

S v DHLIWAYO 1987 (1) ZLR 1 (HC)

Court High Court, Harare

Reynolds J

Criminal review

22 January 1987

Flynote

Evidence - formal and informal admissions - distinction - weight to be attached to such admissions - conclusiveness of formal admissions - whether party may formally admit fact not within his knowledge.

Criminal Procedure and Evidence Act [Chapter 59] - s 291 - need for formal admissions and warning given to accused that he need not make admission, to be recorded.

Headnote

A formal admission is one made in terms of s 291(1) of the Criminal Procedure and Evidence Act [Chapter 59] after a plea of not guilty has been recorded; its object is to permit the accused or the prosecutor at a criminal trial to admit any relevant fact and thereby dispense with the need for that fact to be proved. An informal admission, on the other hand, may be made by any party to a civil or criminal matter and may even be made vicariously. It is part of the evidence that is used against the party who has made it, and is tendered as establishing the truth of its contents.

A formal admission is generally regarded as conclusive proof of the fact admitted and is binding on its maker, unless factors such as genuine mistake or duress are raised to show that the admission cannot be acted upon. An informal admission, on the other hand, like any other item of evidence, is by no means conclusive or irrefutable and may be impeached or explained away by its maker.

While the weight and cogency to be attached to an informal admission are infinitely variable, a fact formally admitted is immediately established and accepted and no question of the weight or value of the admission arises.

A party to a criminal case may formally admit a fact that is not within his personal knowledge.

Formal admissions made by an accused person, together with the fact that he has been warned in terms of s 291(3) of the Criminal Procedure and Evidence Act that he is not obliged to make

any admission, must be recorded by the court before which the admissions have been made.

Cases cited:

R v Mazibuko 1947 (4) SA 821 (N)

Slatterie v Pooley (1840) 6 M&W 664; 151 ER 579

R v Fouche 1958 (3) SA 767 (T)

S v Mjoli & Anor 1980 (3) SA 172 (D)

S v Seleke & 'n Ander 1980 (3) SA 745 (A)

S v Malebo & Andere 1979 (2) SA 636 (BH)

Comptroller of Customs v Western Electric Co Ltd [1966] AC 367 (PC)

S v Sepiri 1979 (2) SA 1168 (NC)

S v Naidoo 1985 (2) SA 32 (N)

S v Serobe & Anor 1968 (4) SA 420 (A)

S v Mdladla 1972 (3) SA 53 (N)

Judgment

Reynolds J: The accused in this case was charged with stealing one goat. He denied the charge, but was convicted and sentenced to an effective term of two months' imprisonment with labour.

The senior regional magistrate who scrutinized the record queried the fact that the complainant had not given evidence of loss. The trial magistrate stated in reply that the accused had formally admitted this fact, but that he had inadvertently omitted to record the admission. The scrutinizing magistrate has now submitted the matter on review, expressing the opinion that the accused was in no position to make any such admission as, according to his defence, it was not within his knowledge as to whether the goat had been stolen or not. He - the scrutinizing magistrate - is of the view that this constitutes a fatal defect to the State case on the charge of theft. He does submit, however, that a contravention of s 14(1) of the Miscellaneous Offences Act [Chapter 68] was established, and as a conviction under that section is a competent verdict on a charge of theft, he suggests that such a verdict should now be substituted on review.

I was in some doubt as to the validity of this opinion, and sought the views of the Attorney-General. I am grateful to him for his expeditious reply. He, too, is of the view that the conviction for theft was improper, though not for

1987 (1) ZLR p3

REYNOLDS J

the reason advanced by the regional magistrate, but because no evidence had been adduced

Copyright Juta & Co Ltd

to establish that the goat recovered belonged to the complainant.

I turn, firstly, to consider the legal effect of the admission made to the magistrate. It is important, when this type of question arises, to determine whether the admission requiring examination may be categorized as "formal" or "informal". There has sometimes been some apparent confusion in appreciating the juridical distinction between these two forms of admission, and the various principles that are adverted to in the cases are not always compatible with each other. As I understand the position, a formal admission may be made in terms of s 291(1) of the Criminal Procedure and Evidence Act [Chapter 59]. This section reads as follows:

"291. (1) In any criminal proceedings the accused or his legal representative or the prosecutor may admit any fact relevant to the issue and any such admission shall be sufficient evidence of that fact."

Any admissions made in terms of this provision are made formally and must be recorded. They may only be made after a plea of not guilty has been entered at the trial; the section does not apply where the accused pleads guilty to the charge (*R v Mazibuko* 1947(4) SA 821 (N)). This procedure is based on expediency, and its object is to permit the accused or the prosecutor at a criminal trial to admit any relevant fact and thereby dispense with the need for that fact to be proved. In the words of MILNE AJ in *Mazibuko*, *supra*, at 831, what is contemplated by the section:

"...is that the accused from the dock, or his representative from the Bar, should formally make admissions of fact during the course of the proceedings for the purpose of shortening them, or to save trouble or expense by making it unnecessary for the Crown to call witnesses to prove the fact or facts so admitted."

An informal admission, on the other hand, may be made by any party to a civil or a criminal matter, and may even be made, in some circumstances, vicariously. This type of admission is, in essence, part of the evidence that is used against the party who has made it, and is tendered as establishing the truth of its contents. It is said that what a party admits against himself may be presumed to be true (*Slatterie v Pooley* (1840) 6 M&W 664; 151 ER 579). The admission may be made either before or during the proceedings, and be by words or conduct.

1987 (1) ZLR p4

REYNOLDS J

In summary, then, the major difference between the two forms of admission is that a formal admission is tendered by a party to 'dispense with proof', whereas an informal admission, is an item of evidence that may be used against the maker. The formal admission is generally regarded as conclusive proof of the fact admitted, and is binding on the maker, whereas the informal admission, like any other matter of evidence, is by no means conclusive or irrefutable and it may be impeached or explained away by the maker (See, generally, *R v Fouche* 1958 (3) SA 767 (T), particularly at 776B-777E; *S v Mjoli & Another* 1980 (3) SA 172 (D)).

Although the effect of a formal admission is to absolve the other party from the burden of proving the fact admitted, and, as mentioned already, is generally considered to be conclusive proof of that fact, this requires some qualification. It would not, in my view, be correct to say that an admission made under the provisions of s 291(1) is totally irrebuttable; factors such as genuine mistake or duress may always be raised in order to show that the admission cannot, in fact, be acted upon (see *S v Seleke & 'n Ander* 1980 (3) SA 745 (A) at 754 (Translation 759); *S*

v Malebo & Andere 1979 (2) SA 636 (BH) at 644 (Translation 559); of *S v Mjoli & Anor*, *supra*, at 179F). In general terms, however, unless and until such an allegation is raised the admission made is taken to be complete proof of the fact admitted. One further aspect bearing on this point concerns the weight to be attached to an admission. An informal admission may be made in any form and in any situation, and its weight and cogency are infinitely variable. This factor has no bearing on an admission made under s 291(1), however, for the fact admitted is immediately established and accepted and, unless specifically raised, no question of its weight or value arises at all.

There is some conflict of opinion in regard to an admission made by a party which is of a fact which is not within his personal knowledge. These opinions range from that expressed by LORD HODSON in *Comptroller of Customs v Western Electric Co Ltd* [1966] AC 367 (PC), where he said, at 371E:

"If a man admits something of which he knows nothing it is of no real evidential value"

to that of BASSON AJ in *S v Sepiri* 1979 (2) SA 1168 (NC) at 1174. Counsel for the State in *Sepiri's* case had argued that the accused could not admit that a suspicion based on reasonable grounds existed in the mind of the person who found the accused in possession of certain goods, that those goods were stolen. The basis of the argument was that "an accused cannot admit a subjective element of which he had no knowledge". In dealing with this point

1987 (1) ZLR p5

REYNOLDS J

the learned judge said at 1174F-G:

"I think that in principle there can be no objection to such an admission. An accused or his legal representative often admit facts of which they do not have personal knowledge because they, for example, know that the State can easily prove them. One example which comes to mind is the results of analyses of samples which are drawn" (Translation p 710).

The question was considered in some depth by THIRION J in *S v Naidoo* 1985 (2) SA 32 (N). I would respectfully agree with the learned judge that the position regarding informal admissions, is, as he puts it at 36G, as follows:

"While therefore in a criminal case informal admission by an accused of facts which are not within his personal knowledge are admissible as evidence of the truth of the facts asserted in the admission, a clear distinction has to be drawn, in this connection, between the admissibility of the admission and its probative value or weight."

Once again, in my view, it is necessary to differentiate between formal and informal admissions in this respect. Where an admission is made formally in the manner prescribed by s 291(1), as I have already indicated, "probative weight" or "evidential value" will generally have no bearing on the matter. It seems to me that the comments of BASSON AJ in *Sepiri*, *supra*, would apply to all formal admissions, and it is irrelevant that the party has admitted a fact of which he has no personal knowledge. I am certainly unaware of any authority to the contrary, and I cannot conceive of any particular reason why this should not be so. In the result I cannot agree with the views of the senior regional magistrate in the present case. It seems to me that the accused's admission here constituted sufficient evidence that the goat in question had been stolen. I

would agree with the Attorney-General, however, that the omission by the State to establish that the goat in question belonged to the complainant was fatal to the charge of theft, and the conviction for that crime is, accordingly, hereby set aside.

In the end result the only facts established by the State in this case were (a) that the complainant had lost a goat; (b) the accused was seen in possession of a dead goat in suspicious circumstances; (c) this goat had been recovered; and (d) the accused gave a false explanation as to his possession. I would on these facts agree with the senior regional magistrate that a contravention of s 14(1) of the Miscellaneous Offences Act [*Chapter 68*] was established, and a verdict in terms of that section is substituted accordingly.

1987 (1) ZLR p6

REYNOLDS J

It remains only to comment upon the trial magistrate's failure to record the admission made in this case. He is required, in terms of s 291(3) of the Criminal Procedure and Evidence Act to warn the accused that he is not obliged to make any admission. The fact that this warning was given should be recorded, and any admissions following should also be recorded. This is essential, and magistrates must be at pains to comply with these requirements (see *S v Mjoli & Anor*, *supra*, at 179H; *S v Serobe & Anor* 1968 (4) SA 420 (A); *S v Mdladla* 1972 (3) SA 53 (N)).

The sentence imposed by the trial magistrate is appropriate to the verdict now entered, and the proceedings otherwise are confirmed.

Sansole J: I agree.

1987 (1) ZLR p7

S v OVIS 1987 (1) ZLR 7 (HC)

Court **High Court, Harare**

Reynolds J & Sansole J

Criminal appeal

13 February 1987

Flynote

Appeal - remittal - grounds for - application for remittal - whether formal application necessary - whether party who has not made formal application may be permitted to adduce evidence at remitted hearing.

Headnote

Appellant had been convicted under the Law and Order (Maintenance) Act [*Chapter 65*] of possessing firearms and ammunition which he had smuggled into Zimbabwe from South Africa.

He pleaded guilty at his trial but failed to give evidence as to why he had brought the weapons into the country because his then legal practitioner persuaded him that it would be imprudent to do so in view of a threat by the State to lead evidence in aggravation; he also feared that he would be subjected to further ill-treatment by the CIO. On appeal he applied on notice of motion for the matter to be remitted to enable him to lead such evidence, and the application was not opposed by the State. His counsel suggested, however, that the prosecution should not be allowed to adduce evidence at the remitted hearing since it had not applied formally for the matter to be remitted.

Held, that it was unnecessary for the State, as well as the appellant, to have applied for remittal before the State could be permitted to lead evidence at the remitted hearing.

Held, further, that the absence of a formal application on notice of motion does not preclude a court from hearing an application for remittal.

Held, further, that the power of remittal will be exercised only in exceptional circumstances and only if all the following criteria are satisfied:

- (a) there must be a reasonably adequate explanation, founded on

1987 (1) ZLR p8

SANSOLE J

allegations that may be true, why the evidence sought to be led was not led at the trial; and

- (b) there must be a *prima facie* likelihood of the truth of the evidence; and
- (c) the evidence should be materially relevant to the outcome of the trial.

Held, further, that in the instant case the criteria justifying remittal had been satisfied.

Cases cited:

S v de Jager 1965 (2) SA 612 (A)

S v Murapi S-104-84 (not reported)

S v Magwanyatha S-62-83 (not reported)

S v Ndilla S-31-83 (not reported)

R v de la Bat & Andere (1) 1959 (3) SA 67 (C)

R v Hepworth 1928 AD 265

M J Gillespie for the appellant

H Fischat for the respondent

Judgment

Sansole J: On 14 October 1986 the appellant was convicted by a regional magistrate, upon his own plea of guilty to a charge of contravening s 37(1) of the Law and Order (Maintenance) Act [*Chapter 65*], in that he was found in possession of arms of war, namely one Pietro Beretta 9-mm pistol, 87 rounds of 9-mm ammunition, one para-illuminating flare, and one green plastic flare pot. In the result, he was sentenced to five years' imprisonment with labour, of which one and half years were suspended for five years upon certain conditions. He now appeals against this sentence.

The facts as they appear from the agreed statement of facts are these. The appellant is a former member of the now defunct Rhodesian Air Force, having rendered one year's service with that organisation. He retired after the advent of independence and emigrated to South Africa, where he took up employment as a pilot. On 18 August 1986 he entered this country via Beitbridge Border Post, driving a Ford Cortina motor vehicle. Customs officials asked him, as is customary, to declare his goods and effects. He duly did so but he omitted or neglected to declare the arms of war in question. Having duly completed the formalities, he left Beitbridge and drove down the Masvingo/Mutare Road. Upon reaching Pamuchana Mission, in the Bikita area, he struck a routine police road block. His car was then and there searched and as a result these arms of war were discovered. He was duly put

1987 (1) ZLR p9

SANSOLE J

under arrest. Members of the CID were contacted, and they arrived at the scene a short while later. These members inquired of the appellant whether he had any weapons. He disclosed that he had a Pietro Beretta 9-mm pistol in a leather holster, which was concealed in the dashboard, a magazine charged with 12 rounds of 9-mm ammunition and two boxes of 9-mm ammunition each containing 25 rounds. A further search was carried out, in the course of which a third box of 25 rounds of 9-mm ammunition was found.

The trial regional magistrate found as proven against the appellant, the following facts, namely, that:

- a) he was a South African resident;
- b) he was a former member of the then Rhodesian Air Force, and a pilot;
- c) he failed to declare the arms of war in question at the border; and
- d) he did not reveal them all at once to the police.

It was upon these facts that the regional magistrate says he was constrained to infer as the only reasonable inference that the appellant harboured a hostile or sinister motive or intent regarding these arms of war, particularly in view of the fact that the appellant had not proffered

any explanation to the contrary.

Mr *Gillespie*, who appeared for the appellant, mounted a two-pronged submission. Firstly he argued, and quite properly in my view, that the learned trial magistrate had misdirected himself in making the inference that he did because, quite plainly, that was not the only inference that could be deduced from the facts found proven. Speaking for myself, save for the pistol - which generally speaking is regarded as a defensive weapon - the remainder of the items cannot, strictly speaking, be regarded as offensive weapons. In this connection, I am fortified in my belief by the opinion of Chief Inspector (T) Haley, who deposed in his affidavit to the effect that the flare "is not intended to be lethal" though he said that its primary function is that of "illumination and signalling". Therefore, Mr *Gillespie* contended further, that as there is this misdirection this court was now at large as to sentence. Thus he urged the court to find a suitable and light sentence in the circumstances. Indeed, generally speaking this would be a proper approach to adopt. However, and in the light of lack of true facts in the record, the court would find itself in the same position as the magistrate. It cannot be done.

In response and in contradiction, Mr *Fischat*, who appeared for the respondent, though conceding that there was a misdirection on the part of the trial magistrate, argued that on account of the scanty information in the record the court could not possibly be in a position to determine a suitable sentence.

1987 (1) ZLR p10

SANSOLE J

Thus he urged the court to set aside the sentence imposed by the trial magistrate and remit the matter to the trial magistrate with a directive that fresh or further evidence be led in regard to sentence.

Secondly, Mr *Gillespie* argued that if the court were to decline to determine the matter as it stood, then the proper course to adopt would be to set aside the sentence imposed and remit the matter to the trial magistrate with leave to the appellant only to lead further evidence. Regarding the correctness of this course of action both Mr *Gillespie* and Mr *Fischat* are in agreement. However, there is a divergence of opinion between them regarding the form and content of the order of remittal. According to Mr *Gillespie* it would be improper if the court were to grant both parties leave to adduce further evidence because such leave may be granted only upon application on notice of motion. Thus as the respondent had not made such an application such leave may not be granted to it by this court. I must reject this submission, for it seems quite unnecessary and quite preposterous that the court should have foisted upon it a double application on notice of motion.

In response, Mr *Fischat* made an application, *viva voce*, in court. He argued, and quite properly in my view, that in the nature of the peculiar circumstances of this case, fairness required that the respondent be given a similar opportunity to lead evidence in rebuttal should the occasion call for such a need. In my view, the rationale for requiring the launching of such an application on notice of motion is to afford the court a prior notice of the reasons why the evidence which is being sought to be adduced was not or could not have been adduced at the trial and thus afford the court prior opportunity to assess the nature and the cogency of the evidence so omitted.

Such notice enables the court to assess whether or not the allegations deposed to in the supporting affidavit do satisfy the criteria which are laid down in the authorities. In addition, where the application is opposed, it affords the respondent the opportunity to counter the allegations raised in support of the application. Speaking for myself, I do not subscribe to the view that without a formal notice of motion of application, as was the case in this matter, the court need be precluded from hearing the application. And, as is usual, each case must be decided on its merits. In the result, I am persuaded by Mr *Fischat's* submission that in the peculiar circumstances of this case and for the sake of fairness to both sides, leave must be granted to both sides to adduce further evidence in the event of a remittal being granted.

I now turn to deal with the merits of the application itself.

1987 (1) ZLR p11

SANSOLE J

It is trite law that the exercise of the power of remittal by this court may only be exercised in exceptional circumstances and very sparingly and generally only where the evidence sought to be led is incontrovertible. Generally speaking, it is contrary to the interests of the administration of justice that a party be allowed a second opportunity to prove his case and to supplement the inadequate evidence on the record, because such an approach would offend against public interest which calls for finality in litigation and, as HOLMES JA put it in *S v de Jager* 1965 (2) SA 612 (A) at 613B:

"...there is always the possibility, such is human frailty, that an accused, having seen where the shoe pinches, might tend to shape evidence to meet the difficulty."

Thus it is for these considerations that the courts have steadfastly laid down stringent criteria which must, conjunctively, be satisfied before leave to lead fresh or further evidence may be granted and these are as follows:

1. There must be a reasonably adequate or sufficient explanation, founded on allegations which may be true, why the evidence which it is sought to lead was not led at the trial;
2. There must be a *prima facie* likelihood of the truth of the evidence and,
3. The evidence should be materially or substantially relevant to the outcome of the trial.

Thus the absence of any one of these conditions is fatal (see: *S v de Jager (supra)* at 613E-F; *S v Murapi* S-104-84 (unreported); *S v Magwanyatha* S- 62-83 (unreported); *S v Ndilla* S-31-83 (unreported)).

In the last two cases an application in both cases was made at the instance of the State and in each case the application was refused because the State had failed to proffer a reasonable explanation as to why it had failed to lead the evidence sought when such was available at the trial. This may be so even where it can be shown that the evidence sought to be led is material or substantial to the outcome of the trial. See *R v de la Bat & Andere (1)* 1959 (3) SA 67 (C) at 71, where it was held that notwithstanding the fact that the evidence which it was sought to lead was material or substantial to the outcome of the trial, the application had to fail because the applicant had failed both to show that it was an exceptional case and to give a reasonable

explanation. It must always be remembered that the power to remit is always discretionary.

1987 (1) ZLR p12

SANSOLE J

The facts upon which this application is based appear more fully in the supporting affidavits which were sworn to by the applicant and his legal practitioner, Mr Traicos, and in summary form they are these:

1. Consequent upon conviction, the appellant alleges that he was desirous to give evidence regarding his reasons for possession of the arms of war and the reasons for his transit through this country. He was dissuaded from doing so by the legal practitioner appearing for him at the trial. He says that it was feared that in view of the State's threat to lead evidence in aggravation, this might in a manner of speech open a Pandora's box. Thus his legal practitioner prevailed upon him that it was prudent to let sleeping dogs lie;
2. He says that in view of the ill-treatment that he received from the investigating details whilst awaiting trial, he was constrained to acquiesce. He says that as a result of this ill-treatment he had been forced to make a confession admitting that he was a South African spy. Therefore, at the time he was amenable to acquiescence because he was "extremely fearful of being sent back into the custody of the CIO", and consequently he was "keen to get the trial over".

Mr Traicos, in support of the application, has deposed to these allegations in his affidavit as follows:

1. He was the legal practitioner for the appellant. He reached agreement with one Mr Omerjee of the Attorney-General's Office that it was desirable to get the matter to court expeditiously. Thus the matter was to proceed by way of an agreed statement of facts.
2. Such a statement was finalised by Advocate O' Meara and the Attorney-General's Office.
3. He was denied access to the appellant notwithstanding repeated attempts to interview him. He was only allowed one consultation with the appellant prior to the matter going to court, and such consultation was done in the presence of CID Law and Order Officials.
4. He was not in court when the agreed statement of facts was put in and the matter argued before the learned magistrate. However, he is aware of the fact that prior to passing sentence the learned trial magistrate had indicated that he wished to be addressed further on the issue of the appellant's motive for travelling to this country.
5. In the result, a decision had to be made by the appellant's legal

1987 (1) ZLR p13

SANSOLE J

practitioner on whether or not the learned magistrate's request could be acceded to, and in particular, in view of the threat to lead evidence in aggravation on the part of the respondent. Furthermore, he says that the respondent had made it known that the appellant had made a statement in which he had admitted that he had acted as a spy. Therefore, for the reasons stated by the appellant, it was decided that prudence required them to let sleeping dogs lie.

As already stated in this judgment, the respondent is not averse to this application because, as Mr *Fischat* put it, there are glaring omissions in the record which can only be remedied by adducing evidence and provided the respondent is afforded equal treatment.

Therefore, it seems to me that the only issue for my resolution is whether or not this account of the events complies with the requirements or criteria as laid down by the authorities.

However, and before dealing with the resolution of the issue and with the concurrence of my brother REYNOLDS, two aspects of this matter call for comment.

Firstly, the manner in which this matter appears to have been handled by the trial court, the prosecution and the defence must be deprecated. It resulted in a miscarriage of justice and it compromised justice.

Secondly, the learned trial magistrate should have invoked the provisions of s 218 of the Criminal Procedure and Evidence Act [*Chapter 59*] which obliged him to secure the evidence which is "essential to the just decision of the case" and s 312(3) of the same Code which expects him to inform himself "as to the sentence proper to be passed". To this end he was entitled to receive, *inter alia*, "evidence on oath, including hearsay evidence". For as has been stated by CURLEWIS JA in *R v Hepworth* 1928 AD 265 at 277:

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done" (emphasis added).

1987 (1) ZLR p14

SANSOLE J

The teaching in this *dictum* applies *mutatis mutandis* to a magistrate or any judicial officer. In this regard I feel that the learned magistrate was remiss in the performance of his duty.

Turning now to the merits of this application, I feel that the depositions in the affidavit make out a strong case and thus provide a reasonable explanation as to why this evidence which was available at the trial was not led. In addition, I am of the opinion that the depositions may be true and thus provide a *prima facie* likelihood of the veracity of the evidence. And, finally, the evidence is materially relevant to the determination of an appropriate sentence.

In the result and for these reasons the application is granted.

Thus the following order is made:

Leave is hereby granted to both parties to lead such fresh or further evidence as may be required, in the circumstances, whether in mitigation or aggravation of sentence, so as to assist the trial magistrate in determining a just sentence.

In the result the sentence passed by the learned trial magistrate is set aside and the matter is remitted to the same magistrate for the purpose as already stated herein.

In this connection it is required that the matter be given priority and be dealt with as speedily as time permits, in order to avoid undue delay and injustice ensuing from such delay.

Reynolds J: I agree.

Winterton, Holmes & Hill, appellant's legal practitioners

1987 (1) ZLR p15

RUSHWAYA v MINISTER OF LOCAL GOVERNMENT AND TOWN PLANNING & ANOR 1987 (1) ZLR 15 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

10 & 19 February 1987

Flynote

Constitution - s 66(3) - advice given to President concerning appointment of chief - whether subject to review by High Court.

Headnote

Notwithstanding s 66(3) of the Constitution, the High Court can review advice given to the President by the responsible Minister in relation to the appointment of a chief in terms of the Chiefs and Headmen Act, 1982. The grounds on which such advice can be reviewed are illegality, irrationality and procedural impropriety.

Cases cited:

Patriotic Front - ZAPU v Minister of Justice, Legal & Parliamentary Affairs 1985 (1) ZLR 305 (SC); 1986 (1) SA 532 (ZSC);

CCSU v Minister for the Civil Service [1984] 3 All ER 935 (HL)

M J Gillespie for the appellant

E Chatikobo for the respondents

Judgment

Dumbutshena CJ: The appellant applied by notice of motion to the High Court for an order declaring that the "installation of the present incumbent of the Serima Chieftainship be set aside". The court *a quo* dismissed the application with costs. He now appeals against that decision.

At the hearing of this matter in the High Court the appellant based his application on two grounds. It was said that:

1987 (1) ZLR p16

DUMBUTSHENA CJ

- "1. the second respondent, as a descendant of Chimire family, has no title or claim to the Chieftainship;
2. the officials of the Ministry of Local Government and Town Planning who were responsible for conducting inquiries into this matter, had acted *mala fide*, and contrary to custom."

The learned judge *a quo* did not examine these two issues in his judgment. He dismissed the application on the sole ground that:

"The appointment of a chief is made by the President in terms of the Chiefs and Headmen Act, No. 29 of 1982, and it is my view that it is not competent for this court to inquire into the merits of this application at all. Section 66 of the Constitution of Zimbabwe provides in subsection (1) that 'the President shall act on the advice of the Cabinet ...', and subsection (3) of this section is to the effect that the court shall not, *inter alia*, inquire into 'the manner in which the President has exercised his discretion'."

Mr *Gillespie*, for the appellant, and Mr *Chatikobo*, for the two respondents, are agreed that the reasons for dismissing the application are not correct. I shall give their reasons later.

It is clear from a reading of subsections (1) and (2) of s 3 of the Chiefs and Headmen Act 1982 (No. 29 of 1982), that the President appoints chiefs and that in doing so he has to give due consideration to the customary principles of succession. The two subsections read as follows:

"3. (1) The president shall appoint chiefs to preside over communities.

(2) In appointing a chief in terms of subsection (1) the President shall give due consideration to the customary principles of succession, if any, applicable to the community over which the now chief is to preside."

It is common cause in this appeal that the President appointed the second respondent, Mapurisa Chapanduka, Chief Serima. It is not contended by the appellant that the President did not pay heed to the customary principles of succession of the community over which the now chief would preside.

It seems clear from the details of the matters and meetings conducted by the officials of the Ministry of Local Government and Town Planning (hereinafter referred to as the Ministry)

contained in Mr Bwititi's affidavit that questions of custom were investigated thoroughly.

1987 (1) ZLR p17

DUMBUTSHENA CJ

The question of succession to the Serima Chieftainship arose because the last Chief Serima died on 9 April 1973. His son, Mr Pome Cornelius Rushwaya, was appointed acting chief by the President on 2 November 1973. At the time of the proceedings leading to the appointment of the second respondent as Chief Serima, Mr Pome Cornelius Rushwaya was still acting chief. On 27 October 1982, after a series of consultative meetings, the representatives of the four houses entitled to succeed to the vacant Serima Chieftainship met. The four houses were the Mudziwepasi House, the Bvungure House, the Chimire House and the Matambo/Rushwaya House. The meeting was also attended by the District Administrator of Gutu, three research officers from the Ministry Headquarters, two administrative assistants from Gutu, District Administrators, two private secretaries from the Head Office, the Deputy Chief Gutu, Acting Chief Serima, and ten councillors from the District of Serima.

In a nutshell, the meeting of 27 October 1982 was called to discuss and to agree on a successor to the Serima Chieftainship. From the papers it appears that a number of issues were discussed. The Matambo/Rushwaya House claimed that only a person from their house could be appointed chief. It was, according to them, the custom and practice to appoint a successor to the chieftainship from that house only. It is apparent from the papers that there was no justifiable reason why previous administrations confined the chieftainship to the Matambo/Rushwaya House. The majority of the Houses and the people at the meeting felt that that was not in accordance with custom. They agreed that the successor to the Serima Chieftainship should rotate among all the four Houses. The meeting decided that the new chief should be appointed from the Chimire House. The Chimire House selected the second respondent. In doing so the people followed the customary principles of succession of the Serima community.

The appellant belongs to the Matambo/Rushwaya House. His people did not agree with the decision taken at the meeting of 27 October 1982.

Mr *Gillespie* argued the appeal on this one ground:

"That the learned Judge erred in holding that section 66 of the Constitution of Zimbabwe precludes a review of the Minister's recommendation in the circumstances of this case."

Counsel are agreed that s 66 of the Constitution comes into operation when the President appoints a chief, because in terms of subs (1) of s 66, which

1987 (1) ZLR p18

DUMBUTSHENA CJ

reads:

"66. (1) In the exercise of his functions the President shall act on the advice of the Cabinet or a Minister acting under the authority of the Cabinet except in cases where he is required by this Constitution or any other law to act

on the advice of any other person or authority:"

the President has to act, when appointing a chief, on the advice of the Cabinet or a Minister. Although s 3 of Act 29 of 1982 does not require the President to act on the advice of any other person or authority, he does appoint a chief on the advice of the Cabinet or a Minister as required by s 66(1).

Counsel are also agreed that in terms of subs (3) of s 66 of the Constitution, if the President acts in his own discretion, the manner in which he exercises his discretion is not subject to judicial review unless he has exercised his discretion outside the law, that is, where the President has, in the exercise of his discretion, made an error of law. Subsection (3) of s 66 reads:

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

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

A court cannot review the four questions or matters mentioned in the subsection when the President acts in his own discretion or on the advice "of any person or authority".

It was Mr *Gillespie's* submission, however, that the wording of s 66(3) does not preclude the investigation of the question whether the advice admittedly given was properly formulated, nor is it forbidden to determine whether the decision is irrational. I can only assume, without deciding the point, that Mr *Gillespie* is right in his interpretation of s 66(3) or the effect of subs (3) in relation to judicial review.

I agree with both counsel that the rules of judicial review apply in this case. The court can review the Minister's advice to the President on three grounds, namely, illegality, irrationality and procedural impropriety. See *Patriotic Front - ZAPU v Minister of Justice, Legal and Parliamentary Affairs* 1985 (1)

1987 (1) ZLR p19

DUMBUTSHENA CJ

ZLR 305 (SC) at 326B-G; 1986 (1) SA 532 (ZS) at 548E-I; 1986 LRC (Constitutional) 672 at 690c-691a; *Council of Civil Service Unions & Others v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 950h-951d.

Mr *Gillespie* did not ask the court to investigate how the President exercised his discretion. What Mr *Gillespie* was asking was whether the Minister - that is, the first respondent - in formulating his advice to the President, acted on sound principle. In this regard he confined his argument to procedural impropriety in that the Minister acted *mala fide* in giving advice to the President.

[The learned CHIEF JUSTICE then considered the evidence adduced in the court *a quo* and continued:]

A reading of the papers has convinced me that the Minister did not, in giving his advice to the President, act *mala fide*. He did not act in an unreasonable manner nor can it be said he acted irrationally during the consultations that led to his recommending the appointment of the second respondent, Chief Serima.

It seems to me that the attention of the learned judge in the court below was not drawn to the cases of *PF-ZAPU v Minister of Justice supra*, and *CCSU v Minister for the Civil Service supra*. Had he considered those cases he would have dismissed the application for different reasons. Although the judge *a quo* did not consider the circumstances in which the court examines, during a judicial review, the advice tendered to the President in terms of s 66(1), he arrived at a correct decision.

For the above reasons the appeal is dismissed. The respondents are awarded costs in the court below and costs on appeal.

Gubbay JA: I agree.

McNally JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

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

1987 (1) ZLR p20

MUNEMO v MUSWERA 1987 (1) ZLR 20 (SC)

Court Supreme Court, Harare

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

9 February & 3 March 1987

Flynote

Res judicata or issue estoppel - whether decree of absolution from instance may found plea of res judicata or issue estoppel - requirements for plea - effect of change in facts - need for issues on which plea is based to have been properly before court which decided them.

Magistrates court - jurisdiction - transfer of immovable property.

Headnote

The respondent leased a house from the Government under a "lease-to-buy" contract in 1956.

Copyright Juta & Co Ltd

He occupied the house with his son (the appellant) until 1977, when his son forcibly evicted him. In 1979 he sought an order for his son's eviction from the house but the court, not realising that the house was being leased from the Government, dismissed the respondent's claim on the basis that his son was a co-owner. In 1982 the respondent paid off the balance of the purchase price and acquired the house from the Government under a deed of grant. Once again respondent sought an order for his son's eviction, and this time the son pleaded that the issue of co-ownership was *res judicata* between the parties by virtue of the judgment in 1979, and counterclaimed for the transfer to himself of an undivided half-share in the property. The trial magistrate rejected the plea of *res judicata* and granted respondent the eviction order he sought, but refused to decide the counterclaim on the ground that he did not have jurisdiction to do so. The son appealed.

Held, assuming the principles of issue estoppel apply in our law, that the plea of *res judicata* or issue estoppel could not succeed, for the following reasons:

1987 (1) ZLR p21

McNALLY JA

- (a) the court's judgment in 1979 dismissing respondent's claim for ejectment amounted to a decree of absolution from the instance, and a decree of absolution can never found a cause of action estoppel;
- (b) the factual situation between the parties had changed since the 1979 judgment, in that respondent had subsequently been granted ownership of the house;
- (c) in so far as issue estoppel was relied on, the issue of ownership of the house was not properly before the court in 1979 since neither party in fact owned the house. The decision of a non-issue based on non-existent facts could not be a basis for issue estoppel.

Held, further, that the magistrate should have decided the counterclaim since, notwithstanding s 8(1) of the Deeds Registries Act [Chapter 139], magistrates courts have jurisdiction to adjudicate on the transfer of immovable property, subject only to the value limitation prescribed in s 13(1)(b)(ii) of the Magistrates Court Act [Chapter 18] - and that limitation can be waived by the parties' consenting to the jurisdiction of the magistrates court, as the parties had done in the instant case.

Cases cited:

Wolfenden v Jackson 1985 (2) ZLR 313 (SC)

Boshoff v Union Government 1932 TPD 345

Hassan v Billiat S-132-86 (not reported)

Bulford v Bob White's Service Station (Pvt) Ltd 1972 (2) RLR 224 (AD)

Makayiseni v Musarurgwa 1947 SR 160

Essack v Essay 1955 (2) SA 407 (D)

V Manyika for the appellant

J Sayce for the respondent

Judgment

McNally JA: This is a dispute between father and son over ownership and occupation of a residential property. It first came to court in 1979 when the father sought to evict the son. He was not successful. The magistrate dismissed his claim with costs on the attorney and client scale.

In the course of that judgment, which was an exhibit in the second trial, the magistrate made a finding that the son had contributed substantially towards the purchase price of the property and was thus a co-owner. Unhappily the magistrate's finding was based on an entirely false premise. The property belonged neither to the father nor the son. It was owned by the Government and leased to the father in terms of a written agreement of the "lease-to-buy" variety. It seems clear that this document was not before the 1979 court.

1987 (1) ZLR p22

McNALLY JA

Subsequent to these proceedings the father paid off the balance of the purchase price and acquired the property from the Government in terms of a Deed of Grant dated 25 June 1982. Once again he came to court to try to evict his son. This time not only did the son resist the action, he also counter-claimed for the transfer of an undivided half-share in the property to himself.

The magistrate on this occasion granted the eviction order and refused to grant the counter-claim on the grounds that he did not have jurisdiction to do so. The son now appeals against both decisions.

The first ground of appeal is that the magistrate should have upheld the plea of *res judicata*. The basis of this plea was that the issue of co-ownership had already in 1979 been decided between the same parties by a court of competent jurisdiction whose decision had not been taken on appeal.

The principles of *res judicata* are well-known and were recently and extensively considered in this court by GUBBAY JA in *Wolfenden v Jackson* 1985 (2) ZLR 313 (SC). I will assume, for the purposes of this case, that the principles of issue estoppel also apply in our law - as to which see Hoffmann and Zeffertt *South African Law of Evidence* 3 ed pp 265-267.

It seems to me that there are a number of reasons why the plea of *res judicata* or issue estoppel cannot succeed in this case.

In the first place, and dealing first with *res judicata*, it must be of significance that the judgment

relied upon was not a judgment for the plaintiff, nor was it a judgment for the defendant. Had the 1979 court decided in favour of the plaintiff, for example, and ordered the eviction of the defendant, the factual situation might have been said to be comparable with that in *Boshoff v Union Government* 1932 TPD 345. However, the judgment in 1979 was a judgment which read: "The Plaintiff's claim for ejectment is dismissed with costs". It is well established that such a judgment is in effect one of absolution from the instance - see *Hassan v Billiat* S-132-86 (not reported); *Bulford v Bob White's Service Station (Pvt) Ltd* 1972 (2) RLR 224 (AD); *Makayiseni v Musarugwa* 1947 SR 160 at 162. The matter is put succinctly by Hoffmann and Zeffertt *op cit* at 263 in the following words:

"The decree of absolution from the instance (or an order dismissing the plaintiff's claims) is specifically intended to allow the plaintiff to bring another action if he can find better evidence in support of his claim. Absolution ...can therefore never found a cause of action estoppel."

1987 (1) ZLR p23

McNALLY JA

Secondly, one can say that the factual situation had changed between the 1979 action and the 1984 action, because of the Deed of Grant in 1982. Indeed Hoffmann and Zeffertt higher up on the same page have this to say:

"But a landlord who has sued for ejectment and failed will not be stopped from trying again if he is able to rely on events which occurred after the previous action."

Reliance, for this proposition, is placed on *Essack v Essay* 1955(2) SA 407 (D) at 409G-H. This additional fact (the Deed of Grant) distinguishes the present case from *Boshoff's* case, *supra*.

Thirdly, and insofar as issue estoppel is relied on rather than *res judicata* (also called "cause-of-action estoppel"), it must be said that the issue of co-ownership was not one which necessarily had to be determined in the 1979 proceedings. Indeed, as we now know, neither party owned the property. The dispute between the parties therefore had nothing to do with the ownership of the property. It seems that the parties, by mutual consent and in ignorance of the true legal position, placed this "non-issue" before the court. The decision of a non-issue based on non-existent facts cannot possibly be considered as a basis for issue estoppel. To put it another way, the question of ownership of the property was thought to be an issue in the 1979 case, but in fact it was not. Where there is no issue, there can be no decision. Therefore the issue of ownership as between the parties has not previously been decided.

I turn then to consider the next point taken by the appellant, namely that the court *a quo*, in delivering the judgment now under appeal, erred in holding that it had no jurisdiction to entertain the appellant's counter-claim for transfer of a half-interest in the property, the subject matter of the dispute.

The magistrate in question, who has since left the Service, said of this prayer:

"Clearly this section (s 13(1)(b)(ii) of the Magistrates Court Act [*Chapter 18*]) does not empower this court to implement the request". The subsection reads as follows:

"Every (magistrates) court shall have in all civil cases the jurisdiction following -

- (a) ...
- (b) with regard to causes of action -
 - (i) ...

1987 (1) ZLR p24

McNALLY JA

- (ii) in actions in which is claimed the delivery or transfer of any property, movable or immovable, where the value of such property does not exceed \$2000 ..."

It is clear therefore that a magistrates court has jurisdiction to adjudicate on the transfer of immovable property, subject only to the value limitation. In the present case that value limitation has specifically been waived by the plaintiff by means of the inclusion in the pre-trial conference minute of the following statement:

"Parties consent to jurisdiction in the event of the value of the counter-claim exceeding jurisdiction of the court."

The magistrate also made something of the fact that if the counter-claim were upheld the son would be obliged to seek an order for the cancellation of the Deed of Grant and the registration of himself and the plaintiff as co-owners. In terms of the Deeds Registries Act [*Chapter 139*] - said the magistrate - "it is clear that only the superior courts are empowered to make such orders". The magistrate did not say what section of Chapter 139 he relied on for this *dictum*. In face he is wrong. Section 8(1) of Chapter 139 reads as follows:

"Save as is otherwise provided in this Act or in any other enactment, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land, or any real right in land other than a mortgage bond, and no cession of any registered bond not made as security, shall be cancelled by a registrar except upon an order of court."

While it is true that "court " is defined in the Act to mean the High Court, the vital words in this section are "save as is otherwise provided in ...any other enactment". It is clear that it is otherwise provided in the Magistrates Court Act, which specifically gives magistrates jurisdiction to order the transfer of immovable property worth no more than \$2 000, or, by consent in writing, of immovable property of a greater value.

The jurisdiction point was therefore wrongly taken by the magistrate. He had jurisdiction to deal with the counter-claim, and he should have done so. Indeed it would be helpful if judicial officers would bear in mind, in situations like this, that it is often useful to deal with the facts so that if, as here, the judgment on the law is wrong, there is an assessment of the facts and the witnesses for the appeal court to work on. As it is, we have nothing helpful from the magistrate. We do not know what he thought of the witnesses. To

1987 (1) ZLR p25

McNALLY JA

make matters more difficult, he has left the Service and we cannot therefore remit the matter to him for his assistance in this regard.

We are thus left with two choices - to assess the evidence for ourselves as best we can; or to set aside the judgment and order a new trial. The appellant, represented by Miss *Manyika*, invited us to remit. The respondent, represented by Mr *Sayce*, invited us to decide.

I take the view that the inherent probabilities in this case are so strong that it is possible to reach a decision on the facts without a finding on the demeanour of the witnesses. Let me summarise the evidence.

[The learned Judge then analysed the evidence and concluded:]

All in all I am far from being convinced on the evidence, and in the light of the written lease and Deed of Grant, that the son has shown on a balance of probabilities that he is the co-owner of the property. Nor, while accepting that he may have paid more towards the deposit/rental/purchase price than his father is willing to admit, do I accept that he has established any right of occupation of the premises.

Accordingly, albeit for different reasons, I conclude that the magistrate was right to grant judgment to the father as claimed with costs and to dismiss the counter-claim with costs.

In the circumstances the appeal is dismissed with costs.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

P A Chinamasa, appellant's legal representatives

Stumbles & Rowe, respondent's legal representatives

1987 (1) ZLR p26

S v HARVEY & ANOR 1987 (1) ZLR 26 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

16 February & 12 March 1987

Flynote

Exchange Control Regulations, 1977 - s 6(3) - failure by Zimbabwean resident to ensure receipt in Zimbabwe of payments for services provided outside country - payment - meaning - whether failure to remit net profits of partnership carried on outside Zimbabwe amounts to failure to remit "payments".

Headnote

The word "payment" in its wide sense means the satisfaction or performance of an obligation; in its narrow sense it means something which can be calculated in money. In s 6(3) of the Exchange Control Regulations, 1977 (which obliges Zimbabwean residents who do acts or provide services outside Zimbabwe for which payment is made to ensure that such payment is received in Zimbabwe), the word means monetary remuneration. It is the gross payment and not merely the net payment which is subject to receipt in Zimbabwe.

The appellants were architects resident in Zimbabwe who had established a partnership in Botswana which dealt exclusively with building projects in that country. The appellants would attend at their Botswana offices to perform work for the partnership, and their fees for doing so were paid in Botswana. Appellants were charged with two counts of contravening s 6(3)(a) of the Exchange Control Regulations, 1977, the allegation being that they had failed to remit to Zimbabwe the net profits of their partnership. They were convicted of those charges and appealed.

Held, setting aside the convictions, that one of the essential elements of a charge under s 6(3)(a) of the regulations is that the accused person must have involved himself in the doing of an act or the provision of a service

1987 (1) ZLR p27

GUBBAY JA

for which he acquires a vested legal right to receive payment outside Zimbabwe.

Held, further, that the appellant's convictions had to be set aside since the accrual of net profits to the appellants from their partnership did not constitute the making of a payment for the purposes of s 6(3)(a) of the regulations. The accrual of profits to a partner is a very different concept from remuneration for services provided.

Cases cited:

Harrismith Board of Executors v Odendaal 1923 AD 530

Woudstra v Jekison 1968 (1) SA 453 (T)

R v Haatsimoyo & Anor 1944 SR 41

Terblanche v Archdeacon 1979 (3) SA 201 (T)

A P de Bourbon SC for the appellants

T B Karwi for the respondent

Judgment

Gubbay JA: The two appellants are qualified architects of considerable standing, each of whom is registered to practise in Zimbabwe, the United Kingdom, South Africa and Botswana. They are both permanent residents of Zimbabwe and for many years have practised together in

this country under the name of Harvey Bufé Partnership ("the Zimbabwe partnership").

On 1 July 1981 the appellants concluded a written agreement with one Lawrence Ireland, in terms of which the architectural practice known as Harvey, Bufé and Partners - Botswana ("the Botswana partnership") was formed, with the two appellants as equal partners and Ireland as a professional assistant entitled to receive a bonus of one-third of the net profits.

The Botswana partnership commenced business on 1 October 1981 from rented premises situated in Francistown. The funds used to establish and operate it were lawfully held outside Zimbabwe and were available to the appellants at the time of their use. No money emanating from this country has been employed in connection with the Botswana partnership.

Since its inception the Botswana partnership has dealt exclusively with building projects intended to be carried out within Botswana. All fees due to it have been paid in Pula, the currency of the country, and its expenses have always been met in Botswana.

Both appellants would attend at the Francistown office and the length of time

1987 (1) ZLR p28

GUBBAY JA

they remained there was dependent upon the amount of work the Botswana partnership had on hand. If it were necessary, as it was on occasion, for either of the appellants to undertake work on behalf of the Botswana partnership in Zimbabwe, the procedure adopted was for the Zimbabwe partnership to debit the Botswana partnership with the fees incurred. In this way the Zimbabwe partnership earned P14 156. In addition, orders for building materials and services placed by the Botswana partnership with firms in Zimbabwe have approximated \$100 000.

The profit and loss account of the Botswana partnership for the period 1 October 1981 to 30 June 1982 shows a fee income of P64 128 and a net profit of P25 797, with P8 599 transferred to the capital account of each appellant. For the following year ending 30 June 1983 the Botswana partnership did not fare nearly as well. The fee income dropped to P16 791, with a net loss of P3 696,13 and a resultant loss for each appellant of P1 232,04. Thus the net profit for the two years in question for each appellant was P7 366,94, in respect of which sum income tax of P677 was levied and paid. The final profit and loss account with which this case is concerned is that in respect of the year ending 30 June 1984. It shows a fee income of P57 963 and a net profit of P40 259,49, giving each of the appellants a share of P13 419,83, against which income tax of P1 406,70 was levied and paid.

In consequence of the discovery by the Zimbabwean authorities of the three annual accounts of the Botswana partnership, the appellants were jointly charged on two counts of contravening s 6(3)(a) of the Exchange Control Regulations, 1977. Alternative charges were framed under s 6(1)(b) of the Regulations. The appellants, who pleaded not guilty at their trial before the Regional Magistrate, were convicted and sentenced on the main counts. They were discharged on the alternatives. On the first count the convictions related to the sum of P6 689,94 which represented one-third of the net profits of the Botswana partnership for the period 1 October 1981 to 30 June 1983, less both one-third of the loss for the year ending 30 June 1983 and the income tax payable. On the second count the convictions related to the sum of P12 013,13

which represented one-third of the net profits of the Botswana partnership for the year ending 30 June 1984, less the income tax payable.

It is against the propriety of the convictions on these two counts that this appeal now lies.

The gravamen of the argument advanced by Mr *de Bourbon*, who appeared for the appellants, was that the State had failed to prove that any "payment"

1987 (1) ZLR p29

GUBBAY JA

had been made to the appellants within the meaning of s 6(3) of the Regulations. The appellants had been charged not with an omission to ensure the receipt in Zimbabwe of payments made in Botswana, but with an omission to cause the receipt in Zimbabwe of their share of the net profits of the Botswana partnership for the three years in question. In other words, the charges related, not to the receipt of foreign payments, but to the accrual of foreign profits.

This argument necessitates an examination of s 6(3) of the Regulations, which reads:

"(3) Subject to the provisions of subsection (7), unless otherwise authorized by the Minister -

- (a) a Zimbabwean resident; or
- (b) a foreign resident carrying on any trade, business or other gainful occupation or activity in Zimbabwe;

who does or is likely to do any act or to provide any service in or outside Zimbabwe for which payment is made or is to be made outside Zimbabwe shall ensure the receipt by him in Zimbabwe of such payment as soon as is reasonably possible in the circumstances for the case."

It is apparent that one of the essential elements of a charge laid under this subsection is that the accused person must have involved himself in the doing of an act or the provision of a service for which payment is to be made outside Zimbabwe. There must be a legal right vested in him to receive such payment by reason of the performance of the act or service. In that event a failure to ensure the receipt within Zimbabwe of the payment as soon as it is reasonably possible constitutes an offence.

The word "payment" has a wide as well as a narrow meaning. In its wide sense it means the satisfaction or performance of an obligation. See *Voet* 46.3.1 (Gane's Translation Vol 7 at 93); *Harrismith Board of Executors v Odendaal* 1923 AD 530 at 539; *Woudstra v Jekison* 1968 (1) SA 453 (T) at 457E-H. In its narrow sense it means something which can be calculated in money. See *R v Haatsimoyo and Mwahamba* 1944 SR 41 at 44; *Terblanche v Archdeacon* 1979 (3) SA 201 (T) at 206F. Whether the word is to be given a wide or a literal meaning depends entirely on the intent and purpose of the enactment in which it appears.

It seems to me that there is no room to impart the wide meaning to the word "payment" in s 6(3) of the Regulations. In the first place, subsections (1) and

1987 (1) ZLR p30

GUBBAY JA

(2) are specifically concerned with moneys held outside Zimbabwe, and the preceding ss 3 and 5 with dealings in, and the surrender of, foreign currency. Secondly, subs (3) itself is made subject to subs (7) which, broadly speaking, exempts a Zimbabwean resident, who is an individual, from the obligation to ensure the receipt in Zimbabwe of any payment made to him resulting from the utilization of moneys lawfully held by him outside the country and which were not acquired by virtue of any income producing operation in Zimbabwe. For instance, if a Zimbabwean resident who held moneys lawfully in Botswana were to do the "act" of lending those moneys to a third party in that country, subject to the loan being repaid with interest, such interest payment when made to him would not have to be remitted to Zimbabwe.

I am satisfied that the law-maker intended to hit at the situation in which the act done or the service provided attracted monetary remuneration. I shall illustrate what I mean: If a motor mechanic resident in Plumtree were to travel across the border to Francistown in order to repair a motor vehicle, and was paid for that service, he would be required to ensure the receipt of such payment in Zimbabwe. Again, if counsel resident in Bulawayo were to represent an accused person before the High Court at Lobatse, in pursuance of a mandate to do so from a firm of attorneys in that city, he would be obliged to remit the fee charged by him for that service.

I consider it implicit from the plain wording of s 6(3) that it is the gross payment and not merely the net payment which is subject to receipt in Zimbabwe. If, therefore, in the examples cited, the motor mechanic or counsel were to incur certain subsistence expenses in Botswana, it would not be lawful for either to deduct such expenses from the remuneration received and remit the balance to this country. The position may of course be different if the remuneration for services were paid separately from the expenses for subsistence.

It was not the State's contention in this case that one-third of the fee income earned by the Botswana partnership over the three years in question ought to have been remitted to Zimbabwe by each appellant. It was that the net profit which accrued to each appellant, less the amount of income tax payable in respect thereon, constituted the making of a "payment" with the meaning of s 6(3).

I cannot agree. To hold that in its contextual setting the word "payment" embraces the accrual of profits to a partner arising from the fulfilment of his agreed contribution of labour and skill to the partnership necessitates, in my

1987 (1) ZLR p31

GUBBAY JA

view, ascribing a meaning contrary to the intention of the Legislature. Clearly an accrual of profits to a partner is a very different concept from remuneration for services provided. He is not being paid for anything done on behalf of the partnership. He is sharing, in a proportion agreed to by all the partners, in the profits made by the partnership.

For these reasons I am of the opinion that the conduct of the appellants did not fall within the

ambit of s 6(3) of the Regulations.

The alternative charges under s 6(1) of the Regulations were perhaps somewhat more appropriate, since what the State alleged was a failure to ensure the receipt of profits in Zimbabwe which the appellants had "the right to receive" in Botswana; and not merely a payment.

Subsection (6) however provides that this obligation does not arise where the right to receive the money outside Zimbabwe "is held by a Zimbabwean resident who is an individual", and where that right "was acquired by such resident otherwise than by virtue of a trade, business or other gainful occupation or activity carried on by him in Zimbabwe". Undoubtedly the appellants fell squarely within this exemption. Indeed this was conceded by Mr *Karwi*, who appeared for the respondent.

Accordingly, I would allow the appeals and set aside the convictions and sentences.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Stumbles & Rowe, appellants' legal representatives

1987 (1) ZLR p32

WEBSTER & ANOR v GOVERNMENT OF ZIMBABWE & ANOR 1987 (1) ZLR 32 (HC)

Court **High Court, Harare**

Blackie J

Civil application

25 April & 12 June 1985, 29 May 1986 & 25 March 1987

Flynote

Motor insurance - undertaking of insurance by Government contained in RGN 876 of 1972 - whether injured parties have right to proceed directly against Government

Headnote

The Government's undertaking of insurance contained in RGN 876 of 1972 is an undertaking to its officers only, creating an enforceable right of indemnity in favour of the officers concerned. It does not give an enforceable right against the Government to persons who have been injured as a result of an indemnified officer's driving of a Government vehicle. If the Government officer does not seek indemnity from the Government, the injured party has no enforceable right to the payment of compensation by the Government.

Case cited:

Badenhorst v Minister of Home Affairs 1984 (1) ZLR 221 (HC)

AP de Bourbon SC for the applicant

CFC Dube for the respondent

Judgment

Blackie J: On 9 January 1982, the first applicant was driving a Peugeot station wagon along the Mount Selinda/Chipinge Road. His wife, Marjorie Webster, and his daughter, the second applicant, were in the vehicle. The first applicant's vehicle was involved in a collision with a Toyota 'Land Cruiser', belonging to the Ministry of Health. This vehicle was being driven by the second respondent, who was then employed by the first respondent. As a

1987 (1) ZLR p33

BLACKIE J

result of this collision, the first applicant's wife was killed and the first and second applicants suffered injuries.

The first and second applicants instituted proceedings against the Minister of Health and the second respondent for damages suffered by first and second applicants arising out of the collision. For reasons which do not concern us here the applicants then withdrew against the Minister of Health and the second respondent and proceeded afresh against the second respondent only.

On 25 April 1985, the applicants were granted judgment in this court against the second respondent in default of appearance to defend. The first applicant was awarded general and special damages in the sum of \$35000,69 and the second applicant in the sum of \$2000.

At the time of the collision the insurance of Government vehicles for third party risks in terms of Part III of the Road Traffic Act, 1976 (No. 48 of 1976), was covered by a Government undertaking contained in RGN 876/72. That Government Notice stated that the Government had undertaken such insurance:

"in relation to any vehicle owned by it in all respects as if it were an insurer for the purposes of [what is now Part III of the Road Traffic Act, 1976] subject to the following terms and conditions:

1. ...

2. The Government will indemnify an officer in respect of all sums which he shall become legally liable to pay in respect of the death of, or bodily injury to, any person caused by or arising out of the official or private use on a road of a vehicle issued to him or under his lawful control, as if the use of such officer was insured under a policy of insurance complying with the requirements of [s 23] of the Act."

At the time the applicants took judgment against the second respondent he had been dismissed from the service of the first respondent. He cannot be found. He has made no claim against the first respondent to be indemnified by it against the applicant's judgment. The applicants, however, seek an order against first respondent declaring that first respondent is obliged to indemnify second respondent and must pay to them the damages awarded in their favour

against second respondent.

The applicants' right to recover directly from first respondent can only arise

1987 (1) ZLR p34

BLACKIE J

from the wording of RGN 876/72. There is no common law right to do so. MacGillivray and Parkington on *Insurance Law* 7 ed para 1986.

