

1986 (1)

The Zimbabwe Law Reports 1986 [Part 1]

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MANDIRWHE v MINISTER OF STATE 1986 (1) ZLR 1 (SC)

Editor's Note:(1)

Court Appellate Division, Salisbury

Fieldsend CJ, Lewis JP & Baron JA

Reference in terms of s 24(2) of Constitution of Zimbabwe, 1980

19 September 1980

Flynote

Constitutional law - Constitution of Zimbabwe 1980 - reference of constitutional point in terms of s 24(2) - what points may be referred.

Human rights - right to liberty - interdict de libero homine exhibendo - procedure where respondent fails to make good return on the return day.

Practice and procedure - interdict de libero homine exhibendo - procedure on return day where respondent fails to make good return.

Headnote

On the 21 July 1980 application was successfully made in the General Division for an *interdict de libero homine exhibendo* against the respondent who had unlawfully caused the arrest of M. On the extended return day the respondent filed an affidavit confirming that M had on his instructions been handed over, without proper legal process, to authorities in Mozambique and that those authorities declined to return him to Zimbabwe. The Judge below felt that he had no alternative but to discharge the *rule nisi* which he did, at the same time *mero motu* referring to the Appellate Division the question whether the provisions of the Declaration of Rights had been contravened and to determine what measures to take to secure their enforcement.

Held, that the presiding Judge had discharged the *rule nisi* prematurely and should have extended the rule in order to give the respondent further opportunity to make good return of M.

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Held, further, that only the particular point and not the whole proceedings are referred to the Appellate Division under the procedure adopted. Therefore reference of a constitutional point may only be made by a Judge *mero motu* where the determination of the question is in the opinion of the presiding Judge necessary to enable him to reach a determination on the nature of the relief sought. In this case the decision was unnecessary for and irrelevant to the court's

decision and accordingly the reference was not competent and could not be entertained.

The purpose and procedure under s 24 of the Constitution of Zimbabwe explained.

Cases Cited:

Shipanga v Attorney-General of Zambia 1977 ZR 53

Kennedy v Caledon Shipbuilding and Engineering Co Ltd 43 ScLR 487

Field v Longden and Sons [1902] 1 KB 47

R v Westminster (City) London Borough Rent Officer, ex parte Rendall [1973] 3 All ER 199 (CA)

M T O'Meara for applicant at the request of the Court

J G Storry for respondent

Judgment

Baron JA: Having heard argument on the preliminary point as to whether the reference of this matter was competent, the court at the conclusion of the hearing ruled that it was not, and that reasons would be given later.

Some time prior to 11 July 1980 the respondent, as a result of information he had received concerning the activities in Zimbabwe of one John Mandirwhe (and presumably at the request of the Government of Mozambique), gave verbal instructions to the Special Branch to arrest Mandirwhe. The respondent was subsequently advised that Mandirwhe's arrest had been effected, and thereafter on 11 July gave written instructions for him to be surrendered to an official of the Government of Mozambique; it is clear from the papers that these instructions were carried out, probably on or about 12 July, and it is also clear that Mandirwhe's brother made an application to the General Division for his release, citing the respondent, the Minister of Home Affairs and the Superintendent of Umtali Prison as the first, second and third respondents; a *rule nisi* was issued on that day, returnable on 31 July. On the return day the rule was discharged as against the second and third respondents, it being accepted that they had no knowledge of Mandirwhe and that the full responsibility for his arrest, and the subsequent events, lay with the first respondent, who was directed to produce Mandirwhe to the Court by 7

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August. This date was later extended by one week because it was not clear that the previous order, which had not been served personally on him, had been brought to the attention of the respondent.

On the extended return day the respondent filed an affidavit in which he confirmed that Mandirwhe had been handed over to the Mozambique authorities on his instructions. He set out in some detail the conversations he had had with the Minister of Defence and the Deputy

Minister of Defence in the Mozambique Government and the efforts he had made to persuade them to arrange for Mandirwhe's return; he told them he had thought it was lawful to hand Mandirwhe over to the Mozambique authorities but had now been advised that it was not; he stressed that if Mandirwhe was returned to Zimbabwe he could thereafter be extradited to Mozambique following proper legal process. The affidavit went on to make it clear that the Mozambican Deputy Minister of Defence was either unwilling or unable to assist in returning Mandirwhe to Zimbabwe, and concluded:

"I am unable to say definitely whether any further enquiries through different channels will be more successful but it seems unlikely."

The respondent submitted that in the premises there was nothing further he was able to do in the time available to him to comply with the order to produce the person of Mandirwhe by that date. The learned Judge took the view that in those proceedings he had no option but to discharge the order of 21 July.

With respect to him, I think the learned Judge came to this conclusion prematurely. The fact that the respondent was not able to comply with the court's order by the time of the return day did not require that the order be thereupon discharged. If a writ of *habeas corpus* had been issued and the respondent on the return day fails to make a good return the court will in a proper case extend the return day in order to give the respondent a further opportunity to make such a return. This was done in the very similar Zambian case of *Shipanga v Attorney-General of Zambia* 1977 ZR 53 in which the Supreme Court, having power on appeal to do so, issued a writ of *habeas corpus*. On the return day it appeared that the respondent had not approached the Government of Tanzania, by whom the applicant was then being held, and the court directed such approach be made and extended the return day for this purpose. On the extended return day it emerged that the "approach" was a discussion with the Tanzanian High Commissioner to Zambia, who had expressed the opinion that a formal approach to his Government would receive a negative answer, but who did not in fact communicate the approach

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to his Government. The Supreme Court declined to accept this return, and extended the return day for a further three weeks to afford the respondent a final opportunity to make a proper return.

I think it would have been proper in the instant case to adopt a similar course. The learned Judge considered that:

"...there is still a possibility that General Mabote's refusal to accede to the request of the respondent ...may be altered by higher councils"

(sic); that being so the rule should not in my view have been discharged until it was clear that the possibility of the applicant being returned to the jurisdiction of the court had disappeared.

Be that as it may, the learned Judge discharged the rule and ordered that:

"...this matter be referred to the Appellate Division of the High Court of Zimbabwe to consider whether the provisions of the Declaration of Rights have been contravened by the Minister of State in relation to the said John Mandirwhe and, if so, to determine what measures should be taken to secure the enforcement of the Declaration of Rights in relation to the latter."

The learned Judge made this order by virtue of the discretion he considered was vested in him by s 24(2) of the Constitution, there being at that stage no request by either party for such reference. Section 24 of the Constitution, so far as is relevant, reads:

"24. (1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of ss (3), apply to the Appellate Division for redress.

(2) If in any proceedings in the General Division or in any court subordinate to the General Division any question arises as to the contravention of the Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer the question to the Appellate Division unless, in his opinion, the raising of the question is merely frivolous or vexatious.

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(3) Where in any proceedings such as are mentioned in ss (2) any such question as is therein mentioned is not referred to the Appellate Division, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Appellate Division under ss (1).

(4) The Appellate Division shall have original jurisdiction -

- (a) to hear and determine any application made by any person pursuant to ss (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and
- (b) to determine any question arising in the case of any person which is referred to it pursuant to ss (2);

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights;

Provided that the Appellate Division may decline to exercise its powers under this sub-section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under other provisions of the Constitution or under any other law."

The basis on which we declined to entertain this reference was that, since the determination of the question of an alleged contravention of the Declaration of rights was unnecessary for the purposes of the order the learned Judge had decided to make, it was not competent for him to refer that question to this court.

Mr *Storry*, on behalf of the Attorney-General, submitted that, since it was not disputed in the proceedings that the actions of the respondent were wholly illegal, no question arose within the meaning of s 24(2); he submitted further that it was not necessary for the just determination of the proceedings to have regard to any alleged contravention of the Declaration of Rights. Mr *O'Meara*, who argued the matter at the request of the court, submitted that there does not have to be a dispute between the parties in question to arise, but that it is sufficient if there was a

doubt in the mind of the Judge as to whether there had been a contravention; and he submitted that the reference was competent notwithstanding that the answer to the question was not material to the order of the court *a quo*, because this court, as the final guardian of the rights of the individual, has the right to pronounce on any contravention of the Declaration of Rights.

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It is convenient to dispose at once of this last submission. If the proposition is limited in its ambit to alleged contraventions emerging in matters before the court it begs the question, since whether or not this matter is properly before the court is precisely the point in issue. If on the other hand it suggested that the court is entitled to pronounce on any alleged contravention which comes to its notice the proposition has only to be stated to be rejected as manifestly untenable.

I think Mr *Storry's* alternative propositions reduce themselves to the same test, namely whether the answer to the question was necessary for the purposes of the decision falling to be made. There are various kinds of statutes in which the expression "a question arises" appears. In *Kennedy v Caledon Shipbuilding and Engineering Co Ltd* 43 Sc LR 487 the issue was the interpretation of s 1(3) of the Workmen's Compensation Act 1897, which read:

"If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act ...the question ...shall be settled by arbitration ..."

LORD PEARSON said at 689:

"But the first requirement of all is, that there shall be a question arising in any proceedings under the Act as to the liability to pay compensation or as to the amount or duration of it. The expression 'any question' obviously means any dispute."

Field v Longden and Sons [1902] 1 KB 47, another Workmen's Compensation Act case, is to the same effect.

Mr *O'Meara*, in support of his proposition that there does not have to be a dispute between the parties for a question to arise, cited *R v Westminster (City) London Borough Rent Officer, Ex parte Rendall* [1973] 3 All ER 199 (CA). In that case the tenant of the ground floor of a six-floor house in London applied to the rent officer for the registration of a fair rent under the Rent Act 1968. The Act provided that rent officers have jurisdiction to register a fair rent for a dwelling if the rateable value is under £400. The rateable value of the whole house was £1 597 but it had never been apportioned between the six floors. The rent officer assessed the rateable value of the ground floor at £250 and proceeded to determine a fair rent, which was registered without objection from the then landlord; objection was

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taken only after the reversion was sold. Lord Denning said this at p 122:

"Section 6(2) only applies where there is a 'question arising'. If the rent officer makes his own estimate of the

rateable value of the part (by doing his own apportionment, rough and ready though it may be) and it comes under £400, and there is no challenge to his jurisdiction, then there is no 'question arising.' There is nothing to refer to the county court. But if he has doubt whether it is over or under £400, so that a question arises in his own mind about it, then he should refer it to the county court. Again, if the landlord takes objection or if there is a challenge to the jurisdiction, then, of course, a question arises and it must go to the county court."

This case supports Mr *O'Meara* to this extent: that even though there was no challenge at the relevant time to the rent officer's jurisdiction a question would have arisen if he himself had had a doubt on that score. In fact the learned Judge in the present case was in doubt; he expressed his view quite unequivocally that "the admitted facts in this case establish that Mandirwe was deprived of the right to immunity of expulsion from Zimbabwe". But even if he had truly been in doubt on the constitutional point, on the authority of *R v Westminster (City) London Borough Rent Officer*, *supra*, there was still nothing to refer. The issue on which LORD DENNING said a question would arise if the rent officer was in doubt about it, and which he should in that event refer to the county court, was the rateable value of the ground floor of the house - an issue crucial to the question whether or not he had jurisdiction to determine a fair rent. By the same token, a doubt in the present case would raise a question proper to be referred to this court only if the answer thereto were material to the decision the court was called upon to make.

We arrive at the same result if we consider simply the general structure of s 24 and the proper construction of subs (2) in the context of that structure. The purpose of s 24 is to provide, in a proper case, speedy access to the final court in the land. The issue will always be whether there has been an infringement of an individual's fundamental rights or freedoms, and frequently will involve the liberty of the individual; constitutional issues of this kind usually find their way to this court, but a favourable judgment obtained at the conclusion of the normal, and sometimes very lengthy, judicial process could well be of little value. And even where speed is not of the essence there are obvious advantages to the litigants and to the public to have an important constitutional issue decided directly by the Appellate Division without protracted litigation. Subsection (1) contemplates the situation in which it is

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clear from the outset that the existence of a remedy depends on whether there has been (or is likely to be) a contravention of the Declaration of Rights, when the person alleging to be aggrieved is given the right to go direct to the Appellate Division. Subsection (2) deals with a different situation; it contemplates that proceedings have been commenced in the General Division or in a subordinate court in circumstances in which it was not anticipated that the question of a contravention of the Declaration of Rights would necessarily arise, since otherwise one expects subs (1) to be invoked. The question having arisen, the subsection provides a speedy procedure for the determination by the Appellate Division of, in effect, a constitutional point of law without the necessity first to conclude the trial in the court of first instance and to come to this court by way of appeal. When the question is referred to this court the proceedings are merely interrupted; this court answers the question but the matter must be concluded in the court *a quo*. The subsection does not authorise the **proceedings** to be transferred to this court; it does not say, as the learned Judge's order incorrectly said, that the **matter** may be referred - only the constitutional question may be referred for determination.

Since therefore the proceedings must finally be concluded in the court in which they were commenced, it follows that a reference under subs (2) may be made *mero motu* by the person presiding only if the determination of the question is in his opinion necessary to enable him to reach a decision on the redress sought; unless the answer to the question is sought for this purpose the court *a quo* is simply seeking an academic opinion, which is not a proper exercise of the discretion given by the subsection. In the instant case the learned Judge's decision to discharge the rule did not in any way depend on whether the respondent had contravened the Declaration of Rights in relation to Mandirwhe; the question was unnecessary for, and indeed quite irrelevant to, the court's decision. Thus on this approach also the result is that the reference to this court was incompetent.

We would add only this. The fact that we were obliged for the foregoing reasons, to decline to entertain this reference does not mean that this court takes any but the gravest view of the respondent's arbitrary and illegal conduct. We can only hope that, particularly since the *rule nisi* was prematurely discharged, some further administrative action will be taken to restore Mandirwhe to this country and to make some amends for the wrong done to him.

Fieldsend CJ and Lewis JP concurred.

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S v SVISVA 1986 (1) ZLR 9 (HC)

Court **High Court, Harare**

Reynolds J

Review

3 January 1986

Flynote

Criminal Procedure - sentence - fine - improper and irregular approach for a magistrate to penalise accused for choosing to come to court instead of paying deposit fine invited.

Headnote

In answering the regional magistrate's query on the sentence imposed on the accused, the magistrate stated that he had imposed a fine in excess of what was normal for the offence since he was of the opinion that a court should impose a fine so as to encourage people who had pleaded guilty to pay deposit fines instead of coming to court. To penalise the accused for choosing to come to court instead of paying the deposit fine invited was improper and irregular. It is enshrined in the Constitution that every person is entitled to be afforded a fair hearing by a lawfully established court, and shall be permitted to defend himself on the charges laid. The deposit fine system acts as a matter of expediency but all persons appearing in court on criminal charges - whether or not previously invited to pay a deposit fine - should be dealt with in exactly the same way, and accorded all the rights and privileges attaching to a fair, judicial trial.

Cases cited:

R v Charlie Sampson 1944 GWLD 84

R v Cowan 1969 (2) RLR 18 (GD)

Judgment

Reynolds J: The accused was charged with a contravention of the Road Motor Transportation Act [Chapter 262], and he pleaded guilty to that charge. The trial court purported to proceed in terms of s 255(2)(a) of the Criminal Procedure and Evidence Act [Chapter 59], and yet sentenced the

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accused to pay a fine of \$120 or in default of payment 2 months' imprisonment with labour. This section reads as follows:

"(a) the court may, if it is of the opinion that the offence does not merit punishment of imprisonment without the option of a fine or of a whipping or of a fine exceeding one hundred dollars, convict the accused of the offence to which he has pleaded guilty on his plea of guilty and impose any competent sentence other than -

- (i) imprisonment with the option of a fine; or
- (ii) a whipping; or
- (iii) a fine exceeding one hundred dollars;

or deal with the accused otherwise in accordance with law;..."

The scrutinising regional magistrate queried the penalty imposed, and the trial magistrate now realises that he has imposed a sentence in excess of the maximum permitted in terms of the relevant provision. The regional magistrate has now remitted the matter requesting that the penalty be reduced to a fine of \$100. It is clear that this is necessary, and the sentence imposed by the trial court is, accordingly, set aside and is substituted by the following:

"\$100 or i.d.p. 25 days IWL."

What is of more concern, however, is that in answering the regional magistrate's query, the trial magistrate stated that he realized that the normal deposit fine for the offence in question was set at \$100, and he then added:

"However, after the accused had given evidence in mitigation, I formed the opinion that the court should impose a fine so as to encourage people pleading guilty to pay deposit fines instead of them coming to court, I then fined the accused \$120 or two months imprisonment with labour."

It is clear from this passage that the magistrate intended to penalize the accused for choosing to come to court instead of paying the deposit fine invited. In my view this is a most improper approach. There are a variety of reasons why an accused person would choose to come to court, and there should be no hindrance or penalty imposed upon him for so doing. It is enshrined in our Constitution that every person is entitled to be afforded a fair hearing by a

lawfully established court, and shall be permitted to defend himself on the charges laid.

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The Attorney-General, to whom the record was sent, agrees that the magistrate's approach was irregular, and he remarks:

"It is however, true that courts are overworked by minor offences which require deposit fines but this should never overshadow the accused's right to come before the court if he so wishes. To discourage him by imposition of a heavy penalty is both improper and contrary to judicial reasoning."

Magistrates should bear in mind that the deposit fine system operates as a matter of expediency. It is convenient to the State and to many offenders as well, and it is of value in that large numbers of petty offences are disposed of inexpensively and expeditiously, and the busy magistrates courts are not unduly cluttered with these cases. (*See R v Charlie Sampson* 1944 GWLD 84.) It must be remembered, however, that the invitation to pay a fixed sum as a deposit is extended to all offenders, and no account is taken of aggravating or mitigating factors, of the accused's personal circumstances, or of any other consideration relevant to the question of penalty. Thus if anyone declines to pay the deposit fine, and chooses to come to court instead, these various considerations may properly be taken into account at the trial.

It must also be stressed that all persons appearing in court on criminal charges - whether or not previously invited to pay a deposit fine - should be dealt with in exactly the same way, and accorded all the rights and privileges attaching to a fair, judicial trial. The gravity or veniality of the offence should be of no relevance in this regard. At the same time, though, it is my view that in assessing a penalty appropriate to the offence, the court should not depart from the sum invited as a deposit fine unless this is clearly warranted. See *R v Cowan* 1969 (2) RLR 18 (GD).

Samatta J: I agree.

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MUDZIMU v MUNICIPALITY OF CHINHOYI & SAMURIWO 1986 (1) ZLR 12 (HC)

Court High Court, Harare

Reynolds J

Civil application

9 & 22 January 1986

Flynote

Costs - attorney and client scale - award not made for all acts of misbehaviour on the part of the losing party - basis of such award - litigant's conduct amounted to an abuse of the court process and his actions thereby brought additional and unwarranted expense to the other party.

Headnote

Actions brought by the applicant were necessitated by the respondent's apparently defiant attitude towards court orders and the respondent's refusal to comply with the terms of those orders.

Held, that an award of costs on a legal practitioner and client scale is not made for virtually any misbehaviour on the part of the losing party.

Held, further, that the basis of such an award is that the litigant's conduct has amounted to an abuse of the Court process and his actions have thereby brought about additional and unwarranted expense to the other party.

Held, further, that there were ample grounds warranting the award of costs on the higher scale in the circumstances of the present case. By virtue of the respondent's unreasonable and objectionable behaviour, the petitioner was put to considerable inconvenience and additional expense and there was no reason why he should be out of pocket in respect of his various and necessary Court actions seeking redress.

Semble: The possible concept that contempt of court *per se* justifies the making of an award of costs on a legal practitioner and client scale appears to be stated too widely.

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Cases cited:

Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd 1985 (4) SA 809 (A)

City of Cape Town v Satz 1939 CPD 195

Caluza v Minister of Justice 1969 (1) SA 251 (N)

Hayes v Baldachin 1980 (2) SA 589 (R)

Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597

Van Wyk v Millington 1948 (1) SA 1205 (C)

AP de Bourbon SC for the petitioner

FC Blackie SC for the respondents

Judgment

Reynolds J: This is the return day of a rule *nisi* issued by my brother Smith on 13 December 1985. *Mr Blackie*, for the respondents, has conceded that the rule should be confirmed in part, and he contests only the question of costs. Although the matter of costs, accordingly, is the only issue requiring consideration, it is necessary, nonetheless, to trace the history of the dispute between the parties. In brief, the facts leading up to the present application were as follows:

In May 1982, the petitioner was engaged by the Municipality of Chinhoyi in the capacity of Town Clerk, and as such, he was provided with a municipal house. In October 1984, the petitioner was arrested on allegations of the theft of municipal property, and he was suspended from his duties by the Council. The charges brought against the petitioner were, however, withdrawn in August 1985, by which time civil litigation had been instituted in connection with the withholding of the petitioner's salary, and regarding the validity of an attempt to terminate his services by the Municipality.

In October 1985, the first respondent issued summons in the magistrates court claiming the eviction of the petitioner from the municipal house that he then occupied. The petitioner entered an appearance to defend that action, but on 7 December, and without being in possession of any court order, the first respondent's policemen forcefully evicted the petitioner, his family and their household property from the premises in question. As a result of this action, the petitioner applied for and was granted a rule *nisi* on 9 December, calling upon the first respondent to show cause on a day specified why an order should not be issued directing that it restore the petitioner and his property into the house concerned, and permitting them to remain in undisturbed use and occupation of the premises until the determination of the court actions then pending. This order operated as a temporary interdict,

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requiring that the first respondent restore possession of the house and contents to the petitioner immediately.

On 11 December the petitioner approached this court again, alleging that the two respondents - the second respondent having then been joined - had refused to comply with the court order, and applying for further orders that, (a) the respondents comply with the first order, and (b) the second respondent appear before the court on the day following service of the order applied for, "to show cause why an order for his imprisonment for contempt of court should not be made." This application was granted by my brother SAMATTA on that same day.

Thereafter, the claim for contempt of court was settled, but, by consent, and as a result of the petitioner still not being able to return to the house, a further rule *nisi* issued on 13 December calling upon the two respondents to show cause, on the day of the present hearing, why an order should not be made directing the respondent:

- "(a) to restore possession of the premises to the applicant immediately; and
- (b) to pay the costs of the application on an attorney and client - legal practitioner and client - basis."

It appears that the petitioner eventually regained occupation of this house on 14 December, and Mr *Blackie*, as already stated, has agreed that para (a) of the final order should be confirmed, but he contests para (b) of that order, claiming that the first respondent is liable for costs only on a party and party basis, and only in respect of the rule now to be confirmed.

In the result, the rule will be confirmed as to paragraph (a) of the court order of 13 December 1985, and the only issue remaining is the question of costs.

Mr *de Bourbon*, for the petitioner, urged that the award of costs should be on an attorney and client scale because he alleges the respondents were in wilful and deliberate breach of the court order, and were dilatory in complying with the third and final order of 13 December as well, despite this order having been issued by consent.

Mr *Blackie*, on the other hand, as I understood him, submitted that:

"(a) the second respondent should not have been joined at all, and that he

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should, therefore, be entitled to the costs he had incurred in opposing these proceedings;

- (b) the content of the original order made on 9 December was invalid in that
 - (i) the then respondent was directed to arrange such property within the house and grounds comprising those premises in the manner in which it was arranged prior to its removal", and such a provision was irregular;
 - (ii) the temporary interdict applied for was required to operate until the determination of the two cases pending and this provision was also irregular. As a result of these irregularities, the respondents were obliged to persist in their opposition to the applications made, and should not, therefore, have to pay costs;
- (c) the proceedings were conducted with such undue haste, particularly bearing in mind the difficulties of communication with Chinhoyi, that the respondents had had inadequate notice to consider the application properly, and had in fact not wilfully defied the court orders;
- (d) the alleged refusal to comply with the court orders was based on hearsay evidence, and there was nothing else to show that there had been wilful defiance of the orders issued."

It is convenient to deal with the points raised by Mr *Blackie* first, and I shall consider each in turn.

(a) As to the joining of the Mayor as second respondent in terms of s 79 of the Urban Council Act [*Chapter 214*], a duly appointed Mayor is required to preside at all meetings of the Council he attends. It was alleged in the petitioner's affidavit that the second respondent had been present at the Council meeting at which it had been resolved not to comply with the court order, and yet at no stage has the second respondent denied this, nor has he claimed that he did not participate in the resolution made.' Had he not attended the meeting, or had he dissented from the decision taken, it is only reasonable to assume that he would have said so. I am in agreement with Mr *de Bourbon*'s submission, that, on a balance of probabilities, he personally and as a member of the Council, chose to ignore the court order. He was, therefore, in my view, properly joined as from 11 December.

(b) I do not consider that these points are of substance, in relation to the question of the scale of costs.

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(c) & (d) These last two points raised by Mr *Blackie* may be considered together. The allegation was made by the petitioner, whether based on hearsay evidence or not, that the respondents had resolved, at a formal meeting of the Council, to disregard the court order, and that there had been no denial of this at any stage. The facts of the matter support this allegation, and it is apparent that it was only after persistent and industrious effort that the petitioner obtained a measure of satisfaction, some five days after the original order was issued. This does not seem to me to amount to unduly hasty action. In my view, then, the failure to comply with the court orders has been established, and in this event, wilfulness on the part of the defaulting party is inferred, and the onus rests upon him to rebut this inference (*Putco Ltd v T V & Radio Guarantee Co (Pty) Ltd*, 1985 (4) SA 809 (A) at 836). The respondents here have made no attempt to discharge this *onus*, and I am satisfied, therefore, that their failure to comply with the court orders was both wilful and deliberate. The question then arises as to whether this fact should, as Mr *de Bourbon* submits, form the basis of a ruling that any costs due to the petitioner should be paid on an attorney and client scale.

Mr *de Bourbon* relies on a passage in Cilliers *Law of Costs* 2nd ed p 56, 4 18, and the cases there cited in support of his argument.' This passage reads as follows:

"4.18 Litigant's deplorable attitude towards the court

An unsuccessful litigant's attitude towards the court may lead it to award costs on an attorney and client scale against him. This was done where an attempt had been made to trifle with the court. (*City of Cape Town v Satz* 1939 CPD 195). In another case the court, in granting an application to set aside an action, awarded the applicant costs on an attorney and client scale on the grounds, *inter alia*, that the respondent's attitude towards the court was deplorable and highly contemptuous." (*Caluza v Minister of Justice* 1969 (1) SA 251 (N)).' See also *Hayes v Baldachin* 1980 (2) SA 589 (R) 595."

This statement, and the authorities on which it is based require examination. The leading case on the award of costs on an attorney and client scale is *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597. After an exhaustive review of the concept of attorney and client costs, TINDALL JA stated, at 607:

"The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, **by** reason of special

REYNOLDS J

considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation."

It seems to me that the words "or from the conduct of the losing party" in this passage have been misconstrued. I do not believe that the learned judge meant by this expression that virtually any misbehaviour on the part of the losing party sanctioned the imposition of costs at the higher level. The basis of such an award is, in my view, that the litigant's conduct has amounted to an abuse of the court process, and his actions have thereby brought about additional and unwarranted expense to the other party. If he is guilty of offensive behaviour towards the court or its officials, or towards any other person, this is irrelevant, as far as costs are concerned, if it does not have this effect, and I do not understand TINDALL JA to suggest otherwise.

I turn to examine the three cases cited above, which do not seem to me to be in conflict with this reasoning. In *City of Cape Town v Satz & Anor*, *supra*, although CENTLIVRES J, did state that the manner in which an affidavit was framed was "disingenuous", and "an attempt to trifle with the court", the basis of the award of costs given on an attorney and client scale was, as I understand the judgment, the objectionable manner in which the respondents had put their case before the court. The effect of this misconduct on the part of the respondents had been to render it necessary for the City of Cape Town to institute the court action.

In *Caluza's case*, *supra*, it is true that HARCOURT J, dwelt at length and with obvious indignation on the applicant's attitude towards the court, which he described as "deplorable and highly contemptuous", but once again the basis of the award of costs at the higher level appears to have been that the applicant had failed to provide the security ordered by the court, and in the course of the proceedings had behaved in an objectionable way. The respondent had, as a result, been required to attend court on several occasions unnecessarily. The learned judge traced "the sorry history of the (applicant's) approaches to the court", and dismissed the application.

Finally in the case of *Hayes v Baldachin* referred to *supra*, WADDINGTON J indeed commented on the plaintiff's impertinent and contemptuous behaviour towards the court, but only as a ground for holding that the plaintiff's

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REYNOLDS J

conduct, in this and in other ways, was "vexatious, and an abuse of the process of the court." In conclusion the learned judge said "I therefore have no hesitation in finding that a special order should be made on the ground that plaintiff has brought these proceedings vexatiously."

If I am however, incorrect in my reading of the judgments in these three cases, and the learned judges concerned did in fact intend to hold that contempt of court *per se* justifies the making of an award of costs on an attorney and client scale, then, with great respect, it is my view that the concept is stated too widely. Having arrived at that conclusion, the various proceedings brought in the present matter may now be examined.

The general rule is that the successful party is entitled to costs, and I do not consider that any reason of substance has been advanced that would warrant a departure from that general rule in the present case. In my judgment all the actions taken by the petitioner were necessary and

reasonable in the circumstances and he is, therefore, entitled to an award of costs and the only issue still to be determined is the scale of those costs.

The initial petition brought on 9 December, when the second respondent was not, at that stage joined, was not in my view, out of the normal run of spoliation cases, and there are no "very strong reasons", in regard to that action, that justify the making of the special order sought as to costs (*Van Wyk v Millington* 1948 (1) SA 1205 (CPD) at 1215).' The subsequent actions, however, were necessitated by the respondents' apparently defiant attitude towards the court orders, and their refusal to comply with the terms of those orders. It is my view that in such circumstances, there are ample grounds warranting the award of costs on the higher scale. By virtue of the respondents unreasonable and objectionable behaviour the petitioner was put to considerable inconvenience and additional expense. There is no reason why he should be out of pocket in respect of various and necessary court actions seeking redress.

In the result the rule issued on 13 December is confirmed as to para (a), and as to para (b), costs are awarded against the first respondent only in case number 3456/85 on a party and party basis. In all subsequent actions costs are awarded against the two respondents jointly and severally, on an attorney and client scale.

Coghlan, Welsh & Guest, petitioner's legal practitioners

Brighton & Cole - Bowen, respondent's legal practitioners

1986 (1) ZLR p19

ATTORNEY-GENERAL v MHARAPARA 1986 (1) ZLR 19 (SC)

Court Supreme Court, Harare

Beck JA, Gubbay JA & McNally JA

Criminal appeal

24 January 1986

Flynote

Appeal - order giving leave to appeal - order allowing bail pending appeal - whether Attorney-General has the right to appeal against such orders.

Legislation - High Court of Zimbabwe Act, 1981 s 44.

Words and Phrases - "criminal case" - "subject to".

Headnote

An order granting leave to appeal and an order allowing bail pending appeal are decisions in a criminal case. The Attorney-General has no right to appeal against such orders.

Cases cited:

Paweni & Anor v Acting Attorney-General 1985 (3) SA 720 (ZSC)"

S v Mharapara 1985 (2) ZLR 211 (SC)

Hawkins v Administrator of South-West Africa 1924 SWA 57

E Chatikobo for the appellant

K Laue for the respondent

Judgment

Beck JA: On 17 January 1986 the respondent was convicted in the High Court of having stolen a large sum of money from the Zimbabwe Embassy in Brussels. Judgment on sentence was reserved for a week and the conditions on which the respondent had been granted bail of \$1 000 pending trial were extended pending sentence.

1986 (1) ZLR p20

BECK JA

On the morning of 24 January the respondent was sentenced to eight years' imprisonment with labour, three years of which were suspended on condition that he refunds to the Zimbabwe Government the equivalent of what he stole - Z\$24 449,62. The learned trial judge granted the respondent leave to appeal against conviction and sentence and also granted the respondent bail pending appeal on the same somewhat generous terms and conditions on which he had been granted bail pending trial, save only that the requirements as to reporting to the Police were made stricter.

The same afternoon the parties were before the court. The Attorney-General wished to appeal as a matter of urgency against the orders granting the respondent leave to appeal, and bail pending appeal. The respondent's legal representative had no objection to the desire of the Attorney-General to have the matter set down with such haste, but advanced *in limine* the submission that the Attorney-General has no right to appeal against either of the two orders in question. At the conclusion of argument we upheld that submission and intimated that our reasons for so doing would be furnished later. These are those reasons.

Mr *Chatikobo* relied on subs (1) of s 44 of the High Court of Zimbabwe Act for the Attorney-General's alleged right to appeal against the decision of the judge *a quo* to grant the respondent leave to appeal against his conviction and sentence, and to grant him bail pending appeal. He freely accepted that, unless subs (1) of s 44 gave the Attorney-General the *locus standi* for which he contended, he was out of court.

The subsection reads :

"44. (1) Subject to the provisions of this section, 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."

Mr *Chatikobo* submitted that the decisions with which the Attorney-General is dissatisfied are

decisions in a "criminal case", and by way of analogy he cited *Paweni & Anor v The Acting Attorney-General* 1985 (3) SA 720 (ZSC) and *S v Mharapara* 1985 (2) ZLR 211 (SC). Being decisions in a "criminal case" they are therefore such decisions as are covered by the wording of s 44(1), the effect of which, he argued, is to give to the Attorney-General an absolute and unfettered right of appeal.

1986 (1) ZLR p21

BECK JA

The objection that was raised by Mr *Laue* to the Attorney-General's claim to an absolute and unfettered right of appeal against a decision in any criminal case is founded upon the opening phrase of s 44(1), viz: "Subject to the provisions of this section ..." That phrase can only mean, Mr *Laue* said, that subs (1) has to be read with all the other subsections of s 44, and that the rights of appeal given to interested parties by subs (1) are therefore circumscribed by the provisions of the ensuing subsections.

The words "subject to" may and frequently do mean "except as curtailed by". See for example *Hawkins v Administration of South - West Africa* 1924 SWA 57 at 67. They have clearly been used in that sense here. Thus, subs (2) curtails the right of appeal conferred upon a person convicted on a criminal trial held by the High Court. The right of appeal enjoyed by such a person against the outcome of such a process, namely a High Court criminal trial, is by no means absolute and unfettered in terms of subs (1) of s 44, but is curtailed by subs (2), so that it may only be exercised insofar as subs (2) allows it to be exercised. The same curtailment is effected by subs (5) of the right of appeal conferred on a person convicted in an inferior court or tribunal who is dissatisfied with the judgment of the High Court on an appeal or on a review (but not a review pursuant to s 63 of the Magistrates Court Act).

The curtailments of the rights of appeal conferred upon the Attorney-General are to be found in subs (6) and (7). Subs (7) addresses itself to the Attorney-General's right of appeal against sentences imposed by the High Court, with which we are not concerned in the matter now before us.

Subsection (6), however, is the curtailment upon which Mr *Laue* has successfully relied in objecting to the Attorney-General's *locus standi* to bring this appeal. The subs was repealed and substituted by s 5(d) of Act 3 of 1984. Both in its original form, and now, its provisions govern the Attorney-General's right of appeal when dissatisfied with a High Court judgment in "a criminal matter", whether in the exercise of the High Court's original or appellate jurisdiction, or on review - including a review pursuant to s 63 of the Magistrates Court Act.

The phrase "a criminal matter" is quite as wide as the phrase "any criminal case" that is used in subs (1). The decisions that the Attorney-General has sought to appeal against are unquestionably decisions in "a criminal matter", and they are therefore decisions to which the provisions of subs (6) apply, no less than do the provisions of subs (1). Since, however, the rights of appeal that are conferred by the provisions of subs (1) are only such as are "subject to", or "curtailed by", the provisions of subs (6), the Attorney-General can

1986 (1) ZLR p22

BECK JA

only be heard if the right of appeal for which he contends is one that is permitted by the provisions of subs (6).

It clearly is not. In terms of subs (6) only those judgments of the High Court in a criminal matter may be appealed against by the Attorney-General, with the leave of a judge of this Court, if the appeal is on a point of law, or if the accused was acquitted or had his conviction quashed because of a view of the facts which could not reasonably be entertained. Neither of these situations is applicable to the appeal that the Attorney-General has sought to bring in this case.

It may be observed in conclusion that the amendment that was effected to subs (6) by Act 3 of 1984 was of such a nature as to be wholly inconsistent with Mr *Chatikobo's* submission that it was the Legislature's intention to confer on the Attorney-General, by subs (1), absolute and unfettered rights of appeal that are additional in some way to the rights provided for in subs(6), despite the difficulty of distinguishing between the generality of the concepts of "a criminal case" and "a criminal matter".

The purpose of the 1984 amendment was surely to give to the Attorney-General a right that he did not have before, namely a right, under certain circumstances, to appeal against an acquittal on the facts. If Mr *Chatikobo's* submission in the present matter be correct however, it would mean that the purpose of the 1984 amendment was not to enlarge the Attorney-General's rights of appeal, but was the very opposite, namely to restrict those rights by providing that an appeal by the Attorney-General on the facts would henceforth only lie in the limited circumstances provided for by the amended subs (6), whereas prior to the amendment the Attorney-General had enjoyed, according to Mr *Chatikobo's* submission, an unfettered and absolute right of appeal on the facts by virtue of the provisions of subs (1). This would be the first time, as far as I am aware, that claim has been laid on behalf of the Attorney-General to a right of appeal on the facts before such a qualified right was brought into being in 1984. I am satisfied that Mr *Chatikobo's* submission is incorrect.

It was for these reasons that at the conclusion of argument we upheld the objection *in limine* and found that the Attorney-General had no right to appeal against the orders in question.

Gubbay JA: I agree.

McNally JA: I agree.

Kantor & Immerman, respondent's legal practitioners

1986 (1) ZLR p23

MURIMO v TSIVAI 1986 (1) ZLR 23 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Civil appeal

30 January 1986

Flynote

Appeals - lapse for want of prosecution - when deemed to occur.

Legislation - Maintenance Act [Chapter 35] s 3.

Child - maintenance - shortcomings in existing procedure for obtaining maintenance.

Headnote

The appellant made a late noting of appeal from the order of a maintenance court; he did not apply for a date of hearing within the prescribed time; the record was six months in preparation; even when it was ready the appellant took no steps to have set down arranged; a variation of the original order was obtained prior to the hearing of the appeal. The appellant was apparently content to drift along in the advantageous position created by these events.

Held that the appeal must be deemed to have lapsed.

Held, further, that inadequacies in the existing procedure for obtaining maintenance existed.

Appellant in person

Respondent in person

Judgment

McNally JA: This is an appeal from the order of a maintenance court, established in terms of s 3 of the Maintenance Act [*Chapter 35*]. It provides an opportunity to comment upon the administration of the Act, and to point to areas where amendment of the Act or of the procedure under the Act might lead to improvement. First however I should set out the facts of this case.

1986 (1) ZLR p24

McNALLY JA

The appellant and the respondent fell briefly in love, and in due course, on 24 December 1982, a child was born to them. The appellant did not support the child in any way, nor did he live with or support the respondent.

On 12 September 1984 the respondent made a complaint on oath to a maintenance officer in terms of s 4 of the Act. She claimed maintenance for the child in the sum of \$150 per month. Paternity was not disputed. At the hearing on 22 October 1984 the appellant offered \$30 per month. After what must be described as a very cursory and inadequate investigation of the facts (the record of the evidence is one-and-a-half pages long) the magistrate delivered judgment on the same day in the following words:

"I have considered all the facts, and I consider that you should pay maintenance in the sum of \$120 per month. First payment by the 31st October, that is the end of this month, and thereafter by the last day of each month.

Payments through the Clerk of the Court, Maintenance Court, Harare."

For a judgment involving the payment of \$23 400 over some sixteen years this is quite astonishingly brief. Nor did the magistrate elaborate on his reasons for judgment when notice of appeal was lodged.

The appeal was not noted within the 21 days required by Order 31 of Rule 2 of the Magistrate's Court (Civil) Rules, SI 290 of 1980. It was noted on 3 December 1984. The effect of an appeal, of course, is to suspend the operation of the order appealed against.

Once an appeal is noted it is required to be prosecuted within fixed time limits. Rule 55(1) of the Rules of this court, SRGN 380 of 1964, provides that an application for a date of hearing of an appeal shall be made in writing to a registrar (of this court) by the appellant or his legal representative within eight weeks after the appeal has been noted. In default thereof the appeal "shall be deemed to have lapsed unless a Judge (of this court) grants relief on cause shown".

The appellant made no application for a date of hearing. In fact, even if he had done so, the Assistant Registrar of this court would have had to advise him to wait, because the record of the hearing was not prepared and made available to this court and to the parties until 10 June 1985. This is over six months from the date of noting of the appeal. Rule 50 of the Rules of this court requires the Clerk of Court to lodge the record within 28 days of the noting

1986 (1) ZLR p25

McNALLY JA

of the appeal. The record is a mere ten pages long, of which three required transcribing. The rest simply photocopying. A delay of this nature is most unsatisfactory. Not only does it make nonsense of the Rules of both courts. It also, and more importantly, creates a situation in which nothing is done about a maintenance order for many months.

Even after the record became available, the appellant took no steps to have the appeal set down. Eventually the respondent approached the Assistant Registrar of this court in January 1986 and at her instance the matter was set down for hearing on 30 January 1986, over 15 months from the date of the magistrate's order.

This is not the first occasion on which such delays have occurred in maintenance matters. These delays have two consequences, both of them unfortunate. In the first place the appellant is under no pressure to pay maintenance for his child or to prosecute the appeal with any urgency during the period of the delay. Time, for him, is money. In the second place the parties' circumstances have usually changed significantly by the time the matter comes before us. We are required to treat the matter as an appeal based on the facts and circumstances of the time of the original hearing, when realistically the matter should be treated as an application for a variation order, based on today's facts, together with an application for the payment of the inevitable arrears.

In the present case the role of this court has been pre-empted by the appellant. Despairing, so he says, of any progress in the matter of the appeal, he went back to the maintenance court for a variation order, not only in relation to this case but also in relation to three other cases. The

four cases were heard jointly on 30 December 1985. The three other women attended. The respondent did not. She says she was not advised of the hearing. The magistrate apparently ordered the appellant to pay each of the mothers, including the respondent, \$70 per month by way of maintenance. The other women allegedly agreed to waive their claims for arrears. The respondent does not agree either to the reduction or to any waiver of arrears.

The appellant further claims, and the respondent without commitment to the exact details admits, that he did in fact pay her \$50 per month for some months and then reduced it in May 1985 to \$30 because of his financial problems. He says he has paid \$70 to the Clerk of the Maintenance Court in respect of the new order.

1986 (1) ZLR p26

McNALLY JA

All this emerged at the hearing after extensive questioning of the unrepresented parties.

In the view we took of the matter, the first question to be asked was whether the appeal should be deemed to have lapsed.

As has already been recorded, the appellant at no stage approached this court to apply for a date of hearing, even after he was provided with a copy of the record. Had he done so within eight weeks of the providing of the record, he could hardly have been refused condonation. In fact it was the respondent who approached the Assistant Registrar, six months after the record became available. Her approach must be seen (despite her understandable plea that she set it down in order to get her money) as an application to dismiss the appeal for want of prosecution. That is all she is entitled to. In court the appellant asked that his delay be condoned.

In our view however, the appellant has provided no real reason for his failure to set the matter down. It seems he was content to drift along in the advantageous position created first by his noting of the appeal and later by the variation order.

Nor could we see any point in hearing the appeal at this stage. The order appealed against was so inadequately reasoned and researched that it is really impossible to say whether the *quantum* ordered was appropriate or not. It has in any event been overtaken by the variation order. As to the arrears, they can adequately be dealt with by an application by the respondent to the Clerk of the Maintenance Court in terms of s 22(2) of the Act, if she wishes to seek to enforce them.

In all these circumstances we took the view that the most appropriate action by this court was to deem the appeal to have lapsed for want of prosecution, and to decline to grant relief by way of condonation of the late prosecution, or, more accurately the non-prosecution of the appeal by the appellant.

Accordingly at the end of the hearing we dismissed the appeal for want of prosecution and refused the appellant's application for condonation. Since neither party was represented we made no order as to costs.

The consequences of this order were explained to the parties at the hearing, and are now for

convenience and record set out in writing:

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McNALLY

1. The original maintenance order in Case No. M 614/84 stands at \$120 per month, first payment on or before 31 October 1984.
2. Insofar as payments under that order have not been fully made, the respondent is entitled to apply to enforce the order with the assistance of the Clerk of the Maintenance Court in terms of s 22(2) of the Act.
3. If, as we have been informed, the maintenance court has since made a variation order, that order will stand with effect from the date it was made effective, which we understand was 1 January 1986.
4. If, as the respondent claims, she was not advised of that hearing, she is entitled to apply for rescission of that variation order in terms of s 12 of the Act.

Arising out of this and several similar matters which have come before us recently, we venture to make the following suggestions for consideration by the relevant authorities:

1. Amendment of the Form "Complaint on Oath in terms of s 4(1) Maintenance Act, Chapter 35" -
 - a. Paragraph 4 should contain a list of headings of the expenses of her family unit as a whole eg Rent/Mortgage Payments; Water and Electricity; Telephone; Bread; Milk; etc;
 - b. She should be advised to produce at the hearing, if available, a recent salary advice and receipted accounts for those expenses normally receipted, to support her allegations.
2. There should be annexed to the Summons a document requiring the respondent to set out his income and expenditure in the same format as the complainant does, together with a list of his dependents. The document should also advise him to bring documentary evidence to the hearing as in 1 b above.
3. Amendment of the Form "Order made in terms of s 6(1) of the Maintenance Act, [Chapter 35]".

The present cyclostyled copies of this form do not in fact have a page 2, though reference is made to it on page 1. In addition to the information about penalties which is (allegedly) on page 2, there should be information about how to appeal, and the time limits applicable.

1986 (1) ZLR p28

McNALLY JA

4. It is for consideration by those concerned with legislative drafting whether there should not be some provisions for the payment of maintenance while the appeal is pending. It could either be provided that the noting of an appeal does not suspend the obligation to pay, or that two - thirds (or some other proportion) of the maintenance ordered should be paid pending the decision on appeal. Provision would also have to be made about whether or not the amounts would be repayable if the appeal succeeded.
5. It would seem that, certainly in the larger centres, those concerned with staffing and administration should consider how to avoid delays, due partly to merely mechanical problems such as the lack of photocopying or transcribing facilities, and partly perhaps to understaffing.

In a country striving to achieve equality of treatment between the sexes the Maintenance Act in certain respects seems to operate to the disadvantage of those who are left literally holding the baby.

The Assistant Registrar is requested to make copies of this judgment available to the Secretary for Justice, Legal and Parliamentary Affairs, the Director of Social Welfare and the Chief Magistrate.

Beck JA: I agree.

Gubbay JA: I agree.

1986 (1) ZLR p29

JENA v NECHIPOTE 1986 (1) ZLR 29 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Civil appeal

31 January 1986

Flynote

Costs - successful appeal against order granting summary judgment - costs of appeal made dependant upon outcome of main action.

Headnote

An appellant who successfully appeals against an order granting summary judgment, but whose affidavit opposing the original application was unacceptably bald ought only to be allowed the costs of the appeal if his defence in the main action succeeds.

Cases cited:

Davis v Terry 1957 (4) SA 98 (SR)

Rex v Rhodian Investments Trust (Pvt) Ltd 1957 (4) SA 631 (SR)

Kassim Brothers (Pvt) Ltd v Kassim & Anor 1964 (1) SA 651 (SR)

Shingadia v Shingadia 1966 (3) SA 24 (SR)

Webb v Shell Zimbabwe (Pvt) Ltd 1982 (1) ZLR 102.

Gilinsky & Anor v Superb Launderers & Dry Cleaners 1978 (3) SA 807 (C)

RM Fitches for the appellant

The respondent in person

Judgment

Gubbay JA: The respondent (to whom I shall refer hereafter as "the plaintiff") issued a summons out of the magistrates court in which she claimed against the appellant ("the defendant") payment of two sums of money (a)'\$700 alleged to be due under an acknowledgement of debt signed by the defendant in March 1983; and (b)'\$250 alleged to be the amount of monies lent in advance to the defendant in March 1983. An appearance to

1986 (1) ZLR p30

GUBBAY JA

defend was entered and thereafter the plaintiff filed the requisite affidavit in support of an application for summary judgment. The defendant in turn filed an opposing affidavit in which he admitted signing the acknowledgement of debt but averred that: "...this debt has been paid in full and the money is not due to plaintiff". All knowledge of a loan of \$250 is denied.

The magistrate correctly refused summary judgment in the amount of \$250. He gave the defendant leave to defend that claim and ordered that the action proceed in respect of it. Summary judgment was however granted in the sum of \$700 with costs being awarded against the defendant. The appeal lies against that order.

The magistrate based his decision on the fact that the defendant had no documentary proof that the debt had been discharged and that were the issue to go to trial it would be a matter of his word against that of the plaintiff with the predictable outcome being in favour of the plaintiff. That was an erroneous approach.

All that a defendant has to establish in order to succeed in having an application for summary judgment dismissed is that "there is a mere possibility of his success"; "he has a plausible case"; "there is a triable issue"; or, "there is a reasonable possibility that an injustice may be done if summary judgment is granted". These tests have been laid down in many cases, typical of which in this country are *Davis v Terry* 1957 (4) SA 98 (SR); *Rex v Rhodian Investments Trust (Pvt) Ltd* 1957 (4) SA 631 (SR); *Kassim Brothers (Pvt) Ltd v Kassim & Anor* 1964 (1) SA

651 (SR); *Shingadia v Shingadia* 1966 (3) SA 24 (SR); *Webb v Shell Zimbabwe (Pvt) Ltd* 1982 (1) ZLR 102.

Although the relevant allegations in the defendant's affidavit are somewhat bald - particulars should have been given of when, where and in what amounts, the debt was repaid - I am nevertheless satisfied that, upon an application of any of the tests I have referred to, the defendant's affidavit reveals a *prima facie* defence. Consequently summary judgment ought not to have been granted.

It was for these reasons that at the conclusion of the hearing the appeal was allowed and the order of the court *a quo* altered to read:

"The application is dismissed and leave is given to the defendant to defend the action. The costs of the application for summary judgment are reserved for determination by the trial court."

1986 (1) ZLR p31

GUBBAY JA

The question of whether the costs of the appeal should follow the event remains to be considered.

It seems to me that one has to weigh in the balance three different considerations. They are these:

1. We do not yet know anything about the merits of the defendant's case. If he has truly repaid the alleged debt there can be no doubt that he deserves his costs of appeal. If he is lying, however, and does in fact owe the money, should the court, in exercising its discretion in regard to costs, award them to a victor who has no moral right to his victory? One bears in mind that this is not a case involving points of law. The defendant knows very well whether or not he has repaid the money lent to him.
2. Order 15 Rule 2(1)(c) of the Magistrates Court (Civil) Rules, SI 290 of 1980, requires more than a bare denial of the plaintiff's allegation (see *Kassim Brothers (Pvt) Ltd v Kassim & Anor supra*, at 659D), although even in such a case it may be proper to refuse summary judgment - *Gilinsky & Anor v Superb Launderers & Dry Cleaners* 1978 (3) SA 807(C).
3. On the facts of the present case this court's finding shows that the magistrate was wrong to award summary judgment and thus if the defendant's denial of liability is *bona fide* he had no alternative but to bring the matter on appeal.

In *Gilinsky's* case, *supra*, the Full Bench of the Cape Provincial Division was dealing with an appeal against the award of summary judgment. In circumstances very similar to the present it was decided that the plaintiff's case was not "unanswerable". Summary judgment should not have been granted. However for two reasons no order as to the costs of appeal was made. First, the appellants had been supine, failing to appear at the original hearing. This does not apply to the present case. Second, the bare denial in the affidavits (very similar to the facts of the present case) was not a compliance with the Rules of Court. These Rules, although more explicit than ours, are similar in the way they are interpreted - see *Kassim's* case, *supra*. This

criterion applies in the present case.

It would not be appropriate at this stage to deny the defendant his costs of appeal, especially as it was open to the plaintiff, once the appeal had been noted, to abandon the judgment and allow the trial to proceed in respect of

1986 (1) ZLR p32

GUBBAY JA

both claims. If it transpires at the hearing that the defendant succeeds, even partially, then he should be entitled to his costs of appeal. The baldness of his allegation may be condoned where it turns out to be true. But if he fails, it would not be proper to condone his failure to spell out where, when and how and in whose presence he paid the money back. In that circumstance the order made in *Gilinsky's* case, *supra*, would be called for.

Accordingly the following order is made with regard to the costs of appeal:

"The costs of appeal are ordered to be contingent upon the outcome of the hearing on the merits in relation to the respondent's claim for \$700. If that claim is wholly successful, there will be no order as to the costs of appeal. In any other event, the costs of the appeal are awarded to the appellant."

Beck JA: I agree.

McNally JA: I agree.

Scott & Associates, appellant's legal practitioners

1986 (1) ZLR p33

S v GIJIMA 1986 (1) ZLR 33 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

3 February 1986

Flynote

Evidence - accused - false evidence given by - weight to be attached - whether leads to inference of guilt.

Headnote

An accused's untruthfulness standing by itself is not sufficient for a court to draw an inference of guilt because an innocent person may falsely deny certain facts because he fears that admitting them would put him in trouble.

Cases cited:

Broadhurst v Reginam [1964] 1 All ER 111

S v Dladla 1980 (1) SA 526 (AD)

S J R Chihambakwe for the appellant

E Chatikobo for the respondent

Judgment

Dumbutshena CJ: The appellant is a serving member of the Police Force. He holds the rank of Inspector. At the time of the commission of the crime for which he was convicted, he was the member-in-charge of Glen Norah Police Station.

He was charged with contravening s 35 of the Police Act [*Chapter 98*], as read with paras 28 and 29 of the Schedule. It was alleged by the State that the appellant wrongfully, unlawfully and improperly used a Police motor vehicle, registration no. P PM 27, in that he caused Constable Mahaso to drive him in that car to his house in Hatfield without obtaining permission to use

1986 (1) ZLR p34

DUMBUTSHENA CJ

the car. The appellant denied the charge but was convicted and sentenced to pay a fine of \$50,00 or, in default of payment, to 25 days' imprisonment with labour. He now appeals against conviction.

At the end of hearing submissions this court dismissed the appeal and indicated that the reasons would follow later. These are our reasons:

Briefly the facts of this case are as follows: The appellant was on duty on 30 July 1984. At about 16.30 hours he enquired from the Charge Office about drivers. He was told that there were two drivers present, Sergeant Chigambure and Constable Mahaso.

At about 16.50 hours the appellant called Constable Mahaso. Sergeant Chigambure saw the appellant walk together with Constable Mahaso. Later on he observed Constable Mahaso driving the motor vehicle PPM 127. The appellant was sitting in the front passenger seat.

According to Constable Mahaso the appellant asked him to drive him to CABS in Stanley Avenue. He drove there and stopped at CABS Centre. The appellant's wife, Mrs Opa Gijima, a member of the Zimbabwe Republic Police then stationed at Marlborough Police Station, got into the car. The driver next stopped the car at OK Bazaars in Hatfield. The appellant and his wife went into OK Bazaars. When they returned the appellant instructed the driver to drive to his house at 129 Kilwinning Road, Hatfield.

Near the appellant's house the driver was flagged down by Police details in a Police car. He wanted to stop. The appellant instructed him to drive on. They did not go to the appellant's house but zigzagged around that area until the Police car lost track of them. Then the driver

was instructed to park the car in a certain yard and to remain in that yard until the appellant returned.

After waiting for some time the driver drove away and met the appellant on the main road. The driver said under cross examination that the appellant was driving a Peugeot station wagon. He instructed the driver to drive to the Glen Norah Police Station via Widdecombe Road, otherwise popularly known as Epworth Road.

Of course, the appellant denied all this. His story was simple but false. He admitted handing the car keys to the driver. He said he asked the driver to deliver a message to Section Officer Mafumba. The driver left without the appellant. He denied picking up his wife at CABS Centre in a car driven by

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the driver. He did not proceed to his house in the company of his wife. He denied having been flagged down by Police details near his house. He did not walk to his house from the yard of a neighbour's house.

The appellant testified that he left Glen Norah Police Station dressed in his civilian clothes and not in uniform. He did not walk out from there with the driver but walked out through a side door. He boarded an emergency taxi to Glen View Highway. He was dropped along Beatrice Road. From there he proceeded to Waterfalls Ambulance Service. He said he had left his car there in the morning because one of the wheels of his motor vehicle had come off. His wife testified that the rear wheel had burst. She could not say why it burst. Their stories were in conflict. When he got to his car the appellant put back the wheel by securing it with two bolts and two nuts. He then drove to his house, arriving there at 11 pm.

The magistrate rejected the appellant's story and believed that of the prosecution witnesses. The appeal is substantially against the magistrate's acceptance of the prosecution evidence, especially that of Constable Mahaso. The appellant's grounds of appeal were largely based on the fact that Constable Mahaso was a liar whose evidence was uncorroborated. It was said that the magistrate erred in accepting his evidence because he was an accomplice and there was no evidence *aliunde* that the crime had been committed.

It seems to me that on the evidence on the record Constable Mahaso cannot be said to be an accomplice. Both in his heads of argument and in his submissions before us, Mr *Chihambakwe*, for the appellant, failed to support the appellant's contention that Constable Mahaso was an accomplice. There is no evidence which suggests that Mahaso was liable to be prosecuted for the same offence as that committed by the appellant or as an accessory after the fact to such an offence. I need not, therefore, consider Mr Chihambakwe's contentions on the need for applying the cautionary rule when considering Mahaso's evidence. Even if Mahaso were an accomplice there is, as will become clear later in this judgment, sufficient evidence which corroborates his evidence.

Mr Chihambakwe attacked the magistrate's finding that Constable Mahaso was a credible witness. He contended that Mahaso could not be a credible witness because he was once

found to be a liar and that it was proved on previous occasions that when he "is put in a tight corner (he) lies". In support of his contention Mr Chihambakwe relied on what Mr Mahaso said in

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evidence. For this purpose the following passages are more than of passing interest:

- "Q. The accused's defence outline is also to the effect that you were well known for mis-using Police vehicles and also that you have a propensity for not telling the truth when put in a tight corner. What is your comment on that?
- A. Well,...
- Q. Let me break that into parts. The accused, in his defence outline, said you had the tendency of mis-using Police vehicles. What is your comment on that?
- A. I might have been mis-using them before the end of 1983. I wouldn't deny that, but since the end of 1983 I have never mis-used a vehicle, other than doing Police duties.
- Q. What happened in 1983? I mean, you have given us 1983 as the date marking the period?
- A. The reason is I was once arrested for mis-using a Government vehicle in mid 1983, and I was charged for that. I also paid a deposit fine for that. Since that incident I never wanted to mis-use a vehicle. In fact, I thought of, well, seeking God's help, and began to go to church and pray.
- Q. The accused also says that you have a propensity for not telling the truth when you are put in a tight corner. What is your comment on that?
- A. Since I was born again I left telling lies in that same year 1983. Telling lies is something which I have already forgotten. In fact, when we left the Station, with me and the accused driving towards town, I was trying to explain to the accused what the born again experience is, until we reached CABS Centre. So, I couldn't have been telling lies on that day, because I no longer tell lies."

He was then questioned during cross - examination on his propensity to tell lies. The question and answer - a battle of wits - went like this:

- "Q. Until you were re-born you lived in the luxury of telling lies and mis-using Police vehicles?
- A. That was not a luxury, and the lies which I told on that day which I mentioned, was only on that day when I was arrested, but it wasn't a luxury. I wasn't staying telling lies all the time.
- Q. You told lies only once?
- A. I can't say once. But, as you said it was a luxury, I can't say it was a luxury because nobody wants to tell lies every time.

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- Q. But you told lies. OK, but it was not a luxury, you told lies on numerous occasions to save yourself from problems before mid 1983?
- A. It is practical to the unborn again person that on a tight corner (he) is to tell lies to defend himself.
- Q. Again, before you were re-born, or so you tell us, you were then mis-using Police vehicles on several occasions?
- A. I have told the court that I was once arrested for mis-using a Police vehicle for which I was charged and paid a deposit fine for that.
- Q. Now, let's get at some details of an example of your telling lies. Do you remember any lies that you told? Just give us one example.
- A. I was arrested for driving a vehicle outside my patrol area, and when I was arrested I told the people who arrested me that I had not driven outside my police patrol area.
- Q. But actually you had driven outside your area?
- A. That is correct. That is why I was arrested.
- Q. Any other lies which you told?
- A. I might have told other lies, but I am no longer interested in what lies I told, because I am living a new life of not telling lies."

It seems to me that Mahaso was quite frank and open about the previous occasions when he told lies. This open mindedness enhances, in the instant case, his credibility and underlines his assertion that he now no longer tells lies because he is "a born again". On his showing in this case there would have been no credible reason for rejecting his evidence.

