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The Zimbabwe Law Reports 1986 [Part 2]

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MANNING v MANNING 1986 (2) ZLR 1 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

26 June & 18 July 1986

Flynote

Court - village court - jurisdiction limits - cannot be increased by consent.

Judgment - status of judgment given without jurisdiction.

Legislation - Customary Law and Primary Courts Act 1981, ss 10 and 11.

Headnote

The limits of a village court jurisdiction are set in the Act and cannot be increased by consent. A village court is not a court of inherent jurisdiction and any judgment given by it in a matter exceeding its jurisdiction is a nullity.

Cases cited:

MacFoy v United Africa Co Ltd [1961] 3 All ER 1169 (PC)

Isaacs v Robertson [1984] 3 All ER 140 (PC)

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Mkhize v Swemmer & Ors 1967 (1) SA 186 (D)

Maponga v Jabangwe 1983 (2) ZLR 395 (SC)

J James for the appellant

C E Ndebele for the respondent

Judgment

McNally JA: The parties are married to each other. In March 1985 the respondent left the matrimonial home taking with her certain property which she claimed was hers. On 13 May 1985, while she was absent from the place where this property was kept, the appellant came

and took it away.

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She then applied for a spoliation order, which was granted by the regional magistrate Bulawayo. It is against this order that the appeal is now made.

The essence of the appellant's case, both in the magistrates court and on appeal, was that he was in law entitled to remove the property because he had a village court order in his favour, to which the respondent had consented.

The value of the property is not clear. In the spoliation proceedings Mrs Manning listed and itemised the disputed property and gave a global valuation of \$2 779,00. The village court order does not list the property or indeed identify it in any way. It reads simply "Mr Manning to collect his property from P M S Kumalo. The property worth \$601 to be sent back". Whether this is the same property or only part of it is not clear.

Fortunately it is not necessary for the court to resolve this confusion. We can assume that the property in dispute is worth at least \$601.

That being so, the village court had no jurisdiction. Nor could jurisdiction be conferred on it by consent. This is clear from the provisions of ss 10 and 11 of the Customary Law and Primary Courts Act No. 6 of 1981 which read as follows:

"10. Subject to the provisions of this Act, and in particular to the provisions of section eleven, a primary court shall have and may exercise jurisdiction to hear, try and determine any civil case in which customary law is applicable where -

- (a) the defendant is normally resident within the area of jurisdiction of the court; or
- (b) the cause of action or any element thereof arose within such area; or
- (c) the defendant consents to the jurisdiction of the court.

11.(1) A village court shall have no jurisdiction in any civil case -

- (a) where the case is not determinable by customary law; or
- (b) where the claim or the value thereof exceeds five hundred dollars; or
- (c) to dissolve any marriage: provided that ..."

It is clear beyond dispute that a defendant cannot consent in terms of s 10(c) to the jurisdiction of the court where the value of the claim exceeds \$500. Nor can the defendant consent to the jurisdiction in a case involving the dissolu-

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tion of a marriage or a case not determinable by customary law. Consent relates only to the

question of jurisdiction by area which is the ambit of s 10. It does not relate to the question of jurisdiction by cause of action, which is the ambit of s 11.

Not only do the opening words of s 10 make it clear that consent to the jurisdiction is subject to the provisions of s 11. It is also a matter of obvious common sense. Village courts are not intended or designed to deal with the matters listed in s 11. It would clearly thwart the intention of the Legislature if the parties could confer on them a jurisdiction which they were not created to exercise. The Legislature could not have expressed itself more clearly than it had done in the words of s 11. "A village court shall have no jurisdiction" in the three cases specified. There is no provision in s 11 for any variation by consent. The consent provisions in s 10 apply only to the jurisdictional matters dealt with in s 10.

The village court therefore acted in this matter without jurisdiction. The signature of Mrs Manning on a piece of paper is no indication of her consent. At best it may be an acknowledgement by her of the purported authority of the court. Clearly she did not consent to the removal of the property.

Mr James, for the appellant, has sought to make the point that the village court order is valid at least until it is set aside. The regional magistrate cited the *dicta* of LORD DENNING in *Macfoy v United Africa Co Ltd* [1961] 3 All ER 1169:

"If an act is void then it is in law a nullity ..."

I allow for the limitation placed on those words by LORD DIPLOCK in the Privy Council case of *Isaacs v Robertson* [1984] 3 All ER 140 at 143c, to the effect that an order of a court of unlimited jurisdiction must stand until it is set aside. I accept further the words of ROMER LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 at 569 that :

"...it is the plain and unqualified obligation of every person against or in respect of whom an order is made by a **court of competent jurisdiction** (my emphasis) to obey it unless and until that order is discharged."

The fact remains that the village court was not a court of unlimited jurisdiction. It was not, in this case, a court of competent jurisdiction. Its position was governed by the rule "that judicial decisions will ordinarily stand until

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set aside by way of appeal or review, but to that rule there are certain exceptions, one of them being that, where a decision is given without jurisdiction, it may be disregarded without the necessity of a formal order setting it aside." - *per* FANNIN J in *Mkhize v Swemmer & Ors* 1967 (1) SA 186 (D) at 197C-D. Its decision therefore cannot be relied upon to justify an action otherwise unlawful. It is unnecessary for the purposes of this decision for me to go further and say that it cannot be valid for any purpose whatever.

The case of *Maponga v Jabangwe* 1983 (2) ZLR 395 (SC) is not authority against that proposition. It decided only that no appeal is possible against a judgment by consent. The judgment in fact expressly left open the question whether the community court had the

"jurisdictional right to adjudicate upon the issue raised on the summons" (p 398H).

It remains only to say therefore that the appellant had no right to remove the goods from the possession of the respondent without her consent.

The appeal is dismissed with costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Sansole & Senda appellant's legal practitioners

Advocate S K Sibanda respondent's legal practitioner

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MACEYS CONSOLIDATED (PVT) LTD & ANOR v TA HOLDINGS LTD (1) 1986 (2) ZLR 5 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & Gubbay JA

Civil appeal

16 May & 24 July 1986

Flynote

Contract - interpretation - context in which it appears may alter everyday meaning of word.

Sale - price - agreement that price be fixed by an independent valuer - such valuation binding on the parties in the absence of fraud collusion or caprice.

Headnote

Respondent purchased from the appellants a supermarket business. The purchase price for the fixtures, fittings and motor vehicles was subject to valuation by a third party which valuation was to be "final and binding". Being dissatisfied with the valuation the respondent refused to pay the price thus set.

Held, that, in the absence of any allegation of fraud or collusion or caprice, the parties were bound by the valuation.

Cases cited:

Bekker v RSA Factors 1983 (4) SA 568 (T)

Gillig v Sonnenberg 1953 (4) SA 675 (TPD)

Total South Africa (Pty) Ltd v Bonaiti Developments (Pty) Ltd;
Total South Africa (Pty) Ltd v Valdave Investments (Pty) Ltd;
Total South Africa (Pty) Ltd v Dave White Holdings (Pty) Ltd;
Total South Africa (Pty) Ltd v Dave White Investments (Pty) Ltd 1981 (2) SA 263 (D)
Dean v Prince & Ors [1954] 1 All ER 749 (CA)

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Campbell v Edwards [1976 1 All ER 785 (CA)
Barber v Kenwood Manufacturing Co Ltd & Whinney Murray & Co [1978] 1 Lloyds Rep 175 (CA)
Burgess & Anor v Purchase & Sons (Farms) Ltd & Ors [1983] 2 All ER 4 (Ch)
Dublin v Diner 1964 (1) SA 799 (D)
Arenson v Arenson 1977 AC 405; [1973] 2 All ER 235 (CA)
List v Jungers 1979 (3) SA 106 (A)
Gotze v Estate van der Westhuizen 1935 AD 300
Worman v Hughes & Ors 1948 (3) SA 495 (AD)
Van Rensburg en Andere v Taute en Andere 1975 (1) SA 279 (A)
Swart en 'n Ander v Cape Fabrix (Pty) Ltd. 1979 (1) SA 195 (A)
Barclays Bank International Ltd v Smallman 1976 (2) RLR 163 (GD)
H Z Slomowitz SC, with him *I A Donovan*, for the appellants
A P de Bourbon SC for the respondent

Judgment

Dumbutshena CJ: This appeal is concerned with an agreement of sale entered into between Maceys Consolidated (Private) Limited (the first appellant) and Maceys of Salisbury (Private) Limited (the second appellant) and TA Holdings Limited, the respondent. The agreement was signed by the parties on 24 November 1984.

Part One of the agreement deals in clauses 1 to 9 with the sale of the share capital and loan accounts. Part Two deals in clauses 10 to 14 with the sale of properties owned by the appellants. Part Three deals in clauses 15 to 30 with the sale of the supermarket businesses. Part Four deals in clauses 31 to 33 with general provisions of the agreement.

The appeal is more or less concerned with the matters contained in clauses 17 to 20. For

convenience I shall first consider that part of the agreement which is concerned with the valuation of fixtures, fittings and motor vehicles.

Clause 17 fixes the purchase price of these assets at \$600 000. That price was conditional upon its acceptance by the respondent. The respondent was given the option to accept that price or to fix the purchase price in the manner set out in clause 18.

Clause 18 deals with the valuation of fixtures, fittings and motor vehicles. It reads:

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" VALUATION

In the event of TAH electing to have the fixtures, fittings and motor vehicles valued, then the firm of Richard Ellis will make a valuation as soon as reasonably possible as to the current market value thereof and their valuation shall be final and binding upon the parties and shall conclusively fix the purchase price of such assets as between the parties. The costs of the valuation shall be shared equally between Maceys Trading and TAH. Current market value shall have the same meaning as set out in Clause 3.1."

The respondent elected to have these assets valued by Richard Ellis. They valued them at \$716 973. They advised the parties of their valuation by letter dated 7 January 1985 which, among other things, stated:

"We have not undertaken any mechanical or electrical surveys nor arranged for any tests to be carried out on any mechanical assets, our valuation being prepared on the basis of their external condition and apparent defects and assuming that only normal maintenance is required. Further we are advised that all Inokoshi cash registers are now in good working order and have valued those assets on that basis."

The respondent did not think much of that method of carrying out the valuation of the assets concerned. By letter dated 24 January 1985 it expressed its dissatisfaction and rejection of the purchase price fixed by Richard Ellis. The respondent did not think the valuation had been carried out in accordance with the agreement. The letter went on to say:

"Accordingly you have not made a valuation on the basis of the current market value of those assets. In order to ascertain the current market value of the assets you will know as professional valuers that account must be taken of the mechanical, electrical and physical condition of the assets together with their age and any other condition or factor which may affect the determination of current market value including obsolescence. The qualification that your valuation was prepared 'on the basis of their (assets) external condition and apparent defects and assuming that only normal maintenance is required' cannot be made in the determination of current market value of the assets. Indeed certain of the assets were not working to capacity or at all at the time the valuation was carried out."

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Similarly, in regard to the Inokoshi cash registers, you have not carried out your mandate because you have assumed that all the registers were in good working order simply because you have been advised that they were. With respect you cannot value them on that basis. This is inconsistent with the provisions of the agreement which requires you to determine their current market value taking all factors into account.

In addition we are also concerned at the valuation of certain other assets which clearly do not reflect current market value - for instance to name two items only at Borrowdale, firstly the Chiller Refrigerated unit 1.8 metres x

1 metre x 1 metre, and secondly the Imperial Deep Freeze 2.45 metres x 1 metre x 1 metre, valued at \$5 100 and \$5 000 respectively. Those units are freely available for purchase as brand new units (including the normal new unit guarantees) at \$2 790 and \$3 577 respectively exclusive of sales tax.

In all the circumstances your valuation in its present form has not been carried out in terms of your mandate and the agreement. Accordingly and as a matter of some urgency you should prepare a new valuation which accords with the agreement and reflects the true current market value of the assets."

It is common cause that the rejection of the valuation was based on the fact that no account was taken of the mechanical, electrical and other factors. As a result of the respondent's rejection of the first valuation Richard Ellis made a second valuation.

The refrigerators were re-assessed because Richard Ellis had thought that refrigerators were not easily obtainable in Zimbabwe whereas in fact new refrigerators were made in Zimbabwe. They stated in their letter of 20 March 1985:

"Upon re-examination, we agree that certain of the refrigeration assets have been included in our report at an excessive value and should be revalued. In general, these are items which were included at a higher value than the cost as new if freely available and we have listed our adjustments in the attached schedule."

And again:

"Shortly after the completion of our survey we were told by Mr S Levy

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that spares for the Inokoshi cash registers had been delivered to Maceys and upon enquiry with your Mr Piha at the Hypermarket we were advised that all but two of the cash registers were operational and that it was anticipated that those two would be in working order in a couple of days.

Technically we erred in valuing the Inokoshi cash registers as though they were all in good working order on 27 November 1984, the date of our valuation. You will remember that you instructed us to carry out our valuation on 28 November 1984 but it was physically impossible for us to certify the condition of all the equipment seen on other dates. We have no proof that any equipment was, or was not, in good working order on 25 November 1984 the date of your take-over. In good faith we tried to adopt the approach that Maceys had the spares and resources to put the cash registers in good working order and it was in your best interests that this should be done and the items valued accordingly. It is probable that some of the cash registers could be sold for a higher price than our valuation if offered for sale in the open market and we estimate that the cost of repair (as indicated by your memo from CBH to DJMV) would be more than compensated for by the increase in value of the working units.

The sum of \$716 973 was thus reduced by \$16 800 to \$700 173.

The respondent rejected this second valuation because the valuation was still qualified by the statement in the letter of 7 January 1985, quoted above. In a letter to Richard Ellis of 23 April 1985 the respondent, further stated:

"We are not questioning values *per se* - what we are questioning is the fact that the values you have determined have not been determined in terms of the agreement and are not current market values on your own statements. We have then indicated what we consider to be the true current market values had you made the determination on the proper basis.

We make two points, namely:

1. That the valuation must be carried out in terms of the agreement in order to determine current market value.
- and
2. That to determine current market value account must be taken of the mechanical, electrical and physical condition of the items to be

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valued as well as their age and any other condition or factors which may affect the determination of current market value, including obsolescence."

This second valuation was accepted by the appellants. They believed that it complied with the provisions of clause 18. They were satisfied with the sum of \$700 173 as the purchase price duly fixed for the fixtures, fittings and motor vehicles. They relied on clause 18 which expressly states that the valuer's valuation of the fixtures, fittings and motor vehicles "shall be fixed and binding on the parties and shall conclusively fix the purchase price of such assets as between the parties".

The learned trial judge agreed with the respondent. He did not think that the valuer had complied with his mandate. He stated his opinion and supported it thus:

"Can it be said, however, that he complied with his mandate? I do not think so. The respondent is entitled to have the value fixed according to the current market value. Clause 3.1 specifically provides that the valuator 'would take into account all relevant circumstances including the condition of the buildings' which, when applied to fixtures, fittings and motor vehicles, must, in my opinion, include the mechanical, electrical and physical condition of the assets concerned, as well as their age and any other condition affecting the determination of their current market value. If the valuator felt that this task was impossible or performance could not be completed within a reasonable time, he should have advised the parties and they could have reconsidered their positions. However, as the agreement stands, I consider that the valuator has not fixed the price in accordance with the requirements of clause 18. It is not necessary to decide whether or not his valuation is grossly inequitable; indeed this cannot be determined until a valuation in accordance with the requirements of clause 18 has been carried out."

Mr *de Bourbon*, who appeared for the respondent, argued that the learned judge's approach was correct. He said, in relation to the second valuation, that the new method of calculation was still not acceptable to the respondent. Mr *de Bourbon* relied in support of his contention on the principle laid down in *Bekker v RSA Factors* 1983 (4) SA 568 (T).

It is useful to examine the evidence to see whether the principle stated in *Bekker v RSA Factors* (*supra*) was not applied in the instant case. It is also

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necessary, for purposes of determining whether Richard Ellis carried out his mandate in terms of clause 3.1, to consider in bare outline whether the provisions of clause 3.1 were complied with. Clause 3.1 states:

"The valuation of each property shall reflect the current market value of each of the properties determined on the

basis of a willing buyer/willing seller, and on the basis that the sale would take place within a three month period from the date of such valuation. It is specifically agreed that the value of the properties would not be determined on the basis of a forced sale but would take into account all relevant circumstances including the condition of the buildings on the said properties and what rents could be obtained for the properties on an arm's-length basis."

Did Richard Ellis reflect in his valuation "the current market value of each of the properties"? Richard Ellis, in his letter of 20 March 1985, points out that in their valuation they paid attention to the current market value of the assets "as though they are being sold as part of a going concern with no intention of either party to sell on a 'break-up' or 'forced sale' basis". They believe that the current market values of the properties were taken into account in determining their values. Has it been shown that this was not done?

In my view the respondent has not in its criticism shown a tangible method of calculation that might have been used. I do not agree with Mr *de Bourbon*'s contention that by ignoring the examination of cash registers the condition in clause 3.1 was not fulfilled. A reference to a passage in the letter of 20 March 1985 quoted above does show that the valuer applied his mind to the requirements of clause 3.1, in the circumstances in which the assessment of the registers was carried out. Account was taken of the availability of spares and the possibility of repairs being effected to those registers not in good working order. In my opinion there was compliance with the provisions of clause 3.1.

Mr *de Bourbon* submitted that where, as in this case, one of the parties is aggrieved by the valuation made by a third party the principle that was applied in *Bekker v RSA Factors, supra*, is applicable. Unfortunately for me the judgment is in Afrikaans, a language I am not qualified to understand. There being no translation available to me, the little understanding of the principle relied upon by Mr *de Bourbon* which I have comes from a reading of the English head-note. It reads:

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"If a third person is nominated to fix a price or to make a valuation, he must exercise the judgment of a reasonable man. If he exercises his judgment in regard to the determination of the price or valuation so unreasonably, irregularly or wrongly that it would lead to a patently inequitable result, then the person prejudiced thereby is not bound by it, and the determination or valuation can be rectified on equitable grounds.

In casu a mechanical horse had been leased to the appellant by the respondent. Appellant having fallen into arrears with his rental payments, respondent cancelled the lease and repossessed the vehicle. In terms of the provisions of the contract, and for the purposes of calculating the amount still due to the respondent, the vehicle was subjected to a 'final and binding' valuation by a sworn appraiser appointed by the respondent. In an appeal against a decision of a magistrate to the effect that respondent was entitled to payment of the amount thus calculated, it transpired that the appraiser concerned had assumed that the engine, gearbox and diesel pump had to be repaired; that this assumption was not based upon a proper examination and that only the engine itself needed repairs."

It was further held:

"...that, where the appraiser had wrongly assumed that the engine, gearbox and diesel pump had to be repaired, he had not been properly informed, with the result that his valuation was arbitrary and not the judgment of a reasonable man."

Because, as I understand the head-note, of the wrong assumption the appraiser made the court held:

"...that the appellant was not bound by the valuation, that the respondent had failed to establish the *quantum* of its damages and that the magistrate should, in the circumstances, have ordered absolution from the instance with costs."

It seems to me that this case is distinguishable on the facts from the instant case. In the case before us there was a wrong assumption made about the non-availability or otherwise of new refrigerators. Whatever error was made on some of the registers, it was later found that spare parts were available for the repair of those that were not in good working order. What distinguishes this case from the *Bekker* case, *supra*, is the fact that once an appreciation of the

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error was made an adjustment to the prices was effected. It is that adjusted purchase price that the second appellant wants paid.

The question is whether the respondent is not bound, on the evidence on the papers, by the second valuation as the learned judge found or whether the respondent is bound by that reduced final figure of the assessment. On the authorities relied upon by the appellant's counsel, the respondent is bound by whatever valuation was made.

Let me first consider the other case referred to by Mr *de Bourbon* as supporting the principle to be applied in the instant case.

In *Gillig v Sonnenberg* 1953 (4) SA 675 (TPD) MURRAY AJP (as he then was), after considering ancient authorities, expressed his opinion on the principles applicable on the facts of the case before him. I intend to quote at length what he said at 682F-683F:

"To my mind, both on authority and on principle the present problem has to be decided by application of the general considerations underlying the doctrine of *laesio enormis*. As for the authority, Voet's views have been quoted above, Huber Heed. Recht. III c. 4 Secs. 6 and 7 is to the same effect, as is Perezus ad. Cod., 4.38 (relying on Code, 4.44.2). Of the authorities cited only Lauterbach, whom Brunneman quotes and follows, appears to make any distinction, and then only to the extent that in this type of case relief is granted 'even though the inequity does not exceed half of the just price' - an opinion which Pothier appears to share. On principle I am unable to see any good ground for applying different considerations from those underlying *laesio enormis*. The basis of *laesio enormis* is that even in the absence of fraud or misrepresentation on the part of the other contracting party a buyer or seller is, on ground of equity, given relief against a seriously prejudicial bargain which he has concluded. As I see the position, the reason for this grant of relief is precisely the same whether the party (seller or buyer) has himself agreed to a specified price or whether he has, by agreeing to a price to be determined by a third person suffered *laesio* by that person fixing the price at an inadequately high (or low) figure. The basic principle is the same - it is immaterial whether in cases of the present character the remedy is given on proof of *laesio* of less *enormis* degree or whether the conditions of its application are precisely the same, or more or less extensive, than those of the ordinary doctrine of *laesio enormis*.

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There is much to be said for the view that no relief at all should be granted to a purchaser (or seller) who having

deliberately decided to buy (or sell) at the valuer's price eventually finds that the valuer's opinion differs very seriously from the market value, or the value in the opinion of some other person. If however relief should be granted, it is purely equitable, and in giving it, it is only proper to see that equity must also be done to the other party (*vide* the above quoted passage from Vinnius). There is no apparent reason therefore why in cases of the present type, the other party should be in any worse position than in *laesio enormis* cases strictly so called. Where *laesio enormis* has been proved and the conditions for grant of relief exist, the position, as I understand it, is that the other party has the option either to resile entirely from the contract of sale or to carry it out on the modified price found to be the true or fair value of the *res vendita*. (Mackeurtan p 23, Voet 18.5.8, van Leeuwen *Roman-Dutch Law* (Kotze's translation) 2nd ed vol 11 p 160, *Levisohn v Williams* 1875 B 108, *Durr's Executor v Rens* 3M 365 at p 367). There is every reason for giving that right of election to a person in the position of the defendant in the present case. He was prepared to purchase, but only at a price fixed by a named third party. If the last named's determination is so defective as to justify the plaintiff as seller in refusing to accept it, the defendant is equally entitled to decline to go any further with the transaction, and to resist a new contract being forced upon him."

Total South Africa (Pty) Ltd v Bonaiti Developments (Pty) Ltd & Ors 1981 (2) SA 263 (D) was a case in which, in terms of the lease, the rental fell to be determined upon the basis of a valuation. There was no agreed value. The value was grossly excessive and was found not to be binding upon the parties. In that situation the landlord could not be compelled by the court to accept a rental based on what the court considered to be fair value. The defendant, at intervals of not more than four years, had the premises valued by a sworn valuator and, at its election, retained the agreed value or substituted the sworn valuation for the agreed value for purposes of rent calculation. These facts are distinguishable from the facts of the instant case, FRIEDMAN J remarked at 266G-H as follows on the principles to be applied in such cases:

"Both counsel accepted the correctness of the judgment of MURRAY AJP in the case of *Gillig v Sonnenberg* 1953 (4) SA 675 (T), as explained by MILLER J (as he then was) in the case of *Dublin v Diner* 1964 (1) SA 799 (D). In summary the position would appear to be as follows. Where parties to a contract make provision for the valuation of the subject - matter of the contract by a third party, neither party can be held to that

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valuation if it is one that is so grossly excessive (or in suitable cases so grossly less than the true value) that it bears no reasonable relationship at all to the true value of the property. The party in whose favour the valuation would appear to be cannot compel the other party to the contract to perform it at that valuation or, to put it conversely, the party aggrieved by the valuation can refuse to pay a price or rental based on that valuation. In the event, however, that the aggrieved party resists performance based upon the excessive valuation, the non-aggrieved party has the right to elect whether to resile from the contract or to carry it out upon the basis of the valuation found by the court to be a true or fair valuation of the *res vendita* or the leased property."

One of the distinguishing features of the cases relied upon by Mr *de Bourbon* and the present case is that there is in this case a binding contract. In that contract the parties agreed to be bound by the valuation of Richard Ellis, in other words as between the parties the valuation is final. In my view there is no room for the court to interpose itself between the parties by determining some other valuation or by making a new contract for the parties. The parties accepted the finality of Richard Ellis' valuation. Can it be interfered with without showing that there was a fundamental error or that it was made in bad faith and was also inequitable? The court *a quo* seemed to think it could interfere with the valuation.

The learned judge came to the conclusion that the valuer did not comply with his mandate, ie

he did not take into account all the relevant matters mentioned in clause 3.1 of the agreement. He therefore decided that the valuer did not fix the price in accordance with the requirements of clause 18 and he said: "It is not necessary to decide whether or not his valuation is grossly inequitable: indeed this cannot be determined until a valuation in accordance with the requirements has been carried out". He, therefore, refused to order the respondent to make payment. Was he right? I think not.

In this case it has not been shown that the valuer made a fundamental error in the valuation. As I have pointed out above there is no evidence which supports the respondent's attack of the valuation. Here an error was recognised and it was corrected.

In *Dean v Prince & Ors* [1954] 1 All ER 749 (CA) DENNING LJ expressed the view that the validity of a valuation can be impeached for fraud, mistake or miscarriage. He said at 758H:

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"For instance, if the expert added up his figures wrongly, or took something into account which he ought not to have taken into account, or conversely, or interpreted the agreement wrongly, or proceeded on some erroneous principle - in all these cases, the court will interfere. Even if the court cannot point to the actual error, nevertheless, if the figure itself is so extravagantly large or so inadequately small that the only conclusion is that he must have gone wrong somewhere, then the court will interfere in much the same way as the Court of Appeal will interfere with an award of damages if it is a wholly erroneous estimate."

I have cited this passage for two reasons. First, it shows that there must be some evidence of the valuer's wrongdoing. Secondly, because the opinion expressed above is no longer the law. The position has changed. LORD DENNING MR himself said so in *Campbell v Edwards* [1976] 1 All ER 785 (CA) at 788 c-d:

"In former times (when it was thought that the valuer was not liable for negligence) the courts used to look for some way of upsetting a valuation which was shown to be wholly erroneous. They used to say that it could be upset, not only for fraud or collusion, but also on the ground of mistake. See for instance what I said in *Dean v Prince* (*supra*). But those cases have to be reconsidered now. I did reconsider them in the *Arenson* case ([1973] 2 All ER 235 (CA)). I stand by what I there said. It is simply the law of contract. If two persons agree that the price of property should be fixed by a valuer on whom they agree, and he gives that valuation honestly and in good faith, they are bound by it. Even if he had made a mistake they are still bound by it. The reason is because they have agreed to be bound by it. If there were fraud or collusion, of course, it would be different. Fraud or collusion unravels everything."

GEOFFREY LANE LJ (as he then was) said in the same case at 789b:

"The most up-to-date and accurate statement of the law in the circumstances is in a passage of LORD DENNING MR's judgment in *Arenson v Arenson* (*supra*) in this court which states as follows:

'At common law - as distinct from equity - the parties are undoubtedly bound by the figure fixed by the valuer. Just as the parties to a building contract are bound by the architect's certificate, so the parties are bound by the valuer's valuation. Even if he makes a mistake in his calculations, or makes the valuation on what one or other considers to be a wrong basis, still they are bound by their agreement to accept it.'

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I agree with Mr *Slomowitz* that "in the absence of any allegation of fraud or collusion or capriciousness the parties were bound by the valuation." To decide otherwise would have wrought injustice in a case in which the respondent was a party to a binding agreement and has also taken effective control over the supermarket business including the fixtures and fittings therein and the motor vehicles. As LORD DENNING said in *Campbell v Edwards supra* at 788e:

"But even if the valuation could be upset for mistake, there is no room for it in this case. The premises have been surrendered to the landlord. He has entered into occupation of them. Months have passed. There cannot be *restitutio in integrum*."

How true this is of the fittings, fixtures and motor vehicles which have long been in the custody of the respondent. One may assume that the respondent has put them into full use. Is it not now virtually impossible to place a 1984 market price on them?

A mere mistake without the allegations of fraud or caprice does not entitle a party to avoid or reject a valuation. In *Barber v Kenwood supra*, many cases on this point were reviewed. I only cite the passage at 182 because it is supportive of the view I hold and the contentions of the appellants. SIR DAVID CAIRNS said:

"The first of the modern cases is *Dean v Prince* 1953 1 Ch 590. There Mr JUSTICE HARMAN held on a preliminary point that where, after a valuation of shares had been made by an auditor, they disclosed the basis of their valuation, the court could go behind their certificate and consider whether the valuation had been made on a wrong basis. He said at pp. 593 and 596 that if they had maintained silence the valuation could not have been impeached. He went on to hold that because they had failed to consider break-up value the valuation could not stand. The Court of Appeal, 1954 1 Ch. 409, reversed his decision, holding that none of the grounds on which the valuation was attacked were good grounds. It is important to observe that both counsel accepted that, following *Collier v Mason*, ((1858) 25 B 200), 'fraud, mistake or miscarriage' would invalidate the valuation. Further, anything that was said in the judgments as to whether mistake would invalidate was obiter because it was held that there was no mistake. LORD JUSTICE DENNING did, however, consider at p 427, whether a valuation could be impeached for mistake and he held that it could. He mentioned that there were authorities to the effect that

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the valuer was not liable to an action unless he was dishonest but he said that those cases had no application when considering the validity of the valuation."

See *Burgess & Anor v Purchase & Sons (Farms) Ltd & Ors* [1983] 2 All ER 4 (ChD) at 8-11; *Dublin v Diner supra*.

In my view the respondent has to pay the purchase price fixed by Richard Ellis. If the respondent is aggrieved and feels that it has suffered by this valuation an injustice because of the negligence of the valuers, it has a remedy available to it against the valuer. See *Arenson v Arenson* 1977 AC 405; [1973] 2 All ER 235 (CA). But is this such a case? Where there has been no attempt, in a speaking valuation, to show an error or mistake that would lead to a patently inequitable result, the respondent may not succeed. See *Bekker v RSA Factors supra*. The valuation seems not to be far removed from the price of \$600 000 originally agreed upon by

the parties.

In my judgment the respondent is bound by the agreement to pay to the second appellant \$700 173 with interest at 13% from 15 December 1984.

The appellants have also appealed against the interpretation placed by the learned judge *a quo* on clauses 20.2.2 and 20.3. The judge *a quo* held that the "obsolescence" allowance was applicable to slow-moving stock which was not damaged or shop-soiled.

According to the agreement the purchase price for the stock which was shop-soiled was to be the cost of the stock agreed upon by the firm of Arthur Young and Company, appointed by the appellants, and the firm of Price Waterhouse, appointed by the respondents.

The clauses whose meanings are in dispute read:

"20.2.2 Deduct a specific allowance for obsolescence, as agreed by the said accountants as being a reasonable allowance, where goods are not in a good and acceptable sale condition and such allowance shall be calculated on an item by item basis, but no regard shall be taken of the past obsolescence policy, nor shall such policy be applied.

20.3 Trading stock in the warehouse shall be valued at cost on the basis of the Maceys Trading stock records, provided that an obsolescence allowance shall again be deducted where goods are not in an

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DUMBUTSHENA CJ

acceptable saleable condition and shall again be agreed by the firms of Arthur Young and Price Waterhouse ..."

It is common cause that the two firms of accountants agreed that the cost of the stock was \$3 050 099. There was, however, a difference as to the meaning to be attached to the above clauses.

Arthur Young and Company adopted the view that the obsolescence allowance should be limited to the value of damaged or shop-soiled goods. Price Waterhouse was of the view that there should be deducted a further allowance of obsolescence from slow-moving goods which had been on the shelves for a long time. It put the cost of these goods at \$245 105 and the obsolescence allowance at \$153 033. Arthur Young and Company did not accept these figures. It was their view that no allowance for obsolescence could be made in respect of slow-moving stock.

Because the accountants did not agree on a specific allowance for obsolescence they could not deduct it from the price of goods which were not in a good and acceptable sale condition.

The learned judge *a quo* agreed with the respondent's accountants. He asked this question in his judgment:

"Furthermore, why was the allowance called an 'obsolescence' allowance. The parties must have used that term

deliberately and some meaning must be given to that term. Just as in interpreting a statute a construction which would leave without effect any part of the language thereof would normally be rejected, so, too, in the case of a contract, the provisions must be construed in a manner which would not make any word otiose. In *Burrows Interpretation of Statutes* 2 ed at p 62 it is expressed thus:

'A document should not only be construed as a whole but also, if possible, be construed so as to give effect to every word, and the court is not at liberty to disregard a word if some meaning can be given to it. It is to be assumed that additional words are not used without some purpose.'

Accordingly, I am of the view that the interpretation adopted by the respondent's accountants is the correct one and that so-called 'slow-moving' goods are goods in respect of which the obsolescence allowance is applicable."

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DUMBUTSHENA CJ

In this agreement it seems clear to me that the word "obsolescence" does not bear its ordinary meaning. I agree with Mr *Slomowitz* when he argued that in this agreement "it was open to the parties to an agreement to create their own self-contained dictionary of words for the purpose of their agreement." In support of his argument he relied on *List v Jungers* 1979 (3) SA 106 (A). In that case DIEMONT JA said at 119A:

"Attention is also drawn in a passage in a recent judgment by JANSEN JA to the danger of ascribing an 'ordinary' meaning to a word when construing a contract:

'The first step in construing a contract is to determine the ordinary grammatical meaning of the words used by the parties (*Jonnes v Anglo-African Shipping Co* 1936 Ltd 1972 (2) SA 827 (A at 834E). Very few words, however, bear a single meaning, and the "ordinary" meaning of words appearing in a contract will necessarily depend on the context in which they are used, their interrelation, and the nature of the transaction as it appears from the entire contract. It may, for example, be quite plain from reading the contract as a whole that a certain word or words are not used in their popular everyday meaning, but are employed in a somewhat exceptional, or even technical sense. The meaning of a contract is, therefore, not necessarily determined by merely taking each individual word and applying to it one of its ordinary meanings.'

(*Sassoon Confirming and Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) at 646."

See also *Gotz v Estate van der Westhuisen* 1935 AD 300 at 304; Christie *The Law of Contract in South Africa* at 202-203.

It seems to me that the phrases "specific allowances for obsolescence" and "an obsolescence allowance" should be read in the context of clauses 20.2.2 and 20.3 as a whole. To understand the intention of the parties it is not necessary to ascertain their intention at the time the contract was agreed upon. The expression of their intention can be gathered from the words they used in the contract. They must have meant, so it seems from a reading of the relevant clauses to deduct an obsolescence allowance from goods that had been on the shelves for a very long time.

I derive support from what was said by GREENBERG JA in *Worman v Hughes*

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DUMBUTSHENA CJ

& Ors 1948 (3) SA 495 (A) at 505. The learned judge of appeal said:

"It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, ie what their intention was as expressed in the contract. As was said by SOLOMON, J, in *Van Pletzen v Henning* 1913 AD p 82 at p 99: 'The intention of the parties must be gathered from their language, not from what either of them may have had in mind.' (See also *Union Government v Smith* 1935 AD p 232 at pp 240/1; *Lanfear v du Toit* 1943 AD p 59 at pp 72-3 and in regard to wills, *Cuming v Cuming* 1954 AD p 201 at p 206.)"

See also *Van Rensburg en Andere v Taut en Andere* 1975 (1) SA 279 (A) at 302 G-H.

It means, therefore, that the intention of the parties must first be sought in the words used in the contract, and those words must be construed in their ordinary grammatical meaning or the meaning they acquired from the peculiar manner in which they were used in the contract.

In the instant case the court is aware of the broad background and circumstances in which the agreement was entered into. The appellants were selling their businesses and the respondent was buying viable businesses. Once that is understood the context in which the words were used can easily be ascertained. See *Van Rensburg en Andere v Taute en Andere supra* at 303A-E; and see also *Swart en Andere v Cape Fabrix (Pty) Ltd* 1979 (1) SA 195 (A) at 202C where RUMPF CJ commented on the above principle of the interpretation of a contract as follows:

"What must naturally be accepted is that, when the meaning of words in a contract have to be determined, they cannot possibly be cut out and posted on a clean sheet of paper and then considered with a view to then determining the meaning thereof. It is self-evident that a person must look at the words used having regard to the nature and purpose of the contract, and also at the context of the words in the contract as a whole." (Translation p 34.)

In the instant case the parties, so it seems to me from the use of the phrase "but no regard shall be taken of the past obsolescence policy, nor shall such policy be applied," did not intend to follow the obsolescence policy, whatever it might have been, that the appellants might have had before the agreement.

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The parties then set up a new standard for determining the new obsolescence policy. It was this: The determining factor was the condition of the goods. They had to be in a good and acceptable saleable condition.

The new obsolescence policy encompassed shop-soiled and damaged goods as well as slow-moving goods. In my view that this was the expressed intention of the parties is found in the words used in clause 20.3:

"Trading stock in the warehouse shall be valued at cost on the basis of the Maceys Trading stock records, **provided that an obsolescence allowance shall again be deducted where goods are not in an acceptable saleable condition** and shall again be agreed by the firms of Arthur Young and Price Waterhouse." (The emphasis is mine.)

Counsel for the respondent contended that "a reading of clause 20 as a whole indicates that

what was being sought was the value of the stock-in-trade to enable the respondent to pay a figure which would be realisable upon resale." I agree with this submission. It is a common sense approach to the intention of the parties. Goods that were slow-moving were not attractive on the market. It can be assumed that that was why they remained on the shelves for a long time. Some, it is easy to assume, may still remain on the shelves for still longer. In my view the import of clause 20 is that slow-moving goods be subject to an obsolescence allowance.

The learned judge *a quo* was, in my judgment, correct in the conclusion at which he arrived. The appellants cannot succeed on this leg of their appeal.

In determining the price of slow-moving goods and the obsolescence allowance to be deducted therefrom regard must be had to the year the goods were bought by the appellants. This is not a matter the court should decide. It is up to the arbitrator to assess whatever evidence may be adduced or to observe the condition of the goods and from his observations and acquired knowledge fix a just price for shop-soiled and damaged goods as well as slow-moving goods.

The accountants were unable to agree on the value of the shop-soiled and damaged goods and slow-moving goods. The stock in dispute was correctly referred by the judge *a quo*, in terms of clause 20.5, to summary arbitration.

I need not dwell at length on the question of interest to be paid on the various claims. It is common cause that clauses 5.3, 20.6 and 19 do not provide that

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DUMBUTSHENA CJ

compound interest shall be paid at any date on accrued interest. The agreement provides that if the amount due is not paid on the due date then interest at the rate of 13% per annum will be payable on that portion of the purchase price of the stock which has not been paid reckoned from that date to the date of payment.

It can be seen that there is no mention of compound interest. There is also no mention of capitalised interest. The parties did not agree on the paying of compound interest. See *Barclays Bank International Limited v Smallman* 1976 (2) RLR 163 (GD) at 165; 1977 (1) SA 401 (R) at 402. I agree with Mr de Bourbon that there is nothing in clauses 5.3, 20.6 and 19 which permits compound interest.

Mr Slomowitz contends that it was the capitalisation of interest that the appellants sought to be granted. He submitted in his heads of argument that:

"...if both the purchase price in respect of the various assets and the accrued interest were not paid on due date (ie when the price of each thing sold was fixed), then not only did the balance of the purchase price due carry interest but the amount of accumulated interest then due also carried interest. The interest in question is simply *mora* interest. It is not compound interest although it is calculated on interest. (Cf Christie (*supra*) at 495; *Mavromati v Union Exploration and Import (Pty) Ltd* 1949 (4) SA 917 (A); *Linton v Corser* 1952 (3) SA 685 (A) at 694-6.)"

It is interesting to note that Mr Levy in his answering affidavit in para 3 said that compound interest was payable. He then submitted that the respondent was indebted to the first appellant

in the sum of \$2 396,78 as at the date of 15 May 1985 together with interest at 13% per annum from 15 May 1985 to the date of payment. Then in para 5 he said if the first appellant is not entitled to compound interest then the amount of \$156 109,93 paid on 15 May 1985 extinguished the respondent's indebtedness to the first appellant.

On appeal we were informed that Prayer One of the Notice of Appeal relating to the sum of \$2 396,78 would fall away if the first appellant was not entitled to compound interest because the amount has been paid. It stands to reason since we hold that the interest is not compound interest or capitalised interest, the appeal on the first prayer cannot succeed.

The remaining two prayers relate to the second appellant. The second prayer is for the payment of the sum of \$603 218. This price was due to be paid on

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DUMBUTSHENA CJ

16 May 1985 for shop-soiled and damaged goods and slow-moving goods. The second prayer was correctly referred to summary arbitration by the learned judge *a quo*. There is no way the learned judge's decision can be disturbed.

In the last prayer the price of fixtures, fittings and motor vehicles were fixed at \$700 173 by Richard Ellis on 20 March 1985. This prayer is allowed with interest at the rate of 13% per annum calculated from 15 December 1984.

In the result:

1. The first appellant's appeal for the payment by the respondent of the sum of \$2 396,78 is dismissed.
2. The second appellant's appeal for the payment by the respondent of the sum of \$627 236,57, together with interest thereon at the rate of 13% per annum is dismissed.
3. The second appellant's appeal for the payment by the respondent of \$700 173 with interest at the rate of 13% per annum from 15 December 1984 is allowed.
4. I make no decision on costs because of the conclusion at which I have arrived. The parties are invited to prepare oral or written submissions on costs, bearing in mind the result of this appeal.

Beck JA: I agree.

Gubbay JA: I agree.

Winterton, Holmes & Hill, appellants' legal practitioners

Scanlen & Holderness, respondent's legal practitioners

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SAMBO v BARCLAYS BANK OF ZIMBABWE LIMITED 1986 (2) ZLR 25 (SC)

Court Supreme Court, Harare

Beck JA, McNally JA & Ebrahim AJA

Civil appeal

25 July 1986

Flynote

Insolvency - act of insolvency - nulla bona return - requirements - "disposable property" - does not include mortgaged immovable property.

Evidence - affidavit - deficiencies in evidence in applicant's papers remedied by uncontested depositions of respondent.

Legislation - Insolvency Act [Chapter 303] s 13(b).

Words and Phrases - "disposable property".

Headnote

A *nulla bona* return against movable property only does not establish that there is insufficient disposable property to pay a judgment debt in that it is possible that there may be disposable immovable assets. Where it appears from the respondent's own papers that his immovable property is mortgaged, and therefore not disposable in terms of s 13(b) of the Insolvency Act [Chapter 303] then the deficiency in the return is remedied and sequestration may be ordered

Cases cited

Rodrew (Pty) Ltd v Rossouw 1975 (3) SA 137 (O)

Tewari v Secura Investments 1960 (3) SA 432 (N)

Western Bank Ltd v Els 1976 (2) SA 797 (T)

R M Fitches for the appellant

A P de Bourbon SC for the respondent

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McNALLY JA

Judgment

McNally JA: At the hearing of this appeal we made an order dismissing it and providing that the costs of appeal should be costs in the sequestration. We indicated that our reasons would follow, and I now set them out.

On 20 December 1985 the appellant was provisionally sequestered at the instance of the respondent, whom I will call "the bank." On 21 February 1986 a final order of sequestration was made. The appellant was late in noting his appeal and leave to appeal out of time was granted.

At the hearing the court took the point, *mero motu*, that in fact an act of insolvency on the part of the appellant had been established. In the court *a quo* it had been decided that the bank had failed to establish an act of insolvency but had shown that the appellant was in fact insolvent. It was this finding of actual insolvency which the appellant was contesting on appeal. The relevant facts are these. The appellant owed the bank over \$18 000 plus interest. The bank obtained provisional sentence against the appellant. The appellant did not enter an appearance to defend in terms of Rule 28 of the High Court Rules. Nor did he pay his debt. The bank then issued a Writ of Execution against movables (presumably in Form No 37 of the High Court Rules) and the Assistant Deputy Sheriff made a *nulla bona* return after serving the writ on a caretaker at the appellant's place of business.

The bank alleged an act of insolvency in terms of s 13(b) of the Insolvency Act [Chapter 303]. The subsection reads:

"A debtor shall be deemed to have committed an act of insolvency if a court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment."

Clearly the first part of the section was not satisfied since there was no personal service. Compare *Rodrew (Pty) Ltd v Rossouw* 1975 (3) SA 137 (O) at 138E-F. The learned judge *a quo* found that the requirements of the second part of the section had also not been met because "disposable property" includes immovables as well as movables. Since the writ of execution was against movables only, the return does not establish that there was not disposable immovable property available to satisfy the debt. Accordingly he ruled that the second act of insolvency under the section had also not been proved.

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McNALLY JA

On a proper analysis of the meaning of "disposable property" I think this difficulty falls away. It is well established that immovable property is only disposable where it is not mortgaged. The exception, where the applicant is the first mortgagee, does not arise here. See: *Mars on Insolvency* 7 ed p 68; Smith *The Law of Insolvency* 2 ed p 38.

Although the appellant contests hotly the alleged value of his immovable property, he does not dispute that it is mortgaged. Thus on the basis of his own admissions he has no disposable immovable assets. The Assistant Deputy Sheriff's *nulla bona* return, which *prima facie* meets the requirements of the section, is thus not invalidated by the possibility that there are disposable immovable assets. That possibility has been eliminated on the appellant's own evidence. Compare *Tewari v Secura Investments* 1960 (3) SA 432 (N), and *Western Bank Ltd v Els* 1976 (2) SA 797 (T).

In our view therefore an act of insolvency is established on the original papers before the High

Court, and it is unnecessary to consider whether general insolvency was proved, or whether the application to adduce further evidence should have been allowed (the application to adduce such evidence was not formally made before us).

Mr *Fitches*, for the appellant, asked that costs be costs in the sequestration, and Mr *de Bourbon* for the respondent did not oppose such an order. We ordered accordingly. For the avoidance of doubt it should be added that that order does not apply to any costs arising from the application to adduce further evidence or the opposition to that application. As far as that application is concerned we make no order as to costs. As the parties may feel that they were given no opportunity to make submissions about these costs, we give leave to either party, should it wish to do so, to set down the matter of the costs of the application for argument on a date to be agreed with the Registrar.

Beck JA: I agree.

Ebrahim AJA: I agree.

Gollop & Blank, appellant's legal practitioners

Scanlen & Holderness respondent's legal practitioners

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AUSTIN & ANOR v THE MINISTER OF STATE (SECURITY) & ANOR BULL v THE MINISTER OF STATE (SECURITY) & ORS 1986 (2) ZLR 28 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

24 & 31 July 1986

Flynote

Audi alteram partem - denial to other party of access to document - reliance placed on document - irregularity.

Practice and procedure - document handed to judge in Chambers - not under cover of affidavit or Ministerial certificate - irregularity.

Constitution - detainee - protection of law - prohibits reliance on document not shown to other party - Constitution of Zimbabwe 1981, s 18 (10), (11) and (12).

Legislation - Civil Evidence Act [Chapter 41] s 33A - Courts and Adjudicating Authorities (Publicity Restriction) Act 1985, s 4 - Emergency Powers (Maintenance of Law and Order) Regulations SI 458/1983, s 17, s 21 and s 31(3) - Citizenship of Zimbabwe Act 1984 s 11(9).

Headnote

A and H were arrested under s 17 of SI 458 of 83. The reasons for detention were challenged in the High Court. During the course of proceedings and in order to show a factual basis for the reasons given a document was handed to the presiding judge, not in court, but in Chambers. It was not supported by affidavit or ministerial certificate. The learned judge perused the document and relied upon it as showing a factual basis upon which the allegations were made. Access to the document was denied to the other party.

Held, that *per* DUMBUTSHENA CJ: A court should not put itself in the position where a party to a dispute may perceive it as having acted unfairly. The

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DUMBUTSHENA CJ

reliance placed upon the document by the learned judge was contrary to the *audi alteram partem* rule and to the protection of law enacted in the Constitution.

Held, further, that *per* GUBBAY *et* McNALLY JJA: Properly understood, the learned judge did not place any reliance upon the document; its production was, however, irregular on procedural grounds.

Held, further, that *per* GUBBAY *et* McNALLY JJA: there are three criteria for the validity of reasons for detention: they must be such as warrant detention; they must be sufficiently detailed to enable the detainee to make meaningful representations to the Review Tribunal; they must be based upon information considered reliable.

Held, further, that reliance upon the document was unnecessary, the reasons supplied being sufficient.

Cases cited:

Minister of Home Affairs & Anor v Austin & Anor 1986 (1) ZLR 240 (SC); 1986 (4) SA 281 (ZS)

Conway v Rimmer & Anor [1968] 1 All ER 874 (HL)

Ex parte Zelter 1951 (2) SA 54 (SR)

Ex parte Zelter (1) 1951 SR 6

PF-ZAPU v Minister of Justice, Legal and Parliamentary Affairs 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZS)

Nixon v USA (1975) 418 US 683; 41 L Ed 2d

Bull v Attorney-General & Anor 1986 (3) SA 886 (ZSC)

Holland v Commissioner of Police 1982 (2) ZLR 29 (HC)

Moll v Commissioner of Police 1983 (1) ZLR 238 (HC)

R v Secretary of State for the Home Department [1971] 3 All ER 452 (CA)

R v Gaming Board for Great Britain [1970] 2 All ER 528 (CA)

Road Service Board & Anor v John Bishop (Africa) Ltd 1956 (2) SA 504 (FSC)

van der Linde v Calitz 1967 (2) SA 239 (AD)

Holman v Lardner-Burke NO 1968 (2) RLR 57

Kanda v Government of Malaya 1962 AC 322

A P de Bourbon SC for the appellants

G G Chidyausiku for the respondents

Judgment

Dumbutshena CJ: This appeal is against the whole judgment of the High Court delivered by REYNOLDS J on 9 July 1986 in relation to these two matters which were heard together. The grounds of appeal cover every

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DUMBUTSHENA CJ

conceivable point considered by the learned judge *a quo*. However, Mr *de Bourbon* for the appellants, indicated to us at the beginning of his argument that he was not going to argue that an interdict restraining the State from continuing to detain the appellants Austin and Harper on present allegations should have been granted or for an order that the reasons for detention did not comply with the provisions of the Constitution, because the two appellants, Austin and Harper, were not detained in terms of s 17 of the Emergency Powers (Maintenance of Law and Order) Regulations 1983, SI No 458 of 1983.

The appellants' contention remains in three areas of the appeal. They contend that there was no basis in law upon which the court *a quo* admitted the evidence contained in a secret document handed to the presiding judge in his chambers by the first respondent. That document was not made available to the appellants. It is said that that document was not identified by the first respondent (the Minister of State (Security)) in his affidavit. It was contended that there was no proof that the document handed to the learned judge was the document mentioned by the first respondent in his affidavit. It is also contended that there was no evidence before the court *a quo* to show that the arresting officer had reason to believe that there were any grounds which could justify detention under s 17 of the Regulations. The submission is made that the reasons for the appellant's detention were not adequate.

The appellants also appeal against the order of costs made by REYNOLDS J. They contended that the costs incurred by their appearance before SAMATTA J on 27 June 1986 and costs of the appearance before REYNOLDS J ought to have been awarded to them. These costs, it is argued, were conceded by the respondents both before SAMATTA J and REYNOLDS J.

After hearing argument the court took time to consider its decision. On 31 July 1986 we made

and announced the following decision:

- "(1) The appeal is dismissed with costs.
- (2) A reasoned judgment will follow.
- (3) It is our decision, and as requested, we formally declare that the reasons for detention served on the appellants on 26 June 1986 are now sufficiently detailed to enable them to make meaningful representations before the Review Tribunal. Our decision in this regard is not to be taken by the Review Tribunal as an indication one way

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DUMBUTSHENA CJ

or the other as to the necessity or expedience of continuing the detention. That is a matter left entirely for the determination of the Review Tribunal."

We have dealt with appeals concerning these appellants before. It was as a result of the order of release made in *Minister of Home Affairs & Anor v Austin and Harper* 1986 (4) SA 281 (ZS) that the appellants were, upon their release, re-arrested and detained by Mr Takaendesa, an officer of the Central Intelligence Organisation, who is head of its Counter-Subversion Section. The appellants applied to the High Court for their release. The High Court dismissed their application. It is against that decision of the High Court they now appeal. However, things did not remain static. Mr Takaendesa detained them under s 21 of the Regulations. By the time this appeal came to the Supreme Court they were no longer detained in terms of s 21. They were now, as they are still, detained under a ministerial order in terms of s 17 of the Regulations. It is because of the change in the status of their detention that Mr *de Bourbon* asked for a declaration on the sufficiency or otherwise of a s 21 order of detention. The reasons used for detaining the appellants in terms of s 21 of the Regulations are the same reasons used by the Minister for detaining the appellants in terms of s 17.

There are two matters of importance in this appeal.

1. The document handed in by the first respondent only for the eyes of the presiding judge; and
2. The legality or otherwise of the appellants' detention.

It is not our intention to consider all issues raised in this appeal. It is important to note in passing that Mr *de Bourbon* did not argue the relevance of the appellants' detention under s 21. He, however, made no concession on the relevance or otherwise of that detention in this appeal.

What is pertinent in this appeal are three cardinal points. (a) The basis in law upon which the court *a quo* admitted in evidence a document without it being made available to all the parties. (b) The fact that the appellants say there was no evidence before the court *a quo* to show that the arresting officer himself had reason to believe that there were grounds justifying the detention of the appellants in terms of s 17, and (c) that it was wrong for the court *a quo* to hold

that the constitutional rights of the detainees to receive full and adequate reasons for their detention was subject to the interests of national security.

The court, in my view, is not concerned with the question whether the judge

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DUMBUTSHENA CJ

a quo was right in having sight of the secret document. That is not the issue we have to decide. The burning issue is whether he was right to supplement the reasons for detention with the contents of a document that had not been made available to the appellants and their counsel.

There is no dispute between the parties on the right of a judge to examine a document where discovery of that document is being objected to on the ground of privilege or where the production of the document is objected to because it contains sensitive national security secrets. What Mr *de Bourbon* objected to was the use which the court *a quo* made of the contents of a document whose availability was denied to the appellants.

It is unusual for a document to be made available to the court without one party or the other applying for its discovery or its production. The application for discovery is made in terms of Rule 170 of Order 24 of the High Court Rules. Rule 170 reads:

"Where on an application for an order for discovery, inspection or production privilege is claimed for any document, it shall be lawful for the court or judge to inspect the document for the purpose of deciding on the validity of the claim or privilege."

In his first judgment, *Austin and Harper v Minister of State (Security) & Anor* HH-267-86 REYNOLDS J considered English and South African cases which are:

"...to the effect that the court may order the production of a document which is claimed to be privileged, may inspect it privately, and may even override a ministerial objection to its production (See, for example, *Bilbraugh v Mutual Life Assurance Co* 1906 TH 56; *S v Naicker* 1965 (2) SA 919; *van der Linde v Calitz* 1967 (2) SA 239; *Wednesbury Corp & Ors v Ministry of Housing & Local Government* [1965] 1 All ER 186; *Conway v Rimmer* 1968 AC 910.)"

Had there been a contest between the parties for the discovery or production of the document, the cases relied upon in the judgment would have been relevant. Where there is no discovery of a document applied for, as in this case, and one party is denied sight of that document, the approach adopted by the learned judge *a quo* cannot be justified on the authorities cited above. In my view it does not matter how slight the degree of influence the document might have had on the court *a quo*. What is important is that the court should

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not be seen to be leaning towards one side because it has had sight of a document which has not been shown to the other side. Justice must be seen to be done. It cannot be seen to be done when, for justifiable or unjustifiable reasons one side does not know what it is that is contained in a document which has not been shown to it. When that happens there is a danger

of the courts hearing one side of the dispute and not the other. Fortunately the learned judge in the instant case did examine the document and made comments from the best of motives. I make these comments generally because I am sensitive to the damage that befalls a court that is unfairly or fairly suspected of leaning towards one side. Accusations or failure to apply the *audi alteram partem* principle where such accusations can be justified are not in the interest of justice. In this case the appellants objected to the breaching of the *audi alteram partem* principle. The learned judge appreciated that objection. He said in his judgment:

"His objection, in essence, is that, in applying the *audi alteram partem* principle, the court should not be put in possession of evidence by one party which will not be disclosed or known to the other party."

In this country provision is made for dealing with documents of the kind handed to the judge. I agree with Mr *de Bourbon's* submission that the principles laid down in the cases cited by the learned judge in the judgment referred to above need not arise in Zimbabwe because of the provisions of s 33A of the Civil Evidence Act [Chapter 41]. Section 33A reads:

"33A. (1) Notwithstanding the provisions of this Act or any other law, no person shall in any case be compellable or permitted to give evidence or to furnish any information as to any fact, matter or thing or as to any communication made to or by such person and no book or document shall in any case be produced if an affidavit purporting to have been signed by the Minister responsible in respect of such fact, matter, thing, communication, book or document is produced to the court to the effect that the Minister has personally considered the said fact, matter, thing, communication, book or document and that, in his opinion, it affects the security of the State and disclosure thereof will, in his opinion, prejudicially affect the security of the State.

(2) Nothing in subsection (1) contained shall derogate from any law relating to the matters referred to therein and the provisions of that subsection shall be additional to, and not in substitution, of, any such law."

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Mr *de Bourbon's* submission is fortified by a reading of subs (12) of s 18 of the Constitution. Section 18(12) reads:

"(12) Notwithstanding anything contained in subsection (4), (10) or (11), if in any proceedings before such court or other adjudicating authority as is referred to in subsection (2) or (9), including any proceedings by virtue of section 24, a certificate in writing is produced to the court or other authority signed by a Minister that it would not be in the public interest for any matter to be publicly disclosed, the court or other authority shall make arrangements for evidence relating to that matter to be heard in *camera* and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter."

As I comprehend it there is nothing in s 18 which authorises a Minister to hand a secret document to a judge in order that the judge may deny one or other of the parties seeing its contents. The provisions contained in the sections cited above permit a Minister, if he so wishes, to issue a certificate to prohibit the production of a document if he feels that it is in the public interest that the document should not be produced. Not only does the Minister have the authority conferred on him by subs (12). Section 4 of the Courts and Adjudicating Authorities (Publicity Restriction) Act, No. 25 of 1985, also gives him similar powers. The only difference is that the Minister, while authorised to forbid the disclosure or distribution of a document, information or recording to a party, person or legal representative, may specify the conditions under which it may be distributed in order to ensure that the document or information or recording is disclosed to as few people as possible. It will be seen from a reading of the section

that there is no provision enabling the court to look at the document and to use the contents for the determination of the issues before it. Section 4(1) reads:

"4. (1) In addition to his power in terms of subsection (12) of section 18 of the Constitution to issue a certificate preventing the public disclosure of any matter in proceedings before a court or adjudicating authority, the responsible Minister shall have power to issue a certificate, in writing and signed by him, that it would not be in the public interest to disclose publicly-

(a) ...

(b) ...

(2) Subject to subsection (5), whenever the responsible Minister has issued a certificate, he may -

(a) by notice in writing served on -

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(i) any party to the proceedings or future proceedings concerned; or

(ii) any person who is or may be a witness in the proceedings or future proceedings concerned;

or

(iii) any legal representative of a party or person referred to in subparagraph (i) or (ii);

or

(b) by notice published in the *Gazette*;

direct that any information, document, or recording or class of documents or recordings relating to the proceedings or future proceedings concerned shall not be made available or transmitted by any one such party, person or legal representative to any other such party, person or legal representative, except under such conditions as the responsible Minister may specify in the notice for the purpose of ensuring that any information or matter contained in the document or recording or class of documents or recordings is disclosed to as few people as possible."

It is important to point out the method by which a minister may stop the production of a document or any piece of evidence in any proceedings pending before a court or adjudicating authority so that there is no confusion as to the procedure a minister may wish to use to achieve the purposes authorised by law.

I agree with Mr *de Bourbon*'s submission that the procedure which was adopted 'whereby a document was secretly handed to a Judge in Chambers', conflicts with ss 18, (10), (11) and (12) of the Constitution. And, if I may add, those provisions do not permit the procedure that was adopted by the first respondent. That procedure offends against the *audi alteram partem* rule. In his heads of argument Mr *Chidyausiku* submitted that the court a quo was at common law entitled to see the secret document without it being shown to the appellants because the first respondent claimed privilege against its production and such procedure would not offend the *audi alteram partem* rule. He might have added that Rule 170 makes it lawful for the court or judge to inspect the document for the reasons mentioned in the Rule. He argued that it did not matter that only one party to the proceedings was denied access to the secret document. He relied for that submission on what was said in *Conway v Rimmer & Anor* [1968] 1 All ER 874

(HL) LORD REID said at 888I:

"It appears to me that, if the Minister's reasons are such that a judge can properly weigh them, he must on the other hand consider what is the

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probable importance in the case before him of the documents or other evidence sought to be withheld. If he decides that on balance the documents probably ought to be produced, I think that it would generally be best that he should see them before ordering production and, if he thinks that the Minister's reasons are not clearly expressed, he will have to see the documents before ordering production. I can see nothing wrong in the judge seeing documents without their being shown to the parties."

In the passage relied upon by the respondents LORD REID says there is nothing wrong with this procedure if the documents are not "being shown to the parties". That means both parties to the dispute. In the instant case the document was not shown to the appellant. That was not fair. Had the learned judge ignored its contents there would have been nothing wrong but he used the document to form a view of the matter. That is what offends against the *audi alteram partem* rule. In any event we have statutory provisions which govern the use of documents or any piece of evidence which has information detrimental to the public interest or national security. Under those provisions the Minister has wide powers. If those powers are properly used the question of breaching the *audi alteram partem* principle will not arise.

It appears that in this country the denial of a document to a party is based on history. Just for the record it is of historical importance to mention a few of them. To begin with Mr *Chidyausiku* referred us to *Ex parte Zelter* 1951 (2) SA 54 (SR). That was a case in which the court considered a proviso in regulations which authorised the non-disclosure of a document to an applicant for citizenship. I intend to refer only to *Ex parte Zelter* (1) 1951 SR 6, a judgment of the full court. The court considered whether it was right for the High Court to take "cognisance of a police report without disclosing it to the applicant." Section 13 of SRGN 51 of 1950 and its proviso read as follows:

"13. A report upon any application by the Commissioner of Police shall be lodged with the Registrar within three months of the date of the application and shall be available for inspection by the applicant or his authorised agent at the office of the Registrar:

Provided, however, that on a special certificate from the Minister that on the grounds of public policy reasons for objections to an application should not be disclosed, such reasons shall not be divulged except to the High Court."

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The full court consisting of TREDGOLD CJ, MORTON and BEADLE JJ held that the proviso to s 13 was *ultra vires* s 27(5) of the Southern Rhodesia Citizenship and British Nationality Act No. 13 of 1949.

In terms of s 26 of the Citizenship Regulations, SRGN 276 of 1953, the Minister was empowered to cause information to be disclosed to a Commissioner appointed in terms of the Regulations and to no-one else if he deemed it "expedient on the grounds of public order that

any or all of such information shall not be disclosed by the Commissioner to the person against whom an order is proposed to be made, ...or any other person". Section 16(6) of the Citizenship of Rhodesia Act [Chapter 33] had a similar provision. The Citizenship of Zimbabwe Act, No. 23 of 1984, prohibits the disclosure of information to a person being deprived of his citizenship, subs (9) of s 11. It reads:

"(9) A report made by any police officer or immigration officer in connection with a person against whom an order is proposed to be made in terms of subsection (1) or (2) shall not be disclosed at an inquiry held in terms of this section to any person other than the commissioner if the Minister certifies that its disclosure to any person other than the commissioner would not be in the public interest"

What is more relevant to the instant case is s 31(3) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983, SI 458 of 1983. Here also a witness may give evidence, or a document or report or information may be put before the Review Tribunal in the absence of the detained person and his representative. It seems that to a limited extent the Chairman of the Review Tribunal has greater discretionary powers than the court *a quo* had when it examined the secret document. Section 31 (3) Reads:

"(3) Where the Minister has certified that by reason of the public interest the evidence of any particular witness should be given to or received by the Review Tribunal in the absence of the detained person and his representative, if any, or that the contents of a report or other information should not be divulged to the detained person or his representative or to any person other than the members of the Review Tribunal, the chairman shall consider the certificate and any information and argument in support thereof furnished to him by the Minister's representative and may -

- (a) either unconditionally or subject to conditions concerning the

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furnishing to the detained person of a summary or outline of the whole or a part thereof or otherwise, direct that the evidence of that person may be given or received in the absence of the detained person and his representative, if any, or that the contents of the report or other information may be divulged to the Review Tribunal but not to the detained person or his representative or to any person other than the members of the Review Tribunal, as the case may be; or

- (b) direct that the evidence of that witness may not be given or received otherwise than in the presence of the detained person and his representative, if any, or that the contents of the report or other information concerned may not be divulged to the Review Tribunal unless also divulged to the detained person and his representative."

No argument has been addressed to us on the constitutionality of s 31(3) of the Regulations. One may ask whether the provisions of s 11(9) of the Citizenship of Zimbabwe Act and s 31(3) of the Regulations are *intra vires* or *ultra vires* the Constitution? What is the position in a country with a Constitution and a justiciable Bill of Rights? I make no comment. These questions may be answered in future. They are, however, interesting questions which if properly dealt with after full submissions by learned counsel, may influence the court to make a ruling either way.

We are now concerned with the evaluation of evidence after an inspection of a document by the court. I am in agreement with Mr *Chidyausiku* that the Minister of State (Security) is best placed

to form an opinion, or judgment in matters concerning the security of the State. See *Patriotic Front - ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZSC) at 541H; 1986 LRC (Const) 672 at 683C. There is no dispute touching on that in this case. I have, however, added an extract from a recent US judgment in order to put the thinking of this court in this regard beyond reproach.

In this regard I am more than strengthened in the view I take of the competency of the Executive to form a judgment on matters concerning the security of the State by what was said by BURGER CJ (as he then was), in *Nixon v USA* (1975) 418 US 683, summarised in 41L Ed 2d at 1047:

"36. As to the area of the President's duties, under Article II of the Federal

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Constitution, in diplomatic and military matters, the courts have traditionally shown the utmost deference to Presidential responsibilities; it would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret, since the President, both as Commander-in-Chief and as the nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.

37. Where it is possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged, the occasion for a privilege against disclosure is appropriate, and the court should not jeopardise the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge in Chambers."

In the instant case the document concerned is one that is said to concern the espionage activities of the appellants. It has matters of intelligence which affect the security of the State. I have, therefore, no quarrel with the examination made of it by the learned judge *a quo*. In my view it is questionable whether the learned judge *a quo* should have used the document to form the view "that this evidence (**in the document**) does indeed provide a factual basis upon which the allegations against the applicants were made ..." I say this because the court should not put itself in a position in which one party to the dispute may unwittingly or otherwise accuse it of unfairness. (The insertions and emphasis are mine).

Why was the document provided to the court for its sight only? The record does not tell us the reason. However, the learned judge *a quo* believed, and I agree with him, that:

"It is as a result of these court decisions, in all probability, that the first respondent has made available, at least to this court, the document already referred to."

Judges of this court have in a number of judgments time and again pointed out that the reasons were inadequate. A number of judgments in the High Court were to the same effect. This court has said so in two recent judgments; *Bull v The Attorney-General & Anor* 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZSC) and *The Minister of Home Affairs & Anor v Austin and Harper*

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1986 (1) ZLR 240 (SC); 1986 (4) SA 281 (ZS). In the later case I said that the grounds for detention did not provide sufficient information or particulars to enable the detainees to make meaningful representations before the Review Tribunal.

Faced with these decisions is it not possible that the first respondent handed in the document concerned to prove his *bona fides*? Was he not saying to the judge *a quo* "our grounds for detention are based on the information we have in this document. See for yourself".

I believe he handed in the document "for the eyes of the court only" in order to show the court why he relied on the grounds served on the appellants and to prove, as I have said above, his *bona fides*. The question of the Minister's *bona fides* is not in dispute. I appreciate his motive. I appreciate that he handed the document to the court to prove that he was all along right. Where a court has well laid down procedures buttressed by statute, those procedures must be adhered to. They should not be ignored, because the Legislature must have enacted them for the better regulation of the court when matters of national security are brought before it. In my view it is unwise to encourage any other procedures which may be convenient to one party and not the other. Rules are made for the better administration of justice.

This court did not rely on the contents of the document to prove that the grounds for detention were adequate. We examined the grounds served on the detainees and came to the conclusion that they were adequate. They read:

"The reasons for your detention are as follows:

1. That you and Austin were recruited in 1984 by members of the South African Intelligence Service.
2. You were recruited to work on behalf of the said South African Intelligence Service.
3. That you subsequently passed on security information and intelligence to South Africa by means of clandestine meetings which took place in South Africa and in Zimbabwe.
4. Between June and July 1985, confirmed Intelligence indicates that you used your position within the Department of Customs and Excise to acquire and pass on information concerning Zimbabwe's

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Imports and Exports. Once again, you passed this information to the South African Intelligence Service.

5. In December 1985, you passed information to your runner concerning the ANC in Zimbabwe. You also at the same time, gave your runner the physical address of the ANC office in Harare, which is 16 Angwa Street.
6. You drew up a sketch map of number 19 Eves Crescent which you supplied to your runner in South Africa.
7. During such trips to South Africa, your Hotel Bills were paid by a South African Insurance Company in

order to camouflage your association with the South African Intelligence.

8. The information that you passed-on took the form of both written and verbal reports, and that by so passing-on such information received during the course of your duties, you contravened the Official Secrets' Act and provided intelligence which was detrimental to the safety and well-being of the State.
9. That your conduct and actions constituted a serious danger to the safety and security of the State."

The court was of the view that those grounds contain sufficient details and particulars. They contain dates, the information alleged to have been passed on to South Africa, the method of passing that information through, in one allegation, the agency of a runner. It is alleged they passed on information about the physical address of the ANC in Harare and drew up a sketch map of No. 19 Eves Crescent.

The particulars and information contained in these reasons will enable the detainees to make meaningful representations to the Review Tribunal. The grounds for detention meet the standards set out in *Minister of Home Affairs & Anor v Austin and Harper and Bull v Attorney-General & Anor supra*.

This court is not concerned with the truthfulness or otherwise of the reasons for detention; what the court is concerned with is fairness to the appellants. The Review Tribunal will look at the reasons for detention and will make its own finding on the truthfulness of those reasons. It will decide on what to do with the secret document. It will, I believe, examine its genuineness. That

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is what it is supposed to do, not this court.

