contended for by the applicants) or by reference to their value as quoted on the Johannesburg Stock Exchange on the relevant date, converted to Zimbabwe

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currency at the then ruling rate of exchange (as urged by the respondent).

The difference in the value of the external securities was accounted for by the fact that on the Zimbabwe Stock Exchange they were quoted at a premium. Accordingly, if it were correct to assess the compensation payable by having regard to the local value of the shares, the applicants would have been entitled to receive substantially more than the respondent paid them; the first applicant, an additional $7 959, 07; the second, $262 487, 93; the third, $15 010, 36; an the fourth, $983 841, 44.

The applications, which were heard together, came before Smith J who delivered a reserved judgment on 27 February 1985. It is now reported in 1985 (4) SA 185. Being of the opinion that:

> (the) obligation of the respondent is limited to paying compensation for the actual value of the shares acquired by it as determined on the appropriate foreign stock exchange on the relevant date converted to Zimbabwe currency (see at 194 *in fine* - 195A),

the learned judge dismissed the applications with costs awarded against the applicants jointly and severally.

That decision is now appealed against. As the four appeals fall to be determined on the same basis counsel were agreed that the ruling given in the case of the first appellant, Michael Adrian Aylmer May, would be binding upon the remaining three, and that it was only necessary to consider the affidavits filed in his application.

BECK and GUBBAY JJA

In conformity with the requirement enacted in s 16(1)(a) of the Constitution of Zimbabwe, subsection (6) of s 12A of the Exchange Control Regulations obliges the respondent (to whom the Minister's powers are delegated by RGN 414 of 1977) to pay "adequate compensation" for any security acquired by it, which shall be:

(a) the market value of the security concerned, or of the interest or right therein, as the case may be, as at the date of the giving of the notice in terms of subsection (2) or the date of the giving of the direction in terms of subsection (3), whichever is the higher; or

(b) if, in the particular circumstances of the case, a greater or lesser amount than the amount determined in accordance with paragraph (a) constitutes adequate compensation, such greater or lesser amount.

Para (b) applies where the market value does not reflect the proper measure of adequate compensation. That situation does not arise here, for counsel correctly accepted that payment of the market value of the external securities will provide adequate compensation. They differed, however, as to the particular market at which the value is to be adjudged. In order to determine that matter it is necessary to outline the relevant historical facts, which for the most part are common cause. They are these:

1. Between the years 1948 to 1961 the only restriction in this country on investment in external securities was that they had to be either issued in the "Scheduled Territories" (the

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then British Commonwealth and certain British-protected States) or approved by the Minister of Finance, if issued outside the "Scheduled Territories".

2. On 22 February 1961 the Government of the day introduced exchange control legislation in order to stem the flow of capital from the country. A particular area of concern was the stock exchange which, by its nature, provided a potential route for foreign currency to leave the country. Accordingly a scheme was devised which permitted residents to invest in external securities, provided they were purchased through members of the local stock exchange and were registered in the names of "Specified Nominees" (nominee companies approved by the exchange control authorities). The effect was that although investment in external securities was permitted to residents, they were prevented from disposing of the

BECK and GUBBAY JJA

scrip themselves on the foreign market, thereby ensuring that foreign currency was not permanently removed to the prejudice of this country's interests.

3. For a short period in 1965, immediately prior to the unilateral declaration of independence, a further restriction was imposed, in that private individuals were allowed to invest in external securities only with the approval of the exchange control authorities.

4. After the unilateral assumption of independence on 11 November 1965, the right of residents to purchase external securities with local funds was withdrawn. By then, however, a "pool" of foreign exchange in the form of external securities had been built up. The pool was permitted to remain in existence and thereafter residents were restricted in investing in external securities with local funds to the extent that their total investment did not exceed the value of the investment represented by the pool. Between 1966 and 1972 the pool was enlarged by the addition of the value of external securities brought to the country by immigrants pursuant to an "arbitrage system".

5. The external securities held in the pool would vary from time to time by virtue of switching transactions involving the sale of a particular security by one investor resulting in a foreign exchange credit and the use of that credit to enable another investor to purchase a different security to the equivalent value.

6. At all material times until the dealings on the Zimbabwe Stock Exchange were suspended on 14 March 1984, as part of the scheme of expropriation, external securities were traded on that Stock Exchange. The manner of trading was as follows:

   (a) Transactions were conducted at a price quoted in Zimbabwe currency.