What is more, Mahaso's evidence was corroborated in many material respects by the evidence of witnesses whose integrity was beyond reproach. The trial magistrate carefully analysed and considered that evidence and came to the conclusion that it corroborated Mahaso's evidence. I am in total agreement with that conclusion.

All I need do now is to rehash that evidence: Sergeant Chigambure received a call from the appellant enquiring about station drivers. As a result of that call the appellant was driven away by Mahaso, having handed the car keys to him. Sergeant Chigambure saw them drive past the front of the charge office window.

It is impossible to imagine how Mahaso was supposed to know that Mrs Gijima was picked up at the CABS Centre or boarded a bus at that point. She was a Police officer stationed at the Marlborough Police Station. He would

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not have known that she had left her Police Station to catch a bus at CABS Centre, as she deposed in her evidence. Her evidence was that when their motor vehicle was in order she used to leave her husband at Glen Norah Police Station and drive herself to the Marlborough Police Station.

Another important piece of evidence, which was corroborated, was that the appellant, his wife and Mahaso were dressed in Police uniform. Chief Inspector Bhebhe saw the motor vehicle P PM 127 with three occupants, all dressed in Police uniform. There were two men and one woman. He saw the car and these people in the vicinity of the appellant's house. That was a significant piece of corroborative evidence.

Whatever lies Mahaso might have told in the past, it cannot be said with any justification that in the instant case he told a lie. The magistrate's evaluation of his evidence cannot, in my opinion, be criticised.

In rejecting the defence evidence, the magistrate, properly in my view, considered all the points raised by the appellant and his witness and the improbabilities in the defence case. He rejected the appellant's story. The conclusion to which he arrived cannot therefore be faulted.

The appellant lied about his trip back to his house. He and his wife lied about the clothes they were wearing. Mrs Gijima did not mention in her statement to the Police, Exhibit 3, that she was wearing civilian clothes. Neither did the appellant mention it in his defence outline. They lied about the cause of the breakdown of the appellant's motor vehicle. They lied about the duration of Mrs Gijima's pregnancy.

In this case the fact that the appellant lied or gave false evidence is a factor to be considered when drawing inferences of his guilt. *In Broadhurst v Reginam* [1964] 1 All ER 111 at 120A-B, *Lord Devlin*, when considering inferences which may be drawn about the accused's conduct and state of mind, said:

"But if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends of course on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

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This is not such a case as would call for an inference to be drawn only from the untruthfulness of the appellant and his witness. There is sufficient evidence to prove the guilt of the appellant beyond reasonable doubt. It is that evidence, coupled with the appellant's untruthfulness, which makes it safe for a court to draw an inference of guilt.

I should emphasise that an accused's untruthfulness standing by itself is not sufficient for a court to draw an inference of guilt because an innocent accused may falsely deny certain facts because he fears that admitting them would put him in trouble. This fact was succinctly stated by Miller JA in *S v Dladla* 1980 (1) SA 526 (AD) at 530 C-E:

"Counsel for the State emphasised in argument before us that, if the appellant were innocent, he would not have denied that he behaved aggressively and assaulted the deceased in Jane Duma's room. The fact that he lied in that respect was, he contended, of considerable importance and pointed strongly to his guilt. That the appellant's untruthfulness in this respect is a relevant factor, I have already accepted, but I cannot agree that in the context of this case it is of such significance or has such serious implications as counsel suggested. That an innocent person may falsely deny certain facts because he fears that to admit them would be to imperil himself, is well known and has often been recognised by the courts. (Cf *R v Nel* 1937 CPD 327; *R v Du Plessis* 1944 AD 314 at

323; *R v Gani* 1958 (1) SA 102 (A) at 113B-F; *S v Letsoko & Ors* 1964 (4) SA 768 (A) at 776.) The warning in those cases against the drawing of a possibly erroneous inference from the circumstances that an accused person lied in certain respects or performed some other act which raises suspicion of his guilt ought to have been specially heeded in the circumstances of this case."

In the instant case the fact of the appellant's untruthfulness does not stand alone so it is safe to draw an inference of guilt. There is, therefore, no danger of drawing "a possibly erroneous inference" as was the case in *Dladla's* case, *supra*. In this case the falsehoods were intended by the appellant to rebut cogent evidence adduced by the State witnesses. That evidence, as I have pointed out before, was sufficient to prove the guilt of the appellant.

In my view in this case the magistrate neither misdirected himself nor erred in the many respects relied upon by the appellant. I am satisfied that he was not wrong in his approach to the evidence adduced by the State and defence witnesses.

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Accordingly we dismissed the appeal as stated above.

Gubbay JA: I agree.

McNally JA: I agree.

Chirunda, Chihambakwe & Partners, appellant's legal practitioners.

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S & B v TAXING OFFICER 1986 (1) ZLR 41 (HC)

Court **High Court, Harare**

Smith J

Review of decision of Taxing Officer

5 February 1986

Flynote

Costs - taxation - discretion of taxing officer- when the court will interfere with this discretion - senior practitioner with over 30 years experience; specialised to some extent in taxation and commercial matters; matter complicated without any precedent - taxing officer refusing to allow any fee for attendance at a hearing before taxing officer.

Headnote

The applicants sought a review of the taxation of a legal practitioner and client bill of costs which had been taxed on that basis for the purposes of s 15(2)(ff) of the Income Tax Act

[Chapter 181]. Objection was taken:

- 1) to the taxing officer's refusal to allow a 100% increase (under para 9 of the tariff of Legal Practitioners' fees set out in the second schedule to the High Court Rules 1971 as substituted by the High Court of Zimbabwe (Amendment) Rules 1984 (No. 14) (SI 356 of 1984) claimed by the applicants' legal practitioner who was a senior practitioner with over 30 years experience and who specialised to some extent in taxation and commercial matters in a matter which was complicated, without any precedent and in which a considerable amount was involved;
- 2) to the taxing officer disallowing half an hour on an item of the bill which related to interviewing the applicants' representative and taking instructions;
- 3) to the taxing officer's refusal to allow any fee for attendance, by the applicants' legal practitioner, at a hearing before the taxing officer.

Held that the question as to when the court will interfere with rulings made

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by the taxing officer in the exercise of the discretion he enjoys when taxing bills of costs was considered in *Wellworths Bazaars Ltd v Chandlers Ltd & Ors* 1947 (4) SA 453 (T). Section 15(2)(ff) of the Income Tax Act [Chapter 181] refers to costs incurred by the taxpayer in connection with an appearance in terms of s 54 of that Act. In this case there was no question of costs being awarded to the applicants. The Commissioner of Taxes was not being ordered to pay the costs incurred by the applicants in connection with their appeals. Consequently the principle that litigants who are unsuccessful should not be oppressed by having to pay an excessive amount of costs is not applicable. The taxing officer had, therefore, acted correctly in taxing the costs of the applicants on a legal practitioner and client basis.

Held, further, that the taxing officer's reasons for disallowing half an hour on an item of the bill which related to interviewing the applicants' representative and taking instructions were most perfunctory. The taxing officer's reasons that too much time was spent on taking instructions which necessitated other attendances and included errors which necessitated further amendments, and the conclusions and attitude drawn therefrom, may be perfectly reasonable where a bill is being taxed on a party and party basis. However it is not the correct attitude where the taxing officer is taxing a bill for the purpose of s 15(2)(ff) of the Income Tax Act [Chapter 181].

Held, further, that the taxing officer misdirected himself in considering that he could not use his discretion to depart from the 50% increase in the prescribed tariff rate. Where the taxing officer is taxing a bill on the legal practitioner and client basis the provisions of para 9 of the Tariff of fees are only a guide. In appropriate cases, the taxing officer may increase the prescribed tariff fee by more than 50%.

Held, further, that since the taxing officer had permitted the applicant's legal practitioner to attend the hearing and argue a point which was very relevant to the taxation of the bill, the taxing officer should have allowed for this hearing in his taxation.

Cases cited:

Wellworths Bazaars Ltd v Chandlers Ltd & Ors 1974 (4) SA 453 (T)

Bensusan v Sterling & Mockford 1930 WLD 303

Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467

Loots v Loots 1974 (1) SA 431

Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD 597

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CW Lloyd for the applicants

SM Mafara for the respondent

Judgment

Smith J: The applicants are aggrieved by certain decisions of the taxing officer and have applied for his taxation to be reviewed. The facts giving rise to the application are as follows.

The applicants were appellants in an appeal to the Special Court in terms of s 54 of the Income Tax Act [*Chapter 181*] against a decision of the Commissioner of Taxes relating to certain assessments made under that Act. Section 15(2)(ff) of that Act provides that, for the purpose of determining the taxable income of any person, the amount of any costs, taxed by the registrar of the High Court, incurred by the taxpayer in connection with an appeal in terms of s 54 of that Act, may be deducted from the income of that person if the appeal is allowed to a substantial degree and the special court directs that such costs shall be allowed as a deduction. The applicants were successful to a substantial degree in their appeals and the special court directed that the cost be allowed as a deduction. The legal practitioner for the applicants (hereinafter referred to as Mr C) accordingly drew up a bill of costs. He served a copy of the bill and the notice of taxation on the legal practitioner who had acted for the Commissioner of Taxes in the appeal. The legal practitioner, acting for the Commissioner of Taxes, indicated by letter that he did not intend to appear at the taxation but he contended that the bill should be taxed on a party and party basis.

The respondent advised Mr C that the taxation could be set down for hearing at 2.30 pm on 6 June 1985, and asked that Mr C's file of papers be delivered to him some three days prior to that date. However, the file was only delivered at midday on 5 June. Because the respondent did not have a full three days to go through the file of papers, he telephoned Mr C on 6 June

and suggested that the taxation be postponed to 10 June. During the telephone conversation he said that it seemed that the bill should be taxed on a party and party basis. Mr C challenged this and suggested that he should appear before the respondent at 2.30 pm on that day and address him solely on the question of whether the bill should be taxed on a party and party basis or on a legal practitioner and client basis. The respondent agreed. There is a dispute between Mr C and the respondent concerning this appearance which I shall deal with later.

At the hearing on 10 June Mr C contended that on a legal practitioner and client basis he should be entitled to tax the bill at double the rate prescribed

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for the party and party scale. In making this contention he relied on the fact that he was a senior practitioner with over 30 years experience, that he had specialised to some extent in taxation and commercial matters, that the matter was a complicated one without any precedent and that the amount involved was considerable. At the hearing on 10 June the respondent referred to para 9 of the Tariff of Legal Practitioners Fees as set out in the Second Schedule to the High Court Rules, 1971, as substituted by the High Court of Zimbabwe (Amendment) Rules, 1984 (No. 14) (S I 356 of 1984), (hereinafter referred to as the "Tariff of Fees"), which permitted him to increase the fees set down in the tariff by 50%. The respondent advised Mr C that he proposed to allow a 50% increase where the charge was based on time spent by Mr C but not to allow such increase in respect of attendances relating to such matters as writing or perusing letters and formal attendances.

On some of the items listed in the bill of costs the respondent allowed a 50% increase on the prescribed tariff rate and not the 100% increase claimed by Mr C; on other items he did not allow any increase on the prescribed tariff rate. Item 2 of the bill related to a period of 11/2 hours that Mr C had spent in taking instructions and perusing documents. The respondent felt that the period was excessive and only allowed one hour.

Mr C alleged that on a number of occasions during the taxation, the respondent made comments which implied that Mr C was deliberately wasting time in order to prolong the hearing and so increase the fee he could charge. At the conclusion of the taxation of all the items, which had taken 1 hour and 4 minutes, the respondent asked Mr C if he wanted to check all the deductions made but Mr C said that this was not necessary because he anticipated that the deductions would be added up in order to complete the allocation. The respondent replied that this was not necessary and said that he would allow Mr C one hour for attending taxation. Mr C then pointed out that the taxation had not been completed because the items still had to be added and said that in addition, he should be allowed half an hour for his attendance on 6 June. The respondent refused the latter request on the basis that the attendance had been unnecessary. He also said that he intended to add the deductions after the attendance, using a calculator. When the respondent made it clear that he would not change his attitude on this point, Mr C decided that the deductions made should be checked. As a result, he left the taxation attendance at 3.55 pm having attended for 1 hour 25 minutes. Mr C claimed \$87,50 for attending taxation - he was allowed \$25,00. The respondent allowed 1 hour for attendance on

taxation on 10 June and made no allowance for attendance on 6 June.

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The applicants have now applied for an order directing the respondent to tax the bill of costs on the basis that:

- (a) the half-hour taxed off item 2 be allowed;
- (b) those items on which only a 50% increase in the prescribed tariff fee was allowed should be allowed at 100% increase;
- (c) those items on which no increase on the prescribed tariff fee was allowed should be permitted an increase of 100% or, alternatively of 50%;
- (d) a fee of \$87,50 for attending taxation be allowed.

The respondent stated that his decision to allow a 50% increase on certain of the prescribed tariff fees and no increase on others was based on a number of factors, the most important of which were (i) the provisions of item 9 of the Tariff of Fees; (ii) the complexity of the matter and the fact that the complex issues were handled mainly in the attendances and not in correspondence; (iii) the bulk of the correspondence was entirely between Mr C and his client; (iv) he felt that he could not depart from the 50% increase in the prescribed tariff fees as provided by para 9 of the Tariff of Fees. As regards item 2 of the bill of costs he felt that too much time was spent by Mr C on taking instructions which, in his view, necessitated other attendances and included errors which necessitated further amendments. The respondent admitted that he had made a number of errors in taxing the bill. Certain items which, in accordance with his decision on the principle to be followed, should have been reduced had not been reduced. Also, he conceded that the allowance for the attendance on 10 June should be for one and a quarter hours, ie \$50, because the taxation was concluded after one hour four minutes and then deductions were checked in less than five minutes. As regards the attendance on 6 June, the respondent contended that it was unnecessary and that he was compelled to it by Mr C. He said that he had prepared his mind and knew what scale to use and then when he spoke to Mr C and used the words "it seems that the bill should be taxed on a party and party basis" he was expressing not his own views but those of the legal practitioner who had acted for the Commissioner of Taxes. He said that since he had no obligation to disclose what scale would be used, he did not make his decision known to Mr C until 10 June. Moreover, he felt that it was inappropriate for Mr C to insist on an audience when the opposing party had no such similar recourse.

In his answering affidavit Mr C challenged the accuracy of certain statements made by the respondent, claiming that they were untrue. The respondent

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denied this allegation but unfortunately, instead of replying in a restrained and reasoned manner, he over-responded in a manner which did not help his case. Illustrations of this are the replies in the respondent's further report on the statements by Mr C that the respondent was undecided on 6 June as to the basis on which the bill should be taxed and that it would be ridiculous to suggest that he would have insisted on addressing the respondent had he been told that the respondent intended to find in his favour. The response of the respondent in his further report was:

"It was long before, not on, nor during, the visit on the 6th of June that the Taxing Officer made up his mind. It is undeserved unconstructive criticism to imply that the Taxing Officer could never make, did not make or would not have made any decision **unless** Mr C had insisted on a hearing concerning this simple and straight - forward matter. Yet even if Mr C had delivered enlightenment hitherto unknown to or inaccessible to by the Taxing Officer it would have run completely counter to and against the grain of justice to make a decision based on a monologue and without either notice to or submissions from the legal practitioner representing the opposing party. Again the Taxing Officer reiterates: there was no obligation on the part of the Taxing Officer to say, before the taxation date, what scale he would use. And Mr C did not even ask what scale the Taxing Officer would use. He merely bombarded the Taxing Officer with a barrage of statements entirely uncalled for, unnecessary and unenlightening in the matter. All this because he read into and misinterpreted the words 'it seems', to which the Taxing Officer added no further weight nor emphasis."

and

"It is indeed ridiculous that Mr C did insist. The Taxing Officer takes good cognisance of the words 'in my favour' i.e. in Mr C's favour. The very words used show how ridiculous the insisted hearing was. The implication is that if a party suspects that its 'favour' will not prosper the party can insist on private address to the Taxing Officer. Surely this is not the practice of this office of this Honourable Court. Suffice it to say that taxation repels all aspiration to elements of the nature of 'favour'. 'Taxing Masters, like Judges endeavour to arrive in all cases at a wise and fair decision' (Jacob and Ehlers) not favours!"

The respondent must appreciate that as an officer of the court and a member of the Public Service he is expected to act reasonably and responsibly. Reports made by him should be restricted to factual matters and not written

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in a sarcastic or unrestrained manner, however much he may be provoked or think he has been provoked.

The question as to when the court will interfere with rulings made by the taxing officer in the exercise of the discretion he enjoys when taxing bills of costs was considered by MILLIN J in *Wellworths Bazaars Ltd v Chandlers Ltd & Ors* 1947 (4) SA 453 (T). At p 457 - 8 the learned judge said:

"The law, as I conceive it to be, is that in general the discretion of a Taxing Master will not be disturbed unless it is found that he did not exercise a proper discretion, for example, by disregarding factors which were proper for him to consider or by considering matters which it was improper for him to consider, or by giving a ruling which the court can see no reasonable person would have given. That is the general principle. But that principle has had engrafted upon it something else, and that is this: There is a certain class of case where the point in issue is a point on which the Court is able to form as good an opinion as the Taxing Master and perhaps, even a better opinion. Examples of that class of case are these: First of all, the question whether the employment of more than one counsel was justified in the case. It is apparent that a Judge is in a better position to decide such a matter

than the Taxing Master could be. Another example is when questions of relevancy of evidence arise. The Taxing Master may disallow the costs of an affidavit because he is of the opinion that the affidavit was not relevant to any issue in the case. It is clear that the Judge must be in a better position to decide that point than the Taxing Master. So there has developed what I call a graft on the main principle. The court will feel it its duty to correct the Taxing Master and substitute its own opinion for his opinion when the matter is one in which the court is at least as well able to judge as the Taxing Master is."

Then at the top of page 459 the learned judge, referring to *Bensusan v Sterling & Mockford* 1930 WLD 303 at 305 said:

"Then a Natal case is quoted on the same page, where it was pointed out that, while the court is slow to interfere with the finding of the taxing officer, the rule has more force in a question of *quantum* than in the case of the employment of more than one counsel where the court is better able to estimate the necessity of such employment."

Section 15(2) (ff) of the Income Tax Act [*Chapter 181*] refers to the costs incurred by the taxpayer in connection with an appeal in terms of s 54 of that

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Act. As INNES CJ said in *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488:

"Now costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or to defend litigation as the case may be. Owing to the necessary operation of taxation, such an award is seldom a complete indemnity; but that does not affect the principle on which it is based."

In this case, however, there is no question of costs being awarded to the applicants. The Commissioner of Taxes is not being ordered to pay the costs incurred by the applicants in connection with their appeals. Consequently the principle that litigants who are unsuccessful should not be oppressed by having to pay an excessive amount of costs is not applicable. I consider therefore, that the respondent acted correctly in taxing the costs of the applicants on a legal practitioner and client basis.

Paragraph 1 of the Tariff of Fees provides that in the taxation of party and party bills of costs the tariff shall be adhered to, save in exceptional cases. Paragraph 2 thereof provides as follows:

"In the taxation of legal practitioner and client bills of costs, the taxing officer shall be guided by this tariff but shall have regard to all the circumstances of the case and, where the costs are payable by the legal practitioner's own client out of funds belonging entirely to the client, to the following matters -

- (a) the complexity of the matter or the difficulty or novelty of the questions raised; and
- (b) the place where, the time at which and the circumstances in which the work has been done; and
- (c) where money or property is involved, its amount or value; and
- (d) the importance of the matter to the client; and
- (e) the seniority and experience of the legal practitioner."

As far as costs on a legal practitioner and client basis are concerned, it was accepted by EKSTEEN J in *Loots v Loots* 1974 (1) SA 431 that there were various cases for the taxation

thereof. The basic principle underlying this approach was approved in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 where TINDALL JA at p 607

said:

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"...there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay to his own attorney and the amount of an attorney and client bill which has been taxed against the losing party."

And at p 608 he concluded:

"Where the attorney and client costs are to be paid by the opposite party, the taxation should be stricter than in a taxation as between attorney and client where the costs are to be paid by the client to his attorney."

It is clear that the Legislature, in enacting s 15(2)(ff) of the Income Tax Act [*Chapter 181*], did not intend that the taxpayer should be able to deduct whatever costs it may incur in connection with an appeal, however extravagant or unreasonable. If it had so intended, there would not have been the requirement that the costs should be taxed. On the other hand, I consider that the taxing officer should not be over-zealous or strict in taxing the costs. He should apply the scale which is the most generous.

As regards this taxation, there are three matters in issue, namely (a) whether the respondent acted correctly in disallowing half an hour on item 2 of the bill which related to interviewing the applicants' representative and taking instructions (b) the respondent's refusal to allow a 100% increase in the prescribed tariff rate and his refusal to allow any increase in certain items and (c) the respondent's refusal to allow any fee for the hearing on 6 June.

- (a) **Item 2.** The respondent's reasons for taxing off half an hour on this item are most perfunctory. He merely states that too much time was spent on taking instructions which necessitated other attendances and included errors which necessitated further amendments. From this he concludes that item 2 must have contained details unnecessary or unusable for the issue in hand. Whilst this attitude may be perfectly reasonable where a bill is being taxed on a party and party basis, where the taxing officer is concerned to ensure that the opposing party is not saddled with the burden of paying costs which have been unreasonably incurred by his opponent, it is not the correct attitude where the taxing officer is taxing a bill for the purpose of s 15(2)(ff) of the Income Tax Act [*Chapter 181*]. I was the presiding officer of the court which heard the appeals to which the bill relates, and am therefore well aware of the complexities of the matters involved in those appeals and of the many facts which had to be established concerning various payments which had been made to a

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SMITH J

number of people for different reasons. From the papers it has been established to my satisfaction that the "errors which necessitated further amendments" referred to by the respondent in his report were not the fault of Mr C and therefore the client should legitimately be required to pay for the additional period. Accordingly I am of the view that the respondent acted on the wrong principle when he disallowed half an hour.

(b) **Increase in the prescribed tariff rate.** Paragraph 9 of the Tariff of Fees provides as follows:

- "9. When the taxing officer considers the employment of a senior legal practitioner, ie one with at least 15 years experience warranted, the fees claimed by such legal practitioner may be increased by fifty *per centum*."

The respondent felt that he could not use his discretion to depart from the 50% increase because, as he expressed himself in his report "the current instrument (ie SI 356 of 1984) clearly enlightened the Taxing Officer on the **just** and **reasonable** limit allowable." In my view the respondent misdirected himself in this approach. He conceded that the Tariff of Fees refers only to party and party matters and then said that it was always used as the guide to taxing bills on the legal practitioner and client scale. Having said that however, he then used the Tariff of Fees, not as a guide but as a fixed rule. Paragraph 2 of the Tariff of Fees which I have referred to earlier supports the respondent's statement that in taxing bills on the legal practitioner and client scale the prescribed Tariff of Fees is a guide but the taxing officer must have regard to the matters set out in sub-paras (a) to (e) of that paragraph. Consequently, it seems to me to be clear that where the taxing officer is taxing a bill on the legal practitioner and client basis the provisions of para 9 are only a guide. Therefore, in appropriate cases he may increase the prescribed tariff fee by more than 50%. On this matter, the court is in as good a position as the taxing officer to determine whether or not Mr C was justified in his contention that the prescribed tariff fees should be increased by 100%. This decision relates to a matter of general principle, not one affecting the *quantum* of a particular item. In my opinion the respondent should have agreed with Mr C's contention in this particular case. Having accepted that an increase in the prescribed tariff rate was justified, it seems to me that the respondent did not act correctly in allowing the increase on all fees for attendances but not for correspondence. Bearing in mind that the bill was being taxed on a legal

practitioner and client basis for the purposes of s 15(2) (ff) of the Income Tax Act [Chapter 181], it seems to me that if the increase as allowed for personal attendances by Mr C a similar increase should also be allowed for letters written by him or on his behalf. Mr *Mafara* contended that since the provisions of para 9 were introduced into the Tariff of Fees by Statutory Instrument 356 of 1984, which came into operation on 1

December 1984, and the previous Tariff did not contain a similar provision, the increase should only be allowed in relation to items on the bill of costs which related to events that took place after that date. I do not accept this. The new Tariff of Fees came into operation on 1 December 1982, and would, in my opinion, apply in toto to all bills taxed on or after that date, even if they related to attendances before that date.

- (c) **Hearing of 6 June.** The respondent has averred that this hearing was entirely unnecessary and only took place because of the insistence of Mr C. There is much controversy concerning this hearing but it is common cause that Mr C did attend and the meeting with the respondent lasted approximately 25 minutes. The respondent said that he had already decided that the bill should be taxed on the legal practitioner and client basis but agrees that he did not advise Mr C of the decision until 10 June because it was not necessary for him to do so. It seems to me that the respondent was most remiss in adopting this attitude. He well knew that the matter was of great concern to Mr C and yet he allowed him to waste his own time and that of the respondent by attending to argue the matter. It is the duty of the taxing officer to help legal practitioners who, after all, are also officers of the court. If he has made a decision on a particular issue, he should advise the legal practitioner concerned as soon as possible so that he knows where he stands and whether or not he should prepare a legal argument. Moreover, when the respondent advised Mr C that "it seemed" that the bill should be taxed on a party and party basis without qualification, in my view Mr C was quite justified in assuming that this was the view of the respondent. Even if the respondent had said that this was the view of the legal practitioner who acted for the Commissioner of Taxes, without disclosing his own attitude, Mr C was quite justified in wishing to argue the matter before the respondent. If the respondent felt that the hearing was unnecessary he should not have agreed to it. If he had already decided in Mr C's favour, then he should have advised Mr C and the legal practitioner who acted for the Commissioner of Taxes so that the former would not have come for an unnecessary attendance and the latter could have attended to argue his case if he so wished. Since the respondent permitted Mr C to attend and argue a

SMITH J

point which was very relevant to the taxation of the bill, I consider that he should have allowed for this hearing in his taxation.

The final submission made by Mr *Lloyd* concerned the costs of this application. He argued that if the applicants were successful it would not be appropriate to order costs in the normal manner because of the taxation thereof the taxing officer would be a judge in his own cause. He said that in similar cases in the past the practice was to award a specific sum towards costs in order to avoid the necessity for taxation and suggested that \$150 would be a reasonable amount in the circumstances. Mr *Mafara* felt that \$75 would be a more reasonable figure because a large

proportion of the affidavits and reports dealt with personal matters which did not concern taxation and were therefore irrelevant. It is, indeed, most unfortunate that the individuals concerned allowed their personal feelings to show so clearly in their affidavits and reports. However, I consider that the figure suggested by Mr *Mafara* is too low to cover the expenses incurred in connection with this hearing.

It is accordingly ordered that the respondent tax the bill of costs on the basis that -

- (a) the additional half hour is allowed under item 2;
- (b) the prescribed tariff of fees is increased by 100% in respect of attendances by Mr C whether in person or in correspondence or otherwise;
- (c) the attendance of Mr C on 6 June for half an hour be allowed as part of the attendance for taxation.

It is also ordered that the respondent pay \$150 in respect of the costs of the applicants.

Atherstone & Cook, applicants' legal practitioners

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

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COWLEY & COWLEY v REGISTRAR-GENERAL 1986 (1) ZLR 53 (HC)

Court High Court, Harare

Smith J

Civil application

12 February 1986

Flynote

Child - adopted child - change of name.

Human rights - equality of treatment.

Headnote

The applicants, after their births, had their births duly registered in the Register of Births in terms of the Births and Deaths Registration Act [*Chapter 30*]. The applicants were adopted and their births were subsequently registered in accordance with the provisions of s 71 of the Children's Protection and Adoption Act [*Chapter 33*]. Thereafter, the applicants changed their name by notarial deed. The applicants applied to the respondent for the registration of the changes of their surnames and for the issue of certified copies of their entries of birth recording the surname they had adopted. The respondent having refused the applications on the grounds that he was prohibited from doing so by s 20(3) of Chapter 30, as read with s 71(1) of Chapter

33, the applicants applied for an order directing the respondent to register the change of their surnames and for the issue of certified copies of the entries of their births. The second applicant having withdrawn his application.

Held, that the intention of the Legislature by enacting s 71 of Chapter 33 was that in the case of adopted children, their particulars would be entered in the Adopted Children Register and that evidence of their adoption and the dates of their birth would be provided by certified copies of extracts from that register. The Legislature omitted to provide in that section for the registration of any change of the surname of an adopted person. On the other hand, the Legislature did not expressly in s 20(3) of Chapter 30

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preclude the registration of any change of the surname of an adopted person where the change was effected by notarial deed.

Held, further, that the effect of interpreting s 20(3) of Chapter 30 so as to preclude the registration of any change of the surname of an adopted person by notarial deed, if the effect of not doing so would be to nullify the clear intention of the Legislature in enacting s 71 of Chapter 33 to keep secret the identity of the father and mother of an adopted child, would be that adopted persons would be unjustly discriminated against. The court would only adopt such an interpretation if the necessity to do so was overwhelming.

Held, further, that here there was no such necessity. Section 20(3) of Chapter 30 does not expressly preclude the registration of the change of surname of an adopted person by notarial deed. Consequently, where the requirements of that provision are satisfied, the respondent should register the change of surname in the Register of Births.

Semble: the provisions of s 71 of Chapter 33 and subs (2) and (3) of s 20 of Chapter 30 should be suitably amended.

Case cited:

Shenker v The Master & Anor 1936 AD 136

J Sayce for the applicants

NP Murnane for the respondent

Judgment

Smith J: The applicants were both born in this country, the first applicant on 9 November 1964, and the second applicant on 13 February 1967, and their births were duly registered in the Register of Births in terms of the Births and Deaths Registration Act [*Chapter 30*], (hereinafter referred to as "Chapter 30"). On 5 July 1974, the two applicants were adopted. Their adoption and births were subsequently registered in the Adopted Children Register in accordance with the provisions of s 71 of the Children's Protection and Adoption Act [*Chapter 33*], (hereinafter referred to as "Chapter 33"). In 1985 the applicants changed their surnames by notarial deed. The changes were duly advertised in the Government Gazette and the notarial deeds were registered in the Deeds Registry. The applicants then applied to the respondent for the

registration of the changes of their surnames and for the issue of certified copies of their entries of birth recording the new surname they had adopted. The respondent refused these applications on the grounds that he was prohibited from so doing by s 20(3) of Chapter 30 as read with s 71(1) of Chapter 33.

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SMITH J

Section 20(3) of Chapter 30 provides as follows:

"(3) where the birth of a child has been registered, whether before, on or after the 30th November 1963, and the surname of the child is altered, otherwise than by adoption, the person responsible for the child or the person to whom the registration relates after that person attains the age of twenty-one years may apply to the Registrar - General for the registration of such alteration and the Registrar - General shall, on payment of the prescribed fee and if he is satisfied that -

- (a) a notarial deed, as defined in the Deeds Registries Act [*Chapter 139*], setting forth the change of surname has been registered in the Deeds Registry; and
- (b) the change of surname has been advertised in the Gazette;

register the change of surname in his register, but without erasing the original surname."

The second applicant has not yet attained the age of 21 years. For that reason he has withdrawn his application.

Mr Sayce pointed out that the latest change of surname by the first applicant was effected by notarial deed and not by adoption. He argued that s 20(3) of Chapter 30 only precluded registration of alterations of surnames where such alterations had been effected by adoption and therefore alterations effected by notarial deed could be registered, even if the surname of an applicant had previously been altered by adoption. To refuse such registration would be to discriminate unjustly against adopted persons. Since s 71 of Chapter 33 does not provide for the registration in the Adopted Children Register of changes in the name of an adopted person subsequent to his or her adoption, it would mean that no change of name could be registered.

Mr Murnane submitted that the application of the first applicant should be refused on a number of grounds. The first applicant had not attained the age of 21 years when she signed the notarial deed changing her surname or when she applied to the respondent for registration thereof. She only attained that age on 9 November 1985. Apart from this technical point, he submitted that the Adopted Children Register was established in order to protect the identity of the mother and father of an adopted child. Once the birth of an adopted person had been entered in that register it would not be appropriate for the original entry in the Register of Births to be amended on the subsequent change of name of the adopted person.

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SMITH J

It is anomalous that s 20 of Chapter 30 should provide for the registration in the Register of Births of alterations of names that have previously been registered therein, whereas s 71 of

Chapter 33 does not make similar provision in the case of the Adopted Children Register. If the birth of the adopted person has been registered in the Register of Births, the Registrar - General is required to mark that entry with the word "Adopted". Subsection (6) of s 71 then provides that a certified copy of any entry in the Adopted Children Register shall, where the entry contains a record of the date of the birth of the adopted child, be received not only as evidence of the adoption but also as evidence of the date of the birth of the adopted child, "in all respects as though the same were a certified copy of an entry of the Register of Births." It is clear, therefore, that the intention of the Legislature was that, in the case of adopted children, their particulars would be entered in the Adopted Children Register and that evidence of the date of the birth of any adopted child would be provided by the issue of a certified copy of the relevant entry in that register. The intention to keep secret the identities of the father and the mother of the adopted child is shown by subs (8) of s 71 of Chapter 33. It requires the Registrar-General to keep such other registers and make such entries therein as may be necessary to record and make traceable the connection between any entry in the Register of Births which has been marked "Adopted" and any corresponding entry in the Adopted Children Register but the registers so kept shall not be open to public inspection or search nor, except under an order of the appropriate Minister, may the Registrar-General furnish anyone with any information contained in, or with any copy or extract from, such registers.

Subsection (3) of s 20 of Chapter 30 provides for the entry in the Register of Births of any change of the surname of a person where the surname is altered, otherwise than by adoption. On the face of it, therefore, and giving the words used their ordinary, everyday meaning, where a surname is changed by notarial deed such alteration may be registered in terms of that subs (3), whether or not the person concerned has been adopted. The subsection does not provide, as would be expected, that no alteration may be made in relation to any entry which has been marked with the word "Adopted". Would the registration in the Register of Births of the change of the surname of an adopted child nullify the intention of the Legislature that the identities of the father and the mother of an adopted child should be kept secret? Subsection (4) of s 20 of Chapter 30 provides as follows:

"(4) After the registration of an alteration of surname under this section every certified copy of the entry concerned shall include the original surname."

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SMITH J

Compliance with the provisions of this subsection would clearly identify the mother and, if the child was not illegitimate, also the father of an adopted child. However the provisions of s 10 of Chapter 30 must also be considered. Subsection (1) of that section provides for the issue of certified copies of entries in any register in the custody of the Registrar - General. Subsection (3) thereof provides as follows:

"(3) Unless otherwise directed by the Minister or Ministers, as the case may be, administering the Children's Protection and Adoption Act [*Chapter 33*], a certificate issued in terms of subs (1) in respect of a child adopted in terms of the enactment in force at the relevant time governing the adoption of children shall give the new name or names of such adopted child and not those which were registered in terms of this Act or the repealed Act."

It seems to me that subs (3) of s 10 of Chapter 30 is a more specific provision than subs (4) of s

20 of Chapter 30. If the latter provision were to override the former, the former provision would have to be regarded as pro non scripto. However, if s 20(4) of Chapter 30 were to be read as being subject to the provisions of s 10(3) thereof, it would mean that full effect could be given to the latter which, as I have said, is more specific, with only a minor inroad into the provisions of the former which are more general.

The position as I see it, is that the Legislature, by enacting s 71 of Chapter 33, intended in the case of adopted children that details concerning their adoption and birth would be entered in the Adopted Children Register and that evidence of their adoption and the dates of their birth would be provided by certified copies of extracts from the register. However the Legislature omitted to provide in that section for the registration of any change of the surname of an adopted person. On the other hand, the Legislature did not expressly in s 20(3) of Chapter 30 preclude the registration of any change of the surname of an adopted person where the change was effected by notarial deed. As DE VILLIERS JA said in *Shenker v The Master & Anor* 1936 AD 136 at 142

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"...where the language of a statute is unambiguous, and its meaning is clear, the court may only depart from such meaning if it leads to absurdity so glaring that it could never have been contemplated by the Legislature, or if it leads to a result contrary to the intention of Parliament as shown by the context or by such other considerations as the court is justified in taking into account'."

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SMITH J

This court might be justified in construing s 20(3) of Chapter 30 so as to preclude the registration of any change of the surname of an adopted person by notarial deed if the effect of not doing so would be to nullify the clear intention of the Legislature in enacting s 71 of Chapter 33 to keep secret the identity of the father and the mother of an adopted child. However, the effect of such an interpretation would be that adopted persons would be unjustly discriminated against because it would mean that where such persons have changed their names by notarial deed they would not be able to have such alteration registered and evidenced by an extract from the Register of Births, whereas persons who had not been adopted would not be subject to such disadvantage. The court would only adopt such an interpretation if the necessity to do so were overwhelming. In my view, there is no such necessity. Section 20(3) does not expressly preclude the registration of the change of surname of an adopted person by notarial deed. Consequently, where the requirements of that provision are satisfied the Registrar - General should register the change of surname in the Register of Births. However, where a certified copy of the entry of the birth concerned is issued the original surname should be included, as required by subs (4) of s 20, because the provisions of s 10(3) of Chapter 30 have overriding effect.

It is accepted that the first applicant changed her surname and applied for the registration of the alteration before she attained the age of twenty-one years. Section 20(3) provides that an application for registration must be made either by the person responsible for the child or by the person concerned after he or she has attained the age of twenty-one years. The first applicant, subsequent to her application to the respondent, has attained the requisite age. It seems to me that it would be unnecessarily formalistic to reject her application to this court on the ground that

she was under age, though having attained her majority, when she made her application to the respondent. Her application to this court shows that she wishes to persist with her application to the respondent. It is, however, anomalous that the second applicant, although he has attained the age of majority and therefore could legally enter into a notarial deed to change his surname, cannot make an application in terms of s 20(3) of chapter 30. Such an application before he attains the age of twenty-one years can only be made on his behalf by his "responsible parent" as defined in Chapter 30.

Having reached the above conclusions, it seems to me that s 71 of Chapter 33 should be amended so as to provide for the registration in the Adopted Children Register of changes in the names of adopted persons. Consequentially, s 20(3) of Chapter 30 should be amended so as to preclude alterations

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of entries which have been marked with the word "Adopted". Furthermore, since the age of majority has been reduced from twenty-one to eighteen years, subs (2) and (3) of s 20 of Chapter 30 should be amended accordingly.

It is therefore ordered that:

- (a) the respondent is hereby directed -
 - (i) to register, in the Register of Births, the alterations of the name of the first applicant to reflect the name as shown in the notarial deed whereby she effected her change of name; and
 - (ii) upon payment of the prescribed fee, to issue to the first applicant a certified copy of the entry of her birth in the said Register, showing her new name but not her original surname;
- (b) the respondent pay the costs of the first applicant.

Honey & Blanckenberg, applicants' legal practitioners

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

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S v CHITIKI 1986 (1) ZLR 60 (HC)

Court **High Court, Harare**

Gibson J

Criminal appeal

3 March 1986

Flynote

Criminal procedure (sentence) - factors affecting sentence - accused is over the age of 18 as at date of conviction and sentence.

Headnote

At the time of the commission of the offence the accused was under the age of 18. At the time of sentence he was however over eighteen. Whatever the common law position may have been, in terms of s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*] the important date to consider is the date of sentence and not the date on which the offence was committed. Accordingly if an accused is a juvenile when the offence is committed but has reached the age of eighteen as at date of conviction he will be treated as an adult for purposes of sentence.

Cases cited:

S v Pledger 1975 (2) SA 244

R v Rainers 1961 (1) SA 460 (AD)

R v Mazibuko 1958 (4) SA 353

R v Scotfin 1930 1 KB 741

R Anderson for appellant

V Shamu for the State

Judgment

Gibson J: The appellant was convicted together with another youth of the offence of rape of a 16-year-old girl. The appellant whose age was estimated at 19 years on the day he was convicted and sentenced received a sentence of four years' imprisonment with labour of which one-and-a-half years was

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suspended on conditions for the two counts of rape to which he pleaded guilty. His co-accused was 17 years old on the date of conviction and sentence, he was sentenced to receive some cuts for the one count of rape to which he pleaded guilty.

The ground of appeal is that the learned trial magistrate erred in treating the appellant as an adult for the purposes of sentence when at the date of commission of the offence the appellant was a juvenile. Further, it is stated that by adopting the approach that it is the age of the accused at the time of sentence and not his age at the time of the commission of the offence, the learned regional magistrate misdirected himself. In the circumstances, the sentence imposed is excessive in the light of the accused's blameworthiness at the time of the

commission of the offence.

These are the facts. On 31 December 1984 the appellant and his co-accused met the complainant near her home. The appellant proposed love which the complainant accepted. Appellant and complainant then agreed to meet later at the borehole, when they met they agreed to walk along a nearby stream. The co-accused was present but remained at a discreet distance. After walking for a short while the appellant suggested that they had sexual intercourse, as proof of the complainant's love of the appellant. The complainant declined, notwithstanding, the appellant forced the complainant to lie down; he held her down with one hand and undressed with the other and then lay on top of her and raped her. As he dressed after achieving his objective the co-accused arrived upon the scene. The appellant suggested that his co-accused should also have sexual intercourse with the complainant who was lying face down. The co-accused proceeded to do so, lay on the complainant's back and raped her. The appellant then left with his co-accused. The complainant went home and reported the rape.

Counsel for the respondent, *Mr Shamu*, conceded that the trial magistrate ought to have considered the age of the appellant at the time of the commission of the offence, and that by failing to do so the learned regional magistrate thereby misdirected himself.

When the notice of appeal was referred to the learned regional magistrate he commented as follows:

"With respect it is the age of the accused at the time of sentence and not his age at the time of commission of the offence which dictates whether he is eligible to be treated as a juvenile. Since I found the accused to be

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GIBSON J

19 years of age at the time of sentence it was not competent to treat him as a juvenile."

The relevant provision which the learned regional magistrate had in mind must be s 330 of the Criminal Procedure and Evidence Act [*Chapter 59*]. The section provides:

"As often as any male person who has not attained the age of 19 years is convicted of any offence, the Court before which he is convicted may -

- (a) in lieu of any other punishment; or
- (b) ...

and as well as in the case of a first conviction as of any subsequent conviction, sentence such person to receive in private a moderate correction of whipping, not exceeding ten cuts."

It would seem that the magistrate's view is correct - certainly on a literal reading of the words of the section that view would appear to be correct. Notwithstanding that view, State counsel, Mr *Shamu* has supported the appellant's submissions that the trial magistrate's approach is wrong in law, and that as a result there was a misdirection. Both counsel based their submissions on a number of South African cases, in particular the case of *S v Pledger* 1975 (2) SA 244, in which a number of authorities were considered and applied. I have found the SA decisions attractive and laudable. But if I am to follow the Rule of Interpretation of Statutes that where appropriate, I

must give the words of a statute their ordinary every day meaning, then it seems to me that a *prima facie* meaning of these words gives the court a clear discretion to impose a sentence of whipping instead of any other punishment which may be open to the court on a male person of up to 19 years of age.

The facts in the *Pledger* case, *supra*, were not unlike the facts in the instant case. Also, in that case the Statutory provision which fell to be considered was almost identical with the provisions of s 330 of the Criminal Procedure and Evidence Act, [Chapter 59], almost word for word. The only difference lies in the prescribed age. The learned trial Judge in the *Pledger* case, *supra*, CLOETE AJP observed at p 245:

" The issue in this matter relates to the proper interpretation to be given to sec. 345 of Act 56 of 1955. This section reads as follows:

'If a male person of not exceeding the age of 21 years is convicted of any offence, the court before which he is convicted may, in lieu of any other punishment and, as well in the case of a first conviction as of any

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subsequent conviction, sentence such person to receive in private a moderate correction of whipping, not exceeding ten cuts, which correction shall be administered by such person and in such place and with such instrument as the court may appoint. The parent or guardian of such first mentioned person shall have the right to be present.'

The question is whether, on a proper interpretation of this section, the operative date which entitles the court to apply its provisions in passing sentence, is the date of the commission of the crime or the date on which the sentence is imposed. In other words, does this section apply to a case such as the present one where the accused, at the date of commission of the crime, was under the age of 21 years but over that age as at the date of sentence."

Pausing there for a moment, I think it will be seen that the two provisions, our s 330 and the South African s 345 both refer to **the date of conviction as the material date**.

After posing the question previously referred to, the learned judge in the *Pledger* case went on to consider a number of relevant cases. In particular the learned Judge referred to the case of *R v Rainers* 1961 (1) SA 460 (AD). In that case the court interpreted provisions of a statute, which were not dissimilar to the words of s 345, save that the provision related to the imposition of a sentence of death on a youth, and noted that both sections referred to the date of **conviction** as the operative date. Following the decision of the court in the *Rainers* case which held that it was competent under the Common Law to impose on a juvenile convicted of murder, a sentence other than the death sentence, where the juvenile was over the age of 18 at the time of conviction but under 18 at the time of commission, CLOETE AJP observed in *S v Pledger* at p 246H that,

"the ratio for the principle of dealing more leniently with youthful offenders is to be found in the frailty and deficiencies of youth at the time of the commission of the offence. In spite of the clear wording of the section the learned Judge of Appeal held that the material date for the assessment of sentence was the date of commission of the offence and not the date on which sentence was passed."

Another common law principle which influenced the learned Judge in the *Pledger* case is that stated in *R v Mazibuko* 1958 (4) SA 353, (which was cited before us), that,

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GIBSON J

"When sentence is to be passed regard must be had to the position prevailing at the time of commission of the offence and not at the date of conviction, even if the status of the accused has meanwhile changed."

If the learned trial magistrate is right in the view that it was not competent to treat the appellant as a youthful offender, once he had attained the prescribed age at the time of conviction then it must follow that the above decisions of the South African Courts, unless they can be distinguished, are wrong. I think that what the South African courts did was to strike out the words '**on the date of conviction**' and to substitute the words 'on the date of commission'. I think that in doing so the courts in South Africa went far beyond that which was allowed a judicial officer by the rules of interpretation of statutes in construing the words of a statute which were otherwise clear. In my view the courts there were in danger of being rightly accused of usurping the functions of the legislature. The tendency is undesirable and ought not to be followed. However there is no doubt in my mind that the provisions under consideration are unhappily worded; that notwithstanding, it is not the function of the court to redraft the provisions of a statute merely because they result in an injustice.

If I may, I will remind myself of the rule of interpretation of statutes which in my view is applicable.

The relevant rule of interpretation is that which allows the court in its discretion to alter or, add to a statute words designed to prevent a provision from being unintelligible, absurd or totally unreasonable. This list is not exhaustive but the listed considerations herein are the most pertinent. In attributing to the provisions of s 330 of the Criminal Procedure and Evidence Act their ordinary meaning I have not found anything unreasonable, absurd or unintelligible. This conclusion is underlined in my view by the fact that no decisions of these courts were cited to be by Mr *Anderson*, or Mr *Shamu* on the point.

In support of the proposition that it is trite law that the date of assessment of sentence is the date of the commission of the offence and not the date of conviction or sentence, Mr *Anderson* cited the following authorities, *R v Mazibuko*, *Pledger*, *Rainers* and *Gluck* "Pandecten" 1.1 para 21B 1144 Digest 48.19.1. I have not read the *Mazibuko* nor the *Pledger* cases, they are reported in Afrikaans which I do not read, nor the last two authorities which clearly embody the common law. However, the relevant part of the principle would appear to be contained in the passage at p 247 of the *Pledger* case,

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supra where CLOETE AJP states:

"The views of *Gluck* and *Brunneman*, following the Digest 48.19.1, as set out in this passage by Steyn JA, are clearly that, when sentence is to be passed, regard must be had to the position prevailing at the time of

commission of the offence and not to the date of conviction, even if the status of the accused has meanwhile changed."

As I understand the rules of interpretation, the power given the judge to revert to the common law where a statute is quite clear in its meaning is extremely limited. Also it has been stated that the fact that the results of the statute may appear harsh is not in itself a justification for the court to alter its meaning. The court is not concerned with the results where the intention of the legislature is quite clear. Cross on *Interpretation of Statutes* at p 86 states -

"...the Courts have no power to read words into a statute which are not already there by necessary implication; but some allowance must at least be made for obvious drafting errors."

In another passage, at p 94 of the same book, the author observes in discussing cases where it has properly been held that a word can be struck out of a deed or statute and another substituted and says of the Rule of Interpretation that permits of this practice, it

"...confers a wholly exceptional power of what is in effect rectification of a statute, ..."

Having regard to the sentiments stated above I am disinclined to agree that the approach of the South African courts in the above cases was justified. The fact that the plain meaning of s 330 of the Criminal Procedure and Evidence Act is that a male juvenile foregoes the benefits of the court's discretion to impose a sentence of whipping on attaining the age of 19 does not entitle the court to take this drastic step to redraw the statute. The words "is convicted" make it clear that the material time is the time of conviction and none other.

The silent reference to the date of commission is deliberate, in a statute that both consolidates and **amends** the Common Law. There is no justification in my view to go back to the Common Law.

In the circumstances the decisions which make reference to the Common Law were wrongly decided - unless perhaps these provisions were enacted under an Act that solely consolidated the Common Law.

1986 (1) ZLR p66

GIBSON J

Turning now to the present appeal, it is unfortunate that through no fault of his own the appellant was referred for sentence almost 11/2 years after he was first arrested. I am concerned too that the decision I have come to would appear to uphold the imposition of a harsher sentence on the accused than may have been the case had the prosecution been brought a little sooner, but that concern as I have previously stated does not entitle me to redraw the statute.

In any event the injustice which must have prompted the South African courts to intervene in this drastic manner is more apparent than real. I say so because a court sentencing an accused person is bound to look at all the circumstances prevailing at the time of the commission of the offence including the fact that the appellant was a juvenile at the time of the commission of the offence and to give those factors due weight. In order to arrive at a just and fair sentence in this instance I am satisfied that the learned regional magistrate gave due allowance for the

deficiencies of youth at the time the appellant committed the rape. I am persuaded in the view I have taken herein by the decisions of the courts in England and Wales. Although I am not bound to follow those, nevertheless their approach does underline the fact that the decision I have reached is not necessarily unjust. The situation similar to the instant case is met with in cases where a youth is convicted in the Magistrates Court (petty sessions) but the court decides to refer the accused to the Crown Court (Quarter Sessions) for a sentence of Borstal training or some other sentence which the inferior court had not the power to impose. I note that the courts there have had no qualms in interpreting the words of the relevant statute to mean that the material time for the ascertaining of the age of the accused is, that when sentence is passed, not that of his conviction. In *R v Scottin* [1930] 1 KB 741, the facts were these. The appellant was convicted at petty sessions for an offence of burglary. He was remitted to Assizes for sentence in terms of s 10(1) of the Criminal Justice Administration Act as amended. The section gave the petty sessions a discretion to refer a youth of not less than 16 years or more than 21 years for sentence at an assize court. At the time of conviction the appellant was under 21 years but by the time of sentence, (3 weeks later), he had attained 21 years. The words of the Statute state that a person may be sent to Borstal if it appears to the court that he "is" not more than 21 years old. At p 743 LORD HEWART CJ stated,

"There is much to be said for the view that the statute might have been differently worded, but that is not a question for this Court. We have no doubt that the appellant was above the age mentioned in the statute, and he must therefore forego the benefits of Borstal treatment, and instead go to prison for six months in the second division."

1986 (1) ZLR p67

GIBSON J

The court was there well aware of the problems presented by the wording of the statute, but nonetheless did not feel it proper for the courts to run away from the obviously unjust results of that interpretation.

I think that is the correct approach. I reject the submission that the trial magistrate misdirected himself.

In conclusion I would like to venture the view that the South African attitude is just and laudable. For that reason I wish to suggest that the Legislature may feel it necessary to consider at the earliest available opportunity the need to amend s 330 of the Criminal Procedure and Evidence Act by adding a **proviso** to the section on these lines.

"...Provided that where a youth has attained the prescribed age between the date of the commission of the offence and the date of conviction and sentence, the Court shall be entitled in its absolute discretion to treat the offender as if he were still below the prescribed age when considering the appropriate sentence ..."

or similar words to that effect. In that event the court would then have the discretion, provided that the accused is not very much older than the prescribed age, of passing a sentence appropriate to his youthful behaviour.

Finally it was argued in addition that the learned magistrate was obliged to estimate the age of the appellant and because of the lack of accuracy and certainty that goes with such estimation the learned magistrate erred in failing to exercise his discretion and to treat the appellant as a

juvenile. I may be wrong, but I understood this ground to say that since the magistrate had to estimate the appellant's age, in the absence of any certainty about that estimate the trial court should have found in favour of the lesser age of appellant and treated the appellant as a juvenile. Later on however that additional complaint would appear to have been abandoned over the page by the appellant where at para 2.2 of the heads of argument he states that the assessment of the age of the appellant is not challenged. I accept that the assessment was justified.

Accordingly I find that there is no substance in the criticism levelled at the trial court regarding the assessment of the appellant's age. The magistrate, in my view, rightly considered and took into account all the factors he was entitled to - in particular the evidence of the probation officer contained in the report which was placed before him.

1986 (1) ZLR p68

GIBSON J

However in view of the fact that the complainant had previously agreed to sexual intercourse, much of the gravity of the offence falls away. I do not consider that the learned regional magistrate paid sufficient regard to that fact. Furthermore, the co-accused was sentenced to corporal punishment and the disparity of sentence between these two young men is sufficient to warrant interference by this court.

In addition, the appellant had only just passed the age which he could properly have been sentenced to a whipping, and I do not consider that the magistrate paid sufficient regard to that fact.

For these reasons I am of the view that the sentence is excessive and induces in me a sense of shock.

Accordingly the sentence is set aside, and is substituted therefore; I order that a sentence of 3 years' imprisonment be imposed, of which 2 years' imprisonment is suspended for 5 years on condition that the appellant is not in that time convicted of an offence of which unlawful sexual intercourse is an element committed during that time.

Reynolds J: I agree.

Morris, Beale & Collins, appellant's legal practitioners

Attorney-General, respondent's legal practitioner

1986 (1) ZLR p69

S v PINDO TINTO & KAMUKANGA 1986 (1) ZLR 69 (HC)

Court High Court, Harare

Smith J

Automatic review

5 March 1986

Flynote

Criminal procedure - necessity to produce exhibits in criminal trials

Headnote

Where exhibits are not produced magistrates should not meekly accept this as a new practice. They should direct the prosecutor to investigate the matter and to remedy the fault. If necessary, disciplinary action should be taken against anyone responsible for the loss of an exhibit.

Cases cited:

S v Chakanetsa 1981 (1) SA 876 (ZAD)

S v Shadaya 1977 (2) RLR 22 (AD)

S v Zuze 1972 (1) RLR 255

Judgment

Smith J: The accused were charged with the theft of ten spanners from an old car at a garage. The spanners were valued at \$30. They were recovered. The accused both pleaded not guilty but were both convicted of theft. The magistrate set out his reasons for finding the accused guilty and I believe that their convictions are in order. In his judgment the magistrate said "As is now the practice in these courts, and I do not know why, the exhibits were not produced." This statement causes grave concern. The failure to produce an exhibit could well result in a miscarriage of justice. In this case, accused No. 2 when questioning the complainant, said that the spanners were bicycle spanners. The complainant denied this. Then during the course of the trial accused No. 1 said that only four of the spanners were his and that the complainant, after apprehending accused No. 2 with the four spanners, had added six of his own. He also alleged that accused No. 2 had a screwdriver

1986 (1) ZLR p70

SMITH J

at the time. The magistrate, with good reason, rejected these allegations but it would have made his task more straight-forward if the spanners had been produced as exhibits.

The complainant is, of course, entitled to the return of his spanners. If they cannot be found he must be paid compensation. I trust that if the spanners have been lost or mislaid and Government has paid compensation, then the official concerned will be surcharged. The reasons for the failure to produce exhibits should also be investigated so that matters can be put right as soon as possible. Where exhibits are not produced, magistrates should not meekly accept this as a new practice. They should direct the prosecutors to investigate the matter and to remedy the fault. If necessary disciplinary action should be taken against anyone responsible

for the loss of an exhibit.

Accused No. 1 was sentenced to pay a fine of \$50 and also sentenced to 3 months' imprisonment with labour which was conditionally suspended for 5 years. Accused No. 2 is younger than accused No. 1. The former had stolen the spanners from the car and when he was apprehended by the complainant, accused No. 1 intervened and said that he had sent accused No. 2 for the spanners. The only reason for the disparity in sentences was that accused No. 1 was a first offender whereas accused No. 2 was not. In passing sentence the magistrate castigated accused No. 2 as being an outright thief and a lay-about and said that he was stealing the tools in order to use them to commit other thefts. He said that perhaps accused No. 2 was "passed reform". It seems to me, however, that the magistrate permitted the record of accused No. 2 to influence him too greatly. This is evidenced by what the magistrate said to accused No. 2 after the latter had admitted his previous convictions. He said -

"You know, you have just taught me one thing. Do not judge a book by the cover. All along I thought you were a very innocent victim who was used by accused 1. All along I got the distinct impression that you are not a thief but a fool and yet it is the very opposite."

In 1969 accused No. 2 was convicted of theft of car parts and the passing of sentence was postponed. Then a year later, in 1970, he was convicted of two counts of theft of a cycle. Both were treated as one for sentence and he received a moderate correction of 6 cuts with a light cane. The postponed sentence was then passed and he was given 2 months' imprisonment with

1986 (1) ZLR p71

SMITH J

labour conditionally suspended for 3 years. He was fined \$5 for common assault in 1971 and then in 1972 he was sentenced to 3 years' imprisonment with labour on two counts of rape, 18 months of which was suspended for 5 years. In 1974 he was sentenced to 5 years' imprisonment with labour for rape and the 18 months' imprisonment with labour that had been suspended was brought into effect. In 1984 he was sentenced to 9 months' imprisonment with labour, 6 months of which was suspended, for escaping from lawful custody.

From the above it is evident that accused No. 2 has spent a considerable period in prison. However, he has not served any term of imprisonment for theft. His convictions for rape and escaping from custody have no relevance in assessing the punishment that should be imposed for the theft of the spanners. The three convictions for theft are of course relevant but they were 15 and 16 years ago and at that time he was still under the age of twenty. In my view the magistrate has clearly misdirected himself in placing so much emphasis on accused No. 2's previous convictions. In *S v Chakanetsa* 1981 (1) SA 876 (ZAD) at 877C-E, FIELDSEND CJ said:

"There are a number of cases which have drawn attention to the fact that undue weight must not be attached, in assessing sentence for what in itself is not a serious offence, to the previous criminal record of an accused. *R v Petersen* 1944 EDL 165; *R v Adamu* 1946 SR 103; *R v McDermott* (Bulawayo Judgment 72 of 1964 (not reported)). The principle cannot be better set out than it is in Halsbury *Laws of England* 4th ed vol 11 para 483. This appeared in the second edition and was cited with approval in *Petersen's* case, *supra*. It reads:

'It is the practice of criminal courts generally to punish persistent offenders more severely than those who have not been previously convicted or have not committed other offences, but it is not right to be guided merely by previous convictions, and it is a well - recognised principle that a severe sentence for a trifling offence cannot be justified merely on the ground that the offender has had many previous convictions.'

More weight must of course be given to previous convictions for offences of the same character as that for which the offender is to be punished than to convictions for offences of a different character ..."

Furthermore it seems to me that there is a disturbing disparity between the sentences imposed on the two accused. In *S v Shadaya* 1977 (2) RLR 22 (AD) many cases are referred which have dealt with the approach of an appeal court

1986 (1) ZLR p72

SMITH J

to sentence when there is such a disparity between the sentence appealed against and that which has been imposed upon another participant in the same offence that the sentence appealed against becomes disturbingly inappropriate. In such cases the appeal court will ameliorate the offending sentence, not necessarily to equate it with the lesser sentence, but to alter it to the extent that is appropriate in all the circumstances. As MACDONALD ACJ said in *S v Zuze* 1972 (1) RLR 255 (AD) at 257A:

"Where a number of persons are convicted of the same crime there must, of course, if justice is to be done, be reasonable uniformity between the sentences imposed on each of them ..."

The conviction of the two accused is confirmed as is the sentence imposed on accused No. 1, although in my opinion it errs on the side of leniency. The sentence imposed on accused No. 2 is set aside and the following is substituted:

"Accused No. 2 is sentenced to three months' imprisonment with labour of which two months' imprisonment with labour is suspended for 5 years on condition that the accused is not convicted of an offence involving dishonesty committed within that period for which he is sentenced to imprisonment without the option of a fine."

Sandura JP: I agree.

1986 (1) ZLR p73

MAKOMBOREDZE v MINISTER OF STATE (SECURITY) 1986 (1) ZLR 73 (HC)

Editor's Note:(2)

Court High Court, Harare

Ebrahim J

Trial action

14 March 1986

Flynote

Damages - wrongful arrest and imprisonment - twelve months wrongful deportation.

Human rights - right to liberty - serious view taken of deprivation of liberty.

Legislation - Constitution of Zimbabwe, 1980 - s 13(3) and (ii).