I will not dwell at length on whether the second respondent, Mr Takaendesa, the arresting detail, had the requisite belief that justified in law the detentions of the appellants. The second respondent is head of a security section of the Central Intelligence Organisation concerned with these matters. His position entitles him to the information upon which the decisions to detain are taken. The judge *a quo* thought that this was probable but that it did not necessarily follow that it was so. I believe that it is more probable than not that the first respondent would have received the information contained in the document from the second respondent. His position is distinguished from that of Superintendent Oberholzer who the court believed had "simply obeyed SAC Mkunu's instructions that he must issue the detention order." (See *Holland v Commissioner of the Zimbabwe Republic Police* 1982 (2) ZLR 29 at 35H-36F and *Moll v Commissioner of Police & Ors* 1983 (1) ZLR 238 (HC) at 240-241.) He is head of the section of Central Intelligence Organisation dealing with detentions. As such he must have entertained a reasonable belief that there were grounds justifying their detentions. Not only that, the appellants had been detained before. There was also this document the presence of which, I must presume, the second respondent knew. This case is, on the basis outlined above, distinguished from *Holland v Commissioner of the Zimbabwe Republic Police supra* and *Moll v Commissioner of Police supra*, cases in which subordinates were given orders to arrest and in obedience to those orders detained the persons concerned. For purposes of this appeal it is unnecessary for the court to go beyond the facts that I have stated above. It is clear from para 23 of the affidavit of Mr Bull that the second respondent informed him that he was not in a

position to divulge all the reasons for re-detention for security reasons, but he advised Mr Bull that the reasons comprised essentially passing information to South Africa and engaging insubversive activities. This information is very different from that supplied to Holland. See *Holland v Commissioner of Police supra* at p34. In any event having come to the conclusion that the reasons furnished to the detainees bore sufficient particularity to enable them to prepare a meaningful presentation for the Review Tribunal, it matters not that the second respondent did not file an affidavit stating that the second respondent had no reason to believe that there were grounds which would justify the appellant's detention under s 17. Because of the history of this case it could not be said that the second respondent's information to the appellants failed to equip them with sufficient detail to enable them to make reasonable representation to the Review Tribunal in terms of s 2(2) of the Second Schedule.

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Because of the conclusion I have arrived at on the adequacy and sufficiency of the particulars of the reasons for detention, I came to the view that this appeal could not succeed.

The judge *a quo* did not give any reasons why he did not award wasted costs to the appellants. My *prima facie* view is that the appellants should have been granted their wasted costs in the court below. But the learned judge also did not award costs to the respondents who succeeded at the trial. It is easy to infer from that that he might have believed that the non-award of wasted costs to the appellants was counter balanced by the non-award of costs to the respondent. It was in his discretion to make an order of costs that he thought proper. It is always preferable to give reasons supporting a decision not to award costs and in most cases even in those circumstances where the successful party is awarded costs. We have for our part awarded costs to the successful party but those are costs of appeal only.

Gubbay et McNally JJA: Although we have come to the same conclusion as the learned CHIEF JUSTICE in this matter, we have arrived at it by a somewhat different route. In the circumstances we have thought it appropriate to set out our views in a joint but separate judgment.

These two cases came together before REYNOLDS J in the High Court. In the second case Mr Bull appeared as legal representative of Messrs Austin and Harper. Both cases concerned the liberty of Messrs Austin and Harper. When we use the expression "the appellants" we will mean, unless the context indicates otherwise, the detainees, Mr Austin and Mr Harper.

On 9 July 1986 REYNOLDS J dismissed the two applications of the appellants and made no order as to costs.

On appeal before this court on 24 July 1986 Mr *de Bourbon* who appeared for the appellants indicated that their situation had changed since the hearing. At the time of the hearing they had been detained in terms of s 21 of the Emergency Powers (Maintenance of Law and Order) Regulations 1983, SI 458 of 1983. Since then, and prior to the appeal hearing, they had been served with Ministerial Orders of Detention in terms of s 17 of the Regulations.

As a result he would not be seeking an order that their detention under s 21 was invalid. But,

since the reasons given by the Minister to justify the detention under s 17 were identical with those previously used to justify the

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detention under s 21, he would be seeking a declaration in principle that those reasons were inadequate. He would also be seeking an interdict restraining the respondents from redetaining the appellants upon the same grounds in future.

Those were the main issues on which it was contended that REYNOLDS J had erred. There were, however, three subsidiary issues. The first was (and we quote from the appellants heads of argument):

"Whether the court was right to admit in evidence a document without it being made available to all parties, without it being identified by affidavit, and without proof that the document delivered to the court was the document mentioned in para 6(b) of the affidavit of the first respondent."

The second was whether the arresting officer himself (Mr Takaendesa) had reason to believe that there were grounds which would justify a detention under s 17 of the Regulations.

The third was the question of the costs incurred in an earlier appearance before SAMATTA J on 27 June. The contention of the appellants was that these costs had been conceded by respondents and should have been awarded to them by REYNOLDS J

After hearing argument this court took some time to consider the matter. Then, on 31 July 1986 the following decision was announced:

- "(1) The appeal is dismissed with costs.
- (2) A reasoned judgment will follow.
- (3) It is our decision, and as requested, we formally declare that the reasons for detention served on the appellants on 26 June 1986 are now sufficiently detailed to enable them to make meaningful representations before the Review Tribunal. Our decision in this regard is not to be taken by the Review Tribunal as an indication one way or another as to the necessity or expedience of continuing the detention. That is a matter left entirely for the determination of the Review Tribunal."

It is important, bearing in mind that this is the sixth in a series of decisions by this Court affecting these two appellants (see the unreported judgments in

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S-27-86 and S-33-86, and those reported in 1986 (3) SA 870 (ZSC), 1986 (3) SA 886 (ZSC) and 1986 (4) SA 281 (ZSC)*(1) to keep steadily in the forefront of one's mind that one is dealing with a contention that there are no adequate reasons for the detention of the appellants. That contention in turn arises from the provisions of s 2(1)(a) of Schedule 2 of the Constitution of Zimbabwe.

The sub-section reads:

"Where a person is detained under any law providing for preventive detention he shall be informed as soon as reasonably practicable after the announcement 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 ..."

The wording of the sub-section is repeated in the Regulations. The court has interpreted that section to imply that the reasons given must be adequate reasons. In deciding whether the reasons given are adequate this court is careful to avoid usurping the function of the Review Tribunal provided for in the same section of the Constitution and established in terms of the same Statutory Instrument.

It is the function of the Tribunal to investigate the factual basis for the detention of the detainees appearing before it; to evaluate and investigate the evidence laid before it; and to recommend accordingly. Our function, at this stage, is simply to ensure that the reasons for detention which are furnished to the detainees are adequate. We venture to suggest that this means that they must meet three criteria. They must be:

- a) Such as *prima facie* to warrant detention;
- b) Sufficiently detailed to enable the detainees to make meaningful representations to the Tribunal;
- c) Based upon information which is considered reliable.

We do not wish to be understood as saying that at this stage it will never be appropriate to place evidence before the court. The distinction between the reasons themselves and the facts (evidence) upon which those reasons are based, is not an absolute one. But generally speaking where the reasons are

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such as to meet the criteria set out as a), b), and c), above, the court will not be concerned, **at this stage**, to go further; compare *R v Secretary of State for the Home Department*, ex parte *Hosenball* [1977] 3 All ER 452 (CA); *R v Gaming Board for Great Britain*, ex parte *Benaim & Anor* [1970] 2 All ER 528 (CA) at 533 *et seq*; *Road Services Board & Anor v John Bishop (Africa) Ltd* 1956 (2) SA 504 (FSC) at 513.

We turn then to examine the reasons which were served on the appellants. We set out the reasons served on Mr Harper which are *mutatis mutandis* the same as those served on Mr Austin. They are:

"The reasons for your detention are as follows:

- 1. That you and Austin were recruited in 1984 by members of the South African Intelligence Service.
- 2. You were recruited to work on behalf of the said South African Intelligence Service.
- 3. That you subsequently passed on security information and intelligence to South Africa by means of

clandestine meetings which took place in South Africa and in Zimbabwe.

4. Between June and July 1985, confirmed Intelligence indicates that you used your position within the Department of Customs and Excise to acquire and pass on information concerning Zimbabwe's Imports and Exports. Once again, you passed this information to the South African Intelligence Service.
5. In December 1985, you passed information to your runner concerning the ANC in Zimbabwe. You also at the same time, gave your runner the physical address of the ANC office in Harare, which is 16 Angwa Street.
6. You drew up a sketch map of number 19 Eves Crescent which you supplied to your runner in South Africa.
7. During such trips to South Africa, your Hotel Bills were paid by a South African Insurance Company in order to camouflage your association with the South African Intelligence.

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8. The information that you passed-on took the form of both written and verbal reports, and that by so passing-on such information received during the course of your duties, you contravened the Official Secrets' Act and provided intelligence which was detrimental to the safety and well-being of the State.
9. That your conduct and actions constituted a serious danger to the safety and security of the State."

It seemed to us that these reasons were substantially more detailed, more specific and more inherently convincing than any provided on previous occasions. They contain dates; they contain details of the information allegedly passed; they contain some particularity of the methods used; they contain allegations which if considered reliable, could justify a decision by a reasonable Minister to order the preventive detention of the appellants.

We must make it quite clear that when we use the phrase "more inherently convincing" we do not intend to make any judgment as to the accuracy of the allegations. They may be true. They may be utterly false. What we mean is that assuming they are true, they justify the decision to detain. They are to be contrasted with the earlier allegations that the appellants were passing information obtained in the course of their duties to South African authorities. BECK JA in 1986 (3) SA 886 at 891C described these "reasons" as mere "speculative conjecture". Given that the appellants were Customs officials dealing with the traffic between here and South Africa, those allegations, even if true, did not point at all convincingly to their guilt. They were open to the comment: "Well, of course they passed information to South Africa. That was part of their job". Such comment cannot *prima facie* be made about the present allegations.

The fact that the allegations are detailed and specific means that the appellants will be able to make meaningful representations to the Review Tribunal. As far as the reliability of the information is concerned, it does seem to us desirable that, in future, reasons for detention should set out the assessment of the detaining authority as to the reliability of the information upon which the detention is based, with such particularity as is consistent with security. Obviously for instance it is relevant to know that the reasons are not based simply on allegations made in an anonymous letter, unsupported by any other evidence.

In the present cases the first respondent avers "that he is in possession of

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factual material which justifies the Petitioner's detention." (The petitioner is Mr Bull, but one can safely assume that the Minister intends to refer to Messrs Harper and Austin). One section of the reasons refers to "confirmed intelligence." And finally the very act of tendering the evidence to the court implies that the Minister considers it reliable.

In the circumstances we were satisfied that the reasons were adequate because they complied with the three criteria earlier enumerated.

That is really all that needs to be said on the merits of the appeals. However since a considerable amount of argument was addressed to us in regard to the other issues mentioned, we will deal with them, as also with the question of costs.

The point was made, in reliance on *Holland v Commissioner of the Zimbabwe Republic Police* 1982 (2) ZLR 29 at 35-6 and *Moll v Commissioner of Police & Ors* 1983 (1) ZLR 238 at 240-241, that Mr Takaendesa did not allege personal knowledge of the facts which formed the basis of his decision to detain the appellants. It is true that he did not say anything about his own knowledge. But he did assert that he was head of the Security Section of the Central Intelligence Organisation. In that capacity it seems to us more probable than not that he would have had knowledge of the information available within that section. In fact, he must have known of the allegations in the document upon whose contents the reasons for detention were allegedly based. He was not simply a subordinate told to go out and arrest someone. On this basis one can distinguish *Holland* and *Moll supra*. In any event, of course, the issue is academic since we are no longer concerned with detention orders under s 21.

The next point of importance concerns the document which was placed before REYNOLDS J "for his eyes only". He ruled, in Case No. HH-267-86 that this document, tendered on behalf of the respondents, should be "made available for my private inspection".

Having inspected it, the learned judge in the main case HH-268-86 referred to it on three occasions. First, he said that having looked at it he was satisfied that it should not be "disclosed any further". Second, he said of it that "the court is only interested basically in whether this evidence provides a factual foundation for the orders of detention made." Lastly he said: "It must be emphasised that this document has not been taken to establish that the second respondent had reason to believe that grounds for the detentions existed, but

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rather that it provides a concrete example that the reasons for detention supplied cannot be added to without prejudice to the public interest".

As we understand his approach to the document therefore, the learned judge looked at it simply

to satisfy himself that further and better particularity of the reasons could not be given.

If that understanding is correct, then it must be said that it was unnecessary to look at it. The reasons given for the detention of the appellants, as we have said, were *prima facie* adequate. It would not have made any difference, then had a perusal of the document revealed that another additional reasons could have been given.

We would agree too with Mr *de Bourbon's* contention that we are not here concerned with a claim of privilege. Privilege is a defence to a claim by a party to be shown a document. The appellants did not ask to be shown the document. They did not know of its existence. There is no doubt that a judge may look at a document for which privilege is claimed in order to decide whether to allow the claim or not - *Conway v Rimmer* 1968 AC 910; *van der Linde v Calitz* 1967 (2) SA 239 (AD); *Holman v Lardner-Burke* NO 1968 (2) RLR 57 (GD) at 70-71; Rule 170 of the High Court Rules.

These cases, and the Rule, are not authority for the procedure followed in this case.

Indeed it seems to us that on procedural grounds alone, the document should not have been accepted. It was not submitted under cover of an affidavit or certificate by the appropriate Minister. It seems to have been handed to the learned judge in his Chambers. No attempt was made to produce it in terms of the provisions of the Courts and Adjudicating Authorities (Publicity Restriction) Act, No. 25 of 1985. There is no warrant for such a method of production.

We prefer to take our stand in this case on the procedural objection to the production of this document. It is not, we think, appropriate to seek to lay down any general rule in these proceedings, because the various arguments have not been fully canvassed. On the one hand, one has the court's instinctive horror at the idea that it should rely upon evidence against a man without that man being allowed to see it and thus possibly to controvert it. One can cite many *dicta* in support of such an approach, from CHIEF JUSTICE WARREN BURGER in *Nixon v USA* 1975 418 US 683 summarised in 41 L Ed

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2d at 1047 paras 36 and 37, to LORD DENNING in *Kanda v Government of Malaya* 1962 AC 322 at 337. One must also have regard to s 18(9) of the Constitution of Zimbabwe.

On the other hand there are authorities for the proposition that the *audi alteram partem* rule may have to yield in cases involving the public interest, and there are legislative provisions in this country which allow for just such a procedure.

One of them has an interesting history. In *Ex parte Zelter* (1) 1951 SR 6 (and 1951 (2) SA 34) the court ruled that a provision in SRGN 51 of 1951, allowing the High Court alone in a naturalisation case to see a confidential Police report, was *ultra vires* the Statute. Subsequently, and no doubt, consequently, the Regulations were repealed and re-enacted. The new regulations provided for the appointment of a Commissioner. Section 26 allowed the Minister to cause information to be disclosed to the Commissioner and continued that he "may if he deems it expedient on the grounds of public policy order that any or all of such information

shall not be disclosed by the Commissioner to the person against whom an order is proposed to be made ...or to any other person".

A similar provision was in the Citizenship of Rhodesia Act 1970 [*Chapter 23*], s 16(6). It has been retained in s 11(9) of the Citizenship of Zimbabwe Act, No 23 of 1984.

And, of course, coming closer to the present situation, there are the provisions of s 31(3) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983, SI 458 of 1983.

Finally one must acknowledge that the State has apparently tendered the document from the best of motives, namely in an attempt to show that the previous handling of the matter by officialdom had been *maladroit* rather than *mala fide*.

Recognising, acknowledging, and appreciating that attitude, we must nevertheless rule that the document was improperly produced and should not, for that procedural reason, have been taken into account by the court *a quo*. The State's purpose could better have been achieved had the first respondent's affidavit contained an averment about the apparent authenticity and reliability of the evidence supporting the reasons for detention. This could have been done without tendering the document itself.

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It remains finally to deal with the question of costs in the court *a quo*. It is correct that the wasted costs of the hearing on 27 June were conceded by the respondent. The learned judge *a quo* did not give any reasons as to why he did not award the appellants those costs, as *prima facie* he should have. But by the same token, he did not award costs of the case before him, to the respondent, who was the successful party. One may infer from that that he took an overall view of the costs situation and in his discretion balanced the one against the other. Although it would have been better had the learned judge set out his reasons in this regard, we do not consider it necessary to interfere with his order.

For these reasons the appeal was dismissed with costs.

Atherstone & Cook appellants' legal practitioners

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

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S v MASEKO 1986 (2) ZLR 52 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

30 June & 1 August 1986

Flynote

Criminal Procedure - plea - change of - after verdict - principles.

Legislation - Criminal Procedure and Evidence Act [Chapter 59] s 255A.

Headnote

An accused who wishes to change a plea of guilty after verdict has been given must discharge an *onus* showing on a balance of probabilities that the plea was not voluntarily, understandingly and correctly made.

Quaere: Whether the situation is different if the application is made prior to verdict.

Cases cited:

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

S v Mapawona AD-79-71 (unreported)

S v Mudimu 1971 (1) RLR 172 (GS)

S v Haruperi HH-207-84 (unreported)

S v Mazwi 1982 (2) SA 344 (T)

S v Hazelhurst 1984 (3) SA 897 (T)

S v Britz 1963 (1) SA 394 (T)

S v Kannigan 1975 (4) SA 639 (N)

Pitso v Additional Magistrate, Krugersdorp & Anor 1976 (4) SA 553 (T)

S v Hendriks 1977 (4) SA 78 (C)

S v Simbi 1975 (4) SA 700 (RAD)

R v South Tameside Magistrates Court, ex parte Rowland [1983] 3 All ER 689 (QB)

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S v Recorder of Manchester [1971] AC 481

S v Ndlovu 1983 (4) SA 507 (ZS)

R v Mutford and Lothingland Justices, ex parte Harber [1971] 1 All ER 81

M Davies for the appellant

B N Sigidi for the respondent

Judgment

McNally JA: The appellant pleaded guilty to a charge of rape before a regional magistrate in Bulawayo on 31 December 1985. The plea was dealt with in terms of s 255(2)(b) of the Criminal Procedure and Evidence Act. In view of the fact that the appellant later applied to change his plea I will set out in detail what took place.

The appellant was initially unrepresented. The proceedings were interpreted. The charge, which is in the standard form, was put to him. He pleaded guilty. The magistrate then questioned him as follows:

"Did you have intercourse on the 30th December with (name deleted)? - Yes.

How many times? - Once.

And was this an act of intercourse without her consent? - It was without her consent.

Do you have any excuse, reason or defence which you wish to offer? - I was tempted and I failed to resist."

The outline of the State case was then read to the appellant. The outline was signed by the appellant himself and was apparently recorded at Bulawayo Central Police Station at 10.30 am on the day of the trial by someone other than Inspector Kambira who later gave evidence. It reads as follows:

- "1. The accused is aged 23 years and married with two children and resides at Number 2 Ailsa Court, Wilson Street/Selborne Avenue, Bulawayo. He is a Pastor at Victory Fellowship Church, Wilson Street/Selborne Avenue, Bulawayo.
2. The complainant (name deleted) is aged 17 years, and a scholar at Founders High School. She was found to be a child in need of care by a Juvenile Court and ordered to be placed in foster care of accused and his wife.

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3. On Monday the 30th day of December 1985 at approximately 08.00 hours, complainant was in her bedroom. Complainant who at the time was wearing her pants, wrapped herself with a blanket. Whilst in her bedroom accused asked for a kiss from complainant and indicated to her that he wanted the two of them to have some romance.
4. Complainant refused accused's request and moved off from the bedroom leaving accused in the bedroom and entered into the toilet. Complainant then returned to her bedroom. Whilst complainant was in the bedroom accused entered again for the second time and he requested to be kissed by complainant but complainant refused.
5. At that time the accused was looking at the complainant who was in a standing position, accused grabbed complainant by the waist and a struggle started till complainant was overpowered and thrown on the bed. At the same time accused removed complainant's pants and he forced his penis inside complainant's

vagina and forcibly had sexual intercourse with her.

6. After the incident accused left the complainant and went to his room.
7. On Monday the 30th December at approximately 14.45 hours, complainant made a report to the police, and she was visited and accused was arrested.
8. On Tuesday the 31st day of December 1985 at approximately 10.00 hours accused was verbally warned and cautioned about the case, and he freely and voluntarily elected to give a statement. A warned and cautioned statement was obtained from the accused.
9. The accused is admitting the charge."

The medical report was then read to the appellant. It seems the complainant was examined at 16.30 hours on 30 December 1985. It records *inter alia* that her sex life was "active" and that "there appears no sign of outside violence. Patient was very upset". It stated that it was "possible" that penetration had been effected.

The appellant was then asked by the court:

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"Do you understand the State case outline and medical report? - I do.

Do you agree? - I do.

Do you have anything to add to what has been read out or to subtract to what has been read out or say anything on the merits of the case and you may speak in mitigation in a moment? - I voluntarily went to the police on my own. The police did not come for me to arrest me.

Anything else? - After I realised that I had done wrong I left and prayed to God and apologised and I did apologise to the complainant. The complainant then indicated to me that she was going to forgive me and further indicated that she was going to vacate the house. That is all I wish to say."

The magistrate then formally found him guilty and for purposes of sentence the State called the 17-year-old complainant. She said that she had been in foster care with the appellant for just over a year and that she had had a good relationship with him. She said that after the event she had wanted to leave but the appellant had wanted her to stay and tell the truth to his wife. She had not felt able to face his wife so she had gone to her mother who was very angry and took her to Social Welfare and hence to the police. She said she forgave the appellant. She said she had had a sexual relationship some time earlier, but subsequently "I became a Christian."

The appellant in mitigation of sentence said that he "had decided to present myself to the police and tell them the truth of what I had done before I went to church. I did so thinking I was going to be forgiven so that I can be able to go to church and carry out the church services". He was asked by the court:

"What possessed you to do this? Had you been drinking or something?"

and he said:

"I am a human being. I have got feelings. I was tempted and I then failed to resist the temptation."

At this stage the regional magistrate advised the prosecutor that he wished to consider sentence and would remand the matter over the New Year (Wednesday) to Thursday 2 January 1986. There was then a discussion on bail during which the magistrate decided to grant bail so that the appellant might have an opportunity to wind up his affairs. He said to the appellant:

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"It is unusual to be allowed bail, but I think it is only fair to tell you that it is likely that you will receive a custodial sentence."

When the matter resumed on Thursday 2 January the appellant was represented and applied to have his plea of guilty altered to one of not guilty. The reason for the application was that "the plea was entered and made by the accused as a result of misleading and fraudulent statements made to him by members of the Zimbabwe Republic Police".

The appellant then gave evidence in support of his application. He totally denied any act of intercourse with the girl. He said that Inspector Kambira had interviewed him. He had said the Medical Report showed that he had raped the complainant. He pointed out that the appellant could plead guilty in the Special Court, (colloquially called the Plea Court) where he might hope for leniency. But if he denied guilt the matter could be remanded for many months, possibly six to nine months, and he would probably not be granted bail. The appellant decided to plead guilty. He asked the Inspector what he should do if asked why he had done so and the Inspector advised him to say he had been tempted.

The appellant decided to go along with the Inspector's suggestion and signed a statement which was not his statement but one made on the basis of information from the complainant.

The appellant gave evidence as to why the girl would have accused him falsely. He said first that she told him on that day that she was tired of living with them. She accused him of not trusting her because of an incident when she had gone away to Harare and on her return the Social Welfare authorities had required her to have a pregnancy test. He went to his office and later he found her telling the clerks in his office that she was going to "fix" him. She was shouting at him. Under cross-examination he mentioned for the first time that she had a reason for wanting to "fix" him, namely that he had beaten her with a switch for lying about her trip to Harare.

He said he had not gone to the police station to surrender himself but only to find out where the girl was and why she had gone there.

He conceded that on the Monday when he went to the police station nobody brought any pressure on him to admit the charge. He said a woman police officer called him a rapist and he was detained overnight. It was the next morning that Inspector Kambira told him, if not in so many words then at least

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by clear implication that he would be well advised to plead guilty. He gained the impression, though nothing was said, that he could be fined \$300 or, in default of payment, three months' imprisonment with labour.

In response to the application the State called Woman Patrol Officer Rusha Chavhunduka and Inspector Kambira.

Miss Chavhunduka denied that she had called the appellant a rapist. She did not know at any stage on the Monday what the appellant's attitude was in regard to the charge. Strangely she was not cross-examined about her denial of her alleged reference to a rapist.

Inspector Kambira said he saw the appellant for the purposes of investigation on Tuesday morning. He told the appellant he was to be charged. He explained that if he denied he would be remanded but if he admitted he would "go on plea". He explained that if he was remanded the question of bail would be for the court to decide. If he pleaded he could possibly be sentenced there and then. The appellant then said he was a Christian and wanted to tell the truth. He admitted the intercourse and said that afterwards he had knelt and prayed for forgiveness. He asked the Inspector to say nothing to his wife. The Inspector then handed the appellant over to SO Nyandoro for the completion of the plea docket and to take a warned and cautioned statement. He told the appellant that the medical report indicated that intercourse was possible.

Under cross-examination the Inspector conceded that initially in the Charge Office the appellant denied the allegation. He agreed that the appellant had asked him how much he would be fined if found guilty on plea and he had replied that that was up to the court. He said it was his impression that the appellant was influenced by the presence of his wife to deny the charge, both on the Monday and subsequently.

The magistrate refused to allow the change of plea. He referred to *S v Kurimwi* 1985 (2) ZLR 63 (SC) a judgment of this court, in which the authorities concerning a change of plea were canvassed, albeit briefly because the appeal against conviction was not pressed. He found Inspector Kambira to be a dignified and impressive witness and he recorded his own impression that the appellant's statements when he confirmed his plea of guilty were spontaneous and unequivocal. He noted that the appellant had added facts which, though not in the State outline, were subsequently confirmed by the complainant. He was satisfied that the appellant's real reason for changing was that he had hoped for a fine and was shocked when

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he realised that he would probably face a prison sentence.

The magistrate then proceeded to impose a sentence of three-and-a-half-years' imprisonment with labour of which he suspended one-and-a-half-years. The appellant is serving that sentence pending our decision in the matter.

In considering whether or not the magistrate was right, it is necessary to consider the law; and in considering the law one has to distinguish between those cases prior to the Statutory amendment to the law, and those cases decided since.

In Zimbabwe s 255A of the Criminal Procedure and Evidence Act was introduced in 1975. Prior to that it was accepted that "the *onus* is on the accused to show that the plea was not voluntarily and understandingly made" (*per* MacDONALD JP in *S v James Mapawona* AD-79-71 as cited in *S v Mudimu* 1971 (1) RLR 172 at 175F). This of course related to an application to change the plea which was made after verdict.

As I have earlier indicated, the passage in *Mudimu* was cited in this court in *S v Kurumwi supra* with approval, but in a situation where the matter was not put in issue by appellant's counsel.

The question of the exact nature of the *onus* was, however, rather more fully canvassed by SMITH J in *S v Haruperi* HH-207-84 (unreported). In this case the learned judge considered the effect of the statutory amendment and the similar amendment in South Africa in 1977. He came to two general conclusions:

- "1. ...that s 255A of our Code embraces all contingencies where there is an application to set aside a plea of guilty. There is no longer any need or place for the former common law powers which were available to the court for setting aside such a plea, because s 255A has superseded the common law.
2. If ...the application is made after the court has found the accused guilty, then there is an *onus* on him which can be discharged by proof on a balance of probabilities, having regard to the general principles applicable when a person bears an *onus* in criminal proceedings."

In coming to these conclusions he relied on a decision by two judges of the

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Transvaal Provincial Division in *S v Mazwi* 1982 (2) SA 344 (T). The decision has subsequently been dissented from by two other judges in the same division, in *S v Hazelhurst* 1984 (3) SA 897 (T).

The learned judge went on to reach two further specific conclusions:

- "1. Where the accused has applied for the alteration of his plea on two grounds *viz* coercion and undue influence and also actual innocence, then as was said by MT STEYN J in *S v de Villiers* 1984 (1) SA 519, the merits of the matter in relation to the guilt or innocence of the accused must also be taken into account and the trial court will at least have to decide whether there is a reasonable possibility that the accused is innocent and that the application is *bona fide*. It is, accordingly, permissible in such cases to have regard to the accused's statements during explanation of plea in terms of s 112 (i)(b). In cases where only the first basis is at issue the question of guilt or innocence will be irrelevant. (The quotation is from the headnote which is a summary of what the learned judge said at p 542 of the report, letters D to H)
2. As to the methods by which the requirements of s 255A may be satisfied, no hard and fast rule can be laid down. The section itself gives no indication in this regard and each case must obviously be decided on its own merits. In some cases a statement from the Bar by an accused's legal representative, or by an accused from the dock, may suffice. In other cases *viva voce* evidence by or on behalf of the accused and on behalf of the State may be necessary. In such cases the magistrate should conduct the 'trial within a

trial' procedure giving the accused and the State an opportunity to give evidence."

In South Africa a convenient starting point is the case of *S v Britz* 1963 (1) SA 394 (T). It is important to bear in mind that Britz applied to change his plea before any verdict was reached and therefore while the presumption of innocence still operated in his favour. In that case CLASSEN J said, at pp 398H-399B:

"The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea ... If he fails to give an explanation, the court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no *onus* on him to convince the court of the truth of his

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explanation. Even though his explanation might be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty."

(I will refer to this *dictum* later in this judgment as "the Britz principle".)

It is clear from other passages in the judgment of CLASSEN J in that case that he was speaking only of an application to change a plea made before a verdict of guilty was entered, because he was apparently of the opinion that after verdict no such application could be entertained - see p 397A. That view was held to be wrong by VAN DIKJHORST J in *S v Mazwi supra* at 347H for reasons which seem to me, with respect, to be sound. It is entirely clear that a plea of guilty may in a proper case be withdrawn at any time up to the moment when sentence has been passed.

Given this misconception on the part of CLASSEN J then, I think it must follow that the very generous test (from the point of view of the accused) that he propounds can be applicable only in cases where the application is made before a verdict of guilty is brought in. Once the court has made a finding of guilt, additional considerations come into play. It does not seem to me therefore that VAN DIKJHORST J was correct when he spoke of what I may call "the Britz principle" as the common law principle applicable where an accused person applies to change his plea to one of not guilty. It may be the principle applicable where the application is made before verdict. I am not here concerned with that situation. I see no reason for thinking that it is the principle applicable when the application is made after verdict. It was certainly not applied in this country either before or after the introduction of s 255A. Our courts never hesitated to place an *onus* upon the accused in such a situation - see *S v Mudimu supra* and *S v Mapawona* AD-79-71 (unreported) - and the English Courts, as I shall seek to show, effectively take the same stance.

If I am right in thinking that VAN DIKJHORST J misunderstood the extent of the applicability of the "Britz principle", then it becomes unnecessary to decide who is right in the subsequent controversy which arose in the Transvaal when *Mazwi* was dissented from in *S v Hazelhurst supra*. In that case HUMAN AJ with whom SPOELSTRA J concurred, disagreed with the view of VAN DIKJHORST J that "there is really no room for a common law withdrawal of a plea of guilty

separate from that under s 113".

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I would say only that HUMAN AJ appears to have assumed, like VAN DIKJHORST J, that "the Britz principle" necessarily applies after a verdict of guilty has been entered, as well as before - see p 910B-C of the judgment. This assumption, as I have endeavoured to show, is in my view unwarranted.

I would add that in all three cases cited by HUMAN AJ as following "the Britz principle" the accused made his application to change his plea, or at least raised the issue, before verdict was entered. This was done formally in *S v Kannigan* 1975 (4) SA 639 (N) and *Pitso v Additional Magistrate, Krugersdorp & Anor* 1976 (4) SA 553 (T), and informally by the unrepresented accused in *S v Hendriks* 1977 (4) SA 78 (C).

I turn finally to the English law situation since as far as criminal procedure is concerned the common law of Zimbabwe, by virtue of the provisions of s 89 of the Constitution, is the law in force in the Colony of the Cape of Good Hope on 10 June 1891, and that law was heavily influenced by the English procedural law reforms introduced between 1827 and 1832. The English cases on criminal procedure are therefore relevant and persuasive authority and have been referred to frequently both in our courts and those of South Africa. (See *S v Simbi* 1975 (4) SA 700 (RAD) at 701H.)

The authorities may be found collected in 29 *Halsbury's Laws* 4 ed para 360 and in Archbold *Criminal Pleading, Evidence and Practice* 41 ed paras 4-121, 15-10. The most recent case, which states the law with clarity, is *R v South Tameside Magistrates Court, ex parte Rowland* [1983] 3 All ER 689 (QB). The law is that a court may only accept a plea of guilty where it is unequivocal. Thereafter the court has a discretion to allow a plea of guilty to be withdrawn at any time before sentence, in appropriate circumstances. "This discretionary power" as LORD UPJOHN said in *S v Recorder of Manchester* [1971] AC 481 (HL) at 507 G-H, "is one which should only be exercised in clear cases and very sparingly".

I conclude therefore that in spite of the conflict which appears to exist in the South African courts, the approach of our courts and the English courts to the question of the *onus* in cases where an accused person **after verdict** seeks to withdraw his unequivocal plea of guilty is that the accused should be required to show, on a balance of probabilities, that the plea was not voluntarily and understandingly and, perhaps one should add, correctly, made.

It seems to me that there is a clear parallel between this situation and the situation where an accused person seeks to challenge a confirmed statement.

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In terms of the proviso to s 242(1a) of the Criminal Procedure and Evidence Act he is required to prove that the statement was not made freely and voluntarily (*S v Ndhlovu* 1983 (4) SA 507

(ZS) at 510C). The *onus* is cast on him because he has in open court and under questioning by a judicial officer stated the opposite of what he now avers. So here, the procedure under s 255 involves an explanation by the magistrate of the facts and the essential elements of the offence. The magistrate is further required by the section to "inquire from the accused whether he understands the charge and the essential elements of the offence and whether his plea of guilty is an admission of the elements of the offence and of the acts or omissions stated in the charge or by the prosecutor."

All that having been done, I do not consider it unreasonable that an *onus* be placed on an accused person wishing to change his plea. No doubt it may be said that that *onus* will more easily be discharged if the question is raised before verdict while the presumption of innocence still applies. However I need not take that aspect of the matter any further since it does not arise in this case.

Against that legal background I proceed to examine the facts of this case and the approach of the magistrate.

There can be no doubt that the plea was unequivocal. The questions put to the appellant as to the elements of the offence were the right questions and the answers were clear and unambiguous. Nor were they simply monosyllabic affirmatives. He said specifically "it was without her consent" and in explanation "I was tempted and I failed to resist".

The State outline and medical report were then read to him. He said he understood them and agreed with them. He was asked if he wanted to add or subtract anything and he said "I voluntarily went to the police on my own. The police did not come for me to arrest me". He was asked "Anything else?" and he spoke of his realisation of wrongdoing, his praying, his apology to the complainant and her forgiving him. All this bears the hallmark of genuineness. Moreover, as the magistrate pointed out, the complainant subsequently confirmed the fact that she had forgiven him, when she gave evidence as to sentence. This fact had not been before the court, apart from his saying so. Why should they both say this if in fact there had never been anything to forgive?

The appellant then gave evidence in mitigation at some length and with

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considerable fluency. It seems clear that he was hoping for a sentence other than a prison sentence. He repeated that he had been tempted and had failed to resist. He must therefore have been shaken when the magistrate, in adjourning the proceedings for 48 hours, spoke of the probability of a prison sentence.

Up to this point therefore there can be no question that the appellant knew what he was doing, understood the proceedings and expressed contrition.

On the resumption he sought to change his plea and the magistrate properly adopted the "trial within a trial" procedure. He heard the appellant, who by this stage was represented. No other witnesses were called by the appellant. He heard the two police officers whose conduct was

alleged to be improper. He believed the latter for good and sufficient reasons, and disbelieved the appellant. He concluded that the appellant was seeking to change his plea because he had become aware of the serious consequences of such a plea in terms of imprisonment. This is of course a very common reason for persons seeking to change their plea - see the comment of LORD PARKER CJ in *R v Muford and Lothingland Justices, ex parte Harber* [1971] 2 QB 291 at 299: [1971] 1 All ER 81 at 86.

It seems to me that the magistrate's conclusion was entirely right. I bear in mind that the appellant's claim was that the allegation against him was totally false in every particular. He is not saying that there was intercourse but it was by consent. In such circumstances one can imagine that his shame and his feelings of moral guilt might have led him to vacillate. But here he claims total innocence. The charge against him, he says, is totally without foundation. In such circumstances I cannot accept that a man could say nothing when told, as he claims to have been told: "The medical report proves you had intercourse with her". How could an innocent man fail to question such a statement? Yet he does not say that he raised any query. He does not claim at any stage to have asked what it was he was said to have done, or how or when or where. In my view the magistrate was quite right to disbelieve his evidence. No doubt he was told of the pros and cons of a plea of guilty as against that of not guilty, but that in itself does not amount to undue influence.

In general therefore it seems to me his conduct was totally inconsistent with innocence and totally consistent with that of a guilty man who seeks to change his plea on realising the danger of imprisonment.

The magistrate in fact applied the more favourable test - the test laid down

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McNALLY JA

in *S v Britz supra* - and concluded that beyond reasonable doubt the explanation given by the appellant was false. I am satisfied that that conclusion was right. *A fortiori* the appellant failed to discharge the *onus*. I would dismiss the appeal.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Calderwood, Bryce Hendrie & Partners appellant's legal practitioners

1986 (2) ZLR p65

ANDREW PHILLIPS (PVT) LTD v GDR PNEUMATICS (PVT) LTD 1986 (2) ZLR 65 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

15 July & 1 August 1986

Flynote

Agency - ostensible authority - prior transactions - forged order form bearing company stamp - standard commercial practice estoppel - principles - whether loss of rubber stamp used to forge order form is negligence founding an estoppel.

Delict - duty of care - duty to keep official stamp under lock and key.

Headnote

The respondent supplied goods to a third party on the strength of a forged order form bearing the impression of the appellant's rubber stamp. When sued for payment for the goods sold the appellant denied the purchaser to have been its agent and the respondent alleged an ostensible authority based on prior transactions between the parties and on standard commercial practice in respect of official order forms delivered by employees.

Held, that previous conduct between the parties consisting of six transactions occurring at least twenty seven months prior to the relevant incident is insufficient to justify the inference that the appellant had represented to the respondent that any person presenting its official order form bore its authority, strong evidence is needed to justify such an inference particularly where the bearer has no connection whatsoever with the party against whom it is sought to establish an estoppel.

Held, further, that the failure to keep the rubber stamp under lock and key can scarcely be classified as negligence, but even if it were the appellant was under no duty of care to the respondent to secure its own rubber stamp.

Held, further, that commercial practice does not allow the recipient of an order form to take on trust that it is a genuine rather than a fraudulent

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GUBBAY JA

order. The safeguard against this type of fraud lies with the recipient of the order.

Cases cited:

Strachan v Blackbeard 1910 AD 282

Monzali v Smith 1929 AD 382

Henney v Annesley 1960 (4) SA 462 (SR)

Sathe v Kutubudien 1914 CPD 221

Gottschalk v Dreyfus & Co Ltd 1938 (1) PH A II

Cripps v Collins 1937 SR 161

Quinn & Co Ltd v Witwatersrand Military Institute 1953 (1) SA 155 (T)

Union Government v National Bank of South Africa 1921 AD 121 (C)

Guarantee Investment Corporation Ltd v Shaw 1953 (4) SA 479 (SR)

M T O'Meara for the appellant

J B Colegrave for the respondent

Judgment

Gubbay JA: On 11 July 1984 a person purporting to go by the name of Mandinagi presented himself at the premises of the respondent company, which carries on business as a supplier and repairer of heavy vehicle air brake equipment. He was in possession of a partly printed purchase order form, No. 4/8784, to which had been applied, somewhat indistinctly, the name stamp of the appellant company. Handwritten on the order form were the date, the appellant's sales tax number and "6 x 24/30 Air Brakes", being the nature of the goods to be supplied. Below was the signature "H. Clive." The order form was handed to the respondent's counter sales assistant, Andrew Mavangira. In the knowledge that the appellant was an acceptable credit customer with which his company had enjoyed some dealings in the past, Mavangira issued an invoice for six double diaphragm spring brake chambers - which properly described the goods referred to in the order - at a price of \$1 050. That done he obtained Mandinagi's signature to the invoice and effected delivery to him. Thereupon Mandinagi disappeared without trace. The goods never reached the appellant. The transaction was fraudulent, for Mandinagi was unknown to the appellant. He was neither its servant nor agent. By some means or other, probably through an accomplice in the employ of the appellant, Mandinagi must have obtained access to the rubber stamp bearing the appellant's name. He must also have acquired its correct sales tax number and information that a salesman known as Clive (his full names being Clive Hein) was authorised to sign purchase order forms. Although order form No. 4/8784 was not stolen from the appellant, Mandinagi would have had little difficulty in procuring it, for such prototype forms

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GUBBAY JA

are commonly in use by businesses throughout the country.

The fraud came to light at the end of July 1984 when the appellant queried the respondent's statement reflecting a debit of \$1 050. It refused to pay on the ground that it had not authorised the purchase made by an unidentified trickster. The respondent was equally adamant that having clothed Mandinagi with ostensible authority to present the order form and obtain delivery of the goods, the appellant was estopped from denying that he had acted as its agent.

At the trial which followed the magistrate resolved the dispute in favour of the respondent. He held that the practice in the trade of accepting such order forms, taken in conjunction with the prior commercial dealings between the parties, sufficiently established that Mandinagi had

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ostensible authority to make the disputed purchase. That decision is now the subject of this appeal.

It was not in contention that the *onus* lay on the respondent to prove that the essential requisites of estoppel were present. See *Strachan v Blackbeard* 1910 AD 282 at 288 *in fine* - 289. These are: (a) a representation, by words or conduct, which might reasonably be expected to mislead; (b) the misleading of the representee; (c) inducing him to alter his position on the faith of such representation. See *Monzali v Smith* 1929 AD 382 at 385; *Henney v Annesley* 1960 (4) SA 462 (SR) at 486G; De Villiers and Mackintosh *The Law of Agency in South Africa* 3 ed at pp 443-444.

The first point taken by Mr O'Meara on behalf of the appellant was that it emerged clearly from the mouth of the respondent's managing director, Gordon Reade, that the order had been executed solely in reliance upon what was regarded as standard business practice. The respondent had not relied on the pattern of its past dealing with the appellant as being capable of misleading a reasonable person into believing that Mandinagi had authority to present the order and take delivery. Certainly, the submission appears to be borne out by the following passage in Reade's cross-examination:

"Q. Are you saying that receiving an order like this he (Mavangira) remembered, "Oh! two years ago we received a similar order form it must be alright"? - A No.

Q. He would not remember that? - A Well he may or he may not but the point I am making here is that it is standard practice to receive an order whether it is from Andrew Phillips or Clan Transport or Swift

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GUBBAY JA

Transport or anybody. It is standard practice to receive an order supply the goods, give them an invoice, and follow up the statement.

Q. So really you are basing your claim of ostensible authority on what you regard as the standard practice in this town? - A Yes.

Q. And not on the fact that two years prior to this a similar order form was received by your firm? - A No."

But I do not consider that this piece of evidence, damaging though it is, is necessarily conclusive of the issue. For if Reade's testimony is read as a whole it would seem that what in effect was relied upon as giving rise to an estoppel was the prior course of conduct or dealings between the parties, as a consequence of which the appellant represented that **anyone**, whether a member of the appellant's organisation or a complete outsider, presenting the respondent with a stamped order for goods was authorised to receive delivery. However that may be, I am prepared to assume in the respondent's favour that this was the true basis of its case.

What then was the extent of the dealing between the two companies prior to 11 July 1984? In fact, comparatively little business was transacted. On six occasions from 23 November 1978 to 26 March 1982 signed purchase order forms, similar in format to that used by Mandinagi,

identifying the goods to be supplied, were handed to the respondent by an employee of the appellant. On each of these occasions the name of the appellant and its sales tax number had been stamped distinctly thereon. Prices of the goods sold ranged from \$27,40 to \$547,92, and the last purchase, having been made some twenty-seven months before the fraudulent one, was in the amount of \$96,75.

It is a sound principle, which I readily accepted, that "strong evidence" is required to permit of an inference that a person who lacks direct authority for a particular transaction, nonetheless has ostensible authority in respect of it by virtue of the existence of a number of prior transactions. See *Sathe v Kutubudien* 1914 CPD 221 at 224; *Gottschalk v Dreyfus & Co Ltd* 1938 (1) PH All.

In the present case I am not persuaded that the effect of the six prior dealings is such as to justify an inference that in respect of the fraudulent transaction the appellant must be found to have represented that anyone handing the respondent an order form upon which its name has been stamped, was authorised to receive delivery. There are several factors which weigh heavily against such an inference:

1986 (2) ZLR p69

McNALLY JA

In the first place, the course of dealings was spasmodic, consisting of a single order in 1978, no orders at all during 1979 and 1980, three orders in 1981, and two orders in 1982. I do not think it can be said that so few transactions, extending over a period of three-and-a-half years and not made on any regular or anticipated basis, were sufficient to lead the respondent to the reasonable belief that anyone who happened to present the appellant's official order form, even though not identified as an employee of the appellant, was nevertheless being represented as having authority.

Secondly, I would **think that any** significance attaching to the former series of **transactions** was considerably weakened, if not entirely destroyed, by the lapse of as long a period as twenty-seven months from the penultimate order to the fraudulent one. The substantial break in the course of dealings between the parties had the effect, in my view, of isolating the transaction of 11 July 1984 from the former orders. It implied a cessation of any representation arising from the previous course of dealings between the parties and ought to have put the respondent upon its enquiry. See *Monzali v Smith supra* at 389-390.

Thirdly, it is obviously far more difficult to establish estoppel against a party with whom the person concerned has no connection whatsoever, for there is one material link less in the chain. This is the situation *in casu*. Mandinagi was not in the appellant's service but a total stranger. (Compare *Cripps v Collins* 1937 SR 161 at 164; *Quinn & Co Ltd v Witwatersrand Military Institute* 1953 (1) SA 155 (T) at 159F 160C.) He acted fraudulently for his own illegal purposes.

Finally, and perhaps more importantly, one searches in vain in the evidence of Mavangira for any suggestion that he was influenced to accept and process the order handed to him on account of his knowledge of the past course of dealings with the appellant. Indeed, this is not surprising, for it was not until 1981 that Mavangira commenced employment with the respondent

and then in the capacity, not as a salesman, but as a "spares picker". When acting as a counter salesman the only order he ever saw bearing the appellant's name stamp was that of 11 July 1984. He accepted it on the faith that it appeared authentic and in the appreciation that the appellant's credit-worthiness was good.

It was not part of Mr *Colegrave's* argument, and wisely so, that the appellant was estopped from disputing liability by reason of its negligence in failing to keep the rubber stamp bearing its name under lock and key lest it might find

1986 (2) ZLR p70

McNALLY JA

its way into fraudulent hands. That omission can hardly be classed as imprudent let alone negligent, but even if it were the appellant was under no duty *vis-à-vis* the respondent to use reasonable care to secure the rubber stamp in a safe place. See *Union Government v National Bank of South Africa* 1921 AD 121 at 149; *Guarantee Investment Corporation Ltd v Shaw* 1953 (4) SA 479 (SR) at 483E-H.

Unfortunately this is a case in which one of two innocent parties must suffer. The conclusion I have arrived at may cause those who receive order forms issued *ex facie* by a reputable and credit-worthy company to be anxious and shaken in their confidence in respect of the validity of those orders. But a company cannot adequately protect itself against this type of fraud. The safeguard rather lies with the recipient of the order. It is within his power to ascertain from the company's senior management whether the order is valid. If the answer is in the negative then the enquiry will have succeeded in preventing loss.

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

"The Plaintiff's claim is dismissed with costs."

Dumbutshena CJ: I agree.

McNally JA: I agree.

Atherstone & Cook appellant's legal practitioners

D W Aitken & Co respondent's legal practitioners

1986 (2) ZLR p71

S v MUNEMO 1986 (2) ZLR 71 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

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30 June & 1 August 1986

Flynote

Criminal procedure (sentence) - murder - extenuating circumstances - onus on accused - facts alleged by accused on which conviction based - whether must necessarily be accepted for purposes of extenuation.

Evidence - extra - curial statement - exculpatory portions - weight to be given for purposes of extenuation.

Headnote

A court convicting a person of murder on the basis, *inter alia*, of a confession by the accused is not necessarily bound by the exculpatory portions of that confession when considering the question of extenuation. The onus is on the accused to establish extenuating circumstances, and a version of facts accepted by the court as reasonably possible in convicting the accused may yet fall short of the requisite degree of proof insofar as the accused seeks to rely on the exculpatory portions thereof as extenuating circumstances.

Cases cited:

S v Muchimika 1985 (2) ZLR 328 (SC)

S v Theron 1984 (2) SA 868 (A)

R v Jairos 1966 RLR 115 (AD)

R v Mlambo 1957 (4) SA 727 (AD)

S v Sephuti 1985 (1) SA 9 (A)

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

S v Tovakepi 1972 (2) RLR 372 (AD)

1986 (2) ZLR p72

McNALLY JA

R R P Gwati for the appellant

B N Sigidi for the respondent

Judgment

McNally JA: The appellant was convicted of murder with actual intent by the High Court on circuit at Gweru on 1 October 1985. His appeal was heard in Bulawayo on 30 June 1986 and it was noted that there was no notice of appeal in the record.

It is necessary to repeat what I said in *S v Muchimika* 1985 (2) ZLR 328 (SC) namely that counsel appearing for appellants, even where, as here, the right of appeal is automatic, should ensure that a notice of appeal is prepared and lodged with the Registrar and that it forms part of the record.

Quite apart from the fact that this is a requirement of the Rules, it might well be a matter of the utmost importance to the appellant. In a case which, on the record, is altogether hopeless, the appellant might raise in his notice of appeal new allegations which might persuade this court to remit the matter for further investigation. In the absence of the notice of appeal, this court, acting on the record alone, would have dismissed the appeal. It will be apparent therefore that the presence or absence of the notice of appeal can be a matter of life or death for the appellant. Counsel on appeal are in my view failing in their duty to their client if they do not obtain and consider the notice of appeal, investigate the allegations therein, amend it as necessary and ensure that it forms part of the record.

In the present case we have, with the assistance of the Registrar, unearthed the notice of appeal allegedly submitted on 14 October 1985. In addition we have discovered a letter signed by the appellant on 22 January 1986 addressed to the Registrar.

In the notice of appeal he appeals against sentence only, and admits the crime. He says, *inter alia*:

"I know that I did commit the crime.... I do not know what came to me to commit such a bad crime.... I also feel pity for the deceased one since I took her as my mother ..."

He asks that the sentence be reduced to life imprisonment. This attitude is consistent with what he said to the court at the stage of *allocutus*, when asked if he had anything to say why sentence of death should not be passed. He said:

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McNALLY JA

"My Lord, firstly I am sorry that this happened and secondly I did not intend to do what I did. However this happened that way. I did not know that this would result in her death."

In his letter of 22 January 1986, however, he reverted to his attitude during his trial, namely that he knew nothing whatever of the crime nor of the deceased.

Mr *Gwati*, who appeared both at the trial and on appeal, said he had no submissions to make on conviction. It seems to me he was completely justified in adopting that attitude. The case against the appellant was overwhelming. He spoke about the killing that very afternoon in a beerhall to one Johnson Sibanda. Sibanda very properly called the police who arrested the appellant and found a key on him. The key was later found to open the door of the house where the deceased had lived. In fact it was as a result of the report by Sibanda that the crime came to the attention of the police, who then went to the house and found the body of the deceased. The appellant also made a statement admitting the killing. He claimed the statement was made up by the police, who had also "planted" the key on him. He said Sibanda was lying. The trial court properly rejected those contentions.

Mr *Gwati* argued that the trial court should have found extenuating circumstances in the provocative attitude and behaviour of the deceased. The foundation for this submission lies in the confirmed warned and cautioned statement. The difficulty for the defence in relying upon it is, of course, that the appellant himself has contended that the statement is false and was made up by the police. Bearing in mind that the *onus* is on the appellant to establish extenuating

circumstances (*S v Theron* 1984 (2) SA 868 (A); *R v Jairos* 1966 RLR 115 (AD)), he starts off with a finding of credibility against him. (Compare *R v Mlambo* 1957 (4) SA 727 (AD) at 738 B-D.)

Be that as it may, one must look at what the appellant says in his statement, because what he said was to an extent accepted as being the truth of the matter, and it may be, in a proper case, that even the exculpatory portions of such a statement are so probably true that the court should accept them. This is what he said:

"Yes, it happened, this woman said my employment with her was terminating. I said, 'When am I going to take my money'? She said, 'You come and get it at the month end'. I asked what I was going to eat since

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McNALLY JA

I am not working. She then said 'Where you were staying, what were you eating; if I had not employed you what were you going to eat'. That is when she started talking, saying 'The Ndebeles, your heads are dry/hard'. That is when she started shouting, saying 'Go, go away from my yard'. I then said, 'Give me the keys to unlock and take my purse and go'. She said, 'Go, go and I don't want to see you here'. I then became angry. I took an axe which was at the door and hit her with it on the head. I then locked the house. I took the key and went away. That is all."

Now, the court accepted as a fact that the appellant had been employed by the deceased "in one capacity or another, it does not matter which." It also found that "there was an altercation over a delayed wage, salary or payment." It concluded that, "though mitigatory, this factor does not amount to an extenuating circumstance". The court, it seems to me, was simply accepting these facts in the absence of others, as a convenient explanation of how the appellant and the deceased came into contact with each other and how that contact became acrimonious. They are, broadly speaking, neutral facts as far as extenuation is concerned. The State failed, surprisingly, to investigate whether or not the appellant was employed at the house. They could easily have done so. Thus in the absence of proof to the contrary it was accepted that he was so employed.

It seems to me to be a big step to say that because those facts were accepted, therefore one must also accept the appellant's explanation of the reason for the dispute and particularly his version of where the fault lay. It may be that he was treated harshly and unjustly. It may be that he fully deserved summary dismissal, but that he should not have been denied his money. One simply does not know. I can see no basis for saying that this version of the incidence of the fault must be accepted because it is probable, or because there is no other. I think it is equally probable, no more and no less, that the fault lay with him. He was hardly likely to say so, if it was. As for the absence of any other version, he has killed the only person who could give another version, and can hardly claim credit for that.

There are certain *dicta* in the minority judgment of SMALBERGER AJA in *S v Sephuti* 1985 (1) SA 9 (A), cited with approval in the court in *S v Chaluwa* 1985 (2) ZLR 121 (SC), which need to be considered in this connection. The learned Acting Judge of Appeal said:

"Extenuating circumstances must have their foundation in the proven circumstances of each case. (*S v Ndlovu*

McNALLY JA

The proven circumstances include those facts on which the conviction is based together with such other facts as may be proven when the enquiry into extenuation is undertaken, provided that such last-mentioned facts may only amplify or temper the findings on the merits but may not alter them. (*S v Vontsteen* 1972 (4) SA 5551 (A) at 558D.) In *R v Samson* 1959 (1) SA 893 (C) it was decided that where the court, in convicting an accused of murder, makes certain findings that form an integral and necessary part of the findings on which the conviction rests, those findings have to be accepted for purposes of deciding whether or not there are extenuating circumstances. (See too *R v Maïke* 1961 (2) SA 240 (N) at 244G; *Du Toit Straf in Suid Afrika (Punishment in South Africa)* at p 40; *Hiemstra Suid Afrika Strafproses (South African Criminal Procedure)* 3 ed at 596; and compare *S v Shepard & Ors* 1967 (4) SA 17-0 (W) at 180 D-H.) In the course of his judgment in *Samson's* case at 894 A-B VAN WYK J said:

'In the present case in considering whether the accused is guilty of murder the court found that his evidence might reasonably possibly be true. His evidence presents the facts in as favourable light for himself as is possible. In view of the *onus* that rests on the Crown the Court accepted the essence of the accused's version, but nevertheless found him guilty of murder. The probability is that the accused's account is false, but in my view the court cannot now, when considering whether extenuating circumstances are present, reject the accused's account because of the probabilities.'

These comments were described in the majority judgment by BOTHA JA (with whose judgment JANSEN JA concurred) as "attractive" but possibly not reconcilable in principle with the law's view as to the incidence of the *onus* in relation to extenuating circumstances as set out in *Theron's* case *supra*. He himself preferred to express no view on the matter.

It seems to me in any event that the *dicta* of SMALBERGER AJA cannot possibly be taken to mean that if the only explanation of the events at a killing is that of the killer, and if the court accepts the general description of those events by the killer, for want of any better explanation, for the purpose of conviction, it is bound also to accept in extenuation the exculpatory explanation of the reason for the killing put forward by the killer.

All that SMALBERGER AJA was saying, as I understand him, is that a fact accepted in favour of the accused in deciding that he is guilty of murder,

McNALLY JA

cannot then be rejected in deciding whether or not there were extenuating circumstances, simply because the incidence of the *onus* is different. This is my understanding of the passage at the foot of p 17 and the top of p 18 of the report where he says (the translation is mine):

"In the present case the conclusion was reached, as far as the first phase was concerned, that although the appellant's version of the events that led to the death of the deceased was improbable, it might nonetheless reasonably possibly be true. On that version, as already stated, the appellant is guilty of murder. When we come to the second phase, the question arises whether the appellant can rely, for the purposes of showing extenuating circumstances, on the improbable but reasonably possibly true facts on which his conviction was founded."

He concluded that the answer to that question had to be in the affirmative.

It is true, in the present case, that the learned trial judge found as a fact for the purpose of conviction that the appellant had been employed by the deceased. In fact he said "we accept the confession as the truth". I do not think that can be taken to mean that the court accepted every word of the statement as the truth. It simply means that insofar as it was a confession it was the truth.

I see no reasons in this regard to depart from the statement of principle made by BEADLE CJ in *S v Tovakepi* 1972 (2) RLR 372(A); 1973 (1) SA 694 in the following terms:

"The court must give careful consideration to everything that is said in a confession, if that confession is to be relied upon at all in convicting an accused, but if it considers the exculpatory portions of the confession or those portions which deal with extenuating circumstances are untrue for one reason or another, it is perfectly within its rights to reject those parts of the confession which are favourable to the accused while accepting those parts which are not ..."

It seems here that the court accepted that there was an altercation over a delayed wage, salary or payment. We are asked from that to infer that the deceased was treating the appellant unjustly and thus provocatively. We do not know the reason for the dismissal, nor the amount of the wage involved (since the killing occurred on 3 August the wage for August services would be minimal, but it is possible the wage for July was being withheld - we simply do not know), nor the reason she had for withholding it. It does not

1986 (2) ZLR p77

McNALLY JA

seem to me that the court can come to a conclusion, for the purposes of extenuation, that the appellant was being treated unjustly.

Indeed when one considers what the appellant said in the beerhall to Johnson Sibanda, one cannot help noticing the absence of any suggestion of justified grievance. The following are the relevant extracts from Sibanda's evidence:

"He told me that had killed a white woman, he locked her in her house. I asked how he had killed the deceased and he told me he had used an axe."

(Later):

"...the accused suggested that 'if you have got some courage, after dark let us go and unlock the house, pick up the corpse, throw it into the toilet and then take the clothing and then share it'"

(And later):

"When this policeman asked why the accused had done this his reply was 'This white old woman had told me, 'that is why you are getting problems from people' and therefore I decided to finish her'"

It will be apparent that it does not seem to me that the appellant has established anything more than that he became annoyed with his employer when he was summarily dismissed and under a sense of grievance, whether real or imagined, snatched up an axe and killed her. I myself find it difficult to disagree with the learned judge when he concluded that "though mitigatory, this

factor does not amount to extenuating circumstances". It does not to my mind significantly reduce the moral blameworthiness of the action. Even if one assumes in his favour that, having grounds for summary dismissal, she overstepped her legal rights in declaring her intention to delay payment of money due to him, I cannot accept that such "provocation" can reduce the moral blameworthiness of his act. One bears in mind that she was an old woman of 70, unarmed and defenceless, and he was a young man of 24 who hit her on the head with the back of an axe or chopper with sufficient force to cause a depressed fracture of the skull.

Mr *Gwati's* final argument was that the learned judge erred in concluding that there was an actual intent to kill. The weapon used was described by the learned judge as "an ordinary household axe, popularly referred to as a 'chopper' in this country at least. About 11/4 to 11/2 ft. long; the blade is about

1986 (2) ZLR p78

McNALLY JA

51/2 inches." The back of this axe head fitted apparently into the depression in the deceased's skull which was 7 cm long by 3 cm wide.

If the intent behind such a blow with such a weapon to the head of an old woman is not an actual intent to kill, then it is so close to such an intent as to be morally indistinguishable. I would not wish to differ from the learned trial judge's finding in this regard.

In my view the appeal must be dismissed in its entirety.

Dumbutshena CJ: I agree.

Gubbay AJ: I agree.

Pro Deo

1986 (2) ZLR p79

S v JOKASI 1986 (2) ZLR 79 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Criminal appeal

21 March & 8 August 1986

Flynote

Criminal procedure (sentence) - murder - infanticide - factors to be considered - emotional disturbance of mother and premeditation not mutually exclusive - appropriate sentence range.

Headnote

The most important factor to take into account in sentencing a mother convicted of murdering her newly-born child is her emotional state at the time of the killing. Premeditation in the killing is not necessarily exclusive of emotional disturbance. The latter frequently underlies the former.

Per McNally JA: The time has come for research and study into the offence and for a re-assessment of the attitude of the courts to the question of sentence in cases of infanticide. It is undesirable generally to impose a sentence in excess of five years.

Per Beck JA: The courts should not have fettered their discretion to impose upon a person convicted of infanticide a sentence that falls within the range of sentences imposed for murder of a mature victim, but will and do nevertheless recognise that in the great majority of cases there are factors of stress to which the accused was subject which will call for a sentence of considerably less severity.

Per Gubbay JA: It cannot be said that where the death of an infant was carefully premeditated, motivated by self-interest and attended by little emotional stress that the killing is hardly removed from the conventional conceptions of murder; there are at least three reasons why the killing of an infant should be regarded less reprehensible than ordinary murder; it cannot agonise upon the contemplation of approaching death; it leaves

1986 (2) ZLR p80

McNALLY JA

no gap in the family circle; it does not create a sense of insecurity in society.

Cases cited:

S v Rufaro 1975 (1) RLR 97 (AD)

S v Crawford & Anor 1979 (2) SA 48 (A)

A Ebrahim for the appellant

E Chatikobo for the respondent

Judgment

McNally JA: The appellant was charged with and convicted of murder. She pleaded guilty. That plea was recorded and accepted. It is the usual practice to record a plea of not guilty in murder cases, but presumably in this case, because the indictment alleged the murder "of her newly born girl infant", it was not considered necessary to do so. Her legal representative indicated that the plea was in accordance with his instructions.

An agreed statement of facts was placed before the court as Exhibit One. It read as follows:

1. The accused is Eriya Jokasi who at the time of the incident was thirty-eight years old.

2. She was resident at Karingura Village in the Hurungwe Communal Land.
3. On the 15th September 1984, whilst she was at her village she went into labour. Shortly thereafter she proceeded to some nearby maize fields and gave birth to a live baby girl. She then wrapped the baby girl in a plastic bag and carried the child to a nearby kopje some 150 metres away.
4. The accused thereafter placed her baby girl on the ground. It was still alive. She located a large rock weighing some 49 kilograms and placed the rock on top of the baby. After a short while the accused's baby stopped crying and she returned to her village.
5. On 15 October 1984, Sergeant Nyuke proceeded to the accused's village and having warned and cautioned the accused in regard to the charge of murder the accused admitted she had killed the child and led Sergeant Nyuke to a small kopje not far from the village. He was shown where the child had been killed and observed that a large rock had been placed

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on top of a fertilizer bag. The bag in question appeared to have been torn and it appeared that wild animals or dogs had interfered with the plastic bag and its contents.

Some small pieces of bone were scattered about the immediate vicinity. The rock was moved away and it was observed that little remained of the deceased's body. Some small pieces of bone, the contents of the bag and the rock were taken as exhibits.

6. Later that same day the accused made a warned and cautioned statement which was subsequently confirmed. This statement is not challenged in any way whatsoever.
7. On 18 October 1984, the accused was examined by Dr McClean, and his findings as per report No. 7017E are not challenged in any way.
8. The remains of the deceased were taken to Dr Mahari to ascertain cause of death. Due to the negligible remains, no conclusive finding could be made.
9. It is accepted that the accused by placing the rock on top of her child directly caused the death of the deceased.

In addition a warned and cautioned statement by the appellant was produced as Exhibit Two. In this she gave her reason for the killing in the following words:

"I did this because I was afraid of my late husband's relatives that they could have chased me from home."

The only evidence led before verdict was that of a policeman. He said, among other things, that the appellant lived in Karingura Village with the other wife of her late husband and that "the huts are within the area where the headman resides". There are about five other adult women in the village. The appellant has seven children, the oldest of whom is about 16 or 17 years of age. She was unemployed. Her parents were dead. The village headman was taking care of her. The

father of the dead child had been employed in that area but had left. The appellant herself gave no evidence.

In sentencing the appellant to nine years' imprisonment with labour the learned judge said that the circumstances surrounding the death of the child

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showed "an unbelievable degree of callousness". He referred to the only reported authority in our courts, which is the case of *S v Rufaro* 1975 (1) RLR 97 (AD). In that case BEADLE ACJ spoke of the wide range of sentences imposed in the past, ranging from one year to ten years. He said that the most important factor to take into account was the emotional state of the mother at the time when she killed the child. She might be "so distressed that she might hardly know what she is doing". Or "the murder may be a carefully premeditated one and committed entirely in the interests of the mother herself because she feels that it is in her own interests that it should not be known that she has given birth to a child. A carefully premeditated killing in these circumstances is little different from many other cases of murder and if that is the state of mind of the accused when the murder is committed, a substantial sentence of imprisonment would be justified".

The learned Acting Chief Justice (as he then was) went on to list other relevant factors - the youthfulness of the mother, the number of previous births (on the theory that a first childbirth is usually more upsetting than subsequent ones), the motive, the manner of killing, and finally contrition.

As far as the manner of killing was concerned he said (pp 99 D-E):

"If the killing amounted to simply wrapping the umbilical cord around the child's throat or simply pushing the child away and leaving the child exposed, that might not be as serious as if the mother, having appreciated that the child is alive, deliberately and brutally murders the child, say, by beating its head against a stone or cutting its throat."

Whether there is less moral blameworthiness in leaving an infant to die of exposure than in causing its instant death by one violent act must, I think, be a matter of conjecture.

In *Rufaro's* case she strangled the child with the umbilical cord and put the body in an antbear hole. In the present case the appellant put the child in a plastic bag and placed it under a heavy rock. It cried for a short time and then stopped. It is not clear, because the body was later torn by animals, how the child died. I have difficulty in distinguishing the moral blameworthiness of the two.

In *Rufaro's* case *supra*, the Appellate Division reduced the sentence from seven years to four years, principally because the trial judge had found that "she was emotionally disturbed to a considerable extent". That finding was

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based on nothing more than probability, as appears from the passage from the judgment of the trial court cited in the appeal:

"In view of the fact, too, that the strangling of this child happened almost immediately after it had been born, **it is probable that the** mere fact of giving birth brought about some emotional disturbance in the accused. That coupled with this great fear that she entertained **makes it highly probable** that she was emotionally disturbed to a considerable extent..."

Her fear was based on the fact that this was an adulterous child. Her husband and her father, suspecting her condition, had threatened severe punishment if she gave birth to a child. She was twenty-five, a rural dweller, with three children.

It does not seem to me that the fear felt by the appellant in *Rufaro's case supra* can be significantly distinguished from the fear felt by the appellant in the present case. It is true that there was here no threat of physical punishment, as there was, at least by inference, in *Rufaro's case supra*.

But for an unemployed, unskilled, totally unsophisticated, totally unemancipated tribal woman past her middle years, to be threatened with expulsion from the village and presumably separation from her children, is surely a terrible threat. Her parents were dead, and there is no evidence of any other relatives to whom she could have gone. In that society a woman must live under the protection of a man. In that area (Hurungwe) starvation is a reality.

It must also be said that it seems that there was some degree of deliberateness in the killing in this case. The facts are known only from the appellant's confession in which she says that after giving birth she waited until it was dark and then later went with it to a nearby kopje. We do not know how long she had to wait. She gave no evidence. So we do not know what her mental and emotional state was while she was waiting for darkness to fall.

It does seem to me, with respect, that the time has come for a re-assessment of the attitude of the courts to the question of sentence in cases of infanticide. There are, I suggest, a number of aspects which need re-examining.

The first, which is not of course a question for the courts, is whether there should not be, as for example in England, a separate offence of infanticide. In this country infanticide is murder. There is simply the distinction that, in

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terms of s 314 of the Criminal Procedure and Evidence Act, the court "may impose any sentence other than the death sentence" and, since the promulgation of Act 32 of 1985 on 21 March 1986, the court may suspend all or part of the sentence imposed. It is arguable that the gravity of the penalty for murder distorts the penalty sometimes imposed for infanticide. It might be better to treat them as different offences.

The second problem relates to the law's reliance on some medical learning of doubtful validity concerning the mental and emotional state of women immediately after childbirth.

The English Infanticide Act of 1938, which is still in force, speaks of the balance of the woman's mind being:

"...disturbed by reason of her not having fully recovered from the effect of giving birth to the child, or by reason of the effect of lactation consequent upon the birth of the child."

According to the Fourteenth Report of the (English) Criminal Law Revision Committee published by HMSO as Cmnd 7844 in March 1980:

"...the medical principles underlying the Infanticide Act are, it seems, not proven. For example, the medical basis for the reference in the Act of 1938 to 'the effect of lactation' was that lactation might be associated with mental illness (known in the early part of the century as 'lactational insanity'). The medical experts say now, however, that there is little or no evidence to support this."

The report continues:

"Furthermore it is now thought that mental disturbance following childbirth is not confined exclusively to the effects of giving birth. The Royal College of Psychiatrists described to us four types of circumstances any of which may lead to a disturbed balance of mind ...which ...would not come within s 4 of the Mental Health Act, 1959. They are the following:

- (1) Overwhelming stress from the social environment being highlighted by the birth of a baby, with the emphasis on the unsuitability of the accommodation etc;
- (2) Overwhelming stress from an additional member of a household struggling with poverty;

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- (3) Psychological injury, and pressures and stress from a husband or other member of a family from the mother's incapacity to arrange the demands of the extra member of the family;
- (4) Failure of bonding between mother and child through illness or disability which impairs the development of the mother's capacity to care for the infant."

The report goes on to explain that not all these situations fall within the present definition if it is applied strictly. It suggests:

"...that the Statute would more accurately reflect the existing practice of the courts if it specified the offence as being committed when, at the time of the act or omission, the balance of the woman's mind was disturbed by reason of the effect of giving birth or circumstances consequent upon that birth."

Thus premeditation and emotional disturbance due to overwhelming stress are not necessarily mutually exclusive.

The third and perhaps most important question is the nature of the sentence that should be passed. The Criminal Law Revision Committee suggests a maximum prison sentence of five years. It points out that between 1969 and 1974 in England there were 88 convictions. Only two of these women were sent to prison, neither for more than three years. The pattern, says the report, has not changed since 1974.