The only issue in this application is whether the wording of RGN 876/72 entitles the applicants to claim such payment directly from the first respondent. The issue of prescription of the applicants' claims which was raised on the papers, was abandoned at the hearing of this application by Mr *Dube*, who appeared for the first respondent.

It is submitted for the applicant, that the primary purpose of Part III of the Road Traffic Act is to ensure that all vehicles on the road in Zimbabwe are covered for third party risks and that the intention of the legislature is that injured persons should not go without compensation for injury arising out of such risk. It is said that to refuse to permit the applicants to recover directly from the first respondent in the circumstances of this case would defeat the primary purpose of the Act.

RGN 876/72 states that the Government undertakes "the insurance in respect of third-party risk in relation to any motor vehicle owned by it in all respects as if it were an insurer for the purposes of [what is now Part III] of the said Act [now the Road Traffic Act, 1976]". However, that liability is limited by the terms and conditions of the undertaking. One of those terms and conditions is that an injured party has no right to sue the Government direct. A person injured in an accident involving a Government vehicle must first establish legal liability on the part of the driver of the vehicle: *Badenhorst v Minister of Home Affairs* 1984 (1) ZLR 221 (HC). In respect of other insurers against third party risks in terms of Part III of the Road Traffic Act, the injured party has the right in terms of s 25 of the Act, to proceed directly against the insurer. The Government has therefore eliminated from its undertaking contained in RGN 876/72, the right of an injured party to proceed to claim directly against it.

Another of the terms and conditions of the undertaking in RGN 876/72 is that the Government has given an undertaking to "indemnify [the] officer in respect of all sums which he shall become legally liable to pay ...as if the use of such vehicle ...was insured under a policy of insurance complying with the requirements of [what is now s 23] of the Act".

The words "indemnify [the] officer" are clearly an undertaking to the officer concerned. The words do not provide an undertaking to any other person. These words coupled with the expressed exclusion of the right to proceed

1987 (1) ZLR p35

BLACKIE J

directly against the Government, puts the question beyond doubt. The Government undertaking

in terms of RGN 876/72 is an undertaking to its officers only, creating an enforceable right of indemnity in favour of that officer. It does not create an enforceable right of payment against the Government by the injured party. If the Government Officer does not seek indemnity from the Government, the injured party has no enforceable right to the payment of the money by Government.

In the result, therefore, the application must be dismissed with costs.

Gill, Godlonton & Gerrans, applicants' legal practitioners

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

1987 (1) ZLR p36

BULL v ATTORNEY-GENERAL & ANOR 1987 (1) ZLR 36 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Civil appeal

17 March & 2 April 1987

Flynote

Costs - criminal proceedings - what are - habeas corpus proceedings arising out of remand of accused person on criminal charge - whether criminal proceedings - whether award of costs competent

Headnote

Appellant was a legal practitioner whose clients had been remanded in custody on a criminal charge. Following his clients' remand, which was opposed on the ground that the State had failed to show a reasonable suspicion that they had committed the alleged offence, appellant petitioned the High Court for a writ of *habeas corpus* (an *interdictum de homine libero exhibendo*). The High Court dismissed his petition but it was granted on appeal to the Supreme Court. In regard to the costs of the proceedings, the question arose whether the proceedings were civil or criminal in nature and, if they were criminal in nature, whether an order of costs was competent.

Held that although *habeas corpus* proceedings are instituted by way of application and are heard by a judge of the High Court sitting civilly, it is the essential subject-matter of proceedings which determine their character rather than the form of the procedure adopted or the nature of the relief sought. In the instant case the relief sought was in fact an appeal against the magistrate's decision given in criminal proceedings. The proceedings were therefore criminal in nature.

Held, further, however, that despite the criminal nature of the proceedings an order of costs was competent since what was sought from the High Court was recognition of the fact that appellant's clients had been unlawfully deprived of their constitutional right to liberty. The

instant case could not be distinguished, from the standpoint of costs, from a referral and determination of a constitutional question in terms of s 24 of the Constitution; and in cases involving such a referral the Supreme Court should make a suitable order as to costs without regard to whether the question was referred during the course of proceedings conducted by a criminal or a civil court.

Cases cited:

Monckton v Attorney-General & Anor 1986 (1) ZLR 182 (HC)

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

Austin & Anor v Minister of State (Security) & Anor; Bull v Minister of State (Security) & Ors 1986 (2) ZLR 28 (SC)

Mackeson v Minister of Information, Immigration & Tourism & Anor 1979 RLR 481 (GD); 1980 (1) SA 747 (R)

Mackeson v Minister of Information, Immigration & Tourism & Anor 1980 ZLR 76 (SC); 1980 (2) SA 747 (RA)

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

In re Clifford & O' Sullivan [1921] 2 AC 570

Amand v Home Secretary & Minister of Defence of Royal Netherlands Government [1943] AC 147

Bonalumi v Secretary of State for the Home Department & Anor [1985] 1 All ER 797 (CA)

Cox v Hakes & Anor (1890) 15 AC 506

Sita & Anor v Olivier NO & Anor 1967 (2) SA 442 (A)

S v Mohamed 1977 (2) SA 531 (A)

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

Paweni & Anor v Attorney-General 1984 (2) ZLR 39 (SC); 1985 (3) SA 720 (ZS)

Lawrance v Assistant Resident Magistrate, Johannesburg 1908 TS 525

Goncalves v Assisionele Landdros, Pretoria & 'n Ander 1973 (4) SA 587 (T)

Granger v Minister of State 1984 (1) ZLR 194 (SC); 1984 (3) SA 214 (ZS)

Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd 1983 (2) ZLR 376 (SC); 1984 (2) SA 778 (ZS)

Granger v Minister of State 1984 (2) ZLR 92 (SC); 1984 (4) SA 908 (ZS)

Bickle & Ors v Minister of Home Affairs 1983 (2) ZLR 400 (SC); 1984 (2) SA 439 (ZS)

Bull v Minister of Home Affairs 1986 (1) ZLR 202 (SC); 1986 (3) SA 870 (ZS)

1987 (1) ZLR p38

GUBBAY JA

A P de Bourbon SC for the appellant

S Ahmed for the respondents

Judgment

Gubbay JA: In his judgment on the merits of this appeal, now reported in 1986 (1) ZLR 117 (SC); 1986 (3) SA 886 (ZS), BECK JA dealt with the question of costs as follows:

"It seems that this appeal is, in the context of its facts and background, a criminal matter, so that no order of costs can be made. (Cf *Paweni & Anor v Acting Attorney-General* 1985 (3) SA 720 (ZS) at 722E-H; Ex parte *Woodhall* (1888) 20 QBD 832 (CA); *R v Governor of Brixton Prison ex parte Savarkar* [1910] 2 KB 1056 (CA).) Accordingly, there will be no order as to costs. But the point was not canvassed and leave will be given to either party to set the matter down for argument before us should that be desired." (See at 125F-G; 893A-B of the South African report.)

Although the successful appellant timeously exercised the right accorded him, by notice to the Registrar of this Court, it was not possible to reinstate the appeal prior to the retirement of BECK JA. Consequently, and in terms of s 4(3) of the Supreme Court of Zimbabwe Act, 1981, it became necessary to consider whether the appeal should proceed before the two remaining judges, or whether it should be directed that a further judge of this court be asked to sit. It was felt that the latter procedure was the more appropriate, primarily because a *prima facie* view adverse to the appellant had been expressed by Beck JA (with the concurrence of the two remaining judges), which had been approved of and adopted by SANDURA JP in *Monckton v Attorney-General of Zimbabwe & Anor* 1986 (1) ZLR 182 (HC). The learned CHIEF JUSTICE was therefore approached and he agreed to sit.

To fully understand the contentions of opposing counsel on the appellant's entitlement to recover the costs of the appeal and the costs of the proceedings in the lower court, and as this judgment is separate from that relating to the main issue, I propose briefly to recount the relevant historical facts.

The appellant is a legal practitioner who at all material times has acted on behalf of John Vincent Austin and Kenneth Neil Harper. On 12 March 1986 Austin and Harper were arrested by the Police and held in custody with the intention of being charged with having contravened s 4(1)(d)(i) of the Official Secrets Act [Chapter 97], in that they had passed on or communicated certain prohibited information to unauthorised persons. The following

1987 (1) ZLR p39

GUBBAY JA

day they were brought before a magistrate and an application was made by the prosecutor that they be remanded in custody upon the said charge. It was opposed on the ground that the State had failed to show that there was a reasonable suspicion that the two accused men had committed the offence alleged. The magistrate ruled in favour of the State. Under s 67(1) of the Magistrates Court Act [Chapter 18] his decision was not appealable, for a conviction had not been returned, so the appellant, on behalf of his clients, urgently moved the High Court for a writ of *habeas corpus ad subjiciendum*, more correctly known in Roman-Dutch law as an interdictum *de homine libero exhibendo*. The petition, which was opposed, was dismissed with costs by REYNOLDS J. The consequent appeal to this court was allowed on 2 April 1986, and it was ordered that the two men be released from custody forthwith. What happened to them thereafter and the validity of the administrative acts to which they were subjected, are discussed in *Minister of Home Affairs & Anor v Austin & Anor* 1986 (1) ZLR 240 (SC); 1986 (4) SA 281 (ZS) and *Austin and Harper v Minister of State (Security) & Anor; Bull v Minister of State (Security) & Ors* 1986 (2) ZLR 28 (SC).

The gravamen of the first argument advanced by Mr *de Bourbon* on the appellant's behalf was to this effect: The nature of the proceedings before the High Court came within the definition of a "civil case" in s 2 of the High Court of Zimbabwe Act, 1981, as being "any case or matter which is not a criminal case or matter". Section 43(1) of that Act allowed the appeal to be brought to this court as "an appeal in any civil case". Thus the power to award costs is vested in both courts, and since in *habeas corpus* proceedings costs normally follow the event, the appellant should be favoured with such an order. See, for instance, *Mackeson v Minister of Information, Immigration and Tourism & Anor* 1979 RLR 481 (GD) at 491; 1980 (1) SA 747 (R) at 755E; and on appeal, 1980 ZLR 76 at 84B; 1980 (2) SA 747 (RA) at 752D; *Moll v Commissioner of Police & Ors* 1983 (1) ZLR 238 (HC) at 245E.

Mr *de Bourbon* accepted, correctly in my view, that if, on the same facts, an application for a writ of *habeas corpus* on behalf of Austin and Harper had been brought in England, a judgment denying the writ would have been treated as a judgment in "a criminal cause or matter" within s 18(1)(a) of the Supreme Court Act No. 54 of 1981 (1981 c 54). The reason being that the direct outcome of the dismissal of the writ may have led to the resumption of the prosecution and their possible punishment on the charge preferred against them. An appeal to the Civil Division of the Court of Appeal would have been precluded. See *In re Clifford and O' Sullivan* [1921] 2 AC 570 at 580; *Amand v Home Secretary & Minister of Defence of Royal Netherlands Government*

1987 (1) ZLR p40

GUBBAY JA

[1943] AC 147 at 156, 162 and 165-166; *Bonalumi v Secretary of State for the Home Department & Anor* [1985] 1 All ER 797 (CA) at 804b-h.

Counsel submitted, however, that although it could not be gainsaid that the proceedings in the magistrates court were criminal in nature, the *habeas corpus* application brought before the High Court in consequence of the order to remand Austin and Harper in custody was nonetheless "a civil case". This was because, as I understood him, the procedure in *habeas*

corpus is not laid down in the Criminal Procedure and Evidence Act [Chapter 59] or in those sections of the High Court of Zimbabwe Act relating to criminal jurisdiction. Section 3(b) of the latter Act, which deals specifically with the composition of the High Court for the purpose of hearing a criminal trial, is silent as to its composition in criminal cases other than criminal trials.

It is true that in this country the procedure which is followed to obtain the remedy of *habeas corpus* is that application is made, either upon notice of motion or, in cases of extreme urgency, *ex parte* for the issue of a rule *nisi* with the return day being as short as possible. The application is heard almost invariably by a single judge sitting in the Civil Division of the High Court and not in the Criminal Division. As the restraint of individual freedom is involved, the enrolment of the matter is given priority. Replying affidavits are usually filed but in appropriate circumstances the presiding judge may permit oral evidence to be tendered by the opposing party, or indeed by the applicant, and dispose of the matter summarily. Speed and simplicity are the cornerstones of the application, for *habeas corpus* is intended to be, in LORD COKE'S words, "*festinum remedium*". (See *Cox v Hakes & Anor* (1890) 15 AC 506 at 515.)

But the form of the procedure adopted and the nature of the relief sought does not, in my view, determine the character of the proceeding as either civil or criminal. It is the essential subject matter of the proceeding which does so. The question is whether in substance the proceeding is civil or criminal, and what is relevant to the answer is the forum in which the subject matter in dispute in the subsequent proceeding first arose. One must be wary of allowing the form of a subsequent proceeding to disguise or transform the nature of the original proceedings. See *Sita & Anor v Olivier NO & Anor* 1967 (2) SA 442 (AD) at 449C-E; *S v Mohamed* 1977 (2) SA 531 (AD) at 539 *in fine*-540A.

It admits of no doubt that the subject matter in dispute in the court *a quo* first arose in the magistrates court. Despite its form, the relief sought from the

1987 (1) ZLR p41

GUBBAY JA

High Court was in fact an appeal against the magistrate's decision given in criminal proceedings. In this connection the remarks of LORD ESHER MR in *Ex parte Woodhall* (1888) 20 QBD 832 (CA) at 836 are especially apposite, and I respectfully associate myself with them. This is what was said:

"Was the decision of the Queen's Bench Division, refusing the application for a writ of *habeas corpus*, a decision by way of judicial determination of a question raised in or with regard to the proceedings before Sir James Ingham? (The latter being the Chief Magistrate who had committed Alice Woodhall to a prison in Middlesex pending her extradition as a fugitive criminal accused of having committed forgery in New York). I am clearly of opinion that it was, and I think it is impossible to say that what took place before him was not a proceeding the subject-matter of which was criminal. If the proceeding before the magistrate was a proceeding the subject-matter of which was criminal, then the application in the Queen's Bench Division for the issue of a writ of *habeas corpus*, which if issued would enable the applicant to escape from the consequences of the proceeding before the magistrate, was a proceeding the subject-matter of which was criminal."

In the absence of specific statutory authority, the rule in this jurisdiction is that in criminal cases a court has no power to order either the State or the accused person to pay the costs. (See the exceptions provided in sections 26(1) and 341(5) & (6) of the Criminal Procedure and Evidence

Act.) If the originating court lacked the power any further proceeding by way of review or appeal would not be such as to permit the higher court to award costs against the unsuccessful party. Such an order would be incompetent. See *Paweni & Anor v Attorney-General* 1984 (2) ZLR 39 (SC) at 48H; 1985 (3) SA 720 (ZS) at 727F; compare *Lawrance v Assistant Resident Magistrate, Johannesburg* 1908 TS 525 at 527; *Goncalves v Assisionele Landdros, Pretoria en 'n Ander* 1973 (4) SA 587 (T) at 603A.

For these reasons the first argument fails.

Mr *de Bourbon's* second argument was that even accepting that the subject matter of the proceeding before the court *a quo* was essentially of a criminal nature, the constitutional aspect attaching to it ought not to be overlooked. It was "a criminal case or matter" *sui generis*. It concerned the legality of holding Austin and Harper in custody under the authority of the Criminal Procedure and Evidence Act, a procedure involving the deprivation of their personal liberty which, once challenged, had to be justified in terms of

1987 (1) ZLR p42

GUBBAY JA

s13(2)(e) of the Constitution of Zimbabwe by the State discharging the onus of establishing that a reasonable suspicion existed of their having committed the crime with which they were charged. What in reality was sought from the High Court was judicial recognition that Austin and Harper had been unlawfully deprived of their constitutional right to personal liberty. And, as this court has held such deprivation to have occurred, it would be wholly unrealistic to deny an order of costs merely because it arose from unlawful action taken under the Criminal Procedure and Evidence Act; yet, on the other hand, be prepared to award costs if the Emergency Powers (Maintenance of Law and Order) Regulations, 1983, had been utilised wrongfully to effect the deprivation. (Compare s 29(1)(b) of the Act with sections 17(1) and 21(1) of the Regulations.) Why should the entitlement to costs depend upon whether the unlawful deprivation of liberty had been founded in a criminal enactment as opposed to a non-criminal one?

This argument is attractive and plausible with much to commend it.

Section 24 of the Constitution is significant. Its purpose is to provide speedy access to this court where the issue in dispute concerns the possible infringement of an individual's fundamental rights or freedoms. Subsection (1) allows any person who alleges that the Declaration of Rights has been, or is likely to be, contravened in relation to him to apply directly to the Supreme Court for redress. Subsection (2) deals with a different situation. It enjoins the person presiding in the High Court or in a subordinate court, if requested by any party to the proceedings, to refer the question of a contravention of the Declaration of Rights to the Supreme Court for determination; if not so requested he may *mero motu* resort to such referral. When the question is referred, proceedings are merely interrupted. This court answers the question but thereafter the proceedings must be concluded in the court *a quo*. See *Granger v Minister of State* 1984 (1) ZLR 194 (SC) at 199G-200G; 1984 (3) SA 214 (ZS) at 219B-I.

If an application were brought directly to this court under subs (1) of s 24 for redress of an infringement of rights which had occurred in the context of the criminal law that factor, in my

opinion, would not be taken as precluding the making of an order of costs. The application would not be subject to an enquiry as to whether it fell within the definition of a "civil case" in s 2 of the Supreme Court of Zimbabwe Act. In accordance with that approach, where a constitutional question is referred by the High Court or a subordinate court under subs (2), no regard should be paid to whether the question was referred during the course of a proceeding conducted by a criminal court or a civil

1987 (1) ZLR p43

GUBBAY JA

court. In both instances the Supreme Court should make a suitable order as to costs. See generally *Zimbabwe Township Developers (Pvt) Ltd v Lou's Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 385E; 1984 (2) SA 778 (ZS) at 785G; *Granger v Minister of State* 1984 (2) ZLR 92 (SC) at 101E; 1984 (4) SA 908 (ZS) at 915E. To take an example, if during the course of a criminal trial a magistrate referred the question of whether the Regulations under which the accused person was charged were *ultra vires* the Constitution, and if the resolution of that question was in favour of the accused who was represented before this court, I am confident that he would be awarded costs despite the proceeding in the subordinate court being of a criminal nature.

The point to be resolved therefore is whether an order for costs must be withheld from the appellant because, instead of requesting the magistrate to refer the question of whether Austin and Harper had been unlawfully deprived of their liberty for the determination of this court, he allowed the magistrate to rule on the issue himself. If the question had been referred during the course of the criminal proceeding, then, as I have indicated, this court would have awarded him the costs. I do not wish to imply, however, that the appellant was wrong in failing to request the magistrate to refer the question. On the contrary, I think that in the circumstances he was correct in not doing so and in deciding rather to oppose the prosecutor's application for a remand in custody. See *Bickle v Minister of Home Affairs* 1983 (2) ZLR 400 at 432E-F; 1984 (2) SA 439 (ZS) at 441H. I merely illustrate the injustice which would result if he is now to be deprived of his costs.

A not dissimilar situation arose in other proceedings taken by the appellant in consequence of the production by the prosecutor of a ministerial certificate issued under s 106(2)(a) of the Criminal Procedure and Evidence Act, certifying that a likelihood existed that public security would be prejudiced if Austin and Harper were admitted to bail. The certificate prohibited the magistrate, in terms of s 106(2b) of the Act, from admitting the two men to bail and he remanded them in custody. This led the appellant to petition the High Court for an order declaring subss (2) and (2b) of s 106 to be contrary to ss 13 and 18(9) of the Constitution, and therefore void. The petition was dismissed with costs by SANSOLE J. On appeal the judgment was upheld save as to the order as to costs which was set aside on the ground that as a constitutional issue was involved, with regard to which the answer was not self-evident, it was appropriate that no order as to costs in either court should be made, despite the appellant's failure in both. (See *Bull v Minister of Home Affairs* 1986 (3) SA 870 (ZS) at 876A-B.) Although the point was not taken that the proceeding in the High Court involved a criminal case or matter, I

GUBBAY JA

mention this decision because it appears to acknowledge that with regard to costs the constitutionality of a matter overshadows the essential nature of the proceeding which gave rise to it.

It seems to me that individuals whose constitutional rights have been infringed may be disinclined to seek relief by engaging in what may prove to be expensive litigation if, despite success, they enjoyed no prospect of recovering their costs. That is a situation which cannot be countenanced. The Declaration of Rights must never be thought to be reserved only for the fortunate few who can afford to litigate without the consideration of recompense from the other side.

Moreover, the sanction of costs could well encourage servants of the State to adopt a more cautious attitude and probing approach than they might otherwise do, where what is at stake is the deprivation of the subject's liberty. It would also ensure that unnecessary and unreasonable opposition is not mounted by the State. Frivolous allegations of such breaches would likewise be discouraged. In short, the imposition of orders of costs would be a most useful weapon in the armoury of the courts.

But considerations of justice and equity apart, I am satisfied that there is no persuasive ground upon which to distinguish, from the standpoint of costs, the proceeding in the High Court and the appeal which followed it, from a referral and determination of a constitutional question which arose in the course of a criminal proceeding.

Accordingly, I would order that the costs of the appeal and the costs in the lower court be paid by the first respondent.

Dumbutshena CJ: I agree.

McNally JA: I agree.

Atherstone & Cook, appellant's legal representatives

FAUST PRODUCTS (PVT) LTD v CONTINENTAL FASHIONS (PVT) LTD 1987 (1) ZLR 45 (HC)

Court High Court, Harare

Reynolds J

Civil application

2 & 9 April 1987

Flynote

Costs - summary judgment - unsuccessful application - stage at which liability for costs to be determined - scale at which costs should be awarded.

Headnote

Plaintiff had instituted proceedings against defendant for payment for goods sold and delivered. Despite the fact that defendant had indicated that it would counterclaim on the ground of defects in the goods, plaintiff applied for summary judgment. Subsequently plaintiff conceded that the counterclaim raised a triable issue and withdrew the application. On the question of costs:

Held, that the general rule, that where issues are distinct and severable the successful party on each issue is entitled to his costs, should be applied in the present case.

Held, further, that plaintiff's application for summary judgment could be excised fairly readily from the main action and the dispute as to costs should therefore be determined at this stage rather than reserved for the trial court. It did not matter that what appeared at this stage to be a *bona fide* defence might turn out, at the trial, to be *mala fide*; the issue at this stage was whether the plaintiff had complied with the requirements applicable to summary judgment and, if so, whether the defendant had put forward a *bona fide*, triable or arguable defence which, if established at the trial, could succeed.

Held, further, that although plaintiff's application was ill-conceived and doomed to failure, an award of costs on an attorney and client (legal

1987 (1) ZLR p46

REYNOLDS J

practitioner and client) scale would be justified only if the circumstances specially demanded such a course - for instance, if the application had been an attempt to harass the defendant, or if plaintiff had been guilty of opprobrious conduct.

Cases cited:

Estate Wege v Strauss 1932 AD 76

Penny v Walker 1936 AD 241

May v Union Government 1954 (3) SA 120 (N)

Sampson v Union & Rhodesia Wholesale Ltd 1929 AD 468

Kensington Steam Bakery v Dogan 1916 TPD 17

Golding v Torch Printing & Publishing Co (Pty) Ltd & Ors 1949 (4) SA 150 (C)

Chrismar (Pvt) Ltd v Stutchbury 1973 (1) RLR 277 (GD)

du Preez v Pritchard 1978 (4) SA 552 (NK)

Ronnie Reed & Co (OFS) (Pty) Ltd v Kimberley Brake & Clutch (Pty) Ltd 1977 (3) SA 364 (NC)

HH Robertson (Africa) (Pty) Ltd v NL Builders & Construction Co (Pty) Ltd 1974 (3) SA 776 (N)

Estate Potgieter v Elliott 1948 (1) SA 1084 (C)

Eisenberg's v OFS Textile Distributors (Pty) Ltd 1949 (3) SA 1047 (O)

Weinkove v Botha 1952 (3) SA 178 (C)

Groenewald v Plattebosch Farms (Pty) Ltd 1976 (1) SA 548 (C)

Bodemer v Hechter 1962 (4) SA 244 (T)

Uranovsky v Pascal 1964 (2) SA 348 (C)

Mudzimu v Municipality of Chinhoyi & Anor 1986 (1) ZLR 12 (HC)

Primrose Brickworks (1936) Ltd v Metropolitan Timber Co Ltd 1959 (1) SA 35 (W)

A Ebrahim for the plaintiff

J B Colegrave for the defendant

Judgment

Reynolds J: In this application for summary judgment, the plaintiff has conceded that the defendant should be given leave to defend the action brought. The only remaining issue between the parties concerns the award of costs of the application.

A brief history of the facts leading up to the present hearing is as follows: Between the years 1983 and 1986 the parties entered into certain contracts whereby the defendant would supply fabrics and accessories to the plaintiff, who would, in turn, manufacture short trousers from the items supplied. The

1987 (1) ZLR p47

REYNOLDS J

plaintiff would then return the completed garments to the defendant, and would receive a specified price for the work done. The plaintiff alleged that despite demand, the defendant had failed to pay an amount of \$73 714,98 in breach of these contracts. The plaintiff alleged further that the defendant's employees had entered the plaintiff's premises on 5 September 1986 and had removed partially completed articles of clothing, materials, patterns and trimmings, also in breach of the contracts, thereby cancelling those contracts. The plaintiff claimed damages at \$2 500 *per diem* for eight days due to the suspension of business arising out of this latter event. Summons was issued on the 17 February 1987.

The defendant entered an appearance to defend the action on 20 February, 1987, and notice of application for summary judgment was filed on 2 March 1987. The defendant gave notice of opposition to that application and filed its affidavit on 13 March. On 25 March the applicant's

legal practitioners wrote to the defendant's legal practitioners to the effect that it was conceded that a triable issue had been raised, and the application for summary judgment was, therefore, withdrawn. It was proposed that an order be obtained to the effect that the defendant be given leave to defend, and be required to file its plea within 12 days. It was suggested that costs be in the cause, or, alternatively, that costs be reserved.

The defendant did not accede to either proposal regarding costs, and demanded, in terms of O 10 R 72 of the High Court of Zimbabwe Rules, 1971, that the plaintiff's action be stayed until the plaintiff paid the defendant's costs on an attorney and client (legal practitioner and client) scale. It is this issue that now arises for determination. Two decisions are necessary: firstly, the stage at which liability for costs should be determined; and, if at the present stage, then secondly, at what scale the award should be made. These questions will be considered in turn.

It happens frequently that, even when an application for summary judgment is dismissed, the matter of costs is reserved for decision at the main trial. It is desirable to examine this aspect. I would, with respect, agree with the statement of the general rule in this regard as formulated by WESSELS ACJ in *Estate Wege v Strauss* 1932 AD 76 at 86:

"This court has on several occasions laid down that if issues are distinct and severable the successful party on each issue is as a rule entitled to his costs on that issue. This is a general rule which all courts should follow, but it is not a hard and fast rule, and considerable discretion must be left

1987 (1) ZLR p48

REYNOLDS J

to the trial judge in regard to costs."

(See, too, *Penny v Walker* 1936 AD 241 at 260; *May v Union Government* 1954 (3) SA 120 (N) at 131; *Sampson v Union and Rhodesia Wholesale Ltd* 1929 AD 468.)

Where, however, the relevant issues are not readily divisible, it usually happens that the court will prefer to reserve the question of costs for the ultimate decision of the trial court, for it is normally the case that liability for those costs can be more effectively decided at that final stage. See *Kensington Steam Bakery v Dogan* 1916 TPD 17; *Golding v Torch Printing & Publishing Co (Pty) Ltd & Ors* 1949 (4) SA 150 (C).

Accepting, then, that this is the test that should be applied to such matters, it is my view that the present application may be fairly readily excised from the main action, and that the dispute as to costs should, as a result, be determined at this juncture. See *Chrismar (Pvt) Ltd v Stutchbury* 1973 (1) RLR 277 (GD) at 279G; *du Preez v Pritchard* 1978 (4) SA 552 (NK) at 554 - translations at 1099; *Ronnie Reed & Co (OFS) (Pty) Ltd v Kimberley Brake & Clutch (Pty) Ltd* 1977 (3) SA 364 (NC); and of *HH Robertson (Africa (Pty) Ltd v NL Builders & Construction Co (Pty) Ltd* 1974 (3) SA 776 (N). In the last-mentioned case - *Robertson's case* - at 777C-D FANNIN J expressed doubt :

"as to whether justice would be done by ordering a plaintiff to pay the defendant's costs merely on the ground that the defendant's defence has been disclosed before the issue of summons, if it should subsequently turn out that the plaintiff was quite right in alleging that he believed the defence not to be *bona fide*, and if it should turn out that in fact the defence adumbrated prior to the issue of summons is a *mala fide* and untruthful defence."

With respect, it seems to me that the learned judge has confused two separate and different considerations. As I see it, when an application for summary judgment is made - or, for that matter, when any action is taken which is distinct from the main action - certain procedures and certain rules are applicable, and the court will base its decision on these factors. This decision is arrived at on an entirely different footing from that adopted by the trial court. In summary judgment proceedings, for example, if the applicant has complied with the formal requirements involved, the courses open to the defendant and the other procedures applicable are all governed by the relevant rules of court as these have been interpreted by the courts.

1987 (1) ZLR p49

REYNOLDS J

In order to decide upon the initial application, the court hearing the matter is not concerned with the merits of the main action, nor with the various factors that require determination in that regard. The questions to be answered are simply whether the plaintiff has complied with the requirements applicable, and if so, whether the defendant has put forward a *bona fide*, triable or arguable defence which could succeed if established.

It may well happen that the first court might decide that the defence raised is, on the face of it, *bona fide*, whereas the trial court may come to the conclusion that it is bad in law or *mala fide*. There is, in my view, no conflict in such a situation. The tests applied are quite different. At first sight it might appear, as FANNIN J suggested, that it would be unjust that the plaintiff, who had brought an application for summary judgment under the belief that the defence raised was, say, concocted, might be ordered to pay the costs at that stage, when at the trial stage he proves that his beliefs and allegations are true, and that the defendant had indeed raised a bogus defence. In other words, the defendant would receive some costs despite having raised a spurious defence. On closer examination, however, it is my view that no injustice occurs in this event. In bringing the application for summary judgment the plaintiff knows of the legal requisites applicable. He must, therefore, take a calculated risk as to the possibility of having an order of costs awarded against him at that stage should his application be unsuccessful. As VAN DEN HEEVER J expressed the point in *du Preez v Pritchard, supra*, at 554C (Translation, p 1098):

"He (the plaintiff) must risk to win: a probable order as to costs against him in respect of the application for summary judgment in exchange for a claim to attorney and client costs at the conclusion of the trial..."

OGILVIE THOMPSON AJ (as he then was), in *Estate Potgieter v Elliott* 1948 (1) SA 1084 (C) at 1087, underlined the main distinguishing feature when considering the application of an equivalent South African rule:

"The Rule prescribes that the defendant must satisfy the court by affidavit that he has a *bona fide* defence to the action. I do not think that necessarily means anything more than the substantiation of facts which, if proved, would give rise to a valid legal defence" (my emphasis).

Accordingly, I am satisfied that the appropriate order should be made now, and should not be reserved for the decision of the trial court.

1987 (1) ZLR p50

REYNOLDS J

It must also be remembered that the summary judgment action is a special and singular form of procedure, and it should be resorted to only if the particular circumstances warrant it. In *Ronnie Reed & Co v Kimberley Brake & Clutch (Pty) Ltd*, *supra*, this aspect is emphasized at 367E:

"What practitioners do not always take to heart is that it is intended not as a licence for a fishing expedition which plaintiff may undertake without any real risk, but solely to afford speedy completion of a matter in which defendant can by no stretch of the plaintiff's imagination have a defence."

Again, in the words of BECK J (as he then was) in *Chrismar v Stutchbury* *supra* at 279C-D:

"The special procedure of summary judgment was conceived so that a *mala fide* defendant might summarily be denied, except under onerous conditions, the benefit of the fundamental principle of *audi alteram partem*. So extraordinary an invasion of a basic tenet of natural justice will not lightly be resorted to, and it is well established that it is only when all the proposed defences to the plaintiff's claim are clearly unarguable, both in fact and in law, that this drastic relief will be afforded to a plaintiff."

(See, too, *Eisenberg's v OFS Textile Distributors (Pty) Ltd* 1949 (3) SA 1047 (O) at 1054.)

This aspect is of particular relevance in deciding whether the plaintiff's original application was well-founded or not. It was common cause that prior to the filing of the notice of application, the only mention made by the defendant of a possible defence to the plaintiff's claim was that contained in the defendant's letter to the plaintiff dated 4 November 1986. To my mind this letter sets out clearly that the defendant intended to counter-claim against the plaintiff by virtue of the fact that many of the garments supplied had been rejected due to "Faust Products Manufacturing faults, as a result of lack of control of quality". It may be mentioned that a counter-claim is a defence open to the defendant in answer to an application for summary judgment (see *Weinkove v Botha* 1952 (3) SA 178 (C); *Groenewald v Plattebosch Farms (Pty) Ltd* 1976 (1) SA 548 (C)). I do not accept that the plaintiff could have been in any doubt whatsoever that this defence was at least arguable, and there was no suggestion made that it was brought *mala fide*. It must also be borne in mind that it cannot be expected of the defendant in this situation that

1987 (1) ZLR p51

REYNOLDS J

he would compose his letter of opposition to the claim with the precision that would be required in a plea (see *Estate Potgieter v Elliott* *supra* at 1087).

The only other point of substance raised by Mr *Ebrahim*, for the plaintiff, was that the defendant had made available a quality controller to oversee the manufacturing process, and the defendant could not, accordingly, complain that the garments were of poor quality. The plaintiff did not, however, allege that this controller had been present at all times, and it was conceded that he had been absent for 22 working days. In view of this concession, there could be no dispute as to the possible validity of at least part of the defendant's counter-claim. Although the defendant had, apparently, accepted the garments in question without himself checking their quality, I do not believe that this fact would necessarily justify the rejection of the defence raised. The contract, after all, was to make clothing of a reasonable standard, and any breach in

quality would be actionable.

In these circumstances I am satisfied that the plaintiff, at the outset "brought an ill-conceived application that was doomed to failure" (*per* BECK J in *Chrismar (Pvt) Ltd v Stutchbury, supra*, at 279F). That plaintiff should, therefore, pay the defendant's costs in this application is, in my view clear. (See *Bodemer v Hechter* 1962 (4) SA 244 (T); *Uranovsky v Pascal* 1964 (2) SA 348 (C).) The only remaining question, then, is at what scale these costs should be paid.

I would respectfully agree with that part of the judgment of FANNIN J in the *HH Robertson* case *supra* at 777C, where he stated that:

"it is only in certain very special circumstances that the Court ought to go to the length of exercising its undoubted powers under Rule 32(9)(a) ..."

It is my view that this unusual and exceptional provision should be applied only if circumstances especially demand such a course. I find myself almost in exactly the same position as did Beck J in the *Chrismar* case *supra* where he said, at 280A-D, that:

"While I am clearly of the view that the application should never have been brought in the circumstances that I have described, I have no reason for finding that it constitutes an attempt to harass the defendants, or that the plaintiff in bringing it has been guilty of opprobrious conduct that merits a penal award of costs to mark the court's disapproval...In my view, no more can fairly be said of the present plaintiff than that, in

1987 (1) ZLR p52

REYNOLDS J

common with almost every other unsuccessful litigant, he has taken an oversanguine view of the imagined strength of his case, combined perhaps with an insufficient appreciation of the very special nature of the relief afforded by summary judgment procedure."

The learned judge in that case dismissed the plaintiff's application with costs on a party and party basis. It is my view that a similar order should be made in the instant matter. (See, *Ronnie Reed & Co (OFS) (Pty) Ltd v Kimberley Brake & Clutch (Pty) Ltd, supra*, at 368; *Mudzimu v Municipality of Chinhoyi & Anor* 1986 (1) ZLR 12 (HC); *Primrose Brickworks (1936) Ltd v Metropolitan Timber Co Ltd* 1959 (1) SA 35 (W); Herbstein & van Winsen's *Civil Practice of the Superior Courts of South Africa* 3 ed at 309.)

In the result I hold that it is not appropriate in this case to order a stay of proceedings as is contemplated by Rule 73(b), nor is it appropriate that costs should be awarded on the higher scale. There will, accordingly, be an order that the costs of this unwarranted application must be borne by the plaintiff on a party and party basis.

Atherstone & Cook, plaintiff's legal practitioners

Ali Ebrahim, defendant's legal practitioner

1987 (1) ZLR p53

S v MUTSUNGE & ANOR 1987 (1) ZLR 53 (SC)

Court Supreme Court, Harare

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

2 & 16 April 1987

Flynote

Criminal procedure (sentence) - murder - extenuating circumstances - finding of - whether aggravating features can neutralise such finding.

Headnote

The appellants were members of the ruling political party and members of the Special Constabulary in their area. The deceased was a member of ZAPU, a party at that time in opposition to the ruling party and suspected of supporting dissidents in Matabeleland. Late in 1984 two prominent members of the ruling party were murdered by dissidents in the appellants' area. Their funeral was a major event, at which inflammatory speeches were made by senior officials and instructions were given that collaborators with the dissidents should be killed. The appellants received information that the deceased had assisted the murderers of the party members whose funeral they had attended. The deceased was forced to lie on a pile of wood that had been collected in a donga and while lying there was shot by the appellants. The wood was then set on fire and deceased's corpse burnt.

The trial court found extenuating circumstances, in that the appellants were acting under instructions, had received inadequate training in the use of their weapons, and believed the deceased to be a collaborator with the dissidents. However, the court found that the aggravating features of the case outweighed the extenuating features and sentenced the appellants to death. It found the aggravating features to be

- (a) the fact that the appellants had been entrusted with the task of keeping law and order in the area;
- (b) the abuse of their authority;

1987 (1) ZLR p54

McNALLY JA

- (c) the manner of carrying out the murder; and
- (d) the fact that the killing was politically motivated and premeditated.

Held, that by weighing up the extenuating circumstances and the nature of the crime the trial

court misdirected itself. The manner in which the crime was carried out was irrelevant in the present case, as it did not throw doubts on the facts alleged in support of the extenuating circumstances. The aggravating features were really the extenuating features, looked at from a different angle. The court should have found that there were extenuating circumstances.

Held, further, that the crime was nevertheless very serious and people must learn that obedience to patently wrongful orders carries serious consequences. The callous and cruel way in which the killing was carried out did not call for leniency and a sentence of twenty years' imprisonment would be substituted.

Cases cited:

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

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

A Thompson for the appellants

Miss S Ahmed for the respondent

Judgment

McNally JA: The two appellants were found guilty in the High Court of murder and were, on 31 January 1986, sentenced to death.

The allegations against them were not in essence disputed. They both admit that together they shot to death the deceased, a man who had been captured by others and was in their power. They did so quite deliberately and indeed openly. The unfortunate deceased was forced to lie on or near some brushwood which had been collected in a donga. He was then shot numerous times by both appellants, who then with their companions set the wood on fire and partially destroyed the body.

Not only were these immediate facts common cause. The background to these events, and the reason for the killing, was also undisputed. Briefly, what happened was this. On 11 October 1984, in the Lower Gweru area, a man and his wife, Mr and Mrs Jani Mpfu, prominent members of ZANU (PF), were murdered by dissidents. Clearly the murders were politically motivated. There was no public reaction to this killing immediately. However the funeral took place three days later, on 14 October 1984. The funeral was a major occasion. It was attended by the Governor of the Midlands

1987 (1) ZLR p55

McNALLY JA

Province, the late Benson Ndemera and the Officer-in - Charge Gweru Rural Police, Inspector Wurayayi. It was said by the appellants, and not disputed by the State, that three busloads of Youth Brigade members from Gweru attended. It was also said, and not denied, that inflammatory speeches were made and instructions given that dissident collaborators were to be killed and reprisals were to be undertaken.

Immediately after the funeral a large number of huts were set ablaze. We are left to infer that the hut owners were, or were suspected to be, ZAPU members, or dissident supporters, or both. More significantly, however, it is alleged, and again not denied by the State, that one Peter, suspected of leading the dissidents to the house of the murdered couple, was shot there and then, more or less in the presence of the authorities, and nothing was done to arrest his killer.

It was these undisputed allegations which led the court to find and, on the evidence, correctly to find, that "the possibility does exist that instructions were given". By "instructions", the court meant instructions to kill dissidents and their collaborators. Once that possibility is accepted, as it was, then the court had to proceed to assess the moral blameworthiness of the appellants on the basis that they had been instructed by the Provincial Governor and the Officer-in - Charge Gweru Rural Police to kill collaborators. It is shocking to think that such an instruction might have been given, and it is amazing that the State should have let such evidence go unchallenged. But since it did go unchallenged, the appellants must have the benefit of it. Their moral blameworthiness must therefore be assessed on the basis that they were acting under general instructions, which they knew to be unlawful, to kill dissident collaborators. It is also part of the agreed facts of the case that the deceased, Patrick Sbanda, was believed by the appellants to have assisted the murderers of Mr and Mrs Jani Mpofu, the ZANU (PF) leaders whose killing led to the disturbances.

The appellants themselves were both young men in their twenties. Mutsunge was born in 1960 and Gaba in 1964. They were both ZANU (PF) members and members of the Special Constabulary. Gaba, though younger than Mutsunge, was the District Political Commissar for ZANU (PF) and senior to him as a Special Constable. The person they killed, Patrick Sibanda, was the local organising Secretary for ZAPU. On the day of the killing they were both on duty and in uniform and armed. There is no doubt that they were strongly affected by the deaths of the Mpofus, who were well respected people and party leaders. They were affected by the speeches they had heard,

1987 (1) ZLR p56

McNALLY JA

despite the fact that a day had passed since the funeral orations. They had, in fact, been looking for the deceased since the previous day.

In dealing with extenuating circumstances, the trial court seems to have accepted the facts put forward by the defence as constituting extenuating circumstances. These were:

- "1. That the accused acted in furtherance of instructions given by their superiors. They acted out of loyalty and under a belief that their action would please their superiors.
2. They are inadequately trained. Entrusting weapons to ill-trained persons could be an extenuating circumstance. See *S v Jacob* 1981 ZLR 1 (AD).
3. Both accused suspected the deceased to be a dissident collaborator. This was so particularly in view of the fact that the late Peter had implicated the deceased in the murder of Mr and Mrs Jani Mpofu."

However, the court went on to say:

"The court has carefully considered these features and it has reached the conclusion that though they would

cumulatively constitute extenuating circumstances, they are, nevertheless, outweighed by the aggravating features and these are as follows, viz:

- a) The accused were entrusted with the responsibility to keep law and order in this area. Instead, they turned criminals and promoted lawlessness thus bringing into disrepute the forces of law and order in the area.
- b) They abused their authority and the weapons entrusted to them for the protection of the public.
- c) The killing was done in the most dastardly manner upon a defenceless victim. Firewood was gathered and piled into a donga. The deceased was led into this donga and was ordered to lie on his stomach on the pile and whilst in this position more firewood was piled on his back. There and then the two accused, acting in concert, shot him eight times and at close range. Fourteen empty cartridges were recovered from the scene. Thereafter, they proceeded to burn the corpse and no doubt this act of burning the body was intended to induce a sense of shock and abhorrence in the minds of the populace in the area.

1987 (1) ZLR 53 p57

McNALLY JA

- d) The murder was with actual intent and though politically motivated it was carried out in cold blood. The court finds that the political emotions of the previous day had calmed down. Therefore, and save for the fact that the deceased was a member of ZAPU, there is nothing which the accused showed in evidence to support their suspicion that he was a collaborator with dissidents. The killing was not on the spur of the moment as was the case in *Jacob's* case. In the result the court finds that there are no extenuating circumstances."

Accordingly the sentence of death was passed on the appellants.

It is unfortunate that the trial court was not referred in argument to the case of *S v Ndwalane* 1985 (3) SA 222 (A). Nor was the case referred to in counsels' heads of argument. It is unfortunate because the court *a quo* in *Ndwalane's* case came to the same conclusion as the court *a quo* in this case and its finding was overruled on appeal.

The facts and the findings of both courts in *Ndwalane's* case are set out adequately in the headnote at 222-223, which reads as follows:

"One D, a Black community councillor, was murdered in circumstances which, according to township rumour, pointed to the complicity of M, a rival councillor. The appellant, who was D's protégé, procured a revolver and after a search of some two weeks, approached M unawares and shot him while the latter was sitting in his vehicle at a taxi rank. The Court *a quo*, on a charge of murder arising from the death of M, took into account the appellant's close relationship with D; his distress at D's death; his conviction that M was one of those responsible therefor and his frustration at the fact that M, whose conduct after the death of D was brazen and provocative, appeared to be going unpunished. Having done so, and having acknowledged that the appellant did not stand to gain a tangible reward and probably thought that he was doing the community a service, the Court nonetheless concluded that, inasmuch as his act was a premeditated and cold-blooded assassination executed in furtherance of a plan formulated some two weeks previously, the above circumstances did not serve to reduce his moral blameworthiness. It accordingly found no extenuating circumstances and imposed the death sentence. In an appeal,

Held, that it would appear that the Court *a quo* had found that, because the factors which would otherwise be extenuating influenced the appel-

1987 (1) ZLR p58

McNALLY JA

lant to take the law into his own hands and, by a carefully planned stratagem, exact revenge for D's death, any extenuation was wiped out or neutralised.

Held, further, that such reasoning postulates a weighing up of, or comparison between, the extenuating circumstances and the nature of the crime.

Held, further, that, in so doing, the Court *a quo* had misdirected itself: the enquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the crime is irrelevant.

Held, accordingly, that the Court *a quo* had erred in concluding that the nature of the crime neutralised the extenuating circumstances.

Held, further, that, adopting the point of view that an extenuating circumstance is a fact which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of guilt, the circumstances in question were, in any event, clearly extenuating: D was a close friend of the appellant, whom he loved and respected and looked upon as a father; he had been overcome with grief at D's death, whom he regarded as a benefactor of the community; he was beset with feelings of outrage and frustration because the perpetrators were not brought to book and his overriding thought after he had killed M was not so much that he had performed a public service as it was a feeling of satisfaction at having been able to bring just retribution upon M

Held, accordingly, that the death sentence had to be set aside and a sentence of ten years' imprisonment imposed."

Although the facts of two cases always differ to some degree, there is a considerable similarity in principle between the state of mind of the accused in each of these cases. In each case the accused took the law into his or their own hands, and, as is usually the case, made a mockery of the law in so doing. Nevertheless, subjectively, the accused had, to some extent, a belief in the rightness or the righteousness of their cause. To the extent that they held that belief, the moral blameworthiness of their act was diminished.

The Appellate Division in *Ndwalane's* case *supra* found that the trial court had misdirected itself. VILJOEN JA said at 227D-G:

"As I read the judgment it would appear that the Court found that, because the factors which otherwise would have been extenuating, influenced the appellant to take the law into his own hands and, by a carefully planned

1987 (1) ZLR p59

McNALLY JA

stratagem, exact revenge for Dube's death, any extenuation was wiped out or neutralised. Such reasoning postulates a weighing up of, or a comparison between, the extenuating circumstances and the nature of the crime. In so doing the Court *a quo*, in my view, misdirected itself. The inquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the murder is irrelevant."

This passage from *Ndwalane's* case has been cited previously in this Court with approval. In *S v Chaluwa* 1985 (2) ZLR 121 (SC) at 127-8 (not referred to by either counsel) the Chief Justice set out the same passage and others from the judgment.

It will be noted that VILJOEN JA made more or less the same point in two different ways. He

began by saying that the court *a quo* misdirected itself by weighing up or comparing -

"...the extenuating circumstances and the nature of the crime".

It seems to me, with respect, that in this case the High Court has made precisely the same error. After accepting that the factors cited were extenuating, it went on to measure those circumstances against four factors, the first two of which were:

- "a) The accused were entrusted with the responsibility to keep law and order in this area. Instead, they turned criminals and promoted lawlessness and thus bringing into disrepute the forces of law and order in the area.
- b) They abused their authority and the weapons entrusted to them for the protection of the public."

These two features simply define the nature of their crime. Indeed they are really no different from the first two features of extenuation which I repeat here for the sake of comparison:

- "1. That the accused acted in furtherance of instructions given by their superiors. They acted out of loyalty and under a belief that their action would please their superiors.
- 2. They are inadequately trained. Entrusting weapons to ill-trained persons could be an extenuating circumstance."

1987 (1) ZLR p60

McNALLY JA

In short, these so-called features of aggravation are no more than the extenuating features seen from a different angle. It is wholly illogical to count them as factors of aggravation. They should have been ignored.

I said earlier that VILJOEN JA made more or less the same point in two different ways. His alternative formulation (at 227F) was:

"The inquiry is whether the factors which subjectively influenced the mind of the offender to commit the murder are extenuating or not; the manner in which he committed the murder is irrelevant."

This passage also received the approval of this court in *S v Chaluwa supra*. However it must be read in its context. The manner in which the murder is committed may be such that it throws doubt upon the facts alleged in support of the extenuating circumstances. To that extent it may be relevant. It may also be relevant when one considers the length of the prison sentence to be imposed.

In the present case, the manner of the killing was certainly callous, cold-blooded, deliberate and, in the collection of firewood before the killing and the burning of the body afterwards, cruelly terrifying to the victim and to his family and friends.

But, it must also be said that it was entirely consistent with the extenuating circumstances, in that the killing was clearly carried out as an execution, a punishment of the victim and a warning to his family. To that extent, therefore, the manner in which the murder was carried out confirms that we are dealing with a gross excess of duty. The manner of the killing confirms the extent to

which the killers were influenced by the conduct and instructions of their superiors and by their own revulsion at the murder of Mr and Mrs Mpofu. In short, it is wholly consistent with the factors which are urged in extenuation. To treat the manner of killing as an aggravating feature is here illogical.

In regard to the fourth feature of aggravation, it was in my view a further misdirection for the court to say: "There is nothing which the accused showed in evidence to support their suspicion that he was a collaborator with dissidents". The answer to this is that it was an agreed fact that B No further evidence on the point was necessary.

1987 (1) ZLR p61

McNALLY JA

This court, because of the misdirections, is free to substitute its own discretion for that of the trial court. There is no point in referring the matter back. We are satisfied that the extenuating features accepted by the trial court (indeed they were accepted by the prosecutor as well) were properly regarded as extenuating. We discount almost entirely the so-called aggravating features. In the result the proper finding was that there were extenuating circumstances.

In our view a great deal of the moral blameworthiness for this murder, at least on the evidence placed before the court, attaches to persons other than the appellants. These persons were vastly senior to the appellants, both in the police sphere and in the political sphere. Their influence and authority would seem, even if the evidence is exaggerated, to have been wickedly abused.

The crime was, however, a serious one. People with arms must learn that obedience to patently wrongful orders carries serious consequences, especially when those orders involve killing. Moreover the callous and cruel way in which the killing was carried out does not call for leniency.

In each case the sentence of death is set aside and in its place each appellant is sentenced to twenty years' imprisonment with labour.

Gubbay JA: I agree.

Manyarara JA: I agree.

Pro Deo

1987 (1) ZLR p62

S v TAANORWA 1987 (1) ZLR 62 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

19 February & 5 May 1987

Flynote

Criminal procedure (sentence) - murder - extenuating circumstances - mental defect falling short of mental disorder - whether may constitute extenuating circumstances - evidence required - psychiatric evidence - practical problems.

Headnote

It is well recognised that the mental and emotional state of the accused, or his mental or emotional development or maturity, may, even where it falls short of "statutory" mental disorder or defect, amount to a circumstance of extenuation. However, a psychiatric examination is generally made only to ascertain either whether the accused is mentally disordered or defective, so as to be unable to stand trial at all, or, if he is able to stand trial, whether he was, at the time of committing the offence mentally disordered or defective, so as to warrant a special verdict. Because medical practitioners are by training accustomed and by law enjoined to apply these tests for mental disorder or defect, they do not as a rule go beyond that and express an informed medical opinion on the often life and death question as to whether or not his mental or emotional state should be regarded as a circumstance of extenuation. The court has to make such a finding without the benefit of expert psychiatric evidence.

There are several practical problems in the interviewing of accused persons for the purpose of ascertaining their mental state, such as the usually inadequate time available, the fact that the psychiatrist's source of information often is the accused himself (who may either be unaware of any strangeness in his behaviour or anxious to conceal it) and the existence of a language barrier.

1987 (1) ZLR p63

McNALLY JA

Cases cited:

S v Makaka S-25-87 (not reported)

S v Joseph S-82-85 (not reported)

S v Runameso S-120-85 (not reported)

S v Sibiya 1984 (1) SA 91 (A)

S v Phillips & Anor 1985 (2) SA 727 (N)

S v Sulpisio A-104-71 (not reported)

S v Smith & Ors 1984 (1) SA 583 (A)

M Ncube for the appellant

Miss S Ahmed for the respondent

Judgment

McNally JA: This court has expressed concern on several occasions about the investigation of the mental and emotional state of appellants convicted of murder. The most recent of these cases is *S v Makaka* S-25-87 (not reported); but see also *S v Joseph* S-82-85 (not reported) and *S v Runameso* S-120-85 (not reported).

It may be useful to make some general observations before going on to consider the particular facts of the present case:

1. There is a tendency, especially though not exclusively on the part of less experienced practitioners, to ignore odd or inexplicable or sometimes downright bizarre behaviour by their clients. This behaviour may become apparent from the manner in which the killing was carried out, or from the behaviour of the killer before, during or after the killing, or from the way in which he instructs defence counsel, or behaves in court.

It must be said at once that when such conduct is drawn to the attention of the Attorney-General's Office, that Office has always been co-operative in arranging psychiatric interviews. But surprisingly often the matter is not raised.

2. There is also a basic practical and procedural problem. When a person accused of murder is referred for medical examination in terms of Part II of the Mental Health Act 23 of 1976, the provisions of the Act require that he be examined for the purpose of determining whether he is "mentally disordered or defective", so as to be unable to stand trial, or for the purpose of determining whether he was, at the time of committing the offence mentally disordered or defective, so as to warrant a special verdict.

1987 (1) ZLR p64

McNALLY JA

The term "mentally disordered or defective" is defined in s 2 of the Act to mean -

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

The term "psychopathic disorder" is also defined as meaning -

"a persistent disorder or disability of the mind, whether or not sub-normality of the mind is present, which -

- (a) has existed or is believed to have existed in the patient from an age prior to that of eighteen years; and
- (b) results in abnormally aggressive or seriously irresponsible conduct on the part of the patient".

This test is difficult enough to apply at the best of times, but I am not at present concerned with that aspect. The problem arises when it is found that the person is not "mentally disordered or defective". He then stands trial, and, assuming he is found guilty, the critical question of

extenuating circumstances arises.

It is well recognised that the mental and emotional state of the accused, or his mental or emotional development or maturity, may, even where it falls short of "statutory" mental disorder or defect, amount to a circumstance of extenuation. See for example *S v Sibiya* 1984 (1) SA 91 (A); *S v Phillips & Anor* 1985 (2) SA 727 (N).

Yet precisely because medical practitioners are by training accustomed and by law enjoined to apply the test for mental disorder or defect, they do not as a rule go beyond that and express an informed medical opinion on the often life or death question as to whether or not his mental or emotional state should be regarded as a circumstance of extenuation.

The problem was stated succinctly by the then CHIEF JUSTICE (BEADLE CJ) in *S v Sulpisio* A-104-71 (not reported) when he said:

"A man may not be certifiable under the Mental Disorders Act [now the Mental Health Act] and he may not be mentally disordered within the meaning of the criminal law, but nevertheless his mentality may be that of a man who suffers from a diminished sense of responsibility and such a condition, while it may not be relevant in considering verdict, may be very relevant indeed in determining whether or not, in a case

1987 (1) ZLR p65

McNALLY JA

such as this, a proper sentence should be the death sentence. If the court was satisfied that the appellant suffered from some unusual state of mind such as having a genuine persecution mania or that he was suffering from some diminished sense of responsibility at the time when he committed this offence, this would be a most important factor to be taken into consideration in deciding what the appropriate sentence should be."

Yet the court usually has to make this decision without the benefit of expert psychiatric evidence, because the psychiatrist's evidence has stopped short at the statutory limit.