   (b) Whenever a resident sold an external security the sale would actually take place on the Zimbabwe Stock Exchange but the local broker would then arrange for the sale of that security to be effected on the foreign stock exchange under his name. He would then hold the foreign currency generated from the sale in his own name and use it later as a principal to purchase such

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external securities as were purchased subsequently by the same or another resident of this country.

(c) Thus the amount of foreign currency available to local brokers limited the extent to which external securities could be purchased, and supply and demand affected the price payable on the local market. If there was a greater demand for external securities than those on offer, a premium was payable when compared to the external price. If the demand was less than the supply, a discount prevailed.

(d) The level of the premium to be paid by buyers was established by the brokers each day, when it was "bid". Once fixed it would be announced and recorded as the premium applicable to all transactions in external securities on that day, and was not related to the scarcity or otherwise of any particular share. The premium fixed for the day would be added to the price of all external securities dealt with on that day on the relevant foreign stock exchange.

(e) From November 1983 until the day when dealings were suspended, the prices of South African shares on the Zimbabwe market were higher than the prices for the same shares on the South African market converted at the ruling rate of exchange; throughout the period the higher price was equivalent to a premium on buying transactions of 31% and a premium on selling transactions of 30%.

(f) At the time the scheme of expropriation was implemented the relevant premium was 30%.

7. Mr May acquired the external securities as an investment. They were purchased on the Zimbabwe Stock Exchange and paid for with local currency. It was not lawful to deal directly on the foreign stock exchange. Dealings had to be in Zimbabwe currency and were transacted at the premium or discount prevailing at the time. The Zimbabwe market price was taken as the market value of the securities in Zimbabwe and the prices on the Zimbabwe Stock Exchange were used for the assessment of brokers' commission and as the basis for valuing such securities for death duties and for the purpose of estate duty, income tax and capital gains tax.

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8. In accordance with the requirements of the Exchange Control Regulations all of Mr May's securities were registered in the names of nominee companies.

9. All dealings in external securities were suspended by the respondent on 14 March 1984. On 27 March 1984 the respondent announced the termination of such dealings and that all external securities would be compulsorily acquired. Notice of the respondent's intention to acquire was given on 27 April 1984 and implemented on 29 May 1984. The latter are the

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relevant dates for the purpose of determining compensation under s 12A(6)(a) of the Exchange Control Regulations.

10. If dealings in external securities had not been terminated the premium of 30% on selling transactions, in all probability, would have continued at least until the end of May 1984. Certainly if the external securities had been voluntarily sold and not expropriated the value realised would have been their price on the Zimbabwe Stock Exchange.

The rationale for SMITH J's conclusion that the respondent was entitled to disregard the premium attaching to the external securities and to fix their value as reflected on the foreign exchange on the relevant date is contained in the following passages of his judgment at 194F-J:

> However, these cases which I have mentioned do not relate to a situation where the market in question has been specifically created to deal with particular circumstances and has been permitted by the State to continue to operate subject to State regulation. When this situation pertained and the State, in the public interest, has decided that the operation of the market so created must be terminated, it seems to me that it would be wrong to assess compensation as though the market had continued to operate.
>
> I do not think that the premium could be regarded as the price paid for the right to enter or participate in the market for foreign securities in Zimbabwe, as was submitted by Mr *Schreiner,* and not as part of the value of the foreign security concerned. As long as the market for foreign securities was permitted to continue to operate on the local stock exchange, this premium, or possibly discount, was an integral part of the price or value of the securities. If the respondent had acquired only a

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> portion of the total of the foreign securities traded on the Zimbabwe Stock Exchange, it could not have been argued that the compensation to be paid therefor should not include the premium or discount prevailing on the relevant date. In my opinion the premium element of the share price depended on the market for foreign securities continuing to operate in Zimbabwe. When this market was abolished that element fell away. The abolition of this market followed as a consequence of the respondent acquiring the 'pool' of foreign securities. In my view, the respondent was not obliged to compensate investors for the abolition of this special market.

We respectfully disagree with the learned judge that the permission granted by the State for the market in external securities to continue operating in restricted circumstances - in contra-distinction to its complete abolition - together with the undoubted power to have prohibited such dealings at prices in excess of those ruling on the foreign stock exchange, created a situation which served to differentiate the case from others in which recognised principles for the assessment of compensation have been laid down. The reality is that the State could have controlled the prices of external securities on the local stock exchange but chose not to do so. The existence of such a power relates equally to all commercial activity and in that sense all dealings in property of whatever nature may be said to depend upon the "grace and favour of the State" (see at 193G). To take an instance, the State could impose price control over land, fixing the maximum price per hectare payable for different classes of land. But the fact that it enjoys this power, but fails to use it, is not a basis for awarding compensation at a lower rate than the market price of such land in Zimbabwe. It has no bearing on what the compensation should be.