I do not suggest that what happens in England should happen here. I cite these facts merely as

examples of a different approach. I do suggest, however, that research is needed in this country. A limited pioneering study has been carried out under the auspices of the Zimbabwe Association for the Care and Rehabilitation of the Offender. A great deal more information is needed about the subject, which is as much a sociological as a criminal problem, before the courts can feel confident that they are handling the question of sentences for infanticide or "baby dumping" in any sort of purposeful way.

In the meanwhile, and until the results of such research are available, it seems to me that the courts should avoid the extremes of severity represented by sentences of seven to ten years. From the information placed before us the following facts emerge -

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1. In 1984 there were 12 cases. Sentences were:

In 2 cases 3 years' imprisonment with labour

In 3 cases 4 years' imprisonment with labour

In 1 case 4 1/2 years' imprisonment with labour

In 1 case 5 years' imprisonment with labour

In 3 cases 6 years' imprisonment with labour

In 1 case 7 years' imprisonment with labour

In 1 case 9 years' imprisonment with labour

(These sentences were imposed at a time when there was a public outcry at the number of cases coming before the courts).

2. Between 1975 and 1979 there were 19 cases. Sentences were:

In 1 case transferred to Juvenile Court

In 1 case 1 year's imprisonment with labour

In 1 case 2 years' imprisonment with labour all suspended

In 3 cases 2 years' imprisonment with labour

In 1 case 2 1/2 years' imprisonment with labour

In 4 cases 3 years' imprisonment with labour, partly or wholly suspended

In 3 cases 3 years' imprisonment with labour

In 1 case 3 1/2 years' imprisonment with labour

In 1 case (*Rufaro*) 4 years' imprisonment with labour

In 1 case 5 years' imprisonment with labour

In 1 case 6 years' imprisonment with labour

In 1 case 9 years' imprisonment with labour

3. Between 1967 and 1975 there were 25 cases. Sentences were:

In 2 cases accused treated as a juvenile

In 1 case 12 months' imprisonment with labour, all suspended

In 1 case 12 months' imprisonment with labour

In 1 case 15 months' imprisonment with labour

In 1 case 18 months' imprisonment with labour

In 2 cases 2 years' imprisonment with labour

In 2 cases 3 years' imprisonment with labour (in one case all suspended)

In 1 case 2 1/2 years' imprisonment with labour

In 3 cases 4 years' imprisonment with labour

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In 1 case 4 1/2 years' imprisonment with labour

In 6 cases 5 years' imprisonment with labour

In 1 case 6 years' imprisonment with labour

In 2 cases 7 years' imprisonment with labour

In 1 case 10 years' imprisonment with labour

It may be noted that the imposing of suspended sentences would appear to have been done without regard to the provisions of s 337 of the Criminal Procedure and Evidence Act as it was then worded.

It seems to me that these cases indicate a mean level of three to five years, with lower sentences for cases where there is a special reason for mitigation. Of the 56 cases, 29 fall into the three-five year category, with 15 lower and 11 higher.

In a subsequent case (*S v Tawanda* S-104-86), which came before us while this judgment was being prepared we were shown another schedule dealing with cases before the High Court between 1 July 1985 and 1 June 1986. There were 33 such cases. The average term of

imprisonment imposed was under 3 years. The average term of effective imprisonment (taking account of suspended sentences) was 2,7 years. There were two sentences of 6 years, one of 5 years, eight of 4 years, one of 3 1/2 years, six of 3 years. The other fifteen cases involved effective sentences of less than 3 years' imprisonment with labour. The overall picture of 89 cases in almost 20 years (though not all years are covered in the survey) shows 45 in the three-five year category, with 30 lower and 13 higher.

I do not, in this judgment, seek to chart a new course. I wish merely to indicate the need for research and study, so that the results of that research and study can be placed before the courts. Only then, I suggest, will we be able to approach the question of sentencing in a purposeful way.

In the meanwhile and as a general rule I would not think it desirable to go beyond what I have described as the mean limit of five years' imprisonment.

In my view the sentence in this case, which I do not regard as particularly different from the general run of such cases, is so high as to induce a sense of shock. I would set it aside and in its place impose a sentence of 4 years' imprisonment with labour. There can be no question of suspending any part of that sentence because at the date of conviction - 4 April 1985 - suspension was not possible for this offence. This court cannot on appeal

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impose a sentence which would at the time of conviction have been incompetent *S v Crawford & Anor* 1979 (2) SA 48 (A).

Beck JA: The facts of this matter have been fully stated by McNALLY JA whose judgment, as well as the judgment of GUBBAY JA, I have had the advantage of reading.

I agree with both my brethren that the sentence of nine years' imprisonment with labour that was imposed is manifestly excessive in the circumstances of this particular case and must therefore be reduced.

In view, however, of the comments on the decision of *S v Rufaro* 1975 (1) RLR 97 (AD) that are contained in the judgments of my brethren, I am constrained to say that to my mind there is nothing erroneous in the exposition at pp 98E to 99G of that case of the principal guidelines to be taken into account when sentencing mothers guilty of infanticide.

That exposition emphasises, to my mind correctly, that the all-important task of the court in this kind of case is to assess the emotional state of the accused at the time of the offence. No exhaustive enumeration of factors that will be relevant to such an enquiry can be given, and the court in *Rufaro's* case expressly guarded itself against the risk that those factors which it did enumerate might be thought to be the only ones to which regard should be paid. Indeed, in the judgment of McNALLY JA in the present matter reference is made to a variety of situations capable of subjecting the mother to such stress and pressures as to cause substantial emotional disturbance; and the point is well made by him that premeditation and emotional disturbance are not necessarily mutually exclusive: The latter not infrequently underlies the

former.

I do not agree with the suggestion that there should be a maximum sentence for infanticide, whether it be introduced by way of legislation or by way of a conscious avoidance by the courts of sentences in excess of a particular limit, regardless of the circumstances of any individual case.

No doubt it is seldom - as the collection of sentences listed in the judgment of McNALLY JA amply reveals - that infanticide cases do not contain circumstances of mitigation which render them considerably less serious than other forms of murder. Nevertheless I associate myself with the following observation in *Rufaro's case supra* at p 98 F-H:

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BECK JA

"At the other end of the scale, her emotional stress may be very little indeed and virtually have no bearing on the killing. The murder may be a carefully premeditated one and committed entirely in the interests of the mother herself because she feels it is in her own interests that it should not be known that she has given birth to a child. A carefully premeditated killing in these circumstances is little different from many other cases of murder, and if that is the state of mind of the accused when the murder is committed a substantial sentence of imprisonment would be justified."

Notionally, therefore, I do not find it incongruous that a survey of 89 infanticide cases over a period of almost 20 years shows that on three occasions sentences of as much as nine or ten years have been imposed. I do not, with respect, share the views of GUBBAY JA that the three objective factors that he mentions as attendant upon all infanticides are in themselves sufficient to render a sentence of nine years' imprisonment with labour inappropriate in cases of infant murder. Violence is a scourge of most societies and the threats to the sanctity of human life are today as great, if not greater, than they have ever been despite the vaunted enlightenment of our age. Our own society is by no means spared this danger.

While the deliberate killing of a newly-born infant is, on the one hand, attended by the features to which my brother GUBBAY JA has pointed which make it to some extent less distressing than "ordinary" murder, it exhibits features, on the other hand, which seem to me gravely to aggravate the reprehensible nature of the offence. The victim is utterly vulnerable and helpless and is totally innocent of any wrong whatsoever towards its assailant. Moreover, a newly-born infant is, both by nature and by the most fundamental dictates of our culture, peculiarly dependant for its succour and its safety upon the very hands that destroy it. The offence is so unnatural and heartless that, when its commission is not attended by circumstances of great stress upon the mother, it should in my view be regarded as a form of murder that has peculiar features of reprehensibility and aggravation that offset those features to which GUBBAY JA has pointed, and which justify the comment in *Rufaro's case supra* that in some instance infanticide "is little different from many other cases of murder".

Accordingly it is my opinion that the courts should not have their discretion fettered to impose, in an appropriate instance, upon an accused convicted of infanticide a sentence that falls within the range of prison sentences imposed for murder of a mature victim. While retaining that

necessary discretion, however, our courts will, and do, recognise that in the great majority of

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infanticide cases there are factors of stress to which the accused was subject which will call for a sentence of considerably less severity; the schedules that have been put before us amply bear this out and show that sentences of more than 5 years have been thought appropriate in only 15% of cases.

In the instant case it seems to me that the court *a quo* attached much too little weight to the stress that operated upon the appellant and to the emotional disturbance that this must have caused. I agree with my brother McNALLY that for a woman in her situation and in her society the threat of expulsion from the village is a terrible threat, and it is essentially for that reason that I consider that the sentence must be reduced.

Balancing that feature against the other features that are reflected in the summation by the court *a quo* which is quoted in the judgment of GUBBAY JA, I agree with McNALLY JA, that the sentence should be reduced to one of four years' imprisonment with labour.

Accordingly the appeal against sentence succeeds to the extent that a sentence of 4 years' imprisonment with labour is substituted for the sentence of 9 years that was imposed in the court below.

Gubbay JA: I have had the opportunity of reading the judgment of McNALLY JA and I am in full agreement that the sentence imposed upon the appellant is disturbingly inappropriate. In my view it should be reduced to five years' imprisonment with labour. I wish in this connection to express briefly some observations of my own.

The learned trial judge said this of the appellant:

"In your case you are not a 15 or 16 year old girl. You are a mature woman 38 years old. You have seven children before this infant. It would appear that there were no complications in the birth and that you were alone in the fields and you have not alleged that there were any problems. The motive for killing was that you were scared you **might** be chased from the home. **There is no evidence as to how justified these fears were.** However much validity there might have been in those fears it is little justification for the killing of a young baby.

The manner of the killing, as I have said, is particularly callous and cold-blooded. It was not committed on the spur of the moment. You had some

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GUBBAY JA

time to consider what you were doing and you deliberately went to the kopje to find a place where you could kill the baby." (The emphasis is mine.)

I can find no fault with that summation. Implicit in it is an acceptance, correctly made in my opinion, of one of the guidelines to the assessment of punishment proffered by BEADLE ACJ in *S v Rufaro* 1975 (1) RLR 97 (AD) at 98E, that:

"The most important factor to take into account is the emotional state of the mother at the time when she kills the child."

But I respectfully disagree with the corollary that, where the death of the infant was carefully premeditated, motivated purely for self-interest, and attended by little emotional stress, the killing is hardly removed from conventional conceptions of murder, thus justifying a substantial custodial sentence. (See at 98 G-H.)

Faced with that situation, adverse though it be to the offender, there are, to my mind, at least three reasons why the killing should be regarded as less reprehensible than ordinary murder.

In the first place, the injury done to the newly-born infant is less, for it is incapable of the kind of suffering that might be felt by an adult or teenage victim of a murder. Its level of consciousness is not sufficiently developed to enable it to agonise under the contemplation of approaching death. It is incapable of exhibiting fear or terror. Secondly, the loss of a newly-born infant leaves no gap in the family circle, deprives no children of their breadwinner or their mother, and no-one of a friend, helper or companion. Thirdly, the crime does not create the sense of insecurity in society which other murders cause. No-one feels less safe because of it.

It is these objective features which have persuaded me that the period of nine years' imprisonment should not be allowed to stand, for I am in no doubt that its extent falls well within the range of sentences which conventional murders committed with a constructive intent to kill attract.

Nonetheless, I regard this case as one of the more serious instances of infant murder. It is apparent to me that in considering the factor of emotional stress the learned judge correctly attached little significance to the explanation provided in the appellant's extra-curial statement that:

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GUBBAY JA

"I did this because I was afraid of my late husband's relatives that they could have chased me from home."

This exculpatory averment was not repeated on oath by the appellant, for she elected not to testify in mitigation, preferring to maintain silence. The State, therefore, was denied the opportunity of testing its veracity, and in the circumstances I see no warrant to assume in the appellant's favour that she was subject to the threat of expulsion from her village. It is for this reason that I have settled for five years as an appropriate sentence, although the majority view favours four years. I am satisfied that her moral blameworthiness was of a high degree and that she had little effective mitigation to offer.

Pro Deo

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S v MPALA 1986 (2) ZLR 93 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

6 June & 8 August 1986

Flynote

Criminal law - mens rea - dolus indeterminatus - murder - non- deliberate killing of accomplice by accused in indiscriminate shooting.

Criminal procedure (sentence) - murder - extenuating circumstances - dolus indeterminatus - failure to separate investigation of extenuation and other sentencing procedure - production of previous convictions during enquiry into extenuation - irregularity.

Headnote

An armed robber who, while struggling with his intended victims shoots indiscriminately with his weapon killing his accomplice, is guilty of murder even where the shot was accidental if in the circumstances the killer foresaw the possibility of an accidental shooting during a struggle and was reckless of the consequences.

Cases cited:

S v Nkombani & Anor 1963 (4) SA 877 (AD)

S v Ncube 1983 (2) ZLR 111 (SC); 1984 (1) SA 204 (ZSC)

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

S v Nkwenja en 'n ander 1985 (2) SA 560 (AD)

S v Nhlapo & Anor 1981 (2) SA 744 (AD)

S v Shabalala 1966 (2) SA 297 (AD)

J James for the appellant

B N Sigidi for the respondent

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McNALLY JA

Judgment

McNally JA: The appellant was convicted in the High Court, Bulawayo on 20 December 1985 of one count of murder with constructive intent, two counts of armed robbery, two counts of attempted armed robbery and one count of contravening s 37(1) of the Law and Order

(Maintenance) Act [*Chapter 65*].

The offences were committed in 1981. The appellant was absent from the country thereafter for a considerable period of time.

On Count One the court made a finding that there were no extenuating circumstances and he was sentenced to death.

On Count Two, armed robbery, he was sentenced to seven years' imprisonment with labour.

On Count Four, armed robbery, he was sentenced to seven years' imprisonment with labour.

On Count Six, attempted armed robbery, he was sentenced to five years' imprisonment with labour.

On Count Seven, attempted armed robbery, he was sentenced to five years' imprisonment with labour.

On Count Eight, contravening s 37(1) of the Law and Order (Maintenance) Act, he was sentenced to seven years' imprisonment with labour.

The sentence on Counts Two and Four were ordered to run concurrently. The effective prison sentence was thus twenty four years.

The offences were committed over a period of some two months, and rather confusingly they were not charged in chronological order. Thus Count Six occurred first, on 4 July 1981. Counts Two, Three (on which he was acquitted), Four and Five (on which he was acquitted because it was treated as one with Count Four) occurred on 17 August 1981. Counts One, Seven and Eight occurred on 3 September 1981.

The appellant appealed as of right against conviction and sentence on Count One and with leave of the court *a quo* on the other counts.

I propose to deal first with Count Six, because on this count the State

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conceded that it could not support the conviction. The conviction was based on similar fact evidence only. There was no identification of the appellant. The features which related this crime to the others were:

1. Two men were involved, one tall, one medium height;
2. A get-away car was used;
3. An AK rifle was used;
4. The bullets recovered at the scene tallied with those found at the other scenes.

Of these features the only significant one was the fourth. With a gap of six weeks between this

event, which was the first in the series charged, and the next, the court agreed with Mr *Sigidi*, who appeared for the State, that it could not safely be said that the same two people were involved. Accordingly the conviction and sentence on this count will be set aside.

I do not propose to waste time on the details of Counts Two and Four. These involved armed robberies of two shops in the same part of Bulawayo on the afternoon of 17 August 1981. The appellant was identified by two separate witnesses as being one of the two men involved. These witnesses attended a well-organised identification parade on 19 January 1983 and picked out the appellant. The appellant is further linked to the events by the use of a green and white bag associated with the criminal events of 3 September and by the ballistics evidence which shows that the same weapon was used on each occasion as was used in the other counts..

The convictions on these counts were undoubtedly right.

Finally, I turn to the events of 3 September 1981 which gave rise to Counts One, Seven and Eight. The central event was an attempted armed robbery on one Pedzisayi Makomva at Pelandaba Township, Bulawayo. During this attempt it was alleged that the appellant, undoubtedly without intending to do so, shot and killed his colleague and fellow-criminal, Wilson Ncube. This gave rise to the murder charge and to the charge of possessing arms of war in contravention of s 37(1) of the Law and Order (Maintenance) Act, as well as to the attempted robbery charge.

Mr Makomva's evidence was that of a very courageous man. He was accosted by a robber in his house. He wrestled with this man and knocked

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him unconscious by banging his head on the door frame. He then came face to face with another man carrying an AK rifle. This man fired at him once and missed. They wrestled. The witness had his arms around the armed man from behind and the gun was spraying bullets all around until it stopped, presumably because all the bullets had been fired. The man then broke free and ran away to a vehicle which he drove off. He was carrying a green and white bag. Mr Makomva retreated into his house. He emerged about half an hour later to find the unconscious man gone and a pool of blood where he had been lying.

Mr Makomva identified the appellant as the man with the AK rifle. The rest of the evidence supporting these three convictions and linking them with the others is as follows:

1. Early the next morning a policeman found a dead man some 200 yards from Mr Makomva's house. He had been stripped and laid on the ground with his head on a green and white bag. The bag contained clothes and an AK rifle. The rifle was later linked by ballistic evidence to all the relevant scenes. The man had bruises on his forehead and a penetrating wound through the hips consistent with an AK rifle wound. He had lost a great deal of blood from that wound but had not bled significantly from the head wound.

Strangely Mr Makomva, when asked to look at the body, could not see the bruise on the forehead and thus could not say it was the man he knocked out. The court, properly in my

view, accepted that this was probably due to the great loss of blood by the dying man, and to Mr Makomva's obvious reluctance to look closely at the corpse. He did however identify the green and white bag and (for what it was worth) the blood-stained jeans and the AK.

2. One Japhet Sibanda, brother of the deceased, confirmed that on the afternoon of 3 September 1981 he saw his brother and the appellant together. This was credible evidence which the appellant denied hotly.
3. On 4 September 1981 and at Plumtree, an auxiliary police constable arrested a man driving a car erratically. The man gave his name as Alfred Mpala and his year of birth as 1958. These are the names and year of birth of the appellant. He gave a different address. The constable was sure the person he arrested was the appellant and he noticed a lot of blood on the back seat of the vehicle. His evidence was impressive and convincing.

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McNALLY JA

4. The claim by the appellant that he was already in South Africa by 25 August 1981 is disproved by the evidence of Japhet Sibanda and Pedzisayi Makomva and the constable from Plumtree.

The evidence is overwhelming that the appellant shot the deceased accidentally while struggling with Mr Makomva; tried to take him away in his car; and left him behind when he died.

The only question which exercised our minds was as to the intent to kill. The learned judge said:

"To my mind, if a man sets out to commit a crime, such as robbery, and takes with him a lethal weapon, he exhibits an intention to use that weapon against anyone who attempts to stop him or obstruct him in the commission of the crime. He exhibits, as in this case, a general intention to kill."

I would not wish to disagree with that general view of the law. He then continued:

"The accused saw his companion lying unconscious on the ground. He nonetheless recklessly and with total indifference to his co-robber kept his finger on the trigger hammer with the weapon pointing downwards spraying bullets all around them till it was empty."

Two points arise in this connection. Is it clear that the appellant saw his fellow-robber lying unconscious on the ground? And was he intentionally firing his rifle or was it discharged accidentally in the course of the struggle?

The evidence does not specifically reveal that the unconscious Wilson Ncube was visible from where the appellant was, but the inference is very strong that he was. It was at night but there were lights. The evidence of Mr Makomva is as follows:

"He (Wilson Ncube) turned towards the door and he was beckoning his companion to join him. Then I grabbed him here and I pushed him against the door frame. I did this violently. As a result he fell down. When he had fallen down I tried to run out. I then met up with another man who was armed with a gun. As he tried to point the gun at me, I struck him here. The gun went off, pointing at the wall of my house. As a result the bullet struck the wall. I

then grabbed the gunman from

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behind. The firearm continued to fire, the bullets going like this. (Indicates) The firearm stopped firing and then we started a physical struggle..." (The significance of the witness's indications was not recorded by the court.)

In cross-examination he said the unconscious man fell "within the doorway, with his head inside the house and the rest of his body outside". And later:

"As I was going out of the room, because the other man had fallen, I did not even take one step before I saw this man. He was pointing a gun at me. I hit him and the bullet hit the wall."

It seems to me from this evidence that the appellant must have known that his accomplice was lying nearby, and must have intended to shoot Mr Makomva with his first shot which however hit the wall harmlessly. It seems more likely than not however that the later shots were fired inadvertently and unintentionally or at least without the specific intention of hitting Mr Makomva during the course of the struggle between the two men. They cannot have been aimed at Mr Makomva, who was holding the appellant from behind. It must have been one of these shots which killed Wilson Ncube.

The law applicable in cases where an armed robber accidentally kills one of his accomplices was elaborated in the case of *S v Nkombani & Anor* 1963 (4) SA 877 (AD). In that case two men set out to rob a petrol station and in the course of a struggle with a petrol attendant the one fired a shot which hit his accomplice in the head, killing him.

STEYN CJ handed down a minority judgment in which he said that no more than culpable homicide was proved on the facts because (in relation to the person who fired the shot) he could not be said to have foreseen the possibility that he might kill his accomplice and because it was doubtful whether the fatal shot was fired intentionally.

The other members of the court were however satisfied on the facts that the shot had been fired intentionally at the petrol attendant and that anyone involved in the robbery would appreciate that anyone else involved could be shot dead whether deliberately or accidentally.

What is important in the relevant judgment, that of HOLMES JA, is that he seems quite clearly to accept that it was critical to determine whether or not

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the fatal shot was fired deliberately. He said, at page 894D-E:

"It is therefore unnecessary to decide what the legal consequences might have been if the shot had been fired accidentally."

I do not want to generalise about all accidental shootings in such circumstances. I bear in mind that the *aberratio ictus* rule has been discredited (See *S v Ncube* 1984 (1) SA 204 (ZSC)) and that we must look at the *mens rea* of the appellant vis-à-vis the deceased, using the criterion of

foreseeability to determine whether he subjectively foresaw the possibility that the deceased might be killed. (See *S v Mavhungu* 1981 (1) SA 56 (AD) at 67H.) It may be that an accidental shooting in the course of an armed robbery could occur in circumstances so bizzare that it could not be foreseeable or foreseen. In such a case, by analogy with the decision in *S v Nkwenja en 'n andere* 1985 (2) SA 560 (AD), a verdict of culpable homicide might be appropriate.

On the facts of this case however, I have no difficulty in coming to the following conclusions:

1. The appellant deliberately shot once at Mr Makomva, intending to hit him.
2. Therefore it is clear that he brought the AK with him with the intention to use it in the course of the robbery if necessary.
3. He must have foreseen and did subjectively foresee that a shot fired at one person could hit another (a fortiori with a fusillade of shots).
4. He was reckless of such a consequence.
5. He must have foreseen and did subjectively foresee that there could be a struggle in the course of which the gun, which was obviously cocked and ready to shoot, could go off just as it did.
6. He was reckless of such a consequence.

In all the circumstances I am satisfied that even though the fatal shot was probably not fired with the intention of hitting Mr Makomva it was fired in the course of a struggle consequence upon the firing of a shot aimed at him. The appellant's state of mind remained the same. He had at least a constructive intent to kill Mr Makomva. The shot, the struggle and the subsequent shots are inseparable from each other as elements of the *res*

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McNALLY JA

gestae. The killing of the deceased therefore was both foreseen (as a possibility) and intentional on the basis of *dolus eventualis*. I would adopt in this context the words of HOLMES JA in *Nkombani's* case *supra* at the foot of p 895 of the report:

"...he must have foreseen the possibility of bullets flying in a mobile shooting affray, and a confused and desperate scene in which anybody present could be hit..."

It seems to me that this conclusion is strengthened by reference to the decision in *S v Nhlapo & Anor* 1981 (2) SA 744 (AD) in which three armed robbers attacked three security guards transporting money. In the affray one of the security guards was killed and it was not clear whether the bullet that killed him was fired by one of the robbers or one of his colleagues. The court concluded that the appellants had *dolus indeterminatus* in that "they foresaw the possibility that anybody involved in the robbers attack or in the immediate vicinity of the scene, would be killed by cross-fire". Thus "the shooting of one guard by another was, as far as the robbers were concerned, 'an envisaged incident or episode' in the crime planned by them". The convictions and the sentences of death were confirmed.

It does not seem to me, in the final analysis, that a finding that the fatal bullet was not aimed to hit anyone makes a significant difference as far as the trial court's conclusions on extenuation are concerned. The court noted the possibility that the fatal shot had gone off accidentally, and held that even if that were so "I doubt whether on the strength of the principle of law enunciated in *S v Nkombani & Anor* 1963 (4) SA 877 you could have availed yourself of such evidence as an extenuating feature". In all the circumstances I would not disagree with such a conclusion.

However it must be stated that an irregularity occurred in the approach to extenuating circumstances. It seems from the record that extenuation, mitigation of sentence and aggravation of sentence were all combined. As a result a formidable list of previous convictions was placed before the full court at the stage when extenuation was under consideration.

This is a misdirection, as was clearly pointed out by RUMPF JA in *S v Shabalala* 1966 (2) SA 297 (AD). Only where the accused seeks to convince the court in evidence on extenuation of his good character may the State introduce rebutting evidence of previous convictions. In such a case the State should make an application to lead such evidence before adducing it.

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Hunt *South African Criminal Law and Procedure* 2 ed vol II p 388.

The previous convictions, three involving violence and ten involving dishonesty, appear to have weighed heavily with the learned judge. The question must be however, whether as a result of the irregularity there was a substantial miscarriage of justice - ss 11 (2) and (3) of the Supreme Court of Zimbabwe Act, 1981. I do not think that there was. The appellant led no evidence in mitigation, and his evidence at the trial was wholly untruthful. It amounts therefore to this - can one find extenuating circumstances in a situation where, having shot at and missed the householder he intended to rob, the appellant was then involved in a struggle with the householder in the course of which his weapon sprayed out its whole magazine of bullets, one of which hit and killed his companion?

Apart from the constructive intent, which is not of itself necessarily a factor of extenuation, I find nothing in these facts to lessen the moral blameworthiness of the appellant. I would not therefore interfere with the finding.

The learned judge in dealing with the lesser counts erred I think in treating Count Eight separately from the others in respect of sentence. The possession of arms of war was an essential and main ingredient in the other offences. Once he has been punished for those, it does not seem just that he should be entirely separately punished for possessing arms of war. In my view this was a misdirection. I would order that four years of the sentence imposed on Count Eight run concurrently with the other sentences. The effective prison sentence, allowing for the setting aside of the conviction on Count Six, is thus reduced to fifteen years.

Accordingly I would order as follows:

- "1. On Count One the appeal is dismissed and the conviction and sentence of death are confirmed.

2. On Count Six the appeal is allowed and the conviction and sentence are set aside.
3. On Count Eight the conviction is confirmed but it is directed that four years of the sentence of seven years should run concurrently with the sentences on the other counts.
4. For the rest the appeals are dismissed."

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McNALLY JA

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

Pro Deo

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DUBE v KHUMALO 1986 (2) ZLR 103 (SC)

Court Supreme Court, Bulawayo

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

25 June & 20 August 1986

Flynote

Criminal law - fraud - prejudice - whether fact that misrepresentee is induced into contract is prejudice.

Contract - enforceability - contra bonos mores - facilitates adulterous association - whether this immoral in case of unregistered customary marriage - illegality - ex turpi causa non oritur actio - inflexibility of maxim - par delictum rule - depart from.

Practice and procedure - pleading - illegality of contract - duty to plead where not apparent ex facie the transaction - joinder - deferment of judgment pending ascertainment of attitude of party not joined who should have been joined.

Headnote

The parties entered an agreement whereby appellant would purchase a house in the name of respondent. The use of respondent's name as purchaser involved a deception on the seller, the Municipality of Bulawayo, which would not have sold to the appellant himself. The purchase of the house was to allow the parties, both of whom were unhappy in their existing unregistered customary marriages, to live together in an adulterous association. This relationship foundering, the appellant demanded possession of the property from the respondent who refused to comply. In the magistrates court the appellant was refused relief on an application of the *par delictum* rule. On appeal:

Held, that the fraud on the Municipality was a criminal offence, the inducement to enter a contract with a person with whom a contract would not otherwise have been entered being sufficient prejudice.

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Held, further, that the inflexible rule *ex turpi causa non oritur actio* is of no application since the suit is not one to enforce the agreement which had already been performed and achieved its purpose when the Municipality was defrauded.

Held, further, that a contract furthering adultery is not *contra bonos mores* where the marriage which would be violated is an unregistered customary union which is not a valid marriage in law.

Held, further, that the respondent relying on the alleged immorality of the contract had a duty to allege and prove a valid marriage.

Held, further, that in the circumstances the *par delictum* rule should be relaxed in order to do justice between the parties.

Cases cited:

Conradie v Rossouw 1919 AD 279

Colonial Banking and Trust Co Ltd v Hill's Trustee 1927 AD 488

R v Hendrikz 1934 AD 534

R v Asner 1938 AD 416

R v Gilbert 1953 SR 94

R v Deale 1960 (3) SA 846 (T)

S v Reggis 1972 (1) RLR 110 (G)

S v Minnaar 1981 (3) SA 767 (D)

Pietzsch v Thompson 1972 (4) SA 122 (R)

Thornycroft v Vas 1957 (3) SA 754 (FSC)

Yannakou v Apollo Club 1974 (1) SA 614 (AD)

Mathews v Rabinowitz 1948 (2) SA 876 (W)

York Estates Ltd v Wareham 1950 (1) SA 125 (SR)

Jajbhay v Cassim 1939 AD 537

Petersen v Jajbhay 1940 TPD 182

Padayachey v Lebesse 1942 TPD 11

Albertyn v Kumalo & Ors. 1946 WLD 529

Rootes (Central Africa) (Pvt) Ltd v Mundawarara & Anor 1973 (1) RLR 57 (GS)

Osman v Reis 1976 (3) SA 710(C)

Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (AD)

Toekies Butchery (Edms) Bpk en Andere v Stassen 1974 (4) SA 771 (T)

A P de Bourbon SC for the appellant

R Majwabu-Moyo for the respondent

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GUBBAY JA

Judgment

Gubbay JA: The appellant, to whom I shall refer as "the plaintiff", sued the respondent, "the defendant", in the magistrates court in Bulawayo for an order compelling her to transfer to him or his nominee the right, title and interest under a written contract of sale of Stand No. 70769 Lobengula West from the Municipality of Bulawayo ("the Municipality"). In her plea the defendant denied that she had acquired the right, title and interest in the said contract of sale as the plaintiff's nominee or agent, averring that such acquisition was for her own account and benefit.

In the trial which followed the magistrate determined the factual dispute in favour of the plaintiff and upon an acceptance of his evidence as opposed to that of the defendant. A reading of the record fully justified that decision, and indeed there is no cross-appeal against it.

However, judgment with costs was given for the defendant, it being found that the verbal agreement of the parties that the defendant was to be the plaintiff's nominee in any contract of sale entered into with the Municipality was illegal on two grounds, neither of which justified the relaxation of the *par delictum* rule: First, the plaintiff and the defendant had conspired to defraud the Municipality into believing that the real and true purchaser of Stand No. 70769 was the defendant. And secondly, the object in purchasing the stand, upon which was a residential dwelling, was to further an adulterous relationship and so was against public morality and public policy.

The acceptable facts upon which the issues in the appeal fall to be resolved are these:

In July 1980, and during the subsistence of their respective marriages, the plaintiff and the defendant met and fell in love. Each was experiencing matrimonial problems and they found that they were able to give one another much-needed understanding and comfort. Soon it was decided that they should live together and to that end the plaintiff rented a single room in a house in the western suburb of Pelendaba. The accommodation proved to be totally

unsatisfactory. What the parties required was a house of their own where they would be able to settle down permanently in privacy and seclusion.

The problem was that the plaintiff was the registered owner of Stand No. 2416, New Magwegwe, which he had purchased in May 1969 from the Municipality for the occupation of himself and his family. His wife and children remained living there and to his certain knowledge it was contrary

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GUBBAY JA

to the long-standing policy of the Municipality to permit a person who already owned a stand in the western suburbs of Bulawayo to enter into a contract of sale with it in respect of a second stand.

So the plaintiff struck upon a scheme, approved of by the defendant, that the defendant should apply to the Municipality for the purchase of an improved stand, falsely representing herself as the prospective purchaser; it being understood by her that in the event of the sale of such a stand eventuating, any contractual rights of interest arising therefrom were to vest in the plaintiff.

In pursuance of their verbal agreement, the defendant completed and signed an application form in which she falsely represented that she was a spinster, self-employed as a hawker, earning an income of \$180 per month, with two minor male children. The names of the children given were those of her nephews. The plaintiff affixed his signature to the form as a witness. By virtue of the defendant's sex the consent of her legal guardian to the contract was required and it was the plaintiff who signed the relevant consent, misrepresenting that he was the cousin and legal guardian of the defendant.

Within a few months the Municipality approved the application, and on 28 April 1981 the defendant entered into a written contract of sale with it in respect of Stand No. 70769, Lobengula West. The price was \$4 070 and was to be paid by an initial deposit of \$425 and by minimum monthly instalments of \$32,50.

Upon the understanding that the defendant was no more than his nominee the plaintiff paid the deposit and occupation was taken. Thereafter the monthly instalments were met from the plaintiff's earnings; the defendant making no payment whatsoever to the Municipality.

The parties continued to live in harmony until the latter part of 1983 when their relationship soured to the extent that the defendant made it clear that she wished the plaintiff to remove himself from Stand No. 70769, proclaiming that as her name and signature, and not his, appeared as the purchaser of the property in the contract of sale, she was entitled to evict him. Initially the plaintiff resisted, but on 9 October 1984 left to live with his sister on the faith of an assurance that his doing so would in no way be regarded as a waiver of his rights.

The first matter to consider is whether the verbal agreement of the parties which preceded and motivated the defendant's application, embodied a

GUBBAY JA

conspiracy to defraud the Municipality; or to put the point more directly, was a fraud perpetrated upon the Municipality? If the answer is in the affirmative, the verbal agreement must be held to be offensive to public policy, for it concerned the commission of an indictable crime. See *Conradie v Rossouw* 1919 AD 279 at 314 *in fine*; *Colonial Banking and Trust Co Ltd v Hill's Trustee* 1927 AD 488 at 495; Wessels *Law of Contract in South Africa* 2 ed vol 1 paras 490-491, and the texts there cited; Christie *The Law of Contract in South Africa* at pp 347-348.

There is no doubt to my mind that although no direct financial prejudice resulted from the false misrepresentations made to the Municipality, for it has been paid, and continues to be paid, what is due to it under the contract of sale, nonetheless the element of prejudice necessary to establish the crime of fraud is satisfied. Hunt *South African Criminal Law and Procedure* 2 ed vol 2 at p 773, poses the question:

"...can it be said that there is prejudice where X fraudulently induces Y to make a contract which he would not otherwise have made, even though Y does not end up worse off (and it cannot be said that the worse off result was reasonably possible either)?"

The reasoned reply given is this:

"After all, if but for the misrepresentation Y would not have contracted, he has been forced into a contract which may cause him substantial inconvenience, and annoyance. He may find himself linked with someone with whom he would not otherwise have contracted. He may be put to a civil action to rescind the contract, and this will inevitably entail attorney and client costs, and waste Y's time and inconvenience him in other ways."

That view of the learned author is amply supported by authority and I respectfully associate myself with it. See *R v Hendriks* 1934 AD 534; *R v Asner* 1938 AD 416; *R v Gilbert* 1953 SR 94; *R v Deale* 1960 (3) SA 846 (T); *S v Reggis* 1972 (1) RLR 110 (GD); *S v Minnaar* 1981 (3) SA 767 (D).

Consequently as the Municipality was defrauded into entering into the contract of sale with the defendant, the preceding agreement of the parties, involving as it did the attainment of that very purpose, was illegal and void.

The second ground upon which it was contended that the verbal agreement of the parties falls foul of public policy and is *contra bonos mores* is that it

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had as one of its objects the securing of a residential property in order to facilitate the continuance of an adulterous association. It was therefore concerned with sexual immorality and so injurious to the honourable institution of marriage. This latter proposition, founded in the main upon the decision of MACAULAY J in *Pietzsch v Thompson* 1972 (4) SA 122 (R) at 126 B-C, was accepted as correct by Mr de *Bourbon*, who appeared for the plaintiff. (See also *Thornycroft v Vas* 1957 (3) SA 754 (FSC) at 760C). He submitted, however, that it applied only to a situation where there was in existence a marriage contracted under the civil law, and not to

one where the marriage was according to customary law and had not been solemnized in terms of the African Marriages Act [Chapter 238]. He cited an extract from Goldin and Gelfand's *African Law and Custom in Rhodesia* at p 216 to this effect:

"To constitute adultery it is essential that the woman must be validly married to the plaintiff. A husband who is married by customary law which was not solemnized in terms of s 3 of the African Marriages Act [Chapter 105] has no right of action for adultery (*Murumbiriva v Chief Nyashanu* 1962 SRN 29; *Shumba v Ticharewa* 1958 SRN 567; *Jefita v James* 1961 SRN 29; *Mason v Nyamuya Zhuwankinyu* 1971 AAC 1)."

I agree with Mr *de Bourbon*'s submission. Public policy is concerned with the protection and sanctity of valid marriages; marriages which the general law of the land recognises as such. An unregistered customary union is not regarded as a valid marriage for it is potentially polygamous.

What is to be decided, therefore, is whether the magistrate's finding that the plaintiff and the defendant were married by civil law is supported by the evidence.

There is no direct assertion by either of the parties as to the nature of their marriages. Neither was asked the vital question. This is not surprising for illegality was not pleaded by the defendant and not suggested to the plaintiff in cross-examination. It was only at the close of argument that the defendant's legal practitioner raised it as a defence.

I have read with some care the evidence of both parties and in particular the various passages to which my attention was properly directed by counsel. I do not consider that a probability is revealed one way or the other. Any conclusion based on these passages would be purely conjectural, and I remain unconvinced that the defendant, upon whom the *onus* lay, proved that

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GUBBAY JA

either the plaintiff or herself were married by civil law. The fault for that omission lay entirely with her. In this regard TROLLIP JA said the following in *Yannakou v Apollo Club* 1974 (1) SA 614 (AD) at 623 G-H:

"And if his defence is illegality, which does not appear *ex facie* the transaction sued on but arises from its surrounding circumstances, such illegality and the circumstances founding it must be pleaded. It is true that it is the duty of the court to take the point of illegality *mero motu*, even if the defendant does not plead or raise it; but it can and will only do so if the illegality appears *ex facie* the transaction on from the evidence before it, and, in the latter event, if it is also satisfied that all the necessary and relevant facts are before it."

I turn then to consider whether the plaintiff's claim for relief, based as it is upon an agreement which involved a conspiracy to defraud the Municipality, should be entertained.

There are two rules which are of general application: The first is that an illegal agreement which has not yet been performed, either in whole or in part, will never be enforced. This rule is absolute and admits no exception. See *Mathews v Rabinowitz* 1948 (2) SA 876 (W) at 878; *York Estates Ltd v Wareham* 1950 (1) SA 125 (SR) at 128. It is expressed in the maxim *ex turpi causa non oritur actio*. The second is expressed in another maxim *in pari delicto potior est conditio possidentis*, which may be translated as meaning "where the parties are equally in the wrong, he who is in possession will prevail." The effect of this rule is that where something has

been delivered pursuant to an illegal agreement the loss lies where it falls. The objective of the rule is to discourage illegality by denying judicial assistance to persons who part with money, goods or incorporeal rights, in furtherance of an illegal transaction. But in suitable cases the courts will relax the *par delictum* rule and order restitution to be made. They will do so in order to prevent injustice, on the basis that public policy "should properly take into account the doing of simple justice between man and man." As was pointed out by STRATFORD CJ in *Jajbhay v Cassim* 1939 AD 537 at 544-545:

"Courts of law are free to reject or grant a prayer for restoration of something given under an illegal contract, being guided in each case by the principle which underlies and inspired the maxim. And in this last connection I think a court should not disregard the various degrees of turpitude in delictual contracts. And when the delict falls within the category of crimes, a civil court can reasonably suppose that the criminal

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law has provided an adequate deterring punishment and therefore, ordinarily speaking, should not by its order increase the punishment of the one delinquent and lessen it of the other by enriching one to the detriment of the other. And it follows from what I have said above, in cases where public policy is not foreseeably affected by a grant or a refusal of the relief claimed, that a court of law might well decide in favour of doing justice between the individuals concerned and so prevent unjust enrichment."

It was again emphasised by GREENBERG JP in *Petersen v Jajbhay* 1940 TPD 182 that in determining where the justice of the matter lay, it was proper to consider that if the relief were refused to the plaintiff the defendant would be unjustly enriched at his expense (see at 191).

In this case, so it seems to me, the plaintiff was not seeking to enforce an illegal agreement. That agreement had been performed. It had achieved its purpose - the Municipality was defrauded. In consequence of it the defendant had acquired rights of respect of Stand No. 70769 without incurring any corresponding disadvantage. She had given no value for them. The plaintiff paid for their acquisition and continues to do so. And it was the official recognition that those rights vested in him and not in the defendant that he sought from the court *a quo*; in other words, the recovery of those rights from the defendant.

In my view the refusal to accord the plaintiff that relief allowed the defendant to be unjustly enriched at his expense. See *Padayachey v Lebeso* 1942 TPD 11; *Albertyn v Kumalo & Ors* 1946 WLD 529; *Rootes (Central Africa) (Pvt) Ltd v Mundawarara & Anor* 1973 (1) RLR 57 at 61 A-B; *Osman v Reis* 1976 (3) SA 710 (C) at 712H.

Moreover, the grant of the relief by the court *a quo* would not have prejudiced the position of the Municipality. The effect of the fraud, constituting as it did material misrepresentations, is to give the Municipality a choice of one of a number of remedies. It may ignore the contract of sale and if sued on it use the fraud as a defence. It may cancel the contract and claim restitution. It may claim cancellation, restitution and damages. It may treat the contract as binding and claim damages for any loss it has suffered. In sum, it is open to the Municipality to have the last say should it wish.

In addition, clauses 12 and 20 of the contract of sale offer further protection. Clause 12 reads:

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GUBBAY JA

"The purchaser shall not at any time before the said piece of land has been transferred into his name, sell the said piece of land, or cede, assign, transfer or make over any of his rights under this agreement without the written consent of the Municipality."

And clause 20 provides that the Deed of Transfer into the name of the purchaser shall contain a number of special conditions, one of which is that:

"...the said piece of land shall not be sold, or transferred without the consent of the Municipality of Bulawayo."

In the result I reach the conclusion that the court *a quo* erred in refusing to relax the *par delictum* rule. Accordingly I would allow the appeal with costs and alter the order of the court *a quo* to read:

"Judgment is entered for the plaintiff with costs."

One further matter requires comment. During the course of the appeal it was debated whether an application in terms of Rule 8(2) of Order 33 of the Magistrates Court (Civil) Rules 1980 should not have been made for the joinder of the Municipality as a party to the action. But, having been afforded sight of the correspondence which passed between the plaintiff's legal practitioners and the Municipality prior to the issue of summons, this court considered it unnecessary to follow the course adopted in *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (AD) at 663 and *Toekies Butchery (Edms) Bpk en Andere v Stassen* 1974 (4) SA 771 (T), and defer judgment until it was ascertained that the Municipality had no concern in being joined. For it was clear that the Municipality, having been appraised of the nature of the plaintiff's claim, did not desire to be involved in the action. That attitude is readily understandable, for as I have already mentioned, the grant of relief to the plaintiff will in no way prejudice any action the Municipality may wish to take against him. It has no direct interest in the dispute between these parties to protect. I think it desirable, however, that a copy of this judgment be sent to the Municipality, and it is so ordered.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Lazarus & Sarit appellant's legal practitioners

Sansole & Senda respondent's legal practitioners

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GARFIELD v MINISTER OF DEFENCE 1986 (2) ZLR 112 (HC)

Court High Court, Harare

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Mfalila J

Civil application

10 July & 3 September 1986.

Flynote

Court - contempt of court - denial of audience to party in contempt - discretion of court.

Headnote

The petitioner, imprisoned by a court martial, obtained an urgent rule *nisi* ordering *inter alia* his release from detention. The respondent failed to obey the order. On the return day counsel for the petitioner submitted that the court ought to deny the respondent audience. For the respondent it was submitted that the petitioner himself had placed the court in an invidious position by adopting an incorrect procedure rather than a review and seeking a decision on sufficiency of evidence in the absence of the record of the proceedings of the court martial.

Held, that a party in contempt, unlike a fugitive from justice, is not absolutely barred from being heard in a court of law but his cause may be entertained at the court's discretion.

Held, that good grounds existed to hear the respondent.

Cases cited:

Kotze v Kotze 1953 (2) SA 184

Hadkinson v Hadkinson [1952] 2 All ER 567 (CA)

Maluleke v Du Pont NO & Anor 1966 RLR 620

Neill v S 1982 (1) ZLR 142

Mulligan v Mulligan 1925 WLD 164

Van Duyker v District Court Martial & Anor 1948 (4) SA 691

Wessels v General Court Martial & Anor 1954 (1) SA 220

1986 (2) ZLR p113

MFALILA J

MJ Gillespie for the petitioner

GE Mandizha for the respondent

Judgment

Mfalila J: On 17 June 1986 this court (EBRAHIM J) upon the petitioner's urgent application issued a rule *nisi* returnable on Wednesday 25 June 1986 calling upon the respondent to show

cause, if any, why:

"(a) the petitioner should not be released from detention pending the confirmation or otherwise of the conviction sustained by him on Court Martial on the 11th day of June, 1986;

(b) the respondent should not be reinstated in rank pending the confirmation or otherwise of the aforesaid conviction;

(c) the respondent should not pay the costs of this application.

That this rule serve as a temporary order and that the petitioner be and is hereby reinstated in rank and ordered to be released immediately pending the return day.

That this order be served on the Officer Commanding of the Directorate of Legal Services by the Deputy Sheriff, Harare."

The return day was extended from time to time until 10 July when the matter came up for hearing with the respondent strongly opposing the confirmation of the rule.

On 16 June 1986, the petitioner filed this petition on a certificate of urgency praying for his release from detention and reinstatement in his rank pending confirmation or otherwise of the conviction he sustained on Court Martial on 11 June 1986.

The background of the matter is that the petitioner is a Warrant Officer and a regular member of the Air Force of Zimbabwe with responsibility for financial administration in particular the maintenance of Air Force Imprest Account. In January 1985 the usual annual audit could not be carried out because certain necessary documents apparently under the control of the petitioner went missing and were never traced. Accordingly the petitioner was arrested, detained and later charged in three counts with offences related to the loss of these documents. He was found guilty and sentenced to six months' detention in barracks and reduction in rank. In the petitioner's view there was no evidence to support the convictions and in any case the sentences were excessive. It was for these reasons that he petitioned this

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MFALILA J

court to order his release pending the confirmation or otherwise of the conviction "as the prejudice suffered by him at the moment hundredfold outweighs any possible prejudice that could be suffered by the Respondent in the event of his release", and that "it is also just and equitable that your petitioner retains his rank as Warrant Officer I pending confirmation or otherwise of the entire matter". As indicated this court granted the rule and made the relevant orders. But it is apparent and the respondent did not dispute this that the petitioner in defiance of the order of this court was not released and was not restored to his rank. It is for this reason that Mr *Gillespie* at the hearing contended on behalf of the petitioner that the respondent is in contempt of this court and that therefore he should not be heard.

Mr *Mandizha* who appeared for the respondent conceded that the respondent is in contempt, but he submitted that this fact cannot take away the respondent's right to be heard by this court. He said that it was open to this court *mero motu* or the petitioner to bring notice of motion proceedings against the respondent to show cause why he should not be committed for

contempt. After hearing both counsel on this point I ruled that I would exercise my discretion and allow the respondent to be heard and reserved reasons for my ruling which I said would be embodied in the main judgment.

The general rule is that a party in contempt cannot be heard or take proceedings in the same cause until he has purged his contempt, nor while he is in contempt can he be heard to appeal from any order made in the cause. (See Halsbury's *Laws of England* vol 9 Lord Hailsham ed). Thus in the South African case of *Kotze v Kotze* 1953 (2) SA 184 the court refused to hear in defence a husband who was in contempt. The facts in that case were that in 1947 the court had in divorce proceedings granted the applicant mother custody of three minor children of the marriage, reserving leave to both parties to apply for an alteration or amendment of such order on good cause shown. In 1948 the respondent unlawfully and without the applicant's knowledge or consent removed the child while it was attending school and had despite frequent requests refused to return the child. Applicant had applied for an order that the respondent should return the child or that the Sheriff be authorised to have the child returned to the applicant. The court held that as the respondent was in contempt of an Order of Court, he should not be heard unless there were circumstances present which entitled him to be heard. The learned judge HERBSTEIN J quoted with approval the remarks of ROMER LJ in the English case of *Hadkinson v Hadkinson* [1952] 2 All ER 567 (CA) that:

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"It is the plain and unqualified obligation of every person against, or in respect of whom an order is made by a court of competent jurisdiction to obey it, unless and until that order is discharged; and that two consequences flow from that obligation. The first is that anyone who disobeys an order of court is in contempt and may be punished by committal, or attachment or otherwise. The second is that no application to court by such a person will be entertained unless he has purged himself of his contempt,"

and that

"disregard of an order of court is a matter of sufficient gravity, whatever the order may be."

HERBSTEIN J then said he had no hesitation in following the above decision and stated at page 187F:

"The matter (ie obeying orders of court) is one of public policy which requires that there shall be obedience to orders of court and that people should not be allowed to take the law into their own hands."

The other case cited by Mr *Gillespie* in support of his contention that the respondent should not be heard is not relevant to the considerations in the present case. The decision in *Maluleke v Du Pont NO & Anor* 1966 RLR 620 dealt with the rights of a fugitive from justice or of one who had definitely placed himself beyond the reach of the law. The court held per QUENET JP that "the law will deny its protection to those who place themselves beyond its reach". The present case concerns a party who is within reach of the law but in contempt of court. The difference between a fugitive from justice and one who is merely in contempt was highlighted by this court in *Neill v S* 1982 (1) ZLR 142. In his judgment with which McNALLY J (as he then was)

concurrent, SQUIRES J stated:

"Despite the concession made by Mr Deeks, I am not at all sure that there is a discretion in the court where a litigant is a fugitive from justice. The matter after all is one of *locus standi in judicio*, the right and basis to approach the court for relief. And in our law it seems to be clear that the only category of person **who has absolutely no right** to institute proceedings at law is the fugitive from justice or outlaw."

And citing *Mulligan v Mulligan* 1924 WLD 164, SQUIRES J continued:

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"In the judgment of *Mulligan v Mulligan*, DE WAAL J (as he then was) investigated a number of old Roman-Dutch authorities on the subject, and it seems clear from them that exiles or fugitives from justice amongst others, appear to have laboured under a legal disability which exposed them to an exception to any suit instituted by them in civil proceedings. English Law appears to be to the same effect. An 'outlaw' - as that jurisprudence calls a fugitive from justice - can neither sue on his contract nor has he any legal rights which can be enforced."

When assessing the status of the fugitive, DE WAAL J stated that it did not matter how a person acquires this status whether by exile, banishment or voluntary flight from the jurisdiction but that:

"In either case the person, whether he be in exile or a fugitive from justice is not amenable to the processes of the court, and as such in my opinion, cannot invoke the authority of the court for the purpose of establishing his legal rights. Before a person seeks to establish his rights in a court of law he must approach the court with clean hands, where he himself through his own conduct makes it impossible for the process of the court (whether criminal or civil) to be given effect to, he cannot ask the court to set its machinery in motion to protect his civil interests."

These cases clearly spell out the consequences of being either in contempt or a fugitive from justice. In the present case the respondent is clearly in contempt. The rule issued by this court on 17 June ordered the release of the petitioner as well as reinstatement of his rank. The respondent has since consistently refused or wilfully failed to comply with these orders. The respondent chose not to obey an order of this court. I view this as a sad example of flouting orders of court by a government agency which on the contrary should be in the forefront of demonstrating that in an ordered society nobody should take the law in their own hands. For as ROMER LJ stated in the *Hadkinson* case *supra* disregard of an order of court is a matter of sufficient gravity, whatever the order may be. In these circumstances Mr Gillespie correctly stated that the respondent is in contempt and has forfeited his right to be heard by this court. However, unlike a fugitive from justice or an outlaw, a party in contempt is not absolutely barred from being heard in a court of law. The court can still hear him even before he has purged his contempt if the interests of justice demand it. This is because unlike a fugitive from justice who has placed himself beyond the reach of the law by leaving the jurisdiction, the person in contempt is within its reach, thus the weight of the law can descend on him at any time.

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MFALILA J

In *Halsbury's Laws op cit* it is stated that:

"Even in cases (such as the present) where the rule is *prima facie* applicable the court appears to retain a

discretion whether or not to hear the party in contempt, and may in its discretion refuse to hear a party only on those occasions when his contempt impedes the course of justice and there is no other effective way of enforcing his obedience."

It was on this principle that the court in the *Hadkinson* case *supra* decided to hear the mother and stated that as it was dealing with a matter that affected the welfare of a child, it was essential that it should have before it the views of the mother for a refusal to hear a person who is in contempt might result in irreparable injury to the child. The court therefore came to the conclusion that there might be circumstances in which the court would hear a person who was in contempt.

In the present case I decided to hear the respondent even though he is in contempt because of the unusual nature of the petition that is to say the petitioner asked the intervention of this court in a matter decided by a tribunal without the benefit of the record of proceedings in that tribunal.

Indeed this was one of the points taken by the respondent in his opposition to the confirmation of the rule. Mr *Mandizha* submitted several reasons why this court should not confirm the rule it issued on 17 June 1986. First he said that the petitioner adopted a wrong procedure. If, as it appears to be the case, he said, the petitioner wanted this court to review the proceedings of the Court Martial, he should have followed the procedure laid down in Rule 256 of the High Court Rules. This he did not do. Secondly he said that the petitioner was convicted and sentenced by a properly constituted tribunal, he should have followed the procedural steps provided in the Act to obtain the remedies in the Act instead of trying as he did to circumvent the Act in an attempt to obtain a remedy, ie release pending appeal, which is not provided by the Act. Thirdly he said that this court cannot really make any meaningful decision without having before it the record of the proceedings in the tribunal.

The petitioner is really asking this court to order his release pending confirmation or otherwise of his conviction and that no reasonable person or tribunal could convict on such evidence, and in support of this view he cited the alleged advice of the Judge Advocate to the tribunal which all the same convicted him against such advice. Mr *Gillespie* said that this court has the necessary jurisdiction to entertain the matter and explained that the petition

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MFALILA J

procedure was adopted because of the urgency of the matter and that the absence of the record is not the fault of the petitioner.

With regard to jurisdiction, there is no doubt on the power of this court to interfere, at the instance of a party, with the decisions of tribunals including military tribunals if they act without or in excess of their powers. Rule 256 of the High Court Rules provides both the power and the procedure for exercising this power. A somewhat similar point arose in the South African case of *Van Duyker v District Court Martial & Anor* 1948 (4) SA 691 where the appellant who was a Staff-Sergeant was charged before the District Court Martial with two counts. He was convicted and sentenced to reduction of rank and detention in barracks for 30 days. This decision was confirmed by all the high military authorities. In the appeal court GREENBERG JA stated at

page 694:

"It is common cause that the appellant had by then exhausted all his remedies under the Defence Act and the Military Code and he thereupon applied to the Transvaal Provincial Division for an order setting aside the conviction and sentence. It was not contended either before him or before this court that the District Court Martial was not properly constituted or that any of the respondents had been guilty of procedural irregularities of any kind; the ground on which the appellant claimed the intervention of the Provincial Division was that there was no evidence on which a reasonable person could convict him. The learned judge *a quo* after consideration of certain authorities, came to the conclusion that the absence of such evidence would entitle the court to grant the application, but he held that there was such evidence. In argument before us both Counsel were in agreement that the learned judge was correct in his view as to the ground on which the court could intervene.

It is clear in the first place that Courts Martial are tribunals whose powers and rules of procedure (including the admissibility of evidence) are defined by the Military Code ...these courts are therefore statutory tribunals and if they act in excess of their powers in convicting or sentencing any person, a superior court of law would have jurisdiction to set aside the conviction and sentence ...It appears from *Rex v Kalogeropoulos* 1945 AD 38 that to convict a person against whom there is no evidence is a much greater injustice than to convict him upon inadmissible evidence, and I think that on such a conviction a court of law could interfere. The phrase 'no evidence' covers a case where there is no evidence on which a reasonable person could convict..."

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MFALILA J

The same decision was made six years later in *Wessels v General Court Martial & Anor* 1954 (1) SA 220 and that the court can intervene at any stage not only at the end.

However in both these cases the courts of law were able to make independent judgments on the sufficiency of the evidence led in the tribunal from the tribunal records themselves. In the present case the petitioner has not only not exhausted the remedies available to him under the Act, but he is asking this court's intervention and holds that there was insufficient evidence before the tribunal to convict him not from the record of proceedings, but from what he says. I can think of no greater danger to administrative or judicial procedures. Mr *Gillespie* said that it is not the fault of the petitioner that the court did not have the record of proceedings in the tribunal and that the petition method was chosen because of the urgent nature of the matter. On the contrary I think it is very much the petitioner's fault that the tribunal record of proceedings is not before this court. The law does not provide for alternative procedure in urgent matters. Rule 256 is very clear and if the procedure provided there had been adopted the relevant people would have been served and the record provided. The availability of the record of proceedings is so important that s 71 of the Defence Act [*Chapter 94*] which provides powers for the confirming authorities, provides in subs (7) that except where a finding and sentence are confirmed a confirming authority shall not exercise any of the powers conferred by this section without first having called for and considered the court's statement of facts found proved and the reasons for judgment and having consulted with the Judge Advocate.

For these reasons I cannot confirm the rule issued on 17 June 1986 because there is no way in which I can make an independent assessment of the strength and reliability of the evidence on which the Court Martial convicted the petitioner. Accordingly I discharge the rule with costs.

D W Aitken & Co petitioner's legal practitioners

PIO v SMITH 1986 (2) ZLR 120 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & McNally JA

Civil appeal

5 August & 9 September 1986

Flynote

Constitutional law - elections - rejection of ballot paper setting aside election - court reluctant to do so - costs.

Interpretation of Statutes - reading "a" for "the" - reading provision couched in negative as if couched in positive - interpretation to advance intention of legislature.

Legislation - Electoral Act 1979, ss 63(2), 79(3)(e), 79(3)(d), 156; Electoral (Modification) Regulations SI 155A of 1985, s 6(1)(a).

Headnote

A court ought not to be astute to adopt a construction of a section which would have the effect of invalidating a vote where the intention of the voter has been indicated with certainty and where in all other respects the ballot paper is in order.

An election conducted substantially in accordance with the principles of the Electoral Act ought not to be invalidated on the ground that a narrow majority in favour of the successful candidate would not have been achieved if only a few eligible voters had not been discouraged from voting by encountering some modest inconvenience that could have been avoided had better foresight been exercised by those responsible for arrangements at the polling station.

An election should only be set aside where there is failure to comply in substance with the principles underlying the Electoral Act or where a mistake or non-compliance with the Act affected the result.

BECK JA

Cases cited:

Mtoba & Ors v Sebe & Ors 1975 (4) SA 413 (E)

Borough of Hackney Case (1874) 31 LTR 69

Morgan & Ors v Simpson & Anor [1974] 3 All ER 722 (CA)

Gunn & Ors v Sharpe & Ors [1974] 2 All ER 1058 (QB)

A P de Bourbon SC for the appellant

M T O'Meara for the respondent

Judgment

Beck JA: Voters on the White roll went to the polls on 27 June 1985 in the last Parliamentary election. The appellant and the respondent were the only two candidates to contest the Kadoma/Chegutu constituency. The next day, 28 June, the respondent was declared duly elected, 849 votes having been counted in his favour against 847 votes for the appellant.

The appellant petitioned the High Court for an order declaring the election for the above mentioned constituency void on the ground of certain alleged irregularities. One of these was conceded in the court below by the respondent. That concession was adhered to in this court, and correctly so. The undisputed irregularity was that the returning officer had allowed as a valid vote in favour of the respondent a ballot paper whereon the voter had signed his name in the space provided for a cross or a number.

In terms of s 63(2) of the Electoral Act, 1979, as read with s 79(3)(e), that ballot paper should not have been taken into account but had to be considered blank. The majority that was gained by the respondent must therefore be taken to be a majority of one only.

Two further irregularities were alleged. In respect of one of these the learned judge *a quo* found in favour of the respondent. In respect of the other he found in favour of the appellant.

The appellant however, was non-suited and was denied the relief he sought because written notice of the presentation of the petition, together with a copy of the petition, was served on the respondent two days later than the time allowed for service by s 141 of the Electoral Act; the provisions of that section in relation to the time within which service must be effected were held to be peremptory so as to render fatal any failure to comply strictly therewith.

By way of appeal and cross-appeal all these findings of the court below are challenged.

1986 (2) ZLR p122

BECK JA

I shall deal firstly with the alleged irregularity with regard to which the learned judge found in favour of the appellant. It was held that the returning officer should not have counted in favour of the respondent three ballot papers wherein a cross had been placed, not in the blank rectangle furthest to the right of the rectangle in which the respondent's name was contained, but in the very rectangle that contained his name. It was held that the returning officer is peremptorily obliged by s 79(3)(d) of the Act to reject and not to count any such ballot paper. That section is in these terms:

"79. (3) Subject to the provisions of subsections (6) and (7), in the case of an election for a White Roll member

where there are only two candidates for election, the returning officer shall reject and not count any ballot paper -

- (d) on which a cross or the figure 1 has been placed elsewhere than in the rectangle opposite the name of the candidate."

(I may say that the provisions of subs (6) and (7) have no bearing on the question that has arisen.)

I shall assume that the learned judge *a quo* was correct in holding, for the reasons that he gave, that this is not a directory provision only. I do not however, agree that it was shown that the provision had not been complied with in the three instances that I have mentioned.

The ballot papers that were used contained four vertical columns and three horizontal columns divided, by means of parallel vertical and horizontal lines, into twelve rectangles. The first vertical column contained, in the top rectangle, the words "Name of Candidate." The two rectangles immediately beneath it contained, respectively, the names of the appellant and respondent. The second vertical column contained, in the top rectangle, the words "Name of Party" and the two rectangles immediately beneath it contained, respectively, the names of the appellant's and respondent's parties. The third vertical column contained, in the top rectangle, the word "Symbol", and the two rectangles immediately beneath it contained, respectively, the symbols of the appellant's and respondent's parties. The fourth vertical column contained nothing in the top rectangle, and the two rectangles beneath it were similarly blank. Obviously, being blank, it is one of these two lower rectangles in the fourth vertical column that voters were expected to use when indicating, by means of a cross, the candidate of their choice.

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BECK JA

But a blank rectangle in the fourth vertical column is clearly not the only rectangle, on a ballot paper that is arranged in the way these ballot papers have been arranged, which complies with the description used in s 79(3)(d) of the Act. The rectangles in the second and third vertical columns of these ballot papers also do so, even though they are not blank rectangles. There is ample room in either of those rectangles for a voter to place a cross without superimposing it on the name, or on the symbol, of the party; and a cross so placed would most certainly, so it seems to me, be placed "in the rectangle opposite the name of a candidate".

It is true that the use of the definite article "the" suggests a particular rectangle, rather than just one of a number of rectangles; but that is not a sufficient warrant for reading the subsection - if it is to be treated as peremptory - as if the word "rectangle" were expressly qualified by the adjective "blank", or by an adjectival phrase such as "furthest to the right", so as to invalidate any votes indicated by a cross placed in either of the rectangles in the second or third vertical columns.

When a ballot paper is presented in the form in which these ballot papers were presented, a form in which there are not only a number of rectangles opposite the name of each candidate, but where the name of each candidate is itself in a rectangle of its own and indeed when all twelve of the smaller rectangles into which the ballot paper has been divided themselves form one large rectangle, then it seems to me that one is constrained to treat the definite article "the"

in s 79(3)(d) as if it were the indefinite article 'a'. And if s 79(3)(d) is to be so construed in relation to these particular ballot papers, then a cross placed opposite the name of a candidate in any one of the four horizontal rectangles, including the very rectangle in which the candidate's name is contained, should not be held to offend against s 79(3)(d). The court ought not to be astute to adopt a construction of the section which would have the effect of invalidating a vote where the intention of the voter has been indicated with certainty, and where in all other respects the ballot paper is in order.

It is not suggested that the crosses, in the three instances in question, were superimposed on the name of the respondent, an action that might be taken to indicate an intention to vote against the candidate rather than for him; it was alleged merely that the crosses were placed in the rectangles in which his name appeared. Opposite the respondent's name in that rectangle there is ample room for a cross to be placed without it being superimposed on any part of the respondent's name.

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BECK JA

Accordingly the returning officer acted correctly in my opinion in counting those three ballot papers as valid votes in favour of the respondent, and the court *a quo* was wrong in taking a contrary view.

I turn next to the remaining alleged irregularity, with regard to which the learned judge *a quo* held in favour of the respondent.

The complaint of the appellant was that certain forms were not available at the Norton polling station between 9.15 am and 4 pm on polling day, with the result that not less than three persons who could allegedly have voted and who would have done so had the forms been available at the Norton polling station between those hours, did not in fact vote. It was contended on behalf of the appellant that this temporary non-availability of these forms was an irregularity; and that, having regard to the majority of one only that the respondent gained, the result of the election would have been different had the three persons in question been able to vote since all three have said under oath that they would have voted for the appellant.

The forms in question are those for which provision was made in the Electoral Regulations 1979, contained in RGN No. 242 of 1979. Known as Form V 1, it is the prescribed claim form for registration as a voter under Chapter III of the Electoral Act 1979, s 22(1) of which provides:

"22. (1) Any person who wishes to be registered as a voter on the Common Roll or the White Roll shall complete the appropriate prescribed claim form and lodge it with the electoral officer."

The need to be registered as a voter before polling day was considerably modified prior to the 1985 Parliamentary elections. In particular the following provisions were enacted:

Section 14 of Act No. 13 of 1985 inserted the following subsection into the Electoral Act:

"24. (3) If a voter has applied for registration in terms of the National Registration Act, 1976 (No. 36 of 1976), and been issued with -

- (a) a notice in writing in terms of subsection (1) of s 7 of that Act; or
- (b) an identity document in terms of subsection (2) of s 7 of the Act;

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BECK JA

he need not be furnished or issued with a voters registration card in terms of this section."

And in SI 155A of 1985 the following provision was enacted:

"Confirmation, correction and transfer of registration.

6. (1) Notwithstanding any provisions of the Electoral Act, where the presiding officer for any polling station established for any constituency is satisfied that any person whose name does not appear on the roll for that constituency -

- (a) is registered as a voter or, by virtue of possessing a notice or identity document issued to him in terms of section 7 of the National Registration Act, 1976 (No. 36 of 1976), is deemed to have applied for such registration and is therefore entitled to be registered as a voter; and
- (b) is entitled to be registered as a voter on the roll for that constituency, whether or not he is registered on the roll for any other constituency; and
- (c) has not already voted in that election;

he may, **upon the application of that person**, register him as a voter on the roll for that constituency by entering, in a register to be kept by him for the purpose, the name and address of that person and particulars of the notice or identity document that person has produced and shall require that person to sign such entry."

The appellant contends that the phrase that I have emphasised, viz "upon the application of that person", means "upon completion of "the appropriate prescribed claim form" " which is referred to in s 22(1) of the Act, namely the Form V 1 that was set out in RGN No. 242 of 1979. But I do not think that is so, because if the person concerned is already registered as a voter (although for another constituency), as is envisaged by s 6(1)(a), he will of necessity already have completed a Form V 1 and it would be pointless supererogation to require of him that he do it again; if on the other hand, as is alternatively envisaged by s 6(1)(a), the person concerned possesses a notice or an identity document issued to him in terms of s 7 of the National Registration Act, then physical completion of Form V 1 is pointless because

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BECK JA

the person concerned is deemed, by the mere fact of such possession, to have applied already for registration as a voter, and indeed to be entitled to be registered as a voter. Moreover, the application referred to in the above quoted emphasised portion of s 6(1)(a) of SI 155A of 1985 is not an application that is to be lodged by the applicant with the electoral officer - as is the position with the "appropriate prescribed form" required by s 22(1) of the Act - but merely with the presiding officer of the polling station in question.

In the absence of any specific form in which the would-be voter under s 6(1) of the Statutory Instrument is required to cast his application, the phrase "upon the application of that person" cannot properly be construed to mean anything more than just "upon the request of that person" after satisfying the presiding officer of either of the matters referred to in s 6(1)(a), as well as of the further matters referred to in s 6(1)(b) and (c). Having so satisfied the presiding officer, the person concerned will, as is indicated by the heading to s 6(1), have either "confirmed, or "corrected, or "transferred" his registration (deemed or actual) as a voter. Thereupon, the presiding officer has to enter onto a roll kept for that purpose the person's name and address, and the particulars of the notice or the identity document issued to him under the National Registration Act, and upon signing that entry the person concerned may vote at the polling station.

In my view therefore any would-be voter wishing to exercise his right to vote under the provisions of s 6(1) of SI 155A of 1985 was not under any statutory obligation to complete Form V 1 at the polling station and the non-availability of such forms was not a breach of any statutory provision, to which our attention had been drawn, governing the conduct of the election.

The evidence discloses however that it was nevertheless thought that such would-be voters had to complete Form V 1 before they could vote, and that this view was shared or at least unquestioningly accepted by the candidates and by their helpers. A message was accordingly sent that more of these forms were needed at the Norton polling station and everyone expected that they would arrive before long. In the meanwhile any people affected by the non-availability of the forms were told by the candidates or by their respective helpers that the forms should soon be available. It was open to such people either to return later in the day to vote, or to proceed to another polling station for the same constituency and vote there, if they did not wish to wait for the forms to arrive. There were further polling stations at Selous, Warren Hills Golf Club and at the Harare Motel. This last mentioned polling

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station was the nearest of the three to Norton and was about 24 kilometres away.

The record does not disclose how many people altogether may have been affected by the non-availability of the forms at Norton, although the indications are that it was not more than just a handful; nor do we know how many, if any, of the people affected in fact waited or went to another polling station to vote, or came back to Norton later in the day and did so. Only in relation to three would-be voters is there evidence that they neither waited, nor went elsewhere to cast their vote, nor did they return later to the Norton polling station to do so. They are the three who, as I have already mentioned, testified on behalf of the appellant that had they cast their votes they would have voted for him.

It is by no means clear however that each of these three would-be voters would have been able, armed only with the documents that they brought with them to the Norton polling station, to satisfy the presiding officer that they were covered by the provisions of s 6(1) of SI 155A of 1985. Mrs Howlin, for instance, testified that, although entitled to become a citizen of Zimbabwe, she was not in fact a citizen of this country, had not registered as a voter, and had arrived at the

Norton polling station with her passport (obviously not a Zimbabwean passport) and her driver's licence. That evidence does not show that she could have brought herself, without more, within subs (a) of s 6(1) of SI 155A of 1985, and the completion by her of Form V 1 on her arrival at the polling station would have been of no immediate help to her.