Headnote

The plaintiff, a citizen of Zimbabwe by birth was on 4 July 1980 wrongfully arrested and imprisoned and thereafter deported to Mozambique. He was kept there in a detention camp until March 1982 when he was released and permitted to return to Zimbabwe. He was never allowed access to a lawyer nor informed of the reasons for his detention. On his return his house had been repossessed; his wife had left him and his children placed in schools for displaced children. He had lost his livelihood and a *curator bonis* had been placed in charge of his affairs.

Held that the right to liberty is one of the pillars of freedom in a democratic society. The undermining of the plaintiff's rights deserved the unreserved criticism of the Court and warranted an award of general damages of \$50 000.

1986 (1) ZLR p74

EBRAHIM J

Cases cited:

Allan v Minister of Home Affairs 1985 (1) ZLR 339 (HC)

AP de Bourbon SC for the plaintiff

MJ Gillespie for the defendant

Judgment

Ebrahim J: In this case the plaintiff claims damages from the Minister of State (Security) in the following terms:

"\$50 000 as and for damages suffered by reason of his wrongful and unlawful arrest and imprisonment at the instance of the defendant and during the period 4 July 1980 to March 1982;

\$5 927 special damages also suffered by reason of the premises set out in the preceding paragraph and due to a loss of salary suffered by the plaintiff for 20 months at the rate of \$150 per month, amounting to a total of \$3 000 and in addition a cash loan which, it is alleged, was stolen or lost during the period of his arrest and imprisonment; finally, the plaintiff seeks cost of suit and an order that 8% interest be payable on an award of damages made by this Court to run from the date of judgment until payment is made."

The facts in this case are largely common cause. The plaintiff gave evidence and deposed that on 3 July 1980, at approximately between 6 and 6.30 pm, he was sitting in his car which was parked in Engineering Lines in Highfields, having heard that the police were looking for him. Whilst he was seated there he was approached by the police and eventually he found himself detained at the Southerton Police Station. It is not disputed that the persons responsible at that stage of the events were the Special Branch of the Zimbabwe Republic Police who were acting on the instructions of the Minister of State Security.

It is common cause that the plaintiff spent two nights in the cells at the Southerton Police

Station and was then removed to Central Police Station and placed in the cells. He was kept in these cells for a further eight nights when he was transported to Mutare. The plaintiff said that whilst he was in the custody of the authorities in Harare he was refused access to his lawyer although he had asked to see him. He was never told why he was being detained although one of the details who had dealings with him did ask him if he was involved in the politics of Mozambique.

1986 (1) ZLR p75

EBRAHIM J

The plaintiff further deposed that he was never taken before a court of law in this country or given an opportunity to resist through the courts in any way his removal from this country. In fact, he just did not know why he had been detained or what the allegations against him were. It was only as he was being transported to Mutare that one of his escort details told him that he was being taken to Mutare to be handed over to the Mozambique officials.

Prior to his detention the plaintiff was a ZANU-PF district chairman of his area and a person who owned two businesses and also a person who was involved in the administering of some of the schools which accommodated mainly displaced children. He was married and had six children.

After being handed over to the Mozambican authorities, the plaintiff eventually found himself in Mozambique in a detention camp where he was kept until March 1982, when he was permitted to return to Zimbabwe. Whilst he was in the hands of the Mozambican authorities, all that he was interrogated on were matters relating to his personal details and on whether he had been to South Africa. In fact, on the first day of his arrival in Mozambique, he was asked by one of the Mozambican officials why he was there. Whilst he was in Mozambique he never appeared in court and he never had access to a lawyer.

On his return to this country the plaintiff found that he no longer owned his house which he had previously purchased on a deed of sale. This was apparently due to a failure on his part to maintain his instalment payments. He also found that his wife had left him and commenced an association with another man with whom she had children and that his children were no longer home but had been placed in schools for displaced children. He also discovered that the schools which he had helped to administer were no longer in existence save for one, thereby resulting in him losing income which he previously received for helping administering such schools. He had also lost both his businesses which he owned prior to his arrest.

In my view, the plaintiff was a reliable witness, worthy of belief, save on the question of what he earned as a salary for administering the schools he was involved with. He also deposed that on his return to this country he discovered that a *curator bonis* had been appointed to administer his affairs and that in any event he found himself destitute.

This was the sum total of the evidence placed before me. No evidence was led for the defendant at all.

1986 (1) ZLR p76

EBRAHIM J

It is against the background of this evidence that I am required to consider the complaint made by the plaintiff that as a result of the unlawful treatment that he was subjected to he has suffered damages. Personal liberty is a right which every person has under our Constitution. Section 13(ii) of the Constitution of Zimbabwe provides as follows:

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

The exceptions are outlined in subs (2) and none fit the facts of this case. Subsection (3) of the same s provides as follows:

"Any person who is arrested or detained shall be informed as soon as reasonably practicable in a language that he understands of the reasons of his arrest and detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him."

Now it is apparent on the only evidence I have before me that the plaintiff was never afforded his rights to which he is entitled to in terms of the Constitution. That he was deprived of his rights in my view amounts to a very serious breach of his constitutional rights. In a recent judgment of this Court, my brother REYNOLDS J emphasized the importance of an individual's rights to personal liberty. I can do no better than to quote his words from that judgment. It was in the case of *Allan v Minister of Home Affairs* 1985 (1) ZLR 339 (HC) at 346B-D where he stated:

"Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost 800 years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson: 'The God who gave life gave us liberty at the same time.' Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the Courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved. In a speech delivered in the House of Commons in 1883, William Pitt said: 'Necessity is the plea for every infringement of human freedom. It is the argument of tyrants.' The warning implicit in these words must be heeded. Instances of unwarranted or oppressive assumptions of power may always be challenged in the Court."

1986 (1) ZLR p77

EBRAHIM J

It is apparent on the facts of this case that the plaintiff, upon being apprehended by the authorities and finally dumped across the border into Mozambique, was given no reason for being detained, was refused access to a lawyer and no formalities relating to his deportation or extradition to a foreign country were complied with.

On the evidence before me he is a person who was born in Zimbabwe and who was educated here and has always regarded this country as his home. That he should have been treated in this manner without any regard being had to the fundamental rights of a man in a free society leaves me appalled. That this could happen to a man born and bred here in these times is equally disturbing. In the result I find that there was a serious encroachment upon the freedom and rights of the plaintiff in this case.

Following the deprivation of his personal liberty the plaintiff on his return to this country, some 20 months later, having been deprived of his freedom, found himself in the unhappy state of having lost his business, his employment, his wife and his children having been placed in the schools for displaced children. Neither counsel could refer me to a case of a similar nature. I am not surprised. The conduct exhibited by the authorities on the facts of this case is unique. This is therefore not a case where I can seek guidance on an appropriate amount to be awarded as damages by looking at other similar case, nor is there any satisfactory evidence before me on what financial losses were suffered by the plaintiff as a result of the detention for 20 months.

In assessing the damages to be awarded, I must not, however, lose sight of the fact that one of the pillars of freedom in a democratic society, that is the right of any individual to liberty under the Constitution, has been undermined. The people responsible for causing the loss and suffering to the plaintiff deserve the unreserved criticism of this Court. This was a serious encroachment upon the freedom and rights of the plaintiff in this case. He was a man of good reputation in the community as is evidenced by the fact that he was the district chairman of the ZANU-PF branch in his area. He is a man with no criminal record. He was a man involved in assisting in schools for not much financial reward. His actual period of detention following his unlawful arrest was lengthy. He is a person, following his return from Mozambique, who found himself to be destitute, having lost all that he had achieved in life.

In the circumstances I find the plaintiff's claim for general damages in the sum of \$50 000 is fair and reasonable and judgment is entered for the plaintiff in that sum.

1986 (1) ZLR p78

EBRAHIM J

It should be said before I conclude that Mr *de Bourbon* did not persist with the claim for special damages in the sum of \$2 927 and accordingly special damages in that amount is not awarded.

Furthermore I am not satisfied that the claim for special damages for loss of salary totalling \$3 000 was satisfactorily established on the evidence laid before me and no award is made in that regard.

I arrive at this conclusion because the plaintiff in my view did not satisfactorily establish what his earnings were in this regard. There was doubt whether he received a fixed salary or not and this was never resolved on the evidence.

The award or the order of the Court therefore is that the plaintiff is awarded general damages in the sum of \$50 000 and that it is ordered that the interest be payable from the date of this judgment until payment of that amount is made. Plaintiff is also awarded costs of suit.

George Seirlis & Associates, plaintiff's legal practitioners

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

1986 (1) ZLR p79

RB RANCHERS (PVT) LTD v ESTATE OF THE LATE R R McLEAN & THE MASTER OF THE HIGH COURT OF ZIMBABWE 1986 (1) ZLR 79 (SC)

Court Supreme Court, Harare

Beck JA, Gubbay JA & McNally JA

Civil appeal

13 & 24 March 1986

Flynote

Bills of Exchange - interest as damages on dishonoured bill - whether payable where dishonour is justified.

Contract - implied term - necessary in a business sense to give efficacy to the contract.

Interest - whether creditor is entitled as against executor of deceased estate to interest between date of death and payment of claim.

Legislation - Bills of Exchange Act [Chapter 277] s 56.

Headnote

The appellant was holder of a cheque drawn by the deceased, presented for payment after his death and consequently dishonoured by the bank. The cheque was in payment for goods sold on credit. There was no express agreement between the parties relating to interest. Because of complications in winding up the estate, payment to the appellant was considerably delayed. The executor of the first respondent rejected the appellant's claim for interest; the second respondent overruled the appellant's objection thereto; application was made to the High Court for an order setting aside the second respondent's ruling and directing the executor to amend the estate account so as to make provision for the payment of interest.

Held that unless the claim carries interest, the creditor will not be entitled to interest between the date of death and payment of the claim, except for the period after the creditor has become obliged to pay.

1986 (1) ZLR p80

McNALLY JA

Held, further, that a term whereby interest shall become payable in the event of non-payment on presentation of invoice cannot be implied since it is not necessary to give business efficacy to the contract of sale.

Held, further, that interest as damages is only payable on a dishonoured bill of exchange where that dishonour is wrongful or without justification.

Case Cited

Reigate v Union Manufacturing Co(Ramsbottom) Ltd 1918 1 KB 592

Citimakers (Pty) Ltd v Sandton Town Council 1977 (4) SA 959 (W) *Biedermann v Allhausen &*

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Co 1921 37 TLR 662

NV Ledeboter & Van Der Held's Textiel - Handel v Hibbert [1947] 1 KB 964

McNicol v Delport NO 1980 (4) SA 287 (W)

FC Blackie SC for the appellant

RY Phillips for the first respondent

NP Murnane for the second respondent

Judgment

McNally JA: The facts of the case were summarised by Mr JUSTICE SMITH in the court below in the following terms:

"The late R R McLean (hereinafter referred to as "the deceased") was a cattle 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 the same day the applicant presented the cheque for payment but the bank concerned refused to pay out on the cheque since it had been notified of the death of the deceased.

On 26 November 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

1986 (1) ZLR p81

McNALLY JA

1984, when the \$53 700 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 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."

The appellant (which I will refer to as "the applicant") failed in its claim for interest, and the application was dismissed with costs. Although the learned judge did not specifically say so, it is accepted that costs were not awarded in favour of the second respondent who took no part in the proceedings. In this court Mr *Murnane* appeared for the second respondent, but advised the court that he did so merely to abide the judgment of the court. He did not seek an award of costs, nor did Mr *Blackie*, for the appellant, ask for costs against the second respondent.

1986 (1) ZLR p82

McNALLY JA

In this court Mr *Blackie* advanced the same submissions as he had made in the court *a quo*. He contended:

1. That it was an implied term of the agreement of sale that, in the event of the money not being paid in cash immediately the purchaser would become liable for interest on the outstanding account;
2. That the purchaser is liable in damages for breach of contract for failure to pay cash immediately;
3. That the drawer of the cheque is liable in terms of s 46(1)(a) and s 56(a) of the Bills of Exchange Act [*Chapter 277*] for interest/damages.

Ground 2 can most easily be disposed of. There was no contract to pay cash immediately, as was conceded in the affidavit of the applicant's Managing Director.

Ground 1 gave food for thought. I do not think, as I have already said, that the question of "cash immediately" is anything more than a red herring. Mr White, the applicant's Managing Director, said quite explicitly in his affidavit that:

"I confirm that our sales by public auction are conducted on a cash basis, but this condition was not enforced in respect of the late Mr McLean because he was well known to us and we expected payment to be made immediately on presentation of our invoice. Had we known that payment was to be delayed for nearly two years we would have not waived this right.

I accept that on our invoice the question of interest was not dealt with. This was because we did not intend to give credit to him."

This statement makes it quite clear that the applicant was prepared, in the case of Mr McLean, to regard "cheque on presentation of invoice" as the equivalent of the normal "cash at sale". It was not giving him credit perhaps in a formal sense, but informally. Nonetheless as a matter of law, and however it chose to define its terms, it did give credit. It passed the ownership of the cattle to him on delivery and did not expect payment until a reasonable time after presentation of the invoice.

It is quite evident that the parties were *ad idem* on this term because Mr McLean complied with it, insofar as he could. He received the cattle on 30 September; he received the invoice

presumably within a day or two of the

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McNALLY JA

date on it which was 26 October; and he posted the cheque on 1 November. Had the applicant deposited it before 9 November this dispute would not have arisen.

The sale therefore was in fact a credit sale, the terms of credit being "cheque on presentation of invoice". The real question is therefore whether it was an implied term that if, for any reason, payment was not made as agreed, then interest would start to run.

SMITH J cited the passage from the judgment of SCRUTTON LJ in *Reigate v Union Manufacturing Co(Ramsbottom) Ltd* [1918] 1 KB 592 at 605:

"A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said 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 both have replied, 'Of course, so-and-so will happen; we did not trouble to say that; it is too clear'."

The learned judge went on to say that 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 he found that there was no such implied term.

It seems to me, with respect, that the learned judge was right. The argument against his conclusion may be set out like this:

Both parties were experienced businessmen. Both would know that if money owing was not paid the creditor would be deprived of the use of the money. Both knew that the creditor was operating on an overdraft. Therefore both knew that failure to pay on time would cost the creditor the bank overdraft rate on the amount unpaid. Therefore it must necessarily be implied that, if asked, both parties would have said: "Of course R B Ranchers will be entitled to 16% *per annum* interest on the amount outstanding pending payment". Unless this is implied, one may add, what incentive is there for the debtor to pay?

Attractive and equitable as this agreement may seem, there is one convincing answer to it, and one other possible answer. In the first place, I do not think the term must necessarily be implied in order to give business efficacy to the agreement. The ordinary machinery of the law is after all there to cater for

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McNALLY JA

this very contingency. If Mr McLean had simply declined to pay, RB Ranchers would have issued summons within a few days demanding payment in terms of the contract, alleging that a reasonable time for payment had elapsed, and adding a prayer for interest *a tempore morae*. The rate of interest could have been set at the ordinary *mora* interest rate or, if they wanted the higher rate, they would have claimed that rate following the logic of *Citimakers (Pty) Ltd v*

Sandton Town Council 1977 (4) SA 959 (W) at 963-4.

If on the other hand Mr McLean had become insolvent, the Insolvency Act provided an answer. And if, as indeed happened, Mr McLean died, the Administration of Estates Act provided the machinery for dealing with the situation.

In short, the implied term was not necessary. There is no need to provide in a contract for conventional interest when the law provides automatically for interest as damages (*mora* interest) in every normally foreseeable case. I use the phrases "conventional interest" and "interest as damages" as they are used in Cowen on the *Law of Negotiable Interests in South Africa* 4 ed at pp 208-9.

If it is said that the law does not provide for interest as damages in cases such as the present, where the debtor dies before payment, then the answer must be that the law accepts that for the sake of orderly administration some delay in the payment of debts is inevitable when the debtor dies. It is the policy of the law that ordinarily this delay will not automatically entitle the creditor to interest. (See the reference to Meyerowitz *The Law and Practice of Administration of Estates* 5 ed p 219, later in this judgment).

Therefore the contract was a perfectly efficacious business contract as it stood, without the need for an implied term. The law had an answer for every eventuality which was not expressly provided for. The fact that the machinery of the law seems in this case to have worked exceedingly slowly is altogether another question. It might have been desirable, in the light of the way things turned out, to have made a specific provision about interest, but that is not to say that without such a provision the agreement lacked business efficacy. See generally the cases cited at pp 158-159 of Christie *Law of Contract in South Africa*. The second answer is that the terms sought to be implied must be capable of clear and exact formulation. In this case it is arguable that it is really not possible to say either from what date the interest would have been set to run, or what rate of interest would have been agreed.

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McNALLY JA

Mr McLean might have persuaded the applicant to agree to something lower than 16%. Speaking for myself I am not wholly convinced of the strength of this answer, and I prefer to rely on the first one. But there are certainly cases (see generally Christie *op cit* at 160-161) which would support the conclusion that a clear and exact formulation of the implied term is not possible in this case.

I turn lastly to consider the final submission, based on the provisions of the Bills of Exchange Act [Chapter 277]. I pause to observe that by common consent this submission relates only to the lesser sum of \$47 900 and not to the further \$5 800 which was not included in the cheque.

The contention is this: Section 46(1)(a) of the Act provides:

"46. (1) A bill is dishonoured by non-payment -

(a) When it is duly presented for payment and payment is refused or cannot be obtained..."

Section 56 then provides:

"56. Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: -

- (a) ...
 - (i) the amount of the bill;
 - (ii) interest thereon in accordance with the stipulation, if any, in the bill, or from the time of presentment for payment if the bill is payable on demand...;
- (b) ...
- (c) Where by this Act interest may be recovered as damages, such interest may, if justice requires it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

Finally it is necessary to set out s 74 of the Act as follows:

"74. The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by -

- (a) countermand of payment;
- (b) notice of the customer's death; or
- (c) notice of the customer having become insolvent."

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McNALLY JA

The contention is simply that in terms of s 56 the applicant is entitled to recover not only the face value of the cheque but also interest as damages.

The contention runs squarely counter to the two English decisions relied on by the learned judge *a quo*, namely *Biedermann v Allhausen & Co* 1921 37 TLR 662 and *NV Ledeboter & Van der Held's Textiel - Handel v Hibbert* [1947] 1 KB 964.

Mr *Blackie* contended firstly that these decisions were wrong, alternatively that they were distinguishable. He sought to distinguish them on the ground that, in both these cases, payment of the debt was actually prohibited, whereas here the executor was not forbidden by law to make the payment.

In my view this is a distinction without a difference. In the two earlier cases it was the advent of war which made the payment of the debt to the creditor illegal. In the present case it was the death of the debtor which made the honouring of the cheque impossible. It should be noted that in the English cases the debt was not cancelled. It was simply by law rendered irrecoverable pending the end of hostilities. *Mutatis mutandis* the same applies here.

The essence of the decisions both by DARLING J in 1921 and by MORRIS J in 1947 was that there was no breach of duty or breach of contract in the non-payment. Therefore it was inappropriate to speak of damages. "Damages for dishonour" could only mean "damages for wrongful dishonour", or as MORRIS J put it "dishonour without justification". Both judges,

incidentally, were interpreting the Bills of Exchange Act, 1882 whose provisions on the relevant points are identical with our Act.

It seems to me that the learned judges were indisputably correct and that their reasoning applies to the facts of this case. Mr McLean did everything in his power to comply with the terms of his contract. His death was not a wrongful or culpable act such as to be a breach of contract or a breach of duty. When he died the financial consequences were regulated by operation of law. The banker's dishonouring of the cheque was not a wrongful act. The applicant's rights against the executor are set out in Meyerowitz *The Law and Practice of Administration of Estate* 5 ed s 16.3 at 219. The last paragraph of that section reads:

"Unless the claim carries interest, the creditor will not be entitled to interest between the date of death and payment of the claim, except for the period after the executor becomes obliged to pay and the creditor has demanded payment, ie the executor is put in *mora*."

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McNALLY JA

See also *McNicol v Delport* NO 1980 (4) SA 287(W).

The only basis upon which a claim for interest in these circumstances could succeed, it seems to me, is that the executor wrongfully or culpably delayed payment. No foundation for such a claim was laid in the papers, and indeed Mr *Blackie* expressly disavowed any reliance on such a contention.

Comment has been made that these are old decisions by single judges at first instance. Obviously they are not binding precedents. The reasoning contained in the judgments however seems to me, with respect, to be faultless. Nor can it be coincidence that the issues there decided have apparently never been raised again. The judgments have been cited in every edition of Byles on *Bills of Exchange* up to the 25th. They have stood the test of time in the glare of publicity.

I would dismiss the appeal and order that the first respondent's costs be paid by the appellant.

Beck JA: I agree

Gubbay JA: I agree

Winterton, Holmes & Hill, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners

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

1986 (1) ZLR p88

MHORA & MADZIWA v THE MINISTER OF HOME AFFAIRS 1986 (1) ZLR 88 (HC)

Court **High Court, Harare**

Gibson J

Civil application

6 & 26 March 1986

Flynote

Practice - citation - responsible minister

Police dismissal of officer - practice - citation - responsible minister

Headnote

Since the Police Act is administered by the Minister of Home Affairs he is the correct person to cite in proceedings concerning matters incidental to the administration and running of the Act. It is unreasonable to suggest that the Minister is not the right person to cite purely because certain responsibilities had been transferred to Police Service Commission.

No matter how compelling or insidious allegations against an officer may be the basic tenets of natural justice require that before a dismissal may be effected a Commission of Inquiry should be established to investigate the allegations and allow the accused the right to answer the allegations.

Case cited:

Marais & Ors v Pongola Sugar Milling Co Ltd & Ors 1961 (2) SA 698

Groenewald v Minister of Justice 1972 (3) SA 596

Commissioner of Police v Wilson 1981 (1) ZLR 451

PF-ZAPU v The Minister of Justice 1985 (1) ZLR 305 (SC) ; 1986 (1) SA 532

Ridge v Baldwin & Ors [1963] 2 ALL ER 66

AP de Bourbon for the applicants

SW Mafara for the respondent

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GIBSON J

Judgment

Gibson J: By notice of motion the applicant seeks to have the decision of the respondent declared null and void on the grounds that it was wrongful and unlawful, and an order that the respondents should reinstate the applicant's pension rights and leave benefits.

The respondent is being sued in his official capacity as Minister of Home Affairs. He opposed

the application on grounds that appear from the Judgement.

Both applicants had served in the Police Force for a considerable time, eighteen years and 21 years respectively and at the time both held ranks of Deputy Commissioners. Sometime after 19 December 1985 the applicants were summarily discharged from the force by letters signed by the respondent a copy of which is annexed to their affidavits. The letter also notified them of the forfeiture of their state pensions and leave pay; the latter only to the extent of 50%.

The letter reads as follows:

"I have to inform you that His Excellency the President has, on the ground that you are unfit to remain in the Police Force, removed you from office as a Deputy Commissioner of Police, thereby discharging you from the Police Force, with effect from 19 December 1985.

The President has also determined, with reference to section 8 of the State Service (Pensions) (Uniformed Forces) Regulations, 1976, that you should not be awarded a pension. That being so, you will be entitled to a refund of pension contributions in accordance with the provisions of section 9 of those regulations. You will also be paid fifty per centum of the cash equivalent of accrued leave in terms of section 12(5) of the Police (Leave) Regulations 1969."

The applicants challenged the decision, and the nature of the challenge is in terms of the respective letter written on their behalf by their Legal Practitioners dated 31 December 1985, copies of which are annexed to their affidavits. The letters are in similar terms, and they advert to the question of lawfulness of the dismissal on the following terms:

- i) that they were not subjects of that Commission of Inquiry which investigated the conduct and effectiveness of the then Commissioner of Police.

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GIBSON J

- ii) that they have never been invited to answer any allegations of misconduct.
- iii) that they have never been summoned to appear before any Police Disciplinary Board.
- iv) that they have never been convicted of any crime.

The respondent's case is that the applicants were discharged from the Zimbabwe Republic Police Force by the President, he had merely signed the respective letters. He denies that he had tendered any advice to the President to that effect and avers that he is not the correct person to cite.

The first question raised by the respondents is whether the correct person has been brought to the Court as respondent. Mr *de Bourbon* for the applicants contended that the citation was correct and the argument was not valid. Counsel argued that in discharging the applicants the President had acted in terms of s 54A of the Police Act [*Chapter 98*] as amended by SI 294/85. Section 54A gives the President power (to discharge an officer) acting on the advice of the Prime Minister or such other Minister as may be designated for the purpose by the Prime

Minister. In terms of SI 285/80 the respondent is the person assigned the administration of the Police Act [*Chapter 98*], therefore as such he is the Minister responsible for the Police Force.

Counsel argued further that by virtue of the State Liabilities Act [*Chapter 54*] where there is a right to sue the State the Minister who has the headship of the Ministry for the time being is the correct person to sue. Counsel referred to the provisions of s 3 of the Act, in support of the argument. Mr *de Bourbon* cited two decisions of the South African courts in support of this contention - the cases of *Marais & Ors v Pongola Sugar Milling Co Ltd & Others* 1961 (2) SA 698 (M) and *Groenewald v Minister of Justice* 1972 (3) SA 596.

Counsel for the respondent, Mr *Mafara*, argued that the dismissal was not carried out by the respondent and there was therefore no basis for citing the Minister for Home Affairs. He continued and submitted that as the Minister has not had a hand in the dismissal he is not a proper person to sue. He admitted that in terms of s 94(1)(a) of the Constitution as amended by Act No. 4 1984 the power of dismissal vests in the President and not the Minister. He further argued that although the President acts on the advice of the Prime Minister or such other Minister whom the Prime Minister may designate, the Minister for Home Affairs was not the person so designated and therefore the citation is wrong.

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GIBSON J

Mr *Mafara* argued that the powers of the Minister of Home Affairs in relation to the Police Force are limited to giving general directives to the Commissioner in terms of s 93(3) of the Constitution. Since the Commissioner has no control over dismissals from the Force and his responsibility ends with the right to be consulted before advice is given to the President on that matter, the Minister's power is similarly curtailed. In any event, he submitted, the Police Act has been weakened by the removal of those parts of its provisions which dealt with matters involving conditions of service of Members of Force and their discharge and the transfer of the responsibility to the Police Service Commission.

Section 94(1) of the Constitution provides:

"Subject to the provisions of this section, section 93 and section 96 and regulations made there under, the power to make appointments to any office or rank in the Police Force and the power of removal from office or reduction in rank shall vest -

- (a) in relation to the rank of Inspector or any more senior rank, in the President, acting on the advice, tendered after consultation with the Commissioner of Police, of the Prime Minister or such other Minister or Ministers as may be designated for the purpose by the Prime Minister;...
- (b) ..."

The meaning of the words "subject to the provisions of this section, s 93 and s 96" have already been construed in the case *Commissioner of Police v Wilson* 1981 (1) ZLR 451 at p 464. The Chief Justice held that these words mean "subject to qualifications and limitations". At p 465 the CHIEF JUSTICE went on:

"Having regard to these five indications against the background of the legislation it is clear to my mind that the purpose of the qualifications enunciated in section 94(1) is to allow regulations made under section 96(1)(c) to

limit the common law power to dismiss or reduce in rank a police officer at will. See *Hawkins v Administration in South - West Africa (supra)*. The language is both necessary and apt to achieve that purpose and in the context it is not apt to allow regulations to be made to alter the specific vesting of the powers of appointment, dismissal and reduction in rank in the President and the Commissioner, and in particular not to allow regulations to be made to vest the powers given by section 94 (1) in any person other than those to whom they are given."

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GIBSON J

An examination of the Regulations as made under s 96 make it clear that these Regulations do not "alter the specific vesting" of the powers in the President. But before looking into the Regulations it is as well to look at the enabling section. Generally s 96 of the Constitution, gives power to the Police Service Commission (which is set up by s 95 of the Constitution) to make regulations for:

"...the general well being and good administration of the Police Force, the maintenance thereof in a high state of efficiency and the conditions of service of members of the Police Force, which may include provision for the punishment of members found guilty of offences against discipline; ..."

The relevant section is s 96(1)(c).

The question raised by the State is that because the Police Service Commission has these powers over the Force the Minister is thereby rendered so impotent that he cannot be cited with confidence in matters pertaining to the force. I do not agree.

Since the Police Act is administered by the Minister for Home Affairs in terms of SI 285/80 made under s 69(1) of the Constitution, it seems right to me to hold that the Minister for Home Affairs should be the right person to cite in proceedings concerning matters incidental to the administration and efficient running of the Act. It is unreasonable to suggest that this Minister is not the right Minister to cite merely because certain responsibilities relating to the administration of the Police Act have been transferred to the Police Service Commission.

The question of whom to cite in proceedings against the State is set out in the State Liabilities Act [*Chapter 54*] which states at s 3:

"In any action or other proceedings which are instituted by virtue of section 2, (any claim against the State) [my own brackets], the Plaintiff, Applicant or Petitioner, as the case may be, may make the Minister to whom the headship of the Department concerned has been assigned nominal Defendant or Respondent."

I have read the case of *Marais* which dealt with the provisions of a similar enactment in South Africa, but my view is that that case is of little assistance because there the question was whether it was necessary to join as defendants

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GIBSON J

several Ministers where claims were laid against their respective Departments. It was held that it would suffice to proceed against one Minister only. The authority would be of some use if I were to hold that the Prime Minister by virtue of the fact that he advised the President as well as the Minister for Home Affairs were both proper persons to sue. In my view it would still have

been right to proceed against the present Minister, since he has the Headship of the Department. It is unlikely that the Prime Minister would have advised the President without the Minister responsible for the Department.

The conclusion so far then is that the Minister for Home Affairs is correctly cited.

At this stage it is necessary to revert to the submissions of Counsel. Mr *Mafara*, at one stage 'ventured to suggest' an argument which had no foundation on the papers - namely that the correct party to cite was the Prime Minister. He implied that because the applicants were aware of the provisions of the Constitution of s 63(3) that the Courts had no jurisdiction over matters of State, the applicants had settled for the present respondent to avoid that insuperable obstacle.

Mr *de Bourbon* having objected to this new ground, submitted that the proposition was clearly wrong. He urged that the Courts jurisdiction was ousted in such matters only when those matters relate to matters of State. He cited *PF ZAPU v Minister of Justice* 1985 (1) ZLR 305 (SC); 1986 (1) SA 532. I agree with the submission. For that purpose, it will suffice to quote the judgment of the CHIEF JUSTICE at p 313E - F (p 539 of the South African report) that:

"The phrase 'Act of State' is not a term of art. It has been used generally as a prerogative act of policy in matters affecting foreign affairs, that is, as the authorities have consistently used it,

'An act of the executive as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown',

is an act of State. See *Halsbury's Laws of England (supra)*. That meaning of the term 'Act of State', as used in the above passages, has become notorious. It is a phrase that has carved for itself a permanent meaning in the field of foreign relations. Its use in domestic affairs may soon find its resting place in the archives of legal history."

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GIBSON J

As far as this judgment is concerned I see no reason to disturb its peaceful repose.

Mr *de Bourbon* argued that the President acted in breach of the law when he discharged the applicants from the Police Force. Counsel argued that the President's power to remove Police Officers from the Force is not absolute, but is subject to s 93 and s 96 and the Regulations made there under. Counsel argued that the Regulations made under s 96(1)(c) - namely SI 294/85 - were the type of Regulations which the Police Service Commission were entitled to make. Counsel also argued that the President's discharge of the officers infringed s 54A of the Police Act, because that section only allows the President to discharge the officers following the happening of three events:

- 1) where the officer is convicted of a criminal offence, or,
- 2) where the officer is found to be unfit in terms of s 55 of the Police Act, or,
- 3) following the setting up of a Commission of Inquiry under Chapter 80.

Mr *de Bourbon* pointed out that the applicants have not been convicted of any criminal offence,

nor has a Board of Inquiry in terms of s 55, or a Commission of Inquiry been set up in respect of these applicants. The Commission of Inquiry set up under SI 54/85 was only empowered to investigate the then Commissioner of Police. Counsel cited the case *Ridge v Baldwin & Ors* [1963] 2 All ER 66 (HL) and submitted that since the President's decision did not follow any of the three events, the purported discharge is invalid; therefore the Applicants are entitled to the relief sought.

Mr *Mafara* agreed that the President had acted in terms of s 54A, *supra*. He agreed that there was no enquiry in terms of s 55, and that the applicants had not been convicted of any criminal offence. However he argued that the discharge was proper, and was the result of an Inquiry in terms of the Commission of Inquiry Act [Chapter 80] "from whence it appeared that the applicants were found to be unfit to remain in the Police Force." Counsel argued that a reading of s 54 A makes it clear that the Commission of Inquiry under Chapter 80 does not have to be instituted in respect of a particular officer nor does the section state that the Commission should be set up to enquire into a particular individual. He argued that it is enough that it is subsequently known to those who advise the President that the individual was said to be unfit and following that knowledge the advice was tendered to the President. Counsel argued that if it is found that the officers had been

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GIBSON J

discharged by the President then the Court had no jurisdiction under s 66(3) of the Constitution. Counsel argued that the President in terms of the State Service Uniformed Regulations had decided not to allow the officers any pensions, and stated that this was a Presidential Act which the Court had no power to enquire into.

Counsel further argued that if what the applicants are saying is that the President's act of removing them from the service is null and void, then the prayer to reinstate their pensions is misconceived, the relief they should seek is reinstatement of their salaries.

Continuing his submission, Mr *Mafara* argued that although the powers of the President under s 94(1) are subject to Regulations made under s 96(1) of the Constitution, such regulations cannot remove the powers of the President and vest them in someone else. If the Regulations purport to do that then they are null and void as being *ultra vires* the constitution. Mr *Mafara* referred to the case of *Commissioner of Police v Wilson* 1981 ZLR 451. While that proposition of law may be correct in the right context, it seems to me that the import of that case is clearly distinguishable from the present. The effect of these Regulations is clearly different.

If I may say so with respect, the meaning of the Regulations under consideration in the *Wilson* Case, *supra*, could not have been clearer in their intention to confer powers to reduce in rank any officer who fell within the category specified on the Commissioner. What was not clear as the Chief Justice observed on p 462, of that judgment was:

"...whether this [the Regulations], (my brackets) purports to give the Commissioner the sole power or whether to confer on him concurrent power with the President in terms of section 94(1)(a) is not clear."

Whatever the end result those Regulations clearly conflicted with the Constitution. I do not think

that it can be said that the present Regulations, are in conflict with the Constitution. It is as well to set out s 54 A here. Section 54A provides :

"Subject to section 93(5) of the Constitution, an officer who is - [the qualification relates to the Commissioner of Police]

- (a) convicted of any offence and sentenced therefor to imprisonment without the option of a fine whether or not the execution of such sentence is suspended; or

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GIBSON J

- (b) found to be unfit to remain in the Force as the result of an enquiry concluded in terms of section 55 or in terms of the Commissions of Inquiry Act [Chapter 80];

may be discharged from the Force by the President, acting on the advice, tendered after consultation with the Commissioner, of the Prime Minister or such other Minister or Ministers as may be designated for the purpose by the Prime Minister and no such discharge shall be subject to confirmation in terms of subsection (4) of section 94 of the Constitution."

In as much as it is possible to discern the intention of Parliament behind the pen of the legal draftsman, it does appear that the intention of Parliament in enacting that section was to confer upon the President a Power of Dismissal or Appointment parallel to the power in s 94(1)(a). Thus the President has two distinct powers vested in him. If the President elects to use one rather than the other then the law of the land requires that he acts in the terms of the law that permits him to do so. In my view the provisions of s 54A contain the elementary principles of natural justice that where a man is accused, he must be informed of the accusation and be afforded the opportunity to answer the allegations. Unless that is done then the purported act of dismissal is invalid. The powers of the President are increased by providing an alternative.

The principle above was applied in the classic case on natural justice *Ridge v Baldwin & Ors* [1963] 2 ALL ER p 66 at 74 where LORD REID in a concurring judgment said:

"In *De Verteuil v Knaggs* (3) the governor of Trinidad was entitled to remove immigrants from an estate 'on sufficient ground shown to his satisfaction.' Lord Parmoor said that

'the acting governor was not called upon to give a decision on an appeal between parties and it is not suggested that he holds the position of a judge or that the appellant is entitled to insist on the forms used in ordinary judicial procedure...'

but he had

'...a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement brought forward to his prejudice.'

On the authority of the *Ridge v Baldwin* case it is my view that no matter how

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GIBSON J

compelling, no matter how insidious may be the allegations against the applicant, the basic tenets of natural justice insist that before the applicant is dismissed a Commission of Inquiry should be established to investigate the allegations and allow him the right to answer yea or nay.

In my view the specific provisions of the Commissions of Inquiry Act [Chapter 80] which lead me to the conclusions are set out below: -

Section 2 of the Commissions of Inquiry Act provides:

"It shall be lawful for the President, whenever he deems it advisable, to issue a commission appointing one or more commissioners and authorizing such commissioner or commissioners, or any quorum of them therein mentioned, to inquire into the conduct of any officer in the Public Service ..."

The words "any officer in the Public Service" clearly indicate that there must be an identified person.

Section 2(2) provides:

"Each such commission shall specify the subject of inquiry ..."

These words are self-explanatory.

Another material section of the Act is s 16:

"Any person whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry, shall be entitled to be represented by a Legal Practitioner, at the whole of the inquiry, and any other person who may consider it desirable that he should be so represented may, by leave of the commission, be represented in the manner aforesaid."

It is arguable that the words above beginning "any other person who may consider" may entitle the Commission of Inquiry to go outside its terms of reference where it may deem it necessary and where it seems that some other person such as a witness appears to be implicated in the allegations. But even then, that subject must be identified and may be afforded the opportunity, if it is deemed necessary, to be represented. However this point was not argued and I will say no more.

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GIBSON J

A reading of SI 54/85 makes clear in my mind that a Commission of Inquiry in the instant case was required to inquire into the conduct of a named person ie the then Commissioner of Police. The SI is headed "The Commission of Inquiry into the Commissioner of Police". Further down the SI again specifies that the investigations are into the conduct of a named person and the effectiveness of the Commissioner of Police in discharging his duties.

It seems to me clear that the Commission of Inquiry only lawfully investigated and was empowered exclusively to investigate the conduct of the Commissioner of Police. If any suggestion is made that there was any other enquiry into any other officer such as the applicants then that was clearly wrong and the commission would have acted outside its powers

and terms of reference.

In concluding it does appear to me that in exercising the powers of dismissal, the President was bound to follow the provisions of s 54A of the Police Act, but in the instant case the provisions of the section had not been observed, because there had not been a Commission of Inquiry in terms of Chapter 80 in respect of the appellants in terms of that law.

The dismissal is set aside. But I wish it to be recorded from information given to me from the Bar, by Mr *de Bourbon*, that neither applicant wishes to be reinstated; that Mr Madziwa has already resigned and that it is Mr Mhora's intention to resign as soon as practicable. This information removes any inconsistency that there might be between relief sought and the logical result of the assertions made. Because of the decision I have come to I do not feel it is necessary to consider the issues raised by the decision that the applicants should forfeit their pension rights and accumulated leave benefits.

IT IS ORDERED:

THAT the dismissals be and are hereby set aside with costs.

Sawyer & Mkushi, applicants' legal practitioners

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

1986 (1) ZLR p99

HARTLEBURY & EVANS v CHAIRMAN OF THE DETAINEES REVIEW TRIBUNAL & MINISTER OF HOME AFFAIRS 1986 (1) ZLR 99 (HC)

Court **High Court, Harare**

Reynolds J

Review proceedings

13 & 26 March 1986

Flynote

Review - decision of the Detainees Review Tribunal - approach of reviewing court - Constitution - detainees - Detainees Review Tribunal - procedure.

Headnote

In terms of s 31(4) of the Emergency Powers (Maintenance of Law and Order) Regulations the Detainees Review Tribunal is not bound by the ordinary rules of evidence or procedures applicable in courts of law. As the Tribunal is not governed by the formal rules and restrictions which must be observed by courts of law it must at all times be alert to ensure that detainees are treated fairly in regard to the reception of evidence upon which it relies. The evidence should be fully disclosed and an opportunity given of answering any prejudicial aspects. There

must be no apprehension on the part of detainees of partiality or pre-judgement and no lack of opportunity given to them to reply in full to any prejudicial information admitted in evidence.

Case cited

Liversidge v Anderson[1942] AC 206

Allan v The Minister of Home Affairs 1985 (1) ZLR 339 (HC)

Barlin v Licensing Court of the Cape 1924 AD 472

Virginia Land and Estate Co v Virginia Valuation Court 1961 (4) SA 479

Maxwell v Dept of Trade and Industry [1974] QB 523

Crow v Detained Mental Patients Special Board 1985 (1) ZLR 202 (HC); 1985 (4) SA 83

1986 (1) ZLR p100

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Haruperi & Ors v Minister of Home Affairs & Anor HH-278-84 (unreported)

Minister of the Interior v Bechler & Ors 1948 (3) SA 409

Board of Education v Rice[1911] AC 179

Huyser v Louw NO & Ors 1955 (2) SA 321

Mpemvu v Nqasala 1909 (26) SC 531

Loxton v Kenhardt Liquor Licensing Board 1942 AD 275

Sullivan v Wheat Industry Control Board 1946 TPD 194

De Villiers v Administrator OFS 1954 (3) SA 395

Herring v Templeman & Ors 1973 (3) AER 569

Union Govt v Union Steel Corporation 1928 AD 230

Clairwood Motor Transport Co v Pillai & Ors 1958 (1) SA 253

AP de Bourbon for the applicant

S Mafara for the respondent

Judgment

Reynolds J: The two applicants seek relief by way of review following the decision of the Detainees Review Tribunal (Tribunal) to recommend that the applicants should continue to be detained under the order of the second respondent issued in terms of s 17 of the Emergency

Powers (Maintenance of Law and Order) Regulations (SI 458/83).

A brief account of the events leading up to the present hearing is as follows. The applicants were arrested on 31 December 1981 on two charges. The first of these was that they had contravened the Official Secrets Act in that they had allegedly passed on intelligence information to another country, to the prejudice of the safety of Zimbabwe. The second charge was that each of the two applicants was in unlawful possession of arms of war. At their subsequent trials on these charges they were both acquitted, but were immediately rearrested and detained in terms of the Emergency Powers Regulations already referred to. The applicants have remained in detention since, but have appeared on four separate occasions before the Tribunal as is provided for in the regulations. On each occasion the recommendation of the Tribunal has been that they should continue to be detained. It is the last such recommendation that is now under review, and the application is for the Tribunal's recommendation to be set aside, and to be substituted by a recommendation for the applicants' release.

Mr *de Bourbon*, who appears for the applicants, has urged this Court not to lose sight of the concern expressed by Lord Atkin in his well-known speech in *Liversidge v Anderson* [1942] AC 206 at 244, where the following appears:

1986 (1) ZLR p101

REYNOLDS J

"I view with apprehension the attitude of Judges who on mere questions of construction when face to face with claims involving the liberty of the subject show themselves more Executive minded than the Executive... In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war and peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the Judges are no respectors of persons and stand between the subject and any attempted encroachment on his liberty by the Executive, alert to see that any coercive action is justified in law."

I think that I may say with some measure of confidence that the judges of this court do not harbour the attitude criticized by the learned law Lord. Indeed the principles adopted by the Zimbabwean courts are expressed in cases such as *Allan v The Minister of Home Affairs* 1985 (1) ZLR 339 (HC) at 346B-D, where I said:

"Since time immemorial the liberty of the individual has been regarded as one of the fundamental rights of man in a free society. Long before the Magna Carta codified the principle almost eight hundred years ago, man has pursued and jealously guarded his right to freedom of person. In the words of Thomas Jefferson - 'The God who gave us life gave us liberty at the same time.' Revolutions have been staged and wars have been fought in the name of freedom. This includes Zimbabwe's own long and bitter struggle. The protection of this right is enshrined in the Constitution of Zimbabwe, and the Courts will certainly play their part in preserving this right against all infringements, and all attempts to erode or violate the principle involved."

See, too, the case of *Mandirwhe v Minister of State (Security)* held on 19 March 1986, as yet unreported.*⁽³⁾

The relevance of this sentiment in the present context is that a review court will examine the proceedings of lower courts or tribunals adjudicating on the liberty of the subject with sedulous care. If there has been any irregularity or any injustice, the proceedings will be corrected without

hesitation. By the same token, it may also be remarked that the lower forum itself, when it is dealing with a case involving a person's liberty, should approach its duties with the utmost concern that it should arrive at a just decision.

1986 (1) ZLR p102

REYNOLDS J

A great deal has been said and written of the need for administrative tribunals to apply the principles of 'natural justice', or 'to act with fairness', and distinctions have been drawn between purely administrative, as opposed to judicial or quasi-judicial functions. Without attempting to rationalise the abundance of judicial comment on the subject, it is my view that it is the responsibility of this court, in scrutinizing the present quasi-judicial proceedings, to be satisfied, in simple terms, that the Tribunal dealt with this case fairly. The various statutory and moral requirements directing the methods and procedures that the Tribunal should adopt, and the manner in which it should have exercised its discretion, may all be embraced by this simple term. (*Barlin v Licensing Court of the Cape* 1924 AD 472; *Virginia Land & Estate Co v Virginia Valuation Court* 1961 (4) SA 479 at 495A; *Maxwell v Dept of Trade and Industry* [1974] QB 523 at 539; *Crow v Detained Mental Patients Special Board* 1985 (1) ZLR 202 (C); 1985 (4) SA 83(Z)). The courts will act, on recognized grounds as to irregularities or illegalities, to correct or set aside the proceedings of lower courts and tribunals, and the basis of interference when applicable, will be a failure of justice.

It is convenient at this stage to consider in turn each of the various matters raised by the applicants, whereby it is submitted that improprieties occurred in the proceedings before the Tribunal.

- 1) The first such contention was that the Tribunal had acted as "an extended arm of the Executive" and had accepted at face value the opinion of that branch of Government as to whether the applicants constituted a threat to public safety or order, without itself considering whether there were in existence jurisdictional facts on which to reach its own conclusions. This proposition is examined below in more detail, but suffice it to remark at this stage that this notion was not, as far as can be seen, put to the Tribunal by the applicants' legal representative, nor was any suggestion made that the opinions referred to would be placed in issue, other than in general terms that the applicants did not constitute a threat to the security of the State.
- 2) The next point taken was that the applicants were being detained as a punitive measure and for no other reason. It was said that Minister Mnangagwa had admitted this, and it was a "trite proposition that detention cannot be used for an purpose other than that expressly stipulated in the Regulations." I would also agree that if the Tribunal recommended further detention on the basis

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that they deserved additional punishment, then that would amount to an illegality. (See *Charles Haruperi & Ors v Minister of Home Affairs & Anor* HH-278-84, and cases there cited).

It was alleged, further, that the Tribunal did not deal with this aspect, and did not apply its mind to the point at all. This omission, it was said, was "strong evidence of bad faith on the part of the Tribunal". In fact, it is not correct that this point was not dealt with. In the reasons for the decision given by the Chairman of the Tribunal, which form part of the record, it is stated: "The detainees, he (Mr Colegrave) argued, are now being detained as 'punishment' for their past activities and not because they are a threat to the security of Zimbabwe". The Chairman then proceeded to make it quite clear, in my view, that the Tribunal was of the opinion that the detainees did in fact constitute a threat to the public order and safety of Zimbabwe. He even went so far as to say that had the Minister made such a statement to the Tribunal personally, the Tribunal would have recommended the release of the detainees. In these circumstances I find that there is no substance in this point.

- 3) Mr de Bourbon has submitted that it would not be proper for either the first respondent or this court to take into account for the purposes of this hearing, evidence that had not been before the Tribunal at the time it made its recommendation. I agree with this, and the subsequent evidence produced by way of affidavit is, accordingly, ignored.
- 4) It was also contended that it was improper for the Tribunal to consider itself "a continuing court", and, as such, to take note of documents and other information which did not form part of the record of the proceedings. Mr *de Bourbon* argued that the Tribunal could decide the matter only from facts specifically presented to it at the actual hearing, particularly as the membership of the Tribunal changes periodically. He pointed out that none of the present members were concerned with the Tribunal reviewing the case of the detainees previously. Mr *de Bourbon* maintained that if the present Tribunal relied on previous hearings in coming to its decision, the applicants would not have received a complete review, or even a fair hearing. Mr *de Bourbon* concluded his argument with the submission that no evidence had been placed before the Tribunal to justify the recommendation made, and that there were no "reasonable grounds" established which would give rise to an apprehension that the applicants were a danger to the order or security of the State. The judgment of this Court delivered in respect of a previous review of

REYNOLDS J

the present applicants' case was cited, (reported as HH-485-84), in which Gibson J held that had there been no such "reasonable grounds" in existence, she would have had no hesitation in interfering with the recommendations made.

There are, in my judgment, two important factors that require consideration in this respect. The first is that the Tribunal, in terms of s 31(4) of the Regulations, is not "bound by the rules of evidence or procedure applicable to any legal proceedings." It must also "take due cognizance of any report submitted by the Minister, the Commissioner of Police or the Director of the Central Intelligence Organisation".

It is clear from this that the Tribunal is not governed by the formal rules and restrictions which must be observed by a court of law. It must, however, in my view, be alert at all times to ensure that the detainees are treated fairly in regard to the reception of evidence upon which it relies. By this I mean, in essence, that the evidence in question should be fully disclosed, and an opportunity given of answering any prejudicial aspects (*Minister of Interior v Bechler & Ors* 1948 (3) SA 409 at 451; *Board of Education v Rice* 1911 AC 179 at 182; *Huyser v Louw NO & Ors* 1955 (2) SA 321). "Evidence" in this context, as I see it, means any information tending to establish a fact, or a valid reason justifying the detention, continued detention or release of the detainees. It is necessary that this information should relate to the interests of public order or safety, for these are the jurisdictional facts upon which the decision must be based. It may also be remarked that it is only necessary that there be "some evidence" upon which the Tribunal could decide on its recommendation. (*Mpemvu v Ngasala* 1909 (26) SC 531.)

There would appear to be, therefore, no reason why, on this basis, the Tribunal should not have regard to any source of information such as the records of its own prior hearings, and to other reports including judgments of courts of law. It may avail itself of its own knowledge in formulating its decision. (*Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 315). In this respect, Rose - Innes' *Judicial Review of Administrative Tribunals in South Africa* at 163, contains the following:

"...administrative tribunals are not limited in the way courts of law are by the ordinary rules of evidence, and may obtain, rely and act on information from various sources other than the evidence or statements made before the tribunal."

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(See, too, *Sullivan v Wheat Industry Control Board* 1946 TPD 194; *De Villiers v Administrator OFS* 1954 (3) SA 395; *Herring v Templeman & Ors* [1973] 3 AER 569). The case of *Loxton v Kenhardt Liquor Licensing Board*, *supra* is also of particular relevance. Feetham JA is reported as saying, at 315:

"Where an administrative authority entrusted with quasi-judicial functions holds an enquiry on a question submitted for its decision, and the party whose rights or claims are the subject of such enquiry is entitled to a hearing, it is one of the requisites of a fair hearing that, if the authority avails itself of its own knowledge, in regard to particular facts relevant to the question submitted to it, or of information in regard to such facts independently obtained from outside sources, it should give the party concerned notice of any points, derived from such knowledge or information, which may be taken into account against him, so as to give him an opportunity of meeting such points."

The need for fairness in this regard, as in all other respects, must be stressed. There must be no apprehension on the part of the detainees of partiality or prejudgment by the Tribunal, and no lack of opportunity granted for them to reply in full to any prejudicial information admitted in

evidence. The Tribunal should also bear in mind that the formal rules of evidence are usually consistent with fairness and justice. As EVATT J, is reported as saying, in his dissenting judgment in *R v War Pensions Entitlement Appeal Tribunal; Ex Parte Bold* (1933) 50 CLR at 256:

"this does not mean that all rules of evidence may be ignored as of no account. After all they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposite party."

Review court should be cautious to examine each individual case bearing these considerations in mind.

The second factor that is pertinent to this question is that it would be, in my mind, a time-consuming and sterile exercise if it were necessary that all the basic information applicable in each case had to be repeated at every successive review. This is particularly so when the factual information is, in all probability, common cause. The *stare decisi et non qujeta*

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REYNOLDS J

Movere, which is applied to advantage in most legal systems, would be an analogy. The weight and value of analyses of the facts and evidence undertaken at prior hearings would be lost if these were not available at subsequent reviews. Provided that the possible dangers and disadvantages are borne in mind by the Tribunal, and the guiding principle of fairness is adhered to I can see no reason why the Tribunal should not act on information received in this way.

In any event, it would be undesirable for the same arguments or objections to be put to each successive Tribunal in the hope that this might result in a conflict of views between Tribunals composed of different members.

In the instant case, it seems to be clear from the record that the Tribunal did indeed take cognizance of the facts and documents relating to earlier reviews, and to the reports of other committees and organizations. The applicants were legally represented, and counsel was afforded every opportunity to present a full argument to the Tribunal. There is nothing in the record to suggest that the point now taken was addressed to the Tribunal. I find that there was nothing improper or irregular in the methods adopted by the tribunal in receiving the evidence that it did.

- 5) Objection was taken to the fact that the Chairman indicated in his reasons for decision that the report submitted by the "Central Intelligence Organisation HQ", (produced as an exhibit at the hearing), "contains information to the effect that the two detainees should not be released as they still constitute a threat to the security of Zimbabwe". It was contended that this exhibit contained an opinion and not 'information'. This document is marked 'SECRET', and it is not proposed to set out the relevant portion of it. Suffice it to say that in my view, the Chairman correctly refers to the contents as 'information' and not 'opinion'. Even if the document does only reflect an opinion, however, it would be quite in order for the Tribunal

to take account of this. I find that there is no substance in the point raised.

The fact that this same document did not specifically purport to come from the Director - General of the Central Intelligence Organisation was also criticized, as s 31(4) of the Regulations specifically refers to this personage. In my judgment a report emanating from 'Central Intelligence Organisation HQ' must be taken to have come from the Director - General of that Organisation, or at least to have been issued under his authority. I find that there is nothing objectionable about this document.

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- 6) Mr *de Bourbon* advanced the argument that there was "no evidence presented to the Review Tribunal" on which that body could have validly concluded that the detainees still constituted a threat to the public order and security of Zimbabwe.

It will be of value to itemize some of the evidence which, it appears, was taken into account by the Tribunal.

It was stated in evidence given by Mr Taylor, who was one of the detainees' legal representatives at the time, that Minister Mnangagwa had told him that he - the Minister - had recommended the release of the detainees to the security committee chaired by the Prime Minister, but that this committee had not accepted his recommendation, and he had been overruled (pp 5 & 8 of the record).

Again at p 9 of the record, and after Mr Taylor had been asked about the Minister's stated reasons for detention, the reply given is as follows:

"He (the Minister) had said that the reason for their detention was because the committee was satisfied that they had been South African agents. That is why he listed the details of negotiations that the South Africans had attempted to pursue with the view to obtaining their release."

This was said to explain the Minister's subsequent letter, which was before the Tribunal as exhibit seven, in which the Minister concluded,

"It is, therefore, my view that your clients are justifiably being kept where they are at present."

It is clear that this information was noted and taken into account by the Tribunal. In addition, and in his reasons for decision the Chairman states, "The memorandum submitted by the CIO opposes the release of the two detainees 'as there is no doubt that if released, they will join their masters in South Africa'. So does the security committee referred to by Mr Taylor in his evidence, which also opposes their release."

It is also clear that the detainees did not dispute that they had operated as spies for South Africa (p 10 of the record).

As already stated above, it is apparent that the Tribunal took cognizance of the previous reviews of these detainees. It also seems probable that the

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judgment of GIBSON J, relating to one such prior hearing, would be available to the Tribunal, and would have been perused by the members. (HH-485-84, *supra*). In the course of this judgment, the learned judge set forth the history of the matter and the reasons for the detentions in some depth.

All of this, in my mind, was 'evidence' that was quite properly taken into account by the Tribunal. Furthermore, there would be, in my view, no reason why the members of the Tribunal should not discuss the matter between themselves, and pool their knowledge of the facts, and generally familiarize themselves with the background to the case. To judge from the reasons recorded by the Chairman, this is what happened, and the conclusions reached were based on such general and specific information. There was no apparent adverse comment made at the time as to the Tribunal's sources of information by the applicants' legal practitioners. It is also pertinent to point out that the Tribunal is required to report on the "necessity or expediency" of continued detention, and this must entail the formation of an opinion based on the evidence and the facts considered. Provided always that the basic principles of fairness were adhered to, and there was no suggestion advanced to the contrary, I cannot see that the Tribunal was guilty of any irregularity or illegality in this respect.

Much was made of the alleged statement by Minister Mhangagwa that in his opinion the detainees were no longer a threat to the safety and security of Zimbabwe. Accepting that this was indeed said by the Minister, it appears that the Tribunal discounted this evidence on the basis that at best it must have been a personal opinion only, and not one shared by the Prime Minister's security committee, the Central Intelligence Organisation, the responsible Minister, or indeed the Tribunal itself. This seems to me to be an acceptable approach.

It had been made clear to Mrs Hartlebury, according to her evidence, that the Minister held out no promises, but had merely undertaken to approach the Prime Minister with a recommendation for the release of the detainees (p 19). Mr Taylor stated that the Minister had told him that the Minister's recommendation had not been supported or confirmed by the Prime Minister's security committee.

In this event, it could hardly have come as a surprise to the applicants to learn that the Tribunal had not placed reliance on the alleged statement by the Minister. In any event, he would not be the sole judge of the detainees future, although his views would obviously carry great weight.

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REYNOLDS J

7) The Tribunal was alleged to have acted *mala fide* because of the following factors:

- (a) "the evidence given on behalf of the detainees was completely ignored".

It is difficult to understand how this conclusion was arrived at. In fact this evidence was dealt with in detail, and the Chairman took note of it and went so far as to say that on the face of it, there was a conflict "between the Minister in charge of security, and the State apparatus he administers for the Security of the country". The conclusion was reached that the Minister must therefore, have been expressing his personal views, and the Chairman sounded the warning that this expression of opinion could have been taken to be the official government policy on the matter.

- (b) It was stated that the first respondent had tried to 'bolster his decision' by annexing to his own affidavit that of Minister Mnangagwa. This fact was said to show that the first respondent 'had not distanced himself from the Executive'.

I think it can be taken that the preparation of the papers for the present review hearing was undertaken by the staff of the Civil Division of the Attorney-General's office, and not by the Chairman of the Tribunal. I do not think, therefore, that any significance attaches to the fact that the affidavits produced were annexed to each other.

- c) It was alleged that there was ample evidence from Mr Taylor and Mrs Hartlebury that the Tribunal "was merely a pawn of the Executive". References were made, in support of this allegation, to the effect that the Minister had said to Mrs Hartlebury that the findings of Review Tribunals were immaterial, they "were insignificant". Mr Taylor testified to the fact that the Minister had told him that until government withdrew its case against the detainees, "the tribunal would continue to recommend that the two detainees should continue to be detained." It may well be that the Minister in question does in fact hold the view that Review Tribunals recommendations are insignificant; the machinery certainly exists for the Minister to decline to give effect to any recommendation made. Whether or not this is his view, however, it is no more than an opinion, and I do not think that this statement can in any way suggest that the Tribunal is 'a pawn of the Executive'.

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REYNOLDS J

The remarks allegedly made by the Minister to Mr Taylor are slightly more suggestive, but could easily have meant that the Minister merely thought it doubtful that any Tribunal would recommend a detainee's release if it was aware of the fact that Government would not withdraw its opposition to the release. Again, a comment of this nature is no more than an opinion which may or may not be correct. It does not necessarily suggest to me any objectionable partisanship or submissiveness on the part of the Tribunal. Indeed the Chairman's clear warning to the Minister regarding possibly inaccurate unofficial statements is indicative of an independent and autonomous attitude.

In the result I find that there is no evidence whatsoever before me to establish that this Tribunal showed *mala fides* (see *Union Govt v Union Steel* 1928 AD 220 at 237; *Clairwood Motor*

Transport Co v Pillai & Ors 1958 (1) SA at 253; *De Villiers v Administrator OFS supra*).

There were no further points raised which have not already been examined above. I find that the Tribunal, in its conduct of these proceedings acted *bona fide* and fairly, and that the applicants have not established any grounds which would entitle this court to interfere with the recommendation made by the Tribunal.

The application is, accordingly, dismissed with costs.

Gill, Godlonton and Gerrans, applicants' legal practitioners *Civil Division of the Attorney-General's Office*, respondents' legal practitioners

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MUSHONGA v NATIONAL RAILWAYS OF ZIMBABWE 1986 (1) ZLR 111 (SC)

Court High Court, Harare

Samatta J

Exception

20 January and 27 March 1986

Flynote

Employment - conditions of service - National Railways of Zimbabwe Officers Conditions of Service - termination of contract by mutual agreement.