3. There are real practical problems in the interviewing of accused persons for the purpose of determining their mental state. In the first place, the opportunity for observation is limited. A twenty minute interview may (I do not know) be long enough to determine whether a person is mentally disordered or defective in terms of the Act. It may well not be enough to determine less clear-cut abnormalities which are the material upon which extenuating circumstances may be built. An interview by a psychiatrist in a prison hospital room cannot, I think, be as adequate as a period of days spent under observation by trained psychiatric staff, coupled with a series of interviews by the psychiatrist.
4. One is concerned also about how well briefed the interviewing psychiatrist is. It is not uncommon to learn from his evidence in court that his information comes only from the accused. One may wonder sometimes whether a less reliable source could be found. A man's parents or fellow villagers may have a host of stories about his strange behaviour since childhood; yet he himself may either be unaware of the strangeness, or keen to conceal it. It is one of the ironies of the legal profession that the *onus* of proof of mental abnormality lies on the one least capable of discharging it and often most anxious to deny it. (I note that in *S v Smith & Ors* 1984 (1) SA 583 (A) the incidence of onus was queried and left open.)

5. Finally, how many such persons are interviewed through an interpreter? How easy is it across a linguistic and cultural gap of such magnitude to pick up abnormalities and deficiencies?

It is because of these imponderables that this court has expressed and continues to feel some concern, bearing in mind particularly that, as the law

1987 (1) ZLR p66

McNALLY JA

now stands, the *onus* at all stages is on the accused person. It is against this background that I turn to consider the facts of the present case.

Hapson Taanorwa (the appellant) was charged with two counts of armed robbery and one count of murder. The facts of the case were not in dispute. The defence raised was that of mental disorder or defect, and the appellant was examined before trial by two psychiatrists, Dr Vermeulen and Dr Hollander. Doctor Vermeulen gave evidence. Doctor Hollander did not.

Dr Vermeulen is a qualified psychiatrist with 10 years' full-time and 4 years' part-time experience. He examined the appellant on 3 September 1983. He had had sight of statements by the appellant's wife and father, the case summary, the warned and cautioned statement and prison hospital case notes. He was satisfied that the appellant was not mentally disordered or defective.

Under cross-examination, Dr Vermeulen conceded that his examination probably took between 15 and 30 minutes, and that the prison hospital at Harare Central Prison was not adequately supplied with facilities for this type of examination. He said that, ideally, such a patient should be under observation by trained psychiatric staff for at least a month. He conducted a "Section 26" examination, ie an examination in terms of s 26 of the Mental Health Act, to establish whether an accused person is mentally disordered or defective. In fact his affidavit deals with the appellant's mental condition both at the time of the killing and at the time of the examination. He concluded that:

- a. "He showed no evidence of mental disorder when examined by me." and
- b. "There is no substantive evidence of mental illness on the day of the alleged crime, and the accused was responsible for his actions at the time".

It may be noted that neither of these findings follows the wording of the Act.

Doctor Vermeulen conceded that the only facility for conducting a proper (ie a month-long) examination of such cases was at Ingutsheni Hospital in Bulawayo, but it was not the practice to send Mashonaland cases to Matabeleland. He conceded further that there was evidence that the appellant had behaved strangely in the past. He said: "In other words there are indications in the patient's history that he has been mentally ill, perhaps".

1987 (1) ZLR p67

McNALLY JA

What must be stressed, however, is that Dr Vermeulen's evidence related solely to the statutory question: "Was the appellant, at the time of the offence or at the time of the trial, mentally disordered or defective?". He did not deal with the question: "If the answer is in the negative, what can you say as to whether his mental or emotional state, or the nature of his personality, at the time of the offence, can be taken into account for the purpose of a finding of extenuating circumstances ie circumstances which tend to reduce the appellant's moral blameworthiness?".

When the court re-assembled Dr A P Baker gave evidence. He is a specialist psychiatrist. He examined the appellant for some 20 minutes in Ingutsheni. He said five minutes would have been enough. He prepared a report in the form of a letter to the Attorney-General. He adhered to it. He concluded that the appellant's denial of all knowledge of the crime or his being under arrest was simulated. He found no evidence of mental disorder, past or present. He did not consider it necessary to speak to witnesses or examine the State outline.

He took exception to being cross-examined as to his method of examination. When shown the appellant's father's statement (which he had evidently not been shown before despite the court's order to that effect) he said this sort of conduct could be evidence of an hysterical personality. He relied on the appellant's denial of ever having shown signs of mental disorder in the past, though such denial was clearly false. He said: "In my opinion, he was not mentally disordered at the time and his refusal to talk about it was due to the fact that he had no symptoms to talk about".

It will be apparent from this summary of the psychiatric evidence that neither specialist dealt with the question of extenuating circumstances. This was, of course, perfectly understandable, because they were not asked to do so. Nevertheless, in the somewhat curious circumstances of this case, it is our view that some psychiatric explanation of the conduct of the appellant is essential before the court can properly come to a conclusion on extenuating circumstances.

The trial court's misdirection was in seeking to apply for the purpose of extenuation psychiatric evidence given for the purpose of verdict.

The only course open to us is to set aside both the finding on extenuation and the sentence and remit the matter for further medical evidence. We have ascertained that Dr Chikara, the Chairman of the Department of Psychiatry

1987 (1) ZLR p68

McNALLY JA

at the University School of Medicine and a Shona speaker, is available and willing to undertake such an investigation.

The investigation we deem necessary is to consider, in the light of all the facts, whether there exists a basis for a finding of extenuating circumstances. Such a finding can be reached if the conclusion is that the appellant, while not mentally disordered or defective in terms of the Act, was probably suffering from some substantial mental or emotional or personality defect or disorder sufficient to diminish his moral as opposed to his legal culpability for the crime at the

time it was committed.

In considering this question the psychiatrist is to take into account, in addition to his own observations and the results of such tests and enquiries as he may carry out, the following facts about the appellant -

1. That as a 7-year-old child he suffered from fits (possibly epileptic) and would on occasion make meaningless statements of an abusive nature. He would fall to the ground and act like a mad man, uttering abusive obscenities.
2. As a child he once took someone else's bicycle which had a puncture and pushed it for five miles and then brought it back. He had no rational explanation for this conduct.
3. His father's aunt and a relative of his mother have a history of mental illness.
4. His wife says that he talks in his sleep and on occasion would assault her for no apparent reason. After he woke he would deny having assaulted her.
5. He claims to have had visual disturbances and auditory hallucinations and to have been possessed by ancestral spirits.
6. He surrendered himself to the Police for this offence, when he would not otherwise have been detected. He co-operated for a day, then suddenly became mute and did not speak for a month.
7. He has been considered to be shamming when undergoing previous psychiatric examinations. He has been examined by Dr Vermeulen, Dr Baker and Dr Hollander.

1987 (1) ZLR p69

McNALLY JA

8. He committed two armed robberies and shot dead a man who came towards him during the course of one of the robberies. He apparently also wounded one of his accomplices.

Accordingly, I would make the following order:

1. The finding as to extenuating circumstances and the sentence are set aside.
2. The matter is remitted to the trial court with the following instructions:
 - a. The State is to make arrangements for the appellant to be interviewed by Dr Chikara, to whom the record of this trial and this judgment are to be made available;
 - b. Doctor Chikara is requested to interview the appellant, to prepare a report in accordance with the guidelines set out in this judgment, and to present that report to the Registrar of the High Court, Harare;

- c. The Registrar is to make copies of the report available to the court, the State and the defence;
- d. Doctor Chikara, and any other witness deemed necessary by the court, is to be called by the court as a witness so as to be available for cross-examination by either side;
- e. At the conclusion of evidence and after counsel has made such further submissions as are considered necessary, the court is to consider afresh the questions of extenuating circumstances and sentence.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

A A *Chiwara & Co*, appellan's legal representatives

1987 (1) ZLR p70

S v MHLANGA 1987 (1) ZLR 70 (SC)

Editor's Note:(1)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, Gubbay JA & McNally JA

Criminal appeal

25 February & 5 May 1987

Flynote

Criminal law - rape - penetration - slightest penetration sufficient to constitute crime. Evidence - sexual offences - juvenile complainant - corroboration - false evidence by accused - whether can amount to.

Headnote

To establish the crime of rape, the slightest penetration of the female body by the male organ is sufficient. It is not necessary, in the case of a virgin, to show that the hymen was ruptured.

When dealing with the evidence of young children and in sexual cases generally, it is important to apply the cautionary rule because of the danger of children inventing evidence or involving a man who was not actually involved at all. False evidence by or on behalf of the accused may provide the necessary corroboration of the complainant, but only when

- (a) the lie must be deliberate;
- (b) the lie relates to a material issue;

- (c) the court is satisfied that the sole reason for the fabrication was a realisation of guilt and a fear of the truth and that there is no other reason for the false evidence being put forward, such as shame or a fear by the accused that his own evidence will not be enough; and
- (d) the accused's story must clearly be shown to be a lie by evidence other than that of an accomplice who has to be corroborated.

1987 (1) ZLR p71

DUMBUTSHENA CJ

Cases cited:

S v K en 'n Ander 1972 (2) SA 898 (A)

R v Judson 1965 RLR 501 (AD); 1966 (1) SA 88 (RA)

S v Mupfudza 1982 (1) ZLR 271 (SC)

S v Santos S-138-85 (not reported)

R v Penman (1986) 82 Cr App R 44

R v Chapman & Anor [1973] QB 774; [1973] 2 All ER 624 (CA)

Boardman v DPP [1975] AC 421 (CA)

R v Lucas [1981] 2 All ER 1008 (CA)

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

R v Stidolph 1965 RLR 552 (AD); 1966 (1) SA 535 (RA)

S v Ndlovu S-135-85

G Nyoni for the appellant

B N Sigidi for the respondent

Judgment

Dumbutshena CJ: I have had the advantage of reading in draft the judgment prepared by my learned brother, MR JUSTICE McNALLY. I do not agree that the identity of the offender has not been properly established. The complainant lived in the same building with the appellant for three years. It is common cause that she regarded him as her brother. It has not been shown that she harboured some hostility towards him. It also has not been shown that she made false accusations against him in order to shield her lover. She is too young to have a lover. Her allegations were simple and well told.

The appellant denied attempting to rape and raping the complainant. He said he was being framed by her mother because he reported to her that his \$4 went missing in the house. It was

his story that he was arrested by the police after making that report to the complainant's mother. He also testified that at all relevant times he had his wife with him during the month of December 1985. The trial court did not believe him. He was convicted on both counts and sentenced to seven years' imprisonment with labour.

The complainant was, at the time the offences were committed, nine years of age. The appellant was aged 34 years. He was married and had a big family. His wife lived in the Sawmill Communal Land. She used to make periodic visits to Bulawayo to see her husband who was working there. He was a lodger at the house of the complainant's parents. As stated above, he had lived in their house in that capacity for three years. The complainant's parents regarded him as their son.

1987 (1) ZLR p72

DUMBUTSHENA CJ

The State case was that the complainant committed attempted rape and rape on two consecutive days during December 1985. The gist of the complainant's evidence was that the appellant called her to his room on the first occasion, the day he attempted to rape her. She was playing in the yard of her parents' house. She went to the appellant's room. He placed her on a small green bench in his room. He removed her pants and made her stand on the bench with her legs apart. He took down his trousers up to his knees. He then attempted to insert his penis into her vagina. He failed, but he made movements which were consistent with those made by a man in the process of sexual intercourse. After this attempt she said he threatened to assault her should she report the incident to her parents. She did not report.

On the following day he again called the complainant to his room. This time he used his bed. He placed the complainant on the bed and removed her underpants. He pushed his penis into her vagina. She felt pain. She says there was slight penetration. In reply to a question put to him, Dr Mabiza said if there is no evidence of "rupture of the hymen we cannot say penetration has been effected beyond the hymen, but as far as the hymen is concerned penetration may have gone that far". Then he was asked:

"So if I understand you correctly, the mere fact that the hymen is still intact, that it has not been broken, does not exclude the possibility of slight penetration because there has to be slight penetration anyway before the hymen can be ruptured? - That is correct."

For the purposes of establishing the offence of rape it suffices for the penetration to be slight. In Smith & Hogan *Criminal Law* 5 ed p 407 the learned authors say:

"The slightest penetration will suffice and it is not necessary to prove that the hymen was ruptured."

In *South African Criminal Law Vol II* 2 ed Hunt says at 440:

"There must be penetration, but it suffices if the male organ is in the slightest degree within the female body. It is not necessary in the case of a virgin that the hymen should be ruptured..."

See *S v K en 'n Ander* 1972 (2) SA 898 at 900C.

Although Dr Mabiza said in his report penetration was not effected he was, as he commented in

his evidence-in-chief, thinking of penetration "from the

1987 (1) ZLR p73

DUMBUTSHENA CJ

medical point of view" because "if the hymen is still intact we would say that penetration was not effected". Here we are concerned with penetration from the legal point of view. Dr Mabiza, however, agreed that the fact that the hymen was not ruptured did not exclude slight penetration.

To prove that the complainant had sexual intercourse with the appellant the State relied on the fact that she had an infection in her private parts. Her mother noticed, albeit during the month of May, that she was consistently scratching her private parts. She became suspicious. She examined her panties and saw a whitish yellowish discharge. When she was medically examined the doctor found the same stuff. It was thought the infection had been sexually transmitted.

Before convicting the magistrate warned himself of the danger of convicting on the uncorroborated evidence of a complainant, especially a young complainant. When dealing with the evidence of young children, and in sexual cases generally, it is important to apply the cautionary rule because of the danger of children inventing evidence or involving a man who was not involved in raping the complainant. See *R v Judson* 1965 RLR 501 (AD) at 505-506; *S v Mupfudza* 1982 (1) ZLR 271 (SC) at 273F-G and *S v Santos* S-138-85 (not reported).

The learned magistrate was aware of applying the cautionary rule and of the need to look for corroboration. He said in his judgment:

"In the case of young children the court has to guard against the possibility of fantasising, but it is abundantly clear from the medical report that the complainant's private parts have been interfered with and it would appear that she is suffering from a sexually transmitted disease and this to my mind lends considerable support to the complainant's testimony notwithstanding the gap between the offences and the medical examination. The complainant, as I indicated, mentions being placed on a stool - this stool was seen at the premises of the accused."

In my view the fact that the infection was only found in May does not reduce the corroborative importance of that piece of evidence. There was no suggestion that the complainant had sexual intercourse with someone else other than the appellant. Where there is evidence of sexual intercourse and a girl is found with an infection that can be transmitted sexually it can be presumed without more that the infection was contracted during that intercourse.

1987 (1) ZLR p74

DUMBUTSHENA CJ

The fact that the complainant used to attend hospital monthly for medical examinations because she was suffering from asthma, and the infection was not discovered during those medical examinations, does not reduce the infection's evidential importance because one looks for asthma in the respiratory organs which are located in the upper part of the body. The infection was in the lower part of the body.

One piece of evidence the learned magistrate used to corroborate the complainant's evidence was the evidence on indications adduced by Woman Section Officer Ncube. WSO Ncube's evidence fitted like a jigsaw puzzle with the evidence of the complainant. There was a bench. Whether it was inside the room or outside the room when WSO Ncube visited the appellant's room is neither here nor there. She saw the bench which the complainant alleged was used to achieve a convenient height in order to enable the appellant to have sexual intercourse with the complainant. There was a bed in his room on which the complainant alleged she was raped. What is more important, the complainant made indications. The appellant was invited to make indications or to comment on the indications made by the complainant. He refused to make them or to comment on the indications made to WSO Ncube by the complainant. The evidence on indications is better appreciated when one realises that it confirms in material respects the complainant's evidence.

The court believed her evidence. If it had not, there would have been no necessity to look for corroboration of her evidence. See *S v Mupfudza supra*. Of her evidence the magistrate said:

"I found this little girl in spite of her age, to be a credible witness. She gave her evidence well and with a fair amount of detail."

It seems to me that the learned trial magistrate should have looked for more corroboration of the complainant's version in the evidence of the appellant and that of his wife. They gave a false alibi which may provide corroboration of the evidence of the State. In doing this the court must realise that: "False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any

1987 (1) ZLR p75

DUMBUTSHENA CJ

support for identification evidence" *per* HUTCHINSON J in *R v Penman* [1986] 82 Cr App R 44 at 47.

Using the approach outlined above it seems to me that the appellant lied when he put up his alibi. A false alibi, in a case such as this one, a case in which the complainant has told the court truthful evidence, tends to corroborate the complainant's evidence. Why did the appellant ask his wife to tell lies? He asked her to testify in order to save him from conviction. He knew he had told lies. He wanted someone else to make these lies good.

The question is: can the appellant's and his wife's lies told in court be used to corroborate the complainant's evidence? The doubts of doing so and the appropriateness of using such lies to corroborate the complainant's evidence are crisply dealt with in *Phipson on Evidence* 13 ed paras 32-19. The learned author says of lies told by an accused:

"(1) The mere fact that a jury reject the account given by a defendant does not of itself, provide corroboration of evidence which the jury has preferred to that of the defendant.

- (2) The fact that a defendant has told a lie does not of itself amount to corroboration.
- (3) A lie told out of court is capable in some circumstances of constituting corroboration.
- (4) Until 1981 doubt existed as to whether lies told in court could amount to corroboration. In *Chapman* the Court of Appeal said that lies told in court could not amount to corroboration (based on propositions (1) and (2) *ante*). However a differently constituted Court of Appeal in *R v Boardman*, while accepting that the decision in *Chapman* was right on its own facts, doubted whether it was generally applicable. Another court has recently agreed with the view expressed in *Boardman*.
- (5) The law which was thus unclear has been clarified recently by the Court of Appeal in *R v Lucas*. The Court laid down four certain criteria and said that if they were met lies both in and out of court could provide corroboration. The criteria were as follows:
 - (i) The lie had to be deliberate.
 - (ii) It had to relate to a material issue.
 - (iii) The motive for the lie had to be a realisation of guilt and fear of the truth. The court said that in appropriate cases the jury should be reminded that 'people sometimes lied in an attempt to bolster up a just cause or out of shame or out of a wish to conceal

1987 (1) ZLR p76

DUMBUTSHENA CJ

disgraceful behaviour from their family.'

- (iv) The statement had to be clearly shown to be a lie by evidence other than that of the accomplice who was to be corroborated ie by admission or by evidence from an independent witness."

After the decision in *R v Chapman* [1973] 2 All ER 624 there was some doubt as to whether lies told in court could amount to corroboration. However in *Boardman v DPP* [1975] AC 421 (CA) the restriction of corroboration to lies only told to the police was said to be confined to the circumstances found in *Chapman's* case. ORR LJ said at 428H-429B:

"As to lies by the defendant in court we accept the correctness of the decision in *R v Chapman* [1973] QB 774 on the facts of that case, and that it will be applicable in most cases. Whether the judgment should be treated as authority for the proposition that a lie told by the defendant in evidence can never, whatever the circumstances, be capable of amounting to corroboration is a matter on which we feel some doubt but which does not arise for determination in the present case. In our view the short answer to the present problem is that the question of lies in court was inextricably bound up with that of lies before the hearing to Inspector Baker, for the jury could not be satisfied that the defendant had lied to the inspector unless they disbelieved the defendant's evidence at the trial that he had never mentioned expulsion of S .."

This apparent confusion in the authorities was put to rest in *R v Lucas* [1981] 2 All ER 1008 (CA). LORD LANE CJ explained the confusion created by the authorities at 1011C-J in these words:

"There is, without doubt, some confusion in the authorities as to the extent to which lies may in some circumstances provide corroboration and it was this confusion which probably and understandably led the judge astray in the present case. In our judgment the position is as follows. Statements made out of court, for example statements to the police which are proved or admitted to be false, may in certain circumstances amount to corroboration. There is no shortage of authority for this proposition (see, for example, *R v Knight* [1966] 1 All ER

647; [1966] 1 WLR 230 and *Credland v Knowler* (1951) 35 Cr App R 48). It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate. In the words of LORD DUNEDIN in *Dawson v M'Kenzie* 1908 SC 649, cited with approval by LORD GODDARD CJ in *Credland v Knowler* (at 55):

1987 (1) ZLR p77

DUMBUTSHENA CJ

'...the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had not such false statement been made.'

To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that of an accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.

As a matter of good sense it is difficult to see why, subject to the same safeguard, lies proved to have been told in court by a defendant should not equally be capable of providing corroboration. In other common law jurisdictions they are so treated: see the cases collated by Professor JD Heydon (1973) 89 LQR at 561) and cited with apparent approval in *Cross on Evidence* (5 ed (1979) p 210).

It has been suggested that there are dicta in *R v Chapman* [1973] 2 All ER 624; [1973] QB 774 to the effect that lies so told in court can never be capable of providing corroboration of other evidence given against a defendant. We agree with the comment on this case in *Cross on Evidence* (5 ed (1979) pp 210-211) that the court there may only have been intending to go no further than to apply the passage from the speech of LORD MACDERMOTT in *Tumahole Bereng v R* which we have already cited.

In our view the decision in *R v Chapman* on the point there in issue was correct. The decision should not, however, be regarded as going any further than we have already stated. Properly understood, it is not authority for the proposition that in no circumstances can lies told by a defendant in court provide material corroboration of an accomplice. We can find ourselves in agreement with the comment on this decision made by this court in *R v Boardman* [1974] 2 All ER 958 at 963; [1975] AC 421 at 428."

In the instant case the appellant's evidence was not believed. He testified that

1987 (1) ZLR p78

DUMBUTSHENA CJ

his wife was living with him during the month of December 1985. He then called his wife to give evidence in support of his "alibi". She testified in support of her husband. She told lies on his behalf. Her evidence differed from the statement she made to the police. Under

cross-examination she changed her evidence and told the court that she came to Bulawayo in December for short periods. She could not remember the dates she visited the appellant. She was trying to support his "alibi". Her evidence was false. In *R v Mlambo* 1957 (4) SA 727 (A) at 738C MALAN JA said:

"...if an accused deliberately takes the risk of giving false evidence in the hope of...escaping conviction altogether and his evidence is declared to be false and irreconcilable with the proved facts a court will, in suitable cases, be fully justified in rejecting an argument that, notwithstanding that the accused did not avail himself of the opportunity to mitigate the gravity of the offence, he should nevertheless receive the same benefits as if he had done so."

See also *R v Stidolph* 1965 RLR 552 (AD) at 555; 1966 (1) SA 535 (RA) at 536-537.

On the strength of the cases cited above it is proper to take the lies told by the appellant and his wife as evidence corroborating the complainant's evidence. I have no doubt in my mind that the appellant told lies in order to escape conviction. The evidence adduced at the trial presents to me clear proof of every material fact necessary to sustain conviction. In my view the facts of this case differ significantly from those in *S v Ndlovu* S-135-85. The complainant's evidence in *Ndlovu's* case created doubts. She said she had fallen and damaged her underpants. She also alleged she had been sexually assaulted. In the instant case the complainant's evidence was clear and credible. The learned trial magistrate applied the cautionary rule. He found sufficient evidence to corroborate the complainant's evidence.

For these reasons it is my judgment that the court *a quo* convicted the appellant after carefully considering the evidence before it. It found the complainant's evidence credible. It convicted the appellant after applying the principles laid down in *S v Santos supra*. In that case this court considered the dangers inherent in the evidence of children of tender years and the importance of looking for corroboration. In the instant case the evidence adduced by the complainant was clear, credible and more coherent than the evidence adduced by the complainant in *S v Santos*. In my view the appellant was correctly convicted on both counts.

1987 (1) ZLR p79

DUMBUTSHENA CJ

Mr *Nyoni*, who appeared for the appellant, conceded that deterrent sentences are called for in offences in which children are sexually abused. He, however, submitted that the court *a quo* could have suspended a portion of the sentence of seven years' imprisonment with labour. Mr *Nyoni* based his submission on the ground that the complainant's virginity was not affected. Besides, the appellant was a first offender. In my view, Mr *Nyoni's* submission is sound in a case in which there are no features of aggravation.

In this case the appellant sexually abused a child of nine years of age. He was determined to abuse her. He took advantage of the good relationship prevailing between the complainant's family and himself. He was a lodger in the house of the complainant's parents. The complainant regarded him as a brother. It was easy for him to call the little girl and to fulfil his intentions.

It is the duty of the courts to protect young children from the criminal designs of their would-be abusers. The only way to protect them is by imposing severe sentences which meet the approval of society while at the same time doing as humanely as possible justice to the

offender. In doing that the court should never lose sight of society's revulsion to cases involving abuse of children of tender years.

This nine-year-old girl must have suffered silently from the pains of an infectious disease. From her silence it is proper to presume that she was afraid of telling her mother.

The magistrate properly, in my view, took into account when assessing sentence all the personal circumstances favourable to the appellant. He, however, came to the conclusion that there were more factors of aggravation than those of mitigation. I cannot say he erred or misdirected himself in any way. He imposed a sentence of seven years' imprisonment with labour having taken into account the two counts of attempted rape and rape as one for purposes of sentence. This in my opinion is an appropriate sentence for an offence that involves child abuse. For these reasons the appeal against sentence must fail.

Accordingly the appeal is dismissed.

Gubbay JA: I agree with the judgment of the learned CHIEF JUSTICE and there is nothing that I can usefully add.

1987 (1) ZLR p80

McNALLY JA

McNally JA: In this appeal the appellant has been convicted of attempted rape and of rape. The offences allegedly occurred on two separate occasions and involved a nine-year-old girl with whose family the appellant was a lodger. In consequence it is said the girl developed a vaginal infection.

The appellant denied all knowledge of the matter. He said the only explanation for the charges could be that he had complained that a sum of \$4 had been missing from his room. Soon after this complaint the allegation had been made against him.

The case has a considerable similarity on the facts to *S v Ndlovu* S-135-85 (not reported). Since this court in the *Ndlovu* case reversed the conviction, Mr Nyoni, who appeared for the appellant, not unnaturally relied heavily on the facts and the reasoning in that case.

In both cases a lodger was involved; in both cases the child did not cry out or complain although there were other people nearby; in both cases the matter was only discovered when the mother later noticed evidence of infection and questioned the child. In the present case the alleged offences took place in December 1985 and the infection was discovered only towards the end of May 1986. The medical examination took place on 1 June 1986.

[His Lordship examined the evidence and concluded:]

In the final analysis, I am not satisfied either that there was adequate proof of penetration or that there is adequate corroboration or support for the identification of the appellant as the offender. Even, therefore, if I were to find the conviction supportable, I would reduce the charges in both cases to indecent assault. I would not accept that there was an attempt at penetration because of the strong impression I have that this little girl was not significantly hurt on either occasion, and was not physically or emotionally traumatised. That is precisely why

there is the danger that she may be shielding the real offender.

For the reasons I have given, I am not satisfied that the identity of the offender has been properly established, and I would allow the appeal and set aside the convictions and sentence.

Sansole & Senda, appellant's legal representatives.

1987 (1) ZLR p81

MAZONGORORO PAPER CONVERTERS (PVT) LTD v MAZONGORORO SALES (PVT) LTD **1987 (1) ZLR 81 (SC)**

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

25 March & 5 May 1987

Flynote

Company law - winding - up - grounds for - inability to pay debts - loan to respondent company and petitioner's rights arising therefrom - long - term loan which has not been called in - "just and equitable" - destruction of relationship between members of company - petitioner who is not a member - allegation of mismanagement - what creditor must show - application for winding - up - when should be referred to trial - Companies Act [Chapter 190] - ss 178 and 179.

Headnote

The appellant company applied for a winding-up order in respect of the respondent company. In spite of the similarity in their names, the two companies were only indirectly connected with each other, the appellant being controlled by TSL Ltd, which in turn had a minority interest in the respondent. Because TSL became dissatisfied with the financial management and profitability of the respondent, it sought to put the respondent into liquidation.

There were two main grounds for the petition. The first was that the respondent was unable to pay its debts. The debt in question was a loan that had been made to the respondent. The respondent averred that the loan was a long-term one; there was, in any event, no clear evidence as to the precise nature of the loan and whether it was actually due and payable. The second ground given for winding up the respondent was that it was "just and equitable" to do so, because (a) there had been such misuse of the respondent's assets as to prejudice shareholders and creditors and (b) that the relationship between the members of the

1987 (1) ZLR p82

McNALLY JA

respondent was of a quasi-partnership nature and that relationship was being destroyed.

The trial judge dismissed the application. On appeal:

Held, dismissing the appeal, that the appellant not having made demand for the payment at least three weeks before the application, had to rely on the respondent's contingent and prospective liabilities. On the evidence presented, it could not be said that, if the debt were payable a year or two hence, the respondent would be unable to repay it.

Held, further, that the appellant being merely a creditor of the respondent and not a member or shareholder, could not claim that the relationship between the members of the respondent was being destroyed. Before a creditor may apply for winding-up on the ground that it is just and equitable, he must have a legitimate interest; he must show that the mismanagement is such that the company will be reduced to insolvency, so as to reduce his prospects of being paid.

Held, further, that the appellant's claim that the application should not have been dismissed but sent to trial for oral evidence, this was not an appropriate case to do so. The appellant's case had been confusingly presented and the situation had changed with time. Other action could be taken to protect the appellant's interests.

Cases cited:

Katsapas v Norvalspont Investments (Pty) Ltd 1969 (4) SA 403 (O)

Cluver v Robertson Portland Cement & Lime Co Ltd 1925 CPD 45

Woomack v Commercial Vehicle Spares (Pvt) Ltd 1968 (2) RLR 10 (GD); 1968 (3) SA 419 (R)

Emphy & Anor v Pacer Properties (Pty) Ltd 1979 (3) SA 363 (D)

J Sayce for the appellant

A P de Bourbon SC for the respondent

Judgment

McNally JA: In this judgment I will refer to the parties as "Converters" and "Sales" respectively. Converters applied in the High Court for a winding-up order in respect of Sales. In its petition it alleged that Sales owed it \$392 907,97 in respect of goods sold and delivered between July 1985 and February 1986; and in respect of goods sold and delivered and various other disbursements and interest between March and June 1986.

In view of the course that events took later, it may be noted that there was no averment in that context that demand had been made or that the sum was due and payable. Elsewhere in the petition, the indebtedness was described as a

1987 (1) ZLR p83

McNALLY JA

loan "which is now due and payable"; yet elsewhere as a long term loan.

In accordance with the provisions of s 179 of the Companies Act [*Chapter 190*], Converters

Copyright Juta & Co Ltd

relied on three grounds as the basis for the winding-up of Sales by the court. These were -

1. that Sales was unable to pay its debts in terms of s 179(f) as read with s 178 (a) and (c) of the Act;
2. that Sales had lost more than 15% (presumably this is a misprint for 75%) on its paid-up share capital;
3. that it was just and equitable that it be wound up in view of its inability to continue to trade without the position of its creditors being considerably jeopardised, due to its being unable to pay its existing debts and any future debts.

Presumably these latter two allegations were made in contemplation of subsections (e) and (g) of s 179 of the Act.

The second of these allegations can, I think, be disposed of without much difficulty. The facts alleged in support of it showed that the shareholders' capital had been considerably reduced over the period January to June 1986. However, the shareholders' capital is almost entirely loan capital. The actual paid-up share capital, which is what s 179(e) is concerned with, was only \$100. It does not seem to me that subs (e) was designed for such a situation. Indeed Mr *de Bourbon*, in an interesting historical *excursus*, told us that in England the provision was introduced by s 67(5) of the Joint Stock Companies Act 1856 (19 and 20 Victoria c 47), to protect holders of joint stock. It was omitted from the Companies Act of 1862 and has never been introduced in any subsequent Companies Act in that country. Although the provision has survived in this country and in South Africa, I wonder to what extent it is an anomaly without significance in the present day. In any event I am satisfied that it has not been shown that Sales has in fact lost 75% of its paid-up share capital of \$100, or that that share capital has become useless for the business of the company.

We are left, therefore, with two alleged bases for winding - up -

1. Inability to pay debts;
2. Just and equitable.

Before I go on to consider these two questions, I think it is important and relevant to look at the structure and relationship of these two companies as well as their relationship with their parent company, TSL Limited (TSL).

1987 (1) ZLR p84

McNALLY JA

The petition reveals that TSL, which is a public company, is the financial power behind the throne. TSL owns 51% of the shares in Converters and 49% of the shares in Sales. The rest of the shares in each company are owned by a group of individuals (described by the petitioner as "the family"), who are, in the fashionable language of the moment, emergent businessmen. Their total financial contribution to the paid-up share capital of both companies was \$100. The balance of the working capital came and still comes from TSL. The family's contribution came in the form of their own services, their know-how, their contacts and their ability to obtain foreign

currency allocations. It is a partnership of mutual self-interest, each, in the unfashionable language of the moment, exploiting the other.

That is the reality of the situation, stripped of its corporate veil. The technique by which the partnership is achieved, and by which the financier seeks to protect his investment, demands a structure which to some extent disguises these realities.

Thus the petitioning company, Converters, is controlled by TSL, which has a 51% shareholding to the family's 49%. The majority of the directors of Converters are TSL nominees. This ensures that Converters speaks with the voice of TSL. Sales, however, is controlled by the family, in the sense that they own the majority of shares and nominate the majority of directors. TSL is a minority shareholder. The family's power, however, is checked to the extent that the purse-strings are held indirectly by TSL, directly by Converters, through which company TSL funds are channelled to Sales.

One can readily understand that the financier would want some mechanism whereby he could protect his investment. The structuring of the shareholding, the directorate and the capital of the two companies, Converters and Sales, was designed to provide TSL with ultimate control. Equally one can understand that when things go wrong, when the financier is dissatisfied with the return on his investment, or the family is convinced that its contribution is being used to benefit the group rather than its own company, it may become necessary for each side to go its own way.

Thus it was that Converters, speaking with the voice of TSL, sought to wind- up Sales. Essentially because it was dissatisfied with the financial management and profitability of Sales, it sought to put Sales into liquidation.

This, then, is the broad picture. But to put a company into liquidation is a serious matter. It was the view of the learned judge who heard the case in the

1987 (1) ZLR p85

McNALLY JA

High Court that the petitioner had not satisfied him on the facts. He held that there was a *bona fide* dispute of fact as to Sales' inability to pay its debts and in particular as to the question whether whatever was owed by Sales to Converters was already due.

The learned judge did not deal specifically with the other two grounds on which it was alleged that Sales should be wound up - namely that it was just and equitable, and that 75% of the paid-up share capital had been lost. I have already disposed of the latter ground.

The argument that it was just and equitable was, in the court a *quo*, based on allegations of misuse of company assets. It was attempted to give the argument an entirely new content on appeal. I will deal with this in due course.

Let me then turn to deal with the basic questions. They are:

1. Was the learned judge wrong to find that there was a *bona fide* dispute of fact about Sales'

alleged inability to pay its debts?

2. Is there a basis, albeit not one considered by the learned judge, for saying that it is just and equitable that Sales be wound up?

INABILITY TO PAY DEBTS

I have earlier indicated that there was no allegation in terms of s 178(a) of the Companies Act that Converters had made formal demand for the payment of the sum of \$392907,97 at least three weeks before its application for a winding-up order. Accordingly, Converters must rely solely on s 178(c).

In the course of the appeal, it became clear that Converters did not rely on the allegations about debts due to other creditors. In fact, it seemed to be common cause that these had been paid off. It was therefore only the alleged debt to Converters which was in contention.

The first point made by Mr Z Utsiwegota, who filed an affidavit on behalf of Sales, was that it was at all times agreed with TSL that the finance for the project would be "long-term". In support of this contention he drew attention to the Auditors' Report annexed to the petition, which describes the sum of \$521 721 (which as at 31 October 1985 was the size of the amount allegedly owing by Sales to the group) as "long-term loans".

It is also a little surprising, as Mr *de Bourbon* pointed out, that Converters, in its own petition, seems to indicate a realisation of the weakness of its

1987 (1) ZLR p86

McNALLY JA

position by making an attempt to alter it. At p 53, in a Balance Sheet for Sales as at January 1986, the sum of \$521 721 is shown under "Loans and Long-Term Liabilities". Yet at p 52, in the Balance Sheet for Sales as at 30 June 1986, this figure has been shifted to fall under the heading "Current Liabilities".

It is true that this may be explicable on the basis that, like an overdraft, the amount owing, as long as things were going well, was not regarded as a sum which would be called up at short notice; but that when things went badly a different view was taken. Be that as it may, what the court needs to know is not what the lender's policy was, but what its rights were. Was it in fact a long-term loan? By what right did it decide to foreclose at short notice?

These questions are not adequately answered on the papers. As I indicated at the beginning of this judgment, the petition itself showed confusion in describing the amount claimed as money owing for goods sold and delivered; in the next breath as a loan now due and payable; and in the annexures as a long-term loan and again as a current liability.

In his replying affidavit, Mr Walters, the Managing Director of TSL, has sought to explain the system of financing of companies in the TSL group. He says:

"The nature of 'loans' within the TSL Group needs to be clarified - although this has previously been explained to the family. All the Companies operate on inter-company accounts, which is an interest bearing current account

payable at call to finance inter-company trade and current operational expenses. As a matter of accounting practice these balances have been shown as 'loans' within the capital employed in the audited accounts and the use of the term in these papers must be construed accordingly."

He goes on to explain how, under this system, the funding of the respondent (Sales) by the petitioner (Converters) varied from month to month, the indebtedness rising and falling just as an individual's overdraft with his bank might rise and fall. He concludes this part of his affidavit by saying:

"...at no time was financing of the Respondent considered to be long term. That Company has no fixed assets of any real value to secure such a loan. Loans at call were given to finance current operations only. It is not therefore to be construed that these loans are long term. On the contrary the standard is that they are repayable at call."

1987 (1) ZLR p87

MCNALLY JA

The three phrases that I have emphasised in this passage are significant. In legal language Mr Walters is saying: "I admit there is no express agreement with the respondent that these amounts are repayable at call. But it must be implied that that is the position because that is a term necessarily to be implied, in accordance with normal business practice, in order to give business efficacy to our agreement".

There is no evidence as to what normal business practice is in this regard, nor anything from which it can be inferred that there was an implied or tacit agreement that these moneys would be payable at call or on demand. And, although one can understand the petitioner's attitude, can one say that it is unreasonable for the respondent to claim that it could not be expected to operate under the constant threat of instant extinction; that a reasonable period of notice is necessarily to be implied; and from the nature of the relationship that period is to be measured in years rather than months? Can it be said that what might be reasonable between two parties at arms length is reasonable when those parties are sister companies within a group?

I do not know the answers to these questions. I readily understand that someone in Mr Walters' position (he is Managing Director of TSL) would feel that he needed a control mechanism so that he could "crack the whip" when necessary. But in fairness to "the family" one would have expected an express, ideally a written, agreement as to the terms on which finance would be made available. In the absence of evidence of such an express agreement, their contentions are not *prima facie* unreasonable. And Converters' case has not been assisted by the confusing and contradictory way in which it has been put forward.

All in all, therefore, I am not satisfied that the learned judge was wrong when he found that there was a *bona fide* dispute as to whether the money claimed by Converters was due and payable.

I must add that I appreciate that the court is enjoined by s 178(c) to take into account the contingent and prospective liabilities of Sales. The amount claimed (or, accepting that some of the figures are rather vaguely disputed by Sales, at least a substantial part of it) is clearly a prospective liability of Sales. On the information available, however, it cannot be said that, if the amount were payable in a year or two, Sales could not pay its debts.

I am not satisfied therefore that Converters has made out a *prima facie* case for the winding-up of Sales on the ground that it is unable to pay its debts.

1987 (1) ZLR p88

MCNALLY JA

JUST AND EQUITABLE

The point must be made at the outset that Converters has twice fundamentally shifted its ground between the High Court hearing and the appeal hearing.

In the High Court, as I indicated at the beginning of this judgment, the allegation that winding-up was just and equitable was based on an allegation that it was:

"...unable to continue to trade without the position of its creditors being considerably jeopardised, due to its being unable to pay its existing debts and any further debts."

I am not sure that this is saying anything more than that it is unable to pay its debts.

Then, in the notice of appeal, Converters alleged that:

"...it was established *prima facie* that there had been such misuse of company assets by the respondent as to prejudice shareholders and creditors (and) that it was just and equitable that the respondent be placed in provisional liquidation."

At the hearing of the appeal the appellant applied to amend its grounds by deleting this allegation and replacing it with the following, which in fact repeats the same averment, and adds another:

"...it was established *prima facie* that it was just and equitable for the Respondent to be placed in provisional liquidation on the basis:

- (i) that there had been such misuse of company assets by the Respondent as to prejudice shareholders and creditors; and
- (ii) that the relationship between the members was of a quasi- partnership nature and such relationship had been destroyed."

The difficulty that I have with this aspect of the application is that Converters is not a member or shareholder of Sales. It is simply a creditor. This fact alone seems to me to destroy ground (ii) of the proposed amended grounds of appeal because that ground relates exclusively to the relationship between members. Had TSL been the petitioner the matter might have been different. But it can rarely be appropriate for a creditor who is not a member to complain that the relationship between the members has been destroyed.

As to the other allegation about misuse of company assets, I would deal with

1987 (1) ZLR p89

MCNALLY JA

this on the basis that it allegedly prejudices creditors. I would ignore the allegation that it

prejudices shareholders because Converters is not a shareholder.

Although a creditor may apply for a winding-up on the ground that it is just and equitable -

"...he must have a legitimate interest, eg if he alleges mismanagement he must show that due to the mismanagement the company will be reduced to insolvency so as to prejudice his prospects of being paid."

(*Henocheberg on the Companies Act* 4 ed vol 2 p 588) and see *Katsapas v Norvalspont Investments (Pty) Ltd* 1969 (4) SA 403 (O) at 406F-H. Moreover, as was said in *Cluver v Robertson Portland Cement & Lime Co Ltd* 1925 CPD 45 at 52:

"Misconduct on the part of the directors, and misapplication of funds, may give ground for an action against the directors, but will not in themselves justify the winding-up of a solvent company capable of carrying on its business, especially against the wishes of the majority of the shareholders."

In the final analysis what a creditor, as opposed to a member, has to show in order to take advantage of the "just and equitable" provision of the Act, is almost the same as what he has to show under s 179(f), namely that the mismanagement is such that the company "will be reduced to insolvency so as to prejudice his prospects of being paid" (*Henocheberg loc cit*).

It seems to me that in this regard Converters faces the same problem as before, namely that if its debt is not due and payable "at call" there is nothing to suggest that the company (Sales) is not capable of carrying on its business, and is not a solvent company, and will not be able to pay Converters in due course.

Accordingly, I would refuse the application to amend the grounds of appeal on the basis that the amended ground is not a good ground of appeal. I would dismiss the appeal based on Sales' inability to pay its debts and on the allegation that it is just and equitable that Sales be wound up.

It remains only to consider the last leg of Converters' argument, namely that if all else fails the application should not have been dismissed but should have been sent to trial for oral evidence.

1987 (1) ZLR p90

McNALLY JA

It seems to me that as a general rule the approach set out in *Henocheberg op cit* at 583 is the correct one, namely that "the procedure for winding-up is not designed for the resolution of disputes as to the existence or non-existence of a debt". True, in this case the issue is not so much the existence or non-existence of the debt, but whether or not it is due. Nonetheless the principle is the same. It does not seem to me to be equitable that a company in the position of Sales should be handicapped in its efforts to prove itself viable by being forced to remain under the cloud of a winding-up application.

The applicant has failed to establish *prima facie* the state of affairs which it set out to prove; the position has changed and a considerable time has elapsed since the matter was set down. In all these circumstances it seems to me that equity demands that the slate be wiped clean.

It is true that there have been cases where an application for a provisional winding-up order has

been referred to trial. In this country there was the case of *Woomack v Commercial Vehicle Spares (Pvt) Ltd* 1968 (2) RLR 10 (GD); 1968 (3) SA 419 (R), and in South Africa *Emphy & Anor v Pacer Properties (Pty) Ltd* 1979 (3) SA 363 (D). However, I am satisfied that the cases are clearly distinguishable. *Woomack's* case involved allegations of fraud which had to be investigated. *Emphy's* case involved a dispute between the only two members (each holding 50 shares) of a company which was in the nature of a partnership. It was essential, in order to do justice between the two, to investigate the allegations.

That is not the position here. Converters' case has been confusingly presented. A considerable period of time has passed during which the situation has changed. Converters (or its *alter ego* TSL) can take other action if necessary to protect its interests.

In the circumstances it is unnecessary to deal with the question of Mr Walters' *locus standi*.

I would dismiss the appeal with costs.

Gubbay JA: I agree.

Manyarara JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

Gollop & Blank, respondent's legal representatives

1987 (1) ZLR p91

S v NGARA 1987 (1) ZLR 91 (SC)

Court **Supreme Court, Bulawayo**

Gubbay JA, Manyarara JA & Korsah JA

Criminal appeal

6 April & 5 May 1987

Flynote

Criminal procedure - conviction on evidence of single witness - failure by trial court to appreciate that witness an accomplice - failure to warn witness - effect.

Evidence - accomplice - what is - person offering bribe to official - corroboration of accomplice - similar fact evidence as - what is similar fact evidence.

Appeal - misdirection or irregularity during trial - finding on appeal that there has been no miscarriage of justice despite misdirection or irregularity.

Criminal procedure (sentence) - bribery - appropriate sentence.

Headnote

Special caution is observed in evaluating the credibility of an accomplice because -

- (a) he is *ex hypothesi* a criminal himself;
- (b) he has taken part in the commission of the offence, or is an accessory, and so is peculiarly equipped by virtue of his inside knowledge of the crime to convince the unwary that his lies are the truth; and
- (c) there is a possibility that he may have implicated the accused in the belief that by so doing he will secure an indemnity for himself against prosecution for the offence.

A person who offers or gives a bribe to an official is an accomplice to the offence that official commits under the Prevention of Corruption Act [Chapter 70].

Although in terms of s 253 of the Criminal Procedure and Evidence Act

1987 (1) ZLR p92

[Chapter 59] it is competent for a court to convict on the single evidence of a competent and credible witness, this does not apply when the witnesses are accomplices. In that situation, s 254 of the Act applies, and there must be proof aliunde of the commission of the offence or the accomplice must be confirmed. In addition, the accomplices should be warned. Failure to adhere to these requirements is a serious misdirection. Nevertheless, where the magistrate fails to realise that the witness is an accomplice and convicts the accused, the appeal court will consider on the evidence (and credibility findings, if any), unaffected by the misdirection, whether there is proof of guilt beyond a reasonable doubt. If it does so consider - and the onus is on the State to satisfy it - then there is no resultant miscarriage of justice and the conviction may be upheld.

When looking for corroboration of an accomplice, what is looked for is corroboration in some material respect which shows, or tends to show, that the accomplice is reliable, though it need not necessarily show that the accused is the offender. The court must be satisfied that it can safely rely on the accomplice when he says it was the accused who committed the crime and it must be satisfied that the inherent danger of false incrimination has been eliminated. Where there are several counts, each testified to by a single witness, the evidence on one count may be taken to corroborate the evidence on others, provided that the acts spoken of by each accomplice bear a striking similarity to one another.

Corruption of any form is viewed by the courts with abhorrence, particularly when resorted to by police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity. Deterrence and public indignation must predominate above all other factors in the assessment of the penalty.

Cases cited:

R v Mokoena 1932 OPD 79

R v Ellis 1961 R & N 468 (FSC)

S v Nyati 1977 (2) RLR 315 (AD)

S v Moyo S-153-86 (not reported)
R v Curry 1941 CPD 63
R v Maqutu 1946 EDL 220
R v Otter 1947 SR 111
S v Gokool 1965 (3) SA 461 (N)
S v Paweni & Anor 1985 (2) ZLR 133 (SC); [1986] LRC (Crim) 431
R v Simakonda 1956 R & N 463 (SR)
S v Ncube & Anor 1975 (2) RLR 150 (AD)
S v Strydom & Ors 1980 ZLR 364 (AD); 1981 (1) SA 236 (ZA)

1987 (1) ZLR p93

GUBBAY JA

R v Lakatula & Ors 1919 AD 362
R v Troskie 1920 AD 466
R v Galperowitz 1941 AD 485
S v Mubaiwa 1980 ZLR 477 (AD)
R v Ncanana 1948 (4) SA 399 (A)
R v Lembikani & Anor 1964 R & N 7 (FSC)
R v Juwaki & Anor 1964 RLR 604 (AD); 1965 (1) SA 792 (RA)
Boardman v DPP [1975] AC 421; [1974] 3 All ER 887 (HL)
R v Sims [1946] 1 All ER 697 (CCA)
DPP v Kilbourne [1973] 1 All ER 440 (HL)
R v Rance, R v Herron (1975) 62 Cr App R 118 (CA)
R v Scarrott [1978] 1 All ER 672 (CA)
S v Meager 1977 (2) RLR 327 (AD)
S v R 1977 (1) SA 9 (T)
S v van der Westhuizen 1974 (4) SA 61 (C)
Attorney-General v Chinyerere & Anor 1983 (2) ZLR 329 (SC)

J James for the appellant

J R Devittie for the respondent

Judgment

Gubbay JA: The appellant was charged in the magistrates court on six counts of contravening s 3(1)(a) of the Prevention of Corruption Act [*Chapter 70*]. He was acquitted on counts one, three and four. The particulars of the remaining counts upon which he was convicted were to the effect that being a person in the employ of the Government of Zimbabwe, he had unlawfully and corruptly accepted:

\$40 from Stanley Khumalo on 25 November 1984 (count two)

\$25 from Moffat Ncube between 27 - 30 December 1984 (count five)

\$20 from Edward Mutangiri on 2 February 1985 (count six)

as an inducement or reward for forbearing to do any act in relation to his principal's affairs or business. A sentence of six months' imprisonment with labour was imposed on each count, but of the total period, six months were suspended for five years upon appropriate conditions.

During the period in question the appellant was a serving member of the Zimbabwe Republic Police attached to the Traffic Branch, at the Drill Hall, in Bulawayo. His duties, of which he had considerable experience, included the issuing of what are colloquially referred to as "traffic tickets" (police form No. 265) to offending motorists. Each ticket, which is in triplicate, is one in

1987 (1) ZLR p94

GUBBAY JA

a book of twenty five and bears an individual serial number. It is headed "Notice to Appear in Court ". The procedure is simple. The traffic officer writes out the ticket in the presence of the motorist by completing the blank spaces in which are to be specified the date and time at which the offender is to appear before the magistrates court; the nature of the offence and the place, date and time of its occurrence; the amount of the deposit fine fixed and the date on or before which it is to be paid in order to avoid the appearance in court; the offender's full names, residential and business addresses, date and place of his birth, and finally, the officer's own name, rank and number. Once completed the top white copy of the ticket is given to the motorist and the pink and cardboard carbon copies must be handed in within a few days (at the very outside within two weeks) to the Traffic Branch at the Drill Hall for processing. There a record is kept of the serial numbers of the tickets in the book which has been issued to every traffic officer, and in the event of any ticket remaining outstanding for an excessive period, an enquiry is instituted.

On 21 March 1984, and as a result of information received from the Traffic Branch, Detective Section Officer Zvenyika conducted a search for missing traffic tickets in the appellant's living quarters at Ross Camp. In the headboard of the appellant's bed, he discovered six pink and cardboard copies, three of which related to the persons named in counts two, five and six.

Ticket No. 080793 bore the name and personal details of Stanley Khumalo. Its date of issue was 18 November 1984, the offence particularised was "no driver's licence", and the deposit fine to be paid by 27 November 1984, was fixed at \$100; the date to appear in court was 12 December 1984. Ticket No. 084361 bore the name and personal details of Moffat Ncube. Its date of issue was 27 December 1984, the offence particularised was "deviation of route - Pumula instead of Tshabalala", and the deposit fine to be paid by 12 December 1984 (presumably in error for 12 January 1985), was fixed at \$100; the date to appear in court was 18 December 1984 (presumably in error for 18 January 1985). Ticket No. 084640 bore the name and personal details of Edward Mutangiri. Its date of issue was 25 January 1985, the offences particularised were "(1) driving without supervision; (2) No 'L' plates", and the deposit fine, to be paid by 2 February 1985, was fixed at \$60; the date to appear in court was 15 February 1985. All three tickets had been signed by the appellant and bore his rank and number.

Being dissatisfied with the explanation proffered by the appellant as to his retention of the tickets at his living quarters, the police, in the person of DSO

1987 (1) ZLR p95

GUBBAY JA

Masunda, proceeded to investigate the matter with Khumalo, Ncube and Mutangiri. What they revealed to him resulted in the appellant being brought to trial. They were the State's main witnesses.

Stanley Khumalo testified that a week after he had been issued with a ticket, the appellant telephoned, identified himself and asked if they could meet. He agreed and suggested that the appellant come to his place of employment after 5 pm. As soon as they met the appellant made it known that if he were given some money the \$100 fine would not have to be paid. Khumalo enquired how much money the appellant required and was told to pay an amount he could afford. He thereupon handed the appellant two \$20 notes as well as the white copy of the ticket. The appellant then departed.

Moffat Ncube gave evidence that two days after he had been ticketed, he was unexpectedly approached in the street by the appellant, who was in uniform and riding a motor-cycle. The appellant asked how much money he had on him. He replied that he had \$5 with which he intended to purchase petrol. In fact a \$5 note was sticking out of the breast pocket of his shirt. The appellant extracted the \$5 note (and not \$25 as alleged in the charge sheet) saying that the ticket was no longer operative and would be destroyed.

Edward Mutangiri said that immediately after the ticket had been written out he asked the appellant if he could pay the fine that day. The appellant enquired whether he had any money on him and upon receiving an affirmative response, indicated that he would take \$20. Upon being handed a \$20 note the appellant tore up the ticket.

It admits to no doubt that all three witnesses appreciated the unlawfulness of their actions in paying the appellant. The monies were not extorted from them but given without objection in order to secure an advantage for themselves.

The appellant testified in his own defence. While admitting that it was he who had issued the

tickets, he adamantly denied the receipt of money from the three traffic offenders. He had no such dealings with them. He had not surrendered the carbon copies of the tickets because the nature of his duties in manning road blocks in conjunction with army personnel, and later as a member of the Presidential escort, did not afford him time to do so. So he put the tickets in a safe place in his quarters and subsequently forgot about them.

It is apparent from this brief summary that there was a direct and fundamental

1987 (1) ZLR p96

GUBBAY JA

conflict between the evidence of the three State witnesses and that of the appellant.

The trial magistrate considered that it was permissible in terms of s 253 of the Criminal Procedure and Evidence Act [Chapter 59] to convict the appellant on counts two, five and six, provided the single evidence of Khumalo, Ncube and Mutangiri, pertaining thereto was satisfactory in every material respect. See, for instance, *R v Mokoena* 1932 OPD 79; *R v Ellis* 1961 R&N 468 (FSC); *S v Nyati* 1977 (2) RLR 315 (AD) at 31E-H; *S v Moyo* S-153-86 (not reported). Finding the three witnesses to be credible and disbelieving the appellant's contrary evidence, he returned verdicts of guilty on each count.

In adopting that approach the magistrate seriously misdirected himself. He failed to appreciate that the three State witnesses were accomplices and that it was s 254 of the Criminal Procedure and Evidence Act to which regard had to be paid and not s 253. To some extent I sympathise with the magistrate in his error for neither the prosecutor nor the defence counsel drew his attention to the fact that he was dealing with the evidence of accomplices. That Khumalo, Ncube and Mutangiri were accomplices is not open to question. They had corruptly agreed to give the appellant money as an inducement for forbearing to do his duty, thereby rendering themselves liable to prosecution and conviction for contravening s 3(1)(b) of the Prevention of Corruption Act [Chapter 70] (now replaced by Act No. 34 of 1985). As the givers they were intimately associated in the illegal passing of the monies, as was the appellant as the receiver. And there is nothing which suggests to me that the Legislature intended the supplementary act of the giver of a bribe to protect him from criminal liability as an accessory to the main act of the receiver. See *R v Curry* 1941 CPD 63 at 65; *R v Maqutu* 1946 EDL 220 at 223-224; *R v Otter* 1947 SR 111 at 112; *S v Gokool* 1965 (3) SA 461 (N) at 467C-F; *S v Paweni & Anor* 1985 (2) ZLR 133 (SC); [1986] LRC (Crim) 431 at 433.

It was obligatory therefore for the magistrate to warn the three witnesses in conformity with the direction given in *R v Simakonda* 1956 R&N 463 (SR) at 465B-C, as approved of and applied in *S v Ncube & Anor* 1975 (2) RLR 150 (AD) at 151H-152A. This he omitted to do. And, even more importantly, as there was no proof *aliunde* of the commission of the three offences, he failed to consider whether the requirement set out in s 254 of the Criminal Procedure and Evidence Act, that there must be confirmation of the single evidence of the accomplice, had been satisfied; or, if it had, to warn himself of the special danger inherent in acting on the evidence of an accomplice, by the application of what is known as the cautionary rule. Any caution with

1987 (1) ZLR p97

GUBBAY JA

which he approached the evidence was in the context of an enquiry under s 253.