Mr *Chaskalson,* who appeared for the appellants, supported the learned judge's view that the

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premium was an integral part of the price paid by the investors for the external securities. But he strongly disputed that that element of value disappeared when the market in external securities was abolished by the respondent and thus should be ignored in assessing compensation. He argued that, as the destruction of the market was part of the scheme of expropriation and since the premium was an integral part of the value of the securities, there is no logical justification why it should be ignored, while other elements of market value, such as dividend prospects and dividends declared but not yet paid, should be taken into account. The learned judge's approach, so the argument went, was to look to the value of the securities on the foreign market because the local market was no longer in existence. In

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effect, he had looked to the consequences of the scheme of expropriation rather than to what the expropriatees had lot by the destruction of the market. Or, to state the proposition another way, it was the value of the securities to the expropriating authority to which regard was had and not their value in the hands of the investors.

We think that SMITH J was influenced by the fact that as the external securities had been expropriated in the public interest, regard was to be had to their value to the expropriating authority. That approach introduced a departure from settled principle. After all, expropriations which are not in the public interest are few and far between. Moreover, it must be borne in mind that what were expropriated were the external securities and not what they would realise in foreign currency. The premium value was lost to the State by reason of the decision to convert the expropriated external securities into foreign currency. Mr *Chaskalson* gave a graphic and apt illustration of this: if every Mercedes truck in this country had been expropriated and if such vehicles were only obtainable in South Africa, to be adequately compensated the owners would have to be paid their value in Zimbabwe and not the lower South African price. If the State chose to realise the trucks in South Africa the consequent loss would have to b borne by it.

It is well established that the effect of the scheme of expropriation on the market value of the property must be disregarded. Any increase or decrease in such value resulting from the actions or scheme of the expropriator must be ignored. See *Sammel & Ors v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (AD) at 693B; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 954C-D; *Point Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 at 572; *Melwood Units Pty Ltd v Commissioner of Main Roads* [1979] 1 All ER 161 (PC) at 165 a-c; Jacobs, *The Law of Expropriation in South Africa* at 166-168.

SMITH J cited the following extract from the judgment of DIXON J in *Nelungaloo (Pty) Ltd v Commonwealth & Ors* (1947-48) 75 CLR 495 at 571 as expressing "admirably and succinctly the position of the law in Zimbabwe":

> Now 'compensation' is a very well understood expression. It is true that its meaning has been developed in relation to the compulsory acquisition of land. But the purpose of compensation is the same, whether the property taken is real or personal. It is to place in the hands of the owner

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> expropriated the full money equivalent of the thing of which he has been deprived.
>
> Compensation *prima facie* means recompense for loss, and when an owner is to receive compensation for being deprived of real or personal property his pecuniary loss must be ascertained by determining the value to him of the property taken from him. As the object is to find the money equivalent for the loss or, in other words, the pecuniary value to the owner contained in the asset, it cannot be less than the money value into which he might have converted his property had the law not deprived him of it. You do not give him any enhanced value that may attach to his property because it has been compulsorily acquired by the governmental authority for its purposes . . . Equally you exclude any diminution of value arising from the same cause. The hypothesis upon which the inquiry into value must proceed is that the owner had not been deprived by the exercise of compulsory powers of his ownership and of his consequent rights of disposition existing under the general law at the time of acquisition.

But he failed, so it seems to us, to apply the principles there laid down. They are: (i) the compensation is to be determined by reference to the value of the expropriated property to the person from whom it is taken and not by reference to the value of that property to the expropriating authority - the question is what the owner has lost and not what the State has gained; (ii) the compensation should not be less than the money value into which the expropriated property could have been converted if there had been no expropriation; and (iii) any increase or decrease in the value of the expropriated property due to the scheme of expropriation should be ignored.