Headnote

Where an employee renounces his obligations under a contract of employment by tendering his resignation, an assertion that the contract was wrongfully terminated cannot be sound in law. Parties to a contract may, at any time during the currency of the contract, mutually agree to terminate the contract. Such an agreement can override formal and substantive restrictions placed on the termination of contract by the original contract itself.

Cases cited:

Kameel Tin Co (Pty) v Brollomar Tin Exploration Ltd

1928 TPD 726 *Latchford Premier Cinema Ltd v Ennion* [1931] 2 Ch 409

R. Phillips for excipient

G Mutendadzamera for respondent

Judgment

Samatta J: This is an exception taken by the defendant to the plaintiff's declaration. After setting out in paras 1 and 2 of the declaration the name of the parties, the plaintiff's declaration

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in paras 3-9 reads as follows:

"3. Plaintiff is an employee of defendant and is entitled to payment of \$1 828,75 per month as salary.

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4. On 14 March 1985, defendant purporting to act on a "Notice of Resignation" tendered by plaintiff dismissed plaintiff from employment.
5. At the time the purported notice of resignation was tendered plaintiff was on authorised leave of absence.
6. Section 16(2) of the National Railways of Zimbabwe OFFICERS CONDITIONS OF SERVICE (hereinafter referred to as "Conditions") expressly prohibits and thus makes null and void any notice of resignation tendered by an officer whilst he is on authorised leave of absence.
7. Defendant did not give plaintiff notice of dismissal.
8. Thus as plaintiff's notice of resignation was of no force and effect and as defendant had not given him proper notice of dismissal, plaintiff is still an employee of the defendant and as such entitled to salary and benefits commensurate with his status as an employee. Plaintiff's salary is \$1 828,75.
9. As a result of such dismissal plaintiff has had to sell his house at a price below market value and has thus suffered damages in an amount of \$2 204,00."

The plaintiff claims as follows:

- a) \$1 828,75 per month from 14 March 1985, to date of proper dismissal less \$825,89 which client has already received.
- b) \$1 828,75 being pay in lieu of leave standing to his credit as at a date when proper notice of dismissal is received, in terms of s 24(12)(i) of the Conditions.
- c) Qualification allowance at the rate of \$110,00 per month from 14 March 1985, to date of proper dismissal less \$49,68 already received by him.
- d) Locomotion allowance at the rate of \$70,00 per month from 14 March 1985 to date of proper dismissal less \$31,61 which client has already received
- e) Damages in an amount of \$2 204,00.
- f) Costs of suit."

Responding to a request by the defendant for further particulars on a number of points, the plaintiff supplied the following further particulars, among others:

- "(a) Plaintiff purchased a house for \$23 829,00 for which defendant stood as guarantor. As the plaintiff was deemed to have left

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SAMATTA J

defendant's employ on 14 March 1985, defendant declined to carry on as guarantor leaving plaintiff with no option but to sell the house on short notice for \$21 626 as he could not find security for the balance of the purchase price. This price was far less than the fair market value of the house.

- (b) Plaintiff bought a car for \$13 500,00 using a loan which he obtained from defendant. When defendant dismissed plaintiff it called for the balance of \$9 155,71 which was outstanding on the loan. As plaintiff did not have that amount of money he was forced to sell the car for about \$11 200,00 which was less than the market value of the car."

The defendant has excepted to the declaration in the following terms:

"Defendant excepts to plaintiff's declaration as being bad in law and disclosing [no] cause of action in that:

1. Plaintiff seeks to found his cause of action upon his own admitted departure, pleaded by him expressly, from the Conditions of Service relied upon by him.
2. In regard to para 9 of the declaration and the claim (para (d) of the prayer) founded thereon:
 - (a) the loss alleged is not one which is in law recoverable from defendant in the absence of any averment that defendant forced plaintiff to sell his house at a price below its market value;
 - (b) the claim is in any event contingent upon the soundness of the other cause of action pleaded in para 6 of the declaration, which (*vide supra*) is bad."

Section 16 of the National Railways of Zimbabwe OFFICERS CONDITIONS OF SERVICE, referred to by the respondent in his declaration is, unhappily, not a model of accuracy. In so far as is relevant to this case, it reads as follows:

"LEAVING THE SERVICE

16. Notice

- (1) In the absence of any agreement to the contrary, 30 days' notice in writing is required. This may be given at any time and will include the day on which such notice is given. The Railways will give a like period of notice, except where circumstances justify immediate dismissal.

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- (2) Notice of resignation will neither be accepted nor tendered by the Railways whilst the officer is on authorised leave of absence."

It would require the labours of Sisiphus and the sophistry of a Roman jurist to persuade me that there could be a situation in which the Railways could tender notice of resignation. Be that as it may, the first question I have to decide is: What was the status of the Conditions of Service *vis-a-vis* the respondent's contract of employment? It seems to me that the Conditions of Service were incorporated into the contract. In other words, they formed some of the terms of the contract.

Citing a passage in Wessels *Law of Contract* vol II para 2935 at p 794, Mr *Phillips*, for the

excipient, submitted that, the respondent having renounced his obligations under the contract of employment by tendering his resignation, his assertion that the contract was wrongfully terminated cannot be sound in law. I think this contention is well-founded. The passage relied on by counsel reads as follows:

"We have seen that Paul held that the premature renunciation of a contract of partnership constitutes a breach of a contract which liberates the innocent part from all further obligation, but renders the guilty party liable for all damages which flow from the breach... This example is only a particular instance of the general rule that after a clear renunciation by one party of his obligation towards the other, he cannot revert to the *status quo ante*. It is expressed in the maxim, "*qui aliquid expresse renunciatur id reiterare non potest*", and in a *lex* of the Code, "*statim enim absurdum est redire ad hoc cui renunciandum putavit*" (C.4.1.11.pr.; see also *Kameel Tin Co (Pty) v Brollomar Tin Exploration Ltd*, 1928 TPD 726)."

The facts of the *Kameel Tin Co* case are accurately given in the headnote to the case as follows:

"Plaintiff agreed to cede certain prospecting contracts to defendant company for an agreed consideration, and to apply for shares in defendant company to an agreed amount. On plaintiff being required by defendant to render performance against performance tendered by defendant at a date when performance was due, plaintiff declined to perform "at that stage". Thereafter defendant intimated to plaintiff that proceedings were being taken to enforce specific performance. Plaintiff

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then made certain offers of a modified performance, which offers defendant neither definitely accepted nor rejected, but in regard to which he took up a negative attitude. Finally, some three weeks after its original refusal to perform, plaintiff offered performance in terms of the contract, which offer defendant rejected. Plaintiff then brought action against defendant for payment of the agreed consideration against cession by it of the prospecting contract, and for delivery of the shares in the defendant company against payment by plaintiff of the agreed amount."

The question before the court was whether the plaintiff was entitled to approbate the contract and claim the right to perform. It was answered in the negative. It was held that the plaintiff had in the first instance definitely repudiated the contract, and that the subsequent threat by the defendant to enforce performance did not give the plaintiff the right to demand to be allowed to perform.

To revert to the instant case, Mr *Mutendadzamera*, for the respondent, submitted that, since the excipient was bound by s. 16(2) of the Conditions of Service, the acceptance by it of the resignation of the respondent when he was **on leave of absence** was inoperative. According to the learned advocate, the excipient was bound by the section to reject the respondent's resignation. I have the greatest difficulty in persuading myself that this submission accords with the law. In accordance with general contractual principles, parties to a contract may at any time during the currency of the contract mutually agree to terminate the contract: See Lee and Honoré *The South African Law of Obligation* 2 ed para 353 (iv) at p 123. Such an agreement can override formal and substantive restrictions placed on the termination of contract by the original contract itself. It is, I think, instructive to note that there is similarity between the English Law and our law on this point. In *Latchford Premier Cinema Ltd v Ennion* [191] 2 Ch 409, a company's articles of association provided that the office of a director should *ipso facto* be

vacated if by notice in writing to the company he resigned his office. Two of the directors orally tendered their resignations at the annual general meeting of the company and their resignations were accepted by the meeting. On subsequent dates, however, the two directors attended the meetings of the board of directors of the company, claiming the right to be present and to participate in the deliberations of the directors on the ground that their resignations were inoperative as the company's articles of association required the resignation of directors to be by notice in writing. BENNET J rejected the argument as unsound. In the course of this judgment he said, at p 410:

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SAMATTA J

"I see no reason in law why the contract of service between the company and its directors should not be terminated by the same means as that by which the contract of service between two individuals may be terminated, and I see no ground in law for saying that where a written contract has been made for service which requires a written notice on either side before it can be terminated, it cannot be terminated by word of mouth by mutual agreement between the parties. That is all that happened in this case, and in my judgment the offices of the defendants were vacated when, on February 10, 1931, they verbally offered to resign and their offers were accepted by the resolution of the company."

In my opinion it cannot be asserted as a matter of logic and good sense or principle that the respondent's contract of employment was not validly terminated. On the contrary, I think that the point raised by Mr *Phillips* is unanswerable. The respondent cannot reassert that which is expressly renounced.

In the result, the exception succeeds and judgment is entered in the excipient's favour, with costs of suit.

Sawyer & Mkushi, respondent's legal practitioners

Webb, Low & Barry, excipient's legal practitioners

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BULL v ATTORNEY-GENERAL & DIRECTOR OF PRISONS 1986 (1) ZLR 117 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Beck JA, Gubbay JA & McNally JA

Criminal appeal

1 & 2 April 1986

Flynote

Constitution - Zimbabwe Constitution 1980 - section 13(2)(e) - reasonable suspicion that person has

committed or is about to commit offence - to be tested objectively - court to be informed of grounds.

Criminal Procedure - arrest - reasonable suspicion that offence committed - remand - grounds giving rise to reasonable suspicion - onus on prosecution to show - objective test.

Practice - *interdictum de libero homine exhibendo* - purpose - to enable court to review legality of arrest and detention - granting of - does not amount to attempt to nullify Ministerial certificate against bail - does not compel Attorney-General to discontinue proceedings.

Headnote

Where it is sought to justify the deprivation of liberty of a person on the grounds provided in s 13(2)(e) of the Constitution, namely that there exists a reasonable suspicion of his having committed or being about to commit a criminal offence, the State must disclose to the court grounds which when tested objectively give rise to a reasonable suspicion. The purpose of bringing an interdict *de libero homine exhibendo* is to enable a court to review the legality of an arrest and detention. *Prima facie* every person arrested is entitled to ask the court for his release and the court is bound to grant it unless there is some lawful cause for his arrest. The release of a person pursuant to a successful application does not amount to an attempt to nullify a ministerial certificate refusing bail, and does not prevent the subsequent prosecution of the person concerned.

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BECK JA

Cases cited:

Principal Immigration Officer & Minister of Interior v Narayansamy 1916 TPD 274

S v Purcell - Gilpin 1971 (1) RLR 241 (A)

United Democratic Front (Western Cape Region) v Theron NO 1984 (1) SA 315 (C)

Ndabeni v Minister of Law and Order & Anor 1984 (3) SA 500 (D) *Inland Revenue Commissioners & Anor v Rossminster Ltd (and related appeals)* [1980] 1 All ER 80 (HL)

Katofa v Administrator - General for South - West Africa & Anor 1985 (4) SA 211 (SWA)

Attorney-General v Matewere & Anor 1983 (2) ZLR 339 (SC)

Smith v Attorney-General Bophuthatswana 1984 (1) SA 196 (B)

Paweni & Anor v Acting Attorney-General 1985(3) SA 720 (zs)

Ex parte Woodhall (1888) 20 QBD 832 (CA)

R v Governor of Brixton Prison, ex parte Savarkar [1910] 2 KB 1056 (CA)

I A Donovan for the appellant

E Chatikobo for the respondents

Judgment

Beck JA: This is an appeal against the dismissal of an urgent petition to the High Court for an order that the imprisonment of John Vincent Austin and Kenneth Neil Harper be declared invalid and for their immediate release from custody and production before the court. The petition was brought by a legal practitioner on behalf of the two men and it was in effect a *habeas corpus* application, known to the Roman-Dutch law as the interdict *de libero homine exhibendo*, "the central purpose of (which) in modern law is to enable a court to review the legality of an arrest and detention ... The remedy is concerned first and foremost with bringing the lawfulness of the detention under review; the release of the detainee is only a consequence". (Baxter *Administrative Law* p 693.)

Section 13(1) of the Constitution of Zimbabwe prohibits the deprivation of personal liberty "save as may be authorised by law in any of the cases specified in subs (2)". One of those cases is that which is set out in subs (2)(e), namely "upon reasonable suspicion of his having committed, or being about to commit, a criminal offence."

It was, and is, the contention of the Attorney-General that Austin and Harper have been arrested and are being held in custody in terms of the Criminal

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BECK JA

Procedure and Evidence Act and that this deprivation of their liberty under the authority of that Act is valid in terms of s 13(2)(e) of the Constitution because there is a reasonable suspicion that they have committed the criminal offence of contravening s 4(1)(d)(i) of the Official Secrets Act [Chapter 97]. The relevant provisions of that section read:

"4. (1) Any person who has in his possession or under his control any ...information which -

...

(d) he has obtained or to which he has had access owing to his position as a person who holds or has held office in the service of the State...;

and who -

(i) communicates such ... information to any person, other than a person to whom he is authorised to communicate it ... shall be guilty of an offence ..."

On behalf of Austin and Harper that contention is challenged by the appellant who disputes that there is a reasonable suspicion that they have committed, or are about to commit, any such offence. No other basis for lawfully depriving them of their liberty is relied on and unless the onus is discharged of establishing that a reasonable suspicion exists liberty must be restored to them in accordance with the long established principle that "*prima facie* every person arrested ... is entitled to ask the court for his release and the court is bound to grant it unless there is some legal cause for his detention". (*Principal Immigration Officer & Minister of Interior v Narayansamy* 1916 TPD 274 at 276.)

It is not open to doubt, and Mr *Chatikobo* for the respondents did not contend otherwise, that

the question whether a reasonable suspicion exists that the men in question have contravened, or were about to contravene, s 4(1)(d)(i) of the Official Secrets Act, is to be tested objectively. Conditions of this kind on the existence of which the lawful right to exercise a given power is made to depend must, when put in issue, be objectively demonstrated: *S v Purcell - Gilpin* 1971 (1) RLR 241 (A); *United Democratic Front v Theron* NO 1984 (1) SA 315 (C); *Ndabeni v Minister of Law and Order* 1984 (3) SA 500 (D); *Inland Revenue Commissioner & Anor v Rossminster Ltd* [1980] 1 All ER 80 (HL) at 92h - 93b and 104a. To that end the court must be informed of the grounds upon which reliance is placed for the existence of the reasonable suspicion - *Katofa v Administrator General for SWA & Anor* 1985 (4) SA 211 (SWA).

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BECK JA

The history of the arrest and subsequent detention of the two men is relevant to the question of whether the onus has been discharged of showing that the suspicion in question exists and that it is a reasonable suspicion.

They were arrested by members of the Central Intelligence Organisation on 22 February 1986, and were detained under the Emergency Powers (Maintenance of Law and Order) Regulations 1983. On 25 February written reasons for the detention were furnished in terms of s 21(3) of these Regulations. On 4 March a judge of the High Court ruled that the reasons given were inadequate and ordered proper reasons to be supplied by 6 March. That order was not complied with and on 7 March the High Court ordered the release of the men.

They were released pursuant to that order, only to be re-arrested immediately, it being alleged that new reasons for their detention had become known. Those new reasons were not disclosed and on 10 March an application to the High Court was made for an order directing reasons for the fresh detention to be given. At the request of the State that application was postponed to 12 March.

On 12 March the High Court was informed by counsel for the State that he had been instructed that the men were no longer being detained under the above-mentioned Emergency Powers Regulations, but were now under ordinary arrest and were being held in Police custody with a view to being charged with having contravened the Official Secrets Act. Accepting that the instruction given to counsel for the State was accurate and that the re-detention of the two men under the Emergency Powers Regulations had been terminated, the High Court understandably made no order for reasons for the re-detention to be furnished.

On 13 March the two men were brought before a magistrate and the State requested that they be remanded in custody on a charge of having contravened s 4(1)(d)(i) of the Official Secrets Act. The request was opposed on the ground, *inter alia*, that the State had not established that there was a reasonable suspicion that they had committed the offence alleged. The magistrate reserved judgment until the following morning, when he granted the request for a remand in custody. Because it was the State's declared intention to produce a ministerial certificate that would forbid the granting of bail to the accused persons the magistrate ruled that he would not entertain an application for bail for seven days. A certificate in terms of s 106(2)(a) of the

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Minister on 14 March and was filed in the magistrate's court on 18 March, on which date the two accused were remanded in custody until 1 April.

The issue of that certificate led to yet another application to the High Court to declare s 106(2) of the Criminal Procedure and Evidence Act to be *ultra vires* s 13 of the Constitution of Zimbabwe. That application was dismissed and the judgment dismissing it has since been unsuccessfully appealed against. While that appeal was still under consideration, however, the *habeas corpus* petition from which this present appeal has stemmed was lodged in the High Court. The petition was opposed and the matter was argued on 24 March and was dismissed by the learned judge *a quo* on 26 March.

Having regard to the circumstance that the two men have been in custody for almost six weeks by now, and to the fruitless requests and injunctions that were made and obtained while they were yet detained under the Emergency Powers Regulations, for sufficient reasons for their detention to be furnished, one would have expected that the prosecuting authorities would have been acutely alive to the need to state, and to have been in a position to do so explicitly, the grounds that have given rise to a suspicion that is reasonable that the accused have committed the offence with which it was decided to charge them, and on which it was intended that they be held in custody pending trial.

The only grounds that were advanced before the magistrate when the reasonableness of any suspicion that might exist was put in issue, were the following:

The charge was said to be a contravention of s 4(1)(d)(i) of the Official Secrets Act in that "the two accused passed or communicated certain information, prohibited to unauthorised persons."

The only relevant further information put before the magistrate was an assertion by the Public Prosecutor that

"The State alleges that the two accused were leaking information pertaining to the nature of exports leaving Zimbabwe through the Mocambique route, to South African authorities or persons. The two accused are a potential threat to the security of the nation."

In the *habeas corpus* petition it is averred by the appellant that he "has spoken to both the Senior Public Prosecutor and to the Director of Public Prosecutions in an effort to obtain specific details of the factual allegations against the accused of the charge which they face and the basis on which it is suspected that they have contravened s 4(1)(d)(i) of Chapter 97. Neither

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officer has been able to furnish any further information".

This averment that neither the Senior Public Prosecutor nor the Director of Public Prosecutions, who is currently the Acting Attorney-General, can add any further information concerning the

basis on which it is suspected that the accused has contravened the Official Secrets Act, was admitted in an affidavit filed in the court below by the Senior Public Prosecutor.

The only other source of information concerning the basis of the suspicion, the reasonableness of which must be demonstrated by the State, is a paragraph in another affidavit filed in the court below by the Central Intelligence Organisation officer who caused the original detention orders to be served on Austin and Harper when they were first arrested on 22 February. That paragraph reads:

"That prior to the accused's detention reliable information had been gathered through intelligence that the accused who at all relevant times were employed by the Government of Zimbabwe obtained information by virtue of the nature of their duties relating to Zimbabwe's exports to and imports from Mocambique and thereafter passed such information to South African authorities. It is not within the course of their duty to pass such information."

It will be noted that while the above-quoted assertion refers to "exports to and imports from Mocambique" the Public Prosecutor told the magistrate at the remand hearing that the information in question related to "the nature of exports leaving Zimbabwe through the Mocambique route." That apparent inconsistency in the information on which the suspicion rests has not been explained.

The accused men are both in the employ of the Department of Customs, Austin being an Assistant Controller and Harper a Senior Assistant Customs Officer. At the remand hearing they both gave evidence before the magistrate in which they informed the court that their duties involve communicating information to people in other countries, including South Africa which was said to be "the largest trading country" with Zimbabwe. They were not cross-examined on that evidence.

In the light of that knowledge the assertion that the accused men have passed to South African authorities information "pertaining to the nature of exports leaving Zimbabwe through the Mocambique route", or "relating to

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Zimbabwe's exports to and imports from Mocambique", loses much of whatever sinister conjecture it might otherwise give rise to. For the suspicion that they have thereby contravened s 4(1)(d)(i) of the Official Secrets Act to be reasonable, enquiry into the origins and factual content of such an assertion becomes indispensable. What, for instance, is the source of the assertion? If it emanates from a source familiar with the circumstances whereunder Customs Officers of the rank of the accused may legitimately communicate information to authorities in other countries, including South Africa, and with the nature of the information that may or may not be communicated in various circumstances by persons such as the accused, then the suspicion might derive its reasonableness from the authoritative character of the source of the assertion. If, however, it emanates from an unknown informant, or from a source which has no knowledge of the circumstances under which senior Zimbabwean Customs officials may legitimately communicate with South African authorities, or of the kind of information that they can legitimately communicate, then the bald assertion that the State has pointed to as grounds

for a reasonable suspicion support nothing more than speculative conjecture.

Without pointing to the authoritative character of the source of the allegedly reliable information given to the investigating authorities, and without any enlightenment whatsoever as to the result of enquiries into the content of the information said to have been passed, the circumstances under which it was passed, and the identity of the persons to whom it was passed, the speculative conjecture that it may have been prohibited information passed in contravention of s 4(1)(d)(i) of the Official Secrets Act is devoid of any foundation capable of elevating it to a reasonable suspicion. There has been time enough to make enquiries designed to obtain some verification of the bald allegation that information was communicated by these Customs officers, the content of which and the recipients of which were such that the two officers appear to have acted in contravention of s 4(1)(d)(i) of the Official Secrets Act. The inability of the State to offer even now anything more than an unsupported conclusion that it was not within the course of their duty to pass to unidentified South African authorities unidentified information concerning "Zimbabwe's exports to and imports from Mocambique" - or is it "exports leaving Zimbabwe through the Mocambique route?" - makes it impossible for the court to determine objectively whether or not there is a reasonable suspicion that the accused men have committed a criminal offence.

Accordingly, the onus of demonstrating the legality of depriving them of their personal liberty has not been discharged and they are, as a matter of

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BECK JA

right, entitled to the orders that they have sought. (Baxter *Administrative Law* at p 712.)

Before concluding, I should say that in coming to our conclusion the decision of this Court in *Attorney-General v Matewere & Anor* 1983 (2) ZLR 339 (SC) has not been overlooked. In our view that decision is of no assistance in the determination of the issue now before us, for at that time anything done under the authority of an existing law was protected from being held to be in contravention of the Declaration of Rights, by virtue of s 26(2)(b) and (3)(b) of the Constitution. The effect of s 13(2)(e) of the Constitution on what had been done under the authority of the Criminal Procedure and Evidence Act was therefore irrelevant and did not arise from consideration in *Matewere's* case, *supra*.

There was some debate during argument as to whether it would not have been more appropriate to have taken the magistrate's decision to remand the accused in custody on review. I am satisfied that nothing turns on that. The procedure that was adopted of petitioning the High Court for a *habeas corpus* order has not in any way prejudiced the investigating or prosecuting authorities. On the contrary, it afforded them the further opportunity of placing before the High Court any additional information that might serve to demonstrate the reasonableness of the suspicion that has to exist if the accused are to be deprived of their liberty. That opportunity was grasped, for as I have indicated, the record of the remand proceedings was not all that was put before the learned judge *a quo*. In addition, affidavits were filed by the Senior Public Prosecutor, by the investigating officer attached to the Central Intelligence Organisation, and by a Detective Superintendent who commands the Law and

Order Section of the Zimbabwe Republic Police, and who was requested by the Senior Public Prosecutor to furnish the latter with more information. Those affidavits, however, did not add anything to the information that was before the magistrate in the remand proceedings.

I wish to make two things clear so as to avoid any misunderstanding. The first is that the conclusion that has been reached, and the order for liberation that is to be made, are in no way to be understood as an attempt to nullify the ministerial certificate forbidding bail. I have already mentioned that this court dismissed the appeal in which it was contended that that certificate was invalid because of the alleged unconstitutionality of s 106(2)(a) of the Criminal Procedure and Evidence Act. Differing from the Supreme Court of Bophuthatswana in this regard (Cf *Smith v Attorney-General Bophuthatswana* 1984 (1) SA 196 (B)) this court has upheld the constitutionality of

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BECK JA

s 106(2)(a) and full effect must be given to ministerial certificates issued in accordance therewith. It must be appreciated however that such certificates only relate to persons who have been lawfully deprived of their liberty in the first place. If that deprivation is not shown to be lawful there is no valid custody to which the ministerial certificate denying bail can relate and the question of its operation simply does not arise.

The second point is that it was initially suggested in argument by Mr *Chatikobo* that a decision that the accused must be released would be an unconstitutional interference with the independence of the Attorney-General, for the only way in which he could now effect the release of the accused would be by exercising his powers in terms of s 76(4)(c) of the Constitution to discontinue the criminal proceedings that he has instituted; and it is submitted that the effect of an order of court directing their release would be to compel him to exercise those powers.

That suggestion is fallacious and rests upon a *non sequitur*. The release of the accused on the ground that no reasonable suspicion has been demonstrated such as would make it lawful to deprive them of their liberty does not compel the Attorney-General to discontinue the criminal proceedings he has instituted. He retains the right to prosecute the accused. That right is unaffected by their constitutional right to be left at liberty until such time as a reasonable suspicion can be demonstrated that they have committed or are about to commit a criminal offence. That constitutional right that they enjoy in common with every other person is only diminished by the exceptional powers enacted for use during a period of public emergency and which are saved by the provisions of the second schedule to the Constitution; but with those exceptional powers we are not now concerned.

Finally, I mention the matter of costs. It seems that this appeal is, in the context of its facts and background, a criminal matter, so that no order of costs can be made. (Cf *Paweni & Anor v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 722W-H; *Ex Parte Woodhall* (1888) 20 QBD 832 (CA); *R v Governor of Brixton Prison, ex parte Savarkar* [1910] 2 KB 1056 (CA).) Accordingly, there will be no order as to costs. But the point was not canvassed and leave will be given to either party to set the matter down for argument before us should that be desired. If neither party notifies the Registrar of this Court within fourteen days of today's date that it is

desired that the matter be set down for costs to be argued the order that there will be no order as to costs shall become final.

For this reason the appeal is allowed, the custody in which John Vincent

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BECK JA

Austin and Kenneth Neil Harper are being held is declared unlawful and it is ordered that they must be released from custody forthwith. Subject to the qualification mentioned in the preceding paragraph, there will be no order as to costs.

Gubbay JA: I agree

McNally JA: I agree

Atherstone & Cook, appellant's legal practitioners

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BENNETT NO v MASTER OF THE HIGH COURT 1986 (1) ZLR 127 (HC)

Court High Court, Harare

Smith J

Stated case

6 February & 9 April 1986

Flynote

African Affairs and Customary Law - African Marriages Act s 13 - whether applies to devolution of movable property where parties have married in United Kingdom - customary law - whether applies to devolution of movable property where parties have married in United Kingdom.

Husband and wife - marriage - foreign marriage - whether marriage in terms of Marriage Act

Legislation - African Marriages Act [Chapter 238] s 13 - Customary Law and Primary Courts Act 1981, s 3 - Legal Age of Majority Act 1982 - Marriage Act [Chapter 37].

Headnote

An intestate African had been married in the United Kingdom according to English law. In terms of s 113 of the Administration of Estates Act [Chapter 301] a stated case was put to the Court to determine two issues:

- a) does s 13 of the African Marriages Act [Chapter 238] apply to the devolution of movable property where the parties were married in the United Kingdom and not in terms of the Marriage Act [Chapter 37]?

- b) if s 13 of the African Marriages Act [*Chapter 238*] does not apply, is the disposal and devolution of movable property governed by s 3 of the Deceased Estates Succession Act?

Held, that:

- a) s 13 of the African Marriages Act [*Chapter 238*] does not apply to

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SMITH J

the disposal and devolution of movable property where the parties were married in the United Kingdom and not in terms of the Marriage Act [*Chapter 37*];

- b) the disposal and devolution of movable property is governed by s 3 of the Deceased Estates Succession Act [*Chapter 302*].

Held, further, that the role of customary law in the devolution of movable property on the death of an African has changed with the introduction of the Legal Age of Majority Act, 1982, which accords full legal capacity and independence to married women.

Cases cited:

Dokotera v The Master & Ors 1957 (4) SA 468 (SR)

Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)

Dokwani v Old Mutual & Anor HH-103-86 (not reported)

RY Phillips for the applicant

S Mafara for the respondent

Judgment

Smith J: Section 113 of the Administration of Estates Act [*Chapter 301*] provides that whenever any difference of opinion upon a question of law arises between the executor of an estate and the Master in relation to the distribution of an estate and a minor is interested in the decision of that question, the Master and the executor may state a case in writing for determination by a judge in chambers. The judge may, however, refer the matter to the court for argument.

One Wilson Panashe Mangoro who, at the time of his death, was married to Barbara Mangoro died intestate at Harare on 24 March 1983. The applicant was appointed executor dative on 13 July 1984. The marriage between the deceased and Barbara Mangoro was solemnized in England on 7 December 1974, according to Christian rites. There are two children born of the marriage, Mugore David born 17 February 1975 and Mugwagwa Wilson born 7 April 1979.

The first and final Liquidation and Distribution Account was forwarded to the Master on 6 February 1985. On 2 April 1985, the Master advised the executor that the account would have to be re-drawn because the deceased's property should be distributed in terms of African customary law. The letter stated:

"Section 13 of the African Marriages Act [*Chapter 238*] therefore applies

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SMITH J

in this estate. Even though the deceased was married in the United Kingdom, s 13 of the above Act cannot be waived."

The executor replied on 2 April 1985, disputing the Master's views. On 6 May 1985, the Master advised that the distribution of immovable property was governed by s 7 of the African Wills Act [*Chapter 240*], which proposition was accepted by the executor in conformity with the decision in *Dokotera v The Master & Ors* 1957 (4) SA 468 (SR) at 471. The next letter from the Master reiterated his view that s 13 of the African Marriages Act [*Chapter 238*] was not affected by the fact that the marriage was contracted outside Zimbabwe. The executor was invited to place the question of law between the executor and the Master before a judge, as envisaged by s 113 of the Administration of Estates Act [*Chapter 301*].

The minor children have an interest because the eldest son is the natural heir to his deceased father if customary law is applied. If, however, the general law is applied, the surviving spouse is an intestate heir in terms of the rules set out in s 3 of the Deceased Estates Succession Act [*Chapter 302*].

In accordance with the said s 113, the following questions were stated for determination:

- (a) does s 13 of the African Marriages Act [*Chapter 238*] apply to the disposal and devolution of movable property where the parties were married in the United Kingdom and not in terms of the Marriage Act [*Chapter 37*]?
- (b) if s 13 of the African Marriages Act [*Chapter 238*] does not apply, is the disposal and devolution of movable property governed by s 3 of the Deceased Estates Succession Act [*Chapter 302*]?

The stated case was submitted to GIBSON J in Chambers and she referred the matter to the court for argument. I am indebted to Mr *Phillips* and Mr *Mafara* for their submissions.

Section 13 of the African Marriages Act [*Chapter 238*] provides as follows:

"The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and, unless disposed of by will, shall devolve according to African law and customs."

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SMITH J

The term "Marriage Act" is defined in s 2 of the African Marriages Act [Chapter 238] as follows:

"'Marriage Act' means the Marriage Act [Chapter 37] and includes, where appropriate, the Marriage Act (Chapter 177 of 1963)."

Mr *Mafara* argued firstly that a marriage contracted under the Marriage Act [Chapter 37] was a monogamous marriage as was a marriage contracted in England "according to so-called Christian rites" and that it was because of this common characteristic that, in the absence of fraud, a marriage contracted in England was recognised in this country as one contracted under the Marriage Act [Chapter 37]. He then went on to argue that the law that governed the validity of a marriage was the law of the place where the marriage was celebrated (the *lex fori celebrationis*) and once it was established that a marriage contracted in England according to English law was valid, the courts in Zimbabwe would recognize that marriage as one contracted under the Marriage Act [Chapter 37]. It is not clear to me why it was felt that there was any significance in the fact that the marriage had to be contracted "according to so-called Christian rites". I agree with the submission that a marriage contracted in England in accordance with the requirements of English law would, in the absence of fraud, be regarded in Zimbabwe as a valid marriage. That being so, however, it does not automatically follow that the marriage would be recognized as having been contracted under the Marriage Act [Chapter 37]. Such a conclusion is a complete *non sequitur*. Our law does not require that, in order to be valid, a marriage must be contracted in accordance with the requirements of either the African Marriages Act [Chapter 238] (including its predecessors) or the Marriage Act [Chapter 37] (including its predecessors). A marriage contracted in a foreign country which is recognised as a valid marriage in that country can be recognized in Zimbabwe as a valid marriage without it having to be deemed to have been contracted under the Marriage Act [Chapter 37]. Such a foreign marriage might well be equated with, and regarded as having consequences similar to, a marriage contracted under the Marriage Act [Chapter 37] but that does not mean that it will be treated as though it had been contracted under that Act.

According to the golden rule of interpretation of statutes, if there is nothing to modify, alter or qualify the language which the statute contains, it must be construed in the ordinary and natural meaning of the words and sentences. It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify

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SMITH J

the inference that the Legislature intended something which it omitted to express. Having regard to the definition of the term "Marriage Act" in s 2 of the African Marriages Act [Chapter 238], s. 13 of that Act applies only to marriages solemnized between Africans in terms of the Marriage Act [Chapter 37]. I can find no grounds for justifying an extension of the term as used in the said s 13 so as to include marriages solemnized in a foreign country which are contracted in "accordance with so-called Christian rites" and are monogamous. If the Legislature had intended that the provisions of the said s 13 should apply to foreign marriages it could easily have said so. It did not. It merely referred to the "Marriage Act" which term is defined and is used only in ss 12, 13, 14 and 16 of the African Marriages Act [Chapter 238]. Where a term is

specifically defined in a statute and it is thereafter used on only a few occasions it is more probable that its defined meaning was considered and intended on each of those occasions than where the term is used on many occasions and in many different contexts.

I do not agree with the submissions that monogamous marriages contracted in England are recognized in Zimbabwe as having been contracted under the Marriage Act [*Chapter 37*]. Furthermore, I cannot accept that the term "Marriage Act", when used in s 13 of the African Marriages Act [*Chapter 238*], must be given a meaning wider than that given in s 2 of the said Act.

If s 13 of the African Marriages Act [*Chapter 238*] does not apply, what law governs the disposal and devolution of the movable property?

Section 3(1a) of the African Law and Tribal Courts Act [*Chapter 237*] specifically provides that, unless the justice of the case otherwise required, customary law was applicable in any case between Africans which related to the devolution, otherwise than by will, of movable property on the death of an African. That Act was, however, repealed by the Customary Law and Primary Courts Act, 1981 (No. 6 of 1981). Section 3(1) thereof, which replaced the provisions referred to above, provides that subject to the provisions of any other enactment, unless the justice of the case otherwise requires, customary law shall be applicable in any case where the parties have expressly so agreed or where, from the nature of the case and the surrounding circumstances, it appears either that they have so agreed or else that it is just and proper that it should apply. Thus, whereas previously an Act of Parliament specifically declared that customary law shall be applicable in a case between Africans which related to the devolution otherwise than by will of movable property on the death of an African, the position now is that the statutory provision applying customary law is made subject to the provisions

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SMITH J

of any other enactment. There are in force two enactments dealing with the devolution otherwise than by will of movable property on the death of an African. There is s 13 of the African Marriages Act [*Chapter 238*] which I have referred to earlier in this judgment and there is s 3 of the Deceased Estates Succession Act [*Chapter 302*]. That latter section, as repealed and replaced by s 3 of the Deceased Estates Succession Amendment Act, 1977 (No. 18 of 1977), sets out the rules according to which the surviving spouse of a person who dies wholly or partly intestate is declared to be an intestate heir of the deceased spouse. There is nothing in that section which would indicate that the rules apply only to certain classes of persons. It is general in its application. Whereas prior to 10 December 1982, which was the date the Legal Age of Majority Act, 1982 (No. 15 of 1982) came into operation, the legal status of the surviving spouse might have affected the position, that is now no longer the case. As DUMBUTSHENA CJ said in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) at 124D:

"It is common cause that the effect of the Legal Age of Majority Act is that the old customary law concept that an African woman was a perpetual minor who needed a guardian to assist her in her contractual obligations has been done away with because every person acquires majority status on the attainment of the age of 18 years."

The effect of having majority status is that one has full legal capacity and full legal

independence. This includes the right to contract and marry unassisted by a guardian (see *Katekwe v Muchabaiwa*, *supra*.) and the right to assume guardianship of another (see *Dokwani v Old Mutual & Anor* HH-103-86 (not reported) and must also include the right to own property.

The answers to the two questions stated are therefore:

- (a) section 13 of the African Marriages Act [*Chapter 238*] does not apply to the disposal and devolution of movable property where the parties were married in the United Kingdom and not in terms of the Marriage Act [*Chapter 37*];
- (b) the disposal and devolution of the movable property in question is governed by s 3 of the Deceased Estates Succession Act [*Chapter 302*].

There will be no order as to costs.

Scanlen & Holderness, applicant's legal practitioners

The Director, Civil Division of the Attorney General's Office, respondent's legal practitioners

1986 (1) ZLR p133

S v MUDOTI 1986 (1) ZLR 133 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

3 February & 10 April 1986

Flynote

Evidence - *res ipsa loquitur* - applicability of maxim in criminal cases .

Headnote

The maxim *res ipsa loquitur* is merely a method of reasoning, it gives rise to no presumption or shifting of the onus. The maxim applies equally to civil and criminal cases so as to require a party against whom it is used to give an explanation, save that in a criminal case the explanation need only be one which creates a reasonable possibility of innocence.

Cases cited:

R v Jass 1939 EDL 249

Green v R 1956 (2) PH H223 (BR)

R v Meiring 1927 AD 41 (B)

B Mparadzi for the appellant

E Chatikobo for the respondent

Judgment

McNally JA: The appellant was an ambulance driver at Masvingo Hospital. On 30 March 1984 he was driving back to Masvingo from Harare. He had a number of patients in his vehicle who had been in Harare for treatment. A nursing aide travelled with him in the front seat of the vehicle. They were in no particular hurry. It was somewhere between 4 o'clock and 5 o'clock in the evening. The weather was fine and the road surface was dry, though it had been raining and the verges were wet. They had passed through Beatrice and had reached the 67,5 km peg.

At that stage the road, which is the main national road to Beitbridge, takes a

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McNALLY JA

slight curve. Prior to that point there had also been a curve. The ambulance went off the road, came back on, went off again, rolled over at least once, lost its canopy and ended up on its wheels. Two passengers died at once and a third later.

A sketch plan was produced at the hearing. It marks the path of the vehicle, approaching a right-hand curve. It swung over to the right, went onto the verge with its offside wheels, swung back onto the road, returned almost to its correct side, then swung right again, off the road, where it went careering along between the road and the fences, rolling over and throwing out the two people who died, one of whom was found on the other side of the fence.

The movement from the correct side of the right verge, back again and off to the right again, was a fairly gradual one. The distance, in a straight line from where it began to go onto the wrong side of the road to where it finally left the road, was 110 metres. The vehicle did not travel in a straight line but in an S-shaped move, swinging right, then left, then right again. From where it left the road to where it was found was another 52 metres.

Mr *Mparadzi* argued hotly, on these facts, that it was not for the appellant to prove his innocence and that the *res ipsa loquitur* rule does not apply in criminal cases.

It is certainly not for an accused person to prove his innocence. As a general proposition Mr *Mparadzi's* first contention is true. As to *res ipsa loquitur* it is as well to say that it is not a doctrine or a rule or a presumption. It is simply a metaphorical statement of a method of reasoning. As Hoffmann and Zeffertt on *Evidence* put it (3rd ed p 433):

"If an accident happens in a manner which is unexplained but which does not ordinarily occur unless there has been negligence, the court is entitled to infer that it was caused by negligence. *Res ipsa loquitur* means that the accident speaks for itself; there is no direct evidence about the defendant's conduct but an inference of negligence is drawn from the nature of the occurrence ... the court in the absence of some explanation is entitled to infer negligence from the common knowledge that such events do not usually happen unless someone has been negligent."

One should also refer to a later passage at p 435 where the learned authors say:

"Proof of a *res ipsa loquitur* situation calls for an answer from the defendant, but does not require him to prove that he was not negligent."

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McNALLY JA

It is true that each of the examples cited by Hoffmann and Zefferdt is an example taken from a civil case. And it has been said that "the doctrine of *res ipsa loquitur* has no place in criminal law" (*R v Jass* 1939 EDL 249). That *dictum*, however, was based upon the assumption that the effect of the maxim was to shift the *onus* of proof on to the accused. In fact there is no shifting of *onus*. The use of the maxim involves merely a question of inference. Indeed the learned judge, LANSDOWN JP, said in *Jass's* case, *supra*: "It is true that facts proved in a criminal case may be such as to justify conviction unless the accused can give a reasonable explanation."

With respect, I would agree with the view expressed in *Cooper Motor Law* vol I pp 518-519 that: "There seems to be no reason in principle why (the maxim) should not apply in criminal as well as in civil cases." Cooper goes on to cite many instances of the application of the maxim in criminal cases, including one from this jurisdiction, *Green v R* 1956 (2) PH H 223 (SR). Indeed since the test of liability is the same in both civil and criminal cases (*R v Meiring* 1927 AD 41 (B) at 46), and only the standard of proof differs, I can see no basis for the argument that a process of reasoning which makes sense in a civil case should not also make sense in a criminal case. It must of course always be remembered that one is dealing with a rebuttable inference and not with a shifting of *onus*.

Where an explanation from the accused is called for, that explanation, of course, need only be one which creates a reasonable possibility of innocence. I turn therefore to consider the appellant's explanation in this case.

We do not have the appellant's warned and cautioned statement. It was stated in the defence outline signed by Mr *Mparadzi* that "the accused will adopt his warned and cautioned statement as part of the outline." It should therefore have been placed before the court. It was not. The defence outline advances no direct explanation of the accident at all. It merely relates an incident earlier in the day when a man advised him that one of his wheels (apparently it was the right front wheel) was wobbling. As a result, when he arrived at Harare he went to CMED, where they checked the wheel and told him it was safe to travel back to Masvingo.

We are left to infer that this might offer some explanation for the accident. In his evidence, however, he speaks of hearing a bang after the vehicle started shaking and then swerved. The bang, he says, was at the back. So *prima facie* it had nothing to do with the allegedly suspect wheel at the front. There is no suggestion that there was any vibration in the steering wheel or any other

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indication of wheel wobble up to the bang at the point of the accident. In fact there was no

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problem with the vehicle. Even after the accident the tyres were inflated. There is no explanation for the alleged bang. Although the vehicle inspector confirmed that some of the steering rods were bent, his opinion was that this was accident damage because if they had been bent before the accident "that car would not run."

Of the two passengers who gave evidence, one was the nurse aide who sat beside the driver. She was dozing off from time to time. She noticed nothing untoward until the accident happened. She said nothing about a bang or about the vehicle shaking. She was not asked about it. The other passenger, a patient sitting in the back of the ambulance, gave some vague and unsatisfactory evidence about high speed. He denied hearing any bang. He said nothing about shaking.

There is nothing in the sketch plan to show anything other than a swerving progression off the road. There is no sign of a wheel locking or leaving any unusual mark on the road. No suggestion was made that this occurred.

It seems to me that if there had been a bang followed by vibration so serious as to render the vehicle uncontrollable, the passengers would inevitably have noticed this and would have testified that this was the cause of the accident. The fact that nothing alarmed them is consistent only with the explanation that, whether through speed, inadvertence or drowsiness, or a combination of these, the appellant simply veered away from the path of the road, recovered, over-corrected, and then overturned the vehicle.

In my view the path followed by the vehicle, coupled with failure of the passengers to notice anything alarming before the accident, indicate with overwhelming certainty, and beyond a reasonable doubt, that the accident was due to some combination of speed and inattention on the part of the appellant. There is no support whatever for his claim that there was a bang followed by uncontrollable vibration. In fact those who might be expected to have supported it did not do so. The magistrate rightly rejected that explanation.

Thus, at the end of the day, there is no explanation by the driver which could postulate a reasonably possible cause of the accident consistent with his innocence. The mute testimony of the facts must prevail. It derives negative support from the absence of any evidence of banging or shaking by the passengers.

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McNALLY JA

The appeal against conviction must fail. There is no appeal against sentence. Accordingly, the appeal is dismissed.

Dumbutshena CJ: I agree

Gubbay JA: I agree

B Mparadzi & Co, appellant's legal practitioners

1986 (1) ZLR p138

JENAH v NYEMBA 1986 (1) ZLR 138 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

6 February & 17 April 1986

Flynote

African affairs and customary law - married African woman, whether has locus standi in judicio to sue unassisted by her husband customary law - status - whether to be decided by customary or general law - African marriage - effect on property of spouses.

Pleading - majority - whether necessary to allege - married woman - whether must allege free administration of own property.

Legislation - Legal Age of Majority Act, 1982 - Customary Law and Primary Courts Act 1981, s 3(3) - African Marriages Act s 13.

Headnote

Respondent, an African married woman, unassisted by her husband, sued the appellant for general damages for personal injury. In the High Court objection was taken *in limine* to the respondent's *locus standi*. The objection was dismissed, and, on appeal

Held, in the first instance, that status is to be decided according to general law since the right to relief depends on the general law.

Held, further, that regardless of whether Africans enter into a marriage in terms of the Marriage Act, custom continues to apply to their proprietary rights; according to custom, with few exceptions, the property acquired during the marriage becomes the husband's property.

Held, further, that in customary law a wife may not sue for damages unless assisted by her husband.

Held, further, that by the Legal Age of Majority Act full capacity is bestowed upon married African women.

Held, further, that it is not necessary to aver majority in a declaration nor,

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except in the case of a woman married in community of property, free administration of property.

Cases cited:

Chikosi v Chikosi (1) 1973 (1) RLR 161 (G)
Chikosi v Chikosi (3) 1975 RLR 140 (G)
R v Machingura 1932 SR 67
Katsidzira v Chiromo 1981 ZLR 87 (G)
Keresiah & Jack v Martha & Mugweni Masimba 1958 SRN 551
Meri v Merita 1966 AAC 53
Amon Nyamapfukudza v Dorothy assisted by Chirekeni 1968 AAC 1
R v Gutayi & Ors 1915 SR 49
Katekwe v Muchabaiwa 1984 (2) ZLR 112 (SC)
O'Linsky v Prinsloo 1976 (4) SA 843 (O)
Sesing v Minister of Police & Anor 1978 (4) SA 743 (W)
McLaurin v Horne 1965 RLR 639 (G)
McCullogh v Ross 1918 CPD 389
Pepler v Liebenberg 1928 CPD 266
Goldblatts Wholesale (Pty) Ltd v Damalis 1953 (3) SA 730 (O)
King Confections (Pty) Ltd v Harris 1955 (3) SA 545 (E)
MT O'Meara for the appellant
FE Ziumbe for the respondent

Judgment

Gubbay JA: In her summons and declaration issued out of the High Court on 12 July 1983 the respondent (to whom I shall refer as "the plaintiff") claims against the appellant ("the defendant") payment of the sum of \$18 143 and costs of suit. That amount represents general damages for personal injuries alleged to have been sustained on 8 August 1982 in consequence of the defendant's unlawful action in shooting the plaintiff in the thigh with a firearm.

Paragraph 1 of the declaration describes the plaintiff as "a married woman of C726 Chegutu Township, Chegutu." In his plea the defendant, while admitting liability, puts in issue the *quantum* of damages claimed.

At the trial which followed the defendant objected *in limine* that the plaintiff lacked *locus standi in judicio* on the ground that a married African woman is not entitled in law to sue in her own right unassisted by her husband. It seems that for the purpose of the preliminary argument the learned judge presiding was asked and agreed to regard para 1 of the declaration as if

GUBBAY JA

amplified by the further allegations that the plaintiff and her husband initially had contracted a customary union duly registered under the African Marriages Act [*Chapter 238*], and thereafter had entered into a civil marriage under the Marriage Act [*Chapter 37*].

The learned judge dismissed the objection with costs, holding that the effect of the Legal Age of Majority Act 1982 was to repeal by implication the proviso to s 3(3) of the Customary Law and Primary Courts Act 1981, as well as s 13 of the African Marriages Act. This appeal lies against that ruling.

It was common cause between Mr *O'Meara* for the appellant, and Mr *Ziumbe* for the respondent, and correctly so in my opinion, that in terms of the proviso to s 3(3) of the Customary Law and Primary Courts Act, the capacity of any person falls to be determined by customary law only if the existence of the right or obligation in issue is dependent on customary law; that as the right to recover general damages for personal injury does not so depend, the proviso is inapplicable; and so by virtue of subs (3) of s 3 of that Act the plaintiff's capacity to enforce her rights is to be determined in accordance with the general law of Zimbabwe. Section 3(3) reads:

"(3) The capacity of any person to enter into any transaction or to enforce or defend any rights in a court of law shall, subject to any enactment affecting any such capacity, be determined in accordance with the general law of Zimbabwe:

Provided that, if the existence or extent of any right held or alleged to be held by any person or of any obligation vesting or alleged to be vesting in any person depends upon or is governed by customary law, the capacity of the person concerned in relation to any matter affecting that right or obligation shall be governed by customary law."

In s 2 of the Act "'general law of Zimbabwe' means the common law of Zimbabwe and any enactment, and excludes customary law".

Plainly the civil marriage of the plaintiff and her husband replaced their solemnized customary law marriage. Their prior potentially polygamous union was converted into a monogamous one with all the personal incidents associated with the latter. The parties therefore incurred all the consequences of a civil marriage unless such consequences are excluded by clear and express statutory provision. See *Chikosi v Chikosi* (1) 1973 (1) RLR 161 (GD) at 164H-165A; *Chikosi v Chikosi* (3) 1975 RLR 140 (GD) at 143 B-H; cf. *R v Machingura* 1932 SR 67.

GUBBAY JA

Such an exclusion is provided for by s 13 of the African Marriages Act which reads:

"13. The solemnization of a marriage between Africans in terms of the Marriage Act shall not affect the property of the spouses, which shall be held, may be disposed of and unless disposed of by will, shall devolve according to African law and custom."

Thus, regardless of whether Africans enter into a marriage in terms of the Marriage Act, African

law and custom continues to apply to their proprietary rights. It is not open to them to elect to have the property consequences of their marriage governed by the general law of Zimbabwe. They are not permitted, however much they may desire to do so, to choose to be married either in or out of community of property. In other words, the proprietary consequences of s 2 of the Married Persons Property Act [Chapter 38] are in the case of Africans married under the Marriage Act excluded by s 13 of the African Marriages Act, for that provision specifically enacts that the marriage "shall not affect the property of the spouses", which is exactly what s 2 of the Married Persons Property Act does. Section 13, therefore, prevents Africans who enter into a civil marriage from enjoying the same options as to the proprietary consequences of a marriage under the Marriage Act which are available to other Zimbabweans, and to that extent albeit not unconstitutionally, discriminates against them on account of their race. (See s 23(3)(b) of the Constitution.)

In African law and custom property acquired during a marriage becomes the husband's property whether acquired by him or his wife. To this rule there are a few exceptions:

Ownership of immovable property, in the event of a divorce or the death of the husband, is determined in accordance with the general law. This is because the concept of private ownership of immovables was unknown to customary law. See *Dokotera v The Master* 1957 R&N 697 (SR) at 702H-703C; *Gwebu v Gwebu* 1961 R&N 694 (SR) at 699E; *Jirira v Jirira & Anor* 1976 RLR 7 (GD) at 15 G-H; *Chiromo v Katsidzira* 1981 ZLR 418 (AD) at 419D-E.

Secondly, in terms of s 13 itself, each spouse may, by will, dispose of his or her property. Customary law governs succession unless there is a will. (See s 7 of the African Wills Act [Chapter 240].) This means that if the husband dies without a will, the wife inherits nothing.

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GUBBAY JA

Thirdly, the wife is entitled to ownership of her "umai" property without interference from her husband. That category of property comprises the livestock and its increase which accrues to a woman as a result of her daughter's marriage and pregnancy. In addition a husband has no right to the wife's "mavoko" property, which includes all the property acquired by the woman through her personal labours. Traditionally it comprised the small livestock which a woman earned by her activities as a mid-wife, herbalist, brewer of beer, maker of pots and so forth. See Child *The History and Extent of Recognition of Tribal Law in Rhodesia* at p 76; Holleman *Shona Customary Law* at pp 350-352. Today there is controversy as to the ownership of property acquired by married women by means of monies earned from employment, an activity unknown to traditional African society. Although logically and equitably such property would seem to fall into the mavoko category and not belong to the husband since the woman worked for it herself, that view is not universally shared by African men. (Cf *Katsidzira v Chiromo* 1981 ZLR 87 (GD) at 93D).

Finally, an unemancipated wife may sue for damages for injuries suffered to her person or reputation and hold in her own right any award made. This right is derived from the common law and the principles of Roman-Dutch law govern the proceedings. See *Keresiah & Jack v Martha & Mugweni Masimba* 1958 SRN 551; *Meri v Merita* 1966 AAC 53 at 55; *Amon Nyamupfukudza*

v Dorothy assisted by Chirekeni 1968 AAC 1 at 3. Though this was not the position historically, with the passage of time it has become part of African law. See Goldin and Gelfand *African Law and Custom in Rhodesia* at p 268. But as, certainly at any rate prior to the operation of the Legal Age of Majority Act, an unemancipated African woman no matter her age was a perpetual minor, passing upon marriage from the *patria potestas* of her nearest male relative to that of her husband (see *R v Gutayi & Ors* 1915 SR 49 at 60; Child, *op cit* at p 79), she was not entitled to sue for damages for personal injuries without the assistance of her guardian.

Has the Legal Age of Majority Act freed her from that bondage in respect of such an action? May she now sue for personal damages unassisted by her husband?

The Legal Age of Majority Act applies without qualification to any person who attains or has attained the age of eighteen years. It is not restricted to single persons. It embraces a married African woman aged eighteen years or over who prior to the fixed date was a perpetual minor falling under the guardianship of her husband, for subs (3) of s 3 specifies that the preceding

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GUBBAY JA

two subsections "shall apply for the purpose of any law **including customary law**" (my emphasis). The effect therefore is to bestow capacity upon African married women. Indeed it is unthinkable that in the context of its avowed aim of liberalisation the Legislature could have intended to limit its grant of capacity to unmarried African women who fulfil the age requirement, but to retain a married African woman of say fifty years of age in the disadvantageous condition of minority.

It follows that the plaintiff did not require the assistance of her husband provided she had attained the legal age of majority at the date the action was instituted.

This view accords with the obiter dictum of DUMBUTSHENA CJ in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC) at 123C that: "African women now have full legal capacity". The contentious issue in that celebrated case was whether the Legal Age of Majority Act repealed the proviso to s 3(3) of the Customary Law and Primary Courts Act to the extent that single African women of eighteen years or over were no longer under the guardianship of their nearest male relative. Strictly therefore the learned Chief Justice was not concerned with the status of married African women or the need for such women of whatever age to be assisted by their husbands.

It remains for me to say that I respectfully disagree with the conclusion of the learned judge in the court *a quo* that s 13 of the African Marriages Act has been repealed by implication by the Legal Age of Majority Act. Section 13 deals with the substantive law governing the moveable property of African spouses and the disposal and devolution of such property. The Legal Age of Majority Act, on the other hand, is concerned with age, status and capacity, all of which are matters of adjective law.

It is true that on the pleadings as they stand there is no direct allegation that the plaintiff is a major. But the reference in the further particulars to the declaration to her having worked as a voluntary Home Economic Demonstrator since 1976 and to the fact that at the time of the injury

she was a qualified Community Development Officer, strongly lead to the inference that she was an adult at the material date.

In any event I consider that it was not for the plaintiff to allege majority, but for the defendant to allege her minority, if such were the case. Minority falls within what is termed in Beck's *Theory and Principles of Pleading in Civil Actions* 4th ed para 140 as "the fourth class of defence", where the defendant

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GUBBAY JA

proceeds to avoid the claim by setting up facts by way of a special plea in abatement which show that the cause of action has been lost or discharged, or that it is for some particular reason unenforceable. See, for instance, *O' Linsky v Prinsloo* 1976 (4) SA 843 (O); *Sesing v Minister of Police & Anor* 1978 (4) SA 743 (W).

Mr *O' Meara* placed considerable reliance upon Rule 90 of the High Court Rules 1971, and submitted that at the very least it was incumbent upon the plaintiff to allege that she has "the free administration of her own property". I am unable to agree. I think that Rule is particularly inappropriate to the case of an African woman who has been married under the Marriage Act. Apart from the exceptions I have mentioned, she has no property to administer, not because her husband has the marital power and in its exercise administers either the joint estate or her separate property, but because traditionally all property acquired is owned by him. Rule 90 is aimed, so it seems to me, at marriages in which community of property and of profit and loss and the marital power are excluded, as in *Maclaurin v Horne* 1965 RLR 639 (GD).

Even assuming that Rule 90 is of application to the plaintiff, she has adequately met its requirement. It is not imperative under the Rule that in order to plead capacity a married woman must allege that she "has the free administration of her own property." That will be a sufficient method, but equally sufficient and effective will be the allegation, made expressly or by implication, "...a married woman whose husband does not possess the marital power". For a husband who lacks that power has no right to administer his wife's separate property. The administration of it is reserved for her and she can sue without his assistance. See *McCullogh v Ross* 1918 CPD 389 at 395; *Pepler v Liebenberg* 1928 CPD 266 at 267; *Goldblatt's Wholesale (Pty) Ltd v Damalis* 1953 (3) SA 730 (O) at 736A; *King Confections (Pty) Ltd v Harris* 1955 (3) SA 545 (E).

The plaintiff has sued the defendant for damages for personal injuries suffered and any award made she will be entitled in law to hold as her own. Also as a matter of law the Legal Age of Majority Act allows her to sue unassisted by her husband. What arises therefore from the allegations of fact contained or deemed by agreement to be contained in the declaration, is that insofar as this action is concerned the plaintiff falls outside the *patria potestas* or marital control of her husband.

For these reasons I would dismiss the appeal with costs.

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GUBBAY JA

Dumbutshena CJ: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest, appellants legal practitioners

Guni & Guni, respondent's legal practitioners

1986 (1) ZLR p146

ARCHIPELAGO (PVT) LTD & SARAH'S INVESTMENTS (PVT) LTD v LIQUOR LICENSING BOARD 1986 (1) ZLR 146 (HC)

Court **High Court, Harare**

Ebrahim J

Civil application

27 March & 21 May 1986

Flynote

Review - domestic remedies - whether must be exhausted before review is brought - grounds - gross irregularity - unreasonableness - discretion - misuse of.

Legislation - Liquor Act, 1984, s 17(2), s 19, s 71(1)(c), 71(1)(a)(iii), High Court Act 1981, s 27(1)(c).

Headnote

The respondent purported to cancel the liquor licences of the two applicants on the grounds enacted in terms of s 71(1) of the Liquor Act which provides, *inter alia*, that a licence shall become null and void where a director of a company to which a licence has been issued has within the preceding twelve months twice been convicted of certain offences under the Act. On the facts there were indeed two relevant convictions in respect of each applicant but of these four convictions, all being admissions of guilt, only one was against a director. As a preliminary point it was submitted for the Respondent that no review could be brought since the internal appeal provided for in the Liquor Act had not been pursued.

Held that the jurisdiction of the High Court to review the decision of any inferior court is enshrined in the High Court Act and the presumption against this jurisdiction being ousted in any case, or against its exercise being delayed pending the pursuit of internal remedies, is particularly strong. In this case the provision of an internal appeal mechanism did not affect the review jurisdiction of the High Court.

Held, further, that the provision in the High Court Act of a power of review

on the grounds of "gross irregularity in the proceedings or the decision" shows an orientation towards questioning the result of the complaint. This ground may be equated with the common law ground of gross unreasonableness.

Held, further, that to establish gross unreasonableness it must be shown that the unreasonableness of the decision is evidence of a misuse of power.

Held, further, that in *casu* the respondent misunderstood the law and purported to exercise a jurisdiction where none existed, namely a discretion to cancel the licence, which, had the convictions been relevant, would have brought about immediate nullity of the licences, this alone being sufficient grounds for review.

Held, further, that in any event the convictions were not relevant for the purposes of the Liquor Act and the licences were unaffected and remained valid.