In the light of the misdirection by the magistrate it becomes necessary for this court to determine whether it appears, in the words of s 11(2) of the Supreme Court of Zimbabwe Act, 1981, "that a substantial miscarriage of justice has in fact resulted". Put simply, the issue is whether the court hearing the appeal considers on the evidence (and credibility findings, if any), unaffected by the misdirection or irregularity, that there is proof of guilt beyond a reasonable doubt. If it does so consider, and the *onus* is on the State to satisfy it, then there is no resultant miscarriage of justice. See *S v Strydom & Ors* 1980 ZLR 364 (AD) at 367F; 1981 (1) SA 236 (ZA) at 239-240.

In the absence of any finding by the magistrate, the initial determination which this court has to make is whether, on the record before it, there was any credible evidence relevant to each count which sufficiently corroborated the single evidence of Khumalo, Ncube and Mutangiri, for the purpose of complying with the mandatory requirement of s 254. What must be looked for is corroboration in some material respect which shows, or tends to show, that the three accomplices were reliable witnesses, though it need not necessarily demonstrate that the appellant was the offender. See *R v Lakatula & Ors* 1919 AD 362 at 364; *R v Troskie* 1920 AD 466 at 468-469; *R v Galperowitz* 1941 AD 485 at 491; *S v Mubaiwa* 1980 ZLR 477 (AD) at 479F- 480C.

Such corroboration, so it seems to me, is afforded by the unchallenged word of DSO Zvenyika that traffic tickets bearing the names of the three accomplices were discovered in the appellant's living quarters. That was factual evidence which, albeit not implicating the appellant in the commission of the offences, makes the testimony of each accomplice more likely to be acceptable. It tends to support the truth of their stories.

It is settled law however, that even though the requirements of s 254 have been met, the court must exercise special caution in acting upon the evidence of an accomplice. It must be convinced that it can safely rely on the accomplice when he says that it was the accused who committed the crime, and that the inherent danger of false incrimination has been eliminated. See *R v Ncanana* 1948 (4) SA 399 (A) at 405-406; *R v Lembikani & Anor* 1964 R&N 7 (FSC) at 8L-9B; *R v Juwaki & Anor* 1964 RLR 604 (AD) at 605G-606E; 1965(1) SA 792 at 794A -F; *S v Mubaiwa supra* at 480B-C.

1987 (1) ZLR p98

GUBBAY JA

It would seem that there are three principle reasons why special caution must be observed in evaluating the credibility of an accomplice:

- (1) he is, *ex hypothesi*, a criminal himself;
- (2) because he has taken part in the commission of the offence, or is an accessory, he is peculiarly equipped by virtue of his inside knowledge of the crime to convince the unwary that his lies are the truth;

- (3) there is a possibility that he may have implicated the accused in the belief that by so doing he will secure an indemnity for himself against prosecution for the offence.

But if a single witness testifies to the commission of an offence by the accused and that witness is an accomplice, the confirmatory evidence required by s 254 will serve to reduce the possibility of error for it would show, or tend to show, that the single accomplice was speaking the truth. Nonetheless the safeguard of the cautionary rule must still be observed.

So the approach which this court must now adopt is to consider the evidence of the three accomplices and that of the appellant, assisted by the findings of credibility made by the magistrate, and, applying the cautionary rule, decide in respect of each count whether the accomplice was so trustworthy as to remove any reasonable doubt of the appellant's proclaimed innocence.

Firm findings of credibility appear in the magistrate's judgment. He was impressed by the demeanour of the three accomplices. He said that each gave a lucid and straightforward account of his experience with the appellant which he maintained despite an intense and protracted cross-examination. I have carefully examined the alleged discrepancies, contradictions and improbabilities relied on by Mr *James*, who appeared for the appellant. It seems to me that none of them detracts substantially from the essential veracity of the witness concerned. In my view the evidence of each accomplice has a distinct ring of truth and reality about it. That is the impression gained from a reading of the record. Thus I am not persuaded that the magistrate erred in his assessment of the witnesses.

The appellant, on the other hand, was said to have cut a poor image in the witness stand and I have no hesitation in agreeing with the magistrate that he was untruthful in his explanation for not surrendering the duplicate copies of the tickets for processing. He was aware of the imperative nature of his duty in that regard and if he could not find the time to traverse the short distance from Ross Camp to the Drill Hall - which in itself defies belief - there were a number of simple and obvious measures he could have employed to inform

1987 (1) ZLR p99

GUBBAY JA

his superior of the alleged predicament in which he found himself. He could have had the tickets delivered by another police officer; posted them to his superior under cover of a letter, or telephoned him to seek instructions. The appellant undoubtedly gave false evidence on this material aspect of his case.

Quite apart from the persuasive nature of the evidence of the three accomplices and the demerits of the appellant as a witness, I can discern no basis for any of them wishing to falsely implicate the appellant. He was a virtual stranger to them and there is no possibility of their having incriminated him in order to shield some other police officer, for it was he who had issued the tickets - of that there was no denying. Each admitted that he was guilty of a traffic offence for which he was liable to pay a fine. If the position were, as averred by the appellant, that they had not been prosecuted simply because he had retained the tickets, one wonders why they did not say that they were still waiting to be summoned to court. Why should they have

told lies against the appellant? Why admit to having committed the offence of bribery if innocent? The contention, made in the course of argument, that DSO Masunda may have pressurised them into doing so, is untenable.

It follows that in my judgment the misdirection of the magistrate did not lead to a miscarriage of justice, for there is conclusive proof on the record that the appellant committed the three offences with which he was charged. I would therefore dismiss the appeal against conviction.

One further matter requires mention lest it be thought to have been overlooked. The magistrate appears to have considered, though somewhat as an afterthought and rather as a makeweight, that the single witnesses corroborated one another thereby further justifying the conviction of the appellant on each count.

Where, as in this case, an accused is prosecuted on several similar counts, each of which is testified to by a single accomplice, the question arises as to whether the evidence on one of the counts is admissible to confirm the testimony of the single accomplice witnesses on the other counts. Do the acts spoken to by each accomplice bear what has been termed a "striking similarity to one another"? If they do, then the evidence of accomplice A, deposing to one offence, may be taken to corroborate the evidence of accomplices B and C, deposing to separate offences. In *Boardman v Director of Public Prosecutions* [1974] 3 All ER 887 (HL) at 897g-h LORD WILBERFORCE said in this connection:

1987 (1) ZLR p100

GUBBAY JA

"The basic principle must be that the admission of similar fact evidence (of the kind now in question) is exceptional and requires a strong degree of probative force. This probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence. The jury may, therefore, properly be asked to judge whether the right conclusion is that all are true, so that each story is supported by the other(s)."

See also *R v Sims* [1946] 1 All ER 697 (CCA) at 701C-D; *Director of Public Prosecutions v Kilbourne* [1973] 1 All ER 440 (HL); *R v Rance*, *R v Herron* (1975) 62 Cr App R 118 (CA) at 121; *R v Scarrott* [1978] 1 All ER 672 (CA) at 676c-h.

An application of the striking similarity test of admissibility to the facts of this case fails to persuade me that it would be proper to hold that the accomplices corroborated one another, and so afforded yet another safeguard in regard to the cautionary rule.

In the first place there is the limiting factor of there being only three acts which are not very closely related in time.

Secondly, the initiating technique was different. In count two, the meeting was set up one week after the ticket had been issued. In count five, the subsequent encounter was purely fortuitous, and in count six, the illicit proposal was made immediately upon the writing out of the ticket.

Thirdly, the procedure adopted in relation to the sums of money paid varied in each instance. In count two, the amount was left to Khumalo's discretion; he tendered \$40. In count five, the

appellant accepted \$5, and in count six, it was he who suggested that \$20 would suffice.

Standing against these divergent features are the common ones that the appellant picked upon traffic offenders, indicated to them that he was prepared to accept something less than the deposit fine he had fixed, and retained the duplicate tickets at his quarters. Their cumulative weight is inadequate, in my opinion, to establish what has been loosely called a system. The stories of the three accomplices, though similar in a general sense, do not reveal similarities which may be described as striking. (Compare *S v Nyati*

1987 (1) ZLR p101

GUBBAY JA

supra at 320F-321E; *S v Meager* 1977 (2) RLR 327 (AD) at 332F; *S v R* 1977 (1) SA 9(T) at 14G.)

This brings me to the matter of sentence. Any form of corruption resorted to by government servants, especially police officers whose duty it is to uphold the law and by their conduct set an example of impeccable honesty and integrity, is rightly viewed by the courts with abhorrence. It is a dangerous and insidious evil in any community and in particular requires to be guarded against in a developing country.

Corruption is a crime difficult to detect and more difficult to eradicate. If unchecked or inadequately punished, it will disadvantage society by depriving it of a good, fair and orderly administration. Deterrence and public indignation are the factors which must predominate above all others in the assessment of the penalty. See the remarks of BAKER J in *S v van der Westhuizen* 1974 (4) SA 61 (C) at 65G, quoted with approval in *Attorney-General v Chinyerere & Anor* 1983 (2) ZLR 329 (SC) at 332; and *S v Paweni & Anor supra* at 141.

On no less than three occasions the appellant abused the trust and confidence reposed in him as a member of the police force. That he disgraced its good name cannot be gainsaid. A severe custodial punishment was clearly called for, and I am satisfied that the magistrate awarded the appellant nothing more than he deserved. There is no room for this court to interfere with the sentence imposed.

In the result the appeal in its entirety falls to be dismissed.

Manyarara JA: I agree.

Korsah AJA: I agree.

Sansole & Senda, appellant's legal representatives

1987 (1) ZLR p102

DONKIN v CHIADZWA 1987 (1) ZLR 102 (HC)

Court High Court, Harare

Copyright Juta & Co Ltd

Mtambanengwe J

Application for provisional sentence

9 April & 6 May 1987

Flynote

Practice and procedure - provisional sentence - acknowledgement of debt - denial by defendant that signature thereon is his - onus on plaintiff then to prove genuineness of signature - referral of matter to trial.

Headnote

Where, in an application for provisional sentence, the defendant denies that the signature on the liquid document relied on is his or that of his agent, or denies the authority of his agent, the onus is then on the plaintiff to establish that the signature is the defendant's. The court should not, when the defendant disputes his signature, grant provisional sentence on the balance of probabilities on the affidavits. After hearing evidence the court will not grant provisional sentence unless it is satisfied that the genuineness of the signature has been proved. Where the defendant denies his signature, the appropriate course is to refer the matter to trial, the provisional summons standing as a summons.

Cases cited:

Dabya v Singh 1953 (4) SA 564 (T)

Williamson v Dragon Mountain Inn (Pty) Ltd 1962 (3) SA 447 (N)

Inglestone v Pereira 1939 WLD 55

Hicks v Dobriskey 1976 (1) RLR 218 (GD)

Zentland Holdings v Saambou Nasionale Bouvereniging 1979 (4) SA 574 (C)

Mathews Insurance v Gallery Africa (Pvt) Ltd HH-4-87 (not reported)

A M Donagher for the plaintiff

1987 (1) ZLR p103

MTAMBANENGWE J

A Chizikani for the defendant

Judgment

Mtambanengwe J: The plaintiff in this matter issued summons for provisional sentence against the defendant. The claim is based on a liquid document, being an acknowledgement of debt in the sum of \$10 000.

In answer to the summons the defendant has filed an affidavit denying that the signature on the acknowledgement of debt is his and denying ever borrowing any such amount from the plaintiff.

The plaintiff has filed an answering affidavit in which he has detailed how he knows the defendant, how the loan came to be arranged and the acknowledgement came to be signed, where and, in whose presence. He alleges that he invited the defendant to his house for the transaction and also invited a friend to witness the transaction; that on the day in question he introduced the defendant to his wife who, however, did not witness the handing over of the money nor the signing of the acknowledgement of debt by the defendant. Both the plaintiff's friend and the plaintiff's wife have put in affidavits testifying to the events as they are said to have witnessed.

I take it as admitted that the defendant knows and is known to the plaintiff. He does not deny this. The plaintiff's friend, a Mr Thornton, also says he had known the defendant before the date in question.

While it is highly improbable that three persons, two of whom claiming to know the defendant very well, would falsely swear affidavits in this vein; and while it is quite probable that any person who decides to cheat could append a false signature to a document such as the one in this case; and while it would appear the balance of probabilities is in favour of the plaintiff, one must however be guided by the law in order to decide whether or not to order provisional sentence against the defendant.

The law, as I understand it from the reading of the authorities on the point, is that if the defendant denies that the signature to the document is that of himself or his agent or denies the authority of his agent, the *onus* would be on the plaintiff to establish these facts: see Herbstein and van Winsen *Civil Practice of the Superior Courts in South Africa* 3 ed at p 555 (part paragraph) -556. In the case cited by the learned authors at p 555, *Dabya v Singh* 1953 (4) SA 564(T), at 567 DE WET J says:

"It seems clear from the authorities mentioned that the Court is not entitled

1987 (1) ZLR p104

MTAMBANENGWE J

to grant provisional sentence on a balance of probabilities on the affidavits when the defendant disputes his signature."

The learned judge, in deciding against hearing of oral evidence, went on to say:

"The issue in regard to the genuineness of defendant's signature is bound up with other issues. The relationship between the parties must be canvassed in detail and it seems that to a great extent the decision will depend on findings of credibility. It seems to me undesirable that the court should give a decision which is only provisional in its effect. Should it be found that the defendant's conduct is fraudulent, attorney and client costs or possibly double costs should be awarded against him, but in my opinion such an award should not be made unless the issues between the parties are finally determined."

FANNIN J makes the same point in *Williamson v Dragon Mountain Inn (Pty) Ltd* 1962 (3) SA 447 (N) at 453B where the learned judge rejects the statement of RAMSBOTTOM J (as he then was) in *Inglestone v Pereira* 1939 WLD 55 at 71. In *Inglestone's* case the learned judge had stated the law, apparently to the effect that the *onus* was on the plaintiff to prove his case on a balance of probabilities. In *Williamson's* case *supra* the true rule was stated as being:

"that where the signature is denied, the plaintiff will be expected to produce proof of its verity, and after hearing evidence the Court will not grant provisional sentence unless it is satisfied that the genuineness of the signature has been proved."

Mr *Donagher*, for the plaintiff, referred me to the case of *Hicks v Dobriskey* 1976 (1) RLR 218 at 220D-221F. With due respect, I think the facts in that case are distinguishable from the facts of the present case. In that case, the defendant was not denying his signature, as is the case here. In my view, the decision of GOLDING J (as he then was) in that case does not purport to alter the rule as stated in *Dabya's* case and in *Williamson's* case *supra*. The relevancy of the other case referred to in Mr *Donagher's* heads of argument, *Zentland Holdings v Saambou Nasionale Bouvereniging* 1979 (4) SA 574 (C), escapes my comprehension.

Mr *Donagher* also referred me to a number of cases in this court and in the Supreme Court involving the defendant. In the view I take of this matter and

1987 (1) ZLR p105

MTAMBANENGWE J

in the light of what I understand as the law on the points in issue, a reference to cases in this court and the Supreme Court where the defendant has been shown to be a liar could not possibly influence the decision one way or other. Indeed, at p4 of the cyclostyled judgment of SAMATTA J in *Mathews Insurance (Pvt) Ltd v Gallery Africa (Pvt) Ltd; J Mathews and Johnny Mathews Estate Agency (Pvt) Ltd v Chiadzwa* HH-4-87, there is a reference to the difficulty encountered in this case. In the two matters decided together by the learned Judge, the present defendant was resisting applications by the applicants (plaintiffs in cases HC 2671/86 and 2672/86) where on trial SANDURA JP had found against the respondent (defendant in those two cases). The applications were for orders to execute pending appeals. The learned judge remarked:

"The only way the learned Judge President could determine the case was on the basis of credibility as the handwriting expert's testimony supported neither side."

In the result the matter is referred to trial, and the provisional summons is ordered to stand as summons under Rule 34 of Order 4 of the High Court Rules. No formal appearance by the defendant is required, and the plaintiff's answering affidavits shall stand as the plaintiff's declaration, subject to any amendment the plaintiff may wish to make. The defendant shall file his plea within three days of this judgment. The costs of these proceedings are reserved for decision at the trial.

Stumbles & Rowe, plaintiff's legal practitioners

A Chizikani, defendant's legal practitioner

1987 (1) ZLR p106

KENNEDY v P HALL & CO (PVT) LTD 1987 (1) ZLR 106 (SC)

Court **Supreme Court, Bulawayo**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Civil appeal

7 & 16 April 1987

Flynote

Delict negligence - foreseeability - driver of vehicle at night in area where cattle are known to be - owner of cattle - duty to keep animals off public road.

Appeal - when appeal court will interfere with court trial court's apportionment of fault.

Costs - grant of full costs to plaintiff in action where contributory negligence found - counter - claim by defendant - whether plaintiff should receive full costs.

Headnote

Where a person drives a vehicle into stray cattle on a public road at night, he will be found to have been negligent if it is shown that he ought reasonably to have foreseen the possibility of stray cattle being on the road and nonetheless drove at a speed which was not reasonable in the circumstances and failed to keep a proper look out. On the other hand, it is the duty of farmers in control of domestic stock to take reasonable, though not extraordinary, precautions to prevent their animals from wandering off the land onto a public road, thereby creating a source of danger to the public. Where there is a gate in a paddock alongside a public road, the farmer should make certain that the lock on the gate is sufficient to prevent the egress of the cattle, as far as this can be reasonably achieved. Where the gate is left open so that cattle escape and cause an accident, the farmer will, in the absence of intervention by a third party, render himself liable.

In a case where a trial court has apportioned damages, an appeal court will

1987 (1) ZLR p107

GUBBAY JA

not lightly interfere with that apportionment, unless the apportionment which the appeal court would make is strikingly disparate from that made by the trial court. Where a plaintiff has had his claim reduced on the grounds of contributory negligence but nevertheless is substantially successful, the normal practice is that he will be awarded all his costs. This does not, however, apply where there is a counterclaim which itself is partly successful. In such cases, the court should reflect its overall view of the success of the parties in a single order for costs.

Cases cited:

Viriri v Wellesley Estates (Pvt) Ltd 1982 (1) ZLR 200 (AD)

South British Insurance Co Ltd v Smit 1962 (3) SA 826 (A)

James v Fletcher 1972 (2) RLR 451 (AD)

Dreyer v van Rijnberk 1978 RLR 1 (AD)

Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A)

Crow v Royal Insurance Group 1973 (1) SA 579 (R)

Lemire v Rhodesia Railways 1981 ZLR 251 (GD)

Stolp v du Plessis 1960 (2) SA 661 (T)

Venter v Dickson 1965 (4) SA 22 (E)

A P de Bourbon SC for the appellant

D M Campbell for the respondent

Judgment

Gubbay JA: The respondent, to which I shall refer as the plaintiff, instituted an action in the High Court against the appellant, as the defendant, for damages in the sum of \$2 433, occasioned by the loss of eleven of its pedigree Brahman cattle, which were either killed instantaneously or were fatally injured (and later destroyed) as a result of having come into collision with a seven tonne Nissan truck driven by the defendant's authorised employee. The collision occurred at 9 pm on 23 August 1980 at approximately the 111,5 km peg on the Zvishavane - Bulawayo road, which at that point runs alongside the fenced farmlands owned by the plaintiff. The truck also sustained damage. The reasonable cost of repairing it, amounting to \$782,11, formed the subject of a claim in reconvention.

The plaintiff alleged that the defendant's driver was solely negligent in travelling at a speed which was excessive in the circumstances and in failing to keep a proper lookout for cattle. The defendant denied the negligence attributed to the driver and in turn alleged that the plaintiff was solely negligent in allowing its cattle to stray onto a public road at night.

1987 (1) ZLR p108

GUBBAY JA

The learned judge, KORSAH J, found that the collision had been caused by the negligence of both the plaintiff and the defendant's driver. He assessed the fault of the driver at $66\frac{2}{3}$ per cent and that of the plaintiff at $33\frac{1}{3}$ per cent. On the basis of that assessment, and in terms of s 4 of the Law Reform (Contributory) Negligence Act [*Chapter 45*], he reduced the plaintiff's damages to \$1 622 (being two-thirds of the agreed *quantum*) and the defendant's damages to \$260 (being one-third of the agreed *quantum*). He ordered the defendant to pay the costs of the action.

The defendant noted an appeal: (i) against the finding that his driver had been at fault in contributing to the collision; (ii) alternatively, against the measure of the apportionment of

damages; and (iii) against the order as to costs. The plaintiff has not cross-appealed.

Mr *de Bourbon*, on behalf of the defendant, while not formally conceding that negligence on the part of the driver had been established, found himself unable to advance any cogent argument against the contrary conclusion of the learned judge. His predicament is understandable, for I may say that I cannot discern any ground for holding that KORSAN J was wrong. I can do no better than to refer to that portion of his judgment which deals with the question of the driver's negligence, for it amply demonstrates that if he had been driving prudently, he would have seen the large herd of cattle in the middle of the road obstructing his line of travel in time to avoid the impact:

"The defendant's driver has been driving since 1972. He has driven in many parts of this country. He conceded that it was not uncommon to find stray cattle on the road at night in this country. He knew the area he was driving through was cattle territory. He ought reasonably to have foreseen the possibility of stray cattle being on the road.

The evidence disclosed that the defendant's vehicle, apart from having an 1107 tractor with six wheels secured by chains in it, had a bowser full of diesel in tow. With this weight, and at night, on a road running through cattle farms the defendant's driver admitted to driving at a speed of 80 km/h. From the driver's own testimony this was the speed he was travelling at when the collision occurred. From his own testimony the curve he negotiated before the collision was such that one could not see round the bend until it had been rounded. Seeing round the bend was made more difficult by the fact that at night the lights of a vehicle rounding a curve play on the bushes on the side of the road until the curve has been negotiated. In explanation of why he could not bring the vehicle

1987 (1) ZLR p109

GUBBAY JA

promptly to a halt he said the vehicle would have jack-knifed if he had attempted to do so, and the braking distance was also increased by the weight he was carrying.

Taking all these features into consideration, I ask myself: 'Was it prudent to drive a vehicle carrying such a weight at night round a blind curve at 80 km/h, when he knew he was travelling through cattle territory?' I am of the view that the defendant's driver drove the said vehicle at a speed which was excessive in the circumstances. The herd of cattle were at a distance of 90 metres from the curve. He saw them when it was too late. Had he been driving at a speed which was reasonable in the circumstances and keeping a proper lookout he would have been able to bring his vehicle to a halt before ploughing into them. In driving in the manner he did under the aforementioned conditions the driver ought reasonably to have foreseen the possible consequences of his action... The cattle did not suddenly emerge from bushes obscuring them from sight. There was not one, but thirty- one of them. A person keeping a proper lookout and driving at a reasonable speed cannot fail to notice such a mass of walking beef if he has his headlamps on at night. And the defendant's driver had his headlamps on that night."

See also the remarks of BARON JA in *Viriri v Wellesley Estate (Pvt) Ltd* 1982 (1) ZLR 200 (AD) at 206E-G.

The finding by the learned judge, that the plaintiff was negligent in failing to adequately secure the gate to the paddock which adjoined the national road so as to ensure that its cattle did not pass through the gate, was not challenged. Having regard to the close proximity of the gate to the road an accident of the very type which occurred was clearly foreseeable. The plaintiff ought to have guarded against it by the simple and reasonable expedient of providing a padlock or other effective locking device on the gate. See *Rocky Lodge (Pvt) Ltd v Livie* 1977 (1) RLR 218 (AD) at 225E-F. It is the duty of farmers in control of domestic stock to take reasonable, though not extraordinary, precautions to prevent their animals from wandering off the land onto a public road, thereby creating a source of danger to vehicular traffic. Where there is a gate in a

paddock alongside a public road the farmer is to make certain that the lock on the gate is sufficiently effective to prevent the egress of animals in the paddock, insofar as this can reasonably be achieved. Where the gate is left open so that cattle escape from the paddock and cause an accident, in the absence of proof of intervention by a third party, he will render himself liable.

1987 (1) ZLR p110

GUBBAY JA

Mr *de Bourbon* accepted that an appeal court will not lightly disturb an apportionment of fault decided upon by the trial court in the exercise of a value judgment. See *South British Insurance Co Ltd v Smit* 1962 (3) SA 826 (A) at 837F; *James v Fletcher* 1972 (2) RLR 451 (AD) at 460B; *Dreyer v van Rijnberk* 1978 RLR 1 (AD) at 12H; *Viriri v Wellesley Estate (Pvt) Ltd supra* at 207E-F. He submitted, however, that in this instance the learned judge was wrong to place the major share of the fault for the collision upon the defendant's driver. By allowing thirty-one head of cattle to stray onto a national road at night, the plaintiff had created a hazardous situation without which an accident would not have happened; consequently it should have been ordered to bear the greater proportion of liability.

I cannot subscribe to the proposition that the negligence of the plaintiff was more gross and contributed more substantially to the collision than that of the defendant's driver. He was in control of a seven-tonne truck which had a tractor loaded upon it and a bowser full of diesel fuel in tow. He proceeded to negotiate the bend in the road at a speed which was excessive, having regard to the weight of the vehicle and his appreciation that any sharp application of the foot-brake would cause it to "jack-knife", his inability to see what lay ahead at the end of the bend, and his awareness that he was travelling in an area where it is not unusual to encounter unattended cattle wandering along the road at night. By the exercise of reasonable care and skill he could have avoided the collision with the plaintiff's cattle. The negligence of the plaintiff, on the other hand, preceded that of the driver and before the latter's negligence began to operate the plaintiff had ceased to have the power of exercising control over the circumstances leading to the collision. It could do nothing further to avoid the consequences.

In deciding that the plaintiff had departed from the norm of the *diligens paterfamilias* by $33\frac{1}{3}$ per cent and the driver by $66\frac{2}{3}$ per cent, the learned judge adopted the same apportionment made by this court in *Viriri v Wellesley Estate (Pvt) Ltd supra*. In that case one of the defendant's cows had a propensity for escaping from its paddock and leading other animals out. This was known to the farm manager. On the night in question the cow concerned escaped and wandered onto the main road where it was struck and killed by the plaintiff's vehicle. The vehicle itself was severely damaged. It was held that the defendant ought to have foreseen the precise occurrence and was negligent in failing to take steps to avoid it, such as tethering the cow at night and at other times when the herdsman were off duty. And the plaintiff was negligent in failing to regulate his speed so that in the event of an animal suddenly appearing on, or attempting to cross, the road in front of him he

1987 (1) ZLR p111

GUBBAY JA

would have been able to avoid colliding with it.

Though each case must obviously depend on its own facts, it does seem to me that whereas the negligence shown by the defendant's driver may be fairly equated in degree with that of Viriri, the degree of the plaintiff's negligence was greater than that of the owner of the errant cow. The plaintiff ought to have foreseen that by failing to provide a padlock or other adequate locking device on the gate to the paddock, not merely one or two head of cattle but a whole herd might stray onto the road at night, causing a danger to traffic.

If I had been sitting at first instance I would have apportioned the blame as to two-fifths on the plaintiff and as to three-fifths on the defendant. But the difference in terms of proportions between two-fifths to one-third and three-fifths to two-thirds is not strikingly disparate, and so to substitute my apportionment for that of KORSAH J would, I think, in the words of BARON JA, "amount to an unwarranted tinkering with his value judgment". Accordingly, I would not interfere with the apportionment made.

It is in regard to the grant of the full costs of the action to the plaintiff that I find myself in respectful disagreement with the learned judge. His reason for so ordering was that the plaintiff had been substantially successful. That approach would have been correct had the defendant not sued to recover the costs of the repairs to his vehicle, for the authorities indicate that in apportionment actions where there is only a claim, and no counter-claim, the plaintiff, in the absence of a tender, will generally recover all his costs notwithstanding any reduction in the damages claimed which may have been ordered by the court. See *Norwich Union Fire Insurance Society Ltd v Tut* 1960 (4) SA 851 (A) at 854D-F; *Crow v Royal Insurance Group* 1973 (1) SA 579 (R) at 585A; *Lemire v Rhodesia Railways* 1981 ZLR 251 (GD) at 254 A-G.

In considering the difficult question of awarding costs where there are cross claims for negligence, and after stressing the undesirability of laying down a hard and fast rule, BARON JA in *Viriri v Wellesley Estate (Pvt) Ltd supra* went on to say at 209H-210A and 210D:

"Generally, in the absence of special circumstances (for instance, misconduct) the question of costs will turn primarily on substantial success; the first question is therefore to decide to what extent the parties have been successful. This is not the same question as the extent to which each party is held responsible for the accident; a party may be held partly to

1987 (1) ZLR p112

GUBBAY JA

blame for an accident and yet be substantially successful in the action as a whole notwithstanding failure on certain issues, including issues raised in a counter-claim. One must look at the overall picture."

And:

"Another important guideline, to which I have already made reference, is the desirability of avoiding the complexities and possible injustice of a double taxation; the court will thus seek to reflect its over-all view of the success of the parties in a single order for costs."

Factors akin to those which obtained in that case are present in this, namely:

1. The plaintiff was successful in resisting the allegation that it was solely to blame for the collision; it succeeded in proving a preponderance of negligence on the part of the defendant's driver, and in monetary terms it recovered \$1 622, being two-thirds of its claim.
2. The plaintiff was also successful in resisting the greater extent of the defendant's claim.
3. The defendant was successful in establishing that the plaintiff was negligent - a vital success if he was to recover anything at all - and in monetary terms he recovered \$260.
4. The defendant was also successful in resisting, to an extent, that he was solely to blame.
5. The *quantum* of damages claimed by each party was admitted.

Reflecting as best I can in a single order the respective degrees of success and failure of both sides, I think it equitable that the plaintiff should be awarded 60 per cent of its costs in the court below.

With regard to the costs of the appeal, the defendant has succeeded on one of the main issues and failed on the other. Had he succeeded in overturning the learned judge's assessment of fault, the costs of appeal would not have been apportioned but allowed him. See *Stolp v du Plessis* 1960 (2) SA 661 (T) at 664B; *Venter v Dickson* 1965 (4) SA 22 (E) at 28F. He has achieved partial but not insignificant success. It is my view that in these circumstances he should be awarded 40 per cent of the costs of appeal.

1987 (1) ZLR p113

GUBBAY JA

In the result the order made is:

1. The appeal is dismissed save to the extent set out in paragraph 3 below.
2. The appellant is awarded 40 per cent of his costs of appeal.
3. The order of the court a quo relating to costs is set aside and the following substituted:

"The defendant is to pay 60 per cent of the plaintiff's costs of both the claim and counter-claim".

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

Granger & Harvey, appellant's legal representatives

Calderwood, Bryce Hendrie & Partners, respondent's legal representatives

1987 (1) ZLR p114

SCHWEPPES (CENTRAL AFRICA) LTD v ZIMBABWE NEWSPAPERS (1980) LTD 1987 (1) ZLR 114 (HC)

Court High Court, Harare

Mtambanengwe J

Petition for interdict

6 May 1987

Flynote

Practice and procedure - interdict - restraining publication of matter alleged to be defamatory - requirements.

Headnote

Before an interdict may be granted restraining the publication of matter alleged (or admitted) to be defamatory, the court must be satisfied not only that the matter is defamatory but also that there is no defence (such as that the statement is true and for the public benefit) and that nothing has occurred to deprive the plaintiff of his remedy (such as consent to publication).

Where a newspaper received an anonymous letter concerning the petitioner, which letter was grossly defamatory and potentially harmful to the petitioner, the court refused an application for a perpetual interdict. The letter had not been published and would not be published until or unless the truth or otherwise of the allegations in it was established; and the final article, if published, might not be defamatory of the petitioner. It could only be determined at the publication of the contemplated article, if it could be determined at all, what the truth was.

Cases cited:

Setlogelo v Setlogelo 1914 AD 221

Roberts v The Critic Ltd & Ors 1919 WLD 26

A P de Bourbon SC for the petitioner

J Sayce for the respondent

1987 (1) ZLR p115

MTAMBANENGWE J

Judgment

Mtambanengwe J: On 27 February 1987 the petitioner obtained a rule *nisi* calling upon the respondent to show cause, if any, why the respondent should not be perpetually interdicted from publishing the contents in whole or in part of an anonymous letter received by the respondent concerning the petitioner, and why respondent should not pay the costs of the proceedings. The rule *nisi* was returnable on 11 March 1987 but by consent the matter was postponed to 9 April

Copyright Juta & Co Ltd

1987. The respondent was ordered to pay the wasted costs.

It is common cause that the letter complained of is grossly defamatory of the petitioner and the respondent admits that it is potentially harmful to the petitioner. The respondent, however, states that the chances of "publishing its contents without being able to establish their truth were and are nil". The basis of this statement is that it was and is the inflexible practice of respondent never to publish anonymous letters, as that is contrary to normal newspaper practice throughout the English-speaking world and that the petitioner's Mr Kelley, who previously worked for the respondent from 1969 to 1976 in various capacities (including those of Sports Editor, Sunday Mail; Deputy News Editor, The Herald; Senior Reporter, The Herald and News Editor, The Herald) knew or should have known of the regulation that unsigned letters would not be published. Mr Kelley presently works for a firm called Profile Public Relations, a public relations firm retained by the petitioner. He admits the basis of respondents statement as referred to above.

The events leading to the petitioner seeking and obtaining the rule *nisi* which it now seeks to have confirmed were in brief the following. When the respondent's Sunday Mail news editor received the anonymous letter he detailed a cadet reporter to contact Mr Kelley and seek his comments on the letter.

The cadet reporter, a Miss Reyhana Masters, had only been employed by the respondent since 15 January 1987. She says her instructions from the respondent's Sunday Mail news editor were to investigate the allegations made in the letter. Accordingly, on 20 February 1987, she went to Mr Kelley's office with a list of questions which she put to him and he wrote them down. A little later that day she supplied a typed copy of the letter to Mr Kelley. Mr Kelley says that he understood from (not that he was told by) Miss Masters that the respondent would publish the letter and the petitioner's comments in the 22 February edition of the respondent's Sunday Mail newspaper. The same day Mr Kelley then telephoned the editor of the respondent's Sunday Mail, Dr T Muradzikwa, and arranged a meeting for 24 February 1987.

1987 (1) ZLR p116

MTAMBANENGWE J

Between 20 and 24 February 1987 the editor was informed by the news editor that Mr Kelley had already been supplied with a copy of the anonymous letter. Consequently, he telephoned Mr Kelley on 24 February to cancel the meeting, stating to him "since you already have a copy of the letter, all you need to do is to reply to it". He says he "informed him (Kelley) that [he] wanted an early reply perhaps with a view to publishing some kind of an article or story on 1 March 1987".

The respondent's editor says in his affidavit:

"I wanted an early reply from Mr Kelley because by the 24th he had already had a copy of the anonymous letter for 4 days and I had a considerable amount of investigative work to do before I could make a decision whether to publish or not. I would only publish if I were satisfied that the allegations were true and, before I could make a decision to publish, I intended, through my reporters, to approach the workers' committee, individual employees of the petitioner and Coca - Cola so that a comparison could be made between employment conditions in that Company and in the petitioner's Company."

A further interview was arranged for 26 February, this time with the respondent's managing director. When this was cancelled, because respondent's managing director had, on 25 February, been advised that the letter, which he had thought was signed, was anonymous, the petitioner then, on 26 February, wrote to respondent commenting on the letter, and seeking confirmation by close of business on 26 February 1987 "that the anonymous letter not be published".

When, by 27 February, no reply had been given to that letter, Mr Kelley sought a statement of Dr Muradzikwa's intentions about the letter; the latter refused to advise the respondent's intentions. He had seen the respondent's letter only on the 27th and he says, in his affidavit (paras 19-20), *inter alia*, that he would not confirm that the contents in whole or in part of the anonymous letter would not be published because the matter was still under investigation, and that he may still wish to publish the contents of the letter if inquiries show that the complaints in the letter are justified. He does not accept that the petitioner's letter (commenting on the anonymous letter) are conclusive.

It seems to me on the papers before me there is no real dispute between the parties, apart from a difference of interpretation or misinterpretation made by

1987 (1) ZLR p117

MTAMBANENGWE J

each party of the other party's attitude or intentions. That difference in my view arises from the loose use of words. The respondent, for example, sometimes refers to publication of the letter, meaning the contents of the letter, and the petitioner, on the other hand, interprets the respondent's objections as an attempt to prevent investigation of the matters complained of in the anonymous letter. Again, the petitioner sometimes talks of an article to be published whereas none seems to have been prepared. Any such misunderstandings, however, are cleared on the papers before me and the position is that the petitioner says "by all means investigate":

"You are of course at liberty to approach the workers' committee for their comment" (See Annexure 'B' p 3, at p 13 of the papers).

The respondent says there is no intention whatsoever of publishing the letter, nor the contents in whole or in part unless or until, if after investigations, they are found to be true:

"The anonymous letter is so grossly defamatory of and potentially harmful to, petitioner that the chances of my publishing its contents without being able to establish their truth were and are nil."

It would seem to me that the sort of initial misunderstanding that arose between the parties up to 27 February led to the petitioner seeking and obtaining the rule *nisi*; it certainly was not a one-sided misunderstanding, though. The petitioner's Mr Kelley knew the respondent's procedures regarding non-publication of anonymous letters and would thus have been in a position to allay the petitioner's fears. One must assume the petitioner was not seeking to prevent revelation of the truth.

The question I have to decide is whether on the papers before me the petitioner has established the three requirements that have to be established if the type of interdict now

sought to be confirmed should be granted, or the temporary interdict obtained by the petitioner should be confirmed.

The three requirements are well known and are set out in the oft-quoted case of *Setlogelo v Setlogelo* 1914 AD 221 and need not be repeated here. In *Roberts v The Critic Ltd & Ors* 1919 WLD 26 at 28-20 WARD J said:

"The Court has power to grant an injunction to restrain the publication of a libel, but before doing so it must be satisfied that the matter complained of is libellous; that no defence, eg that the statement is true and for the

1987 (1) ZLR p118

MTAMBANENGWE J

public benefit, could be successfully set up in an action on the libel; that nothing has occurred, eg consent to publication, to deprive the plaintiff of his remedy. If there is any doubt upon any of these points, then the interdict should be refused, and the case is one to be decided at the trial."

In the next paragraph the learned Judge went on to say:

"In the present case, if the article complained of is a libel it is one of a very gross character because there is either an imputation of murder, or there is no libel. JESSELL MR in the case of *Quartz Hill Consolidated Mining Co v Beall* (20 ChD 500 at 508) says "It is a jurisdiction (ie to restrain the publication of a libel on interlocutory application) which must be carefully exercised. No doubt there are cases in which it would be quite proper to exercise it, as for instance, the case of an atrocious libel wholly unjustified and inflicting the most serious injury on the plaintiff. But on the other hand where there is a case to try, and no immediate injury to be expected from the further publication of the libel it would be very dangerous to restrain it by interlocutory injunction."

In that case the learned Judge was dealing with a case where an article imputing murder of her husband to Mrs Roberts had been published and the writer of the article proposed to continue with further publication of the material he was analysing in that vein. After a discussion of similar cases (see pp 30-31 of the judgment) the learned Judge concluded:

"There is grave difficulty in the way of granting an interdict restraining the publication of an article which purports to deal with a matter of great public interest, and which I have not before me. It is impossible to say what it will contain, however grave one's suspicion may be. The respondents specifically state that the continuation will not be libellous, nor will it slander the petitioner, nor will it affect her good name and fair fame. It can only be determined upon the publication of the article if this statement be true..."

Bearing in mind that (as the learned Judge in the case *supra* said), "a decision on one set of facts is very rarely of any assistance in dealing with a different set" it seems to me that in the present case a similar situation arises. The article has not been published; the respondent says it will not be published until or unless the truth or otherwise of the contents of the anonymous letter has been established; and, for all the editor knows, the article, if published, may not be defamatory of the petitioner, or enquiries may show the complaints in the letter to be justified. It can only be determined at the publication,

1987 (1) ZLR p119

MTAMBANENGWE J

if at all, of the contemplated article what the truth is, and on trial if one should arise as a result.

In the result the application fails and the rule *nisi* is discharged with costs.

Gill, Godlonton & Gerrans, petitioner's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners

1987 (1) ZLR p120

LEVY v BENATAR 1987 (1) ZLR 120 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Appeal from order directing that respondent be acquitted on charges brought privately by appellant

24 March & 18 May 1987

Flynote

Criminal procedure - private prosecution - locus standi of prosecutor - onus - substantial and peculiar interest - prosecutor required to show that he has suffered actionable injury - whether extends to contempt of civil court order obtained by prosecutor - guardian - offences committed against ward - ward coming of age before commencement of proceedings - locus standi of guardian lapsing - review - uncompleted criminal proceedings - private prosecution.

Headnote

While in the context of unconcluded criminal proceedings the High Court's inherent power of review is to be sparingly exercised, this does not apply as strictly to private prosecutions, which are a rarity. The factor of a reluctance to intervene for fear of disrupting the general continuity of proceedings in inferior courts assumes a lesser importance. In addition, where the matter is brought on review because the private prosecutor's locus standi is challenged, the accused might well suffer grave injustice should the trial be ordered to proceed and it thereafter be adjudged that the prosecutor had no *locus standi*.

The right of a private party who considers himself aggrieved to prosecute is set out in s 17 of the Criminal Procedure and Evidence Act [*Chapter 59*]. The party must, as well as obtaining from the Attorney-General a certificate of *nolle prosequi*, show -

- (i) some substantial and peculiar interest
- (ii) in the issue of the trial
- (iii) arising out of some injury

1987 (1) ZLR p121

- (iv) which he individually has suffered
- (v) in consequence of the commission of the offence.

Where a prosecution is brought by a private party and his *locus standi* is challenged, it is for him to show compliance with these requirements. The "interest" referred to need not necessarily be of a material or pecuniary character, for prosecution is not designed primarily to recover compensation. The "issue of the trial" is either an acquittal or a conviction, which should be the sole motivating force behind all private prosecutions. The generally accepted view is that the private prosecutor is required to show that he has suffered some actionable injury, there being no title to prosecute if he is unable to prove an invasion of a legal right. Such an injury must be beyond that suffered by the public generally.

A wilful and *mala fide* refusal to comply with a civil court order constitutes a contempt for which the State can prosecute. However, even where the order has been obtained at the instance of a would-be private prosecutor, his interest in the punishment of the person in disobedience is not peculiar to him, but is shared by every right-thinking member of society. Consequently, the private prosecutor would have no *locus standi*.

The right is extended to certain other parties, including the guardians of minors, in respect of offences committed against their wards. However, this right exists because minors do not have *locus standi*; once a minor reaches the age of majority, he is entitled, in his own right, to prosecute in respect of an offence committed against him while he was a minor, and his guardian's right lapses.

Quaere: whether a guardian's title would lapse if the ward attained his majority during the course of prosecution proceedings.

Cases cited:

Ellis v Visser & Anor 1956 (2) SA 117 (W)

Wahlhaus v Additional Magistrate, Johannesburg & Anor 1959 (3) SA 113 (A)

Bonadei v Magistrate of Otjiwarongo & Anor 1985 (3) SA 92 (SWA)

Ellis v Visser 1954 (2) SA 431 (T)

Mullins & Meyer v Pearlman 1917 TPD 639

S v Beyers 1968 (3) SA 70 (A)

S v Benatar 1984 (1) ZLR 296 (SC); 1984 (3) SA 588 (ZS)

Attorney-General v Crockett 1911 TPD 893

Attorney-General v van der Merwe & Bornman 1946 OPD 197

Solomon v Magistrate, Pretoria, & Anor 1950 (3) SA 603 (T)

GUBBAY JA

Gordon v Barnard 1977 (1) SA 887 (C)

Nestor & Ors v Minister of Police & Ors 1984 (4) SA 230 (SWA)

C W Lloyd for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay JA: After the Attorney-General had declined to prosecute and had issued a certificate to that effect, the appellant instituted a private prosecution on three charges against the respondent in the court of the regional magistrate. The charge sheet particularized the offences as follows:

"FIRSTLY, contempt of court, in that on divers occasions during the period from June 1983 to March 1984, the accused wrongfully, unlawfully and intentionally violated the dignity, repute or authority of a judicial body, that is to say did meet and communicate with Julia Naomi Levy, then a minor, in violation of an order issued by the Honourable Mr Justice Waddington out of the High Court of Zimbabwe at Harare on 23 February 1983.

SECONDLY, contravening section 339(2)(b) of the Criminal Procedure and Evidence Act (Chapter 59), in that on divers occasions during February and March 1984, at Harare, the accused wrongfully and unlawfully incited Alexander Dardagan to commit the crime of murder, that is to say did incite Alexander Dardagan to kill Samuel Rahamin Levy by shooting him with a pistol.

THIRDLY, attempted murder, in that on 22nd March 1984, and at Flat No. 2 Avon Friars, in Avondale, Harare, the accused wrongfully, unlawfully and intentionally attempted to kill Julia Naomi Levy by cutting her wrists with a razor blade."

In answer to each charge, and before pleading to the merits, the respondent pleaded that the private prosecutor had no title to prosecute and issue was joined on those pleas in terms of s 169 of the Criminal Procedure and Evidence Act.

A statement of admitted facts was then placed before the regional magistrate. It reads:

- "1. Julia Levy is the daughter of Mr Samuel Levy.
2. Late in 1982, Mr Levy learnt of an association between his daughter, then aged 15 years, and the accused, whom he believed to be a

GUBBAY JA

twenty-six year old divorcé with a child. Mr Levy disapproved of this association and instructed his daughter and the accused to terminate it.

3. In February 1983, in the belief that the association had resumed and was of a sexual nature, Mr Levy obtained a High Court order interdicting the accused from meeting or communicating in any manner whatsoever with Julia Levy during her minority."

Without adducing any *viva voce* evidence prosecuting counsel closed his case. Defence counsel did likewise. Thereafter argument was addressed to the regional magistrate on the validity or otherwise of the preliminary point. After reserving judgment, the regional magistrate dismissed the pleas to each charge.

The criminal proceedings did not, however, resume before the regional magistrate, as he had ordered, for the respondent brought the decision that the appellant had title to prosecute him on each of the charges on review before the High Court. The specific grounds for review were that:

"In respect of each charge there was no evidence to show that:

- (a) the private prosecutor had some substantial and peculiar interest in the issue of the trial; or
- (b) such interest arose out of some injury which the private prosecutor individually has suffered by the commission of the offence charged:"

The appellant opposed the application. Somewhat surprisingly, it was not sought to persuade the learned presiding judge, EBRAHIM J, that as the criminal proceedings before the regional magistrate had not terminated and, as the essence of the complaint was not that a gross irregularity had been committed but rather that the regional magistrate had simply erred in dismissing the special pleas, the normal and proper course was for the respondent to await the result of the trial on the merits and if a conviction ensued, to appeal to the Supreme Court (see, for instance, *Ellis v Visser & Anor* 1956 (2) SA 117 (W) at 119F-120A; *Wahlhaus v Additional Magistrate, Johannesburg & Anor* 1959 (3) SA 113 (A) at 119D-120A; *Bonadei v Magistrate of Otjiwarongo & Anor* 1985 (3) SA 92 (SWA) at 98B-C). It would seem that counsel representing both parties were *ad idem* in requesting the learned judge to review the decision of the regional magistrate.

1987 (1) ZLR p124

GUBBAY JA

Nonetheless, EBRAHIM J properly gave careful thought to whether he ought to do so, for he appreciated that in the context of unconcluded criminal proceedings the inherent power of review is to be sparingly exercised. He was influenced in no small measure by the reasoning that as private prosecutions are a rarity in our criminal procedure, the factor of reluctant intervention for fear of disrupting the general continuity of proceedings in inferior courts assumed diminishing importance. This, and the factor that the respondent might well suffer grave injustice were the trial ordered to proceed and subsequently it be adjudged that the appellant was not entitled to bring any of the charges, prompted him, in the exercise of his discretion, to utilize the power available to him.

This aspect of the judgment is not appealed against. It need only be added that, in any event, a court of appeal is usually reluctant to interfere with the discretionary exercise by the court of first instance of its inherent power to review proceedings

The learned judge dealt separately with each charge. He held that the appellant did not have a

peculiar interest in the issue of the trial of the respondent on the charge of contempt of court. In respect of the charge of incitement to commit murder he expressed the view that the appellant had no right of civil redress, for he had suffered no actual injury as a result of the commission of the offence by the respondent. And thirdly, he considered that the appellant had lost his *locus standi in judicio* to prosecute the respondent on the charge of attempted murder once his daughter, Julia, attained her majority. Consequently he upheld the three special pleas and issued a *mandamus* requiring the regional magistrate to acquit the respondent on all three charges. The appellant was ordered to pay the costs incurred in the prosecution as well as the costs of the review.

The right of a private party who considers himself aggrieved to prosecute is prescribed by s 17 of the Criminal Procedure and Evidence Act, which provides:

"17. In all cases where the Attorney-General declines to prosecute for an alleged offence any private party, who can show some substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered by the commission of the offence, may prosecute, in any court competent to try the offence, the person alleged to have committed it."

1987 (1) ZLR p125

GUBBAY JA

The private party concerned must show:

- (i) some substantial and peculiar interest,
- (ii) in the issue of the trial,
- (iii) arising out of some injury,
- (iv) which he individually has suffered,
- (v) in consequence of the commission of the offence.

See *Ellis v Visser* 1954 (2) SA 431 (T) at 434E-F; *Swift's Law of Criminal Procedure* 2 ed at 40).

The fourth requirement is broadened by s 18 of the Act which grants to certain other private parties the right of prosecution. They are:

- "(a) a husband, in respect of offences committed against his wife;
- (b) the legal guardians or curators of minors or mentally disordered or defective persons, in respect of offences committed against their wards;
- (c) the wife or children or, where there is no wife or child, any of the next of kin of any deceased person, in respect of any offence by which the death of such person is alleged to have been caused;
- (d) public bodies and persons on whom the right is specially conferred by statute, in respect of particular offences."

These five requirements are in addition to the obligation to obtain from the Attorney-General a

certificate of *nolle prosequi*, for the practice has always been for the State jealously to guard its right to prosecute offenders. See Lansdown and Campbell *South African Criminal Law and Procedure* Vol 5 at 120.

Before turning to an analysis of the separate charges, it is necessary to deal briefly with the *onus* of proof, for prosecuting counsel submitted to the regional magistrate that if the accused person pleads that the private party has no title to prosecute it is for him to establish the deficiency.

Whatever may be the position where the prosecution is at the instance of the State, it is clear to me that where it is brought by a private party and his *locus standi* is challenged, it is for him to show compliance with the requirements

1987 (1) ZLR p126

GUBBAY JA

of s 17 of the Act. Only then does the right to prosecute vest in him. See *Mullins and Meyer v Pearlman* 1917 TPD 639 at 647 and 649; *Ellis v Visser* 1954 (2) SA 431 (T) at 434E. The existence of s 17 renders wholly inappropriate any analogy with the *onus* being on the accused of proving a plea of *autrefois* acquit or *autrefois* convict, or a plea to the jurisdiction. See Lansdown and Campbell *op cit* at 446.

THE CHARGE OF CONTEMPT OF COURT

It is no longer open to doubt that a wilful and *mala fide* refusal or failure to comply with a civil court order constitutes a contempt for which the State can prosecute. See *S v Beyers* 1968 (3) SA 70 (A) at 81C-E; *S v Benatar* 1984 (1) ZLR 296 (SC) at 303; 1984 (3) SA 588 (ZS) at 592H-I. The nature of the crime is based on the principle that it is necessary in the interests of the State to safeguard the dignity, esteem and authority of the courts, concerned as they are with the proper and effective administration of justice, by punishing those guilty of acts calculated to bring these judicial bodies into contempt. See *Attorney-General v Crockett* 1911 TPD 893 at 900; Melius de Villiers *The Roman and Roman-Dutch Law of Injuries* at 166.

Every individual member of society has a common interest in the preservation of the authority and respect of the courts and in the protection and maintenance of the administration of justice; for contempt of court is an offence within the public domain. But is he able to show, within the meaning of s 17 of the Act, that he has a "substantial and peculiar interest in the issue of the trial arising out of some injury which he individually has suffered", even where - as in this case - it was he who obtained the court order upon which it is alleged the contemptuous breach is based?

The "interest" referred to need not necessarily be of a material or pecuniary character, such as the recovery of property or money. As observed by VAN DEN HEEVER AJP (as he then was) in *Attorney-General v van der Merwe and Bornman* 1946 OPD 197 at 201:

"Prosecution is not primarily designed to recover compensation. I do not think, therefore, that the expression 'substantial and peculiar interest' was intended - as Mr Lutge suggested - to convey only a pecuniary interest in respect of which the prosecutor may obtain compensation or restitution. The object of the phrase was clearly to prevent private persons from arrogating to themselves the functions of a public prosecutor and prosecuting in

respect of offences which do not affect them in any different degree than any other member of the public; to curb, in other

1987 (1) ZLR p127

GUBBAY JA

words, the activities of those who would otherwise constitute themselves public busybodies."

The words "in the issue of the trial", which comprise the second requirement, have been explained by ROPER J in *Solomon v Magistrate, Pretoria & Anor* 1950 (3) SA 603 (T) at 609F-G as envisaging -

"...an acquittal or a conviction, and the interest of the prosecutor lies in securing the conviction and punishment of the man who had injured him by a criminal act."

It is the acquittal or conviction and punishment which should be the sole motivating force behind all private prosecutions, for in granting the right the law-maker was minded to reduce the temptation offered to an aggrieved person to resort to the undesirable concept of self-help.

The Full Bench decision in *Mullins and Meyer v Pearlman supra* is the leading authority on the third and fourth requirements. MASON J, with whom DE VILLIERS JP and GREGOROWSKI J agreed, expressed himself thus at 643:

"The Courts have laid down that any person who has sustained actual injury, beyond that suffered by the public generally, by reason of the commission of some offence, has a civil remedy against the wrongdoer, and that any member of a particular class of persons for whose protection a Statute has been enacted is entitled to apply to the Courts for an interdict against any contravention of the Statute which is likely to impair the rights intended to be conferred upon him. These principles undoubtedly afford assistance in the construction of the limitations upon the right of private prosecution. It is, I think, clear that where no right of civil redress exists the right of private prosecution would cease."

Notwithstanding the doubt cast upon this view by ROPER J in *Solomon v Magistrate, Pretoria, & Anor supra* at 608 *in fine*-609B, it was approved by both judges in *Ellis v Visser supra*. BLACKWELL J said at 437C-D:

"If these concluding words of MASON J are a correct reflection of s 14, then clearly the magistrate was wrong in holding that Visser was entitled to prosecute, because admittedly, Visser had no civil remedy against Ellis, and even if Visser suffered prejudice, he suffered no actionable wrong. This dictum of MASON J's represents the Court's approach to the decision of the matter before it, and cannot in my view, be said to be, as

1987 (1) ZLR p128

GUBBAY JA

was argued before us, merely *obiter*. We must therefore treat it as authoritative and binding upon us unless we have a clear view that it is mistaken. So far from having such a view, I find myself substantially in agreement with it. Once it is conceded that the term injury must be used in its juristic sense, then what can it mean but an invasion of a legal right."

And DOWLING J stated at 438B-C:

"I agree that the appeal should be upheld. I prefer, however, to base my opinion on the simple ground that Visser has not shown that he has suffered an actionable injury, as required by the judgment of the Full Court in *Mullins and Meyer v Pearlman sup cit*.

It seems to me that the remark of MASON J ...that when no right of civil redress exists no right of private prosecution can arise, was not obiter. In my opinion it should be regarded as a *ratio decidendi* of the case and represents the considered view of the Court that 'injury' in s 14 means an actionable injury."

More recently, in *Makhanya v Bailey NO 1980 (4) SA 713 (T)*, LE ROUX J (Kruger AJ concurring) approved of the submission that :

"...the cases laying down that a civil remedy should be available before this peculiar interest could be said to exist were not applicable in a case where it must be clear that a personal interest did exist quite apart from the question of the civil remedy" (see at 716H).

Since it was accepted in that case that the private prosecutor had a civil remedy available to her the learned judge's remarks were, so it seems to me, *obiter*.

However that may be, I respectfully associate myself with the more acclaimed view that the private prosecutor is required to show that he has suffered an actionable injury; there being no entitlement to prosecute if he is unable to prove an invasion of a legal right. A suitable test to apply is to enquire whether the allegation by the private party that he has suffered an injury, if pleaded in a civil suit, would make the declaration excipiable. If it would not, he may prosecute.