Upon an application of these principles, compensation in the present cases should have been assessed by reference to what the investors would have obtained for their external securities if the scheme of expropriation had not been implemented and the external securities had been sold by them on the date of expropriation. But, as on that date the market for external securities ceased to exist, it became necessary to determine their value by establishing notionally what a buyer would have paid on such date if a market still operated. This was the approach adopted in *Todd v Administrator, Transvaal* 1972 (2) SA 874 (AD) where RABIE JA at 881H-882A said:

> It is obvious that when a situation arises where there is only one potential purchaser, viz, the expropriating authority itself, there can hardly be said

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> to be an 'open market' in which the value of the property can be determined in the manner envisaged by s 8(1)(a)(i) of the Act. The Act, however, requires the 'open market' test to be applied, and the question accordingly arises how that is to be done in a case like the present. The only possible answer, it seems to me, is that the arbitrator should determine the value of the property, with such potential as it has, in the same way as he would have done if there had been several possible purchasers. In other words he must ignore the fact that there is only one potential purchaser, and he must assume that there is an 'open market'. Support for this view is to be found in *Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* 1939 AC 302.

See also *Gatooma Rural Council v Crook* 1974 (1) RLR 321 (AD) at 325H-326A; 1974 (3) SA 840 (RAD) at 843D-E; *Minister of Agriculture v Estate Randeree & Ors* 1979 (1) SA 145 (AD) at 152B-153A; Jacobs, *op cit,* at p 64.

Mr *Schreiner,* for the respondent sought to counter this approach by submitting that there

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existed two potential markets - the foreign market and the local market - and that after the termination of the local market by the expropriating authority a factual market for the securities still obtained. Hence there was no justification for postulating the existence of a notional market in order to determine a price, as contemplated in such cases as *Todd v Administrator, Transvaal, supra.*

We are unable to agree. As far as the Zimbabwe investors were concerned only the local market was available to them. It was on that market and on no other that external securities were bought and sold in Zimbabwe currency. Indeed, it was illegal to dispose of them on any other market. Save for the expropriation the local market would have continued with the premium ruling at 30%. Therefore, to fix the value of the securities upon the destruction of the market by reference to the value on the Johannesburg Stock Exchange is not only wrong but wholly unrealistic. It does not represent the true value to the owners. The Zimbabwe price is what the securities were worth to the investors and the fact that they had a lower price on a different and inaccessible market is not, in our opinion, a relevant consideration.

In *Holden & Anor v Inland Revenue Commissioner* [1974] AC 868 (PC); [1974] 2 All ER 819 (PC) the appellants, residents of New Zealand, became entitled to sterling funds in the United Kingdom. They wished to convert these assets into New Zealand currency available in New Zealand and

instructed their share-broker to make the necessary arrangements. He arranged in New Zealand a price in that currency for selected United Kingdom securities on a particular day and instructed his agent in London to buy these securities with sterling funds and simultaneously to sell them for New Zealand currency. The result of these transactions was that the appellants received in New Zealand more New Zealand currency than they would have received if they had remitted their sterling funds to New Zealand for exchange into that currency through the banking system at the official rate of exchange. They were assessed for income tax on the difference between the two resulting amounts. In allowing the appeal LORD WILBERFORCE said at 877D-E(825a-b of the All England report):

> The funds owned by the appellants did, in truth, have a special, ie, premium, value to a New Zealand resident. And so far from their being inaccessible except at the official rate, they were inaccessible, in the sense that they could not have been bought, at that rate. They were only accessible if he paid the premium. To treat them, therefore, as having only their official rate value, is to disregard the fact that they were freely available for external use and, for that reason, commanded a premium value. Thus they had the same value (disregarding brokerage, etc) as the purchased securities. No profit was made on the sale.

In the same way, external securities were inaccessible to Zimbabwe investors except at the Zimbabwe rate; they were inaccessible at the rate operating on foreign stock exchanges. To acquire them the premium had to be paid. Their value was the Zimbabwe value and they could be disposed of nowhere but in Zimbabwe for Zimbabwe currency.

But the main argument advanced by Mr *Schreiner* was that the only assets acquired by the respondent for which compensation was payable were the external securities. They always had

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a single value, that placed upon them by the foreign market in which they were traded. The premium was an additional amount, of concern solely to purchasers and sellers in Zimbabwe. It arose because there was a limited pool of foreign currency available to Zimbabweans who wished to invest in external securities and thus they had to compete amongst themselves for it. This differentiated the position of Zimbabwean investors from others. It followed that there were two elements to each share transaction undertaken. In order to purchase a share the local resident had to gain access to the foreign currency in the pool for which a price was fixed each day depending upon demand for the restricted supply; if the necessary currency was available he then paid a price for the share itself which was

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determined by demand for that share on the relevant foreign stock exchange. Thus the premium was an amount separate and distinct from the price of the share itself, owing its origin not to the demand for the particular share, but to the demand for the limited amount of foreign currency available to purchase that share. It was the price paid to obtain the requisite foreign currency to make the acquisition.