Cases cited:

Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111

Hotel Association of SR v SR Liquor Licensing Board 1958 (1) SA 426

Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors 1960 AC 260

Welkom Village Management Board v Leteno 1958 (1) SA 490 (A)

Reid - Daly v Hickman & Ors 1981 (2) SA 315 (ZAD)

Leach v Secretary for Justice, Transkeian Government 1965 (3) SA 1

Johannesburg Municipal Council v Maserowitz & Maserowitz 1914 TPD 439

Helpmekaar Taxi Diens v Nasionale Vervoerkommissie 1978 (1) SA 250

Msomi v Abrahams NO & Anor 1981 (2) SA 256 (N)

Union Government v Union Steel Corporation 1928 AD 220

Loxton v Kenhardt Liquor Licensing Board 1942 AD 275

Clan Transport Co Ltd v Rhodesia Railways 1956 (3) SA 480 (FSC)

Cone Textiles (Pvt) Ltd v Ayres & Anor 1980 (4) SA 728 (ZAD)

S v Wandrag 1970 (3) SA 151

S v Sayed 1981 (1) SA 982

SA Broadcasting Corp v Transvaal Township Board & Ors 1953 (4) SA 169 (T)

Nkomo v Minister of Justice & Attorney-General of Southern Rhodesia 1965 RLR 557

Holman v Salisbury Defence Exemption Board 1977 (1) RLR 148

Computer Investors Group v Minister of Finance 1979 (1) SA 879

1986 (1) ZLR p148

EBRAHIM J

FC Blackie SC for the applicants

S Mafara for the respondents

Judgment

Ebrahim J: The applicants are owners of nightclubs in Harare. They possess night club liquor licences granted in terms of s 42 of the Liquor Act (No. 9 of 1984).

On the evening of Sunday, 16 March, 1986, the directors of the respective companies were taken aback when it was announced on the late news on Zimbabwe Television that their licences had been revoked forthwith. No prior notification of the intended action had been given.

The following Monday the parties each received notification of the revocations dated Friday, 14 March and signed by the secretary to the Respondent Board. These notices differed significantly in content and it is worth recording the variations. The notice to Archipelago (Pvt) Ltd (hereinafter referred to as the first applicant) was addressed to Mr Stouyannides, one of the directors of the company. It informed him that the Archipelago licence had been cancelled in terms of s 71(1)(c) of the Liquor Act as read with para(1)(c)(iii) and subs (3)(b) of the same section. Nothing in the provisions quoted empowers the cancellation of a licence.

The notice to Sarah's Investments (Pvt) Ltd (hereinafter referred to as the second applicant) was addressed to a firm of legal practitioners. In it, quoting the same statutory provisions as mentioned in the notice to the first applicant, the secretary informed the management of the second applicant that their liquor licence had become void on a date a month previously. Section 71 does provide that, in certain circumstances, a licence shall become null and void.

On Tuesday, 18 March the applicants petitioned this court for relief. Mr JUSTICE SANSOLE granted them rules nisi calling on the Board to show cause why its actions should not be set aside. The rules also operated as temporary orders reinstating the liquor licences pending the decision of the court. This is the extended return day of the rules.

Section 17(1)(c) of the Act provides that no authority for the issue, renewal or transfer of a licence to or in favour of any person shall be issued to any person who has, within the preceding twelve months, been convicted of an offence and sentenced to imprisonment without the option of a fine or to a fine exceeding fifty dollars. In terms of sub-para (e)(iii) of the same subsection this embargo is extended to a company which has a director who has, within a specified time been convicted of a specified offence. The particulars

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relevant here are that a licence may not be issued to a company which has a director who has, within the preceding twelve months been twice convicted of an offence in terms of the Act and sentenced on either occasion to a term of imprisonment without the option of a fine or to a fine exceeding fifty dollars. Subsection (3)(b) provides that the issue, renewal or transfer of a licence to or in respect of a person who becomes a person who would be disqualified in terms of the section from holding it, shall become null and void.

The Board alleges that each establishment has sustained two convictions within the past twelve months. The Board maintains that in the circumstances it is compelled by the Act to cancel (*sic*) the licences.

The Board has taken the point, which must be dealt with *in limine*, that the matter is not reviewable. The basis of this contention is undoubtedly a misinterpretation of ss 17(2) and 19 of the Act.

Section 17 concerns decisions of the Board. Subsection (2) thereof provides that it shall not be incumbent on the Board to give reasons for its decisions unless the applicant or objector so requests within seven days. Section 19 provides that a person aggrieved by a decision of the Board or the Minister may, with certain specified exceptions, appeal to the Administrative Court. This statutory assignation of the right to appeal does not, however, detract from this court's powers of review established by s 26 of the High Court Act (No. 29 of 1981). This right falls into the second classification of reviews set out by INNES CJ. in *Johannesburg Consolidated Investment Company v Johannesburg Town Council* 1903 TS 111 at 115. If the right did not exist, there would be no means of correcting proceedings in which the Board had acted *mala fide* from improper motives or without applying its mind to the matter (*Hotel Association of SR v SR Liquor Licensing Board* 1958 (1) SA 426 at 431 (B)). In the *Johannesburg Consolidated Investment* case, *supra*, the learned judge indicated that the right to review matters irregularly considered by an administrative tribunal was in the nature of a common law right. It has now been enshrined in the High Court Act. Therefore the presumption against any intended ouster of the right of review must be particularly strong. This presumption was enunciated as follows by VISCOUNT SIMMONDS in *Pyx Granite Co Ltd v Minister of Housing and Local Government & Ors* 1960 AC 260 at 286:

"It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's Courts for the determination of his rights ought not to be excluded except by clear words."

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(See also *Welkom Village Management Board v Leteno* 1958 (1) SA 490 (A) at 503C; *Reid - Daly v Hickman & Ors* 1981 (2) SA 315 (ZAD) at 381E; and *Leach v Secretary for Justice, Transkeian Government* 1965 (3) SA 1 at 10A.)

In *Johannesburg Municipal Council v Maserowitz & Maserowitz* 1914 TPD 439, where the Council had unreasonably refused to grant a trading licence, it was held that the prospective licensee was entitled to approach the court for relief. The decision is good in law and today the

relief sought would be a review. (*Helpmekaar Taxi Diens v Nasionale Vervoerkommissie* 1978 (1) SA 250.)

The case of *Msomi v Abrahams NO & Anor* 1981 (2) SA 256 (N) is directly in point. The decision of a claims officer made in terms of the South African Unemployment Insurance Act was brought on review before the Natal Bench of the Supreme Court. As in this matter the respondents raised the point *in limine* that the applicant's right to a review was ousted by the existence of a right of appeal provided by the Act itself. At 261A PAGE J said:

"The mere fact that a statute provides an extra-judicial remedy in the form of a domestic appeal or similar mechanism which would afford the aggrieved party adequate relief does not give rise to such a necessary implication (that the intention was to oust the court's jurisdiction completely): in the absence of further conclusive implications to the contrary, it will be considered that such extra-judicial relief was intended to constitute an alternative to, and not a replacement for, review by the courts ...

The domestic remedy afforded by the statute in the present case is an appeal and not a review. The appellate tribunal can substitute its decision for that of the claims officer but cannot enjoin him to conduct his own enquiry afresh and with due regard to the principles of natural justice. This latter relief is that to which the applicant would be entitled by way of review by the court and I am unable to find any indication in the statute that it was the intention of the Legislature to deprive her of that remedy."

The grounds on which the High Court may review a decision are determined by s 27 of the High Court Act. The most appropriate to the present case is the ground mentioned in s 27(1)(c) (ie "gross irregularity in the proceedings or the decision").

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It will be noted that the section is orientated toward the result of the complaint rather than its cause. This is emphasised by the word "irregularity". It has been traditional to say that a matter can be reviewed, in this context, on the grounds of unreasonableness. In the book *Judicial Review of Administrative Tribunals in South Africa* at p 212, LA Rose Innes comments as follows on the connection between the concepts of irregularity and unreasonableness:

"Whether or not an inference of bad faith, improper purpose, failure to consider a matter which requires to be considered, or some other irregularity, will be drawn by the court from the unreasonableness of a decision depends upon various considerations. It has been held that the unreasonableness of a decision, however gross, is not sufficient, standing by itself, to justify a finding of *mala fides*, ulterior motive or failure to consider the case, but may afford some evidence of such irregularities. On the other hand, the unreasonableness may be so extreme that little further evidence is needed for proof of irregularity."

It is clear, therefore, that in order for the present case to be brought within the review jurisdiction of this court it must be shown that the Board's decision was not merely unreasonable but that this unreasonableness was evidence of a misuse of its powers. In *Union Government v Union Steel Corporation* 1928 AD 220, STRATFORD JA stated the position thus (at p 237):

"Emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is inexplicable except on the assumption of a *mala fides* or ulterior motive, or that it amounts to proof that the person on whom the discretion is conferred has not applied his mind to the matter ..."

See also *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 310; *Clan Transport Co Ltd v Rhodesia Railways* 1956 (3) SA 480 (FSC) at 488; *Cone Textiles (Pvt) Ltd v Ayres & Anor*

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1980 (4) SA 728 (ZAD) at 734A.

In order to determine whether or not the Board's decision to terminate the respondents' licences is reviewable in the light of what has been said above, it is necessary to examine the reasons for this decision. The Board alleges that two convictions have been sustained within the past twelve months on each of the licensed premises. The Board contends, it is "compelled by the Act to cancel a licence if a person is convicted and given a fine exceeding \$50 within the preceding period of twelve months". The wording is quoted from the Board's replying affidavit.

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On the basis of this wording alone I would be inclined to hold that the decision is reviewable. The wording is clear evidence that the Board failed to give due consideration to the case. Firstly, as has already been mentioned, the section which the Board purported to act does not authorise the cancellation of licence' it provides that a licence shall, in certain circumstances, become null and void. There are both practical and conceptual differences between these methods whereby a licence may become invalid. Cancellation is the most drastic punishment the Board can visit on a licensee. It is, therefore, to be reserved for the most serious infringements of the Act. Section 16, which defines the powers of the Board, provides that a licence may be cancelled upon consideration of a report made in terms of ss 90 and 91.

Section 71 specifically provides for licenses to become null and void when the holders commit certain wrongs. Reference to the consequences of holding the Board's notices to be valid will illustrate the difficulties which emerge from a confusion of the concepts. The notice addressed to the first applicant informed that company that their license had been cancelled. In the absence of any stated date of cancellation it must be assumed the licence was cancelled "forthwith" (as s 16 provides). The notice to the second applicant declared that their licence became null and void on the 15 February, over a month before. This unequal treatment would mean that the second applicant had been operating illegally for a period, whereas the first applicant, allegedly implicated in identical circumstances, had not. There is nothing in the section under which the Board purported to issue the notices which compels the Board to cancel the licence. This amounted to a mistake of law on the part of the Board and is a reviewable irregularity. The legal basis of this irregularity will be dealt with below.

The postponement of this exposition is necessitated by the fact that a further similar irregularity appears from the Board's actions. I have already mentioned that in order for a licence to become null and void in terms of s 17(3)(b) the licensee in question must have been twice convicted, during the preceding twelve months. The licensees in this case are companies. Therefore para (e) of subs (1) applies. This provision, as already stated, requires that before a company licence becomes null and void one of the company's directors must have sustained two convictions in terms of the Act, in respect of each of which he was sentenced to imprisonment with the option of a fine or a fine exceeding \$50.

The basis on which the Board purported to withdraw the licences (to use neutral terminology) was that two deposit fines of one hundred dollars each

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have been paid in respect of offences committed on each applicant's licensed premises. In all four cases the deposit fines were paid in respect of purported admissions of guilt to contraventions of s 114(g) of the Act, that is, broadly, selling liquor at a time when its sale is not authorised under the licence which relates to the premises on which the sale took place. The admission forms were signed by various people, apparently in various capacities. So it is necessary to examine each to ascertain its relevance to the purported withdrawals.

In relation to the admissions made at Sarah's (second applicant), one of the admissions was signed by the barman who was serving at the time the police discovered the offence. The other was signed by a person described in the applicant's petition as a manager. Because nothing turns on it, I will assume in the Board's favour that this person was a manager approved by the Board in terms of s 63(4)(b)(i) of the Act. The offences enumerated in s 114 can be committed only by a licensee or an approved manager. This is clear from the wording of the section. The barman could not, therefore, validly be charged with the offence. It follows that his conviction stemming from the alleged contravention was equally as invalid. Section 336(1)(a) of the Code authorises a prescribed officer (which term includes every member of the Zimbabwe Republic Police - see s 3(a) of Government Notice No: 625 of 1964) to receive a signed admission of guilt from a person accused of an offence if he has reasonable grounds for believing that a court convicting him of the offence would not impose a sentence of imprisonment, or of a whipping or a fine exceeding \$100. The policeman concerned objectively could not have had reasonable grounds for believing a court would convict the barman of an offence with which he could not validly be charged. Therefore, he ought not to have received the admission of guilt from him. Paragraph (b) of the subsection of the Code mentioned above provides for the administrative machinery of entering the admission into the court records. Paragraph (c) provides that the admission shall be laid before a court which shall either convict the accused of the crime to which the admission relates or refuse to do so. In this case, for the reasons already given, the court should have refused. Exercising my review jurisdiction I declare this conviction void. I have discussed this aspect with my brother REYNOLDS J who agrees with my conclusion. The grounds for review of this case are similar to the grounds in the main case: an improper exercise of function. The fine paid by the barman must be returned to him. Further on this point, if it is the Board's contention, as seems probable, that the barman signed on behalf of the company, the contention is clearly erroneous. Section 336(4) of the Code lays down that where a director, manager or secretary purports to have signed an admission

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on behalf of a corporate body, it shall be presumed that he has been authorised by the body to do so. The barman clearly was not one of the officials of the company in the contemplation of this presumption. Therefore, in order for him to have signed on behalf of the company it would have been necessary for him to have had express authorisation to do so. There is no evidence

of such authorisation. It naturally follows that the Board's reliance on this "offence" for the purposes of declaring the second applicant's licence null and void is without substance.

As a result of this conclusion it is strictly unnecessary to comment on the second "Admission of Guilt" produced by the Board in support of its' decision, since two convictions are clearly necessary in the circumstances before a licence becomes null and void in terms of s 71(3)(b). However, for the sake of clarity, I make the following observations:

The second admission was made and signed by a manager, who, as indicated above, I will regard as an approved manager. In this capacity he was capable of contravening s 114(g). He indicated (by means of the appropriate deletions and entries on the "Admission of Guilt" form) that he was signing on behalf of 'Sarah's'. As a manager he was entitled to so sign in terms of s 336(4) of the Code. As an approved manager he was competent to admit to a contravention of s 14(g) of the Act. Moreover, by signing on behalf of the company, he was admitting guilt as licensee.

This conviction represents a valid conviction of Sarah's Investments (Pvt) Ltd, but it does not assist the Board in the proof that the licence was null and void. It is a specific requirement of s 71(1)(e) that one of the directors should have sustained two relevant convictions within the preceding twelve months. It is axiomatic that a company's legal persona is quite distinct from that of its directors. Therefore the conviction of the company cannot effect the criminal records of its directors.

In the case of the first conviction of the first applicant on which reliance was placed by the Board similar considerations apply. The admission was signed by a person described as a manager, who was not a director. Therefore the conviction could not be considered for the purposes of the license becoming null and void in terms of the relevant provisions of s 71. The difference between the two admissions is that the manager at Archipelago (Private) Limited specifically excluded the company from liability by means of making the correct deletions and entries on the Admission of Guilt form. He accepted, as he was entitled to accept, full responsibility for the offence in his

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personal capacity (assuming again that he was an approved manager in terms of the Act).

Although, as in the case of the second applicant, it is not strictly necessary to discuss the second conviction on which the Board relied, I consider it desirable to do so. The admission in this case was signed by a director of Archipelago (Private) Limited in his capacity as such. The completed form clearly indicates this intention. The name "Archipelago Night Club" has been written against an instruction which requires the name of the corporate body if the admission is made by a director, manager or secretary on behalf of the body. I do not think too much significance can be attached to the fact that the correct legal title Archipelago (Private) Limited, was not recorded. The circumstances in which the admission was made must be remembered. It was 4.50 a.m. The location was a place known to all as Archipelago Night Club. As far as is known, this is the sole business concern of the Company. It would, in my opinion, be over-

legalistic to insist on precision in citation.

It was submitted on behalf of the first applicant that there is a distinction between a conviction in the meaning of s 71 of the Act and a conviction on an admission of guilt. Any such difference can occur only where there has been some irregularity in the acceptance, recording or confirmation of the admission such as has been discussed above. In the case of an unequivocal admission such as that made by the Archipelago director, there is no distinction.

The time of commission of the offence is indicative of the probability of its commission. The director who signed the admission could have been expected to have raised any defence at the time if there was any to raise. Directors of companies may be assumed to be familiar with the law relating to their company's field of operation. (*S v Wandrag* 1970 (3) SA 151 at 160; *S v Sayed* 1981 (1) SA 982 at 990.) I find, therefore, that this second conviction relating to first applicant was a proper conviction for the purposes of s 71(3)(b) of the Liquor Act. As I have already pointed out, however, this in no way supports the Board's action in purporting to deprive Archipelago (Private) Limited of its licence. To justify such an action two convictions of **one** director are necessary.

From what has been said above it is apparent that the Board has misinterpreted the Act on two counts. Firstly in maintaining it was compelled to act in the positive manner it did. It seems to me that a licence becomes null and void by process of law in terms of s 71(3)(b) of the Act. There is certainly

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no provision for the Board to declare that the licence is null and void, far less cancelled, in terms of the section. From an administrative point of view, it might be advisable that some form of notice be served on a licensee whose licence has been made null and void in terms of the abovementioned provision. But the circumstances of the present action were illegal and unnecessary. Secondly, as has been shown in this judgment, in maintaining that the Act authorised a nullity or voidness in any case in this instance, the Board misapplied the Act. Fuller consideration of the issues involved would have led the Board to the same conclusion as this court.

In *Union Government v Union Steel Corporation*, *supra*, at page 234, STRATFORD JA said:

"If a discretion is conferred by a statute upon an individual and he fails to appreciate the nature of the discretion through misreading the Act which confers it, he cannot and does not properly exercise that discretion. In such case a court will correct him and order him to direct his mind to the true questions which have been left to his discretion."

This principle has been repeatedly followed. See, for example, *South African Broadcasting Corporation v Transvaal Townships Board & Ors* 1953 (4) SA 169 (T) at 177A; *Nkomo v Minister of Justice and Attorney-General of Southern Rhodesia* 1965 RLR 557 at 565; *Holman v Salisbury Defence Exemption Board* 1977 (1) RLR 148 at 161A; *Computer Investors Group v Ministry of Finance* 1979 (1) SA 879 at 895B.

The error here was that the Board exercised a discretion where none existed. This, it will be

noted was not through a pure mistake of law, but through a mistaken assumption of jurisdiction which it did not possess. Where a body has no jurisdiction to exercise a discretion it follows as a matter of logic that the purported exercise of the discretion is *ultra vires*.

The matter came before the court as an application to confirm the rules nisi. I must therefore consider whether the confirmation should be granted. The Rule called on the Board to show cause why the order cancelling the licences should not be set aside. As has appeared above the Board was unable to support the actions taken for the reason that they were *ultra vires*; the reasons given for the termination of the licences were not substantiated by the section under which the terminations were purportedly effected. Reaching this decision has involved an effective review of the matter. As has been shown above, the unreasonableness of the purported "cancellations" assumed a

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gross quality by virtue of the Board members' obvious failure to apply their minds to the issue, which failure resulted in manifest injustice. The Board maintained that the matter was not reviewable, presumably on the basis that the applicants have not yet exhausted the domestic remedies provided by appealing to the administrative court in terms of s 19. But an appeal against so grossly unreasonable a decision would be quite meaningless; there are no grounds but the intrinsic unreasonableness of the decision. Review was the respondents appropriate means of seeking a remedy. In consequence the Rules are confirmed.

The applicants have succeeded fully in this action and in view of the Board's totally ill-advised course of action, there is no basis for apportionment of costs. The Board is ordered to pay the costs of these applications.

D W Aitken & Company, applicants' legal practitioners

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

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D v M 1986 (1) ZLR 158 (HC)

Court High Court, Bulawayo

Muchechedere J

Civil application

21 March & 23 May 1986

Flynote

Child - access by father to illegitimate child - no inherent right of access or custody for a father of a minor

illegitimate child.

Headnote

There is no inherent right of access or custody for a father of a minor illegitimate child, but the father, in the same way as other third parties, has a right to claim and will be granted these if he can satisfy the court it is in the best interests of the child. The onus is on the applicant to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the court is that used before interfering with the custodial rights of a father of a legitimate child.

Cases cited:

Dauids v Davids 1914 WR 142

Matthews v Haswari 1937 WLD 110

Docrat v Bhayat 1932 TPD 125

Calitz v Calitz 1939 AD 56

HG Bisset for the applicant

IA Esat for the respondent

Judgment

Muchecheter J: In this matter the applicant seeks the following order:

1. That is hereby declared that the applicant has a right of reasonable access to the parties' illegitimate minor child LWM.

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2. That the respondent be, and is hereby, ordered to grant reasonable access by the applicant to the said minor child.
3. That the respondent be, and is hereby, ordered to pay the applicant's costs as between party and party incurred in this application.

During the hearing counsel for the applicant abandoned the third paragraph of the above order and instead asked for an order that each party pays its own costs whatever the result of the hearing.

The application is opposed by the respondent on the ground that she is the sole legal guardian and custodian of the minor illegitimate child (hereinafter referred to as "the child") and the applicant has no inherent right of access to the child and that the applicant has not shown any grounds to satisfy the court that it should, in the interests of the child, interfere with the custodial

rights of the respondent. In the circumstances the respondent asked for the application to be dismissed with costs and also for the applicant to be ordered to pay maintenance for the child at the rate of \$100 *per mensem* with retrospective effect from 1 November 1985. The issues which I must determine are whether the applicant has any right of access to the child, whether in the interests of the child reasonable access to the child should be granted to the applicant and, in any event, how much maintenance is the applicant liable to pay for the child.

In his founding affidavit the applicant avers that during the period between October 1984, and January 1985, he had a carnal affair with the respondent which resulted in the respondent being pregnant during January 1985. The pregnancy culminated in the respondent being delivered of a child on the 19 October 1985, at Bulawayo. The applicant further avers that he is willing to pay maintenance in respect of the child and that indeed he is presently paying maintenance for him. He also avers that he is advised and verily believes that he is entitled to reasonable access to the child notwithstanding that the child is illegitimate although he has no other rights in respect of the upbringing of the child. The applicant further avers that the respondent, notwithstanding requests by him, refuses to allow him any access to the child. Finally the applicant submits that it will be in the best interests of the child that he should be offered access to him, and that it was in the best interests of the child that he should know who his father is, and become acquainted with his father.

The respondent in her replying affidavit admits that she had a carnal relationship with the applicant which resulted in the pregnancy and subse-

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quent birth of the child. She however, describes the carnal relationship as seduction and avers that at the time of the seduction she was a virgin and that in spite of the fact that she fell pregnant because of it the applicant had neither offered to marry her nor offered to pay damages therefor. In the circumstances she had instructed her legal practitioners to institute legal proceedings against the applicant for the recovery of damages sustained by her. She further avers that at the birth of the child she and the applicant had entered into an agreement whereunder the applicant undertook to pay maintenance for the child at the rate of \$100 per month with effect from 1 November 1985, but that the applicant had subsequently repudiated the agreement and offered instead to refer the matter to the Maintenance Court, Bulawayo, for assessment. The respondent however admits that the applicant did pay some money towards maintenance but avers that there is still a shortfall on the amount agreed.

The respondent also avers that even though she has refused to grant the applicant regular rights of access to the child she has nevertheless on three separate occasions taken the child to the applicant's home. She however avers that she does not believe that it would be in the best interests of the child that "the spurious father (the applicant) be allowed to visit him (the child) and have access to him". She elaborates on this as follows:

- "9. THAT this is in view of the fact that I am twenty two years of age and have very good chances of marrying following which it is my intention that the guardianship of the minor child pass to the step-father either by process of adoption or order of this Honourable Court.

10. THAT furthermore, the child would not be able to identify, recognise or appreciate, his natural father either now or for several years to come.
11. THAT the minor child would, in addition, not be emotionally in a position to understand the inevitable conflict between natural father and step-father until he has attained the legal age of majority after which the question of access would be irrelevant.
12. THAT I am fully willing and able to care for the minor child and take all decisions relating to his upbringing, and should like to be in a position to do this with the child's future step-father and without interference from applicant."

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The applicant did not file an answering affidavit.

Mr *Bisset*, who appeared for the applicant, submitted that the law was not clear on whether the father of an illegitimate minor child had an inherent right of access to the child. He cited a number of cases where access was granted to such natural fathers but admitted that no clear principles emerged from the cases. In the end he was inclined to agree with Mr Esat who appeared for the respondent that the correct view was that natural fathers do not have inherent rights to access to their illegitimate minor children. Mr *Bisset* further submitted that even if such fathers are held not to have inherent rights of access the court can intervene to grant them access in the interests of the children concerned.

The law on the above points is stated in Boberg's *The Law of Persons and the Family*, pp 333 to 346:

"The legal position of an illegitimate child is founded upon the philosophy that '*een moeder maakt geen bastaard*', ie as far as the mother is concerned, the law does not regard the child as illegitimate; his disabilities relate to his rights *vis-à-vis* his father and third parties."

The philosophy is reflected in what follows:

"Whereas the parental power over a legitimate child rests in his father, in the case of an illegitimate child it is his mother who, unless she is herself a minor has the right of guardianship and custody over him and whose surname and domicile he assumes. The father's only right over the child is one of reasonable access. Where it is in the child's interests, however, the court may deprive the mother of guardianship or custody, transferring these rights to the father, or even conferring them on a third party."

See also Spiro's *The Law of Parent and Child*, 3rd ed pp 425 to 426:

"It was pointed out that the natural father is not possessed of the parental power and is not the guardian of the minor illegitimate child. But this principle does not conclude the inquiry into the question whether he is a complete stranger in relation to the illegitimate child.

First of all, as will be more fully shown later, the natural father is subject to the duty, though jointly with the mother, to maintain the illegitimate child. This duty has been said to be based on paternity. In *Wilson v Eli*

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1914 WR 34, a natural father was granted the right of access to an illegitimate child 'especially as it was his duty to supply maintenance'. If the learned Judge meant thereby to refer to a rule of law, he went, with respect, too far. But the maintenance duty is a factor which cannot wholly be ignored.

It is against this background that the question must be approached whether the natural father may apply for access or even custody. Some of the cases deal with the *locus standi* (*in judicio*) or otherwise of the natural father. But this is, with respect, not the real question. The natural father has clearly *locus standi in judicio* if he is the respondent or if he has a right to apply for access or custody. **In these matters there is, it is considered, only one question, viz., what is best in the interests of the minor illegitimate child? If it is in the interests of the minor illegitimate child that the natural father should have access, such access should be granted to him.** If the interests of the minor illegitimate child so demand, custody, if not even guardianship may be awarded to the natural father" (emphasis added).

A brief discussion of some cases where access and custody of minor illegitimate children was granted would be useful on this point. In *Wilson v Eli*, *supra*, the applicant who was the mother of a minor illegitimate child applied for an order that the respondent, the natural father, forthwith deliver up and return her the child. The learned Judge said that the applicant was the rightful custodian and guardian of the child and therefore ordered the return of the child to her. He however also ordered that in the circumstances of the case the father was entitled to have access to the child "especially as it was his duty to pay maintenance". While I agree with Spiro's above quoted views on this case I however consider that the learned Judge's statement and decision must be considered within the context of this case. The parties had prior to the case lived together as man and wife for a long time (they had been married under Moslem rites but this marriage was not legal under South African law) and in the circumstances it was in the interests of the child to continue some kind of relationship with the father. In addition after the respondent had alleged that the child had "voluntarily come to him in rags and tatters" it was, in my view, in the interests of the child for the person to whom the child went for support and who paid maintenance to have access to the child if only so that he could ascertain that the maintenance he paid was properly used. The case did not therefore grant an inherent right of access but access in the interests of the child.

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In *Davids v Davids* 1914 WR 142 custody of a minor illegitimate child was granted to a natural father while the mother was granted access. The parties' marriage has been in accordance with Malay rites and therefore not recognised under South African law. The court made the order in this case after being satisfied that it was in the best interests of the child to give custody after having deprived her of this, it was in my view natural that access had to be granted to her.

In *Matthews v Haswari* 1937 WLD 110 while custody of a minor illegitimate child was confirmed to rest with the mother reasonable access was granted to the natural father. Although the law on access was not discussed in the case I consider that again this decision must be looked at within the context of the circumstances found in the case. The parties had also lived together as man and wife together with the child who must have formed a parental relationship with the father. In the circumstances, it was, in my view, in the interests of the child to continue some form of relationship between them by granting access to the father. The learned Judge indicated

that in the final decision the interest of the child would be crucial.

In *Docrat v Bhayat* 1932 TPD 125, it was held that the father of a minor illegitimate child cannot claim custody of the child "as of right" after the mother's death. In this case the child was a product of a Moslem marriage which, as already stated above, was not recognised under South African law. There was nothing in the application to show that the child was not being properly cared for or would not be properly cared for by the respondent and his wife who were respectively the husband of the child's aunt and the sister of the child's mother. Although this case was concerned only with custody, it is very relevant because access is part of and, in fact, an encroachment upon, or a diminution of custodial rights. The point therefore to take note of in this case is that the court will only intervene to interfere with the custodial rights which include access in the interests of the child.

From the above, my conclusion is that there is no inherent right of access or custody for a father of a minor illegitimate child but the father, in the same way as the third parties, has a right to claim and will be granted these if he can satisfy the court that it is in the best interests of the child. The onus is on the applicant, in this case the father, to satisfy the court on the matter and usually the court will not intervene unless there is some very strong ground compelling it to do so. The standard usually applied by the court is that used before interfering with the custodial rights of a father or a legitimate child although in a case like the present one the fact that the applicant is paying

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maintenance for the child will also in my view be taken into account. See *Calitz v Calitz* 1939 AD 56 at p64 where TINDALL JA said:

"Where, however (as in the present case), it is not exercising such a power, the Court in Scotland cannot deprive the father of the custody except upon special grounds. In *Nicholson v Nicholson* 6 Sc.L.R. 692 a case where the Court ordered an infant to be returned to the father - the common law was thus stated: **'The legal right to the custody of a lawful child is in the father. But that right is not absolute, it is not beyond the control of the law. It is within the power of the Court to mitigate the severity of the general rule by interfering in exceptional cases. The exceptions must be few and must rest on clear grounds and the grounds must be found in consideration of danger to the life, health or morals of the child. When the interests of the child in regard to life, health or morals have required it, the Court has refused to permit the father to retain custody. This has been done in Scotland in the exercise of *nobile officium* of this Court'** I presume that power correspond with the powers of the Supreme Court in South Africa as the upper guardian of minors" emphasis added).

In view of the above the applicant in this case can therefore only succeed if he satisfies this court that it is in the best interests of the child that the court interferes with the custodial rights of the respondent and grant reasonable access to him. In this connection the applicant avers:

"It is obviously in the interests of the child that he should know who his father is, and become acquainted with his father."

This and the fact that the applicant has paid and is willing to pay some maintenance for the child are the only matters placed before the court for consideration in support of the application. Mr *Bisset* could neither elaborate nor, indeed, add to these during his submissions. There are no

allegations suggesting or implying that the respondent is not capable of, or has not looked after, the child properly necessitating a periodical check by the applicant. There is no allegation or suggestion that the maintenance the applicant has paid so far had been, or in the future will be, misused. There is no allegation that the child, who has been seen by the applicant on three separate occasions since birth, was other than happy and well in the respondent's care and custody. Nothing untoward has been said about the respondent's character and the environment under which the child is being brought up. It is, more

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importantly, not explained in which way it is in the interests of the child that it should know and be acquainted with its natural father. Mr *Bisset's* submission on this point in my view amounted to saying that any child needed a father. This may be correct, but there are some kinds of father children are better without. In my view, the application has not gone beyond saying that the applicant wants access because he is a natural father and because he pays maintenance. This, in my view, is the same as applying for access as of right on the ground of an inherent right of access which, as I have stated above, is non-existent in the case of a natural father.

Against the above the respondent's reply is that it is not in the interests of the child for it to get to know and become acquainted with its natural father because this might jeopardise her future efforts to get the child adopted. There is no reply to this from the applicant and he does not offer to adopt the child himself. The respondent also alleges that the applicant has been difficult in connection with the payment of the agreed maintenance instalments and this has not been denied. There is also an allegation of seduction against the applicant which has not been denied. The applicant has also not made or offered to make amends on this. In this connection the respondent rightly, in my view, implies that as custodian and guardian of the child her discretion in deciding whether the child should or should not associate with an unrepentant seducer should remain unfettered. Lastly the respondent in a wise and open-minded use of her discretion has, on three separate occasions taken the child to the applicants home. This, in my view shows that the respondent's actions and attitude are in the interests of the child. There is therefore, in my view, no reason for the court to interfere with the respondent's custodial rights which are so wisely being exercised.

In the circumstances I agree with the conclusion arrived at by Mr *Esat* in his most helpful and well-researched heads of argument that the applicant has failed to satisfy the court that there is some ground, let alone strong ground, in the interests of the child requiring the court to interfere in any way with the full custodial rights of the respondent. The application therefore fails.

The next matter I have to decide is the amount of maintenance to be paid by the applicant. Mr *Esat* submitted that the court should enforce the applicant's agreement to pay maintenance at the rate of \$100 per month and argued that the agreement is a binding contract between the parties. Mr *Bisset*, on the other hand, while not denying that the applicant had agreed to pay the amount mentioned, submitted that the applicant cannot afford to pay the amount in question, but could only afford \$75 per month. He also submitted that as both

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parties were working and the respondent was receiving a salary which was about \$100 less than that of the applicant per month, applicant's contribution should be re-assessed taking into account what the respondent should also contribute. He argued that in maintenance matters the means of both parties and the needs of the child should be looked at. He further argued the child was still only a small baby and that it needed no more than \$75 per month to support it.

As there was no denial in connection with the existence of an agreement by the applicant to pay \$100 per month I have no option but to hold that the agreement exists. However, an agreement to pay maintenance, in my view, is different from other agreements mainly because unlike other agreements parties to it can go to court and have it reviewed or varied without the agreement of the other parties if their circumstances or the circumstances under which it was made change. This is because maintenance payments depend on the ability of the person liable to pay to afford it and the needs of the child in question. These could change from time to time. In view of this there is no reason why, in my view, this court cannot look at this agreement in the light of the evidence presented by the applicant.

From what has been said for both parties on this point I have come to the conclusion that an amount of \$75 per month would be reasonable in the circumstances. This amount is to be payable by the applicant as from 1 April 1986. The amount payable by or recoverable from the applicant for the period 1 November 1985 to 31 March 1986, is at the rate of \$100 per month. I have not made the new amount payable retrospective because I regard it as a variation on an amount which was already payable and no argument has been advanced on behalf of the applicant to make it retrospective.

Lastly, there remains the question of costs. Mr *Bisset* after dropping the applicant's claim to costs urged the court to order that each party should pay its own costs. He argued that it was usual in matters where the welfare of children were involved for parties to bear their own costs. Mr *Esat* on the other hand, argued the rule that costs should follow the result should apply in this case. Although a decision by the court to grant access to the applicant would have affected the welfare of the child, I do not consider that these proceedings were commenced by the applicant after being genuinely concerned about the welfare of the child. Nothing in the application points to this. In my view, the applicant's intention was primarily to assert what he thought was his right of access to the child. This removes the application from the category in which Mr *Bisset* sought to place it.

MUCHECHETERE J

For the reasons given above I make the following order:

1. That the application be and is hereby dismissed.
2. That the applicant be and is hereby ordered to pay maintenance for the minor illegitimate child LM at the rate of \$100 per month in advance on the first day of every month with effect

from 1 November 1985 to 31 March 1986, and thereafter at the rate of \$75 per month.

3. That the costs of this application be borne by the applicant.

Webb, Low & Barry, applicant's legal practitioners

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners

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S v VAMBE 1986 (1) ZLR 168 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

29 May 1986

Flynote

Criminal law - fraud - tendering in payment of civil debt a cheque which is dishonoured - complainant not altering position for the worse - theft - pre-paid contract - use for own purpose of money paid as purchase price of goods not delivered - not theft by conversion.

Headnote

A person who pays to his creditor in respect of the debt a cheque which is dishonoured generally does not commit a fraud since the creditor is generally not induced thereby to act to his prejudice, the civil debt remains.

A person who receives money from another as the purchase price of goods which he undertakes but fails to obtain and deliver does not commit theft in respect of the money even though he converts it to his own use.

Cases cited:

R v Stewart 1920 SR 55

R v Lipschitz 1938 (2) PH H234 (T)

Goddefroy v R 1945 NPD 451

S v Ellis 1969 (2) SA 622 N *S v Matlare* 1965 (3) SA 326 CPD

R v Gebhard 1947 (2) SA 121O (GWLD)

S v John 1971 (2) PH H125

R v Harlen 1964 (4) SA 44 (SR)

R v Takumira 1958 R&N 187 (HC)

SM Taylor for the appellant

D Drury for the respondent

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DUMBUTSHENA CJ

Judgment

Dumbutshena CJ: The appellant was charged with three counts of fraud and three counts of theft by conversion. He denied all charges. He was found guilty on one count of fraud and on all the three counts of theft by conversion. He was sentenced to 4 years' imprisonment with labour. He now appeals against conviction.

Mr *Drury* for the respondent, gave notice in terms of s 9A of the Supreme Court of Zimbabwe Act No. 28 of 1981, that the State did not support the convictions on all the four counts. Section 9A reads:

"9A. When an appeal against conviction in a criminal case, other than an appeal from the judgment of the High Court, has been noted to the Supreme Court, the Attorney-General may, at any time before the hearing of the appeal, give notice to the registrar of the Supreme Court that he does not for reasons stated by him support the conviction, whereupon a judge of the Supreme Court in chambers may allow the appeal and quash the conviction without hearing argument from the parties or their legal representatives and without their appearing before him."

We heard the appeal. It should be noted that while the Attorney-General may decide not to support the conviction and gives his reasons for not doing so, it is up to the judge of the Supreme Court to allow the appeal and quash the conviction without hearing argument. If, however, for some reason or other he does not agree with the reasons for not supporting the conviction, he may ask the legal representatives of the parties to appear before him and argue the appeal or he may order that the appeal be heard by the Full Bench.

This is, however, a different case because the court is in total agreement with counsel. Both counsel are agreed that the convictions cannot be supported.

One of the counts on which the appellant was convicted was count 2 on which he was found guilty of fraud because he had agreed to buy a tractor, a trailer and a plough for Chibaya at a price of \$8 000,00. Chibaya, the complainant, paid a deposit of \$2 500,00. At one stage the appellant showed the complainant a tractor without a trailer and a plough. When the complainant visited the appellant on a subsequent occasion the tractor was no longer there. In the end the complainant kept on pestering the appellant. The appellant decided to put him off by paying back the money. He drew two postdated cheques in favour of the complainant on a local bank. One was due for presentation for payment on 24 December 1981 and the other on 31

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December 1981. The cheques were presented on the relevant dates but were dishonoured.

Mr *Drury* submitted in his Notice that the conviction could not stand in view of the fact that the issuing of the cheques did not alter the position between the complainant and the appellant. The appellant was still indebted to the complainant "by virtue of the existing civil debt which arose once there had been a failure to perform on the contract." There was, therefore, no prejudice suffered by the complainant. Mr *Drury* relied in support of his submission on *R v Stewart* 1920 SR 55; *R v Lipschitz* 1938 (2) PH H234 (T); *Goddefroy v R* 1945 NPD 451; *S v Ellis* 1969 (2) SA 622 (N). In *S v Ellis*, *supra*, a review judgment, MILLER J said at 623D-E:

"The cheque which the accused handed to the complainant was for arrear rental which he owed her. He did not induce or intend or attempt to induce her to act to her prejudice nor did she in fact alter her position for the worse or suffer any loss or prejudice as a result of his handing her the cheque. The debt in respect of which the cheque was given was a pre-existing debt for which she had and still has a claim against the accused and she was in no better or worse position after the accused had handed her the cheque than she was before he handed it to her. The magistrate referred to *R v Lipschitz* 1938 PH H234, and I agree that that decision is in point and supports his conclusion that the offence of which the accused pleaded guilty was not shown to have been committed at all."

That is the position in this case. In *Goddefroy v R*, *supra*, BROOME J referred to *R v Stewart*, *supra*, at 455 and said:

"A case very nearly on all fours with the present case is *Rex v Stewart* 1920 SR 55, where the accused gave worthless cheques in settlement of an existing indebtedness for hotel accommodation. The conviction for fraud was quashed on the ground that the false statement by the cheque had not been made for the purpose of being acted upon to the prejudice of the representee, as the prejudice or detriment had already been incurred prior to the representation. This is directly in point, though I would have preferred to say that the only prejudice suffered by the representee was not the result of the false representation."

Counts 4, 5 and 6 relate to theft by conversion. For purposes of this judgment it is not necessary to repeat the full facts. Suffice it to say that in count 4 the appellant received \$2 500 from the complainant as a deposit for the pur-

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chased of a tractor. He did not buy the tractor. He issued the complainant with a receipt. He then converted the money to his own use. The complainant demanded the return of his money. The appellant gave him a cheque for \$2500 postdated to 13 December 1981. When the complainant presented the cheque to the bank it was dishonoured.

In the fifth count the complainant Maibva deposited with the appellant the sum of \$1 000 for buying a grinding mill from the General Business Organisation Limited. The complainant was issued with receipts. The appellant did not buy the grinding mill.

In the sixth count the appellant is alleged to have received from the complainant, Mangoto, the sum of \$1 700. Mangoto wanted the appellant to buy him a grinding mill. The appellant did not buy the grinding mill but converted the money to his own use.

The appellant denied in counts 4, 5 and 6 receiving money in his personal capacity. He said he received it in his capacity as general manager of General Business Organisation (Pvt) Limited or Business Sales and Property Consultants (Pvt) Limited. Mr *Taylor* for the appellant, stated in

his heads of argument that in each of the three counts "the contract was a simple sale and the complainant made a pre-payment for goods which had yet to be specifically identified and which were, at the time of the pre-payment, probably not in the possession of the complainant." It was submitted in the heads of argument that there was no expressed requirement that the pre-payment was to be held in trust by the appellant, to be applied solely for the benefit of the individual complainant in each case. The appellant was selling goods and was not the complainant's agent for the purchase of those goods. The money paid as a deposit was put in a "general fund" which was available to the appellant. In a situation like that there was no duty for the appellant to account to the complainant for the use of their money.

Counsel are agreed that the purpose for which the money was paid was the reduction of the purchase prices for the individual goods the complainants wished to buy and which were to be supplied by the appellant. The money which was paid by the complainants was received by the appellant for his own use. If a person receives money for buying goods for someone and does not buy them but converts the money to his own use he does not necessarily commit theft. See *S v Matlare* 1965 (3) SA 326 (CPD) at 327G; *R v Gebhard* 1947 (2) SA 1210 where the headnote reads:

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"A person does not commit the crime of theft if he obtains money from another as the purchase price of goods which he undertakes to deliver to that other and neither delivers the goods nor returns the money paid but converts it to his own use.

A was charged with two counts of theft by conversion in the following circumstances: (1) B hearing from A that he was able to buy cattle cheaply paid a sum of £200 into A's bank account. Thereafter B instructed A to buy 100 cattle at £2 a head, and to rail the cattle to him by a certain date. B admitted that A had a discretion; he could for instance have paid £3 10s 0d per head. A had to advance the railage and was to be paid a remuneration to be fixed later when accounts between them were settled. B neither delivered the cattle nor returned the money. His bank account, in which there was a credit balance of £300 before the £200 was deposited, was subsequently closed with a credit balance of £8. (2) A sold 35 head of cattle on B's behalf for £210 and received the proceeds. B instructed him to buy and deliver to B by a certain date a further 36 head with part of the proceeds, and to keep the balance for his trouble. He neither delivered the cattle nor accounted to B for any part of the £210.

Held, that B had merely a civil claim against A; he was not guilty of the crime of theft."

It must be noted that this case is concerned specifically with theft by conversion. It appears to be settled law that where one is dealing with what Hunt calls "prepaid contracts" a charge of theft by conversion will usually fail. Of course, if the State can prove a fraudulent misrepresentation as to the accused's state of mind which induced the complainant to part with his money, then the accused might be guilty of fraud or theft by false pretences. See *South African Criminal Law and Procedure* vol II 2 ed at 631 and especially at 637- 8; *S v John* 1971 (2) PH H125; *R v Harlen* 1964 (4) SA 44 (SR); *R v Takumira* 1958 R&N 187.

Similarly, if the State can prove that the money was "trust money" ie money given to an agent with instructions to devote it to a specific purpose, then the use of that money for some other purpose without the retention of an equivalent liquid fund may well constitute theft. See Hunt *op cit* at 639 and the cases there cited at note 355.

The evidence that the three counts of theft by conversion on which the

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appellant was convicted shows that the appellant was in breach of the contracts he entered into with the three complainants. The contracts fell into the category of prepaid contracts. There was not sufficient evidence to establish any fraudulent state of mind. He merely failed to deliver the goods he was to buy for them. The complainant's remedy lies, for what it is worth, in the civil courts.

For these reasons we allow the appeal against the convictions and set aside the convictions and sentences.

Gubbay JA: I agree.

McNally JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

1986 (1) ZLR p174

AUSTIN & HARPER v MINISTER OF STATE (SECURITY) & COMMISSIONER OF ZIMBABWE REPUBLIC POLICE 1986 (1) ZLR 174 (HC)

Court **High Court, Harare**

Sandura JP

Civil application

16 & 30 May 1986

Flynote

Constitutional laws - Emergency Powers (Maintenance of Law and Order) Regulations, 1983 - detention in terms of s 21 of said Regulations - onus of establishing lawful detention rests on State - "reason to believe" grounds exist for detention of persons - objective test to be applied.

Human rights - right to liberty - imprisonment without trial

Headnote

The onus of establishing that persons are lawfully detained rests upon the State. To discharge this onus the State must satisfy the court that the arresting officer had reason to believe that grounds justifying detention in terms of s 17(1) of the Regulations existed and the State must establish that objectively determined grounds which justify such detention exist. The words "reason to believe" require an objective test and it is for the court to decide on objective standards whether or not a belief held by an officer was reasonable.

Cases cited:

Bull v The Attorney General & Anor 1986 (1) ZLR 117 (SC)

Sigaba v Minister of Defence and Police & Anor 1980 (3) SA 535 (Tk)

Katofa v Administrator General for SWA & Anor 1985 (4) SA 211 (SWA) *Hurley & Anor v Minister of Law and Order & Anor* 1985 (4) SA 709 (D)

I A Donovan for the applicants

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S Mafara for the respondents

Judgment

Sandura JP: This matter came before me as an urgent application for an order declaring that the detention of the two applicants is unlawful and that they should, therefore, be released forthwith. The matter has had a long history which was accurately summarized by BECK JA in *Bull v Attorney General and Director of Prisons* 1986 (1) ZLR 117 (SC). For the purpose of determining the present application, however, I do not consider it necessary to give a detailed account of that history. It suffices to state that the two men were first arrested by members of the Central Intelligence Organisation on 22 February 1986 and released pursuant to an order of this court because the reasons for their detention which had been supplied were considered inadequate. However, they were immediately re-arrested, it being alleged that there were new grounds for their detention. Before those new grounds were supplied to the applicants, the two men were brought before a magistrate and were remanded in custody on a charge of contravening a section of the Official Secrets Act. They were no longer being detained in terms of the Emergency Powers Regulations. Subsequently, they successfully challenged the legality of depriving them of their personal liberty on the ground that there was no reasonable suspicion that they had committed a criminal offence and the Supreme Court ordered their release. However, more than five weeks later they were re-arrested and detained in terms of s. 21(1) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983. This is the detention which the applicants are challenging in the present application.

Section 21(1) of the Emergency Powers (Maintenance of Law and Order) Regulations, (SI 458 of 1983) reads as follows:

"21. (1) Subject to the provisions of section 41, any police officer may without warrant, arrest and detain, pending inquiries, any person in respect of whom he has reason to believe there are grounds which would justify his detention under section 17."

Section 17(1) of the same Regulations reads as follows:

"17. (1) Subject to the provisions of section 41, if it appears to the Minister that it is expedient in the interests of public safety or public order that -

(a) any person, whether he is a resident of Zimbabwe or otherwise, and, in the case of a person who is not a

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irrespective of the circumstances in which he has entered Zimbabwe or been apprehended; or

(b) ...;

should be detained, he may, by order under his hand, direct that such person ...be detained ..."

The reasons or grounds for the detention which were furnished to each of the applicants in terms of s 21(3) of the Regulations are the same. They are as follows:

- "1. It has come to Government notice that you have been engaged in espionage activities which have been detrimental to the security of the Republic of Zimbabwe. You began your nefarious activities soon after our independence and used to drive vehicles to South Africa after they had been impounded by the Department of Customs and Excise. Whilst in South Africa you received remuneration in the form of commissions and benefits in the form of hotel accommodation which were all paid for by an insurance company under a suspect arrangement. This was done in violation of your allegiance to Zimbabwe and contrary to the regulations of the Department of Customs.
2. Unknown to us at the time when you seemed to have stopped your nefarious activities, you were deeply involved in supplying information to South Africa of a security and military nature. You would gather intelligence relating to Zimbabwe's military hardware as well as that which travelled through Zimbabwe to neighbouring independent States from eastern block countries and supply all this to South Africa.
3. You were also tasked by your South African masters to gather information relating to certain military and economic targets.
4. When South Africa threatened to invade us, you were furthermore tasked to gather intelligence on the personnel offices and residences of South African Liberation Organisations stationed in Zimbabwe. In fact you did gather intelligence in respect of offices and residences of these Liberation movements and sent it to South Africa."

Mr *Donovan* who appeared for the applicants submitted, and I did not understand Mr *Mafara* who appeared for the respondents to disagree with the submission, that the *onus* of establishing that the applicants were lawfully

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detained rests upon the respondents. In fact this is clear from the judgment of Rose Innes J in *Sigaba v Minister of Defence and Police & Anor* 1980 (3) SA 535. The learned judge had this to say at page 547A-B:

"The decisive question is whether, having regard to the onus of proof being upon respondents to justify the arrest and detention, it has been established upon a preponderance of probabilities that Major Tyelela, at whose instance Sigaba was arrested and detained, had reason to believe that Sigaba had committed an offence under Act 30 of 1977 at the time that he was arrested and detained."

Mr *Donovan* further submitted that in order to discharge the onus of proof which rests upon

them the respondents must satisfy the court on two issues. Firstly, they must satisfy the court that the police officer who arrested and detained the two men had reason to believe that grounds which would justify their detention under s 17(1) of the Regulations existed. Secondly, they must establish that, objectively determined, grounds which would justify such detention exist. Again, I did not understand Mr *Mafara* to disagree with Mr *Donovan's* submissions in this regard. I propose to deal with the two issues separately.

The first issue which I must determine is whether the police officer who arrested and detained the applicants had reason to believe that there were grounds which would justify the detention of the applicants in terms of s 17(1) of the Regulations. In this regard, Mr *Donovan* drew the court's attention to the fact that the police officer who arrested and detained the applicants did not sign the Notice of Reasons for Detention which was served upon each applicant. Upon perusal, it is clear that that Notice bears the signature, rank and force number of the police officer who served the Notice upon the applicants but does not bear the signature, rank and force number of the officer who detained the two men. Dealing with this omission Mr *Mafara* assured the court, and Mr *Donovan* did not challenge this, that the officer who served the Notice upon the applicants is the person who arrested and detained them and should have signed his name twice. In the circumstances, I accept that this was a technical omission on the part of the police officer and shall not attach any weight to it. In my view, it does not in any way invalidate the detention.

Mr *Donovan* further submitted that as the police officer who detained the applicants had not filed any affidavit alleging that he had reason to believe that there were grounds which would justify the detention of the applicants,

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the respondents have not furnished any evidence to establish that the said police officer had reason to believe that such grounds exist. It is true, of course, that no affidavit was filed on behalf of the police officer who arrested and detained the applicants. However, in the Notice of Reasons for Detention which was served upon each applicant, copies of which are before me, the detaining police officer makes it quite clear that he has reason to believe that such grounds exist and sets out those grounds. In that Notice he states as follows:

"You are hereby notified that you are being detained, pending inquiries in terms of section 21 of the Emergency Powers (Maintenance of Law and Order) Regulations, Statutory Instrument 458, 1983, because I have reason to believe there are grounds which would justify your detention under section 17 of the same regulations. Those grounds are as follows: See attached."

Attached to the notice is a document specifying the four grounds upon which the detention is based. Whilst I agree that it would have been more appropriate for the police officer who arrested and detained the applicants to file an affidavit confirming his belief that there are grounds which would justify the detention of the applicants, I do not think that the validity of the detention should be determined by whether or not the police officer filed an affidavit confirming what he has already told the applicants. Nothing has happened since the arrest and detention of the applicants to suggest or indicate that the police officer has changed his mind. Had the police officer changed his mind I would have expected him to withdraw the detention orders and

release the applicants. This he has not done. The truth of the matter, therefore, appears to be that the said police officer still maintains that he has reason to believe that there are grounds justifying the detention and this application must be determined on that basis. I am fortified in this conclusion by the fact that the first respondent, the Minister of State (Security), in his replying affidavit, avers as follows in para 5(b):

"During the five week period when the Applicants were free, I have verified the information contained in the Detention order and I am satisfied that the allegations are true and that the Applicants pose a Threat to the State and the only way to protect State security is to detain the Applicants in terms of Section 17 of the Emergency Powers (Maintenance of Law and Order) Regulations SI 458 of 1983 which orders will be served on them shortly."

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I must now determine whether the police officer who arrested and detained the applicants had reason to believe that grounds for detaining the two men existed. The words "reason to believe" have been the subject of discussion in a number of cases. In *Sigaba v Minister of Defence and Police & Anor, supra*, ROSE INNES J considered at length the meaning of these words and had this to say at page 542G-H:

"...the words 'if he has reason to believe' in s 47 do not in my opinion mean 'if in his opinion he has reason to believe', nor 'if he is satisfied that he has reason to believe', and they certainly do not mean 'if he states that he has reason to believe'."

Further on in his judgment the learned judge continued at page 544D-H as follows:

"The words in section 47 'if he has reason to believe that any person has committed an offence under this Act', carry the premise that the belief must be a reasonable belief. The commissioned officer must have an honest belief that the person to be detained has committed an offence under the Act and, in addition, there must be reason for that belief, that is to say, he must have information such as would lead a reasonable man to believe that the suspect had committed an offence under the Act. 'Reason to believe' means to believe rationally as a reasonable man would upon the information which he has. It is not sufficient for the officer to say 'I had reason to believe that the person whom I arrested and detained had committed an offence under the Act,' because the criterion is not a subjective - but an objective one... He does not discharge any onus which there may be upon him to bring the arrest and detention within the authorisation given by s 47 by testifying that according to his lights and his opinion he had reason to believe that an offence under the Act had been committed. It is for the court to decide on objective standards whether or not it was reasonable upon the information which the officer had at the time for him to believe that the person arrested or detained had committed an offence under the Act."

Similar views were expressed in *Katofa v Administrator - General for SWA & Anor* 1985 (4) SA 211 and *Hurley & Anor v Minister of Law and Order & Anor* 1985 (4) SA 709. I agree with those views, and the test laid down by ROSE INNES J is the test which I shall apply in this case in order to determine whether the police officer who arrested and detained the applicants had reason to believe that grounds for the detention of the applicants existed.

1986 (1) ZLR p180

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In order to determine that issue the court must look at the information which the police officer had and consider whether or not it was reasonable upon that information for him to believe that

there were grounds which would justify the detention of the applicants in terms of s 17(1) of the Emergency Powers Regulations. The information which the police officer had at the relevant time is to be found in the grounds for detention which were furnished to the applicants. That information is as follows:

1. That the applicants have been engaged in espionage activities which have been detrimental to the security of Zimbabwe.
2. That the applicants have been deeply involved in supplying to South Africa information of a security and military nature; that they gathered intelligence relating to Zimbabwe's military hardware and the military hardware which passed through Zimbabwe on its way from Eastern Block countries to a neighbouring independent state and supplied this information to South Africa.
3. That the applicants were tasked by their South African masters to gather information relating to certain military and economic targets.
4. That the applicants were tasked to gather intelligence on the personnel, offices and residences of South African Liberation Organisations stationed in Zimbabwe; and that they gathered intelligence in respect of offices and residences of these liberation movements and sent it to South Africa.

The question which arises for consideration is whether this information is such as would lead a reasonable man to believe that there are grounds which would justify the detention of the applicants in terms of s 17(1) of the Regulations. As already indicated, s 17(1) of the Regulations empowers the Minister to detain any person if it appears to him that it is expedient in the interests of public safety or public order that such person should be detained. Would the Minister be justified, on the basis of the information summarized above, in detaining the applicants? In other words, would it appear to the Minister, upon receipt of this information, that it is expedient in the interests of public safety or public order that the applicants should be detained? I think it would and the Minister would be perfectly justified in detaining the applicants on the basis of this information. In my view the information is such as would lead a reasonable man to believe that there are grounds which would justify the detention of the applicants in terms of s 17(1) of the

1986 (1) ZLR p181

SANDURA JP

Regulations. In the circumstances, I have come to the conclusion that it was reasonable, upon the information which the police officer who arrested and detained the applicants had at the time, for him to believe that there were grounds which would justify the detention of the applicants under s 17 of the Regulations. He, therefore, had reason to believe that the grounds referred to in s 21(1) of the Regulations existed.

I now come to the second issue which I must deal with in this application. Mr *Donovan* submitted that even if I came to the conclusion that the police officer who arrested and detained the applicants had reason to believe that grounds which would justify their detention under s 17 of the Regulations existed, I have to determine objectively whether grounds which would justify

such detention exist. In this regard, he submitted that the court requires information to be placed before it in order to determine that issue and that as no such information has been furnished by the respondents the court cannot determine whether grounds for the detention of the applicants exist and should therefore, order their release from detention. Whilst I agree that in order to determine that issue the court requires certain information to substantiate the allegation that grounds for the detention of the applicants exist, I do not agree that such information is not before me. I have already stated that the information upon which the police officer acted is to be found in the grounds for detention which were furnished to the applicants. As already stated, in my view that information is such as would lead a reasonable man to believe that there are grounds which would justify the detention of the applicants in terms of s 17(1) of the Regulations. In the circumstances, I am satisfied that, on the basis of the information which the police officer had, which is before me, grounds which would justify the detention of the applicants in terms of s 17(1) of the Regulations exist.

Although Mr *Donovan* did not argue that the grounds for detention were not sufficiently detailed, he informed the court that he reserved his position in this regard. However, he asked the court for leave to apply for a mandamus on the same papers in the event that the present application is dismissed and he is instructed to do so. As I cannot see any reason for not granting that leave, it is hereby granted.

In the circumstances, the application is dismissed with costs.

Atherstone & Cook, applicants' legal practitioners

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

1986 (1) ZLR p182

MONCKTON v ATTORNEY GENERAL OF ZIMBABWE & CHIEF MAGISTRATE OF ZIMBABWE 1986 (1) ZLR 182 (HC)

Court High Court, Harare

Sandura JP

Criminal application

15 May & 4 June 1986

Flynote

Practice and procedure - application to court - "criminal case or matter" - definition of for purposes of determining whether an award of costs is competent.

Headnote

The applicant had initially brought an application the effect of which had it succeeded would have been to force the first respondent to commence a criminal trial against the applicant on several charges. At the hearing it was sought to withdraw the application as all charges bar one

against the applicant had been withdrawn. The remaining charge was in respect of an offence to which the applicant was prepared to plead guilty. It was contended that as the application did not relate to a "criminal case or matter" it was competent for the court to make an order awarding costs to the applicant.

Held, that although some of the charges against the applicant were withdrawn the relief sought would have as its direct outcome the trial of the applicant and his possible punishment and the application was therefore a criminal case or matter.

Held, further, that the instant application could be distinguished from a habeas corpus application as the direct outcome of such an application is either the release of the detainee or his continued detention.

Cases cited:

Paweni & Anor v Acting Attorney-General 1985 (3) SA 720 (ZSC)

Re Clifford & O' Sullivan (1921) 2 AC 570

1986 (1) ZLR p183

SANDURA JP

Bull v Attorney-General & Anor 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS)

AP de Bourbon SC for the applicant

S Ahmed for the respondents

Judgment

Sandura JP: When this matter came up for hearing Mr *de Bourbon* who appeared for the applicant informed the court that the applicant was not persisting with the application and was applying for leave to withdraw it as its purpose had fallen away. He informed the court, however, that as the respondents had not tendered the applicant's costs in the matter it was necessary to seek the court's order regarding the applicant's costs. Because I have to determine whether or not an order for costs is competent in a case such as this it is, I think, necessary to set out the order which the applicant originally sought. It is as follows:

"IT IS ORDERED:

1. THAT the first respondent furnish to the applicant's legal practitioners, Messrs Coghlan Welsh & Guest, the charges to be brought against the applicant, together with a summary of the prosecution case against the applicant not later than seven (7) days after the date of this Order.
2. THAT the first respondent and the second respondent take all reasonable steps to ensure that the applicant be brought to trial immediately on the matter or matters for which he has been held on remand since 15 October 1985 and that the trial commence not more than fourteen (14) days from the date of this Order.
3. THAT the aforesaid trial be continued until its determination without further adjournment or remand unless the applicant or his legal practitioners agree thereto or request such adjournment.