Of course, certain actionable injuries, in the criminal sense, are injuries against society as a whole and not against individual members within society.

1987 (1) ZLR p129

GUBBAY JA

The injury suffered individually must therefore be beyond that suffered by the public generally.

It was argued by Mr *Lloyd* that the parental obligation to protect the chastity and reputation of his daughter, Julia, afforded the appellant a substantive and peculiar interest in the issue of the respondent's trial arising from the injury he individually suffered by reason of the violation by the respondent of the order of the High Court interdicting him from communicating or meeting with Julia during her minority. Counsel relied heavily on the case of *Gordon v Barnard* 1977 (1) SA 887 (C), in which a father succeeded in his application for an interdict restraining the respondent, a married man, from meeting or communicating in any way with his minor daughter, aged 18 years. The child had been the subject of an almost puritanical regime at home and her father had kept a close surveillance over her relationships with men. The parental control was extensive but STEYN J held that the respondent's conduct in building up a surreptitious and intimate relationship with the child, which included having sexual intercourse with her and attempting to take her away from her home, had brought the parental control into contempt and constituted an *injuria* against her father (see at 890 F-G).

I have no quarrel with that decision. Indeed, on 23 February 1983, the High Court must have been persuaded by much the same reasoning to grant the appellant the interdict it did against the respondent.

But events progressed since that time. The injury which the appellant relied upon as individually suffered, in his prosecution of the respondent, no longer arose from the breach of an extant parental control over his daughter; it was founded upon the wilful breach of a civil court order. That put an entirely different complexion on the nature of his interest in the issue of the trial. Undoubtedly he had an interest in the punishment of the respondent for his contemptuous disobedience of the order of the High Court, but that interest was not peculiar to him. It was one shared with every right-thinking member of society. It was neither greater nor less than that of any other person anxious to ensure that the dignity and the authority of the country's judicial bodies remain unscathed.

I believe this conclusion to be firmly supported by the fact that any punishment meted out to the respondent would not have the effect, even indirectly, of coercing obedience to the court order (which if it did, may have served to differentiate the appellant's interest from that of the general public). It cannot have that effect, for the order prohibited the respondent from

1987 (1) ZLR p130

GUBBAY JA

meeting or communicating with Julia only during her minority; and she came of age prior to the institution of the criminal proceedings.

I am satisfied, therefore, that the appellant failed to overcome the initial hurdles of s 17 and accordingly was correctly held by EBRAHIM J not to possess the *locus standi* to bring this charge.

THE CHARGE OF INCITEMENT TO COMMIT MURDER

Assuming, as I do for the purposes of this judgment, that the respondent committed this offence, the insurmountable problem facing the appellant is his failure to testify at the criminal proceedings. The *onus* was on him to prove an entitlement to prosecute and, with particular regard to this charge, that he individually had suffered an injury within the meaning of s 17. Not one word did he utter to the regional magistrate about it. There is nothing on record which suggests that by reason of the offence he even entertained an apprehension of injury, let alone that he suffered an actual injury. It is not known whether the incitee, Dardagan, ever agreed to carry out the respondent's instructions; he may have dismissed them as ridiculous. Furthermore, it is not known whether the appellant, when ultimately informed of the incitement of Dardagan, took it seriously as a wrongful aggression upon his person. Conceivably he may have been advised, and so believed, that there was never any prospect of Dardagan becoming susceptible to the respondent's persuasion. Proof, and not mere speculation, was what was required of the appellant.

Even if it can be said that a substantial and peculiar interest arose inferentially from the allegations in the charge sheet, there was a void of evidence to justify a finding that the commission of the offence resulted in the appellant suffering some injury.

I tend also to agree with the learned judge that, as it was not established that the incitement was ongoing at the time the appellant first became aware of it, or that he had a reasonable apprehension of its being repeated in the future, he would not have succeeded in obtaining civil

redress by means of a prohibitory interdict. See generally, *Nestor & Ors v Minister of Police & Ors* 1984 (4) SA 230 (SWA) at 244F-I. In short, it was not even shown that the appellant had a civil remedy against the respondent at any stage, let alone at the later stage when the prosecution was instituted.

THE CHARGE OF ATTEMPTED MURDER

The prosecution on this charge was brought in terms of s 18(b) of the Act,

1987 (1) ZLR p131

GUBBAY JA

which grants to legal guardians the right to prosecute in respect of offences committed against minor wards.

It was common cause at the trial that, although at the date of the alleged offence Julia was still a minor under the legal guardianship of the appellant, she had come of age prior to the commencement of the prosecution on 9 April 1985, with the consequence that the appellant's powers as guardian had terminated by then. See Voet *Pandects* 1.7.15; Spiro *Law of Parent and Child* 3 ed at 227-228.

Accordingly, what was at issue was whether the appellant had lost his right of prosecution. The learned judge held he had on two grounds:

"Firstly, on an interpretation of s 18(b) a guardian is given the right to prosecute on behalf of his minor ward. The right given is the right of prosecution. It follows that there must be a minor ward at the time the right is exercised. If, as here, the minor has ceased to be such before the right is exercised, then the right is extinguished. Secondly, as an adult, the respondent's daughter now has the right to pursue her own private prosecution of the applicant should she so wish, because she would have a substantial interest in the issue of trial arising out of the injury she suffered."

I find this reasoning compelling. The whole basis of s 18(b) is that minor wards do not have *locus standi* to prosecute in respect of offences committed against them. That right vests in their guardians who act in a representative capacity; a capacity bestowed upon them by statute, for the right of private prosecution for criminal offences did not exist under Roman-Dutch law. See *Mullins and Meyer v Pearlman supra* at 642; *Ellis v Visser* 1954 (2) SA 431 (T) at 434F. But if, at the commencement of the prosecution, the age of majority has been attained and the private party, in his own right, is entitled to prosecute in respect of an offence committed against him while still a minor, then it is he and not someone on his behalf who must do so. I cannot perceive the Legislature intending that the right to prosecute co-exists between the former minor and the former guardian, for the consequence could be disagreement on whether to prosecute or not: and whose decision would prevail?

What the position is where during the course of prosecution proceedings brought by a guardian on behalf of the minor, the latter attains majority, does not fall for determination. I venture to think, however, that if the right is held

1987 (1) ZLR p132

GUBBAY JA

by the guardian at the inception of the prosecution, it will not be extinguished upon the minor attaining majority.

In the result I am not persuaded that EBRAHIM J erred in issuing a *mandamus* requiring the regional magistrate to acquit the respondent on all three charges, and I would dismiss the appeal with costs.

McNally JA: I agree.

Manyarara JA: I agree.

Atherstone & Cook, appellant's legal representatives

Kantor & Immerman, respondent's legal representatives

1987 (1) ZLR p133

BLACK v BLACK 1987 (1) ZLR 133 (SC)

Court **Supreme Court, Harare**

Gubbay ACJ, McNally JA & Manyarara JA

Appeal against order of maintenance court

22 May & 8 June 1987

Flynote

Maintenance - increase in - party claiming increase able to make some contribution by working - effect - maintenance court - approach to be adopted by - Maintenance Act [Chapter 35] - s 6(4)(d) - Matrimonial Causes Act 1985 - s 7(3).

Headnote

Before a variation or discharge of a maintenance order may be granted, it must be established that a change in the means or circumstances of any of the parties has occurred. An onus thus falls on an applicant for an alteration to maintenance to show that sound reasons exist for such alteration. One of the factors which the maintenance court must take into account is whether the parents of any dependants are able to work and whether it is desirable that they do so. Where a person, by her work, used to contribute to the standard of living she enjoyed while married, it is just that she should work at the same level as before and thereby continue to contribute by her own efforts to the standard of living she enjoys. It would not be just for her to receive maintenance sufficient to allow her to enjoy the same standard of living without any effort on her part.

Although s 7(3) of the Matrimonial Causes Act 1985 enjoins the High Court, when determining whether to vary a maintenance order made by it, to endeavour to place the spouse and children

in the same position they would have been in had a normal marital relationship continued between the spouses, this is not necessarily the approach to be adopted by a maintenance court, which is a creature of a different statute.

1987 (1) ZLR p134

GUBBAY ACJ

Cases cited:

Prophet v Prophet 1948 (4) SA 325 (O)

Marufu v Moyo 1983 (2) ZLR 386 (SC)

Buch v Buch 1967 (3) SA 83 (T)

Zimunya v Zimunya HH-378-84 (not reported)

Owen - Smith v Owen - Smith 1981 ZLR 514 (SC)

Louis v Louis 1973 (2) SA 597 (T)

Daines v Daines & Anor 1980 ZLR 141 (GD)

M T O' Meara for the appellant

J Sayce for the respondent

Judgment

Gubbay ACJ: The parties to this appeal were formerly husband and wife. Their marriage endured for twenty years and produced three children. The youngest, Sara, was born on 27 May 1970; the other two have completed their tertiary education and are now majors, gainfully employed. Ultimately it became apparent that the marital relationship had broken down irretrievably and on 25 June 1980 the parties were divorced. In terms of a consent paper, which was made an order of the High Court, maintenance was payable by the respondent (the husband) to the appellant in the sum of \$670 per month and a further \$110 per month was payable in respect of each of the three children, of whom she was awarded the custody. The respondent also agreed to meet the entire fees of the private schools for the children (inclusive of the costs of the uniforms, books and sports equipment required by them) and those of any future University or post-school education or training undertaken by them, as well as all expenses incurred in connection with the medical, dental or optical care and treatment of the children and the appellant. In addition, he was to pay the appellant the sum of \$66 500, being the cost of acquiring and furnishing a town house in Harare. Finally, he undertook to assist the appellant financially in replacing from time to time the motor vehicle used by her.

These provisions made by the respondent for the welfare of the appellant and the children, all of which he has faithfully complied with, were undoubtedly generous and, so far as the appellant herself was concerned, exceeded her material needs at that time. They recognised the high standard of living to which the appellant and the children had been accustomed, but caused the

respondent no financial hardship, for he was then and remains today, a successful and wealthy farmer.

Towards the end of 1983 the appellant informally sought an increase in

1987 (1) ZLR p135

GUBBAY ACJ

maintenance and it was settled that with effect from 1 April 1984 the respondent would pay the wages of the appellant's domestic employee (\$75 per month) and the annual comprehensive insurance premium levied in respect of her motor vehicle (\$279,98). It is not denied by the respondent that he was influenced to agree, at least in part, by an acceptance that with the passing of almost four years since the divorce there had been an appreciable rise in the cost of living.

When, however, the respondent was approached in January 1986 for a further increase in maintenance his attitude towards the appellant hardened. He considered she was becoming more and more grasping and was labouring under the misapprehension that she was not obliged to augment her maintenance by taking up employment, but could rely solely on him to uphold a standard of living which was extremely affluent, if not extravagant. Not only did he refuse to accede to any increase, but he ceased forthwith to pay the monthly wages of the domestic employee and the annual insurance premium.

The appellant countered by applying to the maintenance court for a variation of the order of the High Court. She sought an increase in her personal maintenance of \$230 per month and in that of Sara's of \$90 per month, and an order that the respondent pay the monthly wages of the domestic employee and the annual insurance premium in respect of her current motor vehicle. The respondent opposed the application, contending that although his income and resources were large enough to enable him, without any strain, to afford these additional demands, the maintenance provided for in the consent paper was not only adequate but more than sufficient in the appellant's present circumstances.

Recognising, as he did, that after divorce both parties were entitled to keep up a high standard of living consistent with their social status, the presiding magistrate considered the average monthly expenses incurred by the appellant for herself and Sara, amounting to \$1304, were not unreasonable. He was satisfied that the very substantial rise in the cost of living since June 1980 constituted an alteration in the circumstances of the appellant (a fact previously conceded by the respondent), thereby meriting an upward variation in the *quantum* of maintenance then agreed upon. See *Prophet v Prophet* 1948 (4) SA 325 (O) at 329; *Marufu v Moyo* 1983 (2) ZLR 386 (SC) at 388C-D. But, in assessing the increase to be awarded, he had regard to the well-recognised concept that after divorce a wife is not necessarily entitled to live at the same standard she enjoyed during the marriage, and held that in this case there was an obligation upon the appellant to make up in part the

1987 (1) ZLR p136

GUBBAY ACJ

shortfall in her living expenses by undertaking permanent employment. In the event he allowed the application but only to the extent of ordering an increase in the appellant's personal maintenance from \$670 to \$730 per month and in that of Sara's from \$110 to \$160 per month.

It was conceded by Mr *O' Meara* in his heads of argument that the maintenance court was justified in refusing to order payment by the respondent of the wages of the domestic employee and of the annual insurance premium. He contended, however, that it had erred in failing to grant in full the increase of \$230 and \$90 per month.

It is as well at the outset to touch briefly on the question of the *onus* in an application for a variation or discharge of a maintenance order brought in terms of s 8 of the Maintenance Act [Chapter 35], for, relying upon the judgment by CLAASSEN J in *Buch v Buch* 1967 (3) SA 83 (T) at 87D-F, as approved in *Zimunya v Zimunya* HH-378-84 (unreported), it was submitted before the maintenance court that there was no burden on the present appellant to establish an alteration in the means or circumstances of herself or the respondent (see s 8(5)(b)).

The submission was correctly rejected by the magistrate. Not only was it in conflict with the *dictum* of GEORGES CJ in *Marufu v Moyo supra* at 387G, but an examination of the decision in *Buch's* case *supra* plainly reveals that it was concerned with the nature of the particular inquiry, and especially the part played therein by the maintenance officer, under the South African Maintenance Act, 1963, which differs in material respects from the inquiry prescribed in s 8 of Chapter 35. Whilst it is true that inquiry proceedings in a maintenance court are *sui generis* and do not accord with those in an ordinary civil action between litigants (see *Owen - Smith v Owen - Smith* 1981 ZLR 514 (SC) at 517 A-C), it is nonetheless a requirement that before a variation or discharge of a maintenance order may be granted it must be established that a change in the means or circumstances of any of the parties has occurred. If such is not established then the application must fail. It is a necessary implication from this that an *onus* rests on the applicant to satisfy the maintenance court that sound reason for an alteration to the *status quo* exists, and it matters not that the maintenance court enjoys the concurrent power to call such witnesses as it deems necessary and may call for the production of any book or document and to examine any witness on oath.

The gravamen of Mr *O' Meara's* argument was that the maintenance court ought not to have assessed the appellant's need for an increase in maintenance

1987 (1) ZLR p137

GUBBAY ACJ

upon the basis of her taking up permanent employment. He sought to derive support for that proposition from the fundamental change in the law brought about by the introduction of the Matrimonial Causes Act 1985, which repealed its predecessor, Chapter 39, on 7 February 1986. Section 7(3), as read with s 9 of the new Act, provides, where relevant, that in determining whether to vary a maintenance order made by it, the High Court is to have regard to all the circumstances of the case including those particularised in paragraphs (a) to (g) "and in so doing ...shall endeavour as far as is reasonable and practicable and, having regard to their conduct, is just to do so, to place the spouses and children **in the position they would have been in had a normal marital relationship continued between the spouses**" (my

emphasis). In the past, under s 9 (1) and (5) of Chapter 39, entitlement to maintenance after divorce was not to be determined on the same basis as it was for a wife merely separated from her husband. See *Louis v Louis* 1973 (2) SA 597 (T) at 598B- D; *Daines v Daines & Anor* 1980 ZLR 141 (GD) at 142G-143C.

I am not entirely persuaded that the approach to be adopted by the High Court, in seeking to equate the position of the spouses at the time of the application to what it would have been if a normal marital relationship had continued between them, must be that adopted by maintenance courts. For they are enjoined to apply the provisions of the Act which created them. Section 6(4), as read with s 8(5)(b) of the Maintenance Act spells out that in considering an application like the present, one of the factors a maintenance court shall have regard to is:

"(d) whether the dependant or any of his parents are able to work and, if so, whether it is desirable that they should do so."

But even if I am wrong in doubting whether regard to the notional continuance of a normal marital relationship is a factor which bears upon an inquiry conducted by a maintenance court, I agree with Mr Sayce that such an approach affords no assistance to the appellant's contention that there is no obligation upon her to work.

The undisputed position is that before the parties were divorced the appellant did work, although not in formalised employment. She devoted herself not only to the management of the household and the raising of the children, but to the performance of "many tasks, chores and office work" in relation to the efficient administration of the farm. In that way she contributed by her own endeavours to the standard of living she enjoyed. To employ, therefore, the

1987 (1) ZLR p138

GUBBAY ACJ

wording of s 7(3) of the Matrimonial Causes Act 1985, in order to place the appellant in the position she would have been in had a normal marital relationship continued, it is just that she should work at the same level as before and thereby continue to contribute by her own efforts to the standard of living she enjoys. It would not be just for her to receive an amount of maintenance sufficient to allow her to enjoy the same standard of living without any effort on her part.

It is my view that whatever approach be adopted, the appellant is presently obliged to contribute, in some degree at least, to the cost of maintaining herself. This is what she has been doing. She has periodically undertaken employment as a receptionist, earning a net salary of \$400 per month. She is over forty years of age, holds no professional qualification and has not received any occupational training which would equip her to obtain more lucrative employment. Her belief that she lacks the capacity to earn more than \$400 net per month appears well founded.

The appellant has an earning ability, albeit somewhat meagre, and by utilizing it she may be said in a real sense to be doing nothing more burdensome than she did when married to the respondent. It follows that she is not entitled to look to the respondent to maintain her to the full

extent of her reasonable needs.

Oddly enough, in restricting her claim to an increase of \$230 for herself and \$90 for Sara, the appellant seems to have tacitly acknowledged that her earning capacity should be taken into account. Accepting as the maintenance court did, that an expenditure of \$1 304 per month for herself and Sara was not unreasonable - indeed the amount was not challenged by Mr Sayce - there is still a shortfall of \$373 per month. For of the \$780 per month payable under the consent paper \$120 is deductible as income tax, and at the same rate of taxation an increase of \$320 per month will yield a net amount of \$271. Thus the shortfall is calculated by deducting \$931 from \$1 304.

It is relevant to note that, according to the Quarterly Digest of Statistics for September 1986 published by the Central Statistical Office, the consumer price index for higher income urban families rose from a base of 100 in 1980 to 175 in April 1984 and to 220 in June 1986 when the magistrate gave his judgment. Although this evidence was not placed before the maintenance court, I mention it to indicate that the increase sought by the appellant was, by the criterion of purchasing power, a modest one. \$670 per month in 1980 went a great deal further than \$900 per month in 1986.

1987 (1) ZLR p139

GUBBAY ACJ

Moreover, even though the respondent did not dispute his ability to pay any reasonable increase, it is apparent that his maintenance responsibility has decreased since 1980 because the two elder children are no longer dependent upon him.

Having regard, then, to the appellant's obligation to take up employment, to her age and circumscribed earning power, to the duration of the marriage and to the high standard of living which she is entitled to enjoy, and, finally to the respondent's considerable means, I am of the opinion that her claim for an increase in personal maintenance of \$230 was justified and ought to have been awarded by the maintenance court.

The maintenance payable for Sara stands on a somewhat different footing. The respondent is involved in very considerable expense in keeping his daughter at a private school as a boarder. He pays for all her school requisites, including uniforms. She spends some nine months of the year at school and part of her holidays with him. There is therefore perhaps less justification for an increase, in respect of her remaining expenses, of about 81% as opposed to the increase of about 34% in respect of the appellant.

On the other hand, as I have sought to demonstrate, the increase of \$230 per month for the appellant is a modest one. Taken together the total request represents a mere 41% increase over the six years between the order and the application for an increase. It would be wrong not to adopt a global view. To the extent that the request in respect of Sara may be a little high, the request in respect of the appellant's own maintenance may be said to be a little low. The calculation which I have made shows a shortfall of \$373 per month, despite being based on the full amount claimed. To reduce the award for Sara by \$40 a month, as the magistrate has done, would push the shortfall to over \$400 per month, and on the figures there is no warrant for that.

Accordingly I do not think it is possible to support the decision of the maintenance court to reduce the amount requested in respect of Sara by \$40. No good reason for this arbitrary reduction was given, and the overall figures do not merit such a conclusion.

In the result I would allow the appeal with costs, and amend the order of the maintenance court by substituting the figures "\$900" and "\$200" for the figures "\$730" and "\$160".

McNally JA: I agree.

1987 (1) ZLR p140

MANYARARA JA

Manyarara JA: I agree.

Honey & Blanckenberg, appellant's legal representatives

Coghlan, Welsh & Guest, respondent's legal representatives

1987 (1) ZLR p141

ORION INVESTMENTS (PVT) LTD v UJAMAA INVESTMENTS (PVT) LTD & ORS 1987 (1) ZLR 141 (SC)

Court Supreme Court, Harare

Dumbutshena CJ, Gubbay JA & McNally JA

Appeal against decision on a stated case

5 & 6 February & 2 July 1987

Flynote

Contract - formation - offer and acceptance - communication of acceptance to offeror - when may be dispensed with - counter - offer or qualified acceptance - effect - necessity for offeree to agree to exact terms proposed by offeror.

Headnote

The general rule with regard to the formation of contracts is that a contract is not concluded until the offeree has not only decided in his own mind to accept the offer made, but has communicated his acceptance to the offeror. It is competent for the offeror to dispense with such notification either expressly or impliedly, and to indicate the manner in which acceptance may be manifested. Compliance with the method of acceptance, even though not brought to the knowledge of the offeror, will create a *vinculum juris* between the parties.

For a contract to be formed it is necessary that the offeree must, in agreeing, accept the exact terms offered by the offeror. Where the offeree makes a counter - offer or signifies a qualified

acceptance of the offer, the offer is taken to have been refused and no contract is formed.

In the present case, the parties were negotiating the sale of a commercial property. Three draft agreements had been prepared but the parties were unable to agree. A fourth draft agreement, signed by the respondents, the sellers, was sent to the appellant, the would-be buyer. This draft included the words -

"This agreement shall only become of force and effect when executed by the Sellers and by the Purchaser..."

1987 (1) ZLR p142

DUMBUTSHENA CJ

The draft was sent under cover of a letter which said:

"We enclose in duplicate agreement duly signed by all sellers. If it is not acceptable, your early return of the agreements would be appreciated."

A few days after the appellant signed the draft, the appellant's legal practitioner wrote to the respondents' practitioner, seeking amendments to the draft.

The appellant contended that merely by its having signed the draft a binding agreement came into being.

Held, that the wording of the letter sent by the offerors to the appellant clearly indicated that the offerors expected to receive from the appellant either a signed copy of the draft, if the offer was accepted, or both copies unsigned, if the offer was rejected. Signing without notification would not be enough; it would put the offerors at a great disadvantage, as they would be kept guessing about the fate of their offer and be unable to offer their property to someone else. In any event, because of the necessity to exchange documents before the effective date of the contract, it was essential that communication of the acceptance be made.

Held, further, that the letter from the appellant's legal practitioner effectively made a counter-offer and the respondents' offer had thereby been rejected.

Cases cited:

Robophone Facilities Ltd v Blank [1966] 3 All ER 128 (CA)

Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591 (A)

R v Nel 1921 AD 339

McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16

Reid v Jeffreys Bay Property Holdings (Pty) Ltd 1976 (3) SA 134 (C)

Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd 1983 (4) SA 296 (T)

Smeiman v Volkersz 1954 (4) SA 170 (C)

Watermeyer v Murray 1911 AD 61

Reid Bros (SA) Ltd v Fischer Bearings Co Ltd 1943 AD 232

Boerne v Harris 1949 (1) SA 793 (A)

R H Zulman SC, with him *M T O' Meara*, for the appellant

L H Cook, with him *C N Greenland*, for the respondent

Judgment

Dumbutshena CJ: This is an appeal against the decision of SAMATTA J on a special case stated in terms of Order 29 Rule 199 of the High Court of Zimbabwe Rules. The issues to be determined by the High Court were set

1987 (1) ZLR p143

DUMBUTSHENA CJ

out by the parties as follows:

- "1. Whether upon signature of the original of Annexure 'J' hereto by the plaintiff on 17th October and notwithstanding the facts set out in Annexure 'K', a binding agreement came into being between the Plaintiff and the Defendants upon the terms set out in the said document?
2. What was the effect of the letter written by the Plaintiff's Legal Practitioners dated 22nd October, 1984, to the Defendant's Legal Practitioners, a copy of which letter is Annexure 'K' hereto, read with the reply thereto of 24th October, 1984 (Annexure 'L') and the non-compliance with the requirements therein set forth?
3. Was there a proper compliance, in the circumstances emerging from the agreed stated facts, by the Plaintiff with the obligations imposed upon the Plaintiff in terms of Clause 16 of the said Annexure 'J' hereto?
4. Did the payment tendered by the Plaintiff of the purchase price and its efforts to comply with the terms of Clause 16 constitute an infringement of Section 58 of the Companies Act (Chapter 190)? If so, does this render the agreement unenforceable by Plaintiff?
5. Is the Plaintiff entitled to delivery and transfer of the shares in the Company from the Defendants and cession assignment and transfer of the Defendants' Loan Account claims against the Company to the Plaintiff against payment to the Plaintiff of the purchase price thereof?
6. Who is to pay the costs of these proceedings, including the costs of how many legal practitioners?"

In a detailed judgment the learned trial judge determined the six issues as follows.

On the first issue he found that there was no binding agreement between the appellant (the plaintiff at the trial) and the respondents because the offeree did not communicate the acceptance of the offer to the offeror.

On the second issue he found that the letter written by the appellant's legal practitioners on 22 October 1984, as read with the reply of 24 October 1984, constituted a counter offer and therefore there was no acceptance by the appellant of the offer contained in the agreement, Annexure "J".

DUMBUTSHENA CJ

On the third he found that the appellant did not comply with its obligations in terms of clause 16 of the agreement.

On the fourth issue the learned judge found that the payment tendered by the appellant of the purchase price and the efforts made by the appellant in regard to the provisions of clause 16 did not constitute an infringement of s 58 of the Companies Act [*Chapter 190*] and the agreement was not for that reason unenforceable.

On the fifth issue, he decided that the appellant was not entitled to receive transfer of the shares from the respondents and cession, assignment and transfer of the respondents' loan account claims against the company.

Finally the sixth issue was resolved in favour of the respondents by awarding them costs.

Right at the outset of his argument, Mr *Zulman*, who appeared for the appellant, submitted that the first issue was of great significance, and if it were determined in favour of the appellant then all the remaining issues would have to be gone into in great detail. But, if it were determined in favour of the respondents, then the appellant would have lost the appeal and there would be no need to consider the remaining issues. Mr *Cook*, who appeared for the respondents, agreed with that approach.

I now proceed to set out as briefly as possible the facts in this appeal. I do so because the learned judge *a quo* covered comprehensively all the facts in the stated case. I need do no more than record only those salient facts that are pertinent to the resolution of this appeal.

The appellant and the defendants (respondents) entered into negotiations for the sale by the respondents of the R/E of Stand 574, Salisbury Township, otherwise known as Ivory House (hereinafter called the property). The plaintiff (appellant) is an investment company duly incorporated according to the laws of Zimbabwe. The first respondent is a company incorporated in Zimbabwe holding 252 full-paid ordinary shares of \$2,00 each. The second respondent is a resident of Zimbabwe who holds 110 fully-paid ordinary shares of \$2,00 each. The third respondent is a resident of Zimbabwe and the holder of 216 fully-paid ordinary shares of \$2,00 each. The fourth respondent is an investment company registered according to the laws of Zimbabwe. Its principal shareholder is resident in the United Kingdom. It holds 206 fully-paid ordinary shares of \$2,00 each. The fifth respondent is a

DUMBUTSHENA CJ

company incorporated according to the laws of Zimbabwe. It holds 151 fully-paid ordinary shares each of \$2,00. Its principal shareholder is one Alexander Katz who is its managing director. It is an estate agent whose registered agent is Mr Katz. The sixth respondent is an investment company incorporated according to the laws of Zimbabwe. Its principal shareholder

is resident in the United Kingdom. It holds 65 fully-paid ordinary shares of \$2,00 each.

The respondents' shareholdings constitute the whole issued share capital of 1000 shares of \$2,00 each (hereinafter referred to as the shares) of African Films and Features (Private) Limited (hereinafter referred to as the Company). All these shareholders have loan accounts in credit with the Company. During the period of negotiations between the parties, and as at 31 October 1984, the respective loan accounts of the respondents with the Company were as follows: first respondent \$12 908,00; second respondent \$6 726,00; third respondent \$13 836,00; fourth respondent \$76 348,26; fifth respondent \$5 073,00; sixth respondent \$25 494,30.

The respondents were negotiating with the appellant to sell to the appellant and for the appellant to buy from the respondents all the issued shares in the Company at the close of business on 31 October 1984 (hereinafter referred to as "the effective date") and the cession, assignment and transfer of the respondents' loan accounts as at and with effect from the effective date to the appellant.

During the month of August 1984 the parties first entered into negotiations for the sale and purchase of the above shares and for the cession to the appellant of each of the respondents' loan accounts with the Company. Four draft agreements were prepared. The first draft was apparently prepared by Katz. What is significant about this draft agreement, Annexure A? The purchase price of the shares and the loan accounts was \$530 000 payable on 31 August 1984 the then effective date. The second draft agreement, Annexure F, was prepared by Mr Eastwood, the legal practitioner representing the respondents, on or about 12 September 1984. The purchase price was still \$530 000. The agreement was submitted to Mr Kassim, the appellant's legal practitioner. The parties did not agree. They negotiated further. Mr Kassim, representing the purchaser, prepared another draft agreement, Annexure G. It was submitted to Mr Eastwood. He made amendments and alterations to Mr Kassim's draft. Finally Mr Eastwood prepared a fourth draft agreement, Annexure J. The difference between earlier draft agreements and Annexure J was in the price which now stood at \$339 000. No

1987 (1) ZLR p146

DUMBUTSHENA CJ

reason was given for the reduction in the purchase price. It also incorporated clause 9 of the Kassim draft agreement as clause 20. This clause gave a different complexion to the draft agreement. Clause 20 reads:

"This agreement shall only become of force and effect when executed by the Sellers and by the Purchaser and shall thereupon be the exclusive memorial of the agreement of sale and purchase between the Sellers and the Purchaser as aforesaid and of the respective claims of the parties and no variation of this agreement shall be binding upon the parties unless recorded in writing and signed by the parties."

This draft agreement was signed by Mr Eastwood on behalf of the first respondent and by Mr Katz on behalf of the other respondents, and on behalf of the Company on 9 October 1984. Mr Katz submitted it to Mr Kassim under cover of a memorandum of the 9th October (Annexure I). What did that memorandum say? It said:

"We enclose in duplicate agreement duly signed by all sellers. If it is not acceptable, your early return of the

agreements would be appreciated."

The burning question in this appeal is whether upon signature and execution of the agreement, Annexure J, by the appellant on the 17 October 1984, a binding agreement came into being between the appellant and the respondents upon the terms set out in the draft agreement. Mr *Zulman's* contention was that upon signature or execution of the document by the appellant on 17 October 1984 a binding agreement came into being between the parties. He argued that upon mere signing or execution a binding agreement came into being because of the plain and unambiguous wording of clause 20 of Annexure J

Mr *Zulman* further submitted that the effect in law of the submission of the document, Annexure J, signed by the respondents, was that the respondents made an offer to the appellant in terms set out in the document which the appellant could accept or reject. He said that it could be accepted or rejected as set out in the memorandum, Annexure I, which states as much. This part of his argument is to some extent correct. The document, Annexure J, signed by the respondents was only an offer. It could be revoked by the respondents at any time before it was signed or accepted by the appellant. See *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 (CA) at 131I.

Mr Cook agreed. He, however, did not agree with Mr *Zulman* that upon

1987 (1) ZLR p147

DUMBUTSHENA CJ

signature the agreement came into existence. He contended on behalf of the respondents that an offer becomes a binding agreement when accepted and the acceptance is conveyed to the offeror by the offeree. There must be a consensus between the offeror and the offeree and this consensus cannot be there until the offeror knows that his offer has been accepted.

In *Robophone Facilities Ltd v Blank supra*, at 131I-132C LORD DENNING MR put the general rule in these terms:

"In order to become binding, someone duly authorised would have to sign it as accepted on behalf of the plaintiffs; and, moreover, their acceptance would have to be communicated to the defendant. The general rule undoubtedly is that, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified: see *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; [1890-94] All ER Rep 127 at 130 *per* LINDLEY LJ, *Entores Ltd v Miles Far East Corpn* [1955] 2 All ER 493 at 497 *per* PARKER LJ. Clause 14 does not dispense with the necessity of notification; Signing without notification is not enough. It would be deplorable if it were. The plaintiffs would be able to keep the form in their office unsigned, and then play fast and loose as they pleased. The defendant would not know whether or not there was a contract binding them to supply or him to take. Just as mental acceptance is not enough (see *Felthouse v Bindley* (1862) 11 CBNS 69), nor is internal acceptance within the plaintiff's office. In this very case we know that the plaintiffs signed it sometime or other (for it was produced at the trial complete with signature), but we do not know when the plaintiffs signed it. No evidence was given on the point. In the circumstances I think that, until the plaintiffs notified the defendant of their acceptance, the agreement was not complete. It was, in the words of the defendant himself, provisional."

Put simply, the general rule is "a contract is not concluded until the offeree has not only decided in his own mind to accept the offer, but has communicated his acceptance to the offeror". See Christie *The Law of Contract in South Africa* at 65; *Wessels Law of Contract in South Africa* 2

ed vol I at para 105 and 111-120; Cheshire, Fifoot & Furmston's *Law of Contract* 11 ed at 47.

Driftwood Properties (Pty) Ltd v McLean 1971 (3) SA 591 (A) is seemingly relied upon by both parties. In that case the parties agreed to be bound by van Aswegen's signature on 17 May as envisaged by clause 7 of the written

1987 (1) ZLR p148

DUMBUTSHENA CJ

contract. It was clear that if either party failed to sign and only one party had signed by 17 May 1969, the offer would lapse. What is of importance in that case, for the purposes of the above argument, is that "unless the acceptance of the offer was in terms of the written document conditioned to be made in a particular manner, it is governed by the ordinary principles applicable to acceptance of an offer, which require van Aswegen not only to sign the document, but also to communicate the fact of his having signed it to the respondent on or before 17th May, 1969. Only then will there be an acceptance according to law" (at 597C-D). This in my view is the position in the instant case.

The question is, did the agreement, Annexure J, prescribe a method of acceptance? Mr *Zulman* contended that it did. How did Mr *Zulman* seek to sustain the submission that upon signature or execution of the document by the appellant on 17 October 1984, a binding agreement came into being between the parties? He argued that the above flows from the plain and unambiguous wording of clause 20, which it is convenient to repeat:

"This agreement shall only become of force and effect when executed by the Sellers and by the Purchaser and shall thereupon be the exclusive memorial of the agreement of sale and purchase is aforesaid and the respective claims of the parties and no variation of this agreement shall be binding upon the parties unless recorded in writing and signed by the parties."

It was contended that clause 20 did in plain words prescribe a method of acceptance of the offer made by the respondents to the appellant and that that method of acceptance was by signing the document. But did the clause prescribe a method of acceptance? Without the word "only" the submission would have been far stronger. To sustain his argument Mr *Zulman* relied on Mr Katz' memorandum, Annexure I, written to Mr Kassim. He argued that Annexure I assisted the appellant in coming to the conclusion that clause 20 was the mode of acceptance. He submitted that the appellant was told by Annexure I:

"We do not want to be informed of your acceptance but only communicate your refusal."

Put differently, he said the effect of Annexure I was:

"If you accept the draft just sign it. You don't have to tell us that you have signed."

1987 (1) ZLR p149

DUMBUTSHENA CJ

In thus contending Mr *Zulman* did not go against the general rule that, at the conclusion of a contract, acceptance by the offeree has to be communicated to the offeror. He however contended that an offeror may expressly or impliedly dispense with such communication or

prescribe a method of acceptance. In this case, the question is: did the respondents dispense with communication or did clause 20 prescribe a method of acceptance? In my view, they did not dispense with communication and clause 20 did not prescribe a method of acceptance.

In *R v Nel* 1921 AD 339, one of the cases cited by Mr Zulman in support of his contention that upon signing the appellant accepted the respondents' offer in accordance with the method prescribed in clause 20, SOLOMON JA said at 344:

"Now accepting it as a general rule that it is necessary that the communication of an acceptance should be made to the offeror in order to effect a contract, it is clear that it is competent for the latter to dispense with such notification either expressly or impliedly, and to indicate the manner in which acceptance may be manifested, see *Carlill v The Carbolic Smoke Ball Co* [1893] 1 QB 256; *Bloom v American Swiss Watch Co* 1915 AD 100."

In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 the appellant applied for 100 shares of one pound each in the respondent company. The appellant agreed to accept the number of shares he applied for or "any lesser number that may be allotted to me and to abide by the articles of association which I authorise you to sign on my behalf". MAASDORP JA said at 22:

"This is wholly inconsistent with an intention that the contract should not be binding on the defendant until he received notice of acceptance. It was laid down in the case of *Nel v The King*, decided by this Court in May, 1921, that although it is a general rule that it is necessary that the communication of an acceptance should be made to the offeror in order to effect a contract, it is clear that it is competent for the latter to dispense with such a notification, either expressly or impliedly, and to notify the manner in which the acceptance may be manifested.

In the present case the defendant dispensed with the communication of acceptance as an essential to the conclusion of the contract by requesting the plaintiff to allot the shares to him upon receiving the application. By

1987 (1) ZLR p150

DUMBUTSHENA CJ

such allotment the plaintiff manifested his acceptance of the application, and he did so in the manner indicated by the defendant."

See also *Reid v Jeffreys Bay Property Holdings (Pty) Ltd* 1976 (3) SA 134 (C) at 137H; *Hawkins v Contract Design Centre (Cape Division) (Pty) Ltd* 1983 (4) SA 296 (T) at 308F-309H; *Christie Business Law in Zimbabwe* at 44; *Christie The Law of Contract in South Africa* at 65-67.

In this case should the acceptance have been brought to the knowledge of the offeror? Mr Zulman said it was not necessary. He relied on what was said in the cases cited above and especially in what Ogilvie Thompson J, as he then was, said in *Smeiman v Volkersz* 1954 (4) SA 170(C) at 176F-G:

"Now to conclude a contract, acceptance must ordinarily be communicated to the offeror. That is the general, and clearly established, principle of our law of contract (*Dietrichsen v Dietrichsen* 1911 TPD 486 at 494-5; *R v Dembovsky* 1918 CPD 230 at 240-1). It is, however, equally well established that the offeror may require or authorise a particular method of acceptance, and that compliance with such method, even though not brought to the knowledge of the offeror, will create a vinculum juris between the parties. In the words of MAASDORP JA, in *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 22:

'...although it is a general rule that it is necessary that the communication of an acceptance should be made to the offeror in order to effect a contract, it is clear that it is competent for the latter to dispense with

such a notification, either expressly or impliedly, and to notify the manner in which the acceptance may be manifested."

It is the offeror who authorises the particular mode of communication. In the instant case the appellant contended that clause 20 and Mr Katz' memorandum to Mr Kassim, Annexure I, dispensed with notification. This submission initially influenced me to agree with Mr *Zulman's* contention that no communication of acceptance was required. I found Mr *Zulman's* argument on the effect of Mr Katz' memorandum of 9 October 1984 to Mr Kassim rather attractive. I thought then that the respondents had elected a method of notifying acceptance when he said: "If it is not acceptable, your early return of the agreements would be appreciated". I thought then that if the appellant signed the agreement and remained silent that would indicate acceptance. Mr Katz' memorandum seemed to fit in with para 67 of *Corbin on Contracts* Vol I where the learned author says:

1987 (1) ZLR p151

DUMBUTSHENA CJ

"In the first place, there is no question that the offeror can require notice of acceptance in any form that he pleases. He can require that it shall be in any language and transmitted in any manner. He may require notice to be given by a nod of the head, by flags, by wig-wag, by a smoke signal on a high hill. He may require that it be by letter, telegraph or radio, and that there shall be no contract unless and until he is himself made conscious of it.

Secondly, the offeror can specify a mode of making an acceptance of his offer, without making that method exclusive of all others. If the mode that he specifies is one that may not bring home to him the knowledge that his offer has been accepted, then such knowledge by him is not a requisite. The offeror can specify a mode of acceptance without any knowledge of the law of contract and without thinking in terms of offer and acceptance at all."

However a close examination of the sentence: "If it is not acceptable, your early return of the agreements would be appreciated", indicates no more than the respondents' desire to be informed early should the offer be rejected. It envisages that the offeree would notify the offeror at his own time in the event of his accepting the offer. It does not, in my considered view, dispense with the need to notify the offeror of the offeree's acceptance. The use of the plural "agreements" is very significant. When you send someone two copies of a proposed agreement, you normally intend that, if and when he signs them, he will keep one and send the other back to you. If he does not sign them, especially if your signature is already appended, you want both copies back, for obvious reasons.

For this reason the phrasing of the first sentence of Annexure I is equally important:

"We enclose in duplicate agreement duly signed by all sellers."

The obvious reason for sending it in duplicate was so that the purchasers could sign both, retain one and return the other. The strong inference is that the writer intended that acceptance would be notified by the return of one signed copy, and rejection by the return of both copies unsigned. I agree with LORD DENNING MR that: "Signing without notification is not enough ... The plaintiffs would be able to keep the form in their office unsigned, and then play fast and loose as they pleased". See *Robophone Facilities Ltd v Blank* *supra* at 132A. If silence were good enough as a method of communicating

DUMBUTSHENA CJ

acceptance it would put the offeror at great disadvantage. He would not only be kept guessing as to the fate of his offer, he would also be unable to offer his property to someone else. It is important that there be a consensus between the offeror and the offeree and, as Mr Cook said in his heads of argument, it cannot exist until the offeror knows that his offer has been accepted by the offeree. See Christie *Law of Contract in South Africa* at 65; Wessels *Law of Contract in South Africa* (2 ed) vol I paras 105 and 111-120; *Driftwood Properties (Pty) Ltd v McLean supra* at 597D-F. There are exceptions to every rule but the facts of this case allow of no exceptions.

It is trite that an offeror may expressly or tacitly dispense with notification of acceptance and may indicate some other manner of acceptance. In that case the contract is concluded when the offeree signifies acceptance in the manner prescribed by the offeror. That was not the case here. See Christie *Law of Contract of South Africa* at 65; Joubert *The Law of South Africa* vol 5 para 122; *Driftwood Properties (Pty) Ltd v McLean supra*; *R v Nel supra*; *McKenzie v Farmers Co-operative Meat Industries Ltd supra*.

This case allows no other conclusion than that the parties, at each stage of negotiations leading to agreement, expected to be informed of each other's attitude. There were four agreements prepared. The first three were rejected for one reason or another. When Mr Eastwood drew the last draft I am certain he did not expect it to be accepted by Mr Kassim. After all, the third draft prepared by Mr Kassim was, figuratively speaking, mutilated by Mr Eastwood. And what is also important is that it contained for the first time clause 9, which was incorporated into the final draft as clause 20. It was a very significant departure from the first two drafts. Mr Eastwood inserted a number of suggestions on Mr Kassim's draft. Mr Kassim himself was perturbed by the delay in finalising negotiations. His draft agreement was meant to be the final one. It was not. The property, from his letter of 1 October 1984, Annexure H, was being advertised for sale. His client was anxious. This worried him. So he wrote:

"We are quite prepared to consider minor amendments to this agreement.

We also must place on record that unless the Agreement of Sale is signed between the parties on or before 4 pm, Friday the 5th of October our client will consider itself free to withdraw the offer made to your client. If the Agreement is not signed by that date our client's offer will be reduced to \$500 000 gross".

As pointed out above, when his draft agreement was sent back to him it had

DUMBUTSHENA CJ

many suggested amendments and alterations and, more importantly, it was not signed. The response was a new agreement with new features and variations. It was sent to Mr Kassim already signed by the respondents. There was no guessing what the other side was going to do. Once a party is put on terms he would inevitably expect to be notified whether his offer was acceptable. Under these circumstances, the respondents would await communication of acceptance. How could one tell whether the other party was going to accept or reject the

newest draft? In his heads of argument Mr Cook rightly said, and I agree with him:

"There could have been no certainty in the minds of the sellers that the offer contained in Annexure 'J' would be accepted. Whenever there is uncertainty, and the greater the uncertainty, the probabilities are totally against a person waiving the necessity to convey an acceptance of an offer."

It was for this reason that Mr Katz wrote in Annexure I that the agreements would be returned if it was not accepted. On each previous occasion a written draft was sent by one party to the other party and each time it was not acceptable that fact was communicated to the other party. The adoption of that procedure, in my view, casts doubt on the contention that clause 20 required no notification of acceptance to the sellers. Why make an exception of the final draft? One would have expected the parties to communicate the rejection or acceptance. The history of the dealings between the parties during the long process of negotiations supports the contention that notification of the acceptance of the offer was required.

There are other considerations which made communication inevitable. The control of the Company was to pass on 31 October 1984, the effective date. It was therefore important to inform the sellers, ie the respondents, that the offer had been accepted. Besides, there were share certificates and other documents to be exchanged. Communication of the acceptance of the offer was therefore essential. I agree with the learned judge *a quo* that communication of the acceptance of the offer was required and was not done.

Even if I am wrong on the need for communication, there is still the fact that the appellant's signature was appended to a document which it wanted to be amended. This is clear from Mr Kassim's letter to Mr Eastwood, annexure K, dated 22 October 1984. It reads:

"We refer to the agreement which has been signed by the sellers and which

1987 (1) ZLR p154

DUMBUTSHENA CJ

has also now been signed by the purchaser but on the express condition that the agreement is interpreted in the light of, and includes the points made in this letter. They all refer to matters which might be ambiguous, particularly in view of the very strict provisions of clause 20.

The points are as follows:

- (a) The documents required under Clause 3 should include appropriately completed cessions of the loan accounts.
- (b) The Sellers will be obliged to pay to the Company any income tax that may be found to be due in excess of the \$40 000 for the period prior to the effective date after the Sellers put forward such objections and opposition as they wish to. At the moment the Agreement does not expressly provide that any such excess must be paid by the Sellers and clearly it was intended that it should be.
- (c) Neither Clause 5(b) nor Clause 22(a) expressly obliges the Sellers to pay to the purchaser prepaid rents and clearly this should be the obligation of the Sellers.
- (d) Surely the obligations of the Sellers under the Agreement should be expressed to be joint and several. Please confirm."

Mr Cook submitted that even if there was an implied waiver of the need to notify the

respondents of the acceptance of their offer, there was no valid contract and the purported acceptance was itself not valid. By its letter, Annexure K, the appellant did not make its acceptance final and an unqualified assent to the terms of the offer. See *Chitty on Contracts* 25 ed para 54. The appellant by its signature did not, in my view, intend to give an unconditional acceptance of the offer. Had it intended to do so, Mr Kassim's letter, Annexure K, would not have sought amendments to the agreement the appellant had already signed. By proposing amendments to the document it had signed, it made a counter offer which Mr Eastwood easily identified. It seems Mr Eastwood was prepared to accept the amendments. However, Mr Katz was not. Hence the letter of 24 October 1984, Annexure L, addressed to Mr Kassim asking him to incorporate the amendments in the agreement, sign the agreement and send it to Mr Katz for his signature by no later than Monday 29 October 1984. If this was not done the latest offer would be refused and there would be no binding contract. By letter Annexure P, dated 27 October 1984 addressed to Mr Eastwood, Mr Katz brought the agreement to an end. He said:

"I would prefer the Agreement to remain exactly as it is. If they don't agree, we are not bound, which I would prefer for the reasons discussed.

1987 (1) ZLR p155

DUMBUTSHENA CJ

We should, in any case, be allowed to retain November rents received in October to create the pool of \$40 000 we are supposed to be able to retain for tax.

I would rather not give a joint and several guarantee and I suppose the others would not want to either.

If Abdulla is difficult and we can't rely on your notice for 29 October, I hope we can rely on Clause 16 to withdraw."

Mr Eastwood advised Mr Kassim of the respondents' rejection of the counter offer by letter, Annexure Q, dated 30 October, 1984. He wrote:

"We understand from Mr Katz that he has received a copy of this letter signed by the Purchaser. However, Mr Katz informs us that, as contemplated in our letter of the 24th October 1984, he does not approve of the amendments proposed, which were called for in your letter of the 2nd October. Nor do the remaining proposed Sellers of the shares agree to the proposed amendments to the draft.

We are instructed to inform you that the proposed Sellers would not have accepted joint and several liability and would not have agreed to prepaid rents being immediately payable to the proposed Purchaser rather than being retained until the Income Tax liability had been resolved.

Accordingly the draft proposed by your client has not been acceptable or accepted by the proposed Sellers. Moreover Mr Katz tells us that he has not received from you a copy of the original agreement forwarded to your clients for signature and return and we too have not received any such document. We are instructed to inform you that as the agreement was not signed and was not received on Monday 29th October 1984, negotiations so far as the Sellers are concerned are at an end and all offers are withdrawn."

There was no agreement because the offer was not accepted. The acceptance was conditional and qualified. There was certainly a counter offer which was rejected by the respondents. See Joubert *The Law of South Africa* Vol 5 para 120. Some of the conditions insisted upon by the appellant were material ones. See *Watermeyer v Murray* 1911 AD 61 at 70 where SOLOMON JA said:

"For every contract consists of an offer made by one party and accepted by the other. If the defendant had agreed

to the plaintiff's terms and signed the deed of sale, he would thereby have signified his acceptance

1987 (1) ZLR p156

DUMBUTSHENA CJ

of the plaintiff's offer to buy. But so soon as the plaintiff's counter-offer to buy was made, it follows that the defendant's offer to sell was rejected, for it is impossible that the two could stand together. This very point was decided many years ago in the case of *Hyde v Wrench* (3 Beav 335), a decision which apparently has never been questioned in the English Courts. Nor did that decision turn in any way upon the Statute of Frauds, seeing that all the requirements of that Statute had been complied with. If, then, the defendant's offer to sell on certain terms was rejected by the plaintiff making a counter-offer to buy on different terms, it follows that the defendant's offer was no longer open for acceptance on the 22nd July, when the telegram was sent."

See also *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241; *Boerne v Harris* 1949 (1) SA 793(A) at 799-800.

In my view, Mr Kassim's attitude towards the offer he had purportedly accepted on the appellant's behalf by appending his signature was that it was still open to the process of bargaining. It was not understood by him that the offeree must in agreeing accept the exact terms proposed by the offeror. The learned authors of Cheshire, Fifoot and Furmston's *Law of Contract*, 11 ed at 37 say, as do many other authorities:

"The offeree must unreservedly assent to the exact term proposed by the offeror. If, while purporting to accept the offer as a whole, he introduces a new term which the offeror has not had the chance of examining, he is in fact merely making a counter-offer. The effect of this in the eyes of the law is to destroy the original offer."

That is what the appellant did in this case.

Although it was not necessary for me to consider the second issue, that is, the effect of the letter written by Mr Kassim to Mr Eastwood on 22 October, 1984, and Mr Eastwood's reply of 24 October 1984 "and the non-compliance with the requirements therein set forth", I have felt obliged to touch on the question of the validity of the contract after the appellant sought amendments to an agreement it said it had signed. This court was asked to consider the effect of the failure to communicate acceptance of the contract and the other issues only if the appellant succeeded on the first issue. I have come to the conclusion that the failure by the offeree, that is the appellant, to communicate its acceptance to the offeror meant the offer was not accepted by the offeree. I am strongly of the view that there was no valid contract. Having

1987 (1) ZLR p157

DUMBUTSHENA CJ

come to that conclusion the other issues fall away and need not be considered.

Accordingly the appeal is dismissed with costs.

Gubbay JA: I agree.

McNally JA: I agree.

Gollop & Blank, appellant's legal representatives

S v KANHUKAMWE 1987 (1) ZLR 158 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Criminal appeal

16 June & 6 July 1987

Flynote

Criminal procedure (sentence) - theft - high - ranking public servant stealing large amount of public money - lengthy imprisonment justified - suspension of portion of sentence on condition of good behaviour - necessity for.

Headnote

The appellant, a senior public servant, stole over \$100 000 of public funds during a sixteen month period. He was motivated by greed, not by need, and squandered the money he stole. The trial court imposed a sentence of twenty years' imprisonment, of which seven years were suspended on condition that the appellant made restitution by 31 December 1986. The trial took place on 4 June 1986. On appeal:

Held, that while a lengthy period of imprisonment was justified, with a period suspended on condition of restitution of the stolen funds, and while the trial judge was correct in holding that it was inappropriate where a lengthy period of imprisonment had been imposed to suspend a portion of the sentence on conditions of good behaviour, it was difficult in cases like this to support a sentence of more than fifteen years' imprisonment. A sentence of fifteen years' imprisonment would be substituted, with seven years suspended on condition of restitution, a further period of six months being allowed for the appellant to raise the funds.

Cases cited:

S v Chikopa 1984 (1) ZLR 209 (SC)

S v Sharma S-117-84 (not reported)

S v Kumalo 1973 (3) SA 697 (A)

MANYARARA JA

S v Plaatjies 1976 (1) SA 266 (C)

S v Wakiri 1981 ZLR 51 (AD)

C J Mufanabadza for the appellant

Y Omerjee for the respondent

Judgment

Manyarara JA: The appellant was convicted of theft by conversion and sentenced to 20 years' imprisonment with labour, of which seven years were suspended on condition of repayment of the stolen money by 31 December 1986. His case was disposed of by the High Court at Harare on 4 June 1986 and he appealed against sentence only, alleging that it is manifestly excessive.

The facts are that the appellant was an Under Secretary responsible for the administration and control of the Defence Ministry's finances. His duties included receiving surplus cash from the para-military pay parades conducted at Bindura and accounting for the same to the Ministry's accountant. On seven such occasions from 24 January 1984 to 24 April 1985 the appellant received but failed to account for various sums of money totalling \$103 473,63 specified in the indictment, and he converted the same to his own use.

The authorities to which we were referred provide useful guides to the quantum of punishment for this offence. I believe that *S v Chikopa* 1984 (1) ZLR 209 (SC) is nearest in point. It will be recalled that Chikopa was a senior clerk with little training or supervision in his accounting duties. He stole \$80 351,50 of money received by him by way of fines paid at the Harare Magistrate's Court. He was aged 30 years and married with three children. His gross salary was \$255 per month. His sentence of 12 years' imprisonment with labour was effectively reduced by suspending three of those years on condition of good behaviour. It does not seem that any of the stolen money was recovered.

Mr *Mufanabadza*, who appeared for the appellant, relied on *Chikopa's* case in his bid to have a further portion of his client's sentence suspended, whilst maintaining his contention that the overall sentence of 20 years' imprisonment with labour is itself manifestly excessive.

I believe that Mr *Mufanabadza* has overlooked the fact that the learned CHIEF JUSTICE, DUMBUTSHENA CJ, qualified his decision to follow the usual "trend" of suspending a portion of the sentence in *Chikopa's* case on condition of

1987 (1) ZLR p160

MANYARARA JA

good behaviour with these remarks at 215H-216A:

"The appellant (Chikopa) is a first offender whose other personal circumstances are that he was ill-equipped to handle large sums of money because he was inexperienced and had just come into the city from a rural environment and background and was left to handle large sums of money without sufficient supervision. It is my view that these personal circumstances, coupled with the further fact that those who were responsible for supervising him in his duties were to some extent guilty of laxity, entitle him to a suspension of a portion of his sentence." (Emphasis added.)

Unlike Chikopa, the present appellant was well equipped to handle any sums of money,

however large. Aged 34 years, he held a Bachelor's degree in Administration from Strathclyde University in Britain. It did not lie in his mouth to suggest that he required supervision in his duties. Rather, it was his responsibility as Under Secretary to supervise everyone in his department. As was remarked at the hearing, if the public cannot trust a man of such high standing, who can it possibly trust?

The appellant was in receipt of a comfortable salary which was stated merely as "between \$1 400 and \$1 500 per month". The reason for the imprecision escapes me as the prosecution could have easily obtained the exact figure from the appellant's pay advice slips.

Therefore, *Chikopa's* case does not assist Mr *Mufanabadza* in his argument. It points the other way, and there are further reasons why I believe the trial judge correctly decided not to suspend any of the sentence on the condition of good behaviour.

It is trite that a suspended sentence must itself fit the crime for which it is imposed. The seriousness of the appellant's crime is alarming and befitting of lengthy imprisonment. I go along with the trial judge's conclusion that, when an offender is incarcerated for a substantial period, he should not need any further encouragement to behave himself after his release from prison. At the same time, the purpose of general deterrence is achieved by warning would-be offenders of the quantum of punishment to be expected for a like offence. See also *S v Sharma* S-117-84 at p 8 of the cyclostyled report.