Mrs Wrench said that she is a Zimbabwean citizen and was in fact already registered as a voter, presumably in another constituency, prior to polling day. In terms of SI 155A of 1985 she was therefore entitled to transfer of registration, for which purpose she needed to satisfy the presiding officer that she was already a registered voter (and had therefore already completed and lodged Form V I). The appropriate way of doing that would have been to produce to the presiding officer at Norton the voter's registration card issued to her on registration in terms of s 24(1) of the Electoral Act. Mrs Wrench did not suggest anywhere in her evidence that she had her voter's registration card with her or any other proof of prior registration. She merely said that 'we (referring in general apparently to people whose names were not already on the Kadoma/Chegutu constituency roll) had identity documents and passports and so on, but they were not accepted'. On the face of it, it would seem therefore that even if the forms had not run out while she was at the Norton

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BECK JA

polling station assisting at the appellant's table (she actually arrived there at 9 am before the forms ran out, but did not attempt to vote until later) she would in any event have first had to fetch, or send someone to fetch, her voter's registration card or other proof of prior registration in order to be able to satisfy the presiding officer of the first of the three requirements specified in s 6(1) of SI 155A of 1985. So she would in any event have had to wait until later in the day, and the fact that the forms had not yet arrived by the time she went home was of no consequence in her case.

Mrs Wrench made mention of her adopted son arriving at Norton to vote while she was there and being unable to do so. However, there is nothing in her evidence to show that he would have been able there and then to satisfy the requirements of s 6(1) of SI 155A of 1985. Apart from that, it also emerged from her evidence that he actually drove into Harare after leaving the polling station at Norton, in which event he would necessarily have driven past either the polling station at the Harare Motel or the polling station at Warren Hills Golf Club, depending on which road he took into the city from Norton, and he could readily therefore have voted at one or the other of those two polling stations had he been so minded. He was not available to give evidence himself and it is not known why he did not vote under these circumstances.

The third would-be voter who testified was Mrs McGhie who described herself as a citizen of Zimbabwe and entitled to be registered as a voter, but not in fact registered. She said that she arrived at the Norton polling station with her passport and her identity form. Although she did not explicitly say so, it may well be that by her "identity form" she meant to refer to an "identity document" issued to her in terms of the National Registration Act, 1976. She is the only one therefore in respect of whom there was some evidence to show that she arrived at Norton polling station sufficiently equipped to satisfy, there and then, all the requirements of s 6(1) of SI 155A of 1985. On being asked however to return later when the fresh supply of forms would

have arrived, Mrs McGhie, to use her own expression, was so irritated that she went off in a huff and could not be bothered to return later in the day, or to go to another polling station.

The facts of this matter are very different from those in two cases on which the appellant placed reliance: *Mtoba & Ors v Sebe & Ors* 1975 (4) SA 413 (E); and *Borough of Hackney Case* (1874) 31 LTR 69. In the *Mtoba* case *supra* ballot papers ran out well before the close of voting at twelve polling stations and it was held that "as the non-availability of the ballot papers was

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BECK JA

on so extensive a scale leading to the extreme collapse of the poll, the election as a whole was not conducted in accordance with the laid down principle that every voter must be afforded a full and free opportunity to exercise his vote. The departure from this principle was on a substantial scale'. So too in the *Borough of Hackney* case *supra* where two polling stations were shut all day and others were shut for part of the day, so that almost 5 000 voters were effectively prevented from voting, it was held that "an election which is conducted in such a way and which, by accident or by design, does not afford to a very large mass of the electors an opportunity of voting, cannot be a true election."

Both these cases are illustrations of the principle that "if the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not." (*Per* DENNING MR in *Morgan & Ors v Simpson & Anor* [1974] 3 All ER 722 (CA) at 728d-e.) Nothing remotely approaching such a state of affairs happened in this case. It is not suggested that more than just a very few persons arrived between 9.15 am and 4 pm at the Norton polling station in the expectation of obtaining registration under the provisions of the Statutory Instrument. Except for the possible case of Mrs McGhie it is a matter for speculation whether each one of those very few persons could then and there, or even at all, have satisfied the presiding officer on the matters provided for in the Statutory Instrument. Mrs McGhie may therefore have been the only person who arrived equipped to qualify herself for registration under the latitude allowed by the Statutory Instrument, only to be inconvenienced by being required to wait for the V 1 forms to arrive, or to proceed to another polling station, or to return to the Norton polling station later in the day. But even if a handful of other persons were unnecessarily confronted with that same inconvenience and, like Mrs McGhie, chose to forego their right to such registration rather than to wait, or go elsewhere, or return later, I do not for one moment consider that this could be said to constitute so gross a departure from the principles of the Electoral Act concerning the conduct of elections as to require this election to be set aside, regardless of whether or not the result of it was affected thereby.

However, while not contending that what occurred constituted, *per se*, an irregularity so serious that the election was not conducted in accordance with the principles laid down in the Electoral Act, the appellant does contend that it was nevertheless an irregularity, and that it cannot be said that it did not affect the result of the election, regard being had to the minuscule majority of one only.

BECK JA

Section 156 of the Electoral Act is designed to ensure that an election will not lightly be set aside. In *Gunn & Ors v Sharpe & Ors* [1974] 2 All ER 1058 (QBD) WILLIS J, at 1063j-1064a, said of the similarly worded s 37(1) of the Representation of the People Act, 1949:

"We are very conscious of the importance of the principle which occurs throughout the cases to which we have been referred that elections should not be lightly set aside, simply because there have been some informalities and errors, and that both s 13 of the 1872 Act and s 37 of the 1949 Act were framed with this principle in mind."

Section 156 of the Electoral Act reads as follows:

"156. No election shall be set aside by the High Court by reason of any mistake or non-compliance with the provisions of this Act if it appears to the High Court that the election was conducted in accordance with the principles laid down in this Act and that such mistake or non-compliance did not affect the result of the election."

In *Morgan v Simpson supra* at 725e-g, LORD DENNING, speaking of the corresponding s 37(1) of the Representation of the People Act, 1949, pointed out that it, like our s 156, is couched in the negative and says when an election is not to be declared invalid. He held however, having regard to the history of the law as to elections and to the case law, that the section should be construed as if it was couched in positive form. *Mutatis mutandis*, in relation to our s 156, that positive form would run thus:

"An election shall be declared invalid by reason of any mistake or non-compliance with the provisions of this Act if it appears to the High Court that the election was not so conducted as to be substantially in accordance with the principles laid down in this Act or that the mistake or non-compliance did affect the result."

So construing the section the court of appeal held that any breach of the election rules which is shown to have affected the result of an election is of itself enough to cause the elections to be set aside.

The facts of the matter before us reveal two features both of which, in my view, tell against the appellant's contention that the result of the election was affected by an irregularity.

BECK JA

In the first place the conclusion is not justified that any eligible voters were precluded from voting by an unnecessary insistence upon form V 1 being completed, coupled with the absence of those forms at the Norton polling station for some hours. It was not the insistence upon the use of that form, and the temporary absence of a supply thereof, that was the real reason for Mrs McGhie not casting a vote. It was her own decision not to wait, nor to return later, nor to proceed to another polling station, that was the direct and immediate reason why her vote was not cast. And if any other eligible voters reacted similarly to the inconvenience with which they were confronted on arrival at Norton polling station the same comment applies.

An election conducted substantially in accordance with the principles of the Electoral Act, as this election was, ought not to be invalidated on the ground that a narrow majority in favour of

the successful candidate would not have been achieved if only a few eligible voters had not been discouraged from voting by encountering some modest degree of inconvenience that could have been avoided had better foresight been exercised by those responsible for the arrangements at the polling station. The situation is hardly any different from that of voters who arrive at a polling station only to find that the number of people already there has resulted in queues and delays which could have been avoided with better organisation, and who choose not to vote rather than accept the inconvenience of waiting, or returning, or going to a less busy polling station. In short it seems to me that the responsibility for Mrs McGhie's lost vote, and for whatever other handful of votes may have been lost for similar reasons, lies at least as much at the voter's door as it does at the door of those responsible for the Norton polling station.

In the second place, one cannot be certain that the result of the election, meaning thereby the success of the respondent over the appellant, was in fact affected by the insistence upon use of the forms and the temporary absence of a stock of them at the polling station. Without intending to cause the slightest slur on Mrs McGhie's honesty, I think courts should be properly cautious in election cases about accepting the *ipse dixit* of people who did not vote, as to the manner in which they would have voted. In cases such as *Morgan v Simpson supra* and *Gunn v Sharpe supra* the courts knew as a fact that the result of the election had been affected, because the votes in dispute had been cast and the ballot papers revealed for which candidate each of the disputed votes would have gone had they been counted.

Even if the court were to accept without reservation Mrs McGhie's assertion regarding the candidate for whom she would have voted, the difficulty

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BECK JA

remains that the respondent testified that a few of his professed supporters, as well as an individual whose professed allegiance was unknown, were also confronted with the same inconvenience with which Mrs McGhie was confronted. So she may not have been the only qualified voter who allowed herself to be discouraged from voting, which renders it a matter for speculation as to what the result of the election would have been, despite the majority of one only, if the forms had been available at all times throughout the day.

Accordingly it is my view that no grounds have been shown for setting the election aside.

The conclusion that the appellant failed to show any ground for invalidating the election makes it unnecessary to consider whether the court *a quo* was correct in holding that the appellant had to be non-suited because written notice of the presentation of the petition, together with a copy of the petition, was served on the respondent two days later than the period of ten days which is allowed by s 141 of the Electoral Act.

In fairness to the appellant's legal practitioner it is perhaps necessary to comment that the fault was really not his, as was suggested by the learned judge, because the papers were put into the hands of the Deputy Sheriff when four days still remained for service to be effected timeously, and the Deputy Sheriff was asked to effect service as a matter of urgency. The lateness of service was due rather to an understandable reluctance on the part of the Deputy

Sheriff to incur unnecessary costs by travelling a long distance to the respondent's farm to effect service when it was expected that service could economically and timeously be effected in Harare where the respondent was expected to be. But for a misunderstanding between the respondent and the Deputy Sheriff's office over a telephonic message, service would in fact have been effected in Harare before it was too late.

The court *a quo*, while it dismissed the petition, ordered each party to bear his own costs. It did so because, in terms of its judgment, although the respondent won on two issues, the petitioner won on one. It has been my conclusion however that the court *a quo* incorrectly held in favour of the petitioner on that one issue, namely, the issue as to whether the returning officer acted correctly in treating as valid the three ballot papers where the cross had been put in the same rectangle as that in which the candidate's name appeared. The respondent has noted a cross-appeal against the order of costs that was made in the court below.

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BECK JA

In my view the respondent is entitled to an alteration of that order. Both in the court *a quo* and in this court there is no reason to depart from the general rule that costs should follow the result. There has been no vexatious conduct, nor any unfounded allegations or unfounded objections, nor any needless expense that can be attributed to either party, so as to justify an apportionment of costs in terms of s 151 of the Electoral Act.

In the result therefore the appeal is dismissed with costs and it is ordered that the costs of the proceedings in the court below are also to be borne by the appellant (petitioner). It is determined in terms of s 143(3)(a) of the Electoral Act that the respondent was duly elected.

McNally JA: I agree.

Dumbutshena CJ: I agree.

Gill, Godlonton & Gerrans appellant's legal practitioners

Coghlan, Welsh & Guest respondent's legal practitioners

1986 (2) ZLR p134

S v KUGOTSI 1986 (2) ZLR 134 (HC)

Court High Court, Harare

Samatta J

Criminal review

17 September 1986

Flynote

Criminal law - receiving stolen property - property received not stolen - correct verdict where animus furandi present is theft.

Headnote

The accused had been found in possession of \$500 and certain items of clothing. The money had been given to the accused by the four-year-old son of the complainant. The accused must have known that the four-year-old would not have had the authority to hand over the money but in view of the age of the child the money could not have been stolen. A conviction of receiving stolen property set aside and a verdict of guilty of theft substituted.

Judgment

Samatta J: The accused, who is aged 16, was charged in the magistrates court at Guruve with the theft of \$700 alternatively with receiving the sum knowing it to have been stolen by "some person to the prosecutor unknown". He pleaded not guilty to theft and guilty to the alternative charge and was sentenced to receive a moderate correction of 6 cuts with a light cane. Since receiving stolen property knowing it to have been stolen is, in terms of s 205 of the Criminal Procedure and Evidence Act [*Chapter 59*], a competent verdict on a charge of theft, the alternative was, in my opinion, redundant.

Was the magistrate right in law to convict the accused, as he did, of the alternative charge? This is the question I have to decide in this matter.

The State outline, which the accused admitted to be correct, read as follows:

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SAMATTA J

- "1. On the 12th October, 1985 and at about 14.00 hrs, complainant withdrew some money amounting to seven hundred dollars (\$700,00) and placed it in his house in a display cabinet.
2. It is believed the accused entered the house, whilst open took the money which was in the display cabinet and went for shopping. He bought a number of clothes and a medium size trunk box and placed all his clothing in there (new).
3. On the 14th October, 1985 and at about 19.00 hrs, complainant checked for his money from where he had placed it and found same missing. He carried out some enquiries and through information received, he approached the accused.
4. Accused, when asked where he had got \$500,00 cash he was found in possession of and a trunk box full of new clothes, replied: 'The son of complainant aged four years had approached me and asked me to make a wire toy car and I told him that he was to pay for the work done'. After the wire toy car was completed, the accused alleges, ...he...asked the 4-year-old child to go and get the money for the work done.
5. The accused alleges that the 4-year-old child then brought to him \$700,00...He took the money from the child and went shopping.'

The accused's admission of the accuracy of these facts was followed by the following questions

and answers :

"Magistrate: [You] understand and agree with facts?

Accused: Yes.

Magistrate: [Do you] admit receiving \$700 from a 4-year-old child as alleged?

Accused: Yes.

Magistrate: When you received this money you knew that it had been stolen?

Accused: Yes, I suspected so.

Magistrate: Did you appreciate you were committing an offence?

Accused: Yes.

Magistrate: Any right or excuse?

Accused: No.

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SAMATTA J

Magistrate: Any defence to offer?

Accused: No.

Magistrate: Is your plea an admission of the charge, facts and elements?

Accused: Yes.

Magistrate: Anything else to say?

Accused: No."

Since the State already knew that the accused would allege that the 4-year-old son of the complainant had given the \$700 to him, it is difficult to understand why the charge alleged that the money was stolen by a person to the prosecutor unknown. If the State did not accept that the child had taken the money, it should not have brought the receiving charge at all, let alone accepted a plea to it. Be that as it may, taking into account all the relevant matters, including the accused's admission that, when he received the money, he suspected that it had been stolen, the conclusion that the accused knew, at the time of receipt, that the complainant's son was not the owner of the cash and had no authority from the owner to give it to him seems ineluctable. It follows that the accused acted *animo furandi* when he accepted the money. But on those facts, he could not, in law, be convicted of the crime of receiving stolen property knowing it to be stolen, because when he received it the money was not *stolen* property. Due to his age the complainant's son is, in law, incapable of criminal conduct. His conduct in taking the money from the display shelf and handing it over to the accused could not, in law, therefore, constitute theft. No crime of receiving stolen property knowing it to be stolen is committed if the property in question is received, as in the present case, from a person who is *doli incapax*. In those circumstances, the "receiver" would, if he acted *animo furandi*, be guilty of theft. There is no doubt, as already remarked, that in the present case the accused acted *animo furandi*. The

verdict of the court *a quo* should, therefore, have been "Guilty of the main charge and not guilty on the alternative charge". I would alter the verdict accordingly. Having given the matter careful consideration, I am of the opinion that there is no warrant for interfering with or altering the sentence which was meted out to the accused. I would allow it to stand.

Sansole J: I agree.

1986 (2) ZLR p137

ATTORNEY-GENERAL v MUNGANYI 1986 (2) ZLR 137 (SC)

Court **Supreme Court, Harare**

Beck JA & McNally JA

Criminal appeal

15 & 25 September 1986

Flynote

Roads and Road Traffic - driving - reckless driving - a higher degree of negligence - no *dolus* required.

Legislation - Road Traffic Act 1976 s 44(1).

Words and Phrases - "reckless".

Headnote

"Recklessness" has a well-settled meaning in the context of reckless driving and is one of the categories of negligence involving a gross and aggravated form of negligence. It does not require any element of *dolus*.

Cases cited:

R v Phillipson 1957 (1) SA 114 (SR)

R v Usiye 1958 (2) SA 379 (SR)

R v Ellis 1959 (4) SA 497 (SR)

S v Van Zyl 1969 (1) SA 553 (AD)

R v Rundle 1953 (2) SA 662 (SR)

R v Gochin 1955 (1) SA 412 (SR)

R v William 1957 (2) SA 531 (SR)

R v Greenland 1962 (1) SA 51 (SR)

R v Chitanda 1968 (1) SA 427 (RAD)

R v Georgiou 1969 (3) SA 159 (RAD)

S v Ephraim 1971 (1) RLR 14 (AD)

S v Shupika 1973 (2) SA 471 (RAD)

Moyo v S AD-102-78 (unreported)

S v Chikeya 1983 (1) ZLR 266 (SC)

1986 (2) ZLR p138

BECK JA

H R J F Fischat for the appellant

S Moyo for the respondent

Judgment

Beck JA: This is an appeal by the Attorney-General, in terms of s 69 of the Magistrate's Court Act [Chapter 18], against the acquittal of the respondent in a magistrates court.

The respondent was charged, on the main count, with what is commonly known as drunken driving. In the alternative she was charged with reckless driving in contravention of s 44(1) of the Road Traffic Act No. 48 of 1976. The magistrate acquitted her on both counts. The Attorney-General sought leave to appeal against the acquittal on the main as well as the alternative count, but was granted leave to appeal in respect of the alternative count only.

On behalf of the respondent it was conceded before us that the trial magistrate misdirected herself in acquitting the respondent on the alternative count. However, the State's contention that the respondent should have been convicted of reckless driving, as charged, was resisted; it was contended for the respondent that the only offence established on the evidence was that of negligent driving

The unchallenged facts of the matter were that the respondent was driving homewards in Harare at a normal speed of approximately 50 to 60 kph at about 7 pm on a night in October 1984 when her car veered to the left off the tarmac surface of the road onto the dirt verge where it narrowly missed a lamp-post, then veered back to the right across both traffic lanes on the left half of the tar road and across the centre line of the road into the right-hand half of the road. From there her car veered left once more across the left-hand half of the road, only to veer right again so as to cross back into the right-hand half of the road where she collided in rapid succession with two cars coming from the opposite direction.

No explanation for this extremely erratic driving over a distance of some 300 to 350 metres was given by the respondent. She denied that she was drunk, and the State could not prove that she was. She did not claim that her car developed any sudden steering defect, or that she found herself, for whatever reason, in any state of emergency or incapacity. All she could say was that

she was emotionally upset that day because she and her husband had had a row that morning and that during the day she had decided to leave him. The oncoming vehicles with which she collided had their lights on and were readily visible to her. Indeed, she found herself constrained to agree with a

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BECK JA

suggestion by the prosecutor that the manner of her driving, for which she could give no excuse, was such that it could be considered reckless.

In argument before us, Mr *Moyo*, who appeared for the respondent, accepted that her conduct was negligent, and seriously so. He did not resist Mr *Fischat's* submission that her negligence could properly be described as gross. His sole contention was that negligence, however gross, can never constitute recklessness for the purposes of the Road Traffic Act. He submitted that recklessness can only be established where a conscious advertence by the accused to the risks involved in his conduct is proved. Reckless driving, he contended, requires *dolus*, whether it be *dolus directus* or *dolus eventualis*, and not just *culpa*.

This submission is founded upon three judgments of YOUNG J which are to be found in the cases of *R v Phillipson* 1957 (1) SA 114 (SR), *R v Usiye* 1958 (2) SA 379 (SR), and *R v Ellis* 1959 (4) SA 497 (SR). All three judgments, however run counter to judicial authority here as well as in South Africa.

The South African Appellate Division in *S v Van Zyl* 1969 (1) SA 553 (AD) decided that reckless driving includes gross negligence and that a conscious awareness by the accused of the danger involved is not a necessary ingredient of the offence.

In Zimbabwe the cases have uniformly been to the same effect and the abovementioned judgments of YOUNG J have been held to be incorrect.

In *R v Rundle* 1953 (2) SA 662 (SR) it was said that s 125(1)(a) of the then Roads and Roads Traffic Act [Chapter 257] did not create two separate offences, viz. negligent driving and reckless driving but that driving recklessly and driving negligently were respectively a more serious and a less serious aspect of the same offence.

In *R v Gochin* 1955 (1) SA 412 (SR) MORTON ACJ said, at 417A:

"From the juristic point of view, recklessness in s 125 approximates to *culpa lata*, negligence in that section to *culpa levis*, and lack of due care and attention to *culpa levissima*."

In *R v William* 1957 (2) SA 531 (SR) MURRAY CJ after referring to the view adopted by YOUNG J in *Phillipson's* case *supra* that the difference between recklessness and negligence is, for the purposes of the offences of reckless

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BECK JA

and negligent driving no less than for other purposes in law, the difference between advertence and inadvertence, and that it is therefore logically fallacious to say that reckless driving is merely a higher degree of negligent driving, went on to say, at 533F:

"Whether or not they are guilty of the logical fallacy referred to, there are numerous instances in which the decided cases on the statutes both in this Colony and in the Union penalising improper driving of motor vehicles have treated recklessness as an aggravated degree of negligence."

In *R v Greenland* 1962 (1) SA 51 (SR) BEADLE CJ expressly disapproved of the view taken by young J in the cases of *Phillipson* and *Ellis supra* and reiterated that the better view was that the word "recklessly" in the statute 'means nothing more than a gross or aggravated form of negligence. He commented that if the Legislature intended the word "recklessly" to mean something entirely different from "negligently", one would have expected it to have created two separate offences (at 53 E-G).

The Act was amended in 1966 in such a way that the words "recklessly" and "negligently" no longer appeared in juxtaposition to each other in the same sub-section, as had formerly been the case, but were now contained in separate sub-sections, so that the new section, viz s 218 of Chapter 289, reads thus:

"218. (1) Any person who drives a vehicle upon any road -

(a) recklessly;

(aa) negligently;

(b) ...

shall be guilty of an offence ..."

This amendment, coming - as it did - on the heels of the comment that the Chief Justice had made in *Greenland's* case *supra* gave scope for the contention that its very purpose was to make the offence of driving recklessly distinct and separate from that of driving negligently, and that the Legislature's intention was that the offence of reckless driving was henceforth to be understood in the sense adopted by YOUNG J in *Ellis'* case *supra* and in the earlier cases of *Phillipson* and *Usiye supra* to which I have referred.

That very argument was advanced before BEADLE CJ and QUENET JP in *R v Chitanda* 1968 (1) SA 427 (RAD), only to be rejected. The same argument has been repeated by Mr Moyo before us in this appeal, based upon the

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BECK JA

circumstances that in the current Road Traffic Act, No. 48 of 1976, the offences of negligent driving and reckless driving are separately constituted in two sections of the Act, namely ss 43 and 44.

The answer to Mr Moyo's argument is no different to the answer that was given by BEADLE CJ in the following passage which appears at 429B-H of *Chitanda's* case *supra*:

"The answer to this argument, however, seems to me to be this. In many of the cases dealing with 'driving recklessly' in which the word 'recklessly' has been regarded as being the equivalent to gross negligence, the word has been construed as if it stood alone and the court has not in these decisions been influenced by its juxtaposition to the word 'negligently' in arriving at its conclusion. See, for example, *Gochin's case supra* at p 17, and *Rex v Mahametsa*, 1941 AD 83, CENTLIVRES JA at p 86. What I said in the passage of *Greenland's case supra* just quoted is merely an additional argument reinforcing the meaning given to the word 'recklessly' in the earlier cases. My *dicta* cannot be construed as suggesting that if 'driving recklessly' and 'driving negligently' were two separate offences then a different meaning would necessarily have to be given to the word 'recklessly'. In these circumstances I hardly think it can be assumed that the Legislature would have paid the close attention to my *dicta* in *Greenland's case* which counsel flatteringly suggests. Rather, I think it can be assumed that the Legislature, knowing the word 'recklessly' in the context of 'driving recklessly' had been decisively determined by our courts, would have intended to leave the meaning as so determined undisturbed. It seems to me the sole object of dividing the old sub-section into two separate sub-sections, and to create two distinct offences, was to provide for a mandatory punishment of the suspension of a driving licence in the case of the more serious manifestation of dangerous driving (that is 'driving recklessly'), while not insisting on the mandatory suspension of a driver's licence in the less serious manifestation of dangerous driving (that is 'driving negligently').

In any event, it seems to me the same result is reached by another approach. The whole object of s 218 is to protect the public from the results of the dangerous driving of a motor vehicle. The emphasis is on the consequences of the accused's driving and not on his personal intention. Had the Legislature intended to import into the offence of 'driving recklessly' the element of an express intent I think it would have said so explicitly by using some such words as 'knowingly' or 'wilfully'

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BECK JA

in s 218(1)(a). This is one of those cases where the principle enunciated in *Stainer v R* 1956 R & N 199 and in *Rex v Wallendorff and Others* 1920 AD 383, applies. If the Crown proves the manner of the accused's driving was 'reckless' in the sense in which this word has been construed in Rhodesia in the past, then it brings the accused within the statute and an *onus* is cast on him to prove on a balance of probabilities 'that the violation of the law which had taken place had been committed ...innocently so far as he was concerned' (see *Wallendorff's case supra*, SOLOMON J A at p 401). This is not an offence where any *onus* is placed on the Crown to prove a specific intent on the part of the accused."

Section 44 of the Road Traffic Act of 1976 still refers to the offence of driving "recklessly" without any qualification of that word by the use of some such words as "knowingly" or "wilfully", so it is even clearer now than it was in 1968 that the Legislature did not intend to depart from the meaning of "reckless" driving that was re-affirmed by the Rhodesian Appellant Division in *Chitanda's case, supra*.

Decisions subsequent to *Chitanda's case supra* have not departed in any way from that well-established meaning of "recklessly" in relation to the offence of driving recklessly. Thus, in *R v Davis* 1969 (2) RLR 88 (RAD), *Chitanda's case supra* and *Gochin's case supra* were both referred to with approval. In *R v Georgiou* 1969 (3) SA 159 (RAD) the view was expressed that the appellant, whose driving was 'negligent to a very high degree' was lucky not to have been charged with reckless driving. In *S v Ephraim* 1971 (1) RLR 14 LEWIS JA at p 19B referred to 'gross negligence or recklessness' as though they are synonymous terms in relation to dangerous driving. In *S v Shupika* 1973 (2) SA 471 (RAD) the Appellate Division was confronted with the converse argument to that which was advanced in *Chitanda's case supra*. It was contended on behalf of Shupika, who had deliberately driven at a pedestrian in order to terrify

him and make him jump for his life, that 'reckless driving is concerned only with gross negligence and here there is an element of *dolus* in the driving that is not the offence of reckless driving' (p 472G). BEADLE CJ went on to say of this novel submission:

"It is not surprising that Mr *Kennedy Grant* can find no authority whatsoever, in support of this proposition. It is quite true that in such cases as *R v William*, 1957 R&N 186, and *R v Chitanda*, 1968 (1) RLR 47, the judgments state that gross negligence constitutes reckless driving, but these cases were concerned with the argument that gross negligence did not constitute reckless driving. They were concerned

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BECK JA

with the argument that before an accused could be convicted of reckless driving there must be an element of *dolus* in the case, and these cases pointed out that that was not the law, that gross negligence was sufficient to found a charge of reckless driving. None of the cases, however, state that if the accused deliberately intended to drive in the manner he did, that would not be reckless driving. It seems to me absurd to suggest that that is the law because though gross negligence in the driving of a motor vehicle constitutes reckless driving, deliberately driving a vehicle dangerously must, *a fortiori* constitute the crime. In many typical 'reckless driving' cases the accused may be guilty of actual *dolus*."

Finally, in *Moyo v S* AD-102-78 (unreported) the Appellate Division, *per* DAVIES JA, accepted a submission that, on the authorities, 'recklessness in the context of reckless driving means a gross and aggravated form of negligence amounting almost to wilfulness.'" And in the recent case of *S v Chikeya* 1983 (1) ZLR 266 this court said, *per* GEORGES JA (as he then was) at p 268 F-G, in relation to sentencing an accused for culpable homicide arising from bad driving, that "... in characterising the negligence of the appellant it might be more useful to follow the categories laid down in the Road Traffic Act rather than to invent terms such as 'gross' which are by nature difficult to define". The learned judge went on to refer to s 44 of the Act, which creates the offence of reckless driving as one of the categories of negligence laid down in the Act.

There is no question but that this line of cases, and others as well, have given a well-settled meaning to "recklessness" in the context of reckless driving against which it is futile to attempt to revive the oft-laid ghost of *Ellis*' case *supra* on which Mr *Moyo* has relied.

The respondent's driving was undoubtedly grossly negligent, as has correctly been conceded, and therefore reckless. Accordingly the Attorney-General's appeal is allowed and the respondent is convicted of reckless driving in contravention of s 44(1) of the Road Traffic Act of 1976. She is sentenced to a fine of \$300 or to sixty days' imprisonment in default of payment.

The question now arises as to what must be done about the mandatory prohibition from driving for a period of not less than six months which must be imposed in terms of s 44(3)(a)(i) of the Act upon a first conviction for reckless driving. We have been informed that the respondent, with the prior knowledge of the Attorney-General, who raised no objection thereto, has left

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BECK JA

the country to pursue a two-year course of study overseas and it is not known if she will return to Zimbabwe before the end of that period. She has, however, left her driving licence in the possession of her legal practitioner. Because of her absence there is no point in now remitting the matter to the trial magistrate for an investigation into the possible existence of special circumstances as to why such a prohibition order should not be made. However, no special circumstances are apparent on the fact of the record, and in the light of her absence from the country it hardly seems possible that there could be such special circumstances at the present time. Accordingly it seems to me that the only appropriate order to make is to order that the respondent be prohibited from driving for six months, but with the proviso that she is given leave, if she so wishes, to apply to the trial magistrate, on written notice to the Attorney-General, for his prohibition order to be set aside if she can satisfy the trial magistrate that special circumstances exist within the meaning of sub-section (4) of s 44 of the Act.

McNally JA: I agree.

Scanlen and Holderness, respondent's legal practitioners

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S v CHIKUMBIRIKE 1986 (2) ZLR 145 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Criminal appeal

8 October 1986

Flynote

Appeal - bail - right to appeal against decision of judge of the High Court refusing bail - nature of such appeal
- criminal cases - right of appeal in.

Criminal procedure - bail - appeal against refusal by judge.

Legislation - High Court of Zimbabwe Act 1981 s 44.

Headnote

An unfettered right of appeal in criminal cases is given by s 44(1) of the High Court of Zimbabwe Act, accordingly an appeal lies to the Supreme Court against the refusal of a judge of the High Court to admit a person to bail. The court of appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably as to vitiate its decision

Cases cited:

S v Mohamed 1977 (2) SA 531 (AD)

Paweni v Attorney-General 1984 (2) ZLR 39; 1985 (3) SA 720 (ZSC)

A P de Bourbon SC for the appellant

Y Omerjee for the respondent

Judgment

Beck JA: This is an urgent appeal against the refusal by a judge of the High Court sitting in Chambers, to admit the appellant to bail. The appellant has been arrested and has been held in custody on suspicion of involvement in a recent murder.

1986 (2) ZLR p146

BECK JA

State Counsel has taken the point that there is no right of appeal to this court in matters of this nature. He accepts that the matter is a criminal one and not a civil case and in doing so I am satisfied that he is correct. That has, in fact, been decided by the South African Appellate Division in the case of *The State v Mohamed* 1977 (2) SA 531 where under similar circumstances TROLLIP JA said at 539H:

"...although (the proceedings) are civil in form, they are criminal in substance, and must be so regarded for the purposes of the relevant sections of the Supreme Court Act."

The right of appeal from the High Court in criminal matters is to be found in s 44 of the High Court of Zimbabwe Act No. 29 of 1981. Mr *Omerjee* contends that the unfettered right of appeal which is given by subs 1 of s 44 is in fact not an unfettered right of appeal but can only be such a right of appeal as is permitted by the ensuing subs of s 44. That submission runs contrary to the decision of this court in the case of *Paweni v The Attorney-General* 1984 (2) ZLR 39; 1985 (3) SA 720 and it is clearly contrary to the plain wording of s 44. Subsection 1 gives an unfettered right of appeal; subs 2, on which Mr *Omerjee* specifically relies, relates only to appeals by persons who are convicted on a criminal trial held by the High Court. This is not such a case and the provisions that are contained in subs 2 of s 44 do not apply.

We hold therefore that the matter is properly before us on appeal.

The next matter to be decided is whether this court in hearing the appeal should treat it as an appeal in the wide sense, that is to say, that it is to be treated as if it were a hearing *de novo*. Once again that matter has been decided by the case of *The State v Mohamed supra* at 542B-C where TROLLIP JA said that in an appeal of this nature the Court of Appeal will only interfere if the court *a quo* committed an irregularity or misdirection or exercised its discretion so unreasonably or improperly as to vitiate its decision. On reflection, Mr *de Bourbon* who appears for the appellant, has accepted the correctness of that approach.

The question then is, in relation to the merits of the appeal, whether there is any irregularity or misdirection to be found in the decision of the judge *a quo* or whether his discretion was so improperly exercised as not to have been judicially exercised.

The essential reason why the learned judge *a quo* refused to grant bail was

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BECK JA

because he was of the view that there was some risk that if bail were granted the appellant might interfere with investigations which are still in progress.

Before us Mr *Omerjee* gave on behalf of the Attorney-General the most solemn assurance that the Attorney-General is satisfied that if the appellant were now to be released, there is a risk that the investigations might be compromised and that certain crucial matters which are now being looked into concerning the appellant's possible involvement in this offence would be prejudiced. We are given to understand that Mr *Omerjee*, who also appeared before the judge in the court *a quo*, gave the learned judge the same assurance.

It has always been the practice of the courts of this country, as it has been the practice of the courts of South Africa as well, to pay proper and serious regard to solemn assurances given to it by an officer of the court as responsible as the Attorney-General. He exercises a position of great responsibility and authority and the courts trust him to exercise that position with the proper measure of restraint and of regard for the rights of accused persons. Reposing that confidence in the Attorney-General the courts always attach, not conclusive weight, but proper weight, to any assurance that is seriously given by the Attorney-General. In the face of such an assurance having been given to the learned judge *a quo* it seems to me that there is no basis upon which this court could say that he misdirected himself on the facts in finding that there was some risk that the current investigations would be prejudiced if the appellant were to be released on bail.

It must also be borne in mind that he was given the assurance, as we have been given the same assurance, that the State only asks to be allowed to keep the appellant in custody for the next fortnight while investigations are in progress; and that the Attorney-General's office has enjoined the Police to expedite these investigations to the utmost and anticipates that they will be concluded within the next fortnight so that the matter may be reviewed in the light of the result of those investigations at the end of that short period.

In all these circumstances it seems to us that the appeal must fail and accordingly it is dismissed.

Gubbay JA: I agree.

McNally JA: I agree.

Chirunda, Chihambakwe & Partners appellant's legal practitioners

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MOFFAT OUTFITTERS (PVT) LTD v HOOSEIN & ORS 1986 (2) ZLR 148 (SC)

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Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Civil appeal

25 September & 16 October 1986

Flynote

Landlord and tenant - lease - restoration of property to landlord for urgent repairs during currency of lease - failure of lessee to restore property - breach of lease - commercial premises - statutory tenant - eviction - good and sufficient cause - renovation to property - re-occupation to lessee after work complete - whether should be ordered.

Legislation - Commercial Premises (Rent) Regulations SI 676/83 s 22(2).

Headnote

The owners and lessors of certain commercial premises gave to the lessee in occupation of the property notice to vacate informing it of the need to effect necessary, urgent and substantial repairs to the premises. The lessee refused to quit and summons was issued claiming its eviction. The trial was contested by the lessee who denied the owners right to evict it permanently.

Held, that at common law a lessor may recover possession of leased premises, even during the currency of the lease, in order to effect necessary repairs, but could not terminate the lease permanently for this cause unless he could not at the time of making the contract reasonably have foreseen the necessity for repair as likely to occur during the currency of the lease.

Held, further, that in refusing to vacate the premises on being given notice, the lessee was in breach of its duty under the lease, being an implied term of the lease.

Held, further, that on this ground alone, the owners were entitled to the relief claimed and the lessee was disqualified from protection as a statutory tenant.

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GUBBAY JA

Held, further, that the question of the existence of 'good and sufficient grounds' in terms of the Commercial Premises (Rent) Regulations involves the exercise of a value judgment which if arrived at without caprice or bias or the wrong application of principle will not lightly be interfered with on appeal.

Held, further, that in the circumstances good and sufficient grounds to terminate the lease exist.

Held, further, that the lessee ought not to be given the right to reoccupy the premises on completion of renovations since these will be substantial; will take a lengthy time; will involve a necessary increase in rental which the court cannot set; and since at common law termination would have been allowed.

Cases cited:

Elher (Pty) Ltd v Silver 1945 WLD 271

Marshall v Ivory 1951 (2) SA 555 (SR)

Anderson & Co v Byron 1955 (4) SA 395 (N)

Gidoomal v Heimann & Ors 1930 WLD 13

MacKay v Theron 1947 (1) SA 42 (N)

Dyneley Investments (Pty) Ltd v Stevens 1968 (2) PH A 59 (C)

Smith v Coulon 1956 (1) SA 163 (N)

J B Colegrave for the appellant

A Ebrahim for the respondents

Judgment

Gubbay JA: The respondents are Yunus, Gulam, Ismail and Jacub Hoosein, who trade in partnership under the style of Hoosein Brothers. They are the owners of a building situate at the corner of Moffat and Bank Streets in Harare known as "the corner shop." It is a single storey structure erected in 1928, comprising two interleading shops with an arcaded canopy to both frontages. Save for the replacement of the corrugated iron roof in 1962 and the repainting of the exterior walls in 1974, little, if any remedial or redecorative work has been done. Consequently the building has fallen into a state of considerable and obvious disrepair, and compares adversely with other commercial premises in what recently has become a prime shopping area.

For about forty years the appellant company, Moffat Outfitters (Private) Limited, leased the corner shop, successfully conducting there the retail business of selling shoes. Its directors and shareholders are the members of the Gulab family. Originally the tenancy was secured under written and fixed

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GUBBAY JA

period agreements, the last of which expired many years ago. Thereafter the appellant continued in occupation confident in the belief that by reason of the most cordial relations between the two families, its tenure of the corner shop would not be terminated. In that it was mistaken, for in January 1984 oral notice was given to vacate by 30 June 1984. This was followed by a letter dated 10 April 1984, written on behalf of the respondents, which reiterated, albeit with some regret, that possession was required in order to carry out whatever renovations were necessary to upgrade a badly neglected premises. In answer to its enquiry as to the nature of such renovations, the appellant was advised that:

"...as soon as your client vacates the premises structural alterations will be carried out and in addition the

premises will be painted and in addition certain plastering will be undertaken."

Early in July 1984 the respondents were informed by the firm of chartered architects engaged by them, that the cost of the necessary and extensive alterations, restoration and redecoration the corner shop required, was estimated at \$18 500.

The appellant took no heed of the repeated intimations and remained in occupation. Although undoubtedly aware that the condition of the corner shop called for much remedial work, it refused to vacate even for a temporary period. It raised the defence that the building constitutes "commercial premises" and that by virtue of the provisions of s 22(2) of the Commercial Premises (Rent) Regulations 1983 (SI 676/83), its continued occupation was lawful. So on 3 August 1984, proceedings for its ejectment were instituted in the High Court.

At the trial before SMITH J held on 29 and 30 July 1985, an architect, William Ward, and a structural engineer, Michael Calvert, testified on behalf of the respondents as to the severely dilapidated condition of the corner shop. According to Ward over the intervening year the external canopy of the building had deteriorated considerably, to the extent of becoming unsafe. All the precast concrete columns, which were free standing with inadequate foundations - having been built directly off the pavement on small brick plinths - were leaning and in a potentially dangerous state. Two of them were severely out of vertical, having been subjected to vehicular impacts, and the others marginally so. The roof gutters were not functioning adequately and as a result some of the canopy timbers had bowed. The flashings on the roof were in poor condition and permitted the ingress of rain water, with the

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GUBBAY JA

consequence that some of the plaster was liable to collapse. Dependent upon whether or not a new roof was needed, which would only be ascertainable once the ceilings had been removed, the total cost involved would amount to between \$40 000 and \$50 000. It would take three to four months to execute the necessary work and during that period the building could not be used for the purposes of trade; it would have to be vacated.

Calvert also voiced concern that the external canopy was a hazard to the public. He agreed that a proper examination of the roof, which he observed had sagged badly was necessary in order to reveal the extent of the damage caused by leaking water.

It was properly recognised by the appellant's witness, Dinho Gulab, that the remedial and consequent redecorative work particularised by Ward and Calvert, was essential, urgent and costly. The appellant, he said, was perfectly prepared to vacate the corner shop whilst such work was being done and readily accepted that subsequent to completion and re-occupation it could not expect the monthly rental to remain unchanged. A fair increase would have to be negotiated by the parties. But an obligation to vacate the premises permanently was strongly disputed. That approach differed markedly from the stance the appellant had adopted up to the commencement of the trial, which was to disclaim the respondent's right to require it to vacate temporarily so as to allow the remedial work to be carried out.

However that may be, the willingness of the appellant to vacate on a temporary basis, did not

find favour with SMITH J He expressed himself as follows:

"This court has no wish or authority to fix a reasonable rent. Furthermore it cannot, in my view, order that the defendant may continue to occupy the corner shop at a rent to be agreed between the parties. What happens if they cannot agree on a rent? Must the plaintiff accept what the defendant says is its highest offer or must the defendant pay whatever the plaintiff asks, however unreasonable either figures may be?"

And being satisfied that the respondents were *bona fide* in their desire and intention to undertake necessary, urgent and substantial renovations to the corner shop, the learned judge held that good and sufficient grounds had been shown for granting the relief they sought. Accordingly he ordered the permanent ejectment of the appellant with costs. Was he right in so doing?

1986 (2) ZLR p152

GUBBAY JA

Section 22(2) of the Commercial Premises (Rent) Regulations, 1983, reads as follows:

"(2) No order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom which is based on the fact of the lease having expired, either by the effluxion of time or in consequence of notice duly given by the lessor, shall be made by a court, so long as the lessee -

- (a) continues to pay the rent due, within seven days of due date; and
- (b) performs the other conditions of the lease;

unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than that -

- (i) the lessee has declined to agree to an increase in rent; or
- (ii) the lessor wishes to lease the premises to some other person."

It is apparent that as a preliminary to its decision as to whether a statutory lessee is to be given the protection afforded by this provision the court must be satisfied not only that the rent is being paid within seven days of the due date but that the other conditions of the lease, as it was at the date of its expiration, are being performed. A statutory lessee therefore, who fails to perform any condition of a lease will forfeit the protection to which he may otherwise have been entitled. See for example, *Elher (Pty) Ltd v Silver* 1945 WLD 271; *Marshall v Ivory* 1951 (2) SA 555 (SR) at 560 *in fine* - 561A.

The question of whether the appellant, as a statutory lessee, was shown to have failed to perform a condition of its lease depends in turn, so it seems to me, upon whether at common law it was within its rights in remaining in continued occupation of the corner shop and in refusing to vacate for the duration required to effect the remedial work. As I have mentioned it was only at the eleventh hour that the appellant acknowledged the respondents' right to require it to quit the premises while the work was being undertaken. For thirteen months from the termination of the lease to the commencement of the trial it failed to indicate any willingness to temporarily vacate.

The position of a landlord desirous of executing repairs to leased premises was carefully

reviewed by the full bench of the Natal Provincial Division in *Anderson & Co. v Byron* 1955 (4) SA 395 (N). SELKE AJP, who delivered the judgment concurred in by holmes and KENNEDY J, said at 397H-398B:

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GUBBAY JA

"...I understood it to be agreed that the Common Law was, in effect, that where the leased premises had come to be dangerous or urgently in need of repair *ex causa superveniente non praevisa tempore contractus*, the lessor had the right to obtain possession of them, even while the contract period was running, for the purposes of executing the necessary repairs. Such a right obviously imports a corresponding duty on the part of the tenant to yield up to the lessor possession for that purpose. As to whether or not the lessor could in such circumstances terminate the tenancy altogether, the Common Law authorities seem not clear. It appears to me, however, that the view to be preferred is that he could not do so, save in circumstances the likely occurrence of which he could not reasonably have foreseen at the time of the making of the contract of lease; the reasoning being, seemingly, that, if, at the time of the making of the contract, the lessor could reasonably have foreseen the necessity for the repair as likely to have occurred during the contractual term of the lease, he should not have made the lease for so long a term, or, alternatively, should have inserted in the agreement appropriate provision to meet the situation."

He continued at 398D-E:

"...as I understand it, these Common Law rights of the landlord, and the corresponding duties on his tenant, are implicit in every contract of lease, and, *mutatis mutandis*, persist after the lease has terminated and the lessee has become a statutory tenant under the Rents Act."

I have no quarrel at all with that statement of the common law, which is in conformity with such other authorities as *Gidoomal v Heimann & Ors* 1930 WLD 13 at 15; *MacKay v Theron* 1947 (1) SA 42 (W) at 45; *Dyneley Investments (Pty) Ltd v Stevens* 1968 (2) PH A 59 (C); and *Wille Landlord and Tenant in South Africa* 5 ed at p 156. I am also in respectful agreement with the proposition that the obligation or duty to allow the landlord the opportunity of executing necessary repairs to the premises, is implicit in any contract of lease and remains binding after the contractual relationship has ended and the lease has been converted into a statutory one.

In the present case then it would appear that having been given reasonable notice, the appellant by declining to vacate the corner shop to permit the necessary work to be done, broke the implied term of the original contract, by which as a statutory lessee, it was bound to perform under s 22(2)(b) of the Regulations. Nor do I consider it can be contended that the subsequent

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GUBBAY JA

offer to vacate, made at the trial, healed the breach. It was too late. It should have come before the institution of the action.

On this ground alone therefore, and without having regard to whether the remedial work was of such an extensive nature as to justify in itself a termination of the lease at common law, it seems to me that the order for the ejectment of the appellant was justified.

Nonetheless I prefer to base my decision additionally on the ground relied upon by the court *a quo*.

It is hardly possible and, in my opinion, certainly undesirable, to attempt any definition of the words 'good and sufficient grounds' which appear in the latter part of the s 22(2) of the Regulations. Whether a lessor succeeds in overcoming the burden they create depends on the particular circumstances of each case, viewed against the real purpose behind the Regulations. That purpose, as expressed by the learned judge, is to prevent unscrupulous landlords from taking advantage of the shortage of commercial premises by increasing their tenants' rents unjustifiably'. The court is enjoined to exercise a value judgment, which if arrived at without caprice or bias or the application of a wrong principle, will not lightly be interfered with on appeal.

In this case it is not possible to hold that SMITH J acted upon a wrong principle or was affected by extraneous matters. The factors which influenced his decision are weighty and convincing, and if I had presided over the trial my order would not have differed from his.

In the first place the remedial work which it is urgently necessary to carry out, and which cannot be done while the appellant is in occupation, is by its very nature substantial, the time it is likely to take fairly lengthy, and the estimated cost considerable. (See *Smith v Coulon* 1956 (1) SA 163 (N).) Secondly, the appellant was given reasonable notice to vacate. Thirdly, the appellant's properly made and realistic concession that upon the conclusion of the operation it could not reasonably expect the rental of the corner shop to be no higher than what it was before, is a persuasive consideration against allowing re-occupation. See Pothier *Letting and Hiring* para 321. Finally, I think that in common law a lessor in these circumstances would be entitled to terminate, always provided the necessity for the repair (as in this case) could not reasonably have been foreseen when the lease was entered into. See Kerr *The Law of Sale and Lease* at p 206; *Anderson & Co v Byron supra* at 398A. If this is so, as I apprehend it to be, then the appellant ought not, as a statutory

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GUBBAY JA

lessee, to be put in a better position than it would have been under the common law.

I would accordingly dismiss the appeal with costs.

Beck JA: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest appellant's legal practitioners

Ali Ebrahim respondents' legal practitioners

1986 (2) ZLR p156

BANDA v MINISTER OF DEFENCE 1986 (2) ZLR 156 (SC)

Court Supreme Court, Harare

Beck JA, Gubbay JA & McNally JA

Civil appeal

22 July, 25 September & 21 October 1986

Flynote

Practice - interdict - against the Minister of Defence and Commander of the Air Force directing them to take all necessary steps within their powers to prevent any member of the Air Force from unlawfully detaining, arresting or assaulting the appellant.

Headnote

In the circumstances which showed a reasonable apprehension on the part of the appellant that members of the Air Force were conspiring to do him harm and which indicated an attitude of cynical and callous indifference on the part of the respondent, the Commander and officers of the Air Force to the appellant's plight, the intervention of the law is justified to give to the appellant such protection as it can afford him against another ill-disciplined and unlawful invasion of his right to personal safety.

While the respondent, the Commander of the Air Force and his officers cannot be required to guarantee the safety of the appellant against unlawful molestation by members of the force acting contrary to discipline, it is appropriate to direct that they take all necessary steps to prevent such occurrence; which steps would include the identification and punishment of those responsible.

Cases cited:

Nordien & Anor v Minister of Law and Order & Ors 1986 (2) SA 511 (C)

E Chatikobo for the appellant

S W Mafara for the respondent

1986 (2) ZLR p157

BECK JA

Judgment

Beck JA: The appellant, AC Elisha Banda, is a radio technician in the service of the Zimbabwe Air Force, stationed at New Sarum. On Sunday, 18 May, a Rothmans Shield soccer match between the Air Force and Cone Textiles was played at Masvingo. The appellant, although a serving member of the Air Force, was not part of the Air Force team, but played instead for Cone Textiles. Since the beginning of the year he had in fact played for Cone Textiles in eleven previous games without any hindrance from the Air Force. On this occasion, however, Group Captain Zimondi of the Air Force told the Secretary of the Cone Textiles team on the day of the

match if Banda played for Cone Textiles he would be arrested. The threat was ignored and Banda played. Two Military Policemen thereafter made repeated demands to Cone Textiles team officials to remove Banda from the field of play. The demands went unheeded but the Military Policemen themselves sought to remove Banda at half time. At the intervention of the referee they desisted and the game ran its course. Cone Textiles defeated Air Force 4-3, Banda scoring one of the goals. After the match Banda was arrested and taken away.

On behalf of the Cone Textiles team approaches were immediately made to Air Commodore Muchena of New Sarum in an attempt to resolve the difficulty and ensure that Banda would be allowed to continue playing for Cone Textiles without hindrance. However, for reasons that it is not now necessary to detail, the impression was gained that Banda would not be allowed to play for Cone Textiles any longer.

A return fixture between Cone Textiles and Air Force was scheduled to be played at Masvingo on Sunday, 8 June. On 6 June the company Cone Textiles (Pvt) Ltd obtained as a matter of urgency from the High Court a *rule nisi* calling upon the Commander of the Air Force and the Air Force Football Club to show cause on the return day of the rule why a declaratory order should not be made declaring Banda entitled to train with, and to play soccer for, the Cone Textiles team.

The High Court recorded in that rule *nisi* that the respondents had undertaken, without prejudice to their position, to permit Banda to play for Cone Textiles over the weekend of 7-8 June, subject only to the possibility of his being required in the event of an operational emergency.

Despite the undertaking Banda, to the knowledge of Air Commodore Muchena, was allocated duties at New Sarum until 2 pm on Sunday, 8 June, which made it impossible for him to get to Masvingo in time to play in the match against the Air Force that afternoon. On the following Sunday,

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BECK JA

however, Banda played for Cone Textiles against Dynamos without hindrance.

On Tuesday 17 June, two replying affidavits were lodged in the High Court. The deponent to one was Group Captain Zimondi, who opposed the application on behalf of the Commander of the Air Force. The deponent to the other was Flight Lieutenant Tshabalala, who opposed the application on behalf of the Air Force Football Club. Neither deponent put in issue any of the factual averments that I have set out above.

It was variously contended, however, that the company Cone Textiles (Pvt) Ltd had no legal interest in the Cone Textiles soccer team, and hence had no *locus standi* to bring the application; that Banda was contravening Defence Force Regulations by playing for Cone Textiles for remuneration without the consent of his Commander, and that he had not applied for such consent, but had nevertheless magnanimously been allowed to play for Cone Textiles up to the end of April; that as far as the Air Force Football Club was concerned, it had nothing to do with the difficulties Banda was experiencing; and that, insofar as there might be thought to be a dispute between the Cone Textiles and Air Force teams, that dispute must be submitted for

determination to the Zimbabwe Football Association of which both teams are members, in terms of the rules of that Association.

Shortly after 8 am on Monday morning, 16 June, the day before the abovementioned replying affidavits were lodged, Banda and his wife were walking in Rotten Row, Harare, when a dark grey-blue Mazda 323 motor-car, with white number plates, stopped abreast of them. The car had the appearance of an Air Force vehicle. Three men were in it. Two were in civilian dress, but the third, the driver, wore the uniform of an Air Force Officer. At their invitation Banda entered the vehicle, whereupon he was told that he was under arrest. As the car drove off one of the men also called to Banda's wife that they had arrested him. Later that day, and the next, Banda's wife made a number of telephone enquiries from the Air Force at New Sarum as to her husband's whereabouts, only to be told that New Sarum had no idea where he was and had posted him as absent without leave.

Eight days later, on the afternoon of 24 June, Banda was found by Constable Dambamupfe of the Zimbabwe Republic Police lying unconscious by the side of Boshoff Drive in Braeside. His hands were tied behind his back, his mouth was gagged, his shirt was bloodstained, and he had numerous cuts on his arms and torso. He was taken to hospital.

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BECK JA

What happened to Banda between 16 and 24 June is best told in his own words in a statement made by him at Harare Hospital on 25 June:

"When I got into the vehicle, I was told that I was under arrest but I thought that they were joking. The driver of the vehicle then said to my wife who had been with me at the time, that I was under arrest.

We proceeded to Rhodes Avenue where he turned right into either Second or Third Street. We then turned into Samora Machel Avenue from which we turned into the Enterprise Road.

Before reaching the main prison (The Remand Prison) the person seated in the rear of the car behind the driver instructed me to give him my hand. I enquired as to the purpose herefor but was given no reason. I declined however, to give him my hand, I being seated in the front of the vehicle.

This person then rose and pulled my right hand whereupon the other person in the back of the vehicle produced a hypodermic syringe which was placed into the main vein of my right arm and a liquid injected into me.

That is all I remember (of that journey).

I next woke up (I do not know how much later) in a bare room. This room had a door on my left and a window opposite which was curtained. The floor consisted of plain red tiles, the walls being plain white. The side of the curtains facing me were made of white flannel. The door was wooden and looked like it was made from Mukwa. There was nothing on the walls.

I was lying on a single bed but one for which I was too long. I was lying on top of the blankets situated on the bed. I had no injuries (at that time) but was tied up, that is, my hands were tied with white rope to a bedstead behind my head. My legs were not tied. A handkerchief had been tied over my mouth. I felt drowsy.

I spent almost a day or two there, I cannot recall. The person to whom I had referred as the driver of the vehicle came in from time to time, now wearing plain clothes but nonetheless I recognised him [as having been the driver of the vehicle under reference]. [At that time] he said nothing. I dozed from time to time.

BECK JA

On the next occasion when the driver of the vehicle came in, he was accompanied by another person, the latter being taller than the driver, that is to say he was about my height. Both individuals were wearing open-necked shirts, the driver wearing a jacket while the other person wore a jersey.

They (questioned me) wanting to know (all) about me. The person to whom I have referred as the driver did the talking. He wanted to know my life history. I told him where I was born and that I had worked for Customs before joining the Air Force and that I had been sent to Libya for training purposes. I told him that I had returned from Libya in October. At that point he became nasty and said that he wanted to know more. I (repeated) that I was working in the Air Force. He asked me about my social life and I gathered that he wanted to know why I played soccer for Cone Textiles. I was able to draw this conclusion because he lingered on this point.

Thereafter, he asked me how I had come to join the Cone Textiles team. I said that I had a friend who also worked at Cone Textiles (and played for the Cone Textiles team). I explained that I had trained in the Air Force (soccer) team for two to three months. They would sometimes let me come in as a staff substitute during training. Eventually, however, the coach said that I would not make the grade hence I went to play for Cone Textiles.

Thereafter they left the room and I heard people talking on the other side of the door. I think that I recognised one of the voices as I have talked to this person on many occasions and recognised the voice.

(I concluded) that the room in which I was formed part of a house as I heard other doors (opening and closing) after these persons had left the room.

The driver and the other individual returned some time later although I am unable to determine how much later this was. (It was apparent) that the person to whom I have referred to as the driver wanted to beat me up. He grasped the front of my shirt and pulled me up as far as was possible with the restriction of my arms being tied, but the other man instructed that he should not hit me as it would cause too much trouble.

The driver then produced a knife which had a short blade and a silver or

BECK JA

metallic coloured handle and came over to me and pulled up my shirt. I was wearing a jersey and a white jacket at the time. He then began (several short incisions) cutting upwards from the region of my upper belly. I then kicked him on the back of his neck whereupon he fell over. He then stood up and "everything went haywire". He began to slice me up (resulting) in lacerations on my left arm. I believe that I must have passed out. After some time I regained consciousness whereupon they gave me some clear liquid to drink which I believe to have been alcohol. It was bitter tasting and light in colour.

The driver said he was going to drown me. (I believed him) as I would have believed anything at that time.

I have never drunk before but (the liquid) made me drunk and after some time I vomited. They at first forced me to drink this liquid from a metal cup. I was unable at the time to see the container used to fill this cup. After some time I became drunk and submitted to continued drinking from the cup.

The driver thereafter untied my hands from the bedstead, retying them behind my back.

As I was not able to walk properly the other man gave (the driver) a hand and I walked out with them dragging me. It was dark at that time and there were lights on outside which may have been street lights. They pushed me

into a smallish car, I cannot now recollect the make of this vehicle. The two then got into the front with the person to whom I have referred as the driver again driving.

After some time we stopped and they pulled me out. I was still unable to walk (unassisted). We then started walking with them assisting me and after walking for some time it became very cold. I wished to vomit again so they removed the gag from my mouth. We were there for a long time whilst they conversed with each other. We then continued walking whereupon I heard voices of people approaching in our direction. The driver (instructed me) to get down and tried to pull me down. I, however, started to run and kept running. I crossed a stream and decided to hide behind a bush as I was feeling tired. I passed out but when I later awoke my head was starting to clear.

I then set off (on foot) and crossed a road which I believe to have been

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the Prince Edward Dam Road. After crossing this road I again started vomiting. I do not know what happened thereafter, my next recollection being when I woke up here in (Harare) hospital.

I do not know at what stage I received the lacerations on my right arm.

I believe that whilst detained in the room to which I have referred I was subjected to further injections. Although I cannot recollect other injections being actually given to me, I (base this conclusion on subsequently becoming informed that a week had passed between the date of my arrest and the date upon which I came to in the hospital).

The only description I am able to give of the driver is that he was bearded.

I was unaware as to where I was being taken after being removed from the vehicle (as hereinbefore described) but I recollect that we were walking along a path in a bushy area."

There are six photographs before the court that depict the extent to which Banda was cut. No less than 42 cuts, most of them quite a few inches in length and stitched with numerous stitches, are to be seen on his arms, chest and abdomen.

In consequence of Banda's disappearance on 16 June, and before he was found on 24 June, a *habeas corpus* application was brought by Banda's wife. She cited as respondent the Minister of Defence in his capacity as the Administrator of the Defence Act. The Judge President of the High Court issued a rule *nisi* returnable on 2 July calling on the respondent to show cause why the Air Force of Zimbabwe should not release Banda from its custody and directing that Banda be produced before the court on the return day.

Prior to the return day of this rule Banda was, as I have said, found unconscious at the roadside on 24 June. The statement that I have set out above, which was taken from him at Harare Hospital on 25 June, was verified by an affidavit made on 26 June by Banda and was filed in the High Court on that day. Reference was made in that affidavit to the photographs that had been taken of the knife wounds inflicted on Banda, and it was said that those photographs would be filed in court before the return day of the rule, as soon as they had been developed and printed. That was in fact done. An amended draft order was also filed indicating that on the return day of the rule an order would be sought permitting Banda to resign from the Air Force forthwith, and

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prohibiting the Air Force from henceforth contacting Banda or interfering in any way with him. Finally, in supplementation of the papers filed in support of the application, an affidavit from Constable Dambamupfe was filed on 30 June in which the policeman described how he found Banda lying unconscious alongside Boshoff Drive on the afternoon of 24 June, gagged, with his hands tied behind his back, and with cuts on his body.

In reply to these startling revelations of the ordeal to which Banda was subjected after being abducted in what was apparently an Air Force vehicle by men of whom one at least was apparently an Air Force officer, one would have expected Banda's superiors in the Air Force to have been extremely concerned at what had been done to one of their men; and even more concerned to think that there was reason to believe that one or more Air Force personnel may have been guilty of such savage behaviour, perhaps by reason of the soccer dispute that had resulted in legal proceedings against the Commander of the Air Force and the Air Force Football Club. Had there been any such concern, one would have expected further that in opposing the relief that was being sought in terms of the amended draft order, Banda's commanding officer would have expressed shock at what had occurred; would have promised an immediate enquiry into the matter in an endeavour to ascertain whether or not it was in fact Air Force personnel who had abducted and assaulted him; and would have assured the court and Banda that the Air Force would do what it could to prevent any misguided Air Force personnel from subjecting Banda to a repetition of such outrageous ill-disciplined and unlawful behaviour.

Such an attitude of concern, and such expressions of intention, would not only have been natural and proper in the circumstances, but would also have gone far towards rendering it unnecessary for Banda to have persisted in seeking confirmation of the rule *nisi*. After all, what he primarily needed and was entitled to expect was not protection against the Commander and other responsible senior officers of the Air Force, but such protection from their hands as they could reasonably be expected to be willing and able to give him against the apprehension that he might again be kidnapped and assaulted by his former abductors who appeared to be personnel subject to the discipline and control of the Force.

Far from any concern whatsoever being displayed at what had so outrageously been done to Banda by - as a matter of probability - a member, or members of the Air Force, an affidavit was filed by Air Commodore Muchena in opposition to the confirmation of the rule *nisi* which could only

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have increased Banda's fears of possible further molestation. It was the only affidavit to be filed on behalf of the respondent, and the attitude that the deponent adopted was to assert baldly what simply could not have been within his knowledge to assert, namely that Banda was not abducted by Air Force personnel; and to add that as far as the Air Force was concerned, Banda

had been and still remained, absent from duty without leave. In the light of the revelation of what had happened to Banda, and the available photographic confirmation of the extent of his injuries, the assertion that he was still considered to have been absent without leave would appear to betray an incomprehensibly cynical and callous indifference to the ordeal that Banda had endured and to the all important question of whether Air Force personnel were guilty of having subjected him to it.

The application was duly opposed on the return day of the rule and on 9 July the application was dismissed. The *ratio decidendi* for the learned judge's conclusion that the application must fail is succinctly stated in the concluding paragraph of his judgment thus:

"I cannot accept that it is appropriate for the head of a unit, Department, official force or the like to be required, by a court order, to prevent the members of that unit from committing unlawful acts, when there is nothing to suggest that that head, or that unit, through its members, had carried out any wrongful, unlawful or even reprehensible act."

In an earlier passage in his judgment the learned Judge expressed the view that the facts did not suggest to him that the Air Force "as a Unit" was implicated in the acts of "hooligans."

An appeal was noted against that judgment and the matter came before us on Tuesday, 22 July. On that morning we were informed by counsel for the appellant that the appellant's doctor had certified that the appellant would be fit to resume duties on Monday, 21 July, but that counsel was instructed that Air Force personnel had unsuccessfully attempted a further illegal abduction of Banda on Saturday, 19 July. A postponement of the appeal was requested with a view to representing an application of this court to receive fresh evidence. We assented to that request and issued the following order:

"THAT the matter be and is hereby postponed to enable the appellant to file and to serve formal application for leave to adduce new evidence of events that have allegedly taken place subsequent to the judgment of the court *a quo*."

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THAT the application be filed and be served on the respondent by not later than Monday, 28 July 1986.

THAT the respondent and the Commander of the Air Force take all necessary steps within their power to prevent any member of the Defence Forces from unlawfully detaining, arresting, assaulting, threatening or harassing the appellant.

THAT the respondent and the Commander of the Air Force are interdicted and restrained from taking any disciplinary action against the appellant for allegedly being absent without leave prior to the date of service of this order."

The matter did not come before us again until 24 September. On that date we accepted affidavits tendered on behalf of the appellant wherein:

- (a) The whole background history of the soccer dispute was recounted; and

(b) Events subsequent to the judgment of the court *a quo* were recounted.

We also accepted a replying affidavit by Air Commodore Muchena as well as a number of supporting affidavits that dealt with the events of Saturday, 19 July.

The attitude of Air Commodore Muchena as expressed in his replying affidavit was that everything in the affidavits tendered on behalf of the appellant that dealt with matters or events other than the events of Saturday, 19 July, was not within the terms of the order made by this court on 22 July, was therefore inadmissible, and was therefore not replied to.

Insofar as the new affidavits have recounted the history of the soccer dispute they are merely tautologous, for that history is fully set out in the papers filed of record in the case between Cone Textiles and the Commander of the Air Force, No. HC1638/86.

The learned judge *a quo* was fully entitled to have regard to those papers and to that history as background material which is relevant to the present matter, regard being had to the thrust of the questions that Banda says he was subjected to by the abductor who was the driver of the vehicle in Air Force livery in which he was abducted, and who was dressed in the uniform of an Air Force Officer. This court has also had regard to those papers, as I have

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already indicated, and to the factual averments made therein on behalf of Cone Textiles, which averments were not then, and have still not now, been contradicted.

With regard to the new evidence that has been tendered, and that relates to events subsequent to 9 July it will be seen from the terms of the order that we made on 22 July that paragraph 1 of the order, in terms, relates to events 'that have allegedly taken place subsequent to the judgment of the court *a quo*.' It is not therefore confined, as Air Commodore Muchena seeks to confine it, to the events of Saturday, 19 July, only. It is true that at the time we made that order we were only told of events that had allegedly occurred on that Saturday, and we did not therefore anticipate that the new evidence would deal with anything but the events of that day. However, there is no conceivable reason why we would have been prepared to receive relevant new evidence of the events of that day and not relevant new evidence of any other events that took place subsequent to the decision in the court below.

The facts that have been revealed by this new evidence are as follows:

On Friday, 18 July, Banda's legal practitioners addressed a letter to the Commander of the Air Force, marking it for the attention of Air Commodore Muchena. The first paragraph of the letter reads:

"We have been requested by Mr Banda to advise you that his doctor is now satisfied that he is fully recovered and Mr Banda wishes to return to his duties on Monday 21 July, 1986 by which date the doctor is of the view that Mr Banda will be fit for work. Mr Banda has been requested to hand in a letter from his medical practitioner Mr Farinisi when he returns for duty on Monday."

The very next afternoon, Saturday 19 July, an attempt was made by Air Force personnel of the

Special Investigation Branch to arrest Banda in the street near his home in Seke. Banda refused to enter their car, his resistance attracted a crowd and the crowd's hostility towards the Air Force personnel caused them to abandon the attempt to arrest Banda. The affidavit filed by the Air Force details involved in this attempt to arrest Banda asserts that he was being looked for as a deserter from the Air Force.

Because Air Commodore Muchena had chosen not to deal in his replying affidavit with the letter of 18 July written by Banda's legal practitioners, one cannot be sure that the contents of that letter had come to his attention by the

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afternoon of the next day, and one does not know whether or not there is any link between the advice that Banda was about to return to duty on Monday, 21 July, and the attempt to arrest him on Saturday, 19th July, as an alleged deserter. Be that as it may, in the light of having been told, in the papers served in this matter, how he had come to be missing in the first place, what had happened to him thereafter, and the parlous condition in which he was eventually found and taken to hospital, the decision to post him as a deserter and the instruction to arrest him as such on sight, without, as far as the court knows, any prior enquiry as to his physical condition and as to his intentions regarding returning to duty, appears once again to indicate an attitude of gross indifference towards the ordeal he has been through, and even vindictiveness towards him. It has certainly enhanced the apprehension that he feels about his safety. In his latest affidavit he explains his fears in these terms:

- "62. I am aware of suggestions that the people who abducted me on 16 June 1986 were hooligans who were acting on their own without authority.
- 63. I am convinced that this is not so and that these were in fact Air Force people who were acting under instructions from superiors in the Air Force.
- 64. My grounds for alleging this are as follows:
 - a. When I was abducted on 16 June, 1986, the motor vehicle concerned was an Air Force motor vehicle.
 - b. The driver of that vehicle was wearing Air Force uniform and it was apparent from his cap that he was an officer.
 - c. I was given an intravenous injection in what appeared to me to be a very skilful manner. I received no bruising and no pain as a result of this injection. This was clearly a pre-conceived plan.
 - d. I was tied to a bed and deliberately and systematically tortured.
 - e. I was questioned by the driver of the Air Force vehicle and other persons about my life generally, my work and the Air Force and, in particular, my playing soccer for Cone Textiles.
 - f. I made an initial written application on the proper form for

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BECK JA

authority to play soccer for Cone Textiles and this application was approved by my immediate superior and also by the Station Commander. However this application has since disappeared.

- g. An attempt was made to arrest me immediately after I scored a goal against the Air Force for Cone Textiles on 18 May, 1986.
- h. On Saturday 19 July, 1986 I was told by the Air Force persons who tried to take me away by force that I would never see New Sarum.
- i. It is abundantly clear to me that all the events outlined above have happened as a direct result of my playing soccer for Cone Textiles and, further, I am satisfied in my own mind that the persons who approached me, threatened me, assaulted me, abducted me and attempted to take me by force were not hooligans acting on a frolic of their own.
- j. To my mind there was a very close similarity between the manner of my first abduction on 16 June and the attempt to take me away on Saturday 19 July, 1986. On both occasions I was approached without warning while I was walking in the street and it seems that on both occasions my movements had been watched very closely.
- k. There has been a complete lack of concern shown and expressed by Air Force personnel, of all ranks, who have been dealing with this matter and as far as I am aware no attempt has been made to find the persons responsible for my abduction and torture.
- l. There are many instances of the Respondents in the two matters before the courts failing to challenge allegations made in the papers but simply dismissing them out of hand without any reason or explanation."