The fallacy in this reasoning is that it proceeds upon the misconception that the Zimbabwean investor dealt on the foreign stock exchange through an agent, and that the premium paid was to acquire the foreign currency to do so. In fact the investor dealt on the Zimbabwe Stock Exchange with local stockbrokers. Everything took place in Zimbabwe. Investors never acquired any foreign currency. The limited pool available to them was one of external securities and not foreign currency. It was the brokers who dealt on the foreign stock exchange and they did so as principals. When external securities were sold it was the brokers who received the foreign currency. This is made abundantly clear in the following passages in the affidavit of the Chairman of the Zimbabwe Stock Exchange, the correctness of which was not disputed:

12. It is important to understand that the Reserve Bank's approval aforesaid did not permit residents to actually buy and sell on the foreign stock exchanges. Only local stockbrokers were permitted to buy and sell on the foreign stock exchanges and for this purpose to hold foreign currency accounts. Consequently when local stock-brokers purchased external securities they acted as principals and bought in their own names. To fulfil an order from a resident the broker completed a separate transaction on the local stock exchange. The resident client was only a party to the transaction on the local stock exchange.

13. The fact that the local broker was acting as a principal was acknowledged by the use of a 'book-over' procedure, whereby another broker was used to confirm the transaction. This whole procedure made it clear that as far as the resident client was concerned he purchased or sold on the local stock exchange only and only the local market price was available to him. At all material times this procedure was in force and it was brought about by the manner in which the Reserve Bank permitted dealings in external securities. The Stock Exchange rules enforce this procedure, and indeed, the Stock Exchange Rules make it clear that the brokerage

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to be charged on such transactions had to be calculated on the Zimbabwe dollar price on the local market, which normally included a premium.

14. I need to explain the premium I have mentioned. As explained when a resident sold an external security the sale would actually take place on the local stock exchange, but the local broker would then arrange for a sale of that security to be effected on the foreign stock exchange in his own name. The local stockbroker would then hold the foreign currency generated from the sale in his own name, and use it later as a principal to purchase such external securities as were subsequently purchased by the same or another resident of this country.

. . . .

28. I state that as far as market value is concerned, there was only one market value for all Zimbabwean residents, and Zimbabwean stockbrokers, when buying and selling external securities for residents, and that is the market value fixed on the Zimbabwe Stock Exchange.

We agree with the learned judge and Mr *Chaskalson* that the premium paid by local investors was as much a component of the value of the shares as was the prospect of any enhancement of value. It was not severable from the price of the shares on the foreign stock exchange. It was an essential part of that price to the local investor. Once this is accepted there can be no question, in our opinion, of regarding the expropriation divisibly, with that of the premium being a deprivation of property for which compensation is not payable. (See *Hewlett v Minister of Finance & Anor* 1981 ZLR 571 (SC) at 594E; 1982 (1) SA 490 (ZSC) at 506D).

In support of the proposition that the value on the foreign market was the correct value for the purpose of assessing compensation, Mr *Schreiner* submitted that there was no ground in justice or equity why the appellants should be compensated for the loss of the premium, as they could have entertained no legitimate expectation of every being recompensed therefor. He pointed to the Budget Speech delivered by the Minister of Finance on 15 July 1976 which received wide publicity and was debated in the national press. In it investors were warned that if the State decided to acquire their external securities no account would be taken of the inflated priced paid in determining the amount of compensation due. And during 1978 authorised dealers in external securities, at the request of the Government, repeated the warning to their investor clients.

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In our view all this amounted to no more than a declaration of intention as to the form of the legislation which the then Government would have passed if it had decided to expropriate the securities. That Government was not bound by a constitutional obligation to pay "adequate compensation" for expropriated property, and could have elected to terminate the market and expropriate without compensation or with the payment of inadequate compensation. With the

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advent of independence, however, and the coming into power of a new Government under a different Constitution imposing an obligation to pay "adequate compensation" for expropriated property, the situation changed materially. All those investors who had acquired external securities prior to 18 April 1980 and continued to hold them thereafter did so secure in the knowledge that if expropriated they would receive adequate compensation. They no longer held at risk. Their status cannot be distinguished from persons who acquired external securities after Independence. In these circumstances we do not consider that any significance attaches to the action threatened by a Minister of a former Government eight years before the expropriation.