On the other hand, the suspension of a sentence on condition of restitution does not present any of the problems I have just discussed. Firstly, the portion

1987 (1) ZLR p161

MANYARARA JA

to be suspended can be satisfactorily equated with the loss caused, as I believe it was in this case. Secondly, justice is manifestly seen to be done by giving the offender the opportunity of making reparation on pain of his having to serve the suspended period of imprisonment if he fails to seize the opportunity given to him of avoiding it. Restitution is a strong mitigatory factor requiring no justification.

Different considerations apply to the severity or otherwise of the overall sentence imposed in this case. It is settled that a court of appeal cannot interfere with the trial court's sentence unless the sentence is vitiated by irregularity or misdirection, or is strikingly disparate from the sentence which the court of appeal would have passed: *S v Kumalo* 1973 (3) SA 697 (A) at 698A-C and the authorities cited therein.

I would emphasize that the trial judge did not commit any irregularity in this case, nor did he misdirect himself at all in imposing the sentence he imposed. I have no doubt that he was correct in regarding the case as a very serious one indeed, deserving of severe punishment.

The question for consideration regarding the severity of the sentence is whether, in the light of all the circumstances of the case, there is a striking disparity between that sentence and that which this court would in the circumstances have imposed.

There can be no doubt whatsoever that the appellant's offences, committed and persisted in for a period of 15 or 16 months, were motivated by greed and not need. He was in high office, in receipt of a comfortable salary. His wife was also well placed as an Assistant Secretary in the Finance Ministry earning a substantial salary. The couple owned two residential properties in Harare, one in Greendale and the other at Mabelreign. They drove a Peugeot 504 motor vehicle and had only two infant children to support.

The appellant clearly stole public funds to further raise his already high standard of living. It was with exasperation that the trial judge abandoned a determined effort to ascertain what the appellant had done with the large sum of money he stole. The trial judge rightly disbelieved the appellant's half-hearted suggestion that he had recycled some of the stolen money back into the Defence Ministry by entertaining foreign dignitaries at places like the Trade Fair in Bulawayo. In my view, the trial judge also correctly doubted that any worthwhile sum had been spent by the appellant on the medical care of certain members of his extended family.

1987 (1) ZLR p162

MANYARARA JA

The clear picture conveyed by the appellant's failure to explain what he did with the stolen money is that he was just avaricious and extravagant to an alarming extent. His moral blameworthiness was, therefore, correspondingly high. A lengthy period of imprisonment for his crime was inevitable and, in fairness, Mr *Mufanabadza* has not suggested otherwise

Having said that, however, I do go along with Mr *Mufanabadza's* contention that a sentence in excess of 15 years' imprisonment is difficult to sustain for the reasons set out by McNALLY JA (BECK JA and GUBBAY JA concurring) in *Sharma's* case *supra*, where the learned Judge of Appeal said this at p 6 of the cyclostyled report:

"One may ask - what sentence would be appropriate where a quarter of a million dollars is stolen and nothing is recovered? What sentence would be appropriate where five or six million dollars is involved?

These considerations and comparisons suggest to me that a twenty-year sentence for a crime of dishonesty unaccompanied by violence must be approaching the outer limit of what any court in this jurisdiction would impose for such a crime. A sentence of this magnitude for the offence with which we are here concerned [theft by conversion of \$238 588,08, of which \$185 658,06 was recovered] does not leave enough scope for the punishment of even more serious crimes of dishonesty calling for a heavier sentence than was imposed upon the appellant in this case [ie 20 years' imprisonment with labour, 5 years suspended on conditions]."

See also *Chikopa's* case *supra* and *S v Plaatjies* 1976 (1) SA 266 (C) which is authority for the proposition that care should be taken not to (unduly) elevate the seriousness of the offence and impose a very heavy sentence.

On this basis, and adopting the approach laid down in *S v Wakiri* 1981 ZLR 51 (AD) at 53A, it seems to me that the appellant's crime should attract a sentence of 15 years' imprisonment with labour. Of this sentence, 7 years should be suspended on the condition formulated by the trial court and the appellant allowed a further six months in which to raise the necessary funds.

Such sentence should not be considered to be lenient as we were told that to date the appellant has had some difficulty in liquidating his assets and that he may still be unable to raise

the bulk of the money to be repaid. I consider this problem the appellant faces to be itself some measure of punishment as his prospects of escaping the suspended term of imprisonment altogether or even a substantial portion of it appear gloomy.

1987 (1) ZLR p163

MANYARARA JA

I am of the view that the result is sufficiently disparate from the sentence of the trial court to warrant our interference.

Therefore, the appeal against sentence is allowed in part, in that the sentence is altered to one of 15 years' imprisonment with labour of which 7 years' imprisonment is suspended on condition of repayment of the stolen money on or before 31 December 1987.

Gubbay JA: I agree.

McNally JA: I agree.

Sawyer & Mkushi, appellant's legal representatives

1987 (1) ZLR p164

MUGARI v MACHIRI 1987 (1) ZLR 164 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Civil appeal

16 July 1987

Flynote

Evidence - presumptions - inference from facts - party failing to lead evidence which he could have led - court will not draw inference of facts he could have proved.

Practice and procedure - pleadings - apportionment of damages - effect of failure to plead.

Headnote

Where a party to a civil action could have led evidence on a point but failed to do so, the court will not be drawn into making inferences to establish it in his favour.

If there are no positive facts from which an inference can be made, the method of inference fails, and the court is left with mere speculation or conjecture. *Dictum* of BOSHOFF J in *S v Cooper & Ors* 1976 (2) SA 875 at 888 approved.

Quaere: whether failure to plead apportionment of damages precludes the defendant from

claiming it.

Cases cited:

Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd 1979 (1) SA 621 (A)

Guardian Royal Exchange Assurance Rhodesia Ltd v Jeti 1980 ZLR 436 (AD)

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

C J Mufanabadza for the appellant

E Chatikobo for the respondent

1987 (1) ZLR p165

McNALLY JA

Judgment

McNally JA: The appellant (plaintiff) lost his action for damages in the High Court and appealed to this court claiming that he should have succeeded either wholly or partially. After hearing his legal representative we advised Mr *Chatikobo* for the respondent (defendant) that it would not be necessary to hear him, and we dismissed the appeal with costs.

The appeal arises out of a claim for personal injuries in the agreed sum of \$6 000, suffered by the plaintiff in a traffic accident between his vehicle and a mechanical horse and trailer driven by the defendant.

The broad facts are clear and simple. The detailed facts are obscure. In essence the plaintiff was driving along a straight road (Zambezi Road) just before midnight on 12 September 1981. The defendant entered Zambezi Road from a side road (Patrenda Way) which joined Zambezi Road from the plaintiff's right, and ahead of the plaintiff. He then turned towards the plaintiff, ie turned left into Zambezi Road. As he was turning, or just after he had turned (these details are disputed) the plaintiff's vehicle collided with the trailer being pulled by the mechanical horse. Neither vehicle was photographed or available for inspection.

The plaintiff was knocked unconscious by the accident and remained unconscious for some time. His evidence was understandably not very helpful. He said the defendant's vehicle did not stop at the "Give Way" sign but turned left, and swung out into his pathway so that he could not avoid it. He could not move away (ie to his own left) because of the presence of some black and white painted rails which faced Patrenda Way to show persons coming down that road that they were approaching a T-junction. Why he did not slow down was unexplained.

The defendant did not claim to have stopped at the "Give Way" sign. He said the road was clear and he turned left. He conceded that he had to swing his long vehicle wide to make the left turn, and, therefore, he would have "overlapped into the right hand side lane". He did not say by how much. But he was adamant that he had already returned to his own side of the road when the plaintiff's vehicle passed his mechanical horse and struck the wheels of the trailer. He said he was travelling very slowly around the corner and had accelerated to not more than 20 kph

when he was hit.

In a general sort of way one might well think that the balance of probabilities favoured the possibility that the defendant did indeed encroach upon the plaintiff's side of the road. One might then wonder why the plaintiff, seeing

1987 (1) ZLR p166

McNALLY JA

this vehicle slowly moving into a position which obstructed his path, did not slow down or move over to his left. There is room for a finding of negligence on the part of both parties.

General speculations of this nature are not what one means by proof on a balance of probabilities. There may be occasions when no further evidence is available and the court has to make do with the basic facts provided. But the court will not allow itself to be drawn into making inferences when it is apparent that evidence could have been led on the very point on which the court is being invited to make the inference. The reason is obvious. The court will not reach out in the dark when the plaintiff has his hand on the light switch. It will ask itself why the plaintiff does not switch on the light. Is it because the light will reveal facts which inferential reasoning would not have revealed? See *Munster Estates (Pty) Ltd v Killarney Hills (Pty) Ltd* 1979 (1) SA 621 (AD) at 624B *et seq.*

In the present case the investigation and presentation of the plaintiff's case were so inadequate that it seemed to us that a finding of absolution from the instance by the trial court was fully justified.

The inadequacy begins with the pleadings. It is obvious that the one particular of negligence above all that the plaintiff should have relied upon was that the defendant moved across the centre line of Zambezi Road and into the path of oncoming traffic when it was unsafe to do so. If the defendant did not do that, then it is very hard to think of any basis on which he can be blamed for the plaintiff's misfortunes. Yet no such allegation was made.

The particulars of negligence relied upon by the plaintiff were as follows:

"He (the defendant) failed unreasonably to obey a lawfully erected give way sign;

He failed unreasonably to keep a proper lookout;

He failed unreasonably to apply his brakes or take other evasive action when an accident appeared imminent."

It might be said that the witnesses dealt with the allegation of encroachment across the centre line even though it was not pleaded, and this is to some extent true. But had it been pleaded the defendant might well have been obliged to confess and avoid - to admit crossing the centre line but to aver that he had returned to his own side before the collision. He might then have

1987 (1) ZLR p167

McNALLY JA

pleaded that if he was negligent the plaintiff was also negligent, and thus invited as an

alternative, an apportionment of damages. The course of the trial might have been different.

Indeed the defendant's case was equally badly pleaded and he is fortunate that the plaintiff did not make out a *prima facie* case. Had he done so, the defendant's failure to plead apportionment of damages and his ridiculous attempt to divert the blame, if any, to his employers might have cost him dear. It may not be fatal to fail to allege apportionment (see Cooper and Bamford *South African Motor Law* at pages 287-8) but it is certainly highly desirable that a defendant should, in the alternative, set out the grounds on which he alleges that the plaintiff was negligent and thereby contributed to the occurrence of the accident.

It is perhaps important to say at this point that the legal practitioners who appeared before us did not appear at the trial, and that counsel for the defendant at the trial did not draw the plea. We began therefore with fundamentally inadequate pleadings. But worse was to follow, both in the evidence and in the lack of it.

The plaintiff became aware later, even though he was unconscious at the time, that the police from Glen Norah Police Station had come to the scene of the accident. In fact he knew that some policeman on a bus had been among the first at the scene. Yet it was in fact the defendant who testified that he had found the police unco-operative. They told him the investigating officer had been transferred to Bulawayo. They also told him not to worry because "we have already thrown out the case". This was a reference to the criminal case which was never brought against him. The plaintiff, himself a policeman, never claims to have made any attempt to find the relevant Traffic Accident Report Book and subpoena the relevant policeman. The importance of police evidence in such matters goes without saying - see *Guardian Royal Exchange Assurance Rhodesia Ltd v Jeti* 1980 ZLR 436 (A) at 437 *in fine* to 438D.

The plaintiff also failed to suggest an inspection *in loco*. Indeed one wonders whether the lawyers themselves had visited the scene of the accident. The plaintiff claimed that there was no room for him to move to his left because of the presence of the black and white striped barrier facing Patrenda Way. It seems highly improbable that that barrier was immediately next to Zambezi Road. The plaintiff's witness in fact said that the plaintiff's car had ended up two paces off the road at exactly the spot where that barrier was, suggesting

1987 (1) ZLR p168

McNALLY JA

that there was in fact plenty of room for manoeuvre had the plaintiff tried to avoid the trailer by moving to his left.

Given the plaintiff's personal inability to recall the facts, his inadequate pleading, and his failure to call the police or to propose an inspection *in loco*, everything for him depended on the reliability of his witness. This witness, a Mr Mangwende, was giving evidence in March 1986 about an accident which took place in September 1981 - four-and-a-half years before. It took place in the dark (there was no evidence about street lights) and he arrived after the collision had occurred. So he started with considerable disadvantages. A careful legal practitioner would have taken him to the scene of the accident to refresh his memory before taking a statement from him. It does not seem that this was done, perhaps because the decision to call him was, it

appears, a last minute one.

Mr Mangwende's attention was directed to Ex. 5, a plan of the scene apparently prepared by the defendant. I say "apparently" because Ex. 5 was not before us. While Rule 34 of the Supreme Court Rules no longer states that the appellant shall be responsible for the preparation of the record, it is obviously in his interests that the record be complete. The appellant should have taken steps to ensure that this exhibit was before us. Be that as it may, the fact is that Mr Mangwende placed an X on this plan, with the words "I have marked with an X on this plan where I say the accident was, and I have marked a block across the road where Mugari's vehicle ended." He later said of this X, "I concluded it was the point of impact because of the debris there, there was glasses from Mugari's lights and there was a piece of metal from a marker ... sorry, from a mudguard."

Then the cross-examination continues:

"And, even on your story, it does mean, as I understand that X that you have marked, that the point of impact was on the defendant's side of the road? - JUSTICE GIBSON

Well it's just on the outside of that lane, more central ... - MR GREENLAND replies:

Just inside the defendant's side of the road. - MR GREENLAND continues - You see that?

(ANSWER) I said, as I have marked here, the lorry crossed the white line and it ended up where it ended, on Mugari's side.

QUESTION - That is not what you have marked, you have marked it on the defendant's side?

1987 (1) ZLR p169

McNALLY JA

ANSWER - This X does not mean anything ..."

Thus it can be inferred, and in the absence of the exhibit we can only infer, that Mr Mangwende put his X, being the point of impact, either exactly in the centre of the road, or slightly on the defendant's side. (It may be noted that in her judgment the learned judge said it "lay on the defendant's side of the road".) Only when it was pointed out to Mr Mangwende that this effectively destroyed the plaintiff's case did he seek, rather unconvincingly, to move it.

The point of impact, in relation to the centre line (the road was the normal 22 foot tar, although we were not told whether there was a painted centre line) is critical. In the absence of evidence that the defendant's vehicle, or his trailer, was across that centre line when it collided with the plaintiff's car, the plaintiff's case does not begin to get off the ground. It is not enough to say "Well if it did not cross the line why would the plaintiff have collided with it"? The answer is that the court should not be compelled to speculate when there was evidence apparently available which was not led, and when the evidence led by the plaintiff tended to support the defendant. In this context the words of BOSHOF J in *S v Cooper & Ors* 1976 (2) SA 875 at 888 *in fine*, are appropriate:

"When triers of fact come to deal with circumstantial evidence and inferences to be drawn therefrom, they must be careful to distinguish between inference and conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts

can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

It was for these reasons that we considered the trial judge's decision to grant absolution from the instance was the proper one.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Sawyer & Mkushi, appellant's legal representatives

Gollop & Blank, respondent's legal representatives

1987 (1) ZLR p170

MEMAN & ANOR v CONTROLLER OF CUSTOMS & EXCISE 1987 (1) ZLR 170 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Civil appeal

3 & 17 July 1987

Flynote

Customs and excise - Customs & Excise (General) Regulations 1980 - s 71(2)(a)(iv) - duty - free importation of motor vehicle by immigrant purchased with "own funds" outside Zimbabwe - meaning of "own funds" - onus of proof.

Evidence - onus of proof - extent of onus to be placed on individual in cases where his liberty or property rights are threatened by the State.

Headnote

For the purposes of s 71(2)(a)(iv) of the Customs and Excise (General) Regulations contained in SI 310 of 1980, which permits an immigrant to import a motor vehicle into Zimbabwe free of duty if the motor vehicle is shown to the satisfaction of the Controller of Customs and Excise to have been paid for by the immigrant "out of his own funds held outside Zimbabwe", it is sufficient for the immigrant to prove that it was paid for out of his own resources outside Zimbabwe as opposed to the pecuniary resources of another resident of Zimbabwe.

Proof that the motor vehicle was purchased from the immigrant's own bank account outside Zimbabwe *prima facie* discharges the onus resting on him. An evidential onus then shifts to the Controller, not to prove that the funds in fact belonged to another Zimbabwe resident, but to put forward some grounds for his not being satisfied with that *prima facie* position. The fact that the immigrant may have been untruthful does not assist the Controller in this respect. In cases such as this, where the liberty of the subject and the property of the individual are threatened by the

State, the court will be careful not to impose a greater burden of proof on the individual than the law demands.

1987 (1) ZLR p171

McNALLY JA

Cases cited:

Commissioner for Inland Revenue v da Costa 1965 (3) SA 768 (A)

Joachimson v Swiss Bank Corporation [1921] 3 KB 110

Foley v Hill (1848) 2 HL Cas 28; 9 ER 1002

Sinclair v Brougham [1914] AC 398 (HL)

R v Cronwright & Anor 1952 (2) SA 517 (C)

Glen Anil Development Corporation Ltd v Secretary for Inland Revenue 1975 (4) SA 715 (A)

S v Mapheele 1963 (2) SA 651 (A)

Eshugbayi Eleko v Officer Administering the Government of Nigeria & Anor [1931] All ER Rep 44; [1931] AC 662

Khawaja v Secretary of State for the Home Department & Anor [1983] 1 All ER 765

S v Alouis 1981 ZLR 351 (AD)

Smit v Arthur 1976 (3) SA 378 (A)

A P de Bourbon SC for the appellants

E Chatikobo for the respondent

Judgment

McNally JA: In September 1980 the appellants, husband and wife, immigrated to Zimbabwe. The husband had lived here previously but was treated for Customs purposes as an immigrant. Shortly after arrival they learned that they could import a motor vehicle each, duty free, in terms of the provisions of s 71(2)(a)(iv) of the Customs and Excise (General) Regulations, 1980, published in Statutory Instrument 310 of 1980. They made arrangements to do so and purchased two Mercedes - Benz cars which arrived at the Beitbridge border post on 22 June 1981. They were given temporary clearance and the appellants were required to clear them on arrival in Harare. Difficulties arose over the clearance, as a result of which Notices of Seizure in respect of the vehicles were issued by the respondent on 23 December 1981.

It may be observed that the privilege of duty free importation of a car after immigrating, as long as it was purchased within four months of arrival, was withdrawn with effect from 1 January 1982, in terms of SI 326 of 1981. The section under interpretation no longer exists.

The appellants challenged the seizure of their cars and issued summonses against the respondent on 12 March 1982. Their claims were dismissed by the High Court on 28 November 1985, and their appeal is now before us. *(2)

1987 (1) ZLR p172

McNALLY JA

The issue between the parties is a narrow one. Only one of the provisions of the Statutory Instrument is in contention. It is the provision that the motor vehicles must be shown, to the satisfaction of the Controller, to have been paid for by (the appellants) "from his (their) own funds held outside Zimbabwe".

No point is made about any distinction between the two appellants. The Controller accepts, for the purposes of this case, that if the cars were paid for out of Mr Meman's "own funds held outside Zimbabwe" then Mrs Meman's car is also covered by the rebate.

There was no dispute either about the role of the High Court. The parties accepted that the High Court's function was not merely a review function. The hearing before the court was a rehearing of the whole matter and the court was entitled to substitute its own discretion for that of the Controller (*CIR v Da Costa* 1985 (3) SA 768 (AD) at 774H-775A).

The evidence led before the High Court related entirely to the question of the source of funds from which the price of the two motor vehicles had been paid. There was no doubt at all that the immediate source of the funds was the bank account of the second appellant (the husband) in Bolton, Lancashire. Having made that statement I must at once draw attention to its short-comings. In fact the Deutschmarks necessary to pay the German supplier of the cars were provided not by Barclays Bank in Bolton, Lancashire, but by Barclays Head Office in London. The transactions whereby the first appellant's account in Bolton was debited with the cost of the Deutschmarks and the bank charges were no doubt computerised transactions. So when I say the immediate source of the payment was his bank account I am using non-technical language, which is not strictly correct. This perhaps usefully illustrates the danger of too technical an interpretation of phrases like "his own funds". One must constantly bear in mind the purpose of these regulations, made in terms of the Customs and Excise Act [*Chapter 177*]. The purpose is obviously to ensure that the rebate of customs duty granted to an immigrant is in fact being given to him and not to some resident of Zimbabwe who is using the immigrant as an agent or "front" to bring in a motor-car for him, the resident. In this way the resident avoids paying customs duty on the car.

The issue for decision it seems to me is a twofold one:

1. What is the meaning of the phrase "his own funds held outside Zimbabwe"?

1987 (1) ZLR p173

McNALLY JA

2. What is the nature and extent of the *onus* on the appellants?

THE MEANING OF THE PHRASE

There is no problem about the words "held outside Zimbabwe". We are really dealing with the meaning of the phrase "his own funds".

Mr *de Bourbon* submits that all his clients had to show was that the money came from the second appellant's bank account in Bolton. Once that is established (and it is clearly established on the evidence) that is the end of the matter. "Funds" means "pecuniary resources". The money standing to your credit in your current account is undoubtedly part of your pecuniary resources. *Cadit quaestio*. How it got into your account or where it came from is quite irrelevant.

The learned judge rejected that submission in these words:

"Section 71 (2)(a)(iv) of the Regulations referred to earlier requires that the immigrant must show that the moneys were his own funds. In my opinion, this means that the funds must be owned by the immigrant, that is that he has earned or been given them or acquired them in some other manner other than by borrowing. If an immigrant has borrowed money, I do not think that it can be said that it is his own money as required by the said s 71 (2)(a)(iv) because then the use of the words 'his own' would be tautologous. The section need only, in that case, refer to funds held outside Zimbabwe."

I have problems, with respect, with this analysis. I think it is both undesirable and unnecessary to introduce the concept of the ownership of money. Strictly speaking, a person does not own the money in his bank account. "The bank borrows the proceeds and undertakes to repay them" as LORD ATKIN said in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127, following *Foley v Hill* (1848) 2 HL Cas 28; 9 ER 1002. Property in money generally passes with possession - see *Sinclair v Brougham* [1914] AC 398 at 418. Thus technically the bank is the owner of the money in your bank account. But whether you could call that the Bank's own money, would depend on the context and, in particular, on what you were contrasting it with.

In any event we are not seeking to define "money" but "funds". Insofar as they are overlapping concepts, FA Mann, in the 4th Edition of his *The Legal Aspect of Money* at p 26 describes money as "wealth power" "purchasing power in terms of wealth in general". The Oxford English Dictionary (Vol

1987 (1) ZLR p174

McNALLY JA

IV p 603) defines "funds" as "money at a person's disposal; pecuniary resources". What is important about both these definitions is the stress on availability rather than ownership. Money in your bank account is not strictly your money, but it is money at your disposal; and that is so whether you have earned it or been given it, or borrowed it.

Does the word "own" in the phrase "his own funds" take the matter any further as the learned judge suggested? The Oxford English Dictionary (Vol VII p 344) says that the usual construction of the word, as used after a possessive case or adjective, is to emphasise the possessive meaning. In *R v Cronwright & Anor* 1952 (2) SA 517 (C) it was held that the phrase "purchaser's

own container" did not mean that the purchaser had to own the container. He might have hired it or borrowed it. The force of the word "own" was held simply to be that it indicated a container provided by the purchaser as opposed to a container provided by the seller (at 518E-F). I would accept that the word "own" often imports the meaning "as opposed to somebody else's". In that sense it can no doubt, in a proper context, mean "his personal funds as opposed to borrowed funds". But in the present context I see no reason to give it so restricted a meaning. We are dealing with a provision applicable to an immigrant who is already in Zimbabwe as opposed to immigrants who may not yet have immigrated; and we are concerned with a mischief which is that another Zimbabwe resident may be using the immigrant as a "front" or "cover" for his own purposes. In those circumstances I would think "his own funds" means "his pecuniary resources as opposed to the pecuniary resources of another resident of Zimbabwe". I do not agree, with respect, that in the context of these regulations borrowed funds are excluded.

At best for the respondent, the phrase is ambiguous. That being so, and since we are dealing with a fiscal statutory instrument, and since the words we are concerned with amount to a limitation on a privilege of a fiscal nature, that limitation is to be interpreted restrictively rather than widely.

A recent statement by BOTHA JA in *Glen Anil Development Corporation Ltd v Secretary for Inland Revenue* 1975 (4) SA 715 (A) at 727F expressed the law with clarity:

"Apart from the rule that in the case of an ambiguity a fiscal provision should be construed *contra fiscum* (*Estate Reynolds & Ors v Commissioner for Inland Revenue* 1937 AD 57 at 70) which is but a specific application of the general rule that all legislation imposing a burden on

1987 (1) ZLR 175

McNALLY JA

the subject should, in the case of an ambiguity, be construed in favour of the subject, there seems little reason why the interpretation of fiscal legislation should be subjected to special treatment which is not applicable in the interpretation of other legislation."

I have not overlooked the fact that it may be an offence in terms of the Exchange Control Regulations for an immigrant who has already become a resident of Zimbabwe to borrow money abroad. That, however, is no reason to import a special meaning into the phrase under consideration. There are many circumstances (see for example ss 3(3) and 8(2) of the Exchange Control Regulations, 1977 (RGN 399 of 1977)) in which such borrowing would not be an offence. Moreover the Regulations with which we are concerned are not made under the Exchange Control Act, but under the Customs and Excise Act.

I conclude therefore that the interpretation of the phrase "his own funds" in s 71(2)(a)(iv) of the Regulations by the learned judge was unduly restrictive. In particular there was no basis for his concern as to whether the funds in the second appellant's bank account were borrowed or not.

It remains to consider another gloss which Mr *Chatikobo*, for the respondent, sought to place upon the phrase. He contended that the word "lawfully" should be read in since any reference in a statute to any action or conduct should be a reference to lawful action or conduct. He relied upon *S v Mapheele* 1963 (2) SA 651 (AD) at 655. The general statement is true, no doubt, but it does not mean that everyone who asserts he has done something must prove that he has done

so lawfully. Nobody has suggested that the funds in the second appellant's account were unlawfully there, or in what way they were unlawful. In such circumstances lawfulness is assumed.

Finally I come back to Mr *de Bourbon's* interpretation. He claims, in effect, that "his own funds" can in the context be interpreted to mean "his own bank account". This, it seems to me, is an interpretation which is unduly favourable to the appellants. If, for example, it were shown that the balance in that bank account was the result of a payment in by a resident of Zimbabwe, then I do not think the Controller could be expected to be satisfied that the motor vehicles had been paid for by the second appellant from his own funds as opposed to those of the other Zimbabwe resident. The Controller would be entitled to call for an explanation. Failing a satisfactory explanation he would be entitled to express himself not satisfied.

1987 (1) ZLR p176

McNALLY JA

THE ONUS

This leads naturally to a consideration of the onus. In the court a quo the matter was dealt with as follows:

"It was common cause that the onus lay on the plaintiffs to establish that the motor cars were paid for from their own funds held outside Zimbabwe (See *Voss v Controller of Customs* 1956 R & N 678 at 683 and *Jeffries v Commissioner of Customs & Excise* 1954 (3) SA 607 (E)). It was also common cause that this onus had to be discharged on the balance of probabilities." *(3)

I have no doubt that the *onus* was correctly found to lie on the appellants even though s 186 of the Act is not applicable. But the question arises as to the extent of the *onus*.

The English Courts have taken a strong line in cases involving the liberty and property rights, not only of citizens but of all who come under their jurisdiction. The dicta begin with some words of LORD ATKIN in his speech in the Privy Council in *Eshugbayi Eleko v Officer Administering the Government of Nigeria & Anor* [1931] All ER Rep 44 at 49D-E; [1931] AC 662 at 670. This is what he said:

"In accordance with British jurisprudence, no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice."

Citing these words with approval, LORD SCARMAN took the matter further in *Khawaja v Secretary of State for the Home Department & Anor* [1983] 1 All ER 765 at 781. He went on to say that the law extends this protection to every person within the jurisdiction. "There is no distinction between British nationals and others" (782f).

Finally, dealing with the question of proof, he said at 782h:

"The initial burden is upon the applicant. At what stage, if at all, is it transferred to the respondent? And, if it is transferred, what is the standard of proof he has to meet? It is clear from the passages cited from Lord Atkin's opinions in *Liversidge v Anderson* and *Eshugbayi's* case

1987 (1) ZLR p177

McNALLY JA

that in cases where the exercise of executive discretion interferes with liberty or property rights he saw the burden of justifying the legality of the decision as being on the executive. Once the applicant has shown a *prima facie* case, this is the law."

I am conscious that we are dealing here with a different statute and a differently worded statutory instrument. In particular there was no requirement, as here, that the executive authority must be satisfied as to the facts relied upon by the immigrant. Despite this there is a clear general principle which emerges. It is that in matters where the liberty of the subject and the property of the individual are threatened by the State, the court will be careful not to impose a greater burden on the individual than the law demands.

Where, as here, the right to bring possessions into the country duty free as an immigrant is challenged, it seems to me that the initial *onus* is clearly on the immigrant to show that the possessions (in this case motor cars) were purchased out of his own external funds. That *onus* in the present case was *prima facie* discharged when the appellants showed conclusively that the payments were made from the second appellant's own bank account in Bolton, a source which is self-evidently outside Zimbabwe, and a fund which is self-evidently the second appellant's own fund.

Once that was established, as it clearly was, then the evidential *onus* shifts to the respondent, not to prove that in fact the funds were those of another Zimbabwean resident, but at least to put forward some grounds for his not being satisfied with the *prima facie* evidence. The untruthfulness of the second appellant does not assist the respondent in this regard. In the first place the respondent did not put forward any allegations as to relevant facts upon which his "non-satisfaction" was based. There was nothing therefore in respect of which the appellants could, as it were, be put upon their defence in relation to the suspicion that the funds had a Zimbabwean connection. Secondly, just as, in a criminal case, the mere untruthfulness of the accused is not conclusive against him (see for example *S v Alouis* 1981 ZLR 351 (AD)), so in a civil case innocent persons may be strongly tempted to conceal facts from which they think an inference adverse to them might be drawn. (See *Smit v Arthur* 1976 (3) SA 378 (D) at 385 *in fine*.)

Had the respondent been able to put forward any facts which suggested either that the funds were the funds of another Zimbabwe resident held outside Zimbabwe, or that they came from inside Zimbabwe, then the untruthfulness of the various statements by the second defendant might well have served to

1987 (1) ZLR p178

McNALLY JA

promote the acceptability of such evidence to a decisive level. In the absence of any pointers to the contrary, the evidence that the payment was made from the second appellant's own bank account in Bolton should have been held to have discharged the *onus* upon the appellants.

In the circumstances I would allow the appeal with costs. In view of the provisions of s 180 of the Customs and Excise Act [Chapter 177], Mr de Bourbon very properly did not ask that the

costs of the hearing in the High Court be awarded to the appellants.

Accordingly the order of this court will be as follows:

The appeal is allowed with costs. The order of the High Court in Cases GD 513 and 514 of 1982 is altered to read -

In Case No. 513 : The defendant is directed to release from seizure and to return to the plaintiff motor vehicle Mercedes Benz 230E registration number 369-492 W seized under Notice of Seizure No. 26461C dated 23 December 1981.

In Case No. 514 : The defendant is directed to release from seizure and to return to the plaintiff motor vehicle Mercedes Benz 230E registration number 369-493 X seized under Notice of Seizure No. 26460C dated 23 December 1981.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Ali Ebrahim, appellants' legal representative

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

1987 (1) ZLR p179

ATTORNEY-GENERAL v REGIONAL MAGISTRATE, EASTERN DIVISION & ANOR 1987 (1) ZLR 179 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Application for leave to appeal

9 & 20 July 1987

Flynote

Appeal - Attorney-General's right of - interlocutory matter during criminal trial - Magistrates Court Act [Chapter 18] - s 69 - Supreme Court of Zimbabwe Act 1981 - s 11A.

Headnote

The Attorney-General has no right of appeal against a magistrate's ruling on an interlocutory matter, such as admissibility of evidence, while the trial is still in progress.

Cases cited:

National Telephone Co Ltd v Postmaster - General [1913] 2 KB 614 (CA)

S v Tekere & Ors (1) 1980 ZLR 441 (AD)

Dickinson & Anor v Fisher's Executors 1914 AD 424

Nxaba v Nxaba 1926 AD 392

Heyman v Yorkshire Insurance Co Ltd 1964 (1) SA 487 (A)

Publications Control Board v Central News Agency Ltd 1977 (1) SA 717 (A)

Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A)

G B Karwi for the applicant

No appearance for the first respondent

A P de Bourbon SC for the second respondent

Judgment

Gubbay JA: On 15 August 1985, the second respondent ("the accused") was charged before the first respondent ("the regional magistrate") on six

1987 (1) ZLR p180

GUBBAY JA

counts of fraud, eleven counts of theft by false pretences and five counts of theft by conversion. Pleas of not guilty were entered on each count. On the sixteenth day of the trial, being 19 November 1986, and in relation to five of the fraud counts, the prosecutor sought to produce through the former manager of a commercial bank in Harare (the State's thirty-sixth and last witness) a series of photostatic copies of computer print-outs purporting to record the financial state of the accused's current account with the bank over the period extending from 1 January 1983 to 31 August 1983. Objection was taken by the accused's counsel to their admissibility and, after hearing his submissions and those of the prosecutor, the regional magistrate came to the conclusion that as the copies of the computer print-outs did not fall within the ambit of either s 263 to 265, or s262B, of the Criminal Procedure and Evidence Act [*Chapter 59*] - being the alternative provisions relied upon by the prosecutor for the contention that they were to be received in evidence by the court - they offended against the best evidence rule.

Being dissatisfied with the interlocutory ruling of the regional magistrate, the prosecutor requested and obtained a stay in the proceedings in order to consider the State's position in respect of an appeal. Thereafter, on 21 November 1986, the Attorney-General applied to a judge of the Supreme Court for leave to appeal against the regional magistrate's decision on the ground that he had erred in law in rejecting the copies of the computer print-outs as admissible in evidence. The papers, in proper form, were laid before me, and I directed that the application for leave to appeal and the appeal itself be set down together for hearing by the Full Court.

At the hearing on 9 July 1976, Mr *Karwi* presented argument on behalf of the Attorney-General, as did Mr *de Bourbon* for the accused.

The first matter to consider is whether an appeal lies at the instance of the Attorney-General

against an interlocutory ruling, albeit on a point of law, made during the course of criminal trial in the magistrates court that has not yet terminated.

Such right of appeal, if it exists at all, must be sought in s 69 of the Magistrates Court Act [Chapter 18], read in conjunction with s 11A of the Supreme Court of Zimbabwe Act, 1981. For to repeat the self-evident words of Kennedy LJ in *National Telephone Co Ltd v His Majesty's Postmaster - General* [1913] 2 KB 614 (CA) at 621:

"The creation of a right of appeal is an act which requires legislative

1987 (1) ZLR p181

GUBBAY JA

authority. Neither the inferior nor the superior tribunal nor both combined can create such a right, it being essentially one of the limitation and of the extension of jurisdiction."

See also *S v Tekere & Ors* (1) 1980 ZLR 441 (AD) at 447F.

Section 69 reads as follows:

"69. If the Attorney-General is dissatisfied with the judgment of a court in a criminal matter -

- (a) upon a point of law; or
- (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained;

he may, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against that judgment:

Provided that the **person who was the accused in the case** shall have the right, should he so desire, at his own expense to appear in person or to be legally represented or a judge of the Supreme Court may order that such person be legally represented, in which event the expenses of such representation shall be defrayed out of moneys appropriated for the purpose by Parliament" (the emphasis is mine).

The corresponding provisions in the High Court of Zimbabwe Act, 1981, and in the Customary Law and Primary Courts Act, 1981, are ss 44(6) and 20A respectively. They, too, give the Attorney-General with the leave of a judge of the Supreme Court, the right to appeal on a point of law against a judgment of the High Court in a criminal matter in the exercise of its original or appellate jurisdiction or on review, and against a judgment of a community court or a district court. The provisos to both these sections are worded identically to the proviso to s 69.

Section 69, s 44(6) and s 20A are to be read with s 11A(1) of the Supreme Court of Zimbabwe Act, which provides:

"11A. (1) Where the Attorney-General seeks the leave of a judge of the Supreme Court to appeal against the judgment of a court -

- (a) on a point of law; or
- (b) because it has acquitted or quashed the conviction of any person who was the accused in the case on a view of the facts which could not reasonably be entertained;

GUBBAY JA

a judge of the Supreme Court may, in granting such leave or at any time thereafter, make such orders or give such directions as he deems fit in order to secure the attendance before the Supreme Court of the person who was the accused in the case concerned, including orders or directions for the issue of a summons or warrant of arrest, and the granting of bail or taking of recognisances." (The emphasis is mine.)

All four sections in their present form were introduced by the Criminal Procedure Laws Amendment Act, 1984 (No. 3 of 1984).

Although the wording of s 69 of the Magistrates Court Act, of s 44(6) of the High Court of Zimbabwe Act and of s 20A of the Customary Law and Primary Courts Act does not expressly exclude the right of the Attorney- General to appeal against an interlocutory judgment, it is implicit from the use of the phrase "the person who was the accused in the case" that the Legislature did not intend such right to accrue during the progress of the trial; for at that stage the person who is the subject thereof remains "the accused in the case". This interpretation is borne out completely by the powers vested in the Supreme Court under s 11A(2) of the Supreme Court of Zimbabwe Act, which lays down that on appeal by the Attorney-General on a point of law, it:

- " (a) may confirm the decision of the court or tribunal concerned; or
- (b) may give judgment declaring the verdict and sentence which it considers the court or tribunal concerned should have given without, however, altering the judgment in the particular case concerned; or
- (c) may exercise such other powers as are conferred upon it in relation to appeals against conviction or sentence by any other provision of this Act and may, where there has been an acquittal or the quashing of a conviction and where it is considered desirable having regard to the interests of justice to do so, substitute a verdict of guilty and either pass sentence itself or remit the case to the court concerned for the passing of sentence."

The nature of the powers specified in paragraphs (b) and (c), which become exercisable upon the appeal being allowed, point inescapably, in my view, to the situation where the trial in the lower court has been completed.

Mr *de Bourbon* drew attention to the use of the word "judgment" in s 69 of the Magistrates Court Act and submitted that in context it must not be taken to embrace every decision or ruling of a court, but should be confined to those

GUBBAY JA

decisions granting "definite and distinct relief" in the technical sense of finality to either the State or the accused. See, for instance, *Dickinson & Anor v Fisher's Executors* 1914 AD 424 at 427; *Nxaba v Nxaba* 1926 AD392 at 394; *Heyman v Yorkshire Insurance Co Ltd* 1964 (1) SA 487 (A) at 490 D-F; *Publications Control Board v Central News Agency Ltd* 1977 (1) SA 717 (A) at 745A; *Constantia Insurance Co Ltd v Nohamba* 1986 (3) SA 27 (A) at 35F-36E and 42I-43G.

The submission becomes even more cogent when regard is had to the position prior to the

repeal and substitution of s 69 by Act 3 of 1984. The Attorney-General had an automatic right of appeal to the Supreme Court if dissatisfied with a "finding upon a point of law in any criminal case". But in the event of the appeal succeeding the ruling of the Supreme Court in no way affected the finality of the finding of the magistrates court. The deliberate change of the word "finding" to "judgment" seems to me to indicate an appreciation by the Legislature that the use of the latter word was far more appropriate to the Supreme Court's new power to substitute a verdict of guilty and pass sentence itself or remit the case to the court *a quo* for the passing of sentence, which clearly is a power exercisable only where the trial has terminated and the magistrate is *functus officio*. Put simply, the law-maker made the change in order to underscore the point that an appeal by the Attorney-General is not permissible while the trial is still in progress.

Finally, it is important to observe that in terms of s 67 of the Magistrates Court Act an accused person has a right of appeal only upon conviction. If the Legislature had been minded to give the Attorney-General a greater right of appeal than that given to an accused person, and in particular a right of appeal against an interlocutory ruling prior to the determination of the trial, I am confident that it would have used specific wording to that effect.

I hold for these reasons that the present application was misconceived.

It is undesirable to debate the correctness or otherwise of the regional magistrate's decision, and I decline to do so, for if at the conclusion of the trial the accused is acquitted on the five counts of fraud it will then be open to the Attorney-General to apply for leave to appeal. Accordingly I would dismiss the application as being premature.

Dumbutshena CJ: I agree.

Manyarara JA: I agree.

1987 (1) ZLR p184

S v WILLIAMS 1987 (1) ZLR 184 (HC)

Court High Court, Harare

Adam J

Criminal review

22 July 1987

Flynote

Criminal procedure - trial - loss of record - procedure to be adopted - whether trial *de novo* can be ordered.

Headnote

The High Court is not empowered to order a trial *de novo* where the record of proceedings is lost before verdict in a magistrates court. This situation is entirely different from one where the

magistrate is no longer available. The proceedings remain valid. If the record is lost, it becomes the task of the magistrate or clerk of court to compile afresh a record of the completed part of the trial in any manner which is fair and as reliable as possible. At the resumed trial, after the record has been reconstructed as well as possible, the magistrate is entitled to recall any witness to give evidence, to lay his reconstructed evidence before him and ask him whether it tallies with the evidence he gave previously. The witness will then be subject to cross-examination on the answers given to the questions put by the magistrate on the correctness of the record. Thereafter the trial should continue in the normal way.

Cases cited:

S v Suliman 1969 (2) SA 385 (A)

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

S v Gwala & Ors 1969 (2) SA 227 (N)

S v Mathys 1985 (1) SA 209 (C)

S v Catsoulis 1974 (4) SA 371 (T)

Judgment

Adam J: The accused was charged with contravening s 43(1)(a) of the Road

1987 (1) ZLR p185

ADAM J

Traffic Act, No 48 of 1976, in that he wrongfully and unlawfully drove a motor vehicle negligently. Although the very scant record of the proceedings provided does not disclose much, it appears that the accused must have pleaded not guilty. The presiding magistrate has written as follows -

"I presided over the above matter and before I delivered the judgment I was transferred to Bulawayo. When I came back to complete the case on the 6th July, 1987, I discovered that my notes (record of the proceedings) were missing from the Criminal Record. Thus I could not deliver the judgment and sentence. The Prosecutor and the Clerk of the Criminal Court have failed to locate my notes.

I therefore kindly request the Honourable Judge to quash the proceedings and direct that the case be tried *de novo* before a different magistrate."

I am unable to accede to the trial magistrate's request. This is not a situation where evidence had been led before verdict and death has supervened or incapacity to the presiding judicial officer not of a temporary nature had occurred; the proceedings then could be regarded as a nullity. As stated by OGILVIE THOMPSON JA in *S v Suliman* 1969 (2) SA 385 (A) at 391A:

"... should a presiding Judge die during a criminal trial, the accused may, in my opinion, be tried again *de novo*."

Further, the criterion laid down in *S v Makoni & Ors* 1975 (2) RLR 75 (GD); 1976 (1) SA 169 (R) was that the incapacitation of the presiding magistrate was likely to persist for a considerable period before proceedings in the lower court could properly be set aside and trial *de novo*

ordered.

Similarly, where a presiding judicial officer is transferred to another district, the fact that he no longer has jurisdiction where the trial was commenced does not imply that he is disqualified to complete the trial. It was held in *S v Gwala & Ors* 1969 (2) SA 227 (N) at 228 *in fin* - 229 B by KENNEDY AJP that trial *de novo*:

"quite obviously is the correct course to adopt where the presiding officer has recused himself at the request of the defence. Clearly such officer becomes *functus officio* upon his recusal and, the prosecutor desiring to proceed with the case, it becomes necessary to have a completely new hearing. Equally so, the death of a magistrate, his resignation or

1987 (1) ZLR p186

ADAM J

dismissal would give rise to the opening of a case *de novo* against an accused person, but the classification into these categories of a magistrate who has newly been transferred to another district is, with respect, a *non sequitur*, for he can be officially returned to the district concerned to complete the case, and accordingly I cannot agree with the learned Judge that, once a magistrate has been transferred, the proceedings become abortive and are logically a nullity."

There is no provision in our statute law for the procedure suggested by the trial magistrate. The High Court is not empowered to order a trial *de novo* where the record of the proceedings is lost before verdict in a magistrate's court. See *S v Mathys* 1985 (1) SA 209(C). In *S v Catsoulis* 1974 (4) SA 371 (T) at 372F-374A (Official translation, pp 830-831) MARAIS J correctly outlined the proper procedure to be followed when he said:

"In a case like the present certain things should not be confused. One should distinguish for instance between the trial of an accused and the administrative tasks in connection therewith, eg the recording of the evidence. Once the accused has pleaded, he is entitled to have his case heard and finalised. ... The fact that the record has been lost is no concern of the accused. The evidence given has been heard by the trial court and forms part of the case, whether or not it has been recorded or is still on record. It would be an entirely different thing should the trial court, ie the magistrate, not be available to proceed with the trial. In such a case a trial *de novo* would be necessary, because the first proceedings could be considered void.

This is not the case here. The proceedings in court remain valid, despite the disappearance of the record. The trial should obviously proceed from where it was left off. There is no legal ground upon which a re-trial at this stage can be ordered either by the trial court or by the Supreme Court.

..

In the present part-heard case the position is, in my opinion, as follows: that the trial was, up to the stage reached, a proper, valid trial and there is neither reason nor jurisdiction to declare the part-heard trial to be a nullity; that it is the administrative task of the magistrate and/or the clerk of the court to compile afresh a record of the completed part of the trial in any manner which is fair and as reliable as possible; that this embraces an administrative enquiry and action and has nothing to do with the trial as such; that at the resumption of the trial, after the record has been restored as well as possible the magistrate is in terms of s 210 of the Criminal Procedure Act, 56 of 1955, entitled to recall any witness to give

1987 (1) ZLR p187

ADAM J

evidence, to lay his reconstructed evidence before him and to ask whether it tallies with the evidence which he

originally gave at the trial. The witness will then be subject to cross-examination by the defence on his answers to the magistrate's questions on the correctness of the record and on the contents of his evidence against the accused. Thereafter the trial can take its normal course."

In *Lansdown and Campbell South African Criminal Law and Procedure Vol V* at p 712 the learned authors state:

"The procedure followed in the Cape, Transvaal and Natal requires the clerk of the lower court to assemble the best available secondary evidence of the missing evidence and documents ... the clerk of the court should submit affidavits to prove -

- (a) the loss of the record;
- (b) the charge, the plea and all other parts of the record ...;
- (c) the evidence recorded - this is to be proved by affidavits from the witnesses and, if necessary, from other persons present at the trial."

This procedure was also recommended where part of the record is lost or where the recording machine fails to record the evidence.

Accordingly, the trial magistrate, having reconstructed from the best available secondary evidence the lost record of the completed part of the trial, should resume the trial. At the resumption, the trial magistrate should recall the witnesses and put to them the reconstructed secondary evidence and ascertain from them whether this accords with their original evidence given at the trial. The witnesses would be subject to cross-examination on the answers given to the questions put by the trial magistrate on the correctness of the record. The trial should then continue its normal way to its conclusion. I would like to impress on the trial magistrate that this is not a trial *de novo* before him but a continuation of the trial.

I should emphasise to all concerned that records of proceedings must be kept with meticulous care and attention drawn of presiding officers to the proper recording of evidence and its preservation.

Reynolds J: agrees.

1987 (1) ZLR p188

PARKER v W G B KINSEY AND COMPANY (PVT) LTD 1987 (1) ZLR 188 (SC)

Court **Supreme Court, Harare**

Gubbay JA, McNally JA & Manyarara JA

Civil appeal

19 June & 27 July 1987

Flynote

Company - Companies Act [Chapter 190] - s 167 - compromise or arrangement sanctioned by court - nature -

power of court to set aside - when exercised.

Headnote

Where a compromise or arrangement has been sanctioned by the High Court in terms of s 167 of the Companies Act [*Chapter 190*], its intrinsic character remains contractual, for its provisions do not become an order of court, and the court has no greater power over it than over any other form of contract.

The High Court has power, in its discretion, to set aside a compromise or arrangement which it has previously sanctioned in terms of s 167(2) of the Companies Act, where there has been a breach going to the root thereof. Before setting it aside, however, the court would want to know the attitude of the creditors generally and would not be prepared to make a decision until the body of creditors had in some competent manner elected whether to enforce or annul the compromise or arrangement.

Decision of the High Court in *Parker v W G B Kinsey & Co (Pvt) Ltd* 1985 (1) ZLR 380 (HC) confirmed.

Cases cited:

Parker v W G B Kinsey & Co (Pvt) Ltd 1985 (1) ZLR 380 (HC)

Ex parte de Wet NO, in re Mackville Motors (Pty) Ltd (in liquidation) 1971 (1) SA 256 (W)

Cohen NO v Nel & Anor 1975 (3) SA 963 (W)

Ex parte Ensor NO, in re Cape Natal Litho (Pty) Ltd 1978 (3) SA 908 (D)

1987 (1) ZLR p189

GUBBAY JA

Sonia (Pty) Ltd v Wheeler 1958 (1) SA 555 (A)

Serein Investments (Pty) Ltd v Myb (Pty) Ltd 1967 (4) SA 437 (C)

Barclays National Bank Ltd v H J De Vos Boerdery Ondernemings (Edms) Bpk 1980 (4) SA 475 (A)

Administrateur - Generaal vir die Gebied Suidwes-Afrika v Hotel On-duri (Edms) Bpk en Andere 1983 (4) SA 794 (SWA)

Ingel & Toubkin's Trustee v The Master 1925 OPD 86

Blou v Lampert & Chipkin NO& Ors 1970 (2) SA 185 (T)

Ilic v Parginos 1985 (1) SA 795 (A)

Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)

Soffiantini v Mould 1956 (4) SA 150 (E)

Joossab & Ors v Shah 1972 (1) RLR 137 (GD)

Lalla v Spafford NO & Ors 1973 (2) RLR 241 (GD)

Masukusa v National Foods Ltd & Anor 1983 (1) ZLR 232 (HC)

A N H Eastwood for the appellant

A P de Bourbon SC for the respondent

Judgment

Gubbay JA: On 30 December 1980 the appellant, to whom I shall refer hereafter as "the applicant", entered into a written agreement with the respondent in terms of which he sold 81 000 shares representing 54% of the issued shares in the company Clearway Plant Hire (Private) Limited ("Clearway"), and undertook to cede to the respondent the amount standing to his credit in the books of Clearway. The purchase price of the shares, and the consideration for the cession of the loan account, was \$525 000. The respondent was required to make a down-payment of \$25 000 upon the execution of the agreement and to pay the balance of the purchase price in annual instalments of \$25 000, the first such instalment falling due on 30 September 1981. Interest at a specified annual rate upon the purchase price outstanding from time to time was to be paid in arrears on the last day of each month. An addendum to the agreement, signed by the parties on the same day, provided that if 54% of the net asset value of Clearway, and the amount of the applicant's loan account as reflected in the balance sheet and accounts as at 30 September 1980 (for 1 October 1980 was the effective date), were not valued at \$525 000, the applicant waived his right to the difference between the two figures.

In 1983 the respondent began to experience grave liquidity problems and thus failed to meet the instalments of interest for the months of August and September 1983, as well as the capital sum of \$25 000 due on 1 October 1983.

1987 (1) ZLR p190

GUBBAY JA

In consequence, on 28 October 1983, the applicant gave written notice demanding payment of the outstanding interest within fifteen days, it being a term of the agreement that if during such period the default were not made good, the full amount of the purchase price and any accrued interest thereon would become due and payable immediately without further notice.

On 9 November 1983 the respondent reacted to the demand for payment by petitioning the High Court, pursuant to s 167(1) of the Companies Act [*Chapter 190*], for the summoning of a meeting of creditors to consider a scheme of arrangement designed to create a moratorium on its debts, and to vest the control of its affairs in a management committee of creditors. The order was granted and the meeting was summoned for 1 December 1983.

The applicant was represented at the meeting of creditors held on 1 December 1983. For the purpose of calculating the value of the claims of creditors of the respondent, the applicant's

claim was provisionally accepted at \$425 000, being the balance of the purchase price alleged to be payable by virtue of the breach of the agreement of sale. But it was made known to the applicant that the respondent disputed that such amount represented the true extent of its indebtedness.

Subject to a modification relating to the priority of payments, the scheme of arrangement, as previously laid before the High Court, was approved by creditors representing a majority in number and three-fourths in value, and on 4 January 1984 it was duly sanctioned under s 167(2) of the Companies Act. It contains the following relevant clauses:

- "5.1 The (Management) Committee shall meet as often as is necessary for the transaction of its business but not less than once in each month;
- 5.2 The (Management) Committee shall report to creditors at least once every three months;
- 6.1 Creditors shall be entitled to attend at all general meetings of the Company and shall be given at least ten (10) days notice in writing of such meetings specifying the place, date and hour and the nature of the business to be transacted at such meetings;
- 6.2 The Management Committee may, whenever it thinks fit, and shall, upon receipt of a requisition in writing by a creditor or creditors representing TWENTY PER CENTUM (20%) of the total accepted liabilities of the Company, convene an extraordinary general meeting of creditors of the Company;

1987 (1) ZLR p191

GUBBAY JA

...

- 7.2 The Management Committee shall be empowered to fix a date by which all claims of creditors shall be agreed or, failing agreement, by which all claims of creditors shall be submitted for proof in the manner provided for in the Companies Act;
- 7.3 Should any creditor fail to agree his claim with the Management Committee, or having failed to agree his claim, have failed to submit his claim for proof by a date fixed by the Committee, then the claim of such creditor shall be barred;
- 7.4 Notwithstanding the provisions of sub-clause 3 hereof any creditor whose claim has been rejected or reduced by the Management Committee shall be entitled to have the matter adjudicated upon by any competent Court and any amount, including taxed costs, which may be awarded to such creditor shall be admitted by the Committee as a claim against the Company;

...

- 8. The Company's net income will be utilised by the Management Committee to effect payment of costs and the Company's debts in the priorities listed below:

...

- 8.4 The payment by the 31st March, 1984 of:
 - 8.4.1 all creditors whose capital claims are under \$2 000,00;
 - 8.4.2 25% of the capital claims of creditors whose claims are more than \$2 000,00 and less than \$5

000,00.

8.4.3 15% of the capital claims of creditors whose claims exceed \$5 000,00.

8.5 The capital amounts and interest, if any, accrued and payable to creditors *pro rata* to their claims."

After the scheme came into effect and over the ensuing fourteen months, much correspondence passed between the parties concerning the amount payable by the respondent under the agreement of sale. The applicant claimed to be entitled to receive by 31 March 1984, 15% of his capital claim of \$425 000. The respondent disputed such entitlement. It contended that the valuation of the plant and machinery as reflected in Clearway's balance sheet and accounts was excessive of their true value, and that no provision had been made for the payment of deferred taxation arising from the disposal by Clearway of certain fixed assets previously held by it under agreements of lease-hire. And that having regard to these factors, 54% of the net value of Clearway, plus the applicant's loan account settled at \$77 459, was calculated to be far less than \$525 000. What the management committee did, however,

1987 (1) ZLR p192

GUBBAY JA

was to pay the applicant, on 25 June, 1984, the sum of \$5 662,50 representing 15% of both the arrear capital instalment of \$25 000 and of the arrear interest for four months totalling \$12 750. This payment was accepted by the applicant without prejudice to his rights.

Being convinced that there was no prospect of the dispute as to the *quantum* of the respondent's indebtedness being resolved amicably, the applicant, on 22 February 1985, brought proceedings in the High Court by way of notice of motion in which he sought an order that the scheme of arrangement be set aside with costs. Essentially the grounds were that the provisions of the scheme were not being complied with by the management committee. The respondent opposed the relief, and on 8 March 1985 instituted an action against the applicant in which it claimed cancellation of the agreement of sale on the ground of breach of warranty and, as its main alternative, an order that the purchase price of the applicant's shares and loan account in Clearway be revalued at \$193 112. That action has not progressed beyond the filing of pleadings.

The application came before SMITH J on 22 May 1985 and subsequently was dismissed with costs. The judgment is reported in 1985 (1) ZLR 380 (HC) and 1985 (4) SA 206 (ZH).