Having regard to the thinly veiled atmosphere of strong hostility towards Banda that emerges from the papers it seems to me that the cumulative effect of all the uncontradicted averments of fact suffice to ground a reasonable apprehension that there may very well be one or more members of the Air Force, superior in rank to Banda and including a commissioned officer, who brazenly abducted him on 16 June and protractedly subjected him thereafter

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to a most frightening, serious and dangerous assault; and that there may very well be such an attitude of indifference on the part of officers of the Force under whose command he falls towards what happened to him that his personal safety may be in jeopardy. The apparent lack of concern over the indications that Banda was abducted and tortured by someone in the uniform of an Air Force officer; the apparent absence of any willingness even to enquire into the matter; and the apparently unfeeling persistence, in spite of the uncontradicted evidence, in the attitude that Banda had all along been, and still was, absent without leave and even a deserter from the Force, has understandably caused Banda to fear that in such an atmosphere nothing would be done to discourage a repetition of another serious assault on him.

It seems to me that the learned judge *a quo* took too benevolent a view of things when he said there was "nothing to suggest that ...that unit, through its members, had carried out any wrongful, unlawful or even reprehensible acts." The uncontradicted evidence indicates, *prima*

facie that it was an Air Force officer, and an Air Force vehicle, with two other men whose attitude and actions suggested that they too were members of the Force, who abducted Banda and tortured him and kept him imprisoned and in a befuddled state for days on end. Such an apparent gross breach of discipline by members of the Force ought to have been of the most serious immediate and grave concern to Banda's superior officers, but they have chosen instead to turn a blind eye to the indication of so grave a state of affairs while stolidly maintaining that the unfortunate victim of this atrocious behaviour is guilty of being absent without leave. It is an extraordinary instance of straining at a gnat and swallowing a camel. In my view it justifies the intervention of the law to give to Banda such protection as it can afford him against another ill-disciplined and unlawful invasion of his right to personal safety. I do not consider that this case is any different in principle from the recent case of *Nordien & Anor v Minister of Law and Order & Ors* 1986 (2) SA 511 (C) where the relevant Minister, the Commissioner of Police and certain other senior Police officers were directed to take all necessary steps within their powers to prevent any members of the Police from assaulting, threatening, harassing or intimidating the applicants who had allegedly suffered a torrid time at the hands of some ill-disciplined Policemen.

The third paragraph of the temporary order that we made on 22 July was designed to protect Banda, as far as is practically possible, from apprehended future harm. Naturally, neither the respondent nor the Commander of the Air Force, nor his officers, can be required to guarantee Banda against future unlawful molestation by members of the Force acting contrary to discipline.

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But the order does not impose any such impossible task upon them. It merely requires that they take all necessary steps within their powers to prevent such a breach of discipline. Endeavouring to identify the culprits, if they should be members of the Force, so as to subject them to disciplinary punishment would be such a step.

I should perhaps emphasise that the order we propose to make is not intended to interfere in any way with any **lawful** steps against Banda to which he may now have exposed himself. When the matter again came before us on 24 September we were informed by Mr *Chatikobo* for the appellant that Banda had recently vanished but under what circumstances he could not say. Our order of 22 July was not intended to and did not in fact, exonerate Banda from his obligation to return to duty forthwith, as he had been medically certified fit to do; and it was indeed in the expectation that he was about to do so that he was temporarily afforded the protection of the third and fourth paragraphs of that order. If he did not do so, and if he had no lawful excuse for not doing so, or if he has since unlawfully gone absent without leave or deserted, then he may, of course, be lawfully dealt with by the authorities upon being found, and the order that is about to be issued is no obstacle to his being lawfully dealt with.

For all these reasons the appeal is allowed with costs. The temporary order that was issued on 22 July 1986 is discharged, save for the third paragraph thereof, the substance of which is hereby perpetuated, as follows:

"The respondent and the Commander of the Air Force are directed to take all necessary steps within their powers to prevent any member of the Air Force of Zimbabwe from unlawfully detaining, arresting or assaulting the appellant."

The appellant is also awarded the costs of the proceedings in the court *a quo*.

Gubbay JA: I agree.

McNally JA: I agree.

Kantor & Immerman appellant's legal practitioners

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

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MHUNGU v MTINDI 1986 (2) ZLR 171 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Civil appeal

2 & 21 October 1986

Flynote

Practice - lis pendens - discretion of court to ignore other disputes for sake of equity and convenience - documents filed of record - court always entitled to make reference to its own records and proceedings - summary judgment - plea of lis pendens - reference to other records.

Headnote

Where a defendant has taken the objection of lis pendens the court may, even in a summary judgment application, exercise its discretion to determine the dispute before it for the sake of equity and convenience.

In general the court is always entitled to make reference to its own records and proceedings, and to take note of its contents, even in summary judgment proceedings.

Cases cited:

Rauties Transport (Edms) Bpk v Plaaslike Padvervoerraad Johannesburg en 'n ander 1983 (4) SA 146 (W)

Boyce NO v Bloem & Ors 1960 (3) SA 855 (T)

Shell Zimbabwe (Pvt) Ltd v Webb 1981 ZLR 498 (HS)

Geldenhuys v Kotze 1964 (2) SA 167 (O)

E Chatikobo for the appellant

J B Colegrave for the respondent

Judgment

McNally JA: This is an appeal against the granting of summary judgment. The papers in the application for summary judgment reveal that Mrs Mtindi owns a house. She sold it by deed of sale to Mr Mhungu. He fell behind in

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McNALLY JA

his payments. She cancelled the sale. Later she issued summons claiming:

- a. a declaration that the sale was cancelled;
- b. eviction;
- c. payment of \$3 300 "Being the balance outstanding towards the purchase price";
- d. interest; and
- e. costs.

When Mr Mhungu entered an appearance to defend, she applied for summary judgment.

In reply to her application Mr Mhungu filed an affidavit in which he made two points: First, he said there were other proceedings between the parties involving virtually the same issues and so the matter was *sub judice*. Second, he said that in those other proceedings Mrs Mtindi was alleging a lease not a sale. This had so confused him that he had decided to withhold payment. It may be noted that his confusion has not led him to vacate the premises.

The second of these contentions may be dismissed out of hand as mere sophistry. The first requires closer examination.

The defence raised by this allegation is the defence of *lis pendens*, sometimes known as *lis alibi pendens*. Herbstein and van Winsen in *The Civil Practice of the Superior Courts in South Africa* 3 ed at pp 269 *et seq* say, at pp 269-270:

"If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis pendens*, that is, another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

Note the use of the words "in its discretion" which are explained and developed at pp 272, 326 and 376. And see *Rauties Transport (Edms) Bpk v Plaaslike Padvervoerraad Johannesburg en 'n ander* 1983 (4) SA 146 (W) at 157 B-C.

McNALLY JA

It seems clear from the judgment in which the learned judge *a quo* granted summary judgment that he made reference to the papers in case No HC 3406/84.

In so doing he was undoubtedly right. In general the court is always entitled to make reference to its own records and proceedings, and to take note of their contents - Halsbury 4 ed vol 17 para 102; *Boyce NO v Bloem & Ors* 1960 (3) SA 855 (T); *Shell Zimbabwe (Pvt) Ltd v Webb* 1981 ZLR 498 (HS) at 503-4 (this case was upset on appeal but not on this point). The position is *a fortiori* when the defence involves a reference to the previous proceedings, as this one does.

Reference to the record in HC 3406/84 is unfortunately not enough. It is necessary to have regard to two other cases - HC 650/85 and HC 656/85. I have studied all three of these records. The picture is one of total and remarkable confusion. The papers are scattered haphazardly through the records. An application is in one record; the opposing affidavit in another; the answer in a third. *Prima facie* one cannot blame the Registrar, because the legal practitioners have typed the records reference numbers apparently at random on the papers. After a tedious re-allocation of papers to their proper records, the following timetable of events emerges -

11 October 1983	Deed of Sale; Mtindi to Mhangu;
1 March 1984	Mhangu pays arrears;
17 July 1984	Further arrears alleged, agreement purportedly cancelled;
24 September 1984	Lease agreement w.e.f. 1.4.1984 signed;
12 November 1984	Mtindi purports to cancel lease for non-payment of September, October and November rent;
27 November 1984	Mtindi sues (HC 3406/84) for eviction, rent of \$750 and damages;
28 February 1985	Judgment in default of plea for \$750 (damages abandoned);

McNALLY JA

6 March 1985	Application for rescission filed and served - HC 650/85 (Alleging lease signed under duress and not binding - deed of sale still valid);
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6 March 1985	Writ of eviction stayed on urgent petition - HC 656/85 - <i>ex parte</i> ;
18 March 1985	Judgment of 28 February 1985 (HC 3406/84) amended to include order of eviction (no reference to order of 6 March 1985 in HC 656/85);
20 March 1985	Hearing of rescission application postponed to 3 April;
2 April 1985	Opposing affidavit filed in rescission proceedings;
16 April 1985	Answering affidavit filed in rescission proceedings;
May 1985	Mtindi's legal practitioners renounce agency;
28 June 1985	Mtindi's new legal practitioners give notice of cancellation of the sale agreement;
21 August 1985	Mtindi's new legal practitioners issue summons and declaration in the present proceedings HC 2337/85 - apparently unaware of other proceedings; Presumably appearance is entered to defend;
5 September 1985	Application made for summary judgment;
12 September 1985	Replying affidavit refers to HC 3406/84;

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McNALLY JA

28 October 1985	Mtindi purports to withdraw action in HC 3406/84 and tenders wasted costs (eight months after judgment in her favour!);
6 February 1986	Mtindi consents to rescission of judgment (but does so on file 656/85 instead of 650/85);
13 February 1985	Summary judgment application heard (HC 2337/85).

I will refrain as far as possible from comment on this extraordinary sequence of events. I will deal only with the points that are relevant. They are as follows:

1. As far as the lease is concerned the parties are *ad idem* at least to this extent - Mrs Mtindi claims to have cancelled the lease for non-payment of rent; Mr Mhungu claims the lease was invalid because he was either tricked or pressurised unduly into signing it. So both parties are agreed that the lease is no longer relevant;
2. Mrs Mtindi claims a right to evict Mr Mhungu under the Deed of Sale for non-payment of instalments. She also claims a declaration that the agreement is cancelled. Mr Mhungu admits non-payment, and gives a specious reason for not doing so;
3. The dispute that was pending when the application for summary judgment was filed was resolved by the time the application was heard, in that Mrs Mtindi had consented to the rescission of judgment and had withdrawn her action, albeit in reverse order.

Given that the court has a discretion as to whether or not to uphold the plea in abatement known as *lis pendens*, it seems to me that on the facts of this case there was every reason for the judge to have exercised his discretion as he did in relation to the claims for eviction and cancellation. The facts are not dissimilar from those in *Geldenhuis v Kotze* 1964 (2) SA 167, where the court ignored the existence of another dispute "for the sake of equity and convenience". Given that by the date of the hearing the other dispute no longer existed, this case is even stronger than *Geldenhuis supra*. It would in my view be quite unconscionable to allow the appellant to remain in

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McNALLY JA

occupation of the property in view of his persistent reluctance to offer any *quid pro quo*. Nor had he any basis for opposing an order declaring the cancellation of the Deed of Sale when he himself alleges that he is trying to negotiate its reinstatement, thus admitting that it has been cancelled. His defence in these respects is a red herring - a semantic smokescreen.

The position in regard to the money claim is, however, on a different footing. In the first place, part of the claim is apparently for the balance of the deposit, which, in terms of the Agreement of Sale, is to be forfeit as *rouwkoop*. Although on the present papers the appellant has not raised the question of the Conventional Penalties Act, he has done so, in a round about way, in paragraph 12 of his affidavit in the rescission of judgment application HC 650/85.

In addition to this question, there is the further question as to the nature of the money claim. In the declaration it is called "the balance outstanding towards the purchase price." On the other hand, if the agreement was cancelled at the end of July 1985 (I may say it is not at all clear on what date it was allegedly cancelled), then any amounts paid before that date are forfeit as *rouwkoop* in terms of clause 4(1); any amounts due up to that date but not paid are claimable as outstanding instalments in terms of clause 4(a); and any amounts claimable subsequent to that date are claimable in terms of clause 4(b) as "damages as a result of the occupation of the property without adequate compensation to the seller." It is confusing to speak of "rent" which

suggests the existence of a lease.

Given the lack of clarity in the respondent's allegations about the money due and the confusion in her method of proceedings, I do not think it would be fair to penalise the appellant for raising the defence provided by the Conventional Penalties Act in an obscure manner in different proceedings. Had the learned judge *a quo* been referred specifically to the papers in HC 650/85 and HC 656/85 I do not think he would have granted summary judgment in respect of the money claim.

Three final things must be said about the form of the order issued by the Registrar of the High Court in this case.

In the first place, the prayer in the declaration was for an order declaring the sale agreement to be cancelled. This is not the same as a prayer for cancellation. Yet the Registrar's order was an order that the agreement "be and is hereby cancelled."

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McNALLY JA

The Registrar is not to be blamed for this difference. The applicant in such a case, who seeks a declaration, should set out the date on which he claims to have cancelled, make the necessary averment that he cancelled on that date, and ask for a declaration that the agreement was cancelled **with effect from that date**. Since the applicant (respondent on appeal) did not specify a date, the Registrar had no alternative but to make the order in the form that he did.

Secondly, the Registrar overlooked the fact that in granting summary judgment "in terms of the summons" the learned judge had altered the summons by changing the amount claimed from \$3 300 to \$4 500. The order therefore should have been for the payment of the larger sum. In the event this does not matter since that part of the order will be set aside.

Thirdly, the order appears to name the wrong judge.

The appellant had succeeded to some extent in the appeal, in that he has achieved a reversal in respect of the order concerning money. But in my view he has substantially failed in the important questions of cancellation and eviction, and has succeeded in staying in the premises for a further seven months.

The respondent is equally at fault for the confused manner in which she has sought to establish her rights. I would accordingly make no order as to the costs of appeal.

I do not propose to alter the order as to costs made in the court *a quo*, since the respondent (the plaintiff) remains substantially successful in that action.

Accordingly the following order is made:

- "1. Paragraph 1 of the order in the court *a quo* is confirmed;
2. Paragraph 2 of the order in the court *a quo* is confirmed save that the words "on or before the 28th day of February, 1986" are deleted and replaced by the word "forthwith";

3. Paragraph 3 is struck out and replaced as follows -

Defendant is given leave to defend in respect of the claim for \$4 500 together with interest thereon

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McNALLY JA

4. Each party is to bear its own costs of appeal.

Gubbay JA: I agree.

Beck JA: I agree.

P Machaya Esq appellant's legal practitioners

Chirunda, Chihambakwe & Partners respondent's legal practitioners

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MHENE v TEUBES 1986 (2) ZLR 179 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & McNally JA

Civil appeal

10 & 21 October 1986

Flynote

Legal practitioner - ethics - interview opposing party - give evidence.

Headnote

In circumstances of a contentious dispute between parties, likely to lead to litigation, it is undesirable and unwise for a legal practitioner privately to interview the other party and then to give evidence of the meeting

Cases cited:

Meyer v Merchants Trust Ltd 1942 AD 244

Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd 1980 (4) SA 271

Rosenfield v Teakland Sawmills 1962 R&N 456; 1962 (3) SA 919

M J Gillespie for the appellant

J B Colegrave for the respondent

Judgment

McNally JA: The appellant appeals out of time but with the leave of this court, against the decision of SAMATTA J in the High Court Harare on 27 November 1985. The learned judge had found in favour of the plaintiff (Mr Teubes) and against the appellant/defendant (Dr Mhene) in an action in which Mr Teubes was claiming rectification of an agreement of sale and of an acknowledgement of debt and payment of \$8 700 with interest and costs.

It was common cause that Mr Teubes had sold and transferred a residential property to Dr Mhene. It was common cause that the agreement of sale and all the documentation in relation to the transfer and the bond showed the price of the property to be \$27 300. Of that sum \$8 002 was paid in cash and the

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balance of \$19 298 was to be, and was obtained from CABS by way of a loan secured by means of a mortgage bond and a government guarantee.

Mr Teubes claimed that he was owed another \$8 700 because the sale price of the house was in fact \$36 000. Insofar as the documents suggested otherwise, he claimed rectification. Dr Mhene argued that the sale price was as shown in the documents of sale.

Mr Teubes started with an obvious disadvantage. In claiming rectification he had to assert that he had been extremely casual and intentionally deceptive about what he wrote in a legal document. And in claiming that the price was more than he had said both in the agreement and in a solemn declaration for Deeds Office purposes, he had to assert again that he was a man not over scrupulous when it came to legality. From this unpromising start, he made a very good impression on the trial judge who said he "impressed me as an honest and reliable witness." His account of events is coherent, lucid and probable. It goes like this:

He owned a house in Greencroft. He wanted to sell it. The property had two cottages and an upstairs and downstairs flat. He wanted \$36 000 for the property. Dr Mhene expressed interest. He had \$8 002 in cash and a government guarantee for \$19 298. He could not get a bond for more than \$19 298. So there was a problem about the balance of \$8 700. The Building Society would not lend more than the figure quoted because repayments at that level were about \$240 per month and on Dr Mhene's income of approximately \$1 000 per month it was considered that a greater commitment might over-extend him. It was suggested to the Building Society that they should treat Dr Mhene as a man with an income of \$1 450 per month, because he could let the two cottages and the one flat for a total of \$450 per month. This they declined to do.

Another scheme of dubious legality was proposed, but Mr Teubes rejected it. Finally they hit on a solution. They decided to go ahead with the transaction as if it were a sale at \$27 300, but at the same time to enter into an acknowledgement of debt in terms of which Dr Mhene would

acknowledge that he owed Mr Teubes \$8 700 for the money lent and advanced. This idea, said Mr Teubes, was discussed at length. He pointed out that if Dr Mhene used the income from the rents (\$450 per month) to repay the \$8 700 with interest, he could do so in about two years.

At the time the two documents were signed, said Mr Teubes (and they were

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signed simultaneously, he claimed) Dr Mhene expressed concern about the possibility that in some months one or other of the tenants might default or one or other of the properties might be vacant. How then, would he pay the \$450? To meet this problem Mr Teubes added, in longhand, a clause to allow for this.

Dr Mhene does not deny that he signed the acknowledgement of debt and the addendum to it.

On the face of it, therefore, Mr Teubes' explanation of the facts, as a statement of what actually took place, is reasonable and understandable. It demonstrates a mutual intention to deceive the Building Society, and to that extent it is reprehensible. The bond application form (Ex 6) required a disclosure of the full extent of the purchase price, and it is normal practice for building societies to require confirmation from the conveyancers that there are no acknowledgements of debt involved. Moreover I would not be surprised if the government guarantee contains some provision prohibiting underhand arrangements of this nature. In addition of course there is a solemn declaration by both purchaser and seller to the Registrar of Deeds in which they state the amount of the purchase price. On this statement the transfer duty is calculated. Dr Mhene therefore paid less transfer duty than he should have. I am sure this benefit was incidental rather than intentional, but it was nevertheless an undue benefit.

Before one can accept Mr Teubes' explanation however, there are a number of facts which require further explanation. These are the facts in respect of which Mr Teubes sought rectification. The rest of them relate to the existence of Clause 9 of the agreement of sale.

Clause 9 was an acknowledgement that "this agreement constitutes the entire contract between them and no terms, conditions, stipulations, warranties or representations whatever have been made, expressly or by implication, by either party or his/her or its agent other than those specifically incorporated herein."

Mr Teubes says he copied this from another agreement of sale on which he pencilled in the changes and then gave it to his typist to copy. Neither of them intended this clause to render the underhand acknowledgement of debt null and void. Indeed this must be obvious. He said it was included by mistake. Really, he said, he should have omitted it. He admitted however that he signed the "Declaration by Seller" intentionally.

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I must say I am not entirely convinced that Clause 9 was inserted by mistake. Its absence might

have caused the Building Society some concern. But whatever the position may be in that regard, and as far as third parties are, concerned, as between the immediate parties it is self-evident on Mr Teubes' version, that it was not intended to nullify the acknowledgement of debt. Nor can Dr Mhene be heard to say that he signed the documents tongue in cheek, knowing that he intended to double-cross, Mr Teubes. Indeed he does not say so. One can safely assume therefore that Dr Mhene signed the acknowledgement of debt seriously and deliberately, intending to be bound thereby. That being so, it must follow that he signed Clause 9 either without advertent to its meaning, or deliberately for the purpose of deceiving the Building Society. He could not have signed it with the intention that it should frustrate the acknowledgement of debt.

In short, insofar as Clause 9 suggests that the parties intended the acknowledgement to be a nullity, as between themselves, it was clearly a joint mistake, because that was not their intention. It is appropriate that the court should give effect to the true intention of the parties *inter se*. There is nothing to suggest that rectification will affect the rights of innocent third parties, such as for example the Building Society concerned. See *Meyer v Merchants Trust Ltd* 1942 AD 244; *Leyland (SA)(Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 at 272-3. Nor is it fatal to the prayer for rectification if the evidence suggests that although the parties intended the clause, they did not intend the legal consequences thereof. See *Rosenfield v Teakland Sawmills* 1962 R&N 456; 1962 (3) SA 919 and Christie *Law of Contract* pp 329-334.

The second prayer for rectification related to the wording of the acknowledgement of debt. The prayer was to omit all reference to a loan by making certain deletions.

Again it is clear that the parties chose, for the furtherance of the pretence that the sale was at the price of \$27 300, to describe the \$8 700 as being a loan "actually lent and advanced to me by the lender on the same day as on the signing of this agreement." Each of them knew that this was not so.

I am not sure, speaking for myself, that rectification is either necessary or appropriate in the case of the acknowledgement of debt. The parties consciously intended the transaction to masquerade as a loan advanced and to be repaid. They did not make any mistake in that regard. Nor were they mistaken as to the intended effect of the document which was to acknowledge an indebtedness and provide for the terms of repayment and interest. It was

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only the *causa* which was deliberately falsified.

Nor is it necessary to rectify the document to enable the plaintiff to sue on it. He is not suing on it. He is claiming the balance of the purchase price of the house.

The point was not argued either before us or in the court below, and its resolution makes no difference to the result of the appeal. Accordingly I do not propose to interfere with the order of the learned judge in this regard.

There are other minor points which are made. The witnesses, it is claimed, did not sign in the

presence of the parties. This, apparently, is true, but it makes no difference because Dr Mhene does not dispute his signature. Lastly, the acknowledgement of debt is dated 2 June 1983 when according to Mr Teubes it was signed on 22 March 1983. Mr Teubes points out that he dated it then because that was the date of transfer of the property and the repayments were to be made out of the rents from the property. Had he not postdated it, it would have meant Dr Mhene would have been obliged to pay earlier, because the provision was that repayment should commence "thirty days after the date of this document." The irregularity was to benefit Dr Mhene, and did not harm anyone else.

Given the basic deception involved, all these explanations make sense and hang together. One looks then to Dr Mhene to discover how he explains the facts.

The learned judge described him as a very unsatisfactory witness, and proceeded at length to illustrate this finding. It is unnecessary to go over the same ground again. The learned judge was absolutely right. Dr Mhene offered no meaningful explanation as to the acknowledgement of debt or of the addendum. It is painfully evident from his evidence that he is seeking to use the mutually agreed irregularity of their conduct to his unilateral advantage. His case is "Look at the agreement of sale. Ignore everything else". It is a technical argument ignoring both reality and morality. The learned judge properly rejected it.

It remains only to say that Mr Teubes called two supporting witnesses-his wife and his legal adviser. As far as Mrs Teubes is concerned, the learned judge found her to be a credible witness and I have no quarrel with that finding. I am more concerned, however, about the evidence of the legal practitioner.

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He gave evidence that he had asked Dr Mhene to come and see him because he was concerned that the irregularities in the conduct of both parties meant "trouble ahead for both parties". He interviewed Dr Mhene and gave evidence as to what was said at that interview.

One can appreciate that there are times when it is appropriate for a lawyer to act for both parties, when the matter is non-contentious. Even then, as is said in Lewis *Legal Ethics* at p 67:

"If one party is a regular client of the attorney and the other a newcomer the attorney should firmly propose to the other that he be independently represented and if necessary should assist him in obtaining suitable representation, and he should only act for both if he cannot envisage any possibility of the risks referred to becoming an actuality."

Here of course the lawyer was not acting for both parties. But the situation was one fraught with difficulty and was likely to become contentious. The client had indicated that if the matter was not settled, he wanted to go to court. In my opinion, and with due deference, it was unwise and undesirable for the lawyer in those circumstances to interview the other party. It might perhaps have been acceptable on a "without prejudice" basis as an attempt at settlement. This would have avoided the further question whether he should give evidence at all, or at least without withdrawing as legal representative for the plaintiff. (Lewis *op cit* para 69 pp 73-74.) I propose to ignore the evidence. The case can readily be decided without it, and indeed the learned judge

a quo did not appear to place much, if any, reliance on it.

In my view, for the reasons I have given, the appeal is without merit and should be dismissed with costs.

The Registrar is requested to ensure that copies of this judgment are sent to the Registrar of Deeds, the Director of the Civil Division of the Attorney-General's Office and the Secretary of CABS.

Dumbutshena CJ: I agree.

Beck JA: I agree.

Gill, Godlonton & Gerrans appellant's legal practitioners

Coghlan, Welsh & Guest respondent's legal practitioners

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SAYBROOK (1978) (PVT) LTD & ANOR v GIRDLESTONE 1986 (2) ZLR 185 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Beck JA & Gubbay JA

Civil appeal

27 May & 23 October 1986

Flynote

Delict - passing off - get - up - indirect representation by imitation of get - up that products were those of competitor - deception of ordinary purchaser.

Headnote

Generally a manufacturer is permitted to use and indeed to copy another's concepts, ideas and scenes in the absence of a registered patent or design except to the extent that his imitation amounts to a representation that that product in which such concepts, scenes, ideas or designs are incorporated is that of another manufacturer who has gained a reputation in the market through the concepts, ideas, scenes and designs so copied.

The court must be satisfied that the conduct complained of is calculated to pass-off other goods as those of the complainant or at least to produce confusion in the minds of probable customers as would likely to lead to the other goods being bought for the complainant's.

The type of purchaser whose likely deception is to be considered is the ordinary person who has in mind's eye a general idea of the appearance and characteristics of the articles he wishes

and who looks at the article not closely but sufficiently to take in its general appearance.

Cases cited:

Capital Estate & Ors v Holiday Inns Inc. & Ors 1977 (2) SA 916 (AD)

Bon March (Pvt) Ltd v Brazier & Anor 1984 (2) ZLR 50 (SC)

Brian Boswell Circus v Boswell - Wilkie Circus 1985 (4) SA 466 (AD)

Policansky Bros Ltd v L & H Policansky 1935 AD 89

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Benchair Ltd v Chair Centre Ltd 1974 RPC 429

Easyfind International (SA) (Pty) Ltd v Instaplan Holdings & Anor 1983 (3) SA 917 (W)

Agriplas & Ors v Andrag & Sons 1981 (4) SA 873 (C)

Pasquali Cigarette Co Ltd v Diaconicolas & Capsopolus 1905 TS 472

American Chewing Products Corporation v American Chick Company 1948 (2) SA 736 (AD)

Softex Mattress (Pty) Ltd v Transvaal Mattress & Furnishing Co Ltd 1979 (1) SA 75 (D&CLD)

RI Chudzikowski v A Sowak (Trading as Premier Productions) 1957 RPC 111

RJ Elliot & Co Ltd v Hodgson 1902 RPC 518 (Ch)

Slenderella Systems Incorporated v Hawkins & Anor 1959 (1) SA 519 (T)

Lorimar Productions & Ors v Dallas Restaurant 1981 (3) SA 1129 (TPD)

Oxford Pendaflex Canada Ltd v Korr Marketing Ltd et al 97 DLR 124

A N Eastwood for the appellants

A P de Bourbon SC for the respondents

Judgment

Dumbutshena CJ: This appeal is concerned with passing-off. Both the appellants and the respondent are manufacturers of clothes. The appellants are in that business in a big way. The respondent manufactures ladies wrap-around skirts. She made these unique skirts by a specialised screen-printing and tie-dyeing technique and processes. She used an unusual process to introduce a shading of colours in her cloth. The pattern of the cloth is shaped and designed so as to control shrinkage. She named and signed her skirts Hove Mbiri.

It is said that in 1982 a Mrs Contoret, a manager employed by Sayprint Textiles (Private) Limited, the second appellant, was impressed by the techniques and processes the respondent

used to produce the Hove Mbiri skirts. She informed a Mr Whyte, a managing director of Saybrook (1978)(Private) Limited, the first appellant in this appeal. He visited the respondent. He saw the Hove Mbiri skirts and was impressed.

An agreement was entered into between the appellants and the respondent. The appellants were to manufacture the respondent's skirts for sale outside Zimbabwe. The appellants alone would export the skirts. The appellants were thus granted a franchise. They agreed to pay the respondent a royalty

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of 10% on the proceeds of their export sales. The respondent was to sell the skirts in Zimbabwe. The respondent continued to manufacture her skirts or if she wished she would buy them from the appellants. The respondent and her staff trained the appellants in the techniques and processes of producing and manufacturing Hove Mbiri skirts.

Things did not work well for long. In 1983 the respondent discovered that the appellants were in breach of the agreement. They were selling Hove Mbiri skirts in Zimbabwe at lower prices. To cut the story short, the respondent applied for an interdict *pendente lite* before SCOTT J in September 1983. It was granted. A further application was made for breach of the order of SCOTT J. The parties resolved the dispute. The appellants promised to adhere to the terms of the agreement which was embodied in an order granted by REYNOLDS J on 20 September 1984. The order reads:

"IT IS ORDERED:

That the First and Second respondents, their directors, servants or agents be and are hereby restrained from distributing, selling, producing or in any way dealing in-

- (a) skirts or garments manufactured or produced according to the applicant's pattern, a sample of which is filed of record as Exhibit '1'; or
- (b) skirts, incorporating the applicant's artwork and designs, as set out in the brochure filed of record as Exhibit '2';
- (c) skirts or garments produced by means of the tie-dyeing and sunray pleating methods and techniques as depicted in the skirts filed of record as Exhibits '3' and '4', whether with or without a screen printed design.

IT IS ORDERED:

That the applicant withdraws her actions in Cases HC 2531/83 and HC 1527/84."

It will be seen from the agreement (the Order) that the respondent was protecting her pattern, artwork designs, the tie-dyeing and sunray pleating methods, techniques with or without a screen printed design and the eight

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designs in her brochure. She did not contend that her rights went beyond sunray pleating, irregular lines running with the cut of the skirt, and the designs in the brochure.

The appellants, so it seems to me, paid no heed to the order of court of 20 September 1984. They continued to manufacture Hove Mbiri skirts. The respondent went back to court.

On 12 December 1984, she got another order. SANDURA JP granted it to her in this form:

IT IS ORDERED:

That the respondents be and are hereby restrained from producing, selling, distributing, exporting or in any way dealing in skirts or garments presently being produced depicting the following scenes -

- 1) Zulu People
- 2) Elephant
- 3) Baobab
- 4) Huts and trees
- 5) Pots
- 6) Zebra
- 7) Masks

That the respondents pay the petitioner's costs including the costs of the hearing on the 26th day of October, 1984."

It is against the whole of this order including the order as to the costs of 26 October 1984 that the appellants now appeal.

Right at the beginning of his heads of argument Mr *Eastwood*, who appeared for the appellants, pointed out that the learned Judge President had correctly applied the broad approach in a passing-off action. Mr Eastwood summarised that approach as follows:

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- "1. The applicant holds some goodwill or reputation in particular merchandise.
2. It is likely that ordinary members of the public will be misled into believing that the merchandise of another party is that of the applicant.
3. A clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

For this brief and concise summary of what is required to establish the wrong of passing-off, Mr Eastwood relied on the following cases: *Capital Estate & Ors v Holiday Inns Inc & Ors* 1977 (2) SA 916 (AD) at 925G-929C; *Bon March (Pvt) Ltd v Brazier & Anor* 1984 (2) ZLR 50; *Brian Boswell Circus v Boswell - Wilkie Circus* 1985 (4) SA 466 (AD) at 479A-E; *Policansky Bros Ltd v L & H Policansky* 1935 AD 89. These cases do indeed support the principles he has so briefly

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stated above.

For his part the learned Judge President cited the principles laid down in McKerron's *The Law of Delict* 7 ed at 214, *Capital Estate & General Agencies (Pty) Ltd & Ors v Holiday Inns Inc & Ors supra* and *Bon Marché (Pty) Ltd v Brazier and Gibson supra* and came to the conclusion that there was a passing-off in this section.

The appellants do not quarrel with the principles laid down by the Judge President but they disagree with the conclusion to which he arrived.

In determining the principles applicable in a passing-off action I find it useful to restate what was said by WESSELS, CJ in *Policansky Bros Ltd v L & H Policansky, supra* at 98 because in this case we are concerned more with the get-up of the goods and not the similarities of names. WESSELS CJ said:

"In most of the cases which occur it is the get-up of a manufacturer's goods by a rival which gives rise to passing-off actions. Here as a rule the element of *dolus* prevails, for the get-up is seldom, if ever, accidental: it is generally the result of calculated imitation. In order, however, to judge whether there has or has not been a passing-off, the get-up of the goods, even if there has not been dishonest imitation, is often an element in determining whether the defendant's acts are or are not calculated to deceive the ordinary reasonable man to believe that when buying the goods of A he is buying those of B. There are various ways in which the

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defendant can pass off the goods of the plaintiff. The mass of reported cases show how numerous the devices are by which a manufacturer can attempt to identify his goods and therefore how varied the circumstances are in passing-off cases. If we examine the decided cases we find that many of them fall into definite classes which have common features."

This case is not like others because the parties were at one time agreed. They had a working arrangement. The respondent showed her work to the appellants and taught them how to make her skirts. The appellants were granted a franchise and an external market. Had they not breached that agreement there would have been no passing-off. Here the passing-off is by an agent (the franchise holder) who has been selling his principal's goods and who has now introduced on to the market goods of his own in such a way as to represent, by the very close similarities in the skirts, that the skirts were from the respondent.

See *Halsbury's Laws of England* vol 48 para 150.

The appellants do not challenge in this appeal the learned Judge President's finding that the scenes depicted on their skirts are very similar to those of the respondent. How can they? They accept the finding of facts made by the judge *a quo*. They of course dispute that the similarities found by the court below are such as to represent to the public that their skirts are the skirts of the respondent. They say they are free to imitate respondent's skirt because no patent was registered.

Mr Eastwood's main contention is that, in his own words:

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"A manufacturer is permitted in the present state of the law to use and indeed to copy another's concepts, ideas, scenes, in the absence of a registered patent or a registered design, provided that by the presentation, the 'get-up' of the goods, he does not represent those goods as having been produced by that other. The law does not favour monopolies in ideas or concepts or even in techniques and skills. The protection afforded by registration of a patent or design is to encourage the development of new devices and ideas, but on expiry of the period of protection these may be widely disseminated and used. Human progress depends upon this being so, for otherwise artists could never apply anything learned from one another, nor authors, nor philosophers. There would be only one manufacturer of television sets, one printer of books.

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What a manufacturer may not do is to represent goods copied from another as having been produced by that other. Such representation might reflect upon the quality of the goods, thereby misleading the public and harming the reputation or goodwill of that other manufacturer."

The general proposition that "a manufacturer is permitted in the present state of the law to use and indeed to copy another's concepts, ideas, scenes in the absence of registered patent or a registered design" is of course limited by the fact that it is not permitted for the manufacturer to make false representations that the concepts, ideas, scenes and designs are those of another manufacturer who has earned a reputation in the market through the concepts, ideas, scenes and designs so copied. And if that happens the plaintiff may seek his remedy in a common law action for passing-off.

Mr *Eastwood* relied for his proposition on what was said by GRAHAM J in *Benchair Ltd v Chair Centre Limited* 1974 RPC 429 at 435 where the learned judge said:

"The essence of passing off is, it is said by Mr Watson, and I agree, the false representation by the defendant that his goods are those of the plaintiff, as has been laid down by the authorities for well over a century in numerous cases. This is, for example, noted for HARMAN LJ in *Hoffman - La Roche v DDSA* 1972 RPC 1 at 18, where he quotes the words of lord *Halsbury in Powell v Birmingham Vinegar Brewery Co Ltd* 1897 AC 710, who in his turn is quoting the words of TURNER LJ in *Burgess v Burgess* 1853 3 De G, M & G 896. If there is no such false representation there can be no passing off, and the mere copying of the shape of the plaintiff's articles is not in itself such a representation. Anyone is entitled, subject to some monopoly or statutory right preventing him, to copy and sell any article on the market, and false representation and passing off only arise when a defendant does something further which suggests that the article which he is selling is that of the plaintiff. This he may do by a direct representation to that effect such as by the use of the plaintiffs' name or mark, or by an indirect representation such as by imitation of get-up by enclosing the article in a distinctive package which is similar to that used by the plaintiff."

See also *Easyfind International (SA)(Pty) Limited v Instaplan Holdings & Anor* 1983 (3) SA 917 (W) at 925D-H where SCHUTZ AJ (as he then was) said:

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"The rule is clear that it is open to anyone to adopt the ideas or devices of his neighbour and apply them to his own goods provided that he clearly distinguishes his goods from those of his neighbour; *Adcock-Ingram Products Ltd v Beecham SA* (*supra* at 437F-G); *John Craig (Pty) Ltd v Dupa Clothing Industries* 1977 (3) SA 144 (T) at 156A. The case for *Easyfind* is presented on the basis that *Instaplan* has failed sufficiently to distinguish its get up.

But it is by no means clear to me that this is a case about get up at all. The question is whether it is not Easyfind's product itself, in which no monopoly is claimed, which has been copied. Copinger and Skone James Copyright 12^{ed} para 750 at 336 say:

'Get up is mainly concerned with such matters as the design of the packaging and in the associated labels which, over a period of time, the public come to associate with goods of a particular manufacturer. To copy is not to pass-off. Merely copying the shape of that other person's goods or articles is not itself a false representation. Subject to some such monopoly as registered design or statutory right of property such as copyright anyone is entitled to copy and sell an article on the market, provided that he does not make false representation suggesting that the article which he is selling is in fact that of the plaintiff.'

Here there is a difference. The similarities so ably pointed out by the learned Judge President and which I shall consider later in this judgment constitute the get-up of the Hove Mbiri skirts. The question in this case is whether the Judge President's conclusion on the law was correct.

In the instant case there was clearly an indirect representation, by imitation of the get-up of the skirts, that they were the skirts of the respondent. I agree with Mr *de Bourbon*, for the respondent when he says that "the law permits a manufacturer to copy goods belonging to another provided he does not represent those goods as having been produced by another". It must be admitted that the skirts are not only shaped in an unusual way, they also have unusual scenes.

Mr de Bourbon cites a passage at 882C in *Agriplas & Ors v Andrag & Sons* 1981 (4) SA 873 (C). In that case BURGER J referred to a passage in *Benchairs Ltd v Chair Centre Ltd supra* at 435-436 and said:

"The English law appears to be well summarised by GRAHAM J in the passage quoted in *Benchairs Ltd v Chair Centre Ltd* 1974 RPC at 435, 436 and quoted earlier.

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The Canadian Supreme Court has also adopted a similar approach. In *Oxford Pendaflex Canada Ltd v Korr Marketing Ltd et al* 97 *Dominion Law Reports* (3) 124 at 130 quoting with approval from a judgment of the Supreme Court of Canada the learned trial Judge, with respect, correctly stated the law and the burden that was on the appellant when he said, quoting from *J B Williams Co v H Bronnley & Co*:

What is it necessary for a trader who is plaintiff in a passing-off action to establish? It seems to me in the first place he must, in order to succeed, establish that he has selected a peculiar-a novel-design as a distinguishing feature of his goods and that his goods are known in the market and have acquired a reputation in the market by reason of that distinguishing feature and that unless he establishes that, the very foundation of his case fails'."

Unfortunately for the respondent she instructed the appellants in the processes of making her wrap-around skirts and they produced skirts of their own whose similarity to those of the respondent the appellants do not challenge. Mr *Eastwood* has said so. What went wrong? The appellants not only manufactured skirts of their own with concepts, scenes and designs similar to those of the respondent, they also marketed them and in marketing and distributing them they committed the wrong called passing-off. In the case of the appellants it was not only mere copying that they did. That is why they do not dispute the copying of her scenes etc. They let

the respondent give it all to them. They received instructions in the techniques and processes of making the respondent's wrap-around skirts. On top of it all they had the franchise and with it the external market. They marketed, in the first instance, the respondent's skirts in South Africa under an agreement. Then they abandoned the agreement and manufactured wrap-around skirts of their own using the techniques, processes and features taught them by the respondent. It is easy to infer, in circumstances such as these, that the appellants' customers believed that they were still buying the respondent's skirts from the respondent's agents, the appellants.

This is a case, to use the words of GRAHAM J in *Benchairs Ltd v Chair Centre Ltd supra* at 436 where it would easily be said:

"...there might be a case where an article itself is shaped in an unusual way not primarily for the purpose of giving some benefit in use or for any other practical purpose, but in order purely to give the article a distinctive appearance characteristic of the particular manufacturer's goods. In

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such an event it seems to me possible that such manufacturer must be able in course of time to establish such a reputation in such distinctive appearance of the article itself as would give him a cause of action in passing off if his goods were copied, because in the circumstances assumed the putting of the copy on the market would amount to a representation that it emanated from the plaintiff."

It is the continuation by the appellants in selling products similar to those of the respondent that would make the public believe that they were still buying skirts from the same manufacturer and which were being marketed by the same people.

Mr *Eastwood* contended that in the case of ladies fashion goods such as skirts what is important is the material, the cut, the colours, the effect, the type of scene depicted and the manner of depicting it and the whole concept of its realisation that "constitutes the article purchased." This case is about the unusual features and scenes which have nothing to do with the use to which the skirts are put but which give those skirts a distinct appearance or get-up of their own. That is what this case is all about. That is why the ordinary discerning buyer, according to Mr *de Bourbon*, "would not analyse critically each separate aspect of the make up of the garment, but would look at the overall concept to determine whether or not to purchase it." It is to achieve the overall effect, that the appellants produced their skirts.

On Mr *Eastwood's* classification of goods and the characteristics of shape, concept and scenes constituting the ladies fashion, the customer would have to be such a discerning and careful one. She would not be the average customer who looks and searches for what she wants to buy in the manner the ordinary purchaser described in these words by SOLOMON J in *Pasquali Cigarette Co Ltd v Diaconicolas & Capsopolus* 1905 TS 472 at 475:

"Now when one talks about the ordinary purchaser being deceived or being induced to accept one manufacturer's goods as the goods of another there is some difficulty perhaps in understanding exactly what that means. An ordinary purchaser certainly does not mean the very careful man who knows exactly what he wants and takes very good care when he is buying an article that he gets what he actually wants, who looks closely at the article which he is buying, and who would detect any striking difference between the article he is purchasing and the

article which he intended to purchase. Nor does it mean the very careless man who does not know the peculiar characteristics of the article which he

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wants to buy, and who is not at all particular about what he gets, but who when he asks for an article accepts what is given him as being the article which he requires, and therefore does not look at it and does not very much care whether he is getting the article he asked for or not. The ordinary purchaser does not mean either the very careful or the very careless and ignorant man. I think it must be some one between the two. I take it the ordinary purchaser is a man who knows more or less the peculiar characteristics of the article he wants; he has in his mind's eye a general idea of the appearance of the article, and he looks at the article not closely, but sufficiently to take in its general appearance."

See *American Chewing Products Corporation v American Chick Company* 1948 (2) SA 736 (AD) at 743-744.

Although *Softex Mattress (Pty) Ltd v Transvaal Mattress and Furnishing Co Ltd* 1979 (1) SA 755 (D& CLD) is a passing-off case dealing with publishing advertisements the possibility of passing-off was examined by HEFER J, (as he then was), not only by looking at that which might cause confusion in the public but also by looking at the purchaser who might be confused. He said at 759A-C:

"The first question which arises in this regard, is whether there is a likelihood of persons who see the advertisement being deceived into believing that the product to which it relates is respondent's product (or, stated more correctly, whether the applicant has shown that there is no such likelihood). As VAN WYK J put it in *Stellenbosch Farmers' Winery v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 240 :

'In passing off cases the complaint is based ...on the likelihood that the similarity of another's get-up may mislead the public ...the result is that in passing off actions the comparison is between the whole get-up of the applicant and the whole get-up of the respondent.'

In the present case the comparison is not between respondent's actual product and applicant's product; it is between the advertisement and the distinctive way in which respondent's product is usually presented to the public, viewed against the background of what is known to the public about that product. And this comparison is not to be made through the eyes of an unusually astute and careful person, but rather through the eyes of an ordinary person, as a man who knows more or less the peculiar characteristics of the article he wants; he has in the mind's eye a general

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idea of the appearance of the article, and he looks at the article not closely but sufficiently to take in its general appearance."

(per SOLOMON J in *Pasquali Cigarette Co v Diaconicolas & Capsopolus* 1905 TS 472 at 475).

That is the purchaser we are looking at. In the light of what is said in the cases cited above, let

me now examine the skirts, the subject of this passing-off action.

Before doing so I would like to see whether the approach in the court *a quo* was right. I do so by looking at what the learned Judge President did. He compared the appellants' skirts and those of the respondent and said:

"Although the respondents' pattern is slightly different, the respondents' skirts do have the same scenes as those appearing on the petitioner's Hove Mbiri skirts. The respondents have, however, introduced a few differences here and there. Some of these differences relate to the size, shape or colour of the huts or trees. In my opinion these differences are minor and insignificant because they do not alter the basic fact that the respondents have copied the scenes which appear on the petitioner's Hove Mbiri skirts. They could have chosen scenes completely different from those on the Hove Mbiri skirts, but they did not."

Here the learned Judge President was not considering passing-off which is brought about by the similarity of trade marks or names. He was concerned with the similarity in the get up of the skirts. He applied his mind to the nub of a passing-off action of this nature.

What remains now is for me to examine the skirts made by the respondent and those made by the appellants. I have had the advantage of seeing them and comparing them by putting each set of skirts side by side. The issue to be determined and which the learned Judge President determined is one of fact.

In carrying out this exercise, one has to compare the patterns, designs and scenes which have earned the respondent's Hove Mbiri skirts a reputation on the market both, as I understand it, in Zimbabwe and in South Africa.

In doing this I would like to repeat what was said by LORD EVERSHED MR in *R I Chudzikowski v A Sowak (Trading as Premier Productions)* 1957 RPC 111 (CA) at 116:

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"But in approaching a matter of this kind, I think it is first important to bear in mind what was said in the House of Lords in *Hecla Foundry Coy v Walker Hunter & Coy*, to which Mr Russell-Clarke referred us. LORD HERSCHELL, at (1889) 6 RPC p 559, said this: 'It seems to me, therefore, that the eye must be the judge in such a case as this, and that the question must be determined by placing the designs side by side, and asking whether they are the same, or whether the one is an obvious imitation of the other ...' "

I am mindful of the fact that this is a matter of fact for the trial judge whose eyes saw the skirts and observed the similarities he referred to in his judgment. This court has had the advantage of seeing the skirts which the judge *a quo* saw with his naked eye before concluding that there was the wrong of passing-off. To me there is no doubt that there is a combination of a number of features which are used by the respondent in her Hove Mbiri skirts which have been copied by the respondents. Here the passing off has occurred because of the similarity of the general appearance or get-up of the skirts of the respondent and those made by the appellants.

See *Halsbury Laws of England* vol 48 4 ed para 168.

In exhibit 1 the Hove Mbiri skirt has twelve Sotho people with women carrying what appears to

be pumpkins on their heads and men striding along carrying what appears to be black and coloured walking sticks with dogs thrown in between and African huts set in groups of three, each group with a tree which is aglow with orange flowers. Exhibit 19 is the respondent's copy of exhibit 1. It consists of Zulu people men and women. The Zulu women are either cooking or carrying what appears to be orange coloured pots and other objects on their heads and there are also dogs thrown in between. The village has groups of huts in a setting which is similar to one in exhibit 1. Each group of three Zulu huts has a tree with a black trunk and orange flowers or leaves. The colours of the skirts are somewhat similar. Once you have seen exhibit 1 you are more likely to buy exhibit 19 believing that it is one and the same skirt. There is exhibit 4, the components of that skirt, the huts with trees giving a pinkish effect were copied in exhibit 18 which has huts and trees with slight differences in the colouring. Again the purchaser I have described above is likely to be deceived. The respondent's skirt, exhibit 5, has pots on it set in groups of three. The appellants' skirt has pots set in groups of two. Although the colours are different, it is my view that a purchaser is likely to be deceived because the general concept is the same. What an interested purchaser is more likely to remember are the pots.

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It is the same wrap-around skirt with the same design. There are also skirts with what appears to be African masks. In exhibit 7 the respondent has on the Hove Mbiri skirt ten masks patched on some pedicle and in between the masks there is an artifice meant to give greater decorative effect to the skirt. The appellants' skirt, exhibit 15 is designed and patterned in the same way. The masks are on pedicles which appear to be African style combs and there is an artifice in between the masks. I confess, I do not see that such difference between the two skirts. These skirts are similar in concept and are thus likely to deceive. Respondent's skirt, exhibit 3, has a baobab tree. Appellants' skirt exhibit 17 has the same baobab tree. There is no dispute on the copying of the artwork in exhibit 2. The elephant which is on the appellants' skirt, exhibit 20 reflects that artwork. Equally it is common cause that exhibit 6, the respondent's skirt with the zebra was copied by the appellants in their skirt, exhibit 16. The overall impression is the same.

The features described above appeal to the eye of the purchaser and it seems to me that in all the circumstances described above there is a likelihood of deception. The fact that the appellant's skirts go by the label *Mischief* and those of the respondent's have the signature Hove Mbiri is an insignificant factor which will be hardly noticed by the purchasing public.

To sum up Mr *Eastwood* is right when he argues that there was no use made of the respondent's artwork save in respect of one skirt depicting an elephant and another depicting a small dog in a village scene. I have, however, pointed out above the capricious attributes of shape and colour and the copying of the general concept which offend against that which the respondent seeks to protect as her own. These features and the general concept produce, as was submitted by Mr *de Bourbon*, "an effect identical to that which has gained a reputation for the respondent".

It is important to emphasise that in this case it is not the copying of attributes of the respondent's skirts which give some benefit to use which is being treated as passing-off. Here the appellants have imitated the get up of the respondent's skirts. It is the artwork or features of

her lively fancy that has been copied or imitated. The features, images and other artifices-the capricious additions to the skirts which constitute that which has been imitated and that which constitutes passing-off.

I appreciate that this is not a case in which the passing-off consists of imitated packaging or marks. We are dealing here with the article itself. In *R J Elliot & Co Ltd v Hodgson* 1902 RPC 518 (ChD) the plaintiff manufactured and

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sold cigars which were "flat-ended" or "blue-nosed" and "cylindrical" throughout. They were called "Bull-dog" cigars. The defendant was dealing in "Turnbull-cigars" which were an exact copy of the "Bull-dog" cigar. The shape of the cigars was identical. There were no other cigars on the market other than the "Bull-dog" with a flat or snub-nosed end. The defendant adopted the same device of the bull, and the plaintiff's shape of the cigar. Although he labelled his cigars "Ye Turnbull" and the plaintiff's were "Bulls" BUCKLEY J, held that the boxes were sufficiently distinct, but that the cigars might be sold apart from the boxes so as to mislead purchasers, and that the plaintiffs were entitled to the injunction prohibiting the selling of the cigars.

See also *F Hoffman - La Roche Co AG & Anor v DDSA Pharmaceuticals Ltd* 1972 RPC 1 (ChD) at 21; *Roche Products Ltd & Anor v Berk Pharmaceuticals Ltd* 1973 RPC 473 (CA).

I need only touch on one other contention put up by Mr Eastwood. He submitted that it was necessary for the passing-off to have occurred within Zimbabwe. He says the respondent's fears and complaints were directed to the selling of the skirts in South Africa. He relies for his contention on two cases *Slenderella Systems Incorporated v Hawkins & Anor* 1959 (1) SA 519 (T) and *Lorimar Productions & Ors v Dallas Restaurant* 1981 (3) SA 1129 (TPA). I need only refer to *Slenderella Systems Incorporated v Hawkins supra* which in my opinion, tends to support the view that an action may be brought in respect of a passing-off in South Africa if it can "be shown that if acts complained of were carried out there they would amount to passing off and that they are actionable in the country concerned". See *Kerly's Law of Trade Marks & Trade Names* 11 ed para 16-101. In *Slenderella's* case *supra*, WILLIAMSON J (as he then was) said something to the same effect at 521C-F:

"It is not necessary that the *peregrinus* should actually carry on business in the jurisdiction in which he seeks relief. It is sufficient if his goods are sold on the market within the jurisdiction and have thereby given him a right of property therein in a reputation, name or goodwill attaching to the goods or business. An example of such protection being afforded to a trader who had never actually traded in England but whose goods had been there marketed and had acquired a reputation which was entitled to protection in that market, may be found in the case of *Poiret v Jules Poiret Ltd* AF Nash 37 RPC 177. There the *peregrinus* granted protection was a dress-designer and costumier of Paris who did not carry on business in London but whose goods were there regularly sold and

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had thereby acquired a reputation as the goods of the plaintiff *peregrinus*. That it is only a right of property

existing in the jurisdiction which is protected, may also be gathered from the remarks of FARWELL J in *Sturtevant Engineering Co Ltd v Sturtevant Mill Co of USA* 53 RPC 430 at p 439 and p 441, lines 30 to 40. For a discussion of these and other authorities see Kerly Trade Marks 7 ed p 522 and *Halsbury Laws of England* Hails ed vol 32 p 619 para 924."

The respondent manufactured her Hove Mbiri skirts in Zimbabwe and they were sold on the South African markets by the appellants. And when the appellants manufactured the skirts now complained of they did not only export them to South Africa they also distributed them in Zimbabwe. In my judgment the learned judge *a quo* did not err when he found that members of the public in Zimbabwe were likely to be misled or deceived.

In my view the respondent proved that there was deception. It appears to me that what the learned authors of Kerly's *Law of Trade Marks and Trade Names* said at para 16-72 holds good in this case. Writing on the *onus* of proof they said:

"The court must be satisfied that the defendant's conduct is calculated to pass off other goods as those of the plaintiff, or, at least, to produce such confusion in the minds of probable customers or purchasers or other persons with whom the plaintiff has business relations as would be likely to lead to the other goods being bought and sold for his. This is the foundation of the action.

The onus of proving deception is upon the plaintiff.

The question of likelihood of deception is for the court (not the witnesses) to decide "looking at the documents and evidence before him." Evidence may be called on the point, but is not essential except in cases of doubt, and the assistance it gives to the court will be of a limited nature unless it includes evidence of actual deception.

The existence of unexpected and unexplained similarities between the goods of the defendant and those of the plaintiff or of similarities which have been modified by colourable differences or by differences and distinctions so arranged as to escape notice, the use by the defendant of descriptions, which, as applied to himself or his own trade, are inaccurate, and by reason of their inaccuracy approach more nearly to the

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proper description of the plaintiff and the gradual approximation of the defendant's names, get-up or description to those of the plaintiff, are all obvious badges of fraudulent intention frequently recurring in the cases which come before the court."

The above passage lends weight to the conclusion the learned Judge President arrived at - that there was the wrong of passing-off.

The court *a quo* made no specific reference in the judgment to the Hove Mbiri skirt, exhibit 6, "the zebra skirt", and the alleged imitation skirt, exhibit 16. Exhibit 16 was not before us. We are, therefore, unable to say there was a passing-off of the "zebra skirt". Apart from that we agree with SANDURA JP that there was the wrong of passing-off and the order that he made.

Mr *Eastwood* submitted that if the appeal was not successful, the appellants should be awarded the costs of appearing on 26 October 1984. Appellants' witnesses attended that hearing. He says witness expenses of the directors and staff of the appellants who attended should be awarded. What are his reasons for so submitting? He says the relief is claimed "as the hearing

was unusual and extreme and was successfully opposed by the appellants. The terms of the rule issued were no different than would have resulted from an ordinary Notice of Motion, without any preliminary hearing. The very short notice of the Petition afforded to the appellants (one day) made the attendance in person of those members of the appellant who later made affidavits desirable in the light of the unusual and extreme relief claimed in case their viva voce evidence was required. The costs of the hearing should be declared to include their witness expenses."

The learned Judge President applied his mind to the costs of 26 October 1984. In my view he exercised his discretion properly. He saw no "reason for depriving her (the respondent) of the costs of this hearing as well as the costs incurred on 26 October 1984 when the rule *nisi* was issued."

Mr *Eastwood* did not cite to us any authority entitling the appellants to be paid witness expenses. Why pay witness expenses to people who only attended proceedings without giving evidence or who attended the court proceedings because they wanted to prepare their own affidavits. The order prayed for at this stage is a very unusual one and as Mr *de Bourbon* says it "is not cognisable in law." I say it may be cognisable in law but I know not of any law which authorises the payment of witness expenses to people who attend court because the applicant was seeking an Anton Piller Order at short notice.

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As I understood from Mr *Eastwood* they were there in order afterwards to prepare their evidence and they later swore affidavits. Why should the respondent pay costs to people who were preparing evidence in rebuttal?

In the result the appeal is dismissed with costs.

Beck JA: I agree.

Gubbay JA: I agree.

Kantor & Immerman appellants' legal practitioners

Winterton, Holmes & Hill respondent's legal practitioners

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RAG (PVT) LTD v HUIZENGA NO 1986 (2) ZLR 203 (SC)

Court **Supreme Court, Harare**

Beck JA, Gubbay JA & McNally JA

Civil appeal

3 & 23 October 1986

Flynote

Appeal - late noting - application for condonation - different method of calculation of time in High Court and Supreme Court - may not be sufficient excuse.

Company - winding-up - grounds - unable to pay debts - commercial insolvency - just and equitable - only manner in which creditor can achieve payment of debt - director - personal responsibility for costs in unsuccessful opposition to winding-up

Costs - director of company liable de bonis propriis - unsuccessful opposition to winding-up.

Insolvency - commercial insolvency - sale of assets necessary to pay debts.

Legislation - Companies Act [Chapter 190] ss 179(f), 179(g), 243(a); Insolvency Act [Chapter 303] s 102(3); Prevention of Corruption Act 1985, Part III s 10(e).

Headnote

The Supreme Court may not continue to accept as a sufficient excuse for failure to abide by the time limits for noting an appeal any confusion caused by the different methods of calculating time in the Supreme Court and the High Court

Where after sale of its liquid assets a company would still be in a position of appreciable indebtedness the company is commercially insolvent. Its winding-up would be justified on the additional ground that it is just and equitable if that is the only means by which a creditor can obtain payment.

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Cases cited:

Ellis & Anor v Maceys Stores Limited 1983 (2) ZLR 17 (SC)

Oak Holdings v Chiadzwa S-136-85 (unreported)

Sithole v Moyo S-73-86 (unreported)

Chiadzwa v Monticolo S-88-86 (unreported)

Koekemoer v Taylor & Steyn NO & Anor 1981 (1) SA 267 (WLD)

Shepherd v Mitchell - Cotts Seafreight (SA) (Pty) Ltd 1984 (3) SA 202

Kleynhans v van der Westhuizen 1970 (1) SA 565 (O)

Francarmen Delicatessen (Pty) Ltd v Gulmini & Anor 1982 (2) SA 485 (W)

C N Greenland for the appellant

M T O'Meara for the respondent

Judgment

McNally JA: This matter came before us by way of an application for leave to appeal out of time. Since it was evident that the success of the application would depend upon the prospects of success in the appeal, beck JA directed that the application and the appeal should both be set down on the same occasion. We heard the application on 3 October 1986.

It became apparent to the court that the appeal had no merit whatever. Accordingly we dismissed the application and indicated that our reasons would be handed down later. We also, for reasons to which I will revert, reserved the question of costs and gave the parties leave to file written submissions on the question of costs on or before 10 October 1986.

I proceed therefore to set out our reasons for the application and our judgment on the question of costs.

The delay in noting the appeal was only a matter of days. The standard excuse was put forward—that time runs faster in the Supreme Court than in the High Court because the Supreme Court Rules do not exclude Saturdays, Sundays and public holidays. We have accepted that excuse in *Ellis & Anor v Maceys Stores Limited* 1983 (2) ZLR 17, *Oak Holdings (Pvt) Limited v Chiadzwa* S-136-85, *Sithole v Moyo* S-73-86 and *Chiadzwa v Monticolo* S-88-86. We may not continue to accept it. But on this occasion, had there been any merit in the appeal, we would not have refused to hear it because of the delay.

Let me turn now to the facts of the matter. Mr Huizenga filed a petition for the winding up of RAG (as I shall call the company). A rule *nisi* was issued calling upon all interested parties to show cause why the company should not

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be wound up. Mr Huizenga was appointed provisional liquidator. The only opposition came from Mrs Paweni, purporting to speak for the company. The learned judge overrode that opposition, ordered that the company be wound up and that the costs of the proceedings be costs of liquidation.

The facts of the matter are a little out of the ordinary. It is not usual that the petitioning creditor, who is also the effective manager of the respondent company, is appointed liquidator. But in this case Mr Huizenga petitions in his capacity as the liquidator of a group of companies formerly controlled by Mr Samson Paweni. I will call them the Paweni Group. RAG is a company which runs a farm. It is also a Paweni company. It is indebted to the Paweni Group. Mr Huizenga took over effective management of RAG when Mr Paweni was imprisoned. It is obviously sensible that he, as liquidator of the group, should also be the liquidator of RAG. There is certainly nothing improper in such an appointment.

The allegation in the petition was that RAG's liabilities exceeded its assets and that its liquid resources were insufficient to pay its debts to the Paweni Group, which debts were due and

payable. In short the applicant was relying on s 179(f) of the Companies Act [Chapter 190]. The Paweni Group was the only creditor because it seems that as a matter of group policy RAG's debts were met by the other companies in the group.

The first complaint by Mrs Paweni was that Mr Huizenga's facts were wrong. She said he had undervalued the assets and overvalued the debts. She put him to the proof of his assertions. In reply Mr Huizenga confirmed that the indebtedness of RAG to the Group was indeed higher than he had first thought, amounting to \$470 076,87, while the assets of RAG totalled \$366 486,87, a shortfall of \$103 590,00

Returning to the fray with more concrete assertions, Mrs Paweni then claimed that RAG's total indebtedness to the Group was a mere \$225 723,35 and that its assets exceed that figure by \$243 084,23. After disposing of liquid assets it would have a shortfall of only \$83 035,77.

But even if one accepts the figures given by Mrs Paweni, it is evident that RAG is hopelessly commercially insolvent. She says that RAG can sell a tractor for \$32 000 and that she personally can sell assets for \$129 000. But it appears she is personally indebted to the Group in sum of approximately \$170 000 and has admitted liability for \$134 129,06. She is in no position to sell assets or to lend money to the company. Apart from anything else she

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McNALLY JA

is a "person" in terms of Part III of the Prevention of Corruption Act, No. 34 of 1985.

The concept of commercial insolvency is well known. See for example *Koekemoer v Taylor & Steyn NO & Anor* 1981 (1) SA 267 at 271A-B. A farming company is clearly commercially insolvent if it has to sell its stock and implements to pay its debts. In this case, even on Mrs Paweni's own figures, it would have to find another \$83 035 after using all its liquid resources. This is patently not a viable proposition.

It seems to me to be established beyond any shadow of a doubt that RAG is commercially insolvent. The learned trial judge's conclusion in this regard is, with respect, unquestionably right.

When one bears in mind that the shareholders in RAG are Mr and Mrs Paweni, who hold one each of the two issued shares; that the Group on whose behalf Mr Huizenga is petitioning is the only creditor; and that it is quite patently just and equitable that RAG be wound up since that is the only way in which the Group can collect the money owing to it, then it is clear the appeal has no merit. Indeed I would have thought the application could as well have been based on s 179(g) of the Companies Act.(g) of the Companies Act.

The point has been made that a petitioning creditor should not be allowed to make his case in his answering affidavit. The answer to that is clear. Exceptional cases may necessitate a departure from strict rules. Here we have a situation in which a professional liquidator is required to disentangle the ramifications of a commercial empire which has fallen on evil days. Is he to be non-suited because he omits certain details of his founding affidavit or discovers new facts after he had lodged it? Clearly this would be wrong. There is ample authority for saying

so. I need only refer to the two which Mr O'Meara relied on; *Shepherd v Mitchell - Cotts Seafreight (SA)(Pty) Ltd* 1984 (3) SA 202 at 205E-I; *Kleynhans v van der Westhuizen NO* 1970 (1) SA 565 (O) at 568H.

In any event it seems to me to be going much too far to say that Mr Huizenga did not make out a case in his founding affidavit. He omitted one figure, which was clearly no more than an error, and omitted to enumerate certain assets. The answering affidavit provided those figures and gave certain additional information which did not contradict but supplemented and brought up to date the allegations previously made. Nor can I accept that on the basis of the original affidavit it could not be said that a case had been made

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out on a clear balance of probabilities. The case was a clear one. The answering affidavit made it even stronger.

I turn next to consider the question of costs. In order to do so, one must ask the question-who was the real objector to the winding up? Was it, as the papers suggest, the company, RAG, or was it Mrs Paweni personally?

The company had two issued shares. They were issued to Mr and Mrs Paweni. They were directors. There is some dispute as to whether Mr Huizenga has been appointed a director in place of Mr Paweni and on the papers this cannot be resolved. But since Mr Paweni is insolvent and in prison it is difficult to understand Mrs Paweni's claim on the papers to be "duly authorised by the Respondent Company" to speak and act on its behalf. Nonetheless that assertion was admitted by Mr Huizenga and it was this, no doubt, which led the judge in the court *a quo* to order that the costs be costs in the liquidation. Despite that, I think she is properly to be regarded as having been a party to the proceedings in the court *a quo*.

In the application for an extension of time within which to note the appeal, the situation is different. Mrs Paweni's affidavit reads as follows in its opening paragraph:

1. I **was** a Director and I am a shareholder of the applicant company ..." (my emphasis).

Paragraph 3 reads:

- "3. On or about the 14 February 1986 I instructed my legal practitioners ..."

Whatever the position may have been at the hearings in the High Court, it seems to me to be clear that it is Mrs Paweni personally who is applying to this court. She has *locus standi* to do so as a 50% shareholder and an intervening party in the court *a quo*. I may add that as a "specified person" in terms of s 10(e) of Act 34 of 1985 she is not permitted, without the approval of her "investigator" (and we have heard and seen nothing from her investigator) to "perform any act as a director of a company." This is further support for the view that she must be regarded, for the purposes of this application, as the applicant, in her personal capacity.

At the hearing, when it became evident that the court was considering

McNALLY JA

ordering that the costs of the application be borne personally by Mrs Paweni, we gave leave to the parties to make written submissions on or before Friday 10 October. Both counsel have done so and we are grateful for their assistance. Mr *O'Meara*, apart from making the points to which I have already referred, relied on certain cases in which directors, who were not parties, were required to pay costs *de bonis propriis*. See for instance *Francarmen Delicatessen (Pty) Ltd v Gulmini & Anor* 1982 (2) SA 485 (WLD).

It seems to me the present case is different and stronger. Mrs Paweni is the applicant. She does not and cannot purport to act in the name of the company in making her affidavit. It is true that the form of the notice of motion shows RAG as the applicant, but in substance it is clear that she is the applicant. Mr *Greenland*, in his supplementary heads of argument, accepts this. Once that is so, she must automatically bear the costs of the application unless the court directs otherwise - s 102(3) of the Insolvency Act [*Chapter 303*], as read with s 243(a) of the Companies Act. I see no basis for directing otherwise. The application, as already indicated, is without merit. See generally Henochsberg *Companies Act* 4 ed p 606.

Mrs Paweni has had a week's notice of the court's proposal to hold her responsible for the costs, so no question of prejudice can arise. She was present at the appeal hearing.

In the result therefore the application is deemed to be the application of Mrs Gertrude Alice Paweni, and the order of the court is that the application is dismissed with costs, which costs are to be borne by Mrs Gertrude Alice Paweni.

Beck JA: I agree.

Gubbay JA: I agree.

Gollop & Blank appellant's legal practitioners

Atherstone & Cook respondent's legal practitioners

RK FOOTWEAR MANUFACTURERS (PVT) LTD v BOKA BOOKSALES (PVT) LTD 1986 (2) ZLR 209 (HC)

Court High Court, Harare

Sandura JP

Civil application

23 October & 5 November 1986

Flynote

Landlord and tenant - Commercial Premises (Rent) Regulations 1983 - eviction of statutory tenant - good and sufficient cause - material date for ascertaining existence of is date of hearing of the application.

Practice and procedure - declaratory order - eviction of statutory tenant on some future date - not available - discretion of court - should be exercised against the granting of a declaratory order which will not do away with future litigation.

Headnote

The material date for ascertaining the existence of good and sufficient cause for the ejectment of a statutory tenant is the date of hearing of the application. A lessor cannot bring an application for a declaratory order that at a future date, for instance the date of expiry of notice given, the lessee will be obliged to vacate since at that future date a further application may in any event be required to secure the lessee's ejectment.

Cases cited:

Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd 1953 (3) SA 324

Reinecke v Incorporated General Insurances Ltd 1974 (2) SA 84

MJ Gillespie for the applicant

RM Fitches for the respondent

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SANDURA JP

Judgment

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

- "1. That the Applicant is entitled as against the Respondent and all persons claiming title from the Respondent, to occupation of the premises occupied by the Respondent at Evanessa House, 46 Forbes Avenue, Harare, with effect from the 1st April, 1987.
2. Further that the Respondent pay the costs of and incidental to this application."

The facts of this case are these. In January 1980, the respondent leased part of the premises in dispute from a company called Dominion Buildings (Pvt) Ltd. The agreed rent was \$200 per month and the lease was for a period of one year. Clause 26 of that lease provided as follows:

"26. In the event of the leased premises being sold by the present owners during the currency of this lease, it is hereby agreed that the new owner will have the right to terminate this lease by giving the tenant six calendar months notice to vacate the premises."

After the first year, there were increases in rent and in the area leased. These were agreed upon verbally from time to time, but it appears that no other terms of the lease were renegotiated. At present, the respondent occupies a large portion of the premises in question ie Evanessa House, at a monthly rent of \$1 900.

Early in 1986 the applicant in this matter purchased Evanessa House from Dominion Buildings (Pvt) Ltd Thereafter, the applicant wrote to the respondent on 28 May 1986 as follows:

"You will now have been informed by Dominion Buildings (Pvt) Limited that the premises which you occupy on lease have been sold to our company.

We should be glad if you would contact the writer to arrange an appointment at our offices to discuss the new terms for leasing the premises which you occupy."

When there was no response from the respondent, the applicant sent another letter to the respondent on 26 June 1986. That letter reads as follows:

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"This letter is to inform you that we shall be requiring use of that portion of the building which you presently occupy with effect from 1st January 1987.

You are therefore hereby given notice of six months to vacate these premises by that date.

Intimation was given to you by the previous owners of an increased rental charge from the 1st June 1986 and you were invited to attend our offices for discussion on this.

It is regretted that the present rentals on the building are not economic and we now have to inform you that with effect from 1st July we shall require a monthly rental from you of \$3 500,00 until the above notice expires in December."