4. THAT in the event of the respondents failing to comply with the provisions of either of the first two paragraphs of this Order the applicant shall forthwith be released from remand and shall be entitled to the refund of his bail, the return of his travel documents and the cancellation of the requirement that he report to the police.
5. THAT the respondents pay the cost of this application."

It is clear from this order that the applicant's complaints were that the charges to be brought against him had not yet been formulated and that his trial upon those charges was taking too long to come up. He, therefore, sought a court

1986 (1) ZLR p184

SANDURA JP

order compelling the first respondent to furnish to his legal practitioners the charges to be brought against him and to commence his trial upon those charges not more than 14 days from the date of that order. However, when the matter came up for hearing Mr *de Bourbon* informed the court that the applicant was not persisting with the application because the first respondent had indicated that he did not intend prosecuting the applicant on any of the charges involved, other than the charge relating to the applicant's possession of foreign currency to which the applicant was prepared to plead guilty. The trial of the applicant on the foreign currency charge will, therefore, take place in due course. This was confirmed by counsel for the respondents.

Miss *Ahmed*, who appeared for the respondents submitted that an order of costs was incompetent because the application related to 'a criminal case or matter'. In this regard, she relied upon the case of *Paweni & Anor v Acting Attorney-General* 1985 (3) SA 720, a decision of the Supreme Court of Zimbabwe. In that case the Supreme Court ruled that an application for the postponement of a criminal trial was 'a criminal case or matter' and that an award of costs was incompetent. Dealing with the test of what is 'a criminal case or matter' Gubbay JA, after referring to what VISCOUNT CAVE said in *Re Clifford and O' Sullivan* (1921) 2 AC 570 at 580, said the following at 722 G-I:

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

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

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

Mr *de Bourbon* submitted that the application and the relief sought by the applicant did not relate to 'a criminal case or matter'. His submission was as follows:

1986 (1) ZLR p185

SANDURA JP

"It is respectfully submitted that the present matter is not a criminal matter, although of course it is concerned indirectly with a criminal matter. It is an application for redress for breach of a basic right under Chapter III of the Constitution of Zimbabwe 1979. As such, it is respectfully submitted that it falls into a special category of cases in which the question of costs is not prohibited by law, and indeed in which the granting of costs where there has been a breach of the fundamental rights there set out is in the public interest."

Later on in his argument Mr *de Bourbon* made the following submission:

"The fallacy in the argument of the respondents is demonstrated when regard is had to applications for *habeas corpus*. These often relate to matters which are technically criminal in nature, in that the applicant for the writ is to be prosecuted. However, in such cases, the applications are dealt with on the normal civil basis and costs follow the result, see for example *Bozzoli v Station Commander, John Vorster Square, Johannesburg* 1972 (3) SA 934 (W) at 943, *Hurley & Anor v Minister of Law and Order & Anor* 1985 (4) SA 709 (D) at 725, *Bull v Minister of Home Affairs* HH-125-86, and *Bull v Attorney-General of Zimbabwe and the Director of Prisons* HH-134-86."

Dealing with Mr *de Bourbon*'s first submission I cannot agree that the application does not relate to 'a criminal case or matter'. The test set out by GUBBAY JA in the *Paweni* case, *supra*, is whether 'the matter is one the direct outcome of which may be the trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so.' In the application under consideration, the applicant sought a court order compelling the first respondent to furnish to his legal practitioners the charges to be brought against him and to commence his trial upon those charges not more than 14 days from the date of that order. Although the respondent has dropped some of the charges which he initially intended to bring against the applicant, the applicant will in due course be put on trial on the foreign currency charge to which he has indicated his readiness to plead guilty. In these circumstances, and applying the test set out by GUBBAY JA, I have no doubt in my mind that the application under consideration relates to 'a criminal case or matter'. I cannot therefore, accept Mr *de Bourbon*'s argument that the application falls into a special category of cases in which an award of costs is competent.

I now wish to deal with Mr *de Bourbon*'s second submission. He compared the application under consideration to *habeas corpus* applications and

1986 (1) ZLR p186

SANDURA JP

submitted that those applications often relate to matters which are technically criminal in nature in that the applicant for the writ is to be prosecuted and yet the applications are dealt with on the normal civil basis in that costs follow the result. In my view, this is certainly not the case where the *habeas corpus* application is brought in order to challenge the legality of the applicant's detention in terms of the Emergency Powers (Maintenance of Law and Order) Regulations. The direct outcome of such an application is not the 'trial of the applicant and his possible punishment for an alleged offence'. The direct outcome is either the release of the detainee or his continued detention. Such applications do not relate to 'a criminal case or matter'. That is why they are dealt with on the normal civil basis and costs follow the result.

Mr *de Bourbon* referred me to a number of cases in support of the submission that *habeas corpus* applications often relate to matters which are technically criminal in nature in that the applicant for the writ is to be prosecuted. These cases, which I have already listed above, are

not of much assistance in determining the issue before me because the question whether an award of costs was competent or not was never argued. However, when one of them went to the Supreme Court of Zimbabwe on appeal that court was of the view that an order of costs was incompetent: *Bull v Attorney-General & Anor* 1986 (1) ZLR 117 (HC); 1986 (3) SA 886.

In the circumstances, the applicant is granted leave to withdraw his application but there will be no order as to costs.

Coghlan, Welsh & Guest, applicant's legal practitioners

Attorney-General, respondent's legal practitioner

1986 (1) ZLR p187

KONA & ORS v ATTORNEY-GENERAL 1986 (1) ZLR 187 (HC)

Court High Court, Harare

Sandura JP

Criminal applicationx

15 May & 4 June 1986

Flynote

Constitutional laws - s 13 (4) of the Constitution of Zimbabwe - what constitutes a "reasonable time" within which a person should be tried.

Human rights - protection of the law.

Headnote

Section 13 (4) of the Constitution of Zimbabwe envisages that a person who is arrested or detained and is held in custody will be brought to trial within a reasonable time. What is a reasonable time greatly depends upon the facts and circumstances of each case.

AP de Bourbon SC for the applicants

S Ahmed for the respondents

Judgment

Sandura JP: This application, which is opposed by the respondent was brought by four men seeking the following order:

- "1. It is declared that a reasonable time has elapsed since the arrest of each of the applicants and that, in consequence, in terms of section 13(4) of the Constitution of Zimbabwe, each of the applicants are (sic) entitled to be released.
2. It is ordered that each of the cases of the applicants be remitted to a magistrate within two days of the date of this order in order to determine the conditions upon which each of the applicants are (sic) to be released from custody.

3. It is ordered that the respondent pay the applicants' costs of suit."

1986 (1) ZLR p188

SANDURA JP

Briefly, the facts of this case are that the four applicants were arrested during the months of July, August and September 1985 and were detained in terms of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983. Subsequently, in January 1986 they were taken to the magistrates court at Harare and remanded in custody upon a charge of contravening s 50(1) of the Law and Order (Maintenance) Act [*Chapter 65*], the allegation being that they conspired with a group of other persons to stage a *coup d'etat* in Zimbabwe. They were remanded in custody because the public prosecutor produced a certificate issued by the Minister of Home Affairs in terms of s 106(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*], barring the granting of bail on the ground that it is likely that public security would be prejudiced if the men were released on bail. The men have now applied for their release on the ground that since they have not yet been tried and a reasonable time within which they should have been tried has already elapsed, they should be released in terms of s. 13(4) of the Constitution of Zimbabwe.

Section 13(4) of the Constitution of Zimbabwe reads as follows:

" 13. (1) to (3) ...

(4) Any person who is arrested or detained -

(a) ...; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

It is the applicants' contention that the reasonable time envisaged by s 13(4) has already elapsed. This is disputed by the respondent.

The question which I must, therefore, determine in this application is whether the reasonable time envisaged by s 13(4) of the Constitution of Zimbabwe has elapsed. If it has elapsed, then the applicants should be released either unconditionally or upon reasonable conditions. If they are released, this will not prevent the respondent from prosecuting them. This is so because the

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SANDURA JP

provisions of s 13(4) were designed to ensure that a person who is arrested or detained upon reasonable suspicion that he has committed a criminal offence and is not tried within a reasonable time shall be at liberty pending his trial.

In my view, what is a reasonable time greatly depends upon the facts and circumstances of each case. In order to determine the issue before me, I must, therefore, examine the facts of the present case and then decide, in the light of those facts and all the relevant circumstances, whether the reasonable time envisaged in s 13(4) of the Constitution of Zimbabwe has elapsed. In his founding affidavit the first applicant avers that he was arrested on 15 August 1985 and has been held for 82 months. The second applicant avers that he was arrested on 31 July 1985 and has been held for 9 months. The third applicant avers that he was arrested on 23 September 1985 and has been held for over 7 months. The fourth applicant avers that he was arrested on 24 September 1985 and has been held for over 7 months.

In his replying affidavit the respondent avers as follows in paragraphs 3-8:

- "3. My Office first becomes involved with a criminal case when the accused person is first brought to court by the Police and placed on remand as it thereafter becomes the function of my Office to ensure that such person is brought to trial as expeditiously as can be expected in the prevailing system of legal administration. The applicants were placed on remand on 27 January 1986.
4. The docket relating to the applicants who are being investigated by the Police along with six other persons, was first submitted to my Office on 14 March 1986, and was dealt with as expeditiously as can be expected in the prevailing system of legal administration.
5. The docket was returned to the Police on 14 April 1986 with instruction that the Police carry out further enquiries into matters which I believed had been inadequately investigated. Such further enquiries I envisage will require no longer than two more weeks after which I will be in a position to consider a trial date.
6. The investigation into the offence the applicants are alleged to have committed has been an involved one which required careful study. A study of the docket revealed that the Investigating Officer and his team devoted almost all their time towards finalising the investigation and encountered numerous difficulties, some of which have been alluded to by the Investigating Officer in his supporting Affidavit.

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SANDURA JP

7. The earliest available date for hearing the matter in the High Court is 7 July. Should investigations be finalised before that date I verily believe we will be in a position to hear the matter.
8. In view of the complexity of the case and the fact that the witnesses were to be located throughout the country I verily believe that the delay in bringing the applicants to trial cannot be regarded as unreasonable."

The Investigating Officer, a Senior Assistant Commissioner of Police, has filed an affidavit in support of the respondent in this application. Paragraphs 3 - 10 of that affidavit read as follows:

- "3. I should mention that this is one of the most serious cases that have been investigated by Police in the history of Zimbabwe.
4. As can be appreciated in a case of this nature a large number of people had to be interviewed at length.

5. I commenced investigations into this case towards the end of September 1985.
6. Since commencing these investigations virtually every day has been spent working on the case in one way or another.
7. The docket of the case was submitted to the Attorney-General's Office on 14 March 1986 but certain leads were and are still being followed up.
8. Considerable difficulties have been experienced throughout the investigations. Some of the difficulties have been:
 - a) the need to interview some members of the Army who were out of the country on duty.
 - b) the need to locate further witnesses who would testify on the likely charges of recruiting that could be brought against some of the accused.
 - c) locating witnesses in various parts of the country and interviewing them.
 - d) an important witness Tembani Bigboy Maphosa, who also faced other charges, escaped from custody; he is still being sought.
9. Since forwarding docket to the Attorney-General I have been receiving instructions to carry out further inquiries.
10. In view of the foregoing I strongly believe that the period spent in custody by the applicants is reasonable."

Those are the facts on the basis of which I must determine whether or not the reasonable time envisaged by s 13(4) of the Constitution has expired.

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SANDURA JP

It is quite clear from what the respondent and the Investigating Officer say that the early completion of investigations has been hampered by the serious difficulties which the Investigating Officer and his team have encountered. A large number of people had to be interviewed at length. These people had to be located in various parts of the country before they could be interviewed. Some of the people to be interviewed were members of the Army who were out of the country on duty. An important witness who was facing certain charges escaped from custody and has not been found. These are some of the major problems encountered by the investigating team which have delayed the completion of the investigations in this case. The respondent, however, believes that if the investigations are completed before 7 July 1986, the applicants' trial will commence on that date.

Bearing in mind the nature of the charge and the problems encountered by the Investigating Officer and his team I cannot accept Mr *de Bourbon*'s submission that the reasonable time referred to in s 13(4) of the Constitution of Zimbabwe has elapsed. The applicants have been in custody for about 9 months now; they were first placed on remand in January this year; the docket relating to the applicants was first submitted to the respondent on 14 March 1986 and was returned to the police on 14 April 1986 with the instruction that the police should carry out further investigations in connection with a number of matters. In these circumstances, without specifying what a reasonable time should be, I am satisfied that there can be no justification in the case under consideration for reaching the conclusion that the reasonable time referred to in

s 13(4) has elapsed. The application must, therefore, be dismissed.

Finally, I must mention the question of costs. Mr *de Bourbon* submitted that an award of costs is competent in this matter. On the other hand, Miss *Ahmed*, who appeared for the respondent, submitted that no award for costs can be made because this matter is, in the context of its facts and background, a criminal matter. Since I have decided to dismiss the present application the question of the applicants' costs being paid by the respondent does not arise. It is, therefore, unnecessary for me to deal with Mr *de Bourbon*'s submission that an award of costs is competent.

In the circumstances, the application is dismissed and there will be no order as to costs.

Scanlen & Holderness, applicants' legal practitioners

Attorney-General, respondent's legal practitioner

1986 (1) ZLR p192

CORREIRA v BERWIND 1986 (1) ZLR 192 (HC)

Court High Court, Harare

Mfalila J

Exception

19 May & 4 June 1986

Flynote

Damages - claim against medical practitioner for negligence - claim contractual or delictual - where parties bound contractually or delictual action not precluded.

Headnote

Even if it were correct to say that the relationship between a doctor and patient is usually one in contract, this is not the same thing as saying that a contractual relationship is the only one that can subsist between a doctor and patient. Whilst there is no authority for the proposition that a breach of a contractual duty is a wrongful act for the purposes of the Acquilian liability in itself, a given set of facts can give rise to both a delictual and contractual claim. The fact that the parties are bound by a contract does not preclude a delictual action provided the facts support a claim in delict independently of the existence of the contract.

Cases cited:

Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (AD)

Van Wyk v Lewis 1924 AD 438

A N H *Eastwood* for the excipient

AP *de Bourbon* for the respondent

Judgment

Mfalila J: The excipient claimed damages for negligent surgical operation on her right kidney carried out by the respondent, which caused the loss of her right kidney, pain, suffering, loss of amenities of life, anguish and

1986 (1) ZLR p193

MFALILA J

misery all of which caused her damages in the sum of \$25 000 of which she claimed payment and costs of suit.

In her declaration, she stated that on or about 26 September 1980, the defendant performed a surgical operation upon her right kidney and that he performed this operation negligently, because:

- (a) There were no or there were insufficient grounds for conducting the said surgical operation.
- (b) During the course of the said surgical operation, the defendant injured her right kidney.
- (c) The defendant failed to remove, after the said surgical operation a splint (or catheter) which had during the surgical operation been introduced by the defendant into her right ureter.

She went on to state that the result of the defendant's failure to remove the splint from her right ureter until 27 January 1981 was that she suffered a recurrent urinary infection of the bladder, pain and anxiety. She also averred that the negligent operation as a whole occasioned her pain and suffering and the injury to her right kidney resulted in its nephrosclerosis and/or its atrophy, requiring its surgical removal on 13 March 1984. She concluded that the said injury and its consequences occasioned her pain, suffering, chronic illness, anxiety and a reduced expectation of life. Hence she said, she is claiming special damages in the sum of \$2 500 and general damages in the sum of \$27 500.

In response, the respondent filed a special plea in bar under Rule 137 (1)(a) of the High Court Rules and pleaded that the excipient's claim is prescribed in terms of s 13(1) of the Prescription Act, 1975 because:

- (a) the date of the alleged negligence and surgical operation is 26 September 1980;
- (b) further allegation of negligence for failure to remove the splint until 27 January 1981;
- (c) the period of prescription in terms of s 14(d) of the Prescription Act in respect of such claim is 3 years;

MFALILA J

- (d) in terms of s 15(1) of the said Act prescription began to run not later than the 27 January 1981; and
- (e) summons in this case was only served on 4 March 1985, more than three years after 27 January 1981.

Following the filing of this special plea in bar, the excipient requested further particulars under Rule 137 (1)(d) in the following matters:

- (a) the dates on which the claims in the various paragraphs become due, and when did the excipient become aware of the identity of the defendant and the facts in the various paragraphs.
- (b) whether it is alleged that the excipient could have acquired knowledge of the facts from which the claim arises by exercising reasonable care? If so, then this to be specified.
- (c) whether it is also alleged that the excipient could have acquired knowledge of such identity and of such facts by exercising reasonable care and if so these also to be specified.

The respondent supplied the particulars regarding when the two claims became due, but with regard to the request on when the excipient became aware of the identity of the defendant and the facts, he replied as follows:

"Since the plaintiff's claim in this matter is based on a contract between her and the defendant, the particularity sought in respect of section 15(3) of the Prescription Act is irrelevant. Accordingly the defendant declines to give such particularity."

As a result of this refusal by the respondent to produce the particulars, the excipient filed this exception to the special plea in bar denying that her claim in the declaration arises from contract as contemplated by s 15(3) of the Prescription Act and that therefore as a matter of law the respondent is obliged in terms of s 15(3) of the Act to allege in raising prescription that the excipient became aware of the identity of the defendant and the facts from which the claim arises before 5 March 1982 and/or that the excipient could have acquired knowledge thereof by exercising reasonable care, that this he failed to do, and that the respondent's contention that her claim is based on contract between her and the respondent is argumentative, vague and embarrassing and does not arise from any allegation in the excipient's

MFALILA J

declaration. In the circumstances, she prayed that the respondent's special plea in bar be set aside with costs, alternatively that paras 1(b) and (c) and 2(b) and (c) of the defendant's particulars filed on 30 May 1985 be struck out with costs.

In his submissions at the hearing of this exception, Mr *Eastwood* who appeared for the excipient stated that there are two issues raised on the papers. First whether the excipient has sued in tort or in contract, secondly if the excipient has sued in tort, whether it is open to the defendant to assert by way of a special plea that the claim is founded on contract. In his submission, the excipient sued in tort not contract because the summons is for "damages for negligent surgical operation" and the declaration cites the respondent as a urologist alleging that he performed a surgical operation upon the excipient and alleges negligence in performing the operation as there were insufficient grounds for it and the manner in which the respondent performed the operation. Nowhere, he said, does the excipient allege agreement express or implied nor does she claim refund of any medical fees for breach of contract, pecuniary loss or loss of business income. Her claim is solely for injuries to her body and mental state. With regard to the second point, Mr *Eastwood* submitted that the defendant has not excepted to the claim as being bad in law on any contention that the plaintiff cannot claim against a surgeon or other professional person in delict or tort.

Summarising his submission, Mr *Eastwood* said that the main issue which thus arises is whether a surgeon who is sued for physical injuries inflicted in the course of an operation performed by him can be sued only in contract. If he can be sued either in contract or in delict, it follows that the excipient can elect to sue him in tort as she has elected to do in this case because he added, in our law a claim always lies in tort against a person who has by want of reasonable care caused another physical injury, i.e. injury to person or property, subject only to certain limits imposed by social considerations.

On behalf of the respondent Mr *de Bourbon* made two submissions. Firstly he said that the excipient's action is in contract because in para 3 of her declaration, she alleges that services are rendered to her by the respondent in terms of a contract and that in any case the relationship between a doctor and patient is usually one in contract and that in order to fix liability in delict, this court would have to be persuaded that the decision in *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475, was wrongly decided. Secondly, and as a corollary to the first submission, that as the action is founded on contract, and under the exception provided by

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MFALILA J

s 15(3) of the Prescription Act, the respondent is not required to state when the creditor became aware of the identity of the debtor and of the facts from which the debt arises.

The first question to consider is whether the excipient alleged in her declaration that the services were rendered to her by the respondent in terms of a contract. Mr *de Bourbon* cites para 3 of the declaration as making such allegation. I do not think this paragraph makes any such allegation. This paragraph states that on or about the 26 September 1980, the defendant performed a surgical operation upon the right kidney of the plaintiff. Clearly then this is just a statement of an alleged fact regarding the events of 26 September 1980 between the excipient and the respondent. It does not mention the existence of any contract. It is simply an explanation of her claim in the summons for "damages for a negligent operation to her right

kidney carried out by the defendant..."

Secondly it is correct to say as Mr *de Bourbon* seemed to suggest that a doctor is not liable to his patient outside a contractual relationship and that therefore there is no liability in delict within the relationship of doctor and patient.

I do not think one can seriously quarrel with Mr *de Bourbon*'s assertion that "the relationship between a doctor and patient is usually one in contract," without statistics on the relative number of patients who enter into contracts with the doctors and those who simply consent to be treated relying on the professional expertise of the doctor. But even if it were correct to say that the relationship between a doctor and patient is usually one in contract, this is not the same thing as saying that a contractual relationship is the only one that can subsist between a doctor and patient. Strauss, the learned author of the book, *Doctor, Patient and the Law* 2 ed quoted by Mr *de Bourbon*, makes no such point on the relevant pages cited. Indeed I would have been very surprised if he had made such a suggestion in Section I of the book dealing with contractual obligations of the doctor; when in Part XI of the book he discusses the liability of doctors for medical negligence. In his book, *Medical Negligence*, LORD NATHAN states at page 15:

"In the great majority of cases the duty owed by a medical man or a medical institution towards the patient is the same whether there exists a contract between them or not. Where there is no such contract, a duty arises by reason of the assumption of responsibility for the care of the patient; **where there is such a contract, this duty in tort exists side by side with a similar duty arising out of the contract. But the implied**

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contractual duty is normally the same as that which exists apart from contract." (Emphasis added.)

Therefore as between a doctor and patient there can exist both contractual and delictual liabilities. Perhaps I should at this stage deal with the *Lillicrap* case (*supra*), which according to Mr *de Bourbon* decided that professional men have no liability for the way they discharged or render their professional services outside a contractual relationship and that therefore if I fix delictual liability on the respondent in this case, I must be prepared to say that that case is wrongly decided.

In that case the facts as taken from the judgment of GROSSKOPF AJA were that the respondent was a glass manufacturer. The appellant, a firm of consulting and structural engineers, performed professional services in connection with the planning and construction of a glass plant for the respondent. The respondent was not satisfied with the manner in which the appellant performed its duties and issued a summons in the Local Division in which it claimed compensation for damages which it had allegedly suffered as a result of the appellant's professional negligence. After provision of further particulars and the substantial amendment of the respondent's claim, the appellant excepted to the particulars of claim as amended and amplified, on the grounds that they lacked averments necessary to sustain an action. In the alternative the appellant applied for the striking out, as being irrelevant, of one or more of the individual heads of damage set out in the respondents further particulars. The court *quo* dismissed the exception, but ordered certain paragraphs of the respondent's further particulars

to be struck out. Both parties appealed, the appellant against the dismissal of the exception, and the respondent against the granting of the striking out order. The respondent argued in the appeal court that in June 1975 a formal agreement was executed between it and the appellant which, among other things, confirmed the appointment of the appellant as consulting engineer in respect of the design and supervision of the work. The respondent added that by this time it had already paid the appellant the sum of R100 051,72 in respect of professional services rendered prior to the date of the formal agreement. Hence the respondent contended in its particulars of claim that in the circumstances the appellant owed the respondent a duty of care, to carry out properly and with professional skill and care the various tasks which it purported to perform. However, the respondent alleged, in breach of the said duty of care, the appellant negligently failed to carry out these tasks properly and with the necessary professional skill and care, thereby causing the respondent damages in the sum of R3 605 511,00.

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GROSSKOPF AJA who delivered the majority judgment recognised that the "present case thus raises fundamental questions relating to delictual liability, and more particularly, its relationship with the liability for breach of contract" and added that "even if a breach of contract should properly be classified as a form of delict, that would not alter its essential characteristics or eliminate the differences which exist between the action for damages arising *ex contractu* and liability pursuant to the extended Aquilian action which the respondent has sought to invoke in the present case." The learned judge then proceeded to discuss the possibility that both actions could arise from the same set of facts and continued at page 496 DH:

"In the present case it is common cause that the damages which the respondent is claiming pursuant to the Aquilian action could, in so far as they arose before the assignment of the contract to Salanc, have been claimed on the basis of breach of contract. The respondent's contention is that in the circumstances of the present case, the facts gave rise to both causes of action. In principle there would be no objection in our law to such a situation. Roman law recognised the possibility of a *concursum actionum*, ie the possibility that different actions could arise from the same set of facts. More particularly the facts giving rise to a claim for damages under the *lex aquilia* could overlap with those founding an action under certain types of contract such as deposit, *commodatum*, lease, partnership, pledge etc. In such a case a plaintiff was in general entitled to elect which action to employ ... In modern South African Law, we are of course no longer bound by the formal actions of Roman law, but our law also acknowledges that the same facts may give rise to a claim for damages *ex delicto* as well as one *ex contractu*, and allows the plaintiff to choose which he wishes to pursue...**The mere fact that the respondent might have framed his action in contract therefore does not per se debar him from claiming in delict. All that he need show is that the facts pleaded establish a cause of action in delict. That the relevant facts may have been pleaded in a different manner so as to raise a claim for contractual damages is in principle irrelevant.** (Emphasis added.)

The fundamental question for decision is accordingly whether the respondent has alleged sufficient facts to constitute a cause of action for damages in delict. In the present case we are concerned with a delictual claim for pecuniary loss, and, as mentioned above, it is common cause that the claim was founded on the principles of the extended Aquilian action. It is trite law that, to succeed in such a claim, a plaintiff must

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allege and prove that the defendant has been guilty of conduct which is both wrongful and culpable; and which

caused patrimonial loss to the plaintiff... What has been placed on issue by the appellant is whether, on the facts pleaded, the appellant's conduct was wrongful for purposes of delictual liability and whether the damages alleged to have been suffered, are recoverable in a delictual action."

I have quoted this passage at length because it dispels any notion suggested by Mr *de Bourbon* that there can be no delictual liability where there is a contractual relationship between parties.

The court of appeal found that there is nothing in the respondent's pleadings which alleges or implied that the defects in the construction of the plant created a danger of damage to the respondent's property. The respondent's sole case seemed to be that the defects in the construction of the plant rendered it unsuitable or less suitable for its purpose. The court then continued on page 498 C - E:

"If the respondent's case is not based on wrongful damage to property, what then is the nature of the wrongfulness upon which the respondent relies?"

The court answered this question at page 499 D - E thus:

"The only infringement of which the respondent complains is the infringement of the appellant's contractual duty to perform specific professional work with due diligence; and the damages which the respondent claims, are those which would place it in the position it would have occupied if the contract had been properly performed. **In determining the present appeal we accordingly have to decide whether the infringement of this duty is a wrongful act for purposes of aquilian liability.**" (Emphasis added.)

The court was therefore faced with the question whether to extend aquilian liability to this kind of action. Although the court noted that "in our law aquilian liability has long outgrown its earlier limitation to damages arising from physical damage or personal injury" and has been extended to cover negligent misstatements which cause pure financial loss, it remarked that there was no authority in Roman or Roman-Dutch Law for the proposition that the breach of such a contractual duty is a wrongful act for the purposes of aquilian liability. However the situation is different in the case of a

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concursum actionum because here the actions of the defendant satisfy the independent requirements of both a contractual and an aquilian action. Such was the position in the case of *Van Wyk v Lewis* 1924 AD 438 because independently of the contract which existed, Dr Lewis would have been liable to his patient for professional negligence. On those considerations the court held that "our law adopts a conservative approach to the extension of remedies under the *lex aquilia*", and that "it would accordingly be breaking fresh ground if it were to recognise the respondent's cause of action as valid." The court then summed up the position as follows at page 501 G - H:

"To sum up, I do not consider that policy considerations require that delictual liability be imposed for negligent breach of contract of professional employment of the sort with which we are here concerned."

These pronouncements make it quite clear that if the respondent had satisfied the independent requirements of both a contractual and an aquilian action, the court would have allowed the

action and dismissed the exception as the court *a quo* had done. But the Court of Appeal found that the respondent had failed to satisfy by its pleadings the requirement for an aquilian action when it refused to extend further the basis for such an action. In the present case, even if I were to find that there was a contract between the parties, I would find it no bar, as it was found in the *Van Wyk's case*, (*supra*,) to the excipient founding her action against the respondent in delict because independently of any contract, he owed her a duty of care when performing the surgical operation upon her, to perform it with such professional skill as to avoid injuring her which she alleges he did. In her summons, she alleges both the duty to take care and a breach of that duty.

Commenting on the *obiter dictum* by INNES CJ in the *Van Wyk's case*, that the delictual duty arose from the contract between the parties, GROSSKOPF AJA stated as follows at page 502 E - F:

"This interpretation (which he had just propounded) seems probable if one has regard to the **unlikelihood** that INNES CJ would have intended to suggest that a medical doctor could not be delictually liable for his negligence unless there was a contractual relationship between him and his patient."

This statement puts beyond doubt that the *Lillicrap* case made no decision along the lines suggested by Mr *de Bourbon* and that by fixing delictual liability on the respondent, far from suggesting that that case was wrongly

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decided it affirms its correctness. To put the matter beyond controversy, Boberg in his book, *The Law of Delict*, opens his first chapter on the "Nature and Basis of Delictual Liability" with the following words based on the decision in the *Lillicrap* case:

"A delict is a civil wrong. It is an infringement of another's interests that is wrongful irrespective of any prior contractual undertaking to refrain from it - though there may also be one. It entitles the injured party to claim compensation in civil proceedings - though criminal proceedings aimed at punishing the wrongdoer may also ensue. A single act may give rise to give both delictual and contractual, or delictual and criminal, liability. **The existence of concurrent contractual liability is no bar to an action in delict, provided that the requirements of delictual liability are also satisfied.**" (Emphasis added.)

For these reasons I am satisfied that the excipient's claim against the respondent is properly based on delict or tort and that therefore the provisions of s 15(3) of the Prescription Act do not apply and that the respondent is bound to furnish the information required by the excipient. It was agreed all round that the Prescription Amendment Act No. 23 of 1985 does not apply to these proceedings.

However as the question of prescription is still very much alive between the parties, I cannot set aside the respondent's special plea in bar, but in view of my findings, I allow the exception as pleaded in the alternative that paras 1(b) and (c) and 2(b) and (c) of the respondent's particulars filed on 30 May 1985 be struck out with costs.

The respondent is also granted leave to file an amended special plea in bar.

Kantor & Immerman, excipient's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

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BULL v MINISTER OF HOME AFFAIRS 1986 (1) ZLR 202 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA, McNally JA, Sandura AJA & Ebrahim AJA

Constitutional appeal

3 March & 9 June 1986

Flynote

Constitution - Zimbabwe Constitution, 1980 - s 13 and s 18(9) - interpretation - approach to. Criminal procedure - bail - Ministerial certificate in terms of s 106(2) and (2b) of the Criminal Procedure and Evidence Act [Chapter 59] forbidding bail - not unconstitutional - remand - reasonable suspicion. Legislation - Criminal Procedure and Evidence Act [Chapter 59] s 106(2) and (2b).

Headnote

Provision in the Criminal Procedure and Evidence Act [*Chapter 59*] empowering a ministerial certificate forbidding bail in certain circumstances is not contrary to the Constitutional protection against deprivation of liberty or the Constitutional right to the protection of law.

Cases cited:

Attorney-General v Matewere & Anor 1983 (2) ZLR 339 (SC)

Bull v Attorney-General & Anor 1986 (1) ZLR 117; 1986 (2) SA 886

Stogmuller v Austria 1 EHRR 155

Scheisser v Switzerland 2 EHRR 417

Smith v Attorney-General, Bophuthatswana 1984 (1) SA 196 (BS)

Minister of Home Affairs (Bermuda) & Anor. v Fisher & Anor [1980] AC 319 (PC)

Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC)

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (SC)

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Minister of Home Affairs & Ors v Dabengwa & Ors 1982 (1) ZLR 236 (SC)

Sigaba v Minister of Defence and Police & Anor 1980 (3) SA 535 (TKD)

Minister of Home Affairs v Bickle & Ors 1983 (2) ZLR 400 (SC)

James v Commonwealth of Australia [1936] AC 578

Endell Thomas v Attorney-General of Trinidad and Tobago [1982] AC 113

Attorney-General of the Gambia v Momodou Jobe [1984] AC 689 (PC)

Council of the Civil Service Unions v Minister for the Civil Service [1985] AC 374 (HL)

Minister of Home Affairs & Anor v Dabengwa 1983 (2) ZLR 346 (SC)

Ngui v Republic of Kenya 1986 LRC (Const) 308 (Kenya)

I A Donovan for the appellant

BC Brown, with him *J Wood*, for the respondent

Judgment

Beck JA: When it was ordered that this appeal be dismissed we indicated that our reasons for that decision would be furnished in due course. These are our reasons:

The appellant is a legal practitioner. Two of his clients were remanded in custody on a charge of having contravened s 4(1)(d)(i) of the Official Secrets Act [*Chapter 97*]. The prosecutor produced a ministerial certificate in terms of s 106(2)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*], certifying that a likelihood existed that public security would be prejudiced if the two accused persons were admitted to bail, thereby depriving the remand court in terms of s 106(2b) of the Act of the power to admit them to bail.

The appellant thereupon petitioned the High Court for an order declaring subs (2) and (2b) of s 106 of Chapter 59 to be contrary to ss 13 and 18(9) of the Constitution of Zimbabwe and therefore void. That petition was dismissed with costs by SANSOLE J As I have already indicated, the appeal that was then made to this court failed. We did, however, set aside the award of costs in favour of the respondent which the learned judge made in the court *a quo*, and we directed that neither in the court *a quo*, nor in this court, would there be any order as to costs because a Constitutional issue was involved with regard to which the answer was not self-evident. Indeed, Mr *Brown*, who appeared for the respondent, agreed that it would be appropriate that no order as to costs in either forum should be made, despite the failure of the appellant's case in both courts. A similar approach to costs was adopted in

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Hewlett v Minister of Finance & Anor 1981 ZLR 571 (SC); and in *Zimbabwe Township*

Developers (Pvt) Ltd v Lou's Shoes (Pvt) Limited 1984 (2) SA 778 (ZSC).

The relevant portion of subs (2) of s 106 of Chapter 59 reads:

"106. (2) The Minister of Law and Order may, in an application for bail in terms of subsection (1) -

- (a) in respect of any offence, certify that it is likely that public security would be prejudiced if the applicant were admitted to bail;
- (b) ..."

Subsection (2b) of s 106 provides that:

"106. (2b) Where a certificate is issued in terms of subsection (2), the application for bail shall be refused."

The relevant portions of s 13 of the Constitution of Zimbabwe are in the following terms:

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

(2) The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law - ...

(d) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court or before the Senate or the House of Assembly in execution of the order of the Senate or that House;

(e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

...

(4) Any person who is arrested or detained -

(a) for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

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and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial."

Mr *Donovan*'s first submission on behalf of the appellant was one that he did not advance in the court below. Relying on the decision of this Court in *Attorney-General v Matewere & Anor* 1983 (2) ZLR 339 (SC), he argued that once a suspected offender has been arrested and has been brought without undue delay before a court, as is required by s 13(4) of the Constitution, then any law that authorises a continued deprivation of liberty thereafter must depend for its Constitutional validity on s 13(2)(d), and not on s 13(2)(e). He contended that any statutory authority that a court has to remand an arrested person in custody cannot be saved by s

13(2)(e) of the Constitution, because in terms of *Matewere's* case, *supra*, the remanding court is not permitted, let alone required, to decide whether grounds exist for a reasonable suspicion that the arrested person has committed a criminal offence.

If then, so his argument proceeded, s 13(2)(d) can be the only Constitutional authority for a statutory power to continue to deprive of his liberty a suspected offender who has been brought before a court after his arrest, it follows that no such statutory power can be Constitutionally valid unless it is given for the only purpose that is stipulated in s 13(2)(d), namely that "of bringing him before a court in execution of the order of a court ". Since the statutory authority that is contained in ss 106(2)(a) and (2b) of Chapter 59 to deprive an arrested person of his liberty by denying him bail is an authority that is given, not for the purpose that is stipulated in s 13(2)(d) but for quite another purpose, namely to avoid prejudice to public security, those sections of Chapter 59 are not saved by s 13(2)(d) and must therefore be held to be void as being in conflict with s 13(1) of the Constitution. I had occasion recently to point out that the Constitutionality of the authority derived from the provisions of the Criminal Procedure and Evidence Act for what was done to the arrested persons in *Matewere's* case, *supra*, did not arise for consideration, because at that time anything done under the authority of an existing law enjoyed temporary protection against unconstitutionality by virtue of ss 26(2)(b) and (3)(b) of the Constitution. (See: *Bull v The Attorney-General and the Director of Prisons* 1986 (1) ZLR 117 (HC); 1986 (3) SA 886.)

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But that aside, there is a further comment that I must make about *Matewere's* case, *supra*, to the decision of which I was a party. As is apparent from the judgment of GEORGES CJ, the remanding magistrate had qualified the allegations of fact that were put before him as constituting the grounds for a reasonable suspicion that the accused persons had committed a criminal offence, by drawing certain inferences of doubtful accuracy in favour of the accused. It was this, it was decided, which he was not permitted to do, and I do not intend to retract in any way from the conclusion. I am now satisfied, however, that the observation of the learned Chief Justice at p 344G is misleading. He said:

"As I understand the scheme of the Act he is not empowered to decide that what he has heard does not in his view amount to a ground for reasonable suspicion."

If this is understood to mean that the remanding magistrate is compelled to assume that what is alleged against the accused is capable of proof then I have no quarrel with it. But if it is understood to mean, as *Mr Donovan's* argument supposes, that the remanding magistrate is not permitted to decide whether, objectively considered in the light of the facts alleged by the prosecution, a suspicion has been shown which is reasonable that the accused has committed a criminal offence, then the error must be dispelled. If it is correct, as I think it to be, that an arrested person brought before court to be remanded can only be remanded in custody if there is a reasonable suspicion of his having committed a criminal offence, then the remanding court is required, should the issue be raised, to decide whether the facts that are alleged against the accused are such as to give grounds for a suspicion that is reasonable that he has committed

an offence, assuming those facts to be capable of proof.

Insofar, therefore, as Mr *Donovan* has relied upon *Matewere's* case, *supra*, to support his contention that it is to s 13(2)(d) of the Constitution, and not s 13(2)(e), that one must look for the validity of any statutory provision authorising a continued deprivation of liberty after arrest and the initial bringing to court of the arrested persons, his argument must fail.

But quite apart from *Matewere's* case, *supra*, Mr *Donovan* derived support for his contention that s 13(2)(d) is the governing Constitutional provision for the purposes of testing the validity of ss 106(2)(a) and 2(b) of Chapter 59, from a passage in Barnett *The Constitutional Law of Jamaica* at p 383. The passage in question refers to s 15(1)(e) of the Constitution of Jamaica, which corresponds with s 13(2)(d) of our Constitution, and reads:

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"Warrants to secure attendance or appearance in court: The right to freedom of person may be abridged by arrest for the purpose of bringing a person before a court in accordance with the order of a court. This covers all the numerous cases in which a person who is summoned to appear as a party or to attend as a witness fails to do so and is ordered to be arrested and brought before the court. **It covers also the case of an accused adult who is remanded in custody pending his trial either in the same court or, as in the case of committal to trial after a preliminary enquiry, in another court,** as well as the case of a juvenile who is detained in a place of safety pending his appearance before a Juvenile Court." (Emphasis added.)

It is the words that I have emphasised to which Mr *Donovan* directed our attention, and he stressed that the Constitution of Jamaica also contains provisions which correspond to ss 13(2)(e) and (4) of our constitution. Undoubtedly therefore, the view expressed by Dr Barnett supports Mr *Donovan's* submission.

Without going so far as to suggest that the wording of s 13(2)(d) of the Constitution of Zimbabwe is incapable of covering the case of liberty deprivation by way of remanding in custody pending trial, I am respectfully constrained to say that I think that s 13(2)(e) is much the more appropriate provision for clothing with Constitutional validity a law authorising such a deprivation.

As the first part of the above - quoted passage from Dr Barnett's work correctly indicates, the purpose of s 13(2)(d) is to authorise laws made for the purpose of giving effect to court orders (as well as certain other orders) made out of the presence of the person concerned, and made for the specific purpose of procuring the presence of that person before the court (or before the Senate or House of Assembly, as the case may be). I find nothing in the section to suggest that it has in contemplation the question of accused persons and how they may be dealt with when in the presence of the court. Section 13(2)(e) on the other hand has in express contemplation accused persons - persons reasonably suspected of having committed a criminal offence.

Sections 13(2)(d) and (e) are both linked with the provisions of s 13(4) of the Constitution, which requires that any person arrested as envisaged by s 13(2)(d), and equally any person arrested as envisaged by s 13(2)(e), shall be brought before a court without undue delay. In relation to the former category of person the purpose for which he was arrested - that of bringing him

before

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a court in execution of the order of a court - is fulfilled upon his production to the court, and s 13(4) understandably contains no provisions which affect his right to liberty thereafter. On behalf of the respondent Mr *Brown* correctly pointed out that any further deprivation of such a person's liberty cannot be Constitutionally justified by a continued reliance upon s 13(2)(d), the purpose of which has been completed, but can only be Constitutionally justified - if at all - by reliance upon some other subsection of s 13(2).

By contrast, s 13(4) does go on to make provisions concerning the right to liberty of the latter category of arrested person, i.e. the suspected offender contemplated by s 13(2)(e). The provision it makes is that if such a person is not tried within a reasonable time, then he shall be entitled to his release pending trial, necessarily envisaging therefore that until a reasonable time for bringing him to trial has elapsed he may Constitutionally be deprived of his liberty. The customary way of achieving that is, of course, by way of remanding the accused in custody pending trial.

The provisions of s 13(4) are in my view a powerful, if not indeed a conclusive, indication that it is s 13(2)(e), and not s 13(2)(d), that is relevant to the attack that is made on the Constitutionality of ss 106(2)(a) and (b) of the Criminal Procedure and Evidence Act.

This conclusion is fortified by a passage in the judgment of the European Court of Human Rights in the case of *Stogmuller v Austria* 1 EHRR 155 at pp 190 - 191. Speaking of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (which Article is the parent of s 13 of the Constitution of Zimbabwe) and more specifically of Article 5(1)(c), the court said:

"It is true that paragraph (1)(c) authorises arrest or detention for the purpose of bringing 'before the competent legal authority' on the mere grounds of the existence of 'reasonable suspicion' that the person arrested 'has committed an offence' and it is clear that the **persistence of such suspicions is a condition sine qua non for the validity of the continued detention of the persons concerned** ..." (emphasis added).

In the event of this court holding that the Constitutionality of ss 106(2)(a) and (2b) of Chapter 59 is to be tested with reference to s 13(2)(e) of the Constitution, rather than s 13(2)(d), Mr *Donovan's* next submission was that ss 13(2)(e) and (4) should be so construed as to cut down as little as possible upon the fullness of the protection of the right to liberty that is afforded by

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s 13(1), as read as a whole with ss 18(1)(2) and (9). These last - mentioned sections provide:

- " 18. (1) Every person is entitled to the protection of the law.
- (2) If any person is charged with a criminal offence then, unless the charge is withdrawn, the case shall be

afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- (9) Every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations."

It was Mr *Brown's* contention that the present matter does not concern the right to an expeditious and fair criminal trial of the offence charged such as is conferred by s 18(2); nor does it concern the right to an expeditious and fair determination of the existence or extent of any "civil rights or obligations" in terms of s 18(9), since it concerns bail which is not a "civil" right; nor indeed is bail a "right" at all, since the grant of bail is not mandatory before a reasonable time for trial has elapsed, and a dispute concerning the denial of bail is not therefore a dispute as to the existence or extent of a (civil) right or obligation within the meaning of s 18(9).

Mr *Brown* may be correct, but I shall nevertheless accept as sound the proposition which Mr *Donovan* sought to emphasise by pointing to these sections, which is that the Constitution should not lightly be interpreted as validating deprivations of that fundamental right to personal liberty that it is the purpose of s 13(1) to protect, which are sought to be achieved by executive decision rather than by an impartial and independent judicial process.

The "judicial character" of the procedures contemplated in Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was endorsed by the European Court of Human Rights in *Schiesser v Switzerland* 2 EHHR 417 pp 425/6 in these terms:

"The Court views Articles 5 as designed to ensure that no one should be arbitrarily dispossessed of their liberty. This overall purpose entails, in the area covered by paragraph 4, the necessity of following a procedure that has a 'judicial character' and gives 'guarantees appropriate to the

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kind of deprivation of liberty in question', without which it would be impossible to speak of a 'court'. The 'officer' referred to in paragraph 3 must, for his part, offer guarantees befitting the 'judicial' power conferred on him by law." (Paragraph 3 of Article 5 of the Convention is the forerunner of s 13(4) of the Constitution of Zimbabwe.

In like vein, in *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (BSC) at p 200F, it was said:

"The universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to 'due process of law'. This principle is so ancient that it can be traced back to the Magna Carta (1225)."

Speaking of a statutory provision similar to ss 106(2)(a) and (2b) of Chapter 59 the learned judge (Hiemstra CJ) went on to say:

"In s 61A the judicial process is eliminated. The order refusing bail to a suspect is still made in open court by a judicial officer, but it is a pantomime of a court. The magistrate is not only compelled to accept the Attorney-General's *ex parte* statements of fact, not supported by any evidence but the statute also tells him what order to give, namely a refusal of bail. A statute which eliminates the judicial process in matters of personal liberty

is plainly unconstitutional."

Mr *Donovan* invited us to pass the same strictures on ss 106(2)(a) and (2b) of Chapter 59. He contended that to do so would be in keeping with the observation of Lord WILBERFORCE in *Minister of Home Affairs (Bermuda) & Anor v Fisher & Anor* [1980] AC 319 at pp 328 - 9 that:

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."

That observation has more than once received the approval of this Court. See: *Hewlett v Minister of Finance & Anor*, *supra*, at 580H - 582C; *Minister of*

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Home Affairs & Ors v Dabengwa & Anor 1982 (1) ZLR 236 (SC) at 243H; *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd*, *supra*, at 782H - 783A. Mr *Donovan* also referred to a portion of the passage in the judgment of ROSE - INNES J in *Sigaba v Minister of Defence and Police & Anor* 1980 (3) SA 535 (Tk.SC) at 541, which was quoted with approval in *Minister of Home Affairs v Dabengwa*, *supra*, to the effect that:

"On the one hand, a statute depriving the subject of his rights should in a case of ambiguity be restrictively interpreted in favour of liberty, so as to give the words that meaning which least interferes with the liberty of the individual."

"Full recognition and effect" to the fundamental rights and freedoms which the Constitution protects can nevertheless only be given to the extent that the clear language of the Constitution is not departed from. Thus, at p 594F of *Hewlett's* case, *supra*, FIELDSEND CJ said:

"I do not think that even the application of the principle enunciated by LATHAM CJ in *Dalziel's* case 1944 68 CLR 261 that a provision of a constitution plainly intended for the protection of the subject should be liberally interpreted is of itself justification for departing from clear words."

The succeeding Chief Justice, GEORGES CJ, stressed the same need to pay regard to the language used with construing the Constitution of Zimbabwe. In *Bickle & Ors v Minister of Home Affairs* 1983 (2) ZLR 400 (SC) at p 440D he associated himself with the following words of Lord WRIGHT in *James v Commonwealth of Australia* [1936] AC 578 at 513:

"The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another."

And at p 514, after accepting "that a Constitution must not be construed in any narrow and pedantic sense" LORD WRIGHT concluded by saying:

"The true test must, as always, be the actual language used."

Standing upon the plain and unambiguous meaning of the actual language used, Mr *Brown*

contended that anyone arrested and detained upon suspicion of having committed a criminal offence, taken to court without undue delay and remanded by the court in custody, has been dealt with in terms of laws

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that are covered by s 13(2)(e) as read with s 13(4) of the Constitution. For the sake of convenience I shall repeat the relevant portion of the latter section. It reads:

"(4) Any person who is arrested or detained -

(a) ...

(b) upon reasonable suspicion of his having committed ...a criminal offence;

and who is not released, shall be brought without undue delay before a court; and if **...not tried within a reasonable time then ...he shall be released** either unconditionally or upon reasonable conditions..."

In my opinion Mr Brown is correct in saying that the words emphasised in this extract from s 13(4) are fatal to the contention that a remand suspected offender has a constitutional right by reason of s 13(1), **prior to the stage when it can be said that he has not been tried within a reasonable time**, to be released on bail; or even to have an impartial and independent court decide whether or not he should be allowed on bail. Before that stage deprivation of liberty, if authorised by law, is Constitutionally permissible according to the plain meaning of the language used in s 13(1). Accordingly, in the case of a person detained upon reasonable suspicion of having committed a criminal offence, it would be Constitutionally permissible to authorise a continuing deprivation of liberty pending trial within a reasonable time, **without making any provision for bail under any circumstances**. That being so, a provision such as ss 106(2)(a) and (2b) which merely narrows the ambit of a law which gratuitously - in the Constitutional sense - permits liberty that is Constitutionally unprotected to be restored, cannot be said to be inconsistent with the Constitution. The logical maxim of *omne majus continet in se minus* compels this conclusion; and the application to the interpretation of Constitutions of logical principles expressed in such maxims is as permissible as it is in the interpretation of other statutes. [See, for instance: *Thomas v Attorney-General of Trinidad and Tobago* [1982] AC 113 at 135E (*Generalia specialibus non derogant*); *Hewlett's case*, *supra*, at 595E (*Expressio unius est exclusio alterius*).]

Pertinent and strong persuasive authority in support of this view is provided by the decision of the Privy Council in *Attorney-General v Momodou Jobe* [1984] AC 689 (PC). It was contended in that case that a law of The Gambia that forbade the granting of bail, in the absence of certain defined special circumstances, to a person charged with an offence of dishonesty which

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affected public funds or public property was invalid as being in conflict with s 15 of the Constitution of The Gambia. At p 697 A - F LORD DIPLOCK said:

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"The relevant provisions of the Constitution relating to remand in custody and release on bail are to be found in section 15 of the Constitution and they are: "

- (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: ...
 - (e) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia ...
- (3) Any person who is arrested or detained:
 - (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law of The Gambia;and who is not released, shall be brought without undue delay before a court.
- (4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings save upon an order of a court.
- (5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.'

There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally, but subject to an exception if the magistrate is satisfied that there are special circumstances warranting the granting of bail, cannot in their Lordships' view be said to be in conflict with any provision of the Constitution."

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At p 698B LORD DIPLOCK went on to say:

"Section 15(5) of the Constitution does not come into operation unless the person who has been arrested upon reasonable suspicion is not tried within a reasonable time. There is nothing in the Act which authorises unreasonable delay in bringing a suspected person to trial."

It will be seen that not only is this decision (to which LORDS ELWYN-JONES, KEITH KINKEL, SCARMAN and BRIGHTMAN were party) directly in point, but that it is almost an *a fortiori* proposition that a similar conclusion would have been arrived at under the Constitution of Zimbabwe which does not have any provision which corresponds with s 15(4) of the Constitution of The Gambia.

The omission from the Constitution of Zimbabwe of any provisions designed to entrust to a court, exclusively and in all cases, the decision to remand in custody or to release on bail, is all the more significant when the history of ss 106(2) and (2b) of the Criminal Procedure and Evidence Act is borne in mind. The framers of the Constitution of Zimbabwe must be taken to have been aware of that history, which is as follows:

By Act 35 of 1960 a similar provision was enacted as s 104(2) of the Criminal Procedure and

Evidence Act (which was then Chapter 28 of 1939), namely:

"If the Attorney-General certifies that it is likely that public security would be prejudiced if the accused were admitted to bail, the application for bail shall be refused."

The provision remained part of the Law of Rhodesia under the Constitution of Southern Rhodesia, 1961, which contained this country's first justiciable Declaration of Rights. It remained part of the statute law of the country (as amended by Act 12 of 1964, enacted while the 1961 Constitution was still in force) until replaced in 1975 by the provisions that are now being challenged. Ever since 1960 therefore provisions for bail have not been couched in terms that conferred an entitlement to bail, but in terms that provided for the granting of bail as a matter of judicial discretion, subject initially to the Attorney-General's certificate, and since 1975 to the Minister's certificate.

This background must lend colour to the understanding of s 13 of the Constitution of Zimbabwe. Bearing it in mind, there is considerable force in Mr *Brown's* contention that if the framers of the Constitution of Zimbabwe had intended to prohibit the operation of a provision like ss 106(2) and (2b)

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of Chapter 59 during the reasonable pre-trial period, or if they had intended to grant a right to bail during that period, then s 13(4) of the Constitution would have been differently worded. It would, for example, have read something like this:

"...brought without undue delay before a court; and shall by that court be either remanded in custody or released upon reasonable conditions as the court in its sole discretion sees fit; and if a person who is remanded in custody by the court is not tried within a reasonable time, then ...he shall be released ..."

A further consideration which militates against what I may refer to as Mr *Donovan's* "due process of law" argument is that even if it were proper to read into s 13(4) of the Constitution a requirement that a judicial decision whether to release on bail or to remand in custody must be permitted even before a reasonable time for bringing the suspected offender to trial has elapsed, it would nevertheless be Constitutionally proper to impose a qualification such as that which is imposed by ss 106(2)(a) and (2b) of Chapter 59, because it is a qualification that is concerned with the issue of public security. On such an issue it is proper for those who are responsible for public security to be the sole judges of what public security requires, the judicial process being unsuitable for reaching decisions on such an issue. (Cf *CCSU v Minister of Civil Service* [1985] AC 374 at 402 C - E; *Minister of Home Affairs & Anor v Dabengwa* 1983 (2) ZLR 346 (SC) at 362 A - B)

The fact that we are here concerned, not with a certificate by an Attorney-General relating to matters relevant to the question whether the accused will or will not stand trial if bail is granted, but to a certificate by a Minister relating to a matter that he says is one of public security, distinguishes this case from that of *Smith v Attorney-General, Bophuthatswana, supra*. Quite apart from that consideration, however, I am satisfied that to follow the approach that was adopted in *Smith's* case, *supra*, would result in an impermissible departure from the clear meaning of the language used in ss 13(2)(e) and (4) of the Constitution of Zimbabwe. It is only

after a reasonable time has elapsed for bringing a suspected offender to trial that such a person enjoys a Constitutional right not to be deprived of his liberty any longer. In such a situation a court would be bound to release the suspected offender unconditionally, or on reasonable conditions, notwithstanding the existence of a ministerial certificate in terms of s 106(2)(a) of Chapter 59. In so doing the court would be construing ss 106(2)(a) and (2b) as subject to "such modifications, adaptations, qualifications and exceptions as (are) necessary

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to bring them into conformity with the Constitution", as the court is required to do in terms of s 4(1) of the Zimbabwe Constitution (Transitional, Supplementary and Consequential Provisions) Order, 1980, which reads:

"4.(1) Subject to the provisions of the Constitution and this Order, the existing laws shall, notwithstanding the revocation of the revoked Orders and the establishment of a Republic in Zimbabwe, continue in force and effect on and after Independence Day and shall then have effect as if they had been made in pursuance of the Constitution, but they shall be so construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and this Order"

These then are the reasons which moved us to reject Mr *Donovan's* argument and to dismiss the appeal.

It remains only to say that subsequent to the announcement of our conclusion my attention was drawn to a decision of the Kenyan High Court which was not referred to in argument, and of which my colleagues and I were unaware. It is the case of *Ngui v Republic of Kenya* 1986 LRC (Const) 308 Kenya.

Section 60(1) of the Constitution of Kenya confers on the High Court of Kenya unlimited original jurisdiction in civil and criminal matters.

Section 72(5) of the Constitution of Kenya provides:

"(5) If a person arrested or detained as mentioned in sub - section 3(b) is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions..."

Subsection 3(b) applies to "a person who is arrested or detained ...upon reasonable suspicion of his having committed, or being about to commit, a criminal offence."

It was successfully contended before a Bench composed of SIMPSON CJ and COCKAR and MBAYA JJ that s 123(3) of the Criminal Procedure Code, as amended, was inconsistent with ss 72(5) and 60(1) of the Constitution. Section 123(3) of the Criminal Procedure Code originally contained no restriction on the powers of the High Court to grant bail. In consequence of amendments made in 1978 and in 1984, however, the section came to read as follows:

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"(3) The High Court may, save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence, direct that a person be admitted to bail or that bail required by a subordinate court or police officer be reduced."

The decision that the words which the amendments added to the section, namely "save where a person is accused of murder, treason, robbery with violence or attempted robbery with violence" - all offences which carry in Kenya a mandatory death penalty - conflict with s 60(1) of the Constitution of Kenya, has no relevance to the appeal that is before us, and I make no comment upon that part of the judgment.

The decision that those words had to be struck out of s 123(3) of the Code as being in conflict with s 72(5) of the Constitution is, however, very much in point. It was no part of the facts of that case that the appellant, who was an unwell woman of 54 charged with robbery with violence, had not been brought to trial within a reasonable time. The reasoning for the decision was simply that, as appears from p 311 a - b:

"Whereas s 72(5) of the Constitution makes release on bail mandatory only in certain prescribed circumstances, it is applicable to all offences. The amendments to s 123(3) have the effect of prohibiting the High Court from granting bail in cases of murder, treason, robbery with violence and attempted robbery with violence in any circumstances. Thus where, for example, a person is accused of robbery with violence bail may not be granted even if he is not tried within a reasonable time."

It appears from the report that no case authority was cited to the court. Certainly the decision of the Privy Council in *Attorney-General of The Gambia v Momodou Jobe*, *supra*, was not brought to the court's attention. If it had, the court would not have been able to distinguish the matter before it from *Jobe's* case insofar as the effect of s 72(5) of the Constitution of Kenya was concerned. The fact that s 123(3) of the Code could admittedly not be taken as authorising a denial of the High Court's jurisdiction to release on bail a suspected murderer, traitor or violent robber who is not brought to trial within a reasonable time, because of s 72(5) of the Constitution, does not, in my respectful view, lead to the conclusion that such a jurisdiction could not constitutionally have been denied the High Court (disregarding the question of s 60(1) of the Constitution) in relation to a suspected murderer, traitor or violent robber while he is being held in custody for a reasonable time pending trial. Such a suspected offender has no constitutional right under s 72(5) to

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liberty before a reasonable time for being brought to trial has elapsed. I must therefore say of *Ngui's* case, *supra*, that I respectfully disagree with the reasoning that I have quoted above which appears at p 311 a-b of the report.

The release of these reasons has, to some extent, been delayed by the absence on leave, subsequent to the hearing of argument, of some of the members of Court.

Gubbay JA: I agree.

McNally JA: I agree.

Sandura AJA: I agree.

Ebrahim AJA: I agree.

Atherstone & Cook, applicants' legal practitioners

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CARTER & SHIELDS v DIRECTOR OF CIVIL AVIATION & MINISTER OF TRANSPORT 1986 (1) ZLR 219 (HC)

Court **High Court, Harare**

Sandura JP

Civil application

15 May & 11 June 1986

Flynote

Aviation - "accident" as defined in Air Navigation Regulations, 1954 - removing aircraft from place of accident.

Administrative law - director of civil aviation must apply audi alteram partem rule before suspending pilot's licence.

Criminal law - statutory offences - remove aircraft in contravention of Legislation s 142 FGN 246/1954 - Air Navigation Regulations FGN 246/1954 ss 84(i); 140 and 142.

Headnote

The successful landing of a twin engined aircraft on only one engine, the other having been shut down as a precaution, is not an accident as defined in the Air Navigation Regulations 1954 even where, because of a wet runway, the aircraft only came to rest in the overshoot area beyond the edge of the runway.

A person does not commit an offence of moving an aircraft involved in an accident unless he is aware of the accident.

The director of civil aviation is obliged to permit representations by a pilot whose licence he is considering suspending.

AP de Bourbon SC for the applicants

S Mafara for the respondents

Judgment

Sandura JP: The first applicant is a commercial pilot employed by Skyline Charters (Pvt) Ltd

as the company's chief pilot. The company

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provides charter services, scheduled flights to and from Hwange, and engages in the hire of pilots and the hire of aircraft with or without pilots. The business of the company requires the first applicant to fly a variety of aircraft owned by the company for its clients, and to pilot aircraft owned by the company's clients. He is also required to instruct and train other pilots employed by the company. He is able to perform these functions by virtue of a private pilot's licence which was first issued to him in August 1982 and by virtue of a commercial pilot's licence which was first issued to him in August 1984. Both licences were issued by the Department of Civil Aviation.