On appeal before this Court Mr *Eastwood* contended that it was established on the papers that the management committee appointed to oversee and control the business and affairs of the respondent, had failed to comply with its duties under the scheme of arrangement. It had omitted to report to creditors at least once every three months (clause 5.1.); it had ignored the request for fixing a time and manner of proving the applicant's claim (clause 7.2.); no meeting of creditors had been called (clause 6.1.); and, most crucially, other creditors had been preferred to the applicant in that *pro rata* their claims they had received more than he had. The effect of these four breaches, taken singly or cumulatively, warranted the impeachment of the scheme of arrangement by the court *a quo*, and it had erred in declining to intervene.

Assuming for the moment the validity and materiality of the applicant's complaints, the question which requires determination is whether, once a compromise or arrangement has been sanctioned under s 167(2) of the Companies Act, thereby becoming binding on all the creditors, the court has the power to set it aside. To this Smith J gave an affirmative answer. He expressed himself thus at 386B-D (210C-E of the South African report):

1987 (1) ZLR p193

GUBBAY JA

"In the absence of any such circumstance, (ie the non-fulfilment of a condition precedent embodied in the scheme), I consider that this court would be able to set aside the scheme of arrangement but only if there had been a material breach of the terms thereof and there was no other remedy available to the aggrieved party to protect his rights. Moreover, before setting aside the scheme, the court would have to be satisfied that the other creditors or persons affected were aware of the application to the court to set aside the scheme and had had an opportunity to make representations to the court."

If the court has the power then clearly in my view the learned judge was correct in holding that it has a discretion as to whether to exercise it or not.

The initial submission put forward by Mr *de Bourbon*, on behalf of the respondent, was that the court is not empowered to set aside or cancel a judicially sanctioned compromise or arrangement even for a vital breach of its terms. What it has is the power to declare the compromise or arrangement inoperative because of the non-fulfilment of a suspensive condition. In amplification counsel contended that the concept of a compromise or arrangement is a creation, not of the common law, but of the Companies Act, and that the power of the court in relation to it must be sought within the four corners of the Act and nowhere else. The court's basic function is to satisfy itself that the compromise or arrangement is one which on its merits should be made binding on all interested parties concerned, be they creditors or members of the company; it must ask itself whether an honest and astute man of business would reasonably approve of it. Once so satisfied, and granting its imprimatur in consequence, the court's involvement ceases, for the law-maker has not deemed it necessary to vest in it the additional power to set aside a compromise or arrangement it has sanctioned and which has become properly operational. Its binding effect cannot be questioned. It remains unimpeachable.

Mr *Eastwood's* contrary argument was that a compromise or arrangement which has been sanctioned must be subject to the overall control of the court in order to ensure that it is being administered fairly and not oppressively, and that the procedural requirements embodied in it are being implemented. He pointed out that with a scheme such as the present it is imperative that the management committee should not exercise power without being responsible for its actions to a higher authority, for were it otherwise the potential danger would exist of the company being run for the benefit of a few chosen creditors to the detriment of others. In that way injustice would be worked

1987 (1) ZLR p194

GUBBAY JA

To my mind, it is of fundamental importance to have regard to the effect of the sanctioning of a compromise or arrangement, subject, of course, to registration of the order pursuant to s 167(3)

of the Act. I comprehend it to be this: The sanction is not an order of court *ad factum praestandum*, a contravention of which is punishable by contempt of court. It merely gives to the compromise or arrangement contractual force as between those bound by it, deriving such force, not from their actual consent, but by operation of law.

The rights and obligations of the parties bound are determined by the terms of the compromise or arrangement, express or implied. They are not to be sought outside the confines sanctioned by the court. Questions relating to validity and interpretation follow normal contractual principles, for the act of sanction does not convert the compromise or arrangement into an order of court. The court has no greater power over it than in any other sort of contract. It cannot judicially condone a default in performance, nor can it relieve a party bound by it from the consequences of its operation. See *Ex Parte de Wet NO: In Re Mackville Motors (Pty) Ltd (In Liquidation)* 1971 (1) SA 256 (W) at 258C; *Cohen NO v Nel & Anor* 1975 (3) SA 963 (W) at 968F-969A; *Ex Parte Ensor NO: In Re Cape Natal Litho (Pty) Ltd* 1978 (3) SA 908 (D) at 911A-D.

Once it is appreciated that to sanction a compromise or arrangement does not mean that its intrinsic character is any less contractual - for its provisions do not become an order of court - it seems to me to follow that a vital breach would enable an aggrieved victim, as with any other form of contractual relationship, to approach the court for an order of cancellation. He has a right to do so. Indeed, in a situation where there are other interested parties, it would be normal and desirable to seek a judgment of cancellation so that the status of the contract is not left in doubt, but is well recognised. See *Sonia (Pty) Ltd v Wheeler* 1958 (1) 555 (A) at 561A-C; Christie *The Law of Contract in South Africa* at p 520. In principle therefore I can discern no basis why a court should lack the power to set aside a judicially sanctioned compromise or arrangement which has been breached in an essential respect.

Although counsel were unable to refer this court to any decided case in which a judicially sanctioned compromise or arrangement was subsequently cancelled by the court (and I confess to having fared no better in my researches), I am fortified in my thinking by persuasive indications in some of the judgments that a duly sanctioned compromise or arrangement is unimpeachable until it has been set aside.

1987 (1) ZLR p195

GUBBAY JA

The earliest of these is to be found in *Serein Investments (Pty) Ltd v Myb (Pty) Ltd* 1967 (4) SA 437 (C) where DIEMONT J (as he then was) said at 438 *in fine* to 439A:

"Where as previously a creditor had the right to sequester the company and look to the liquidator to pay him a dividend in due course, he is obliged now to sit back and wait for the provisional liquidator or receiver to implement the terms of the compromise. The compromise is binding upon him and unimpeachable - even if he did not vote for it - until such time as it has been set aside. if he disapproves of the method of distribution as being in conflict with the terms of the compromise, he may have a remedy against the receiver. **He may even be entitled to ask the Court to set aside the compromise - this is an issue that was not argued and I express no final view on it**" (my emphasis).

In that case, however, the court was concerned with a creditor's attempt to circumvent the effect of a sanctioned compromise (which was binding upon him) by taking independent action to

liquidate the company in order to accelerate the payment of dividends to creditors. Needless to say the attempt failed.

In *Cohen NO v Nel & Anor, supra*, the applicant, who had been appointed the receiver for the creditors of a company under a scheme of arrangement sanctioned by the court, instituted motion proceedings in which he claimed from the respondents payment of moneys alleged to be due under the arrangement. The respondents, in their replying affidavits, contested the grant of the order. At the hearing the respondents applied for leave to file a fourth set of affidavits in order to furnish additional evidence in respect of their defence that the arrangement had lapsed by reason of the failure of a condition precedent embodied therein. The applicant opposed the admission of these affidavits on the ground that they were entirely irrelevant to the merits of the matter. The submission was that once the arrangement was sanctioned by the court it became binding on all the parties thereto, including the creditors and the respondents as offerors, and that its consequences could only be avoided by the arrangement being set aside. FRANKLIN J rejected the submission. He upheld that of the respondents that it was open to them to allege and prove, despite the court's sanctioning of the arrangement, that one of the conditions precedent had not been fulfilled, causing the offer to lapse (see at 969E-H). Although the learned judge was not therefore required to determine the question whether the sanctioned arrangement was unimpeachable until set aside on application made to that end, it is perhaps of some slight

1987 (1) ZLR p196

GUBBAY JA

significance that he did not reject the obvious implication in the applicant's argument that a court has the power to set aside a compromise or arrangement which it has sanctioned.

In *Barclays National Bank Ltd v HJ De Vos Boerdery Ondernemings (Edms) Bpk* 1980 (4) SA 475 (A) the appellant was a creditor holding a security in the form of a mortgage bond. it sued for provisional sentence. The respondent maintained that the appellant's claim had been compromised in an offer sanctioned by the court. The appellant's response was that although the court sanctioning the compromise purported to make it binding on all creditors, at the time meetings of creditors were held the prescribed majority was obtained only in relation to concurrent creditors and not for secured creditors. Accordingly the compromise was not binding upon it. After examining the cases of *Serein Investments* and *Cohen, supra*, WESSLES JA upheld the contention, saying at 484A-C:

"The question is whether, in the circumstances of this case, the issue whether the terms of the sanctioned compromise are binding upon appellant can only be raised in proceedings impeaching the sanctioned arrangement with a view to obtaining a declaratory order that it is not binding upon appellant. Notwithstanding *dicta* in the judgments referred to above to the effect that a duly sanctioned offer of arrangement is unimpeachable until it has been set aside, I am satisfied that a person who claims that he is not bound by its terms by reason of the fact that he was never a party to the arrangement is not necessarily obliged first to have that issue determined in proceedings for a declaratory order of the kind referred to above."

No criticism was offered by the learned Judge of Appeal of the proposition that a court is empowered to entertain proceedings to impeach a judicially sanctioned compromise or arrangement.

But perhaps the strongest expression of the existence of the court's power is to be found in *Administrateur - Generaal vir die Gebied Suidwes - Afrika v Hotel Onduri (Edms) Bpk en Andere* 1983 (4) SA 794 (SWA), in which STRYDOM J held that where a sanctioned compromise is subject to a suspensive condition that fails, an order of court is still necessary to set it aside. His reasoning, at 801E-H, was this:

"Once a compromise has been sanctioned by a Court, however, it is my view that the conditional obligations created by the compromise subject

1987 (1) ZLR p197

GUBBAY JA

to a suspensive condition, can only be suspended by the setting aside thereof by the Court as regards those parties bound to it.

This is in my view the case as a compromise in order to be binding on all the parties to it must be sanctioned by an order of the Court. This is a statutory requirement in terms of s 311 of Act 61 of 1973. As a result of such compromise and should the provision of s 311 be complied with, persons who were opposed to the compromise or who were not present at the meetings in terms of s 311 are bound thereto. The sanction of the Court is necessary to effectively bring this about and although it is not an order *ad factum praestandum* which by non-compliance would be punishable with contempt of Court, ... the Court still grants its approval thereto, and in view of the effect which it has, it is my view that only the Court can undo the compromise by setting it aside. Another factor relevant hereto (as pointed out by Mr *Unterhalter*) is that third parties, who are not parties to the compromise, can obtain rights after the Court has sanctioned it. The compromise therefore comes into existence by an order of Court, and cannot be set aside by the parties without an order of Court." (In translation.)

Whether the learned judge was correct in his view, which differed from that of Diemont J in the *Serein Investments* case, *supra*, need not be considered. What is pertinent is his recognition of the power vested in the court to set aside a judicially sanctioned compromise.

The cases of *Ingel & Toubkin's Trustee v The Master* 1925 OPD 86 and *Blou v Lampert & Chipkin NO& Ors* 1970 (2) SA 185 (T), relied upon by Mr *de Bourbon*, are distinguishable. In each the court was dealing with a composition under the Insolvency Act and in a sequestrated estate, and was alive to the fact that upon breach of the terms of the composition the creditors could only act by and under the machinery in the insolvency law. To my mind, therefore, the dicta in these judgments, which suggest that a court may not be empowered to annul a composition upon breach of its terms by the insolvent, are not to be extended to a compromise or arrangement which upon judicial sanction is taken outside the purview of the Companies Act. (See also *Ilic v Parginos* 1985 (2) SA 795 (AD) at 801H-L.)

It necessarily follows that I am in agreement with Smith J that the court has the power to set aside a sanctioned compromise or arrangement upon a breach going to the root thereof, which power it will proceed to exercise in circumstances deemed to be appropriate.

1987 (1 ZLR) p198

GUBBAY JA

Mr *de Bourbon's* alternative submission upon this aspect of the appeal, was that the scheme of arrangement itself denied an aggrieved creditor the right to seek a judgment of cancellation on the ground that the management committee had failed to comply with the obligations imposed

upon it. Reliance was placed on clause 9.1, which reads:

"9.1. The Scheme of Arrangement shall be terminated:

9.1.1. upon payment in full of the claims of all accepted creditors; or

9.1.2. on the vote of a majority in number representing three-fourths in value of the accepted creditors present and voting at an extraordinary general meeting of creditors of the Company."

I find this submission unpersuasive. Clause 9.1 envisages that the scheme will terminate upon the fulfilment of its very object, or where for any reason whatsoever, whether justified or not, the requisite body of creditors at any time decide to put an end to it. It is their contractual right to do so. The individual aggrieved creditor, on the other hand, is protected by clause 2. It is there provided that in the event of the management committee, which is empowered to do everything necessary for the management and administration of the business and affairs of the respondent, failing to carry out the obligations imposed upon it, a creditor may then pursue whatever action was available to him prior to the date of sanction. He is freed from the scheme. His personal rights are not made subject to the limitations of clause 9.1.2. The two clauses deal with entirely different situations.

I pass now to consider whether the applicant was wrongly refused the relief claimed, empowered though the court *a quo* was to grant it.

The respondent did not deny that reports were not sent to creditors every three months by the management committee; two reports were, however, made to creditors, as is apparent from a letter written by the chairman of the management committee. Nor is there a denial by the respondent that up to 14 March 1985, the date when its opposing affidavit was filed, the management committee had not called a meeting of creditors. I understand the basis of this complaint to be that the respondent was in contravention of s 102(2) of the Companies Act.

However that may be, I do not regard these two complaints as relating to anything more than minor administrative failings, which in no way undermined the continued validity of the scheme of arrangement. There is no

1987 (1) ZLR ZLR p199

GUBBAY JA

suggestion that any other creditor viewed them with apprehension or even mild concern.

The remaining two complaints, that the management committee failed to respond to the applicant's request to fix a date for proof by him of his claim, and that other creditors were receiving preferential treatment, seem to me, to some extent, to be interlinked, by reason of the clear dispute between the parties as to the *quantum* of the debt. The correspondence shows that over a long period attempts were made to settle the amount of the respondent's indebtedness without finality being achieved.

Against that background it is not surprising that the management committee believed it would be completely unproductive to grant the applicant the opportunity of proving his claim before it. But even if the management committee erred in that approach and ought to have afforded the

applicant a hearing, I do not think that particular failing is one that goes to the root of the scheme of arrangement, requiring it to be set aside.

Mr *de Bourbon* conceded that the complaint that the claims of other creditors were being preferred to that of the applicant, if proved, and this is really the crux of the matter, would constitute a vital breach of the scheme of arrangement. He argued, however, that on this issue the substantive conflict of fact as it emerged from the affidavits was genuine, and not merely illusory, and was one which was not susceptible of resolution without the hearing of evidence; for to do so might cause an injustice to the other party concerned. See *Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1165; *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154E-F; *Joossab & Ors v Shah* 1972 (1) RLR 137 (GD) at 138G-H; *Lalla v Spafford NO & Ors* 1973 (2) RLR 241 (GD) at 243B; *Masukusa v National Foods Ltd & Anor* 1983 (1) ZLR 232 (HC).

Notwithstanding the cogency with which Mr *Eastwood* pressed his client's cause, I do not intend to embark upon an analysis of the opposing averments, for I am firmly of the opinion that a just decision can only be reached after *viva voce* evidence has been heard. Certainly that appears to have been the view of SMITH J, for he was not prepared to make a finding one way or the other.

If, contrary to my opinion, the applicant must be taken to have discharged the heavy *onus* of establishing on the affidavits that other creditors received *pro rata* their claims more than he had, then nonetheless there remains sound

1987 (1) ZLR p200

GUBBAY JA

reason for confirming the order of the learned judge.

A setting aside of a compromise or arrangement on the ground that a vital breach of its terms prejudiced the rights of a single creditor could seriously affect the body of creditors. Some creditors may wish to have it continue in force in spite of the default; others to have it cancelled. The court would want to know their attitude and would not, I think, be prepared to make a decision until the body of creditors had in some competent manner elected whether to enforce or annul. It might well consider that, just as it is a prerequisite that a majority in number and three-fourths in value accept a compromise or arrangement so the same majority should be the arbiters of whether or not it survive. For, after all, creditors are better placed than the court to ascertain where their best interests lie.

The applicant did not regard it necessary to enlist the support of other

creditors for the relief claimed. He did not even inform individual creditors of the application, thereby depriving them of the opportunity to make representations to the court. Notice to the management committee did not suffice for that purpose. In adopting the course he did, the applicant erred.

Moreover, I find it difficult to appreciate why the applicant persisted in seeking to impeach the scheme of arrangement when, short of cancellation, other and more appropriate remedies were

available to him. He could have proceeded under clause 7.4 of the scheme, which allows the rejection or reduction of a claim by the management committee to be adjudicated upon by the court. There can be no question but that this is how the management committee treated his claim. He could have sought a *mandamus* against the management committee that it fix a date enabling him to submit proof of his claim and that it comply with any other of its obligations. And finally, if prepared to undertake the burden of proving a vital breach by the management committee, he could have instituted an action against the respondent for payment as permitted by clause 2.

In my judgment the inability of the court *a quo* to inform itself of the attitude of the body of creditors in consequence of the applicant's omission to give notice, and the availability to him of other remedies which would have achieved his essential objective yet at the same time not put an end to the scheme of arrangement, were weighty factors justifying a refusal of the order prayed.

I would accordingly dismiss the appeal with costs.

1987 (1) ZLR p201

GUBBAY JA

McNally JA: I agree.

Manyarara J: I agree

Kantor & Immerman, appellant's legal representatives

Gill, Godlonton & Gerrans, respondent's legal representatives

1987 (1) ZLR p202

S v MUTTERS & ANOR 1987 (1) ZLR 202 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Criminal application for remittal

27 July 1987

Flynote

Appeals - remittal for further evidence - when granted.

Headnote

The two applicants had been convicted of malicious injury to property for breaking the side window of the complainant's motor vehicle. Both had denied the charge and set up the defence of an alibi. Subsequently, two other persons, T and R, admitted that they, and not the

applicants, were the persons responsible for breaking the complainant's car window, albeit not maliciously. The applicants applied to have their convictions and sentences set aside, and for the remittal of the case for further evidence to be led on their behalf, attaching warned and cautioned statements made by T and R, duly confirmed by a magistrate, admitting that they were the persons who had broken the window.

Held, notwithstanding that the new evidence was not put forward in the form of affidavits, as it should have been, the three requisites for the granting of such an application were satisfied, viz:

- (a) There was a reasonably sufficient explanation why the new evidence was not led at the trial.
- (b) There was a *prima facie* likelihood of its being true.
- (c) The evidence was materially relevant to the outcome of the trial. The application was accordingly granted. *S v de Jager* 1965 (2) SA 612 (AD) applied.

Cases cited:

R v Ngombe 1964 RLR 231 (AD)

S v de Jager 1965 (2) SA 612 (AD)

1987 (1) ZLR p203

MANYARARA JA

S v Murapi S-104-84 (not reported)

A M Donagher for the applicants

Y Omerjee for the respondents

Judgment

Manyarara JA: This is an application to set aside conviction and sentence, and remit the case to the magistrates court to enable fresh evidence to be led on behalf of the applicants. At the hearing, we granted the application but remitted the case for re-trial before a different magistrate for reasons which I now proceed to set out.

The applicants were tried by a Mutare magistrate on a charge of malicious injury to property. The allegation was that they wilfully and unlawfully broke the side window of a motor vehicle belonging to and driven by the complainant. The incident occurred at midnight on Churchill Road, Mutare, on 13 September 1986. The applicants denied the charge. Their defence was an alibi. They were convicted as already mentioned and sentenced to ten months' imprisonment with labour, of which five months were suspended on the usual conditions.

An appeal against both the convictions and sentences was duly noted. Subsequently, the present application was lodged.

The affidavits of the applicants allege that, shortly after their release on bail pending appeal, two persons known as Darren Brian Todd and Paul George Reimer admitted that they were the persons involved in the incident for which the applicants were convicted. Attached to the affidavits are statements recorded from Todd and Reimer under warning and cautioning which were confirmed by a magistrate. Todd says in his statement that he broke the window quite accidentally when he banged it to attract the driver's attention to his failure to give him right of way earlier on further down the road. Reimer supports this story, saying that he was the pillion passenger on Todd's motor cycle on the occasion. The version put forward by the State at the trial was that it was the applicants who had been the persons involved in the incident.

This application is opposed by the respondent on a basis sworn to very briefly by the acting Attorney-General in his affidavit as follows:

- "1. The applicants have been convicted and sentenced for the crime of Malicious Injury to Property.

1987 (1) ZLR p204

MANYARARA JA

2. From a perusal of the Police docket and other papers it is my view that there exist material discrepancies with regard to known facts as between the version of Todd and Reimer and the State evidence, viz. the colour of the motor cycle ridden by the offenders, the events leading up to the incident and the place of the incident.
3. It is my view that the interests of justice will not be served by a remittal to lead any further evidence."

The application is not in proper form, in that it does not set out by way of an affidavit or affidavits the new evidence expected to be led by Todd and Reimer: *R v Ngombe* 1964 RLR 231 (AD) at 233H. It is not sufficient compliance with procedure merely to annex their statements to the application. In fairness to Mr *Donagher*, who appeared for the applicants, he properly conceded the point and tendered his apology to this court. On the other hand, the only interpretation it is possible to venture of the opposing affidavit is that the State had available to it at the trial certain "evidence" which it failed to place before the magistrate. The respondent has not suggested that there is any explanation for the omission. In any event, an explanation is difficult to contemplate as the version which the applicants seek to introduce is not on record and the applicants have explained that this version was not available at the time. Consequently, the applicants cannot justly be denied the opportunity of putting the new version to the complainant himself as well as to the various witnesses who testified at the initial trial.

We found it significant that Todd and Reimer came forward after the applicants had been convicted and sentenced. It must be assumed that it was only then that they learned of the outcome of the incident and sought legal advice. Todd and Reimer approached the police through their legal practitioners who saw it fit to have their statements confirmed by a magistrate. One must assume, therefore, that *prima facie* likelihood of what is disclosed by the

statements being true has been established

Despite its deficiency, to which I have already referred, the application clearly satisfies the test for granting an application of this nature. That test is set out in *S v de Jager* 1965 (2) SA 612 (AD) at 613C-D and has been approved by this court in *S v Murapi* S-104-84 (not reported). For case of reference, the test is as follows:

- " (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

1987 (1) ZLR p205

MANYARARA JA

- (b) There should be a *prima facie* likelihood of the truth of the evidence.
(c) The evidence should be materially relevant to the outcome of the trial."

I have already dealt with paras (a) and (b) of this test. There can be no doubt that, if placed before the trial court and accepted by that court, the evidence expected from Todd and Reimer will be "materially relevant to the outcome of the trial" by establishing the applicants' alibi (paragraph (c) of the above test). The new evidence would corroborate the evidence of the defence witnesses at the trial. These were a certain Mr Forrester who said he was in the company of the first applicant on that crucial night; the first applicant was driving a Datsun 140Y motor vehicle; he did not own a motor cycle; Forrester knew the second applicant and he had not seen him that night. The evidence of the second defence witness, Brian Johnson, was broadly to the same effect.

Our reason for remitting this case for re-trial before a different magistrate was that the present magistrate has made positive findings on the credibility of the witnesses who appeared before him.

These are our reasons for granting this application in the terms which we did, setting aside the convictions and sentences and remitting the case for re-trial before a different magistrate.

Dumbutshena CJ: I agree.

Gubbay JA: I agree.

J H E Rogers, applicants' legal practitioner

1987 (1) ZLR p206

MATEREKE v CT BOWRING & ASSOCIATES (PVT) LTD 1987 (1) ZLR 206 (SC)

Court **Supreme Court, Harare**

Annotations [Link to Case Annotations](#)

Dumbutshena CJ, Gubbay JA & Korsah JA

Civil appeal

7 & 30 July 1987

Flynote

Employment - Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, s 3(1)(b) - "wilful disobedience of a lawful order" - what constitutes.

Headnote

"Wilful disobedience of a lawful order given by the employer", justifying summary dismissal of an employee under s 3(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, contained in SI 371/1985, must be such disobedience as to be likely to undermine the relationship between employer and employee, going to the root of the contract of employment. Knowledge and deliberateness and an intention to disobey must be present, and the disobedience must be serious and not trivial. The test whether the employee's wilful disobedience is a breach going to the root of the contract is an objective one, and it need not be shown that, subjectively, it evinces an intention on the employee's part to repudiate his contract of employment. *Dictum* of MORTON J in *Burnett v Standard Tobacco Co Ltd* 1957 R & N 508 (SR) at 511-512B, disapproved. The existence of a moral excuse for an employee's wilful disobedience to a lawful order will not make the disobedience any less wilful or the order any less lawful.

Cases cited:

S v Mpofu 1978 RLR 435 (GD)

Woodman v Robinson (1891) 1 CTR 263

Moonian v Balmoral Hotel 1925 NPD 215

Citrus Board v S A Railways and Harbours 1957 (1) SA 198 (A)

1987 (1) ZLR p207

GUBBAY JA

Bischoff Embroidery South Africa (Pty) Ltd v S A Railways and

Harbours 1966 (4) SA 385 (W)

Laws v London Chronicle (Indicator Newspapers) Ltd [1959] 2 All ER 285 (CA)

Burnett v Standard Tobacco Co Ltd 1957 R & N 508 (SR)

Yodaiken v Angehrn & Piel 1914 TPD 254

Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A)

Bouzourou v The Ottoman Bank[1930] AC 271 (PC)

Turner v Mason (1845) 14 M&W 112; 153 ER 411

Minister of Home Affairs v Badenhorst 1983 (2) ZLR 248 (SC); 1984 (2) SA 13 (ZS)

D P Carter (*pro deo*) for the appellant

M T O' Meara for the respondent

Judgment

Gubbay JA: This is an appeal brought pursuant to s 108(2) of the Labour Relations Act, No. 16 of 1985, by Mr Peter Matereke against a majority decision of the Labour Relations Tribunal. It is the first of its kind to come before this court and concerns the question of whether the Labour Relations Tribunal was correct in setting aside the decision of the Labour Relations Board and in reinstating the prior determination of the Acting Regional Hearing Officer. That determination was to the effect that the appellant had breached s 3(1)(b) of the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985, contained in Statutory Instrument 371 of 1985, and that in consequence his contract of employment with the respondent, known as "Bowring", was to be terminated.

For the avoidance of doubt I think it opportune to point out that although the Regulations were made by the designated Minister in terms of the powers conferred upon him by s 17 of the Labour Relations Act two days before the Act itself came into operation (its date of commencement having been fixed by the President under Statutory Instrument 367 of 1985 as 15 December 1985), their validity is saved by the Interpretation Act [Chapter 1]. Section 21 thereof allows the power conferred by an Act to make, *inter alia*, statutory instruments to be exercised at any time after the President has assented to the Act, provided that such exercise relates to the doing of "anything necessary or expedient for making the Act effective upon the date of its commencement." The President assented to the Labour Relations Act on 6 August 1985 and a perusal of the Regulations made on 13 December 1985 satisfies me that the requirements of the proviso were met.

1987 (1) ZLR p208

GUBBAY JA

I may say that as 15 December 1985 was a Sunday, and as Statutory Instrument 367 of 1985 was published in the Gazette on 13 December 1985, on the same day as Statutory Instrument 371 of 1985 as well as three other sets of Labour Relations Regulations, it looks suspiciously as if the figure "5" was an error on the part of the printer for "3". If that is so there would be nothing to preclude this court from curing the error. See *S v Mpofo* 1978 RLR 435 (GD) at 438H-439B and the cases there cited. But it is unnecessary to pursue this approach.

The facts upon which this appeal turns are not in dispute. They are these. On 16 April 1982 the

appellant entered the employment of Bowring in the capacity of a clerk in the department which deals primarily with insurance for the Anglo-American Corporation. Two years later he was promoted to junior broker. During that same year he became chairman of the workers' committee, a position he occupied with energy and enthusiasm.

In June 1984 the workers' committee complained to the Chief Labour Relations Officer of racial discrimination practised by Bowring in relation to promotions, salary structures and appointment of black staff. An investigation was undertaken but nothing was done about the complaints. Whether this was because they were not considered to be valid is not known. There followed two other occasions on which Labour Relations Officers were called in by the workers' committee.

On 19 August 1985 further allegations of racial discrimination by the management of Bowring in respect of promotional prospects were brought to the notice of the Ministry of Labour by the workers' committee. They were in the form of written reports by four complainant employees, of whom the appellant was one. On 21 August 1985 two Labour Relations Officers visited the premises of Bowring and discussions occurred between them, the workers' committee and management. The allegations were denied by Bowring in a detailed written response, and it does not appear that the issue was ever determined, or indeed carefully investigated, by the Labour Relations Officers. Certainly no action against Bowring was taken. What did emerge, however, was the existence of a grave lack of communication between the management and staff of Bowring.

On 2 January 1986 Mr S Huckle informed the appellant that he had been appointed by Bowring to replace an executive director who had resigned, and so had vacated the office he had occupied as executive broker. During the course of their conversation the appellant voiced discontent at having been

1987 (1) ZLR p209

GUBBAY JA

promoted to acting broker and requested that his application for the position of executive broker be passed on to the managing director. Mr Huckle undertook to do so although intimating that he did not consider the appellant to be sufficiently experienced for that position.

At 9 am on Friday, 3 January 1986 the appellant informed Mr Huckle that he had decided to occupy the vacant office. Mr Huckle advised against such action, stressing that the appellant had no authority to do so, but the latter took no heed of him and within a few minutes installed himself in the office. At noon Mr Green, the company secretary, on the instructions of the directors of Bowring, handing the appellant a written memorandum. It was in the following terms:

"It has been noted that you have, without lawful authority, moved your working venue into the separate office previously occupied by Mr S Huckle. This is entirely incorrect conduct and you are hereby instructed to vacate the office and return to your former work desk, this to be effected by 3 pm today, 3 January 1986."

The appellant read the memorandum and acknowledged that he understood its contents. He

made no other comment.

As at 3.35 pm the appellant was still in occupation of the office and it was obvious that he had no intention of vacating it. Another memorandum was prepared by Mr Green. This was handed to the appellant at 3.50 pm. It read:

"It is noted that the company's instruction that you vacate the office formerly used by Mr S Huckle has not been complied with. Therefore in terms of s 3(a) and 3(b) of Statutory Instrument 371 of 1985 which is governed by Zimbabwe Act 16 of 1985 you are hereby suspended without pay and other benefits with effect from close of business on 3 January 1986. Further, you will not enter any of the premises of C T Bowring and Associates (Private) Limited whilst under suspension."

At 9 am on Monday, 6 January 1986 the appellant entered Bowring's premises and proceeded to occupy the same office. He was asked by Mr Green to leave but refused to do so. In consequence Mr Green contacted the police and applied in writing to the Labour Relations Officer for a determination or order terminating the appellant's contract of employment. A patrol officer arrived at the premises during the course of that morning and interviewed the appellant in the presence of Mr Green and a member of the

1987 (1) ZLR p210

GUBBAY JA

workers' committee. Having done so, he requested that the three of them accompany him to the police station for further discussions. This was agreed to and the appellant finally left the office.

The appellant gave the reason for his conduct as frustration at the racial discrimination practised by Bowring, and his belief that he would be precluded from succeeding to Mr Huckle's position because he was a black man. He had occupied Mr Huckle's office and had remained there as a protest against such discrimination. This has always been the appellant's case.

Later that day a Labour Relations Officer determined that the appellant should return to his former desk whilst the facts of the matter were being investigated.

Thereafter followed the decisions of the Labour Relations Officer, the Acting Regional Hearing Officer, the Labour Relations Board and the Labour Relations Tribunal; the first and third favouring the appellant, the second and fourth Bowring.

The Chairman, Vice-Chairman and one of the members of the Labour Relations Tribunal were of the opinion that, taking account of what seemed to be an omission on the part of the Labour Relations Officers to make a full and comprehensive investigation into the allegations of racial discrimination practised by Bowring, it was not possible to make a definite finding thereon one way or the other. Nonetheless it was to be accepted that the appellant genuinely believed that such racial discrimination existed and that he was a victim. It was against that background that the majority of members proceeded to enquire whether the appellant had been guilty of wilful disobedience to a lawful order. They were satisfied that the order to vacate the office was a lawful one and that the appellant's continued occupation during the whole of the Friday and part of the following Monday morning was not the result of an impulsive decision. To the contrary, the action he took was deliberate and was persisted in notwithstanding the warnings given to

him. Instead of taking advantage of s 5 of the Labour Relations Act, which provides adequate remedies for those persons who believe that they are the subject of racial discrimination, the appellant had taken the law into his own hands and by so doing had put himself in the wrong.

The two dissenting members held that the appellant had failed to obey a lawful order but considered that such disobedience ought not to be isolated from the charges made against Bowring of racial discrimination and from the

1987 (1) ZLR ZLR p211

GUBBAY JA

appellant's belief that he was an aggrieved party; and that without the findings of an in-depth investigation into the existence or otherwise of such discriminatory practices, it was neither appropriate nor fair to order the appellant's dismissal. While not condoning his action, the two members felt that there were mitigating circumstances which warranted the decision by the Labour Relations Board that he be reinstated with a final warning to be issued to him by Bowring.

Section 3(1)(b) and s 3(2)(a) of the Regulations read as follows:

- "3. (1) Where an employer has good cause to believe that an employee is guilty of -
- (a) ...
 - (b) wilful disobedience to a lawful order given by the employer;
 - ...
- the employer may suspend such employee without pay and other benefits and shall forthwith apply to a labour relations officer for an order or determination terminating the contract of employment
- (2) Upon application being made in terms of subsection (1) the labour relations officer shall investigate the matter and may, according to the circumstances of the case -
- (a) serve a determination or order on the employee concerned terminating his contract of employment if the grounds for his suspension are proved to the satisfaction of the labour relations officer..."

It is clear from these provisions that the propriety of the termination of the appellant's contract of employment depended upon whether the requirements embodied in the phrase "wilful disobedience to a lawful order" were satisfied.

The requirement of "wilful disobedience" is not defined in the Regulations. But, having regard to the purpose of this piece of legislation as well as to the common law grounds for summary dismissal for wilful disobedience or wilful misconduct, the words in my view connote a deliberate and serious refusal to obey. Knowledge and deliberateness must be present. Disobedience must be intentional and not the result of mistake or inadvertence. It must be disobedience in a serious degree, and not trivial - not simply an unconsidered reaction in a moment of excitement. It must be such disobedience as to be likely to undermine the relationship between the employer and

GUBBAY JA

employee, going to the very root of the contract of employment. See *Woodman v Robinson* (1891) 1 CTR 263 at 265; *Moonian v Balmoral Hotel* 1925 NPD 215 at 219; *Citrus Board v S A Railways and Harbours* 1957 (1) SA 198 (AD) at 204G; *Bischoff Embroidery South Africa (Pty) Ltd v S A Railways and Harbours* 1966 (4) SA 385 (W) at 395A-C; *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 (CA) at 287B-I; Scoble, *Law of Master and Servant in South Africa* at p 145; *Halsbury Laws of England* (4 Ed) Vol 16 para 641.

In *Burnett v Standard Tobacco Co Ltd* 1957 R & N 508 (SR) at 511 *in fine*- 512B, MORTON J expressed the view that disobedience to a lawful order justified dismissal only if by its commission the employee evinces an intention to repudiate his contract of employment. With respect to the learned judge, it seems to me that this is too narrow a construction, for it overlooks that if the disobedience were sufficiently grave as to go to the root of the contract of employment, the employee would render himself liable to summary dismissal, albeit repudiation was not his intention. The concepts of an intention to repudiate, and a breach going to the root of a contract, are separate and by no means identical. The test for the latter is objective and not subjective, the intention of the employee being immaterial. See *Yodaiken v Angehrn and Piel* 1914 TPD 254 at 262; *Stewart Wrightson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (AD) at 951 *in fine*-952B; Christie *The law of Contract in South Africa* at p 498.

The second requirement, that the disobedience be directed at "a lawful order", means simply that the employee is not bound to obey an order to do something not properly appertaining to the character or capacity of his contract of employment. An order which involves a reasonable apprehension of immediate danger to the employee's life or injury to his person, not reasonably contemplated at the time he entered the employment, is unlawful and he is justified in refusing to obey it. For instance, an order to remain in a place in which his personal safety is endangered by violence or disease. See *Bouzourou v The Ottoman Bank* [1930] AC 271 (PC) at 276. The position would be otherwise were the employee a fireman, a policeman or a member of the armed forces. See Scoble *op cit* at p 147; *Chitty on Contracts* 25 ed vol 2 para 3510.

The existence of a moral excuse for such disobedience will not make the disobedience any less wilful or the order any less lawful. This proposition is well illustrated by the old English case of *Turner v Mason* (1845) 14 M & W 112; 153 ER 411, in which a domestic servant - quite deliberately

GUBBAY JA

because she had made a request which was rejected - absented herself during a night when she should have been on duty. Her plea of justification was that her mother was desperately ill, though it is not clear that she so informed her employer. She was summarily dismissed and the Court of Exchequer upheld the dismissal. PARKE B remarked that even if the employer had been made aware of the cause of her request to absent herself, it would not have been sufficient to justify her disobedience to his order. He went on to say that: "there is not any

imperative obligation on a daughter to visit her mother under such circumstances, although it may be unkind and uncharitable not to permit her". The decision was approved of in *Bouzourou's case*, *supra*.

On applying what I comprehend to be the basis of the law to the facts of this matter, I find myself in full agreement with the majority of the Labour Relations Tribunal that the appellant's conduct in occupying the office for the whole of Friday, his resumption of occupation on the Monday morning, and his refusal on both days to withdraw until eventually requested to do so by the police, was not to be classified as disobedience of a trivial degree. It was not an impulsive reaction to a situation which to him was intolerable, but rather a deliberate measure taken in defiance of what he subjectively believed to be racial discrimination being practised by Bowring against black personnel and against him in particular. Doubtless he did not intend his action to be regarded as repudiation of his obligations to his employer, but unfortunately for him it amounted to disobedience of a sufficiently serious and grave nature as to go to the root of his contract of employment. It totally ignored the procedure for promotion and was calculated to undermine the authority of Bowring.

The order to vacate the office did not involve a contravention of any law or any improper conduct on the part of Bowring. It did not expose the appellant to any risk or danger. In fact it only required him to return to his own office. That order was not so unreasonable as to be unlawful.

Satisfied as I am that the appellant vehemently believed that he was morally justified in refusing to vacate the office, I do not see how the harbouring of such belief made his disobedience any less wilful in degree or affected the lawfulness of the order. As emphasised in the majority judgment of the Labour Relations Tribunal, the appellant ought to have pursued the lawful remedies provided by the Labour Relations Act for those employees who consider that they have been discriminated against by their employer on the ground of race, tribe, place of origin, political opinion, colour, creed or sex.

1987 (1) ZLR p214

GUBBAY JA

Subsections 5(4) and (5) accord to an aggrieved employee the right to claim damages from the employer for any loss caused by the contravention and/or the right to seek an order directing the employer to redress the contravention.

In adopting the stance he did the appellant knowingly jeopardised his employment. He was given a lawful order which he was bound to obey and his disobedience to it entitled Bowring to apply to the Labour Relations Officer for an order terminating the contract of employment - the risk of which the appellant consciously undertook.

The costs of the appeal remain to be dealt with. The appellant was allowed legal aid in terms of Rule 21 of the Rules of the Supreme Court. He is impecunious. Although there is no principle which precludes this court from awarding costs against him, a grant of such an order is not usual. See *Minister of Home Affairs v Badenhorst* 1983 (2) ZLR 248 (SC) at 254D-E; 1984 (2) SA 13 (ZS) at 19A. Appreciating this to be the position Mr O' Meara, for the respondent,

commendably was not constrained to urge that the appellant be burdened with the costs of the appeal.

I would accordingly dismiss the appeal.

Dumbutshena CJ: I agree.

Korsah JA: I agree.

Pro Deo

Condy, Chadwick & Elliott, respondent's legal representatives

1987 (1) ZLR p215

S v SHONIWA 1987 (1) ZLR 215 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay and Manyarara JJA

Criminal appeal

6 July and 4 August 1987

Flynote

Evidence - murder - body of deceased not found - when conviction may be based on circumstantial evidence.

Evidence - confession - confirming evidence for purpose of s 255B of Criminal Procedure and Evidence Act [Chapter 59] - nature of evidence required.

Sentence - previous cases - relevance - appropriate sentence for infanticide.

Headnote

Appellant had been convicted of the murder of her newly-born child on the strength of her confession, supported by admissions made by her counsel at her trial to the effect that the baby had been born alive and that the appellant had been seen carrying it into the bush in a sack, evidence indicating that she had given birth and evidence that she had pointed out a place where she said she had buried her child's body. The body, however, was never found. On appeal against conviction and a sentence of six years' imprisonment:

Held that for a person to be convicted of murder, where no body has been found, there must be sufficient evidence to establish the corpus delicti; the evidence can be wholly circumstantial provided it is consistent with no other reasonable inference than that the victim is dead and was murdered by the accused.

Held, further, that there is no limitation on the kind of evidence which may confirm a confession for the purposes of s 255B of the Criminal Procedure and Evidence Act [Chapter 59] - such

evidence may even

1987 (1) ZLR p216

DUMBUTSHENA CJ

include other statements made by the accused - so long as it corroborates the confession in a material respect.

Held, further, that in the instant case the totality of the evidence led to one conclusion, which was that the appellant murdered her baby.

Held, further, that when assessing evidence in any particular case, previously decided cases with similar facts are relevant in that they form a broad guideline which, depending on the circumstances, may be useful. But the sentence to be imposed in each case must depend on the facts of that case.

Held, further, that having regard to the facts of the instant case and the guidelines laid down in *S v Jokasi* 1986 (2) ZLR 79 (SC); 1987 (1) SA 431 (ZS), the appellant's sentence should be reduced to one of four years' imprisonment.

Cases cited:

People v Scott (1960) 176 Adv Cal 2d 504, 1 Cal Rpt 600 (1960)

R v Onufrejczyk [1955] 1 All ER 247 (CA)

R v Harry [1952] NZLR 111

McGreevy v Director of Public Prosecutions [1973] 1 All ER 503 (HL)

S v Mbambo 1975 (2) SA 549 (A)

R v Taputsa & Ors 1966 RLR 663 (AD)

S v Bengu 1965 (1) SA 298 (NPD)

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

S v Sikosana 1960 (4) SA 723 (A)

S v Mjoli & Anor 1980 (3) SA 172 (D)

S v Jokasi 1986 (2) ZLR 79 (SC); 1987 (1) SA 431 (ZS)

S v Rufaro 1975 (1) RLR 97; 1975 (2) SA 387 (RA)

R v Karg 1961 (1) SA 231 (A)

S v Fraser 1987 (2) SA 859 (A)

S v Erwee 1982 (3) SA 1057 (A)

Miss S Ahmed (*pro deo*) for the appellant

AV K Chikumira for the respondent

Judgment

Dumbutshena CJ: The appellant was charged with the murder of her child. Although there was no body found she was convicted of murder and sentenced to six years' imprisonment with labour. She was granted leave to appeal against conviction. Later on 23 May 1987 counsel for the appellant applied for condonation of the late noting of an appeal against sentence in terms of s 44(2)(e) of the High Court Act, No. 29 of 1981. The relevant part of the section reads:

1987 (1) ZLR p217

DUMBUTSHENA CJ

"(2) A person convicted on a criminal trial held by the High Court -

(a) to (d) ...

(e) may, where the sentence to which he was liable on conviction was not a sentence fixed by any law, and where sentence of death was not passed upon him, with the leave of a judge of the High Court or, if a judge of that court refuses to grant leave, with the leave of a judge of the Supreme Court, appeal to the Supreme Court against his sentence or order of forfeiture or other order following on conviction."

In granting leave to appeal against sentence the learned trial judge remarked:

"In the light of the sentiments expressed in the *Jokasi* case (ie *S v Jokasi* 1986 (2) ZLR 79 (SC); 1987 (1) SA 431 (ZS)), however, if the accused were to come before me today, I believe that I would impose a lesser sentence than the one originally assessed. In the result the application for condonation and for leave to appeal against sentence are granted."

The appeal is both against conviction and sentence. Briefly the facts of this case are as follows.

The appellant was aged 21 years and 6 months when the crime was committed. She had two young children. On 9 September, 1984 she gave birth to a living baby girl. The State alleged that she planned to get rid of her newly born baby. She thus deliberately severed the umbilical cord with a razor blade without first ligating it. Consequently the baby bled to death within five minutes of the cutting of the umbilical cord. The appellant wrapped the baby in a sack, got hold of a hoe and proceeded to a place where she buried the baby in a shallow grave.

Appellant denied an intention to kill her baby. She testified that she cut the umbilical cord in order to sever the baby from her and from the placenta. She said she was ignorant of the consequences of cutting the umbilical cord without first ligating it. In her reply to the warn and caution she said:

"When I arrived at my mother's sister's home, having seen how I was being chased about from Shurugwi and Gweru I found out that if I was going to deliver there was nowhere I was going to stay with the child so I thought that I would kill the child. On the 9th September 1984 at about 11.00 hours, I gave birth to a living baby girl. The child once cried. I did not stay with the child for a long time. I took a razor blade and cut off the umbilical cord. The child became weak and died. I covered her with

DUMBUTSHENA CJ

a sack. I took a hoe and went with the body to the bush where I dug a hole and buried the body. I never called anyone or to tell anyone that I had given birth to a living baby. I hurried alone when there was no one who saw me."

Her statement, ex. 3, was confirmed by a magistrate. It forms the cornerstone of the State case. There was no eye-witness who saw her give birth, murder her baby and bury her. However, she confessed to the murder of her newly born baby. Although she pointed out to two people the place where she said she buried the body, the body of the child was not found.

In order to convict the appellant the State relied on her confession, together with circumstantial evidence. In terms of s 255B of the Criminal Procedure and Evidence Act [*Chapter. 59*] a court can convict any person on a charge of any offence on the basis of his confession. Section 255B reads:

"Any court which is trying any person on a charge of any offence may convict him of any offence with which he is charged by reason of a confession of that offence proved to have been made by him, although the confession is not confirmed by other evidence:

Provided that the offence has, by competent evidence other than such confession, been proved to have been actually committed."

The law is that on a criminal charge the fact that a person was murdered can, like any other fact, be proved by actual evidence or circumstantial evidence, if that evidence leads to that one conclusion of fact, although no body or corpse was found. The court must, as in any other criminal case, be satisfied beyond reasonable doubt of the guilt of the accused person.

In order to convict a person where no body has been found there need be no confession establishing the guilt of the accused. There must be, however, sufficient evidence to establish the *corpus delicti*. That evidence can be wholly circumstantial, provided it is sufficient to preclude every reasonable inference of the innocence of the accused. See *People v Scott* 176 Adv Cal 2d 504, 1 Cal Rpt 600 (1960); *R v Onufrejczyk* [1955] 1 All ER 247 (CA); *R v Harry* [1952] NZLR 111, *McGreevy v Director of Public Prosecutions* [1973] 1 All ER 5003 (HL). See also *Richard C Donnelly, Joseph Goldstein, Richard D Schwartz Criminal Law* at 645-660.

In the instant case there is a confession. The court *a quo* had to look to the confession to prove that the offence must have been committed. The court

DUMBUTSHENA CJ

cannot, however, come to that conclusion unless, in terms of s 255B, the offence has been "proved to have been committed" by competent evidence other than the confession. The competent evidence must confirm the confession. Section 258(2) of the South African Criminal Procedure Act, 56 of 1955 as amended reads:

"Any court may convict an accused of any offence alleged against him in the charge by reason of any confession of that offence proved to have been made by him, although the confession is not confirmed by any other evidence,

provided the offence has, by competent evidence, other than such confession, been proved to have been actually committed."

It is important therefore to see whether the South African courts have put any limitation to the phrase "any other evidence". In *S v Mbambo* 1975 (2) SA 549 (AD) at 553B-F Galgut AJA summarised the approach of the South African courts thus:

"In *Bengu*'s case the accused was charged with murdering her own child. She made a written confession to a magistrate and an oral confession to a witness. The trial Judge then held that, in the circumstances of that case, this was insufficient evidence to confirm the confession to the magistrate. The confession to the witness took the matter no further in that case than the confession to the magistrate.

It will be seen that in none of the three cases [ie *R v Walker* 1946 EDL 14; *S v Bengu* 1965 (1) SA 298 (N) and *S v Mokgeledi* 1968 (4) SA 335 (A)] was it said that any limitation must be placed on the words 'any other evidence' in sec. 258(2). The words do not in themselves suggest any limitation.

In *R v Sikosana*, which was heard in the Appellate Division in 1950 but is reported in 1960 (4) SA 723, the following is said by VAN DEN HEEVER JA at p 729:

'The danger of innocent persons freely and voluntarily confessing their guilt in connection with crimes which either they did not commit or which were in fact not committed by anyone, is no doubt slight. As a result of accumulated experience, however, different safeguards have been devised in different countries to provide for what must be exceptional occurrences, namely confessions by unbalanced individuals to being guilty of crimes which they never committed. Our practice in this regard has been codified in s 286(2). I find there no

1987 (1) ZLR p220

DUMBUTSHENA CJ

limitation placed upon the kind of evidence which may adequately confirm the confession or prove aliunde the commission of the offence charged.'

Hoffmann in his *South African Law of Evidence*, 2nd ed p 409 says:

'There seems no reason why confirmation should not be provided by other statements of the accused either in or out of court.'

He quotes no authority for this view but it accords with the above *dicta* of VAN DEN HEEVER JA:

The confirmatory value of evidence of the words or conduct of an accused who has made a confession must be determined with regard to the particular circumstances of each case. That this is so appears from cases like *R v Blythe* 1940 AD 355; *S v Letsedi* 1963 (2) SA 471 (AD); *R v Simon* 1943 CPD 11; *R v Rossouw* 1948 (2) SA 89 (C) at p 95; *S v Bengu* 1965 (1) SA 298 (N)."

The approach in South African is the same as in Zimbabwe. In this country in *R v Taputsa & Ors* 1966 RLR 662 (AD) Lewis AJA, as he then was, said at 667F:

"...where, however, there is no evidence *aliunde* proving that the offence itself has been committed, the court must, in addition, go outside the confession and be satisfied that it is confirmed by other evidence. In the leading case of *R v Blythe* 1940 AD 354, TINDALL JA delivering the judgment of the Full Bench of the Appellate Division, laid down that the confirming evidence required by the statute must be such as to corroborate the confession 'in a material respect', although it need not directly implicate the accused in the offence, ..."

It seems to me the approach is similar.

Now applying the tests laid down in the above cases it is important to see whether there is any

evidence which sufficiently corroborates the appellant's confession so as to satisfy the court it would be safe to rely on the confession as a whole in convicting the appellant. See *Taputsa's case, supra*, at 6671.

I now proceed to examine the facts. The appellant stayed with Ulita Mapurisa from 5 September 1984. Mapurisa noticed that she was pregnant. The appellant told her that Peter was responsible for the pregnancy. On 9 September 1984 when Mapurisa returned home from church she noticed that the appellant was no longer pregnant. The appellant told her that she had given birth to a dead child whom she had concealed. When Tafireyi asked

1987 (1) ZLR p221

DUMBUTSHENA CJ

the appellant what had happened to her "stomach pains" the appellant told her that she had given birth to a dead child. When asked what she had done with the child the appellant offered to show Tafireyi "where she had placed the child". When they went there Tafireyi saw "a cloth which had been worn" presumably the sack, ex. 5, which the appellant had used to wrap the child with. The appellant also showed her "a hole which had been covered with sand" where she said she had placed the child. The fact that she buried the dead child without informing others gives the lie to the fact that the child was born dead. Dr Purohit said the umbilical cord is tied at two places before being cut. If it is not tied bleeding from the umbilical cord will take place. The appellant cut the umbilical cord without tying it. Dr Purohit said if the umbilical cord were not tied on the side of the foetus, the foetus would bleed to death within a couple of minutes. He said if the appellant delivered her first two babies in hospital she would know that the umbilical cord is ligated.

The appellant indicated to Patrol Officer Mawere where she buried her child. PO Mawere dug the place but did not find the body of the child. The appellant said she did not know where the body of the child had gone. Added to this evidence is a list of admissions made by the appellant's legal practitioner at the beginning of the trial. These admissions were:

- "(i) the deceased was born alive and had cried;
- (ii) Regis Musaingwa had seen the accused carrying the baby in a sack, and the baby was not crying. The accused was also carrying a hoe;
- (iii) the witness had seen the accused disappearing into the bush carrying the baby and the hoe, and had next seen the accused emerge without the baby."

Miss *Ahmed*, who appeared for the appellant, submitted that the evidence led by the State was insufficient to confirm the confession of the appellant and that there was no evidence upon which a reasonable court, acting prudently, could convict. I do not agree with *Miss Ahmed*, that the evidence I have summarised above does not confirm the appellant's confession.

The appellant was pregnant. On 9 September her pregnancy disappeared. She gave birth to a live baby who cried. Regis Musaingwa saw the appellant carrying the baby in a sack. The baby was not crying. The appellant was carrying a hoe and when next she was seen by Regis Musaingwa she had no baby. The appellant indicated to P O Mawere where she had buried the child. When the police officer dug the place where the baby was said to have been buried the

appellant did not say she did not put her child there. She told the

1987 (1) ZLR p222

DUMBUTSHENA CJ

police officer that she did not know where the body of the child had gone. She indicated to the police officer the sack which she used to carry the child. The pointing out to two people of the place where she buried her baby proves that she knew what she did. In *S v Mbambo, supra*, Galgut AJA said at 553 *in fine*-554A:

"In the present case we have the evidence that the accused pointed out to the police the place in the cane field where the deceased had been found. In *R v Tebetha* 1959 (2) SA 337 (AD) HOEXTER JA says at p 346:"

"When a person points out a thing the pointing out is his act and proves that he has knowledge of some fact relating to that thing."

She was seen carrying the child in a sack and carrying a hoe, facts that were admitted at the trial.

This case is distinguished on the facts from the cases relied upon by *Miss Ahmed. S v Bengu* 1965 (1) SA 298 (NPD) was a case like the instant case in which there was no proof of the corpus delicti. Although the accused had made a confession and had admitted killing her 2 1/2 month old baby the State admitted that there was no evidence *aliunde* of the killing. The accused had told various and different stories to a number of people. It was not clear whether the child had been killed or left somewhere in the custody of other people. The police conducted a thorough search of the area including the use of tracking dogs. Nothing was found in the donga or its surrounding area. The accused was acquitted because there was insufficient evidence to confirm her confession. The acquittal was justified on the ground that "... the absence of a body may be a very good reason for holding that the Crown has not proved its case beyond reasonable doubt, for it lets in the possibility that the person in question may still be alive", per SCHREINER JA in *R v Nhleko* 1960 (4) SA 712 (AD) at 721F-G. *Nhleko's case, supra*, was also different. There was no body found and there was no proof of the disappearance at the time of any person in that neighbourhood who might have been killed. Besides there were witnesses whose evidence was found on appeal to have been improbable, who testified to seeing the appellant killing a strange man. Further in *Nhleko's case, supra*, on the evidence of the police officer as to the pointing out of the place of deposit of the body implicating the appellant Schreiner JA said at 722H:

"Even if the actual pointing out was admissible it was by itself hardly sufficient to provide the corroboration requisite in the circumstances of this case."

1987 (1) ZLR p223

DUMBUTSHENA CJ

I need not comment on *R v Sikosana* 1960 (4) SA 723 (AD). I have already cited a passage from the judgment of VAN DEN HEEVER JA which in this report appears at 729C. What is more appropriate though to the circumstances of the instant case is what the learned Judge of Appeal said at 730A:

"If one puts aside far-fetched conjecture it seems to me that the circumstantial evidence in this case, consisting of so many probative factors all pointing in the same direction, leads one irresistibly to the conclusion that the appellant planned and executed the removal of an unwanted wife. In the rugged country a body could be as effectively hidden or disposed of as if it had been put overboard on the high seas, and it is clear that appellant thought that therein lay safety.

To my mind the cumulative effect of these elements of proof is overwhelming and establishes beyond reasonable doubt the existence of the *corpus delicti* as well as appellant's agency in wilfully and maliciously being its cause."

In the instant case there is circumstantial evidence which is of great confirmatory value. It ties together what the appellant said in her confession and what she told other people. I have summarised that evidence. It shows that the appellant had the opportunity to murder her baby and to dispose of the body. She herself spoke to people about what she did and showed them what she did with the child. From the indications I made above it was proper for the trial court to come to the conclusion that the appellant was guilty of the crime charged. The evidence is circumstantial. Of that there is no doubt. But murder can be proved by circumstantial evidence. In *R v Onufrejczyk*, *supra* at 248H LORD GODDARD said:

"There is, apparently, no reported case in English law where a man has been convicted of murder and there has been no trace of the body at all.*(4) But it is, we think, clear that the fact of death can be proved, like any other fact can be proved, by circumstantial evidence, that is to say, by evidence of facts which lead to one conclusion, provided that the jury are satisfied and are warned that the evidence must lead to one conclusion only."