In reply, the respondent's legal practitioners challenged the termination of the lease as well as the proposed increase in rent and alleged that there was a verbal lease agreement between the former owner and the respondent entitling the respondent to occupy the premises for a year from 1 April 1986 at a rent of \$1 900 per month. Subsequently, there was correspondence between the applicant's and respondent's legal practitioners. Finally on 8 August 1986 the applicant's legal practitioners wrote to the respondent's legal practitioners and the relevant part of that letter reads as follows:

"Accordingly and without acknowledging any right in your client, our client is prepared to allow your client to remain in occupation of the premises until the end of March 1987 provided our client receives your client's assurance that your client will vacate the premises at the end of March 1987 to allow our client to occupy the premises from the 1st of April 1987.

If we do not receive your client's assurance to this effect before the 31st instant we are instructed to make application to the High Court for a declaration of our client's rights in the matter."

In reply the respondent's legal practitioners stated that the respondent "will probably vacate the property by no later than the end of March 1987". Because the respondent did not give a clear and unambiguous undertaking to vacate the premises at the end of March 1987, the applicant filed the present application seeking a declaratory order to the effect that the applicant is

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entitled to the occupation of the premises in question with effect from the 1st April 1987.

This court's power to make a declaratory order is governed by s 14 of the High Court of Zimbabwe Act No. 29 of 1981. That section reads as follows:

"14. The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The South African Supreme Court Act 1959 has a similar provision. Dealing with that provision the third edition of *The Civil Practice of the Superior Courts in South Africa* by Herbststein and van Winsen has this to say at p 521:

"The question whether or not an order should be made in terms of the above-mentioned provisions should be examined in two stages. Firstly, the applicant must satisfy the court that he is a person 'interested' in an, existing, future or contingent right or obligation'. If satisfied on that point, the court decides upon the further question, namely, whether the case is a proper one for the exercise of the discretion conferred on it."

That is the procedure which I shall adopt in determining whether or not the declaratory order sought by the applicant in this case should be granted.

The first question which I must, therefore, determine is whether the applicant is 'interested' in an 'existing, future or contingent right or obligation' in this matter. In my view, there can be no doubt that the applicant is interested in a future right in this matter because it is the applicant's intention to occupy the premises in question for its own use with effect from the first day of April 1987 and the present application has been brought in order to establish that right. Moreover, the applicant is the proprietor of the premises in question. That leads me to the second question which I must determine and that is whether this is a proper case for the exercise of the court's discretion.

Before determining that issue ... [The learned Judge President considered a separate issue and concluded] I therefore accept that the applicant requires the premises for its own use with effect from the first day of April 1987.

However, that is not the end of the matter because it is necessary to determine the date in respect of which the court must be satisfied that the lessor has good

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and sufficient grounds in terms of the Regulations. In order to determine this, it is necessary to examine the wording of s 22(2) of the Regulations. Such an examination establishes that before the court can grant an order for the recovery of possession of commercial premises or for the ejectment of a lessee therefrom it must be satisfied that the lessor has good and sufficient grounds for requiring such order. It follows, therefore, that the date in respect of which the court must be satisfied that the lessor has good and sufficient grounds for requiring the order is the date on which the lessor seeks an order for the recovery of possession of the premises or for the ejectment of the lessee therefrom. This means that the question whether the lessor has good and sufficient grounds must be determined at the hearing of the application for the

ejection of the lessee.

I am fortified in this conclusion by what SCHREINER JA said in *Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd* 1953 (3) SA 324 at 333H-334A. In that case the learned judge was dealing with the South African Rents Act whose provisions are similar to those of the Commercial Premises (Rent) Regulations, 1983. This is what he said:

"The material date for ascertaining whether the lessor reasonably required the premises for its own use was the date of the hearing of the application for ejection and not the date of the expiry of the notice to vacate. Sec 22(1) is not concerned with how or when legal proceedings may be brought by the lessor against the lessee; all it requires is the proved existence of one or other of the situations set out in the lettered paragraphs of the subsection before the Court may make an order for recovery of the premises or for ejection. As being equally applicable to our Sec 22(1) I may quote what was said by MACKINNON LJ, in *Benninga (Mitcham) Ltd v Bijstra* 1946 KB 58 at P 62:

'The Rent Restriction Acts do not forbid the bringing of an action; they only prohibit the granting of certain relief to which the Common Law would entitle the plaintiff, unless certain conditions have been fulfilled. The questions whether those conditions exist must be determined when the question whether the relief claimed may be granted has to be decided, namely, at the hearing of the action.'

Some of the conditions relate to the past and have to be considered in relation to the past but the reasonable requirements of the lessor relate to the time when the Court has to consider whether to grant an order of ejection or not, ie to the time of hearing."

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Later on the learned judge continued at 334C-D:

"It follows that once the claim for ejection was out of the way - the Court having decided not to grant it - the declaratory order should not have included, as in effect it did, a declaration that the lessor reasonably required the premises for its personal use, since that feature can only be declared upon as at the date of hearing of proceedings for an order for ejection which the court is about to grant."

Commenting on the *Lawson and Kirk* case WESSELS JA had this to say in *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 at 97B-E:

"The order granted contemplated that there would be a subsequent application for an ejection order. At the hearing of that application the court would be required to determine whether it appeared, as at the date of that hearing, that the lessor reasonably required the premises for its own use. In so far as the order appealed from in the *Lawson and Kirk* case is concerned, the only information placed before the Court of first instance regarding the lessor's requiring the premises for its own use, related to the position as at the time of the hearing of the application for ejection. Upon the subsequent hearing of an application for ejection, the Court would be required to make a finding whether, as at that time the evidence established that the lessor reasonably required the premises for its own use. In the circumstances, it would have been an error in fact for the Court of first instance to have granted an order declaring that the lessor would, at some undetermined future date, be entitled to relief provided it is then established that it reasonably required the premises for its own use. Such an order would have amounted to no more than a restatement of the relevant provisions of the Rents Act, and would not have determined any existing, future or contingent right of the lessor. The order of the court of first instance no doubt finally determined the lessor's rights as at the date of the hearing of the application. But, as we pointed out on appeal, such determination would not be relevant when ejection proceedings are instituted at some future date."

What SCHREINER JA and WESSELS JA said applies with equal force to the facts of the

present case. The date on which the applicant will be required to establish that it has good and sufficient grounds for the ejectment of the respondent in terms of the Regulations is the date on which the application for ejectment will be heard and this is some undetermined future date. In the circumstances, although I feel that the notice given to the respondent is valid

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bearing in mind the provisions of the first written lease agreement and although I am of the opinion that at present the applicant requires the premises in question for its own use with effect from the first day of April 1987, it would be an essay in futility to grant an order declaring that the applicant will, at some undetermined future date, be entitled to relief provided it is then established that the applicant has good and sufficient grounds in terms of the said Regulations. This is so because if at the end of March 1987 the respondent refuses to vacate the premises in question but continues to pay the rent due and performs the other conditions of the lease the applicant will have to apply for an order of ejectment. In order to succeed in that application the applicant will have to establish that at the time of the hearing of the application there are good and sufficient grounds for requiring the order. This the applicant can do by satisfying the court that at that time it requires the premises for its own use. In such proceedings, an earlier order declaring that the applicant is entitled to the occupation of the premises with effect from the first day of April 1987 would be irrelevant and of no assistance to the court.

In the circumstances, I have come to the conclusion that this is not a case in which the court should exercise its discretion and grant a declaratory order. The application is, therefore, dismissed with costs.

Kantor & Immerman applicant's legal practitioners

Gollop & Blank respondent's legal practitioners.

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ROLAND & ANOR v McDONNELL 1986 (2) ZLR 216 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Beck JA & Gubbay JA

Civil appeal

16 October & 10 November 1986

Flynote

Practice and procedure - consent judgment - setting aside of legislation - Rules 57 and 63, High Court Rules

Headnote

A judgment given by consent may be set aside on good and sufficient cause shown. "Good and sufficient cause" in this context is to be determined according to the same principles by which it is to be determined in an application to set aside a judgment given by default. Moreover, a party will not normally be permitted to fight over again a battle which has been already fought unless there has been a significant change in circumstances or the party has become aware of facts which he could not reasonably have known or found out in the first encounter.

Cases cited:

Chanel Ltd v FW Woolworth & Co Ltd & Ors [1981] 1 All ER 745 (ChD)

GD Haulage (Pvt) Ltd v Mumurgwi Bus Services (Pvt) Ltd 1979 RLR 447 (AD)

S v Franco & Anor; S v Lasovsky Bros & Ors 1974 (4) SA 496 (RAD) 1974 (2) RLR 39 (AD)

Arab v Arab 1976 (2) RLR 166 (AD)

Greenberg v Meds Veterinary Laboratories (Pvt) Ltd 1977 (2) SA 277 (TPD)

C N Greenland for the appellants

J B Colegrave for the respondent

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Judgment

Dumbutshena CJ: The appellants, to whom I shall refer as the plaintiffs, and the respondent, hereinafter referred to as the defendant, were once in business together. The name of their company was DFD (Pvt) Ltd, hereinafter referred to as the company. The name of the company was by 12 July 1982, changed to LBF (Pvt) Ltd. The defendant says that Mr Moore had no shares in the company. This is, however, disputed by Mr Moore and Mr Roland, the two plaintiffs. For the purposes of this judgment I shall assume without necessarily deciding the point that Mr Moore was a shareholder and a director of the company.

From a reading of the papers it appears that some time towards the end of 1981 the plaintiffs decided to sell their interests in the company. Those interests were in the form of shares and loans advanced to the company. When the plaintiffs wanted to be paid the defendant, so it appears from the papers, disputed his indebtedness to the plaintiffs and the amounts of that indebtedness. However on 12 July 1982 it was agreed that each plaintiff was owed \$10 000. The defendant says that it is the company which owed the plaintiffs. To go back a little, before 12 July 1982 the plaintiffs and the defendant held a meeting on 1 December 1981. They discussed how they were going to solve the matters that were in dispute, that is, the amount in money of their shares and their loan accounts.

It appears that an accommodation was reached. By letter dated 2 December 1981, Annexure A, the defendant wrote as follows to Mr Roland:

"With regards to matters discussed at the meeting last night, it is obvious that the animosity between us increases

rather than diminishing. Therefore, I feel the best solution is that either I buy you out or you buy me out.

Having spoken to you this morning, you agreed that you would accept being bought out. It is up to us now to work out what you are owed and the manner in which you wish to be paid.

It is my wish that we settle amicably, as every other member of D F D (Pvt) Ltd, has in the past been settled."

Mr Moore says that letter was also addressed to him. The defendant does not agree.

The language used in that letter is simple and clear. It leaves no one in doubt as to what the best solution was to be. The defendant suggested that either

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he buys the plaintiffs' out or the plaintiffs buy him out. He invited them "to work out what you are owed, and the manner in which you wish to be paid."

The amicable solution referred to in Annexure A is spelt out in a memorandum dated 12 July 1982, Annexure B of the Founding Affidavit.

It is apparent that the memorandum refers to matters that were agreed to. According to the memorandum Mr Moore and Mr Roland ceased to be directors of DFD (Pvt) Ltd. The name of company was changed to LBF (Pvt) Ltd. It was also agreed that the plaintiffs were owed \$10 000,00 each. Payment was to be made in December 1982. The defendant who was now director of LBF (Pvt) Ltd acknowledged the money owed to the plaintiffs. The note is in these words:

"Mr C Moore and Mr H Roland are no longer directors of DFD (Pvt) Ltd, which name is now changed to LBF (Pvt) Ltd.

They are each owed \$10 000,00 and have agreed to wait until December 1982 for payment, together with interest at 12.5%.

As Director of LBF (Pvt) Ltd, I, JB McDonnell, acknowledge this debt to these two gentlemen."

There was no payment made to the plaintiffs by December 1982. In spite of demands made to the defendant, he did not pay them the \$10 000,00 owed to each of them. Because the defendant failed to pay, each plaintiff issued summons on 13 October 1983. A consent judgment was entered against the defendant on 28 January 1985. That judgment was set aside by GIBSON J on 28 August 1985. It is against the judgment that the plaintiffs now appeal.

In para 7 of the founding affidavit the defendant explains the memorandum of 12 July 1982 differently. He denies accepting liability. Paragraph 7 reads as follows:

"On the 12 July 1982 the Plaintiffs insisted that something to reflect this proposal be placed in writing and accordingly the attached memorandum annexure "B" was drawn up. I could not accept liability on behalf of my brother and sister so I accepted liability for the sum of \$10 000,00 (which was implied as Canadian) in my capacity as a director of the company and on behalf of the company but not in my personal capacity."

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The plaintiffs dispute this. They say so in clear terms in para 7 of their answering affidavit:

"We deny that Annexure 'B' to the Founding Affidavit was designed to reflect any proposal that we be bought out by any third party let alone the Defendant's relatives in Canada. Annexure 'B' to the Founding affidavit was signed by Defendant after he had agreed to purchase from us our shares and our loan accounts in the company."

In spite of Annexure 'B' there was a dispute on the papers on the meaning of its contents. The defendant in his denial of liability suggests that the shares were to be bought by his brother and sister who lived in Canada. They were going to buy the plaintiffs' shares by paying each plaintiff \$10 000,00 in Canadian currency.

Payment was to be effected outside Zimbabwe, to be precise in Canada. The plaintiffs denied that such an arrangement was ever made. This was a material dispute of fact which could not be resolved on the papers. Whatever might be the truth, the defendant said that his brother and sister in Canada did not buy the shares as agreed. This fact became known to him after the memorandum of 12 July 1982 and had been drawn up.

Besides the dispute between the parties on the truth of the existence of what the learned judge *a quo* called the "Canadian connection", the evidence on the papers was not such as to cause a court to come to a finding that such connection existed. There was no sufficiency of evidence and there was a dispute of fact. Perhaps a court could, after hearing oral evidence, form a view on the truthfulness or otherwise of the agreement allegedly made between the defendant and the plaintiffs. The learned judge *a quo* came to the conclusion that the defendant decided to buy out the plaintiffs because his brother and sister in Canada had promised him funds. Once such a finding was made one wonders whether the defendant could be "saved by the provisions of the Companies Act [Chapter 190]" as the judge *a quo* seemed to suggest. In terms of subs (1) of s 58 of the Act what is unlawful is for the company to give "any financial assistance for the purpose of or in connection with the purchase or subscription made or to be made by any person for any shares in the company...".

Whether or not there was going to be an infringement of s 58 of the Act, is not clear from the papers. The court cannot speculate on the likelihood of an infringement of the section where it is not clear from the averments, in the

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affidavits that the company was giving financial assistance to the defendant or any other person for the purpose of the acquisition of its own shares.

When the defendant settled his plea he seems not to have had in mind the illegality envisaged under s 58. The plea reads:

"Defendant pleads as follows to Plaintiff's Declaration as amplified by Plaintiff's further and better particulars:-

1. AD PARAGRAPH 1, 2 & 3

These averments are admitted, save to state that DFD (Pvt) Ltd subsequently changed its name to LBF (Pvt) Ltd.

2. AD PARAGRAPH 4

This is denied. During July 1982 the Plaintiff and LBF (Pvt) Ltd agreed to sell and purchase respectively to and from each other all the Plaintiff's shares in LBF (Pvt) Ltd with his loan account in the said LBF (Pvt) Ltd for a total purchase price of \$9 500. Defendant at all material times acted as director on behalf of LBF (Pvt) Ltd and denies contracting with Plaintiff in his personal capacity, as averred.

3. AD PARAGRAPHS 5 & 6

Defendant admits that demand for payment was made by Plaintiff but avers that demand for payment was directed to LBF (Pvt) Ltd and more in particular at Defendant who acted, at all material times, as director of LBF (Pvt) Ltd."

There is no mention of any illegality of any kind. It was only in the plaintiffs' replication that the question of the illegality arising from a company purchasing its own shares was raised.

Paragraph 2 of the replication is in these terms:

"Plaintiff avers, moreover, that it is unlawful for a company to purchase shares in itself and that the purchase of the loan account in itself is meaningless; such a company could only repay such a loan account. Plaintiff avers that Defendant was obviously contracting in his own capacity."

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One of the issues specifically minuted at the pre-trial conference was whether it was legally possible for the plaintiffs to sell their shares and/or loan accounts in the company or to the company. On 4 July 1984 a notice of set down by consent was issued. On 4 October 1984 the defendant withdrew his appearance and consented to judgment. Up to that stage the defendant had not raised the question of the contravention of s 58. This omission alone raises some doubt as to the merit of the defendant's defence.

In his replying affidavit sworn on 28 May 1985 the defendant makes in para 16 this admission:

"I admit that Mr van Oudtshoorn pointed out to me at this time that the Pleas that he had drawn on my behalf were in contravention of the Companies Act and as presently advised I accept that it is not possible under the present Companies Act for a company to purchase its own shares but I do not recall receiving similar advice at or about the times that the respective Defendant's Pleas were drawn."

It is interesting to note that the replying affidavit was made about three months after the writ of execution had been served on the defendant.

It is my view that the defendant was for a long time not aware of the defence which he now seeks to include in his amended plea. It means that the illegality now being proffered as a defence was never in the contemplation of the defendant. It may be that for a long time it did not occur to the defendant that he had a defence in the purported infringement of s 58.

It is trite that a company cannot give directly or indirectly any financial assistance for the purpose of purchasing its own shares. Section 58(1) says so in clear terms. It reads:

"58. (1) It shall not be lawful for a company to give, whether directly or indirectly, and whether by means of

a loan, guarantee, the provisions of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person or for any shares in the company or, where the company is a subsidiary company, in its holding company."

The exceptions are found in the proviso to the subs (1) of s 58:

"Provided that nothing in this subsection shall be taken to prohibit -

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- (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
- (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of, or subscription for, fully-paid shares in the company or its holding company, to be held by or in trust for the benefit of employees of the company, including any director holding a salaried employment or office in the company;
- (c) the making by a company of loans to persons, other than directors, *bona fide*, in the employment of the company with a view to enabling those persons to purchase or subscribe for fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership."

It is not useful to consider whether the exceptions cover the instant case because no party to the dispute seeks to rely on exceptions to s 58(1). I have cited s 58 in order to show how the illegality on which the defendant now seeks to rely arises.

Although it appears from a reading of the judgment that the consent judgment was set aside on the sole ground that it was against the provisions of s 58 for a company to purchase its own shares, consideration was also given to the effect of s 8 of the Exchange Control Regulations RGN 399/77. It is not clear from reading the judgment of the court *a quo* whether rescission was also granted because of the infringement of s 8 of the Exchange Control Regulations. Section 8 of the Regulations provides:

"Subject to the provisions of subsection 2, unless otherwise authorised by the Minister-

- (a) No Zimbabwean resident shall do any act which involves or is in association with-
 - (i) the making of any payment outside Zimbabwe;
 - (ii) or the incurring of any obligation to make any payment outside Zimbabwe;
- (b) ...
 - (i) ...
 - (ii) ...

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in respect of the trade, business or other gainful occupation or activity carried on by him ..."

Here again it is not what the section means that is relevant in the circumstances of this case. The words are clear and unambiguous. So is the meaning. The learned judge *a quo* made a finding of fact on insufficient evidence and on material facts which were disputed by the parties. The plaintiffs specifically denied the "Canadian connection" in para 7 of their answering affidavit. The paragraph contains other matters unrelated to the "Canadian connection". I repeat, however, the paragraph in its entirety because the plaintiffs deny that they were party to an illegal deal, a deal that contravened s 8 of the Exchange Control Regulations. Paragraph 7 reads:

"We deny that Annexure 'B' to the Founding Affidavit was designed to reflect any proposal that we be bought out by a third party let alone the Defendant's relatives in Canada. Annexure 'B' to the Founding Affidavit was signed by Defendant after he had agreed to purchase from us our shares and our loan accounts in the company. The figure of \$10 000 was agreed as being a round figure and as being approximately correct as at that date (as opposed to the 31st March 1981 being the date of the financial statements contained in Annexure 'A' to the Founding Affidavit). There was simply no point in the document being annexure 'A' if it was merely to reflect the debt due to us by the company because that debt was an admitted debt although the exact amount thereof might have been in dispute. There was never any question as between us on the one hand and the Defendant on the other hand that the company did owe all of us on loan account. Even Annexure 'A' to the Founding Affidavit reflects a loan account due to Mr Moore as \$9 500 and if this figure was being translated into Canadian currency at the rate of Z\$0,60 to the Canadian dollar this would have required the document being Annexure 'B' to the Founding Affidavit to have reflected a debt due to Mr Moore of \$15 833. We deny that Annexure 'B' to the Founding Affidavit is an acceptance of liability on behalf of the company because there was no need for such acceptance by the Defendant because we had just reached an agreement with him that he would buy us both out for Z\$10 000 each."

In spite of these disputed facts which properly should not have been used to make a finding of any kind, the learned judge made the following finding of fact:

"I find it convenient to deal with the issues raised by the Canadian

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connection so far. Firstly, I find that the defendant, armed with the interest and promise of funds from Canada, did make an offer to buy the plaintiffs out personally. Since the would-be investors were close members of the family it mattered little whether he was making the offer personally or on their behalf."

I agree with Mr *Colegrave*, for the defendant, who contended that the case should be sent for trial because the learned judge *a quo* had made findings of fact on material facts which were in dispute. It is not necessary to send it for trial at this stage. We must decide on the merits of the judgment granting rescission. It is correct that the findings made by the judge *a quo* should, in my view, have been reserved for the trial court. Unless on the papers there was clear evidence that an agreement to be paid money in Canadian currency in Canada had been made, a finding that such an agreement was made, based as it was, on inadequate averments on the papers cannot be sustained on appeal.

Besides, the sequence of events does not allow an approach that excuses the defendant's default. He agreed on 12 July 1982 that the plaintiffs were each owed \$10 000. Annexure 'B' to the founding affidavit reflects the mutual agreement between the plaintiffs and the defendant.

The agreement specified that the plaintiffs "have agreed to wait until December 1982 for payment, together with interest at 12.5%". No payment was made. On 13 October 1983 a summons was issued. On 27 March 1984 a pre-trial conference was held and issues were defined and agreed to. By consent the matter was set down for trial on 4 & 5 October 1984.

The defendant was advised by Mr van Oudtshoorn that his prospects for success were not good and that his "defence stood in contravention of the Companies Act", and yet illegality was not pleaded. After receiving that advice the defendant instructed his legal practitioner to settle. The basis of the settlement was his willingness to pay \$10 000 on 15 January 1985; \$10 000 on 15 April 1985 and the balance a month later. On 4 October the defendant withdrew his appearance and consented to judgment being entered against him in terms of the summons and the declaration.

By letter dated 4 October 1984, Annexure 'C', the defendant's legal practitioners at that time advised him of the settlement. The letter reads:

"We confirm that we settled the matter on the basis that the capital amounts due be paid over a period of six months the first payment to be

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made on 15 January 1985 and the second on 15 April 1985. The residue in respect of costs and interests to be paid one month thereafter.

In the circumstances the matter appears to be finalised from our end and we would appreciate receiving payment of the balance of our account in due course."

The consent judgment was obtained on 28 January 1985 because the defendant had failed to keep the terms of the settlement. It was only after the Deputy Sheriff had made an attachment on 12 March 1985 that he went back to his legal practitioners on 25 March 1985 and instructed them to apply for a rescission of the consent judgment.

There is merit in Mr *Greenland's* submission that the defendant's default was inexcusable. The settlement agreed to by the defendant, the consent judgment entered and the long delay in applying for rescission of the judgment, make the default inexcusable. It is only now that he seeks to amend his plea in order to include more positively the two illegalities he now wishes to rely on. Those defences were there at the time the two consolidated actions were instituted. It is appropriate in this case to say:

"Ought they to be allowed to reopen the matter six months later, having armed themselves with evidence which they could have obtained on the earlier occasion but failed to do so? In my judgment the answer should be no."

Per BUCKLEY LJ in *Chanel Ltd v F W Woolworth & Co Ltd & Ors* [1981] 1 All ER 745 (CA) at 751h. BUCKLEY LJ went on to say at 751j:

"They, the defendants, are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he

capitulated at the first encounter cannot improve a party's position. The *Revlon* point was open to the defendants in April 1979, notwithstanding that this court had not then decided that case. Some at least of the new evidence was readily available to them at that time."

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These sentiments, admirably expressed, fit into the circumstances of this case. In my view the defendant should not be allowed to try again in a case in which he consented to judgment. My view is based on the delay to plead illegality in the first instance and his consent to judgment. It seems to me right in proper cases for a defendant to apply to court for a rescission of a consent judgment if he has good grounds or a new defence to the claim which he did not know or had to discover later. Here that is not the case.

Mr *Colegrave* contended that even if the defendant "was dilatory in seeking to set aside the judgment the illegality with which appellants claim was tainted and the lack of candor in setting out the true facts in the Declaration, is such that the judgments must be set aside." That does not in my view make the defendant's dilatoriness excusable. However, Mr *Colegrave* appreciated the material disputes and the facts encompassing both the illegality under s 8 of the Exchange Control Regulations and the Companies Act. He did all that was possible to argue his client's brief. That is all he could do, in the circumstances of this case. He came to the conclusion, and he was justified in doing so, that the learned judge *a quo* should have sent the case for trial for the hearing of oral evidence.

In coming to a final decision one has to ask whether the defendant has shown "good and sufficient cause" within the meaning of Rule 63 of the High Court Rules. Did the court *a quo* take into account:

"(a) the defendant's explanation of his default, (b) the *bona fides* of the application to rescind the judgment, and (c) the *bona fides* of the applicant's defence on the merits of the case, and did the court normally consider these matters in conjunction with each other and cumulatively."

See *G D Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd* 1979 RLR 447 (AD) at 455C.

The court has also to consider the defendant's prospects of success at the trial and the question of public policy, that is, the need to reach finality in litigation. See *S v Franco & Anor*; *S v Lasovsky Brothers & Ors* 1974 (4) SA 496 (R, AD) at 501 E-F and *Arab v Arab* 1976 (2) RLR 166 (AD) at 172E. In the instant case all that was required of the defendant in his application for rescission was to show that with the averments in his affidavit, if established at the trial, he would succeed. It was, therefore important to establish whether his defence had any prospect of success. If he was not likely to succeed because of the principle of public policy, then the application must fail. In

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the instant case the plaintiffs are in possession of a judgment which by all accounts they obtained properly. Why should they be deprived of the benefits of their judgment by a defendant

who has no *bona fide* defence? Why should they be required, though no fault of their own, to enter into an expensive and protracted litigation in order to obtain that which they have got because of the defendant's default? In my view in this case the probabilities are against the defendant's success. See *GD Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd supra* at 456C-G.

Has the defendant a *bona fide* defence on the merits? If he has not then his application for rescission must necessarily fail. The *onus* is on him to establish the fact. In *Greenberg v Meds Veterinary Laboratories (Pvt) Ltd* 1977 (2) SA 277 (TPD) FRANKLIN J stated the requisites for success at 278H-279A. He said:

"The sole question for decision, therefore, is whether the applicant has a *bona fide* defence to that application. The *onus* is on the applicant for rescission to establish that fact. The requisites for success in establishing it were stated in *Grant v Plumbers (Pvt) Ltd* 1949 (2) SA 470 (O), as follows:

"It is sufficient if he makes out a *prima facie* defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case, and produce evidence that the probabilities are actually in his favour. That test was approved, *inter alia* in *Naidoo v Cavendish Transport Co (Pvt) Ltd* 1956 (3) SA 244 (D) at pp 248-249; *Van Aswegen v McDonald Forman & Co Ltd* 1963 (3) SA 197 (O) at p 200; *Msane v Bertie Williams (Pvt) Ltd* 1962 (1) SA 910 (D) at p 912; *Du Plessis v Du Plessis* 1970 (1) SA 683 (O) at p 685. Cf *Gordon & Anor v Robinson* 1957 (2) SA 549 (SR) at p 551, and authorities there cited."

In my judgment the defendant failed to show that he has a *bona fide* defence to the claims on the merits. In view of the fact that the averments on the papers seem to me not to be such as would, if established at the trial, result in a successful defence, there would, therefore, be no prospect of his defence succeeding at the trial.

Accordingly, the appeal is allowed with costs. The order of the court *a quo* is altered to read:

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"The application is dismissed with costs."

Beck JA: I agree.

Gubbay JA: I agree.

Gollop & Blank, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners

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AGRICULTURAL FINANCE CORPORATION v POCOCK 1986 (2) ZLR 229 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Civic appeal

24 October & 11 November 1986

Flynote

Contract - non-variation clause - non-waiver clause - combined effect of both clauses in a contract

Headnote

A non-variation clause in a contract entrenches the requirement that any variation has to be in writing but does not prevent a party for whose benefit it is inserted from waiving the requirement.

A non-waiver clause negatives any raising of a waiver or any estoppel in that it amounts to notice given in advance, acknowledged by the other party, that conduct which might otherwise be a waiver or give rise to an estoppel, may not be taken to be such conduct.

The combined effect of the two clauses is that two parties to a written agreement containing carefully and extensively worded non-variation and non-waiver clauses cannot enter an enforceable oral agreement departing from the written terms since to the extent it is a variation of the contract it is precluded by the non-variation clause whereas if it be said to be a waiver or conduct giving rise to an estoppel then the non-waiver clause provides the complete answer to the point.

Cases cited:

Gool v Minister of Justice & Anor 1955 (2) SA 682 (C)

Webster v Mitchell 1948 (1) SA 1186 (W)

SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T)

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Barnett v Van der Merwe 1980 (3) SA 606 (T)

Van As v Du Preez 1981 (3) SA 760 (T)

Sotiriadis v Patel 1960 R&N 280 (SR)

M J Gillespie for the appellant

I A Donovan for the respondent

Judgment

Gubbay JA: This is an appeal against the granting by the High Court (SANSOLE J), with costs, of an interim interdict restraining the appellant from exercising against the respondent the powers conferred by ss 40(a), 40(2a) and 50, of the Agricultural Finance Corporation Act [*Chapter 101*], for the recovery of \$310 674,91 with interest from 28 August 1985 to date of payment, due to it by the respondent, pending the outcome of an action to be instituted by the latter for an order declaring valid and enforceable the verbal agreement concluded by the parties at the end of October 1984.

The appellant is a statutory body. It advances monies on loan to farmers, and affords them certain banking facilities, subject to the furnishing of adequate security. This usually takes the form of stop orders on specified crops, the registration of a first mortgage bond and notes of hand against the farmer's land and a notarial general covering bond upon his movables. The purpose of the loan, its amount, the terms of repayment and the security requirements, are set out in a schedule which is incorporated by reference into the appellant's standard form "Agreement of Loan". This document contains no fewer than seventeen clauses binding upon the signatories to it. Of relevance so far as this appeal is concerned, are clauses 6, 15 & 16. They read:

- "6. Should the Borrower commit or be in breach of any of the terms and conditions of this agreement the Corporation specifically stipulates as provided in Section 40 of the Act, that it shall have the right in terms of that Section of the Act, after demand by registered letter addressed to the Borrower at his last known address or to the address given by him in his application for this loan, and without recourse to a court of law, to enter upon the property hypothecated and to take possession thereof and sell and dispose of the same in whole or in part as the Corporation may determine, always in terms of and subject to the provisions of the Act.
15. The Borrower acknowledges that this agreement constitutes the entire agreement between the Corporation and himself and that any relaxation or indulgency which may be granted by the Corporation

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following any breach by the Borrower of any of the terms and conditions of this agreement shall not be deemed a condonation by the Corporation; nor shall the Corporation be deemed to have waived any of its rights under this agreement. Nor shall any such relaxation or indulgency be deemed to constitute a novation of any of the terms and conditions of this agreement.

16. No agreement varying the terms of this agreement or dissolving the agreement shall be of any force or effect unless contained in writing and signed by the duly authorised representatives of the Corporation and by the Borrower or by his duly authorised representative and no verbal agreement shall have any force or effect."

In 1978 the respondent commenced crop farming in the Gurube district upon the properties known as Bonheim and Chiringi Farms. Since that time and until the farming year 1984/1985, he was dependent upon the appellant for the financing of his operation. Over the period extending from November 1978 to June 1984 he concluded ten standard form agreements of loan under which substantial amounts of money were advanced upon the security of the registration of a first mortgage bond in the sum of \$32 600 and notes of hand for \$77 640 against Bonheim Farm, notarial general covering bonds for \$140 000 over his movable property,

and a series of stop orders on the various crops to be marketed by him. Unfortunately due to conditions of severe drought which affected the country for three successive farming seasons, the respondent found himself in breach of his financial obligations to the appellant. He fell into arrears with his repayments to such an extent that the appellant declined to continue to fund his operation, and on 22 October 1984 called upon him to submit proposals for the settlement of all the outstanding loans. At a meeting held towards the end of October 1984 the respondent laid his written proposals before the appellant's commercial manager, Robert van Es. After lengthy discussions it was orally agreed that the respondent was to repay the appellant \$40 000 annually for a period of ten years; that Bonheim Farm was to be sold and the entire proceeds credited against the respondent's indebtedness; and that the three existing stop orders over the respondent's virginia tobacco crop, maize crop and sorghum crop, were to be cancelled and replaced by a new stop order for \$40 000 over the respondent's sorghum crop for the 1984/1985 season.

The respondent duly executed the necessary forms for the replacement stop order and thereafter procured a substantial loan from a commercial bank to enable him to fund his farming commitments for 1984/1985. The loan was

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secured by the passing of a mortgage bond over Chiringi Farm together with the issue of stop orders over the respondent's crops. Bonheim Farm was sold.

On 28 August 1985 the appellant addressed a registered letter to the respondent, in which was demanded the immediate repayment of the sum of \$310 674,91 with interest thereon to the date of receipt of the monies. It was further intimated that in the event of payment not being forthcoming the appellant would invoke the procedure laid down in clause 6 of the standard form Agreement of Loan. The appellant's attitude in this regard was based upon the allegation that the oral agreement between the respondent and Van Es:

"...was reached when both parties were labouring under a common misapprehension as to the true state of the indebtedness. The omission from the proposals of the loan number 8320196 (in an amount of \$71 892) ...rendered the proposals meaningless. The repayment proposed of \$40 000 would scarcely satisfy the interest and insurance accruing on the full amount. This agreement is therefore not binding."

It is disputed by the respondent that the parties shared a mistaken belief as to the magnitude of his indebtedness and in particular, that the annual repayment figure was arrived at without recourse to the outstanding loan of \$71 892.

Proceeding then upon a provisional acceptance of the facts deposed to by the respondent, the first branch of enquiry is "should (he) on these facts obtain final relief at the trial" (per OGILVIE THOMPSON J in *Gool v Minister of Justice & Anor* 1955 (2) SA 682 (C) at 688E, qualifying the test laid down in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189). The answer, so it seems to me, depends upon whether the oral agreement under which the appellant's representative accepted entirely different terms of repayment, relinquished the security held over Bonheim Farm and replaced three stop orders with one, can stand in the face of the inclusion in the agreements of loan of what are conveniently described as a "non-variation clause" and a

"non-waiver clause" (namely clauses 16 and 15).

In 1964 the controversy as to whether a "non-variation except in writing" clause in a contract entrenched the requirement that any variation had to be in writing, was settled in the affirmative by the South African Appellate Division in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (AD). That case decided that contracting parties could

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effectively stipulate that any variation of their agreement would be invalid unless the variation were to be written; consequently any oral agreement which purported to vary the contract was to be disregarded. Whether such a non-variation clause would preclude a party from relying on an oral or tacit waiver by the other party of his rights under the agreement was left open. The point was raised by counsel in argument but the court refused to consider it because it was not covered by the pleadings.

The answer, however, is to be found in *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) in which HIEMSTRA J recognised that a non-variation clause will not prevent one party waiving a provision of the written contract that is exclusively for his benefit or waiving the right to pursue his remedy for a breach that has already occurred. The learned judge reasoned thus at 277D-E and H:

"But waiver, including oral waiver, decidedly plays a role in regard to this legal problem. It can, however, only have reference to a provision which is to the sole benefit of the one party. A provision, e.g. that rent must be paid, is solely for the benefit of the lessor and he can obviously unilaterally waive his right of collection. He can do this verbally and even by implication. This is not a variation of the contract. This is a *pactum de non petendo* which can exist alongside the main contract. In the alternative it is a unilateral legal act whereby the consent of the other party is irrelevant. In this way the true and valid oral waiver can be distinguished from the disguised one which is nothing more than a dissolution of the contract by agreement ...

A situation may also develop where one party commits breach of contract in such a way that the other party is entitled to cancel the contract. The latter party could then orally waive his already existing right of action." (In translation.)

This decision was approved by COETZEE J in *Barnett v van der Merwe* 1980 (3) SA 606 (T) at 611E-612A. (See also *Van As v Du Preez* 1981 (3) SA 760 (T) at 764B.)

On behalf of the respondent, Mr *Donovan* raised two main arguments. In the first place he submitted that as the right to invoke the extraordinary procedure under clause 6 of the agreements of loan had been inserted solely for the benefit of the appellant and not for the benefit of both parties, the appellant was quite at liberty to waive such a right and did so under the oral agreement

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reached in October 1984. That agreement was a *pactum de non petendo* - an informal agreement not to sue - existing alongside and independent of the agreements of loan and so

did not constitute a variation thereof. Secondly, and in the alternative, counsel urged that if the oral agreement was caught by clause 16 it nonetheless served to estop the appellant from relying upon clause 6. This was because it constituted a representation by the appellant which was intended to and was in fact acted upon by the respondent to his prejudice. On the faith of the appellant's agreement to compromise, the respondent had sought and obtained financial assistance from another source and with the appellant's knowledge had sold Bonheim Farm. The appellant had allowed some ten months to elapse before threatening to invoke the clause 6 procedure. Reliance was placed on the following dictum of COETZEE J in *Barnett v van der Merwe supra* at p 612C:

"Estoppel is a different legal phenomenon and I can visualise that in suitable cases there is room (probably very limited) for a plea of estoppel which could possibly amount to the acquisition of rights which, notwithstanding the entrenchment clause, have their origin in one or other oral agreement." (In translation.)

But the difficulty as I see it, which faces the respondent on both arguments is that differing from the decisions referred to, the present appellant has the advantage of being able to call in aid a non-waiver clause, which is coupled with a non-variation clause entrenching the requirement that the waiver has to be in writing and signed.

Clause 15 is carefully and extensively worded. It specifically provides that consequent upon a breach by the respondent of any of the terms of the Agreement of Loan any relaxation or indulgency which may be granted to him by the appellant shall not be deemed a condonation or a waiver of any of its rights, or a novation.

The impact of a non-waiver clause upon the defences of waiver and estoppel was considered in *Sotiriadis v Patel* 1960 R&N 280 (SR). The parties had entered into a written lease which gave the plaintiff lessor the right to cancel without notice if the rent was not paid within seven days of due date. It also provided in clause 13:

"Notwithstanding any express or implied provisions of this Agreement to the contrary, any latitude or extension of time which may be allowed by the lessor in respect of payments of rent or **any relaxation of any**

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provision of this lease shall not under any circumstances be deemed to be a waiver of the Lessor's rights under these presents" (my emphasis).

Apparently since 1956 the plaintiff, to suit her own convenience, had been in the practice of calling personally on the defendant to collect the rent. This she did at irregular intervals, sometimes three months apart. Eventually, relying on clause 13, she cancelled the lease and sued for ejectment. The defendant pleaded that by reason of the plaintiff's conduct, the right to claim cancellation on the ground of late payment had been waived. HATHORN J rejected the contention in these words:

"Late payment of rent is expressly dealt with and it is said that any latitude or extension of time allowed in respect of payments shall not be regarded as a waiver by the lessor of any of her rights. This covers in terms any late payment of rent and it does not matter whether the latitude is allowed for the convenience of the lessor or not. I

am satisfied that the conduct alleged in the plea falls clearly within the wording of clause 13" (at 282 G-H).

Although the plea did not allege an estoppel the learned judge was prepared to read in such a defence and went on to decide its validity. He said at 288 B-E:

"Where an estoppel has arisen in a case such as the present, its effects may always be removed by a notice given by the lessor. (*Roman Catholic Bishop in Natal v Sewduth*, 1938 NP 110 and p 114.) I see no reason why such a notice should not be given in advance, namely, at the time the contract is made. That is what the effect of clause 13 is. It is a notice by the lessor and an acknowledgement by the lessee that conduct on the part of the lessor which might otherwise give rise to an estoppel may not be taken by the lessee to be such conduct. If a prudent lessee has been given such a notice in advance and wishes to ensure the continued operation of the lease, he knows that he must comply strictly with his obligations and that if he does not do so he is running the risk of having the lease cancelled without further notice. He is not, or should not be taken by surprise if strict compliance with the lease is insisted upon. Nor is there bad faith on the part of the lessor if, having so given notice, he relies upon a breach and cancels the contract."

These remarks of HARTHORN J are in my view entirely apposite to a construc-

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tion of clause 15. Mr *Donovan* sought to avoid their applicability by contending that the use of the word "deemed" signified that what fell within the ambit of clause 15 was not an oral agreement or undertaking embodying a relaxation or indulgence, but merely conduct (as in *Sotiriadis'* case) which gave rise thereto. I do not agree. I consider that interpretation both strained and artificial. It is clear to me that what is aimed at is the prevention of the entitlement to rely on **any** relaxation or indulgence shown to the respondent consequent upon a breach by him of any of the terms of the Agreement of Loan, in the event of it being subsequently decided by the appellant to adhere strictly to and enforce its rights under that written agreement. And this is so whatever form the relaxation or indulgence may take. It matters not whether the nature and extent thereof is defined in an oral agreement or in conduct.

I am satisfied therefore, that the respondent cannot rely successfully on either waiver or estoppel, for the effect of the clause 15 is to negate both defences. Under it the respondent agreed that condonation of a breach will not constitute a waiver of the appellant's rights arising from the breach, and at the same time accepted notice that any conduct of the appellant which might otherwise give rise to estoppel may not be taken by him to be such conduct.

This conclusion makes it unnecessary to decide positively whether the oral agreement is merely a waiver that is, an abandonment or surrender with the necessary knowledge of a right accruing exclusively for the benefit of the appellant; or whether it goes further and involves the definite alteration, as a matter of contract, of contractual obligations, thereby being rendered impermissible by the non-variation clause. (See *Van As v Du Preez supra* at 765B-F per *nestadt* J). For what it is worth, I incline more to the latter view.

For these reasons an interim interdict should have been refused, for the respondent's contemplated action is devoid of any prospect of success. I would accordingly allow the appeal with costs and alter the order of the court *a quo* to read:

"The application is dismissed with costs."

Dumbutshena CJ: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest appellant's legal practitioners

Honey & Blanckenberg respondent's legal practitioners

1986 (2) ZLR p 237

S v CHOUHAN 1986 (2) ZLR 237 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

18 November & 11 December 1986

Flynote

Criminal procedure - irregularity - failure to apply cautionary rule.

Evidence - accomplice - cautionary rule - dangers in relying on accomplice evidence - definition - acquitted person - whether may be an accomplice.

Headnote

It is proper to treat with caution and call for corroboration of the evidence of every witness who has a motive to implicate the accused; an accomplice has a motive to benefit himself by implicating the accused and has the advantage of being in a position to deceive the unwary by giving a realistic account of the offence in question. The fact of the acquittal of a person at his trial does not diminish either of these dangers. Failure to exercise caution where appropriate is a fatal irregularity.

Cases cited:

S v Malinga & Ors 1963 (1) SA 692 (AD)

S v Hlapezulu & Ors 1965 (4) SA 439 (AD)

S v Mupfudza 1982 (1) ZLR 271 (SC)

R v Ncanana 1948 (4) SA 399 (AD)

R v Dikant NO 1948 (1) SA 693 (O)

J B Colegrave for the appellant

DUMBUTSHENA CJ

Judgment

Dumbutshena CJ: The appellant was charged with the contravention of s 339(1) of the Criminal Procedure and Evidence Act [*Chapter 59*] as read with s 5(1)(a)(i) of the Exchange Control Act [*Chapter 170*] and as read with s 16(1)(e) of the Exchange Control Regulations, No. 399 of 1977. It was alleged that on 7 October 1984 at Harare Airport the appellant did wrongfully and unlawfully and without the authority of the Minister of Finance attempt to export from Zimbabwe fifty-eight Krugerrands worth twenty-seven thousand seven hundred and ninety-four dollars and seventy-six cents (\$27 794,76) in Zimbabwe dollars.

The appellant denied the charge, but was convicted and sentenced to two-and-a-half years' imprisonment with labour. One year of that sentence was suspended on appropriate conditions. He now appeals against both conviction and sentence.

Much of the evidence adduced at the trial was common cause. It is important to set out that evidence at the onset of this judgment: Fifty-eight Krugerrands were found in the possession of Gulambhai and Patel at the Harare Airport on 7 October 1984 when they were trying to leave Zimbabwe for India. Customs officers saw on an X-ray machine unidentifiable discs in Gulambhai's baggage. The baggage was searched and forty-nine Krugerrands were found in plaques and in toothpaste tubes. Patel was carrying a plaque containing nine Krugerrands. These Krugerrands were seized by Customs officers. Gulambhai and Patel were arrested.

The appellant went to India on holiday. He met, among others, Gulambhai and Patel. On his return to Zimbabwe he came together with Gulambhai and Patel who were visiting Zimbabwe for the first time. The two Indian gentlemen spent their holiday in Bulawayo living with the appellant.

Two days after the arrest of Gulambhai and Patel the Police were looking for the appellant. He too was arrested. On 5 September 1985 a joint trial was held. There was an application for a separation of trials. Gulambhai and Patel were tried together. They were acquitted. They gave evidence for the prosecution at the trial of the appellant.

Mr *Colegrave*, who appeared for the appellant, submitted, not without justification, that Patel and Gulambhai should have been treated as accomplices. In his view the learned trial regional magistrate erred in not treating the two witnesses as accomplices. In his judgment the learned magistrate said:

DUMBUTSHENA CJ

"The defence has urged the court to treat Gulambhai and Patel as accomplices and therefore treat their evidence with the normal caution which is attached to the evidence of accomplices. On the other hand the court feels that it

would be inappropriate to treat as accomplices people who had actually been acquitted in a court of law."

In coming to this conclusion the learned magistrate erred. Gulambhai and Patel were found in possession of Krugerrands. They were arrested, tried and acquitted. In coming to a decision whether the two were accomplices or not, it matters not that they were acquitted at their own trial. They were arrested because they were found in possession of the fifty-eight Krugerrands. The learned authors of *South African Criminal Law and Procedure* vol V, say this at 929-930 of witnesses to be treated as accomplices:

"No precise definition has been formulated, nor does it seem that any more precision is necessary than can be spelt out of the judgment in *S v Malinga* (1963 (1) SA 692 (AD)), where HOLMES JA distinguished the two possible factors operating on accomplice testimony which account for the existence of the cautionary rule: first, the presence of 'a possible motive to benefit himself by false implication of others' and second, the fact that 'by reason of his participation in [the crime alleged] he [is] in a position in court to deceive the unwary by a realistic account of it, his only fiction being the deceptive substitution of the accused for the real culprits, or the addition of one or more participants for good measure.' Whenever these two factors are present in the case of a particular witness, the cautionary rule then comes into play, whatever the 'juristic niche' into which the witness may be classified. An accessory after the fact is undoubtedly such a witness. The fact that the accomplice has already been convicted and sentenced for his participation in the crime does not obviate the need for caution, for although there is no longer the hope of obtaining more lenient treatment, the motives of revenge or desire to shield others will be unaffected as will the 'inside knowledge' of the details of the offence."

I find the passage from *S v Malinga & Ors* 1963 (1) SA 692 (AD), a case cited by the learned authors, very helpful. In that case HOLMES JA said at 693H-694A of the class of people to be regarded as accomplices:

"The court *quo* treated Mabaso as an accomplice and an informer. He was certainly an informer. Whether in the circumstances he was *de jure* an accomplice I need not decide, for the trial Court's view that he was

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DUMBUTSHENA CJ

could only redound to the benefit of the accused. Whatever the juristic niche into which he may be classified as a witness, his evidence had two things in common with that of an accomplice. First he had a possible motive to benefit himself by false implication of others, for he was an escaped indeterminate convict who had agreed to help the police to round up his confederates in crime. Second, by reason of his participation in this crime he was in a position in court to deceive the unwary by a realistic account of it, his only fiction being the deceptive substitution of the accused for the real culprits, or the addition of one or more participants for good measure. Hence the prudence of applying to his testimony the cautionary rule enunciated in *R v Ncanana* 1948 (4) SA 399 (AD) at pp 405-6 and *R v Gumede* 1949 (3) SA 749 (AD)."

I think it is safe to treat with caution and call for corroboration of the evidence of:

"... 'every witness who has a motive to implicate the accused' in the words of the learned Judge of Appeal in *Rex v Brewis* ([1945 AD 261] at p 270) as also any witness who was at any stage a *particeps* or *socius criminis*, whether as an aider, abettor, procurer, accessory or any other witness who may equally be influenced, inspired, biased, interested and be subject to the same motives and temptations, or witnesses of weak intellect, prostitutes and the like and children of tender age. I am not unconscious of the trial where applying all known demeanour tests a witness of this type may carry absolute conviction but I am also aware, and this is based on experience, that the acceptance of such evidence without corroboration would have led to a grievous miscarriage of justice. I therefore cannot endorse the remarks of DAVIS J, in *Rex v Jansen* (1937 CPD 294) that the rule should be kept within the narrowest limits legally possible; it should on the contrary, as suggested by the learned Judge of Appeal in *Rex v Brewis* (*supra*) be extended to include every witness who has a motive for implicating the accused. Per de beer J

in *Rex v Dikant* NO 1948 (1) SA 693 (O) at 699-700."

The considerations which impose a need for caution in dealing with accomplice evidence also apply to an accessory:

"The policy of the rule would seem to require that it should apply to anyone who has committed an offence in connection with the same criminal transaction which forms the subject matter of the charge."

1986 (2) ZLR p 241

DUMBUTSHENA CJ

See Hoffmann and Zeffertt *South African Law of Evidence* 3 ed at 453. That policy of the rule applies in my view to a person who is afterwards acquitted as well as to one who is convicted, as long as both were charged with an offence with the same criminal transaction. This case fits the bill. Some witnesses may be accomplices or "quasi-accomplices." The same cautionary rule will still apply. The learned authors of *South African Law of Evidence* *supra* say because "quasi-accomplices" have some purpose of their own to serve in giving evidence ... The reasons for the accomplice rule apply equally to such persons and similar circumspection ought therefore to be shown in dealing with their evidence" (at 453).

I think the best summation of all that I have said is expressed by HOLMES JA in *S v Hlapezulu & Ors* 1965 (4) SA 439 (AD) 440E:

"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors. First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description-his only fiction being the substitution of the accused for the culprit. Accordingly, even where s 257 of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a) recognition by the trial court of the foregoing dangers, and (b) the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular *R v Ncanana* 1948 (4) SA 399 (AD) at pp 405-6; *R v Gumede* 1949 (3) SA 739 (AD) at p 758; *R v Ngamtweni & Anor* 1959 (1) SA 894 (AD) at pp 897G-898D. Satisfaction of the cautionary rule does not necessarily warrant a conviction, for the ultimate requirement is proof beyond reasonable doubt, and this depends upon an appraisal of all the evidence and the degree of the safeguard aforementioned."

See *S v Mupfudza* 1982 (1) ZLR 271 (SC) at 276B-E.

In this case the learned magistrate should have applied the cautionary rule enunciated in *R v Ncanana* 1948 (4) SA 399 (AD) at 405-6. I need only repeat here the words of SCHREINER JA at 405:

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DUMBUTSHENA CJ

"What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his

inside knowledge of the crime, to convince the unwary that his lies are the truth."

That is what the learned magistrate did not do. He did not do it because he believed that an alleged participant in a crime who is acquitted at his trial is not an accomplice. He thus failed to appreciate the likelihood of "his powerful motive" impelling him to implicate someone else "notwithstanding their acquittal." Because, in my view, there was a failure to exercise such caution that failure amounts to a fatal irregularity.

In the circumstances of this case, it is clear to me that the learned trial magistrate failed to appreciate fully the danger of convicting the appellant on the evidence of Gulambhai and Patel. Having decided that the two witnesses were not accomplices, the court failed to appreciate that they had at least an interest to serve. They were in trouble. They were found with Krugerrands, attempting to export them. It was only natural for them to try and extricate themselves from the predicament they found themselves in.

The matter does not end there. There was also an admission - Exhibit Five - from the prosecutor. Mr *Fischat*, who appeared for the respondent, could only say of Exhibit Five that it was accepted without thought. It was damaging to the prosecution case. The admission reads:

- "1. When asked for his air ticket in the departure lounge of Harare Airport on the evening of 7.10.84 by Obert Mpofu, who was then a Customs collector, Gulambhai was hesitant and appeared reluctant to do so. It took him some time to produce his ticket during which time he was visibly shaken.
2. Thereafter Gulambhai accompanied Mpofu into the customs office. He was trembling and agitated en route to the office where the plaques were opened.
3. Mr Mpofu did not tell Gulambhai what he was looking for prior to reaching the customs office. Gulambhai's agitation continued in the office."

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DUMBUTSHENA CJ

In the light of this admission it cannot be said that Gulambhai was an unwitting courier. He trembled before he was shown what it was Mr Obert Mpofu, the then Customs collector, wanted to show him. He was hesitant and appeared reluctant to produce his ticket when everyone in the departure lounge had been asked to produce his ticket. What made him tremble and agitated en route to the office where the plaques were opened? One can presume that he knew what he was in for. That admission puts paid to the credibility at least of Gulambhai who must have known why he was being taken to the office.

On the basis of this admission Mr *Colegrave* contended that the magistrate should have found that Patel and Gulambhai were knowing accomplices of whoever gave them the Krugerrands and he should have treated their evidence with a great deal of suspicion becomes credible. Because of the court's failure to find that the two witnesses were accomplices close attention was not paid to the probabilities. I do not intend to dwell on the probabilities in this case.

I believe that in a case in which the court has not properly applied the cautionary rule on the ground that the witnesses were not accomplices when they were in fact accomplices or were witnesses with an interest to serve, failure to apply the cautionary rule, in the absence of

evidence from credible witnesses, is fatal to the prosecution case.

In this case the appellant denied in his warned and cautioned statement, Exhibit One, committing the offence with which he was charged. Had he admitted, his confession would have corroborated Gulambhai's and Patel's evidence.

The learned magistrate believed that Gulambhai and Patel insisted on giving evidence against the appellant. He stated in his judgment:

"They even prolonged their stay in Zimbabwe for this purpose despite their understandable desire to go back home and in circumstances where they appeared to know virtually no-one in Harare."

This was a very generous view of the witnesses' "persistence to give evidence against the accused". Had the magistrate closely examined the facts he would have discovered that the separation of trial was granted on 5 September 1985. On 26 September 1985 Gulambhai and Patel were found not guilty and were acquitted. On 11 October 1985 the appellant's defence

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DUMBUTSHENA CJ

counsel was not available so the matter was postponed to 24 October 1985 for trial. On that day Mr *Colegrave* cannot requested a transcript of the trial record of Gulambhai and Patel. The record was not produced in time. The trial proper was on 31 October 1985. It was postponed to 28 November 1985. It was then remanded to 19 December 1985. From the record it appears that the trial ended on that day and judgment was delivered and the appellant was sentenced on 28 February 1986. It means Gulambhai and Patel gave their evidence within two months after their acquittal. That was not a long time to wait. Besides, no-one knows when they decided to remain in Harare during the appellant's trial. We do not know what they were told when they were asked to give evidence for the prosecution. Had the learned magistrate appreciated that Gulambhai and Patel did not remain that long before the appellant's trial was held, he might not have been so generous about their innocence. In my view, his conception of their "persistence" to give evidence contributed to the conclusion to which he arrived on the probabilities that favour the prosecution's case.

In my view the probabilities which tend to prove that Gulambhai was a knowing accomplice were very strong: He had packed the toothpaste tubes in his suitcase. He must have found out that he was carrying something other than toothpaste. In any event he should have been curious to find out why the appellant was sending toothpaste to India. Ought he not to have asked the appellant: "Why are you sending toothpaste to India, there is plenty of toothpaste in India?" I agree with Mr *Colegrave* when he says that if Gulambhai knew that he was carrying Krugerrands, the probabilities are very strong that Patel also knew and he was also an accomplice. There would have been no reason for telling Gulambhai and not Patel. They were both carrying Krugerrands which they were going to deliver to someone in India.

There are common features on the findings of credibility of the appellant and Gulambhai and Patel. The learned magistrate did not criticise or make a favourable comment on their demeanour. He said of the appellant: "As regards the defence evidence the accused was also consistent in cross-examination and not noticeably evasive." Of the two witnesses the learned

magistrate remarked:

"Nevertheless cross-examination of them as mentioned before did not really reveal any significant inconsistencies between the two. They were, however, well known to each other and had ample opportunity to discuss the case so it is not surprising that they were consistent in court. As will have become apparent the case cannot be clearly resolved on

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credibility alone so the court must now look to the probabilities of the case."

The court did not make any finding on demeanour. It seems to me that there is nothing to choose between the appellant and the two main prosecution witnesses. The above passage casts some doubt on the evidence of Gulambhai and Patel. It seems, therefore, strange that the court found, in view of what was said above, that the evidence of Gulambhai and Patel corroborated each other. The learned magistrate said of them:

"They were well known to each other and had ample time to discuss the case so it is not surprising that they were consistent in court."

Was their evidence credible in view of what the magistrate said above?

This is a case in which a court of appeal is in a better position to make its own judgment on credibility because the finding of facts depends on probabilities. The probabilities in this case seem to point both ways. This, together with the conclusions to which I have arrived on the question of accomplice evidence, leaves this court at large on conviction.

In my judgment the prosecution did not prove its case beyond reasonable doubt.

I need not comment on sentence because of the conclusion to which I have arrived on conviction.

Accordingly the appeal is allowed. Both conviction and sentence are set aside.

Gubbay JA: I agree.

McNally JA: I agree.

Winterton, Holmes & Hill appellant's legal practitioners

1986 (2) ZLR p 246

CHECKERS MOTORS (PVT) LTD v KAROI FARMTECH (PVT) LTD 1986 (2) ZLR 246 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Sandura AJA

Civil appeal

14 & 25 November 1986

Flynote

Landlord and tenant - statutory tenant - eviction - reasonable requirement of owner to use premises for itself - intention to let premises to third party - tenants needs and requirements - whether a valid consideration.

Legislation - Commercial Premises (Rent) Regulations SI 676/83 - s 22(2).

Headnote

The former owner of certain commercial premises sold these premises to the respondent, a related company having the same directors as the former owner. The respondent then sought the eviction of the appellant from the premises on the grounds that it required the premises for its own use. Appellant, resisting eviction, claimed that the sale of the property was a sham designed to circumvent the prohibition in the Regulations against evicting a tenant in order to let premises to a third party, and that respondent had failed to discharge the *onus* of showing good and sufficient cause. The respondent submitted that further certain points raised by the appellant in order to show the prejudice it would suffer on eviction were not relevant.

Held, that the fact that a property is transferred upon sale with the consequent effect that the new owner which wishes to enjoy its occupation thereby obtains a ground for the eviction of the statutory tenant not available to the former owner cannot be viewed as an indirect or circuitous manoeuvre of achieving what the Regulations prohibit. There is no fetter placed by the Regulations on a landlord's right to sell commercial premises occupied by a statutory lessee.

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GUBBAY JA

Held, further, that it is proper to attach substantial weight to the fact that the respondent as owner reasonably required the use of the premises for its business operations.

Quaere: Whether the court in determining the issue of good and sufficient ought to take into account the hardship the tenant will suffer as a result of eviction.

Cases cited:

Peterson v Cuthbert & Co Ltd 1945 AD 420

Voortrekker Pers Bpk v Rautenbach 1947 (2) SA 47 (AD)

Moffat Outfitters (Pvt) Ltd v Hoosein Brothers 1986 (2) ZLR 148 (SC)

Rose's Car Hire Company (Pty) Ltd v Harris & Company 1944 WLD 159

Stuttaford & Co Ltd v Torry 1946 WLD 366

Johannesburg Board of Executors and Trust Company Ltd v Gordon 1947 (1) SA 92 (W)

Paterson v Koonin 1947 (2) SA 337 (C)

Khoja v Mistry 1955 (2) SA 540 (T)

Trustees in Mashonaland of the Church of the Province of Central Africa v Timms 1973 (1) RLR 307

A P de Bourbon SC for the appellant

M J Gillespie for the respondent

Judgment

Gubbay JA: The appellant is a limited liability company which carries on business from the two opposite developed Stands, 118A and 369 Karoi. The premises on Stand 118A consist of a service station forecourt equipped with petrol pumps and underground storage tanks, a showroom, a workshop and storerooms. The forecourt is utilised for the sale of petrol and diesel fuels and lubricating oil; the showroom for the sale of motor vehicle tyres, spares and accessories, as well as farming implements and allied spares; and the workshop and storeroom for the storage of excess stock for the showroom, chemicals, pesticides and large tents for the fumigating of tobacco seedbeds. The monthly sales derived from the business conducted on these premises total in the region of \$83 300.

The premises on Stand 369, which are leased in association with another company, Timmer Tractors and Implements (Private) Limited, are used by the appellant for the operation of its Massey-Ferguson tractor franchise and for repairing, panel-beating and respraying tractors and implements and to store stocks of tractors, implements and spare parts.

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GUBBAY JA

Since 5 October 1960 the appellant has been in occupation of the premises on Stand 118A without a written agreement of lease. With the coming into force of the Commercial Premises (Rent) Regulations 1983 ("the Regulations") on 1 January 1984, the appellant became a statutory lessee.

During 1984 Mercury Enterprises (Private) Limited ("Mercury"), which at the time was the owner of Stand 118A, endeavoured to terminate the appellant's occupation on the ground that it wished to lease the premises to another tenant. Relying on the protection afforded it under the Regulations, the appellant refused to vacate and Mercury desisted. One of Mercury's directors and shareholders is Mr Cees Bakker.

The respondent was incorporated in April 1985 for the purpose of acquiring from a related company, C & A Trading (Private) Limited ("C & A"), the latter's agency as a distributor and repairer of Deutz tractors and Bentall agricultural machinery. Mr Cees Bakker and Mr Aubrey Fussell are directors and shareholders of both companies.

During the six year period that C & A held the agency it operated from premises situate on Stand 309 Karoi which it leased from Mercury. Subsequent to the takeover the respondent has

operated from the same premises. These are far from satisfactory. The showroom is of inadequate size for the proper display and sales promotion of the tractors and agricultural implements, a situation which has evoked repeated criticism and concern from the principal dealer. The servicing of tractors and machinery supplied by customers has to be carried out in cramped conditions in the workshop of yet another company which shares the same premises ; in addition the workshop area is unpleasant during both the winter and rainy seasons. Furthermore customers seeking to purchase spare parts for machines are obliged to call at the new premises occupied by C & A, Stand 372 Karoi, which is several hundred metres away from where the spare parts are kept on Stand 309. There being no telephonic communication between the two Stands, is necessary for a member of the respondent's staff to walk with the customer to the spares department, serve him and then return to the premises of C & A - a procedure which is not only time consuming and inconvenient to both customer and salesman but hardly conducive to good and profitable business.

Quite apart however, from the unsuitability of the premises on Stand 309, the respondent has been informed by the owner, Mercury, that at some date in the future it intends to take over the premises for its own use.

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GUBBAY JA

During February 1986 the respondent purchased Stand 118A from Mercury for \$50 000. Upon obtaining title it forthwith gave the appellant written notice on 25 February 1986 to quit Stand 118A by 30 April 1986, stating that it intended to occupy the premises itself. The appellant again refused to comply, and on 14 May 1986 the respondent instituted proceedings in the High Court by way of notice of motion for the appellant's eviction. It is against the grant of that order by EBRAHIM J that this appeal now lies.

According to Mr Fussell the dominant reason for the purchase of Stand 118A was to obviate the insuperable difficulties which face the respondent in its endeavours to conduct efficiently the agency business at the present premises.

The first argument advanced on the appellant's behalf by Mr *de Bourbon* was that the inter-relationship of the companies Mercury, C & A and the respondent, taken in conjunction with the timetable of events comprising the appellant's rebuff to Mercury in 1984, the creation of the respondent in April 1985, the respondent's acquisition of the agency held by C & A and the transfer of Stand 118A followed immediately by the notice to vacate, point to a course of dealing calculated to circumvent s 22(2)(ii) of the Regulations; a provision that expressly prohibits the eviction of a statutory lessee on the ground that the lessor wishes to lease the premises to a third party. These designed and devious activities, so the argument ran, while not rendering the sale of Stand 118A illegal, nonetheless gave rise to the real dispute of fact as to whether the respondent was *bona fide* in seeking to evict the appellant in order to obtain occupancy for itself. Consequently the learned judge had erred in deciding the matter on the affidavits instead of standing it down for trial. (See generally, Herbststein and van Winsen *The Civil Practice of the Superior Courts in South Africa* 3 ed at 61-62 and the cases there cited.)

In my view the issue of the respondent's *bona fides* was not a genuine dispute of fact incapable

of satisfactory determination by the court *a quo* without the aid of *viva voce* evidence. It is, as Mr *Gillespie* submitted, far more in the nature of an inference sought to be drawn from facts which are basically common cause. What is in dispute is the justification for that inference.

In cases such as this, care must be taken not to elevate every alleged dispute of fact into a real issue which necessitates the taking of oral evidence, for to do so might well encourage a lessee against whom ejectment is sought to raise fictitious issues of fact thereby delaying the resolution of the matter to the detriment of the lessor.

1986 (2) ZLR p 250

GUBBAY JA

See *Peterson v Cuthbert & Co Ltd* 1945 AD 420 at 428.

Mr *de Bourbon*'s alternative argument was that on the affidavits placed before him, EBRAHIM J was wrong in holding that the respondent had discharged the onus of showing that it had good and sufficient grounds to require an order of eviction. (See *Voortrekker Pers Beperk v Rautenbach* 1947 (2) SA 47 (AD) at 49). He was not concerned, in the exercise of a value judgment, with the position of an owner of commercial premises *bona fide* requiring personal occupation of them from the lessee, because the incorporation of the respondent and the subsequent sale of the premises to it were nothing but a ploy aimed at evading the letter and spirit of the Regulations. In truth, it was sought to evict a statutory lessee in order that Messrs Bakker and Fussell, the real persons behind the ownership of Stand 118A could lease it to a third party, the respondent.

I must confess I find this argument not only far fetched but somewhat illogical. For even if it be assumed that the respondent is an artificial entity and the sale of Stand 118A a sham, the resultant disclosure upon the lifting of the corporate veils is an intention on the part of Messrs Bakker and Fussell to use their own property for themselves and not to lease it to the respondent. Such a revelation, of course, would offer the appellant no assistance.

But in any event I do not think that there is any warrant to regard the respondent as an artificial entity and the sale of Stand 118A as anything but genuine. The fact that a property is transferred upon sale from one related company to another with the consequent effect that the new owner which wishes to enjoy its occupation, thereby obtains a ground for the eviction of the statutory lessee not available to the former owner, cannot be viewed as an indirect or circuitous manoeuvre of achieving that which the Regulations prohibit. There is no fetter placed by the Regulations on a landlord's right to sell commercial premises occupied by a statutory lessee. Their real purpose is to prevent unscrupulous landlords from taking advantage of the shortage of such premises by increasing their tenants rents unjustifiably. (See *Moffat Outfitters (Pvt) Ltd v Hoosein Brothers* S-117-86*(2).) And no other attempt has been made by Mercury or the respondent to defeat that purpose.

Moreover it is beyond question that the respondent reasonably requires the use of Stand 118A in order to operate its business and that the premises it presently occupies are unsatisfactory. There is no reason to doubt the *ipse*

GUBBAY JA

dixit of Mr Fussell to that effect. (See *Rose's Car Hire Company (Pty) Ltd v Harris & Company* 1944 WLD 159 at 168.)

I am satisfied therefore that EBRAHIM J was correct in attaching substantial weight to the fact that the respondent, as owner, reasonably requires the use of the premises for the operation of its business.

I did not understand Mr *de Bourbon* to contend that if his submission should fail there was nonetheless a basis for this court to interfere with the value judgment made on the merits. (See the *Moffat Outfitters'* case *supra*.)

In coming to his decision the learned judge considered the needs and circumstances of the appellant and the hardship it will suffer if compelled to vacate the premises. Mr *Gillespie* submitted that in doing so he went too far since the appellant's needs and circumstances were irrelevant to the enquiry; it was only the respondent's needs and circumstances that had to be objectively examined and judged. In support of this proposition counsel cited such cases as the *Rose's Car Hire Company (Pty) Ltd v Harris & Company supra* at 171, *Stuttaford & Co Ltd v Torry* 1946 WLD 366 at 370-371, *Johannesburg Board of Executors and Trust Company Ltd v Gordon* 1947 (1) SA 92 (W) at 96, *Paterson v Koonin* 1947 (2) SA 337 (C) at 342 and *Khoja v Mistry* 1955 (2) SA 540 (T) at 544E. I do not propose to examine these decisions. I would merely draw attention to the contrary remarks of BEADLE CJ in *The Trustees in Mashonaland of the Church of the Province of Central Africa v Timms* 1973 (1) RLR 307 at 314H:

"...that what a court is called upon to do here is to give a value judgment and a value judgment must be based on all the equities of the case. It seems to me that even though the Regulations do not give any special protection to lodgers as such, in exercising a value judgment I am entitled to take into account all the equities, and one of the equities is the unfortunate position in which these lodgers may be placed if they are ejected from these premises immediately. Hardship will also be caused the respondent if she is ejected immediately from these premises, because I understand ...that she has furniture and other equipment which she may have to dispose of hurriedly."

It is unnecessary to decide which approach is to be preferred for as I have mentioned the court *a quo* weighed in the balance the hardship that an eviction order will undoubtedly cause the appellant. I therefore leave the point open.

GUBBAY JA

Finally Mr *de Bourbon* asked that if the appeal should be dismissed, the appellant be allowed three months within which to vacate Stand 118A. That seems to me an excessive period and indeed Mr *Gillespie* did not consent to it. The learned judge was prepared to suspend the operation of the order for nineteen days, but taking account of the difficulties that the year's end may occasion the appellant, I am persuaded that a somewhat longer time be permitted.

In the result the appeal is dismissed with costs but the order to vacate Stand 118A Karoi is to take effect on 1 January 1987.

McNally JA: I agree.

Sandura AJA: I agree

George Seirlis & Associates appellant's legal practitioners

Stumbles & Rowe respondent's legal practitioners

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LE MANS MOTORS (PVT) LTD v COLLINS 1986 (2) ZLR 253 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

11 December 1986

Flynote

Appeal - heads of argument - late filing - appeal dismissed.

Practice and procedure - failure to observe Rules - condonation.

Headnote

For failure to file heads of argument timeously, appeal dismissed.

M T N Chingore for the appellant

M R D Stonier for the respondent

Judgment

Dumbutshena CJ: The appellant is asking for condonation for late filing of the heads of argument. The respondent is opposed to a postponement of this appeal. The explanation tendered by Mr *Chingore* is unsatisfactory because the record has been in his hands since the end of June 1986.