The second applicant is the Chief Aircraft Maintenance Engineer of Skyline Charters (Pvt) Ltd and is the only fulltime aircraft engineer employed by the company. During the course of his employment he is required to service, maintain and repair the aircraft owned by the company and about seventy aircraft owned by the company's customers. He is able to perform these services by virtue of an Aircraft Maintenance Engineer's licence issued to him by the Department of Civil Aviation in 1979.

In March 1986, the first respondent sent letters to the two applicants informing them that he had suspended their licences for six months in terms of s 84(1) of the Air Navigation Regulations 1954, (Federal Government Notice No. 246 of 1954). The grounds upon which these suspensions were based will be dealt with in the course of this judgment. The suspensions were subsequently confirmed by the second respondent on 8 April 1986 in terms of s 84(1) of the said Regulations. The applicants have now come to court seeking an order declaring the suspensions as null and void and setting them aside. The application is opposed by the respondents.

Section 84(1) of the Air Navigation Regulations 1954, in terms of which the licences were suspended, reads as follows:

"84.(1) The Director may, on sufficient ground being shown to his satisfaction after due investigation by him and with effect from such date as he may determine, cancel, suspend or endorse any certificate, licence or other document issued under these regulations, or cancel, suspend or vary any particulars or other matter entered by him in or on any such certificate, licence or other document and may in any particular case provisionally suspend any such certificate, licence or other document pending investigation of the case. Such cancellation, suspension or endorsement shall be subject to confirmation by the Minister."

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The first respondent suspended the licences in question on the ground that the two applicants had contravened s 142 of the Air Navigation Regulations 1954. That section reads as follows: -

"142. If an accident occurs in or over Zimbabwe -

(1) the aircraft shall not, except under the authority of the Director, be removed from its place or otherwise

interfered with: Provided ..."

It is clear from the provisions of s 142 that before the applicants can be said to have contravened the section it must be established that an accident occurred. That is the first and main issue which I must determine in this application.

In order to determine that issue, I must set out the facts of what happened and then decide whether those facts establish that an accident, as defined in the Air Navigation Regulations, occurred. The facts of what happened are clearly set out by the first applicant in paras 12-19 of his affidavit. Those paragraphs read as follows:

- "12. On Wednesday 12 March 1986, I flew a Cessna 421, owned by Skyline Charters to Bumi Hills (via Tashinga and overhead Lake Kariba) with three passengers aboard, namely Messrs D Peddi, C James and S Bernadini. I departed Charles Prince Airport, Harare on 12.00, midday, where the weather was sunny with some cloud cover.
13. On the same day, I piloted the return flight, departing Bumi Hills at 6.15 pm with the same three passengers aboard. After take-off I relayed a message to Harare main control, via a lear jet travelling overhead in a southerly direction to the effect that I had departed Bumi Hills and was en route to Charles Prince Airport. About fifteen minutes after take-off from Bumi Hills, when I had reached cruising altitude the left engine began to run rough. For precautionary reasons, I shut down this engine and continued the flight on the right engine, to Harare.
14. When I was in range of Harare main control I radioed control and advised that I had shut down my left engine and I attempted to give my new estimates as to landing time. This message would then be relayed by Harare main control to Charles Prince Airport. I also asked Harare main control for Charles Prince Airport's latest weather details and was informed that there had been some recent rain in the area.

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15. Once I neared Charles Prince Airport, I contacted the Control Tower (by radio) and was advised as to which runway I was to use and was given wind details. To the best of my knowledge I was not advised that the runway was very wet, although this is normal procedure.
16. Thereafter, I made a normal asymmetric approach into Charles Prince and carried out landing of the aircraft. This landing was carried out at a higher speed than normal, as one is required to do when landing a twin-engined aircraft, upon one engine. After a successful touch-down about 300 metres into the runway which is 925 metres in Tarmac length (ie excluding the overshoot), the aircraft aquaplaned along the runway making safe braking very difficult. The aircraft aquaplaned because of the necessary speed at which landing was carried out and the fact that the runway was more than a little wet. I was unable to stop the aircraft safely on the runway, for the reasons already mentioned, and so continued travelling on to the overshoot, where I was able to bring the aircraft to a safe stop, some one hundred and fifty metres away from the parameter fence, there being no damages to the aircraft or injury to the passengers.
17. As is normal on an asymmetric landing, the Airport firemen were present when I shut down the aircraft and offered assistance. I decided to leave the aircraft where it was overnight as taxiing a twin-engined aircraft on one engine is a difficult operation.
18. Thereafter, I arranged for a guard from the Airport security to be placed on the aircraft to prevent theft and ensure the safety of the aircraft overnight. I also informed the management of Skyline Charters of this incident, as I am obliged to do in terms of the Operations Manual, of Skyline Charters, which manual has been approved by the First Respondent. In terms of this Manual the occurrence I experienced is defined as

an 'incident' as opposed to an 'accident' which is also defined therein, and an 'incident' is not considered to be an 'accident'. As mentioned this Manual has been examined and approved by the First Respondent.

19. On the morning of 13 March 1986 I arranged for the aircraft to be towed back to the hangar of Skyline Charters, where the Second Applicant commenced working on the left engine of the aircraft in order to comply with Airworthiness Notice No. 13. I arranged for the aircraft to be towed to the hangar so that the engine could be examined and because the aircraft is normally parked at the hangar. Furthermore, the aircraft was blocking the overshoot area."

Those are the facts from which I must now determine whether an accident

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had occurred when the aircraft was moved from the overshoot area to the hangar. The word 'accident' is defined in s 140 of the said Regulations as:

- " (a) a landing in circumstances of emergency due to any cause; or
- (b) an occurrence, which takes place between the time any person boards the aircraft with the intention of flight until such time as all such persons have disembarked in which any person suffers death or serious injury while in or upon the aircraft or by direct contact with the aircraft or anything attached thereto, or the aircraft receives substantial damage;"

In the same section, the term 'substantial damage' is defined as "...any damage that necessitates the replacement or extensive repair of any major component or the equivalent considering all damage to the aircraft collectively."

There are, therefore, two definitions of 'accident'. Mr *Mafara*, who appeared for the respondents, appears to have argued that both definitions of 'accident' were satisfied by the facts of what happened on the day in question. However, the first respondent appears to have relied upon the first definition only when he suspended the first applicant's licence. This is what he said in his letter to the first applicant dated 18 March 1986:

"On 12 March 1986, you were the pilot-in-command of aircraft Z-WMB which had an accident while on a single engine asymmetric power landing. You subsequently ran out of runway and stopped short of the boundary fence, beyond the clearway for runway 14 at Charles Prince Airport, causing a risk to life and property."

However, in determining whether or not what occurred was an accident as defined in the Regulation, I shall consider both definitions of the word 'accident'.

The first definition of 'accident' is "a landing in circumstances of emergency due to any cause". In his affidavit the first applicant denies the allegation that on the day in question he landed in circumstances of emergency. This is what he says in para 23.2 of his affidavit:

"23.2 In my opinion, the landing I effected, on the evening of 12 March 1986, at Charles Prince Airport had not been one made in 'circumstances of emergency' as set out in section 140(a). During the course

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of my flight from Bumi Hills, I had shut down one engine for precautionary reasons, as aforesaid; and I had

continued the flight on one engine without mishap, the other engine being in a perfectly sound and functional condition. I had made a normal asymmetric approach and landed the aircraft safely and successfully, having been trained to effect such landings and being experienced in night flying. Although, I did not stop the aircraft on the runway, this did not to my mind create 'circumstances of emergency' since the overshoot area is provided as an extension of the runway and it is not unusual for aircraft to continue off the runway into the overshoot area."In this regard, it was submitted on behalf of the respondents that the overshoot area is provided for landing in circumstances of emergency. If this submission was intended to mean that whenever an aircraft cannot be stopped on the runway but is brought to a safe stop in the overshoot area that aircraft has landed in circumstances of emergency, I cannot accept it as a valid submission. I say so because there must be a number of reasons why an aircraft may fail to stop on the runway. An aircraft which has made a perfect landing may fail to stop on the runway because, for example, the runway is very wet. The fact that in such a case the pilot stops the aircraft in the overshoot area does not turn the landing into a landing in circumstances of emergency. In the case under consideration the first applicant avers that he made 'a normal asymmetric approach and landed the aircraft safely and successfully'."

Although he could not stop the aircraft on the runway partly because of the speed at which the landing was carried out and partly because the runway was very wet, a fact which had not been brought to his notice before he landed, he managed to stop the aircraft in the overshoot area. This was about 150 metres from the boundary fence. There was no damage to the aircraft nor were the passengers injured. In my view, this was not a landing in circumstances of emergency. The definition of "accident" in s 140(a) does not, therefore, apply.

I now proceed to consider the second definition of 'accident' ie the definition in s 140(b) of the Regulations already set out above. Mr *Mafara* relied heavily upon this definition. It is a requirement of this definition that 'the aircraft receives substantial damage' and substantial damage means any damage which 'necessitates the replacement or extensive repair of any major component or the equivalent considering all damage to the aircraft collectively'. Mr *de Bourbon* submitted that the aircraft had not in fact been

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damaged and that what had been damaged was the engine of the aircraft. He argued that the term 'aircraft' refers to the body of the 'flying machine' and not to a component part thereof. I do not think that it is necessary for me to decide that issue in this judgment. I shall, therefore, assume without deciding, that the term 'aircraft' means the body of the 'flying machine' as well as the component parts thereof. It is clear from what the second applicant says in his affidavit that after the aircraft had been moved to the hangar he examined the left engine and ascertained that it had been substantially damaged. It cannot, therefore, be argued that when the aircraft was moved from the overshoot area to the hangar it had not received substantial damage. However, that is not the end of the matter because the applicants cannot be said to have contravened s 142 of the Regulations unless they knew that an accident had occurred. In other words, the two applicants cannot be said to have contravened the section unless they knew that the aircraft (which term includes the engine) had received substantial damage before it was moved to the hangar.

It is quite clear from what the first applicant says in his affidavit that before the left engine was examined by the second applicant he did not know that it had been substantially damaged. This is what he says in para 23 of his affidavit:

- "23.4 There was no damage whatsoever sustained by the aircraft as a result of my landing and consequently this section could only apply to the left engine which I had decided to shut down. As far as I was aware at the time of the flight there was no major damage to the engine. The engine had begun to run rough and I had thought it wise to shut the engine down to give me greater control. To the best of my knowledge, an engine can run rough as a result of a number of minor defects. I therefore, had no reasonable suspicion that there was any major defect, particularly, in view of the fact that the engine had not failed; I had actually shut it down myself.
- 23.5 I have since learned from the Second Applicant that an exhaust valve had failed and resultantly caused considerable damage to the engine.
- 23.6 Since I considered that no 'accident' had occurred I was unaware that I should not arrange for the aircraft to be moved to the hangar of Skyline Charters on 13 March 1986."

The second applicant was in a similar position. He did not know that the engine had been substantially damaged until he examined it at the hangar.

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Before that examination he, therefore, did not know that an 'accident' as defined in the Regulations had occurred. It seems to me that in order for any pilot to comply with the provisions of s 142 of the Regulations he must first of all know that an accident has occurred. If he does not know this, he does not contravene the section. In the present case, neither applicant knew that the aircraft had received substantial damage. Neither applicant can, therefore, be held to have contravened the section.

Having made those findings, I have come to the conclusion that the first respondent did not have any valid reason for suspending the licences of the two applicants. In the circumstances, the suspension must be set aside.

Since I have come to the conclusion indicated above, I do not consider it necessary to deal with the other submissions made by Mr *de Bourbon* on behalf of the applicants. However, I would like to comment very briefly on one of them. Mr *de Bourbon* submitted that the first respondent failed to observe the necessity of a fair hearing in that before their licences were suspended the two applicants were not afforded the opportunity to explain what had happened. In this regard counsel submitted that the first applicant breached the *audi alteram partem* rule. I agree with these submissions. On the basis of the information contained in the papers before me I am satisfied that before the licences were suspended the matter was not properly investigated and the two applicants were not afforded any opportunity to explain the allegations against them. The *audi alteram partem* rule is a rule of universal application in the administration of justice according to which a person is entitled to have an opportunity of being heard before he or she is condemned. Because no such opportunity was granted to the applicants in the present case, the suspension of their licences must be set aside for that reason as well.

In the circumstances, I order as follows:

1. That the suspension of the first applicant's private pilot's licence and commercial pilot's licence for 6 months be and is hereby declared null and void.

2. That the suspension of the second applicant's aircraft maintenance engineer's licence for 6 months be and is hereby declared null and void.
3. That the first respondent shall cancel any endorsement of the said suspensions made upon such licences and return the said licences to the applicants within 7 days of the date of this order.

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SANDURA JP

4. That the costs of this application be borne by the first respondent.

Atherstone & Cook, applicants' legal practitioners

Attorney-General, respondents' legal practitioner.

1986 (1) ZLR p228

ELLIOTT v COMMISSIONER OF POLICE 1986 (1) ZLR 228 (HC)

Court High Court, Harare

Blackie J

Civil application

4 & 11 June 1986

Flynote

Criminal Procedure - search warrants - requirements for a valid warrant.

Headnote

The Courts will refuse to recognise as valid a warrant, the tone of which is too general.

Cases cited:

Pullen NO & Ors v Waja 1929 TPD 838

Divisional Commissioner of SA Police & Ors v SA Associated Newspapers Ltd & Anor 1966 (2) SA 501 (AD)

IA Donovan for the petitioner

S Mafara for the respondent

Judgment

Blackie J: On 22 May 1986, three members of the Zimbabwe Republic Police called at the offices of the Catholic Commission for Justice and Peace in Harare (the Commission). They had with them a search warrant issued by a Justice of the Peace "in terms of s 54(1)(a) of the Criminal Procedure and Evidence Act [*Chapter 59*]", which they exhibited to Mr Ndebele, the Deputy Director of the Commission.

The warrant was issued in these terms:

"To Detective Patrol Officer Gauda and his assistants:

WHEREAS it appears to me, SUPERINTENDENT MAKAURIRE from information on oath that there are reasonable grounds for believing that there is in the possession or under the control of: MR NDEBELE

1986 (1) ZLR p229

BLACKIE J

BUS: - JUSTICE OF PEACE COMMISSION (sic)

or upon or in his offices or residence: certain article(s), that is to say:

SUBVERSIVE DOCUMENTS which are concerned or on reasonable grounds are believed to be concerned with the commission of an offence which it is on reasonable grounds believed may afford evidence of the commission or suspected commission of an offence/*(4)which are intended or on reasonable grounds are believed to be intended to be used in the commission of an offence*(5)

This is, therefore, to require you to seize the abovementioned articles, and to that end you are authorised, where necessary, to search any person identified in this warrant and to enter and search the premises identified in this warrant and to search any person found in or upon those premises. This warrant shall be executed only by day.

Given under my hand at Harare the 22nd day of May 1986.

Signed

S MAKAURIRE

Justice of the Peace

*Delete inapplicable."

Armed with this warrant, the police searched the offices of the Commission and removed from there a number of files and documents. Their authority to do so was challenged. It was alleged that the files and documents being removed belonged to the Commission. However, the police persisted in their actions and these proceedings were then instituted as a matter of urgency. An order was obtained directing that the files and documents removed by the police be placed in the custody of the Registrar of this court pending the determination of the challenge to their removal.

At issue in these proceedings is:

- (a) the general validity of the warrant; and
- (b) the legality of the seizure of the files and documents belonging to the Commission.

In the view I take of the matter, the applicant must succeed on the first ground. It is not

necessary, therefore, for me to express an opinion in regard to the second ground raised.

1986 (1) ZLR p230

BLACKIE J

It has long been established that the courts will refuse to recognise as valid a warrant, the terms of which are too general. See Lansdown and Campbell *SA Criminal Law & Procedure* vol 5 p 138; *Pullen NO & Ors v Waja* 1929 TPD 838; *SA Police v SA Associated Newspapers* 1966 (2) SA 501 (AD).

In this case not only have the very widest terms been used but also the vaguest. No offence is identified in the warrant. Nor has any attempt been made to identify the documents to be seized or to relate such documents to any offence. This warrant, it seems to me, fails to meet the most elementary test of precision and particularity. Also it is couched in such wide and general terms as to justify an inference that the issuing officer did not apply his mind to it as required by s 54(1) of the Criminal Procedure and Evidence Act.

In the circumstances the applicant must succeed. The Registrar of this court is directed to release the documents held by him as a result of the order of this court dated 23 May 1986 and the respondent is ordered to return these documents forthwith to the offices of the Commission.

The respondent is ordered to pay the costs of this application.

Scanlen & Holderness, petitioner's legal practitioners

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

1986 (1) ZLR p231

DW AITKEN & CO v HONEY & BLANCKENBERG & BRUCE 1986 (1) ZLR 231 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Beck JA & Gubbay JA

Civil appeal

28 May & 16 June 1986

Flynote

Agency - mandate - termination of - irrevocable mandate.

Legal practitioner - power of attorney to accept service of summons - whether may refuse service.

Headnote

The parties are firms of legal practitioners, who represented two parties to a dispute. Respondent's client, being about to emigrate from Zimbabwe, and in the face of the threat from

the appellants to cause his arrest *tamquam suspectus de fuga* entered an agreement with the appellant's client whereby he lodged in trust with the respondents a sum sufficient to meet any judgment that might be given against him and executed a power of attorney empowering respondents to accept service and defend proceedings on his behalf. After the departure of their client, respondents refused to accept attempted service of the summons claiming that their mandate had been revoked.

Held, that the question of whether an agent's mandate is irrevocable depends on the nature of the agreement between the principal and the agent and also upon any transaction which may have been entered into with a third party. The consequence of the present transaction was to prevent the principal from summarily terminating the mandate and to prevent the agent from refusing to act upon it.

Cases cited:

Pugin v Pugin 1963 (1) SA 791 (WLD)

Ward v Barrett NO & Anor 1962 (4) SA 732 (N)

1986 (1) ZLR p232

BECK JA

Colonial Government v Robb 5 HCC 433

Colonial Government v Hall (1909) 19 CTR 941

AP de Bourbon SC for the appellant

JB Colegrave for the respondent

Judgment

Beck JA: Mrs Esme Woods, a valuator, made a valuation of the furniture and effects of Mr Houston, a urologist who was about to emigrate and who required the valuation for the purpose of insuring his goods while in transit to Britain. Upon receiving the valuation on 16 May 1985, together with the statement of her fee, Mr Houston protested that she had over-valued his belongings by failing to value them, as allegedly agreed, according to their worth in Britain rather than in Zimbabwe. He also protested that she had calculated her fee at a higher percentage than that upon which they had allegedly agreed. Accordingly he resisted payment of her statement of account for \$1 626,05 and invited her to call upon him on 21 May to discuss suitable recompense.

Mrs Woods had a different view of the terms of their agreement and she immediately instructed the appellant, a firm of legal practitioners, to recover payment of her fee, informing Mr Aitken of the appellant firm that Mr Houston was due to leave Zimbabwe within the next two to three weeks and that all his belongings were about to be packed and made ready for shipment.

On 20 May Mr Aitken addressed a letter of demand to Mr Houston, requiring payment of Mrs Woods' account on 24 May, failing which an application would be made in terms of Order 36

Rule 278 of the High Court Rules for the arrest of Mr Houston and for holding him to bail to answer Mrs Woods' claim.

On receipt of Mr Aitken's letter Mr Houston at once consulted Mr Passaportis of the respondent firm of legal practitioners. A discussion ensued between Mr Passaportis and Mr Aitken which resulted in a letter from Mr Aitken to Mr Passaportis on 22 May in which Mrs Woods offered, without prejudice, to accept \$1 200 in settlement of her claim. The letter went on to state that if Mrs Woods' offer be rejected (as it was) "then we must insist that you confirm to us in writing by not later than 4.00 pm on the 24th instant that you are holding in trust for this particular matter an amount of \$2 000 being the original capital claimed together with some provision for the anticipated costs."

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BECK JA

The concluding paragraph of this letter then followed, and the words in it that I have emphasised sowed the seed of dissension that was to lead to the proceedings that have now reached this court. That paragraph reads:

"In the absence of such confirmation, we now have firm and definite instructions to implement the procedure set out in our letter of the 20th instant so as to safeguard our client's position. In view of the deficiencies in the Magistrate's Court **we are considering implementing the claim in the High Court and we would be grateful if you would secure a proper Power of Attorney to enable you to accept service by the Deputy Sheriff.**"(Emphasis added.)

Mr Passaportis wrote to Mr Aitken on 4 June in reply and said:

"We are now able to confirm that Mr Houston has deposited in our Trust Account an amount of \$2 000 and he has also executed a Power of Attorney enabling us to represent him in any litigation in the High Court. In this regard, we should state that our client sees no necessity for the threatened litigation to take place in the High Court. The dispute clearly falls within the jurisdiction of the Magistrates' Court and Mr Houston is content to use that forum."

The Power of Attorney that Mr Houston executed is before the court. It was executed on 4 June and it appointed the partners and professional assistants of the respondent firm to defend in the High Court proceedings "instituted by Esme Woods and to accept service of process."

On 10 June Mr Aitken wrote to Mr Passaportis in acknowledgement of the latter's letter of 4 June. Mr Aitken reiterated that proceedings would be instituted in the High Court and gave his reasons for considering that the dispute would be more suitably litigated in the High Court than the magistrates' court. The final sentence of his letter reads:

"We shall be issuing summons shortly and will instruct that this be served on you."

Mr Passaportis replied on Friday 14 June. He wrote: "With respect, we do not agree that proceedings should be commenced in the High Court " and went on to contend that resort to the more costly forum of the High Court was not warranted, having regard to the amount in dispute. He made no mention in this letter of any alteration to the mandate that he had been given under the

BECK JA

Power of Attorney executed on 4 June, nor did he intimate that he would not, on behalf of Mr Houston, accept service of any process issued out of the High Court.

The next day, Saturday 15 June, Mr Houston left Zimbabwe.

On 4 July the Deputy Sheriff was instructed by Mr Aitken to serve on Mr Passaportis a High Court summons in the suit between Mrs Woods and Mr Houston. The Deputy Sheriff's return reflects that "Mr Passaportis (whilst he holds a Power of Attorney) refused to accept service as states matter should be under Magistrates' Court Jurisdiction."

On 15 July Mr Aitken wrote to the Deputy Sheriff saying:

"In regard to Mr Passaportis purporting to refuse to accept service, he is in no position to do this ... The High Court has an inherent jurisdiction as a superior court and it is for the plaintiff to choose which forum she wishes to proceed in."

Mr Aitken went on to explain to the Deputy Sheriff that the plaintiff was well aware that to proceed in the High Court on a claim that lay within the jurisdiction of the magistrates' court would expose her to a risk in the area of costs. He concluded:

"You have already acknowledged that Mr Passports has a Power of Attorney and it is improper of him to refuse to accept service of a summons which has already been issued by the Registrar of the High Court. Please now effect service, and if necessary, leave the summons in Mr Passaportis' office or at his feet if he will not accept it."

On 18 July the Deputy Sheriff rendered this further return:

"Further attempt to serve on Mr Passaportis by SL Bruce, Deputy Sheriff. Is quite adamant that refuses to accept service and likewise to produce the Power of Attorney. F Y I Mr Passaportis quotes his authority as being Herbstein and van Winsen (*Civil Practice of Superior Courts in S Africa* 3rd ed pp 211/212).

I have referred the matter to the Sheriff who is of the opinion that Mr P is morally bound to accept service but agrees that if he does not produce the Power of Attorney then I cannot so serve.

BECK JA

Please endeavour to sort this out with H Blanckenberg as I do not wish to indulge in a 'tug of war' re this!"

On 22 July Mr Aitken urged Mr Passaportis by letter to accept service of the High Court summons, failing which an application would have to be made in the High Court for an order compelling him to accept service. The next day Mr Passaportis replied that in his view he was under no obligation to accept service of the High Court summons, but would be happy to accept service of a magistrates' court summons.

Thereupon the appellant firm applied by Notice of Motion for an order on the respondent firm to accept service of the High Court summons by exhibiting to the Deputy Sheriff (who was formally joined in his official capacity as second respondent) the Power of Attorney that Mr Houston had

executed on 4 June.

In the affidavit filed by Mr Passaportis in opposition to the application, the following assertions were made:

- "7.2 At the time when Mr Aitken requested the provision by Mr Houston of a Power of Attorney enabling the first respondent to accept service of process in the High Court, Mr Houston's departure from Zimbabwe was imminent and he was anxious to avoid any further legal problems with Mrs Woods which might delay his emigration.
- 7.3 The respondent [by which Mr Passaportis meant Mr Houston] was still under threat of being arrested *suspectus de fuga* and it was essentially to allay such threat that the respondent [again, he meant to say Mr Houston] granted the Power of Attorney. A copy of the Power is annexed hereto, marked 'I'.
- 7.4 Neither Mr Houston nor the respondent has been content to litigate in the High Court on a matter which clearly falls within the jurisdiction of the magistrates' court.
- 7.5 For this reason it was expressly stated to the applicant in the letter (of 4 June 1985) ...that Mr Houston saw no necessity for the commencement of proceedings in the High Court.
- 8.2 After receiving (the letter of 10 June 1985) from the applicant I held a final conference with Mr Houston before his departure and I again discussed with him the question of the forum to be utilised in the threatened litigation with Mrs Woods.
- 8.3 Mr Houston was adamant that the amount in dispute ...did not warrant litigation in the High Court.

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BECK JA

- 9.1 During a telephone discussion with Mr Aitken shortly before the issue of summons I reiterated that Mr Houston was not prepared to have the dispute resolved in the High Court and that, to this end, any authority given to the first respondent in the Power of Attorney aforesaid had been withdrawn."

In a supplementary affidavit Mr Passaportis explained that the "final conference with Mr Houston" to which he had referred in para 8.2 of his earlier affidavit took place on 13 June, and he went on to say that at that conference:

"Mr Houston stressed that he refused to litigate in the High Court and that the dispute should be contested in the magistrates court. I then regarded any mandate given by Mr Houston to the first respondent concerning the contemplated litigation in the High Court as having been withdrawn."

The application was dismissed with costs in the court below. The learned judge accepted that Mr Houston did in fact withdraw the mandate that he had given to Mr Passaportis to accept service of a High Court summons. Moreover, he relied on the proposition that the authority of an agent may be terminated at any time by either the principal or by the agent (in which connection he referred to *Pugin v Pugin* 1963 (1) SA 791 (WLD) at 793 F-H); and on the further proposition (to which Mr Passaportis had drawn the attention of the Deputy Sheriff) stated at p 206 of the 3rd ed of Herbstein and van Winsen *The Civil Practice of the Superior Courts in South Africa*, that "An agent is not bound to accept service and service on an agent who has full power to accept service but declines to do so is insufficient."

I am less confident than was the learned judge in the court *a quo* that Mr Houston did in fact withdraw the mandate that he had given to Mr Passaportis to accept service of a High Court

summons. It appears to me that it was no more than a tacit assumption on the part of Mr Passaportis that Mr Houston wished that mandate to be withdrawn. Mr Passaportis himself frankly said in his supplementary affidavit, not that Mr Houston expressly withdrew the mandate, but that Mr Passaportis "regarded" the mandate as having been withdrawn.

It by no means follows that Mr Passaportis' assumption is likely to be correct. The right of choosing the forum lay with Mrs Woods, not with Mr Houston. However much Mr Houston may have desired to avoid litigation in the High Court, he was powerless to prevent it and he had in fact expressly authorised Mr Passaportis to accept service of a High Court summons. He had given that authorisation as part and parcel of an agreed compromise, the essential

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BECK JA

purpose of which was - as Mr Passaportis himself said in para 7.3 of his opposing affidavit - "to allay" the threat that he - Mr Houston - might be arrested in terms of Rule 278 of the High Court Rules. I would think that there is a strong degree of improbability that Mr Houston, having obtained for himself removal of that threat by providing monetary security for the claim and by giving authority for High Court process to be served on his legal practitioner in his absence, would have gone back on his word on the eve of his departure by abruptly withdrawing at the last minute the authority that had been required of him and that he had given so that he might leave the country in an untrammelled fashion.

But even if the assumption that Mr Passaportis made were to be a correct assumption, it must surely be clear that Mr Houston was not free to withdraw the mandate he had given to Mr Passaportis except upon reasonable notice to Mr Aitken such as would have allowed Mr Aitken to effect service of the summons on Mr Houston himself prior to his departure, or to take such other steps as he may have been advised to take to protect his client's right to initiate a High Court action. The general proposition that the authority of an agent may be terminated at any time by either the principal or the agent is of no application to a situation such as this where the authority that was given formed an essential part of the agreement with Mr Aitken that the latter would refrain from doing something which Mr Houston and Mr Passaportis wished to avoid. Under those circumstances the authority could not be unilaterally terminated, nor could Mr Passaportis refuse to act in accordance with it, without sufficient prior notice. As CANEY J put it in *Ward v Barrett NO& Anor* 1962 (4) SA 732 (N) at 737D:

"The question whether a power of attorney or the authority of an agent howsoever conferred is irrevocable depends, it seems to me, upon an interpretation of the transaction into which the principal has entered with the agent and an application of the general principles of law to that transaction."

I would add that it must equally depend upon a transaction which the principal and agent on the one hand have entered into with a third party on the other hand, of which transaction the mandate given to the agent is an essential part. The consequence of such a transaction may very well be to prevent the principal from summarily terminating the mandate, and to prevent the agent from refusing to act upon it, which he could otherwise do - see *Colonial Government v Robb* 5 HCC 433; *Colonial Government v Hall* (1909) 19 CTR 941.

BECK JA

It is clear on the facts either that Mr Aitken received no prior notice at all that the mandate had been terminated; or that a notice that he may have been given was not timeously given, for it was only given if at all in the course of a telephone conversation between Mr Passaportis and Mr Aitken which took place shortly before summons was issued, and after Mr Houston had departed from the country. Mr *Colegrave*, faced with the difficulty that this notice that was allegedly given over the telephone was given too late for his client to be entitled to rely on it, was driven to submit that the earlier statement in Mr Passaportis' letter to Mr Aitken of Friday 14 June that "With respect, we do not agree that proceedings should be commenced in the High Court " was tantamount to notice that the mandate that Mr Houston had given had been withdrawn. That is clearly a baseless submission; but even if it were not, the notice that the letter is said to contain would still have been too late, for on the very next day, a Saturday, Mr Houston left the country.

Finally it was contended that in any event no prejudice had been occasioned to Mrs Woods by the refusal to accept service of the High Court summons, because security for the claim had been furnished and any delay that the refusal has caused can be compensated for by awarding interest on the amount of her claim.

In the first place I do not consider that it is open to the respondent to claim that there must be acquiescence in a situation that it has brought about in breach of its obligations, by suggesting that there is a remedy for any prejudice that has been suffered in consequence of its wrongful behaviour. In the second place, any prejudice that has been caused cannot properly be limited to the question of delay alone. If the respondent is allowed to get away, as it were, with the wrongful refusal to accept service of the summons that was issued, Mrs Woods will be compelled either to forego her right to have her claim tried in the High Court rather than in an inferior court, or to resort to having to sue Mr Houston by the process of edictal citation, with its attendant difficulties and expense - one of the very things that she sought to avoid by ensuring before Mr Houston left Zimbabwe, that his agent was armed with an appropriate mandate to accept service of process out of the High Court.

Accordingly I am satisfied that the application was wrongly refused in the court *a quo*. The appeal therefore succeeds with costs against the first respondent only (the second respondent having taken no part in these proceedings) and the order of the court *a quo* is altered to read:

BECK JA

1. The first respondent is ordered to accept service of the summons issued in Case No. HC 1864/85 by exhibiting to the second respondent the Power of Attorney effected by Mr Houston in favour of the first respondent.
2. The second respondent is authorised and directed to effect service of the aforesaid summons on the first respondent.

3. The first respondent is to pay the costs of this application.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

DW Aitken & Co, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

1986 (1) ZLR p240

MINISTER OF HOME AFFAIRS & DIRECTOR OF PRISONS v AUSTIN & HARPER 1986 (1) ZLR 240 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Constitutional appeal

23 & 24 June 1986

Flynote

Constitution - detainee - reasons for detention - Minister must formulate on objective facts - must be supplied to detainee in sufficient particularity to enable him to make representations to review tribunal - failure renders detention invalid - Court's jurisdiction to review not ousted - Schedule 2 s 2(1)(a) 1980 Constitution.

Legislation - Emergency Powers (Maintenance of Law and Order) Regulations 1983, s 17 .

Headnote

In deciding whether to detain a person in terms of the Emergency Powers (Maintenance of Law and Order) Regulations 1983, the Minister must look at the objective facts in order to arrive at the conclusion that there exist reasonable grounds for the detention.

In order to fulfil the requirements of s 2(1)(a) of Schedule 2 of the Constitution and of s 17(2) of the Regulations, a person detained in terms of s 17(1) of the Regulations must be supplied with the facts and material particulars which form the basis of the grounds for detention in sufficient particularity to enable the detainee to make effective representations to the review tribunal.

The jurisdiction of the court to review the Minister's decision to detain is not ousted by the use in the Regulations of the words "if it appears to the Minister". On review the court assesses the objective force of the facts and evidence in order to determine whether they justify the detention.

Where sufficient information concerning the grounds for detention is not

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DUMBUTSHENA CJ

supplied, then the detainees are unable to meet the allegations and the court is unable to judge them and the detention must be held invalid.

Cases cited:

Bull v Attorney-General & Anor 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680 (CA)

Patriotic Front-ZAPU v Minister of Justice, Legal and Parliamentary Affairs 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZS)

Council of Civil Service Unions & Ors v Minister for the Civil Service [1984] 3 All ER 935 (HL)

State of Punjab and Others v Talwandi [1985] LRC (Const) 600

Paweni v Minister of State (Security) & Anor 1985 LRC (Const) 612 (ZH)

Attorney-General of St Christopher, Nevis and Anguilla v John Joseph Reynolds [1980] AC 637 (PC)

Sigaba v Minister of Defence and Police & Anor 1980 (3) SA 535 (TK)

Mafuya & Ors v Mutare City Council 1984 (2) SA 124 (ZH)

Hurley & Anor v Minister of Law and Order & Anor 1985 (4) SA 709 (D)

Minister of Home Affairs & Anor v Dabengwa 1983 (2) ZLR 346 (SC); 1984 (2) SA 345 (ZS)

Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 (HL)

Ross-Clunis v Papadopoulos & Ors [1958] 1 WLR 546 (PC)

Armagh v Government of Ghana & Anor (1968) AC 192 (PC)

Katofa v Administrator-General for South West Africa & Anor 1985 (4) SA 211 (SWA)

Liversidge v Anderson & Anor [1942] AC 206 (HL)

S W Mafara for the appellant

I A Donovan for the respondents

Judgment

Dumbutshena CJ: This is an appeal against the judgment of BLACKIE J declaring the detention of the respondents, in terms of s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations, Statutory Instrument No. 458 of 1983 (the Regulations), unlawful.

The relevant parts of s 17 of the said Regulations read:

"17. (1) Subject to the provisions of section 41, if it appears to the

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Minister that it is expedient in the interests of public safety or public order that -

- (a) any person, whether he is a resident of Zimbabwe or otherwise, and, in the case of a person who is not a resident of Zimbabwe irrespective of the circumstances in which he has entered Zimbabwe or been apprehended; or
- (b) any class of persons who have been removed from an area or portion of an area in terms of paragraph (a) or (b) of subsection (1) of section 4;

should be detained, he may, by order under his hand, direct that such person or that every person who is a member of such class, as the case may be, be detained -

- (i) by being kept in such prison or other place; or
- (ii) by being prohibited from absenting himself from such place;

as the Minister may direct and in accordance with instructions issued by the Minister.

(2) Where a person is detained in terms of subsection (1), he shall be informed as soon as reasonably practicable after the commencement of his detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention, and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him.

...

(5) Every person detained in terms of an order made under subs (1) shall be deemed to be in lawful custody..."

It is important in this appeal to remind ourselves of the somewhat chequered history of the detention of the two respondents. In doing so I need only uplift the narrative so succinctly summarised by the learned Judge of Appeal, the Honourable Mr Justice BECK. He put it thus in *Bull v The Attorney-General & Anor* S-43-86 (as yet unreported) at pp 3-5 *(6):

"The history of the arrest and subsequent detention of the two men is relevant to the question of whether the *onus* has been discharged of showing that the suspicion in question exists and that it is a reasonable suspicion.

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DUMBUTSHENA CJ

They were arrested by members of the Central Intelligence Organisation on 22 February 1986, and were detained under the Emergency Powers (Maintenance of Law and Order) Regulations, 1983. On 25 February written reasons for the detention were furnished in terms of s 21(3) of those Regulations. On 4 March a judge of the High Court ruled that the reasons given were inadequate and ordered proper reasons to be supplied by 6 March. That order was not complied with and on 7 March the High Court ordered the release of the men.

They were released pursuant to that order, only to be re-arrested immediately, it being alleged that new reasons for their detention had become known. Those new reasons were not disclosed and on 10 March an application to

the High Court was made for an order directing reasons for the fresh detention to be given. At the request of the State that application was postponed to 12 March.

On 12 March the High Court was informed by counsel for the State that he had been instructed that the men were no longer being detained under the above mentioned Emergency Powers Regulations, but were now under ordinary arrest and were being held in police custody with a view to being charged with having contravened the Official Secrets Act. Accepting that the instruction given to counsel for the State was accurate and that the re-detention of the two men under the Emergency Powers Regulations had been terminated, the High Court understandably made no order for reasons for the re-detention to be furnished.

On 13 March the two men were brought before a magistrate and the State requested that they be remanded in custody on a charge of having contravened s 4(1)(d)(i) of the Official Secrets Act. The request was opposed on the ground, *inter alia*, that the State had not established that there was a reasonable suspicion that they had committed the offence alleged. The magistrate reserved judgment until the following morning, when he granted the request for a remand in custody. Because it was the State's declared intention to produce a ministerial certificate that would forbid the granting of bail to the accused persons the magistrate ruled that he would not entertain an application for bail for seven days. A certificate in terms of s 106(2)(a) of the Criminal Procedure and Evidence Act [Chapter 59] was signed by the Minister on 14 March and was filed in the magistrates court on 18 March, on which date the two accused were remanded in custody until 1 April.

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DUMBUTSHENA CJ

The issue of that certificate led to yet another application to the High Court to declare s 106(2) of the Criminal Procedure and Evidence Act to be *ultra vires* s 13 of the Constitution of Zimbabwe. That application was dismissed and the judgment dismissing it has since been unsuccessfully appealed against. While that appeal was still under consideration, however, the *habeas corpus* petition from which this present appeal has stemmed was lodged in the High Court. The petition was opposed and the matter was argued on 24 March and was dismissed by the learned judge *a quo* on 26 March."

The respondents appealed to the Supreme Court. On 2 April 1986 their appeal was allowed on the ground that no reasonable suspicion had been "demonstrated such as would make it lawful to deprive them of their liberty."

They were re-detained in terms of s 21 of the Regulations on 9 May 1986, after having been free for a period of five weeks. They applied to the High Court for an order that their re-detention was unlawful and asked for their release. The application was heard on 16 May 1986 and was dismissed on 30 May 1986. They remained in detention under s 21 of the Regulations.

On 27 May 1986 the Minister of Home Affairs signed another Detention Order in terms of s 17(1) of the Regulations. The respondents applied to the High Court for an order declaring that detention invalid and directing their release.

On 16 June 1986 BLACKIE J declared the respondents' "detention unlawful by reason also of the first appellant's failure to supply adequate reasons for their detention". It is against his judgment that the first appellant, the Minister of Home Affairs, appeals.

At the end of argument this court decided as follows:

"After listening to the submission of counsel, we are unanimously of the view that it has not been shown that the judge *a quo* erred in his conclusions. We, therefore dismiss the appeal with costs. A reasoned judgment will

follow later."

These then are our reasons.

Preventive detentions, in those states which either by legislative authority or through brute force resort to them, are a matter of constant worry. Sometimes

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DUMBUTSHENA CJ

they create unnecessary conflict between the judiciary, which is the custodian of the rights of the citizens who seek protection in the courts, and the executive, the guardian of the security of the State. When the executive ignores the orders and judgments of the courts there is the inevitable break-down of law and order, resulting in uncivilised chaos because the courts cannot enforce their own orders. Their jurisdiction and duty end after the delivery of judgment. The history of this case leans more towards that which is undesirable than to that which is desirable in order to uphold the rule of law.

The first appellant has appealed against the judgment of the court *a quo* on a number of grounds. They are:

- "1. The learned judge erred in holding that the appellants' decision to detain in terms of s 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1983, Statutory Instrument 458 of 1983 was so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to it could have arrived at it.
2. The learned judge erred in holding that s 17(1) permitted him to look at the facts objectively in respect of the application before him.
3. The learned judge erred in holding that the reasons given to the detainees were inadequate.
4. The learned judge erred in holding that the appellant had failed to discharge the *onus* of establishing that the detention was lawful."

The first appellant's contention was that there was no unreasonableness in the exercise of his power because the reasons for detention that were served on the respondents were adequate. What was important, so argued Mr *Mafara*, who appeared for the appellants, was that reasons were given which discharged the *onus* that detention was necessary in the interest of State security. He contended that all the court had to do was to look at the reasons served upon the respondents and decide whether or not it was reasonable for the first appellant to detain on those reasons. He seemed to suggest that for the Minister's decision to be unreasonable it must be "so outrageous in defiance of logic or of accepted moral standards." This quotation was extracted from the two cases Mr *Mafara* relied upon, viz, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680 at 682H, and *Patriotic Front - ZAPU v Minister of Justice, Legal and Parliamentary*

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Affairs 1986 (1) SA 532 (ZS) at 548D-549D. See also *CCSU & Ors v Minister of the Civil*

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Service [1984] 3 All ER 935 (HL) at 951b.

Mr *Mafara's* submission on the nature of unreasonableness seems to me to be incomplete unless the full sentence on what constitutes unreasonableness is completed. LORD DIPLOCK said in *CCSU & Ors v Minister for the Civil Service*, *supra*, at 951b.

"It (irrationality) applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards **that no sensible person who had applied his mind to the question to be decided could have arrived at it.**" (Emphasis added.)

In the instant case it may be pertinent to ask whether it was proper or reasonable for the first appellant to decide to detain the respondents on the several grounds served on them. Did he exercise his discretion reasonably on those grounds? Did he ever consider whether his grounds were unreasonable?

On what grounds were the respondents detained in terms of s 17(2) of the Regulations on 27 May 1986? They were:

- " 1. That you are a South African Espionage Agent.
2. That you passed intelligence information to South Africa which is to the detriment of Zimbabwe's security.
3. That you are a threat to the security of Zimbabwe."

As the learned judge *a quo* remarked, these reasons differed from those supplied to the respondents on 9 May 1986 when they were detained in terms of s 21 of the Regulations. Just to show the difference, those reasons were:

- "1. It has come to Government notice that you have been engaged in espionage activities which have been detrimental to the security of the Republic of Zimbabwe. You began your nefarious activities soon after our independence and used to drive vehicles to South Africa after they had been impounded by the Department of Customs and Excise. Whilst in South Africa you received remuneration in the form of commissions and benefits in the form of hotel accommodation which were all paid for by an insurance company

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1. under a suspect arrangement. This was done in violation of your allegiance to Zimbabwe and contrary to the regulations of the Department of Customs.
2. Unknown to us at the time when you seemed to have stopped your nefarious activities, you were deeply involved in supplying information to South Africa of a security and military nature. You would gather intelligence relating to Zimbabwe's military hardware as well as of that which travelled through Zimbabwe to a neighbouring independent State from Eastern Block countries and supply all this to South Africa.
3. You were also tasked by your South African masters to gather information relating to certain military and economic targets.
4. When South Africa threatened to invade us, you were furthermore tasked to gather intelligence on the personal offices and residences of South African Liberation Organisations stationed in Zimbabwe. In fact you did gather intelligence in respect of offices and residences of these liberation movements and sent it to South Africa."

Because the first appellant now says the reasons for detention of 27 May 1986 were served in error, can it reasonably be asserted that he applied his mind to the question of the detention of the respondents?

Mr *Donovan*, who appeared for the respondents, contended that the reasons for detention served on the respondents on 9 May 1986 and on 30 May 1986 are "(with one possible exception) no more than unsubstantiated assertions or conclusions; they do not reveal the factual (or evidential) foundation upon which they are based."

There is substance in this contention because it is important for the detaining authority to furnish the detainee with the grounds of detention which have sufficient information or particulars to enable him to make representations against the order before the Review Tribunal. In drawing up grounds of detention it is incumbent upon the detaining authority to appreciate that the detainees will prepare their representations at the Review Tribunal on inadequate grounds. It is more than important that the detainee must be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before the Review Tribunal. A bare or bald statement that the detainee is a spy is not good enough.

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For purposes of comparisons it is necessary to look at Article 22(5) of the Constitution of India which deals with preventive detention. Clause (5) of Article 22 reads:

"When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order."

It will be seen that subs (2) of s 17 of our Regulations requires that a person detained in terms of subs (1) of s 17 "...shall be informed as soon as reasonably practicable after the commencement of his detention, and in any case not later than seven days thereafter, ...of the reasons for his detention ..." Subsection (2) of s 17 of the Regulations repeats in identical words the wording of s 2(1)(a) of Schedule 2 of the Constitution of Zimbabwe.

Mr *Donovan* relies for his contention on the persuasive authority of an Indian case dealing with preventive detention in terms of Article 22(5) of the Constitution of India. A reading of that case makes clear the view often expressed by this court on the question of detention and on the grounds relied upon by the detaining authority. In *State of Punjab & Ors v Talwandi* (1985) LRC (Const) 600, an appeal case, the respondent was arrested in pursuance of a detention order under s 3 of the National Security Act, 1980. He was furnished with grounds for detention which showed that he had been detained on the basis of two speeches he was alleged to have made. Together with these grounds he was supplied with a police report of the alleged speeches. He challenged the validity of the detention on the basis that the grounds for detention were insufficient to enable him effectively to make representations against the detention to the Advisory Board, as required by Article 22(5) of the Constitution. In that case the detainee was given details of the time, place and date of the alleged speeches in the statement of the grounds but these were omitted in the police report. The High Court held that the detention was

invalid. On appeal the decision was reversed.

I am interested in what CHANDRACHUD CJ, as he then was, said on the furnishing of sufficient particulars for the grounds of detention because this is the nub of the present appeal. I cite the passage at 607 a-i. The learned Chief Justice said:

"The question which we have to consider in the light of these decisions is

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whether sufficient particulars of the first ground of detention were furnished to the respondent so as to enable him to exercise effectively his constitutional right of making a representation against the order of detention. The obligation which rests on the detaining authority in this behalf admits of no exception and its rigour cannot be relaxed under any circumstances.

Having given our anxious consideration to this question, it seems to us impossible to accept the view of the High Court that sufficient particulars of the first ground of detention were not furnished to the detainee so as to enable him to make an effective representation to the detaining authority, that is to say, a representation which on being accepted may give relief to him. This is not a case in which the ground of detention contains a bare or bald statement of the conclusion to which the detaining authority had come, namely, that it was necessary to pass the order of detention in order to prevent the detainee from acting in a manner prejudicial to the interests of public order. The first ground of detention with which we are concerned in this appeal, mentions each and every one of the material particulars which the respondent was entitled to know in order to be able to make a full and effective representation against the order of the detention. That ground mentions the place, date and time of the alleged meeting. It describes the occasion on which the meeting was held, that is, the 'Shaheedi Conference.' It mentions the approximate number of persons who were present at the meeting. Finally, it mentions with particularity the various statements made by the respondent in his speech. These particulars mentioned in the grounds of detention comprise the entire gamut of facts which it was necessary for the respondent to know in order to make a well-informed representation. The inadequacies from which the supplementary particulars furnished to the respondent along with ground No 1 suffer, cannot affect that position because, they do not introduce any obscurity in the facts stated in that ground or detract from the substance of the allegations mentioned in that ground. The argument of the respondent that he could not make an effective representation in behalf of ground No. 1 because of the inadequacy of date in the particulars supplied to him, has therefore to be rejected.

However, we are somewhat surprised that in a matter of this nature, the detaining authority should have opted for a somewhat casual and unimaginative approach to his task. We asked the learned Attorney-General to produce before us the original version of the CID report of

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which an extract was supplied to the respondent by way of particulars. The original version contains almost every one of the material details pertaining to the meeting, which are mentioned in ground No. 1. The detaining authority needlessly applied his scissors excising the data which mentioned the date, the place, the time and the occasion of the meeting. It is this lack of thoughtfulness on the part of the detaining authority which furnished to the respondent the semblance of an argument. This court has observed in numerous cases that, while passing orders of detention, great care must be brought to bear on their task by the detaining authorities. Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution. Nothing less. We will utter the oft - given warning yet once more in the hope that the voice of reason will be heard."

In State of *Punjab & Ors v Talwandi*, *supra*, while it was held that the detainee was not entitled

to know the evidence or the source of the information, it was said he must be furnished with the grounds of detention and "the particulars which would enable him to make out a case, if he can, for the consideration of the detaining authority"; see at 608h. The learned Chief Justice added:

"His right is to receive every material particular without which a full and effective representation cannot be made. If the order of detention refers to or relies upon any document, statement or other material, copies thereof have of course, to be supplied to the detainee as held by this court in *Ichhu Devi Choraria v Union of India* (1981) 1 SCR 640, 650."

See at 609b.

In my view the basic facts and the material particulars which form the foundation or basis of the detention must be supplied to the detainee because they form together the grounds upon which the detention order is based, and as Chandrachud CJ said: "...without being appraised of the same, the detainee cannot possibly make an effective representation." See State of *Punjab & Ors v Talwandi*, *supra*, at 609g.

It is this type of information which in my view fulfils the requirements of s 2(1)(a) of Schedule 2 of the Constitution and subs (2) of s 17 of the Regulations. This is the type of information the learned judge of appeal, the honourable Mr Justice Beck, said was required to enable the detainee to make representations in *Bull v The Attorney-General and The Director of Prisons*,

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supra. It is not bare assertions that meet the requirements of the section referred to above. The courts of this country have repeatedly said the same. In *Paweni v Minister of State (Security) & Anor* (1985) LRC (Const) at 619c - g SMITH J said, quoting a passage from a Zambian case:

"As I said in *Shipanga v Attorney-General* at p 241:

'...in the absence of some legal justification for the deprivation of a person's liberty, whether legislative or under the common law, that deprivation is unlawful.'

That proposition is sacrosanct.

With respect, I consider that the reasoning in the above passage applies equally to s 21 of the Regulations. Having regard to this reasoning, and to the tests referred to above, I consider that the reasons for detention that are set out in the detention order are vague and do not enable the petitioner to make meaningful representations concerning the propriety of his detention. There is no indication of the kind of economic sabotage he has been engaged in. Mr Mafara said, in argument, that the first respondent had advised him that the intelligence received by CIO concerned the contract between the petitioner's company and Government which related to the delivery and distribution of foodstuffs in drought - stricken areas. Therefore it fell within the definition of 'essential service' (by virtue of para (f) of that definition) in the Emergency Powers Act [*Chapter 83*] and consequently was included in the definition of 'public order' in s 2 of the Regulations. There is no indication of this aspect, however, in the reasons furnished to the petitioner. Moreover, there is no indication of when the petitioner is believed to have conspired with 'persons with external connections' to defraud Government or, indeed, who such persons are. The reference to persons with external connections and then to external agents and then to external elements contributes to the vagueness."

Speaking for myself, I am of the view that it is not required of the detaining authority to supply the detainee with the name of its informant. Although BECK JA was concerned with the

detention of persons who had contravened s 4(1)(d)(i) of the Official Secrets Act, the directions he gave in his judgment in *Bull v The Attorney-General and The Director of Prisons, supra*, apply equally to a detention under s 17 of the Regulations. I, therefore, am in total agreement with what he said at p 8*(7):

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"Without pointing to the authoritative character of the source of the allegedly reliable information given to the investigating authorities, and without any enlightenment whatsoever as to the result of enquiries into the content of the information said to have been passed, the circumstances under which it was passed, and the identity of the persons to whom it was passed, the speculative conjecture that it may have been prohibited information passed in contravention of s 4(1)(d)(i) of the Official Secrets Act is devoid of any foundation capable of elevating it to a reasonable suspicion. There has been time enough to make enquiries designed to obtain some verification of the bald allegation that information was communicated by these Customs officers, the content of which and the recipients of which were such that the two officers appear to have acted in contravention of s 4(1)(d)(i) of the Official Secrets Act. The inability of the State to offer even now anything more than an unsupported conclusion that it was not within the course of their duty to pass to unidentified South African authorities unidentified information concerning SIMMs exports to and imports from Mocambique' - or is it 'exports leaving Zimbabwe through the Mocambique route'? - make it impossible for the court to determine objectively whether or not there is a reasonable suspicion that the accused men have committed a criminal offence."

This is the type of information or the particulars which lay a sound foundation for a reasonable detention. With that type of information the detainee will understand the case he is to meet before the Review Tribunal.

Did the several grounds served on the respondents meet the standards dutifully laid above?

It was contended on behalf of the respondents that the reasons served on 9 May 1986 were no more than bald assertions or conclusions without evidential material upon which the Minister could reach his conclusion. Mr Donovan singled out two exceptions, that is, the following sentence in paragraph 1 of the reasons: "Whilst in South Africa you received remuneration in the form of commissions and benefits in the form of hotel accommodation which were all paid for by an insurance company under a suspect arrangement", and the sentence in the reasons served on 30 May 1986: 'That you are a South African Espionage Agent'. The first sentence was categorised as a bald statement. It is clear from a reading of the first sentence that the particulars upon which the suspicion is based are not supplied. Mr *Donovan* submitted that these two sentences cannot justify detention because

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if they were acted upon they would fall into the category of irrationality, that is, unreasonableness. See *CCSU & Ors, supra*. It was argued that the accommodation was paid for under a suspect arrangement and therefore it could be assumed from that alone that the respondents were engaged in espionage activities. Acting on that assumption alone the Minister had no information upon which he could be reasonably persuaded that the acts were suspect. There was, therefore, no basis for the Minister's belief.

The unsatisfactory manner in which the reasons were served and the lack of adequate grounds did not seem right to the detainees. They said they had to make repeated approaches to the authorities and to the court for adequate reasons to be supplied to them. The reasons supplied were given to them at the last moment, often after a deadline set up by the court. They were inadequate. The detainees at some stage were freed and then remanded pending a prosecution under the Official Secrets Act. No prosecution was carried out. The Supreme Court found that information upon which the prosecution was to be based was insufficient. That information failed to satisfy this court that the respondents had committed an offence. Up to now they have not been prosecuted. One wonders why, if they contravened s 4(1)(d)(i) of the Official Secrets Act, they have been charged but not yet tried. The respondents alleged that they were not meaningfully questioned on the allegations made against them. They said that the reasons produced by the first appellant were never consistent with previous reasons supplied to them. They have persistently denied having engaged in any activity warranting their detention.

The history of the events narrated by the respondents was not denied by the first appellant. He said, according to the judge a quo, 'that his reasons for detention have been adapted to the clarifying intelligence picture which became available to him. He further says that he cannot disclose the information on which the applicants were arrested and detained because of security considerations'. The learned judge drew, rightly in my view, an adverse inference against the first appellant for 'failure to supply adequate reasons or such information on which this court could be satisfied that the first respondent's decision was a reasonable one'.

In *Attorney-General of St Christopher, Nevis and Anguilla v John Joseph Reynolds* [1980] AC 637 (PC) the Privy Council had occasion to consider detention regulations similar to ours. They considered whether the Emergency Powers Regulations 1967 and the detention order against Reynolds were lawful. The Constitution of St Christopher, Nevis and Anguilla has on

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detention similar provisions to those of the Constitution of Zimbabwe. The most relevant provision in terms of this case is s 15 of their Constitution which (at p 652G - 653A) reads:

"(1) When a person is detained by virtue of any such law as is referred to in section 14 of this Constitution the following provisions shall apply, that is to say: -

- (a) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing in a language that he understands specifying in detail the grounds upon which he is detained; ...'

The rest of the subsection provides, amongst other things, that not more than one month after the commencement of the detention, the detainee's case shall be reviewed by an independent and impartial tribunal: and that the detainee shall be allowed to have a lawyer to represent him before the tribunal: and the tribunal may make recommendations to the authority by which the detention was ordered but that authority shall not be obliged to act on such representations."

Section 2(1)(a) of Schedule 2 of our Constitution reads:

"2. (1) Where a person is detained under any law providing for preventive detention -

- (a) he shall be informed as soon as reasonably practicable after the commencement of the detention, and in any case not later than seven days thereafter, in a language that he understands of the reasons for his detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and to hold communication with him."

Reynolds was detained and served with the following notice supposed to be in accordance with s 15(1) of the Constitution:

"That you John Reynolds during the year 1967, both within and outside of the State, encouraged civil disobedience through the State, thereby endangering the peace, public safety and public order of the State."

LORD SALMON remarked as follows in his opinion at 661 E - H:

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"It is difficult to imagine anything more vague and ambiguous or less informative than the words of this notice. It was indeed a mockery to put it forward as specifying in detail the grounds on which the plaintiff was being detained.

It seems plain to their Lordships that the irresistible inference to be drawn from this notice is that there were no grounds, far less any justifiable grounds, for detaining the plaintiff. Had there been any such grounds they would surely have been set out in the notice. If they were omitted from the notice by accident, which is hardly likely, evidence on behalf of the Governor could have been called by Crown counsel at the hearing of the inquiry early in July 1967, or at the trial that took place about nine years later, showing that his detention was reasonably justifiable. Naturally the Governor would not have been obliged to furnish anyone with the sources of his information if he considered that it was contrary to public policy to do so. He could, however, have had evidence called on his behalf or given evidence himself to state, with full particularity, exactly what the plaintiff had done to justify his detention, and when and where and how the plaintiff had done it. The fact that no grounds of any kind have been put forward on behalf of the Governor to justify him for making a detention order against the plaintiff, and all the circumstances of the case, raise an irresistible presumption that no such grounds have ever existed. Accordingly their Lordships have no doubt that the detention order was invalid and that the plaintiff was unlawfully detained."

At the risk of repeating myself on this point, let me cite with approval what was said by ROSE-INNES J in *Sigaba v Minister of Defence and Police & Anor* 1980 (3) SA 535 (TkSC) at 551G:

"Where an official in the exercise of his functions denies that he acted unlawfully or unreasonably and avers that he acted within the limits of the powers conferred upon him by a statute and had reason to believe the existence of a state of affairs which the statute requires must exist before the powers may be exercised, but he declines to state what his reasons were for that belief, or what the circumstances were which rendered his belief reasonable, that may in a proper case give rise to an inference that the powers conferred by the statute were improperly exercised and that the reasonable belief which was a condition for their exercise did not exist. Cf *Pretoria North Town Council v Al Electric Ice Cream Factory (Pty) Ltd* 1953 (3) SA 1 (A); *Judges v District Registrar of Mining*

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Rights, Krugersdorp 1907 TS 1046 at 1051; *Minister of National Revenue v Wrights Canadian Ropes Ltd* 1947 AC 709. I am satisfied that the studious avoidance by both the deponents to the affidavits for respondents to state what the offence was which they had in mind when effecting the arrest and detention, and their declining to state what their grounds were for a belief that Sigaba had committed an offence under the Act, gives rise to an

inference adverse to respondents' case."

See also *Matuya & Ors v Mutare City Council* 1984 (2) SA 124 (ZH) at 133 E - G; *Hurley & Anor v The Minister of Law and Order* 1985 (4) SA 709 (D) at 725 D - J

The question of onus was common cause. In my judgment the judge *a quo* was right in his conclusion that the first appellant had failed to discharge the onus of establishing that the respondents' detention was lawful. On the first leg of the appeal alone the appeal should in my view fail.

Mr Mafara stated in his heads of argument that the reasons given by the first appellant were adequate enough to enable the detainees to make meaningful representations at the Review Tribunal hearing. He argued that the respondents had made replies on the grounds supplied by the first appellant. He relied for his contention on *Paweni v Minister of State (Security) & Anor*, *supra*.