1987 (1) ZLR p224

DUMBUTSHENA CJ

See *McGreevy v Director of Public Prosecutions*, *supra* at 510; *R v Harry*, *supra*; *People v Scott*, *supra*. These cases emphasise that where the evidence of death is circumstantial it must be cogent and compelling so as to convince the jury or court that the facts cannot be accounted for on any rational hypothesis other than murder. See also *Halsbury's Laws of England* 4 Ed Vol 11 at para 361, where it is stated that generally it seems that a defendant cannot be convicted of murder or culpable homicide:

"unless either the body of the alleged victim is found or there is evidence, direct or circumstantial, of the death of the person said to have been killed ... If the evidence of death tendered is circumstantial it must be so cogent and compelling as to convince the jury that the facts cannot be accounted for on any rational hypothesis other than murder."

In short the authorities I have cited above allow of a conviction on circumstantial evidence even in the absence of a confession if that evidence is consistent with no other reasonable inference than that the victim is dead and that he was murdered by the accused. See *Halsbury*, *supra*, para 1183.

In the instant case the State relied on the appellant's confession which was confirmed by her admissions (see *S v Mjoli & Anor* 1980 (3) SA 172 (D) at 177D) and circumstantial evidence. The totality of this evidence leads to one conclusion, although no dead body was found, that the appellant murdered her baby. All that is required is that the court should be satisfied of the guilt of the appellant beyond reasonable doubt. See *McGreevy v Director of Public Prosecutions*, *supra* at 510f; *S v Mjoli & Anor*, *supra* at 177H; *S v Mbambo*, *supra* at 554C.

There is no doubt in my mind that the appellant's confession was a genuine one and the trial

court was satisfied beyond doubt of the guilt of the appellant. In my view the requirement of the proviso to s 255B has, on the evidence on the record, been satisfied because the commission of the offence was confirmed by evidence outside the confession. I would therefore not disturb the trial court's conviction.

The appeal against sentence is based on one ground which is that the sentence "is manifestly excessive when regard is had to the mitigating features of the case and to sentences imposed in other similar cases".

This court is at large to alter the sentence imposed by the learned judge *a quo* should it be proper to do so. As pointed out by the learned judge in his reasons

1987 (1) ZLR p225

DUMBUTSHENA CJ

for condoning the late filing of the notice of appeal and his reasons for granting leave to appeal against sentence he would not have imposed a sentence of six years' imprisonment with labour had he read *S v Jokasi, supra*. He said he would have imposed a lesser sentence. In my view had the learned judge been referred to *S v Rufaro* 1975 (1) RLR 97 (AD); 1975 (2) SA 387 (RA) he would also have imposed a lesser sentence than the one he imposed because the sentencing guidelines so ably outlined by BEADLE ACJ in that case are remarkably present in the circumstances and facts of this case. He would have considered the following factors and taken them into account: the emotional state of the mother at the time when she killed her child; the age of the mother; the number of previous births; the motive of the killing coupled with the question whether the killing was premeditated; the manner of the killing and contrition. Let me repeat what Beadle ACJ said at 99F (388F of the South Africa Report):

"... I do not want to give the impression that the list which I have outlined is an exhaustive one. It is not. There may be other factors personal to the accused or peculiar to the case which should also be taken into account."

The list depends on the facts and circumstances of each case.

The above guidelines were recently considered by this court in *S v Jokasi, supra*. I have no doubt in my mind that much good has resulted from the three judgments analysing the court's attitude to sentencing of mothers who kill their newly born babies, and the correct approach to sentencing them. I, however, would like to add a word of caution to the excellent approach so ably considered by my learned brothers in *Jokasi's* case, and in *Rufaro's* case. I do not want to be understood as departing from the guidelines so succinctly laid down in both these cases. All I want to do is to point out the danger of assessing sentences on the sole ground that there are similar facts in the cases being considered. There is no doubt that:

"sometimes a succession of punishments imposed for a particular type of crime provides useful guidance to a Court dealing with such a crime. But each case should be dealt with upon its own facts, connected with the crime and the criminal, and no countenance should be given to any suggestion that a rule may be built up out of a series of sentences which would be irregular for a court to depart from"

per SCHREINER JA in *R v Karg* 1961 (1) SA 231 (A) at 236G-H. It is important to remember that decided cases are of value for the principles of law laid

DUMBUTSHENA CJ

down in them. It does, of course, not mean that in assessing sentences similar facts are irrelevant. They are not. They form a broad guideline which, depending on the circumstances of each case, may be useful. *S v Fraser* 1987 (2) SA 859 (A) was an appeal against sentence in which counsel for the appellant argued that there was a similarity between the facts of that case and those of *S v Erwee* 1982 (3) SA 1057 (A) in which a sentence of periodical imprisonment was substituted for a sentence of imprisonment for one year. Counsel urged the court to adopt a similar course. NICHOLAS AJA rejected counsel's submission. He said at 863A-C:

"I do not think that that is a proper approach. In *R v Wells* 1949 (3) SA 83 (A) CENTLIVRES JA said at 87-88 that:

'Decided cases are ... of value not for the facts but for the principles of law which they lay down. In this connection I cannot do better than quote the remarks of LORD FINLAY in *Thomson v Inland Revenue* (1919) SC (HL) 10:

No enquiry is more idle than one which is devoted to seeing how nearly the facts of two cases come together: the use of cases is for the propositions of law they contain, and it is no use to compare the special facts of one case with another for the purpose of endeavouring to ascertain what conclusion you ought to arrive at in the second case'.

Decided cases dealing with sentence may be of value also as providing guidelines for the trial court's exercise of discretion (see *S v S* 1977 (3) SA 830 (A)) and they sometimes provide useful guidance where they show a succession of punishments imposed for a particular type of crime. (See *R v Karg* 1961 (1) SA 231 (A) at 236G.) But it is an idle exercise to match the colours of the case at hand and the colours of other cases with the object of arriving at an appropriate sentence."

I agree with what Nicholas AJA said and I adopt his approach in deciding the appropriate sentence in this case.

I approach the present matter with the guidelines indicated in the cases cited above. Although the learned judge *a quo* found that "it was most unlikely that you were raped by the father of the baby", I shall take the allegation of rape into account in assessing sentence. Her being raped by Peter was not seriously challenged in cross-examination. I believe she was raped. And what is worse Peter disappeared from her sight and from the neighbourhood. That must have affected and increased the burden of her existence. There are other factors in her favour. She was a young woman. She had two children.

DUMBUTSHENA CJ

Although one was being looked after by the parents of her deceased husband, it is clear from the evidence that she did not have a permanent place of abode and could not provide for herself and the one child she was keeping without assistance from other people. She is not an educated woman. She went about from place to place in search of shelter and support. These factors are mitigatory. From the evidence in the record, I cannot say with certainty what her emotional state of mind was at the time she gave birth to her child. She might have been distressed. I do not know. It is not easy to assume from her killing the baby a few minutes after giving birth that she was emotionally disturbed because evidence revealed that she had

planned killing the baby soon after its birth. It seems to me she planned the murder long before she delivered her baby. Since she had delivered two babies before it is reasonable to infer that giving birth to a third baby did not result in a disturbed emotional state of mind and in distress. However, there are many features of mitigation entitling her to a lesser sentence than that imposed by the learned trial judge.

For these reasons the appeal against sentence should succeed to some extent.

Accordingly the appeal against conviction is dismissed but the appeal against sentence succeeds to this extent: The sentence of six years' imprisonment with labour is set aside and substituted by a sentence of four years' imprisonment with labour.

Gubbay JA: I agree.

Manyarara JA: I agree.

Pro Deo

1987 (1) ZLR p228

CHIHOWA v MANGWENDE 1987 (1) ZLR 228 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, Gubbay JA & Manyarara JA

Civil appeal

7 July & 4 August 1987

Flynote

Customary law - succession - Legal Age of Majority Act, 1982 (No. 15 of 1982) - effect on status of women over 18 years old - capacity to inherit ab intestato under customary law.

Headnote

One of the consequences of s 3 of the Legal Age of Majority Act, 1982, is that a woman who has attained the age of 18 years can now be validly appointed as intestate heiress to her father's estate, with the same rights and duties as those which devolve upon a male person under customary law.

Cases cited:

Masango v Masango S-66-86

Matambo v Matambo 1969 (2) RLR 154 (AD); 1969 (3) SA 717 (RAD)

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

Jenah v Nyemba 1986 (1) ZLR 138 (SC)

N A Chinogwenya for the appellant

D A B Robinson (Pro Deo) for the respondent

Judgment

Dumbutshena CJ: Samson Mangoromera Chihowa died intestate on 23 December 1982. He was a businessman. He left both movable and immovable property. The movable property consisted of seven head of cattle, three motor vehicles, one tractor, cash in the sum of \$900,00 and money in the bank in excess of \$1 000,00. The immovable property was a house at No. 58 Third Avenue, Mbare.

1987 (1) ZLR p229

DUMBUTSHENA CJ

He was survived by his two daughters Auxilia Mangwende and Agnes Mparadzi. He was also survived by his wife, by whom he had no children, his father and four brothers. His father, Leonard Chihowa, is the appellant in this case. Auxilia Mangwende, the respondent, is a divorcée. After her divorce she went back to live with her father and was helping him in his business.

From the evidence on the record it is not clear whether there was a final liquidation and distribution account and, if there was, when that distribution was made. The respondent said in evidence that she noticed some people wearing her late father's clothes. When she enquired from her uncle Lawrence Chihowa how her late father's estate was distributed, he became hostile. The matter did not end there. She brought her claim for succession to her deceased father's estate to the community court. The community court appointed her the intestate heiress to her father's property.

The appellant was dissatisfied with the decision of the community court. He accordingly, in terms of s 29(2) of the Administration of Estates Act [*Chapter 301*] as amended, appealed to the court of the provincial magistrate of Harare. The learned magistrate after hearing evidence upheld the decision of the community court. The appellant now appeals against that decision on three grounds. They are:

- "1. The learned magistrate erred in finding that in accordance with African Law and Customs Auxilia Mangwende was the intestate heiress to the estate of her late father Samson Mangoromera Chihowa. The learned Magistrate accordingly erred in confirming the declaration by the Harare Community Court.
2. The learned magistrate erred in finding that the Legal Age of Majority Act 15/82 had repealed the provisions of Shona Custom providing for only male issue to inherit from a male line of succession.
3. The learned magistrate erred in his finding that real and substantial justice demanded that Auxilia Mangwende should be the intestate heiress to the estate of her late father."

There are two issues before this court: (1) Whether the learned magistrate erred by confirming the decision of the community court when she knew that according to African law and custom a

daughter cannot succeed to the estate

1987 (1) ZLR p230

DUMBUTSHENA CJ

of her deceased father; and (2) whether subs (3) of s 3 of the Legal Age of Majority Act, 1982 (No. 15 of 1982) supersedes African law and custom in matters of inheritance and allows a woman to succeed as intestate heiress.

In her judgment the learned magistrate decided that "when the Legal Age of Majority Act, 1982 came into effect it conferred majority status on all persons who reach the age of 18 years". She was of the view that where a man used to inherit for the benefit of the dependants of the deceased, now a woman can do the same.

Mr *Chinogwenya*, who appeared for the appellant, submitted that the magistrate's ruling was made "notwithstanding that s 69(1) of the Administration of Estates Act ... which provides that the estate of an African who dies intestate shall be distributed and administered according to the customs and usages of the tribe to which he belonged and further despite that Shona customary law by which the deceased was governed provides that where an African dies intestate, and there is no surviving male issue, the father or brothers are entitled to inherit or to succeed to the deceased estate in a male line of succession. It provides that the nearest male relative should inherit." He relied for the second leg of his submission on what Mr Harold Child said at 106 in *The History and Extent of Recognition of Tribal Law in Rhodesia*, 2 ed. The passage reads:

"In Shona law, on the failure of sons and their male descendants, and of brothers and their male descendants, the estate is taken by the deceased's father, then by his brothers, but in this generation the right to inheritance of widows is not permitted."

See Goldin and Gelfand *African Law and Customs in Rhodesia* at 297.

Mr *Robinson*, who appeared for the respondent, contended that subs (1) and (2) of s 69 of the Administration of Estates Act [Chapter 301] are not relevant to the point in issue - the inheritance of the deceased estate by an intestate heiress - because "subsection (1) simply provides for the system of law which is to apply in the circumstances mentioned (in the subsection) and subsection (2) simply provides for the way in which any controversies or questions which arise are to be determined ...". I agree with Mr *Robinson*. Subsection (1) tells us what law is to be applied when administering and distributing the estate of an African married according to African law or custom who dies intestate. Subsection (2) directs the manner in which questions or controversies which arise among relatives in connection with

1987 (1) ZLR p231

DUMBUTSHENA CJ

the administration and distribution of the estate are to be dealt with. Section 69 as amended reads:

"69. (1) If any African who has contracted a marriage according to African law or custom or who, being unmarried,

is the offspring of parents married according to African law or custom, dies intestate his estate shall be administered and distributed according to the customs and usages of the tribe or people to which he belonged.

- (2) If any controversies or questions arise among his relatives or reputed relatives regarding the distribution of the property left by him, such controversies or questions shall be determined in the speediest and least expensive manner consistent with real and substantial justice according to African usages and customs by the provincial magistrate or a senior magistrate of the province in which the deceased ordinarily resided at the time of his death, who shall call and summon the parties concerned before him and take and record evidence of such African usages and customs, which evidence he may supplement from his own knowledge."

Mr *Chinogwenya*'s submissions relate to the past. His contentions were valid prior to 10 December 1982, when the Legal Age of Majority Act became law. In saying this I confine my remarks to the question of entitlement to inherit the estate of an African who dies intestate. The Legislature, by enacting the Legal Age of Majority Act, made women who in African law and custom were perpetual minors majors and therefore equal to men who are majors. By virtue of the provisions of s 3 of the Act women who attain or attained the age of 18 years before the Act came into effect acquired capacity. That capacity entitles them to be appointed intestate heiresses. All that the courts are required to do is to give effect to the intention of the Legislature. Now the eldest daughter of a father who dies intestate can take the lot but not for herself only but for herself and her late father's dependants.

Mr *Robinson* said in his written submissions "... the respondent acquired full legal capacity when she attained her majority with the result that, under customary law, she was qualified, as the eldest child interested in her father's estate, to succeed as his heiress, to the exclusion of the appellant as the father of the deceased, with the attendant responsibility to provide for the support of any dependants of the deceased".

In *Masango v Masango* S-66-86 (unreported), this court considered the

1987 (1) ZLR p232

DUMBUTSHENA CJ

responsibility falling on the eldest surviving son of the deceased, the intestate heir of his father's estate, to maintain and support the customary law junior wife of his deceased father and her three children. The heir had refused to support his late father's third wife. BECK JA, as he then was, said at 3:

"In the absence of making it possible for the appellant to find such alternative accommodation for herself and the children as would be reasonable in all the circumstances, I do not consider that the respondent is entitled to insist upon their eviction from what is admittedly now his house. To order their eviction without suitable alternative provision having been made for their shelter would be tantamount to sanctioning an avoidance by the respondent of his customary law obligation to care for his father's wife and children."

See also *Matambo v Matambo* 1969 (2) RLR 157 (AD) at 155F; 1969 (3) SA 717 (RAD) at 717G.

In *Masango's* case, *supra*, the eldest son was heir to his father's estate and in the instant case it is the eldest daughter who was appointed intestate heiress. What the two share in common is the responsibility to administer their respective estates for the benefit of their father's

dependants according to African custom and usage. What has changed is that the respondent in this case has acquired the same capacity to inherit as is possessed by the heir in Masango's case. The other attributes of customary law remain as they were before the Legal Age of Majority Act was promulgated.

In *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (SC), this court considered the effect of the Legal Age of Majority Act on the status of an African woman who had attained the age of 18 years. At page 128B-C of the case, which involved the question of a father suing for damages for the seduction of his adult daughter, I had occasion to say:

"The daughter can sue for damages for her seduction and not the father. If the daughter is a minor the right of action remains with the father under the customary law. I believe this was the intention of the Legislature. It accords with both the letter and the spirit of Act 15 of 1982."

See *Jenah v Nyemba* 1986 (1) ZLR 138 (SC).

In the different circumstances of this case the above is still applicable. There is nothing in the wording of subs (3) of s 3 of Act 15 of 1982 which remotely

1987 (1) ZLR p233

DUMBUTSHENA CJ

suggests that for purposes of inheritance a woman can still be regarded as a minor. The wording of the subsection is clear and unambiguous and the words used in the subsection bear their ordinary grammatical meaning. Subsection (3) of s 3 reads:

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

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

In *Katekwe v Muchabaiwa*, *supra*, I said at 117G-H:

"... the indications are that Parliament's intention was to create equal status between men and women and, more importantly, to remove the legal disabilities suffered by African women because of the application of customary law. This view is not only common sense, it is supported by the clear and unambiguous language used in subs (3)."

In my judgment some of the traditional anchors and obligations of African society have broken down and are being intentionally abused by those who want to derive benefit from the old situation. The authors of *Women and Law in Southern Africa* (edited by Alice Armstrong and Welshman Ncube) have succinctly expressed the abuse to which our customary law of inheritance are being put. They say at 88:

"The classic scenario of such abuse is that of the widow and/or widows of a deceased African male being denied support from the deceased estate by the heir ... This may be the deceased's eldest son or where the deceased's children are minors or females, the deceased's elder brother, either in his capacity as heir or as guardian of the heir. It is not infrequent that immediately after the deceased's death the putative heir or heirs descend on the deceased's residence and literally strip it of its contents. They claim that under customary law they are entitled to

the deceased's property by right, to do with as they see fit, free of any obligation to the deceased's immediate family.

1987 (1) ZLR p234

DUMBUTSHENA CJ

Most of these problems are the result of the breakdown of the agrarian traditional family base and with it the structural framework on which customary law depends for its efficacy. Customary succession is primarily based on retaining the family generative property within the extended family, where it is administered by the heir for the benefit of the deceased's dependants at customary law. The heir would normally be the eldest male child of the deceased, or where such person was a minor or there were no male heirs, the eldest brother or male relative of the deceased.

The very nature of the traditional society probably of itself regulated the conduct of the heir and ensured that the property was administered for the benefit of the descendants of the deceased. One of the consequences of the evolution of Zimbabwean society seems to have been that in many instances traditional obligations have been superseded by purely acquisitive attitudes to deceased estates. Suffice it to say that these new attitudes are devoid of legal sanction, but nevertheless the problems and abuses remain."

I would like to believe that that is the evil the Legislature wanted to remove when it enacted Act 15 of 1982. There is no indication of a contrary intention other than that enshrined in subs (3) of s 3 of Act No. 15 of 1982. It is my opinion that there is nothing now in any enactment or at customary law which prohibits a woman from being appointed an intestate heiress. Both the community court and the court of the provincial magistrate were, in my view, correct in the decisions they took. The appeal cannot succeed.

Both counsel indicated that there should be no order of costs because the appeal is of national importance. There will be no order of costs.

In the result the appeal is dismissed.

Gubbay JA: I agree.

Manyarara JA: I agree.

P A *Chinamasa & Co*, appellant's legal representatives

Pro Deo

987 (1) ZLR p235

S v CHITIYO 1987 (1) ZLR 235 (SC)

Court **Supreme Court, Harare**

Dumbutshena CJ, McNally JA & Korsah JA

Criminal appeal

14 July & 4 August 1987

Copyright Juta & Co Ltd

Flynote

Criminal procedure (sentence) - diminished responsibility - mitigating effect of - multiple counts - need for court to consider whether sentences should run concurrently or consecutively.

Headnote

The appellant, a young man aged 23, had been sentenced to a total effective sentence of 50 years' imprisonment on ten counts of armed robbery, kidnapping and contravening s 48(1) of the Road Traffic Act 1976. It was accepted at his trial that as a result of an accident he had suffered a personality change which did not amount to a mental disorder or defect in terms of the Mental Health Act 1976 but which rendered him less responsible for his actions. On appeal:

Held, that the appellant's state of diminished responsibility was a mitigating factor that diminished his moral guilt.

Held, further, that when a court imposes sentences on a person for a number of different offences, it must, in fixing the length of each sentence, take into account whether the sentence is going to be made consecutive to or concurrent with other sentences. An undue disparity in the sentences that are ordered to run concurrently may result in the person receiving an inappropriate sentence.

Held, further, that notwithstanding the seriousness of the offences in this case, the totality of the sentences was manifestly excessive and should be reduced to one of 18 years' imprisonment.

Cases cited:

S v Sibiya 1984 (1) SA 91 (AD)

1987 (1) ZLR p236

R v Biyana 1938 EDL 310

R v Bentham & Ors [1972] 3 All ER 271 (CA)

C C Seddon for the appellant

A V M Chikumira for the respondent

Judgment

Dumbutshena CJ: The appellant was charged with ten counts of armed robbery, theft, attempted armed robbery and kidnapping.

[The learned Chief Justice outlined the facts of each count and the offences of which the appellant had been convicted, which were: armed robbery (counts 1, 4, 5 and 7), kidnapping (counts 2 and 9), attempted robbery (counts 8 and 10) and contravening s 48(1)(b) of the Road Traffic Act 1976 (counts 3 and 6). He continued:]

After conviction, and at the request of the prosecutor, the learned trial magistrate referred the

case to the Attorney-General in terms of s 58(1) of the Magistrates court Act [*Chapter 18*].

In the High court the appellant was sentenced on each count as follows:

- Count 1 - ten years' imprisonment with labour;
- Count 2 - 14 years' imprisonment with labour;
- Count 3 - one years' imprisonment with labour;
- Count 4 - eight years' imprisonment with labour;
- Count 5 - eight years' imprisonment with labour;
- Count 6 - one years' imprisonment with labour;
- Count 7 - eight years' imprisonment with labour;
- Count 8 - eight years' imprisonment with labour;
- Count 9 - 14 years' imprisonment with labour;
- Count 10 - ten years' imprisonment with labour.

The learned judge ordered half the sentences in Counts 4, 5, 7, 8 and 10 to run concurrently with the sentence of ten years imposed in Count 1 and the sentence of one year in Count 3 was ordered to run concurrently with the sentence of one year imposed in Count 6.

The effect of this sentencing arrangement was to reduce the total sentence of 82 years' imprisonment to an effective sentence of 50 years. It is against the sentence of 50 years' imprisonment with labour that the appellant now appeals. It is said this sentence is so manifestly excessive as to instil a sense of shock. Mr *Seddon*, who appeared for the appellant, submitted generally

1987 (1) ZLR p237

DUMBUTSHENA CJ

that the appellant, who is 23 years of age, has been sentenced to an effective sentence of 50 years' imprisonment with labour and will be 73 years of age should he serve the whole of his sentence and that, even if he were to get a full one-third remission for good behaviour, he would be 57 years old when he leaves prison. Mr *Seddon* argued that apart from a sentence of death it is difficult to imagine a more severe sentence for an individual who is a first offender.

It seems to me that the magnitude of the sentence of 50 years induced a sense of shock. It is rare to come across sentences of this length in this country.

In a case such as this one it is useful to examine closely the method by which the judge came to impose such a massive total sentence. Can it be said there was failure on his part to weight the aggravating factors and to balance them with the feature of mitigation? The learned judge was fully aware of the need to weigh aggravating factors and mitigating factors. In doing this the

learned judge said:

"I take into consideration what is contained in exhibit 1, the statement of agreed facts and exhibit 2, the affidavit of Doctor Vermeulen and in particular that it is accepted on your behalf that you were involved in an accident and sustained head injuries in 1976, that as a result of the accident you suffered headaches and dizziness and a personality (change) which, although it is not serious enough to amount to a mental disorder in terms of the Mental Health Act did affect you to some extent in that it made you less able to control your actions. But in any event you were still aware of what you were doing and that it was wrong.

I also take into account the fact that as far as your record goes you have not been at odds with the law before, the fact that you pleaded guilty to eight of the ten charges showing to some extent a degree of contrition and also the fact that you reaped very little fruit from your crimes.

On the other side of the coin, however, there are several factors which must be considered while assessing the sentences. The record of your case does to a large extent read like crime fiction. As a guardian of the law, your principal duty was to maintain law and order in the country. You shamelessly abandoned that role and wickedly elected to become a menace to society. During the material time you operated on both sides of the law. The weapon you used in executing your heinous and criminal designs was a pistol belonging to the Zimbabwe Police Force, a weapon

1987 (1) ZLR p238

DUMBUTSHENA CJ

issued for the benefit and protection of members of the public. This makes your moral blameworthiness even higher. Instead of protecting the complainants against the activities of anti-social elements in our society you turned against them. There can be no rational debate over the fact that by perpetrating the crimes you were convicted of, you have grievously wronged society.

In my opinion society is entitled to expect this court will mete out to you sentences which fully reflect the enormity of your breach of trust. Both justice and common -sense rebel against the idea that you should be allowed to go back to society soon. I know of no society in the world which does not regard armed robbery as a very serious crime. In this country that offence attracts the maximum sentence of death. That fact alone clearly demonstrates that the Legislature regards the offence as a grave criminal conduct. This court cannot treat it differently. Within the limits of law and justice it will punish those who perpetrate armed robberies and punish them severely.

While committing the crimes you were convicted of you must have gravely shaken your victims, particularly the nine-year-old girl and the housewife from whom you demanded a sum of \$15 000. That traumatic experience they underwent are likely to take a very long time to fade from their memories."

No-one can say that approach was wrong. There was, however, a tendency to lean in favour of features of aggravation and to underplay factors of mitigation. This might have been done because it is of the highest importance that any serious criminal conduct by a policeman should be shown to be wrong and condemned by both the courts and by society. And society's disapproval can only be shown by the courts imposing very severe sentences. Such sentences should be punitive in order to deter others of like mind and also safeguard society which expects to be protected by the police.

In my judgment the instant case did not warrant the severest of sentences. There were many mitigating factors. The learned judge *a quo* considered them but did not give them their due weight. One of these mitigatory features was common cause: It was accepted by the State that the appellant was involved in an accident in 1976 and sustained head injuries. As a result of that accident he suffered from headaches and dizziness and, more importantly, he had a personality change, which was not serious enough to amount to a mental disorder or defect in

terms of the Mental Health Act, No. 23 of 1976.

1987 (1) ZLR p239

DUMBUTSHENA CJ

However, that personality change made him less responsible. Doctor Vermeulen, who examined the appellant, said in his affidavit, exhibit 2, a severe head injury may have resulted in a personality change and this may have contributed towards his alleged activities. He was less able to control his actions. As a result he now suffers from diminished responsibility.

In a murder trial a successful plea of diminished responsibility reduces the crime of murder to one of culpable homicide. Besides, such personality change diminished the appellant's moral guilt, thus affording him a finding of extenuating circumstances. In *S v Sibiya* 1984 (1) SA 91 (A) the trial court found that the appellant's mental disabilities did not meet the requirements of the South African Mental Health Act, No. 18 of 1973 and did not constitute extenuating circumstances, but on appeal extenuating circumstances were found because of the appellant's mental condition. HOEXTER JA said at 97A-B:

"Looking both at the nature of the appellant's crimes and at Dr Ramsundhar's assessment of the appellant's mental condition I conclude that in the instant case it has been established on a balance of probabilities (1) that when he murdered the deceased the appellant, although he knew what he was doing, suffered from a mental defect which was substantial and (2) that such mental defect diminished his moral as opposed to his legal culpability for the crime. It follows, in my view, that the appellant discharged the *onus* of showing extenuating circumstances."

See *R v Biyana* 1938 EDL 310 at 311.

The crimes committed by the appellant were of a serious nature. However, it cannot be said that the appellant was violent and brutal in executing his criminal intentions. It is true he had a pistol. But he never used it to shoot any of his victims. Once it accidentally fired and hit a wall, and at the Beverley Building Society during a struggle with policemen he accidentally shot himself. It is true the mere production of a pistol must have intimidated the persons who were his victims. However, when Mrs Sly escaped he did not follow her. He could have easily threatened to shoot her. He kidnapped Thulani but looked after her during the night. He wanted to leave her at the car. She followed him into the bush and no harm was done to her. The motor vehicles were conveniently left at places where they were easily found and recovered. His behaviour might be consistent with his changed personality or diminished responsibility. He was a first offender who was very contrite.

1987 (1) ZLR p240

DUMBUTSHENA CJ

These factors were considered by the learned judge, but were not given sufficient weight.

A sentence of 50 years' imprisonment with labour is, in my judgment, objectionable, not because it is unjust or undeserved, but because it seems to me inhumane to keep a young man of 23 years of age in prison for that long.

The correct approach to sentencing an accused person for a number of different crimes was

Copyright Juta & Co Ltd

well put by CAIRNS LJ, who read the judgment in court in *R v Bentham & Ors* [1972] 3 All ER 271 (CA) at 276e-g:

"But when a man is being sentenced at the same time for a number of different crimes, it is necessary, when fixing the length of each sentence, to take into account whether it is going to be made consecutive to or concurrent with other sentences. Thus when a man is being sentenced for, say, four separate burglaries, it is not unusual for him to be sentenced to three years on each count concurrent. While each count, considered alone, merits three years' imprisonment, 12 years would be too severe a punishment for the whole course of crime. Now we considered that the trial judge was right to impose on the appellants Bentham and Baillie sentences on count 9 which were consecutive to those on count 1, but the court reached the conclusion that the addition of five years to 12 years in Baillie's case and of four years to 11 years in Bentham's resulted in a total period of imprisonment which in all the circumstances was excessive."

In the instant case the sentence of 14 years on each count of kidnapping and ten years for each of the two counts of armed robbery was too severe and had the effect of keeping the overall sentence high. In saying this I am aware of the fact that the sentencing judge had in mind the fact that the sentences would run concurrently. What was wrong was the disparity in the different sentences imposed. A greater disparity in the sentences ordered to run concurrently may result in an accused person receiving an inappropriate overall sentence. The same can be said of Counts 2 and 9. On each of these counts the appellant was sentenced to fourteen years' imprisonment with labour.

In this case Mr *Chikumira*, who appeared for the respondent, properly conceded the severity of the overall sentence. He submitted that more of the sentences should have been made to run concurrently.

1987 (1) ZLR p241

DUMBUTSHENA CJ

However, because the offences varied in their gravity I have decided to divide the various offences into groups of three. This is better for purposes of having a desirable effect on the overall sentence. I am going to impose the same sentence on each of those counts relating to armed robbery, attempted armed robbery and attempted robbery. I am justified in doing this because no harm was done to the victims and because his criminal acts were childish.

In the result the appeal against sentence succeeds to this extent:

The sentences of ten years in Counts 1 and 10 are set aside and substituted by sentences of eight years' imprisonment with labour on each count. The sentences in Counts 4, 5, 7, 8 and 10 are to run concurrently with the sentence of eight years in Count 1. For this group of offences the effective sentence will be eight years.

The sentences of fourteen years' imprisonment with labour each in Counts 2 and 9, the kidnapping offences, are set aside and in their place a sentence of nine years on each count is imposed. The sentence of nine years in Count 9 is to run concurrently with the sentence of nine years in Count 2. In this group of crimes the effective sentence is now nine years' imprisonment with labour.

The appellant was sentenced to one years' imprisonment with labour on each Counts 3 and 6. The sentence of one year in Count 6 is to run concurrently with the sentence of one

year in Count 3. The effective sentence in this group of offences relating to contravening s 48(1)(b) of the Road Traffic Act No. 48 of 1976 is one year.

In the result the applicant will serve an overall sentence of eighteen years.

McNally JA: I agree.

Korsah JA: I agree.

Coghlan, Welsh & Guest, appellant's legal representatives

1987 (1) ZLR p242

H & J INVESTMENTS (PVT) LTD v SPACE AGE PRODUCTS (PVT) LTD 1987 (1) ZLR 242 (HC)

Court **High Court, Harare**

Greenland J

Application on notice of motion

25 June & 5 August 1987

Flynote

Landlord and tenant - lease - renewal - option to renew - no specific provision in lease agreement as to rent on renewal - whether lessee nevertheless entitled to renewal without further agreement as to rent - when court can import a contract price, parties having reserved right to themselves.

Headnote

The applicant had leased to the respondent certain industrial premises for a period of three years, terminating on 28 February 1987. Under the lease agreement, the lessee had the option to renew the lease for a further period of three years from the date of termination, provided three months' written

notice of its intention to do so were given. The lease agreement also provided that should the option be exercised the rent for the further period should be "as agreed by both parties". The respondent, in a letter in which it stated that the rental figure would have to be negotiated, gave the applicant the

required notice of its intention to renew the lease, but the applicant did not respond. It allowed the respondent to remain in occupation of the premises until 31 March 1987, when it gave the respondent notice that it required the premises for its own use and required the respondent to vacate the premises by 30 April. The respondent declined, relying on the option clause.

Held, that an option, being a contract in itself, must comply with the requirements of a contract, one of which is that the contract price must be determined or determinable. Until such time as a

price was agreed, no enforceable contract existed. An agreement to negotiate a price is

1987 (1) ZLR p243

itself so vague as to be unenforceable.

Held, further, that the clause relating to the price could not be severed from the rest of the contract. There was no justification for doing so; the contract had to be read as a whole unless there was some absurdity or repugnancy or inconsistency, none of which applied here.

Held, further, that the court could not import a contract price where the parties had expressly reserved the right to fix the contract price themselves.

Held, further, that the doctrine of fictional fulfilment could not be relied on. There was no contract of option and the respondent could only succeed if it could show that there was a "contract to contract", which the lease agreement did not provide.

Held, further, that although there had been a "tacit relocation" by the applicant allowing the respondent to remain in occupation after the expiry of the lease, the lease thereby created was terminable on reasonable notice given.

Held, further, that the applicant was not estopped from proceeding against the respondent. Its failure to reply to the respondent's letter, its allowing the respondent to remain in occupation and its acceptance of the rent for March 1987 did not represent acceptance of the offer to enter into a new

lease and to negotiate the contract price.

Held, further, that the applicant had shown "good and sufficient cause" for the ejectment of the respondent.

Cases cited:

SA Reserve Bank v Photocraft (Pty) Ltd 1969 (1) SA 610 (C)

Swart & Anor v Cape Fabrix (Pty) Ltd 1979 (1) SA 195 (A)

Jaga v Dönges NO & Anor 1950 (4) SA 653 (A)

List v Jungers 1979 (3) SA 106 (A)

Scheepers v Vermeulen 1948 (4) SA 884 (O)

Hattingh v van Rensburg 1964 (1) SA 578 (T)

Grey v Pearson (1857) 6 HLC 61; 10 ER 1216

Trook t/a Trook's Tea Room v Shaik & Anor 1983 (3) SA 935 (N)

Scottish Union & National Insurance Co Ltd v Native Recruiting Corp Ltd 1934 AD 458

Cone Textiles (Pvt) Ltd v Tribal Trust Land Development Corporation Ltd 1979 RLR 114 (AD)

Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C)

Levenstein v Levenstein 1955 SR 91; 1955 (3) SA 615 (SR)

Gowan v Bown 1924 AD 550

Koenig v Johnson & Co Ltd 1935 AD 262

1987 (1) ZLR p244

GREENLAND J

Deetlefs v Wright 1977 (2) SA 560 (A)

Rose's Car Hire Co (Pty) Ltd v Harris & Co 1944 WLD 159

Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd 1986 (2) ZLR 246 (SC)

J Sayce for the applicant

M J Gillespie for the respondent

Judgment

Greenland J: In this matter the applicant seeks the ejectment of the respondent.

The relevant background facts are that -

1. On 27 February 1984 the parties, both being registered companies, entered into a written lease agreement in terms of which respondent leased certain industrial premises from the applicant;
2. The period of lease was fixed at "Three years reckoned from the 1st March 1984 and terminating on the 28th February 1987, on which date the Lessee undertakes to vacate the property". (This quote is from clause 2 of the agreement).
3. The following paragraphs were also included thereafter:
 - "3. The Lessee has the option to renew the lease for a further period of three years reckoned from the date of termination provided that notice to the Lessor of the Lessee's intention to exercise this option is given in writing at least three calendar months before the date of termination. During the renewal period the lease shall be on all the conditions contained herein save that the Lessee shall have no right of further renewal.
 - 4a The rent for the fixed period is as given in item 15 per month payable monthly in advance on the first day of each month, without any deduction whatever, to be paid to the Lessor at Arthur Young & Coor to such other place as the Lessor in writing from time to time directs.
 - 4b Should the option be exercised in terms of the provisions hereof, the rent for such further period, payable similarly, shall be as agreed upon by both parties."
4. On 11 July 1986 the respondent, as lessee, wrote to the applicant, as lessor, in the

following terms:

1987 (1) ZLR p245

GREENLAND J

"Dear Sirs,

In accordance with the terms of our lease and memorandum of agreement dated 27th February 1984, we wish to refer to clause 4b whereby we have the right of option to renew our lease for a further 3 years commencing end of February 1987.

Kindly accept this as formal notice that we intend to exercise our right of renewal from the above mentioned date for a period of at least 3 further years.

Settlement of rental figures will have to be negotiated in accordance with any Government regulations that may control any unwarranted increases.

Kindly confirm by return, receipt of this notification sent to you per registered post.

Yours faithfully,

(Signed)

J Cambitzis (Managing Director)"

5. A further letter making reference to the purportive exercise of an option to renew was thereafter written by the respondent. No reliance is placed on this letter. It is addressed to "Ian H Ferreira (Pvt) Ltd". It is undated. There is nothing to show that IH Ferreira (Pvt) Ltd were the agents for the applicant company for the purpose of lease renewal.
6. Relevant is the fact that the applicant did not respond to the 11 July 1986 letter. The respondent was not told whether or not the applicant accepted the purported exercise of an option.
7. On 31 March 1987, the applicant's legal practitioners wrote to the respondent in the following terms:

"Dear Sirs,

H & J INVESTMENTS (PRIVATE) LIMITED

We act for H & J Investments (Pvt) Limited which had a written agreement of lease with you in respect of Stand 10465 Edison Crescent which expired on the 28th February 1987, since which date you have remained in occupation as a statutory tenant.

Kindly note that our client, which has had a change of shareholders, wishes to utilise the leased premises for its own trading activities and you are accordingly requested to vacate the premises by the 30th April, 1987.

1987 (1) ZLR p246

GREENLAND J

Please confirm to us in writing by the 8th April that you will vacate at the end of April failing which we shall take action for your eviction and for damages against you for holding over.

Yours faithfully,

COGHLAN WELSH & GUEST."

8. By formal letter of the 6 April 1987, the respondent declined to relinquish occupation of the premises and the parties therefore joined issue.

The above represents the relevant background facts which throw up the issues for determination:

- (a) **A preliminary issue, which has been raised in the papers, is whether the applicant is seeking, by the ejectment of the respondent, to circumvent the Regulations, being the Commercial Premises (Rent) Regulations (SI 676/1983).**

The respondent alleges that in view of the fact that the activities the applicant is currently engaged in are, in reality, carried out by three other registered companies, the effect of an order for ejectment would be to permit the premises to be leased to third parties at the expense of the respondent, an eventuality specifically prohibited by the regulations.

The applicant has fully explained the relationship of all the companies involved and has given the assurance that it will be the applicant, and no-one else, who will take occupation.

On the papers I am satisfied that it is not applicant's intention to lease to a third party. The candid and clear manner with which the applicant has explained the whole situation impresses me.

In the result the allegation is supported only by suspicion. Because the applicant's present premises are occupied by third parties it is suspected that this arrangement may continue in the premises in question if the application succeeds.

I am satisfied that the allegation is not properly supported. There is no reason why applicant's full explanation should be rejected. There is nothing improper or unacceptable about the arrangement itself or about the explanation.

1987 (1) ZLR p247

GREENLAND J

This issue is therefore resolved in favour of the applicant.

- (b) **The next issue is whether or not paragraphs 3 and 4b of the Agreement constitute an option available to the respondent.**

The applicant submits that, in the absence of a stipulation as to the amount of rent payable, the "contract of option" is void for vagueness.

As can be seen, Clauses 3 and 4b do not expressly stipulate the rent payable. Rent payable being an essential element of a contract of lease, so the submission goes, its absence in the agreement is fatal to the existence of the contract. Therefore there was no option available to the respondent. See *South African Reserve Bank v Photocraft (Pty) Ltd* 1969 (1) SA 610 (C).

In that case the court was concerned with determining the effect of the following clause agreed:

"The lessor hereby grants the lessee the option to renew this lease for a further period of three (3) years, at a rental to be mutually agreed upon, under the same terms and conditions as herein contained, provided the lessee notifies the lessor in writing of his intention to exercise such option on or before 31st January, 1969."

It is my view that, on the basis that a court is required to give effect to all clauses, and words for that matter (this is what is meant by interpretation in context, eg *Swart & Anor v Cape Fabrix* (Pty) Ltd 1979 (1) SA 195 (A); *Jaga v Dönges NO & Anor* 1950 (4) SA 653 (A) and *List v Jungers* 1979 (3) SA 106 (A) at 119), clauses 3 and 4b must be read together, the latter qualifying the former. As such the resultant agreement is essentially the same and not properly distinguishable from Clause 23 in the *South African Reserve Bank* case *supra*, reproduced above.

I am satisfied with the correctness of approach by STEYN J (as he then was) in the *South African Reserve Bank* case *supra* and his conclusions which can be summarised and supported as follows.

- (i) Rent is an essential element in a contract of lease. This is trite; but if any authority is needed, see Cooper *The South African Law of Landlord and Tenant* at p 37.
- (ii) An option, ie a *pactum de contrahendo*, is itself a contract. It must

1987 (1) ZLR p248

GREENLAND J

comply with the general requisites for a contract. See Horwitz J in *Scheepers v Vermeulen* 1948 (4) SA 884 (O) at 892.

- (iii) The contract price must therefore be determined or determinable. Where not expressly determined it may be determinable on an acceptable construction of the agreement or the parties may be taken to have tacitly agreed. See *Hattingh v van Rensburg* 1964 (1) SA 578 (T) and authorities cited at p 582.
- (iv) The words "the rent ... shall be as agreed upon by both parties" constitute an express agreement prescribing the method by which the rent will be fixed and, in the result, all other constructions are effectively excluded: Hattingh's case, *supra*. It is trite that a court will determine the common intention of the parties from the words actually said, in their grammatical and ordinary sense. This is what has become known as LORD WENSLEYDALE'S golden rule from *Grey v Pearson* (1857) 6 HLC 61 at 106; 10 ER 1216 at 1234. As demonstrated by Christie *The Law of Contract in South Africa* p 200ff, citing numerous authorities, this approach is fundamental in our law.
- (v) In terms of this approach, therefore, the relevant clauses "must be considered as a

mere and typical case in which the parties left a material condition open for future negotiation and agreement. This means that until such time when they have agreed to the price, no accomplished or enforceable contract ... exists": *Hattingh's case*, *supra*, at p 154 of the official translation of the 1969 (1) SA Law Reports.

- (vi) It is also my view that an agreement to negotiate at some future date is "so vague as to its import, significance or consequence as to be unenforceable" *per* STEYN J in *SA Reserve Bank supra* at 613 G, citing HORWITZ J in *Scheepers v Vermeulen supra* at 892:

"... I am of the opinion that an undertaking to negotiate is too vague to be enforceable, because of the absolute discretion on the side of the person who gave such an undertaking" (p 154 of the official translation of the 1969 (1) SA Law Reports).

In fact, in my respectful view, both sides must be taken to have the said discretion.

- (vii) It is my conclusion therefore that Clauses 3 and 4 do not constitute an enforceable contract of option which was available to the respondent. I

1987 (1) ZLR p249

GREENLAND J

am fortified in that approach by the view taken in *Trook t/a Trook's Tea Room v Shaik & Anor* 1983 (3) SA 935 (N) at 937C which described the approach in the *SA Reserve Bank case supra* as established law. I am also fortified in that view by *Christie supra*, who cites the *SA Reserve Bank* case at p 27 as authority for this approach and adds the important qualification that the agreement is not void for vagueness but unenforceable because of vagueness.

- (viii) The respondent's contention on the issue is in two parts:
- A firstly, it is only Clause 4b which is void: it should be struck out, leaving Clause 3 which is perfectly enforceable;
 - B secondly, in any event, as there clearly was *animo contrahendi*, the absence of an express contract price is not fatal as, in such circumstances, the law imports this essential element on the basis of what is a fair and reasonable contract price.

The first argument is disposed of on the basis that there is no justification for ignoring a clear unambiguous provision in a contract which evinces the common intention of the parties. It is clear that a court is required to read the contract "as a whole" (eg *List v Jungers supra* at 119) and will only modify its approach to avoid "some absurdity or to some repugnance or inconsistency with the rest of the contract...": *Scottish Union and National Insurance Co Ltd v Native Recruiting Corp Ltd* 1934 AD 458 at 465-6. On this test clause 4b is not objectionable. It evinces the clear intention of the parties to prescribe the method by which the contract price

envisaged in Clause 3 is to be arrived at. As regards the second argument the Respondent relies on the case of *Cone Textiles (Pvt) Ltd v Tribal Trust Land Development Corporation Ltd* 1979 RLR 114 (AD).

In that case, the court was prepared to hold the applicant to a contract in which it had agreed to pay "rates and charges levied" despite the fact that the contract "did not identify the body or authority which was entitled to levy the rates and charges ..." and there was "no provision ... for fixing the amount of the rates and charges ..."

A reading of the case reveals that it is distinguishable on fundamental grounds. Not surprisingly, therefore, the *SA Reserve Bank* case *supra* and *Hattingh's* case *supra* were neither cited nor considered. The principle distinguishing factor is that in *Cone Textiles* the court was

1987 (1) ZLR p250

GREENLAND J

concerned with a situation where the parties had not evinced "a *de facto* intent to be bound by some specific criterion..." (at p 118D, citing *Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd* 1961 (1) SA 704 (C) at 708 H) whereas, in the present case, the parties specifically prescribed a criterion in clause 4b. The court was also in a position of having to deal with a provision, properly agreed, but essentially ambiguous. It therefore held that in these circumstances, ie absence of criterion and the presence of ambiguity, it was proper to import a contract price on the basis of fairness and reasonableness. In the present case, the court is concerned with a specific criterion and there is no question of ambiguity. Simply put, *Cone Textiles* is no authority for the proposition that a court can import a contract price where the parties have expressly reserved the right to fix the contract price themselves. The same applies to the other case cited by the respondent; *Levenstein v Levenstein* 1955 SR 91; 1955 (3) SA 615 (SR) which, on Christie's approach (op cit at p 27 as read with p 85) actually supports the applicant. The respondent's submissions are therefore rejected.

(c) The respondent further advances a comprehensive argument that the option was exercised and a valid contract of lease ensued by way of the doctrine of fictional fulfillment.

It is submitted that applicant could not unilaterally frustrate the option agreement by refusing or neglecting to agree to a contract price.

A similar argument was advanced in the *SA Reserve Bank* case *supra*, where it was submitted that the "applicant was contractually precluded from withdrawing from the option" and the applicant was "at last obliged to negotiate". The argument failed.

The reason, as I see it, is that, in the absence of a contract, ie a valid enforceable agreement, there can be no obligation on either party. It seems clear that "each contract must be carefully considered to see whether the rule (of fictional fulfilment) can be applied or not..." *per* DE VILLIERS JA in *Gowan v Bownen* 1924 AD 550 at 568. The importance of the nature of the contract has been stressed also in *Koenig v Johnson & Co Ltd* 1935 AD 262 at 272 and *Deetlefs v Wright* 1977 (2) SA 560 (A) at 567 F

It has already been ruled that there was no contract of option. The respondent's submission can only possibly succeed, therefore, if it can be shown that there was, in fact and law, a "contract to contract", ie the applicant

1987 (1) ZLR p251

GREENLAND J

to grant the respondent the option, which first contract the applicant wrongfully frustrated.

The nature of this alleged contract is gleaned from clauses 3 and 4b of the Agreement. In my view, the agreement amounts to nothing more than that the respondent would be given an option provided the procedure in Clause 3 was complied with **and** if the parties were able, **by mutual agreement, to fix the rent**. Clause 4b does not give the respondent a clear right to have the rent fixed. It is implicit therein that there had to be mutual agreement. On basic principles agreement is constituted by offer and acceptance. The facts show that, by the letter of 11 July 1986, the respondent made an offer in the following terms: "Settlement of the rental figures **will have to be negotiated** in accordance with any Government regulations that may control any unwarranted increases" (my emphasis). In my view, this was an offer. As such, it invited negotiations. It **did not propose a contract price**. There was no response. This is entirely consistent with rejection of the offer. Since there was no obligation on the applicant to agree, to my mind, it acted within its rights. The words in Clause 4b ("**as agreed upon by the parties**") envisage an agreement with its constituent elements of offer and acceptance **at the discretion of either side**.

It is my view, therefore, that, bearing in mind the nature of the contract, ie agreement, and the facts of the matter, the applicant acted within its rights in not accepting the respondent's offer to negotiate.

The submission of fictional fulfilment therefore fails.

(d) The respondent also submits that a new lease came into being after expiry of the written lease, on the 28th February, 1987, by way of "tacit relocation".

The applicant's own affidavit reads:

"7. After expiry of the said written lease the respondent remained in occupation of the premises **as a tenant** from month to month [my emphasis].

However, on the 31 March 1987 the applicant served upon the respondent a notice terminating tenancy of the premises from the 30th April, 1987".

1987 (1) ZLR p252

GREENLAND J

To this must be added the fact that the applicant accepted \$1250,00 as rent for March 1987.

Cooper op cit at p 319 defines tacit relocation as "an implied agreement to relet and is concluded by the lessor permitting the lessee to remain in occupation after the termination of the lease and accepting rent from the lessee for the use and enjoyment of the property". Ample

Copyright Juta & Co Ltd

authority is thereafter cited. On the evidence I hold that a lease came into being, after expiry of the written lease on the 28 February 1987, by way of tacit relocation. In terms of Cooper's treatment of the subject and the authorities cited such lease is terminable on reasonable notice.

The respondent has not claimed that the notice given was unreasonable. In the circumstances it is not possible to hold that the respondent has a basis for resisting ejectment in terms of this concept and the issue is therefore resolved against respondent.

- (e) The respondent has also claimed that Applicant has *waived* any right to claim a higher rental.**

As this is a claim for ejectment the relevance of this submission completely escapes me.

- (f) The respondent has argued strenuously that the applicant is *estopped* from denying the existence of a further 3 year lease.**

I quote:

- "(c) The Applicant's failure to negotiate new rent and its acceptance of the March payment for rent and acceptance of the subsequent payments all amount to a representation that the lease continued and remains in force. It would be to the Respondent's prejudice were Applicant now to say that the lease expired and in my submission it is estopped from so claiming.

I accept and believe this advice, and indeed, in my respectful submission any contrary conclusion would not be equitable. I accordingly deny that Respondent is a statutory tenant."

The requirements for estoppel by representation are comprehensively set out in Joubert, *The Law of South Africa vol 9 para 371 et seq.*

1987 (1) ZLR p253

GREENLAND J

Much depends on whether it can be said that the applicant had a duty to respond or was unreasonable in failing to do so. The relevant letter is that addressed to the applicant of 11 July 1986, quoted in para 4 above. As already stated, this letter, in the circumstances, constituted an offer which the applicant could accept or reject. See para (c) above. That offer, I repeat, contained the stipulation:

"Settlement of the rental figure will have to be negotiated in accordance with any Government regulations that may control any unwarranted increases."

It will be readily appreciated therefore that, in terms of the respondent's own stipulation, negotiations, if they were to be meaningful, could have only taken place at the relevant time, ie on expiry of the written lease on the 28 February 1987, when any relevant Government regulations then in force would be relied on, invoked, considered etc. In terms of the respondent's own criterion therefore any earlier negotiations would have been premature.

Ideally the applicant ought to have responded saying as much or simply rejecting the offer. Does this mean, however, that the applicant's inaction amounted to a representation of fact which misled the respondent? I think not. On the applicant's side, it was not unreasonable to

wait until the relevant time. On the respondent's side, it could not have been misled into believing that the applicant had accepted anything. It was the respondent's own stipulation that the contract price still had to be fixed by negotiation. All that the respondent could conclude was that the applicant was either unwilling to accept the offer to negotiate or that it was awaiting the relevant time, not that it had accepted any contract price.

Does the fact that the applicant, on 24 February 1987, accepted the March rent make any difference? I think not. The relevant receipt reads:

"24th February 1987

Received from Space Age Products (Pvt) Limited cheque in the sum of \$1250,00 on behalf of H&J Investments (Pvt) Limited. Rent - month of March 1987"

This document does not amount to a representation of anything other than what appears *ex facie*, ie receipt of March rent. It certainly does not represent acceptance of the offer to enter into a 3 year lease and to negotiate the contract price. Moreover, at this stage, the applicant must be taken to have known

1987 (1) ZLR p254

GREENLAND J

the legal position, ie that on expiry of the written lease, tacit relocation aside, the respondent was entitled to remain in occupation provided it paid the rent. That is the effect of the Regulations.

Since the legal rights of the parties were then regulated by law I hold that there was no duty on the applicant to say anything. Also it was not unreasonable for it to remain silent until 31 March 1987 when it gave notice. In the circumstances this issue is resolved against the respondent.

(g) The remaining issue is whether the applicant has "good and sufficient" cause for requiring the ejectment of the respondent.

See s 22(2) of the Regulations, *supra*, which prohibits a court granting an order of ejectment "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 ... unless the court is satisfied that the lessor has good and sufficient grounds for requiring such order other than ...". In the papers the applicant has properly explained that it requires the premises for its own use and what use is intended.

The respondent has complained that a court should not simply accept the *ipse dixit* of the applicant in this respect. Apart from what was said in *Rose's Car Hire Co (Pty) Ltd v Harris & Co* 1944 WLD 159 at 168 - that great weight ought to be given to the word of the lessor (referred to in *Checkers Motors (Pvt) Ltd v Karoi Farmtech (Pvt) Ltd* 1986 (2) ZLR 246 (SC) at 251- I am at a loss to understand who else the court can be expected to rely on. Only the lessor knows whether or not it requires the premises and the relevant reasons why.

The respondent also submits that it would be inequitable to grant ejectment as this would result in the termination of its livelihood and that of 57 employees as "investigations have shown that it

would not be able to secure alternative accommodation".

Whilst accepting that there may be circumstances where equity would serve as a proper basis for resolving the question in a particular case I am unable to do so in this case. The applicant is the owner of the premises. As such it has an inherent right to possession. The right to property is a fundamental right enshrined in the Constitution. To uphold the respondent's stance would have the effect of depriving an owner of its property indefinitely. I cannot find that this result is equitable in the particular circumstances of this case

1987 (1) ZLR p255

GREENLAND J

where both parties require the premises purely for commercial activities.

It is my finding that the applicant has satisfied the requirement that it show good and sufficient grounds for ejectment. To my mind it is beyond question that the applicant reasonably requires the use of the premises to operate its business. See *Checkers Motors supra* at p 251.

As previously stated, in the case of a tacitly relocated lease, reasonable notice should be given. What is reasonable will vary from case to case. See Cooper *op cit* at p 322. In the *Checker's Motors* case *supra*, the Supreme Court sanctioned the procedure of giving a lessee, in such circumstances, a reasonable time to vacate. That is what I propose to do.

It is ordered therefore that:

- (a) the application for ejectment is granted;
- (b) the respondent, and all persons claiming possession through it of the property being Stand 10465 Edison Crescent, Graniteside, Harare, shall give vacant possession of the said property to the applicant;
- (c) the above order shall take effect on 1 October 1987;
- (d) the respondent pay the costs of this application.

Coghlan, Welsh & Guest, applicant's legal practitioners

Stumbles & Rowe, respondent's legal practitioners

Endnotes

1 (Popup - Popup)

this was a majority decision, McNALLY JA dissenting on the facts.

2 (Popup - Popup)

The judgment is reported in 1985 (2) ZLR at 270 - Editor.

3 (Popup - Popup)

See 1985 (2) ZLR at 276B - C - Editor.

4 (Popup - Popup)

Lord Goddard had clearly forgotten that on 28 April 1948 he dismissed the appeal of James Camb, who had been convicted of murder, in spite of no body being found. Camb was a steward on a ship and had pushed the body of the deceased woman through a porthole during a voyage from Cape Town to England - *Editor*.