On 9 July 1986, the appellant survived an application for dismissal. Time and time again, we have warned legal practitioners of the need to file heads of argument in compliance with Rule 43(2) of the Supreme Court Rules as amended. Insufficient heed has been paid to our warnings. The time has come to indicate this court's disapproval by dismissing this appeal. In doing so we wish to stress that we would not have resorted to this somewhat drastic action but for the fact that it is our unanimous view that there is no reasonable prospect of this appeal succeeding. To strike the appeal off the roll with leave to the appellant to apply for reinstatement would serve no purpose since that leave would, inevitably, be refused.

Accordingly, the appeal is dismissed with costs.

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Gubbay JA: I agree.

McNally JA: I agree.

George Seirlis & Associates appellant's legal practitioners

Atherstone & Cook respondent's legal practitioners

1986 (2) ZLR p 255

J PAAR & COMPANY (PVT) LTD v FAWCETT SECURITY ORGANISATION (BULAWAYO) (PVT) LTD 1986 (2) ZLR 255 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

24 October & 23 December 1986

Flynote

Delict - duty of care - security firm - whether owes duty of care to third party on premises being guarded in accordance with contract between guards and owner of premises - contractual duty - breach of - whether gives rise to cause of action in delict.

Headnote

The respondent, a security organisation, contracted with an oil company to guard its premises. The appellant, a transport company, had on the premises as part of its contract with the oil company certain vehicles. One of these vehicles was stolen by an employee of the oil company and destroyed. Appellant instituted action in delict against respondent claiming damages in delict for the loss of the vehicle alleging the negligent breach by the respondent of a duty of care owed by it to the appellant to prevent the theft of its vehicle.

Held, that the respondent's guard was not negligent in failing to prevent the theft of the vehicle.

Held, further, that *Obiter*: negligent infringement of a contractual obligation may give rise to delictual liability even where there would have been no initial obligation to act but for the contract.

Held, further, that *Obiter*: a duty of care arises where there is sufficient proximity of relationship between the parties concerned. Such proximity did not exist between the parties in this case.

Cases cited:

Peri-Urban Areas Health Board v Munarin 1965 (3) SA 367 (AD)

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Leigh & Sullivan v Alaikamon Shipping [1985] 2 All ER 44 (CA)

Lillicrap, Wassenaar and Partners v Pilkington Bros (SA) (Pty) Ltd 1985 (1) SA 475 (AD)

Cape Town Municipality v Paine 1923 AD 207

Anns v London Borough of Merton [1977] 2 All ER 492 (HL)

Junior Books Ltd v Veitchi Co Ltd [1982] 3 All ER 201 (HL)

C N Greenland for the appellant

H I Bisset for the respondent

Judgment

Dumbutshena CJ: This appeal is against the decision of SANDURA JP dismissing the appellant's claim for damages made against the respondent, Fawcett Security Organisation (Bulawayo) (Pvt) Ltd. The first defendant at the trial, Shield of Zimbabwe Insurance Co Ltd has not appealed against the award of damages of \$7 000,00 made against it. The facts of this case are briefly as follows:

The appellant contracted with Total Zimbabwe (Pvt) Ltd, hereinafter referred to as Total, to carry various Total products in a fuel tanker around Matabeleland. The fuel tanker was painted in the colours of Total. The driver and the attendant were employees of appellant. The respondent had a contract with Total. It provided security over Total's premises in Bulawayo in order to prevent both sabotage and theft.

At about 6 am on 3 November 1979, one Frank Muzira, a Total employee, entered the depot. He identified himself to Mr Dennis Nkala, a security guard employed by the respondent. Mr Nkala was on duty at that time. Muzira showed his identity card to Mr Nkala and told him that he was going out on delivery duty. He went into the depot. Nkala took down the required details of the tanker, its contents and Muzira's destination and let him go. Muzira drove the tanker out of the depot. He failed to negotiate a bend on the road and overturned the tanker.

It was common cause at the trial that Muzira was an employee of Total. He was not a driver and as such he was not authorised to drive a tanker. He had a Total identity card entitling him to enter the premises of Total. It was also common cause that there was no contract between the appellant and the respondent.

In the absence of any contractual nexus the appellant sued the respondent because it believed that the respondent owed it a duty of care. In its amended

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declaration it pleaded as follows:

- "7. Second Defendant owed Plaintiff a duty to ensure that the said tanker was not unlawfully removed from the premises at which it had been placed by virtue of the fact that it had entered into an agreement with the owner of the premises whereby it undertook to provide guards to safeguard the property at the premises (further particulars of which Agreement are to Plaintiff unknown) and were aware that fuel tankers belonging to persons other than the owner of the premises were left there with no other person safeguarding them at the material time.
8. Second Defendant negligently and in breach of its duty permitted the unauthorised removal of the said tanker, particulars of which negligence or the circumstances in which the unlawful removal was permitted are to Plaintiff unknown by virtue of Second Defendant's refusal to disclose the instructions given to its guard and circumstances and manner in which the removal was permitted."

It appears that the respondent did not understand how the duty of care arose. The respondent applied for further particulars of paragraphs seven and eight of the appellant's amended declaration. Because most of the submissions made on behalf of the appellant by Mr *Greenland* centre around the duty of care, I shall reproduce the respondent's request for further particulars and the appellant's replies thereto. It was asked:

"2. Ad paragraph 7:

- (a) Plaintiff is required to state fully the facts or matters on which it relies in support of the allegation that Second Defendant owed it the alleged duty.
- (b) Is it intended to allege that Plaintiff was a party to the alleged agreement between Second Defendant and the owner of the said premises? If so, Plaintiff is required to supply full particulars as to how and when and on what terms it became a party to such agreement.
- (c) Plaintiff is required to supply full particulars of the nature and extent of the duty allegedly owed to it by Second Defendant.

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3. Ad paragraph 8:

- (a) Plaintiff is required to supply full particulars as to the manner in which Second Defendant breached its duty as alleged.
- (b) Plaintiff is required to supply full particulars of the alleged negligence on the part of Second Defendant relied upon by Plaintiff in support of its claim."

The appellant was content to refer the respondent to the particulars in paragraph 7 of the declaration. No more was added because it was believed that the particulars in paragraph 7 were fully set out there.

However, in reply to paragraph 3 of the respondent's request for further particulars the

appellant amplified the particulars in paragraph 8 of the amended declaration as follows:

"Ad Paragraph 3

- a) The Second Defendant was under a duty to supply a security guard to prevent, *inter alia*, the unlawful removal of the Plaintiff's vehicles.
- b) (i) The Second Defendant's security guard negligently failed to prevent the unlawful removal of the Plaintiff's petrol bowser.
(ii) The Second Defendant's guard was negligent in that he failed to ensure that Muzira, who unlawfully removed the vehicle, was authorised to remove it."

It was the evidence of Mr Crosby who was Total's Operations Manager, resident in Harare, that the respondent was hired by Total to guard its premises in Bulawayo against sabotage and theft. The property, as we have already seen, included the appellant's tanker. It was common cause that the tanker's ignition keys were kept in the tankers so that they could be driven away quickly in case of fire or other emergency. There were two tankers on the premises and two tanker drivers. There was also a delivery van and its driver.

The important question is whether the security guard on duty employed by the respondent should have known when Muzira drove away the appellant's

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tanker that he was not one of the three drivers. Mr Crosby said he should have known because each driver had a card with his photograph and name on it. He also said drivers had a uniform. However Mr Crosby did not know or was not sure whether the card bore the capacity in which the holder was employed. Had that capacity been on the face of the card and had Mr Nkala knowingly let Muzira into the premises and then let him drive away the tanker, then Mr Nkala would have been negligent in the performance of his duty. From that negligence an Aquilian liability would arise. But whether the appellant would have proved on a balance of probabilities that it was owed a duty of care by the respondent is another matter.

The employees of Total were required to show the guard their identity cards before they were allowed into the premises. If an employee was a driver with an identity card and the guard allowed him entry into the premises, whatever duty the employee was asked to perform in the premises was not the responsibility of the security guard. This much was not in dispute. If that employee was seen driving a tanker, the guard would assume that he was authorised to drive it out. At that stage all the guard was expected to do was to take down the driver's name and his intended destination. He would also check for property the driver was supposed to carry and invoices of the property the driver was going to deliver to customers. If everything was in order the driver left on his journey.

All these checks and balances were put into effect by Mr Nkala when Muzira arrived at the depot on 3 November 1979. The name of the driver, Muzira, the destination and the number of the fuel tanker were all taken down by Mr Nkala. Muzira afterwards drove out the tanker.

Mr *Greenland* urged the court to disbelieve Mr Nkala when he says that he used to see Muzira

driving a tanker. There was no evidence to contradict him. The court *a quo* disbelieved some aspects of Mr Nkala's evidence because he was not "a particularly good witness". We are not told which of his evidence was disbelieved. However, his evidence on the circumstances leading to the removal from the premises of the tanker was believed. As between Mr Nkala's evidence and that of Mr Crosby, I would prefer the evidence adduced by Mr Nkala who was on the scene and whose evidence was corroborated by that of Mr Sibanda. Mr Crosby lived in Harare and could not be trusted to know the procedures that were applied from day to day by the security guards in Bulawayo.

It is now for me to consider whether on this evidence the learned Judge

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President arrived at the right conclusion. Mr *Greenland* attacked the judgment of the court *a quo* on every conceivable ground. Was Mr *Greenland* right?

The approach adopted by the court *a quo* is summarised in the following passage from the judgment:

"The issue which I must now determine is whether the security guard was negligent in allowing Muzira to drive away the fuel tanker. In determining this issue, I must decide whether theft of the fuel tanker in the circumstances deposed to by the guard was reasonably foreseeable. In other words, could a reasonable man have foreseen the likelihood that the tanker full of fuel would be stolen by Muzira, who was employed as a labourer by Total. The answer to this question is important because the principle that there can be no liability for causing another person loss or harm which could not reasonably have been foreseen is well established. After giving this matter very careful consideration, I have come to the conclusion that the theft or unlawful removal of the fuel tanker in the circumstances already referred to was so remote that it could not have been reasonably foreseeable. Muzira was employed by Total and was one of the employees authorised to be on the premises. He carried an identity card which established that authority. Once he was on the premises, it was not part of the guard's obligations to ensure that if he (ie Muzira or any other employee of Total) drove the tanker he had been actually authorised to do so. In the circumstances, it seems to me that the likelihood of theft of a tanker full of fuel by one of its labourers was not even foreseen by Total. I say so because Total did not have a system whereby a guard sent to its premises for the first time would be made aware of the identities of the authorised drivers."

There is nothing in the above passage which lends itself to the criticism levelled by the appellant against the judgment.

The appellant contends that the approach was wrong. It is said in the Notice of Appeal that the learned judge "erred in holding that - 'the theft or unlawful removal of the fuel tanker in the circumstances ...was so remote that it could not have been reasonably foreseeable'". Specifically the appellant contends that the court *a quo* should have considered and given "effect to the fact that the respondent was a security organisation publicly professing to have the attributes of skill and expert knowledge in relation to the prevention of thefts and unlawful removal" and that in terms of its

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contract, and as a security organisation respondent was under a specific and general duty to

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foresee and guard against all thefts from the premises in question and that respondent had failed in that duty."

The ground of appeal which formed the foundation of Mr *Greenland's* main submission reads:

"Furthermore, the learned trial judge erred in not holding that, in the circumstances, respondent was under a specific and general duty to devise and institute measures to guard against and prevent a theft or unlawful removal of the type in question, and had failed entirely in such duty."

The important question is: How was the respondent "to devise and institute measures to guard against and prevent a theft of unlawful removal" when he was carrying out his duties in terms of a contract with Total? The terms of that contract were not breached. As between Total and the respondent it was not shown that the skills and knowledge in matters of security that the respondent professed to have were not adequately put into use in the guarding of Total's property and premises.

As between the respondent and Total the respondent was not negligent in the performance of its duty of care. The burden of proof that the appellant did not discharge was to show that the respondent owed a duty of care to it. Mr Nkala's account of the manner he dealt with Muzira belies any suggestion of negligence.

Mr *Greenland* found support for his submission that the respondent had a duty of care he owed to the appellant in *Peri-Urban Areas Health Board v Munarin* 1965 (3) SA 367 (AD). In that case a local authority Health Board was successfully sued by the widow of the deceased who was killed performing his duty as an employee of an independent contractor with whom the Board had entered into a contract. The death was attributable to a breach of duty on the part of the Board or its servants. The Board had a contract with the independent contractor to perform the works to the satisfaction of the Board's engineer and the independent contractor was to comply with the engineer's instructions and directions on any matter. The Board's sewerage engineer who had designed and planned the project was in charge of the works with power to give instructions regarding its performance, to insist on the dismissal of incompetent workmen, and in his discretion to suspend the works. The engineer was represented on the works by the Board's clerk of

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works, whose duty was, *inter alia*, to watch and supervise the work. The Board had specific knowledge of the very dangerous situation which had been allowed to develop in the absence of shoring, and of the imminent possibility of the pipelayer's descent into the trench; and that it had taken no steps to stop the work.

It was held:

"...that this knowledge, when superimposed upon the terms of the contract and other above facts, had brought about a situation in which a diligens paterfamilias would surely have guarded against the possibility of the foreseeable harm to the pipe-layer."

It was further held:

"...accordingly, that there had been then a duty of care, and the breach thereof was negligence entitling the widow to damages." (See headnote).

The facts of Munarin case supra are distinguishable from the facts of the instant case in all material respects. There was negligence in the Munarin case supra. There is no negligence on the part of the respondent in this case. There was a contract which regulated the relationships between the parties. There is no contract between the appellant and the respondent in this case.

What is important for the purposes of this case is what was said in *Peri - Urban Areas Health Board v Munarin supra* by HOLMES JA at 373E-G. He said:

"Negligence is the breach of a duty of care. In general, the law allows me to mind my own business. Thus if I happened to see someone else's child about to drown in a pool, ordinarily I do not owe a legal duty to anyone to try to save it. But sometimes the law requires me to be my brother's keeper. This happens, for example, when the circumstances are such that I owe him a duty of care; and I am negligent if I breach it. I owe him such a duty if a diligens paterfamilias, that notional epitome of reasonable prudence, in the position in which I am in, would-

- (a) foresee the possibility of harm occurring to him; and
- (b) takes steps to guard against its occurrence.

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Foreseeability of harm to a person, whether he be a specific individual or one of a category, is usually not a difficult question, but when ought I to guard against it? It depends on the circumstances in each particular case, and it is neither necessary nor desirable to attempt a formulation which would cover all cases "

In the light of what was said by HOLMES JA in the above passage it is pertinent to ask whether in the circumstances of this case, it was possible for Mr Nkala to foresee the possibility that an employee of Total would remove the tanker unlawfully? Was it foreseeable? There must, as between the wrongdoer, the respondent, and the person who has suffered damage, in the instant case, the appellant, be a sufficient relationship of proximity of neighbourhood, that would, were there to be negligence on the part of the wrongdoer, be likely to cause damage to the appellant. See *Leigh & Sullivan v Alaikamon Shipping* [1985] 2 All ER 44 (CA) at 72a-b. In this case there was no such sufficient relationship of proximity of neighbourhood. Mr Nkala carried out his duties without negligence. It was not, therefore, reasonably foreseeable that damage would result from an innocent execution of his duty.

I need not overemphasise the fact that there was no contractual nexus between the respondent and the appellant. Mr *Greenland* argued that where a contracting party undertook work involving expert technical knowledge it would have been a simple matter for the respondent to devise methods of preventing the unlawful removal of a tanker. That argument would have been valid had there been a contract between the parties. The absence of a contract in this case allows of no such argument. In the absence of a contract which results in some relationship that creates delictual liability in situations resulting from negligence and in the absence of wrongdoing or unlawfulness, there can be no cause of action. In *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA)(Pty) Ltd* 1985 (1) SA 475 (AD), the case Mr *Greenland* sought to rely on, there was a contract and the appellant had held itself out as having expert knowledge and

professional skill necessary and required for the carrying out of site investigations an subsoil investigations and the analysis of the results and other works required by the respondent. The analysis was done negligently. SMUTS AJA in his minority judgment said at 509I:

"It follows that a reasonable man, on the basis of the facts alleged, would have foreseen that a proper analysis was essential and that a faulty analysis resulting in an inadequate structure being erected would in all probability cause respondent patrimonial loss."

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There is no basis for saying the same thing in this case. I shall refer to the facts of *Lillicrap* below.

When that which the party sued for damages has done, is not wrong, how can one succeed? The conduct of the wrongdoer has to be wrong first. In an article entitled *Wrongfulness in Aquilian Liability* published in (1967) 6 *Rhodesia Law Journal* 24 at 34 AJE Jaffey said what I believe applies to this case:

"In considering wrongfulness we are concerned with the circumstances in which a person is entitled to recover patrimonial loss, ie the circumstances in which he has a right not to have his patrimony diminished. As to whether in a particular case the plaintiff had such a right (ie whether the defendant's conduct was wrongful), it may be relevant that his loss flowed from the infringement of some right which had an existence independently of the question whether the defendant's conduct was wrongful. For example, whether the plaintiff can recover purely pecuniary loss may depend on whether the defendant's conduct brought about an infringement of a contractual right of the plaintiff. But often the subjective right, from the infringement of which the loss flowed, can be said to exist only because the law holds that the loss is recoverable.

It follows that one cannot tell whether, for the purposes of the Aquilian action, a right existed to be infringed until one has first determined whether the conduct causing the loss was wrongful. Thus the frequent statements in the judgments that the Aquilian action lies only where a right of the plaintiff has been infringed are merely statements that the defendant's conduct must have been wrongful. The requirement of the infringement of a subjective right of the plaintiff is tautologous with the concept of wrongfulness."

There was no wrong done by the respondent, so the respondent did not fail to observe the degree of care which a reasonable man could have observed. As a reasonable man Mr Nkala could not have foreseen the likelihood that the appellant's tanker would be wrongfully removed by Muzira if he had not complied with the norms of his work. See *Cape Town Municipality v Paine* 1923 AD 207 at 216.

I need not consider here the case of *Lillicrap, Wassenaar and Partners v Pilkington Brothers supra* which Mr Greenland strenuously tried to put across in order to support his case. The facts of that case are distinguished

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from those of the instant case. That was a case in which consulting and structural engineers undertook to perform professional services in connection with the planning and construction of a glass plant for the respondent. After some performance there was an agreement to assign the

contract to a third party. This changed the status of the appellant to that of a subcontractor *vis-a-vis* the respondent. In an action for damages arising from alleged deficiencies in the siting, design and construction of the plant, the respondent contended that the appellant had owed it a duty of care, both before and after the assignment of the contract, to carry out properly and with the necessary professional skill and care various tasks which it purported to perform. The respondent alleged that the appellant was in breach of the duty of care, failed to carry out these tasks properly and with the necessary professional skill and care, and caused the respondent damages. This is what is important: "It was common cause that the respondent's case was based on delict and, more particularly, the (extended) action *legis Aquiliae*. Before the court *a quo*, the appellant unsuccessfully excepted to respondent's particulars of claim, as *inter alia*, not disclosing that appellant's conduct was wrongful for the purpose of Aquilian liability, particularly in view of the contract between the parties and the subsequent assignment thereof."

The majority of the court held that "it would be undesirable to extend the Aquilian action to the duties subsisting between the parties to a contract of professional service like the one in issue":

"Held further, that these considerations did not fall away in view of the assignment of the contract: the same arguments which militated against a delictual duty where the parties were in a direct contractual relationship, applied where the relationship was tripartite, namely that a delictual remedy was unnecessary and that the parties should not be denied their reasonable expectation that their reciprocal rights and obligations would be regulated by their contractual arrangements and would not be circumvented by the law of delict."

In this case I have in passing intimated that delictual liability can arise from negligent performance of the contract. I agree with Professor Boberg's view that:

"...our forebears may have difficulty in appreciating that a delictual duty can have a contract for its origin (cf *Winterbottom v Wright* (1842) 10 M&W 109 (152 ER 402)), the phenomenon occurs so frequently today that no one takes any notice of it. Obviously an engineer has no duty to

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build a bridge carefully or at all unless he first contracts with someone to do so. Yet if he makes such a contract and then performs it negligently, he incurs delictual liability to any person injured in consequence (whether a third party or his co-contractant). Likewise a garage has no duty to repair a motorist's brakes unless it first contracts to do so. Once it so contracts, however, it acquires a duty not merely to the motorist but also to third parties to exercise reasonable care in repairing the brakes. Examples can be multiplied almost indefinitely.

Certainly it is true that in such cases the initial obligation to act does not owe its origin to the law of delict. There is no 'general duty imposed by law' to go around building bridges or repairing brakes. What the law of delict does prescribe, however, is a standard of care for those who do essay to build bridges or repair brakes. Just as it does for doctors who embark upon an 'infringement of the patient's bodily integrity'. (Nor can this surgical invasion be dubbed *prima facie* wrongful as the learned judge thought, for it has been legitimated by the patient's consent. It is not the invasion *per se* of which the patient complains in a case like *van Wyk v Lewis* (if it were, his remedy would be an action for assault); it is the negligent (hence unauthorised) conduct of the doctor, causing him damage, and so giving rise to Aquilian liability).

In short, the type of case under discussion is one in which the law of delict does not prescribe what must be done; it prescribes how something must be done if the actor decides to do it. It says to the actor, in effect: 'Whether you do this thing or not is up to you, but if you do it you must measure up to a certain standard of care, and you will incur delictual liability for any damages resulting from your failure to do so.'

(1985) 102 *South African Law Journal* p 214 at 217-218.

A consideration of *Lillicrap* does not assist in deciding this appeal. I have taken some time to state some of the issues considered in that case because it seemed to me that the appellant was anxious to draw a comparison between *Lillicrap* and the instant case. Such a comparison cannot be made. However its consideration in the circumstances of the instant case, throws light on how a delictual liability may arise from a contractual relationship. It is for that reason that I agreed with the view expressed by Professor Boberg in the article referred to above.

Lest I be misunderstood I have no intention to convey that the appellant fails

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in this appeal solely on the ground that it did not have a contractual nexus entitling it to bring an action in tort. There may be a case in which no contract exists between the parties and yet the party in breach may be liable arising from the commission or omission by that party of a negligent act. Let me say this is not such a case because there is no factual basis upon which the law of negligence can come to the appellant's assistance. Unfortunately in this case the damage or loss caused to the appellant was not a direct and foreseeable result of the respondent's negligence. There was no negligence so the appellant must suffer his loss in silence.

I think that LORD WILBERFORCE puts succinctly the circumstances under which the duty of care arises. He said this in *Anns v London Borough of Merton* [1977] 2 All ER 492 (HL) at 498g-h:

"Through the trilogy of cases in this House, *Donoghue v Stevenson*, *Hedley Byrne & Co Ltd v Heller & Partners Ltd* and *Home Office v Dorset Yacht Co Ltd*, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of *perso* to whom it is owed or the damages to which a breach of it may give rise..."

See *Junior Books Ltd v Veitchi Co Ltd* [1982] 3 All ER 201 (HL) at 210J-211A; *Leigh & Sullivan v Alaikamon Shipping* [1986] 2 All ER 145 (HL) at 152.

Applying the two questions posed by lord wilberforce in the above passage to the instant case one has to say, as between the respondent (the alleged wrongdoer) and the appellant there is no "relationship of proximity or neighbourhood" in other words there is no contractual relationship to create sufficient proximity in the relationship and since there was no negligence on the part of the respondent in the circumstances of the case the

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theft or unlawful removal of the fuel tanker was in the reasonable contemplation of the respondent remote and unforeseeable. Besides there is no evidence to support the contention that the respondent failed to take reasonable care in dealing with Muzira. The appeal must for these reasons fail.

Accordingly I would dismiss the appeal with costs.

Gubbay JA: I agree.

McNally JA: I agree

Webb, Low & Barry respondent's legal practitioners

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AMBERLEY ESTATES (PVT) LTD v CONTROLLER OF CUSTOMS AND EXCISE 1986 (2) ZLR 269 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

20 November & 31 December 1986

Flynote

Customs and Excise - excise duty - wines - cessation of manufacture.

Interpretation of statutes - "includes" - effect of word - eiusdem generis rule - need for genus - not appropriate where word "includes" is used - intention of legislature.

Legislation - Customs and Excise Act [Chapter 177] ss 2, 107A, 154(1), 122(2), 207B. Words and phrases - "manufacture", "includes".

Headnote

In 1978 the appellant, a winemaker, ceased the production of wine and notified the respondent of this fact and rendered a return of stocks on hand at the time. Excise duty was at the time suspended and accordingly no duty was then payable. In 1981 an effective rate of excise duty was enacted. Between that date and the middle of 1982 when it vacated the winery the appellant disposed of quantities of wine which in the opinion of the respondent were dutiable. The respondent obtained in the High Court judgment for duty in respect 20 898 litres of wine being a blend of three different types of wine, fined, bottled and sold; 1 170 litres of wine being a blend of two different types of wine, bottled and sold; and 1485 litres of wine, unblended, which was bottled and sold. The processes of blending, fining, bottling and selling all took place after the notice of cessation of manufacture. It was argued for the appellant that the wine having

been accounted for in terms of s 154(1) of Chapter 177, it was not,

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by virtue of the provisions of s 122(2), thereafter liable for duty. In the alternative, it was argued that the processes which had been applied to the wine did not fall within the definition of "manufacture" in terms of the Act and accordingly no duty was payable.

Held, that the effect of s 122(2) is that the manufacturer is to pay excise duty or surtax not only on the goods he initially manufactured but also on any other goods manufactured with the use of the earlier manufactured goods. The relief offered by the proviso to that sub-section only permits the deduction of a credit in respect of duty already paid in goods to which the sub-section refers it does not prohibit the raising of a second amount of duty on them, and accordingly the account given of the wines in terms of s 154(1) of the Act did not render the wines exempt from duty.

Held, further, that the use of the word "includes" in the definition of the word manufacture shows an intention to extend the normal meaning of the word to embrace the specific activities mentioned thereafter, namely "mixing, brewing, distilling" or "production".

Held, further, that the word "mixing" must not be limited in meaning by the words brewing distilling or production, which follow it, for those latter words do not constitute a genus. In any event it is not appropriate to apply the *eiusdem generis* rule to words which follow the word "includes".

Held, further, that the 20 898 litres and 1 170 litres of wine had been manufactured but the bottling of the 1 485 litres of wine was not "manufacture".

Cases cited:

R v Ah Tong 1919 AD 186

R v Debele 1956 (4) SA 570 (AD)

E S & A Robinson (Rhodesia)(Pvt) Ltd v MacIntyre NO 1962 (2) SA 638 (SR)

Santam Versekeringsmaatskappy Bpk v Kruger 1978 (3) SA 656 (AD)

Southern Life Association Ltd v Commissioner of Inland Revenue 1985 (2) SA 276 (C)

Commissioner of Taxes v Processing Enterprises (Pvt) Ltd 1975 (2) SA 213 (RAD)

M J Gillespie for the appellant

I A Donovan for the respondent

Judgment

Gubbay JA: The appellant is a limited liability company formed many years ago. It owned a

farm in the Wedza district, named Scorrer Estates, upon which it grew oranges in abundance. The fruit was used in the manufacture

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of wine. The operation was conducted from the farm in a large old tobacco grading shed, known as "the winery", in which were eighteen fibre glass vats set upon wooden stands, each with a holding capacity of between five hundred and one thousand gallons. Six types of wine were manufactured under the labels Sun-up, Super Sun-up, Don Ric, Escorro - Sweet, Medium and Dry. All were kept in separate vats where they were allowed to mature. The bottling of the wine was also done in the winery.

There was not a great deal of difference between the six varieties of wine. The Sun-up and Super Sun-up were made from second grade oranges and the Don Ric and Escorros from specially selected best quality oranges. Certain herbs were used in the manufacture of the Don Ric. The Sun-up and Super Sun-up were sold at a lower price than the four other varieties.

On 1 December 1977 the appellant sold Scorrer Estates but under a lease entered into with the new owner retained occupation of the winery and the farmhouse until 1 August 1982. At the date of the sale only a small quantity of oranges remained to be used in the manufacture of wine, but the volume of wine in the vats was considerable. Most of it was three years old with some as old as ten years. Virtually all was fully matured, the fermentation process taking between nine and fifteen months to complete.

On 13 December 1978 the appellant notified the Controller of Customs and Excise ("the Controller") that it had ceased the production of wine and was "only selling off the wine which is maturing in our winery". Consequently it did not wish to renew its agricultural wine maker's licence for the year ending 31 December 1979. It also rendered a return of its stock on hand, being 48 000 litres of wine.

Up to this time the wine manufactured by the appellant was liable to excise duty at the rate of 40c per litre in terms of para 12(b) of the Second Schedule to the Customs and Excise Act [Chapter 177], but that duty had been suspended to free under the Customs and Excise (Suspension) (Amendment) Regulations 1966 (No. 3), GN 130 of 1966. As a result the excise duty payable by the appellant on the 48 000 litres of wine on hand on 13 December 1978 was \$00 per litre.

On 1 February 1981, however, the rate of excise duty laid down in the Excise Tariff on wines manufactured from fruit grown in the country was increased by the Customs and Excise (Tariff) (Amendment) Notice 1981 (No. 1), SI 54 of 1981, to 100c per litre, and then under Customs and Excise (Suspension)

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(Amendment) Regulations 1981 (No. 3), SI 55 of 1981, in part suspended to 55c per litre.

From that operative date until 31 July 1982, when it vacated the winery, the appellant disposed of 27 232 litres of wine, of which 25 817 litres were in the opinion of the Controller liable to excise duty. That latter volume was dealt with by the appellant in the following manner:

- (a) Equal quantities of the Escorro Sweet, Medium and Dry were drawn from each of their three separate vats and pumped into the vat used for bottling the Super Sun-up. A handful or two of a fining agent, known as bentonite, consisting of minute particles of clay, were then added so as to settle the sediment. Thereafter the wine was bottled and sold under the Sun-up and Super Sun-up labels. The volume of this wine, described by the appellant as "processed bottled wine" measured 20 898 litres.
- (b) 585 litres of Escorro - Sweet were added to 585 litres of Don Ric and then bottled and sold as Don Ric wine.
- (c) 1 485 litres of wine consisting of 279 litres of Escorro - Dry, 1 044 litres of Escorro - Medium and 162 litres of Escorro - Sweet, all of which had been fined years previously, were piped directly from their individual vats into bottles, to which screw caps were attached by means of a hand-operated machine. The bottles were labelled and ultimately sold. This wine the appellant described as "unprocessed bottle wine."
- (d) 2 264 litres of Sun-up wine which had also been fined years before, described as "unprocessed", were transferred from individual vats into the Sun-up delivery vat, and decanted into containers which purchasers would bring with them to the winery.

It was common cause that from 1 January 1979 to 31 January 1981 the appellant dealt with 5 169 litres of wine in exactly the same manner as it did during the period under consideration, but the Controller laid no claim for duty on this volume as it had been disposed of when the duty was wholly suspended. It was the 25 817 litres of wine which the Controller contended were liable to excise duty at 55c per litres, on the ground of having been manufactured by the appellant in Zimbabwe, from fruit grown in this country, since 1 February 1981, and disposed of. He therefore demanded payment of \$14 199,25 with interest thereon at the rate of 10% per annum, as fixed by GN 752 of 1976. The appellant denied liability.

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At the trial which ensued before GIBSON J the Controller's action succeeded in respect of the 20 898 litres, the 1 170 litres and the 1 485 litres of wine, but failed in respect of the 2 264 litres, it being held that that volume had not been subjected to a process of manufacture. Accordingly the Controller was awarded judgment in the sum of \$12 954,15 with interest as prayed. There was no order as to costs. It is against that judgment that this appeal now lies.

Mr *Gillespie*, who appeared for the appellant, argued that even if it be assumed that the manner in which the appellant dealt with the 23 533 litres of wine fell within the ambit of the definition of "manufacture" in s 2 of the Customs and Excise Act, that volume of wine was nonetheless not liable to excise duty because the appellant had properly accounted for it in terms of the Act.

Section 107A(1) of the Act, where relevant, provides that where excise duty has been imposed on wine manufactured in Zimbabwe the manufacturer is liable for payment of the duty, and such liability continues until the wine has been accounted for in terms of the Act. There are two methods by which wine may be accounted for. Either under s 142 by the securing of duty to the

satisfaction of the Controller upon wine removed from an approved wine store established by the manufacturer on his licensed premises; or, under s 154(1), which reads:

"If a person licensed in terms of section one hundred and eight ceases to manufacture goods in respect of which the licence has been issued, or if his licence is not renewed or is cancelled, he shall, within one month of that date, render to the proper officer a true and complete return of his transactions since his last monthly return, and shall then and there pay the duty or surtax on the balance of his stock, on hand or disposed of, on which the duty or surtax has not previously been paid. Failing the rendering of such return or payment of duty, the proper officer shall seize such stock and sell by public auction so much thereof as will be sufficient to cover the duty or surtax payable on the whole quantity and the expenses in connection with the seizure and sale, and shall return the remainder of the stock, if any, to the manufacturer or to his representative."

The appellant, so the argument went, had notified the Controller on 13 December 1978 of an intention to cease the manufacture of wine and has rendered a true and complete return of its transactions as required by s 154(1). Since at that date there was no duty payable on the remainder of its stock on

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hand, being 48 000 litres of wine, no balance of duty was owing to the Controller. Accordingly the 27 232 litres of wine dealt with by the appellant during the period 1 February 1981 to 31 July 1982, being part of the 48 000 litres, had been accounted for and liability for duty thereon had ceased.

I consider this argument to be more ingenious than sound. It faces two major difficulties. In the first place, s 154(1) is a procedural provision. The requirement to render a true and complete return and to pay the duty or surtax on the balance of stock on hand or disposed of, on which the duty or surtax has not previously been paid, only arises where:

- (a) a person licensed ceases to manufacture; or where,
- (b) his licence to manufacture is not renewed; or,
- (c) is cancelled.

These three contingencies are factual matters. It suffices not that when the appellant notified the Controller on 13 December 1978 it bona fide considered that it had ceased to manufacture wine. The question is whether, in spite of the genuineness of its belief, the appellant, **in fact** ceased to manufacture wine after that date. In other words, did the process to which its wine in stock, or any part thereof, was subsequently subjected constitute "manufacture"? If the answer is found to be in the affirmative, then no liability to excise duty arose in terms of s 154(1) of the Act when the appellant submitted the return of its transactions. The wine would thus not have been properly accounted for and liability to excise duty would have continued.

Secondly, even if there had been a proper accounting by the appellant, it is my opinion that the interpretation to be accorded to s 122(2) as read with proviso a(ii) of the Act, is fatal to Mr *Gillespie's* contention. I shall quote the relevant provisions:

"(2) A manufacturer who uses any goods mentioned in the excise tariff or the surtax tariff, which have been manufactured upon his licensed premises, in the manufacture of other goods upon those premises shall pay the

excise duty or surtax on the goods so used in addition to any other duty which may be payable on the finished product and shall, in respect of the goods so used, comply with the provisions of subsection (1):

Provided that the provisions of this subsection shall not apply where-

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- (a) a licensee uses-
 - (i) ...
 - (ii) wines produced on his licensed premises in the manufacture upon the premises of other wines;
 - (iii) ..."

The effect of s 122(2) is that the manufacturer is to pay excise duty or surtax not only on the goods he initially manufactured, if mentioned in the excise or surtax tariffs, but also on any other goods manufactured with the use of the earlier manufactured goods. Both those goods and the "finished product" are therefore liable to excise duty or surtax. But by the use of the wording "in **addition to** any other duty which may be payable on the finished product" (my emphasis), rather than "**and** any other duty ...", the object of the lawmaker, so it seems to me, was to underline that the duty payable on the finished product, is the main duty with which the Controller is concerned, while the duty payable on the initially manufactured goods, is the subsidiary duty. In the case of wine, however, relief is afforded by proviso a(ii). What is exempted is the excise duty on any manufactured wine utilised in the manufacture of the finished product-what I have termed the subsidiary duty. Excise duty is payable only on the wine finally produced, and the liability to pay arises under s 207(b) of the Act when the wine is delivered from the place of manufacture for consumption or use or otherwise disposed of by the manufacturer.

It follows that I am unable to accept Mr *Gillespie's* submission that the legislative intent in enacting proviso a (ii) to s 122 was merely to relieve the manufacturer from a liability to pay excise duty or surtax twice, without any preference as to whether it is raised on the goods he initially manufactured or on those subsequently manufactured with the use of the former; and that where the manufacturer has paid such duty or surtax on the initially manufactured goods (as in the present case, where the wine was accounted for under s 154(1) and excise duty thereon suspended to free) he is totally relieved from liability to pay duty on the finished product.

I am satisfied that if in 1978 excise duty was payable on the 48 000 litres of wine and had been actually paid by the appellant at that time, and if thereafter the appellant had subjected any part of its stock of wine to a process of manufacture, the Controller would have been entitled to the payment of excise duty thereon; but by virtue of proviso a (ii) would have been obliged to credit the appellant with the amount of duty already paid in respect of the portion of wine which had been utilised in the subsequent manufacture. I am

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fortified in this conclusion by *proviso* (b) which renders inapplicable s 122(2) where:

"...a tobacco manufacturer uses tobacco manufactured upon his licensed premises in the manufacture upon those premises of cigars, cigarettes, pipe tobacco or snuff..."

On Mr *Gillespie's* interpretation a tobacco manufacturer, who had paid excise duty on pipe tobacco, which he had properly accounted for in terms of the Act, would be relieved from paying the much higher excise duty levied on cigarettes and cigars, were he at some time in the future to utilise the same pipe tobacco in the manufacture of cigarettes and cigars. I cannot conceive that the lawmaker intended to afford such unwarranted relief to the obvious financial prejudice of the Controller.

The alternative argument advanced by Mr *Gillespie* was that the specific processes employed by the appellant in relation to the 20 898 litres of wine sold as Sun-up and Super Sun-up, the 1 170 litres sold as Don Ric and the 1 485 litres comprising the three Escorro wines, did not fall within the applicable definition of "manufacture" contained in s 2 of the Act, which reads:

"'manufacture', in relation to-

- (a) goods liable to excise duty or surtax other than-
 - (i) motor spirit; and
 - (ii) imported goods; includes the mixing, brewing, distilling or production of goods liable to excise duty or surtax."

It is to my mind clear that by the use of the word "includes", the Legislature intended to extend the meaning of "manufacture" in its ordinary, popular and natural sense, to embrace the specially mentioned activities of "mixing, brewing, distilling" or "production" about which there might have been disputes whether they came within the overall process of manufacture. (See *R v Ah Tong* 1919 AD 186 at 189; *R v Debele* 1956 (4) SA 570 (AD) at 575). Much the same view was expressed by YOUNG J in *E S & A Robinson (Rhodesia)(Pvt) Ltd v Macintyre* NO 1962 (2) SA 638 (SR) at 644A.

In respect of both the 20 898 litres and the 1 170 litres of wine, it is the word "mixing" which assumes critical importance. The meanings given to the verb "mix" in *The Shorter Oxford English Dictionary* 3 ed at p 2165, are:

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"...to put together (two or more substances, groups or classes) so that the particles or members of each are more or less evenly diffused among those of the rest; to mingle, blend. To put in as an ingredient, to intersperse. To prepare (a compound) by putting ingredients together."

It was Mr *Gillespie's* submission that the word "mixing" is to be taken as being synonymous with "blending" - that is, a mixture together so as to obtain a product with a particular quality or taste. I do not agree. What seems to me to be conclusively against that submission is the use by the Legislature in its definition of "manufacture" in relation to "motor spirit", of both the words

"mixing" and "blending", thereby indicating that the two words were employed in order to express different notions. Thus the presumption must be that by its omission of the word "blending" in the definition of "manufacture" with which I am concerned, the Legislature intended that the word "mixing" was not to embrace the concept of blending.

Mr *Gillespie* also relied on the *eiusdem generis* rule to contend that the meaning of "mixing" was qualified by the following words "brewing, distilling or production of goods", processes which he said bring about a difference in the quality or taste of the end product. But for this rule to operate, there must be a distinct genus or category to which the wide general word is to be linked. See *Santam Versekeringsmaatskappy Bpk v Kruger* 1978 (3) SA 656 (AD) at 663F. And I cannot accept that the words following upon "mixing", particularly, "or production of goods", constitute a definite or clear class. Moreover I respectfully agree with the observation of BURGER J in *Southern Life Association Ltd v Commissioner for Inland Revenue* 1985 (2) SA 267 (C) at 272A, that the *eiusdem generis* rule is hardly appropriate "to a case where the word 'include' is used."

Applying the meaning of putting together or uniting two or more substances, to the 20 898 litres and the 1 170 litres of wine, I am satisfied that the appellant "mixed" all three types of Escorro wines as well as the Escorro - Sweet with the Don Ric. In both instances **different** wines were combined or united to form what was sold as Sun-up, Super Sun-up and Don Ric. The court *a quo* therefore correctly held that the appellant had manufactured these two categories of wine.

What of the 1 485 litres which were piped directly from the individual vats containing the three types of Escorro wines into bottles to which screw caps were attached? There was no "mixing" of these wines, and the crisp issue is whether the procedure of bottling them amounted to "manufacture." The

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learned judge *a quo* held that it did for the reason that the bottling was an essential final stage in the manufacture of the wine. In coming to that conclusion she was much influenced by the following passage in the judgement of BEADLE CJ in *Commissioner of Taxes v Processing Enterprises (Pvt) Ltd* 1975 (2) SA 213 (RAD) at 216C-G:

"It seems therefore that, when dealing with a raw material which is grown by the farmer with the object of that raw material being subsequently manufactured into a finished product by the industrialist, the intention of the legislation must have been to encourage the handling of that raw material right through all its stages, that is from the stage when it is grown by the farmer until the stage when the end product is eventually produced by the manufacturer. If, in the course of manufacturing that raw product, it had to go through various stages of processing, and each stage was vital to the production of the finished product, to regard any essential stage of processing as not being a manufacturing process for the purposes of s 14, would seem to me to be illogical because it would be breaking-if I may call it that-the chain of assistance which is obviously intended by s 5 of the Fourth Schedule, assistance which starts from the growing of the raw material until it is finally fabricated into the finished product. If an intermediate stage of processing did not qualify for assistance, it might well have the effect of discouraging both the growth of the raw material by the farmer and its ultimate processing by the industrialist which would seem to be against the policy of this form of relief. Every one of the essential processes in the course of converting the raw material into the finished product which without doing violence to language can be termed a 'manufacturing process' should, I think, be regarded as such, because if it were not, it might defeat the

object of the Legislature."

I would caution, however, that the approach enunciated by the learned Chief Justice ought not to be elevated into an appropriate test to be applied in every processing activity. While in normal parlance it would not be inaccurate or unrealistic to describe the operation of bottling or that of packaging as a stage vital in the creation of the finished end product and so a process of manufacture, the critical determining factor is the intention of the legislation. This was recognised by BEADLE CJ, for he said at 214 in *fine* - 215A:

"What must be done in each individual case is to examine the statute in which the word is used and see what meaning the Legislature intended to be given to the word, again, as I say, not doing violence to an accepted meaning which can be given to the word."

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What is immediately apparent from an examination of the Customs and Excise Act and Excise Tariff is that excise duty is levied by the Controller on wine per litre, whether bottled, or not. This feature, to my mind, is a most persuasive indication that with regard to the manufacture of wine the Legislature intended that the only relevant process is to be that which actually brings into existence a dutiable product. This accords with reason and common sense. Unlike the process of mixing or blending two or more wines thereby creating a new and different dutiable product, the appellant's subsequent activity of bottling the three Escorro wines did not amount to "manufacture" because each remained in the same dutiable form as it was prior to bottling.

It follows that in my view the court *a quo* erred in finding that the appellant had manufactured the 1 485 litres described as "unprocessed bottled wine."

The question of costs may be shortly disposed of, for Mr *Donovan* informed the court that if the appeal were to succeed on any single aspect, even though the overall degree of success was not substantial, the Controller was not inclined to seek an order for costs. That, if I may say so, is in the circumstances of this appeal, a commendable attitude to adopt.

In the result:

"(1) The appeal is upheld in respect of the 1 485 litres of wine. For the rest it is dismissed.

(2) The order of the court *a quo* is altered to read:

There will be judgment for the plaintiff in the sum of \$12 137,40 with interest thereon at the rate of 10% per annum.

(3) There will be no order as to costs."

Dumbutshena CJ: I agree.

McNally JA: I agree.

Higham, Lewis & Lock appellant's legal practitioners

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

S v McNAB 1986 (2) ZLR 280 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

2 December & 31 December 1986

Flynote

Appeal - grounds of appeal - clearly and specifically set out - notice of appeal - invalid - condonation of.

Practice and procedure - failure to observe Rules - condonation - practitioner's carelessness - interests of litigant - weight to be given to.

Headnote

A notice of appeal which states that the court *a quo* "erred in fact and in law" in holding that the State proved ..." fails to comply with the Rules. Non-observance of the Rules is detrimental to the administration of justice and the court will not be lax in dealing with non-observance of the Rules. Condonation may be refused even where this entails visiting the negligence of the legal practitioner concerned upon his client

Cases cited:

Emerson & Ors v R 1957 R&N 734 (SR)

Du Toit v R 1958 R&N 177 (SR)

Kilian v Messenger of Court, Uitenhage 1980 (1) SA 808 (AD)

Saloojee & Anor NNO v Minister of Community Development 1965 (2) SA 135 (AD)

N Lang for the appellant

B N Sigidi for the respondent

DUMBUTSHENA CJ

Judgment

Dumbutshena CJ: The appellant was tried by a magistrate for contravening s 46(1) of the Road Traffic Act, No. 48 of 1976. It was alleged by the State that he drove a motor vehicle on Fifth Street and Twelfth Avenue in Bulawayo whilst under the influence of alcohol to such an extent as to be incapable of having proper control of his motor vehicle. He pleaded not guilty to

the charge, but was found guilty and sentenced to a fine of \$500, or in default of payment, two months' imprisonment with labour. He was prohibited from driving all classes of motor vehicles for a period of six months and his class four driver's licence was cancelled.

The appellant now appeals against both conviction and sentence.

The ground of appeal against conviction reads:

"The Learned Trial Magistrate erred in fact and in law in holding that the State had proved the appellant was so drunk as to be incapable of having proper control of his motor vehicle."

At the start of his argument Mr *Lang*, who appeared for the appellant, was reminded by the court that the ground of appeal against conviction did not comply with Rule 22(1) of the Appellate Division (Magistrate's Court) (Criminal Appeal) Rules 1979 (SI 501 of 1979).

Rule 22(1) of the Rules reads:

"The appellant shall, within fourteen days of the passing of sentence, or, where a request has been made in terms of subrule (1) of rule 3 of Order IV of the Magistrates Courts (Criminal) Rules, 1966, within seven days of the receipt of the judgment or statement referred to in that rule, whichever is the later, note his appeal by lodging with the clerk of the court a notice in duplicate setting out clearly and specifically the grounds of the appeal..."

As can be seen from Rule 22(1) the above ground of appeal does not comply with the Rules of this court. The notice of appeal does not set "out clearly and specifically the grounds of the appeal".

That which the appellant is attacking in the judgment of the convicting court must be set out in the manner laid down by the Rule. A generalisation such as that set out in the appellant's ground of appeal against conviction is not good enough. It does not point out where the magistrate erred or misdirected

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himself. See *Emerson & Ors v R* 1957 R&N 734 (SR) ; *Du Toit v R* 1958 R&N 177 (SR)

A better understanding of what is required can be gleaned from Rule 51 (7) of the Magistrates Courts' Act 32 of 1944 (South Africa). See *Kilian v Messenger of the Court, Uitenhage* 1980 (1) SA 808 (AD). The extract from the judgment of RABIE JA (as he then was) is taken from the official translation at 234 (p 815 of the Report). It reads:

"Rule 51(7) provides, in so far as it is relevant, that:

'A notice of appeal or cross-appeal shall state-

(a) ...

(b) the grounds of appeal, specifying the findings of fact or rulings of law appealed against.'

Such a notice requires a precise statement of the points on which the appellant relies, so that the respondent may know on which points he must prepare a reply, and so that the Court may know on which points a decision is required. See eg *Himunchol v Moharom* 1947 (4) SA 778 (N) at 780; *Harvey v Brown* 1964 (3) SA 381 (E) at 383. The magistrate must also be properly informed of the grounds on which the appeal is based, so that he can

comply with the duties imposed on him by rule 51(8). Para 1 of the notice of appeal merely contains an allegation that the magistrate erred in making the order in question, without stating in what respect he erred, and it cannot be said that it contains a ground of appeal as required by Rule 51(7)."

Although Rule 51(7) of the Magistrates Courts' Act 31 of 1944 (South Africa) deals with civil proceedings it, in as far as appeals are concerned, is relevant to criminal appeals. There must be stated in the Notice of Appeal "a precise statement of the points on which the appellant relies." A statement that the magistrate "erred in fact and in law in holding that the State had proved appellant was so drunk as to be incapable of having proper control of his motor vehicle" is not precise enough. As I have pointed out above, it does not tell the respondent or the magistrate what it is that is being attacked. The respondent is required to prepare his answer to the allegations made in the Notice of Appeal. Rule 23(1) of the Appellant Division (Magistrates Court) (Criminal Appeals) Rules requires a magistrate to reply to the Notice of Appeal. He must set out in a statement his reasons for judgment and sentence and these reasons must be a reply to the grounds on which the appeal is based.

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The response by the magistrate enables the appellant to amend his grounds of appeal should he wish to do so. These Rules are for the benefit of the appellant, the respondent and the court.

In the instant appeal when Mr *Lang's* attention was drawn to the defective notice, he applied for condonation of the defective notice of appeal. Although he did not say so he might have felt that his heads of argument cured the defect in the notice of appeal, hence his application for condonation.

The heads of argument clearly and specifically set out those areas of the judgment which the appellant was attacking. Mr *Sigidi*, who appeared for the respondent, did not oppose Mr *Lang's* application for condonation.

Because of Mr *Sigidi's* attitude, the fact that the appellant had a valid ground of appeal on sentence and our reluctance to refer the appeal against sentence to the High Court due to the delay that would be occasioned, we condoned the notice of appeal although it was not in compliance with Rule 22(1) of the Rules. There was, in the circumstances of this case, sufficient cause to excuse the appellant for failure to comply with the Rules of Court.

I would like to refer to the judgment of *Saloojee & Anor NO v Minister of Community Development* 1965 (2) SA 135 (AD), a case dealing with an application for condonation of the late noting of an appeal and the late filing of the record. Although the instant case is concerned with a defective notice of appeal, the thinking in *Saloojee & Anor NO v Minister of Community Development supra* is the same. What is important in the *Saloojee* case is the attitude the court should take when there is an application for condonation for non-compliance with the Rules of Court. In that case, as in the instant case, the respondent did not object to condonation.

STEYN CJ said at 138E:

"It is necessary once again to emphasise, as was done in *Meintjies v H LD Combrinck (Edms) Bpk* 1961 (1) SA 262 (AD) at p 264, that condonation of the non-observance of the Rules of this Court is by no means a mere formality. It is for the applicant to satisfy this court that there is sufficient cause for excusing him from compliance,

and the fact that the respondent had no objection, although not irrelevant, is by no means an overriding consideration."

It is in the discretion of the court to refuse condonation even in cases in which the respondents do not object to relief being granted to the applicants. In cases in which defective notices of appeal are filed it is in most cases the

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applicants' legal practitioners who are to blame. In such cases the court has to consider whether to punish the applicants for the negligence of their legal practitioners. In my view clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by STEYN CJ in *Saloojee & Anor NO v Minister of Community Development supra* at 141C-E when he said:

"There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf *Hepworths Ltd v Thornloe & Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council v Thirlwell & Anor* 1957 (4) SA 533 (N).)"

I have dwelt at length on this point because it is my opinion that laxity on the part of the court in dealing with non-observance of the Rules will encourage some legal practitioners to disregard the Rules of Court to the detriment of the good administration of justice.

Most of the facts in this case are not in dispute. It is not denied that there was an accident. It is the appellant's case that he had only drunk four pints of beer and could not therefore have been as drunk as the State alleged. In the defence outline it is stated that the appellant approached the robot-controlled intersection of Twelfth Avenue and Fifth Street and applied his brakes in order to avoid hitting a Vauxhall motor car which had suddenly stopped in front of him. It was because of that that his car swerved and hit the rear of the vehicle belonging to Chang Kee Tui. This is not the prosecution case. According to the prosecution the complainant's car was stationary at the robot when the appellant's car hit it at the rear. Mr Chang Kee Tui's evidence was very clear on that. He did not exaggerate the extent of the evidence. It cannot be said that he wanted to implicate the appellant in any way.

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After the accident P O Chikwanha attended the scene. He formed the opinion that the appellant was drunk. He handed the appellant to Chief Inspector Mhlanga. Chief Inspector Mhlanga conducted a Breath Analysis Test. Before conducting that test, Chief Inspector Mhlanga made observations which he entered in Form 221, Exhibit 4. His conclusion was that the appellant

was drunk. The appellant said he was not sick. That information was recorded in Exhibit 4.

The Breath Analysis Test was challenged by Mr *Lang*. He argued that the court *a quo* improperly relied on its results. When the appellant was asked to breathe into the Breath Analysis instrument, otherwise known as the Breathalyser instrument, he agreed. According to Chief Inspector Mhlanga the result was a recording of 275 milligrams of ethyl alcohol in 100 millilitres of blood. Chief Inspector Mhlanga said he deducted 10% of that recording of 275 and had a final test record of 247 milligrams of ethyl alcohol in 100 millilitres of blood. He recorded by hand the result of the Breathalyser Test Record, Exhibit 5. 247 was the level of alcohol in the appellant's blood.

Chief Inspector Mhlanga said in his evidence-in-chief that the instrument was working, because he tested it, it registered "zero, zero, zero" which was an indication that there was no fault with the instrument.

Mr *Lang* submitted that Exhibit 5, the Breath Analysis Test Record, was improperly relied upon by the court *a quo* because Chief Inspector Mhlanga had no personal knowledge of the mechanical or chemical functions of the instrument and could not tell whether the instrument's failure to print the results mechanically on Exhibit 5 was the result of a malfunction or not. He based his submissions on the failure of the instrument to produce a print-out on the Breathalyser Test Record, Exhibit 5. Chief Inspector Mhlanga said the device did not print the "zero, zero, zero" and the figures on Exhibit 5. Mr *Lang* did not dispute the fact that the figure 275 appeared on the visual display panel and Chief Inspector Mhlanga read that figure from it before he recorded it manually. It is true that the breath analysis instrument failed to produce a print-out. Chief Inspector Mhlanga said so in his evidence. He, however, insisted that the Breathalyser Analysis Instrument was working.

Chief Inspector Mhlanga was trained to operate the instrument. It was not shown in evidence that he did not operate it in accordance with instructions he had received. The defence did not call evidence to contradict the prosecution evidence on the functioning of the instrument. Questions tending to suggest that Chief Inspector Mhlanga did not know the mechanical

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and chemical functions of the instrument were put to him during cross-examination. That was all. It seems to me that the questions were satisfactorily answered and the results of the test speak for themselves.

Section 67 of the Road Traffic Act, No. 48 of 1976 gives powers to police officers above the rank of a section officer and other authorised persons to conduct breath analysis tests in accordance with set procedures and other requirements in circumstances in which a driver of a vehicle is involved in an accident or has contributed to an accident. I shall refer only to those subsections of s 67 that are relevant to this appeal: Subsections (3), (4), (5) and (6) of s 67 read:

"(3) Evidence may be given on a charge of committing an offence in terms of subsection (1) of section forty-five or subsection (1) of section forty-six of the concentration of alcohol indicated as being present in the blood of the

accused by a breath analysing instrument operated by an authorised person.

(4) As soon as practicable after the breath analysis concerned, the authorised person operating the breath analysing instrument concerned shall give to the person whose breath has been analysed a statement in writing specifying-

- (a) the concentration of alcohol indicated in terms of *subsection (3)* as being present in the blood of the second-mentioned person; and
- (b) the date and time of such breath analysis.

(5) If the provisions of subsection (4) have been complied with, it shall be presumed, unless the contrary is proved, that the concentration of alcohol indicated in terms of subsection (3) was present in the blood of the accused at the time of the breath analysis concerned.

(6) A certificate purporting to be signed by an authorised person and stating that-

- (a) the apparatus used by him for the purpose of the breath analysis concerned was a breath analysing instrument; and
- (b) the breath analysing instrument referred to in paragraph (a) was in proper order and was properly operated by him; and
- (c) the provisions of this Act relating to breath analysing instruments were complied with in respect of the breath analysing instrument referred to in paragraph (a); and

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- (d) a sample of the breath of a person named therein was furnished for analysis in the breath analysing instrument referred to in paragraph (a); and
- (e) a concentration of alcohol expressed in milligrams per one hundred millilitres was indicated by the breath analysing instrument referred to in paragraph
- (d) as being present in the blood of the person referred to in that paragraph on a specified date and at a specified time; and
- (f) a statement in writing referred to in subsection (4) was given to the person whose breath was analysed as soon as was practicable after the breath analysis concerned;

shall be proof of the facts so stated on its mere production by any person in proceedings for an offence in terms of subsection (1) of section forty-five or subsection (1) of section forty-six, unless the contrary is proved:

Provided that-

- (i) such certificate shall not be admissible unless the prosecutor or the accused, as the case may be, has received notice thereof not less than three days before its production or consents to its production;
- (ii) the court in which such certificate is adduced in evidence may, of its own motion or at the request of the prosecutor or of the accused, cause the authorised person concerned to be summoned to give oral evidence in the proceedings concerned or may cause interrogatories in writing to be submitted to him for reply, such interrogatories and any reply thereto purporting to be a reply from such authorised person being admissible in such proceedings."

As far as this case is concerned evidence was led on the concentration of alcohol present in the appellant's blood by a person authorised to operate a breath analysing instrument. There was no evidence led to show that the appellant was given a written statement showing the concentration of alcohol in his blood, the date and the time of the test as required by subs (4) of s 67 of the Act. I shall assume that he was given such a statement because Chief Inspector Mhlanga was not cross-examined on this aspect. Perhaps it was not necessary to cross-examine him because he gave oral evidence on how he conducted the test and on the results of the test. In terms of subs 5 of s 67 of the Act when the provisions of subs 4(a) and (b) have been complied with the court can presume that the concentration of alcohol in terms of subs (3) was

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present in the blood at the time when breath analysis was taken. In that case the accused has to prove the contrary.

In this case there was no certificate complying with the requirements of subs (6)(a), (b), (c), (d) and (f). What was entered on the Breathalyser Test Record was in compliance with para (e) of subs (6). The Breathalyser Test Record shows the concentration of alcohol in the blood expressed as required by the subsection. It also has the date and the time when the analysis was taken.

For the purposes of this case what is important to remember is that s 67 refers to a statement in writing and not to a print-out. It does not say a statement automatically produced by the breath analysing instrument. Had the Legislature intended the statement to be a print-out of the breath analysing instrument it would have said so in express words.

In England where a print-out produced by a Lion Intoximeter 3000 device or some other device is required, the Road Traffic Act, 1972, as substituted by the Transport Act 1981, reads in subs 3(a) of s 10:

"(a) ...**a statement automatically produced by the device by which the proportion of alcohol in a specimen of breath was measured** and a certificate signed by a constable (which may but need not be contained in the same document as the statement) that the statement relates to a specimen provided by the accused at the date and time shown in the statement..." (The emphasis is mine).

There are no such words in s 67 of the Road Traffic Act No. 48 of 1976. It means that a reading of the proportion of alcohol to blood can be made from the visual display panel of the breath analysing instrument and recorded by hand on the Breathalyser Test Record. Mr *Lang* belaboured the point that the results of the breath analysis test had not been automatically printed. He said because the machine failed to produce a print-out it was not working properly. I do not think that requirement is necessary. There is no provision in our law for an automatically produced statement.

It is disputed that the appellant had consumed four pints of beer at the Skittle Inn. The appellant said he was there for about three-and-a-half hours. The probabilities, judging from his state of intoxication and the number of hours he spent at the Skittle Inn, are that he consumed more

than four pints of beer. There is nothing in the evidence of Doctor Condon which suggests that the

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appellant was not very drunk. It appears that Doctor Condon left the appellant at the Skittle Inn. He might have taken some more pints of beer during that time.

Doctor Condon also testified that the appellant suffers from ataxia-a lack of co-ordination. In *Alcohol, Drugs and Road Traffic* the authors, Cooper, Schwar and Smith, say this of ataxia at p 172:

"The manner of walking may be modified by ataxia, a clinical condition of muscular incoordination often manifesting itself during walking. Lesions of the cerebrum, cerebellum, labyrinths, anterior and posterior nerve roots as well as muscular hypo - or hypertonia may cause ataxia. On the other hand, extreme emotion, pleasant or unpleasant, such as fright of arrest or accident, may be the cause of a temporary ataxia (French 1945: 361). Of particular relevance is that subclinical pathological ataxias may be exaggerated by even small doses of alcohol quite out of proportion to the blood alcohol concentration generally associated with alcohol or drug induced ataxia."

Mr *Lang* submitted that ataxia could have led to the police misconception that the appellant was drunk, "rather than suffering from delayed shock which heightened and aggravated the effects of appellant's physical infirmity."

That contention is not supported by the evidence. The amount of alcohol in the blood was massive. Ataxia may exaggerate small doses of alcohol. In this case the alcohol in the blood was not by any description small. At the scene of the accident Mr Chang Kee Tui, who had known the appellant for six years, did not observe anything unusual in his condition. The appellant himself suggested calling the police and proceeded to telephone the police. Patrol Officer Chikwanha could also have observed the appellant's state of shock at the scene of the accident. He did not.

During cross-examination the appellant was asked:

"Q. When did you first suffer from this ataxia?

A. I rushed across to call the police and it was quite some time before they came, but I didn't realise that I was going to be taken in. I didn't think I warranted to be taken in - I thought I was being arrested sort of thing.

Q. Perhaps you misunderstood my question, I said when did you start suffering from ataxia?

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A. Mainly when I got to the charge office.

Q. When?

- A. When I got to the Traffic Office.
- Q. Prior to this accident you were not suffering from this ataxia?
- A. No.
- Q. When did you first realise that you were suffering from ataxia-was it before or after the Breathalyser test analysis?
- A. Well, I had been asked a lot of questions; I was getting very nervous; they kept on repeating the same questions and I didn't know what was going on."

Whatever shock the appellant might have suffered must have come after persistent questioning and not before. By that time PO Chikwanha and Chief Inspector Mhlanga had formed the impression that the appellant was very drunk. And a reading of the record leaves one with the impression that the appellant was very drunk. That is very clear from the breath analysis test and the evidence of Chief Inspector Mhlanga. The inevitable conclusion to which the court *a quo* came was that the appellant was driving his motor vehicle under the influence of alcohol and was incapable of controlling it.

The accident happened when the weather was excellent and dry. The time was 3.30 pm. Mr Chang Kee Tui's motor vehicle was stationary at the robot. If the appellant was in full control of his motor vehicle, he would have stopped it before hitting Mr Chang Kee Tui's motor vehicle.

For these reasons the appeal against conviction cannot succeed.

The appeal against sentence was based on the sole ground that the sentence was "manifestly excessive and induces a sense of shock". There was no misdirection alleged. Mr *Lang* frankly conceded that the degree of drunkenness was very high, and therefore the point was without merit.

One of the factors a court has to look at when assessing sentence when a person has been found guilty of drunken driving is the degree of intoxication. In this case it is very high - 247 milligrams of ethyl alcohol in 100 millilitres of blood. The minimum unlawful concentration of alcohol in the blood of a driver is 80 milligrams per 100 millilitres. The appellant's concentration of alcohol in the blood was 167 milligrams above the prescribed minimum.

The question is whether, in the circumstances of the appellant, a fine of \$500 or, in default of payment, two months' imprisonment with labour is so

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manifestly excessive as to cause a sense of shock.

One has to look at the personal circumstances of the appellant. It is true he is a first offender. He is married and supports three children. He is employed by the National Railways of Zimbabwe in its engineering section. He earns a salary of \$1 200 per month. Besides that he is a race horse trainer who employs eight people. We are not told how much his income is from that source. It must be considerable bearing in mind that he is able to employ eight people.

In *S v Madzokere* HB-108-85 (unreported), a case cited by Mr *Lang*, the appellant was convicted of three counts of contravening s 47(1) of the Road Traffic Act and another count. He had driven a motor vehicle while he was drunk. He was sentenced to terms of imprisonment on each count. On appeal the terms of imprisonment were set aside and substituted by a fine of \$250 on each count.

Mr *Lang* says \$250, which was imposed by the High Court on appeal on each of the three counts, is the appropriate fine and not the \$500 imposed in the instant case. The appellant in *Madzokere's* case *supra* was a Major in the Army. We are not told his financial circumstances. We can safely assume that his salary was far less than that of the appellant. We do not know all the appellant's financial circumstances. He is, however, far better off than most offenders who are fined \$250 or \$300 for the same offence. In assessing an appropriate sentence in his case, it is necessary to have regard to the money factor.

A rich man will not feel the pinch if he is sentenced to a fine of \$250. It is a very light fine because \$250 is in money terms nothing to him. If the same amount of a fine is imposed without any distinction between rich and poor, the purpose of punishment on a rich man, namely deterrent, preventative, reformatory and retributive, will be defeated.

In the present appeal \$500 is an appropriate fine for a man of the appellant's means because in money terms he may on that figure feel the pinch. Since there is no misdirection shown to have been made by the magistrate, this court cannot interfere with the sentence he imposed.

For these reasons the appeal against sentence must fail.

Accordingly the appeal is dismissed.

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Gubbay JA: I agree.

McNally JA: I agree.

Ben Baron & Partners, appellant's legal practitioners

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SENIORS SERVICE (PVT) LTD v NYONI 1986 (2) ZLR 293 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

27 November 1986 & 15 January 1987

Flynote

Agency - authority - ostensible authority - act normally within power of person in same capacity as employee - representation - failure to give any indication of limitation on employee's authority.

Headnote

An employee may derive an ostensible authority to perform an act not within his actual or implied power where persons employed in that particular capacity generally have authority to do what he did. An estate agent's negotiator possessed of business cards and specifically named as a person to be contacted in newspaper advertisements possessed ostensible authority to receive money being a deposit paid by an interested purchaser on property being sold through the estate agents concerned.

Cases cited:

Stewart v Zagreb Properties (Pvt) Ltd. 1971 (2) SA 346 (RAD)

Tank v Jacobs (1881) 1 SC 289

Reed v Sagers Motors (Pvt) Ltd 1969 (2) RLR 519 (AD)

Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd & Anor [1964] 2 QB 480; [1964] 2 QB All ER 630 (CA)

Hely - Hutchinson v Brayhead Ltd & Anor [1967] 3 All ER 98 (CA)

International Sponge Importers Ltd v Andrew Watt & Sons (1911) AC 279

Canadian Pacific Railway v Lockhart (1942) AC 591

Rhodes Motors v Pringle - Wood NO 1965 RLR 395 (AD)

Electrolux (Pty) Ltd v Khota & Anor 1961 (4) SA 244 (W)

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Van Rooyen v Minister of Public Works and Community Development 1978 (2) SA 835 (A)

J B Colegrave for the appellant

A Ebrahim for the respondent

Judgment

Dumbutshena CJ: This is an appeal against the judgment of MFALILA J sitting in the High Court in Harare. The learned trial judge entered judgment and costs for the respondent (the plaintiff at the trial). The appellant now appeals against that judgment.

The facts of this case are as follows:

The appellant is a company in the business of selling and renting out properties on behalf of others. The respondent is a school-teacher. The appellant inserted an advertisement, Exhibit

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Eight, in *The Herald* of 3 August 1982. The advertisement reads as follows:

"43 Farms and Smallholdings

Seniors Service Estates
Phone BENHURA
on 700676
after hours 66369

MARONDERA: 601 acres of good mixed soils, ideal for tobacco, maize and cattle. Big river, borehole and 2 wells, good rainfall. Nice big house with 4 b.rms., 2 bathrms., workshop, Millrm., 11 tobacco barns, 8 paddocks. What a bargain at \$42 000 cash. (Ref. TB.74).

RUWA: Deed of Sale. Deposit \$8 000.
271/2 acres of good soil, 2 acres under irrigation, 3-b.rmd. house,
sep. d.r. and lounge, nice fitted kitchen, 3 boreholes in perfect order.
Price \$40 000.
(Ref. TB.73)."

The respondent read the advertisement and became interested in the properties advertised. He then visited Harare on 10 August 1982. He wanted to buy a plot through the appellant. When he got to the appellant's business premises he asked for Benhura, whose name appeared in the advertisement.

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He was shown Benhura at the premises of the appellant. He told Benhura that he wanted to buy a plot in Ruwa. Benhura showed the respondent a number of plots which he said were available.

The respondent then visited the plots. After inspecting them, he decided to buy one in Arcturus. That property belonged to one Forster. The respondent went back to the appellant's offices and told Benhura that he was interested in a plot in Arcturus. Benhura told him that the purchase price of the plot was \$40 000 and the down payment was \$10 000. The respondent said he could not raise \$10 000 at once. He had on him \$5 000. He then proposed to pay the balance of the deposit, \$5 000, by two instalments of \$2 000 and \$3 000 to be paid respectively in December 1982 and in August 1983. Benhura accepted his proposal. He informed the respondent that it was the responsibility of the company to help customers.

The respondent asked Benhura about payment. Benhura handed the respondent a business card, Exhibit One. It is important at this moment to describe Exhibit One. It contains the name "Seniors Service" and a logo on one side and T BENHURA, in capital letters on the other side and below the following information: "CNR REZENDE/BAKER AVENUE RES 66369 BUS 700676." It does not mention the capacity in which Mr Benhura was employed by the appellant, or indeed that the appellant is a limited company. So much for the business card.

After Benhura handed the respondent his card he told the respondent to make the cheque payable to T Benhura. The cheque was drawn in favour of T Benhura and handed to him at the appellant's office.

The respondent said in his evidence-in-chief:

- "A. After receiving the cheque Benhura asked me to wait, since he was going away to fetch a receipt from the people who receive monies for the company.
- Q. Did he in fact go to the cashier's office to arrange a receipt for you?
- A. He left us in the office indicating he was going to get a receipt. I think he must have gone to the cashier because later, he came back and had a receipt."

That receipt, Exhibit Three, was an ordinary receipt. It did not bear the name

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of the appellant, Seniors Service (Private) Limited Estate Agents. The receipt was mounted on a compliment slip which read:

"With the Compliments of

SENIORS SERVICE (PVT) LTD ESTATE AGENTS

Telephone: 700676/7 P O Box U A 358

Union Avenue

cnr Rezende St/Baker Avenue Salisbury"

In December 1982 the respondent went back to the appellant's offices to pay the \$2 000 that he had arranged to pay that month. The cheque, Exhibit Five, for \$2 000 was drawn by the Posts and Telecommunications Corporation in favour of the respondent. It was handed to Benhura who took it with him to the cashier. Benhura returned and told the respondent that the cashier wanted him to endorse the cheque at the back. The respondent signed. Benhura went away and returned with a receipt, Exhibit Four.