I have already pointed out that in that case the court *a quo* found that the reasons set out in the detention order were vague and did not enable the petitioner to make meaningful representations concerning the propriety of his detention. Instead of setting aside the order of detention the learned judge sought to avoid the release of the detainee and his re-detention soon afterwards by following the authority of *Minister of Home Affairs & Anor v Dabengwa* 1983 (2) ZLR 346 (SC); 1984 (2) SA 345 (ZSC), (1985) LRC 581 at 5976 a - e, in which BECK JA tried to avoid repeated release and re-detention by making an order of mandamus. The learned judge of appeal at 362E-G of the Zimbabwe report justified the granting of the order of mandamus in these words:

"Experience has shown that the qualified right to personal liberty has not effectively enjoyed the protection ostensibly given to it when summary release had been ordered by reason of a failure to comply with one or another of the protective provisions of the Constitution and the Regulations. The Executive authorities, no doubt motivated by what appear to

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be the demands of public security, and which are of over-riding importance, have usually met such orders of release by immediately issuing another detention order, and the detainee may in some respects be worse off than before. It is possible, of course, that claims for damages for false imprisonment for the period of wrongful detention could be advanced in consequence of such orders, but this overlooks the Emergency Powers (Security Forces Indemnity) Regulations SI 487/1982, which prevents the institution or continuance of a suit for damages for, *inter alia*, wrongful detention, save with the permission of the Minister of Defence.

It seems therefore to be in the interest both of the detained person and of the State not to broaden unnecessarily the area with regard to which a failure to observe a protective provision will lead undesirably, as far as the State is concerned, to a person being let loose who is responsibly considered to be a continuing threat to public security, and, as far as the detainee is concerned, being immediately overtaken by a new order of detention. To extend the availability of the writ of *de homine libero exhibendo* to instances of non-compliance with any and every mandatory provisions, even those that do not govern the making of a valid order of detention *ab initio* but only govern the rights to which a validly detained person is thereafter entitled, is to broaden that area unnecessarily and, indeed, incorrectly, for a valid warrant of arrest or detention has always been a good answer to an application for the writ."

In *Pawenis* case, *supra*, the learned judge a quo gave the respondent forty-eight hours within which to file fresh grounds for detention. The first appellant was afforded the opportunity to file new grounds on a number of occasions. He did not use those occasions to good advantage. It cannot be said that the Court did not appreciate the nature of the case the Judges were dealing with.

A careful study of the judgments on detentions would, in my view, inform the detaining authority of those matters which the Courts have said do not constitute adequate grounds for detention. Were that appreciated by the detaining authority repeated detentions would become a thing of the past.

Mr *Mafara* contended that the approach of Sandura JP in *Austin and Harper v Minister of State (Security) & Anchor* HH - 221 - 86 was the right approach in matters of this nature. I have read with care the learned Judge President's cyclostyled judgment. The learned Judge President did not, in my view, apply his mind to the question of the sufficiency or adequacy of the grounds

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for detention. The adequacy and sufficiency of information is necessary to enable the detainees to prepare their cases for the Review Tribunal.

The reasonableness or unreasonableness is relevant to the preparation of detainees representations before the Review Tribunal. The grounds for detention should, as I said above, enable the detainees to make meaningful representations before the Review Tribunal. I need not narrate the type of particulars that should be supplied to the detainees. BECK JA considered them in the *Bull* case, *supra*, at 121G to 124A. The learned Judge President avoided the issue of the sufficiency of information to be supplied to detainees for the purposes outlined above.

In relations to the persons to be detained the detaining authority has a duty to act fairly. It is the duty of the Court to determine whether the detaining authority has acted, in making his decision, fairly. Has he been fair to the detainees? Has he served them with reasons for detention which have sufficient information and particulars which will assist them in meeting the case against them? These are the questions to which the Court, determining the irrationality, procedural impropriety or illegality, should apply its mind.

Mr *Mafara* submitted in his heads of argument and before us that "[t]he wording in section 17(1) does not permit an objective approach by the Court". Mr *Mafara* seemed to suggest that because the section is framed in a subjective form, ie, "if it appears to the Minister", it excludes judicial review. During the course of argument it did not seem to me that Mr *Mafara* was clear as to whether the Court was excluded from reviewing the Minister's decision to detain because the section gives the Minister a subjective discretion.

Counsel are agreed that s 17(1) of the Regulations is cast in a subjective form. But in the exercise of his "subjective" discretion in terms of subs (1) of s 17, the Minister has to examine objective facts. It is the consideration of those objective facts or information that will determine

whether the Minister has acted reasonably or unreasonably in deciding to detain.

The phrase "if it appears" does not in any way exclude judicial review. In *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 Lord Wilberforce, when considering a section framed in a "subjective" form - "if the Secretary of State is satisfied" - said at 681i - 682a:

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"This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self-direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment v Associated Society of Locomotive Engineers' and Firemen* (No. 2) ([1972] 2 All ER 949), per Lord Denning MR"

Mr *Donovan* agrees with this approach. His contention is that although the Minister has a subjective discretion the action he takes in exercise of that discretion will be bad unless he acts upon reasonable grounds.

In my view the Minister must look at the objective facts in order to arrive at the conclusion that reasonable grounds existed justifying detention. There must be sufficient information and material upon which to act, that is, in the exercise of his discretion.

The Court in its approach to the assessment of facts or any evidence must be satisfied that those facts and evidence exist to justify the detention. That approach by the Court is objective. See *Ross-Clunis v Papadopoulos & Ors* [1958] 1 WLR 546 (PC) at 560; *Regina v Governor of Brixton Prison ex parte Armah* 1968 AC 192 (PC) at 235C - D, 237G - 238D, and at 257E - G

Mr *Donovan* submitted that for the first appellant 'to assert that it was his subjective belief that these detentions were expedient in the interests of public safety or public order' was not enough. He argued that it was incumbent upon the first appellant to satisfy the Court that there was a foundation of fact or evidence upon which he could properly come to this belief. See *Secretary of State v Tameside, supra*, at 677i - 678a, (1977) AC 1014 (CA) at 1034C - D; *Katofa v Administrator-General SWA & Anor* 1985 (4) SA 211 (SWA) at 224I - 225B.

We agree with the learned judge *a quo* that the Court's jurisdiction to review the first appellant's decision is not excluded by the wording of s 17(1) of the

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Regulations - "if it appears to the Minister". The authorities cited above show that similarly

worded legislation has been reviewed by the courts.

In *Hurley & Anor v Minister of Law and Order & Anor*, *supra*, the court was considering the release of a director of an organisation who had been arrested in terms of s 29(1) of the Internal Security Act 74 of 1982 (South Africa). The question of acting reasonably was in issue as it is in the instant case. The Archbishop of Durban, Dr Hurley, and the detainee's wife applied for his release. It was held there:

"...that the ordinary grammatical meaning of the phrase 'reason to believe' was a belief based upon reason and did not mean 'thinks he has reason to believe': there had to be a factual basis for the reason."

That is the approach this Court has persistently followed in cases of detention.

It is necessary to say that cases of detention involve the liberty of the individual, no matter who that individual is. I would like to repeat and thus endorse what Leon ADJP said in Hurley's case, *supra*, at 715C - J:

"This case raises matters of great constitutional importance affecting the liberty of the subject, the security of the State and the jurisdiction of the Courts. In dealing with this kind of legislation, KOTZE JA said the following in *Union Government v Fakir* 1923 AD 466 at 471:

'I should like, without attempting to dictate to the Legislature, to point out the great danger involved in departing from a well - known rule of constitutional law in all civilised countries - namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts.'

The great danger to which Kotze JA correctly referred would, in my judgment, be increased enormously were the judiciary to approach such legislation in a spirit of compliance rather than one of independent scrutiny. Counsel for the respondents constantly reminded me during the course of his argument that I am concerned with security legislation and he referred to the detailed provisions of the legislation. Implicit in his argument was an appeal that I should construe the Act leaning towards the Executive. Certain observations require to be made with respect to this argument.

Firstly it is perhaps necessary to remind oneself, from time to time, that the first and most sacred duty of the Court, where it is possible to do so,

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DUMBUTSHENA CJ

is to administer justice to those who seek it, high and low, rich and poor, Black and White; to attempt to do justice between man and man and man and State. Secondly one should bear in mind, I think, the famous, great, and dissenting speech of Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL), where the learned Law Lord said at 244:

'I view with apprehension the attitude of Judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more Executive minded than the Executive. Their function is to give words their natural meaning...'

Later, after referring to certain cases, his Lordship went on to say this,

'In this country, amid the clash of arms, the laws are not silent. They may be changed but they speak the same language in war and in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the Judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to

see that any coercive action is justified in law.'

Thirdly, and most important, we are authoritatively enjoined in construing this kind of legislation not to lean towards one side or the other. The correct approach which must be adopted was laid down in *Rossouw v Sachs* 1964 (2) SA 551 (A) at 563 in fine - 564A as follows:

'I accordingly conclude that in interpreting s 17 this Court should accord preference neither to the "strict construction" in favour of the individual indicated in Dadoo's case, *supra*, nor to the "strained construction" in favour of the Executive referred to by Lord Atkin in *Liversidge's* case, *supra*, but that it should determine the meaning of the section upon an examination of its wording in the light of the circumstances whereunder it was enacted and of its general policy and object."

I must point out that the majority decision in *Liversidge v Anderson*, *supra*, was recently overruled by the House of Lords but the dissenting judgment delivered by LORD ATKIN in *Liversidge*, *supra*, is now preferred. The passage I have cited above spells out with certainty the duty of the Court. That duty is, in my view, to decide on the rights, according to law, of all people including those who are charged with the onerous duty of managing the affairs of the State for the good and benefit of its citizens; and to decide whether as between the individual and the State the individual is right or wrong or the State is right or wrong.

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DUMBUTSHENA CJ

It is in this light that we examined the contentions of counsel and came to the view that the learned judge *a quo* was right in declaring the respondents' detention unlawful.

Accordingly, we dismissed the appeal with costs.

Gubbay JA: I agree.

McNally JA: I agree.

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

Atherstone & Cook, respondents' legal practitioners.

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MINISTER OF HOME AFFAIRS v ALLAN 1986 (1) ZLR 263 (SC)

Court Supreme Court, Harare

Dumbutshena CJ & Gubbay JA & McNally JA

Civil appeal

17 June & 11 July 1986

Flynote

Criminal Procedure - arrest - reasonable suspicion that offence committed - whether arresting officer bound

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to question suspect before suspicion is reasonably formed - powers of arrest - whether powers under Emergency Powers (Maintenance of Law and Order) Regulations 1980 S 49(2) afford wider powers than Criminal Procedure and Evidence Act [Chapter 57].

Evidence - state of mind - whether conduct of arresting detail after arrest relevant to show state of mind at time of arrest.

Damages - wrongful arrest and detention.

Legislation - Emergency Powers (Maintenance of Law and Order) Regulations, 1980 s 49(2).

Headnote

The Emergency Powers (Maintenance of Law and Order) Regulations s 49(2) give no wider powers of arrest than the Criminal Code. An arresting detail, under either provision, may act only upon reasonable suspicion.

The appellant took a photograph which a policeman reasonably believed depicted a police station. It is not an offence to take a photograph of a police station although if done with a particular intent, ie to supply an enemy with information, it may be an offence. In circumstances where an act is not necessarily an offence, although it may be so, it is necessary to question the person concerned before a suspicion can be reasonably formed.

1986 (1) ZLR p264

McNALLY JA

Wrongful arrest - detention in police station for a number of hours, restriction on movements until midday the following day, damages awarded in the sum of \$2 000.

Cases cited:

Duncan v Minister of Law and Order 1986 (2) SA 805 (A)

Mohamed - Holgate v Duke [1983] 3 All ER 526 (CA)

Holgate - Mohammed v Duke [1984] 1 All ER 1054 (HL)

R v Nkala & Anor 1962 (1) SA 248 (SR)

Rosseau v Boshoff 1945 CPD 135

Mair v General Accident Fire and Life Assurance Corporation 1970 (1) RLR 124

Stephenson v General Accident Fire and Life Assurance Corporation 1974 (2) RLR 27 (AD)

Ingram v Minister of Justice 1962 (3) SA 225 (WLD)

Ngcobo v Minister of Police 1978 (4) SA 959 (W)

Mgube v Minister of Police 1978 (4) SA 959 (W)

Areff v Minister van Polisie 1977 (2) SA 900 (A)

Granger v Minister of State (Security) 1985 (1) ZLR 153

E *Chatikobo* for the appellant

MJ *Gillespie* for the respondent

Judgment

McNally JA: The appellant was found liable in the High Court a year ago to pay the sum of \$3 000 in damages to the respondent for wrongful arrest and imprisonment. In fact there was no imprisonment. The learned trial judge more accurately described the cause of action as wrongful arrest and detention.

The essential and undisputed facts appear from the opening paragraph of the judgment in the court *a quo* as follows:

"On 11 January 1983 the plaintiff, who is a Chartered Surveyor, proceeded to Bulawayo from Harare on business in order to undertake the valuation of certain properties there. He had a camera with him and he photographed these properties for later use. Having completed his work in the late afternoon, he had a short period of time to spare before proceeding to the airport to catch his return flight to Harare. He decided to utilise his time by using up the film on his camera in photographing old and historic buildings in the city centre which were of interest to him. He took photographs of five such buildings, the last of which was south

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McNALLY J

of, and across the road from the Bulawayo central police station. In order to get a good view of this last building, the plaintiff positioned himself in the centre of the intersecting road on the eastern side of the police station, where there is a central parking area. In so doing he was opposite the charge office entrance door. He proceeded to take his photograph, and then decided to make his way back to his hired car to drive to the airport. His attention was immediately attracted to a uniformed policeman standing behind the charge office counter, who summoned him inside. This officer, Section Officer Mutimbiri, informed the plaintiff that he was under arrest for taking photographs of the police station, and stated that this was an offence under the Law and Order (Maintenance) Act. The plaintiff was thereafter questioned by the Section Officer, and by members of the CID, mainly a Detective Inspector Jambawu, and after some period of time, the duration of which is in dispute, he was allowed to spend the night with a friend of his in Bulawayo. The plaintiff states that this was on the undertaking that he would return to the police station the following morning. This he did but the police enquiries, which concerned the processing of his film, extended into the afternoon, and he was finally told that he was free to leave at approximately 3 pm on 12 January. The plaintiff managed to secure a seat on the evening flight to Harare."

The Minister now appeals against that decision as regards both liability and *quantum*.

As to liability, Mr *Chatikobo*, who appeared for the Minister, took two points.

1. The trial judge failed to address his mind to the question whether the provisions of s 49(2) of the Emergency Powers (Maintenance of Law and Order) Regulations, 1980, provided a justification for the arrest and detention of Mr Allan; and
2. The trial judge erred in taking into account events that took place after the arrest in order to determine whether the arrest was lawful.

I will deal with these two points in that order.

It is true that the trial judge dealt exclusively with the question "whether the police actions fell within the limits of the powers conferred on them by s 29 of the Criminal Procedure and Evidence Act [Chapter 59]". It may be noted that his decision in this regard is not challenged. The contention is that the police had a wider discretion in terms of the Regulations.

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McNALLY J

I must therefore deal with the Regulations. Section 49, as amended by SI 221 of 1981, reads as follows until its repeal on 16 September 1983;

"49. (1) Any police officer may arrest without warrant any person if he reasonably suspects that such person -

- (a) has acted or is about to act in a manner prejudicial to -
 - (i) the public safety or public order; or
 - (ii) the termination of the state of public emergency; or
- (b) has committed or is about to commit any offence under any law related to -
 - (i) the preservation of public safety or public order; or
 - (ii) exchange control,

and may detain any such person for a period not exceeding thirty days.

(2) Any person who is detained in terms of subs (1) shall be deemed to be in lawful custody."

Mr *Chatikobo* did not seek to contend that the provisions of s (2), quoted above, in any way altered the *onus* which, it was common cause, lay on the Minister to justify the arrest and detention. He contended that "the police had reasonable cause to believe that at the very least the conduct of the respondent might be prejudicial to public safety."

I pause here to observe that the words in the Regulation are "if he reasonably suspects". It may be that there is no difference between that phrase and the phrase "if he had reasonable cause to believe". However, it is better to deal with the phrase actually used in the Regulation. I will therefore consider whether Section Officer Mutimbiri reasonably suspected that Mr Allan had acted or was about to act in a manner prejudicial to the public safety. I may say that there is no dispute about the trial judge's view of the meaning of "reasonably suspects" or of his ruling that the test for reasonableness was an objective one. See the recent decision in *Duncan v Minister of Law and Order* 1986 (2) SA 805 (AD) at 814 C - E

In support of the reasonableness of the suspicion, Mr *Chatikobo* advanced the following considerations:

- "(a) The Regulations give the police much wider powers than the Code
- (b) Section 6 of the Regulations provides for the control of taking of photographs and confiscation of cameras. The arresting detail must

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McNALLY JA

be presumed to have been aware of these provisions and his suspicion must have stemmed from his knowledge of the reasons why the Legislature saw it fit to control the taking of photographs.

- (c) The arresting detail was alive to recent bombings of strategic installations and the precarious security situation in Matabeleland.
- (d) It would have been a reprehensible dereliction of duty if against this background the police had not taken steps to confine the respondent while his *bona fides* were being checked out."

I will examine these considerations in turn.

Do the Regulations give the police much wider powers than the Code?

It is certainly true that under the Regulations a person arrested may be detained for a far longer period (thirty days) than a person arrested under s 29 of the Code, who may be detained for not more than forty - eight hours unless the provisions of s 36 of the Code are satisfied. However, that aspect of the difference is not relevant here.

It is possible, though I make no finding on the point, that a person may act in a manner prejudicial to the public safety without committing or attempting to commit an offence. If that is so he could be arrested under the Regulations but not under the Code. In that sense, too, the Regulations give a wider power than the Code.

Thirdly, it may well be the case that an arrest in terms of the Code is for the purpose of bringing the arrested person before the court, whereas an arrest in terms of the Regulations may be for that purpose or for the wider purpose of preventing harm to the public safety, or possibly and again I express no final opinion, for the purpose of further questioning.

However, even acknowledging these differences, the fact remains that a policeman effecting an arrest in terms of the Regulations must "reasonably suspect". A policeman effecting an arrest under s 29(1)(b) of the Code must "have reasonable grounds to suspect." It does not seem to me that there is any meaningful difference between those two phrases.

Accordingly, while conceding in general terms the validity of Mr *Chatikobo's* point, I do not think that it is relevant to the present enquiry. The Regulations require the same objective reasonableness on the part of the arresting policeman as the Code does.

1986 (1) ZLR p268

McNALLY JA

Were Mr Allan's actions with his camera, against the background of the then security situation, such as to engender in Section Officer Mutimbiri a reasonable suspicion that he had acted or was about to act in a manner prejudicial to the public safety?

Before I refer to the facts, I should deal with Mr *Chatikobo's* reliance on s 6 of the Regulations. That section authorises a protecting authority "if it appears to him to be necessary or expedient in the interests of public safety or public order" by order to prohibit or restrict the taking of

photographs.

There is no suggestion that the protecting authority for the Bulawayo area had made any such order. Therefore, on the face of it, the protecting authority (who is Section Officer Mutimbiri's superior officer) did not consider it necessary in the interests of public safety or public order to interfere with the ordinary right of citizens and tourists to take photographs of anything or anyone in Bulawayo. One can assume that the protecting authority was at least as well informed as Section Officer Mutimbiri about the general security situation in Matabeleland.

It seems to me that this fact weakens rather than strengthens the position of the appellant. Had such an order been in existence then the reasonableness of the suspicion would have been more readily defensible. The absence of such an order means that *prima facie* the taking of photographs was not only perfectly lawful but also regarded by the protecting authority as in general not inconsistent with the interests of public safety or public order.

Having said that, I return to the facts. I would not dispute the trial judge's conclusion that "it was, in my view, perfectly reasonable for the witness to form the opinion that the plaintiff had just taken a photograph of the police station". This is so, even though Section Officer Mutimbiri was in fact wrong. No photograph had been taken of the police station. Moreover Mr Allan told him so. Nonetheless it was reasonable for him to believe that a photograph of the police station had been taken.

The taking of a photograph of a police station is not, in itself, an offence. Nor is it an act prejudicial to the public safety. It may become an offence, and it may become an act prejudicial to the public safety, if the purpose of the photographer is that of a spy or a saboteur or of one collaborating with such people. (I ignore, of course, the situation which would arise if the taking of photographs were banned in terms of s 6 of the Regulations.)

1986 (1) ZLR p269

McNALLY JA

In order to formulate a reasonable suspicion about a man's purpose, when his actions, as here, are entirely open and lawful, it is necessary to question him and to evaluate either his answer or his refusal to answer, as the case may be.

I do not wish to make any general statement to the effect that a reasonable suspicion cannot arise unless enquiries have been made to the extent that they can conveniently be made. That approach was rejected in the English Court of Appeal in *Mohammed-Holgate v Duke* [1983] 3 All ER 526, a decision upheld by the House of Lords in *Holgate-Mohammed v Duke* [1984] 1 All ER 1054. In that case, however, it was common cause that the offence itself had been committed and that facts were known to the police which gave rise to a reasonable suspicion in the mind of the arresting detail that the person arrested was the offender. In those circumstances he was not obliged to carry out **further** enquiries before effecting the arrest.

On the facts of this case one can, however, make this statement. The test for Section Officer Mutimbiri was not whether he reasonably suspected that a photograph of the police station had been taken. The test was whether he reasonably suspected that it had been taken for a purpose

prejudicial to the public safety.

It does not seem to me that Section Officer Mutimbiri could reasonably come to any conclusion at all about the purpose for which the alleged photograph was taken without questioning Mr Allan.

It may be said that one is asking too much of an ordinary policeman by insisting that he draws such nice distinctions before making the decision whether or not to arrest someone. Yet, difficult or not, this is the distinction that has always to be made. We are all familiar with two phrases beloved of journalists. One is "The police invited him to accompany them to the police station". The other is "A man is assisting the police with their enquiries".

These are not empty phrases. They underline the care which the police must take before they arrest someone. In both cases the implication is that the man concerned is a possible suspect. But in both cases the police accept that further enquiries are necessary before a decision can be taken to arrest him. Those enquiries may show that an arrest is justified, or that it is not justified. A refusal to assist, or to accompany the police, may in itself create or confirm a reasonable suspicion. Answers may point to innocence or to guilt. But often, until the questions are put, the suspicion is no more than a suspicion. It is not a suspicion based on reason.

1986 (1) ZLR p270

McNALLY JA

It was precisely this point which the learned trial judge was making when he cited the *dictum* of HATHORN J in *R v Nkala & Anor* 1962 (1) SA 248 (SR) at 250D that:

"...there must be an investigation into the essentials relevant to the particular offence before there can be a reasonable suspicion that it has been committed. A fortiori there can be no reasonable suspicion where, as in this case, there was no investigation relating to one of the essentials of the offence."

Applying this dictum to the present case, one can see immediately that the essence of the "offence" (I use the word broadly to include "an act prejudicial to the public safety") is the intention to use the photographs in some way harmful to the State. In the absence of enquiry how could the arresting detail have had any reasonable suspicion as to his intent? To convert a conjecture into a reasonable suspicion one must first make enquiries. Otherwise one is simply, to use a picturesque but accurate phrase, "jumping to a conclusion" as to his intention. Again, I am careful to restrict these general statements to the facts of this case. The position might be different if the facts were different.

I conclude therefore that the trial judge's finding in relation to the provisions of s 29 of the Code are equally valid in relation to s 49 of the Regulations.

I turn next to consider whether the trial judge erred in relying on the manner in which the police conducted their enquiries subsequent to the arrest in order to determine whether they acted on reasonable grounds in effecting the arrest. Mr *Chatikobo* referred to the decision in *Rosseau v Boshoff* 1945 CPD 135 as authority for the contention that such reliance is improper.

It is correct that the trial judge made reference to various actions by the police after the arrest of Mr Allan as indications that they did not seriously regard him as a spy. I have no doubt that

the learned judge was right to point to the fact that he was released into the custody of a friend for the night, and to the fact that the vital evidence, the film, was allowed to go out of police custody so that it could be privately developed the next day. These are not the actions of policemen who seriously suspect that the man they are holding is a spy. Would it be wrong to rely on such observations to support the conclusion that they never did seriously suspect him?

It seems to me there is nothing in the judgment of JONES AJP in *Rosseau's*

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McNALLY JA

case, *supra*, which suggests that such an approach is wrong. He said, at p 137 of the judgment:

"Let me say at once that, for the purpose of coming to a conclusion in this matter the magistrate would not be entitled, nor are we entitled, to have regard to anything which took place subsequently to the arrest. It seems to me that we must determine the defendant's conduct by what he knew at the time when he arrested the plaintiff."

Clearly, in the context, the learned acting judge president was referring to subsequent events other than events which cast a light retrospectively on the state of mind of the arresting detail at the time of the arrest.

In any case, I do not understand the learned trial judge to have used the subsequent events to cast light on the state of mind of Section Officer Mutimbiri at the time he arrested Mr Allan. He referred to them to support his conclusion that the subsequent holding of Mr Allan was unjustified. And, as LORD DIPLOCK said in *Holgate-Mohammed v Duke*, *supra*, at 1056 e-h:

"arrest is a continuing act; it starts with the arrester taking a person into his custody and it continues until the person so restrained is either released from custody or ...remanded in custody."

I see no merit in this point.

I conclude therefore that the trial judge's decision on the merits cannot be disputed. The appeal in so far as it concerns liability must be dismissed.

The next enquiry is as to *quantum*. As Mr Gillespie correctly pointed out, this court will not arbitrarily interfere with an assessment of general damages. In the absence of a misdirection, the court will interfere only if the award is manifestly too great or too small. See *Mair v General Accident Fire and Life Assurance Corporation* 1970 (1) RLR 124; *Stephenson v General Accident Fire and Life Assurance Corporation* 1974 (2) RLR 27 (AD).

No specific misdirection on the part of the trial judge is alleged. It is clear that he took into account the fact that Mr Allan was at no stage placed in the cells. He was required to wait in a room at the police station for a number of hours and was thereafter conditionally released into the custody of his friend. In all he spent perhaps twenty hours under technical arrest. The evidence to the contrary by Inspector Jambawu was quite patently false and indeed was

1986 (1) ZLR p272

McNALLY JA

in effect abandoned by the State when it produced, by consent and after all the evidence had been led, the Police Diary.

Can the award be said to be manifestly too great? I am not sure that reference to awards in South Africa and England is very helpful since conditions there, both political and economic, are so different, and changes in the value of money, and in the relative value of currencies, are so great and so frequent.

Trying to make allowances as best I can for changes in the value of money, it seems to me that Mr Ingram in 1962 and Mr Ngcobo in 1978 were awarded somewhat smaller amounts for somewhat longer and more severe detentions - *Ingram v Minister of Justice* 1962 (3) SA 225 (W); *Ngcobo v Minister of Police* 1978 (4) SA 959 (W) - whereas Mr Areff in 1977 was slightly more generously recompensed (R1 000 for two hours detention) - *Areff v Minister van Polisie* 1977 (2) SA 900 (A).

I would expect awards against the wealthier South African Government to be higher than awards in Zimbabwe, other things being equal. On that very general basis therefore the award in this case is somewhat high.

The same may be said in relation to the award of £1 000 to Mrs *Holgate-Mohammed* for her (allegedly) wrongful arrest and detention in police custody for six hours in England in 1982 - See *Holgate-Mohammed v Duke*, *supra*.

The case of *Granger v Minister of State (Security)* 1985 (1) ZLR 153 is also not particularly helpful because this was a case of *criminal injuria* rather than wrongful arrest. Mr Granger, an elderly lawyer, was man-handled and threatened in a most unpleasant incident. He was awarded \$1 200 in damages.

It does seem to me, however, that there was a failure to give full weight to the relative considerateness of the police officers after the first, arbitrary and wrongful decision to arrest had been taken. The arresting detail acted from a good motive. He was concerned about the security of the State. He made an error of judgment on the facts of this particular case in allowing that concern to override his concern for the rights of the individual.

Similarly, the investigating officer, having failed to release Mr Allan after brief questioning, as he should have done, was again considerate enough to suggest that Mr Allan spend the night at a friend's house. The next morning

1986 (1) ZLR p273

McNALLY JA

he agreed readily to an arrangement for developing the film privately so as to minimise the inconvenience caused to Mr Allan. One must, of course, suspect that much of this considerateness arose from at least a sneaking suspicion on the part of the police that the arrest and detention were unjustified. Be that as it may, the fact remains that Mr Allan was neither harrassed nor put behind bars. He was inconvenienced and put to unnecessary worry

by some clumsy but well-intentioned actions of the police.

In these circumstances it does seem to me that the sum of \$3 000, which was the full amount of the damages claimed, was an excessive award. It would have been appropriate had there been ill-treatment and/or incarceration. In the circumstances of this case I think \$2 000 is an appropriate award, and I consider the difference significant enough to warrant interference.

As far as costs in the court *a quo* are concerned, I consider costs on the High Court scale entirely justified, despite the reduction which brings the award within the jurisdiction of the magistrates court. In terms of s 53 of the High Court of Zimbabwe Act I find and record that the proceedings were fit to be brought in the High Court. (See *Granger v Minister of State (Security)*, *supra*, at pp 8 - 10). The matter was a serious one of general public importance and it was not unreasonable to claim a sum in excess of the jurisdiction of the magistrates court.

Some recognition must be given to the fact that this court has upheld the appeal in part. On the main question of liability the appellant has failed, and it would not be right to deprive the respondent of his costs to any significant extent because of a reduction in the *quantum* of the damages, particularly when the fixing of the *quantum* is not an easy mathematical calculation and no finding of fact in favour of the respondent has been reversed.

I would allow the respondent 75% of his costs of appeal.

Accordingly the following order is made:

1. The appeal is allowed in part.
2. The order of the court *a quo* is altered to read: "That judgment with costs be and is hereby entered for the plaintiff against the defendant in the sum of \$2 000".
3. For the rest, the appeal is dismissed and the appellant is to pay three-quarters of the respondent's costs of appeal.

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DUMBUTSHENA CJ

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

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

Gill, Godlonton & Gerrans, respondent's legal practitioners

1986 (1) ZLR p275

TEKERE v ZIMBABWE NEWSPAPERS (1980) LTD & MUNYUKI 1986 (1) ZLR 275 (HC)

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Court **High Court, Harare**

Sandura JP

Trial action

7, 8, 9 & 16 July 1986

Flynote

Damages - defamation - presumption - factors in assessing. Delict - defamation - defences - fair comment - comment a statement of fact - inference from stated facts - onus of proof - inference that defaming publication wrongful and animus injuriando - damages - inference that damages suffered - pleading - particularity required.

Practice and procedure - duty to begin - striking out - application in terms of Rule 141 at time of trial - particulars - particularity required in defamation case registration - Rules 141, 437, High Court Rules 1971.

Headnote

At the commencement of a trial action for defamation counsel for the plaintiff made application for an order that the defendant should begin and striking out certain particulars pleaded by the defendant on the grounds that the substantive onus was on the defendant and that the particulars complained of were a general charge incapable of informing the plaintiff of the case he had to meet. Thereafter the trial proceeded and at the close was confined to two issues, the defence of fair comment and the quantum of damages.

Held, in that the defendant admitted publishing a defamatory article of the plaintiff

- (a) wrongfulness and intent are presumed.
- (b) damages are presumed to have been suffered; and, accordingly the defendant bore the *onus* of rebutting these presumptions and should begin.

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SANDURA JP

Held, further, that an application to strike out was made in terms of Rule 141 of the High Court Rules at any stage of the proceedings.

Held, further, that in every case in which the defence raises an allegation of misconduct a plaintiff must be enabled to go to court with the knowledge not merely of the general case he must meet but the acts which it is alleged he has committed.

Held, further, that the defence of fair comment cannot succeed where no facts are alleged forming the basis for a comment and where the publication accordingly amounts to a factual assertion.

Cases cited:

Nydoo en andere v Vengtas 1965 (1) SA 1(A)

Mavromatis v Douglas 1971 (1) RLR 119

Walton v Cohn 1947 (2) SA 225

Crawford v Albu 1917 AD 102

Marais v Richard en 'n ander 1981 (1) SA 1157

Buthelezi v Poorter 1975 (4) SA 608

Associated Mine Workers Union & Anor v Gwekwerere & Ors GS - 202 - 81 (unreported)

I A Donovan for the plaintiff

A P de Bourbon SC for the defendant

Judgment

Sandura JP: The plaintiff in this matter is both a Member of Parliament and a provincial chairman of the political party known as the Zimbabwe African National Union (Patriotic Front), which party shall hereinafter be referred to as "ZANU (PF)" or "the party". The first defendant is the publisher of a daily newspaper called The Herald, and the second defendant was at the relevant time the editor of that newspaper. The plaintiff has brought this action against the defendants claiming damages for defamation in the sum of \$50,000 on the ground that the defendants maliciously published in the editorial columns of the Herald on Tuesday, 11 August 1981 and Thursday, 13 August 1981, defamatory statements of and concerning the plaintiff under the headings "EDGAR TEKERE" and "Too many Tekeres" respectively. Copies of both articles are annexed to the plaintiff's Declaration. In respect of the first article (ie annexure A) the plaintiff claims damages in the sum of \$20,000, and in respect of the second article (ie annexure B) the plaintiff claims damages in the sum of \$30,000. The plaintiff claims these sums and costs of suit against both defendants jointly and severally, the one paying the other to be absolved.

1986 (1) ZLR p277

SANDURA JP

In their plea the defendants, whilst admitting that the statements complained of are defamatory and were in fact published, advanced two alternative defences to the plaintiff's action. The first defence is that the statements in question constituted fair and *bona fide* comment made without malice on a matter of public interest in that they related to the conduct of the plaintiff in his capacity as Secretary-General of ZANU(PF) and as a Member of Parliament. The second defence is that the statements complained of are true in substance and in fact and that it was in the public interest that they should be published.

At the commencement of this trial I had to consider two preliminary issues. The first issue was whether it was the plaintiff or the defendants who should adduce evidence first, and the second issue was whether the first sentence in para 3(a) of the defendants' further particulars filed on 2

July 1986 should be struck out. After hearing counsel's submissions on both issues I ruled that the defendants should adduce their evidence first and ordered that para 3(a) of the defendants' further particulars be struck out, but granted the defendants leave to make suitable amendments to the relevant paragraph of their further particulars. I indicated at that stage that the reasons for my decision would appear in my final judgment. Those reasons now follow.

Rule 437 of the High Court of Zimbabwe Rules 1971 lays down the principles to be applied in determining which party in a civil trial shall adduce evidence first. It reads as follows:

"437. (1) If on the pleadings the burden of proof is on the plaintiff, he shall first adduce his evidence, and if absolution from the instance is not then decreed, the defendant shall then adduce his evidence.

(2) When such burden of proof is on the defendant, the defendant shall first adduce his evidence, and the plaintiff shall thereafter adduce his evidence.

(3) Where the burden of proving one or more of the issues is on the plaintiff and that of proving others is on the defendant, the plaintiff shall first call his evidence on any issues proof whereof is upon him, and may then close his case, and the defendant shall then call his evidence on all the issues.

(4) If the plaintiff has not called any evidence, other than that necessitated by his evidence on the issues, proof whereof is upon him, on any issues, proof whereof is on the defendant, he shall have the right

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so to do after the defendant has closed his case. If he has called any such evidence, he shall have no such right.

(5) In case of any doubt or dispute arising, the court shall have discretion to determine which party shall begin. Either party may, with the leave of the court, adduce further evidence at any time before the judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper order."

Mr *Donovan* who appeared for the plaintiff submitted that as the defendants admit that the statements are defamatory and that they were published, there arises a rebuttable presumption that the publication of the statements was wrongful and with *animus injuriandi*. He argued that it was for the defendants to rebut this presumption by establishing either of the two defences raised. He admitted, however, that with regard to damages and the presence of malice in respect of the defence of fair comment the burden of proof rested upon the plaintiff, but submitted that since the plaintiff's claim was for general damages only, actual damage need not be proved because the law presumes that some damages flows from the publication of defamatory matter. He went on to say that the plaintiff would not lead any direct evidence on the existence of malice but would ask the court to infer that such malice was present. In the circumstances, Mr *Donovan* argued that the real issues in this case are the two defences raised by the defendants and that there is clearly an onus on the two defendants to establish those defences. He therefore submitted that in terms of R 437(2) the defendants must adduce their evidence first.

Mr *de Bourbon* who appeared for the defendants disagreed and submitted that in order for the plaintiff to succeed in this action he must show that the words complained of are false and that there was some fault on the part of the defendants in the sense that when they published the statements in question they either knew that the statements were false or reckless as to

whether they were false or not. He also submitted that there is no presumption in our law that damages flow from the publication of defamatory statements. He, therefore, argued that it was for the plaintiff to prove actual damage done to him. In the circumstances, Mr *de Bourbon* submitted that since the burden of proving some of the issues was on the plaintiff and that proving others was on the defendants the provisions of R 437(3) applied and the plaintiff should adduce his evidence first.

It is a well established principle in our law that once it is proved or admitted that a defamatory statement was published the presumption arises that such

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publication was wrongful and that the defendant acted *animo injuriandi*. Dealing with this very issue HOLMES JA had this to say in *Nydoo en Andere v Vengtas* 1965 (1) SA at 20F - H:

"The publication and its defamatory nature having been admitted, the law presumed the existence of *animus injuriandi*... And the onus of proving the contrary, upon a balance of probability, is on the defendant. Voet, 47.10.20, puts it thus:

'But, if the words spoken are such, that they, *per se* and according to their natural meaning import contumely, then an injurious intent is presumed in the speaker on whom lies the burden of proof that there was no malicious intent.."

Dealing with the same issue, Joubert has this to say in *The Law of South Africa* vol 7 para 236:

"The publication of a defamatory statement about a person constitutes an invasion of his right to reputation, and is *prima facie* unlawful. When in defamation proceedings the publication of a defamatory statement is proved or admitted, two inferences arise, viz that the publication was wrongful and that the defendant acted *animo injuriandi*. The onus is then upon the defendant to establish either some justification or excuse for the defamatory language used or the absence of intent to defame."

Similar views are expressed in Gatley on Libel and Slander 8 ed para 115. In the circumstances, I am satisfied that where, as in the present case, the words complained of are defamatory in their natural and ordinary meaning the plaintiff need prove nothing more than their publication. There is a presumption that the publication of the defamatory statements by the defendants was wrongful and that the defendants acted *animo injuriandi*. It is for the defendants to rebut that presumption by establishing either of the two defences which they have raised.

I now wish to deal with Mr *de Bourbon*'s submission that there is no presumption in our law that damages flow from the publication of defamatory statements. That cannot be true. In this regard, I am fortified by what GOLDIN J (as he then was) said in *Mavromatis v Douglas* 1971 (1) RLR 119 at 123A where the learned judge said the following:

"I turn to the question of damages. The law presumes that the plaintiff has suffered loss by reason of the contumelia or insult, and, under the *actio*

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injuriarum, he is entitled to damages for the injury to his reputation. The plaintiff has not proved, and need not

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prove, that he sustained actual loss or damage. (See *Die Spoorbond and Anor v South African Railways* 1946 AD 999, at p 1005.)"

Further support for the conclusion which I have reached on this issue is found in what DE WET J said in *Walton v Cohn* 1947 (2) SA 225 at 229 where the learned judge said the following:

"In regard to the first question, on the assumption that the plaintiff confined his claim for damages to general damages, the magistrate was right in ruling that the onus was on the defendant to begin. It would appear to be quite clear from the authorities that a plaintiff is entitled to general damages when the words complained of are defamatory *per se*. There can be no doubt about it that the words used by the defendant in this case were defamatory *per se*, and the words spoken having been admitted by the defendant, the plaintiff was entitled to general damages without leading any evidence."

The same principle is expressed in *Gatley op cit*, para 1320 as follows:

"In cases of libel or slander actionable *per se*, the plaintiff need not prove actual damage, for the law presumes that some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation."

In the circumstances, I am satisfied that there is a presumption in our law that where the words complained of are defamatory *per se* the plaintiff is entitled to general damages. It was for these reasons that I concluded that there was no onus on the plaintiff to establish the various issues referred to by Mr *de Bourbon* and I accordingly ruled that the defendants should adduce their evidence first.

I now wish to give my reasons for striking out the first sentence in para 3(a) of the defendants' further particulars filed on 2 July 1986. The last paragraph of the second article complained of by the plaintiff (ie annexure B) alleged, *inter alia*, that the plaintiff spent most of his time drinking. In their plea the defendants stated that this allegation was true in substance and in fact. Subsequently, on 25 June 1986 the plaintiff required the defendants to furnish particulars of the facts upon which they relied to establish that that defamatory statement was true in substance and in fact. The defendants'

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further particulars were supplied on 2 July 1986 and para 3(a) thereof reads as follows:

"3. The facts relied on in respect of the last paragraph of Annexure 'B' are the following:

- (a) It will be alleged that the Plaintiff spent too much time drinking. At the time of his arrest on a charge of murder, the Plaintiff was drunk."

Mr *Donovan* submitted that the first sentence in that paragraph is a general charge which does not give the plaintiff the particulars which he required to enable him to know the case which he must meet. Accordingly, he submitted that the sentence ought to be struck out on the ground that it is too vague. Mr *de Bourbon* submitted that this was not the appropriate stage for Mr *Donovan's* application which should have been made before the trial commenced. In any event he informed the court that he could not supply any further particulars of the allegation.

In submitting that the application to strike out should have been made before the trial

commenced Mr *de Bourbon* appears to have relied upon the provisions of R 137(1)(c) of the High Court of Zimbabwe Rules, 1971. That Rule provides that instead of pleading to the merits a party may within the time allowed for the filing of his pleading apply to strike out any paragraphs of the pleading which should properly be struck out. As Mr *Donovan* correctly pointed out, this Rule only applies to applications made before the closure of pleadings. That Rule would not, therefore, apply to the striking out of particulars supplied after the closure of pleadings. However, R 141 in terms of which I acted empowers the court at any stage of the proceedings to strike out any matter in any pleading which should properly be struck out. It was my view that the sentence in question ought to be struck out for reasons which are clearly set out in *Gatley op cit*, para 1117 as follows:

"But where the charge is general in its nature, eg the plaintiff is called a 'charity swindler' or an 'imposter', it is no justification to plead simply that the alleged libel is true. That is not justification, but is merely repeating the libel. In such a case the defendant must set out, either in the defence, or in particulars, the specific acts and instances on which he will rely in support of his justification. It is a perfectly well-established rule in cases of libel or slander, that where the charge is general in its nature the defendant, in a plea of justification, must state some specific instances of the misconduct imputed to the plaintiff, in order that the

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plaintiff may know the case he has to meet, and what acts it is alleged have been committed which justify the general charge against him, for the plaintiff cannot come to the trial prepared to justify his whole life. In every case in which the defence raises an imputation of misconduct a plaintiff ought to be enabled to go to the trial with knowledge not merely of the general case he has to meet, but also of the acts which it is alleged he has committed and upon which the defendant intends to rely as justifying the imputation."

It was for these reasons that the first sentence in para 3(a) of the defendants' further particulars filed on 2 July 1986 was struck out and the defendants were granted leave to make suitable amendments to that paragraph.

I now proceed to deal with the main issue in this case. As already indicated the plaintiff's claim arises out of two articles published in *The Herald* in August 1981. It is, I think, necessary at this stage to set out these articles in full in order to appreciate fully the plaintiff's complaints and then determine whether the defendants have established the defences of fair comment and justification. The first article which appeared in *The Herald* on Tuesday, 11 August 1981, (ie Annexure A) was as follows:

"EDGAR TEKERE

Time and again, the Prime Minister has warned lazy and irresponsible leaders that they face the possibility of losing their jobs if they don't pull up their socks. Admittedly some of our leaders have done nothing for the povo except to talk about revolution and socialism without living by the example.

The removal of Mr Edgar Tekere as party secretary-general last week has come as no surprise. It also shows that no leader should consider himself indispensable. Morale of party members in recent weeks has received a series of jolts, along with their confidence in the ability of the party to fulfil its programmes. The first jolt came last week when a handful of people turned up for a meeting to be addressed by a cabinet minister.

There are still plenty of lazy leaders who are hiding under the efficiency umbrella of the Prime Minister. These too must go."

The second article complained of appeared in the same newspaper of 13 August 1981. It was as follows:

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"Too many Tekeres.

It is often glib to state that a certain period will be 'crucial' in the future of a nation - but even the most cynical must accept that the next few months could be decisive in several vitally important areas of Zimbabwean life.

The result of the intended ZANU (PF) reorganisation in the wake of the dismissal of the secretary - general by the central committee could set the scene for an era of reform long heralded by the Prime Minister. Politically Mr Edgar Tekere has long seemed to lie in the twilight zone between leftwing nationalism and his party's policies. He is a man who has always wanted to be considered revolutionary and belonging to the grassroots despite his lack of efficiency.

When he lost his job in January as Minister of Manpower Planning and Development Mr Tekere said that he was going back to the party to reorganise it. 'The need to revitalise the party is obvious' he said.

As secretary-general, he failed 'to revitalise' the party. It is true that as secretary-general he even failed to visit four of the eight provinces of this country to acquaint himself with the problems of the party. He was seldom seen at party headquarters. In plain and simple language, Mr Tekere was a talker and not a doer. He may have been one of the leaders the Prime Minister spoke of as being lazy and inefficient. As an elected Member of Parliament and as a politician who professed to be concerned with the welfare of the poor and the disadvantaged, he has hardly been their voice in Parliament, for he rarely attends.

There are too many Tekeres in both the party and government who, too must be weeded out. Zimbabweans must reject leaders who spend most of their time drinking, womanising and burning the road at the expense of the taxpayers."

These are the statements complained of and the plaintiff sets out in his declaration what the defendants meant and intended to mean as follows:

- "7. By the first statement Defendants meant and intended to mean that Plaintiff was lazy and irresponsible and had been a leader who had done nothing for the poor people or the masses of Zimbabwe except to talk about revolution and socialism without living in a way appropriate to a revolutionary and a socialist.
8. By the second statement Defendants meant and intended to mean

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that Plaintiff posed as a revolutionary and as a humble party member, was inefficient, was inattentive to his duties as secretary-general of the ruling party and as a member of Parliament professing concern for the poor and disadvantaged without translating that concern into parliamentary action, and that he was one of those leaders who spend most of their time drinking alcohol, consorting illicitly with women and driving cars at excessive speed and at the expense of the taxpayers."

As already indicated, the defendants admit that the statements complained of are defamatory and that the same were published. They have, however, raised two defences. With regard to the whole of annexure A the defendants in their Plea raised the defences of fair comment and, alternatively, justification. The same applies to all the paragraphs of annexure B except the last

paragraph in respect of which the only defence raised is that of justification.

In his evidence, the second defendant, Mr Munyuki, persisted with the defences of fair comment and justification. Dealing with Annexure A (ie the statement published on 11 August 1981) he said that when the statement was published the plaintiff had lost his post of Minister of Manpower Planning and Development and had also been removed from the post of secretary-general of Zanu (PF). He said that when he compiled the statement he, as editor of the Herald, drew inferences from what had happened and from what the Prime Minister had said at a political meeting at Chegutu in July 1981. When he addressed that meeting the Prime Minister was quoted as having said, inter alia, the following:

"There are those who are complaining that the revolution was not continuing and yet they are the most immoral and laziest in the party."

Subsequently, on 9 August 1981 the plaintiff announced that he had lost the post of Secretary-General of the party. About two days later The Herald reported the following:

"Dr Zvobgo confirmed that the central committee had at its last meeting resolved that Mr Edgar Tekere should be removed from his powerful party job of secretary-general.

'The vote was unanimous', he said.

'The central committee felt that Mr Tekere, for a variety of reasons, is unable to continue as secretary-general of the party,"Dr Zvobgo said."

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Mr Munyuki said that after looking at what the Prime Minister had said at Chegutu and at what Dr Zvobgo had said and bearing in mind the fact that the plaintiff had on various occasions spoken about revolutionary change, he compiled Annexure A. He said that he concluded that in his speech at Chegutu the Prime Minister had referred to the plaintiff because the plaintiff lost the post of Secretary-General of the party shortly after the Prime Minister made that speech. He went on to say that the plaintiff had failed as Secretary-General and that this was shown by what Dr Zvobgo said. Referring to the occasion mentioned in annexure A when a few people turned up for a meeting which was to be addressed by a cabinet minister he said that this was due to the plaintiff's fault because it was the plaintiff's duty as Secretary-General to organise such rallies.

Turning to annexure B, Mr Munyuki said that after looking at what had happened he concluded that the plaintiff had lost his position of Secretary-General because he was inefficient and had failed to revitalise the party; he had failed to visit some of the provinces and was rarely found at the party headquarters; he made very few speeches in Parliament and the record of his parliamentary attendance was poor. Dealing with the allegations in the last paragraph of annexure B he maintained that these were in fact true. In that paragraph Mr Munyuki alleged that the plaintiff was one of those leaders 'who spend most of their time drinking, womanising and burning the road at the expense of the taxpayers'. In evidence he said that he knew that the plaintiff had a drinking problem and that he consumed liquor 'in appreciable quantities'. He went on to say that he met the plaintiff once at Meikles Hotel and once at Monomatapa Hotel and that

on both occasions the plaintiff had consumed a lot of liquor and was staggering. With regard to the allegation that the plaintiff spent most of his time 'womanising' Mr Munyuki relied upon the fact, which is admitted by the plaintiff, that the plaintiff was cited in a divorce action in Kenya. As far as the allegation of 'burning the road at the expense of the taxpayers' is concerned Mr Munyuki relied upon the fact, admitted by the plaintiff that on one occasion the plaintiff was fined the sum of \$15,00 for speeding. He admitted, however, that on that occasion the plaintiff was not driving a government motor vehicle but his own motor vehicle. In the circumstances, Mr Munyuki said that it was fair comment that the plaintiff spent most of his time 'drinking, womanising and burning the road at the expense of the taxpayers'

The plaintiff gave evidence and denied that the contents of annexures A and B were true. He denied that he was lazy, inefficient, irresponsible, inattentive to his duties and that he spent most of his time 'drinking, womanising and

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burning the road at the expense of the taxpayers'. He said that when he was a cabinet minister and Secretary-General of the party he was extremely busy and could not attend Parliament as often as a backbencher. As Secretary-General he could not visit three of the country's provinces due to pressure of work. He had a constituency to attend to and visited most of the provinces on party business. In addition to that he had a new Ministry to run which he had started from scratch. After stating that he became Secretary-General of the party in 1976 and referring to the allegation that he was lazy he said, "I would not have been Secretary-General during the most difficult years and engaged in the liberation struggle. Those are tasks which no lazy man can carry". I must state at this stage that the plaintiff gave his evidence in a satisfactory manner and that it was clearly evident that he felt greatly insulted by the statements published by the defendants.

I now proceed to examine the two defences raised by the defendants. After all the evidence had been led Mr *de Bourbon* made it quite clear in his address that he was not persisting with the defence of justification or truth for the public benefit. His attitude was quite understandable because there is no basis whatsoever for that defence in this case. In the circumstances, he relied upon the defence of fair comment only in respect of both statements.

The requirements of the defence of fair comment were originally set out in *Crawford v Albu* 1917 AD 102 and later summarized by JANSSEN JA in *Marais v Richard en 'n ander* 1981 (1) SA 1157 as follows:

1. The allegation in question must amount to comment (opinion);
2. It must be fair;
3. The factual allegations on which the comment is made must be true; and
4. The comment must be on a matter of public interest.

Dealing with the first requirement, Burchell, in his book *The Law of Defamation in South Africa*,

has this to say at p 221:

"A distinction, for the purposes of the defence of fair comment, is drawn between assertions of fact and expressions of opinion (or comment). On this distinction hinges one of the most important differences in the scope of the defence of fair comment and that of truth for the public benefit. If a statement is one of fact then it must be justified, that is, be true and for the public benefit (though admittedly it might possibly be published on a privileged occasion). If the imputation alleged to be defamatory is an expression of opinion, based on facts, then it must be fair as well as in the public interest."

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The answer as to whether the allegation in question amounts to comment is found in the headnote to *Richard's* case, *supra*, part of which reads as follows:

"Concerning the question when the allegation in question amounts to comment, the primary question here is also, as it is in determining whether words amount to a defamatory allegation, how would the ordinary reader (with the ordinary quality of reasonableness etc) understand it. Is the allegation recognisable to him as comment and not an allegation of fact? Much will depend on the content of the allegation, the context in which it was made and the circumstances known to the reader."

I now proceed to look at the two statements separately and determine whether the defence of fair comment has been established in respect of each of them.

Mr *de Bourbon* submitted that with regard to both annexures A and B the defence of fair comment must succeed. He submitted that the facts upon which the comments were made are the following:

1. That in a speech at Chegutu in July 1981 the Prime Minister spoke of the need to remove from office lazy and immoral leaders.
2. That the plaintiff was subsequently removed from the post of Secretary-General of the party.
3. That subsequently Dr Zvobgo said that the party's central committee had resolved to remove the plaintiff from the post of Secretary-General for various reasons.

In the circumstances, Mr *de Bourbon* argued that it was reasonable to infer that the plaintiff was one of the persons referred to by the Prime Minister in his speech at Chegutu as being lazy and immoral. He therefore argued that the contents of both statements amount to nothing more than fair comment on a matter of public interest. However, I did not understand him to advance the same argument with regard to the last paragraph in annexure B in respect of which the only defence raised by the defendants in their Plea was justification.

Dealing with annexure A first, Mr *Donovan* submitted that the inference that the plaintiff was lazy and irresponsible is not one which a reasonable person

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would draw from the facts relied upon by Mr *de Bourbon* as justifying that inference. I agree with this submission because, in my view, a reasonable person would not conclude that because the plaintiff lost the post of Secretary - General after the Prime Minister had said that lazy and immoral leaders would be removed from office the plaintiff therefore lost his post for that reason. The plaintiff could have lost his post for entirely different reasons which have nothing to do with laziness and immorality. With regard to the allegation in annexure A that the plaintiff had done nothing for the povo except to talk about revolution and socialism without living by the example, Mr *Donovan* submitted that this was a factual assertion and not a comment because there are no facts alleged in annexure A which would form the basis for such comment. I agree, and it follows that the defence of fair comment cannot succeed in respect of this allegation. The only defence which would be relevant here is that of justification which was not persisted with for obvious reasons. In the circumstances, I have reached the conclusion that the defence of fair comment on a matter of public interest cannot succeed in respect of the first statement, annexure A

Dealing with the allegations contained in annexure B Mr *Donovan* submitted that the defence of fair comment had not been established. He submitted that the only allegations in annexure B which were established by the evidence were the following:

1. That as Secretary-General of the party the plaintiff did not visit three of the country's eight provinces.
2. That the plaintiff was frequently away from the party's headquarters.
3. That from January to September 1981 the plaintiff attended parliament only eight times.
4. That the plaintiff lost the post of Secretary-General of the party.

Mr *Donovan* submitted that the rest of the allegations in annexure B were not established and that the allegations which were established do not in any way justify the inference that the plaintiff is lazy and inefficient. I agree. In my view, no reasonable person would draw that inference before ascertaining why the plaintiff did not visit the three provinces, why he was frequently away from the party's headquarters, why he attended parliament only eight times within a period of nine months and why he lost the post of Secretary-General.

Finally, with regard to the last paragraph in annexure B, Mr *Donovan*

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submitted that no defence had been established in respect of the defamatory allegations in that paragraph. I agree. This is the paragraph which contains the allegation that the plaintiff spent most of his time "drinking, womanising and burning the road at the expense of the taxpayers." This is a factual assertion and the only relevant defence to it is that of justification or truth for the public benefit. As there was no evidence to establish that the allegations in this paragraph were substantially true the defence of justification was not established. In fact, Mr *de Bourbon* made it quite clear when he addressed the court at the end of the trial that the only defence he was relying upon was that of fair comment which, as already indicated, does not apply to the factual

assertion in the last paragraph of annexure B. In the circumstances, I am satisfied that the defence of fair comment cannot succeed in respect of the defamatory allegations in annexure B.

In the circumstances, I am satisfied that the publication of the two statements, annexures A and B, was unlawful and that the defendants acted *animo injuriandi*.

I now proceed to deal with the *quantum* of damages. As already indicated, the plaintiff is claiming \$20,000 in respect of the first statement and \$30,000 in respect of the second statement. The assessment of damages in a case such as this is not an easy exercise because it is difficult to recompense the plaintiff for the insult perpetrated against him and the pain which he suffered as a result of the false allegations levelled against him. However, there are certain factors which are relevant in the assessment of damages for defamation. These factors were clearly set out by WILLIAMSON AJ in *Buthlezi v Poorter and Ors* 1975 (4) SA 608. These factors are the content of the defamatory article, the nature of the publication, the plaintiff's standing, the extent of the publication, the conduct of the defendants and the recklessness of the publication. Mr *Donovan* submitted that exemplary damages were called for in this case and pointed out a number of aggravating features. The first of these was that when the second defendant gave evidence he persisted with the defence of justification in an attempt to establish that the defamatory allegations were true and went to the extent of stating that the plaintiff had a drinking problem. The second aggravating feature was that at the commencement of the trial Mr *de Bourbon* indicated that evidence would be led to show that the plaintiff was drunk on occasions after August 1981 and that whilst the plaintiff was in detention in 1980 the then Minister of Justice had directed that the plaintiff be allowed to have alcohol. However, no such evidence was led. The third aggravating feature pointed out by Mr *Donovan* was that in cross-examination Mr *de Bourbon* put it to the plaintiff that he had

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gone to Rumania because of his drinking problem, which allegation the plaintiff denied. Finally, Mr *Donovan* pointed out the defendants' failure to take adequate steps to check the truth before publishing the defamatory statements, and the absence of any apology by the defendants. All these are, of course, relevant factors which I shall take into account, in assessing the quantum of damages.

With regard to the content of the defamatory statements it is quite clear that some very serious allegations were made against the plaintiff. I shall bear in mind that these statements were published in a daily newspaper with a circulation of between 50,000 and 80,000 copies. I shall also bear in mind the plaintiff's standing. He is a Member of Parliament, a prominent politician and the Chairman of Zanu (PF) in the province of Manicaland. In this regard Mr *de Bourbon* submitted that the fact that the plaintiff was elected Chairman of Zanu (PF) in Manicaland and was re-elected to Parliament in 1985 reduces the amount of damages recoverable because it shows that the publication of the defamatory statements did not affect his reputation and standing. I disagree because the fact that the words complained of did not achieve their objective does not make them less defamatory (*Buthlezi's case, supra*).

Taking into account all the features of this case to which I have already referred I am of the

opinion that this is a case in which an award of exemplary damages is justified. Dealing with a case in which he awarded punitive damages BECK J (as he then was) had this to say in *AMWU and Bloomfield v Gwekwerere & Ors* GS - 202 - 81 (unreported) at p 2 of the cyclostyled judgment:

"The allegations by the defendants were widely disseminated and are grievously defamatory of the second plaintiff in the field of endeavour which has been his life's work, and in which he has enjoyed an unsullied reputation for honesty. The defamation is particularly scurrilous in that the second plaintiff's dishonesty was said to have been not only great and habitual, but at the expense of the very people whose interest it was his duty to protect. It was not made impetuously, but was deliberately persisted in and repeated the next day, and it calls for a punitive and exemplary award ..."

In that case the defendant had published the following defamatory statements: "Bloomfield earns \$30,000 a year which he steals from the 40 cents contributions paid by the workers;" and "Bloomfield has been an habitual

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thief and is now finished." The learned judge awarded punitive damages in the sum of \$8,000. In my view, what the learned judge said in that case applies with equal force to the present case although the words complained of are different.

In assessing the quantum of damages to be awarded to the plaintiff I shall bear in mind the gravity of the defamatory allegations contained in each article. In my view, the defamatory allegations in annexure B are far more serious than those in annexure A and this must be reflected in the amounts of damages to be awarded. It seems to me that in respect of the first statement the plaintiff is entitled to damages in the sum of \$7,500, and that in respect of the second statement he is entitled to damages in the sum of \$12,500.

In the circumstances I order as follows:

1. That in respect of annexure A, judgment in the sum of \$7,500 be and is hereby granted against the defendants jointly and severally, the one paying the other to be absolved.
2. That in respect of annexure B, judgment in the sum of \$12,500 be and is hereby granted against the defendants jointly and severally, the one paying the other to be absolved.
3. That the defendants pay costs of suit jointly and severally, the one paying the other to be absolved.

Morris, Beale & Collins, plaintiff's legal practitioners

Honey & Blanckenberg, defendants' legal practitioners

Endnotes

1 (Popup - Popup)

This has not previously been reported in these reports; it concerns the plaintiff in the matter *Makomboredzi v Minister of State (Security)* reported at p73 of this volume.

2 (Popup - Popup)

The plaintiff is the same person who was the subject of legal proceedings in the case *Mandirwhe v Minister of State* reported as p1 of this volume

3 (Popup - Popup)

See p1 of this volume - *Editor*.

4 (Popup - Popup)

Delete inapplicable.

5 (Popup - Popup)

Delete inapplicable.

6 (Popup - Popup)

See p 120 B of this volume - *Editor*.

7 (Popup - Popup)

* See p 123, supra, at letters E-H - Editor.