Accordingly in our judgment, the market value of the external securities was their Zimbabwe market value inclusive of the premium of 30%. We do not accept for a moment that this conclusion will impose an unwarranted penalty on the community for an acquisition effected in its interests. It follows that in paying less than that value the respondent failed to adequately compensate the applicant for their loss.

It was not disputed by Mr *Schreiner* that if the appeals of the first, second and third appellants were to succeed, *mora* interest at the rate of 8% per annum was payable on the additional compensation due to them. In the case of the fourth appellant *mora* interest was claimed at the rate of 12% per annum. The evidence establishes that as soon as payment was made the money was invested at that rate of interest. Such higher rate was obtainable because the substantial sum received gave the fourth appellant access to the "wholesale" market. We did not understand Mr *Schreiner* to seriously contest this claim.

We would allow the appeals of the four appellants with costs, inclusive of the costs of three legal practitioners, and substitute the following orders for those made in the court *a quo:*

In the case of the first appellant:

That the respondent be ordered to pay -

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(i) additional compensation amounting to $7 959,07;

(ii) interest on $7 959,07 from 4 July 1984 until the date of payment at the rate of 8% per annum

In the case of the second appellant:

That the respondent be ordered to pay to Gordon Foster Thomas, Mary Thomas and Kathleen Thomas jointly -

(i) additional compensation amounting to $262 487,93;

(ii) interest on $262 487,93 from 3 July 1984 until the date of payment at the rate of 8% per annum.

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In the case of the third appellant:

That the respondent be ordered to pay -

(i) additional compensation amounting to $15 010,36;

(ii) interest on $15 010,36 from 3 July 1984 until the date of payment at the rate of 8$ per annum.

In the case of the fourth appellant:

That the respondent be ordered to pay -

(i) additional compensation amounting to $983 841,44;

(ii) interest on $983 841,44 from 4 July 1984 until the date of payment at 12% per annum.

In the case of all the appellants:

That the respondent be ordered to pay the costs of the proceedings, inclusive of the costs of three legal practitioners.

Dumbutshena CJ: Taking into account the views expressed by the majority of the court, the appeals are dismissed with costs.

Gill, Godlonton & Gerrans, legal practitioners for appellants

Coghlan, Welsh & Guest, legal practitioners for respondent

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Endnotes

1 (Popup - Popup)

This decision was upheld on appeal. See 1986 (1) ZLR

2 (Popup - Popup)

The Master of the High Court - *Editor.*

3 (Popup - Popup)

See *Fawcett Security Orginization* v *Commercial Union Fire, Marine & General Insurance Co Ltd* 1984 (2) ZLR (HC) - *Editor.*

4 (Popup - Popup)

And fully reported in 1984 (2) ZLR 1 - *Editor.*

5 (Popup - Popup)

In an unreported judgment of the Supreme Court an appeal against this decision was dismissed.

6 (Popup - Popup)

The second applicant - *Editor.*

7 (Popup - Popup)

See p 121 of this volume - *Editor.*

8 (Popup - Popup)

This decision was upheld on appeal. See 1986 (1) ZLR

9 (Popup - Popup)

Reported at p 31 of this volume - *Editor.*

10 (Popup - Popup)

See p 34 of this volume - *Editor.*

11 (Popup - Popup)

The judgment of the High Court is reported in 1985 (1) ZLR at p 350 - *Editor.*

12 (Popup - Popup)

See 1985 (1) ZLR at p 357B - *Editor.*

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13 (Popup - Popup)

An appeal against this decision was dismissed but without the Supreme Court finding it necessary to consider the arguments on ss 18 and 81.

14 (Popup - Popup)

Now reported at p 121 of this volume - *Editor.*

15 (Popup - Popup)

See pp 127-130 of this volume - *Editor.*

16 (Popup - Popup)

See pp 131B-132B of this volume - *Editor.*

17 (Popup - Popup)

This decision was upset on appeal.

18 (Popup - Popup)

The second plaintiff was the first plaintiff's husband - *Editor.*

19 (Popup - Popup)

At pages 127H-128A of the report - *Editor.*

20 (Popup - Popup)

The judgment is reported in 1985 (4) SA at 185 - *Editor.*

21 (Popup - Popup)

See 1985(4) SA at 187I to 189A - *Editor.*

22 (Popup - Popup)

See 1985(4) SA at 194F-G - *Editor.*

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