When the respondent went back to the appellant's offices in August 1983 to pay the last instalment of \$3 000 on the deposit of \$10 000 he was informed that Benhura had been arrested for theft of money paid by customers. The respondent saw Roger Senior of the appellant company. Senior was a director and principal shareholder in the company.

Senior showed the respondent a list of customers whose money was stolen by Benhura. Although the respondent's name was not there, he was described on the list as a teacher from Zhaka who had paid \$7 000. The respondent was told that Benhura had paid \$21 000 to the company. The respondent did not get his share from that money. He sued the appellant company.

The learned judge *a quo* found on the facts that Benhura accepted \$7 000 on behalf of the appellant and that he had authority to receive money on behalf of the appellant. He found that the appellant held out Benhura as having authority to receive money from the respondent or any other customer of the appellant. He also found that when Benhura received money from the

respondent "he did so within his ostensible authority and that the defendant company is estopped from denying the existence of this ostensible authority".

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The appellant appeals against these findings on the following grounds:

1. The learned Trial Judge erred in finding that Benhura was acting as the duly authorised agent of appellant when he accepted payment into his own name from respondent.
2. The learned Trial Judge erred in finding that Benhura had authority to receive money from respondent on appellant's behalf and in particular that he was allowed to receive cash payments from appellant's clients.
3. The learned Trial Judge erred in finding that appellant had held Benhura out as having authority to receive money from respondent and that Benhura had received money from plaintiff in terms of any ostensible authority.
4. The learned Trial Judge erred in particular in finding that the advertisement inserted would have misled a reasonable man into believing that a Property Negotiator employed by a company would have authority to receive trust monies in his personal name and not in the name of his employers.

Mr *Colegrave*, who appeared for the appellant, contended that Benhura had no ostensible authority to receive cheques and that the learned trial judge erred when he decided that Benhura's acts in converting the monies to his own use bound the appellant. This was the central point on appeal.

Senior testified that Benhura was a property negotiator. He said he "did not hold out Benhura to go and take monies". He said that a property negotiator does not receive money. Money was paid to the cashier employed by the company. Because of this piece of evidence Mr *Colegrave* argued (I shall put his argument in his own words):

"It is his (Benhura's) task to introduce the prospective seller to the prospective buyer. It was not his duty to conclude contracts, nor to receive money in terms thereof."

In support of that proposition Mr *Colegrave* relied on *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (2) SA 346 (RAD) at 349H and *Tank v Jacobs* (1881) 1 SC 289 at 290.

In *Stewart v Zagreb Properties (Pvt) Ltd supra* the headnote recites the facts

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as follows:

"Plaintiff had made an offer to estate agents employed by an agent appointed by the sole shareholder of the defendant company to purchase the property of the company subject to his obtaining a bond for two-thirds of the valuations of the land and improvements. The agent notified the shareholder of the offer but made no mention of

the condition. This offer was, as a trial court found, accepted by the shareholder. Before the plaintiff could tender the purchase price the shareholder withdrew the offer and the plaintiff unsuccessfully sued for specific performance of the contract. In an appeal,

Held, that, in a sale of property, it was not a normal condition that the sale was subject to the suspensive condition of the nature specified by the appellant.

Held, further, that the shareholder had never authorised the agent and the estate agent to make a contract of the type offered by the appellant.

Held, accordingly, that the agent had exceeded his authority.

Held, further, that in any event before a contract was concluded the offer had been withdrawn."

This was a case in which the agent notified the shareholder of the defendant company of the offer and did not tell him of the condition that the acceptance was dependant on obtaining a bond for two-thirds of the valuation of the land and improvements. So it was held that the agent exceeded his authority.

Mr *Colegrave* relies on a passage at 349H of the above case. To understand that passage well it is as well to state the principles of ostensible authority propounded by BEADLE CJ at 349F-H and underline that portion of this passage that Mr *Colegrave* relies upon. BEADLE CJ said:

"The principles on which a seller or a principal can be bound by the ostensible authority of an agent have been set out recently by this court in the case of *Reed NO v Sager's Motors (Pvt) Ltd* 1970 (1) SA 521 (RAD). The head note to that case, which accurately sets out the judgment, is as follows:

'If a principal employs a servant or agent in a certain capacity and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his "apparent" authority. The principal is bound even

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though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in his capacity) held the servant or agent out as having this authority. **The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. Whether an act is or is not within the scope of the apparent authority of an agent is essentially a question of fact.**" (The emphasis is mine.)

I agree with what the learned Chief Justice said in the above passage. I shall later in this judgment refer to *Reed NO v Sager's Motor (Pvt) Ltd supra*.

Tank v Jacobs supra was a case in which the defendant sold to the plaintiff property in Cape Town, through the agency of P McLoughlin. The plaintiff believed that McLoughlin had authority to receive the purchase money, paid him £150 in part payment and a further sum of £50 towards the expenses of transfer. McLoughlin deposited the money in a bank in the name of his mother-in-law. The bank for some reason returned the money to him and he used it.

The passage at 290 of this case which Mr *Colegrave* relies upon to support his contention that Benhura had no power to receive money from the respondent reads:

"Now it is quite clear that by our law the power to sell does not, as a general principle, confer on an agent the power to receive the purchase money. The authority of Voet (46. 3. 3) and Sande (Dec 3. 16. 2) is clear and decisive upon this point. But the same writers add that even where such an agent has not been expressly empowered to receive the purchase money, circumstances may exist from which such a power may be implied. In the present case circumstances of this nature have, in my opinion, been proved to exist."

Both the passages cited by Mr *Colegrave* in the above two cases seem to support, in my view, the conclusions to which the learned judge *a quo* arrived. In the instant case Benhura's authority, as an employee of the appellant, flows from the fact that Benhura was employed to negotiate the sale of houses or, if you wish to put it in the language of Senior, as a negotiator. Within that scope of his authority he received the money in the circumstances described above.

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In *Reed NO v Sager's Motors (Pvt) Ltd* (1969) (2) RLR 519 (AD) at 523H; 1970 (1) SA 521 (RAD) at 524H) BEADLE CJ discussed and, in a manner of speaking, explained the phrase "ostensible authority" in these words:

"The word 'ostensible' in the *Rhodes Motors Company* case (1965 (4) SA 40) is used in the sense of 'apparent' and in the language of the law of agency these two terms are synonymous. If a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his 'apparent' authority. The principal is bound even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in this capacity) held the servant or agent out as having this authority. The agent's authority flows from the fact that persons employed in the particular capacity in which he is employed, normally have authority to do what he did. There may be other examples of acts falling within the scope of an agent's apparent authority, at the above is certainly one of them."

In the instant case the law regards the appellant as having represented that Benhura had authority. The appellant is therefore bound as against the respondent by its representations. Benhura, from the facts of this case, appeared to have authority though the appellant had not expressly given him that authority or had, as was said in evidence, limited Benhura's authority by telling him not to receive money from prospective purchasers of property. See *Bowstead on Agency* 14 ed at 70 and *Freeman and Lockyer (a firm) v Buckhurst Park Properties (Mangal) Ltd & Anor* [1964] 2 QB 480 at 503; [1964] 1 All ER 630 (CA) at 644 F-I where DIPLOCK LJ (as he then was) said:

"An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he

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is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

In ordinary business dealings the contractor at the time of entering into the contract can in the nature of things hardly ever rely on the 'actual' authority of the agent. His information as to the authority must be derived either from the principal or from the agent or from both, for they alone know what the agent's actual authority is. All that the contractor can know is what they tell him, which may or may not be true. In the ultimate analysis he relies either on the representation of the principal, ie apparent authority, or on the representation of the agent, ie warranty of authority. The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, ie by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has normally 'actual' authority to enter into."

It matters not that the appellant had instructed Benhura not to receive money because "ostensible or apparent authority is the authority of an agent as it appears to others", per LORD DENNING MR in *Hely-Hutchinson v Brayhead Ltd & Anor* [1967] 3 All ER 98 (CA) at 102C; [1968] 1 QB 549 at 583. As it appeared to the respondent Benhura had ostensible or apparent authority. The appellant had represented, as it appeared from the advertisement and Benhura's business card, that Benhura had the authority to receive money. That conduct, in my view, reasonably misled the respondent.

As it appeared to the respondent Benhura had the authority to receive deposit money on behalf of the appellant company. The facts of this case support the assumption made by the respondent. Benhura appeared to him to have power to do all things pertaining to his duties as a negotiator. His actual authority might have been limited but his ostensible authority was not limited. "The company is bound by his ostensible authority in his dealings with those who do not know of the limitation," per LORD DENNING MR in *Hely - Hutchinson v Brayhead Ltd & Anor supra* at 102D.

A summary of the facts which make this case fall within the confines of what was stated in the above cases is as follows:

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Benhura was employed by the appellant company to negotiate the sale of houses or property on behalf of clients of the appellant company. The appellant company was in the business of Estate Agents. That was the capacity in which he was employed. The appellant represented that Benhura had authority to sell houses in the advertisement, Exhibit Eight. In Exhibit Eight prospective purchasers of farms and smallholdings in Marondera and in Ruwa were invited to deal with Benhura. There is nowhere in Exhibit Eight where Benhura is described as a negotiator who is not allowed to receive money. People are invited to telephone him during working hours or after hours. Telephone numbers are given. His business card, Exhibit One, does not say he is a negotiator who is not allowed to take money from customers. On the face of both exhibits he might well be the proprietor of Seniors Service, or a very important employee. He enjoyed the exclusive use of an office in the business premises of the appellant.

And even if the receipts that were issued were ordinary and general receipts which any person could purchase in any stationery shop and own, they were mounted on compliment slips bearing the name of the appellant company. Besides, there was no notice in bold letters warning all and sundry against paying money to negotiators. How could a customer guess the policy of the company?

And in any event it was common cause that the firm, Seniors Service, could take money from prospective purchasers on behalf of prospective sellers. Why should purchasers assume that only the cashier could take their money? Why could not an apparently senior employee, apparently more important than the cashier, take the purchaser's money and pass it on to the cashier?

From these facts the learned judge *a quo* was correct when he came to the conclusion that the appellant represented that Benhura had ostensible authority to receive money from customers.

This conclusion is strengthened by Senior's evidence that was cited in the judgment of the court *a quo*. Senior testified:

"We had training sessions because he had no experience as a property negotiator. During these sessions he received instructions on money and ethics, that deposits were to be put in the Seniors Service trust account and that this could not be tampered with. He was also told that all cash payments were to be made to the cashier who would issue receipts. The cashier would count the money hence the payer had to be present."

Whatever Senior said to Benhura was unknown to the respondent. As long

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as there was no notice in the office telling customers to pay money to the cashier and not to property negotiators the ostensible authority that the appellant had by its conduct invested in Benhura cannot be doubted. In the words of DE VILLIERS CJ in *Tank v Jacobs supra* at 290:

"...even where such an agent had not been expressly empowered to receive the purchase-money, circumstances may exist from which such a power may be implied."

Such circumstances existed in the present case.

Mr *Ebrahim*, for the respondent, relies in support of his submission that the actions of Benhura in receiving a cheque drawn in his favour could be "regarded as a mode, albeit an improper mode, of doing that which he was authorised to do", on *International Sponge Importers Limited v Andrew Watt & Sons* 1911 AC 279.

In that case a commercial traveller by the name of Cohen was employed by a sponge company. His duty was to sell parcels of sponges and fix the price and to receive crossed cheques in payment. The customer, Messrs Andrew Watt & Sons paid for the sponges they bought by crossed cheques payable to Cohen's principals. However, Cohen on four occasions induced Messrs Watt & Sons to pay by open cheque payable to him or by coin and notes and he embezzled the money. Cohen was a rogue just as Benhura was a rogue.

LORD LOREBURN LC said in his opinion what I feel is applicable to the circumstances of the

instant case, albeit the facts might differ. He remarked at 284-285:

"It is clear that Cohen had no actual authority to receive in payment for sponges anything except crossed cheques in favour of the pursuers. It is not, however, established that Messrs Watt had express notice that, while he might receive payment, such payment could only be in the way of crossed cheque in pursuers' favour. There is a printed direction in the form of account usually rendered, relating both to payment by cheque and to the form of receipt. It is, however, partly equivocal; for it admits of a construction which allows of payment in cash, and in such case would dispense with the prescribed form of receipt. Still I am pressed by Mr Buckmaster's argument that, whatever the notice may be, Messrs Watt had no right to pay so large a sum as £1 201 in notes or gold, as they did on one occasion, or to pay by open cheque payable to Cohen, as they

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did in three incriminated transactions, because that was not in the ordinary course of business. And the excuses invented by Cohen to induce the defenders to pay in that way were flimsy enough. I should be very sorry to affirm as a general proposition that such payments to a traveller are to be upheld.

What determines me, though not without doubt, in upholding these payments in the present case is this. The good faith and integrity of Messrs Watt are undisputed and indisputable. Cohen occupied a position of fuller authority than is usual. The only limit of his actual authority was as to the kind of cheque he might receive."

The sponge company sent to its customers bill-heads and statement of account specifying the manner of payment the company prescribed to its customers who were to make payment to the company's agents or travellers on specified terms: "Terms 21/2 per cent disc for prompt cash"; "Terms strictly net. Cheques to be crossed 'National Provincial Bank of England account payees.'" LORD SHAW OF DUNFERMLINE remarked on the above words of notification at 288 as follows:

"My Lords, no one can doubt that these words did not in this case impress the customer with the view that cash payments were forbidden. And I am, after full consideration, unable to affirm that they constitute a plain declaration, by which customers with the International Sponge Importers Limited are bound, that no ready-money trade is done by that firm, and that travellers are prohibited from receiving money in exchange for goods delivered. It appears to me, my Lords, that such a prohibition should not be lightly inferred. The retail customer, visited by the well-known representative of a wholesale firm, does not, in my opinion make an unreasonable or improper or careless supposition when he assumes that, if such an agent or traveller hold the double position of, first, being actually charged with the custody of goods and the delivery of these, and, secondly, being trusted by his employers to collect moneys due upon account, the same agent or representative is empowered to make even better terms for his employers by taking cash - rather than postponed terms of payment - for the goods handed over. I agree with the language of Lord Low upon this point: 'Of course, the allowance of credit is entirely in favour of the buyer. It would be much better for the seller every time to get his money down in exchange for the goods and I can see nothing in the fact that the practice of the pursuers was to give credit, and, of course, of the purchasers to take credit, which would have led to

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the conclusion that it was beyond the power of their traveller to make a cash transaction."

In this case no such warning was given to prospective purchasers of property. What was said above by LORD SHAW OF DUNFERMLINE applies more to the circumstances the respondent found himself in when asked to pay money to Benhura. Impressed by the apparent authority of

Benhura, the respondent did in good faith make two payments to him in the manner described above. He was to make a third payment when, I believe to his shock, he discovered that Benhura was a convicted rogue and that he stole his money. He had made the payments to Benhura in good faith. Now he wants his money from the appellant who employed him.

In my judgment the respondent is entitled to claim his money from the appellant. Benhura had ostensible authority. The collecting of a deposit that Benhura did was connected with his authorised work of a property negotiator, and the appellant is liable for his thefts of the respondent's money.

Mr *Colegrave* submitted that, in the absence of a representation by Benhura that could reasonably be expected to mislead, the appellant cannot be estopped from denying that Benhura had the necessary authority. This submission misses the point which is pertinent in cases where it is alleged that the employee or agent has apparent authority. In such cases the employer is liable for acts which it did not authorise as long as those acts can be regarded as modes of performing that which the employee is authorised to do.

The above statement does not, in my view, offend against the broad principles of estoppel summarised by Mr *Colegrave* in his heads of argument as follows:

- "(a) a representation by words or conduct which might reasonably be expected to mislead;
- (b) the misleading of the representee;
- (c) inducing him to alter his position on the faith of such representation;
- (d) the representor must have intended that the representation should be acted upon by the representee, though this is normally presumed."

See *The Law of Agency in South Africa* 3 ed, de Villiers and Mackintosh at p 440.

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In *Canadian Pacific Railway Company v Lockhart* (1942) AC 591 at 599 LORD THANKERTON summarised the principles which govern cases of this nature as follows:

"The general principles ruling a case of this type are well known, but, ultimately, each case will depend for decision on its own facts. As regards the principles, their Lordships agree with the statement in *Salmond on Torts*, 9th ed. p 95, namely: 'It is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided that they are so connected with acts which he has authorised that they may rightly be regarded as modes - although improper modes - of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it ...On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it.' The well-known dictum of *Lord Dunedin in Plumb v Cobden Flour Mills Co Ltd* ([1914] AC 62) that 'there are prohibitions which limit the sphere of employment and prohibitions which only deal with the conduct within the sphere of employment', may be referred to. Their Lordships may also quote passages from the judgment of this Board in *Goh Choon Seng v Lee Kim Soo* ([1925] AC 550), which was delivered by Lord Phillimore: 'The principle is well laid down in some of the cases cited by the

Chief Justice, which decided that "when a servant does an act which he is authorised by his employment to do under certain circumstances and under certain conditions, and he does them under circumstances or in a manner which is unauthorised and improper, in such cases the employer is liable for the wrongful act "..."

See *Reed NO v Sager Motors (Pvt) Ltd supra* and *Rhodes Motors (Pvt) Ltd v Pringle-Wood NO* 1965 RLR 395 at 406B-D.

The cases cited above are sufficient authority to establish that the appellant is liable for the wrong Benhura did in the carrying out of his legitimate and authorised duty in a manner he was not authorised to do.

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Mr *Colegrave* contended that the appellant was not estopped from denying that Benhura had the necessary authority. He relied on *Electrolux (Pty) Ltd v Khota & Anor* 1961 (4) SA 244 at 245H. The *Electrolux (Pty) Ltd case supra* is distinguishable on the facts from the instant case.

In that case *Electrolux (Pty) Ltd* sold 15 refrigerators to one Grubb, who represented himself as trading as Electrical Distributors. He paid the applicant £1 710 4s in cash by cheque upon the delivery of the refrigerators. Grubb then sold the refrigerators to the first respondent for £1 658. The cheque paid to the applicant was dishonoured. The applicant traced the refrigerators to the first respondent.

Grubb had obtained the refrigerators by fraud. He was arrested and convicted. The *dominium* of the refrigerators remained with the applicant because of the fraud. The applicant was therefore entitled to vindicate the refrigerators from the first respondent.

The question was whether the applicant was estopped from denying that Grubb was the owner of the refrigerators or had the applicant's authority to dispose of them. The applicant had not by its conduct or negligence represented or caused to be represented to the first respondent, and thus to have misled him, that Grubb was the owner or was entitled to sell the refrigerators. The applicant did not mislead the first respondent, but Grubb did, by informing him that invoices would shortly be sent by the applicant because he had just bought the refrigerators. There and then he pretended to telephone the applicant.

It was held in *Electrolux (Pty) Ltd supra* that the first respondent had failed to prove that the applicant had represented in any way that Grubb was the owner of, or had the right to sell, the refrigerators, and that it was Grubb's own fraudulent conduct which had caused the first respondent to believe that Grubb was entitled to sell the refrigerators. It was found that the applicant was not estopped from denying that Grubb was not the owner of the refrigerators. This case does not assist the appellant because the defence of estoppel has not been raised. Further, the applicant in *Electrolux (Pvt) Ltd supra* did not represent that Grubb was the owner of the refrigerators. In the instant case the representation was made by the appellant.

Equally, *Van Rooyen v Minister of Public Works and Community Development* 1978 (2) SA 835 (A), another case cited by Mr *Colegrave*, does not assist the appellant. That was a case in which no representation was made.

DUMBUTSHENA CJ

The regional representative who wrote a letter which purported to cancel the agreement between the parties, although he had wide powers, did not in terms of clause 18 of the agreement have power to repudiate the agreement. That power was vested by clause 18 in the Secretary of the Department. So the regional representative was not authorised to cancel the agreement on behalf of the Government. Because of that the defence of estoppel was untenable. As can be seen from the passage in the judgment of RABIE JA (as he then was) at 849 - see at 617 of the official translation - the defence of estoppel was not available to the appellant. RABIE JA remarked:

"On account of his knowledge of the contents of the agreement, he knew what the powers of the engineer were and he knew that only the Secretary of the Department, or his delegate, could act under clause 18. From this it follows that there was no behaviour on the part of the Department which could reasonably have brought the appellant under the impression that the regional representative was authorised to repudiate the agreement. Because this is so, it follows that there was no representation by the Department which is susceptible to the construction which the appellant wishes to place thereon. It follows, therefore, that respondent made no representation to appellant which can serve as basis for his defence of estoppel. Cf *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) at 364H-365C; *Electrolux (Pty) Ltd v Khota & Anor* 1961 (4) SA 244 (W) at 246A-C. The finding can also be formulated as follows: as the appellant, by reason of his knowledge of the contents of the agreement, knew that the engineer could not terminate the agreement and that only the Secretary of the Department, or his delegate, could do so, the appellant cannot say that he had been misled by the conduct of the Department and had been persuaded thereby to act to his detriment. Cf *Bird v Sumerville & Anor* 1961 (3) SA 194 (A) at 204E-F; *Abrahamse v Connock's Pension Fund* 1963 (2) SA 76 (W) at 79F-H; *Hauptfleisch v Caledon Divisional Council* 1963 (4) SA 53 (C) at 57C-D."

On both the facts and the law *Electrolux (Pty) Ltd supra* and *Van Rooyen supra* do not support the contentions made in support of the appellant's case. These two cases are distinguishable on the facts.

In this case I am in agreement with the conclusions to which the learned judge *a quo* arrived.

Accordingly the appeal is dismissed with costs.

DUMBUTSHENA CJ

Gubbay JA: I agree.

McNally JA: I agree.

Morris, Beale & Collins appellant's legal practitioners

Ali Ebrahim respondent's legal practitioners

ZVOBGO v KINGSTONS LTD 1986 (2) ZLR 310 (HC)

Editor's Note:(3)

Court High Court, Harare

Annotations [Link to Case Annotations](#)

Reynolds J

Trial action

12, 13, 14 November & 5 December 1986

Flynote

Delict - defamation - sting of defamatory allegation - manner of proving quasi - innuendo - defamatory nature of allegation - test for - right of freedom of speech and - fair comment - statement of fact or expression of opinion - based on unrevealed facts animus injuriandi - presumption of - distributor - liability based on negligence.

Damages - defamation - apportionment of - quantum - public figure - costs.

Costs - plus petitio.

Headnote

The plaintiff, then Minister of Justice, brought action on the grounds of the distribution by the defendant of a popular magazine containing an article alleged to be defamatory of him. For the defendant it was denied that the articles were defamatory or bore the sting alleged and the defence of fair comment was raised.

Held, that a plaintiff may call evidence as to the sense in which allegedly defamatory words were understood in order to prove the sting of the defamation provided that he first establishes the existence of particular circumstances which give rise to the distinctive extended meaning of the relevant words.

Held, further, that the plaintiff was defamed.

Held, further, that the defence of fair comment cannot succeed where the defamatory publication would be regarded by the average reasonable reader as founded upon unrevealed information in the possession of the publisher.

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Held, further, that no public figure can expect to escape criticism and provided protests are kept within the bounds of moderation and do not impute dishonourable conduct they will not be actionable.

The factors to be considered in assessing damages suffered by a public figure discussed.

Cases cited:

SA Associated Newspapers Ltd v Samuels 1980 (1) SA 24 (A)
Demmers v Wyllie & Ors 1978 (4) SA 619 (D)
Deedat v Muslim Digest & Ors 1980 (2) SA 922 (D)
Ngcobo v Shembe 1983 (4) SA 66 (D)
Gayre v South African Associated Newspapers Ltd 1963 (3) SA 376 (T)
Hough v London Express Newspaper Ltd [1940] 2 KB 507
De Middellandse Nationale Pers v Stahl 1917 AD 630 HRH
King Zwelithini of KwaZulu v Mervis & Anor 1978 (2) SA 521 (W)
Pienaar v Argus Printing & Publishing Co Ltd 1956 (4) SA 310 (W)
Chesterton v Gill & Ors 1970 (2) SA 242 (T)
Marruchi v Harris 2943 OPD 15 *Channing v South African Financial Gazette Ltd & Ors* 1966 (3) SA 470 (W)
Holdsworth Ltd v Associated Newspapers Ltd [1937] 3 All ER 872 (CA)
Sim v Stretch [1936] 2 All ER 1237 (HL)
Parmiter v Coupland & Anor (1840) 6 M&W 105; 151 ER 340
Henderson v Thompson 1934 NZLR 444
Die Spoorbond & Ors v SA Railways & Harbours 1946 AD 999
South African Associated Newspaper Ltd v Yutar 1969 (2) SA 442 (A)
Pottle v Evening Telegram (1954) 34 MPR 101
Pratten v Labour Daily [1926] VLR 115
Hoare v Silverlock (1848) 12 QB 624 at 630; 116 ER 1004
Drummond-Jackson v British Medical Association & Ors [1970] 1 WLR 688 (CA)
Farrar v Hay 1907 TS 194
Minister of Justice v South African Associated Newspapers Ltd 1979 (3) SA 466 (C)
Waring v Mervis & Ors 1969 (4) SA 542 (W)
Mahomed v Kassim 1972 (2) RLR 517 (AD)
Dorfman v Afrikaanse Pers Publikasies 1966 (1) PH J9

Basner v Trigger 1946 AD 83

Pakendorf en andere v de Flamingh 1982 (3) SA 146 (A)

Emmens v Pottle & Ors (1885) 16 QBD 354

Trimble v Central News Agency Ltd 1934 AD 43

1986 (2) ZLR p 312

Suid - Afrikaanse Uitsaai-korporasie v O'Malley 1977 (3) SA 394 (A)

May v Udwin 1981 (1) SA 1 (A)

Nydoo v Vengtas 1965 (1) SA (A)

African Life Assurance Society Ltd & Ors v Robinson & Co Ltd & Anor 1938 NPD 277

Associated Newspapers v Dingle [1964] AC 371

Hassen v Post Newspapers (Pty) Ltd & Ors 1965 (3) SA 562 (W)

Moolman v Slovo 1964 (1) SA 760 W

Crawford v Albu 1917 AD 102

Marais v Richard en 'n ander 1981 (1) SA 1157 (A)

Botha v Pretoria Printing Works Ltd 1906 TS 710

Hertzog v Ward 1912 AD 62

Pelser v South African Associated Newspapers Ltd & Anor 1975 (1) SA 34 (N) *Gathercole v Miall* (1846) 15 M&W 319; 153 ER 872

Simpson v Williams 1975 (4) SA 312 (N)

Whittaker v Scarborough Post [1896] 2 QB 148

Buthelezi v Poorter & Ors 1975 (4) SA 608 (W)

Dawson v McClelland [1899] 2 IrR 486

Gray v Poutsma & Ors 1914 TPD 203

Dymes v Natal Newspapers Ltd 1937 NPD 85

Mathews & Ors v Young 1922 AD 492

Tekere v Zimbabwe Newspapers (1980) Ltd & Anor 1986 (1) ZLR 275 (HC)

Ley v Hamilton (1935) 153 LTR 385 (HL)

Rhodesian Printing & Publishing Co Ltd v Howman NO 1967 RLR 318 (GD)

Smith v Fourie GS-130-77 (unreported)

Cherneskey v Armadale Publishers Ltd & Ors (1977) 79 DLR (3) 3321

Shield Insurance Co Ltd v Booysen 1979 (3) SA 953 (A)

Pont v Geyser & Anor 1968 (2) SA 545 (A)

Associated Mine Workers Union & Bloomfield v Gwekwerere & Ors GS-202-81 (unreported)

Innes v Visser 1936 WLD 44

Salzman v Holmes 1914 AD 471

Sutter v Brown 1926 AD 155

Cassell & Co Ltd v Broome [1972] AC 1027

Rowles v Isipingo Beach Revision Court 1966 (3) SA 751 (D)

Kathrada v Arbitration Tribunal & Anor 1974 (2) SA 535 (C)

C N Greenland for the plaintiff

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M T O'Meara for the respondent

Judgment

Reynolds J: In the October 1984 issue of a news magazine circulating in Zimbabwe called "Drum", there appeared an article which, *inter alia*, referred to the plaintiff in this case. Some of the passages in this article are alleged by the plaintiff to be defamatory of him. The plaintiff instituted proceedings against four defendants originally, claiming that he had suffered damages in the sum of \$500 000. The plaintiff later withdrew his action against three of the defendants - that is the editor, the printer and the publisher of the magazine - and he proceeds now against the present defendant only. This defendant distributes the magazine in Zimbabwe. The plaintiff's claim was reduced to \$40 000 before the trial commenced.

The facts which led to the publication of this article are as follows: The plaintiff is the Minister of Justice and Legal and Parliamentary Affairs in Zimbabwe, and a senior member of the ruling political party known as the Zimbabwe African National Union (Patriotic Front), to which I will refer as "the party". In August, 1984 the party held its second congress. This was considered to be an important event in the eyes of the party and of the public, and the plaintiff considers that the article in Drum correctly described it as an "historic" congress. At this meeting there was created a politburo. This was described by the plaintiff as being an executive branch of the party's Central Committee which was answerable to that Committee. He stated that its individual members were senior to those on the central committee. The politburo was to consist of fourteen members, who were to be appointed by the President and Deputy-President of the

party. The plaintiff, as it happened, was not appointed to the politbro. The article in question purported to report the proceedings of the congress, and it took the line that the omission of the plaintiff was an unexpected decision. It volunteered a possible explanation for his exclusion from the politburo, and it described the politburo as being "the all-powerful, supreme body of authority in the country."

The allegedly offensive portion of the article reads as follows:

"Hard-working Dr Nathan Shamuyarira, the intellectual confidant of Mugabe, came into the politburo instead of Dr Eddison Zvobgo - tipped not so long ago by many to be the only man to rival Mugabe.

He certainly wasn't excluded simply because Mugabe feared him, if indeed he ever worried about him.

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Zvobgo has tripped up a few times, his behaviour is not always perhaps what Mugabe expects of leaders, and then of course he has been known on at least one occasion to have criticised the leadership of the country, and the leader is, of course, Mugabe.

Zvobgo, sources within Zanu say, is an 'unashamed regionalist', and comes from the influential Karanga grouping of Shonas.

It must have taken some courage on Mugabe's part to act so surefootedly and dump him."

The construction placed on this passage by the plaintiff appears at paragraphs 7 and 8 of his amended declaration. These are:

- "7. That by reason aforesaid article plaintiff has suffered damage in his fair name, reputation and position as a government minister as well as in his career as a politician.
8. That further by reason of the aforesaid article, the plaintiff, by implication, has been referred to as a pretentious, irresponsible person, unworthy of leadership, and as a shameless, tribalistic divisionist within the party and/or Government."

The defendant's plea is in the alternative: in the main it denies that the words in question were defamatory of the plaintiff, or, alternatively, if they did bear a defamatory meaning, then it pleads that they should be construed as being fair comment upon matters of public interest.

I turn now to examine the issues raised. It will be convenient to deal with these issues in the same order as they are set out in the minutes of a pre-trial conference held by the parties. The first such issue is whether the words used were defamatory. In considering this issue it is customary to divide the inquiry into two separate stages. The plaintiff here relies on the meaning of the words in their primary sense, and in this event, it must first be determined what the words actually mean in this sense. Having arrived at a conclusion in this respect, it must then be determined whether that meaning is defamatory. (See *SA Associated Newspapers Ltd v Samuels* 1980 (1) SA 24 (A) at 30F.)

I am required, initially then, to decide what impression would be gained or what inference would be drawn by the ordinary, reasonable person who read

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the report in question. This seemingly simple task is complicated to an extent by the fact that the "ordinary meaning" relied on by the plaintiff is in fact alleged to have a somewhat extended or allusive connotation in the circumstances that existed at the time. Although no "true" innuendo was pleaded, the plaintiff averred that a "quasi-innuendo" governed the meaning to be ascribed to the words in question. This concept is sometimes described as "highlighting the sting of the imputation". (See *Demmers v Wyllie & Ors* 1978 (4) SA 619 (D) at 622 D; *Deedat v Muslim Digest & Ors* 1980 (2) SA 922 (D) at 928 H; and *Ngcobo v Shembe & Ors* 1983 (4) SA 66 (D).) A "quasi-innuendo" simply means that the words in issue, though alleged to be defamatory *per se*, are said to have acquired special or local overtones which give them an extended or particularly pointed significance. It is this expanded meaning which the plaintiff in the present matter relies upon, and in para 8 of his declaration the plaintiff has set out what he considers is the true meaning of the words as they would be understood by the average reader.

An additional complicating factor is that, as is common today with the proliferation of "...isms" and "...ists" that have invaded the English language, the pleadings, the evidence and the contentions advanced in this case fairly bristle with words bearing these suffixes. These coined words are not always susceptible of ready definition, and their precise significance is not always immediately clear. (See, for example, *Gayre v SA Associated Newspapers Ltd* 1963 (3) SA 376 (T) where, associated with several other "...ists", the words in issue were "Fascist geneticist".)

Certain rules of pleading apply when a plaintiff alleges an innuendo. Different rules apply when a quasi-innuendo is pleaded. One difference between the two forms of pleading is that a party alleging an innuendo may lead evidence to show what persons reading the words understood by them, whereas when the plaintiff relies on the ordinary meaning of the words, he may not lead evidence as to the sense in which they were understood. The test in this latter event is objective, and it is the function of the court to decide on the meaning of the words (see *Hough v London Express Newspaper Ltd* [1940] 2 KB 507 at 515; *De Middellandse Nationale Pers v Stahl* 1917 AD 630 at 636). There is authority for the view that he may, however, call relevant evidence where the witness would be in a better position than the court in understanding how the words would probably be understood by the reasonable reader (see *HRH King Zwelithini of KwaZulu v Mervis & Anor* 1978 (2) SA 521 (W); *Ngcobo v Shembe & Ors supra*). But before doing so, in my view, it is necessary that the plaintiff lay a proper foundation to establish in what way or by virtue of what circumstances the distinctive

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meaning pleaded is deemed to apply. He must show the basis, or establish the circumstances for asking the court to attribute an extended meaning to the words (see *Pienaar v Argus Printing & Publishing Co* 1956 (4) SA 310 (W) at 318). This is necessary and important for the defamatory nature of the words may vary between times and between countries, and will depend upon the social or political viewpoint of the time, or even on colloquial usage. (See *Chesterton v Gill & Ors* 1970 (2) SA 242 (T) at 248F; *Marruchi v Harris* 1943 OPD 15.) The

variable import of words such as "homosexual" or "gay"; "communist"; "coloured"; "miscegenation" are but a few that spring to mind that may carry a defamatory imputation or not depending upon the contemporary understanding in the country concerned. (See *Channing v SA Financial Gazette Ltd & Ors* 1966 (3) SA 470 (W).)

In the present case the plaintiff has laid such a foundation in that he gave undisputed evidence that the party - ZANU(PF) - enjoys the support of the majority of the people in Zimbabwe, and that not only these people, but most other adult members of the public as well interest themselves in and follow the political affairs of the party. The community in general would, therefore, possess background knowledge of the principles and policies of the party, and would have been very interested in and concerned with the outcome of the second party congress.

In relation to one particular part of the article, it was the plaintiff's further evidence that one of the cardinal party principles was unity, and anyone, therefore, particularly a Minister, who espoused or practised tribalism or regionalism or any other divisive type of action would be condemned, and liable to severe disciplinary measures. The basis of the policy was said to spring from a desire to encourage a spirit of integration, and from the fact that the liberation war was conducted by all persons in Zimbabwe regardless of tribe, region or ethnic group, and no suggestion, in such circumstances, of any favouritism being shown towards one group or another would be tolerated. It was from this background that the meaning attributed to the words "unashamed regionalist" arose. (See *Holdsworth Ltd v Associated Newspapers Ltd* [1937] 3 AER 872 (CA) at 880.)

[The learned Judge then considered the meaning of various other allegedly defamatory words and continued ...]

I turn now to consider whether either of these remarks were defamatory, bearing in mind the meanings that I have decided would be applicable. It is necessary, before doing so, to examine in brief the meaning of the word

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'defamatory' itself. As LORD ATKIN said in *Sim v Stretch* [1936] 2 All ER 1237 (HL) at 1240, "Judges & textbook writers alike have found difficulty in defining with precision the word 'defamatory'". I do not think that it is necessary to be too precise, however, in determining what constitutes defamatory matter. The test that has been long accepted by our courts is whether the imputations made would lower the reputation of the plaintiff in the eyes of ordinary, right-thinking persons of normal intelligence. (See the authorities cited by Burchell in *The Law of Defamation in South Africa* at 95. See, too, the learned author's suggestion, with which I would, with respect, agree, that the term "right-thinking" should be supplanted by the well-known test of "reasonableness" alone.)

Be that as it may, the essence of the action, in my view, lies in determining whether the imputations made tend to lower the plaintiff in the estimation of others, or to injure his standing and reputation. (See *Sim v Stretch supra*; *Parmiter v Coupland & Anor* (1840) 6 M&W 105; 151 ER 340; *Henderson v Thompson* 1934 NZLR 444; *Die Spoorbond & Ors v South African*

Railways & Harbours 1946 AD 999; *South African Associated Newspapers Ltd v Yutar* 1969 (2) SA 442 (A).) It has been held defamatory to allege that a politician is "irresponsible", (*Pottle v Evening Telegram* (1954) 34 MPR 101), and to impute "incompetence" to a government Minister, (*Pratten v Labour Daily* [1926] VLR 115). It has also been held that the imputation will be defamatory if it reflects on any aspect of the plaintiff's reputation. For example, in *Hoare v Silverlock* (1848) 12 QB 624 at 630 it was decided that "want of gratitude is a serious imputation". Again in *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688 (C) at 698 PEARSON LJ held that words could be defamatory if they impute lack of qualifications, knowledge, skill, capability, judgment or efficiency in a person in the conduct of his business or professional activities.

As against these wide illustrations, there are two other important considerations that bear upon the matter and must be taken into account. The first is the need to strike a balance between the conflicting rights of free speech on the one hand, and of protection of reputation on the other. As INNES CJ expressed this problem of reconciliation in *Farrar v Hay* 1907 TS 194 at 199:

"On the one hand, it is our duty to see that the private character and personal honour of every citizen are protected against unjust attack. On the other hand, we must be careful not unduly to hamper the right of full and fair discussion upon matters of public interest which is so important to the welfare of the community."

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The second aspect is that adverted to by LUDORF J in *Pienaar & Anor v Argus Printing & Publishing Co Ltd supra* at 318 C-E, in the following terms:

"Although conscious of the fact that I am venturing on what may be new ground I think that the Courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this. How soon the audiences of political speakers would dwindle if the speakers were to use the tones, terms and expressions that one could expect from a lecturer at a meeting of the ladies' agricultural union on the subject of pruning roses!"

(See, too, *Minister of Justice v SA Associated Newspapers Ltd* 1979 (3) SA 466 (C) at 475B.)

Having given consideration to these various factors, it is my view that the two passages examined in some depth already are defamatory of the plaintiff. These are (a) "...his behaviour is not always perhaps what Mugabe expects of leaders...", and (b) "Zvobgo, sources within Zanu say, is an 'unashamed regionalist', and comes from the influential Karanga grouping of Shonas". The balance of the words in the article, while setting its framework and tone, would, not, in my judgment, tend to lower the plaintiff's reputation in the estimation of the ordinary, reasonable reader, and are not, therefore, defamatory of the plaintiff. I have already found that the reasonable person would infer from the first phrase specified that "(the plaintiff's) conduct had not always been suitable or seemly for a leader, and it had, as a result, fallen below those standards expected by the Prime Minister". To my mind this statement in this publication goes beyond honest criticism, and beyond the limits of free expression enshrined in our Constitution. I accept that a politician, like 'justice', must suffer the scrutiny and outspoken comment of members of the public, and also of critical comments by the authors of published articles, but he is also entitled to protection against irresponsible attacks which impugn his reputation. (See

Minister of Justice v South African Associated Newspapers Ltd supra at 475B, *Waring v Mervis & Ors* 1969 (4) SA 542 (W) at 549C.) The need to balance these conflicting interests has already been referred to (*Farrar v Hay supra* at 199, *loc cit*).

The words of BEADLE CJ, in *Mahomed v Kassim* 1972 (2) RLR 517 (AD), are pertinent. At 533C he said, "...it is in the public interest that prominent public figures should not be unjustly maligned by newspapers...". To my

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mind, to say of a Minister of the State that his behaviour has been unseemly or unfitting conveys the impression that he has been guilty of some form of dishonourable or disgraceful conduct. The use of the word "perhaps" does not, in my view, lessen the damaging effect of the imputation.

Similarly, and in respect of the second phrase and its imputation, to say of a Cabinet Minister that he is "a regionalist" would undoubtedly, in my view, impair his reputation and lower him in the eyes of ordinary, reasonable members of society. As the plaintiff stated in evidence the very word "regionalist" is regarded with loathing by the membership of the party as it connotes the obnoxious practise of dividing and promoting one area against all others. The reference to tribe would emphasise the implication, and would expose the plaintiff with even greater force to the opprobrium of other members of the party and the public in general.

I am conscious of the fact that the ordinary reader of the article in question would extract and retain only general impressions; he would not undertake a careful and critical analysis of the matter. (*Dorfman v Afrikaanse Pers Publikasies* 1966 (1) PH J9 at 45.) To my mind the reader here would be left with the overall belief that the plaintiff's behaviour had proved unacceptable at times, and that he had improperly favoured his own area of the country against all other areas. It was in consequence of these improprieties that he had not been appointed to the politburo by the Prime Minister.

The next issue that requires determination was recorded at the pre-trial conference as: "were the words published maliciously of the plaintiff?" It appeared that the parties used the word 'malicious' as being synonymous with *animus injuriandi*. As I understand the position these terms are not interchangeable (see *Basner v Trigger* 1946 AD 83; *Pakendorf en andere v De Flamingh* 1982 (3) SA 146 (A)). Furthermore, the liability of a distributor of published material, such as the defendant here, is based on negligence and not intention (*Emmens v Pottle & Ors* (1885) 16 QBD 354; *Trimble v Central News Agency Ltd* 1934 AD 43). But whichever test is used to determine liability in the present case, the result would, in my view, be the same. The defendant has not in any way established absence of either negligence or *animus injuriandi*. In either event the *onus* rests on the defendant. Mr O'Meara, for the defendant did not even raise the question of negligence. His only submission was that by virtue of the fact that Drum was merely repeating what others had already said, the absence of *animus injuriandi* would be presumed. As I understand the position, however, if a statement is proved to be defamatory, *animus injuriandi* is presumed or inferred (*Suid-Afrikaanse*

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Uitsaaiorporasie v O'Malley 1977 (3) SA 394 (A) at 401-2; *May v Udwin* 1981 (1) SA 1(A) at 10; *Nydoo v Vengtas* 1965 (1) SA 1 (A) at 20). I do not consider that this presumption has been rebutted by the defendant. Even assuming that the defendant was correct in stating that the article was merely a repetition of earlier newspaper reports, this would not constitute a valid defence. As FEETHAM JP said in *African Life Assurance Society Ltd & Ors v Robinson & Co Ltd & Anor* 1938 NP 277 at 302:

"It seems to me to be perfectly clear on the authorities that a person who republishes a defamatory rumour, without endorsing it, cannot, on the ground that he passes it on as a rumour only, escape liability."

Again in *Associated Newspapers Ltd v Dingle* [1964] AC 371, LORD DENNING said, in reference to repetitions of reports or rumours in circulation elsewhere:

"If the report or rumour was true, let him justify it. If it was not true, he ought not to have repeated it or aided in its circulation. He must answer for it just as if he had started it himself. Newspapers in particular must not speak ill about people for the spice it gives readers. It does a newspaper no good to say that other newspapers did the same. They must answer for the effect of their own circulation without reference to the damage done by others."

(See, too, *Gatley on Libel & Slander* 8 ed at paras 261 & 262, and the authorities there cited; *Hassen v Post Newspapers (Pty) Ltd & Ors* 1965 (3) SA 562 (W) at 565A.)

The next matter in issue was whether the words contained in the article were false. I have presumed that the relevance of this aspect was whether the statements made were based on true facts, although this point was specifically mentioned later in the minutes of the pre-trial conference, numbered "3.6" as follows: "Were the matters set out based on facts which were true?" The defence of 'truth & public benefit' was not raised, and I can see no other relevance regarding the falsity of the words.

I believe that this question has been sufficiently answered already, and I would merely repeat that the plaintiff's positive and reasoned assertions as to the falsity of each imputation made was accepted. It may also be mentioned that there was nothing to suggest that the truth of the allegations made had been checked or substantiated, **and** three of the original reports

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emanated from letters written to the editor of the newspaper concerned by individuals expressing a personal opinion. These appear to have been adapted, adopted and regurgitated as fact without caring whether they were true or false (see *Moolman v Slovo* 1964 (1) SA 760 (W) at 762D).

The main defence raised of 'fair comment upon matters of public interest' was set out as the next issue in the minutes of the pre-trial conference. Mr *Greenland*, quite properly in my view, conceded that the article as a whole did concern 'matters of public interest', and no further consideration need be given to this factor.

The *locus classicus* on the doctrine of "fair comment" is still *Crawford v Albu* 1917 AD 102, where the requirements of this defence were set out in detail. These were summarized by JANSSEN JA in *Marais v Richard en 'n ander* 1981 (1) SA 1157 (A), as follows:

- "(i) the allegation in question must amount to comment;
- (ii) it must be fair;
- (iii) the facts upon which the comment is made must be true;
- (iv) the comment must relate to a matter of public interest."

(See headnote at 1158H.)

The last two of these elements have already been disposed of. As to the requirement of comment' as opposed to 'fact', Mr *O'Meara*, on the one hand, submitted that the article was based on the known or admitted facts that the second Zanu(PF) Congress had been held at which a politburo had been formed. The plaintiff had not been appointed to this important organ of the party. The author of the article then speculates - ie puts forward an opinion - as to the reasons for this omission. Mr *Greenland*, on the other hand, contended that the offensive parts of the article are reproduced as fact, and no reasonable reader would take these parts as mere speculation or expressions of opinion.

In *Waring v Mervis & Ors supra* at 545H et seq HIEMSTRA J said the following, which is pertinent to the present case:

"The statement must be recognisable as comment, although it can be phrased in the form of a positive averment of fact. The facts upon which the comment is based need not all be expressly set out but they must be clearly indicated and be broadly known to those to whom the comment

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is published, so that they will not regard it as founded upon unrevealed information in the possession of the publisher."

To my mind, the first of the passages to which I have referred as being *prima facie* defamatory - ie '...his behaviour is not always perhaps what Mugabe expects of leaders...' is expressed as a positive averment, and it would not be recognisable as comment by the average and reasonable reader. It seems to me that the reader would be far more likely to regard this statement as being 'founded upon unrevealed information in the possession of the publisher'. In other words, he would believe that the publisher had knowledge of certain acts of misbehaviour committed by the plaintiff, and had prepared his remarks with those acts in mind.

Similarly, and with the second passage that I have held to be *prima facie* defamatory, I consider that the reasonable reader would view the phrase as a report of an admitted fact, ie that the plaintiff had declared himself to be a regionalist. The reference to "sources within ZANU" would, I believe, be taken to mean that this information had been conveyed to the author of the article by a member or members of the party.

In my view neither of the phrases referred to would be identified by the reader as comment, or

at best, comment and fact "are so entangled that inference is not clearly distinguishable from fact". (*Crawford v Albu supra* at 114.)

As I have come to the conclusion that the statements in question are averments of fact and not expressions of opinion, it is unnecessary to consider whether the statements were 'fair' as falling within the reasonable limits of honest opinion. (*Marais v Richard en 'n ander* at 1167 *et seq.*)

[The learned Judge then considered further issues not material to this report and continued ...]

In the overall result I find that the article complained of was defamatory of the plaintiff in the two areas referred to, and that the article did not fall within the bounds of fair comment.

The final issue raised relates to the quantum of damages suffered as a result of the publication of this defamatory matter.

The plaintiff traced his *curriculum vitae* in giving evidence, and there can be no doubt that he is a man of letters, and a public figure of eminence in the

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country. As a Minister of the State he occupies a most important and influential position, and as I see it, his various functions must be carried out, and must be seen to be carried out honourably, dutifully and impartially. Any failings in these respects will jeopardize his reputation and his political career. Any accusation then, that is levelled at a Minister which has the effect of placing in doubt the attributes required of him constitutes *prima facie*, a grave injury to him. (See *Botha v Pretoria Printing Works Ltd* 1906 TS 710 at 715; *SA Associated Newspapers Ltd v Yutar supra*.)

As against this consideration, however, it is an obvious fact that no public figure can expect to escape criticism, disapproval, complaint and even hostility at times in respect of some of his decisions and actions. Provided that these protests are kept within the bounds of moderation, and do not impute improper, immoral or otherwise dishonourable conduct to the plaintiff, the author's constitutional rights of free expression will be protected. In fact, many a public figure welcomes constructive criticism and debate, and would echo Oscar Wilde's remarks in *The Picture of Dorian Gray*, "...there is only one thing in the world worse than being talked about, and that is not being talked about". (See *Farrar v Hay supra*; *Hertzog v Ward* 1912 AD 62 at 70; *Pienaar & Anor v Argus Printing & Publishing Co Ltd supra* at 318; *Pelser v SA Associated Newspapers Ltd & Anor* 1975 (1) SA 34 (W) at 41; *Waring v Mervis & Ors supra* at 549C.)

The extent of the publication has already been dealt with in relation to liability, but it is also relevant to, and an important factor affecting quantum. (*Moolman v Slovo supra* at 763; *Gathercole v Miall* (1846) 15 M&W 319; *Simpson v Williams* 1975 (4) SA 312 (N).) Although the actual number of copies of this magazine that were sold is not before me, I believe that it is permissible to take notice of the fact that Drum is a sophisticated and good quality publication - I refer to the quality of the magazine itself and not necessarily to the contents - that is relatively well-known in Zimbabwe. The probabilities are that a sufficient number of copies must be sold

monthly in order to keep the production viable. In this situation I consider that it would be reasonable to assume and to hold that at least a fair or moderate number of copies of the issue in question were sold. (See *Whittaker v Scarborough Post* [1896] 2 QB 148. See, too, *Buthelezi v Poorter & Ors* 1975 (40 SA 608 (W) at 615.) It would not be possible to be more accurate than that.

There is some controversy in regard to the assessment of damages when there are two or more actual or potential defendants. In English law, there can be no apportionment of damages between joint defendants. The basis for this

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rule is that the plaintiff

"...is entitled to receive a sum representing the damage he has suffered from a single wrong inflicted by all. The defendant has no right to say that his contribution to the injury was smaller than that of the others. Small though it may have been, the wrong might not have been committed at all if he had not taken part in it."

(per *Homes LJ in Dawson v McClelland* [1899] 2 IrR 486 at 501. See, too, *Gatley op cit* at paras 244, 245, 1138 & 1463, and the authorities there cited.)

There is authority in South Africa for the opposite view. In the case of *Gray v Poutsma* 1914 TPD 203 at 219, GREGOROWSKI J held that

"...different damages according to the blameworthiness of the various tortfeasors have to be considered & assessed."

(See, too, *Dymes v Natal Newspapers Ltd* 1937 NPD 85; *South African Associated Newspapers v Samuels supra* at 41-2.) In *Pienaar & Anor v Argus Printing & Publishing Co Ltd supra* the converse situation applied: ie there was more than one plaintiff.

There is much to be said in favour of both approaches in my view, but, as it happens, I do not think that it is necessary to come to a decision as to which approach should be applied in the present matter. Mr *Greenland* contended that the contribution problem does not arise at all in this case as the plaintiff has withdrawn his action against the erstwhile co-defendants, by reason of "insurmountable jurisdictional obstacles", and factors affecting their involvement are not, therefore, before the court. There is merit in this submission in my view. As CARLISLE AJ said in *Dymes v Natal Newspapers Ltd supra* at 99:

"...any amount which a joint tortfeasor, who is not before the court, may have to pay is an entirely unknown factor, and must remain so until the court is in possession of the facts regarding his case."

I would, with respect, agree with this. It is not possible to assess degrees of blameworthiness of persons who are not joined in an action. Furthermore, and to the best of my knowledge there is no reason why the plaintiff should not proceed against only one of two or more possible defendants, and no reason why he should not recover a total award from that defendant.

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But even if I am incorrect in this, and an apportionment of damages should be made, it is my view that the degree of blameworthiness attaching to the present defendant is substantial. As the distributor of various publications, the defendant owes a duty of care to ensure that none of the material he issues contains any harmful matter. (See *Hassen v Post Newspapers (Pty) Ltd supra* at 577A.) In practical terms it is, no doubt, difficult to check every item to be distributed. In some cases, for instance where a book or magazine is in a foreign language, this difficulty may seem to be insuperable, but the duty remains nonetheless. The distributor will only escape liability if he raises and proves absence of negligence (*Trimble v Central News Agency Ltd supra*). This defence was not advanced in the present case.

The magazine Drum appears to consist, at least in part, of political news and comment, and it is printed and published in South Africa, a country which is politically hostile to Zimbabwe. In these circumstances it is my view that the defendant distributes this magazine, and any others of a similar type, without first checking their contents, at its peril. Having said this, however, I do accept that the blameworthiness of the defendant in this matter, as the "innocent" distributor of the magazine, is not exceptionally high. (Cf *Rhodesian Printing & Publishing Co Ltd v Howman supra*.)

I was urged by Mr O'Meara to take into account that even if the article was found to be defamatory, the plaintiff in fact appears to have suffered no damage at all. His position and his reputation seem to have remained intact. To this, in my view, a part answer at least is that as soon as defamatory matter is published, a presumption arises that the plaintiff has suffered injury to his reputation. (*Mathews & Ors v Young* 1922 AD 492; *Tekere v Zimbabwe Newspapers (1980) Ltd and Anor* HH-290-86.) The test is whether the words complained of tend to lower the plaintiff's reputation. (*Gatley op cit* para 31.) In the instant case this presumption is a strong one in my view, for it is almost inevitable that a general imputation of the kind made here will have some damaging effect. (See *SA Associated Newspapers Ltd v Yutar supra* at 456.) There was no rebuttal of this presumption in this case. The extent of the injury is impossible to determine, and that is why, as I understand it, the presumption exists. In the words of Lord Atkin, in *Ley v Hamilton* (1935) 153 LTR 385 (HL) at 386, "It is impossible to track the scandal, to know what quarters the poison may reach". It may be, for all I am aware, that the plaintiff's reputation and standing was seriously damaged, and that he was on the brink of disaster as far as his political career was concerned. It may

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be that members of his party and of the public scoffed at the imputations, and did not accept them. The point is that the actual effect is unknown, and it would be idle and dangerously unreliable to speculate on the possibilities.

Having said this, however, it is clear that if a man has actually been ruined by a defamatory statement this is more serious than if the statement does not appear to have had any adverse effect at all. This is certainly a matter to be taken into account.

It is usually the case in an action for defamation that one of the plaintiff's main reasons for coming to court at all is to attempt to clear his tarnished reputation. Should he eventually succeed, and be awarded substantial damages, this decision will in some measure vindicate his reputation. (See *Pienaar & Anor v Argus Printing & Publishing Co Ltd supra* at 323 G; *Rhodesian Printing & Publishing Co Ltd v Howman* NO 1967 RLR 318 at 339E.) This is another factor, therefore, that will be taken into account.

The difficult task of assessing appropriate damages in a defamation case is exacerbated by the conflicting demands of what appear to be factors of equal importance. *Gatley op cit* notes some of the categories that may be applicable at paragraph 1451. I believe that those aspects having the greatest bearing on the present matter have already received consideration. I was not referred to any cases which involved similar circumstances, nor have I been able to locate any. Of those I have perused, however, the following have some analogous features. The first of these is *Smith v Fourie* GS-130-77 in which a former Prime Minister of this country had been accused of misusing State machinery in order to abduct a leading political opponent. In awarding a sum of \$15 000 damages, the court commented that "a more serious allegation could not be conceived of".

In *SA Associated Newspapers Ltd v Samuels supra*, the plaintiff was a University Professor who was described as being "highly esteemed both within and outside the country". A newspaper report of a criminal trial carried the allegation that the plaintiff had been guilty of dishonest and improper conduct. The newspaper had a large circulation of approximately half-a-million readers. The plaintiff was awarded R8 000 damages.

In a Canadian case, *Cherneskey v Armadale Publishers Ltd & Ors* (1977) 79 DLR (3) 321, the defendant newspaper published a letter condemning the plaintiff's expressed concern over the location of an alcoholic rehabilitation centre as "racist", and "unbecoming a member of the legal profession". The

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plaintiff was a municipal alderman and also a lawyer. The jury awarded him \$25 000 (Canadian) damages, and this was upheld on appeal to the Supreme Court of Canada.

Eighty years have passed since the case of *Botha v Pretoria Printing Works Ltd supra* was heard. The plaintiff in that case was General Botha, who had a seat in the Transvaal's First Volksraad, and who was a member of a Commission that had been appointed to inquire into concessions granted following the annexation of the Transvaal by the British Government. A newspaper report carried the innuendo that the plaintiff had accepted a bribe in connection with one of the concessions. He was awarded £250 damages on the basis that "attacks upon the character of public men are not to be lightly made".

Needless to say the value of money today is the merest fraction of what it was at the time of that judgment, and it is well established that the court may take into account the depreciation in the value of money. (See, for example, *Shield Insurance Co Ltd v Booysen* 1979 (3) SA 953 (A) at 963 C-D.) Even in the last ten years the rate of inflation has had a very significant effect on

values.

In the case of *Pont v Geyser & Anor* 1968 (2) SA 545 (A), the court feared that the imputations against the plaintiffs - each an ordained Minister of the Church -

"were calculated to arouse such loathing against the respondents that, amongst a considerable number of the readers of the monthly paper in which the defamation had appeared, their good names would be ruined, and would be difficult to restore."

It was held that the amounts of R10 000 to each respondent "were unprecedented, but that the defamation was also unprecedented". (Headnote at 545.)

The final four cases to which I will refer may all be described as involving very serious allegations. The first of these is *Tekere v Zimbabwe Newspapers (1980) Ltd supra*. In this case a Member of Parliament, who was also a provincial chairman of the same party as is concerned in the present case, was defamed in two statements published by a leading daily newspaper in Zimbabwe with a circulation of between 50 000 and 80 000 copies. Sandura JP who presided at the trial held "it is quite clear that some very serious allegations were made against the plaintiff". These allegations, basically, were that the plaintiff:

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"was lazy, inefficient, irresponsible, inattentive to his duties, and that he spent most of his time drinking, womanising and burning the road at the expense of the taxpayers."

(At p 16 of the cyclostyled judgment.)

The learned judge found that aggravating features were established, and for the first defamatory statement, damages of \$75 900 were awarded, and for the second, \$12 500.

Another local case was described by BECK J (as he then was) as being

"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."

That case is *Associated Mine Workers Union & Bloomfield v Gwekwerere & Ors* GS-202-81, in which the second plaintiff had been accused of habitually stealing from workers' monetary contributions to a Workers' Union. He was awarded \$8 000 punitive damages.

The next relevant case is *South African Associated Newspapers Ltd v Yutar supra*, in which the allegation was made in a leading South African newspaper with a wide circulation that the plaintiff who was then the Deputy Attorney-General of the country, had deliberately misled the court. This was described in the course of the judgment by STEYN CJ as "a particularly serious allegation" and "one of the most humiliating insults which could have been offered to any person in the position of the respondent". This was said to justify the award of the "unusually high amount" of R10 000.

The last case to which I shall refer in this respect is that of *Buthelezi v Poorter & Ors supra*. From the facts established in that case it was held that there had been an "exceptionally bad

defamation" of the plaintiff who was described as "a person of international repute". The defamatory statement was contained in the editorial of a news magazine with a proved sale of some 27 000 copies. In a rather similar approach to that adopted in the present case the article in the magazine purported to explain why the plaintiff, who was the Regional Director of a Christian Institute, had been served with a banning order. In the course of the explanation put forward, the defamatory remarks were made. The plaintiff was awarded the sum of R13 500 damages.

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It will be noted that in none of these cases, and in none of the many others that I have perused, has a sum even approaching the plaintiff's reduced claim been awarded. It must, however, be borne in mind that the sums awarded would, no doubt, have been significantly higher at today's values. But, it must also be remembered that, as GREENBERG J commented in *Innes v Visser* 1936 WLD 44:

"The figure of Justice carries a pair of scales, not a cornucopia."

The quantum ultimately determined by the court represents what is designed to be a fair and appropriate sum which, in contemporary thinking, will help to assuage the plaintiff's injured feelings, and will compensate him reasonably for the injury. Although it has been held that award should not be "clearly disproportionate to the circumstances of the case", (*Salzman v Holmes* 1914 AD 471 at 480) or "manifestly inadequate" (*Sutter v Brown* 1926 AD 155 at 173), it is not always a simple matter to decide what is proportionate or adequate. The difficulty of assessing an appropriate figure in cases of this sort was adverted to by GREENBERG J, in *Innes v Visser supra* at 45. See, too, *Ley v Hamilton supra* at 386). Again, and in the words of Lord Hailsham in *Cassel & Co Ltd v Broome* [1972] AC 1027 at 1027G:

"the whole process of assessing damages where they are 'at large' is essentially a matter of impression and not addition."

(See, too, the pertinent remarks of WILLIAMS AJ in *Buthelezi v Poorter & Ors supra* at 618).

The defendant here, in my view, could not be said to have participated in an extremely grave attack upon the plaintiff. Adjectives in the superlative degree would not, therefore, be appropriate to describe the nature of this defamation. By the same token, however, it would be equally inappropriate to regard the matter as trivial. Bearing in mind the various factors that I have adverted to above, I am of the view that an award of \$14 000 would meet the justice of the present case. Had a wider circulation been proved, and had the defendant been more directly involved in the publishing of the defamatory matter, this sum would have been greater.

The final matter that requires consideration is the question of costs. Mr O'Meara cited the cases of *Rowles v Isipingo Beach Revision Court* 1966 (3) SA 751 (D) at 753C; and *Kathrada v Arbitration Tribunal & Anor* 1974 (2) SA 535 (C) at 539H-540H in support of his submission that the plaintiff

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should bear all the costs incurred by both parties, regardless of the result of the action.

This contention is based on the allegedly excessive *plus petitio* brought by the plaintiff. Accepting that this is a valid consideration, in the present case, and before the trial commenced, the plaintiff reduced his original claim of \$500 000 against four defendants to one of \$40 000 against the present defendant. There was nothing to suggest that the defendant's resistance to the original claim would have differed had the amended claim been substituted when these proceedings were first instituted. He does not appear to have been prejudiced in any way. Furthermore, it is my view that the mere fact that a party's claim exceeds the sum that is eventually awarded to him will not normally entail a punitive order of costs against a successful plaintiff. If this were the general rule the claims brought in such cases would invariably be too low. Would the court's wrath be visited upon the hapless plaintiff if he falls into this error as well? Surely the very object of calling upon the court to assess an appropriate award, when liability is admitted, is that the parties are unable to agree on a figure? It would be absurd, in my view, to punish the party whose estimate is furthest from the court's eventual assessment. Furthermore, I do not think that a claim that is ultimately held to be inflated necessarily reveals "an unseemly degree of cupidity". The difficulties experienced by courts in assessing damages in cases of this sort has already been mentioned. Why should the plaintiff, or even his legal representative be in any better position than the court in arriving at the "correct" amount?

I do not consider that the figure of \$40 000 claimed is so grossly excessive as to warrant an assumption that the plaintiff is abusing the process of the courts by exhibiting a degree of cupidity. In the circumstances, costs, as is usual, will follow the event.

In the result, judgment is entered in the plaintiff's favour in an amount of \$14 000 with costs.

Chirunda, Chihambakwe & Partners, plaintiff's legal practitioners

Coghlan, Welsh & Guest, defendant's legal

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MACEYS CONSOLIDATED (PVT) LTD & ANOR v T A HOLDINGS LTD (2) 1986 (2) ZLR 331 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Beck JA & Gubbay JA

Ruling on costs

January 1987 * (4)

Flynote

Costs - appeal - each party successful in some measure - substantial success.

Headnote

The general rule is that an appellant who succeeds in having judgment substantially altered in his favour is entitled to costs of appeal to an extent dependant on the circumstances of the case.

Cases cited:

EMS Belting Co of SA (Pty) Ltd & Ors v Lloyd & Anor 1983 (1) SA 641 (OPA)

Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd 1960 (3) SA 585 (AD)

I A Donovan for the appellants

A P de Bourbon SC for the respondent

Judgment

Dumbutshena CJ: On 24 July 1986 this court delivered Supreme Court Judgment No. 92/86 †(5) and invited the parties to prepare oral or written submissions on the question of costs. On 27 November 1986 the appellants filed their written submissions and the respondent did likewise on 8 December 1986.

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DUMBUTSHENA CJ

The appeal in this matter arose from a dispute between the parties who had entered into an agreement of sale of the businesses and properties belonging to the appellants. Because of that dispute the appellants applied to the High Court claiming from the respondent a total of \$1 410 272. That amount was made up as follows:

"\$100 000 was the balance on the purchase price of the Hypermarket plus *mora* interest at the rate of 13 per cent per annum; \$610 099 was the amount outstanding on the price of the stock-in-trade plus *mora* interest at the rate of 13 per cent per annum with effect from 15 December 1984; and \$700 173 was the price of fixtures, fittings and motor vehicles plus *mora* interest at 13 per cent per annum with effect from 15th December 1984."

In addition the appellants claimed compound interest or capitalised interest from the date each of the above amounts became due.

When the respondent filed its replying affidavit it paid \$100 000 for the purchase of the Hypermarket plus interest. The total amount paid was \$156 109,93. That claim fell away before the application in the High Court was heard.

The remaining claims of \$610 099 the balance for the purchase of stock-in-trade plus interest, \$700 173 for the price of fixtures, fittings and motor vehicles plus interest and the claim for compound or capitalised interest were dismissed by the High Court.

On appeal to this court we allowed the claim in the sum of \$700 173 with interest at the rate of 13 per cent per annum from 15 December 1984. We upheld the decision of the court below in

regard to the rest of the claims.

Having given that brief account of the course of events in this appeal, it remains for this court to deal with the question of costs.

The important issue is to establish the party that had substantial success on appeal. In establishing substantial success we are of the view that the questions of compound or capitalised interest on amounts outstanding in respect of the Hypermarket and the outstanding balances in respect of the stock-in-trade and the claim for the payment of the sum of \$610 099 for stock-in-trade plus interest occupied very little time by way of argument on appeal. They were not substantial issues.

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DUMBUTSHENA CJ

There were two issues of substance on appeal. The first was the dispute over the obsolescence allowance. As can be seen from the heads of argument much time was devoted to that issue. In this regard the respondent remains entitled to deduct from the claim in respect of the stock-in-trade the sum of \$610 099 for obsolescence allowance in respect of slow-moving stock.

However, we said in our judgment in "determining the price of slow-moving goods and the obsolescence allowance to be deducted therefrom regard must be had to the year the goods were bought by the appellants". That brings into the determination of the purchase price of slow-moving goods an element which was not considered in the court below. The extent of the deduction is still to be determined by arbitration, but, as pointed out by Mr *Donovan* in his written submission, it cannot exceed the amount of \$147 324 which the respondent claims, and the appellants will recover not less than \$462 775 in respect of the price of the stock-in-trade.

We are of the unanimous view that the appellants achieved substantial success on appeal in respect of their claim for \$700 173 plus interest at the rate of 13 per cent per annum with effect from 15 December 1984.

While we agree with Mr *de Bourbon* that the appellants succeeded in one claim and failed in others, and that on the basis "each party had to go to court to achieve that which it was contending" and "the result gave both success and failure" and therefore each party has to bear its own costs, in our opinion the appellants achieved very substantial success in reversing the decision of the court *a quo* in the most crucial area of the dispute between the parties, the price of fixtures, fittings and motor vehicles. In terms of clause 18 of the agreement, the respondent had to elect to have the fixtures, fittings and motor vehicles valued. Once the firm of Richard Ellis had made the valuation, that valuation "shall be final and binding upon the parties and shall conclusively fix the price of such assets as between the parties". The respondent elected to have a valuation of the fixtures, fittings and motor vehicles but "refused" to be bound by the valuation. Hence the dispute. The appellants had to go to court for the determination of the purchase price. They lost in the court below so they appealed and in our view in reversing the decision of the court *a quo* they achieved a very substantial success. In the words of MULLINS AJ in *EMS Belting Co of SA (Pty) Ltd & Ors v Lloyd & Anor* 1983 (1) SA 641 (OPA) at

646C:

"The appellants were therefore entitled to appeal in order to obtain such relief, and in my view they are entitled to the costs of doing so.

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DUMBUTSHENA CJ

'The general rule is that an appellant who succeeds in having the judgment substantially altered in his favour is entitled to costs of appeal to an extent dependent on the circumstances of the case.'

Mahomed v Nagdee 1952 (1) SA 410 (A) at 420E."

We appreciate Mr *de Bourbon*'s submission that it would be unsafe to try and evaluate success in this matter based solely on the figures in monetary terms. We have applied our minds to that problem but we cannot shut our eyes to the fact that the appellants initially claimed \$1 410 272 and that that amount by their success in the appeal has been reduced, as rightly pointed out by Mr *Donovan*, by a deduction of an amount not exceeding \$147 324 for obsolescence allowance. And although the appellants lost the appeal on their claim for compound or capitalised interest they are still entitled to *mora* interest at 13 per cent per annum. Besides, it was necessary for the appellants to come to court to achieve their success on their claim for \$700 173 plus interest. See *Poort Sugar Planters (Pty) Ltd v Umfolozi Co-operative Sugar Planters Ltd* 1960 (3) SA 585 (AD) at 599C-E and *EMS Belting Co of SA (Pty) Ltd v Lloyd supra* at 647C-F.

In this appeal, when considering the question of costs, the respondent's success in areas cannot be entirely ignored. Recognition must be given to it in one way or another. The appellant's very substantial success was, as already pointed out, in one claim; the rest of their prayers were dismissed. It appears to us that the justice of the case will be met by ordering the respondent to pay 50% of the appellants' costs on appeal. We have come to the conclusion that the appellants should be awarded half of their costs on appeal and that the same award should apply to their costs of the proceedings in the High Court. There seems to be agreement by counsel on such a decision.

Accordingly the respondent is ordered to pay half the costs of the appellants on appeal and half of the appellants' costs of the proceedings in the High Court.

Beck JA: I agree

Gubbay JA: I agree

Winterton, Holmes & Hill appellants' legal practitioners

Scanlen & Holderness respondents' legal practitioners

Endnotes

1 (Popup - Popup)

See 1986 (1) ZLR at pp 202; 117 and 240 respectively - *Editor*

2 (Popup - Popup)

See p 148 above in this volume - *Editor*

3 (Popup - Popup)

See [1986 \(1\) ZLR 275 \(HC\)](#)

4 (Popup - Popup)

Exact date not recorded.

5 (Popup - Popup)

See page 5 of this volume - *Editor*.